Law Commission
Reforming the law

Scottish Law Commission
promoting law reform

Building families through surrogacy: a new law

A joint consultation paper

Law Commission
Consultation Paper 244

Scottish Law Commission
Discussion Paper 167

Law Commission
Reforming the law

Scottish Law Commission
promoting law reform

Law Commission

Consultation Paper No 244

Scottish Law Commission

Discussion Paper No 167

Building families through surrogacy: a new law

A joint consultation paper

06 June 2019

This publication is available at https://www.lawcom.gov.uk/project/surrogacy/ and at https://www.scotlawcom.gov.uk/law-reform/consultations.

THE LAW COMMISSIONS – HOW WE CONSULT

Topic of this consultation: The Department of Health and Social Care has asked the Law Commission of England and Wales and the Scottish Law Commission to consider reforms to the law of surrogacy in the United Kingdom.

Surrogacy is the practice of a woman (who we refer to in this paper as the "surrogate") becoming pregnant with a child that may, or may not, be genetically related to her, carrying the child, and giving birth to the child for another family (who we refer to as the "intended parents").

This Consultation Paper sets out provisional proposals for, and questions about, the reform of the law of surrogacy.

Comments may be sent:

Using an online form at:

https://www.lawcom.gov.uk/project/surrogacy and https://www.scotlawcom.gov.uk/law-reform/consultations

However, we are happy to accept comments in other formats. If you would like to a response form in word format, do email us to request one. Please send your response:

By email to surrogacy@lawcommission.gov.uk

OR

By post to Surrogacy Team, Law Commission, 1st Floor, Tower, 52 Queen Anne's Gate, London, SW1H 9AG.

If you send your comments by post, it would be helpful if, whenever possible, you could also send them by email.

Availability of materials: The consultation paper is available on our websites at https://www.lawcom.gov.uk/project/surrogacy and https://www.scotlawcom.gov.uk/law-reform/consultations.

We are committed to providing accessible publications. If you require this consultation paper to be made available in a different format please email surrogacy@lawcommission.gov.uk or call 020 3334 0200.

Duration of the consultation: We invite responses from 6 June to 27 September 2019.

After the consultation: In the light of the responses that we receive, we will decide on our final recommendations for reform and present them to the Government.

Geographical scope: This consultation paper applies to the laws of England, Wales and Scotland.

Consultation Principles: The Law Commissions follow the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency. The Principles are available on the Cabinet Office website at: https://www.gov.uk/government/publications/consultation-principles-guidance.

Information provided to the Law Commissions: We may publish or disclose information you provide in response to Law Commission papers, including personal information. For example, we may publish an extract of your response in Law Commission publications, or publish the response in its entirety. We may also share any responses with Government and the Scottish Law Commission. Additionally, we may be required to disclose the information, such as in accordance with the Freedom of Information Act 2000 and the Freedom of Information (Scotland) Act 2002. If you want information that you provide to be treated as confidential please contact us first, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic disclaimer generated by your IT system will not be regarded as binding on the Law Commission. The Law Commission will process your personal data in accordance with the General Data Protection Regulation, which came into force in May 2018.

We ask consultees, when providing their responses, if they could avoid including personal identifying information in the text of their responses, particularly where this may reveal the identities of other people involved in their surrogacy arrangement.

Any queries about the contents of this Privacy Notice can be directed to: general.enquiries@lawcommission.gov.uk.

About the Law Commissions: The Law Commission and the Scottish Law Commission were set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are: The Rt Hon Lord Justice Green, *Chair*, Professor Nick Hopkins, Stephen Lewis, Professor David Ormerod QC and Nicholas Paines QC. The Chief Executive is Phillip Golding.

The Scottish Law Commissioners are: The Rt Hon Lady Paton, *Chair*, Kate Dowdalls QC, Caroline S Drummond, David E L Johnston QC, Dr Andrew J M Steven. The Chief Executive is Malcolm McMillan.

Contents

GLOSSARY

We use the following terms within this Consultation Paper.

We are aware that the terminology used in the context of surrogacy is a sensitive issue. We have carefully considered what terminology is most appropriate in the context of our Consultation Paper, but we accept that some consultees may disagree with the terminology chosen. The definitions contained in this Glossary reflects how terms are used in this Consultation Paper. We acknowledge that not all the terms have universally accepted meanings, or are used the same way in all the literature.

Term	Definition
Altruistic / non-commercial surrogacy	A *surrogacy arrangement* in which neither the woman who becomes the *surrogate*, nor any surrogacy agency involved, makes a profit, and the arrangement is not enforceable as a matter of contract law.
Artificial insemination	A procedure where sperm are introduced into the reproductive system of a woman using a syringe. This process can be completed at home, without the involvement of a fertility clinic, or may take place within a clinic.
Assisted conception	An umbrella term which covers conception that does not take place naturally through sexual intercourse. Examples include *artificial insemination* and *IVF*.
Baby / child / foetus	All these terms may be used to refer to the baby that the *surrogate* is carrying during her pregnancy. We have generally preferred to use the term baby or child, even whilst still in utero, unless the context is medical and reference to a foetus is, therefore, more appropriate. For example, while we generally refer to the *surrogate* carrying a child during pregnancy, we have also referred to a woman's ability to gestate a foetus to term.
British Infertility Counselling Association ("BICA")	A registered charity that represents professional infertility counsellors in the UK.

Term	Definition
Biological parent/parentage	A term which can be used to refer to gestational and/or genetic parentage. In the Consultation Paper, we prefer to specify whether we mean *gestational* or *genetic parentage*, as applicable, but we may quote from sources that use the term "biological."
The Children and Family Court Advisory Support Service ("CAFCASS")	The public body in England which liaises with the court to provide a *parental order reporter* in *parental order* applications.
The Children and Family Court Advisory Support Service Cymru ("CAFCASS Cymru")	The public body in Wales which liaises with the court to provide *a parental order reporter* in *parental order* applications.
Commercial surrogacy	A *surrogacy arrangement* in which the woman who becomes the *surrogate* and any agency involved charge the *intended parents* a fee which includes an element of profit. A commercial surrogacy arrangement may also be characterised by the existence of an enforceable *surrogacy contract* between the *intended parents* and the *surrogate*.
Curator ad litem	In Scotland, a court appointed person whose duty is to act on behalf of the child in a *parental order* application, with a duty of safeguarding the interests of the child. In Scotland, a reporting officer is also appointed by the court to witness agreements to the parental order and to perform other duties prescribed by rules of court. The same person usually acts in both roles.

Term	Definition
Domestic surrogacy arrangement	A *surrogacy arrangement* where the *surrogate* and *intended parents* are both based in the UK, and where all elements of the process, including pre-conception screening, *(assisted) conception*, pregnancy and birth take place in the UK. We use this term in contrast to an international surrogacy arrangement, where all or some of the elements of the process take place outside of the UK.
The European Convention on Human Rights (the "ECHR")	The *ECHR* is an international convention designed to protect human rights in Europe. Of most relevance to surrogacy are the rights contained in Articles 8 and 12 and 14 (a right to respect for an individual's private and family life, the right to found a family, and protection from discrimination, respectively). The UK is a contracting state to the *ECHR*, and has implemented its provisions in domestic law through the Human Rights Act 1998.
The European Court of Human Rights (the "ECtHR")	An international court established by the *ECHR*, which decides on applications alleging that a contracting state has breached one or more of the rights guaranteed by the *ECHR*.
Embryo	An organism formed by the fertilisation of two *gametes*. In human pregnancy, from a medical perspective, an *embryo* is classified as a foetus from the 8th week after the fertilisation of the egg.[1]
Gamete	Human reproductive cells. Female *gametes* are called eggs and male *gametes* are called sperm.

[1] https://www.nhs.uk/conditions/pregnancy-and-baby/8-weeks-pregnant/ (last visited 31 May 2019).

Term	Definition
Genetic parent or parentage	A term which refers to the one or both of the two persons whose *gametes* were used to conceive a child.
Gestational parent or parentage	A term which refers to the woman who gives birth to a child.
Gestational surrogacy	A *surrogacy arrangement* in which the *surrogate* is not genetically related to the child. *Gestational surrogacy* involves the implantation of the *surrogate* with an *embryo* or *embryos* created in a process known as *IVF*. These *embryos* may be formed of the *intended mother's* egg and the *intended father's* sperm, although donor sperm or a donor egg can be used. We have preferred this term to that of "host" or "full" surrogacy which can also be used to describe this type of *surrogacy arrangement*.
Guardian ad litem	In Northern Ireland, a court appointed person whose duty is to act on behalf of the child in a *parental order* application, with a duty of safeguarding the interests of the child.
The Human Fertilisation and Embryology Authority (the "Authority")	The statutory body that regulates and inspects all licensed fertility clinics in the UK. It also regulates human *embryo* research.
The Human Fertilisation and Embryology Authority's Code of Practice (9th edition, January 2019) (the "Code of Practice")	The Human Fertilisation and Embryology Authority publishes the *Code of Practice* to provide guidance to bodies such as licensed fertility clinics to help them comply with their duties under legislation. Guidance in the *Code of Practice* is also designed to serve as a useful reference for members of the public, including patients, donors and donor-conceived people.

Term	Definition
Infertility	In the context of an opposite-sex couple, the World Health Organisation defines infertility as a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse.[2] In the context of an individual, we use "infertility" to mean a person who is unable to gestate a foetus or unable to provide *gametes* for the creation of an *embryo*.
Intended parents	The persons who have commissioned the *surrogacy arrangement*, and who intend to become the legal parents of a child born through surrogacy. Individually, we refer to an *intended parent* who is male as an "*intended father*" and an *intended parent* who is female as an "*intended mother*". We prefer this term over "commissioning parent" (an alternative that is sometimes used) because of our view that the parties' intentions are one of the defining features of a *surrogacy arrangement*.
In vitro fertilisation ("IVF")	A medical procedure, used to overcome a range of fertility issues, by which an egg is fertilised with sperm outside the body, in a controlled environment – either a test tube or petri dish – at a fertility clinic.
Legal parenthood	A person or persons being recognised by law as being the parents of a child.

[2] The International Committee for Monitoring Assisted Reproductive Technology and the World Health Organisation, *Revised Glossary on ART Terminology* (2009).

Term	Definition
New pathway	A term that we use to describe our overall new regulated *surrogacy* scheme which, if followed and, if the *surrogate* does not exercise her right to object within a defined period of time, would enable the *intended parents* to become the child's legal parents at birth.
Northern Ireland Guardian Ad Litem Agency ("NIGALA")	The public body in Northern Ireland which liaises with the court to provide a *guardian ad litem* in surrogacy cases.
Parentage	A term which focuses on the factual question of who shares a biological, principally *genetic*, connection with a child.
Parental order	An order that can be obtained from a court under sections 54 or 54A, HFEA 2008 which transfers *legal parenthood* from the *surrogate* (and in some cases her spouse or civil partner) to the *intended parents*, and extinguishes the *legal parenthood* of the *surrogate* and her spouse or civil partner, if any.
Parental order reporter	In England and Wales, a court appointed person whose duty is to act on behalf of the child in a *parental order* application, with a duty of safeguarding the interests of the child.
Parental order route	A term that we use to describe the existing process of the *intended parents* obtaining a *parental order* (a *post-birth order*).

Term	Definition
Parental responsibility, and parental responsibilities and parental rights	In England and Wales, the legal concept of *parental responsibility* means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property. In Scotland, the legal concept of *parental responsibilities and parental rights* means all the obligations that parents, and those acting in place of parents, have towards their children and the powers they have to fulfil these obligations. These concepts include things such as bringing up the child, having contact with the child, consenting to the child's medical treatment and naming the child. The legal parents of a child usually have *parental responsibility / parental responsibilities and parental rights* by virtue of that status, but *parental responsibility / parental responsibilities and parental rights* can also be conferred on people who are not the legal parents.
Pre-birth order	A court order that, in some countries, in relation to surrogacy, is made before the birth of the child. It ensures the *intended parents* are deemed by the law to be the child's parents from the moment of birth.
Post-birth order	An order made by a court after the birth of the child, such as the UK's current system of *parental orders*. This order will transfer the *legal parenthood* of the *surrogate* (and her spouse or civil partner) to the *intended parents*, extinguish the *legal parenthood* of the *surrogate* (and her spouse or civil partner), and allow a new birth certificate to be issued for the child containing the *intended parents'* names.

Term	Definition
Social and / or psychological parent or parentage	A term which refers to the relationship which develops through a person acting in a way that we would associate with a parent, such as providing for a child's needs.
Surrogacy / a surrogacy arrangement	The practice of a woman agreeing to become pregnant, and deliver a baby with the intention of handing him or her over shortly after birth to the *intended parents*, who will raise the child.
Surrogacy agreement / contract	A written agreement between the *surrogate* and the *intended parents* regarding their intention to enter into a *surrogacy arrangement*, and the terms upon which they agree. Depending on which country's law applies, these *surrogacy agreements* or contracts may, or may not be, legally enforceable.
Surrogate	The woman who carries and gives birth to the child in a *surrogacy arrangement*, with the intention of handing him or her over to the *intended parents* shortly after birth, and transferring *legal parenthood* to them. From our discussions with stakeholders, we understand that *surrogates* themselves do not, generally, like to be referred to as the mother of the child, and so we have avoided the term "surrogate mother".
Traditional surrogacy	When the *surrogate* is genetically related to the child she carries because her own egg is used to conceive the child. A traditional *surrogacy arrangement* typically results from the *artificial insemination* of a *surrogate* with the *intended father's* sperm. We have preferred this term to that of "straight" or "partial" surrogacy which can also be used to describe this arrangement.

Term	Definition
Trans man / trans woman	A trans man is a person who is assigned female at birth, but who identifies and lives as a man. A trans woman is a person who is assigned male at birth, but who identifies and lives as a woman. We acknowledge that it may not be necessary or appropriate in all contexts to refer to the person's transgender status at all (for example following transition, many people may wish to be identified simply as a man or woman, as applicable). In the context of this Consultation Paper, we have referred to a person's transgender status to highlight the specific context in which surrogacy may apply to a transgender person.

Abbreviations of legislation

Throughout this Consultation Paper, we have abbreviated a small number of pieces of legislation which we refer to frequently. These abbreviations are set out in the table below:

Full name of legislation	Abbreviation
The Human Fertilisation and Embryology Act 1990 / 2008	The HFEA 1990 / HFEA 2008
The Surrogacy Arrangements Act 1985	The SAA 1985
The Adoption and Children Act 2002 / The Adoption and Children (Scotland) Act 2007	The ACA 2002 / AC(S)A 2007
The Human Fertilisation and Embryology (Parental Order) Regulations 2018[3]	The 2018 Regulations

[3] The Human Fertilisation and Embryology (Parental Order) Regulations 2018 (SI 2018 No 1412).

Chapter 1: Introduction

THE LAW COMMISSIONS' REVIEW OF THE LAW OF SURROGACY

1.1 Surrogacy is the practice of a woman (whom we refer to as the "surrogate") becoming pregnant with a child that may, or may not, be genetically related to her, carrying the child, and giving birth to the child for another family (who we refer to as the "intended parents"). Under the current UK law, the surrogate is the child's legal mother at birth, and the intended parents must apply for a parental order after the birth of the child to become the legal parents of the child.[1]

1.2 The numbers of UK children born each year as a result of a surrogacy arrangement are unknown. We do know that 367 parental orders were granted in England and Wales in 2018 (up from 117 in 2011).[2] The majority of parental orders were granted by the courts of England and Wales: in comparison, in 2018, only 15 parental orders were granted by a Scottish court.[3] The latest figures for Northern Ireland show that from 1 April 2017 to 31 March 2018, five parental orders were granted by a Northern Irish court.[4]

1.3 The number of parental orders granted, however, does not reflect the true number of surrogate-born children each year. That is because, while the intended parents need a parental order to become the legal parents of the child, in practice not every intended parent will apply for an order.[5] Whilst the exact numbers of surrogate births per year is, therefore, uncertain, they certainly represent a tiny fraction of the total number of live births in the UK each year.[6] Yet the number of surrogate births continues to grow, and the impact that the law has on all those affected is substantial.

1.4 The two primary pieces of legislation that govern surrogacy across the UK are the Surrogacy Arrangements Act 1985 (which we refer to throughout this Consultation Paper as the "SAA 1985"), and the Human Fertilisation and Embryology Act 2008 (which we refer to throughout this Consultation Paper as the "HFEA 2008"). Although the HFEA 2008 made certain important updates to the law on surrogacy,[7] the central features of the parental order process that are now contained in sections 54 and 54A

---

1 For a full discussion of the law of legal parenthood, see ch 4.

2 Ministry of Justice, *Family Court Statistics Quarterly: October to December 2018 (Table 4)*, accessible at: https://www.gov.uk/government/statistics/family-court-statistics-quarterly-october-to-december-2018 (last visited 31 May 2019).

3 Data provided to us from the National Records of Scotland.

4 Figures provided to us by the Northern Ireland Guardian Ad Litem Agency ("NIGALA").

5 We understand that intended parents may not apply for a parental order in respect of their child for a variety of reasons including lack of awareness, cost and an inability to fulfil the current eligibility requirements, particularly in international arrangements.

6 There were 755,042 live births in the UK in 2017 (ONS, *Vital statistics in the UK: births, death and marriages – 2018 update* (15 November 2018)).

7 Such as, for example, allowing couples not in a marriage or civil partnership to apply for a parental order: HFEA 2008, s 54(2)(c).

of the HFEA 2008 continue to derive from section 30 of the much earlier Human Fertilisation and Embryology Act 1990 (which we refer to throughout this Consultation Paper as the "HFEA 1990").

1.5 The key aspects and principles of the current law on surrogacy therefore date from legislation passed nearly 30 years ago. The law on surrogacy is now overdue for re-examination in light of the societal and medical changes that have occurred during this intervening period. As has been recently described:

> while the concept of family has been a fluid throughout history and across cultures, the development of reproductive technology over the past decades has seen significant changes to our understanding of family, parenthood, and the creation of life itself.[8]

1.6 The Court of Appeal has noted that changes in this period have included the "current acceptance of an infinite variety of forms of family life of which single sex, single person and so called 'blended families'[9] are but examples".[10] In the same vein, Sir James Munby, the former President of the Family Division of the High Court of England and Wales, recently commented that "our thinking about what a family is continues to change".[11]

1.7 One recent example of how the law has struggled to cope with developments in the concept of the family has been the introduction of The Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018.[12] This remedial order amended the law to allow sole applicants to apply for a parental order in respect of a surrogate-born child. It did this by inserting a new section 54A into the HFEA 2008. Previously, access to parental orders had been restricted to those married, in a civil partnership or living together in an enduring family relationship.[13] Although the remedial order made this one change to the law, it does not change the fundamental features of the law of surrogacy, which continue to date from nearly three decades ago.

1.8 This change in the law was prompted by a High Court decision that declared that the previous law was incompatible with a person's right to a family life, under Article 8 of the ECHR.[14] In this sense, the change in 2018 brought about by the remedial order is an example of Government retrospectively responding to a decision of the court,

---

8 J Pascoe, "Sleepwalking Through the Minefield: Legal and Ethical Issues in Surrogacy" (2018) 30 *Singapore Academy of Law Journal* 455. John Pascoe is the former Chief Justice of the Family Court in Australia.

9 Typically, a blended family is one where one or both of the parents have children from previous relationships, but all the people come together as one family unit.

10 *XX v Whittington Hospital NHS Trust* [2018] EWCA Civ 2832, [2019] All ER (D) 30 (Jan) at [101].

11 Sir James Munby, speech to the Progress Educational Trust's 2018 Annual Conference entitled "New science, new families, old law: is the Human Fertilisation and Embryology Act fit for purpose?". The full text of his speech is accessible at: https://www.bionews.org.uk/page_140387 (last visited 31 May 2019).

12 The Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018 (SI 2018 No 1413).

13 See ch 5.

14 *Re Z (A Child: Human Fertilisation and Embryology Act: Parental Order)* [2015] EWFC 73, [2015] 1 WLR 4993.

rather than proactively (and holistically) reforming the law, in the way that we are suggesting in this Consultation Paper.

1.9 Whilst we acknowledge that there is a lack of public attitudinal research in this area, the research that exists suggests that public attitudes to surrogacy also now stand in stark contrast to the prevailing hostile attitudes at the time of the SAA 1985. The available research reflects the fact that the legislation is now out of step with attitudes towards surrogacy.[15] Reflecting this change, the Department of Health and Social Care (the "DHSC") recently published, for the first time, guidelines on the practice of surrogacy with two publications.[16] One of these documents states clearly that "the Government supports surrogacy as part of the range of assisted conception options".[17]

THE HISTORICAL DEVELOPMENT OF SURROGACY

1.10 Traditional surrogacy (where the surrogate uses her own egg) as a form of assisted reproduction has long-standing historical origins. Examples (of sorts) are found in the Bible, in the Book of Genesis, in the stories of Sarah, Rachel and Leah.[18] Conception, unlike today, was achieved sexually, rather than through artificial insemination.

1.11 A much later development in surrogacy was achieved through the development of IVF. The first successfully IVF-conceived child was Louise Brown, born in England in 1978.[19] IVF allowed gestational surrogacy arrangements (where the surrogate's own egg is not used) for the first time. The first successful birth through a gestational surrogacy arrangement followed in 1985.[20] Perhaps the most famous surrogacy case in the UK also occurred in 1985, when the Baby Cotton case hit the headlines. This case involved a surrogate, Kim Cotton, who was paid £6,500 to carry a child for an anonymous couple from the USA. This arrangement attracted enormous publicity, and provoked great controversy at the time.[21]

1.12 The advent of gestational surrogacy also gave rise to discussions about the legal regulation of surrogacy. In the UK, these discussions have focused around the

---

15 For example, a YouGov 2014 survey found that 59% of adults in Great Britain supported a person using gestational surrogacy to have children, accessible at: http://cdn.yougov.com/cumulus_uploads/document/ubj8or4iat/InternalResults_140805_Surrogate_Mother.pdf (last visited 31 May 2019).

16 DHSC, *The surrogacy pathway: surrogacy and the legal process for intended parents and surrogates in England and Wales* (February 2018) and DHSC, *Care in surrogacy: guidance for the care of surrogates and intended parents in surrogate births in England and Wales* (February 2018). We understand that the Scottish Government has been in discussion with the DHSC and plans to produce an Appendix for Scotland which will be added to the guidance.

17 DHSC, *The surrogacy pathway: surrogacy and the legal process for intended parents and surrogates in England and Wales* (February 2018) p 4.

18 See, for example, Genesis 16:1-4; 30:1-10.

19 For further information see the Official Website for Louise Brown: https://www.louisejoybrown.com/ (last visited 31 May 2019).

20 S F Seavello, "Are you my Mother? A Judge's Decision in In Vitro Fertilization Surrogacy" (1992) 3(2) *Hastings Women's Law Journal* 211, 220.

21 See, for example, discussion in N Gamble, "Children of our time" [2008] *Family Law Journal* 11.

publication of two reports into surrogacy: the Warnock Report[22] and the Brazier Report.[23]

The Warnock Report

1.13 In 1982, the UK Government commissioned a Committee of Inquiry, chaired by Baroness Mary Warnock (a respected moral philosopher) to consider the implications of IVF and other forms of assisted reproduction, including surrogacy. The Committee's Report, the Warnock Report, was published in July 1984.

1.14 The Committee said that the "question of surrogacy presented us with some of the most difficult problems we encountered".[24] The Committee could not achieve consensus on the issue of surrogacy.

1.15 The majority's report concluded that all surrogacy arrangements (whether altruistic or commercial) were "liable to moral objection".[25] Although, therefore, expressing objection to all surrogacy arrangements, the focus of their recommendations was on preventing commercial surrogacy arrangements. This was because they considered that surrogacy becomes "positively exploitative when financial interests are involved".[26] They considered that even a limited, non-profit making surrogacy service, subject to regulation, was not appropriate as "such a service would in itself encourage the growth of surrogacy".[27]

1.16 The Warnock Report recommended, therefore, that the creation or operation of commercial and non-profit surrogacy agencies should be criminally prohibited. They also recommended that all parties in a surrogacy arrangement be criminally sanctioned, other than the surrogate and the intended parents (in order for the child to avoid what they called the "taint of criminality").[28]

1.17 An expression of dissent with regards surrogacy was recorded by two of the members of the Committee. They felt that "it would be a mistake to close the door completely on surrogacy being offered as a treatment for childlessness".[29] They also accepted that "whatever we … may recommend, the demand for surrogacy in one form or another will continue, and possibly even grow".[30] As a result, the minority recommended that

---

22 Report of the Committee of Inquiry into Human Fertilisation and Embryology (1984) Cmnd 9314.

23 Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (October 1998) Cm 4068.

24 Report of the Committee of Inquiry into Human Fertilisation and Embryology (1984) Cmnd 9314 para 8.17.

25 Report of the Committee of Inquiry into Human Fertilisation and Embryology (1984) Cmnd 9314 para 8.17.

26 Report of the Committee of Inquiry into Human Fertilisation and Embryology (1984) Cmnd 9314 para 8.17.

27 Report of the Committee of Inquiry into Human Fertilisation and Embryology (1984) Cmnd 9314 para 8.18.

28 Report of the Committee of Inquiry into Human Fertilisation and Embryology (1984) Cmnd 9314 para 8.18.

29 Report of the Committee of Inquiry into Human Fertilisation and Embryology (1984) Cmnd 9314, Expression of Dissent: Surrogacy para 5.

30 Report of the Committee of Inquiry into Human Fertilisation and Embryology (1984) Cmnd 9314, Expression of Dissent: Surrogacy para 4.

surrogacy should be regulated through licensed surrogacy agencies, in a similar way to licensed fertility clinics.[31]

1.18 As will be seen in the subsequent current law chapters,[32] the majority conclusions of the Warnock Report influenced the contents of the SAA 1985 and the HFEA 1990.

1.19 As a postscript, Baroness Mary Warnock later expressed reservations about the Committee's majority report on the issue of surrogacy. In 2016, after discussing the change in public attitudes since the Warnock Report's publication, she wrote that:

> our law [on surrogacy] now seems to be unduly protective of the surrogate, too much based upon the assumption that she is open to exploitation, which was certainly the assumption that informed [the Warnock Report].[33]

The Brazier Report

1.20 In 1997, public interest in surrogacy increased again.[34] This was a result of well-publicised examples of surrogacy in 1996 and 1997. These included the case of Karen Roche,[35] and the arrival into the UK of the American doctor Bill Handel, who appeared to be able to circumvent the advertising restrictions in the SAA 1985 to highlight the work of his commercial surrogacy agency in California in this country.[36]

1.21 In June 1997, the UK Health Ministers agreed to establish a committee, chaired by Professor Margaret Brazier (a legal academic), to review certain aspects of surrogacy law and regulation, "to ensure that the law continued to meet public concerns".[37]

1.22 The Brazier Committee was not asked to undertake a full review of surrogacy law. Instead, it was given a more limited remit. It was asked to consider:

(1) whether payments, including expenses, should continue to be made to surrogates;

---

31 Report of the Committee of Inquiry into Human Fertilisation and Embryology (1984) Cmnd 9314, Expression of Dissent: Surrogacy para 5.

32 See chs 4 and 5.

33 M Warnock, "Foreword: The Need for Full Reform of the Law on Surrogacy" (2016) 4 *Journal of Medical Law and Ethics* 155, 156.

34 Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (October 1998) Cm 4068 para 1.9.

35 Karen Roche gave birth to a child through a traditional surrogacy arrangement and then refused to hand over the child to the intended parents, Mr Peeters and his wife: "Biological father to fight for custody of surrogate baby" *BBC News* (3 November 1997), accessible at: http://news.bbc.co.uk/1/hi/uk/21009.stm (last visited 31 May 2019).

36 "Bill Handel arranges surrogate births for infertile couples. And he gets paid for his work. Anything wrong with that?" *The Independent* (31 January 1997), accessible at: https://www.independent.co.uk/life-style/i-am-the-egg-man-1285981.html (last visited 31 May 2019).

37 Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (October 1998) Cm 4068 Foreword.

(2) whether a recognised body/bodies should regulate surrogacy arrangements; and

(3) whether any changes were required in the SAA 1985 and/or (the then) HFEA 1990.[38]

1.23 On the question of payments, the Brazier Report rejected any move to allow the surrogate to benefit financially from the surrogacy arrangement.[39] Instead, the report recommended that payments to the surrogate should only cover genuine expenses associated with pregnancy – and a list of allowable expenses was drafted.[40]

1.24 The Brazier Report, like the Warnock Report, again rejected the idea of using criminal sanctions against surrogates and intended parents to try to secure compliance with the law.[41] In an attempt to incentivise compliance, however, the report recommended that the power of the court in parental order applications to authorise payments retrospectively in excess of expenses (as they had defined them) be removed.[42] If payments in excess of expenses were made, therefore, the intended parents would be ineligible for a parental order, and would be required to apply to adopt the child.[43]

1.25 The Brazier Report recommended that surrogacy should be regulated, writing that regulation "might reduce the more obvious hazards to the child and the others involved (including any children of the surrogate mother)".[44] After discussion of models of regulation,[45] the report concluded that:

> all agencies involved in surrogacy arrangements would be required to be registered by the UK Health Departments and to operate in accordance with a statutory Code of Practice.[46]

---

38 Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (October 1998) Cm 4068, Executive Summary para 1.

39 Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (October 1998) Cm 4068 para 5.22.

40 Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (October 1998) Cm 4068 para 5.25.

41 Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (October 1998) Cm 4068 para 4.38.

42 Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (October 1998) Cm 4068 para 7.12.

43 Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (October 1998) Cm 4068 para 7.13.

44 Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (October 1998) Cm 4068 para 6.3.

45 Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (October 1998) Cm 4068 paras 6.8 to 6.22.

46 Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (October 1998) Cm 4068 para 6.23.

1.26 The Code of Practice would operate as a "model of good practice to guide all those contemplating entering into a surrogacy arrangement".[47]

1.27 On legal reform, the Brazier Report recommended a new Surrogacy Act to consolidate and implement its suggested reforms to the law, summarised above.[48] On consolidation, the report suggested that certain aspects of the current SAA 1985 should remain in their proposed Act, such as the non-enforceability of surrogacy contracts, the ban on commercial advertising and the prohibition of commercial agencies.[49]

1.28 The Government never adopted the recommendations of the Brazier Report. As far as we are aware, there was no official Government response to the Report.

THE CURRENT CONTEXT OF SURROGACY

1.29 Surrogacy today is a possible solution for those people who, for medical reasons (whether relating to gender, physical or mental health) are unable to gestate a foetus to term, or deliver a healthy baby. As a result, the intended parents who enter into surrogacy arrangements belong to one of two groups:

(1) opposite-sex couples, or single women, who experience infertility, meaning that there are unable to carry a foetus to term; or

(2) same-sex male couples or single men, who for reasons of gender, cannot carry a foetus.[50]

1.30 Research estimated that globally, in 2010, among women aged between 20 to 44, 1.9% were unable to attain a live birth (known as "primary infertility"), and 10.5% were unable to have a second child (known as "secondary infertility").[51] In the UK, the National Health Service (the "NHS") estimates that around 1 in 7 couples (14%) may have difficulty conceiving.[52] Whilst not all cases of infertility will require the use of surrogacy, we think that it is important to note this broader context. Across Europe,

---

47 Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (October 1998) Cm 4068 para 8.1.

48 Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (October 1998) Cm 4068 para 7.2.

49 Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (October 1998) Cm 4068 para 7.3.

50 In some same-sex male couples, or opposite-sex couples, one of the couple may be a transgender man. While a transgender man might, medically speaking, be able to carry a pregnancy to term, it may be extremely distressing for him to do so. If that is the case, such a couple (or indeed an individual) might wish to enter into a surrogacy arrangement.

51 M N Mascarendhas, S R Flaxman, T Boerma, S Vanderpoel and G A Stevens, "National, Regional and Global Trends in Infertility Prevalence Since 1990: A Systematic Analysis of 277 Health Surveys" (2012) 12 *PLOS Medicine* e1001356.

52 NHS, *Overview: Infertility*, accessible at: https://www.nhs.uk/conditions/infertility/ (last visited 31 May 2019).

research indicates a continued expansion in the numbers of people using assisted conception.[53]

1.31 We examine in more detail why people are entering into surrogacy arrangements in Chapter 3. The effects, however, of infertility on the people concerned are significant and life-altering. As the Constitutional Court of South Africa stated:

> the decision to have a child of one's own has for thousands of years formed a central part of the lives of human beings. It is a blessing that is for the most part taken for granted. The effects of an inability to carry out that decision have, for so many of us, been nothing short of devastating.[54]

1.32 Governmental and parliamentary engagement in surrogacy has been growing again over the past few years. This follows a period of relative inactivity from Government after the publication of the two substantive reports discussed above.[55] The Law Commissions' review, supported and funded by the DHSC is, of course, one example of that level of interest.

1.33 Parliamentary interest in the reform of surrogacy law is demonstrated by the creation of an All-Party Parliamentary Group ("APPG") in late 2017. The launch, and first meeting of the APPG, took place on 19 December 2017, attended by a number of members of Parliament, DHSC officials, intended parents and surrogates. The APPG's purpose is stated to be:

> To fully review our surrogacy laws, encourage and promote debate on the issues, facilitate further research into how surrogacy is conducted, bring the law into line with modern social realities, and encourage domestic surrogacy in the first instance.[56]

1.34 The APPG has held several evidence sessions and plans to report in the spring of 2019, although no report had published at the time of publication of this Consultation Paper.

1.35 In November 2015 Surrogacy UK published their report which looked at the practice and regulation of surrogacy in the UK. It recommended legal reform, including allowing intended parents to become legal parents on birth, the improved collection of data on surrogacy, and NHS funding for IVF for surrogacy.[57] The report also

---

53 C De Geyer, C Jorge-Calhaz, MS Kupka, C Wyns, E Mocanu, T Motrenko, G Scaravelli, J Smeenk, S Vidakovic, V Goossens, "ART in Europe, 2014: results generated from European registries by ESHRE: The European IVF-monitoring Consortium (EIM) for the European Society of Human Reproduction and Embryology (2018) 33(9) *Human Reproduction* 1586.

54 *AB and Another v Minister of Social Development* [2016] ZACC 43 at [1].

55 See paras 1.13 and subsequent.

56 UK Parliament, *Register of All-Parliamentary Groups*, accessible at: https://publications.parliament.uk/pa/cm/cmallparty/180829/surrogacy.htm (last visited 31 May 2019).

57 Surrogacy UK Working Group on Surrogacy Law Reform, *Surrogacy in the UK: Myth busting and reform – Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (2015) pp 6 to 7.

recommended that the (then) Department of Health produce guidance for intended parents and surrogates, and, separately, for medical professionals.[58]

1.36 The DHSC then went on to publish both sets of recommended guidance in February 2018.[59] The guidance for intended parents and surrogates demonstrates a positive vision of surrogacy, setting out the Government's support for surrogacy and its view of it as a "pathway":

> The Government supports surrogacy as part of the range of assisted conception options. Our view is that surrogacy is a pathway, starting with deciding which surrogacy organisation to work with, deciding which surrogate or intended parents to work with, reaching an agreement about how things will work, trying to get pregnant, supporting each other through pregnancy and then birth, applying for a parental order to transfer legal parenthood and then helping your child understand the circumstances of their birth. This guidance gives more information about each stage.[60]

Access to surrogacy

1.37 While surrogacy is now recognised as part of the range of assisted conception options, it is important to acknowledge that, in practice, it is not an option that is open to everyone. Surrogacy involves additional costs to other forms of assisted conception, in particular because of the payments that will, in most cases, be made to the woman who agrees to be the surrogate. Some intended parents know from the outset that surrogacy is the only way for them to have a child of their own (for example, women who know that they are unable to carry a child, or same-sex male couples). These intended parents will have the cost of surrogacy in mind from the time that they start planning their family. Other intended parents may have already funded multiple rounds of IVF treatment to try and carry their child before they turn to surrogacy.[61] For these intended parents the financial strain can be much more significant.

1.38 In making our provisional proposals for reform we have been aware of the fact that an increase in the cost of surrogacy may mean that some intended parents who are able to access surrogacy presently, may be precluded from doing so in future.[62] We think that any increase in cost is a significant matter to bear in mind as new law is developed. We also consider, however, that given the fundamental issues at stake in surrogacy, cost cannot be the sole determinant of any change to the law. All factors,

---

58 Surrogacy UK Working Group on Surrogacy Law Reform, *Surrogacy in the UK: Myth busting and reform – Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (2015) p 7.

59 DHSC, *The surrogacy pathway: surrogacy and the legal process for intended parents and surrogates in England and Wales*, and DHSC, *Care in surrogacy: guidance for the care of surrogates and intended parents in surrogate births in England and Wales*, (both published February 2018). We understand that the Scottish Government has been in discussion with the DHSC and plans to produce an Appendix for Scotland which will be added to the guidance.

60 DHSC, *The surrogacy pathway: surrogacy and the legal process for intended parents and surrogates in England and Wales* (February 2018) p 4.

61 We consider access to IVF treatment on the NHS in ch 3.

62 We discuss these issues in further detail, and ask consultees' various questions on them, in ch 18.

including in particular the welfare of women who agree to be surrogates, and the welfare of the child, must be properly balanced in any reforms that are made.

THE CASE FOR REFORM

1.39 The Law Commissions consult widely when drawing up programmes of law reform, to ensure that our work is as relevant and informed as possible. Consultation for the Law Commission of England and Wales' 13th Programme of Law Reform was launched on 11 July 2016, and ran until 31 October 2016. In this consultation, the Law Commission of England and Wales suggested surrogacy as a possible law reform project. This suggestion prompted the highest number of responses of all the projects in the 13th Programme – 343.[63] That this was an area in need of reform was also supported by consultees responding to the consultation on the 10th Programme of the Scottish Law Commission.

1.40 Responses to the Law Commission of England and Wales' programme consultation included many positive submissions from surrogacy agencies (including Surrogacy UK and Brilliant Beginnings); leading representative legal bodies (including the Law Society, Resolution and the Family Justice Council); the CAFCASS; a wide range of legal practitioners and many people with personal experience of surrogacy arrangements, as intended parents, surrogates, and wider family members. In addition, numerous members of the House of Lords spoke in support of a Law Commission project during a House of Lords debate on surrogacy in December 2016.[64]

1.41 We are aware that surrogacy continues to attract strong views, and support for the Law Commissions undertaking this review is not universal. Four stakeholder organisations (Christian Action Research and Education, the Alliance Defending Freedom International, the Christian Medical Fellowship, and the Anscombe Bioethics Centre) did not support a Law Commission project on surrogacy. Of these four organisations, the first three took the view that the law was not in need of reform.

1.42 Christian Action Research and Education saw surrogacy as a form of exploitation of women: "her body and reproductive functioning are taken as a commodity particularly if money is paid in exchange for this 'service'". It thought that the current law worked well to "uphold the best interests of both surrogate women and children." The Alliance Defending Freedom International wrote that "the objectification of women and children is the common denominator of all forms of surrogacy", and expressed particular concern that "any expansion of the practice of surrogacy to include commercial surrogacy agreements risks exposing more women to the abuses inherent to all forms of surrogacy." Concerns were expressed by the Christian Medical Fellowship that reform may encourage more surrogacy arrangements to take place, often involving complex family situations. They also noted the ethical arguments against surrogacy.[65] The Anscombe Bioethics Centre wrote that surrogacy is problematic because it

---

63 13th Programme of Law Reform (2017) Law Com No 377 para 1.8.

64 *Hansard* (HL), 14 December 2016, vol 777, cols 1318 to 1333 (including Baroness Barker, Viscount Craigavon, Lord Brown of Eaton-under-Heywood, Lord Mackay of Clashfern, Baroness Walmsley, Lord Hunt of Kings Heath, and Baroness Chisholm of Owlpen).

65 We provide an overview of these arguments in ch 2.

involves using women instrumentally and because it fragments the parentage of children born in this way. It supported reform to further restrict surrogacy. All four saw any reform as a matter for Parliament not the Law Commissions.

1.43 Prior to our programme consultations, Surrogacy UK, a surrogacy organisation, concluded that, "the 30-year old regulation of surrogacy in the UK is out of date and in dire need of reform".[66] A survey commissioned for the same Surrogacy UK report also found that 75.2% of respondents thought that surrogacy law in the UK needed to be reformed.[67] This figure had risen to 91.8% in the group's updated 2018 report.[68]

1.44 The most pressing areas of the law in need of reform raised with us by stakeholders included (but were not limited to) the problems caused by the attribution of legal parenthood in surrogacy arrangements, the lack of clarity in the law on payments, and international surrogacy arrangements.

1.45 In relation to the attribution of parenthood, many stakeholders argued that the current law does not reflect the intentions of any of the participants in a surrogacy arrangement, that the intended parents be the legal parents of the child from birth. They argued that the law does not operate in the best interests of the child. Concerns were expressed that the intended parents may be prevented from taking important medical decisions in the days after the child's birth as, not being the legal parents of the child, they also lack parental responsibility.[69] Surrogates also expressed concern at being legally responsible for the child, which they do not consider to be theirs, unless and until a parental order is granted.

1.46 On the issue of payments,[70] stakeholders expressed the view that the current law, which permits intended parents to pay surrogates "expenses reasonably incurred",[71] is unclear and uncertain. It has been suggested that the provision is apt to mislead, and provides little guidance on what payments can be made in practice. We have seen payments are being made to surrogates which appear beyond the everyday understanding of an "expense," with no challenge from the court. Moreover, the court now regularly authorises payments in excess of reasonable expenses made in relation to overseas commercial surrogacy arrangements, further adding to the confused nature of the law.[72] Stakeholders also expressed strongly opposing views on whether a woman who provides the service of a surrogate to intended parents should be able

---

66 Surrogacy UK Working Group on Surrogacy Law Reform, *Surrogacy in the UK: Myth busting and reform – Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (2015) p 6.

67 Surrogacy UK Working Group on Surrogacy Law Reform, *Surrogacy in the UK: Myth busting and reform – Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (2015) p 26.

68 Surrogacy UK Working Group on Surrogacy Law Reform, *Surrogacy in the UK: Further evidence for reform. Second Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (2018) p 42.

69 See ch 8

70 See chs 14 and 15.

71 HFEA 2008, ss 54(8) and 54A(7).

72 See, for example, *Re F & M (Children) (Thai Surrogacy) (Enduring family relationship)* [2016] EWHC 1594 (Fam), [2016] 4 WLR 126.

to receive payment beyond expenses (however widely the term "expenses" is understood).

1.47 As a result, we agree with stakeholders and commentators that the current state of affairs in relation to payments, where the statute is either deliberately or inadvertently not being followed, "undermines the rules of law".[73] Reform is clearly needed.

1.48 Stakeholders raised a range of worrying issues in relation to international surrogacy. These included the problems surrounding the nationality of children born to surrogates (including the risk of statelessness), bringing surrogate-born children into the UK, and the risks of exploitation.[74] These views echo the concerning comments of Mr Justice Hedley in *Re X & Y (Foreign Surrogacy)*[75] where he spoke of the risk of children "marooned stateless and parentless"[76] because of international surrogacy arrangements.[77] We think, in light of these risks, that a reformed law should, in the first instance, try to support and encourage domestic arrangements.

1.49 We note the concerns of those stakeholders who felt that the current law was not in need of reform, or that reform was needed to either restrict, or completely ban surrogacy. We do not think that this position is tenable or achievable, and is not what most stakeholders, or Government, have said that they would want.[78]

1.50 We think that there is a strong case for reform to the law. We believe that the current law is out of date, unclear and not fit for purpose. We think that the law needs to be updated to make it workable and to bring it up to date, and ensure that it protects the welfare of all the participants to the arrangement including, most importantly, the welfare of the child.

HISTORY OF THE PROJECT

1.51 In the light of the considerable support for law reform in responses to the Law Commission of England and Wales's programme consultation, the Law Commission of England and Wales entered discussions with the DHSC about taking on a project to reform the law of surrogacy.

---

73 C Fenton-Glynn and J Scherpe (on behalf of Cambridge Family Law), *Surrogacy: Is the law governing surrogacy keeping pace with social change?* (2017), 4, accessible at: https://www.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.family.law.cam.ac.uk/documents/cambridge_family_law_submission.pdf (last visited 31 May 2019).

74 See ch 2 for a discussion of exploitation.

75 *Re: X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] Fam 71.

76 *Re: X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] Fam 71 at [10].

77 See ch 16.

78 One of the reasons why we think this is because the empirical research on the outcomes for all those involved in surrogacy arrangements does not show significant negative effects: see ch 2 for further discussion.

1.52 The Minister with responsibility at the DHSC provided the confirmation necessary under our Protocol with Government that they would support the project.[79]

1.53 The Scottish Law Commission accepted a reference from the Minister to conduct the project jointly with the Law Commission of England and Wales as part of the Scottish Law Commission's 10th Programme of Law Reform. In the consultation on its 10th Programme, in which it asked consultees for suggestions on topics to be included, of the 49 responses, four included a suggestion of surrogacy.

1.54 After agreeing our Terms of Reference and funding with the DHSC, work started on the project in May 2018.

OUR ENGAGEMENT

1.55 In preparing this Consultation Paper, we have had discussions on the key issues with many of the leading stakeholders in the area. We record our thanks to these stakeholders at the end of this introduction.

1.56 In addition to these stakeholder meetings, we have also attended two academic and practitioner conferences in Hong Kong and Cambridge, respectively. We have also attended Surrogacy UK's annual conference, where we held drop-in sessions to hear the views of surrogates and intended parents.

1.57 We have engaged with representatives from the relevant Government departments and non-governmental agencies in addition to the DHSC, including the Home Office, the Scottish Government, the General Register Office, the National Records of Scotland, Ministry of Justice, Department for Education and the Foreign and Commonwealth Office ("FCO"). The FCO also invited us to visit Ukraine in February 2019 to meet with some of the various actors in international surrogacy arrangements based in the capital Kyiv, including representatives of fertility clinics, surrogacy lawyers, the police and consular staff.

1.58 The Law Commission of England and Wales also undertook some independent research into what intended parents declared by way of payments to the surrogate in domestic surrogacy arrangements. This was completed by conducting a review of the relevant court files for the past few years held by the Central Family Court, in London.[80]

1.59 There has also been notable media interest in our project, even prior to the publication of this Consultation Paper, which we have sought to engage with, and contribute to. This interest has included newspaper articles discussing our work, a number of which have quoted from interviews given by us.[81] Professor Nicholas Hopkins also

---

79 See the Law Commissions Act 1965, s 4B and Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission (2010) Law Com No 321).

80 The results of this research are discussed in the payments chapter see ch 14.

81 See, for example, "Commission begins work on 'not fit for purpose' surrogacy laws" *The Law Society Gazette* (4 May 2018); "Surrogacy reform could remove automatic rights from birth parents" *The Telegraph* (4 May 2018); "We must be at the cutting edge in law reform" *The Times* (15 November 2018); and "Our surrogate, her husband – and the baby we thought we'd never have" *The Times* (5 January 2019).

contributed to the BBC Radio 5 Live podcast "Surrogacy: A Family Frontier," hosted by Dustin Lance Black.[82]

STRUCTURE OF OUR PROJECT

1.60 In this Consultation Paper, we set out the relevant law, explain what reforms we think could be made to the law and ask readers to answer questions that we ask about these potential reforms.

1.61 Following the publication of this Consultation Paper, there will be a formal consultation period during which we will run consultation events aimed at eliciting views from the public and a broad range of stakeholders. Responses to the Consultation Paper should be sent to us by the end of this consultation period, 27 September 2019.[83]

1.62 If funding is secured from the DHSC, the final stage of the project will be the development of recommendations to Government for reform of the law, which will be published in a report. Our report will be accompanied by an impact assessment, identifying the anticipated economic and non-economic effects of our reform recommendations.

1.63 The report will be also accompanied by a draft Bill to change the law in line with our recommendations. We hope that our project will lead to a new, standalone, Surrogacy Act, which would govern surrogacy arrangements and their consequences in the UK. We do not think that further piecemeal reform of the existing law is desirable. A new Surrogacy Act would allow the issue of surrogacy to be addressed in the round, and would represent a clean slate from which to work. Our thinking on this although, will be subject to input from parliamentary counsel as to the best way to achieve our aims.

1.64 This Consultation Paper is the result of a joint project of the Law Commission of England and Wales and the Scottish Law Commission. The Chair of the Law Commission of England and Wales is Sir Nicholas Green; and the Chair of the Scottish Law Commission is Lady Ann Paton.

1.65 The contents of this Consultation Paper were reviewed and agreed to by the two Chairs and eight Commissioners of the two Law Commissions. Their agreement was sought at separate Peer Review meetings held in London and Edinburgh in May 2019.

THE IMPACT OF DEVOLUTION AND SEPARATE LEGAL JURISDICTIONS

1.66 The two primary statutes governing surrogacy arrangements in the UK – the SAA 1985 and the HFEA 2008 – apply across the UK. Beyond the areas covered by these two statutes, however, the law differs to various extents in Wales, Scotland and Northern Ireland, the latter two jurisdictions each having its own legal system.[84] Furthermore, as a consequence of devolution, varying amounts of legislative and

---

82 The episodes of the podcast are accessible at: https://www.bbc.co.uk/programmes/p06tn77s/episodes/downloads (last visited 31 May 2019).

83 See pp i and ii.

84 See generally J G Collier, "Conflict of Laws" (3rd ed 2001) p 6.

administrative power, previously held by the UK Parliament, have been transferred to Wales, Scotland and Northern Ireland.[85]

Wales

1.67 The following matters are specifically excluded from the areas devolved to Wales (that is they remain "reserved" to the UK Parliament). This means that the UK Parliament in Westminster retains the power to make laws about them for England and Wales:

(1) human genetics, human fertilisation, human embryology and surrogacy arrangements;[86]

(2) parenthood, parental responsibility, child arrangement and adoption;[87] and

(3) (in the context of potential reforms to immigration rules for international surrogacy arrangements) immigration and nationality.[88]

1.68 Services and facilities related to adoption, adoption agencies and their functions are all, however, devolved to the Welsh Assembly.[89] As a result, the Welsh Assembly passed the Regulation and Inspection of Social Care (Wales) Act 2016. This Act, once fully implemented, will replace much of the existing regulatory framework of social care that currently applies jointly to England and Wales. This includes replacing the regulation of adoption agencies and adoption support agencies in Wales.

1.69 Where the law in Wales differs from that in England, this is reflected in the text of this Consultation Paper.

Scotland

1.70 Surrogacy arrangements and the subject-matter of the HFEA 1990 are reserved matters under the Scotland Act 1998 in respect of which the UK Parliament retains the power to make laws.[90] Immigration and nationality are also reserved under the Scotland Act 1998.[91]

1.71 As Scotland is a separate legal jurisdiction from that of England and Wales, several areas of substantive family law differ between these jurisdictions. The areas of difference in family law of relevance to this Consultation Paper include adoption law,[92] the concept of parental responsibilities and parental rights,[93] and court procedure.

---

85 See generally R Brazier, "The Constitution of the United Kingdom" (1999) 58 *Cambridge Law Journal* 96.

86 Government of Wales Act 2006, sch 7A Pt 2, s J3.

87 Government of Wales Act 2006, sch 7A Pt 2, s L12.

88 Government of Wales Act 2006, sch 7A Pt 2, s B2.

89 These aspects of adoption law are specifically excluded from the general reservation of adoption law to the UK Parliament: see Government of Wales Act 2006, sch 7A para 1, Head L.

90 Scotland Act 1998, sch 5 Pt II, head J, para J3. We think that it is an oversight that this provision was not amended to refer to the HFEA 2008 in addition to the HFEA 1990.

91 Scotland Act 1998, sch 5 Pt II, head B, para B6.

92 Contained in the AC(S)A 2007.

93 Children (Scotland) Act 1995.

1.72 Where Scots law differs from the law of England and Wales, this is reflected in the text of this Consultation Paper.

Northern Ireland

1.73 Northern Ireland, like Scotland, is a separate legal jurisdiction. Northern Ireland has its own law commission: the Northern Ireland Law Commission.[94]A review of Northern Irish law is, therefore, outside the remit and power of the Law Commissions of England and Wales and of Scotland.

1.74 Due to ongoing budgetary pressure within the Northern Irish Department of Justice, however, the Northern Ireland Law Commission has been non-operational since April 2015.[95] This has meant that we have not been able to offer to work on this Consultation Paper with the Northern Ireland Law Commission on a similar basis to the relationship between the Law Commission of England and Wales and the Scottish Law Commission. As a result, it has not been possible to cover in this Consultation Paper how Northern Irish law differs from English and Welsh and Scots law.

1.75 We have, however, sought to engage with a variety of Northern Ireland stakeholders on the issue of surrogacy and law reform, to ensure that we are alive to specific issues affecting Northern Ireland. These stakeholders have included Northern Irish solicitors and barristers who are involved in surrogacy; and the Northern Irish Guardian Ad Litem Agency ("NIGALA"), who prepare parental order reports in Northern Ireland.

1.76 We have also asked a specific question on the impact of our proposals on Northern Ireland in Chapter 18, and would welcome comments from Northern Irish consultees on this issue. We also plan to host a consultation event in Belfast.

1.77 After the close of the consultation period, we will consider how to facilitate further Northern Irish involvement.

OUR TERMS OF REFERENCE

1.78 The Terms of Reference agreed between the DHSC and the Law Commissions on the surrogacy project are as follows:

---

94 Created pursuant to the Justice (Northern Ireland) Act 2002, s 50.

95 Northern Ireland Law Commission: http://www.nilawcommission.gov.uk/ (last visited 31 May 2019).

The law, regulation and practice of surrogacy, including:

(1) the Surrogacy Arrangements Act 1985

(2) relevant sections of the Human Fertilisation and Embryology Acts 1990 and 2008

(3) family and regulatory law and practice insofar as it is relevant to surrogacy

(4) domestic and international surrogacy arrangements

(5) information about a child's genetic and gestational origins within the surrogacy context

consequential impact on other areas of the law.

1.79 These Terms of Reference define the scope and boundaries of the project. The Terms of Reference agreed reflect our own, and Government's desire, to keep the scope of this project as broad as possible.[96]

TERMINOLOGY

1.80 We are aware that the terminology used in the context of surrogacy is a sensitive issue. We have carefully considered what terminology is most appropriate in the context of our Consultation Paper, but we accept that some consultees may disagree with the terminology chosen.

1.81 We have preferred the term "parent" to "mother" and "father," where we have been able to. In some cases, it was necessary to continue to use gendered terms, largely because this is the language of the current law. We have also used gendered terms where these reflect the actual facts or instances of surrogacy that are being referred to.

1.82 Notwithstanding, we use "women" and the female pronoun when referring to surrogates. We note that trans men who have a uterus can carry a child and that some do. However, we think that it is important to acknowledge that carrying and giving birth to children is almost invariably undertaken by women. Accordingly, we also think it is important to acknowledge that the issue of surrogacy, and the specific concerns about exploitation of surrogates, directly involves women's rights, and has been a subject of interest to feminists.

1.83 We describe the woman who carries the child in a surrogacy arrangement as the "*surrogate*". From our discussions with stakeholders, we understand that surrogates

---

96 We contrast these broader terms with the more limited terms of the 1998 Brazier Report on surrogacy, which we discuss in ch 1. See Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (October 1998) Cm 4068, Executive Summary para 1.

themselves do not, generally, like to be referred to as the mother of the child, and so we have avoided the term "surrogate mother".

1.84 We describe the person, or persons, who have commissioned the surrogacy arrangement, and who intend to become the legal parents of the surrogate-born child, as the "*intended parents*". Where necessary to refer to an individual intended parent, we refer to the "*intended mother*" and the "*intended father*", as appropriate.[97] We prefer this term over "commissioning parent" (an alternative that is sometimes used) because of our view that the parties' intentions are one of the defining features of a surrogacy arrangement. We use the term intended parents to cover the situation of a single intended parent, as well as two intended parents.[98]

1.85 We refer to the two different types of surrogacy arrangement as a "*traditional surrogacy arrangement*" and a "*gestational surrogacy arrangement*".

1.86 A "*traditional surrogacy arrangement*" is where the surrogate is genetically related to the child she carries because her egg is used. A traditional surrogacy arrangement, typically, results from the artificial insemination of a surrogate with the intended father's sperm. We have preferred this term to that of "partial" or "straight" surrogacy which can also be used to describe this arrangement.

1.87 A "*gestational surrogacy arrangement*" is where the surrogate is not genetically related to the child she carries. Gestational surrogacy involves the surrogate being implanted with an embryo or embryos created in a process known as IVF. These embryos may be formed from the intended mother's egg and the intended father's sperm, although donor sperm or a donor egg can be used.[99] We have preferred this term to that of "full" or "host" surrogacy which can also be used to describe this arrangement.

1.88 We have also produced a full Glossary defining a longer list of the terminology that we have used in this Consultation Paper.[100]

FORMAT OF THE CONSULTATION PAPER

1.89 The Consultation Paper is designed to lead the public debate which will inform our later policy decisions. In some areas we have made provisional proposals suggesting how we think the law should be reformed and asking consultees whether they agree. On other points we have asked more open questions, asking consultees for their views without, at this stage, suggesting a preferred view.

1.90 We are conscious that surrogacy raises many issues of wide public interest. We will listen carefully to, and analyse, the views of consultees before deciding on our final recommendations for reform. This is particularly important as we acknowledge that surrogacy raises many questions that are both ethical and legal in nature, on which

---

97 A surrogacy arrangement may, and frequently does, involve two intended fathers.

98 See para 1.7.

99 UK law currently requires, however, that at least one of the intended parents must be genetically related in order to obtain a parental order: ss 54(1)(b) and 54A(1)(b), HFEA 2008.

100 See the Glossary.

consultees may hold a variety of views. The practice of surrogacy, for example, raises deeper questions on who the law should define as a mother and a parent.[101]

1.91 We have attempted to make this Consultation Paper as accessible as possible for all readers, regardless of their background, previous knowledge, or experience of surrogacy. We recognise that the paper is lengthy, and in some places unavoidably technical. We hope, however, that consultees will be able to engage with the vast majority of our consultation questions. We have also published a summary and an Easy-Read version of this Consultation Paper, containing a summary of its key proposals.

1.92 In Chapter 1 – the Introduction – we provide some background to, and introduce, the project.

1.93 In Chapter 2 – Preliminary issues – we discuss, by way of background, issues which underlie the proposed reforms that we discuss later in the paper.

1.94 In Chapter 3 – Current practice – we look at the medical background to surrogacy arrangements, and how surrogacy arrangements work in practice, including the role of surrogacy organisations.

1.95 In Chapter 4 – Current law: the general law – we set out the current regulation of surrogacy arrangements, the law governing who is a parent, the nature and effect of a parental order, and the international law context.

1.96 In Chapter 5 – Current law: parental orders – we set out the detailed law governing when a parental order can be made, and the criticisms of that law.

1.97 In Chapter 6 – Current law: procedure – we describe the procedure for parental order proceedings in England and Wales, and, separately, in Scotland, and set out consultation questions about the allocation of proceedings, and further proposals regarding procedural reform.

1.98 In Chapter 7 – The reform of legal parenthood and parental responsibility – we discuss the context for our proposals on the reform of legal parenthood, including human rights and the comparative law aspect, the welfare of the child and the options for reform.

1.99 In Chapter 8 – Legal parenthood: proposals for reform – a new pathway – we explain our proposal to create a new pathway to legal parenthood in surrogacy cases, and, to this end, make provisional proposals to reform the law of parenthood and parental responsibility.

1.100 In Chapter 9 – The regulation of surrogacy arrangements – we look at which surrogacy arrangements should fall within the scope of the new pathway, the creation

---

[101] As Dolgin explains, for example, surrogacy has the potential to "completely [disrupt] traditional understandings of motherhood". J Dolgin, *Defining the Family: Law, Technology, and Reproduction in an Uneasy Age* (1997) p 120.

of regulated surrogacy organisations and who should regulate them, and the regulation of aspects of surrogacy that would apply to all surrogacy arrangements.

1.101 In Chapter 10 – Access to information – we explain how the current law can be used, principally by those who were born of a surrogacy arrangement, to find out about their origins; and we make proposals for the creation of a new register of surrogacy arrangements.

1.102 In Chapter 11 – Eligibility criteria for a parental order – we discuss reform and make provisional proposals in respect of criteria that apply only to the parental order route to parenthood in surrogacy arrangements: namely, a time limit for applications, and dispensing with the surrogate's consent.

1.103 In Chapter 12 – Eligibility criteria for both a parental order and for the new pathway – we discuss the reform of and make provisional proposals and ask questions, about criteria that apply to both routes to parenthood, namely jurisdiction, applicants' relationship status, the child's home, a genetic link to the intended parents; medical necessity; registration of origins; and the age of the surrogate and intended parents.

1.104 In Chapter 13 – Eligibility criteria for the new pathway – we look at eligibility criteria that we propose apply solely to the new pathway and make provisional proposals on medical screening; implications counselling; independent legal advice; the surrogate's family circumstances; and the number of surrogate births.

1.105 In Chapter 14 – Payments to the surrogate by the intended parents: the current context – we provide an overview of the current law and practice, and criticisms, as well as a consideration of the law of other jurisdictions in this area.

1.106 In Chapter 15 – Payments to the surrogate by the intended parents: options for reform – we set out options for reform and ask consultees for their views.

1.107 In Chapter 16 – International surrogacy arrangements – we look at the law and issues surrounding three key areas in surrogacy arrangements where UK intended parents enter into surrogacy arrangements overseas: nationality; immigration; and legal parenthood, and make provisional proposals in these areas and ask about people's experience of such arrangements. The chapter concludes by looking at UK arrangements involving foreign intended parents, and asking for consultees' views in this area.

1.108 In Chapter 17 – Miscellaneous issues – this chapter considers some smaller issues of the law around surrogacy arrangements as part of our remit to consider the consequential impact of any reform: employment law; succession to property and to titles; and the healthcare aspects of surrogacy arrangements. The chapter asks for consultees' views in these areas, and, in respect of employment law, makes some provisional proposals.

1.109 In Chapter 18 – The impact of reform – we set out questions that ask consultees to provide us with information about the impact of our reforms.

1.110 In Chapter 19 – Summary of proposals and consultation questions – we set out a complete list of our provisional proposals and consultation questions.

ACKNOWLEDGEMENT AND THANKS

1.111 We have held a number of meetings with individuals and organisations while we have been preparing this paper. We are extremely grateful to them all for giving us their time and expertise so generously.

1.112 We would particularly like to extend our thanks to Alan Inglis, Alison McDowell, Andrew Percy MP, the Bar Council, Baroness Barker, Bindmans LLP, Brian Simpson, Brilliant Beginnings, the British Infertility Counselling Association, the British Surrogacy Centre, CAFCASS, Care Clinic, the Christian Medical Fellowship, Ciaran Moynagh, Cindy Wasser, COTS, Dawson Cornwell, Debra Wilson, Deidre Fottrell QC, the Donor Conception Network, Dr Agomoni Ganguli-Mitra, Dr Alan Brown, Dr Claire Fenton-Glynn, Dr Danielle Griffiths, Dr Ephia Yasmin, Dr Herjeet Marway, Dr Jennifer Speirs, Dr Jens Scherpe, Dr Katherina Trimmings, Dr Katherine Wade, Dr Kirsty Horsey, Dr Marilyn Crawshaw, Dr Peter Dunne, Dr Sonia Allen, Elizabeth Isaacs QC, Gee Roberts, Goodman Ray, Hannah Person (Scottish Equality Network), Harjit Sarang, Janys Scott QC, Julianna Cartwright, Karen Gailey, Karen O'Leary, Kathryn Cronin, Katy-Anne McGlade, Kingsley Napley, the Law Society of England and Wales, Lord Mackay of Clashfern, Marissa Allman, NIGALA, NorthWest Surrogacy Center, Osbornes Law, Professor Elaine Sutherland, Professor Emily Jackson, Professor Kenneth Norrie, Professor Margot Brazier, Professor Olga van den Akker, Professor Susan Golombok, the Progress Educational Trust, Rachael Kelsey, Richard Vaughn, Robert Gilmour, Ruth Cabeza, Sarah Green and Sarah Spencer, Stonewall, Stonewall Scotland, and Surrogacy UK.

1.113 We would also like to extend our thanks to the following Government departments and other public bodies: the Department for Education, the Department of Health and Social Care, the Foreign and Commonwealth Office (and, in particular, the Ambassador of the UK to Ukraine, Judith Gough, the Deputy Head of Mission and Consul, Helen Fazey, Neale Jones, the Consular Regional Operations Manager, and the Kyiv consular staff whom we met with in Ukraine), the General Register Office, the Government Equalities Office, the Home Office, the Human Fertilisation and Embryology Authority, the Ministry of Justice, National Records of Scotland, the Northern Ireland Department of Justice and the Scottish Government.

1.114 We are also grateful to a number of judges of the High Court of England and Wales and the Court of Appeal for their time and input on this Consultation Paper.

1.115 Finally, we were saddened to hear of the death of Baroness Mary Warnock in March 2019, who chaired the committee that authored the influential Warnock Report referred to above, and in many of the subsequent chapters of the Consultation Paper. She was generous enough with her time to meet a team from the Law Commission of England and Wales in July 2018, where we discussed our project and sought her views.

THE TEAM WORKING ON THE PROJECT

1.116 We are grateful to the following members of the joint project team who worked on this Consultation Paper: at the Law Commission of England and Wales, Spencer Clarke (team lawyer), Andrew Biden (research assistant), Leonie James (research assistant at the earlier stages of the project) and Matthew Jolley (team head), and, at the

Scottish Law Commission, Gillian Swanson (project manager) and Katie Hendry (legal assistant). We are also grateful to, at the Law Commission of England and Wales, Elizabeth Welch (team lawyer) and for her assistance with the paper.

Chapter 2: Preliminary issues

INTRODUCTION

2.1 In this chapter we consider some preliminary issues which overarch many of the proposed reforms that we consider in this Consultation Paper. These issues were frequently raised by stakeholders in their discussions with us, and often cited as reasons why they supported, or rejected, particular reforms to the current law. They are issues that we have borne in mind throughout the preparation of this Consultation Paper, and we discuss them here to provide context for the provisional proposals for reform that we put forward.

2.2 In this chapter we address five issues. First, we consider debates around the extent to which adoption or assisted reproduction techniques such as IVF provide an appropriate analogy for surrogacy, and the impact of these approaches on policy development. Secondly, we discuss commercial and altruistic surrogacy arrangements. Thirdly, we provide a critical overview of the empirical research into the outcomes for those involved in a surrogacy arrangement, including for those children born as a result of a surrogacy arrangement. Fourthly, we set out the health risks in pregnancy, and acknowledge that the decision of a surrogate to become pregnant is far from risk free. Finally, we provide an overview of the ethical arguments and debates in relation to surrogacy.

COMPARISON BETWEEN ADOPTION AND SURROGACY

2.3 The first overarching issue to discuss is the suitability of adoption as an analogy for the legal regulation of surrogacy. This debate is important because UK law currently regulates adoption to a far greater extent than assisted reproduction such as in-vitro fertilisation. In general terms, therefore, those who view surrogacy through the lens of adoption favour stricter regulation and control than those who view surrogacy as a form of assisted reproduction.[1] The analogy used can also impact on the type of regulation that is considered appropriate for surrogacy: for example, adoption (but not assisted reproduction) includes an assessment of the parenting skills of the prospective parents.

2.4 This division in views as to the appropriate "categorisation" of surrogacy can be seen, for example, in two contrasting decisions of state Supreme Courts in the USA. In *Johnson v Calvert*,[2] the Californian Supreme Court decided that the contractual nature of the *gestational* surrogacy agreement in that case should not be made subject to the state's adoption laws. The court felt that the private nature of the surrogacy arrangement did not bring it within the public policy reasons behind adoption law.

---

1 This is particularly evident in the literature around the appropriate regulation of international surrogacy arrangements. See, for example, D M Smolin, "Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry's Global Marketing of Children" (2016) 43 *Pepperdine Law Review* 265. See chs 9 and 11.

2 *Johnson v Calvert* (1993) 5 Cal 4th 84.

2.5 Conversely, however, in *Re Baby M*,[3] the Supreme Court of New Jersey decided that a *traditional* surrogacy arrangement was invalid on the basis that it did not conform with the state's laws on adoption. In other words, the court concluded that the surrogate arrangement in this case constituted "in effect, a form of independent adoption,"[4] and, thus, needed to be regulated as such.[5]

2.6 It is true that surrogacy and adoption share some similarities, not least because UK surrogacy law already borrows many aspects from the law of adoption. On the similarities between adoption and surrogacy the following has been written.

> Surrogacy and adoption *are* similar in many ways. Both typically originate with infertility, provide methods for establishing legal parentage outside of the context of biological relationships, and invest one's intentions to become a parent with legal significance. Both often involve the presence of third parties in the reproductive process and, thus, raise questions about the importance of genetic and gestational ties to the determination of parentage. Other social policy questions triggered by both adoption and surrogacy are the value of secrecy over transparency, the commodification of children, and the exploitation of women. Finally, both surrogacy and adoption trigger deeply ingrained suspicions and fears about mothers who "reject" their children.[6]

2.7 Nevertheless, we take the view that surrogacy offers a different, and distinct, pathway to parenthood from adoption. The context in which a surrogacy arrangement is made, and the circumstances in which the child is conceived, are both very different from that of adoption.

2.8 One salient difference is that the adoption process begins only after a child already exists, whilst in surrogacy the intended parents and the surrogate begin the process of reproduction together. Surrogacy can, therefore, be seen as a medical solution to infertility as well as a method of reproduction, in a way that adoption cannot.[7]

2.9 We think that the other crucial distinguishing feature in a surrogacy arrangement is the intentions of all the parties. As the authors of *Surrogacy: Law, Practice and Policy in England and Wales* explain:

> The key difference between surrogacy and adoption lies in the circumstances of the conception. A surrogate becomes pregnant with the intention of conceiving and carrying a child that will belong to someone else… the child's conception was

---

3 *Matter of Baby M* (1988) 109 NJ 396.

4 B L Atwell, "Surrogacy and Adoption A Case of Incompatibility" (1988) 20 *Columbia Human Rights Law Review* 1, 15.

5 A similar distinction between gestational and traditional arrangements in this context was also made, for example, by the Minnesotan Legislative Commission on Surrogacy see: *Legislative Commission on Surrogacy: Report to the Legislature* (15 December 2016).

6 R F Storrow, "Rescuing Children from the Marriage Movement: The Case against Marital Status Discrimination in Adoption and Assisted Reproduction" (2006) 39 *UC Davis Law Review* 1.

7 American Bar Association, *Report and resolution 112B* (February 2016), available at: https://www.americanbar.org/content/dam/aba/uncategorized/family/Hague_Consideration.authcheckdam.pdf (last visited 31 May 2019).

> brought about at the behest of the intended parents, and on the basis that the surrogate agreed, at the time, to hand the child over to the intended parents to raise as their own child … .[8]

2.10 This view is supported by the comments of Mrs Justice Theis in *AB v CD (Surrogacy – Time Limit and Consent)*.[9] In this case, she noted that intention is one of the main reasons why a parental order is better suited to surrogacy situations than an adoption order. She explained that a parental order "reflects the reality of what was intended".[10] In adoption, the genetic parents do not conceive a child with the intention of that child being adopted, and third parties are unlikely to be involved until after the birth. In surrogacy, by contrast, the intention of all the parties to the arrangement that the surrogate will have a child which the intended parents will then raise as their own is the very core of what a surrogacy arrangement is.

2.11 This is not to say that we think that the law of surrogacy and adoption should be kept in isolation from one another. We agree that there are some overlapping social policy questions between surrogacy and adoption. In particular, both are situations in which legal responsibility for a child is removed from the woman who has given birth by the intervention of the state. We, therefore, look to adoption law, in some instances, as a point of comparison with surrogacy.

COMMERCIAL AND ALTRUISTIC SURROGACY ARRANGEMENTS

2.12 It is often said that the principle of altruism underpins the UK's current law on surrogacy. Surrogacy UK's Working Group on Surrogacy Law Reform, in their 2018 Report, for example, state that:

> We continue to recommend the careful formulation of new legislation on surrogacy which … helps to protect and facilitate the principle of altruism that underpins the practice of and the law on surrogacy in the UK, while preventing commercialisation and sharp practice.[11]

2.13 This principle of altruism is often placed in opposition to a commercial model of surrogacy. Such a model is said to exist in some states in the USA, for example.[12]

2.14 We have not found the terms altruistic and commercial to be useful descriptions in considering either the current law, or possible reforms. The key difficulty is that the terms themselves can mean different things to different people.[13] In particular, the

---

8 R Cabeza, V Flowers, E Pierrot, A Rao, B O'Leary and L Odze, *Surrogacy: Law, Practice and Policy in England and Wales* (1st ed 2018) para 9.36.

9 [2015] EWFC 12, [2016] 1 FLR 41.

10 *AB v CD (Surrogacy – Time Limit and Consent)* [2015] EWFC 12, [2016] 1 FLR 41 at [71].

11 Surrogacy UK Working Group on Surrogacy Law Reform, *Surrogacy in the UK, Further evidence for reform: Second Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (December 2018).

12 R Walker and L van Zyl, *Towards a Professional Model of Surrogate Motherhood* (2017) Preface, p viii and pp 5 to 12.

13 We note that the South Australian Law Reform Institute has recently commented that "the terms 'commercial' and especially 'altruistic' surrogacy are problematic": South Australian Law Reform Institute, *Surrogacy: A Legislative Framework* (Report 12 – October 2018) para 3.2.12.

description of UK surrogacy law as altruistic has often been linked by stakeholders to the limitation on payments that can be made to surrogates for their expenses. The link between payments to the surrogate and altruism is, however, contested. Two UK academics, for example, suggest that "payment and altruism do not have to be mutually exclusive."[14] Even where a link is drawn, there is little consensus on what payments to surrogates (if any) are compatible with an altruistic model. The Brazier Report, for example, draws a distinction between "a [surrogacy] arrangement recompensed by expenses, or entirely altruistic".[15] The UN Special Rapporteur identifies as one hallmark of a commercial surrogacy arrangement "reimbursement that goes beyond reasonable and itemized expenses incurred as a direct result of the surrogacy arrangement".[16]

2.15 As we consider in Chapter 15 the current law, which enables surrogates to be paid "expenses reasonably incurred" has been interpreted widely. Two academics have recently suggested that a distinction ought to be drawn between a "truly altruistic model," on the one hand, and a "compensation" or "paid" model, on the other hand. In light of their definition of expenses, they argue that the current UK law falls into the second of these two models.[17]

2.16 Further, regardless of the payments permitted under domestic surrogacy arrangements, courts routinely use their power retrospectively to authorise payments in excess of expenses in order to make the parental order in international arrangements.[18] As a result, some commentators have written that "it is clear that UK law does in fact already permit payments of more than expenses for surrogacy, even if it pretends not to do so."[19] Recently, in the context of a medical negligence claim, the Court of Appeal has allowed a woman to claim the costs of commercial surrogacy in California as damages arising from a clinical negligence claim against an NHS trust.[20]

2.17 We consider – consistently with the UN Special Rapporteur – that payments made to the surrogate are not the sole determinants of an altruistic or commercial surrogacy

---

14 A Alghrani and D Griffiths, "The regulation of surrogacy in the United Kingdom: the case for reform" [2017] 29 *Child and Family Law Quarterly* 165, 182. See also H Prosser and N Gamble, "Modern Surrogacy Practice and the Need for Reform" (2016) 4 *Journal of Medical Law and Ethics* 257, 270.

15 Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (October 1998) Cm 4068 para 7.18.

16 M de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* (January 2018), A/HRC/37/60 para 39.

17 C Fenton-Glynn and J M Scherpe, *Surrogacy in a Globalised World* in C Fenton-Glynn, J M Scherpe and T Kaan (eds) *Eastern and Western Perspectives on Surrogacy* (2019).

18 HFEA 2008, ss 54(8) and 54A(7).

19 M Elsworth and N Gamble, "Are contracts and pre-birth orders the way forward for UK surrogacy?" [2015] *International Family Law* 157, 158.

20 *XX v Whittington Hospital NHS Trust* [2018] EWCA Civ 2832, [2019] All ER (D) 30 (Jan).

arrangement.[21] The involvement of profit-making agencies, and enforceable contracts are equally, or perhaps, more indicative, of commercial surrogacy arrangements. [22]

2.18 Rather than taking the labels commercial and altruistic as starting points, we have found it more important to consider, as a matter of principle, what we want a reformed UK law on surrogacy to look like. We adopt this approach in the later chapters discussing reform to the law of payments.[23]

EMPIRICAL RESEARCH INTO THE OUTCOMES OF THOSE INVOLVED IN SURROGACY ARRANGEMENTS

2.19 The third issue to consider is the current empirical research on the effect of surrogacy arrangements on all the participants involved. The empirical research that has been conducted, particularly of UK families, demonstrates largely positive outcomes for families which include surrogate-born children, and for surrogates. By "outcomes" we refer to the number of different measures by which the researchers assessed the wellbeing of the family: for example, the wellbeing of the parent, the wellbeing of the child, and the quality of the parent-child relationship. The methods used included both qualitative (that is research where the data collected is not in the form of numbers, for example, structured interviews); and quantitative (that is research where the data collected is in the form of numbers, for example standardised questionnaires.) We suggest that this research supports the view that underpins our approach to law reform, that surrogacy is a legitimate method of family formation.

2.20 When assisted reproduction techniques first began to be used, there was much speculation as to the effects that these technologies would have on the well-being of all the parties involved, particularly the resulting child.

2.21 The research into the outcome of surrogate families has somewhat trailed behind research into assisted reproduction such as IVF and sperm donation. In recent years however, numerous research studies into the outcome of surrogate families have been undertaken by the researchers at the University of Cambridge's Centre for Family Research (the "Centre"). The Centre was founded in 1966, and its current director is Professor Susan Golombok.[24]

2.22 The findings of the Centre's research into surrogacy are also consistent with other studies in relation to other forms of assisted reproduction such as IVF and sperm donation. Research into these forms of assisted reproduction equally suggests:

---

21 The UN Special Rapporteur takes the view that: "Commercial surrogacy could be conducted in a way that does not constitute sale of children" and that this would mean, in terms of payments, mean that all payments had to be made to the surrogate before the "legal and physical transfer of the child" and that payments must be non-reimbursable. M de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* (January 2018), A/HRC/37/60 para 72.

22 The relevance of these matters is also acknowledged in the report of the Surrogacy UK Working Group: Surrogacy UK Working Group on Surrogacy Law Reform, *Surrogacy in the UK, Further evidence for reform: Second Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (December 2018).

23 See chs 14 and 15.

24 https://www.cfr.cam.ac.uk/ (last visited 31 May 2019).

Few, if any, psychological differences between children conceived by such means and those conceived naturally with regard to emotions, behaviour, the presence of psychological disorders or their perceptions of the quality of family relationships.[25]

Outcomes of surrogate families, including surrogate-born children

2.23 The Centre's longitudinal[26] study of 42 families created by surrogacy, which began in 2000, is unique.[27] This is one of the main reasons that we have focused on the Centre's research in this section. The study involves UK-based surrogate families, and the research results have been published in peer reviewed academic journals.

2.24 Of the 42 UK surrogacy arrangements that the Centre's longitudinal study followed, 26 involved traditional surrogacy, and 16 involved gestational surrogacy. Thirteen of the surrogacy arrangements were between friends or family. In the rest of the arrangements, the surrogate was previously unknown to the intended parents.[28] As this longitudinal research is confined to UK surrogacy arrangements, it does not study the effects of an overseas commercial surrogacy arrangement.

2.25 One of the key finding of the Centre's longitudinal research is that the parent-child relationship appears unaffected by the surrogacy arrangements. As the researchers concluded in their research conducted when the children were aged 3 "the absence of a genetic or gestational link between the mother and the child does not appear to impact negatively on parent-child relationships."[29] Neither does the child's psychological adjustment[30] appear negatively affected: by age 14 there was "no difference in adolescents' [psychological] adjustment between family types."[31]

2.26 The findings from the Centre's longitudinal study are supported by the conclusion of a systematic review of 55 research studies (some of which were the Centre's research) into surrogacy families conducted in 2015. Based on their review of all these studies, the authors reported that "up to the age of 10 years there were no major psychological

---

25 R Edelmann, "Surrogacy: the psychological issues" (2004) 22 *Journal of Reproductive and Infant Psychology* 123, 131.

26 This means that the study followed the same group of people over a period of time.

27 The study is the only longitudinal study worldwide of parenting and child development in surrogacy families: S Golombok, E Illioi, L Blake, G Roman and V Jadva, "A Longitudinal Study of Families Formed Through Reproductive Donation: Parent-Adolescent Relationships and Adolescent Adjustment at Age 14" (2017) *Developmental Psychology* 1966, 1975.

28 S Golombok, C Murray, V Jadva, F MacCallum and E Lycett (2004) 40 *Developmental Psychology* 400, 402.

29 S Golombok, C Murray, V Jadva, E Lycett, F MacCallum and J Rust, "Non-genetic and non-gestational parenthood: consequences for parent-child relationships and the psychological; well-being of mothers, fathers and children at age 3" (2006) 21 *Human Reproduction* 1918, 1922.

30 The assessment of the "psychological adjustment" of a child included measures such as self-esteem, engagement, perseverance, optimism, connectedness and happiness: S Golombok, E Ilioi, L Blake, G Roman and V Jadva, "A Longitudinal Study of Families Formed Through Reproductive Donation: Parent-Adolescent Relationships and Adolescent Adjustment at Age 14" (2017) 53 *Developmental Psychology* 1966.

31 S Golombok, E Ilioi, L Blake, G Roman and V Jadva, "A Longitudinal Study of Families Formed Through Reproductive Donation: Parent-Adolescent Relationships and Adolescent Adjustment at Age 14" (2017) 53 *Developmental Psychology* 1966, 1973.

differences between children born after surrogacy and children born after other types of assisted reproduction, or after natural conception."[32]

Limitations in the research[33]

2.27 It should be acknowledged that the longitudinal research study is based on a small sample size; a fact noted by the authors.[34] Consequently, differences in family types may not have been identified, and nor could the surrogacy families be divided into subsamples (for example gestational and traditional surrogate families).[35]

2.28 We also accept that greater research is needed in relation to older children and adults born of surrogacy arrangements. This research is now beginning to emerge, particularly as the children born of surrogacy arrangements within the Centre's longitudinal study grow up.[36]

2.29 The other major limitation in the longitudinal study is that, as some of the researchers from the Centre have written:

> The children in the present [longitudinal] study were all born using non-commercial surrogacy, as payment to surrogates is prohibited in the UK. These children spoke of the surrogate's altruistic motivations for helping their parents, which raises questions about how children will feel in situations where their surrogate mothers were reimbursed financially.[37]

2.30 This statement evidently leaves open the question of the effect of commercialisation on surrogate-born children.

2.31 A recent study, however, into the parenting and adjustment of children born to gay fathers through surrogacy in the USA showed high levels of psychological adjustment

---

32 V Soderstrom-Anttila, UB Wennerholm, A Loft, A Pinborg, K Aittomaki, LB Romundstad and C Bergh, "Surrogacy: outcomes for surrogate mothers, children and the resulting families – a systematic review" (2016) 22 *Human Reproduction* 260, 268.

33 A comprehensive analysis into the research literature, including limitations, can be found here: V Soderstrom-Anttila, UB Wennerholm, A Loft, A Pinborg, K Aittomaki, LB Romundstad and C Bergh, "Surrogacy: outcomes for surrogate mothers, children and the resulting families – a systematic review" (2016) 22 *Human Reproduction* 260

34 See, for example, S Golombok, E Illioi, L Blake, G Roman and V Jadva, "A Longitudinal Study of Families Formed Through Reproductive Donation: Parent-Adolescent Relationships and Adolescent Adjustment at Age 14" (2017) 53 *Developmental Psychology* 1966, 1975 and E Ilioi L Blake, V Jadva, G Roman, S Golombok, "The role of age of disclosure of biological origins in the psychological wellbeing of adolescents conceived by reproductive donation: a longitudinal study from age 1 to age 14" (2017) 58 *Journal of Child Psychology and Psychiatry* 315, 322.

35 The small sample size is one of the reasons that authors have stated that evidence on the outcomes of surrogate-born children was of "low-quality" (See V Soderstrom-Anttila, UB Wennerholm, A Loft, A Pinborg, K Aittomaki, LB Romundstad and C Bergh, "Surrogacy: outcomes for surrogate mothers, children and the resulting families – a systematic review" (2016) 22 *Human Reproduction* 260, 272).

36 For example S Zadeh, E C Ilioi, V Jadva and S Golombok, "The perspectives of adolescents conceived using surrogacy, egg or sperm donation" (2018) 33 *Human Reproduction* 1099.

37 V Jadva, L Blake, P Casey and S Golombok, "Surrogacy families 10 years on: relationship with the surrogate, decisions over disclosure and children's understanding of their surrogacy origins" (2012) 27 *Human Reproduction* 3008, 3012 to 3013.

in the children, as well as children with positive relationships with their parents.[38] These findings correlate with a recent study of 68 surrogate-born children with gay fathers in the USA. The study found that "children of gay fathers by surrogacy are functioning as well or better than children in the general population."[39] In the first of these studies, the fathers used commercial surrogacy arrangements. It is probable that this was also the case for the fathers who were the subject of the second study, given that they also used surrogacy agencies in the USA.

Outcomes for surrogates

2.32 The Centre's longitudinal study also suggests that surrogacy has generally been a positive experience for the surrogates,[40] although we note that the research has been confined to altruistic arrangements. The study notes that while surrogates experienced some difficulties (such as a feeling of upset) immediately after handing over the child, these "were not severe, tended to be short-lived, and to dissipate with time".[41] Further, one year after the birth, all of the surrogates interviewed were happy with the decision reached about when to hand over the baby and none had experienced any doubts or difficulties whilst handing over the baby.[42]

2.33 Again, however, it should be noted that research undertaken into relation to surrogates is limited with respect to the numbers involved. Additionally, the research often does not consider the effect of different types of surrogacy arrangements, such as gestational versus traditional arrangements, or altruistic versus commercial surrogacy.[43]

Outcomes for the children of surrogates

2.34 The Centre has also used those participating in their longitudinal study (that is those who participated in a domestic surrogacy arrangement) to look at the effects of surrogacy on the children of the surrogate. Two of the Centre's researchers found that:

> overall the children of surrogate mothers do not experience negative psychological health or family functioning … the vast majority of surrogates' children saw

---

38 S Golombok, L Blake, K Slutsky, E Raffanello, G Roman and A Ehrhardt, "Parenting and the Adjustment of Children Born to Gay Fathers Through Surrogacy" (2017) 89 *Child Development* 1, 9.

39 R J Green, R J Rubio, E D Rothblum, K Bergman and K E Katuzyn, "Gay Fathers by Surrogacy: Prejudice, Parenting and Well-Being of Female and Male Children" (2019) *Psychology of Sexual Orientation and Gender Diversity* (advance online publication, accessible at: https://psycnet.apa.org/record/2019-04224-001).

40 V Jadva, C Murray, E Lycett, F MacCallum and S Golombok, "Surrogacy: the experience of surrogate mothers" (2003) 18 *Human Reproduction* 2196, 2203.

41 V Jadva, C Murray, E Lycett, F MacCallum and S Golombok, "Surrogacy: the experience of surrogate mothers" (2003) 18 *Human Reproduction* 2196, 2203.

42 V Jadva, C Murray, E Lycett, F MacCallum and S Golombok, "Surrogacy: the experience of surrogate mothers" (2003) 18 *Human Reproduction* 2196, 2200. This finding reflects that in an earlier study: O van den Akker, "Genetic and gestational surrogate mothers' experience of surrogacy" (2003) 21 *Journal of Reproductive and Infant Psychology* 145.

43 A point noted by V Soderstrom-Anttila, UB Wennerholm, A Loft, A Pinborg, K Aittomaki, LB Romundstad and C Bergh, "Surrogacy: outcomes for surrogate mothers, children and the resulting families – a systematic review" (2016) 22 *Human Reproduction* 260, 273.

surrogacy as positive and felt proud of their mother for being able to help someone in this way.[44]

2.35 This finding is supported by an earlier study.[45]

HEALTH RISKS IN PREGNANCY AND CHILDBIRTH

2.36 The essence of any surrogacy arrangement is that a woman becomes pregnant, and carries a child, for another person. In the discussions of surrogacy throughout this Consultation Paper, it is important to keep in mind that any pregnancy and childbirth are far from being risk free. The decision of a woman to become a surrogate, therefore, represents a significant life decision that may have serious, and potentially damaging, consequences for her health, in the same way that any pregnancy may.

2.37 Common health problems during pregnancy, for example, include cramps, feeling faint, pelvic pain, incontinence, constipation, morning sickness (hyperemesis gravidarum) and tiredness.[46] Then there is the birth itself: women experience pain during childbirth and shortly after, particularly, for example if they have vaginal tearing, an episiotomy or a caesarean section.[47] Women may also suffer post-traumatic stress disorder ("PTSD") in pregnancy and after birth.[48]

2.38 Far greater complications can also arise because of pregnancy and childbirth, leading in some extreme cases to maternal death.[49] The leading cause of maternal death in the UK is heart disease, followed by blood clots.[50] Internationally, nearly 75% of all maternal deaths are a result of severe bleeding, infections (usually after childbirth), high blood-pressure during pregnancy (pre-eclampsia and eclampsia), complications from delivery and unsafe abortion.[51]

2.39 In the UK, 9.8 women per 100,000 live births die during pregnancy or around the time of childbirth.[52] This figure, however, masks significant differences between the spread of maternal deaths across the UK population – black women are five times, and Asian

---

44 V Jadva and S Imrie, "Children of surrogate mothers: psychological well-being, family relationships and experiences of surrogacy" (2014) 29 *Human Reproduction* 90, 95.

45 S Imrie, V Jadva and S Golombok, "The long-term psychological health of surrogate mothers and their families" (2012) 98 *Fertility and Sterility* 46.

46 NHS, *Common pregnancy problems*, accessible at: https://www.nhs.uk/conditions/pregnancy-and-baby/common-pregnancy-problems/ (last visited 31 May 2019).

47 NHS, *Episiotomy*, accessible at: https://www.nhs.uk/conditions/pregnancy-and-baby/episiotomy/; https://www.nhs.uk/conditions/caesarean-section/ (last visited 31 May 2019).

48 P L Yildiz, S Ayers amd L Phillips, "The prevalence of posttraumatic stress disorder in pregnancy and after birth: A systematic review and meta-analysis" (2017) 208 *Journal of Affective Disorders* 634.

49 A maternal death is defined by the World Health Organisation as the death of a woman while pregnant or within 42 days of termination of pregnancy, irrespective of the duration and site of the pregnancy, from any cause related to or aggravated by the pregnancy or its management but not from accidental or incidental causes: https://www.who.int/healthinfo/statistics/indmaternalmortality/en/ (last visited 31 May 2019).

50 MBRRACE-UK, *Saving Lives, Improving Mothers' Care 2018*.

51 L Say, D Chou, A Gemmill, O Tunçalp, A B Moller, J Daniels, "Global causes of maternal death: a WHO systematic analysis" (2014) 2 *The Lancet* 323.

52 MBRRACE-UK, *Saving Lives, Improving Mothers' Care 2018*.

women two times, more likely to die because of complications in their pregnancy and childbirth than white women.[53]

2.40 Internationally, maternal mortality rates vary greatly. In terms of common international surrogacy destinations, the World Health Organisation states that, in 2015, the maternal death rate in the USA was 15 women per 100,000 live births; in Ukraine it was 24 women per 100,000 live births and in Georgia it was 36 deaths per 100,000 live births. In emerging surrogacy destinations such as Kenya and Nigeria,[54] the figures for maternal deaths were far higher – in Kenya, the rate was 510 deaths per 100,000 live births; and in Nigeria it was 814 per 100,000 live births.[55]

ETHICAL ARGUMENTS IN SURROGACY

2.41 Whilst we acknowledge that we are first and foremost a law reform body, it is impossible to consider the issue of surrogacy without engaging with moral, ethical and philosophical arguments. We have sought actively to engage with these arguments throughout this Consultation Paper. In this section of the chapter we set out an overview of the various views put forward on this subject. Our intention is to provide an accessible outline of the arguments that have informed our provisional proposals for reform, rather than to provide an exhaustive critique.

2.42 These ethical arguments are distinct from empirical arguments about the potential harmful effects of surrogacy arrangements on the participants involved.[56] Many of the ethical arguments relate to the practice of surrogacy, and particularly its impact on the women and children involved. Before addressing those, we consider the ethical argument for enabling intended parents to use surrogacy to build their family.

Procreative liberty

2.43 In respect of the position of intended parents, the argument raised in favour of surrogacy is that it supports a person's procreative liberty.[57] Procreative liberty (sometimes termed the right to reproduce) has been defined as "the freedom to have children or to avoid having them."[58] The idea is far more prominent in USA

---

53 MBRRACE-UK, *Saving Lives, Improving Mothers' Care 2018*.

54 For a discussion of some of the issues facing women in Nigeria see B O Eniola and B O Omoleye, "Baby making factories and the Reproductive Health Rights of Women in Nigeria" (2018) 72 *Journal of Law, Policy and Globalization* 22.

55 All figures from the World Health Organisation, Global Health Observatory data repository, accessible at: http://apps.who.int/gho/data/node.main.15 (last visited 31 May 2019).

56 See paras 2.19 and subsequent The importance of this distinction was noted by by L Peng, "Surrogate Mothers: An Exploration of the Empirical and the Normative" (2013) 21 *Journal of Gender, Social Policy and the Law* 555.

57 See, for example discussions in Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (October 1998) (Cm 4068) paras 4.31 to 4.33 and M Vikay, "Commercial Surrogacy Arrangements: The Unresolved Dilemmas" (2014) 3 *UCL Journal of Law and Jurisprudence* 200, 209.

58 J A Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (1994) p 22.

jurisprudence than in the UK. Nevertheless, it is not an unknown concept to this jurisdiction.[59]

2.44 Some women are unable to carry a child to term. Such infertility issues are increasingly recognised internationally as constituting a disability.[60] For these women and their partners (if relevant), surrogacy presents their only opportunity to have a child that is genetically related to them. For a gay man to exercise his procreative liberty, and have a child that is genetically related to him, he will require the involvement of a surrogate. As Cory writes:

> Same-sex couples hoping to become parents face the inevitable reality that they will need to involve a third party in one way or another… For gay men who wish to have children who are genetically related to one partner, they must compensate for the fact that they lack a womb and an egg, "two critical ingredients" to the process of creating human life.[61]

Ethical arguments against surrogacy

2.45 Ethical critiques of surrogacy revolve around two main themes:

(1) Exploitation; and

(2) Commodification (sometimes termed objectification).

2.46 For some authors, commodification is an element of exploitation.[62] This is because they argue that commodification is making wrongful use of (and thereby exploiting)

---

59 B Connolly, "Best interests of the child v the right to procreate: or how far does the law on surrogacy protect the best interests of the child? [2016] *International Family Law* 111.

For commentary on the ECHR jurisprudence on this issue of procreative liberty, see, for example, M Eijkholt, "The Right to Procreate is not Aborted" (2008) 16 *Medical Law Review* 284; B van der Sloot, "Between fact and fiction: an analysis of the case-law on Article 12 of the European Convention on Human Rights" [2014] 26 *Child and Family Law Quarterly* 397; and A Mulligan, "Identity Rights and Sensitive Ethical Questions: The European Convention on Human Rights and the Regulation of Surrogacy Arrangements" (2018) 26 *Medical Law Review* 449.

60 See D Orentlicher, "Discrimination out of Dismissiveness: The Example of Infertility" (2010) 85 *Indiana Law Journal* 143, 156 and L Fourie and A Botes, "Disability discrimination in the South African workplace: the case of infertility" (2018) 22 *The International Journal of Human Rights* 910.

61 C Cory, "Access and Exploitation: Can Gay Men and Feminists Agree on Surrogacy Policy?" (2015) 23 *Georgetown Journal on Poverty Law and Policy* 133, 139 (reference in original text removed).

62 S Wilkinson, "Exploitation in International Paid Surrogacy Arrangements" (2016) 33 *Journal of Applied Philosophy* 125.

another person.[63] We accept that these two criticisms of surrogacy are interrelated,[64] but as each also represents a distinct concern we examine them separately.[65]

Exploitation

2.47 Whilst people will be familiar with the everyday meaning of exploitation, we think that it is important to clarify how the term is used in the context of surrogacy.[66] We think that in the context of surrogacy exploitation comprises at least two distinct elements:

(1) that the surrogate might derive (or is at risk of deriving) an unfairly low level of benefit and/or suffers an unfairly high level of cost and harm from the arrangement;[67] and

(2) that the surrogate's consent to the arrangement is defective or invalid.[68]

Exploitative pay and conditions

2.48 The first issue revolves primarily around concerns over exploitative pay and conditions for surrogates. The literature on this issue has primarily focused on international, rather than UK, surrogacy arrangements.

2.49 In terms of pay, there are concerns that women in certain international destinations which permit commercial surrogacy are being underpaid, and therefore exploited, compared with their equivalents in countries such as the USA. We have been told, for example, that whilst a surrogate in the USA can expect to receive around £30,000 as compensation, a surrogate in Georgia or Ukraine may only receive around £10,000.

2.50 It could be argued, in light of this concern, that increasing the compensation that surrogates receive would reduce the potential for exploitation in these arrangements.

---

63 Equally, we note that exploitation can be characterised as an element of commodification. See, for example, the American academic Scott who includes exploitation in her discussion of commodification: "Political philosophers offer two objections to the commodification of certain transactions. The first focuses on coercion; exchanges that are driven by severe inequality, ignorance, or dire economic necessity are problematic. The second objection focuses on corruption and holds that the market has a degrading effect on certain goods and practices." E S Scott, "Surrogacy and the Politics of Commodification" (2009) 72 *Law and Contemporary Problems* 109, 112.

64 Some feminist writers, for example, would argue that critiques of both exploitation and commodification in surrogacy can both be rooted in a feminist theory which believes that, "in Western society … control over women's bodies, and particularly over their reproductive capacities, has been largely in the hands of men. This control is cited by feminist scholars as one of the main factors in the domination and oppression of women." K B Lieber, "Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?" (1992) 68 *Indiana Law Journal* 205, 211 (footnotes omitted from quote).

65 As a result, we would characterise Scott's first objection in the quote at n 63, above, as exploitation, and her second objection as commodification.

66 For an in-depth examination of this issue, see J L Hill, "Exploitation" (1993 – 1994) 79 *Cornell Law Review* 631.

67 On this element, see also the definition of exploitation in R Ashcroft, "Money, consent and exploitation in research" (2001) 1 *The American Journal of Bioethics* 62.

68 This categorisation derives from S Wilkinson, "Exploitation in International Paid Surrogacy Arrangements" (2016) 33 *Journal of Applied Philosophy* 125, 127.

Those who consider surrogacy inherently to involve commodification of the child take the view, however, that no amount of money would be a fair payment. [69]

2.51 In addition to the issue of pay, there are also serious concerns expressed as to the treatment and conditions of surrogates in some overseas countries, including cases of trafficking of women for the purposes of surrogacy. Before it changed its law to prohibit non-citizens from accessing surrogacy, India became a focal point for such criticism.[70] From the literature in this area, it is clear that some degrading and inhumane conditions existed for surrogates. As one academic reported:

> Live-in surrogacy hostels have emerged to monitor intensely women's behaviour during their pregnancies. At some clinics, women are required to live at these hostels, apart from their families, for the length of their pregnancies under controlled eating, health care, and rest regimens. As well, there can be restrictions about when the surrogates' own families can visit them and the type of physical interactions the women are allowed to have with their children when visiting.[71]

2.52 There have also been concerning reports in previous surrogacy destinations about the treatment of surrogates. For example, there are reports of women acting as surrogates in India who have not been permitted to see the children that they have carried or even to know their sex;[72] and of Vietnamese women trafficked to Thailand for the purpose of surrogacy.[73] Moreover, reports continue to emerge from a number of overseas surrogacy destinations which remain open to UK citizens. These include Ukraine and Georgia.[74]

2.53 Members of the Law Commission of England and Wales visited Ukraine in February 2019, on the initiation of the consul for the region and heard first-hand of a number of

---

69 S Wilkinson, "Exploitation in International Paid Surrogacy Arrangements" (2016) 33 *Journal of Applied Philosophy* 125, 131.

70 For a comprehensive study on this issue see A Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (2014). For further detail on Indian surrogates see also "Indian surrogate mothers talk of pain of giving up baby" *BBC News* (15 August 2016), accessible at: https://www.bbc.co.uk/news/world-asia-india-37050249) (last visited 31 May 2019) and "Why Some of India's Surrogate Moms are Full of Regret" *National Public Radio*, accessible at: https://text.npr.org/s.php?sId=494451674 (last visited 31 May 2019).

71 M Deckkha, "Situating Canada's Commercial Surrogacy Ban in a Transnational Context: A Postcolonial Feminist Call for Legalization and Public Funding" (2015) 61 *McGill Law Journal* 31, 48.

72 "Indian surrogate mothers talk of pain of giving up baby" *BBC News* (15 August 2016), accessible at: https://www.bbc.co.uk/news/world-asia-india-37050249) (last visited 31 May 2019).

73 "Thailand's crackdown on 'wombs for rent'" *BBC News* (20 February 2015), accessible at: https://www.bbc.co.uk/news/world-asia-31556597 (last visited 31 May 2019).

74 On Ukraine see, for example, S N Kirshner, "Selling a Miracle? Surrogacy through International Borders: Exploration of Ukrainian Surrogacy" (2015) 14 *The Journal of International Business & Law* 77 and "In search of surrogates, foreign couples descend on Ukraine" *BBC News* (13 February 2018), accessible at: https://www.bbc.co.uk/news/world-europe-42845602 (last visited 31 May 2019). In mid-2018 criminal proceedings were brought against the owner of the largest provider of assisted conception and surrogacy services in the Ukraine by the Ukrainian prosecutor general pursuant to laws on trafficking in persons and evasion of taxes (cited by S Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008 (Report: Part 2)* (2019) p 168.

On Georgia, see "The new Caucasian chalk circle: Georgia's surrogate motherhood business" *168 Ora* (27 November 2017), accessible at: https://168ora.hu/kriziszona/the-new-caucasian-chalk-circle-georgias-surrogate-motherhood-business-12709 (last visited 31 May 2019).

cases which raised concerns as to the treatment of surrogates. For example, we heard of vulnerable women displaced from occupied territories in the Ukraine acting as surrogates; young women from Georgia who had acted as surrogates being cast out from their communities because they were no longer considered marriageable; and surrogates not being aware of the genetic parentage of embryos transferred to them for the purpose of surrogacy.[75] We also note a news report of a woman in the Ukraine who acted as a surrogate not receiving adequate medical care, and others not being paid by surrogacy agencies if they miscarried or did not adhere to strict requirements.[76]

The issue of consent

2.54 The second component of exploitation set out above revolves around arguments that surrogates cannot (and perhaps can never) validly consent to a surrogacy arrangement. It is argued that a combination of reasons undermine a woman's capacity and competence voluntarily to consent to a surrogacy arrangement.[77]

2.55 This issue of valid consent is a particularly acute issue in international arrangements. For example, in certain international surrogacy destinations, including Kenya, Georgia and Ukraine, limited employment opportunities for poor women, coupled with the potentially large financial incentives in acting as a surrogate, create an obvious risk of pressure and exploitation. As has been written in the context of Indian surrogates:

> One must question the notion of free choice and self-determination when Indian women are agreeing to surrogacy to earn money to obtain urgent medical care for loved ones, win back lost children**,** raise children as a single parent or as the sole breadwinner, and pay for their children's dowries, particularly when the amount of money involved is so high in relation to the woman's standard of living.[78]

2.56 Those risks will be heightened where the woman has not had children of her own, and so has not experienced pregnancy and childbirth. The woman may have little information or education as to what to expect in pregnancy and childbirth, or the risks involved.

2.57 While concerns may be focused around international arrangements, the issue may still be of concern in domestic surrogacies. In the UK, there may in some instances be an unequal distribution of knowledge and wealth, and therefore ultimately of power, between the surrogate and the intended parents.[79] While stakeholders that we have consulted frequently acknowledge that all those involved in a surrogacy arrangement

---

75 While this last point may count more as evidence of mistreatment of intended parents, we think that it also goes to the surrogate's ability to give informed consent.

76 "In search of surrogates, foreign couples descend on Ukraine" *BBC News* (13 February 2018), accessible at: https://www.bbc.co.uk/news/world-europe-42845602 (last visited 31 May 2019).

77 See, for example, J A Gupta, "Towards Transnational Feminisms: Some Reflections and Concerns in Relation to the Globalization of Reproductive Technologies" (2006) 13 *European Journal of Women's Studies* 23, 32 and G Lilienthal, N Ahmad and Z A bin Ayub, "Policy considerations for the legality of surrogacy" (2015) 21 *Medico-Legal Journal of Ireland* 88, 98.

78 U R Smerdon, "Crossing Bodies, Crossing Borders: International Surrogacy between the United States and India" (2008) 39 *Cumberland Law Review* 15, 54.

79 See ch 3.

are often vulnerable, it has also been acknowledged that surrogates are generally economically and socially less well off than intended parents.

Commodification

2.58 The arguments around commodification and surrogacy focus on its effect on both the surrogate and the child born of the surrogacy arrangement.[80] The implication is that surrogacy views both the surrogate and the child as a means to achieving an end; the building of a family for the intended parents.[81]

2.59 Ethical arguments against commodification are focused on commercial arrangements. It has been suggested that commercial surrogacy commodifies women, and specifically that it:

> attempts to transform what is specifically women's labor - the work of bringing forth children into the world - into a commodity. It does so by replacing the parental norms which usually govern the practice of gestating children with the economic norms which govern ordinary production processes.[82]

2.60 An American academic argues that surrogacy goes further than simply commodifying women's reproductive labour. She contends that surrogacy fundamentally devalues women's personhood and commodifies women's bodies and identities.[83] On this, she writes that:

> There is certainly the danger that women's attributes, such as height, eye color, race, intelligence, and athletic ability, will be monetized. Surrogates with "better" qualities will command higher prices in virtue of those qualities. This monetization commodifies women more broadly than merely with respect to their sexual services or reproductive capacity.[84]

2.61 In this context, some feminist scholars have drawn a connection between commercialised surrogacy and prostitution. In both, they argue that it is a women's unique reproductive and sexual capacity which becomes a commodity for men to use.[85]

---

80 P Halewood, "On Commodification and Self-Ownership" (2008) 20 *Yale Journal of Law and the Humanities* 131, 159 (and the literature cited at n 120 in that article).

81 This view has its basis in the writing of the 18th century philosopher Immanuel Kant, that a person should never be treated as a means to an end. See I Kant, *Groundwork of the Metaphysic of Morals* (1785). For a recent discussion on Kantian philosophy in the context of surrogacy see T Patrone, "Is Paid Surrogacy a Form of Reproductive Prostitution? A Kantian Perspective" (2018) 27 *Cambridge Quarterly of Healthcare Ethics* 109.

82 E S Anderson, "Is Women's Labor a Commodity?" (1990) 19 *Philosophy and Public Affairs,* 71, 80 and 92.

83 M J Radin, *Contested Commodities* (1996).

84 M J Radin "Market-Inalienability" (1987) *Harvard Law Journal* 1849, 1932. See also our discussion in ch 4 of the United Nations, *Convention on the Elimination of All Forms of Discrimination against Women* (New York, 18 December 1979).

85 See A Dworkin, *Right-Wing Woman* (1983), G Corea, *The Mother Machine: Reproductive Technology from Artificial Insemination to Artificial Wombs* (1985) and G Corea, "The Reproductive Brothel" in G Corea, R Duelli Klein, J Hanmer, H B Holmes, B Hoskins, M Ishwar, J Raymond, R Rowland, R Steinbacher (eds), *Man-Made Women* (1987).

2.62 A further dimension in the commodification debate concerns the commodification of children. Another academic notes the potential impact of a child being treated, even temporarily, as a commodity:

> While contracts to sell children may not turn them into a commodity (permanently), they still treat them (temporarily) as a commodity. The short duration of such an insult makes it no less disparaging, no less able to undermine one's sense of self-worth.[86]

2.63 Some academics believe that a child born as a result of a commercial surrogacy arrangement does become a commodity. In this context, it is argued that:

> Commercial surrogacy substitutes market norms for some of the norms of parental love… it requires us to understand parental rights no longer as trusts but as things more like property rights-that is, rights of use and disposal over the things owned.

2.64 When market norms are applied to the ways we allocate and understand parental rights and responsibilities, children are reduced from subjects of love to objects of use.[87] This ethical argument features strongly in the Report of the UN Special Rapporteur in January 2018, for example, who concluded that "commercial surrogacy, as currently practised usually amounts to the sale of children as defined under international human rights law."[88]

Ethical arguments in favour of surrogacy

The libertarian/autonomy argument

2.65 Contrary to ethical concerns of exploitation, from a libertarian perspective, an argument has been made that allowing surrogacy (with appropriate safeguards) recognises all the participants' decisions as a matter of "free choice of a rational human being."[89] In other words, the law should recognise the decision of free, autonomous individuals who are in control of, and can make decisions about, their own bodies.[90] Such an approach, it is argued, respects the free will,[91] and freedom of choice of all the participants in a surrogacy arrangement.[92] As Francis suggests, it is

---

86 M J Meyer, "The Idea of Selling in Surrogate Motherhood" (1990) 4 *Public Affairs Quarterly* 175, 182.

87 E S Anderson, "Is Women's Labor a Commodity?" (1990) 19 *Philosophy and Public Affairs,* 71, 76 and 92.

88 M de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* (January 2018), A/HRC/37/6 para 41.

89 M Vijay, "Commercial Surrogacy Arrangements: The Unresolved Dilemmas" (2014) 3 *UCL Journal of Law and Jurisprudence* 200, 206.

90 See M Freeman, "Does Surrogacy Have a Future After Brazier?" (1999) 7 *Medical Law Review* 1, 5 and L M Purdy, "Surrogate Mothering: Exploitation or Empowerment?" (1989) 3 *Bioethics* 18, 24.

91 "Free will has traditionally been conceived of as a kind of power to control one's choices and actions." (Stanford Encyclopaedia of Philosophy, accessible at: https://plato.stanford.edu/entries/freewill/#LibeAccoSour (last visited 31 May 2019)).

92 For one discussion of this, see R A Posner, "The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood" (1989) 5 *Journal of Contemporary Health Law and Policy* 21.

unclear why, as a general matter, decisions to carry a surrogate pregnancy should all be unfree, any more so than other pregnancies.[93]

2.66 This argument takes issue with the idea of "singling out women for paternalistic 'protection against themselves.'"[94] From one feminist perspective[95] (described by some as a "liberal feminist"[96] viewpoint), the argument that surrogates are unable to consent voluntarily to participate in the arrangement attracts criticism. One feminist writer says that such an argument:

> is a dangerous one for feminists to make. It would seem to be a step backward for women to argue that they are incapable of making decisions. That, after all, was the rationale for so many legal principles oppressing women for so long, such as the rationale behind the laws not allowing women to hold property.[97]

2.67 Proponents of this ethical viewpoint, therefore, see attempts to "protect" surrogate mothers as paternalistic, reinforcing stereotypes of women as overly emotional and unable to make rational business decisions."[98] The reference to surrogacy as a "business" decision echoes the focus of concerns around commodification and exploitation on commercial surrogacy arrangements. We note that many stakeholders we have spoken to who have participated in an altruistic surrogacy arrangement in the UK would find these arguments objectionable. They would emphasise the common intention that lies at the heart of their surrogacy agreement. Some women have highlighted that their own reasons for being a surrogate are, in their view "selfish"; that they enjoy the experience of pregnancy and benefit immensely from seeing the family they have helped to create.

2.68 In terms of commodification, it has been argued that concerns are mitigated where it is clear that any payments made to a woman for being a surrogate are for her services in carrying the child. In particular, it has been argued that there can be no concerns that the child is being sold if the surrogate is not compelled to hand the child to the intended parents, and if any payments due are not conditional on her doing so.[99]

---

93 L Francis, "Is Surrogacy Ethically Problematic?" in L Francis (ed), *The Oxford Handbook of Reproductive Ethics* (2017).

94 L M Purdy, "A Response to Dodds and Jones" (1989) 3 *Bioethics* 40, 41.

95 One particular thread of the surrogacy ethical debate is that, "it is impossible to identify a unified feminist perspective on surrogacy. Indeed, feminists are deeply divided on the issue." A Brandel, "Legislating Surrogacy: A Partial Answer to Feminist Criticism" (1995) 54 *Maryland Law Review* 488, 492.

96 L J Lacey, "O Wind, Remind Him that I Have No Child: Infertility and Feminist Jurisprudence" (1998) 5 *Michigan Journal of Gender and Law* 163, 190.

97 L B Andrews, "Surrogate Motherhood: The Challenge for Feminists" (1988) 16 *Law, Medicine & Health Care* 72, 75. See also the similar argument of E S Scott: "Surrogacy and the Politics of Commodification" (2009) 72 *Law and Contemporary Problems* 109, 131 and 142.

98 L J Lacey, "O Wind, Remind Him that I Have No Child: Infertility and Feminist Jurisprudence" (1998) 5 *Michigan Journal of Gender and Law* 163, 191.

99 K B Lieber, "Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?" (1992) 68 *Indiana Law Journal* 205, 231. This point is acknowledged by the UN Special Rapporteur, see M de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* (January 2018), A/HRC/37/60 para 72.

Conclusion

2.69 As the above summary demonstrates, the ethical debate around surrogacy reflects a tension between autonomy and paternalism.[100] Those who support surrogacy on an ethical basis highlight that a woman may be capable freely to decide to become a surrogate, and can be empowered by the freedom to participate in surrogacy arrangements. Those who oppose surrogacy argue that it might constitute exploitation from which women need to be protected.

2.70 We have carefully considered the ethical arguments in proposing any reforms to the law governing surrogacy arrangements in the UK, and refer to the arguments made in this section in relevant chapters.

2.71 Concerns around exploitation and commodification persist in the context of the current law, particularly in respect of commercial arrangements. We consider that law reform in respect of domestic surrogacy arrangements can alleviate, if not eliminate, these concerns by providing more effective regulation of surrogacy arrangements, and revised eligibility requirements and safeguards. We discuss our provisional proposals for reform in these respects in the chapters that follow.[101]

2.72 We also consider in Chapter 16 international surrogacy arrangements, which are almost invariably commercial in nature. In that context we acknowledge that given the limitations of dealing only with the law in the UK, it is impossible to effect change, beyond situations involving intended parents who will bring the child back to the UK. In that respect, we make a provisional proposal for reform that would enable legal parenthood granted overseas to be recognised in the UK, only after an appraisal of the law and practice of surrogacy in each country.[102] We hope that such a development would encourage UK intended parents who do look for an international surrogacy arrangement to use countries where there is a level of confidence in the protection provided to women who become surrogates. Our primary aim, however, is that our proposed reforms will encourage those wishing to enter into surrogacy arrangements to do so in the UK rather than overseas.

---

100 A Brandel, "Legislating Surrogacy: A Partial Answer to Feminist Criticism" (1995) 54 *Maryland Law Review* 488, 489.

101 See ch 9.

102 See ch 16.

Chapter 3: Surrogacy – current practice

INTRODUCTION

3.1 In this chapter, we briefly outline the medical aspects of surrogacy and the preponderance of traditional and gestational arrangements, before going on to explore who is using surrogacy as a means to build a family. We then consider the availability of surrogates in the UK and the organisations that play a part in surrogacy and how they operate. We consider the approach that these organisations take to each stage of the surrogacy journey, leading up to, and after the birth of a child, including obtaining a parental order and telling children about their origins. The focus is on surrogacy arrangements that take place in the UK, although we briefly look at international arrangements too.

SURROGACY IN THE UK

Medical aspects of surrogacy

3.2 Surrogacy obviously involves conception and pregnancy. How medicalised the process is will depend on how conception takes place.

3.3 Surrogacy may, or may not, involve treatment in a fertility clinic, depending on the type of surrogacy that is used. For traditional surrogacy, where the surrogate is using her own egg, the surrogate may use self-insemination outside the setting of a clinic. The surrogate can use a syringe to inject the intended father's sperm into her vagina. Donor insemination for traditional surrogacy (with the donor in this case being the intended father) can also be provided by a clinic. Although the Human Fertilisation and Embryology Authority ("the Authority") recommends using a licensed UK fertility clinic for traditional surrogacy,[1] their use is not common.[2]

3.4 We have been told that traditional surrogacy may be used precisely because it is cheaper than gestational surrogacy. If home insemination is used, then there are practically no costs involved in the surrogate becoming pregnant. Cost may explain why clinics are not commonly used for traditional surrogacy. Beyond the issue of costs, however, we have been told that some surrogates simply prefer a less medicalised approach that does not require treatment in a clinic or the need to take fertility drugs.[3]

---

1 See the Authority, *Surrogacy*: https://www.hfea.gov.uk/treatments/explore-all-treatments/surrogacy/ (last visited 31 May 2019). In intrauterine insemination, the semen is inserted straight into the uterus.

2 See the Authority, *Fertility treatment 2014 – 2016. Trends and figures* (March 2018) p 44. Only six donor insemination cycles where the patient was acting as a surrogate were recorded in UK clinics in 2016. A cycle is a course of treatment. A clinic that we spoke to, based outside London, told us that it was their policy not to be involved in traditional surrogacy arrangements.

3 If the surrogate is artificially inseminated at a clinic using intrauterine insemination, where the semen is inserted into the uterus, the surrogate may take medication to stimulate her ovaries, with the growth of egg follicles being monitored by ultrasound scan to allow insemination to take place at the optimum time. See

3.5 For gestational surrogacy – where the surrogate's own eggs are not being used – IVF is necessary. The eggs used may be the intended mother's or come from an egg donor. The Authority describes IVF in this way:

> It involves collecting a woman's eggs and fertilising them manually with sperm in the lab. If fertilisation is successful, the embryo is allowed to develop for between two and six days and is then transferred back to the woman's womb to hopefully continue to a successful birth.[4]

3.6 Embryos that are created, but not transferred into the womb, may be frozen for future use.

3.7 The term "cycle" of IVF is used to describe a course of IVF treatment. The guidelines of NICE (National Institute for Health and Care Excellence) define a full cycle of IVF as including "one episode of ovarian stimulation and the transfer of any resultant fresh and frozen embryos."[5] The embryo that is transferred to the surrogate may be a freshly-created embryo, or it may be an embryo that was created in a previous cycle of IVF and frozen. For surrogacy IVF treatment, the woman to whose womb the embryo is transferred will, of course, not usually be the woman who provided the eggs.[6]

3.8 Surrogacy IVF treatment usually involves both the intended mother (if using her own eggs, or the egg donor, if donated eggs are used) and the surrogate taking fertility drugs. These drugs are used to synchronise their menstrual cycles[7] and, respectively, to stimulate the production of eggs, and prepare the lining of the womb for embryo transfer.[8]

3.9 NICE guidelines on the availability of IVF recommend that, if eligibility criteria are met, women under 40 should be offered 3 full cycles of NHS funded IVF (1 cycle if aged 40 to 42).[9] In practice, however, access to IVF funded by the NHS varies across England. Some clinical commissioning groups offer the recommended three cycles, others one or two, and several none.[10] Provision in Wales, Scotland and Northern Ireland is set at

---

Department of Health and Social Care (the "DHSC"), *The surrogacy pathway: surrogacy and the legal process for intended parents and surrogates in England and Wales* (February 2018) p 16.

4 See the Authority, *IVF*: https://www.hfea.gov.uk/treatments/explore-all-treatments/in-vitro-fertilisation-ivf/ (last visited 31 May 2019).

5 NICE, *Fertility Problems: assessment and treatment* (Clinical guideline [CG156]) (September 2017). NICE guidelines are not mandatory in Scotland.

6 It would be possible for a surrogate's own eggs to be used in a course of IVF treatment, where those eggs were fertilised with the intended father's sperm and the resulting embryo then transferred to the surrogate's womb.

7 If fresh, rather than frozen, embryos are being used.

8 Other possible treatments, however, use either a lower dose of fertility drugs compared to standard IVF ('mild stimulation IVF') or no fertility drugs at all ('natural cycle IVF'). See the Authority, IVF: https://www.hfea.gov.uk/treatments/explore-all-treatments/ivf-options/ (last visited 31 May 2019).

9 NICE, *Fertility Problems: assessment and treatment* (Clinical guideline [CG156]) (September 2017) paras 1.11.1.2 and 1.11.1.3.

10 See Fertility Fairness, *IVF Provision in England*: http://www.fertilityfairness.co.uk/nhs-fertility-services/ivf-provision-in-england/. In 2018 only 13% of clinical commissioning groups in England offered the

the level of the devolved nation, rather than locally.[11] In Scotland, there are four clinics providing NHS IVF (including IVF for surrogacy). Eligible patients can access up to three cycles of NHS funded IVF.[12]

3.10 We have been told that NHS funding for IVF for the purposes of surrogacy is very rare in England.[13] It is only provided on an exceptional basis and, even then, it is confined to the collection of eggs from the intended mother. In Scotland, on the other hand, up to three cycles of surrogacy IVF are available on the NHS for eligible patients. To secure access, applicants must be a couple (opposite-sex or same-sex) in a secure relationship, and have been cohabiting for at least 2 years. This is part of the eligibility criteria for IVF and surrogacy IVF, and all criteria must be met before couples are referred for treatment. We understand that Wales also provides funding for surrogacy IVF.[14]

3.11 IVF treatment is more expensive when it is being used for surrogacy. That is perhaps unsurprising because the use of a surrogate means that there is an additional patient involved in the IVF treatment. One clinic that we spoke to, based outside London, told us that their usual cost for IVF was £3,350 but that, in a surrogacy context, costs varied between £6,250 and £11,500 depending on whether the intended parents' own gametes, or donor gametes, were used. The clinic explained that the difference in costs arise because surrogacy cases require more administrative work, all parties involved require advice and separate counselling, and mediation may also be required if there is any dispute between the intended parents and the surrogate. In Scotland, for self-funded IVF treatment for surrogacy, we understand that charges to intended parents would be in the region of £6,000.

The prevalence of gestational and traditional surrogacy

3.12 The number of children who are born through surrogacy each year is not readily identifiable. While we know the number of parental orders that are granted each year, this figure will exclude surrogacy arrangements where an application for a parental order is not made. In the domestic context, that may be more likely to happen where the surrogacy arrangement is informal, and traditional surrogacy is used. A parental order may not be applied for following an international surrogacy arrangement,

---

recommended three cycles, see http://www.fertilityfairness.co.uk/wpcontent/uploads/2018/10/infographic_2018_Final.pdf.

11 Fertility Fairness, *IVF Provision in Scotland*: http://www.fertilityfairness.co.uk/nhs-fertility-services/ivf-provision-in-scotland/ (last visited 31 May 2019).

12 Scottish Government National Infertility Group, *Report* (March 2016), accessible at: https://www.gov.scot/publications/national-infertility-group-report/ (last visited 31 May 2019).

13 See, for example, South East London Public Health Commissioning Support Group, *NHS South East London Treatment Access Policy* (2015) which states "the implications of a number of important legal points related to surrogate pregnancy mean that fertility treatment involving a surrogate mother will not be funded" and "as the consequence of the above legal opinion related to surrogacy, assisted conception for couples where both partners are male will not be provided …" p 15.

14 Welsh Health Specialised Services Committee, *Specialised Services Commissioning Policy: CP38 Specialist Fertility Services* (January 2017) para 3.1.2. The policy also says that "male same-sex couples … should refer to the section on surrogacy," suggesting that funding may be available in Wales for gay male couples using surrogacy.

particularly where the intended parents are recorded as the parents on the birth certificate. International cases nearly always involve gestational surrogacy.

3.13 It is also hard to know the exact split in domestic surrogacy arrangements between gestational and traditional surrogacy. We asked the surrogacy organisations operating in the UK (which we discuss below) for their views on the split. Of the two organisations that dealt frequently with traditional surrogacy, one thought that the use of traditional surrogacy was decreasing, but both had member couples who would consider traditional surrogacy: about 20% of couples in one case and 25% in the other.

3.14 Cross-checking against other data, we note that a CAFCASS study of 79 cases from parental order applications made in 2013-14 (including both domestic and international arrangements) found that 21.5% of the surrogacy arrangements overall were traditional arrangements, while 36.2% of the domestic arrangements were traditional. All the international arrangements in the sample were gestational in nature.[15] In its 2018 report, Surrogacy UK said that, of the 218 births that they had recorded from the founding of the organisation in 2002 until October 2018, 33% resulted from a traditional surrogacy arrangement.[16]

3.15 While the available data has limitations, and is not necessarily consistent, it is clear that traditional surrogacy remains significant in domestic surrogacy arrangements.

3.16 Obviously, intended parents and surrogates are the parties to a surrogacy arrangement. However, surrogacy organisations and lawyers are also involved, as we consider below.

WHICH ORGANISATIONS ARE INVOLVED?

3.17 There are a small number of non-profit organisations that facilitate surrogacy arrangements in the UK. These are:

(1) Brilliant Beginnings;[17]

(2) COTS; and[18]

(3) Surrogacy UK.

3.18 The British Surrogacy Centre is a company registered in the state of California (USA) but which also operates in the UK.

---

15 CAFCASS, *Cafcass Study of Parental Order Applications made in 2013/14* (July 2015) p 15, accessible at: https://www.CAFCASS.gov.uk/about-CAFCASS/research-and-data/CAFCASS-research/ (last visited 31 May 2019).

16 Surrogacy UK Working Group on Surrogacy Law Reform, *Surrogacy in the UK, Further evidence for reform: Second Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (December 2018).

17 The founders of Brilliant Beginnings also run an associated law firm, NGA Law, which specialises in surrogacy and assisted reproduction and also undertakes work campaigning for reform in the sector.

18 Childlessness Overcome Through Surrogacy, but the organisation uses the acronym COTS.

WHO IS ENTERING INTO SURROGACY ARRANGEMENTS?

3.19 Current data on the use of surrogacy relates to its use by couples, as it has only recently become possible for single people to obtain a parental order. Surrogacy is used predominantly by same-sex male couples and opposite-sex couples.[19] Surrogacy UK told us that, as of July 2018, of the 409 intended parent couples who had joined since 2009, 20% were same-sex male couples. The opposite-sex couples who made up the remaining 80% had joined Surrogacy UK because of a medical reason, such as cancer or Mayer-Rokitansky-Kuster-Hauser syndrome ("MRKH")[20] (accounting for 51%), because of unexplained fertility or failed IVF attempts (26%), or because the woman was post-menopausal (3%).[21]

3.20 Most organisations reported a significant increase in the proportion of male same-sex couples over the last few years, which was also the experience of CAFCASS.[22]

3.21 COTS told us that 50% of their intended parents are same-sex couples, while Brilliant Beginnings reported the same proportion.

3.22 The British Surrogacy Centre told us that about 30% of its intended parents were male same-sex couples, compared to 50% a few years ago; it attributed this change to the fact that greater numbers of opposite-sex people are seeing surrogacy as an acceptable option, rather than to a decrease in the number of gay people building families through surrogacy.

---

19 In some same-sex male couples, or opposite-sex couples, one of the couple may be a transgender man. While a transgender man might, medically speaking, be able to carry a pregnancy to term, it may be extremely distressing for him to do so. If that is the case, such a couple (or indeed an individual) might wish to enter into a surrogacy arrangement.

20 MRKH syndrome, a disorder that causes the vagina and uterus to be underdeveloped or absent.

21 As of the end of April 2019, an additional 77 intended parent applicants have joined Surrogacy UK, of which 33 are opposite-sex couples, 30 are same-sex male couples and 3 are single intended parents.

22 See also the information provided by CAFCASS dated 7 October 2015 in response to a Freedom of Information Request, which showed that, of 229 parental order applications made in 2014, 172 were made by opposite-sex couples, and 56 made by same-sex couples, compared to 92 opposite-sex couples and 1 same-sex couple in 2010, accessible at: https://www.CAFCASS.gov.uk/about-CAFCASS/transparency-information/freedom-of-information/2015-disclosure-log/ (under the title: "Number of parental order applications and information relating to international surrogacy arrangements and gender of applicants").

Note that it has only been possible for same-sex couples to apply for a parental order since 1 October 2009, when section 54 of the Human Fertilisation and Embryology Act 2008 came into force. In their June 2015 publication "A Guide for Gay Dads", and on their website, the LGBT rights organisation Stonewall include guidance on surrogacy, see: https://www.stonewall.org.uk/sites/default/files/A_Guide_for_Gay_Dads__1_.pdf (last visited 31 May 2019) and https://www.stonewall.org.uk/help-advice/parenting-rights/surrogacy-1 (last visited 31 May 2019).

3.23 One case was described to us as involving elective (also known as social) surrogacy, when the intended mother had a fear of giving birth.[23] We note, however, that a fear of giving birth (tokophobia) may make surrogacy medically necessary.[24]

3.24 There was near universal agreement among those to whom we spoke that the majority of surrogates tend to come from a lower socio-economic group than the intended parents. However, many to whom we spoke thought that all parties in a surrogacy arrangement were vulnerable.

3.25 Surrogacy UK and Brilliant Beginnings pointed out that intended parents can be vulnerable because, for them, having a child depends on finding a woman willing to act as a surrogate. We were also told that an additional reason for opposite-sex intended parents being vulnerable was because there was often a history of failed attempts at using assisted reproduction techniques to conceive, prior to entering into the surrogacy arrangement. These intended parents therefore come to surrogacy after experiencing a long period of stress and emotional distress in trying to have a baby.

3.26 Nearly all those to whom we spoke thought that, in the UK, there were more intended parents looking for surrogates than women who wanted to be surrogates. The British Surrogacy Centre thought that demand remained high, but commented that it was possible to find more surrogates in the UK than had been the case 20 years before. Surrogacy UK, told us that there may be a shortage of surrogates relative to the number of intended parents actively looking in the UK, although they had experienced increases each year in the number of surrogates wanting to join the organisation. However, it explained that in terms of its membership it deliberately keeps the ratio of (actively-looking) IP couples to surrogates at 3.5 to 1 as this maintains a balance between giving surrogates a choice, and ensuring that intended parents have a reasonable chance of success in entering into a surrogacy arrangement.

SURROGACY ORGANISATIONS

3.27 Brilliant Beginnings deals with both domestic and international arrangements, while Surrogacy UK and COTS only assist with domestic arrangements.

3.28 In its 31-year history COTS has been involved in surrogacy arrangements leading to the birth of 1,055 babies and, at the time we spoke, had 30 current intended parents members actively seeking a match. Brilliant Beginnings had 25 to 30 intended parent couples and singles going to the USA, 10 intended parent couples and singles going to Canada, and 20 to 30 domestic intended parent couples waiting to match with a surrogate. Surrogacy UK told us that it had been involved with 231 births since it was founded in 2004, up to and including 2018.

3.29 We would estimate the numbers of intended parents being helped collectively by UK surrogacy organisations at around 60 to 80 each year. This suggests that the

---

[23] Anecdotal evidence from media reports suggests that elective or social surrogacy may, however, be more prevalent elsewhere. See for example, "Having a child doesn't fit into these women's schedule: is this the future of surrogacy?" *The Guardian* (25 May 2019), accessible at: https://www.theguardian.com/lifeandstyle/2019/may/25/having-a-child-doesnt-fit-womens-schedule-the-future-of-surrogacy (last visited 31 May 2019).

[24] See para 12.88.

organisations are not involved with the majority of surrogacy arrangements leading to parental orders granted in the UK.[25] This is not to say that there was no involvement of surrogacy organisations in these other births; many would have involved surrogacy agencies based in other countries like the USA and Ukraine. Nevertheless, it is likely that a fair proportion of children who are the subject of a parental order each year have been born following surrogacy arrangements where an organisation has not been involved in the process.

3.30 We have been told by lawyers and surrogacy organisations that some – perhaps many – surrogacy arrangements are made using social media. These arrangements can involve surrogates working independently of organisations (having sometimes been a member of the organisation in the past). However, we have also been told that there is concern over what were described to us as "fixers" and "malign presences" operating on social media in respect of surrogacy arrangements. By this, we mean people operating on social media to arrange surrogacies in a way that is not ethical, and which can cause needless tension and dissent between those involved.[26]

3.31 From what we have heard, we think that those surrogacy arrangements where a surrogacy organisation has not been involved are more likely to give cause for concern.[27] That is because surrogacy organisations generally set criteria for intended parents and surrogates aimed at ensuring that the arrangement is properly considered and understood by the surrogate and intended parents. That is not to say that some independent arrangements may not include similar safeguards, but it is clear that there is greater variation in practice and that this is not always the case.

Ethos and structure of surrogacy organisations

3.32 Surrogacy UK and COTS do not define themselves as "surrogacy agencies", preferring to be known as "surrogacy organisations", whereas Brilliant Beginnings does.

3.33 Surrogacy UK was started by intended parents and surrogates who had previously been members of COTS. The organisation's ethos places a great emphasis on surrogacy through friendship between intended parents and surrogates (a "friendship first" ethos). Surrogacy UK describes its vision as "altruistic surrogacy as a valued, accessible and inclusive path to parenthood". Surrogacy UK told us that since 2014 its strategy had been to professionalise the organisation, including its governance, and that it is now mostly complete. The principal operational activities of the organisation are performed by a core group of paid professionals who are suitably experienced and trained. They include:

(1) Membership secretaries for surrogates and intended parents (handling applications);

---

25 There were 367 parental orders granted in the England and Wales and 15 in Scotland in 2018, see para 1.2.

26 On this topic, see the comments by Baker J *Re T (a child) (surrogacy: residence order)* [2011] EWHC 33 (Fam), [2011] 2 FLR 392 at [33].

27 Surrogacy organisations like COTS and Surrogacy UK will also use social media, operating Facebook pages.

(2) Membership advisors (running official meetings, such as agreement sessions, team medication and membership interviews); and

(3) Support services such as media co-ordination, project management, IT support, finance and accounting.

3.34 In addition to the core operational roles, the Board of Trustees, Advisory Board and Ethics Committee, who offer strategic input, are made up of volunteers from a range of professional backgrounds. Surrogacy UK also has a large body of other volunteers who offer peer-to-peer support activities, as well as fund raising and event management.

3.35 Surrogacy UK told us that its friendship first ethos, and processes, have also been adopted by women acting as surrogates independently.

3.36 COTS has one full-time paid member of staff; in the past, it has had one or two at any one time. There is an executive committee consisting of the founder, Kim Cotton, and intended parents. COTS say that:

> Our prime objective is to pass on our collective experience to surrogates and would be parents, helping them to understand the implications of surrogacy before they enter into an arrangement and to deal with any problems that may arise during it.[28]

3.37 A group affiliated with COTS, Triangle, introduces intended parents to potential surrogates.

3.38 Brilliant Beginnings told us that the organisation started because there was a demand for a professionally managed service, with staff working full-time with intended parents and surrogates. There are three full-time members of staff and three administrative staff shared between Brilliant Beginnings and NGA Law (the sister law firm of Brilliant Beginnings). Brilliant Beginnings has a director and three client managers, who work on matches between, and who look after, intended parents and the surrogates in the UK. These managers also look after intended parents and surrogates once matched, and help them search for donors (where donor gametes are needed) and liaise with clinics, hospitals and other professionals.

3.39 The British Surrogacy Centre has 10 staff across the UK and USA, with the majority of UK staff being volunteers, alongside some fee-paid consultant social workers. All of the USA staff are paid. It grew out of the agency's founders' personal experience of surrogacy and making referrals to clinics in the USA and UK.

Use of lawyers

3.40 While lawyers are happy to advise about the law of parenthood in the context of surrogacy, and to advise on, and represent clients in, parental order proceedings, the law currently prevents them from advising on surrogacy agreements.[29] Nearly all lawyers to whom we spoke wanted to be able to give this advice, as they said that this

---

28 COTS website, accessible at: https://www.surrogacy.org.uk/ (last visited 31 May 2019).

29 SAA 1985, s 2(1) prevents any persons, on a commercial basis, taking part in any negotiations with a view to the making of a surrogacy arrangement.

would benefit those entering into a surrogacy arrangement and ensure that such agreements were clearly drafted.

3.41 Generally, our impression is that most intended parents in England and Wales do not instruct a lawyer to represent them in parental order proceedings, particularly before lay justices who will hear cases where the surrogacy arrangement is a domestic one. Surrogacy UK told us that very few members feel the need to ask a lawyer to assist with the application for a parental order, as the process is considered to be straightforward in most cases. Lawyers dealing with surrogacy cases have told us that clients often represent themselves in the application for a parental order, even in the High Court, although they may be receiving legal advice in the background. In the cases that we have observed, most of the intended parents were representing themselves. Legal aid is not available for parental order proceedings in England and Wales.[30] In Scotland, where the number of applications for parental orders is low, legal representation in both the Court of Session and the Sheriff Court is the norm. Our understanding is that, subject to meeting the relevant criteria, legal aid is available in Scotland. That said, we did speak to one person with experience of obtaining a parental order in the Sheriff Court without having been legally represented.

3.42 There appears, however, to be an increase in people who wish to enter into a surrogacy arrangement seeking advice before conception. NGA Law told us that most clients come to them before conceiving. It also explained that, where Brilliant Beginnings are dealing with a surrogacy, intended parents take legal advice from NGA Law, while surrogates receive independent legal advice.

THE SURROGACY JOURNEY

3.43 The term "surrogacy journey" is often used to describe the entire process of surrogacy: from intended parents finding a woman willing to act as a surrogate for them or surrogates finding intended parents, through the pregnancy and birth, until the application for a parental order. Below, we consider how this journey looks for parties who undertake their journey in the UK. We begin with a summary of the steps that may be taken, when surrogacy organisations are involved, before considering some topics in more detail:

A summary of the process

3.44 While the process varies (sometimes considerably) between different surrogacy organisations, we set out below a list of the steps that might be taken in the process.

(1) An organisation may hold social events, provide information and allow those interested in surrogacy to access online resources provided by the organisation before they become members.

(2) Intended parents and surrogates each complete an application form, which may be subject to review at several stages and at different levels within the organisation. The form may be used to capture a wide range of information

[30] Most private family proceedings will only be within the scope of legal aid where there is evidence of domestic violence or child abuse – generally, unlikely to apply in a surrogacy situation: Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 9 and sch 1 Pt 1.

about the parties and their views including, for example, their views on termination of a pregnancy.

(3) The parties each attend a membership information session to discuss eligibility, understanding and ethical and safety aspects;

(4) Some organisations may visit the surrogate's and / or the intended parents' home.

(5) All parties receive professional surrogacy preparation counselling.

(6) Organisations then 'match' surrogates and intended parents with each other to discuss a surrogacy arrangement, or help the parties to match with each other. A variety of means may be used, including creating profiles for intended parents and surrogates and online forums to be accessed by members. Other organisations will actively match surrogates and intended parents.

(7) Each party obtains legal advice about surrogacy.

(8) Parties have discussions with fertility clinics.

(9) Intended parents and surrogate get to know each other, including visiting each other's homes.

(10) One organisation imposes a mandatory waiting period of 12 weeks before conception can be attempted (subject to certain exceptions), during which time there will be regular conversations between the organisations and the parties.

(11) The organisation provides a template surrogacy agreement to the parties, with completion being facilitated in a session with an adviser or counsellor.

(12) Up to this point some organisations actively encourage the parties to an arrangement not to continue with the arrangement if any of them have concerns.

(13) The surrogate conceives, possibly by way of IVF treatment.

(14) The organisation provides the parties with support during pregnancy, which may include organisations attending scans, calling all parties monthly; and providing additional counselling to the surrogate pre-birth.

(15) Intended parents may attend ante-natal classes, and go to stay near the surrogate for the birth.

(16) The child is born. After birth, some organisations provide a gift to the surrogate (also provided by some in the event of a miscarriage) and a card to the intended parents to mark the birth; some visit the surrogate just after the birth.

(17) After the birth, some organisations continue to provide support and stay in touch with the surrogate, particularly if there were complications with the birth. Post-birth counselling may be offered to the surrogate.

How do surrogates and intended parents find each other?

3.45 Surrogates and intended parents may often find each other independently. Nowadays, social media, such as Facebook, is used by intended parents and surrogates.[31] In a small number of instances both the parties may already know each other, for example as close friends or family members. Facilitating surrogates and intended parents finding each other is also a key role played by surrogacy organisations.

3.46 That facilitation may take the form of organised social events, conferences and interaction in online spaces.

3.47 As we have discussed, advertising of surrogacy arrangements, with limited exceptions for non-profit organisations, is prohibited by the law.[32] However, surrogacy organisations can compile lists of surrogates and intended parents.[33] Intended parents and surrogates will also find surrogacy organisations through the organisations' websites. We were told that some organisations would like to advertise for surrogates, but do not do so at present, due to the state of the law.

The involvement of surrogacy organisations

3.48 All the surrogacy organisations, to varying degrees and in different (but often similar) ways, provide a process for parties travelling on a surrogacy journey with them. They set criteria for eligibility for surrogates and intended parents to enter into surrogacy arrangements with which the organisation is assisting, and undertake some screening of the surrogate and intended parents.

3.49 The level of scrutiny given to a surrogacy arrangement will differ according to a variety of factors. Those that involve a surrogacy organisation and treatment in a fertility clinic will be subject to the most scrutiny. Informal arrangements where traditional surrogacy is used with home insemination will be subject to the least (or no) scrutiny unless and until an application is made for a parental order, after the birth. Below, we outline the key aspects of the surrogacy journey as it operates through surrogacy organisations in the UK.

Eligibility

3.50 Most surrogacy organisations have requirements for the eligibility of both surrogates and intended parents to enter into a surrogacy arrangement.

3.51 Surrogacy organisations usually require the surrogate to be in good health, which may involve assessing the emotional as well as physical capacity of the surrogate to enter into a surrogacy arrangement. That will generally include surrogates taking the advice of medical professionals and might include provision of a letter from the surrogate's GP, follow-up if the GP's response differs from the surrogate's answers, or a report from a counsellor. Organisations may stipulate that a woman has a BMI[34] below a certain level, is a non-smoker and does not drink more than the recommended

---

31 Independent surrogates also have Facebook groups.

32 See ch 4.

33 Which falls within the exceptions in the SAA 1985: see ch 4.

34 Body Mass Index, which is a measure of whether a person is a healthy weight based on his or her height.

maximum number of units of alcohol per week. Practice varies between organisations as to whether they impose a hard age limit on a woman acting as a surrogate. If there is an age limit, it tends to be around 40. Surrogacy organisations may ask that the surrogate already has her own children (and that these children are living with her) and that the surrogate has no criminal record, or history of involvement with social services.

3.52 In respect of intended parents most organisations will only work with parents who can satisfy the criteria for a parental order (which would currently exclude, for example, intended parents who cannot provide any gametes, and, in the past excluded single applicants). Similarly to surrogates, they may ask for medical evidence of infertility and for confirmation from a counsellor that the intended parents are emotionally ready to enter into a surrogacy arrangement. They may require intended parents to have frozen embryos ready prior to a match with a surrogate so that the arrangement can proceed as quickly as possible once a match is found. Some organisations will not work with intended parents over a certain age, this might be 50, or, say, a maximum combined age for a couple of 110. Surrogates may not wish to work with older intended parents. Organisations may work with intended parents with a terminal illness but may explain that such conditions may make it difficult for the intended parents to find a surrogate.

Screening

3.53 In addition to satisfying eligibility requirements, intended parents and surrogates may need to pass additional screening requirements in order to be treated at a licensed clinic or work with a surrogacy organisation.

3.54 Where a fertility clinic is used in relation to surrogacy, the Code of Practice will be applied by the clinic. The Code of Practice requires that intended parents providing gametes "must be screened in line with requirements for gamete donors." This will include screening for sexually transmitted infections. It also provides that there should be an assessment of all involved in the surrogacy arrangement with respect to the welfare of the child born as a result of the arrangement.[35] We were told by a clinic that in surrogacy cases it goes beyond what is required by the law to screen the surrogate, the surrogate's partner, and the intended parent (if any) who is not providing gametes. The clinic will also write to the GPs of the intended parents and surrogate (and gamete donors).

3.55 Subject to the consent of all the parties, the surrogacy organisations also undertake their own checks. These might include:

(1) verification of the identity of their members;

(2) references from people other than family members;

(3) in-depth meetings with surrogates and intended parents;

[35] The Code of Practice, Interpretation of mandatory requirements 14A and para 14.1, and Licence Condition T52.

(4) criminal record checks on both surrogates and her spouses or partners (if applicable) and the intended parents;

(5) medical and sexual health screening checks on intended parents, surrogates and their partners (this might include smoking and drinking habits);

(6) psychological screening by a counsellor or a psychologist;

(7) assessment of how well-informed, prepared, and committed to surrogacy the parties are, and their support networks (this might include assessing how prepared parties are to deal with any negativity about surrogacy); and

(8) a visit to the homes of surrogates to check their circumstances – one organisation made a visit to the intended parents' home and another was thinking of introducing such a visit.

The surrogacy agreement

3.56 All the organisations require a written agreement and supply a template, and provide assistance for the surrogate and intended parents to complete the agreement. This may be facilitated by a session with an adviser or counsellor who may ensure that all parties have their say, check intention to proceed with the agreement and advise that the agreement is not legally binding and cannot be enforced. The agreement may be signed by the person who facilitated any agreement session, such as an adviser or counsellor, as well as the parties.

3.57 Surrogacy agreements can be very detailed; points that may be covered include:

(1) the parties' personal details;

(2) the nature of the surrogacy arrangement (whether it is traditional or gestational);

(3) arrangements for life insurance and wills;

(4) details of testing for sexually transmitted infections and genetic diseases;

(5) arrangements for trying to conceive, including keeping healthy, embryo transfer (including who will be present for the transfer), and agreement (by surrogate and her partner) to abstain from sexual activity;

(6) the surrogate to provide to the intended parents written confirmation of her pregnancy from her medical practitioner, and the same for any miscarriage;

(7) arrangements for announcing the pregnancy (including whether the parties will find out the sex of the baby);

(8) agreement with respect to the surrogate keeping healthy during the pregnancy (including not going on long-distance holidays without agreement);

(9) arrangements for medical appointments during pregnancy and the tests to be taken;

(10) decisions about termination where the child is diagnosed with specific conditions while in the womb, and selective reduction in the case of a multiple pregnancy (where recommended by the hospital), including what will happen regarding the care of the child where the surrogate refuses to terminate the pregnancy;

(11) arrangements where the child is stillborn, or dies before the making of the parental order;

(12) arrangements for the birth, including drawing up a birth plan (covering matters such as who will be present at the birth, the method of delivery), what will happen in the event of complications with the birth), whether the surrogate will breastfeed the baby, and making the hospital at which the child is to be born aware of the surrogacy arrangement;

(13) arrangements for the announcement and registration of the birth;

(14) agreement by the surrogate to register the child with the intended parents' surname,[36] and to inform the registrar that the child has been born as a result of a surrogacy arrangement;

(15) contact arrangements between the intended parents and the surrogate at the different stages (trying to conceive, during pregnancy and after the birth);

(16) provision for the intended parents and surrogate to visit each other's homes and to meet each other's partner and children;

(17) expenses to be paid;[37]

(18) that the monies paid to the surrogate must be returned if the surrogate keeps the child and, in these circumstances, the surrogate waives the right to maintenance against the intended parents for herself or the child;

(19) that the surrogate has no claim on the intended parents' estate where they die before the making of the parental order, and where the intended parents have appointed guardians;

(20) a declaration concerning who should care for the child where the surrogate or one or both intended parents die;

(21) agreement by the surrogate that she will not consider any child born as a result of the arrangement to be her own child and that the children will live with and be raised as the children of the intended parents;

---

[36] This appears to be possible in England and Wales, but not in Scotland. The Registration of Births, Deaths and Marriages (Scotland) Act 1965, s 43 as applied and modified by reg 5 and sch 4 para 4 of the 2018 Regulations permits a change of name or surname to be registered by the parent or parents with parental responsibilities in relation to the child. This would enable those with a parental order to register a change of name.

[37] See chs 14 and 15.

(22) agreement by the surrogate (and spouse/partner) to confer parental responsibility and parenthood on the intended parents, and not to oppose the making of a parental order;

(23) agreement by the intended parents to seek the making of a parental order; and

(24) agreements with respect to media coverage and use of photographs.

Wills and life insurance

3.58 Surrogacy organisations also ask their members to make arrangements to offer protection in the event that the surrogate or intended parents die. This may include both the surrogate and the intended parents creating or updating wills, including provision for a guardian for the child and the payment of the surrogate's expenses. Commonly, the intended parents will fund life insurance for the surrogate before she becomes pregnant. For example, the practice of one organisation is to ask the intended parents to insure the surrogate's life for two years in the amount of £500,000. The intended parents may also be required to insure their own lives.

Payments

3.59 Intended parents may make two kinds of payments during the surrogacy journey: to surrogacy organisations and to surrogates.

Payments to organisations

3.60 Organisations that operate as membership organisations typically charge a joining fee of around £900 and then a small annual fee for continuing membership. The membership fee covers administrative and screening costs. Only intended parents pay to join the organisation.

3.61 Fees charged by organisations operating more as agencies varied widely, depending both on the level of service required by the intended parents: for example, whether the arrangement is domestic or international.[38] One organisation offered a legal review (not covering an application for a parental order) and different packages for applying for the parental order, depending on whether the parents required representation in court. Fees might be fixed or calculated according to time spent, and might be payable in tranches, for example, on matching and on signature of the surrogacy agreement. Fees charged might be anything from £5,000 to £25,000.

Payments to surrogate

3.62 Some organisations take the view that payments to surrogates are set at a 'going rate'; others view them as genuine expenses. The actual amount payable is agreed between the parties to the agreement but organisations advise intended parents what is reasonable. One organisation mentioned a range of £12,000 to £15,000 and advise them to keep a record of what is paid, and sometimes to keep receipts. One organisation provides an online calculator to track payments and refers any change to what is paid, or expenses that seem high, to a more senior level of the organisation.

---

[38] Where the agency was taking more of a "project management" role, in the international surrogacy arrangements, the fee would be lower than for domestic cases.

3.63 The payment of expenses may be expressed as a total sum, with percentages of this sum being due at monthly intervals during pregnancy and on, or after, the birth of the child. Organisations vary as to how much of the global sum is paid during pregnancy and how much on or after birth (sometimes on registration of the birth). The monthly percentage during pregnancy might be 5 or 10%, so the amount payable after birth might be either the majority of what is due or only a small amount.

3.64 Some organisations separate out pre-pregnancy and pregnancy expenses in their template agreements.

3.65 Expenses that might be included in the surrogacy agreement during pregnancy include: maternity clothing, telephone calls, internet charges, vitamins and folic acid, petrol to and from antenatal clinics, parking costs for antenatal clinics, public transport, taxis, convenience foods, takeaways, any domestic help the surrogate requires for the house or childcare for her own children, attendance at membership events, loss of earnings for the surrogate and her partner and a recuperation break. The surrogacy agreement might provide for additional fixed payments to the surrogate for multiple births, a Caesarean section, and where the surrogate has had to undergo medical procedures such as a hysterectomy.[39] A small additional sum might be provided for each month in which insemination takes place.

3.66 One organisation told us that, if the surrogate miscarries, she keeps the money already paid to her and the intended parents start over again.

3.67 For domestic surrogacies, one organisation asked intended parents to prove that they have the funds to meet the surrogate's expenses. For foreign surrogacies they required funds to be placed in an escrow account.[40]

3.68 Some organisations told us that they knew of many cases where, in addition to the declared amount paid to the surrogate, the surrogate also received either additional payments that were not declared, or gifts, such as jewellery.

Pregnancy and giving birth

3.69 We have been told that intended parents and surrogates have experienced difficulties with how they are treated in hospitals; Surrogacy UK told us that issues have included:

(1) the surrogate being placed on maternity wards post-birth, best practice is to put her in a private room, so that she is not on a ward with mothers and babies;

(2) not providing intended parents with a suitable place to care for the baby (that is, not being allowed on the maternity ward and not being offered an amenity room);

(3) refusing to acknowledge the presence of the intended parents;

---

39 A surgical procedure to remove the womb.

40 An escrow account is an account where money is held by a third party on behalf of two other parties. The Scottish solution involving the use of a trust has the advantage that the funds are wholly protected against insolvency, including that of the party who holds them.

(4) not allowing the intended parents to hold the baby first;

(5) not allowing the intended parents in sonography sessions or at the birth;

(6) preventing the surrogate from handing over the baby to the intended parents on hospital property, with the result that the baby is given to the intended parents in the hospital car park;

(7) making intended parents repeatedly explain their situation to staff;

(8) not allowing the surrogate to be discharged from the hospital independently from the baby being discharged with the intended parents;

(9) insisting that the surrogate cares for the baby and, if she refuses, threatening to call social services; and

(10) preventing the intended parents from caring for the baby from birth or make decisions regarding the baby's medical treatment where this has the consent of the surrogate.

3.70 It appears that, in the past, practice has varied widely between hospitals.[41] One midwife with substantial experience of surrogate births told us that her hospital now has a policy for surrogate births. She explained that she ensures that she sees the surrogate by herself to discuss what she is happy to disclose to the intended parents, and to check that she is happy with the surrogacy arrangement. The midwife also explained that the hospital facilitates the surrogate giving birth in a private room, rather than on a ward, enables skin to skin contact between the intended parents and the newborn baby, and provides a room for the intended parents. She said that she asks the surrogate to sign a written consent allowing the intended parents to give consent for any treatment that the child needs.

3.71 Midwives said that there may not be the same opportunity for undertaking a safeguarding assessment with the intended parents as is the case in non-surrogacy births. Safeguarding issues would generally be raised with a pregnant woman at her 'booking' appointment with the midwife eight to 12 weeks into the pregnancy. The midwife will ask questions intended to find out if there are safeguarding issues involving the woman or that might affect the welfare of the child, in the areas of:

(1) domestic violence;

(2) substance abuse;

(3) mental health issues;

(4) trafficking/modern slavery and

---

41 The DHSC's guidance states that "some NHS hospitals will have their own protocols for dealing with surrogacy pregnancies and some may not and so may vary their standard protocols." DHSC, *The surrogacy pathway: surrogacy and the legal process for intended parents and surrogates in England and Wales* (February 2018) p 17.

(5) sexual exploitation/abuse/female genital mutilation.

3.72 However, the intended parents, who will ultimately have care of the child, will not be present at that appointment.

3.73 We were also told by midwives to whom we spoke that, in a surrogacy situation, the health visitor should ideally visit the intended parents before the birth, when the surrogate is 36 weeks pregnant, to check the intended parents' readiness. However, with time pressures, this visit does not always take place. They thought that it might be possible for the intended parents to take the newborn child to their home area without their local GP practice being aware that this had happened, although they thought that this was unlikely to be the case. Refusal by intended parents to inform their GP of the child's existence would be a safeguarding issue, allowing the midwife to inform the GP without the intended parents' consent.

3.74 In February 2018 the Department of Health and Social Care published guidance for those healthcare professionals caring for those involved in a surrogacy arrangement.[42] It addresses the sort of concerns that we have set out above, stating:

> Every effort should be made to accommodate all reasonable requests, making sure that other existing policies and procedures do not have the unintended consequence of blocking the wishes of the surrogate and intended parents.[43]

3.75 The guidance includes, at Annex B, a checklist of information to be included in the surrogacy birth plan, covering the whole period of pregnancy and care after birth, as well as communications and consents.

3.76 The guidance makes clear that support and follow-on care should be provided to the surrogate the intended parents and the child. The surrogate should be encouraged to access a community midwife for 28 days or more after birth,[44] and may also receive care from her GP and the hospital. The intended parents and the child will receive support and care from their community midwife, local GP and the health visitor, who will monitor the child's progress, as is normal for all children.[45]

3.77 The guidance states that:

> Hospital staff should ensure the timely transfer of information about the child to the community healthcare team where the intended parents live so that care and support can be picked up locally in a seamless manner.[46]

---

42 We are told that an appendix to the guidance, covering Scotland, will be produced by the Scottish Government.

43 DHSC, *Care in surrogacy: guidance for the care of surrogates and intended parents in surrogate births in England and Wales*, (February 2018) p 13.

44 The guidance cites the risk of postnatal depression. See DHSC, *Care in surrogacy: guidance for the care of surrogates and intended parents in surrogate births in England and Wales*, (February 2018) p 15.

45 DHSC, *Care in surrogacy: guidance for the care of surrogates and intended parents in surrogate births in England and Wales*, (February 2018) p 15.

46 DHSC, *Care in surrogacy: guidance for the care of surrogates and intended parents in surrogate births in England and Wales*, (February 2018) p 16.

Obtaining a parental order[47]

3.78 After birth, in order to become the legal parents, intended parents must obtain a parental order. When they do so varies. During this period the intended parents will usually be caring for the child, unless there is a dispute between them and the surrogate, in which case it is possible that the surrogate may be caring for the child.

3.79 However, anecdotally, lawyers in England and Wales have told us that the timeframe for obtaining a parental order can be anywhere from six to 15 months from the date of the application, with the average being around 9 months to a year. It is possible that cases heard by High Court judges (being either complex or international cases) take longer than cases heard by lay justices. There was concern that there was delay in the process, which might be caused by the time taken to issue proceedings, file statements and request a parental order report. It was generally felt that it was rare that the first court appointment happened within the period of four weeks mandated by the rules. We were told, for example, of cases where the first appointment was listed by the court six months after the application for the parental order had been issued.[48]

3.80 The timeframe for obtaining a parental order may differ depending on where it is obtained. One Scottish intended parent to whom we spoke said that in her particular case, which was straightforward and involved a UK surrogate, the process to obtain the parental order in the Sheriff Court took only four weeks.

3.81 Surrogacy UK told us that its members will often discuss the parental order process on discussion boards online and frequently raise very practical questions, such as whether they can bring their children to the hearing. People will often ask for support about how to deal with CAFCASS. Surrogacy UK told us that intended parents can resent having to obtain a parental order, and the evaluation of their suitability to be parents, as their view is that they are already the parents of the child.

Telling children born of a surrogacy arrangement about their genetic and gestational origins

3.82 If a parental order is granted, the intended parents will be listed as the child's legal parents on his or her new birth certificate. Therefore, in order for the child to know that he or she was born via surrogacy and / or with donor gametes, generally the child will be reliant on his or her parents (albeit, if the parents are a male same-sex couple, the child will, at a certain age, become aware that a woman will have given birth to him or her). However, we understand that whether or not intended parents tell their children about the circumstances of their conception and birth varies.

3.83 CAFCASS told us that they encourage intended parents to be honest with their children about their origins, although they cannot, of course, force them to be so, and it remains the intended parents' choice.[49] They will cover the issue in the parental order report, but refusal to tell a child would not, ultimately, prevent a parental order. We have, notwithstanding, been told that judges are increasingly asking intended parents when and how they plan to tell the child, and may wish to hear evidence on

---

47 See ch 6.

48 Family Procedure Rules 2010, r 13.8.

49 See ch 9.

this matter. In Scotland, curators *ad litem*, in their reports, have been known to address the issue of disclosing information about their origins to children born of a surrogacy arrangements, but are not under a duty to do so.

3.84 CAFCASS noted that the surrogate often has ongoing contact with the intended parents and the child and that intended parents, as part of the child's life story, often make scrapbooks and photobooks for the child to have and keep.

3.85 The lawyers with whom we met could not say with confidence whether or not intended parents tell children born of a surrogacy arrangement of their origins. They thought that most certainly intended to do so, but that some probably did not. The most likely reason for not telling a child, in their view, was cultural background, or simply because the intended parents are uncomfortable explaining that one of them is not genetically related to the child.

3.86 We spoke to counsellors from BICA who explained that the issue of telling children born of a surrogacy arrangement about their origins would be covered in the counselling sessions attended by intended parents who use a clinic. It thought that the majority of intended parents do tell their children about their origin. However, it explained that it can be more difficult for those intended parents using donor gametes as well as a surrogate to tell their children about their genetic and gestational origins, as they then have two stories to tell: the donation and the surrogacy.

3.87 The Donor Conception Network ("the Network") pointed out that surrogacy may or may not involve donor conception. Where the surrogate's own eggs, or donor gametes are used, the child will be donor conceived; where both the intended parents' gametes are used in a gestational arrangement, there is no donor conception. Surrogacy that does not involve donor conception falls outside the Network's area of interest. The Network recommends openness about a child's genetic origin from a very early age, an approach recommended by nearly everyone to whom we spoke.[50] The Network explained, however, that such openness may not be appropriate if the child is from a community or cultural background where donor conception is not accepted.

3.88 There are potential difference in parents' attitudes towards disclosing a surrogacy arrangement and disclosing conception with gamete donation. This difference, and the effect that this has on disclosure by the intended parents to their child, is evidenced by the findings of a study undertaken by a CAFCASS officer of whether and how intended parents disclose.[51]

3.89 Surrogacy UK said that it can be easier for same-sex intended parents to tell their children about their origins as it will be obvious that they had assistance conceiving.

3.90 COTS told us that it helps intended parents tell their children about the surrogacy, and recommends books for intended parents to read on the topic. COTS would not assist

---

50 See ch 10.

51 L Odze, "Surrogacy and Risks of Family Secrets" in R Cabeza, V Flowers, E Pierrot, A Rao, B O'Leary and L Odze (eds), *Surrogacy: Law, Practice and Policy in England and Wales* (1st ed 2018).

intended parents who are not willing to tell their child about the surrogacy arrangement.

The relationship between the intended parents and the child, and the surrogate post-birth

3.91 Whether or not surrogates and intended parents, together with the surrogate-born child, maintain a relationship during the child's life also varies in the UK.

3.92 Stakeholders have told us that there is a broad spectrum in the degree and nature of contact that is maintained by the surrogate and the intended parents and child after birth.

3.93 Surrogacy UK and COTS' ethos of friendship promotes contact between the surrogate, the intended parents and the child following the birth of the child. The Surrogacy UK agreement asks the parties to state their expectation as to frequency and type of contact.

3.94 The British Surrogacy Centre thought that expectations as to an ongoing relationship varied; some intended parents and surrogates wanted one, and others did not. It said that it was a case of trying to match surrogates and intended parents with similar expectations, and managing the process correctly. It was sceptical about an ongoing friendship, particularly when intended parents were different sex couples, saying that many intended mothers (who it sees) do not want to have a relationship with the surrogate. It thought that about 30% of the surrogates they worked with had a relationship with the intended parents after birth, but that this relationship would decrease over time.[52]

Problems with surrogacy arrangements

3.95 Above, we outlined the typical process of surrogacy in the UK. However, not all surrogacy journeys proceed without problems.

3.96 We have been told about situations in which a breakdown of the relationship between the surrogate and intended parents during the pregnancy has led to the surrogate refusing either to allow the intended parents to take care of the child, or to give the necessary consent to the making of the parental order.[53] There have also been cases where a surrogate has faked a pregnancy or falsely reported a miscarriage.[54] Nearly everyone that we have spoken to has emphasised that such cases are rare, although

---

52 Contrast this to the results of a study which found that 77% of surrogates had remained in contact with the children seven years after birth (S Imrie and V Jadva, "The long-term experience of surrogates: relationship and contact with surrogacy families in genetic and gestational surrogacy arrangements" (2014) *Reproductive BioMedicine Online* 424).

53 If the surrogate does not consent to the making of the parental order that is an absolute bar to it being made (unless she lacks capacity or cannot be found (see HFEA 2008, ss 54(7) and 54A(6))). However, the court can still decide with whom a child should live if this is in dispute between the intended parents and the surrogate.

54 For example, see *Re P (Surrogacy: Residence)* [2008] 1 FLR 177, [2007] Fam Law 1135 and *Re Z (Surrogacy Arrangements) (Child Arrangement Orders)* [2016] EWFC 34, [2017] 1 FLR 946.

one lawyer did tell us that, during 2018, she had dealt with two cases where, during the pregnancy, the surrogate had changed her mind about giving up the child.

3.97 Surrogacy UK have processes in place to manage difficulties which occur during the surrogacy journey. The case of *Re AB*,[55] in which the surrogate refused to give consent for the making of a parental order, due to the breakdown of the relationship between her and the intended parents, concerned an arrangement supported by Surrogacy UK. It is, however, the only Surrogacy UK case where this has happened. On rare occasions, Surrogacy UK also has to deal with cases where a surrogate has asked for more than reasonable expenses or intended parents refuse to pay expenses that would usually be considered reasonable.

3.98 Surrogacy UK has volunteer support workers who assist with resolving any difficulties. More difficult matters are escalated to "super support workers" and, ultimately, to the trustees, supported by the Ethics Committee.[56] Surrogacy UK can also offer peer-to-peer mediation sessions, and will refer to BICA if they need to. In one instance, Surrogacy UK paid for an external counsellor for the surrogate. Feedback from difficulties encountered is used to update the template surrogacy agreement.

INTERNATIONAL SURROGACY ARRANGEMENTS

3.99 Our focus in this chapter has been largely on surrogacy arrangements between parties in the UK, which we generally refer to as domestic surrogacy arrangements. However, increasingly, intended parents are going overseas to enter into international surrogacy arrangements.

3.100 In the UK context, international surrogacy arrangements take place where intended parents from the UK enter into an arrangement to have a baby with a surrogate from outside the UK, and the baby is born outside the UK. From discussion with stakeholders, it is evident such arrangements are common. Data from CAFCASS shows that there has been a significant increase in the proportion of parental order applications where the surrogacy arrangement was an international one. It appears to be the case that international surrogacy arrangements may now account for up to half of parental order applications.[57]

3.101 The countries most frequently mentioned to us as destinations for intended parents from the UK seeking an international surrogacy arrangement were the USA, Ukraine and Georgia. Canada is also growing in popularity. India was previously a very popular destination for international surrogacy arrangements, but has now closed its borders to overseas couples seeking a surrogacy arrangement.[58] Other previously

---

55 [2016] EWHC 2643 (Fam), [2017] 2 FLR 217.

56 Surrogacy UK told us that support workers and super support workers have personal experience of surrogacy and external training and qualifications.

57 See also the information provided by CAFCASS dated 7 October 2015 in response to a Freedom of Information Request, accessible at: https://www.cafcass.gov.uk/about-cafcass/transparency-information/freedom-of-information/2015-disclosure-log/ (under the title: "Number of parental order applications and information relating to international surrogacy arrangements and gender of applicants") and V Jadva, H Prosser and N Gamble, "Cross-border and domestic surrogacy in the UK context: an exploration of practical and legal decision-making" (2018) *Human Fertility*, 1464, 1466.

58 Although Indian nationals resident in the UK can still access India for surrogacy arrangements.

possible destinations, now closed, include Thailand and Cambodia. There are newly emerging surrogacy destinations including Kenya, Nigeria, Ghana and Greece.

3.102 Two main reasons for intended parents seeking international surrogacy arrangements were put to us. One is the certainty as to legal parenthood offered by jurisdictions where the intended parents are recognised as being the legal parents from birth (in contrast to the position in the UK). It should be noted, however, that for the intended parents to be recognised as the legal parents here, a parental order application is needed when the baby is brought to the UK. The other reason intended parents give is that it is considered easier to find a surrogate overseas. These views are supported by a recent study, which found that of those participants who chose the USA for their surrogacy arrangement, nearly all cited a "better legal framework" as the reason for their choice, while around two-thirds mentioned "easier to find a surrogate", "better success rate at clinics" and "wanted agency to manage the surrogacy process." Conversely, the most popular reason for staying in the UK for surrogacy, although only mentioned by 42% of the participants who did chose a UK surrogate, was that the intended parents "wanted a relationship with the surrogate".[59]

3.103 The international surrogacy arrangements of which we heard were invariably commercial in nature (unless the surrogate was related to the intended parents) and were organised by agencies. It appears to be the case that nearly all international arrangements are gestational surrogacy arrangements; a USA surrogacy lawyer told us that he had only dealt with 12 or 15 traditional surrogacy cases over 12 years.

3.104 We spoke to a USA agency, the Northwest Surrogacy Center, one of the oldest in the USA. They explained their criteria around eligibility requirements for surrogates, the screening that they do, and the process that is followed. Unsurprisingly, given that in some respects these agencies' practices have provided a model for UK surrogacy organisations, much of what the agency does is similar to that outlined for the UK surrogacy organisations earlier in this chapter. The agency to which we spoke placed an age limit of 40 on surrogates, who must have already had at least one child of their own, who was still living with her. In respect of intended parents, the agency told us that clinics are unlikely to work with those aged over 55 (or the clinic may set a maximum combined age of the couple).

3.105 The agency explained that surrogates and intended parents were psychologically evaluated and medically screened, while surrogates were visited at home and (along with their partners) had to pass criminal and other background checks. In contrast to UK organisations, they did not carry out background checks or home visits for intended parents.[60] The agency creates profiles for surrogates and intended parents and, once a match has occurred, will organise an introductory meeting, after which a surrogacy contract is drawn up. We were told that 70% of intended parents will

---

[59] 31% of those participants who stayed in the UK also mentioned "better legal framework". See: V Jadva, H Prosser and N Gamble, "Cross-border and domestic surrogacy in the UK context: an exploration of practical and legal decision-making" (2018) *Human Fertility*, 1464, Table 4.

[60] Although a USA lawyer to whom we spoke told us that it is best practice for USA agencies to carry out background checks on the intended parents.

choose the first surrogate that they are offered while, after the introductory meeting, 96% of people agree to carry on with the arrangement.

3.106 We heard conflicting opinions about the socio-economic status of overseas surrogates, at least in respect of USA surrogates. The USA agency that we spoke to told us that they would only work with surrogates who could support themselves financially. When we spoke to the British Surrogacy Centre, however, it told us that they were of the view that surrogates in the USA generally had a lower socio-economic profile than those in the UK. Interestingly, the British Surrogacy Centre mentioned that, in addition to the money that a surrogate can earn, the availability of healthcare insurance for surrogates in the USA, for those that would otherwise lack coverage, was a significant incentive to be a surrogate.

3.107 As they are commercial in nature, international surrogacy arrangements are more costly than domestic arrangements. We were told that the total cost of surrogacy in the USA was around £140,000 to £150,000 for one child and £200,000 for twins.[61] A law firm shared with us recent figures for sums received by surrogates in the USA, Ukraine, and Georgia, using cases from the last three years. In Ukraine and Georgia, surrogates received the equivalent of around £10,000 to £14,500, whereas in the USA, surrogates were receiving approximately £1,650 to £2,650 for allowances (round sums paid for expenses),[62] £300 to £4,000 for identified, "out of pocket", expenses, and between £24,000 and £32,000 by way of compensation. Payments are made to the surrogate throughout the pregnancy, with some payments being paid after birth.

3.108 The USA agency to which we spoke confirmed that the base compensation received by surrogates for the agency's arrangements was USA$37,000 in Oregon and USA$40,000[63] in California, paid at around USA$3,000 per month following confirmation of pregnancy. Once the surrogacy contract is signed, the surrogate receives USA$200 per month for general expenses, and a flat fee of USA$800 on the occasion of the embryo transfer.

3.109 In the Ukraine, surrogacy is permitted where medically necessary for the intended parents. There must be a genetic relationship between (one of) the intended parents and the child, and the arrangement must be a gestational one, so that there is, conversely, no direct genetic relationship between the surrogate and the child.

3.110 There is a framework for commercial surrogacy in the Ukraine. Surrogacy agencies are independent of clinics but we were told that there is a trend for clinics to open their own – although legally separate – agencies. We were also told that the practice of agencies and clinics varies; while some agencies are concerned to take care of all parties to the arrangement, others are more concerned with their own interests. What surrogates receive by way of entitlement to medical care after the birth depends on

---

61 This is supported by a 2018 study, which found (based on data from a survey conducted in early 2017) that the median cost of surrogacy in the USA was £120,000. It found that the median cost in India and Thailand, respectively, was £50,000 and £55,000. See V Jadva, H Prosser and N Gamble "Cross-border and domestic surrogacy in the UK context: an exploration of practical and legal decision-making" (2018) *Human Fertility*, 1464, 1472.

62 There was an "outlier" figure recorded for an amount of expenses of almost £7,500.

63 Approximately £29,300 and £31,700 equivalent at current exchange rates (31 May 2019).

what is stated in the surrogacy contract with the agency or clinic. Medical tests are arranged for surrogates and intended parents; there is also a psychological evaluation of surrogates but not of intended parents.

3.111 Surrogates will enter into a written agreement with the intended parents, although, often, we were told that only the intended parents will receive legal advice on the agreement. Surrogacy contracts will provide, for example, for the number of embryos to be transferred and the compensation that the surrogate will receive, including compensation for specific expenses such as medical care after the birth, and miscarriage. The surrogate must provide her written consent to the baby being registered in the name of the intended parents.

3.112 As we mentioned above, of the UK surrogacy organisations to which we spoke, only Brilliant Beginnings dealt with international surrogacy arrangements.[64] For most of the English and Welsh lawyers to whom we spoke, however, international arrangements formed the substantial majority of their surrogacy practice. This is perhaps unsurprising because, where the surrogacy arrangement is overseas, the subsequent parental order application must be made before a High Court judge. Intended parents may find the application more complex and daunting to deal with themselves, compared to parental order applications before the lay justices (who deal with domestic arrangements).[65] Several Scottish solicitors drew to our attention that it is not unknown for those habitually resident in Scotland to apply for a parental order through the English courts.

---

64 The British Surrogacy Centre also deals with international surrogacy arrangements.

65 See ch 6. That said, it appears many intended parents do represent themselves in parental order applications made before a High Court judge, sometimes, but not always, with legal advice in the background.

Chapter 4: The current law of surrogacy: the general law

INTRODUCTION

4.1 The current law on surrogacy is a combination of primary legislation (Acts of Parliament), secondary legislation (regulations passed by Parliament) and case law. Whilst most of the current law applies across the UK, this chapter will also set out where, and how, the current law differs between England and Wales on the one hand and Scotland on the other.

4.2 This chapter focuses on the general law governing surrogacy in the UK. This law includes the current regulation of surrogacy arrangements under the SAA 1985 and the rules regarding who are the legal parents of a child born of a surrogacy arrangement (under the HFEA 1990 and HFEA 2008 respectively).

4.3 This chapter includes an explanation of the nature and effect of a parental order. However, the detailed criteria in the current law governing when a parental order can be made is set out in Chapter 5 below. The court procedure that applies to an application for a parental order is set out in Chapter 6 where we also discuss proposed reforms of this procedure.

4.4 To contextualise the law of surrogacy in the UK, we think that it is important to look at the international law context. This is because any reform to the law of surrogacy in the UK needs to comply with the UK's international law obligations. We have set out a summary of relevant international law conventions in this chapter. These conventions include the European Convention on Human Rights (the "ECHR"), and the United Nations Convention on the Rights of the Child (the "UNCRC"). In some cases, Parliament has taken the further step of giving effect to the rights in these conventions in domestic law.

4.5 This chapter, and the following chapter on the criteria for a parental order, are primarily designed to set out the provisions of the current law, and how and why it has been criticised. These are not, consequently, chapters in which we will discuss or propose possible reforms to the law – these discussions are contained in subsequent chapters of this Consultation Paper.

THE SURROGACY ARRANGEMENTS ACT 1985

4.6 The first piece of primary legislation governing surrogacy in the UK to consider is the SAA 1985. This Act creates various criminal offences in relation to commercial surrogacy. For example, agencies or brokers operating on a commercial basis are banned by the SAA 1985, as is advertising for a surrogate. These offences will be examined in more detail below.

Legislative background

4.7 The SAA 1985 was passed by Parliament in the context of the largely negative view of surrogacy taken by the 1984 Warnock Report, and the controversial "baby Cotton" case.[1] Against the backdrop of these two events, it has been said that Government "rushed to pass criminal legislation"[2] in relation to surrogacy.

4.8 Rushed or not, this backdrop certainly contributed to attitudes of disquiet, bordering on hostility, amongst certain sections of the population about surrogacy. Some of the comments expressed by MPs in the House of Commons debate on the bill reflect this atmosphere.[3] The views of the judiciary mirrored those of the public and MPs. Indeed, as one commentator noted at the time:

> the tenor of the Parliamentary debates which prefaced the enactment [of the SAA 1985] recalls the abhorrence and reluctance which English courts have reserved for their dealings with surrogacy.[4]

The scope of the legislation

4.9 Despite the public attitudes of the time, the SAA 1985 does not ban surrogacy in the UK. Its scope is far more limited. The sections below summarise the provisions of the Act. It has come to be seen as adopting a "tolerant" approach, in which altruistic surrogacy is permitted (somewhat reluctantly) within certain confines.[5]

Unenforceability of surrogacy arrangements

4.10 The SAA 1985 states:

> an arrangement is a surrogacy arrangement if, were a woman to whom the arrangement relates to carry a child in pursuance of it, she would be a surrogate mother.[6]

---

1 This "baby Cotton" case hit the headlines in January 1985 and involved a UK surrogate, Kim Cotton, who had agreed to carry and give birth to a child (who became known as "baby Cotton") for an infertile couple from the USA in exchange for £6,500.

For further discussion of background to the SAA 1985 see K Horsey, "Surrogacy 2.0: What Can the Law Learn from Lived Experience" (2018) 14 *Contemporary Issues in Law* 305, 308 and A Alghrani and D Griffiths, "The regulation of surrogacy in the United Kingdom: the case for reform" [2017] 29 *Child and Family Law Quarterly* 165, 167.

2 D Brahams, "The Hasty British Ban on Commercial Surrogacy" (1987) 17 *The Hasting Center Report* 16, 17.

3 Harry Greenaway MP said that the Bill would "rightly outlaw the hell and wickedness that exists in America" (*Hansard* (HC), 15 April 1985, vol 77, col 45). Peter Bruinvels MP said that "this is a good bill that will preserve family life, stabilise society and do away with this unnatural and unfortunate practice which has sickened so many decent-living and family-loving people" (*Hansard* (HC), 15 April 1985, vol 77, col 45).

4 D Morgan, "Who to Be or Not to Be: the Surrogacy Story" (1986) 49 *Modern Law Review* 358, 363. In the first reported surrogacy case in the UK, *A v C*, Ormrod LJ held that the surrogacy arrangement in question was a "totally inhuman proceeding" and a "sordid commercial bargain" ([1985] FLR 445, 454, 457).

5 J M Scherpe and C Fenton-Glynn, "Introduction" in J M Scherpe and C Fenton-Glynn (eds), *Eastern and Western Perspectives on Surrogacy* (2019) p 4.

6 SAA 1985, s 1(3).

4.11 "Surrogate mother" means a woman who carries a child in pursuance of an arrangement:

(a) made before she began to carry the child, and

(b) made with a view to any child carried in pursuance of it being handed over to, and parental responsibility being met (so far as practicable) by, another person or other persons.[7]

4.12 The SAA 1985 goes on to say that a surrogacy arrangement (commercial or otherwise) is unenforceable by or against any of the parties making it.[8] That means that while it is lawful to enter into the arrangement, the courts cannot be asked to enforce its terms, or to provide a remedy for the parties if the agreement is not complied with.

Negotiating surrogacy arrangements on a commercial basis

4.13 According to section 2 of the SAA 1985, it is a criminal offence for any person, on a commercial basis, to:

(1) initiate negotiations with a view to the making of a surrogacy arrangement ("initiate negotiations");

(2) take part in negotiations with a view to the making of a surrogacy arrangement ("participate in negotiations");

(3) offer or agree to negotiate the making of a surrogacy arrangement ("agree to negotiate");

(4) compile any information with a view to its use in making, or negotiating, the making of, surrogacy arrangements ("compile information"); and

(5) knowingly cause another to do any of these acts on a commercial basis.[9]

4.14 For the purposes of section 2 of the SAA 1985, a person does an act on a "commercial basis" if:

(a) any payment is at any time received by himself or another in respect of it, or

(b) he does it with a view to any payment being received by himself or another in respect of making, or negotiating or facilitating the making of, any surrogacy arrangement.[10]

4.15 Crucially, however, surrogates and intended parents are *excluded* from this prohibition.[11] This immunity for surrogates and intended parents addresses the

---

7 SAA 1985, s 1(2).

8 SAA 1985, s 1A.

9 SAA 1985, s 2(1).

10 SAA 1985, s 2(3).

11 SAA 1985, s 2(2).

Warnock Report's concern that surrogate-born children should not be born subject to the "taint of criminality".[12]

4.16 This immunity means that it is not a criminal offence for the intended parents and surrogate to negotiate a surrogacy agreement directly. Nor would it be an offence for an intermediary (such as a solicitor) to agree to help negotiate a surrogacy agreement, provided that the solicitor's advice was not provided on a commercial basis (in other words, the solicitor did not receive a payment).

4.17 Finally, as the Court of Appeal recently noted, it is not an offence for any person to negotiate a commercial surrogacy arrangement overseas: the section does not apply extraterritorially to the actions of UK citizens abroad.[13]

Advertising

4.18 In section 3, the SAA 1985 also provides that it is an offence to place or publish certain advertisements about surrogacy in the UK. The advertisements covered are those which specify that:

(1) a person is or may be willing to be a surrogate; or

(2) a person is looking for a surrogate.[14]

4.19 This provision extends to all methods of advertising, including newspaper, television, radio and the internet.[15]

Criminal offences

4.20 Section 4 of the SAA 1985 sets out the criminal sanctions for breach of the provisions highlighted above. A breach of the provisions on negotiating a surrogacy arrangement on a commercial basis can result in a custodial sentence of up to three months.[16] No proceedings for an offence under the Act, however, can be started in England and Wales without the consent of the Director of Public Prosecutions.[17]

4.21 We attempted to confirm with the Ministry of Justice and Crown Prosecution Service whether any of these offences under the SAA 1985 have been prosecuted (successfully or otherwise) since they were enacted. Unfortunately, due to the way in which these offences would be recorded, it was not possible for either of these bodies to confirm this point to us definitively. We are not, however, aware of any prosecutions that have taken place, and none have been brought to our attention in discussions with stakeholders.

---

12 Report of the Committee of Inquiry into Human Fertilisation and Embryology (Cmnd 9314) (1984), para 8.19.

13 *XX v Whittington Hospital NHS Trust* [2018] EWCA Civ 2832, [2019] All ER (D) 30 (Jan) at [55].

14 SAA 1985, s 3(1) and s 3(3).

15 Print media, such as newspapers, would be caught by SAA 1985, s 3(2). Electronic media, such as television, would be caught by SAA 1985, s 3(3).

16 SAA 1985, s 4(1)(a).

17 SAA 1985, s 4(2)(a) (an equivalent provision for Scotland was not required). The Director of Public Prosecutions would be permitted to delegate these decisions to individual Crown prosecutors.

The position of non-profit agencies

4.22 The HFEA 2008 introduced certain exceptions to the SAA 1985 for non-profit bodies.

4.23 A non-profit making body[18] (such as a non-profit surrogacy agency) is now permitted to initiate negotiations and compile information without the risk of criminal sanction.[19] It is, further, permitted to receive reasonable payments for carrying out these two activities.[20]

4.24 A non-profit making body is also now permitted to advertise the services which it can legally provide – in other words it can advertise that it can initiate negotiations and compile information.[21]

THE CURRENT LAW ON LEGAL PARENTHOOD IN SURROGACY ARRANGEMENTS[22]

4.25 The law on the attribution of legal parenthood is complex. The following paragraphs only represent a summary of the current law. In particular, we confine the account here to the following:

(1) a brief overview of some of the key principles of parenthood law;

(2) how the law works in the context of surrogacy arrangements; and

(3) a discussion of the concept of parental responsibility, and the equivalent Scottish concept known as parental responsibilities and parental rights.

4.26 The law set out below explains who the parents of a surrogate-born child are from the moment of the birth of the child. The identity of the child's legal parents, however, will change when a parental order is granted. A parental order is a court order which is specifically designed to be used in surrogacy arrangements in order to allow the intended parents to apply to become the legal parents of a surrogate-born child. The detailed criteria for obtaining a parental order are set out in the subsequent chapter.

Legal parenthood: key principles

4.27 In summary, the operation of the rules on parenthood means that the surrogate is the legal mother of the child when it is born in all cases, and in some cases her spouse or civil partner will be the child's other legal parent.[23]

---

18 A "non-profit making body" means a body of persons whose activities are not carried on for profit: SAA 1985, s 1(7A).

19 SAA 1985, s 2(2A).

20 SAA 1985, s 2(2A).

21 SAA 1985, s 3(1A).

22 We have reproduced a diagram, with the permission of the Authority at Appendix 1 which sets out a decision tree with regards to legal parenthood in surrogacy arrangements.

23 It is also possible for one of the intended parents to be a legal parent at birth, see paras 4.48 and subsequent.

4.28 After the birth of the child, the intended parents can apply to the court to transfer parenthood from the surrogate (and her spouse or civil partner, if relevant) to themselves.

Who is the child's legal mother?

4.29 The mother who gives birth to the child (the "gestational mother") is, in law, the legal mother of the child. This is true whether the child was conceived through natural conception,[24] or through any form of assisted conception, including surrogacy.[25]

4.30 This means, as section 47 of the HFEA 2008 makes clear, that an egg donor is not to be treated as a legal parent of a child simply as a result of donating her eggs – a woman must carry and give birth to the child to be regarded as its legal mother.[26]

Who is the child's legal father in cases of natural conception?

4.31 In most cases of natural conception, the issue of who is the legal father of the child will simply be a question of establishing who the child is genetically related to. In England and Wales, at common law the man whose sperm fertilised the egg is the child's legal father, unless:

(1) a statutory exception under the HFEA 2008 applies (examined below); or

(2) there has been a formal change of legal parenthood under an adoption or parental order.[27]

4.32 In Scotland, the man whose sperm fertilised the egg would be the legal parent only if he took steps to have himself named on the birth certificate, or a court order was made declaring that he was the child's parent.

Proving genetic paternity

4.33 Before the advent of DNA testing, proving a child's genetic parentage and, therefore, determining paternity, was often difficult. As a result, the common law fell back on a presumption of legitimacy – namely that a child born during a marriage was the legitimate child of the husband.[28] Nowadays, however, DNA tests (either blood or saliva) can show the probability (up to a probability of 99.99%) that two people are genetically related.[29]

---

24 The common law has always held that the gestational mother is the child's only legal mother – see, for example, *The Ampthill Peerage* [1977] AC 542, 577 and A B Wilkinson and K McK Norrie, *The Law relating to Parent and Child in Scotland* (3rd ed 2013) paras 3.04 to 3.05.

25 "The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child" (HFEA 2008, s 33).

26 HFEA 2008, s 47.

27 *Clarke, Hall & Morrison on Children* (Issue 102, May 2019), div 1, para 6.

28 "Fatherhood … is a presumption. A woman can have sexual intercourse with a number of men any of whom may be the father of her child; although it is true that modern serology can sometimes enable the presumption to be rebutted as regards some of these men:" *The Ampthill Peerage* [1977] AC 542, 577.

29 https://www.gov.uk/get-dna-test (last visited 31 May 2019).

4.34 Despite the scientific advances, the presumption of legitimacy remains at common law: the husband of a married woman is presumed to be the father of any child born to her. This presumption, however, can now be rebutted by showing, on the balance of probabilities, evidence to the contrary.[30]

4.35 In Scotland, the matter is now governed by statute. A man is presumed to be the father of a child if he was married to the mother of the child at any time in the period beginning with the conception and ending with the birth of the child.[31] As in England and Wales, the presumption may be rebutted by proof on a balance of probabilities.[32]

4.36 In cases of uncertainty as to the child's father, in England and Wales, the court now has the power, under section 20(1) of the Family Law Reform Act 1969, to give directions for the use of scientific tests to ascertain whether a party to existing civil proceedings is the father (or mother)[33] of the child. As the court explained however:

> section 20 [of the Family Law Reform Act 1969] does not empower the court to order blood tests, still less to take blood tests from an unwilling party: all it does is permit a direction for the use of blood tests to ascertain paternity.[34]

4.37 The failure of a person to comply with a court direction for a scientific test may lead to the court drawing such inferences, if any, from that fact as may appear proper in the circumstances.[35] The court has said that the:

> 'proper' inference permitted by s 23 [of the Family Law Reform Act 1969] … has been held … to be a forensic inference. The forensic process is advanced by presenting the truth to the court. He who obstructs the truth will have the inference drawn against him. The inexorable advance of science cannot be ignored.[36]

4.38 The position is similar in Scotland. The court has power under section 70(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 to request a party to the proceedings to:

> (1) provide a sample of blood or other body fluid or of body tissue for the purpose of laboratory analysis; or

---

30 Family Law Reform Act 1969, s 26.

31 Law Reform (Parent and Child) (Scotland) Act 1986, s 5(1)(a).

32 Law Reform (Parent and Child) (Scotland) Act 1986, s 5(4).

33 Although, as stated above, maternity is never usually in doubt, being a simple question of working out who gave birth to the child. For a rare example of where it was, however, see *Slingsby v Attorney-General* (1916) 33 TLR 120.

34 *Re H (Blood Tests: Parental Rights)* [1996] 4 All ER 28 at [36].

A bodily sample cannot be taken from a person over the age of 16 unless he or she consents: Family Law Reform Act 1969, s 21(1).

A sample cannot be taken from a minor without the consent of the person who has the care and control of the child or, where that person does not consent, if the court considers that it would be in the child's best interests for the sample to be taken: Family Law Reform Act 1969, s 21(3).

35 Family Law Reform Act 1969, s 23(1).

36 *Re G (Parentage: Blood Sample)* [1997] 1 FLR 360.

(2) consent to the taking of such a sample from a child in relation to whom the party has power to give such consent.

4.39 Whilst the court can make this request, it cannot be enforced "for this would involve a person being subjected to a bodily interference, however slight, without his or her consent".[37]

4.40 Where a party refuses or fails to provide (or consent to the taking of) a sample, the Scottish courts may similarly draw such adverse inference as seems to be appropriate in relation to the subject matter of the proceedings.[38]

Who are the parents in cases of assisted conception?

4.41 In assisted conception, as in natural conception, the gestational mother (the surrogate, for our purposes) is always the legal mother of the child, regardless of whether she has a genetic link with the child.

4.42 As the gestational mother is the child's legal mother in all cases, and a child can only have two legal parents, only one other person can become the child's legal parent. The HFEA 2008 sets out who (if anyone) this other parent will be.

4.43 How the HFEA 2008 applies varies depending on whether or not the mother of the child – the surrogate – is married or in a civil partnership. These rules, in the context of surrogacy, will be examined below.

Application to surrogacy arrangements: the other legal parent[39]

If the surrogate is married or in a civil partnership

4.44 In respect of married couples and civil partners, the law on parenthood under the HFEA 2008 applies whether or not the artificial conception occurs in a licensed clinic. This means that traditional surrogacy arrangements, in which self-insemination can occur at home, are covered by this law.

4.45 In surrogacy arrangements, the spouse or civil partner of the surrogate is the legal father or second female legal parent of the child born because of the surrogate's treatment, unless it is shown that the spouse or civil partner did *not* consent to the surrogate's treatment.[40] The presence of consent, or otherwise, is "a question of

---

37 See A B Wilkinson and K McK Norrie, *The Law relating to Parent and Child in Scotland* (3rd ed 2013) para 3.31.

38 Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, s 70(2); see also *Smith v Greenhill* 1994 SLT (Sh Ct) 22.

39 We have not set out below what happens when neither intended parent is genetically related to the surrogate-born child, as currently these people would not be eligible for a parental order. In summary, the gestational mother would be the mother and one of the non-biologically related intended parents could be the child's legal parent if the agreed fatherhood or second female parenthood conditions are met. If these conditions cannot be met, then the child's genetic father would be the child's father, who will not be one of the intended parents. For Scots law, see para 4.32.

40 HFEA 2008, ss 35 and 42.

fact".[41] The law, therefore, presumes that the mother's spouse/civil partner consented to her treatment, unless it is shown otherwise.

4.46 The Code of Practice makes it clear that this presumption does not mean that a licenced clinic is devoid of obligations when it comes to such a situation. In the case of a woman receiving treatment who is married or in a civil partnership, the clinic should take all practical steps to:

> (a) ascertain whether the husband [or civil partner] consents to the treatment 'as a question of fact' taking into account the duty of confidentiality to the woman (it may not be appropriate to contact him [or her] if he [or she] is unaware his [or her] wife [or civil partner] is having treatment), and
>
> (b) obtain a written record of the husband's [or civil partner's] position. If the husband [or civil partner] consents, he [or she] should complete the relevant consent form. If he [or she] does not consent 'as a question of fact', the centre should take all practical steps to obtain evidence of this.[42]

4.47 If the surrogate's spouse or civil partner does not consent to her treatment, then the agreed parenthood conditions described below may be used to assign another person as the child's other legal parent.

If the surrogate is unmarried[43]

4.48 In contrast to the position where the surrogate is married or in a civil partnership, where a surrogate is unmarried, the law under the HFEA 2008 only determines who is the other parent where:

(1) artificial conception takes place at a licensed clinic;[44] and

(2) there is compliance with certain requirements, known as the agreed fatherhood/female parenthood conditions, set out below.

4.49 The agreed fatherhood and agreed female parenthood conditions are materially identical, save for one respect. The agreed fatherhood conditions will not apply where the sperm of the intended father was used. This is because, in such cases, the intended father would not need to rely on the agreed fatherhood conditions. In England and Wales, as the child's genetic father, he would be recognised as the child's father under the common law rules, set out above. In Scotland, however, the intended father would be recognised as the child's father only if he took steps to have himself named on the child's birth certificate, or a court order was made declaring him to be the child's father.

4.50 If the intended father's sperm was *not* used in the surrogacy arrangement, then:

---

41 The Code of Practice p 77.

42 The Code of Practice para 6.22.

43 The rules set out in this section can also be used in the perhaps rare situation where the surrogate is married, but her husband or civil partner does not consent to her treatment.

44 These rules do not apply, therefore, if the artificial insemination occurs at home.

(1) the intended father can be the legal father if the fatherhood conditions are met; or

(2) the intended mother can be the child's legal parent if the agreed female parenthood conditions are met.

4.51 If the agreed female parenthood conditions are met, the child will not have a legal father at birth – the surrogate will be the child's mother; and the intended mother will be the child's second female legal parent.

4.52 A child cannot, however, have more than two legal parents.

4.53 The choice between the agreed fatherhood or female parenthood conditions depends on whether the person who wishes to become the child's second legal parent is male or female. As applied to the surrogacy context, the conditions are as follows:[45]

(1) the intended father or mother has given notice that he or she consents to being treated as the child's father/second female legal parent;[46]

(2) the surrogate has given notice that she consents to the person referred to above being so treated as the child's father or second female legal parent;[47] and

(3) neither the surrogate nor the intended father or mother have withdrawn their consent prior to the sperm, egg or embryo transfer.[48]

4.54 As stated above, the agreed female parent or agreed fatherhood conditions can only be used by unmarried couples to designate a person as a legal parent of the child where the treatment was provided by a licensed clinic. Yet a child can be conceived without the need for the intervention of a clinic. Most typically, this arises where a surrogate has conceived with donor sperm or the sperm of (one of) the intended father(s) via at-home insemination, where no licensed clinic involvement is necessary.[49]

4.55 Where a licensed clinic is not used, the HFEA 2008 does not apply. As a result, the common law rules will continue to apply. This means that the genetic father of the child, that is, in England and Wales:

(1) (one of) the intended father(s); or

(2) a third-party sperm donor

will be the child's legal father.

---

45 HFEA 2008, ss 37 and 44.

46 Using HFEA form SPP.

47 Using HFEA form SWP.

48 Using HFEA form SWC.

49 See ch 3.

4.56 In Scotland, a man who is not married to the child's mother would be the child's legal father only if he took steps to have himself named on the birth certificate, or a court order was made declaring that he was the child's father. [50]

PARENTAL RESPONSIBILITY AND PARENTAL RESPONSIBILITIES AND PARENTAL RIGHTS

4.57 Legal parenthood, however, must be distinguished from the concept of parental responsibility ("PR") and that of parental responsibility and parental rights ("PRR"). In 1986, for example, the Law Commission of England and Wales said that:

> parenthood would entail a primary claim and a primary responsibility to bring up the child. It would not, however, entail parental 'rights' as such. The House of Lords, in *Gillick* …,[51] has held that the powers which parents have to control or make decisions for their children are simply the necessary concomitant of their parental duties. This confirms our view that "to talk of parental 'rights' is not only inaccurate as a matter of juristic analysis but also a misleading use of ordinary language".[52]

4.58 Consequently, in England and Wales, the governing language of the Children Act 1989 became that of "parental responsibility", defined by section 3(1) of Children Act 1989 as "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property".[53]

4.59 In Scotland too, "the law distinguishes between legal parenthood – the status of being a parent – and parental responsibility – the power to act as a parent".[54] In Scotland, the terminology of PRR is used over that of PR.

4.60 The Law Commission of England and Wales concluded that it was not possible to provide a comprehensive list of the incidents of responsibility, and that it was impracticable to do so.[55] In Scotland, however, the incidents of PRR have been defined in statute. Although this definition is not applicable in England and Wales, the Scottish statutory definition does provide an overview of some of the practical consequences of a person having PR or PRR.

4.61 Section 1(1) of the Children (Scotland) Act 1995 states that:

> a parent has in relation to his child the responsibility—
>
> (a) to safeguard and promote the child's health, development and welfare;
>
> (b) to provide, in a manner appropriate to the stage of development of the child—

---

50 See para 4.56.

51 *Gillick v West Norfolk & Wisbeck Area Health Authority* [1986] AC 112.

52 Custody (1986) Law Commission Supplement to Working Paper No 96 para 7.16.

53 Children Act 1989, s 3(1).

54 C Barton and G Douglas, *Law and Parenthood* (1995) para 3.02.

55 Family Law, Review of Child Law, Guardianship and Custody (1988) Law Com No 172 para 2.3.

(i) direction;

(ii) guidance,

to the child;

(c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and

(d) to act as the child's legal representative,

but only in so far as compliance with this section is practicable and in the interests of the child.

4.62 Section 2(1) of the Children (Scotland) Act 1995 states that:

a parent, in order to enable him to fulfil his parental responsibilities in relation to his child, has the right—

(a) to have the child living with him or otherwise to regulate the child's residence;

(b) to control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing;

(c) if the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis; and

(d) to act as the child's legal representative.

Parental responsibility in England and Wales

4.63 In England and Wales, more than one person may have PR for the same child.[56] There is no maximum number of people who can hold PR.

4.64 The mother has PR automatically, and her husband will have PR for the child[57] if they married at any time before the birth.[58] If the mother has a civil partner or is married to a woman, the other party also acquires PR if she is a parent of the child by virtue of section 42 of the HFEA 2008.[59]

---

56 Children Act 1989, ss 2(5) and 2(6).

57 Under common law, there is a rebuttable presumption of paternity in favour of the mother's husband – see A Bainham, "Whose sperm is it anyway?" (2003) 62 *Cambridge Law Journal* 566.

58 Children Act 1989, s 2(1).

59 HFEA 2008, s 42.

4.65 The father who is not married to the child's legal mother can acquire PR by subsequently marrying the mother,[60] by agreement with the mother,[61] or by being named on the birth certificate.[62]

4.66 A standalone order granting a person PR in respect of a child can only be obtained by the father,[63] a step-parent,[64] or a second female parent.[65]

4.67 However, PR can also be obtained through other means. For example, adoption orders, and orders regulating where a child will live (a child arrangement order) confer PR upon the applicant(s).[66]

Parental responsibilities and parental rights in Scotland

4.68 The position in relation to PRR in Scotland is similar to that in respect of PR in England and Wales. The mother acquires PRR automatically whether or not she is married to the father.[67] If the mother is married, her husband will have PRR for the child[68] if he was married to the mother at the child's conception or subsequently.[69] The father who is not married to the child's legal mother can acquire PRR by subsequently marrying the mother, entering an agreement with the mother[70] or by taking steps to be named on the birth certificate.[71]

4.69 If the mother has a civil partner or is married to a woman, the other party also acquires PRR if she is a parent of the child by virtue of section 42 of the 2008 Act.[72]

---

60 R White, A P Carr and N Lowe, *The Children Act in Practice* (4th ed 2008) para 3.49.

61 Children Act 1989, s 4(1)(b).

62 Children Act 1989, s 4(1)(a).

63 Children Act 1989, s 4(1)(c) and R White, A P Carr and N Lowe, *The Children Act in Practice* (4th ed 2008) para 3.60.

64 Children Act 1989, s 4A. A step-parent can also acquire PR by agreement with existing PR holders – see R White, A P Carr and N Lowe, *The Children Act in Practice* (4th ed 2008) para 3.81.

65 Children Act 1989 s 4ZA. A second female parent can also acquire PR by agreement with the mother or registration on the birth certificate.

66 R White, A P Carr and N Lowe, *The Children Act in Practice* (4th ed 2008) paras 3.43 and 5.30.

67 Children (Scotland) Act 1995 s 3(1)(a); see also A B Wilkinson and K McK Norrie, *The Law Relating to Parent and Child in Scotland* (3rd ed 2013) para 6.09.

68 Under Scots common law, there is a rebuttable presumption of paternity in favour of the mother's husband. This matter is now governed by statute in the Law Reform (Parent and Child) (Scotland) Act 1986, s 5(1)(a).

69 Children (Scotland) Act 1995, s 3(1)(b)(i).

70 Children (Scotland) Act 1995, s 4(1).

71 Children (Scotland) Act 1995, s 3(1)(b)(ii).

72 Children (Scotland) Act 1995, s 3(1)(c).

4.70 Likewise, if the child has a second female parent as a result of section 43 of the HFEA Act she can acquire PRR by agreement with the mother,[73] or by registration on the birth certificate.[74]

4.71 In Scotland, the court may make such order as it sees fit relating to PRR,[75] including conferring such responsibilities and rights on a person who does not otherwise have them.[76] PRR can also be conferred through other means including permanence orders,[77] adoption orders[78] and residence orders.[79]

THE NATURE OF PARENTAL ORDERS

4.72 As a result of law of parenthood outlined above, at the very least, a parental order is necessary to remove legal parenthood from the surrogate and transfer it to the intended parents.[80] It may also be required to remove the legal parenthood from the surrogate's spouse or civil partner, if he or she has also become the legal parent of the child. The effect of the grant of a parental order is that it provides "for a child to be treated in law as the child of the applicant or applicants".[81] The child who is the subject of a parental order is to be treated in law as if born as the child of the persons who obtained the order, and not as being the child of any other person.[82]

4.73 A parental order also confers PR for a child in respect of whom it is made (or, in Scotland, PRR in relation to such a child) on the persons who obtained the order.

4.74 The converse is also true. The effect of the grant of a parental order is that the surrogate (and in some cases her spouse or civil partner) have their legal parenthood terminated by the making of a parental order. Their PR or, in Scotland, PRR, is also extinguished by the grant of a parental order.[83]

4.75 To reflect this change in a child's legal parents, the law provides a method to document the change in legal parenthood of the child on his or her birth certificate, by re-registering the child's birth in the parental order register.[84]

---

73 Children (Scotland) Act 1995, s 4A.

74 Children (Scotland) Act 1995, s 3(1)(d).

75 Children (Scotland) Act 1995, s 11(1)(a), (b) and s 11(2).

76 Children (Scotland) Act 1995, s 11(2)(b).

77 AC(S)A 2007, s 80(3).

78 AC(S)A 2007, s 28(1).

79 Children (Scotland) Act 1995, s 11(12).

80 A parental order may only be needed to transfer legal parenthood to one of the intended parents, where one of the intended parents is also a legal parent at birth.

81 HFEA 2008, ss 54 and 54A.

82 ACA 2002 s 67, as applied and modified by the 2018 Regulations, sch 1 para 12; AC(S)A 2007, ss 40(1) to (3) as applied and modified by the 2018 Regulations, reg 3 and sch 2 para 9.

83 ACA 2002, s 46, as applied and modified by the 2018 Regulations, sch 1 para 7; AC(S)A 2007, s 35 as applied and modified by the 2018 Regulations, reg 3 and sch 2 para 8.

84 Details of how a parental order affects a child's birth registration are set out in ch 10.

4.76 But beyond the mechanics of the re-registration of the child's birth, a parental order will also have a more profound effect on the child and its family. Sir James Munby, the then President of the Family Division, summarised the effect of a parental order in the case of *Re X*[85] as follows:

> A parental order has … a transformative effect, not just in its effect on the child's legal relationships with the surrogate and commissioning [intended] parents but also, to adopt the guardian's words in the present case, in relation to the practical and psychological realities of X's identity. A parental order, like an adoption order, has an effect extending far beyond the merely legal. It has the most profound personal, emotional, psychological, social and, it may be in some cases, cultural and religious, consequences … . Moreover, these consequences are lifelong and, for all practical purposes, irreversible.[86]

An exception to the definition of a foster child

4.77 In surrogacy arrangements, there is a gap between the time at which the child starts to live with the intended parents, and the parental order being granted. This is the case even in international arrangements, where the intended parents may have been registered as the child's legal parents on the foreign birth certificate. Generally, where a child is living with someone who is not the child's parent or a relative, and does not have PR or PRR, the child is treated as being a privately fostered child.[87] One of the consequences of this categorisation is that the people the child is living with must inform their local authority that the child is living with them.[88] The local authority is then placed under various statutory duties, including an obligation to visit the home where the child is living.[89]

4.78 Under the 2018 Regulations, however, a child is excluded from the definition of a fostered child provided that the intended parents "propose to apply for a parental order".[90] This exclusion avoids the need for the intended parents to go through the notification process outlined above.

Other effects of a parental order

4.79 The 2018 Regulations also provide for various other legal consequences arising from a parental order including, most notably, rules of interpretation for instruments such as wills. The rules provide, for example, that for the purpose of interpreting a will in England and Wales, a surrogate-born child's date of birth is treated as being the date on which a parental order is granted, as that is the date on which the child becomes

---

85 *Re X (A Child) (Parental Order: Time Limit)* [2014] EWHC 3135 (Fam), [2015] Fam 186.

86 *Re X (A Child) (Parental Order: Time Limit)* [2014] EWHC 3135 (Fam), [2015] Fam 186 at [54].

87 The child would be considered a privately fostered child in England and Wales under the Children Act 1989, s 66(1)(a), and a foster child in Scotland under the Foster Children (Scotland) Act 1984, s 1.

88 Children (Private Arrangements for Fostering) Regulations 2005 (SI 2005 No 1533), reg 3; Foster Children (Private Fostering) (Scotland) Regulations (SI 1985 No 1798), reg 3.

89 Children (Private Arrangements for Fostering) Regulations 2005 (SI 2005 No 1533), reg 4; Foster Children (Private Fostering) (Scotland) Regulations (SI 1985 No 1798), reg 7.

90 Children Act 1989, sch 8 para 5, as applied and modified by the 2018 Regulations, sch 4 para 15; Foster (Children) (Scotland) Act 1984, s 2(5)(a), as applied and modified by the 2018 Regulations, sch 4 para 12.

the child of the intended parents. These statutory rules apply by default, and can be displaced by a contrary indication in the will.[91]

THE INTERNATIONAL LAW CONTEXT

4.80 This section summarises the current international law in relation to surrogacy. It also summarises the status of the ongoing discussions on a possible international convention on international surrogacy arrangements.

4.81 It is important at the outset to clarify the status of international treaties as a matter of UK constitutional law. The UK is characterised by legal academics as a "dualist" legal system. This means that that international law does not form part of domestic law, unless it has been expressly incorporated with parliamentary authority.[92] Such parliamentary authority could be provided through an Act of Parliament or secondary legislation, such as regulations.

The European Convention on Human Rights

4.82 The UK has been a signatory of the ECHR, through its membership of the Council of Europe, since the ECHR entered into force in 1953. The ECHR has been incorporated into UK domestic law via the Human Rights Act 1998. The ECHR guarantees an individual various rights including, of most relevance to surrogacy, those rights enshrined in Articles 8, 12 and 14 of the ECHR (a right to respect for an individual's private and family life, the right to found a family, and protection from discrimination, respectively).[93] Whilst Article 8 of the ECHR has given rise to extensive case law in the European Court of Human Rights (the "ECtHR"),[94] there is relatively little case law on the practice of surrogacy.

4.83 But the ECtHR has decided cases, and found violations of the ECHR, where it was faced with the *consequences* of certain states' bans on surrogacy, rather than the ban itself. These cases will be examined in more detail in the subsequent chapters of this Consultation Paper, where they potentially impact on our reform proposals (for example in Chapter 8 on parenthood.

Brussels II[95]

4.84 Brussels II is European Union ("EU") legislation – a regulation – which is directly enforceable in all EU member states. One of its aims is to determine the Member

---

91 ACA 2002, s 69, as applied and modified by the 2018 Regulations, sch 1 para 14. There is no equivalent Scottish provision.

92 Bradley and Ewing, *Constitutional and Administrative Law* (15th ed 2011), pp 316 to 321. See also discussions in *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964 at [252] and *R (on application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61 at [56].

93 ECHR, arts 8(1), 12 and 14.

94 For ECtHR cases on ART see, for example, *Dickson v United Kingdom* (2008) 46 EHRR 41 (App No 44362/04) (in the context of prisoners' access to artificial insemination facilities whilst in prison); *Costa and Pavan v Italy* App No 54270/10 (in the context of access to embryo testing); *SH v Austria* (2011) 53 EHRR 25 (App No 57813/00) (in the context of Austria's national law banning the use of donor sperm or eggs in IVF treatment).

95 Brussels II Regulation No 2201/2003, Official Journal L 338 of 23.12.2003 p 1.

State in whose courts a family law dispute must be decided. Brussels II provides a general rule in relation to PR that:

> the courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised. [96]

4.85 As applied to the surrogacy context, Brussels II would mean that the courts in which the child was habitually resident (for example, the receiving state such as the UK) would have jurisdiction to determine the legal status of the child.

4.86 There are, however, two significant obstacles to its use in the international surrogacy context.[97]

(1) Brussels II is only binding on 27 Member States of the EU (that is all 28 Member States, except Denmark),[98] whilst international surrogacy is a truly global issue. Notably, popular surrogacy "destinations" such as Ukraine and Georgia are not bound by the provisions of Brussels II, as they are not members of the EU.

(2) The language of Brussels II makes it clear that it resolves issues of PR *not legal parenthood*.[99]

4.87 This second point is a serious flaw in the usefulness of the regulation in international surrogacy arrangements. As has been noted, "although resolving issues of parental responsibility can be of great assistance in resolving disputes centred on surrogacy, issues of parentage will inevitably arise".[100]

The Hague Conference

4.88 The Hague Conference on Private International Law (the "Hague Conference") is an intergovernmental organisation, formally established in 1955, whose explicit purpose is "to work for the progressive unification of the rules of private international law".[101]

---

96 Brussels II Regulation No 2201/2003, Official Journal L 338 of 23.12.2003 p 1, art 8.

97 R Keating, "Left in Limbo: The Need to Regulate International Surrogacy Agreements" (2014) 17 *Trinity College Law Review* 64.

98 In the event of no deal exit from the UK, Brussels II will cease to have effect on the day that the UK leaves. The Government has stated, in this situation, it would rely on a number of Hague Conventions on family law, which cover many of the same areas as Brussels II: "Handling civil legal cases that involve EU countries if there's no Brexit deal, accessible at: https://www.gov.uk/government/publications/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexit-deal/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexit-deal (last visited 31 May 2019). Conversely, if approved, the Withdrawal Agreement negotiated between the UK and EU would have the effect of maintaining in effect existing EU law during a transition period.

99 The tenth preamble states that Brussels II "does not apply to the establishment of parenthood, since this is a different matter from the attribution of parental responsibility, nor to other questions linked to the status of persons." (Brussels II Regulation No 2201/2003, Official Journal L 338 of 23.12.2003 p 1, preamble 10).

100 R Keating, "Left in Limbo: The Need to Regulate International Surrogacy Agreements" (2014) 17 *Trinity College Law Review* 64, 79.

101 Statute of the Hague Conference on Private International Law, art 1.

The Hague Convention on Parental Responsibility and Protection of Children

4.89 The Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (the "1996 Hague Convention") became effective on 1 January 2002 and currently, has been signed by 34 states, and ratified by 3 states (meaning that those states have agreed to be bound by its provisions). The UK signed the 1996 Hague Convention on 1 April 2003, and ratified it on 27 August 2012.[102] It entered into force in the UK on 1 November 2012,[103] and has been incorporated into domestic law.[104]

4.90 The 1996 Hague Convention significantly overlaps with the provisions of Brussels II (discussed above). The 1996 Hague Convention rests on the idea that the courts in the child's country of habitual residence have the jurisdiction to take measures to protect the child's person or property.[105]

4.91 Like Brussels II,[106] however, Article 4 of the 1996 Hague Convention states that it does not apply to the establishment or contesting of a parent-child relationship (that is the determination of legal parentage).[107] This means that its utility in international surrogacy arrangements is, again, limited.

The Hague Conference's current work on international surrogacy arrangements

4.92 Given the recognised "highly complex legal problems"[108] arising from international surrogacy, as well as potentially heightened risks for surrogates, it is notable that there is currently no regulation of international surrogacy arrangements at an international level.[109] As one commentator has explained:

---

102 https://www.hcch.net/en/instruments/conventions/status-table/?cid=70 (last visited 31 May 2019).

103 Treaty Series No 44 (2012) Cm 8477.

104 Parental Responsibility and Measures for the Protection of Children (International Obligations) (England and Wales and Northern Ireland) Regulations 2010 (SI 2010 No 1898); Parental Responsibility and Measures for the Protection of Children (International Obligations) (Scotland) Regulations (SSI 2010 No 213).

105 The 1996 Convention, art 5(1).

106 See paras 4.84 to 4.87, above.

107 1996 Hague Convention, art 4(a).

108 K Trimmings and P Beaumont, "International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level" (2015) 11 *Journal of Private International Law* 627.

109 "There is a complete void in the international regulation of surrogacy arrangements, as none of the existing international instruments contains specific provisions designed to regulate this emerging area of international family law": K Trimmings and P Beaumont, "International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level" (2015) 11 *Journal of Private International Law* 627, 630.

See also F Banda and J Eekelaar, "International Conceptions of the Family" (2017) 66 *International and Comparative Law Quarterly* 833, 845.

> While the recent development of international surrogacy arrangements has brought tremendous joy to infertile couples around the world, it is not difficult to imagine a much darker side to this new phenomenon.[110]

4.93 These potential issues are only exacerbated by the "radically different stances"[111] that individual states adopt in relation to surrogacy.[112]

4.94 Since the start of the project, the Hague Conference has produced various notes and reports on the issues arising from international surrogacy arrangements, in an attempt to find a workable compromise with states. In its 2014 Report,[113] it admitted that work in this area would be difficult given:

> the diverse approach of States to questions concerning legal parentage in internal and private international law, as well as the difficult questions of public policy raised in an area traditionally strongly connected with States' cultural and social milieu … .[114]

4.95 Since the publication of the 2014 Report, progress has substantially stalled, with no definitive conclusions reached at the 2016[115] and 2017[116] experts' group meeting.

4.96 The experts' group tried to find a way through this impasse in February 2018, through the suggestion of an optional protocol specific to international surrogacy arrangements,[117] which would form part of a broader convention on legal parenthood. This approach was endorsed at the most recent meeting of the Hague Conference in March 2019.[118]

4.97 The 2019 Report also states that:

---

110 T Krim, "Beyond Baby M: International Perspectives on Gestational Surrogacy and the Demise of the Unitary Biological Mother" (1996) 5 *Annals of Health Law* 193, 220.

111 *X & Y (Foreign Surrogacy)* [2008] EWHC 3030, [2009] Fam 71 at [3].

112 See, for example, J Scherpe and C Fenton-Glynn, *Eastern and Western Perspectives on Surrogacy* (2019) who categorise domestic laws of surrogacy into one of four different approaches: the prohibitive approach, the tolerant approach, the regulatory approach and the free market approach. See also Hedley J's comments in *X & Y (Foreign Surrogacy)* [2008] EWHC 3030, [2009] Fam 71 at [3].

113 Hague Conference on Private International Law, *The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project* (Preliminary Document No 3B) (March 2014).

114 Hague Conference on Private International Law, *The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project* (Preliminary Document No 3B, March 2014) para 41.

115 Hague Conference on Private International Law, *Report of the February 2016 Meeting of the Experts' Group on Parentage/Surrogacy.*

116 Hague Conference on Private International Law, *Experts' Group on the Parentage/Surrogacy Project (Meeting of 31 January – 3 February 2017)*.

117 Hague Conference on Private International Law, *Report of the Experts' Group on Parentage/Surrogacy (Meeting of 6 – 9 February 2018)*.

118 Council on General Affairs and Policy of the Conference – March 2019 para 25.

> most Experts affirmed the importance of having minimum standards or safeguards specifically for ISA [international surrogacy arrangements] cases to protect the rights and welfare of the parties involved.

4.98 In terms of what these safeguards should be, the 2019 Report refers to a possible list including a requirement of a genetic link, the eligibility and suitability of the surrogate and intended parents, and regulation of the financial aspects of the arrangement. It is clear, however, from the language used that these suggestions did not attract universal support from countries' delegations.

4.99 The Hague Conference's work, whilst valuable, is slow and difficult. It is certainly true that progress has been made since the 1990s, when commentators were reporting that regulation at an international level was simply not possible.[119] Whether the states, with their vastly different domestic laws on this subject, can now build upon the success of the early scoping work, to move towards agreeing substantive matters is the key, unanswered, question.

The UN Convention on the Rights of the Child

4.100 The UNCRC is an international convention which has 196 state parties around the world.[120] The UK has ratified the UNCRC and it entered into force on 15 January 1992.[121]

4.101 The UNCRC has three optional protocols. The protocol of most relevance to surrogacy is the Optional Protocol on the sale of children, child prostitution and child pornography (the "Optional Protocol"). The UK has ratified the Optional Protocol, and it entered into force in the UK on 20 March 2009.[122]

4.102 Neither the UNCRC, nor the optional protocols, have been incorporated into UK domestic law. As a result, they are not binding domestically, in the sense that they cannot be directly relied upon by individuals.[123] This statement, however, should not mask the fact that the UNCRC exerts influence over UK domestic law. As Lord Justice Thorpe noted, the rights under the UNCRC:

> may not have the force of law but, as international treaties, they command and receive our respect.[124]

---

119 See, for example, comments in I Leibowitz-Dori, "Womb for Rent: The Future of International Trade in Surrogacy" (1997) 6 *Minnesota Journal of Global Trade* 329, 350 and A Godwin McEwen, "So You're Having Another Women's Baby: Economics and Exploitation in Gestational Surrogacy" (1999) 32 *Vanderbilt Journal of Transnational Law* 271, 297.

120 For a full list of signatories see: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en (last visited 31 May 2019).

121 Treaty Series No 44 (1992) Cm 1976.

122 Treaty Series No. 13 (2011) Cm 8074.

123 This has recently been confirmed by the Supreme Court in *R (on the applications of DA and others) v Secretary of State for Work and Pensions* [2019] UKSC 21 at [67] at [178].

124 *Re P (A Minor) (Residence Order: Child's Welfare)* [2000] Fam 15, 42.

4.103 The ECtHR has also made it clear that, where relevant, the content of another international convention such as the UNCRC, should inform interpretation of the rights guaranteed by the ECHR (which is part of domestic law, as set out above).[125]

4.104 In addition, Welsh legislation places a specific duty on the Welsh Ministers to pay "due regard" to the UNCRC and its two optional protocols when exercising any of their functions.[126] In Scotland, the Scottish Government has a commitment to incorporate the UNCRC into Scots law within the next two years.[127]

4.105 The Committee on the Rights of the Child, which monitors states' compliance with the UNCRC, has become increasingly vocal about the issue of surrogacy in recent years, in particular commercial surrogacy. In its 2017 report on the USA, the Committee's Report stated that:

> the Committee is nevertheless concerned that widespread commercial use of surrogacy in the State party may lead, under certain circumstances, to the sale of children. The Committee is particularly concerned about the situations when parentage issues are decided exclusively on a contractual basis at pre-conception or pre-birth stage. [128]

4.106 The question of whether commercial surrogacy constitutes the sale of children was then specifically addressed by the Special Rapporteur[129] in a thematic report on the sale and sexual exploitation of children dated 15 January 2018.[130]

4.107 We discuss the Special Rapporteur's conclusions on a variety of topics, including parenthood, payments and regulation, in the relevant reform chapters.[131]

The Convention on the Elimination of All Forms of Discrimination against Women[132]

4.108 The Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") is a multilateral treaty adopted by the UN on 3 September 1981, and has been ratified by 189 parties.[133] States parties are required by the Convention to

---

125 *Neulinger v Switzerland* (2010) 54 EHRR 1087 at [131] and [132].

126 Rights of Children and Young Persons (Wales) Measure 2011, s 1.

127 The Scottish Government is has recently launched a consultation on this issue, accessible at: https://consult.gov.scot/children-and-families/uncrc/ (last visited 31 May 2019).

128 Committee on the Rights of the Child, *Concluding observations on the second periodic report of the United States of America submitted under article 12 of the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography*, CRC/C/OPSC/USA/CO/3-4 (12 July 2017) para 24.

129 The Special Rapporteur is currently Ms Maud de Boer-Buquicchio, from the Netherlands.

130 M de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* (January 2018), A/HRC/37/60.

131 See ch 7, 8, 10, 14 and 15.

132 For further discussion of the relevance of CEDAW to the surrogacy context, see Y Ergas, "Babies without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy" (2013) 27 *Emory International Law Review* 117 and C Vincent and A D Aftadilian, "Liberation or Exploitation: Commercial Surrogacy and the Indian Surrogate" (2013) 36 *Suffolk Transnational Law Review* 671.

133 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (last visited 31 May 2019).

eliminate discrimination against women in public life and in private life, including within the family. CEDAW entered into force for the UK on 7 May 1986,[134] but it has not been implemented into UK domestic law.

4.109 We discuss CEDAW in the subsequent chapters.

The International Covenant on Economic, Social and Cultural Rights

4.110 The International Covenant on Economic, Social and Cultural Rights (the "ICESCR") is a multilateral treaty adopted by the UN on 16 December 1966.[135] The ICESCR commits its contracting parties to work toward the granting of economic, social, and cultural rights to individuals in their respective countries. It entered into force in the UK on 20 August 1976.[136] Again, the ICESCR has not been implemented into domestic law, a specific criticism made by the UN Human Rights Committee in its concluding observations on the UK in 2015.[137]

4.111 The relevant Articles of the ICESCR are most relevant in the context of payments.[138]

4.112 We hope that the above has provided consultees with an overview of some of the areas of the general law, and the regulation of surrogacy, that are relevant to the discussion of the reform of surrogacy law. The next chapter will focus on an analysis of an aspect of the law unique to surrogacy law, namely parental orders.

---

134 Treaty Series No. 2 (1989) Cmnd 8444.

135 United Nations (General Assembly), *Resolution 2200A (XXI)*.

136 Treaty Series No. 6 (1977) Cmnd 6702.

137 Human Rights Committee, *Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland,* CCPR/C/GBR/CO/7 para C.

138 See chs 14 and 15.

Chapter 5: The current law: parental orders

INTRODUCTION

5.1 In contrast with the broader scope of the previous current law chapter, this chapter focuses solely on each of the current criteria that applicants must fulfil to be eligible for a parental order. It will also look at how, and why, the current criteria have been criticised.

5.2 It should be noted that, strictly speaking, the fulfilment of these eligibility criteria by the applicants is a necessary, but not a sufficient, requirement for obtaining a parental order. Following the introduction of the Human Fertilisation and Embryology (Parental Orders) Regulations 2010 [1] (now replaced by the 2018 Regulations), whenever a court is coming to a decision relating to the grant of a parental order, the paramount consideration is the welfare of the child, throughout his or her life.[2]

5.3 As a result, in addition to fulfilment of these criteria, therefore, the court must be satisfied that the grant of the parental order is in the child's best interests. The effect of the introduction of the welfare of the child as the paramount consideration on the law is set out below.

5.4 Parental orders were first introduced by Government after Michael Jopling MP raised the case of a couple in his constituency who had twins through a gestational surrogacy arrangement. As they were genetically related to the children, they did not wish to have to adopt their children. Such a surrogacy arrangement was entirely unprecedented at the time, with their MP commenting in the debate that, "I think that I am right in saying that my constituents are the first example of such a thing happening in this country … ".[3]

5.5 The original criteria for obtaining a parental order were set out in section 30 of the HFEA 1990. Section 30 of the HFEA 1990 has since been repealed and replaced by the parental order provisions in sections 54 and 54A of the HFEA 2008, which are the sections that this chapter will examine.

5.6 Section 54 of the HFEA 2008 covers the situation of two applicants for a parental order who are a couple. Section 54A of the HFEA 2008 (which came into force on 20 December 2018) covers the situation of the single applicant for a parental order.

---

1 The Human Fertilisation and Embryology (Parental Orders) Regulations 2010 (SI 2010 No 985).

2 ACA 2002, s 1, as applied and modified by the 2018 Regulations, sch 1 para 2. AC(S)A 2007, s 14(3) as applied and modified by the 2018 Regulations, reg 3 and sch 2 para 2.

3 *Hansard* (HC), 2 April 1990, vol 170, cols 944 to 945.

THE ELIGIBILITY CRITERIA FOR A PARENTAL ORDER

Who can apply?

Two applicants

5.7 Where there are two applicants for a parental order, these people must be:

(1) husband and wife;[4]

(2) civil partners of each other; or

(3) 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.[5]

5.8 Under the HFEA 1990, only married couples qualified to apply for a parental order. The second and third types of qualifying relationship set out above were added by the HFEA 2008, in recognition that "the families in which children live and are brought up are increasingly diverse and often more fluid than in the past".[6]

Two applicants who are married or civil partners

5.9 This requirement that the two applicants are married or civil partners is relatively simple – either the applicants are legally married or in a civil partnership, or they are not. We think that two cases on this requirement, however, are worth examining.

5.10 In *A v P*,[7] the requirement for the applicants to be married was interpreted to allow a parental order to be made in a case where the husband had died of cancer after the parental order application was made, but before it had been granted. The court held that it was possible to construe the requirement as being for two applicants to apply, but not to require two living applicants at the time of the making of the order.[8]

5.11 The case of *Re X (A Child – Foreign Surrogacy)*[9] raised the issue of a husband and wife in an openly platonic, rather than sexual, relationship. Nevertheless, the then President of the Family Division held that a parental order could be made as "a sexual relationship is not necessary for there to be a valid marriage".[10]

---

4 Following the passing of the Marriage (Same Sex Couples) Act 2013 and the Marriage and Civil Partnership (Scotland) Act 2014, this provision should be read as to apply to married couples of the same sex. For further detail, see the discussion in *Re Z (A Child)* [2015] EWFC 73, [2015] 1 WLR 4993 at [7] to [14].

5 HFEA 2008, s 54(2). With regards to the definition of "prohibited degrees of relationship", see HFEA 2008, s 58(2).

6 *Re F and M (Children) (Thai Surrogacy) (Enduring family relationship)* [2016] EWHC 1594 (Fam), [2016] 4 WLR 126 at [16].

7 *A v P* [2011] EWHC 1738 (Fam), [2012] Fam 188.

8 *A v P* [2011] EWHC 1738 (Fam), [2012] Fam 188 at [23] to [28]. There is an additional requirement that the child's home must be with the applicants or applicant (as the case may be) at the time of the parental order application and the making of the parental order: HFEA 20008, ss 54(4)(a) and 54A(3)(a). This requirement is examined below at paras 5.38 and subsequent, below.

9 [2018] EWFC 15, [2018] 2 FLR 660.

10 *Re X (A Child – Foreign Surrogacy)* [2018] EWFC 15, [2018] 2 FLR 660 at [8].

5.12 This decision is not without criticism. For example, one commentator wrote that:

> it illustrates once again the determination of the judiciary to ensure that s 54 [HFEA 2008] is interpreted in a way which will ensure that the intended parents metamorphose into the child's legal parents with full parental responsibility".[11]

Two applicants in an "enduring family relationship"

5.13 The third type of qualifying relationship, namely that two applicants must be in an "enduring family relationship", is the one most open to judicial interpretation. The authors of *Surrogacy: Law, Practice and Policy in England and Wales* have written that,

> the intention of Parliament … is to include relationships akin to marriage or civil partnerships in all regards save that the couple have chosen not to formalise their commitment by legal registration".[12]

5.14 After citing extensively from the Parliamentary debates, Ms Justice Russell concluded in one case which examined the meaning of this requirement that,

> Parliament pointedly and specifically decided not to define an enduring family relationship in terms of its longevity … and to leave it to the High Court to test whether a couple are in an enduring family relationship".[13]

5.15 In *Re F and M (Children) (Thai Surrogacy) (Enduring family relationship)*,[14] the intended parents had only been living together in England for a year at the time of their parental order application. The applicants stated to the court, however, that they planned to marry in the following year. Considering the relatively short nature of their relationship, the parental order reporter[15] queried whether the applicants were in the required "enduring family relationship", although she stated that the applicants' relationship was a loving one.

5.16 On the facts of the case, Ms Justice Russell held that the applicants were in an enduring family relationship: they were a couple and part of a family. It was, further, "clearly in [the children's] welfare interests for the court to make [the] parental orders … necessary … to give legal effect and recognition to the children's identities".[16]

---

11 M Welstead, "Sex and marriage: no concern of the judges or of the State" [2018] *Family Law* 758.

12 R Cabeza, V Flowers, E Pierrot, A Rao, B O'Leary and L Odze, *Surrogacy: Law, Practice and Policy in England and Wales* (1st ed 2018) para 4.15.

13 *Re F and M (Children) (Thai Surrogacy) (Enduring family relationship)* [2016] EWHC 1594 (Fam), [2016] 4 WLR 126 at [32].

14 [2016] EWHC 1594 (Fam), [2016] 4 WLR 126.

15 In England and Wales, the parental order reporter (who is appointed by the court) considers the child's best interests and investigates the circumstances of the case in line with the parental order criteria. His or her findings are contained within a parental order report, which is presented to the court. For more information, see the discussion in ch 6. The reporting officer plays a similar role.

16 *Re F and M (Children) (Thai Surrogacy) Enduring family relationship)* [2016] EWHC 1594 (Fam), [2016] 4 WLR 126 at [47].

5.17 There is no requirement that the applicants must be in an enduring family relationship both at the time of the making of the application and the making of the parental order. This contrasts with the requirement that the child's home be with the applicants at both these times.[17] Mrs Justice Theis has recently said that in these circumstances, "the court should be alert not to read in any requirement that is not there in the primary legislation."[18]

5.18 We set out a discussion of potential reform to the categories of qualifying relationship in Chapter 12.

A sole applicant

5.19 Section 54A(1) provides that a court can make a parental order "on an application made by one person".[19]

5.20 The background to the introduction of section 54A of the HFEA 2008 is the case of *Re Z (A Child) (No 2)*.[20] This case involved a single person trying to apply for a parental order under section 54 of the HFEA 2008 even though this section requires two applicants. The child was born via a gestational surrogate in the state of Minnesota (USA), and was conceived with the intended parent's sperm, and a third-party donor egg.

5.21 The Government, after the earlier decision of *Re Z (A Child)*,[21] was forced to concede in this case that the requirement of two applicants was incompatible with the rights of the father and child under the ECHR. The current law prevented the father from obtaining a parental order on the sole ground of his status as a single person, as opposed to being part of a couple.

5.22 It was argued, on behalf of the applicant, that the High Court should, consequently, "read-down" the requirement of two applicants in section 54 of the HFEA 2008, to allow a sole applicant for a parental order. The court refused to do this.[22] It felt to do so would not be appropriate considering that surrogacy is a controversial area of social policy.[23] Instead, the court issued a declaration of incompatibility under section 4 of the Human Rights Act 1998. The court's declaration had the effect of passing the decision on how to address this incompatibility to Parliament.

5.23 Parliament responded through the 2018 Regulations and the insertion of section 54A into the HFEA 2008 to enable an application for a parental order by a sole applicant.

---

17 See paras 15.38 and subsequent below.

18 *K v L* [2019] EWFC 21, [2019] 2 WLUK 683.

19 HFEA 2008, s 54A(1).

20 [2016] EWHC 1191 (Fam), [2017] Fam 25.

21 *Re Z (A Child)* [2015] EWFC 73, [2015] 1 WLR 4993.

22 The court's decision in this respect is criticised by A Brown, "Two means two, but must does not mean must: an analysis of recent decisions on the conditions for parental orders in surrogacy" [2018] *Child and Family Law Quarterly* 23.

23 *Re Z (A Child) (No 2)* [2016] EWHC 1191 (Fam), [2017] Fam 25 at [30].

The requirement of a genetic link

5.24 Sections 54(1)(b) and 54A(1)(b) of the HFEA 2008 require that:

(1) in the case of two applicants for a parental order, at least one of them is genetically related to the child; or

(2) in the case of a single applicant for a parental order, he or she is genetically related to the child.

5.25 These provisions mean that the current law prevents surrogacy arrangements which involve both donated sperm and donated eggs (so called "double donation") from being eligible for the grant of a parental order.

5.26 The current law on the use of double donation of gametes can be a barrier for intended parents in two ways.

(1) Some intended parents are prevented from accessing surrogacy because, as a result of the requirement of a genetic link, they will not be able to obtain a parental order. For example, some surrogacy agencies such as Surrogacy UK and Brilliant Beginnings will not work with intended parents unless a parental order will be available.

(2) There may be surrogate-born children in the UK whose intended parents are not recognised under UK law (absent the grant of an adoption order) because the children were born in jurisdictions where a genetic link is not required.

5.27 We set out a discussion on potential reform of the requirement for a genetic link in Chapter 12.

The six month time limit

5.28 Under sections 54(3) and 54A(2) of the HFEA 2008, the intended parents must apply for a parental order within six months of the child's birth. Whilst it is open to speculation as to the possible policy intention behind a time limit,[24] the then President of the Family Division commented in *Re X (A Child) (Surrogacy: Time Limit)*, [25] that:

> the Parliamentary debates are silent as to any policy underpinning section 30(2) [of the HFEA 1990], [now section 54(3) of the HFEA 2008).[26]

5.29 The plain wording of section 54(3) of the HFEA 2008, that the application "must" be brought within six months, would appear to place an absolute bar on applicants applying for a parental order when the child is older than six months.

---

[24] King J speculated on a possible policy intention behind the time limit as being "the speedy consensual regularisation of the legal parental status of a child's carers following a birth resulting from a surrogacy arrangement". (*JP v LP* [2014] EWHC 595 (Fam), [2015] 1 All ER 266 at [30]). The then President of the Family Division in *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] Fam 186 stated that this was "little more than speculation," at [55].

[25] [2014] EWHC 3135 (Fam), [2015] Fam 186.

[26] *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] Fam 186 at [16] and [17].

5.30 This is not, however, how the provision was interpreted by the High Court in the case of *Re X (A Child) (Surrogacy: Time Limit)*.[27] In this case, the court determined that it was not prevented from making a parental order when the intended parents brought the application two years after the birth of the child.

5.31 Although it had been assumed until that point that the wording in the statute meant that the six month time limit was mandatory, the court assumed that Parliament had intended a sensible result. As the then President of the Family Court explained:

> Can Parliament really have intended that the gate should be barred forever if the application for a parental order is lodged even one day late? I cannot think so. … I assume that Parliament intended a sensible result. Given the subject matter, given the consequences for the commissioning parents, never mind those for the child, to construe section 54(3) [of the HFEA 2008] as barring forever an application made just one day late is not, in my judgment, sensible. It is the very antithesis of sensible … .[28]

5.32 The court, consequently, held that it was able to "read-down" the wording of the law to permit exceptions; a conclusion justified by the rules of statutory interpretation under domestic law[29] and/or by the case law of the European Court of Human Rights ("ECtHR").[30] As Mrs Justice Theis noted in a later judgment, the court decided to interpret section 54(3) of the HFEA 2008 in the way in which it did because:

> to not construe it in such a way could have detrimental long-term consequences for the children and the applicants, which is precisely what the section sets out to prevent.[31]

5.33 The decision to relax the time limit has meant that the courts now frequently make parental orders in respect of children older than six months. To cite a few examples from the case law:

(1) in *A and B (No 2 – Parental Order)*,[32] a parental order was made in respect of twins who were aged 3 at the time of the application;

(2) in *D v ED (Parental Order: Time Limit)*,[33] a parental order was made in respect of a child aged 5 at the time of the application; and

(3) in *A v C*,[34] a parental order was made in respect of children aged 12 and 13.

---

27 *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] Fam 186.

28 *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] Fam 186, at [55].

29 Based on the case of *Howard v Bodington* (1877) 2 PD 203 on the impact of non-compliance with statutory rules.

30 Based upon Article 8, European Convention of Human Rights (a right to a private and family life).

31 *A and B (No 2 – Parental Order)* [2015] EWHC 2080 (Fam), [2015] Fam Law 1192 at [72].

32 [2015] EWHC 2080 (Fam), [2015] Fam Law 1192.

33 [2015] EWHC 911 (Fam), [2016] 2 FLR 530.

34 [2016] EWFC 42, [2017] 2 FLR 101.

5.34 One academic, commenting on the decision in *Re X*[35] has written that:

> it demonstrates the willingness of the Court to continue stretching the statutory requirements of section 54 and thus re-affirms the trend towards a more and more lenient approach to parental order applications … .
>
> On the other hand, however, commentators have questioned how far statutory rules should be bent by the Court in order to achieve justice in individual cases.[36]

5.35 Another academic agrees and writes that,

> The decision [in *Re X*] strikes another blow to [the] statutory regime in England, and throws into sharp relief the difficulty, indeed near impossibility, of trying to regulate surrogacy through reassigning parenthood after the fact.[37]

5.36 In a later comment on the case, two academics go further in their criticisms and suggest that this line of case law relaxing the six month time limit:

> has undermined the rule of law, as the statutory provisions, as set out by Parliament, are not being enforced, as to enforce them would breach the rights of the children born through surrogacy.[38]

5.37 We set out a discussion on potential reform of the time limit requirement in Chapter 11.

The child's home

5.38 Sections 54(4)(a) and 54A(3)(a) of the HFEA 2008 require that the child's home must be with the applicants at the time of the parental order application and the making of the parental order. It is important to note that, whilst sections 54(4)(a) and 54A(3)(a) of the HFEA 2008 requires the child's home to be with the applicants at the time of the application and the making of the order, they do not specify that the child's or the applicants' home must be in the UK.

5.39 This requirement posed problems prior to the introduction of the 2018 Regulations allowing single people to apply for a parental order. This was because if the child was not living in the home of both of the applicants (because, for example, the intended

---

35 [2014] EWHC 3135 (Fam), [2015] Fam 186.

36 K Trimmings, "Six month deadline for applications for parental orders relaxed by the High Court" (2015) 37 *Journal of Social Welfare and Family Law* 241, 243. See also A Alghrani and D Griffiths, "The regulation of surrogacy in the United Kingdom: the case for reform" [2017] 29 *Child and Family Law Quarterly* 165, 177 and Kenneth McK Norrie, "English and Scottish adoption orders and British parental orders after surrogacy: welfare, competence and judicial legislation" [2017] 29 *Child and Family Law Quarterly* 93.

37 C Fenton-Glynn, "The difficulty of enforcing surrogacy regulations" (2015) 74 *Cambridge Law Journal* 34, 36.

38 C Fenton-Glynn and J Scherpe (on behalf of Cambridge Family Law), *Surrogacy: Is the law governing surrogacy keeping pace with social change?* (2017), 4, accessible at: https://www.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.family.law.cam.ac.uk/documents/cambridge_family_law_submission.pdf (last visited 31 May 2019).

parents had separated before a parental order could be made), it was unclear whether or not a parental order could be made.

5.40 On the facts of *JP v LP*,[39] Mrs Justice King stated (in comments that were not material to the outcome of the case), that a parental order was unlikely to be made where the intended parents had separated. In that case, the intended mother had left the matrimonial home before an application for a parental order was made. The child was subject to a shared residence order, splitting his time between the home of the intended father and the intended mother.

5.41 The case law has, however, developed since Mrs Justice King's comments. The courts (relying upon the intended parents' right to a family life under Article 8 of the ECHR) have interpreted the legislation in such a way to mean that the physical presence of both applicants with the child in a single family home is not required for this eligibility requirement to be satisfied.[40]

5.42 In *Re X (A Child) (Surrogacy: Time Limit)*,[41] the intended parents were separated at the time the parental order application was issued (although had reconciled by the time the matter came before the court). At the time of the application, there was a shared residence arrangement in place, which meant that the child split his time between two separate homes. The court concluded that:

> [The child] plainly did not have his home with anyone else. His living arrangements were split between the commissioning father and the commissioning mother. It can fairly be said that he lived with them.[42]

5.43 As a result, the court held that the requirement that the child have his or her home with the applicants had been met.

5.44 This aspect of *Re X*[43] has been applied in numerous subsequent cases where the intended parents had separated, either before a parental order application was made, or before it was granted.[44]

Domicile

5.45 Sections 54(4)(b) and 54A(3)(b) of the HFEA 2008 requires that at least one of the applicants is domiciled in the UK, Channel Islands or Isle of Man at the time of the application and the making of the parental order.

5.46 The importance of domicile (as a triggering factor granting the court jurisdiction to grant a parental order) was emphasised by Mr Justice McFarlane in *Re G (Surrogacy:*

---

39 [2014] EWHC 595, [2015] 1 All ER 266.

40 See, for example, *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] Fam 186 at [68].

41 [2014] EWHC 3135 (Fam), [2015] Fam 186.

42 *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] Fam 186 at [67].

43 [2014] EWHC 3135 (Fam), [2015] Fam 186.

44 See, for example, *A and B (No 2 – Parental Order)* [2015] EWHC 2080 (Fam), [2015] Fam Law 1192 and *LB v SP* [2016] EWFC 77.

Foreign Domicile)[45] (in relation to the comparable provision under the previous section 30 of the HFEA 1990), where he stated that:

> The court has been told, and accepts, that, hitherto, from time to time couples who are domiciled abroad have participated in successful surrogacy arrangements with UK surrogate mothers and have achieved a parental order with respect to the resulting child under HFEA 1990 section 30. If that is indeed the case, then such orders must have been made outside the jurisdiction of the court, which, as I have indicated, is confined to applicant parents where one or both is domiciled in the UK, Channel Islands or Isle of Man. It is to be hoped that the publication of this judgment will see an end to such unlawful parental orders being made.[46]

5.47 The key principles for domicile in the surrogacy context were set out in *CC v DD*[47] and in *AB (Surrogacy: Domicile)*[48] in which the court emphasised that a finding of domicile of choice must be determined by reference to the individual facts of each case.

5.48 Indeed, the facts of *CC v DD*[49] serve to demonstrate the factual complexity involved in determination of domicile. The case involved a British-French couple living in France. The wife was raised in the UK, and lived there until 2006 when she met her future French husband. The wife moved to live with her husband, and had lived there ever since. They married in 2011. The wife, however, regularly returned to the UK and maintained significant connections there.

5.49 Against this background, the couple had entered into a traditional surrogacy arrangement with the surrogate, who was based in Minnesota (USA). After the birth of the child, the couple applied to the High Court for a parental order. One of the questions that the court had to decide was whether the wife was domiciled in the UK.

5.50 The Court summarised the key principles of the law of domicile as follows:

(1) a domicile of origin[50] adheres unless the acquisition of a domicile of choice is proved to the required standard (balance of probabilities) by the person asserting such a change;

---

45 *Re G (Surrogacy: Foreign Domicile)* [2007] EWHC 2814 (Fam), [2008] 1 FLR 1047.

46 *Re G (Surrogacy: Foreign Domicile)* [2007] EWHC 2814 (Fam), [2008] 1 FLR 1047 at [3].

47 *CC v DD* [2014] EWHC 1307 (Fam), [2015] 1 FLR 704.

48 [2016] EWFC 63.

49 [2014] EWHC 1307 (Fam), [2015] 1 FLR 704.

50 A person's first domicile is their domicile of origin. Under both English and Scots law, a person's domicile of origin is received by operation of law at birth and is retained until a different domicile of choice is acquired. Broadly speaking, in England and Wales, a child born to legitimate (in other words, to married parents) receives the domicile of their father at the time of the birth; a child born to illegitimate (in other words, to unmarried parents) receives their domicile of the mother: Halsbury's Laws of England, volume 19, paras 340 and 341. In Scots law, where the parents of a child are domiciled in the same country as each other and the child has a home with a parent or a home (or homes) with both of them, the child is domiciled in the same country as the child's parents. Where this does not apply, the child is domiciled in the country with which the child has for the time being the closest connection: Family Law (Scotland) Act 2006, s 22 and Stair Memorial Encyclopaedia, volume 17, para 208A.

(2) a domicile of choice must be acquired both '*animo et facto*' that is that a person must both

(a) reside in a new country; and

(b) also form a sufficient intention to live permanently or indefinitely in that country;

(3) acquisition of a domicile of choice is not to be lightly inferred; and

(4) important factors which are relevant in considering whether a person has formed the necessary intention are whether they intend to return to live in their country of origin on the happening of a realistically foreseeable contingency, and whether they are resident in a country for a general or limited purpose.[51]

5.51 Mrs Justice Theis added that,

> It has been made clear in a number of cases that long residence in a new country is not of itself sufficient to establish that a person has acquired a domicile of choice there, if they intend to return to their country of origin on the happening of a contingency, which is reasonably foreseeable.[52]

5.52 Applying the principles above to the facts of this case, Mrs Justice Theis held that the wife had retained her domicile in the UK and that, therefore, this eligibility requirement for a parental order was met.

5.53 The use of the concept of domicile in family law has been criticised in other contexts. The Law Commissions have previously written, in the context of custody of children, that:

> Domicile suffers … from the major disadvantages that, in particular cases, its ascertainment may be difficult and may occasion delay and expense on what is a mere technical matter.[53]

5.54 In the surrogacy context, the Brazier Report reached a similar view, and concluded that:

> Common law domicile has become a concept of tortuous complexity and it is possible to be domiciled in a country with which the person has at best only tenuous links.[54]

---

51 The Scots law of domicile is similar. See E B Crawford and J M Carruthers, *International Private Law: A Scots perspective* (4th ed 2015) paras 6.09, 6.10, 6.13 and 6.18 to 6.24.

52 *CC v DD* [2014] EWHC 1307 (Fam), [2015] 1 FLR 704 at [23].

53 Custody of Children – Jurisdiction and Enforcement within the United Kingdom (1976) Law Commission Working Paper No 68; Scottish Law Commission Memorandum No 23, paras 3.49 and 3.50.

54 Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (October 1998) Cm 4068 p 65.

5.55 We set out a discussion on potential reform to the requirement of domicile in Chapter 12.

The age of the applicant or applicants

5.56 This requirement (contained in sections 54(5) and 54A(4) of the HFEA 2008) that all applicants must be aged 18 or over at the time of the making of the parental order is self-explanatory, and there is no case law on this requirement.

5.57 This requirement does, however, raise an issue for Scots law, under which persons may choose to marry and found a family at age 16.[55] We think this sits somewhat uneasily with the requirement that an applicant must be aged 18 or over at the time of the making of the parental order.

5.58 It may also give rise to a possible issue in relation to rights under Article 12 of the ECHR, which provides that men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

5.59 We note however that, in the context of adoption, an applicant has to be 21 or, if the applicant is a member of a relevant couple the other member of which is the child's parent, that parent must be 18 or over.[56] Since the Convention rights issue is not restricted to surrogacy, our view is that, while it merits further examination, it is outwith the scope of this project.

5.60 We set out a discussion on potential reform to the age requirement in Chapter 12.

The requirement of consent

5.61 Sections 54(6) and 54A(5) of the HFEA 2008 stipulate that an application can only be made if the surrogate (and potentially her spouse if he or she has also become a legal parent of the child),[57] have "freely, and with full understanding of what is involved, agreed unconditionally to the making of the order".[58]

5.62 The requirement of consent, freely given, is designed to protect the surrogate, and recognise her autonomy in decision-making. As one judge has explained, in the context of the requirement of consent,

> A surrogate mother is not merely a cipher. She plays the most important role in bringing the child into the world.[59]

---

55 It may also be considered an issue under English and Welsh law, where persons may choose to marry aged 16 or 17, if they have parental consent.

56 AC(S)A 2007, ss 29(1)(a) and 30(1) and (3). This is the same in England and Wales: ACA 2002, ss 49 and 50.

57 As discussed in ch 4, if the surrogate is married, her spouse will currently become the legal parent of the child, unless he or she did not consent to the surrogate's treatment.

58 HFEA 2008, ss 54(6) and 54A(5).

59 *D v L (Surrogacy)* [2012] EWHC 2631 (Fam), [2013] 1 WLR 3135 at [24].

5.63 There are, however, two exceptions in the statute to the requirement that the intended parents must receive the consent of the surrogate (and potentially her spouse). These are when a person from whom consent is required:

(1) cannot be found; or

(2) is incapable of giving agreement.[60]

5.64 There is no provision in the statute allowing the court to dispense with the surrogate's (or her spouse's) consent, outside these two limited situations.[61]

5.65 The surrogate cannot give her consent to the parental order less than six weeks after the child's birth.[62] This mirrors the requirement in our adoption law that a mother cannot consent to the adoption of her child less than six weeks after giving birth.[63]

5.66 The potential difficulties of this requirement of consent are evident in the case of *Re AB (Surrogacy: Consent)*.[64] In this case, the surrogate and her husband, the legal parents of the children, had handed over the children to the intended parents, but refused to consent to the making of the parental order. In its decisions, the court did not feel that it was necessary to investigate or determine the reasons for the breakdown in relationship between the surrogate and the intended parents. It did state, however, the "catalyst" for the breakdown appears to have been that the surrogate felt that the intended parents had not shown sufficient concern for her wellbeing after she had been told, at her 12-week scan, that the continuation of pregnancy could put her health at risk.[65]

5.67 In view of this, the court stated that the surrogate's and her husband's decision regarding consent was said to be "due to their own feeling of injustice, rather than what is in the children's best interests".[66] As a result of their lack of consent, Mrs Justice Theis said that:

> the application for a parental order comes to a juddering halt, to the very great distress of the applicants. The result is that these children are left in a legal limbo, where, contrary to what was agreed by the parties at the time of the arrangement, the respondents will remain their legal parents even though they are not biologically related to them and they expressly wish to play no part in the children's lives.[67]

---

60 HFEA 2008, ss 54(7) and 54A(6).

61 Strictly speaking, the court is not "dispensing" with the consent requirement in these two situations. Consent is simply not required. We think, however, that the term "dispense" is useful shorthand, and we will use it in the text. It is also often the language used by the courts in such situations.

62 HFEA 2008, ss 54(7) and 54A(6).

63 England and Wales: ACA 2002, s 52(3); Scotland: AC(S)A 2007, s 31(11).

64 [2016] EWHC 2643 (Fam), [2017] 2 FLR 217.

65 *Re AB (Surrogacy: Consent)* [2016] EWHC 2643 (Fam), [2017] 2 FLR 217 at [19]. Further specialist advice was sought, and the pregnancy continued.

66 *Re AB (Surrogacy: Consent)* [2016] EWHC 2643 (Fam), [2017] 2 FLR 217 at [8].

67 *Re AB (Surrogacy: Consent)* [2016] EWHC 2643 (Fam), [2017] 2 FLR 217 at [9].

5.68 In the face of this withholding of consent to the making of a parental order, the court, instead, made a child arrangement order under the Children Act 1989, providing for the children to live with the intended parents.[68] This order also gave the intended parents parental responsibility for the children, but the surrogate and her husband will remain the children's legal parents throughout their lives, unless and until a parental, or adoption, order is granted.[69] Two academics wrote that this result of the case is "clearly … a wholly unsatisfactory situation, with the law not reflecting the reality of the situation".[70]

5.69 The surrogate and her husband stated that they would not object to the grant of an adoption order in favour of the intended parents.[71] Mrs Justice Theis held, however, that such an order would not reflect the reality of the twins' situation.[72] In doing so, she rejected the notion that an adoption and parental order were simply interchangeable orders. Mrs Justice Theis referred to her earlier judgment in *AB and CD v CT*[73] on this point, where she said that:

> I agree a parental order and the consequences that flow from it are, from a welfare perspective, far more suited to surrogacy situations. They were specifically created to deal with these situations. Put simply, they are a more honest order which reflects the reality of what was intended, the lineage connection that already exists and more accurately reflects the child's identity.[74]

5.70 As the authors of *Surrogacy: Law, Practice and Policy in England and Wales* have noted, the problem with this decision is that:

> in this case the Court was essentially hamstrung. The Court could not have been clearer that a parental order was required … but if the respondents' consent was not forthcoming the Court could not make a parental order.[75]

Where a person from whom consent is required cannot be found

5.71 Cases in which the court has dispensed with the requirement of consent where the surrogate and/or her spouse (if relevant) cannot be found have always involved international surrogacy arrangements.

---

68 *Re AB (Surrogacy: Consent)* [2016] EWHC 2643 (Fam), [2017] 2 FLR 217 at [7].

69 Note that, in Scotland, in terms of the Children (Scotland) Act 1995, s 11(2)(a), the court may grant an order depriving a person of some or all of his or her parental responsibilities or parental rights in relation to a child.

70 A Alghrani and D Griffiths, "The regulation of surrogacy in the United Kingdom: the case for reform" [2017] *Child and Family Law Quarterly* 165, 179.

71 In fact, even if they did not consent, the court can dispense with the requirement for the legal parents' consent for the purpose of making an adoption order: ACA 2002, s 52(1); AC(S)A 2007, s 31(2) and (3).

72 For criticism of this aspect of the decision see G Douglas, "Surrogacy – *Re A and B (Surrogacy: Consent)*" (2017) *Family Law* 57.

73 [2015] EWFC 12, [2016] 1 FLR 41.

74 *AB v CT (Parental Order: Consent of Surrogate Mother)* [2015] EWFC 12, [2016] 1 FLR 41 at [71].

75 R Cabeza, V Flowers, E Pierrot, A Rao, B O'Leary and L Odze, *Surrogacy: Law, Practice and Policy in England and Wales* (1st ed 2018) para 5.100.

5.72 The first time the court considered this issue was in *D v L (Surrogacy)*.[76] In this case, the Indian surrogate could not be found to give her valid consent to the making of the parental order. The surrogate had, in fact, given her consent already, but this was ineffective as it was given less than six weeks after she gave birth.

5.73 The intended parents employed an inquiry agent to try to locate the surrogate, but the agent was unable to do so.[77] The director of the surrogacy clinic, when asked for assistance, purportedly replied to the intended parents with a single piece of paper, with an 'obscene gesture' printed on it.[78]

5.74 Faced with these circumstances, Mr Justice Baker had to decide if it was appropriate to dispense with the requirement of the surrogate's consent on the basis that she could not be found. In such cases, the judge emphasised that the court must carefully scrutinise the evidence as to the steps that have been taken to find the mother – in the judge's words:

> It is only when all reasonable steps have been taken to locate her without success that a court is likely to dispense with the need for valid consent. Half-hearted or token attempts to find the surrogate will not be enough.[79]

5.75 On the facts of this case, the judge accepted that the intended parents had taken all "reasonable steps" to try and locate the surrogate. He therefore dispensed with the requirement of her consent, to allow him to make the parental order. The judge's approach to dispensation of consent has been followed in subsequent cases.[80]

Where a person from whom consent is required is unable to consent

5.76 There has not been a reported decision where the surrogate has been found unable to consent due to a lack of capacity. In England and Wales, the Mental Capacity Act 2005 sets out the conditions under which a person will be held to be lacking capacity for these purposes.[81]

5.77 In Scotland, in terms of the rules of court, the reporting officer is required to ascertain whether the person suffers or appears to suffer from a mental disorder within the meaning of section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003.[82]

---

76 [2012] EWHC 2631 (Fam), [2013] 1 WLR 3135.

77 *D v L (Surrogacy)* [2012] EWHC 2631 (Fam), [2013] 1 WLR 3135 at [14].

78 *D v L (Surrogacy)* [2012] EWHC 2631 (Fam), [2013] 1 WLR 3135 at [11].

79 *D v L (Surrogacy)* [2012] EWHC 2631 (Fam), [2013] 1 WLR 3135 at [28].

80 See, for example, *AB v CT (Parental Order: Consent of Surrogate Mother)* [2015] EWFC 12, [2016] 1 FLR 41.

81 The Mental Capacity Act (MCA) 2005 sets out the relevant test of incapacity in this context: a person is assumed to have capacity unless it is established that they do not (MCA 2005, s 1). A person will lack capacity if, at the material time, he or she is unable to make a decision for himself or herself in relation to the matter because of an impairment of, or a disturbance in the function of, the mind or brain (MCA 2005, s 2(1)).

82 Act of Sederunt (Rules of the Court of Session 1994) (SI 1994 No 1443), ch 97 as amended, r 97.9(1)(c) and the Act of Sederunt (Child Care and Maintenance Rules) 1997 (SI 1997 No291), ch 2, Pt VI as

5.78 We set out a discussion on potential reform of the requirement of consent in Chapter 11.

The requirement of reasonable expenses (unless retrospectively authorised by the court)

5.79 Under sections 54(8) and 54A(7) of the HFEA 2008, in order to make a parental order, the court must be satisfied that the intended parents gave no money or benefit other than "expenses reasonably incurred" for or in consideration of:

(1) the making of the order;

(2) any agreement of the surrogate (and her spouse if applicable) to the making of the order;

(3) the handing over of the child to the applicants; or

(4) the making of arrangements with a view to the making of the order

unless retrospectively authorised by the court.

The meaning of "reasonable expenses"

5.80 It has been suggested by the authors of *Surrogacy: Law, Practice and Policy in England and Wales* that:

> the word *expense* means the same as it would in any other sense, for example of your tax return. It means a payment incurred in undertaking a task. For example, if a surrogate spends money on fares to attend a hospital for the purposes of receiving ART, that is clearly an expense relating to the surrogacy arrangement.[83]

5.81 The application of this approach can be seen in the case of *Re C*.[84] In this case, the court was faced with the following categories of payments in relation to a Californian surrogacy arrangement:

(1) a payment to the surrogate for her identifiable pregnancy-related expenses;

(2) a compensation payment to the surrogate;

(3) a payment to the surrogacy agency;

(4) clinic fees for the surrogate's treatment; and

(5) a payment of USA$6,000 to an egg donor.

---

amended, r 2.51(1)(c). The Mental Health (Care and Treatment) (Scotland) Act 2003, s 328(1) defines "mental disorder", subject to s 328(2), as any mental illness, personality disorder or learning disability, however caused or manifested.

83 R Cabeza, V Flowers, E Pierrot, A Rao, B O'Leary and L Odze, *Surrogacy: Law, Practice and Policy in England and Wales* (1st ed 2018) para 4.64.

84 [2013] EWHC 2408 (Fam), [2014] 1 FLR 757.

5.82 The court held that payments in the first and fourth categories, above, were reasonable expenses, and did not need, therefore, require the court's authorisation. It was held that the payment to the egg donor was not caught by section 54(8) of the HFEA 2008 at all, and therefore did not require the court's authorisation. This was because the egg donor was not legally the mother under either UK or Californian law, and the pregnancy may not have been successful.[85]

5.83 The payments to the surrogacy agency and the compensation payment to the surrogate, however, required the court's authorisation.

Authorisation of payments in excess of reasonable expenses

5.84 The issue of authorisation of payments in excess of reasonable expenses is a particular issue in international surrogacy arrangements from jurisdictions which permit a commercial model of surrogacy. In such circumstances, the payments that the intended parents have made to the surrogate are, by their very nature, in excess of reasonable expenses, and may run to many thousands of pounds.

5.85 *Re X and Y (Foreign Surrogacy)*[86] was the first English case to deal with an overseas commercial surrogacy arrangement. It was decided under the previous law contained in the HFEA 1990, but the relevant provisions are the same under the HFEA 2008.

5.86 The intended parents had paid a Ukrainian surrogate a monthly payment of €235, plus a lump sum of €25,000 for the birth of the twins. It was conceded that these sums significantly exceeded the "expenses reasonably incurred" by the surrogate in the course of her pregnancy.[87] In fact, it was admitted that the lump sum was to enable the surrogate to place a deposit to purchase a flat.[88] The intended parents asked the court to authorise these payments retrospectively.

5.87 Faced with this situation, Mr Justice Hedley outlined three questions to be posed when a court considers the question of authorisation.

(1) Was the sum paid disproportionate to reasonable expenses?

(2) Were the applicants acting in good faith and without "moral taint" in their dealings with the surrogate mother?

(3) Were the applicants party to any attempt to defraud the authorities?[89]

5.88 The court found the latter two questions easy to answer: no advantage was taken, or sought to be taken, of the surrogate mother; and the applicants sought to comply with both English and Ukrainian law as they believed the law to be.

---

85 *Re C* [2013] EWHC 2408 (Fam), [2014] 1 FLR 757 at [15].

86 [2008] EWHC 3030 (Fam), [2009] Fam 71.

87 *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] Fam 71 at [18].

88 *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] Fam 71 at [4].

89 *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] Fam 71 at [21].

5.89 In relation to the first question, considering the costs of living in a city in Ukraine, the judge found, as a matter of fact, that the sums paid were not so disproportionate to reasonable expenses that granting the order would be an affront to public policy. Moreover, the judge was satisfied that the welfare of the children required that they be regarded as lifelong members of the intended parents' family, and so authorised the payments under the HFEA 1990, and made the parental order.[90]

5.90 The difficulty that the court was in was evident – if it refused to make a parental order, the children (already in existence) would not be the legal children of the parents who were raising them. As one academic has written on this decision, it has:

> set the tone for the cases that have followed, all of which acknowledge, to a lesser or greater extent, the near futility of the balancing exercise the judges are engaged in".[91]

5.91 The balancing exercise has become even harder since this decision, as the child's welfare has now become the court's paramount consideration when deciding whether to grant a parental order.[92] The effect of this change in the law on the court's discretion to authorise payments in excess of reasonable expenses was discussed in the case of *Re L*.[93] Mr Justice Hedley wrote that:

> The effect of [the child's welfare being the paramount consideration] must be to weight the balance between public policy considerations and welfare... decisively in favour of welfare. It must follow that it will only be in the clearest case of the abuse of public policy that the court will be able to withhold an order if otherwise welfare considerations support its making.[94]

5.92 The High Court has subsequently authorised payments in excess of reasonable expenses, such as:

(1) a payment of USA$21,500 (around £16,600 at the time of publication), representing the profit element for a commercial surrogacy agency for a surrogacy arrangement in California (USA); [95] and

(2) a payment of €50,000 in a Russian surrogacy arrangement (around £43,600 at the time of publication), of which only approximately £4,324 was for the surrogate's actual expenses.[96]

---

90 *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] Fam 71 at [21] to [23].

91 C Fenton-Glynn, "The regulation and recognition of surrogacy under English law: an overview of the case-law" [2015] *Child and Family Law Quarterly* 83, 87.

92 ACA 2002, s 1, as applied and modified by the 2018 Regulations, sch 1 para 2 (previously contained in the 2010 Regulations, sch 1); AC(S)A 2007, s 14(3), as applied and modified by the 2018 Regulations, reg 3 and sch 2 para 2.

93 [2010] EWHC 3146 (Fam), [2011] Fam 106.

94 *Re L (Commercial Surrogacy)* [2010] EWHC 3146 (Fam), [2011] Fam 106 at [10].

95 *Re P-M* [2013] EWHC 2328 (Fam), [2014] 1 FLR 725.

96 *Re C (Parental Order)* [2013] EWHC 2413 (Fam), [2014] 1 FLR 654.

5.93 We are not aware of a case where a parental order has been refused on the basis of payments exceeding what is reasonable, under section 54(8) of the HFEA 2008. As a result it can be said that:

> English law, as developed through the jurisprudence of the High Court in the 30 years since [the Warnock Report], does not view commercial surrogacy as an intrinsic wrong".[97]

5.94 The current state of the case law on payments has been frequently criticised by academics as being:

> confused and ineffective … . Questions about payments come too late in any case: after the child is born and usually by the time it is being cared for by those who made the payments, with responsibility abdicated (although not legally) by those who received them – child welfare must (and does) take priority.[98]

5.95 This point that scrutiny often occurs too late in the process is reinforced by research on the effectiveness of the current parental order reporter process in England and Wales (which is covered in more detail in Chapter 6. Research shows that there are concerns at the current limited ability of parental order reporters to influence the process or outcome of the parental order case. [99] As the authors of the research wrote:

> The lateness of the [parental order reporter's] involvement – of great concern to many – meant financial and other arrangements had already been transacted and the child had been with commissioning parents for several weeks or months – what many called a 'fait accompli.'[100]

5.96 Another line of criticism is that the current law is unclear in its aims. Although the language of the statute suggests a system of reasonable expenses, one commentator has said that what, in fact, emerges from the case law is a "permissive" approach to payments in excess of expenses. As a result, she notes that it is "almost a foregone conclusion" that the court will grant the intended parents a parental order in cases involving an overseas commercial surrogacy arrangement.[101]

5.97 This view is supported by two academics who have concluded that:

---

97 C Fenton-Glynn, "Outsourcing Ethical Dilemmas: Regulating International Surrogacy Arrangements" (2016) 24 *Medical Law Review* 59, 67.

98 K Horsey, "Not Withered on the Vine, The Need For Surrogacy Law Reform" (2016) 4 *Journal of Medical Law and Ethics* 181, 195 to 196.

99 M Crawshaw, S Purewell, O van den Akker, "Working at the Margins: The Views and Experiences of Court Social Workers on Parental Orders Work in Surrogacy Arrangements" (2013) 43 *British Journal of Social Work* 1225.

100 M Crawshaw, S Purewell, O van den Akker, "Working at the Margins: The Views and Experiences of Court Social Workers on Parental Orders Work in Surrogacy Arrangements" (2013) 43 *British Journal of Social Work* 1225, 1231.

101 C Fenton-Glynn, "The regulation and recognition of surrogacy under English law: an overview of the case-law" [2015] 27 *Child and Family Law Quarterly* 83, 87.

> Notwithstanding this prohibition [in UK law on commercial surrogacy], payments made that have clearly exceeded "reasonable expenses" have been retrospectively authorised by the courts, in at least five cases in the last decade. The reason for this gap between theory and practice is that courts have been placed in an impossible position by the stipulation in the [Human Fertilisation and Embryology (Parental Orders) Regulations 2010 now the 2018 Regulations] that the child's welfare throughout the child's life is the paramount consideration.
>
> [Human Fertilisation and Embryology (Parental Orders) Regulations 2010 now the 2018 Regulations] thus make it unlikely courts will ever refuse retrospectively to authorise payment and grant a parental order, when the child/children are resident with the commissioning parents, especially where the surrogate mother resides outside the jurisdiction. Were a court to declare expenses to be grossly disproportionate, this would bar a parental order being granted, which could leave a child parentless and in some cases stateless. This would not be in a child's best interests, especially when there are two perfectly capable parents who have already expended so much financially and emotionally to create the child.[102]

5.98 We set out a discussion on potential reform to the law on payments to surrogates in Chapter 15.

THE EFFECT OF THE 2018 REGULATIONS

5.99 The 2018 Regulations came into force on 20 December 2018, and replaced the previous Human Fertilisation and Embryology (Parental Orders) Regulations 2010[103] . The new 2018 Regulations were required because of the introduction of section 54A of the HFEA 2008,[104] allowing single people to apply for a parental order.

5.100 The 2018 Regulations apply certain provisions of the ACA 2002 and the AC(S)A 2007, subject to modifications, to surrogacy arrangements. They also state that references to the provisions of certain enactments have effect, subject to modifications, in relation to parental orders and applications for parental orders as they have effect in relation to adoption orders and applications for such orders.

5.101 Some of the most important of the legal consequences of the 2018 Regulations are examined below.

The paramountcy of the child's welfare

5.102 The child's welfare is the court's paramount consideration when coming to a decision relating to the making of a parental order.[105] In parental order cases in England and

---

102 A Alghrani and D Griffiths, "The regulation of surrogacy in the United Kingdom: the case for reform" [2017] 29 *Child and Family Law Quarterly* 165, 179.

103 The Human Fertilisation and Embryology (Parental Orders) Regulations 2010 (SI 2010 No 985).

104 HFEA 2008, s 54A was inserted into the HFEA 2008 by The Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018 (SI 2018 No 1413).

105 ACA 2002, s 1(2), as applied and modified by the 2018 Regulations, sch 1 para 2; AC(S)A 2007, s 14 (3) as applied and modified by the 2018 Regulations, reg 3 and sch 2 para 2.

Wales, when considering the child's welfare, the court must have regard to the following checklist of matters (among others):

(1) the child's ascertainable wishes and feelings regarding the decision (considered in the light of the child's age and understanding);

(2) the child's particular needs;

(3) the likely effect on the child (throughout his [or her] life) of having ceased to be a member of the original family and become the subject of a parental order;

(4) the child's age, sex, background and any of the child's characteristics which the court considers relevant;

(5) any harm (within the meaning of the Children Act 1989) which the child has suffered or is at risk of suffering; and

(6) the relationship which the child has with relatives and with any other person in relation to whom the court considers the relationship to be relevant.[106]

5.103 On the other hand, in Scotland, there is no checklist. The court must have regard to all the circumstances of the case,[107] and, as we have seen above at paragraph 5.99 is to regard the need to safeguard and promote the welfare of the child throughout the child's life as the paramount consideration.[108]

5.104 Furthermore, the court in Scotland must, so far as is practicable, have regard in particular to the following:

(1) the value of a stable family unit in the child's development;

(2) the child's ascertainable views regarding the decision (taking account of the child's age and maturity);

(3) the child's religious persuasion, racial origin and cultural and linguistic background; and

(4) the likely effect on the child, throughout the child's life, of the making of a parental order.[109]

5.105 In relation to the ascertainable views of the child, it is provided that a child who is aged 12 or over is presumed to be of sufficient age and maturity to form a view regarding the decision in question.[110]

---

106 ACA 2002, s 1(4), as applied and modified by the 2018 Regulations, sch 1 para 2.

107 AC(S)A 2007, s 14 (2) as applied and modified by the 2018 Regulations, reg 3 and sch 2 para 2.

108 AC(S)A 2007, s 14 (3) as applied and modified by the 2018 Regulations, reg 3 and sch 2 para 2.

109 AC(S)A 2007, s 14 (4) as applied and modified by the 2018 Regulations 2018, reg 3 and sch 2 para 2.

110 AC(S)A 2007, s 14 (8) as applied and modified by the 2018 Regulations 2018, reg 3 and sch 2 para 2. Though note that, strictly speaking, in terms of the HFEA 2008, ss 54(3) and 54A(2), the intended parents or

5.106 Since the principle of the paramountcy of the child's welfare was first introduced into the law by the Human Fertilisation and Embryology (Parental Orders) Regulations 2010[111] , the courts have struggled to manage the tension created by it. The tension is caused by the fact that an analysis of the child's welfare, where the child is living with the intended parents, or where the court has determined this should be the case, will almost always point towards the making of a parental order.[112] Yet the courts must also try to police, and enforce, the eligibility requirements contained within sections 54 and 54A of the HFEA 2008.

5.107 On this point, we agree that:

> While the elevation of the child's welfare to the paramount concern is laudable, it has undermined the ability of the courts to refuse a parental order.[113]

5.108 This tension has manifested itself in the court's decisions, discussed above, on, for example, extensions to the six month limit, and the authorisation of payments of reasonable expenses. Both are areas where the court has arguably "stretch[ed], manipulate[d], or even disregard[ed] the statutory wording in order to achieve justice for the child".[114]

5.109 As the above discussion shows, there have been criticisms of many of the current criteria that applicants must fulfil to qualify for a parental order and some have been subject to significant judicial interpretation such that they are no longer applied in the way that one would expect from a reading of the statute. In the subsequent chapters we discuss our proposal to introduce a new pathway to parenthood, but we believe that it is necessary to maintain the current parental order route for certain cases. In Chapters 6, 11 and 12, we discuss various reforms to the parental order route, including to the current eligibility criteria discussed above.

---

parent must apply for a parental order within six months of the child's birth. See discussion at paras 5.28 and subsequent above.

111 The Human Fertilisation and Embryology (Parental Orders) Regulations 2010 (SI 2010 No 985).

112 This is largely because of the transformative effect of a parental order for the child's welfare (see para 4.76 above). As Theis J has written, "the only order that will secure the lifelong welfare needs of each of these [surrogate-born] children is a parental order. Only that order will provide the lifelong security and stability that their welfare clearly demands". (*J v G* [2013] EWHC 1432 (Fam), [2014] 1 FLR 297 at [29]).

113 C Fenton-Glynn and J Scherpe (on behalf of Cambridge Family Law), *Surrogacy: Is the law governing surrogacy keeping pace with social change?* (2017), 4, accessible at: https://www.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.family.law.cam.ac.uk/documents/cambridge_family_law_submission.pdf (last visited 31 May 2019).

114 C Fenton-Glynn, "The difficulty of enforcement surrogacy regulations" (2015) 74 *Cambridge Law Journal* 34, 37.

Chapter 6: The court procedure for an application for a parental order

INTRODUCTION

6.1 This chapter examines the current law on the court procedure for obtaining a parental order, and sets out possible reforms to this process.

6.2 The parental order court procedure will continue to be used for those surrogacy arrangements which do not qualify for our proposed new pathway to parenthood, the details of which were set out in Chapter 8. This new pathway would enable intended parents to be the child's legal parents from birth without the need for a post-birth parental order, subject to the surrogate not electing to exercise her right to object within a defined period of time. Those surrogacy arrangements which do not qualify for our new pathway will still require a post-birth transfer of legal parenthood from the surrogate (and in some cases her husband or civil partner)[1] to the intended parents. We envisage that the post-birth transfer of legal parenthood will continue to be achieved by the grant of a parental order.

6.3 Surrogacy arrangements may not qualify for the new pathway for various reasons. It could be that our proposed eligibility requirements for the surrogate or intended parents, which we discuss in Chapters 12 and 13, have not been met. We have also provisionally proposed in Chapter 16 that international surrogacy arrangements should not be able to follow the new pathway. Additionally, a surrogacy arrangement that begins within the new pathway will not result in the intended parents obtaining legal parenthood at birth where the surrogate exercises her right to object. In all these cases we think that it is necessary and appropriate to retain a reformed parental order procedure with judicial oversight.

6.4 We do not think that reform should introduce a separate procedure for international surrogacy arrangements. Two different procedures would risk unnecessary complexity, where none currently exists. Our reformed parental order procedure would, therefore, apply to all cases which do not qualify for the new pathway to parenthood, whether domestic or international.

6.5 Due to the existing significant differences in procedure in England and Wales, and in Scotland, we have not been able to present a unified set of reform proposals. Accordingly, this chapter begins by setting out the current law, and proposed reforms to the parental order procedure, in England and Wales. In England and Wales, these procedural rules are contained within the Family Procedure Rules 2010 (the "FPR 2010").[2]

---

1 We have asked an open question on whether the surrogate's spouse or civil partner should still acquire legal parenthood in surrogacy arrangements.

2 The Family Procedure Rules 2010 (SI 2010 No 2955).

6.6 The chapter will then set out the current parental order procedure in Scotland, along with our proposed reforms.

THE COURT PROCEDURE FOR AN APPLICATION FOR A PARENTAL ORDER IN ENGLAND AND WALES

6.7 To obtain a parental order in England and Wales, an application must be made to a court following the child's birth. The applicants are free to apply to the court from the date of the birth of the child. The required consent from the surrogate to a parental order is not effective, however, if given by her less than six weeks after the child's birth.[3] This means that the parental order cannot be granted by the court until the expiration of this period.

6.8 The rules of court procedure to obtain a parental order in England and Wales are principally set out in Part 13 of the FPR 2010.

6.9 In relation to the procedure and formalities of surrogacy contained in these rules, the court has cautioned that:

> an application for a parental order should be treated with the same care and caution that attends every application for an adoption order. Both Section 54 [of the HFEA 2008] and Family Proceedings Rules Part 13 are in mandatory form; they must be observed and care taken.[4]

The applicants and the respondents

6.10 The applicants to the proceedings will be the intended parent or parents who satisfy the conditions of section 54 f the HFEA 2008 (two applicants) or section 54A of the HFEA 2008 (one applicant).

6.11 All cases will have at least one respondent, namely the surrogate.[5] If the surrogate's spouse or civil partner has become the child's legal parent, he or she will also be a respondent to the proceedings.[6]

6.12 We have made a provisional proposal, at paragraph 8.57, that under our new pathway the surrogate's spouse or civil partner should not continue to be the child's legal parent. We have asked an open question on this subject, at paragraph 8.58, for cases under the existing parental order route. If the law were reformed to remove the surrogate's spouse's or civil partner's legal parenthood, then he or she would no longer be a respondent to the proceedings.

---

3 HFEA 2008, s 54(7).

4 *G v G* [2012] EWHC 1979 (Fam), [2013] 1 FLR 286, at [45].

5 FPR 2010, r 13.3(2)(a).

6 FPR 2010, r 13.3(2)(b).

6.13 The rules allow the court to direct that any other person or body be made a respondent to the proceedings or, conversely, that a respondent be removed from the proceedings.[7]

Making the application

6.14 The relevant court form to apply for a parental order is form C51.[8] The applicable court fee for a parental order application is currently £215.[9]

6.15 Form C51 is clear and straightforward in its layout. The information that the applicants are required to set out includes basic details about themselves, as well as basic details of the child. Each applicant must also state whether they are genetically related to the child.

6.16 Form C51 also asks the applicants to state whether they have the agreement of the surrogate and the surrogate's spouse or civil partner if applicable). Alternatively, the applicants can indicate that they wish for the court to dispense with the need for such consent, on one of the specified grounds.[10]

6.17 We have set out in Chapter 10 our proposed changes to form C51, in order to ensure that the child continues to have access to its gestational and genetic origins.

6.18 Finally, it should be noted that form C51 has now been updated following the introduction of section 54A of the HFEA 2008, allowing sole applicants to apply for a parental order.[11]

Service of the application

6.19 Once the applicants have completed the application on form C51, they must send this form, along with certified copies of various other documents,[12] to the court. The court will then issue the application.

6.20 The applicants (not the court) must then serve the issued application,[13] a form for acknowledging service, and a notice of proceedings, on the respondents. These

---

7 FPR 2010, r 13.3(4).

8 FPR 2010, PD 5A.

9 Family Proceedings Fees (Amendment) Order 2014, (SI 2014 No 877), sch 1.

10 See ch 5 for details of the current law on dispensation of consent.

11 https://www.gov.uk/government/publications/apply-for-a-child-born-to-another-person-to-be-legally-yours-form-c51 (last visited 31 May 2019).

12 These documents are:

(1) the applicants' marriage certificate (if applicable);

(2) the applicants' civil partnership certificate (if applicable);

(3) the child's full entry in the register of live-births; and

(4) any relevant orders.

13 Service is governed by the rules in FPR 2010, Pt 6. Under Pt 6, service of documents can be achieved in one of three ways: (1) personal service; (2) first class post, or other service which provides for delivery on the next business day; or (3) document exchange, where the respondent has notified the applicant that they are legally represented, and that their legal representative is authorised to accept service on their behalf.

documents must be served within 14 days before the hearing or first directions hearing.[14]

6.21 Issues have arisen, particularly in international surrogacy arrangements, with the service of documents on a respondent who may be difficult to locate (most commonly an overseas surrogate). Where the applicants have taken all reasonable steps to try to locate the respondents without success, the court has held that it can dispense with this requirement of service of the application form on each respondent.[15]

Responding to an application

6.22 If the respondents have been served with the application, each respondent has seven days in which to file an acknowledgment of service, using form C52.[16]

Consenting to the making of a parental order

6.23 Each respondent should record their consent to the court making a parental order on form A101A, or a form of like effect.[17] Form A101A makes clear the consequences of a respondent consenting to the making of the parental order. The form states that "if a parental order is made in respect of my child, I understand that I will no longer legally be treated as the parent and that my child will become a part of the applicants' family."

6.24 In England and Wales, if form A101A is used, then this form must be witnessed by an officer of CAFCASS or, where the child is ordinarily resident in Wales, by a Welsh family proceedings officer.[18]

6.25 There are special rules for when form A101A, or the form of like effect, has been executed outside the UK.[19]

6.26 As consent is a requirement to the making of a parental order under sections 54 and 54A of the HFEA 2008, the court must be in receipt of the required consents by the time of the final hearing, to be able to make the order.

6.27 The HFEA 2008 does provide an exception to this consent requirement – consent is not required from "a person who cannot be found or is incapable of giving agreement."[20] The rules state that if the applicants believe that consent is not required from a person for one of these two reasons, then the applicants must:

---

14 FPR 2010, r 13.6(1).

15 *R v S & T* [2015] EWFC 22, [2015] All ER (D) 171 (Mar). In this case, the court also held that the surrogate's consent was not required as she could not be found (see ch 5 fpr details on the requirement of consent). We would expect that dispensing with the requirement of service of the application and a finding that the surrogate cannot be found for the purposes of the requirement of consent will often go hand-in-hand.

16 FPR 2010, r 13.7.

17 FPR 2010, r 13.11 and PD 5A.

18 See the information on form A101A.

19 FPR 2010, r 13.11(4). For an example of a case where these rules were applied see *D v ED (Parental Order: Time Limit)* [2015] EWHC 911 (Fam), [2016] 2 FLR 530 which involved a consent agreement executed in California (USA).

20 HFEA 2008, s 54(7).

(1) state this fact in their application form or, if later than this, by filing a written note with the court;[21] and

(2) file a statement of facts setting out a summary of the history of the case and any other facts to satisfy the court that the other parent or the woman who carried the child cannot be found or is incapable of giving agreement.[22]

The burden is therefore on the applicants to prove that consent is not required because the surrogate cannot be found or is incapable of giving agreement.[23]

Allocation of cases

6.28 Once the respondents have sent the court their acknowledgement of service, a decision will have to be taken as to where the case should be heard.

6.29 In surrogacy cases, the decision on allocation will be based on the rules set out in the Family Court (Composition and Distribution of Business) Rules 2014.[24] These rules draw a distinction between domestic and international surrogacy arrangements, based on the place of the child's birth, and state that:

(1) where the child's place of birth was in England and Wales and where all respondents agree to the making of the parental order, the case will be allocated to lay justices[25] in the Family Court;[26]

(2) where the child's place of birth was in England and Wales, but *not* all the respondents agree to the making of the parental order, the case will be allocated to a judge of circuit judge level in the Family Court;[27] and

(3) where the child's place of birth was outside of England and Wales, the case will be allocated to a judge of High Court level.[28]

6.30 The Family Court gave additional guidance on these rules in the case of *Re Z (Foreign Surrogacy: Allocation of Work: Guidance on Parental Order Reports)*.[29] This case endorsed allocating all surrogacy cases in the Family Division of the High Court

---

21 FPR 2010, r 13.10(2)(a).

22 FPR 2010, r 13.10(2)(b).

23 For further details on these two situations where the court can dispense with the need for consent, see paras 5.61 and subsequent

24 Family Court (Composition and Distribution of Business) Rules 2014 (SI 2014 No 840).

25 Also known as "magistrates". We have preferred the term "lay justices" throughout the text.

26 Family Court (Composition and Distribution of Business) Rules 2014 (SI 2014 No 840), sch 1(1)(o).

27 Family Court (Composition and Distribution of Business) Rules 2014 (SI 2014 No 840), sch 1(3)(c).

28 Family Court (Composition and Distribution of Business) Rules 2014 (SI 2014 No 840), sch 1(4)(f).

29 *Re Z (Foreign Surrogacy: Allocation of Work: Guidance on Parental Order Reports*) [2015] EWFC 90, [2017] 4 WLR 5. The Guidance was expressly approved by the then President of the Family Division.

to one of the group of specialist judges, who are experienced in parental order applications.[30]

Proposed reform to the allocation rules

6.31 Although the allocation of a case may appear to be a technical or administrative matter, it can be of crucial importance to the participants' experience of the parental order process. Despite efforts to improve consistency in decision-making across the court system, we still think that the allocation of a case to a particular court is likely to affect how the law is applied in practice, particularly around the issue of expenses.

6.32 On the one hand, several stakeholders expressed concerns to us that the lay justices in the Family Court were not necessarily well-placed to deal with the complexities of the parental order applications that they are allocated and, consequently, did not provide adequate oversight.

6.33 On the other hand, some have criticised the requirement that the High Court is required to be involved in all cases of international surrogacy arrangements, regardless of the complexity of the case:

> to say that this is an inefficient use of the resources of the Family Division of the High Court would be an understatement.[31]

6.34 We have carefully considered the issue of allocation of surrogacy cases. We note that our reform proposals to parenthood envisage that fewer domestic surrogacy cases will be coming through the courts.[32] The remaining parental order cases requiring a court hearing will, therefore, be a combination of (1) international surrogacy cases; and (2) a presumably small number of domestic cases which have not qualified for the new pathway.

International surrogacy arrangements

6.35 As noted above, in Chapter 16 we have provisionally proposed that international surrogacy arrangements will not be able to access the new pathway to parenthood. In these cases there will, therefore, continue to be a need for a post-birth parental order application.

6.36 From our discussions with stakeholders and our own observations, we have some sympathy for the view expressed by Professor Jackson that it seems disproportionate to assign all international cases to the High Court automatically, without an assessment of their complexity. Whilst some international cases are certainly more complex than domestic cases, raising difficult questions around the consent of the surrogate for example, we are not sure that this is always *necessarily* the case. An international surrogacy arrangement through a reputable and well-established Californian surrogacy agency may present more similar features to a domestic

---

30 This group is currently composed of (in alphabetical order): Mr Justice Hayden, Mr Justice Newton, Mrs Justice Theis and Ms Justice Russell.

31 E Jackson, "UK Law and International Commercial Surrogacy: 'the very antithesis of sensible'" (2016) 4 *Journal of Medical Law and Ethics* 197, 211.

32 See ch 8.

surrogacy arrangement organised through a surrogacy organisation, than a Georgian or Ukrainian surrogacy arrangement.

6.37 We also believe that our proposed reform to introduce habitual residence, as an alternative to domicile,[33] will reduce the scope for legalistic arguments over whether the court has jurisdiction to make a parental order.[34] In our experience, complex arguments over domicile are a frequent feature of current international surrogacy cases which are heard by the High Court.

6.38 We are, however, very conscious of the views expressed to us by the High Court judges we spoke to that all international surrogacy cases should continue to be heard by them. They felt that the current system of allocation of surrogacy cases to a small number of full-time High Court judges allowed these judges to build up a considerable level of expertise in this area of law. They expressed concern at the prospect of these cases being heard by other courts. Another relevant point is that the High Court, through its reported judgments, can also develop case law in a way lower courts cannot (although we note the possibility of cases being referred to the High Court by the lower court).

6.39 Although we hope that our proposed reforms, if implemented, will make domestic surrogacy arrangements more attractive, there are still likely to be a significant number of international cases for the court system to process. Without reallocation, all these international cases would continue to claim the time and attention of High Court judges.

6.40 In light of the divergent views expressed on this issue, and particularly noting the views of the High Court judges, we have decided to ask consultees for their views on whether international surrogacy arrangements should be assigned to a judge of the High Court automatically.

6.41 One option for reform on which we are keen to hear consultees' views is that certain international cases are assigned to a suitably qualified circuit judge.[35] We believe that a ticketing[36] process could be put in place for these judges, to ensure that certain circuit judges build up an expertise in this area. There would still be the opportunity for a circuit judge to refer the case upwards to the High Court, where he or she felt it necessary to do so.

---

33 See ch 5 for details of the current requirement of domicile.

34 See paras 12.5 and subsequent for details on this proposed reform.

35 We envisage that court staff would assess the complexity of the international case on a review of the file, before deciding whether to assign initially to a circuit court judge or High Court judge.

36 Judicial office-holders can be required to be "authorised" to deal with different types of cases, which is often referred to as "ticketing". It may be necessary for the ticketed judge to undertake specialist training. In surrogacy, a small number of circuit judges could be ticketed to hear parental order applications.

Consultation Question 1.

6.42 We invite consultees' views as to whether, in England and Wales:

(1) all international surrogacy arrangements should continue to be automatically allocated to a judge of the High Court; and

(2) if international surrogacy arrangements are not automatically allocated to a judge of the High Court, circuit judges should be ticketed to hear such cases.

Domestic surrogacy arrangements which do not qualify for the new pathway

6.43 If our provisional proposals for the new pathway to parenthood are carried forward, the remaining domestic parental order cases are likely to be a combination of two types of cases.

6.44 The first are cases where the surrogate decides to exercise her post-birth right to object in the new pathway. As stated above, domestic cases where one of the respondents objects to the grant of a parental order are already heard by a circuit judge rather than a panel of lay justices.[37] We do not propose to alter this position, and we envisage that cases which do not qualify for the new pathway as a result of the surrogate's exercise of her right to object would also be heard by a circuit judge.[38]

6.45 The second types of case are independent traditional surrogacy arrangements which may be outside the framework of our new pathway to parenthood.[39] These arrangements will not have involved a licensed clinic or a surrogacy organisation. If this is the case, these arrangements will have taken place with less oversight than some of the current domestic cases heard by lay justices, namely those which have come through a clinic or surrogacy organisation.

6.46 We accept that this lack of oversight does not necessarily make these cases more complicated than current domestic cases. We think, however, that there is the potential for this to be the case. Surrogacy arrangements that involve a licensed clinic or surrogacy organisation have the benefit of the experience and oversight that these bodies bring. We believe that their advice, support and supervision reduces the potential for issues or problems to arise that require a court to resolve.

6.47 It may be thought appropriate, in such cases, for a degree of oversight to be provided by a district or circuit judge rather than a panel of lay justices.

6.48 Perhaps more significantly, as mentioned at the start of this section, judges and lawyers expressed concern regarding the current lack of scrutiny by lay justices in

---

37 Family Court (Composition and Distribution of Business) Rules 2014 (SI 2014 No 840), sch 1(3)(c).

38 If following the exercise of her right to object the surrogate consents to the parental order, then the case could be heard by the lay justices, or by another level of the judiciary if lay justices cease to hear parental order applications.

39 We have asked an open question as to if, and how, independent surrogacy arrangement should be brought into the new pathway – see paras 9.30 and subsequent.

parental order cases over issues such as expenses and consent. Regardless of the anticipated complexity of these remaining domestic cases, therefore, these concerns around the lay justices would remain. One problem, for example, is that there is no way at the moment for individual lay justices to build up experience in surrogacy arrangements in the same way as it is possible for judges through the ticketing system.

6.49 However, we are also aware of the current financial pressures on the court system.[40] Whilst budgetary pressures should not be the principal driver of reforms in this area, we think that these pressures are one relevant factor, amongst a number of others. Another relevant factor is the practical advantages of the courts in which the lay justices sit, such as their greater geographical spread around the country, and often more informal setting. Lay justices also already hear challenging, and difficult, proceedings under ACA 2002. For example, they have jurisdiction to decide upon applications for placement orders by local authorities. Placement orders are the first step towards a final adoption order, and give permission to a local authority to remove a child from its legal parents and place him or her for adoption.[41]

6.50 In light of the split of views on this issue, we have decided to invite consultees' views on this issue, rather than making a provisional proposal.

Consultation Question 2.

6.51 We invite consultees' views as to whether, in respect of England and Wales

(1) domestic surrogacy cases which continue to require a post-birth parental order should continue to be heard by lay justices, or whether they should be allocated to another level of the judiciary; and

(2) If consultees consider that such cases should be allocated to another level of the judiciary, which level of the judiciary would be appropriate.

6.52 In addition to asking consultees for their views on the above potential reforms to the allocation rules, we would also welcome any evidence that consultees could provide to either support the potential reforms to allocation that we have discussed above or, conversely, the retention of the current rules. This would greatly assist us in supporting any final recommendations that we make to Government in our final report.

---

40 The departmental resource budget for the Ministry of Justice will shrink from £6.3bn in 2018/19 to £6bn in 2019/20 (HM Treasury, *Budget 2018* (HC 1629)) p 24. Lay justices are volunteers from the community who are not salaried, but can claim expenses and loss of earnings for their services.

41 The Family Court (Composition and Distribution of Business) Rules 2014 (SI 2014 No 840), sch 1 para 5.

Consultation Question 3.

6.53 We invite consultees to provide any evidence that would support either the retention of the current allocation rules, or their reform along the lines that we discuss in Consultation Questions 1 and 2.

The first directions hearing

6.54 The next substantive step in the proceedings after a case has been allocated to a court will be the first directions hearing, where the court must consider a prescribed list of matters.[42] The primary aim of a directions hearing is for the court to set up a timetable to the final hearing. Amongst the list of prescribed matters, the court is required to fix a timetable for the filing of evidence, including the report of the parental order reporter. The court is also required to consider whether the case needs to be transferred to another court.[43]

6.55 The court is not currently required to consider granting the applicants parental responsibility ("PR") pending the final hearing.[44] We understand, however, that the High Court judges often do consider the issue of PR at the first directions hearing. This results in the court making an order which grants the intended parents PR, such as a child arrangements order providing that the child should live with the intended parents. We have the impression that the making of such an order is not as common when the case is heard by lay justices.

6.56 In Chapter 8 we have provisionally proposed that all intended parents (whether in the new pathway or not) should automatically acquire PR if the child is living with them. If this proposal is supported by consultees, then the need for a court to grant PR to the intended parents falls away.

6.57 If that provisional proposal is not supported, however, then as an alternative we think that the court should be required to consider whether to make an order providing the intended parents with PR at the first directions hearing. Imposing such a requirement will act as a useful prompt for all judges to consider this issue, and improve consistency across cases.

---

42 FPR 2010, r 13.9(1).

43 FPR 2010, r 13.9(1).

44 For a discussion of the current law on PR, see ch 4.

Consultation Question 4.

6.58 We provisionally propose that, in England and Wales, the court should be placed under a duty to consider whether to make an order awarding the intended parents parental responsibility at the first directions hearing in the proceedings.

Do consultees agree?

(Note that this provisional proposal would be necessary only if our provisional proposal in Chapter 8 that all intended parents (whether in the new pathway or not) automatically acquire parental responsibility if the child is living with or being cared for by them is not supported by consultees).

6.59 Unless the court directs otherwise, the first directions hearing must be heard within four weeks beginning with the date on which the application is issued.[45] The default rule is that a first directions hearing takes place in person, although the court may instead issue written directions to the parties.[46]

6.60 We heard from many stakeholders that delays mean that the court can now rarely hear the directions hearing within the stated aim of four weeks from issue. Solicitors reported to us the example of a case issued in January which was not listed for its first directions hearing until June. We remain of the view, however, that a directions hearing in person should remain the default rule, especially as we think that cases coming through the parental order process may become more complex, if our reforms to parenthood are introduced.

The parental order reporter

6.61 As soon as practicable after the issue of proceedings, the court will appoint a parental order reporter.[47]

6.62 As noted by commentators, the parental order reporter plays an important part in ensuring that the wishes of the child are heard by the court.[48] In cases where the respondents freely consent to the making of the parental order, the parental order reporter ensures that an independent voice is heard by the court.

6.63 The duties of the parental order reporter are set out in Part 16 of the FPR 2010. The parental order reporter acts on behalf of the child with the duty of safeguarding the interests of the child.[49]

---

45 FPR 2010, r 13.8.

46 FPR 2010, r 13.5(2).

47 FPR 2010, r 13.5(1)(a)(iii).

48 R Cabeza, V Flowers, E Pierrot, A Rao, B O'Leary and L Odze, *Surrogacy: Law, Practice and Policy in England and Wales* (1st ed 2018) para 3.46.

49 FPR 2010, r 16.35.

6.64 Amongst the parental order reporter's duties, the two primary ones are to:

(1) investigate the matters set out in sections 54 and 54A of the HFEA 2008;[50] and

(2) advise the court on whether the child's welfare requires the court to grant, or refuse, a parental order.[51]

The parental order report

6.65 The advice of the parental order reporter may be given orally or in writing, although the default rule is that a written report is required.[52]

6.66 A report (whether written or oral) to the court by the parental order reporter is, by default, confidential, and is not disclosed to the parties to the proceedings.[53] The court will consider, however, whether to give a direction that a confidential report of the parental order reporter be disclosed to each party in the proceedings.[54] Before giving a direction to permit the disclosure of the report, the court will consider whether any information should be deleted from the report.[55]

6.67 For the reasons set out below, we are concerned that courts may not always be directing the release the parental order report to the intended parents before the final hearing. This omission may stem from the fact that, we understand, domestic surrogacy cases before the lay justices may not always have a first directions hearing in person. Instead, written directions may be sent to the parties.[56]

6.68 If these written directions do not contain a direction to release the parental order report to the parties, then the only other opportunity for the lay justices to make such a direction is at the end of the final hearing.

6.69 We take the view that a direction at this stage is potentially too late. The final hearing is when the parental order will be granted or refused. This decision will be based, at least in part, on the contents of the parental order report. We think that it is worrying that a decision may be taken by the court based on the report without the intended parents having had a chance to see, let alone comment upon, its contents.

6.70 We also appreciate that the parental order reporter's duty is to act on behalf of the child who is the subject of parental order proceedings.[57] The parental order reporter must be able to do this without fear of interference or pressure from the intended parents.

---

50 See ch 5.

51 FPR 2010, r 16.35(2).

52 FPR 2010, PD 16A, para 10.5(a).

53 FPR 2010, r 16.35(5).

54 FPR 2010, r 13.12(1).

55 FPR 2010, r 13.12(2).

56 Where it considers appropriate, the court may, instead of setting a date for a first directions hearing, give the written directions provided for in rule 13.9 (FPR 2010, r 13.5(2)).

57 FPR 2010, r 13.1(2).

6.71 We think that the court is best placed to decide whether and when a parental order report should be released to the parties. But we think that the default rule ought to be reversed – the parental order report should be released to the parties to the parental order proceedings unless the court directs otherwise. Reform along these lines would bring England and Wales in line with Scotland.[58] We note that the court's operational processes will need to ensure that a judge or legal adviser looks at the parental order report before it is sent to the parties. This will ensure that the judge or legal adviser is happy for the default rule to apply, and to consider whether to exercise the court's power to delete information from the report before it is released.[59]

Consultation Question 5.

6.72 We provisionally propose that the rule currently contained in rule 16.35(5) of the FPR 2010 should be reversed, so that a parental order report is released to the parties in the proceedings by default, unless the court directs otherwise.

Do consultees agree?

Does the parental order reporter have to physically see the child?

6.73 The FPR 2010 do not require the parental order reporter to physically see the surrogate-born child, either in the presence of the applicants or otherwise. This is because the current legislation does not specify that the child's or the applicants' home must be in the UK.[60]

6.74 The courts have made clear, however, that ordinarily they would expect any parental order reporter to visit the child. They have said that a parental order reporter must see the child with the intended parents unless there are:

> compelling and exceptional reasons based on the child's welfare why such observations cannot take place or where there is sufficient independent evidence pertaining to the child's welfare from an alternative source.[61]

6.75 There is only one reported case where the court accepted that it was not necessary for the parental order reporter to see the child (who was already living with the intended parents in South Africa).[62] The court felt that it was able to reach this conclusion because there was a comprehensive, independent report from a South African social worker on which both the parental order reporter and the court could rely.[63]

---

58 See para 6.100.

59 The court already has this power under FPR 2010, r 13.12(2).

60 As noted by the High Court in the case *CC v DD* [2014] EWHC 1307 (Fam), [2015] 1 FLR 704.

61 *Foreign Surrogacy: Allocation of Work: Guidance on Parental Order Reports)* [2015] EWFC 90, [2017] 4 WLR 5 at [86].

62 *Re A (Foreign Surrogacy: South Africa*) [2015] EWHC 1756 (Fam), [2015] Fam Law 1051.

63 *Re A (Foreign Surrogacy: South Africa*) [2015] EWHC 1756 (Fam), [2015] Fam Law 1051 at [20].

6.76 We have not heard anything to suggest that there is a need for change in this area, and we do not make any provisional proposals for reform on this issue.

The final hearing

6.77 The final hearing is when the court considers whether to make the parental order.

6.78 The primary purpose of the final hearing is to ensure that the conditions in sections 54 and 54A of the HFEA 2008 have been met and, following the 2010 amendments, whether the child's welfare, throughout his or her life, will be furthered by the making of the parental order.[64]

The final order

6.79 If the court decides that a parental order should be made, the order takes effect from the date when it is made, or such later date as the court may specify.[65]

THE SCOTTISH PARENTAL ORDER PROCEDURE

6.80 In Scotland, an application for a parental order is by petition to either the Court of Session or a sheriff court. The relevant procedure is set out, in the Court of Session, in the Rules of the Court of Session and in the sheriff court, the Child Care and Maintenance Rules 1997.[66]

6.81 In relation to a child who is in Scotland, jurisdiction lies with the Court of Session or sheriff court of the sheriffdom where the child is; and, in relation to a child who is not in Scotland, with the Court of Session.[67] Unless the court directs otherwise, proceedings must be heard and determined in private.[68]

6.82 As set out above in relation to the procedure for applying for a parental order in England and Wales, the conditions laid down by sections 54 or 54A of the HFEA 2008, as may be appropriate, must be satisfied before a parental order may be made.

The applicants

6.83 The applicant or applicants will be the intended parent or parents. As the order can be made only if the surrogate, and where applicable her spouse or civil partner, agrees or cannot be found or is incapable of giving agreement, there will not usually be respondents.[69]

6.84 As mentioned at paragraph 6.12 above, we have made a provisional proposal that, in the suggested new pathway, the surrogate's spouse or civil partner should no longer

---

64 ACA 2002, s 1, as applied and modified by the 2018 Regulations, sch 1 para 2.

65 FPR 2010, r 13.20.

66 Act of Sederunt (Rules of the Court of Session 1994) (SI 1994 No 1443), ch 97 as amended, and the Act of Sederunt (Child Care and Maintenance Rules) 1997 (SI 1997 No 291), ch 2, Pt VI as amended.

67 AC(S)A 2007, s 118, as applied and modified by the 2018 Regulations, reg 3 and sch 2 para 26. (As an alternative to domicile as the basis for jurisdiction specified in the HFEA 2008, we intend to introduce habitual residence as an alternative: see paras 12.5 and subsequent.

68 AC(S)A 2007, s 109, as applied and modified by the 2018 Regulations, reg 3 and sch 2 para 21.

69 HFEA 2008, ss 54(6) and (7) and 54A(5) and (6).

become the child's legal parent.[70] We have asked an open question on this subject for cases under the existing parental order route.[71] If the law was reformed to the effect that the surrogate's spouse or civil partner was no longer a legal parent of the child, then his or her consent to the making of the order would no longer be required.

The form of the petition

6.85 The contents of the petition are set out in the relevant court rules.[72] As in the procedure for England and Wales, basic details about the applicants and the child are required along with the genetic connection or connections. The petition will also set out that the surrogate, and where applicable her spouse or civil partner, has/have consented to the making of the order or, alternatively, that they cannot be found or are incapable of giving such consent.

6.86 In the latter situation, the prayer of the petition asks the court to dispense with the agreement of these parties. This is not consistent with the wording of the HFEA 2008 which is to the effect that the agreement of such a person or persons is not required.[73] It also includes a statement that no money or benefit, other than for expenses reasonably incurred, has been given or received by the applicants for or in consideration of the making of the order sought.

6.87 In the chapter on access to information, we have proposed changes to the form of petition to ensure that the child continues to have access to its gestational and genetic origins.[74]

6.88 Several documents must be lodged in process along with the petition. These include an extract or certified copy of the child's birth certificate, extracts or certified copies of the applicants' birth certificates, and, where appropriate, an extract or certified copy of the applicants' marriage certificate or entry in the Register of Civil Partnerships, and any other document founded on in support of the petition.[75]

6.89 In the Court of Session, the usual petition rules for first orders; intimation and service; and the procedure when answers are lodged and unopposed petitions do not apply.[76]

---

70 See para 8.57.

71 See para 8.58.

72 Act of Sederunt (Rules of the Court of Session 1994) (SI 1994 No 1443), ch 97 as amended, r 97.3(1) and form 97.3; Act of Sederunt (Child Care and Maintenance Rules) 1997 (SI 1997 No 291), ch 2, Pt VI as amended, r 2.46(1) and form 22.

73 HFEA 2008, ss 54(7) and 54A(6).

74 Consultation question 47

75 Act of Sederunt (Rules of the Court of Session 1994) (SI 1994 No 1443), ch 97 as amended, r 97.3(2); the Act of Sederunt (Child Care and Maintenance Rules) 1997 (SI 1997 No 291), ch 2, Pt VI as amended, r 2.46(2).

76 Act of Sederunt (Rules of the Court of Session 1994) (SI 1994 No 1443), ch 97 as amended, r 97.2.

Consenting to the making of a parental order

6.90 Those who are required to consent to the making of a parental order must give their consent on the prescribed form.[77] The form states that the person giving consent fully understands that the effect of the making of a parental order in respect of the child will be to extinguish all the parental responsibilities and parental rights which that person has at that time in respect of the child.[78]

6.91 Where it is executed in Scotland, the form of agreement must be witnessed by the reporting officer appointed under the rules of court; further rules apply where it is executed outwith Scotland but within the United Kingdom or outwith the United Kingdom.[79]

Parental responsibilities and parental rights

6.92 In Chapter 8, we state that our provisional proposal is that all intended parents (whether in the proposed new pathway or not) would automatically acquire parental responsibilities and parental rights if the child is living with them or is being cared for by them. This would address the current situation in England and Wales, where although the court is not required to consider granting the applicants parental responsibility pending the final hearing, there is a lack of consistency of approach. Often High Court judges do consider the issue of parental rights at the first directions hearing but this might not be so prevalent when the case is considered by lay justices.[80]

6.93 If that proposal is not supported, we propose that the court should be placed under a duty at the first directions hearing to consider whether or not to make an order awarding the intended parents parental responsibility.[81]

6.94 In Scotland, it is not usually considered necessary at the initial hearing to grant orders in relation to parental responsibilities and parental rights. There might, however, be circumstances in which such an order is required, for example if the child is in need of urgent medical treatment and consent to that treatment had to be obtained. The petition procedure does not appear to accommodate applications for interim orders of that kind, and we therefore think that, in current practice, separate proceedings would need to be raised in the Court of Session or in the sheriff court under section 11 of the Children (Scotland) Act 1995.

6.95 Proceedings under that section require to be served on various persons, including the parents or guardian of the child, and may require to be intimated to the relevant local

---

77 Act of Sederunt (Rules of the Court of Session 1994) (SI 1994 No 1443), ch 97 as amended, r 97.10(1) and Form 97.10; Act of Sederunt (Child Care and Maintenance Rules) 1997 (SI 1997 No 291), ch 2, Pt VI as amended, r 2.52(1) and form 23.

78 Form 97.10, para (1); form 23, para (1).

79 Act of Sederunt (Rules of the Court of Session 1994) (SI 1994 No 1443), ch 97 as amended, r 97.10(2); Act of Sederunt (Child Care and Maintenance Rules) 1997 (SI 1997 No 291), ch 2, Pt VI as amended, r 2.52(2).

80 See para 6.55 above.

81 See consultation question 4 above.

authority.[82] It seems to us that it might be helpful to streamline this process by making statutory provision to allow the making of interim orders for parental responsibilities and parental rights at the initial hearing and at any subsequent hearing.

Appointment of curator *ad litem* and reporting officer

6.96 On the presentation of a petition for a parental order, the court must appoint a curator *ad litem* and a reporting officer.[83] It is possible to seek the appointment of a reporting officer, on cause shown, before presentation of the petition.[84] The same person usually acts in both roles; in the sheriff court the role is generally assumed by a solicitor and, in the Court of Session, by Counsel.[85]

6.97 A curator *ad litem* has the duty of safeguarding the interests of the child in such manner as may be prescribed by rules of court.[86] The rules of court provide that a curator *ad litem* must:

(1) have regard to safeguarding the interests of the child as his or her paramount duty;

(2) enquire, so far as he or she considers necessary, into the facts and circumstances set out in the petition;

(3) establish that the petitioners understand the nature and effect of a parental order and in particular that the making of the order will render them responsible for the maintenance and upbringing of the child;

(4) ascertain whether any money or other benefit which is prohibited by section 54(8) (or 54A(7)) of the HFEA 2008 has been received or agreed upon;

(5) ascertain whether it may be in the interests of the welfare of the child that the court should make the parental order subject to particular terms and conditions or require the petitioners to make special provision for the child and, if so, what provision;

(6) ascertain whether it would be better for the child that the court should make the order or not make the order;

(7) establish whether the proposed parental order is likely to safeguard and promote the welfare of the child throughout the child's life; and

---

82 For the details see Act of Sederunt (Rules of the Court of Session 1994) (SI 1994 No 1443), ch 97 as amended, rr 49.8(1)(f), (g) and 49.60; Act of Sederunt (Child Care and Maintenance Rules) 1997 (SI 1997 No 291), ch 2, Pt VI as amended, rr 33.7(1)(f), 33.12 and 33.62.

83 Act of Sederunt (Rules of the Court of Session 1994) (SI 1994 No 1443), ch 97 as amended, r 97.8(1); Act of Sederunt (Child Care and Maintenance Rules) 1997 (SI 1997 No 291), ch 2, Pt VI as amended, r 2.50(1).

84 Act of Sederunt (Rules of the Court of Session 1994) (SI 1994 No 1443), ch 97 as amended, rr 97.8(4), (5), (7) and (8); Act of Sederunt (Child Care and Maintenance Rules) 1997 (SI 1997 No 291), ch 2, Pt VI as amended, rr 2.50(4), (5) and (6).

85 Act of Sederunt (Rules of the Court of Session 1994) (SI 1994 No 1443), ch 97 as amended, r 97.8(2); Act of Sederunt (Child Care and Maintenance Rules) 1997 (SI 1997 No 291), ch 2, Pt VI as amended, r 2.50(2).

86 AC(S)A 2007, s 108(1)(a) as applied and modified by reg 3 and sch 2 para 20 of the 2018 Regulations.

(8) ascertain from the child whether he or she wishes to express a view and, where a child indicates his or her wish to express a view, ascertain that view. [87]

6.98 The curator *ad litem* must report in writing on all of the abovementioned matters to the court within four weeks from the date of the interlocutor appointing the curator or within such other period as the court may allow. The curator *ad litem* must also send to the court a copy of the report for each party.[88]

6.99 The purpose of a reporting officer is to witness agreements to the parental order and to perform such other duties as may be prescribed by rules of court.[89] Those other duties are:

(1) to ascertain the whereabouts of all persons whose agreement to the making of a parental order in respect of the child is required;

(2) to ascertain whether there is any person other than those mentioned in the petition upon whom notice of the petition should be served;

(3) in the case of each person who is not a petitioner and whose agreement to the making of a parental order is required under section 54(6) (or 54A(5)) of the HFEA 2008:

(a) to ascertain whether that person understands the effect of the parental order;

(b) to ascertain whether alternatives to a parental order have been discussed with that person;

(c) to confirm that that person understands that he or she may withdraw his or her agreement at any time before an order is made;

(d) to ascertain whether that person suffers or appears to suffer from a mental disorder within the meaning of section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003;

(4) to ascertain whether the conditions in subsections (2) to (8) of section 54 (or 54A(2) to (8)) of the HFEA 2008 have been satisfied;

(5) to draw to the attention of the court any matter which may be of assistance; and

(6) to report in writing on the matters mentioned in paragraphs (1) to (5) above, to the court within four weeks from the date of the interlocutor appointing the

---

87 Act of Sederunt (Rules of the Court of Session 1994) (SI 1994 No 1443), ch 97 as amended, r 97.9(2); Act of Sederunt (Child Care and Maintenance Rules) 1997 (SI 1997 No 291), ch 2, Pt VI as amended, r 2.51(2).

88 Act of Sederunt (Rules of the Court of Session 1994) (SI 1994/1443), ch 97 as amended, r 97.9(6); the Act of Sederunt (Child Care and Maintenance Rules) 1997 (SI 1997/291), ch 2, Pt VI as amended, r 2.51(6).

89 AC(S)A 2007, s 108(1)(b) as applied and modified in by reg 3 and sch 2 para 20 of the 2018 Regulations.

reporting officer, or within such other period as the court may allow.[90] The reporting officer must also send to the court a copy of the report for each party and any agreement for the purposes of section 54(6) (or 54A(5)) of the HFEA 2008.[91]

6.100 There is provision in both sets of rules for all documents lodged in process (including reports by the curator *ad litem* and reporting officer) to be available to the court, the curator *ad litem*, the reporting officer and the parties.[92] This contrasts with the position in England and Wales where the default position is that the report by the parental order reporter is not disclosed to the parties to the proceedings. There is a proposal at Consultation Question 5 above that the default position should be altered so that the report is released to the parties to the proceedings. This would bring the procedure into line with the procedure in Scotland.

6.101 As to the expense of such officers, the court may make an order as to expenses as it thinks fit.[93] Stakeholders have drawn to our attention an apparent inconsistency of approach and lack of transparency, firstly as to what can competently be charged by way of expenses and, secondly, where the responsibility for payment of those expenses lies.

6.102 Certain panels are established from which curators *ad litem* and reporting officers may be appointed.[94] Whereas in the Court of Session, if there is an established panel, the officers must be selected from that panel unless the court considers that it would be appropriate to appoint a person who is not on the panel,[95] the emphasis is different in the sheriff court. In the sheriff court, the rules of court provide that the sheriff may appoint a person who is not a member of a panel.[96] It appears that in some areas the expenses of such officers are met from the public purse but in others the expenses fall on the applicants. Such a difference of approach does not seem to us to be appropriate.

6.103 We invite consultees' views on whether there is a need for greater consistency and clarity in provisions relating to the expenses of curators *ad litem* and reporting officers and, if so, how this should be addressed.

6.104 There does not appear to be any formal requirement that the *curator ad litem* or reporter should see the child in person. Nonetheless, we understand that, in order to

---

90 Act of Sederunt (Rules of the Court of Session 1994) (SI 1994 No 1443), ch 97 as amended, r 97.9(1); Act of Sederunt (Child Care and Maintenance Rules) 1997 (SI 1997 No 291), ch 2, Pt VI as amended, rule 2.51(1).

91 Act of Sederunt (Rules of the Court of Session 1994) (SI 1994 No 1443), ch 97 as amended, r 97.9(2); Act of Sederunt (Child Care and Maintenance Rules) 1997 (SI 1997 No 291), ch 2, Pt VI as amended, r 2.51(2).

92 Act of Sederunt (Rules of the Court of Session 1994) (SI 1994 No 1443), ch 97 as amended, r 97.4; Act of Sederunt (Child Care and Maintenance Rules) 1997 (SI 1997 No 291), ch 2, Pt VI as amended, r 2.47.

93 Act of Sederunt (Rules of the Court of Session 1994) (SI 1994 No 1443), ch 97 as amended, r 97.6; Act of Sederunt (Child Care and Maintenance Rules) 1997 (SI 1997 No 291), ch 2, Pt VI as amended, r 2.2.

94 The Curator ad *litem* and Reporting Officers (Panels) (Scotland) Regulations 2001 (SSI 2001 No 477).

95 Act of Sederunt (Rules of the Court of Session 1994) (SI 1994 No 1443), ch 97 as amended, r 97.8(3).

96 Act of Sederunt (Child Care and Maintenance Rules) 1997 (SI 1997 No 291), ch 2, Pt VI as amended, r 2.50(3).

satisfy the requirement to inquire into all the facts and circumstances, they would usually do so. If the child was not living with the intended parents, efforts would usually be made to obtain information relevant to welfare from a reliable source, such as the Social Work Department.

Hearing

6.105 The relevant rules of court reflect the difference in procedure between the Court of Session and sheriff court but are generally the same as to intimation, appearance and representation.[97]

6.106 If the requirements of sections 54 or 54A of the HFEA 2008 are met, the court may make a parental order; the order may be made subject to terms and conditions.[98]

Proposals for reform

6.107 As we have seen elsewhere in this Consultation Paper,[99] the number of parental order applications which proceed through the Scottish courts is small. Dialogue with the judiciary and practitioners suggests that the current procedure relating to such applications generally works efficiently and effectively. This view is also borne out by the experience of one intended parent to whom we spoke who applied for and obtained a parental order without legal representation.

6.108 As mentioned above,[100] we provisionally propose that the form of the petition be altered to ensure that the child continues to have access to its gestational and genetic origins.[101] We also seek the views of consultees as to:

(1) whether there is a need for greater consistency and clarity in provisions relating to the expenses of curators *ad litem* and reporting officers;[102]and

(2) on whether it should be provided by statute that, at the initial hearing or any subsequent hearing for a parental order, the court may make any such interim order or orders for parental responsibilities and parental rights as it sees fit.[103]

6.109 We also ask whether further procedural reform is needed and, if so, what that reform should be.

---

97 Act of Sederunt (Rules of the Court of Session 1994) (SI 1994 No 1443), ch 97 as amended, r 97.12; Sheriff Court Rules, r 2.54.

98 AC(S)A 2007, s 28(3) as applied and modified by reg 3 and sch 2 para 6 of the 2018 Regulations.

99 See ch 1.

100 Para 6.87 above.

101 This proposal is discussed in detail in ch 10.

102 Para 6.103 above.

103 Para 6.95 above.

Consultation Question 6.

6.110 We invite consultees' views as to whether they are of the view that, in Scotland:

(1) there is a need for greater consistency and clarity in provisions relating to the expenses of curators *ad litem* and reporting officers and, if so, how this should be addressed;

(2) it should be provided by statute that, at the initial hearing or any subsequent hearing for a parental order, the court may make any such interim order or orders for parental responsibilities and parental rights as it sees fit; and/or

(3) further procedural reform is needed and, if so, what that reform should be.

Chapter 7: The reform of legal parenthood and parental responsibility

INTRODUCTION

7.1 By "legal parenthood" we simply mean the person or people whom the law treats as the parent(s) of a child. Currently, when a child is born as a result of a surrogacy arrangement, the legal mother at birth is the surrogate. The legal father, or second parent, is usually the surrogate's spouse or civil partner, if she has one,[1] or one of the intended parents if the surrogate is single. The intended parents then acquire legal parenthood of the child through the grant of a parental order, under sections 54 and 54A of the HFEA 2008.[2]

7.2 The next two chapters consider the question of whether there should be a change in how intended parents become the legal parents of the child. This chapter then begins by asking why legal parenthood is important, and who should be a child's legal parents. The chapter then considers the specific issues around changing the attribution of legal parenthood in surrogacy cases. We also identify the aim of reform and the options for reform. In the subsequent chapter, we set out provisional proposals on the reform of legal parenthood in relation to children born as the result of a surrogacy arrangement.

7.3 Our key provisional proposal is for the creation of a new surrogacy pathway which, when followed, would mean that the intended parents of a surrogate-born child are the child's legal parents from birth, unless the surrogate objects. The consequence of this provisional proposal is that the surrogate would not be the legal parent of the baby or babies to whom she has given birth. As we explain, in making this proposal we had paid particular regard to the views of both intended parents and, importantly, surrogates, who have spoken to us. The overwhelming view of intended parents and surrogates is that recognising the intended parents as legal parents from birth reflects the wishes and intentions of all the parties to a surrogacy arrangement. We take the view that the law should reflect what the parties intend in terms of legal parenthood and that it can do so because, as we explain in this chapter, we think that this will best promote the welfare of the child.

7.4 While we focus on proposals for the creation of a new surrogacy pathway to legal parenthood for the intended parents, we also provisionally propose a reform of legal parenthood with respect to a surrogate's partner or spouse that would apply outside the new pathway. We ask questions about alternatives to our proposal for legal parenthood and the factors that the court should be directed to take into account when deciding whether to make a parental order, and when faced with a surrogacy arrangement that has broken down. We also make provisional proposals with regard

---

1 See paras 4.25 and subsequent.

2 See ch 4. The parental order also removes the status of the surrogate as legal parent.

to parental responsibility that would apply across both the new pathway and the existing scheme of parental orders.[3]

WHY IS LEGAL PARENTHOOD IMPORTANT?

7.5 Mr Justice Cobb said in the case of *AB and CD v The Z Fertility Clinic*[4] that*:*

> Law and society have always attached a special significance to a person's status, and "parentage" confers status – on both the adult and on the child.[5]

7.6 As the judge summarised in the same case, the legal status of "parent" carries with it implications for:

> (i) the law relating to contact and residence (that is with whom the child should have contact and with whom the child should live) …;
>
> (ii) child maintenance [that is, financial support for the child] …;
>
> (iii) inheritance …;
>
> (iv) bringing and defending proceedings about the child … and importantly:
>
> (v) making the child a member of that person's family.[6]

7.7 To this list could also be added citizenship rights under the British Nationality Act 1981, which are determined by reference to legal parenthood, and which we discuss further in relation to international surrogacy arrangements in Chapter 16..[7]

7.8 The legal consequences outlined above that attach to legal parenthood "represent a core body of rights and responsibilities that flow from the fact that X is Y's child and belongs to Y's family".[8]

7.9 But perhaps more importantly, the legal relationship between a parent and a child also supplies a whole legal family for that child:

---

3 We explain the difference between legal parenthood and parental responsibility in ch 4.

4 [2013] EWHC 1418 (Fam), [2013] 2 FLR 1357.

5 *AB and CD v The Z Fertility Clinic* [2013] EWHC 1418 (Fam), [2013] 2 FLR 1357 at [1].

6 *AB and CD v The Z Fertility Clinic* [2013] EWHC 1418 (Fam), [2013] 2 FLR 1357 at [2].

7 See, for example, British Nationality Act 1981, s 1(1):

> A person born in the United Kingdom after commencement … shall be a British citizen if at the time of the birth his *father or mother* is—
>
> (a) a British citizen; or
>
> (b) settled in the United Kingdom or that territory (emphasis added).

We note that legal parenthood for the purposes of the British Nationality Act 1981 has its own statutory definition, set out at sections 50(9) and 50(9A), which is separate to the one under the HFEA 2008.

8 S Harris-Short and J Miles, *Family Law (Text Cases and Materials)* (3rd ed 2015) p 602.

> The first [fundamental effect of legal parenthood] is arguably the most important and is also the most frequently neglected. That is that legal parenthood, but not parental responsibility, makes a child a member of a family, generating for that child a legal relationship with a wider kin going well beyond the parental relationship… .[9]

7.10 Being a legal parent is also an enduring status "ending only through death or the child's adoption".[10] Taken together, it is clear, therefore, that, as Lord Hope has written, the attribution of legal parenthood, "will have a vital and long lasting part to play throughout the child's lifetime".[11]

WHO MIGHT THE LAW RECOGNISE AS A CHILD'S LEGAL PARENTS?

7.11 If legal parenthood is important, then, equally important is what the law says about who should be a child's legal parents. In Chapter 4 where we discuss the current law on parenthood as it applies to surrogacy, we set out the general rules on who the common law and statute say are the legal parents of a child.

7.12 However, the question of who is a parent can be answered in a number of different ways, each of which might provide the basis for the status of being a legal parent. In some cases, the legal parents will accord with who we might naturally regard as the parents for all purposes. For example, where a woman gives birth to a child, and she and her husband are the biological parents of the child, and care for the child, they are parents for all purposes. However, in many cases, the different functions of parenthood will not be unified in this way. For example, the child may have a stepfather or stepmother who is not biologically related to the child, but who care for him or her.

7.13 Lady Hale has expanded on this idea and commented on the three categories of person who may be or become a "natural" parent and, therefore, who the law could recognise as the child's legal parent. It is worth quoting the passage at length.

> The first is genetic parenthood: the provision of the gametes which produce the child. This can be of deep significance on many levels. For the parent, perhaps particularly for a father, the knowledge that this is "his" child can bring a very special sense of love for and commitment to that child which will be of great benefit to the child … For the child, he reaps the benefit not only of that love and commitment, but also of knowing his own origins and lineage, which is an important component in finding an individual sense of self as one grows up. The knowledge of that genetic link may also be an important (although certainly not an essential) component in the love and commitment felt by the wider family, perhaps especially grandparents, from which the child has so much to gain.

---

9 A Bainham, "Parentage, Parenthood and Parental Responsibility" in A Bainham, S Day Sclater and M Richards (eds), *What is a Parent? A Socio-Legal Analysis* (1999) p 27.

10 J Masson, "Parenting by Being; Parenting by Doing – In Search of Principles for Founding Families" in J R Spencer and A du Bois-Pedain (eds), *Freedom and Responsibility in Reproductive Choice* (2006) pp 131 to 132. The same is true of a parental order under HFEA 2008, ss 54 and 54A, which extinguishes legal parenthood for at least one person – namely the surrogate.

11 *Re D* [2005] UKHL 33, [2005] 2 AC 621 at [6].

> The second is gestational parenthood: the conceiving and bearing of the child. The mother who bears the child is legally the child's mother, whereas the mother who provided the egg is not … While this may be partly for reasons of certainty and convenience, it also recognises a deeper truth: that the process of carrying a child and giving him birth (which may well be followed by breast-feeding for some months) brings with it, in the vast majority of cases, a very special relationship between mother and child, a relationship which is different from any other.
>
> The third is social and psychological parenthood: the relationship which develops through the child demanding and the parent providing for the child's needs, initially at the most basic level of feeding, nurturing, comforting and loving, and later at the more sophisticated level of guiding, socialising, educating and protecting.
>
> Of course, in the great majority of cases, the natural mother combines all three. She is the genetic, gestational and psychological parent. Her contribution to the welfare of the child is unique. The natural father combines genetic and psychological parenthood. His contribution is also unique…
>
> But there are also parents who are neither genetic nor gestational, but who have become the psychological parents of the child and thus have an important contribution to make to their welfare. Adoptive parents are the most obvious example, but there are many others.[12]

7.14 *Re G,*[13] the case in which Lady Hale wrote the passage cited above, concerned a lesbian couple who had separated and disagreed about who their children should live and spend time with. The genetic and gestational (which the judges combine using the term "biological") mother of the children, CG, had argued that in the lower courts insufficient weight had been given to her connection with the children. The lower courts had placed the child's primary home with CW, the children's non-genetic parent.

7.15 The House of Lords agreed with CG. Lady Hale wrote that:

> While CW is their psychological parent, CG is, … both their biological and their psychological parent. In the overall welfare judgment, that must count for something in the vast majority of cases. Its significance must be considered and assessed…[14]
>
> The fact that CG is the natural mother of these children in every sense of that term, while raising no presumption in her favour, is undoubtedly an important and significant factor in determining what will be best for them now and in the future. Yet nowhere is that factor explored in the judgment below.[15]

---

12 *Re G (Residence: Same-Sex Partner)* [2006] UKHL 43, [2006] 4 All ER 241 at [33] to [37].

13 [2006] UKHL 43, [2006] 4 All ER 241.

14 *Re G (Residence: Same-Sex Partner)* [2006] UKHL 43, [2006] 4 All ER 241 at [38].

15 *Re G (Residence: Same-Sex Partner)* [2006] UKHL 43, [2006] 4 All ER 241 at [44].

7.16 Lord Nicholls and Lord Scott arguably went even further in their views on the weight that should be attached to CG's status as the genetic and gestational mother. Lord Nicholls said that:

> the court should always have in mind that in the ordinary way the rearing of a child by his or her biological parent can be expected to be in the child's best interests, both in the short term and also, and importantly, in the longer term. I decry any tendency to diminish the significance of this factor. [16]

7.17 Lord Scott added that "mothers are special".[17]

7.18 The way in which the House of Lords dealt with issues of legal parenthood in *Re G*[18] has been criticised. It has been argued that the case placed undue weight on genetic and gestational motherhood and, therefore, failed to recognise the particularities of parenting in a lesbian couple:

> … the combined effects of CG's legal parenthood and her biologically based natural parenthood – her status – outweighed CW's socially and psychologically based natural parenthood – her actual parenting – in the assessment of welfare. According to the way law allocates parental status, [CW's] parenting was enough to give CW natural parent status, but could never be enough to give her legal parent status. Moreover, because of her sex, it was the best she could do. She could not be a legal parent because she could be neither a father nor another mother.[19]

7.19 The law has moved on, however, since this statement, and, under the HFEA 2008, a woman such as CW can become the child's second legal parent.[20]

7.20 Further, the Supreme Court has since appeared to row back from the view that the interests of parents should occupy a special place in the determination of the welfare of the child. In *Re B*, Lord Kerr wrote that:

> all consideration of the importance of parenthood in private law disputes about residence must be firmly rooted in an examination of what is in the child's best interests. This is the paramount consideration. It is only as a contributor to the child's welfare that parenthood assumes any significance. In common with all other factors bearing on what is in the best interests of the child, it must be examined for its potential to fulfil that aim.[21]

7.21 In surrogacy families, parenthood, as analysed by Lady Hale in *Re G*,[22] is split between the gestational parenthood of the surrogate and the social and psychological

---

16 *Re G (Residence: Same-Sex Partner)* [2006] UKHL 43, [2006] 4 All ER 241 at [2].

17 *Re G (Residence: Same-Sex Partner)* [2006] UKHL 43, [2006] 4 All ER 241 at [3].

18 *Re G (Residence: Same-Sex Partner)* [2006] UKHL 43, [2006] 4 All ER 241.

19 A Diduck, "If only we can find the appropriate terms to use the issue will be solved": Law, identity and parenthood" [2007] *Child and Family Law Quarterly* 458, 464.

20 HFEA 2008, s 42.

21 *Re B (Residence: Biological Parent)* [2009] UKSC 5, [2009] 1 WLR 2496 at [37].

22 *Re G (Residence: Same-Sex Partner)* [2006] UKHL 43, [2006] 4 All ER 241.

parenthood of the intended parents (should the surrogacy arrangement go as planned). Genetic (or biological) parenthood may belong to the intended parents alone, if both their gametes have been used, or be shared either with the surrogate, if her eggs were used in a traditional surrogacy arrangement, a sperm donor, or with an egg donor in a gestational arrangement. Where donor eggs and sperm are used, neither the surrogate nor the intended parents will be the genetic parents of the baby.[23]

7.22 In the recent Court of Appeal case of *Whittington*, Lady Justice King commented:

> children born through surrogacy are legally the child of the commissioning parents upon the making of the parental order. To my mind, however, of equal significance to those who become parents as a result of surrogacy, is that psychologically and emotionally the baby who is born is just as much "their" child as if one of them had carried and given birth to him or her.[24]

PARENTHOOD – THE POSITION UNDER THE ECHR

7.23 The recognition of an intended parent as a legal parent of a surrogate-born child has been considered by the European Court of Human Rights (the "ECtHR").

7.24 In the context of surrogacy, Articles 8, 12 and 14 of the European Convention on Human Rights ("ECHR") are particularly significant.

(1) Article 8 of the ECHR states that "everyone has the right to respect for his private and family life, his home and his correspondence".[25]

(2) Article 12 of the ECHR states that "men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right".[26]

(3) Article 14 of the ECHR states that "the enjoyment of the rights and freedoms set forth in this European Convention on Human Rights shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".[27]

7.25 Article 14 of the ECHR is said to be "parasitic" on other rights in the ECHR, because it can only be invoked in conjunction with another Convention right (such as those contained in Articles 8 and 12 of the ECHR).

---

23 In those circumstances, under the current law, the intended parents would not be able to obtain a parental order: it is a condition of obtaining the order that at least one of the intended parents must have contributed gametes.

24 *XX v Whittington Hospital NHS Trust* [2018] EWCA Civ 2832, [2019] All ER (D) 30 (Jan) at [103].

25 ECHR, art 8.

26 ECHR, art 12.

27 ECHR, art 14.

7.26 The ECtHR's case law on assisted reproduction and surrogacy has focused on Article 8 of the ECHR (sometimes in conjunction with Article 14 of the ECHR), rather than Article 12 of the ECHR. It has been suggested, therefore, that the ECtHR "locates rights relating to parenthood within Article 8's protection for the right to respect for private and family life".[28]

7.27 The ECtHR has recognised that there is a lack of consensus in respect of surrogacy as between states, and that states should be afforded a wide margin of appreciation in respect of surrogacy arrangements.[29] The existence of a wide margin of appreciation means that, unless the result of choices made by the national authorities is clearly unreasonable or disproportionate, or the authorities have not provided the procedural protection required by the ECHR, the ECtHR is unlikely to find that Convention rights have been violated.[30]

7.28 While certain European countries ban the practice of surrogacy, these prohibitions have not prevented citizens of these countries travelling abroad to have a child using surrogacy. To reconcile their domestic law with the existence of a living child, these states have attempted to enforce their prohibition on surrogacy by refusing to recognise the intended parents as the legal parents of the child. This refusal to recognise legal parentage has been the subject of the majority of the ECtHR's decisions on surrogacy to date.

7.29 In the linked cases of *Mennesson v France*[31] and *Labassee v France*[32] the French authorities refused to register the intended parents as the legal parents of a surrogate-born child. Surrogacy is not permitted in France, and the French authorities cited public policy concerns in recognising the intended parents as legal parents, in particular the principle of the inalienability of civil status.[33] In both cases, the French intended parents had entered into international surrogacy arrangements in the USA, using donor eggs and the sperm of the intended father, which resulted in the birth of children who were issued with US birth certificates recognising the intended parents as legal parents.

7.30 The parents challenged the refusal of the French authorities to register them as parents, arguing that it violated the right to private and family life of both them and

---

28 A Mulligan, "Identity Rights and Sensitive Ethical Questions: The European Convention on Human Rights and the Regulation of Surrogacy Arrangements" (2018) 26 *Medical Law Review* 449, 452. For recent analysis on the ECHR, art 8 in this context see M Ní Shúilleabháin, "Surrogacy, System Shopping, and Article 8 of the European Convention on Human Rights" (2019) 33 *International Journal of Law, Policy, and The Family* 104.

29 *Mennesson v France* (App No 65192/11) at [79].

30 "In addition, the court frequently applies a rather procedural test in these cases [where it affords national authorities a wide margin of appreciation] – if it finds that the case has been carefully assessed and decided by the national authorities, it will mostly not find a violation": J Gerards, "Pluralism, Deference and the Margin of Appreciation Doctrine" (2011) 17 *European Law Journal* 80, 105 to 106.

31 *Mennesson v France* (App No 65192/11).

32 *Labassee v France* (App No 65941/11).

33 *Mennesson v France* (App No 65192/11) at [26], citing the decision of the *Cour de cassation* of 6 April 2011. Inalienability of civil status is a concept in French law which states that an individual cannot surrender or transfer elements of their legal personality; a person's legal personality includes whether or not he or she is a parent.

their children, as protected by Article 8 of the ECHR. The Court had no difficulty in holding that the refusal constituted an interference with Article 8 but that it was in accordance with the law. The key question for the ECtHR to decide, therefore, was whether this interference could be justified as being "necessary in a democratic society", as required by Article 8(2) of the ECHR.

7.31 While generally recognising the wide margin of appreciation in respect of surrogacy arrangements and the legal parent-child relationship, the ECtHR held that the margin of appreciation was narrower where the infringement related to parenthood and children's identity.[34] The ECtHR said that a balance had to be struck between the interests of the state and the individuals affected by its actions. Where children were concerned the state must ensure that their best interests received more attention than any other factor.[35]

7.32 Considering the rights of the intended parents under Article 8 of the ECHR, the ECtHR found that the failure of French law to recognise the intended parents as the legal parents caused numerous potential unlawful interferences with the intended parents' right to their family life but that, in practice, these obstacles were not insurmountable. It found that the parents and children were able to live in France in conditions broadly comparable to those of other families.[36]

7.33 However, when considering the children's right to private life, the ECtHR focused on the children's right to personal identity, as an aspect of their right to respect for private life.[37] The Court concluded that by preventing the recognition and establishment under domestic law of the children's legal relationship with their biological father, France had acted disproportionately.[38] There had therefore been a violation of the children's Article 8 rights under the ECHR and the French authorities were obliged to register the intended father as the legal parent. In reaching this decision, however, the ECtHR emphasised the existence of a genetic relationship between the children and the intended father, which will not be present in all surrogacy arrangements.[39]

7.34 The decision in *Mennesson* was expressly approved by the ECtHR in two later decisions, both of which, again, involved the refusal of France to recognise birth certificates from foreign surrogacy arrangements.[40]

---

34 *Mennesson v France* (App No 65192/11) at [80].

35 *Mennesson v France* (App No 65192/11) at [81].

36 *Mennesson v France* (App No 65192/11) at [92].

37 A Mulligan, "Identity Rights and Sensitive Ethical Questions: The European Convention on Human Rights and the Regulation of Surrogacy Arrangements" (2018) 26 *Medical Law Review* 449, 458.

38 *Mennesson v France* (App No 65192/11) at [100].

39 *Mennesson v France* (App No 65192/11) at [97] to [100].

40 *Foulon and Bouvet v France* (App Nos 9063/14 and 10410/14), involving an Indian surrogacy arrangement and *Laborie v France* (App No 44024/13) involving a Ukrainian surrogacy arrangement.

7.35 The *Mennesson* decision has been hailed as a "watershed moment for the regulation of international surrogacy in Europe".[41]

> In effect, it means that once the surrogacy has taken place and the child was legally relinquished to the commissioning parents in the country of birth, recognition of the relationship in their home country cannot be denied, at least where there is a genetic link with one of the commissioning parents. For the many countries that completely prohibit domestic surrogacy, this means denial of status can no longer be used as a deterrent against the use of international surrogacy arrangements.[42]

7.36 The decision in *Mennesson* is not without criticism. Another academic has written that it:

> was perceived as a backdoor acceptance of surrogacy and as depriving states of the opportunity to decide whether or not to allow surrogacy, while creating a double standard, as, within the same state, domestic surrogacy is illegal, whereas cross-border surrogacy will be recognised.[43]

7.37 In light of the *Mennesson* case, two key issues remain unclear. The first is whether states would be required by the ECtHR to recognise a genetic intended mother as the mother of a surrogate-born child. In *Mennesson* the ECtHR referred to legal parenthood rather than fatherhood, even though it was only the father with whom the children had the genetic relationship.[44] However, different considerations apply to the recognition of the legal mother. In contrast to fatherhood, there exist numerous possible concepts of motherhood in surrogacy (for example, the genetic mother, or gestational mother), meaning *Mennesson* cannot simply be cross-applied to genetic mothers.[45]

7.38 A number of intended parents (where the intended father, but not the intended mother was genetically related to the child) brought cases before the French domestic courts in an attempt to resolve this question in their favour. When they were unsuccessful in these efforts, they appealed to the ECtHR.[46] On 16 October 2018, the French *Cour de cassation* (France's highest domestic court in private civil law matters) also asked for an advisory opinion from the ECtHR under Protocol 16 of the ECHR on these issues,

---

41 C Fenton-Glynn, "International Surrogacy before the European Court of Human Rights" (2017) 13 *Journal of Private International Law* 546, 555.

42 C Fenton-Glynn, "International Surrogacy before the European Court of Human Rights" (2017) 13 *Journal of Private International Law* 546, 555.

43 M Iliadou, "Surrogacy and the ECtHR: Reflections on Paraidos and Campanelli v Italy" (2019) 27 *Medical Law Review* 144, 153.

44 A Mulligan, "Identity Rights and Sensitive Ethical Questions: The European Convention on Human Rights and the Regulation of Surrogacy Arrangements" (2018) 26 *Medical Law Review* 449, 463.

45 Notably, in contrast to fatherhood, there exists numerous possible concepts of motherhood in surrogacy – for discussion see J L Dolgin, "The Law Debates the Family: Reproductive Transformations" (1995) 7 *Yale Journal of Law and Feminism* 37 and R D'Alton-Harrison, "Mater Semper Incertus Est: Who's Your Mummy?" (2014) 22 *Medical Law Review* 357.

46 *Braun v France* (App No: 1462/18), *Saenz and Saenz Cortes v France* (App No: 11288/18), *Maillard and others v France* (App No: 17348/18).

which was accepted by the ECtHR on 3 December 2018,[47] with the ECtHR handing down its advisory opinion on 10 April 2019.[48]

7.39 In its opinion, the ECtHR wrote that, where at least one of the intended parents was genetically related to the child, French law had to allow for the registration of an intended mother on the child's French birth certificate.[49] As the ECtHR justified its conclusion on this point by referring to the presence of a genetic link between at least one of the intended parents and the child,[50] doubt remains as to whether the ECtHR would require recognition of a legal relationship between the intended parents and the child, where there is no genetic link between them. Where the intended mother, in addition to the intended father, was genetically related to the child, the ECtHR said that the need to recognise the parent-child relationship on the birth certificate would apply with even greater force.[51]

7.40 With regard to the proportionality of any interference with the intended mother's Article 8 rights, the *Cour de cassation* had noted that the mother had the option (if the applicable conditions were met) of adopting the child to establish parenthood.[52] In its opinion, the ECtHR agreed that adoption could be an effective mechanism to recognise the mother-child relationship,[53] but left the final determination of this

---

47 See the press release reporting this accessible at: http://hudoc.echr.coe.int/fre-press?i=003-6268815-81653099 (last visited 31 May 2019).

48 *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother* (Request no. P16-2018-001). Article 5, Protocol 16 of the ECHR states that advisory opinions shall not be binding. They take place in the context of the judicial dialogue between the ECtHR and domestic courts and tribunals. Accordingly, the requesting national court decides on the effects of the advisory opinion on the domestic proceedings. The Explanatory Notes to the Protocol also state that "Advisory opinions under this Protocol would have no direct effect on other later applications. They would, however, form part of the case-law of the [ECtHR], alongside its judgments and decisions." (Council of Europe, *Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms: Explanatory Report*, accessible at: https://www.echr.coe.int/Documents/Protocol_16_explanatory_report_ENG.pdf (last visited 31 May 2019).

49 *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother* (Request no. P16-2018-001 at [46].

50 *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother* (Request no. P16-2018-001) at [36] and [47].

51 *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother* (Request no. P16-2018-001) at [47].

52 This argument was a notable feature of the *Cour de cassation* previous decisions. See, for example, *arret n 824 du 05 juillet 2017* "l'adoption permet, si les conditions légales en sont réunies et si elle est conforme à l'intérêt de l'enfant, de créer un lien de filiation entre les enfants et l'épouse de leur père" ("adoption allows, if the legal conditions are satisfied and if it is in the interests of the child, for the creation of a link of filiation between the children and the spouse of their father").

53 *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother* (Request no. P16-2018-001) at [54] and [55].

question to the domestic court.[54] In other words, French law was not required to register automatically the details of the foreign birth certificate, which showed the intended mother as a legal parent.[55]

7.41 The advisory opinion also leaves open the question whether the ECtHR will require states to recognise intended parents as legal parents, (regardless of whether there is a genetic link) where a domestic surrogacy arrangement is entered into in a state in which surrogacy is prohibited.[56]

SURROGACY AS AN EXCEPTION TO THE GESTATIONAL MOTHER AS LEGAL MOTHER

7.42 The principle that the gestational mother is the legal mother of the baby is one of long-standing origin in European legal systems, including the UK. It dates back to the Roman law maxim *mater semper certa est* (the mother is always certain): "in traditional European-American thinking a mother's identity is understood as [an unwavering] natural fact while a father's identity, itself a product of his relationship to the mother, is understood as a social fact".[57]

7.43 In the USA, in the surrogacy context, by assigning legal parenthood at birth to the intended parents "courts have been willing to negate absolutely, or minimize seriously, the significance of the biological bases of a surrogate's claims to legal maternity".[58] By contrast, in the UK, the emphasis on the gestational grounding of motherhood has meant that the recognition of the surrogate as legal mother at birth has never been successfully challenged.

7.44 Arguments about whether a surrogate, as gestational mother, should be the legal mother focus on several different themes: certainty; the experience and intentions of intended parents; and the best interests of the child. We consider each below.

---

54 *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother* (Request no. P16-2018-001) at [58].

55 *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother* (Request no. P16-2018-001) at [53].

56 See A Mulligan, "Identity Rights and Sensitive Ethical Questions: The European Convention on Human Rights and the Regulation of Surrogacy Arrangements" (2018) 26 *Medical Law Review* 449 who argues that, although the art 8 issues around nationality cited in *Mennesson* may not be engaged in domestic surrogacy arrangements, the child's art 8 right to know its genetic identity will still be engaged. The ECtHR cited this Article 8 right to know your genetic identity in *Mennesson*, alongside their discussion on nationality. This is consistent with its earlier case law on a right to know one's genetic identity: see *Jaggi v Switzerland* (App No: 58757/00) and *Phinikaridou v Cyprus* (App No: 238/90).

57 J Dolgin, *Defining the Family: Law, Technology, and Reproduction in an Uneasy Age* (1997) p 119.

58 R F Storrow, "The Phantom Children of the Republic: International Surrogacy and the New Illegitimacy" (2012) 20 *Journal of Gender, Social Policy and the Law* 561, 594 to 595. In California, the initial recognition of legal parenthood in a surrogacy arrangement, based on the intention of the intended parents, was in the 1993 Supreme Court of California decision, *Johnson v Calvert* (1993) 5 Cal 4th 84.

Certainty

7.45 By having one rule for all situations, the current law promotes certainty and simplicity and might be thought to provide an "intuitive" or "obvious" answer, as to who the legal mother should be.[59] However, even aside from the specific position of the intended mother in a surrogacy arrangement, a genetic mother (the woman that provided the egg) also has a claim to be the legal mother.[60]

7.46 In a recent Irish case at High Court level, concerning a gestational surrogacy arrangement, the judge held that it was possible for blood or DNA testing to determine maternity, as well as paternity.[61] However, the decision was overruled at the level of the Supreme Court in Ireland, with the majority judgment holding that it was a matter for Parliament to change the law in this area.[62]

The experience and intentions of the surrogate and the intended parents

7.47 The argument has also been made that the burdens taken on by pregnant women, because of the nine months of pregnancy and childbirth, provide a moral reason for legal motherhood lying with the gestational mother. The costs are said to be physical, emotional, social and financial, including the health risks associated with pregnancy and the pain associated with carrying the child and giving birth.[63]

7.48 Supporters of the gestational mother as always being the legal mother also argue that, during the pregnancy, a special relationship develops between the foetus and the mother (whether she is carrying the child for herself or for another). In *Re G*, in the passage quoted above, Lady Hale commented that gestational mothers have a "special" relationship with their child.[64] Feminist commentators have also supported this view, seeing surrogacy as a threat to the mother-child relationship.

7.49 There are studies showing foetal attachment to gestational mothers in terms of recognising and being soothed by the mother's heartbeat and voice, and links between pre- and post-birth bonding between the foetus and the mother.[65] However, it is possible to crtiticise the idea of attachment or of a special relationship between the gestational mother and the foetus. First, surrogacy provides the specific

---

59 R Walker and L van Zyl, *Towards a Professional Model of Surrogate Motherhood* (2017) p 118.

60 J L Hill, "What Does it Mean to be a Parent? The Claims of Biology as the Basis for Parental Rights" (1991) 66 *New York University Law Review* 353, 370.

61 *MR* [2013] IEHC 91.

62 *MR* [2014] IESC 60.

63 A Gheaus, "The Right to Parent One's Biological Baby" (2012) 20 *The Journal of Political Philosophy*, 432.

64 *Re G (Residence: Same-Sex Partner)* [2006] UKHL 43, [2006] 4 All ER 241 at [34]. See para 7.13.

65 S Dubber, C Reck, M Muller, S Gawlik, "Postpartum bonding: the role of perinatal depression, anxiety and maternal-fetal bonding during pregnancy (2015) 18 *Women's Mental Health* (negative relationship between maternal–fetal bonding and postpartum maternal bonding impairment); L Rossen, D Hutchinson, J Wilson, L Burns, C A Olsoon, S Allsopp, E J Elliott, S Jacobs, J A Macdonald, R P Mattick, "Predicitors of postnatal mother-infant bonding: the role of antenatal bonding, maternal substance use and mental health; and "Babies rely on mother's voice and heathbeat to develop healthy brains" *PBS* (24 February 2015) (use of mothers' heartbeat and voice in care of premature babies), accessible at: https://www.pbs.org/wgbh/nova/article/babies-rely-on-mothers-voice-and-heartbeat-to-develop-healthy-brains/ (last visited 31 May 2019).

circumstances where the bond between the foetus and the surrogate may not form because the surrogate does not invest emotionally in the same way as a woman who is carrying a child that she intends to keep and to raise. Second, the very idea that there is a special bond has been questioned: can the foetus, before birth, really be said to form an attachment to the mother, separate from the mother simply imagining herself as a mother and caregiver? It has been suggested that research into attachment may not be robust because it relies on self-reporting by pregnant women answering questionnaires about their attitudes.[66]

7.50 This view of the surrogate as having a special relationship with the child, and taking on the burdens of gestation, such as would always justify her being the legal mother, can be criticised as ignoring the intentions and lived experience of many surrogates and intended parents. These criticisms have been echoed by surrogates and intended parents with whom we have met (albeit we recognise that there have been instances where a surrogate has, in fact, wished to raise as her own a child born of a surrogacy arrangement).

7.51 The current law might be said to deny the autonomy of a surrogate who wishes to participate in an arrangement and to give up the child to the intended parents at the conclusion of her pregnancy. Writing 25 years ago about the predecessor of the current law on parental orders,[67] Gillian Douglas said that the law:

> … fails to cater for surrogacy, since it makes the surrogate the legal mother even though she has no wish to be. This outcome was a deliberate measure designed to discourage people from entering into surrogacy arrangements.[68]

7.52 The current law might be said to give insufficient weight to what the parties in a surrogacy agreement – both surrogate and intended parents – actually want to happen, assuming that they have made the choice in an informed way and of their own free will. The joint, desired, outcome is that the child should, from birth, be raised by the intended parents as their child. The law might be seen as rejecting choice as a determinant of who should be treated as a parent.[69] One academic writes that:

> the legislative formula assigning legal parenthood following assisted reproduction works well for straightforward IVF and also for procedures using egg or embryo donation … However, when [a woman's] problem is an inability to carry a child, the legislative position fails to recognise the social and familial reality she intends when using a surrogate.[70]

---

66 R Walker and L van Zyl, *Towards a Professional Model of Surrogate Motherhood* (2017) pp 118 to 123.

67 HFEA 1990, s 27.

68 G Douglas, "The Intention to be a Parent and the Making of Mothers" (1994) 57 *Modern Law Review* 636, 637.

69 J Montgomery, "Rights, Restraints and Pragmatism: The Human Fertilisation and Embryology Act 1990" (1991) 54 *Modern Law Review* 524, 530.

70 K Horsey, "Not Withered on the Vine: The Need for Surrogacy Law Reform" (2016) 4 *Journal of Medical Law and Ethics* 181, 190.

7.53 Put another way, the current law may also fail to recognise the actual experience of those involved in surrogacy arrangements:

> what the law singularly fails to reflect is lived experience: the view of surrogates that they are not mothers, the fact that [intended parents] (who may have already expended a great deal of time, energy and money on unsuccessful IVF treatments and/or suffered from repeated miscarriages) are vulnerable too, frightened about the "risk" – foregrounded by the law – that the surrogate will change her mind.[71]

7.54 The current rule does not recognise the possibility that the parties to a surrogacy arrangement view legal parentage differently, and that they emphasise the position of the intended parents. In the context of surrogacy, greater significance may be placed by the parties on social and psychological parentage of the child born of the arrangement and, it might be argued, legal parentage should similarly reflect this different focus.

The best interests of the child

7.55 Lady Hale, writing extra-judicially, has also suggested that the rule acts in the best interests of the child:

> this rule was enacted to create certainty, but I think that it may also be justified as the one most likely to be in the best interests of the child she carries.[72]

7.56 It is difficult to see, however, how, in the surrogacy context, the gestational mother being the legal mother at birth will always act in the best interests of the child. For example, a surrogacy arrangement may break down because the surrogate changes her mind about giving her consent to the making of the parental order. In these circumstances, the court must determine with whom the child should live, using the principle that "the child's welfare shall be the court's paramount consideration".[73]

7.57 It is not the case that the gestational mother is presumed to be the person most capable of meeting the child's needs. The Court of Appeal case of *Re H*[74] confirmed that the conventional welfare approach in children cases applies equally where a surrogacy arrangement breaks down.

> We reaffirm the position stated … in the surrogacy case *Re N (a Child)* … . The essential question in every case is: all things considered, which outcome will be best for the child? The law does not take a special approach to decisions about surrogacy breakdown or other disputes within unconventional family structures. The welfare principle applies with full force in such cases; indeed, the more unusual the facts, the greater the need to keep the child at the heart of the decision, and to

---

71 K Horsey, "Fraying at the Edges: UK Surrogacy Law in 2015" (2016) 24 *Medical Law Review* 608, 620.

72 B Hale, "New families and the welfare of children" (2014) 36 *Journal of Social Welfare and Family Law* 26, 27.

73 Children Act 1989, s 1(1), Children (Scotland) Act 1995, s 11(7).

74 [2017] EWCA Civ 1798, [2018] 1 FCR 335.

ensure that the interests of others prevail only where they are in harmony with the interests of the child.[75]

7.58 A surrogate can withhold her consent to the making of the parental order, which means that the intended parents will not, under the current law, be able to obtain a parental order and become the legal parents. But the court made it clear that a surrogate is not able unilaterally to decide with whom the child should live.

> [Counsel for the surrogate] wisely withdrew from the submission that such a mother has the right to have her own way about where the child should live. She was also forced to concede that, while the six-week "cooling off" period protects a mother in relation to the important issue of consent to a parental order, it tells one nothing about what the best welfare arrangements for the child will be after birth.[76]

7.59 In the surrogacy context, and where all involved agree, we provisionally consider that the intention of the parties to the surrogacy arrangement can be privileged over genetic and gestational links between the parties and the child concerned. We discuss this point further when we turn to the aim of, and options for, reform.[77]

STAKEHOLDERS' VIEWS

7.60 There was a mix of views among stakeholders on the question of whether the surrogate should be the legal mother at birth.

7.61 Some stakeholders who were in favour of changing the law on this point, emphasised strongly the lack of certainty for both intended parents and surrogates caused by the fact that the intended parents are not legal parents from the birth of the child. They said that the current law does not reflect the wishes of the parties to a surrogacy arrangement. As a result of the rule, intended parents were concerned that the surrogate would want to keep the child. Equally, however, surrogates were concerned at being the legal parent of the child that they did not consider to be theirs in the event that the intended parents do not want the child. These views were advanced, in particular, by surrogacy organisations who represent both intended parents and surrogates.

7.62 Others were concerned that, if the intended parents were the legal parents at birth, the role of the surrogate would be erased, and the genetic and gestational origns of the child could be hidden. We take the view, however, that our proposals in respect of access to information should alleviate concerns in this area.[78]

7.63 A few stakeholders thought that the removal of the surrogate as the legal mother might increase the exploitation of the surrogate and, perhaps, increase the risk of children being trafficked. These concerns were not, however, fully developed by stakeholders. We discuss concerns around the exploitation of surrogates in Chapters

---

75 *Re H* [2017] EWCA Civ 1798, [2018] 1 FCR 335 at [4].

76 *Re H* [2017] EWCA Civ 1798, [2018] 1 FCR 335 at [12].

77 See paras 7.78 and subsequent.

78 See ch 10.

2 and 14.[79] We take these concerns very seriously; however we would expect that concerns around exploitation could be managed by eligibility requirements for surrogacy arrangements and procedural safeguards, that would be a necessary prerequisite for intended parents to acquire legal parenthood at birth, and for the surrogate's status as legal parent to be removed. We have also taken the view that intended parents who enter into international surrogacy arrangements cannot acquire legal parenthood at birth through the new pathway. Stakeholders sometimes conflated changes to legal parenthood with the development of a commercial surrogacy system. We take the view that these are separate questions; the recognition of intended parents as legal parents from birth does not seem to us to have a bearing on whether surrogacy is considered to be commercial.

7.64 We deal below with stakeholders' comments about the welfare of the child.[80]

THE WELFARE OF THE CHILD

How the welfare principle operates in surrogacy cases

7.65 Of the arguments around the surrogate not being the legal mother of the child at birth, the most important, to our mind, must be that of the child's welfare. Certainly, at the point when the court is considering whether to make a parental order, its paramount consideration is "…the child's welfare, throughout his life".[81] International law also supports a focus on the child's welfare: Article 3 of the UN Convention on the Rights of the Child provides that:

> in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

7.66 In the Court of Appeal case of *Re M*,[82] a case where the surrogacy arrangement had broken down, Lady Justice Black said:

> as to the fact that Z was born of a surrogacy arrangement initiated by A and B, that is a matter of which the judge was acutely aware, having devoted quite a lot of her judgment to considering the nature of the arrangement. It was only one of the circumstances of the case and could contribute to the decision only in so far as it had a relevance to decisions about Z's welfare.[83]

7.67 The court can, of course, only make a parental order where all of the conditions in sections 54 or 54A of the HFEA 2008 have been fulfilled. So, where the surrogate has refused her consent to the order being made, which may occur where the surrogacy arrangement has broken down or because it is disputed that a surrogacy arrangement was what was originally intended by the parties, the court cannot make a parental

---

79 See ch 1.

80 See paras 7.65 and subsequent.

81 ACA 2002, s 1, as applied and modified by the 2018 Regulations, reg 2 and sch 1 para 1; AC(S)A 2007, s 14 as applied and modified by the 2018 Regulations, reg 3 and sch 2 para 2.

82 [2017] EWCA Civ 228, [2017] All ER (D) 39.

83 *Re M (child)* [2017] EWCA Civ 228, [2017] All ER (D) 39 at [26].

order.[84] The court has also been left unable to make a parental order because it could not find that at least one of the intended parents was domiciled in the UK, or that the child had its home with both intended parents.[85] In all surrogacy cases to date where the conditions have been met, however, the welfare of the child has required that the parental order be made. That is to say, that we are not aware of any decision where the court, having the power to do so, has refused to make a parental order solely on the basis of the child's welfare. It seems therefore, that, where all the conditions for making the order are met, the court will invariably make the parental order. Indeed, welfare concerns have led to the court making a parental order outside the statutory time limit of six months after the child's birth.[86]

7.68 The power of the welfare principle has also been clearly articulated in cases where the court has been asked to exercise its power to authorise payments to a surrogate and/or commercial agency that go beyond reasonable expenses.[87] To our knowledge, there has not been a case where a parental order has been refused, because of the amount of money that has been paid, given how heavily the child's welfare weighs in the court's decision whether to make a parental order. As Mr Justice Hedley has commented in *Re L*:[88]

> the effect of [the welfare principle being paramount] must be to weight the balance between public policy considerations and welfare … decisively in favour of welfare. It must follow that it will only be in the clearest case of the abuse of public policy that the court will be able to withhold an order if otherwise welfare considerations support its making.[89]

7.69 Essentially, in surrogacy cases, where the conditions are in place for a parental order to be made, the welfare principle will usually dictate that a parental order is made. The context in which a parental order is made is relevant: by the time the parental order comes to be made, the child will probably have been living with the intended parents for at least six months and possibly much longer. Unless there are serious concerns about the child's welfare, in which case further inquiry would be needed, a parental order is almost inevitable.

> It is difficult to imagine a scenario where it would be in the child's best interest for a parental order application to be refused.[90]

---

84 Consent is required under HFEA 2008, ss 54(6) and 54A(5). In some cases, where the surrogacy arrangement has broken down, the court has decided that the child's welfare is best served by living with the surrogate, see, for example: *Re T (a child) (surrogacy: residence order)* [2011] EWHC 33 (Fam), [2011] 2 FLR 392; *Re Z (surrogacy agreements) (Child arrangement orders)* [2016] EWFC 34, [2017] 1 FLR 946.

85 Required by HFEA 2008, ss 54(4) and 54A(3).

86 *Re X (A Child) (Parental Order: Time Limit)* [2014] EWHC 3135, [2015] 1 FLR 349. The time limit is, effectively, no longer in operation, at least in England and Wales, see ch 6 for details.

87 HFEA 2008, ss 54(8) and 54A(7).

88 [2010] EWHC 3146 (Fam), [2011] 2 WLR 1006.

89 *Re L* (A Child) (Foreign Surrogacy) [2010] EWHC 3146 (Fam), [2011] 2 WLR 1006.

90 R Cabeza, V Flowers, E Pierrot, A Rao, B O'Leary and L Odze, *Surrogacy: Law, Practice and Policy in England and Wales* (1st 2018) p 70.

Current requirement for a post-birth welfare assessment

7.70 The primary concern of those stakeholders who raised concerns about removing the surrogate as a legal parent at the time of the child's birth was that doing so could adversely affect the welfare of the child. They emphasised the safeguard of a post-birth welfare assessment. The requirement of a welfare assessment after the birth of the child is hard to reconcile with the intended parents being legal parents at birth. If a post-birth assessment is necessary, that would seem to point towards retaining the current position whereby the intended parents apply for a parental order after the baby has been born.

7.71 The key question, therefore, is whether a post-birth assessment of the welfare of the child is necessary in surrogacy cases. There is obviously a legitimate concern about the safety of children who are placed with intended parents, but we consider that these concerns can be met by screening requirements for the new pathway, discussed in Chapter 13. In that regard, we note that surrogate-born babies currently live with their intended parents whilst awaiting the making of a parental order. A number of months may pass from the birth of the child to the child's welfare being considered by the CAFCASS parental order reporter or, in Scotland, the curator *ad litem* and reporting officer.

7.72 Where the intended parents and surrogate have been screened, and have met procedural safeguards, and assuming that all parties to the arrangement still agree at the time of birth, we have not heard anything from stakeholders that has convinced us that a post-birth welfare assessment remains vital.

7.73 The way that the law currently works means that the court's discretion about whether to make a parental order – once it has the ability to do so – is, in practice, very much circumscribed. We provisionally take the view that, in the context of the new surrogacy pathway, the child's welfare will not be adversely affected by the removal of the post-birth welfare assessment and that this assessment need not be retained in the new surrogacy pathway. Therefore, we do not believe that such an assessment should present a barrier to the intended parents being the legal parents at birth, or to the surrogate not being a legal parent.

7.74 Indeed, we provisionally consider that the child's welfare is better protected by the screening and procedural requirements being imposed prior to conception, combined with recognising the reality of a surrogacy arrangement and the shared intention of the surrogate and the intended parents, and by enabling the intended parents to be legal parents from the birth of the child. If the child, in accordance with the intention of all involved, lives with the intended parents after its birth, then it seems, at best, to make little sense that legal parenthood should lie with the surrogate mother until such time as the parental order is granted.[91] At its worst, a split between the intended parents' social and psychological parenthood (based on them caring for the child), on the one

[91] This assumes that the intention remains in place at birth.

hand, and the surrogate's legal parenthood on the other, may act against the child's welfare.[92]

How should the child's welfare be protected?

7.75 We provisionally propose that any welfare concerns that might exist in the situation of a surrogacy arrangement may fairly be addressed by use of the procedure that already exists in respect of the provision of fertility treatment in UK licensed clinics, which are required by law to take account of the welfare of any child born as a result of the treatment. We cover this point in more detail below when we discuss our provisional proposal for reform. This process would take place, in the new pathway, before the child was conceived.

7.76 Of course, like those children born of natural conception, children born of a surrogacy arrangement will still, as stakeholders pointed out to us, be subject to the usual checks on their welfare, in the form of visits by the midwife post-birth (at least in England and Wales) and then the health visitor. And the usual child protection laws will apply to surrogacy families as much as to any families, so that the local authority can intervene in cases where a child is suspected to be suffering, or at risk of suffering, significant harm.[93] There have already been cases where the local authority has intervened after the birth of a child born as a result of a surrogacy arrangement.[94] We are not, however, aware of any evidence that suggests that surrogate-born children are at a greater risk than children who are in the care of their gestational mothers.[95] Therefore, we do not believe that surrogacy families require a higher level of scrutiny to ensure the welfare of the child.

7.77 We take the provisional view that, under the new pathway, the welfare of the child will be protected by screening and procedural requirements that take place before the child is conceived, including the assessment of the child's welfare (and the usual checks on the welfare of any child discussed above). At the moment, if there are concerns about the suitability of intended parents, assuming that they fall below the threshold where the state would intervene, discussed above, these are very difficult to address after the birth, where the court is presented with a child in existence living with the intended parents.

REFORM – AIM AND OPTIONS

7.78 We take the view that the intention behind surrogacy arrangements is best recognised by the attribution of legal parenthood to the intended parents at birth, so long as there are sufficient safeguards and a regulated, clear, pathway in place. As we have set out above we think that the attribution of legal parenthood at birth can be reconciled with the child's welfare being the paramount consideration. Indeed, in these

---

92 To whom the the child has a gentic link will vary according to the type of surrogacy arrangement and whether donated gametes were used. Currently, to obtain a parental order, one of the intended parents (or parent if only one) must have a genetic link to the child.

93 See the "threshold" criteria, to allow the court to make a care or supervision order in respect of a child, in the Children Act 1989, s 31(2). In Scots law, the grounds for making a compulsory supervision order are set out in the Children's Hearings (Scotland) Act 2011, s 67.

94 For example, see *Re S (A Child) (Care Proceedings: Surrogacy)* [2015] EWFC 99, [2015] 12 WLUK 234.

95 See paras 2.19 and subsequent.

circumstances, we think that legal parenthood at birth will actually promote the child's welfare by removing the current split between legal and social/psychological parenthood that currently persists until the time that a parental order is made.

7.79 Recognising intention in the context of legal parenthood has been criticised as being linked to a contractual model of legal parenthood:

> intent is linked essentially to a world of autonomous individuality and choice, not to a world of fixed relations predicated on biological truth. As a result, the decision to rely on intent is a decision to rely fully on contractual agreements in resolving such cases.[96]

7.80 We accept that it is hard to reconcile a contractual model of parenthood with the focus being on the child's welfare but the new pathway that we propose does not depend on a contract at all or the enforceability of a surrogacy agreement. Instead, it recognises intent by making it possible for the intended parents to acquire legal parenthood at birth, by operation of the law (rather than a contract), but only in conditions where the surrogate continues to share that intention when the child is born.

7.81 We have explored various options for how the intended parents might acquire legal parenthood at birth. One suggestion for reform is that a parental order could be made, either before the child is born,[97] or at birth, based on a pre-birth authorisation.[98] This approach reflects that taken to transfer legal parenthood in California. There, the court's pre-birth order essentially ratifies a contract entered into between the intended parents and the surrogate, which must contain certain information.[99]

7.82 As noted above, however, we consider that legal parentage should be conferred by operation of law, not by contract. Further, we are concerned about the ability of the court to make an order before birth in respect of a child not yet born. We note the unwelcome potential for such a law to suggest that a pregnant woman does not, during her pregnancy, retain her right to choose what happens to her own body, including a decision to terminate the pregnancy or how she gives birth. Our view is that nothing we propose should prevent a woman making decisions about her own body during pregnancy. We consider it essential that the law respects the surrogate's bodily autonomy. After the birth of the child, the child's best interests should be paramount; before that time the surrogate's bodily autonomy should take precedence.

7.83 Pragmatically, if a pre-birth parental order would involve a similar process to that already in place, the making of such an order either before or at birth, would simply involve moving forward the existing process. We think that a more streamlined process could work, however, that avoids the need for an application to court, where

---

96 J Dolgin, *Defining the Family: Law, Technology, and Reproduction in an Uneasy Age* (1997) p 213.

97 H Prosser and N Gamble, "Modern surrogacy practice and the need for reform" (2016) 4 *Journal of Medical Law and Ethics* 257, 273.

98 The latest report by Surrogacy UK discusses various options to provide the intended parents with legal parenthood at birth at pages 64 to 66, see Surrogacy UK Working Group on Surrogacy Law Reform, *Surrogacy in the UK, Further evidence for reform: Second Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (December 2018).

99 The parties must also receive independent legal advice: California Code, Family Code, Fam s 7962.

the parties' intentions are aligned and it is safe to do so. We hope that this approach would reduce the stress on intended parents, both before and after the birth and also remove cases from the court system where judicial oversight is not required, reserving that oversight for cases which do require greater scrutiny and guidance. We therefore discuss below our proposal that there should be a new pathway leading to the intended parents being recognised as the legal parents at birth of a child born of a surrogacy arrangement.[100] In cases that fall outside of the new pathway with its stricter conditions, the intended parents must make an application to court, which will therefore retain its judicial oversight where necessary.

7.84 An alternative model of reform would be to recognise the intended parents as legal parents at birth alongside, rather than instead of, the surrogate (and possibly the surrogate's spouse). Such a model was briefly considered in the preparation of the HFEA 2008, but was ultimately rejected.[101] This approach acknowledges "that surrogacy potentially involves more than two people with a claim to parenthood."[102] Some consider that a three (or more) parent approach better promotes the welfare of the child.[103]

7.85 Allowing a child to have more than two legal parents enables recognition of a more diverse range of family forms within and outside of surrogacy arrangements. It could legally acknowledge the situation where, for example, a couple wish a donor's relationship with a child to have ongoing legal recognition, where the donor intends to co-parent, or where a lesbian couple and a gay couple intend to conceive and raise children together. Other commentators have suggested the possibility of new legal forms that recognise relationships that are neither that of a donor nor that of a "full" legal parent.[104]

7.86 We note that there are already jurisdictions which have legislated for a three or more legal parent model. In Ontario, a surrogacy arrangement can include four or more intended parents, and there can also be up to four legal parents in a non-surrogacy situation.[105] In British Columbia, three legal parents are possible in both situations.[106]

7.87 In the specific context of surrogacy, the main benefit that we see for a three-parent model would be to avoid the concerns raised by removing the legal status of the gestational mother (surrogate) at birth, while giving the intended parents the status of legal parents. Recognition of three legal parents could be temporary, constituting a

---

100 See ch 8.

101 See J McCandless and S Sheldon, "The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form" (2010) 73 *Modern Law Review* 175.

102 A Alghrani and D Griffiths, "The regulation of surrogacy in the United Kingdom: the case for reform" [2017] 29 *Child and Family Law Quarterly* 165, 184.

103 See also L Bracken, "Challenging normative constructions of parentage in Ireland" (2017) 39 *Journal of Social Welfare and Family Law* 316, 324 and R F Kandel, "Which Came First: The Mother or the Egg – A Kinship Solution to Gestational Surrogacy" (1994) 47 *Rutgers Law Review* 165, 226.

104 L Smith, "Tangling the Web of Legal Parenthood: Legal Responses to the Use of Known Donors in Lesbian Parenting Arrangements" (2013) 33 *Legal Studies* 355, 378.

105 See Children's Law Reform Act 1990 (Ontario) ss 9, 10 and 11.

106 See Family Law Act 2011 (British Columbia), s 30.

holding position before a further legal process, after birth, to remove the legal parental status of the surrogate. A few stakeholders who favoured reform were attracted to this temporary three-parent model.

7.88 However, we are not minded to provisionally recommend a three-parent model for surrogacy. The first and main reason is that we do not believe that this model is apt for surrogacy. What we hear from intended parents and surrogates alike is that the shared intention is for the intended parents to be the legal parents of the child at birth, and for the surrogate not to be a legal parent at birth, and that, because most arrangements are not problematic, this intention continues to be shared after the child is born. This addresses the respective anxieties of the parties to a surrogacy arrangement that the surrogate will retain the child, or that the intended parents will decide that they do not want the child. There does not appear to be a desire in practice for legal parentage to be shared between all three (or four) adults involved in a surrogacy arrangement. In that regard we note that, in a recent Court of Appeal case concerning a surrogacy breakdown, the court recorded that:

> we were not impressed by the submission that the Judge was obliged to strive to provide H [the child] with two homes and four functioning parents. Even without the clear evidence of the Guardian, it would have been obvious that it was not likely to be in H's interests to have more than one secure home base, and one couple who could be clearly identified as parents.[107]

7.89 Second, a three-parent model would be likely to necessitate far-reaching changes to the birth registration system, creating practical difficulties for those who administer the register, like the General Register Office and National Records of Scotland. In a situation where the number of children born after a surrogacy arrangement is growing, but still very small compared to the number of births overall, we are wary of reform proposals that might create a disproportionate regulatory burden.

7.90 We think that there could be much merit outside surrogacy arrangements in further exploring the possibility of permitting a child to have more than two legal parents. That would enable the legal position to reflect reality where there is genuine co-parenting of a child by three or four people. It might be that a future project could address this area. But we do not, however, think that enabling more than two legal parents is appropriate in the context of surrogacy. We think that sharing legal parentage between the surrogate (and her spouse) and the intended parents would be open to the same criticism as the current law, insofar as it imposes a solution that does not meet the intentions of the parties to the surrogacy arrangement.

THE COMPARATIVE LAW POSITION

7.91 In Chapter 9, we set out provisional proposals for reform to allow the intended parents to be the legal parents of a child born following a surrogacy arrangement. We note that there already exist many jurisdictions where legal parenthood at birth for intended parents is permitted in certain surrogacy arrangements. For example, US states' legislation typically allows intended parents to acquire legal parenthood at birth where

---

107 *Re H (Surrogacy Breakdown)* [2017] EWCA 1798 (Civ) at [25].

the surrogacy arrangement is gestational in nature. Those jurisdictions where legal parenthood at birth may be permitted, of which we are aware are:

(1) certain states of the USA, including

(a) California,

(b) Nevada,

(c) New Hampshire,

(d) District of Columbia,

(e) New Jersey,

(f) Illinois,

(g) Maine, and

(h) Delaware;

(2) Ontario and British Columbia in Canada;

(3) Greece;

(4) South Africa;

(5) Portugal;

(6) Russia; and

(7) Thailand.[108]

7.92 We have found the position in Ontario and British Columbia particularly useful to consider.

7.93 In Ontario, the legislation enables intended parents to be registered from birth provided a surrogacy agreement was in place prior to conception, and the surrogate consents in writing to relinquish her parental rights following the birth. This process is automatic and administrative, and there is no additional declaration or order needed after the birth of the child.

7.94 A surrogacy agreement is defined as:

---

[108] For a comprehensive comparative overview of surrogacy laws around the world see C Fenton-Glynn, J M Scherpe, T Kaan (eds), *Eastern and Western Perspectives on Surrogacy* (2019). India has a draft bill that would also allow legal parenthood at birth for the intended parents, which passed the lower house before the 2019 Indian general election. We note that Portugal recently changed its law to allow the intended parents to be the legal parents of a child born through a surrogacy arrangement, where there is a written contract. However, the Portuguese Constitutional Court held that the new law was unconstitutional. One of the reasons for its decision is that the surrogate did not have the right to object – called the right to regret in the Portuguese legislation – after the birth of the child. The status of the law is now uncertain.

a written agreement between a surrogate and one or more persons respecting a child to be carried by the surrogate, in which

(a) the surrogate agrees to not be a parent of the child, and

(b) each of the other parties to the agreement agrees to be a parent of the child.[109]

7.95 For a surrogacy agreement to be valid in attributing parenthood at birth:

(1) It must have been concluded pre-conception;[110]

(2) Both the surrogate and the intended parent(s) must have received independent legal advice;[111]

(3) It must not designate more than four intended parents;[112] and

(4) The child must be conceived through assisted reproduction.[113]

7.96 If all four conditions are met then, on the provision of written consent by the surrogate:

(1) the child becomes the child of each intended parent and each intended parent becomes, and is recognised in law to be, a parent of the child at birth; and

(2) the child ceases to be the child of the surrogate and the surrogate ceases to be a parent of the child.[114]

7.97 The surrogate must provide the consent in writing to relinquishing her entitlement to legal parenthood no less than seven days after the child's birth.[115]

7.98 In British Columbia, the relevant legislation also makes the intended parents the legal parents at birth without the need for a judicial process. It will apply if:

(a) before a child is conceived through assisted reproduction, a written agreement is made between a potential surrogate and an intended parent or the intended parents, and

(b) the agreement provides that the potential surrogate will be the birth mother of a child conceived through assisted reproduction and that, on the child's birth,

(i) the surrogate will not be a parent of the child,

---

109 Children's Law Reform Act 1990 (Ontario), s 10(1).

110 Children's Law Reform Act 1990 (Ontario), s 10(2).

111 Children's Law Reform Act 1990 (Ontario), s 10(2).

112 Children's Law Reform Act 1990 (Ontario), s 10(2).

113 Children's Law Reform Act 1990 (Ontario), s 10(2).

114 Children's Law Reform Act 1990 (Ontario), s 10(3).

115 Children's Law Reform Act 1990 (Ontario), ss 10(3) and 10(4).

(ii) the surrogate will surrender the child to the intended parent or intended parents, and

(iii) the intended parent or intended parents will be the child's parent or parents.[116]

7.99 Where these three conditions are met, and no-one has withdrawn from the agreement before the child is born the intended parent (or parents) will be the child's legal parents. For the intended parents to acquire legal parenthood, the surrogate must give written consent to surrender the child to the intended parents and the intended parents must take the child into their care.[117]

7.100 Notably, the legislation in Ontario and British Columbia includes, in both cases, a requirement for the surrogate to consent to the transfer of parenthood. The consent is provided in writing after the birth but, again in both cases, there must be a written agreement entered into before the child is conceived. We think our proposals ought to include a provision equivalent to that requirement. First, it helps to answer concerns about the surrogate's autonomy being overridden by a pre-birth order; second, as we now explain, it may help ensure compliance with international law.

Compliance with the UN Convention on the Rights of the Child

7.101 In addition to considering the laws of other jurisdictions on legal parenthood in a surrogacy situation, we have also considered the significance of the UN Convention on the Rights of the Child. The UK is a signatory to, and has ratified, the UN Convention on the Rights of the Child; it has also ratified the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography (the "Optional Protocol").[118] The relevant sections of the Optional Protocol provide that:

> States Parties shall prohibit the sale of children, child prostitution and child pornography as provided for by the present Protocol.[119]
>
> Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.[120]

7.102 In a recent report, the UN Special Rapporteur has suggested that not recognising the surrogate as a legal parent at birth might be enough to breach the Optional Protocol.[121]

---

116 Family Law Act 2011 (British Columbia), s 29(2).

117 Family Law Act 2011 (British Columbia), s 29(2) and (3). In the case of both Ontario and British Columbia, if the surrogate does not provide her consent to the intended parents being the child's legal parents, the dispute goes before a court for resolution, See Children's Law Reform Act 1990, s 10(7) and Family Law Act 2011, s 31, respectively.

118 The Optional Protocol entered into force in the UK on 20 March 2009.

119 The Optional Protocol, art 1.

120 The Optional Protocol, art 2(a).

121 M de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* (January 2018),

7.103 We take the view that the fundamental principle of the Convention is that it prohibits the sale of children, and therefore that, particularly in the context of an arrangement from which the surrogate is not profiting, there may be scope to query the Rapporteur's view that not recognising the surrogate as a legal parent at birth means that there is a breach of the Optional Protocol. We note the Rapporteur's concerns seem to focus on commercial arrangements, where the surrogacy contract may be determinative of parentage.[122] We do, however, believe that the surrogate should have the right to object to the acquisition of legal parenthood by the intended parents.

7.104 Therefore, under the provisional proposal for reform that we discuss in the next chapter, a surrogate – while not automatically being a legal parent at birth – would be able to object to the intended parents' acquisition of legal parenthood.[123] We also provisionally propose that use of the right to object by the surrogate will have the effect of legal parenthood reverting to her, subject to any later transfer of parenthood by way of a parental order.

A/HRC/37/60 para 77(d). We discuss further the impact of the Optional Protocol in ch 14 on payments in surrogacy (paras 14.58 and subsequent).

122 M de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* (January 2018), A/HRC/37/60 paras 56 and 57.

123 See ch 8.

Chapter 8: Legal parenthood: proposals for reform – a new pathway

INTRODUCTION

8.1 In the previous chapter we looked at the current law and the criticisms of it. In this chapter we set out our reform proposals with respect to a new pathway to legal parenthood for certain surrogacy arrangements. We also set out proposals for reform of parental responsibility, a concept distinct from that of legal parenthood.[1]

THE NEW PATHWAY

8.2 For those eligible for the new pathway, it would enable the intended parents to become the parents of the surrogate-born child at birth, subject to the surrogate deciding to exercise her right to object during a defined period of time following the birth. There would be no need for the intended parents to apply for a parental order.

8.3 We take the view that the new pathway that we set out below should be open to surrogacy arrangements, whether they are traditional or gestational in character. We set out our reasons for this view in Chapter 9, where we discuss how surrogacy should be regulated. We do not think that the new pathway should be open to international surrogacy arrangements, given the risks that we perceive in international arrangements.[2]

8.4 We are not proposing that the new pathway be the only method by which parenthood can be transferred in surrogacy cases. The new pathway is an opportunity to allow intended parents to acquire legal parenthood at birth, if the conditions of the pathway are met. We hope that the recognition from birth that the intended parents are the legal parents of the surrogate-born child, and that the surrogate is not a legal parent, will encourage both intended parents and surrogates to follow the new pathway. The parental order route will still be available for those arrangements that do not meet the requirements of the new pathway, or that cannot do so).

8.5 We provisionally propose, however, that access to this new pathway to parenthood ought to be subject to eligibility requirements and procedural safeguards, which we discuss in Chapters 12 and 13 respectively. There will inevitably be surrogacy arrangements that do not comply with these requirements and safeguards. Bearing in mind the importance of the principle of the welfare of the child, we do not want to deny to children born of surrogacy arrangements outside this route the recognition of their relationship with their intended parents by way of a parental order. We therefore take

---

[1] See ch 4.

[2] See paras 16.86 and subsequent. We make a provisional proposal to that effect in that chapter and we propose in this chapter that parental status or orders resulting from surrogacy arrangements overseas should be capable of automatic recognition in the UK, if the jurisdiction in which the arrangement occurred has been officially recognised by the UK Government as a jurisdiction for which such recognition is afforded.

the view that it is necessary to retain the parental order route for cases which do not come within the new pathway.

8.6 We provisionally take the view that the process leading to the attribution of legal parenthood to the intended parents, if it is to do so at birth, must begin before the child is conceived. By the time a child is born, the welfare principle means that, barring an issue with the requirements under sections 54 or 54A (such as the surrogate refusing her consent to the making of the parental order), it is extremely likely that a parental order will be made.

8.7 In order for the new pathway to be sufficiently regulated, we propose that the agreement must be supervised and counter-signed by either a regulated clinic or a regulated surrogacy organisation. We discuss what we mean by a regulated surrogacy organisation in Chapter 9.

The content of the agreement

8.8 We provisionally propose that, in order to access the new pathway to parenthood, the parties should have entered into a surrogacy agreement before the child is conceived. The agreement should record:

(1) the details of those involved in the surrogacy arrangement: the intended parents and the surrogate, and the clinic or regulated surrogacy organisation;

(2) whose genetic material is being used, including that of any donor (that is not the intended parents or the surrogate);

(3) confirmation that genetic and gestational parenthood will be recorded in the national register of surrogacy;[3]

(4) confirmation that a welfare of the child assessment has been completed and no significant concerns about welfare have been raised;

(5) confirmation that the parties have fulfilled the eligibility and screening requirements;[4] and

(6) confirmation that the procedural safeguards have been met, including the provision of information about the implications of entering into the agreement with respect to the effect on the legal parenthood of the child (known as implications counselling);[5]

(7) a statement that, on the child's birth, the intended parents will be the child's legal parents and that they intend that the child born of the arrangement shall live with them,[6] and that both the surrogate and her spouse or civil partner will

---

3 We discuss in ch 10 the creation of a national register of surrogacy arrangements to record the details of all those involved in the child's conception and gestation. We discuss below the situation where there is an anonymous sperm donor (see paras 8.16 and subsequent).

4 See ch 13.

5 See ch 13.

6 See ch 13.

not be legal parents, but that the surrogate will have, for a limited period, the right to object to the acquisition of legal parenthood by the intended parents.[7]

8.9 We do not think that it should be a requirement for the surrogate's spouse/civil partner, or partner, to be a party to the agreement. We think that the decision to be a surrogate is one for the woman concerned, and that she should not have to seek the consent of her spouse or partner. We are concerned that requiring anyone other than the surrogate to be a party to the arrangement sends an unwelcome message about a woman's bodily autonomy. This position is also consistent with our provisional proposal that, for arrangements in the new pathway, the surrogate's spouse or civil partner will not be a legal parent of the child born of the surrogacy arrangement.[8] We also have in mind the strong views that we have heard from surrogates and their spouses/partners on this issue: that it not appropriate for the partner or spouse to be a legal parent.[9] Of course, in practice, we would hope that surrogates would have the support of their spouse or partner, given that his or her support would clearly be to the surrogate's benefit. In addition, while the surrogate's spouse or partner would not be a party to the agreement, he or she would be subject to other requirements, for example a requirement to attend implications counselling and screening requirements for criminal background checks and health screening (to which their consent would be required).[10]

8.10 The last proposed requirement for the contents of the surrogacy agreement – the statement as to legal parenthood – is the most important because it will have the legal effect, in conjunction with a change in the law, of deciding the legal parenthood of the child born as a result of the surrogacy arrangement. As we have discussed in Chapter 5 on current law, consent is key to the acquisition of legal parenthood, where conception is achieved artificially (including in a surrogacy context).[11] The Code of Practice makes clear:

> the centre[12] should ensure that consent to legal parenthood is:
>
> (a) given voluntarily;
>
> (b) given by a person who has the capacity to do so; and
>
> (c) taken by a person authorised by the centre to do so.[13]

8.11 For the new pathway, we envisage that consent could be taken by staff at the clinic, in the context of a gestational surrogacy arrangement, or by staff at a regulated

---

7 See paras 8.23 and subsequent.

8 See paras 8.52 and subsequent.

9 We note that currently, in England and Wales and Scotland, the surrogate's spouse or civil partner will acquire parental responsibility (or parental responsibilities and parental rights) on the birth of the child (see paras 4.63 and subsequent).

10 See ch 13.

11 See ch 4 and Appendix 1.

12 That is, the fertility clinic licensed by the Authority

13 The Code of Practice para 6.14.

surrogacy organisation, in the context of a traditional arrangement. The Human Fertilisation and Embryology Authority (the "Authority") already produces forms designed to record consent to the acquisition of legal parenthood, including in surrogacy cases where this is possible.[14] We take the view that the regulator could do the same for surrogacy arrangements within the new pathway. However, we do not think that use of such a form should be mandatory, provided that the surrogacy agreement is clear and unambiguous in its statement on the effect on legal parenthood of entering into the agreement (when combined with the provision in law for legal parenthood in surrogacy cases). We do not think that legal parenthood should depend on the use of a specified official form, provided that the agreement used covers the substance of the necessary declaration.[15] In short, we are concerned with substance over form. That said, there would be nothing to prevent a surrogacy agreement annexing or incorporating an official form recording consent to legal parenthood, produced by the regulator.[16]

8.12 We also provisionally propose a duty for a regulated surrogacy organisation (or a clinic) to keep a record of those surrogacy agreements into which it enters, together with the surrogate and the intended parents, as part of the new pathway to parenthood. These records should then be available to both the regulator and the birth registrar, so that the latter can confirm, when asked to register the intended parents as parents on the birth certificate, that they are indeed the legal parents of the child at birth. We provisionally propose that these records should have to be kept for a specified minimum term. We seek consultees' views on what that period should be, but would suggest that at least 100 years – to cover the length of a human life – would be appropriate.

---

14 That is, where the surrogate is unmarried (or her spouse or partner does not consent to the surrogacy treatment) and one of the intended parents' wishes, and it is possible, for him or her to be nominated as the legal parent of the child. See ch 4 and Appendix 1.

15 Consistent with the then President of the Family Division's finding in *Re Human Fertilisation and Embryology Act 2008 (Cases A, B, C, D, E, F, G and H)* [2015] EWHC 2602 (Fam), [2016] 1 All ER 273 at [59] and [63].

16 We bear in mind the then President of the Family Division's criticisms of clinics' practices in relation to consent forms in *Re Human Fertilisation and Embryology Act 2008 (Cases A, B, C, D, E, F, G and H)* [2015] EWHC 2602 (Fam), [2016] 1 All ER 273; his re-iteration that clinics must comply with the Authority's directions and guidance and check consent forms thoroughly before conception; and his recommendation that Authority guidance issued to clinics should employ visual means of highlighting important legal requirements, and the dire consequences of non-compliance (at [108] to [111]).

Consultation Question 7.

8.13 In respect of a domestic surrogacy arrangement, we provisionally propose that, before the child is conceived, where the intended parents and surrogate have:

(1) entered into an agreement including the prescribed information, which will include a statement as to legal parenthood on birth,

(2) complied with procedural safeguards for the agreement, and

(3) met eligibility requirements,

on the birth of the child the intended parents should be the legal parents of the child, subject to the surrogate's right to object.

Do consultees agree?

Consultation Question 8.

8.14 We provisionally propose that regulated surrogacy organisations and licensed clinics should be under a duty to keep a record of surrogacy arrangements under the new pathway to which they are a party, with such records being retained for a specified minimum period.

Do consultees agree?

8.15 We invite consultees' views as to what the length of that period should be: whether 100 years or another period.

The use of anonymous gamete donors

8.16 There is a difficult question of whether those who choose to use an anonymous donor should be denied access to the new pathway to parenthood. This issue will only arise if traditional surrogacy arrangements not involving a clinic or regulated surrogacy organisation, are permitted to come within the scope of the new pathway.[17] Where a UK clinic is involved, the use of anonymously donated gametes is not permitted,[18] and we provisionally propose that the same be true where intended parents are entering into a traditional surrogacy arrangement with the assistance of a regulated surrogacy organisation. However, it may also be possible for parents themselves to import

[17] See ch 9 and paras 9.30 and subsequent.

[18] This is the effect of the provisions giving donor-conceived people the right to identifying information about their donors, for example under HFEA 1990, s 31ZA. Licence Condition T54 in the Code of Practice (Guidance Note 20) also prevents the use of non-identifiable donors except in certain circumstances (for example where the gametes or embryo were supplied to the clinic before 1 April 2005).

anonymously donated sperm for use in surrogacy arrangements where a clinic is not involved.[19]

8.17 Further, this issue will also only arise if the law is changed so that a genetic link is not required between the intended parents and the child. In 12 we provisionally propose that a genetic link should not be required for surrogacy arrangements under the new pathway, in cases of medical necessity. There will be no genetic link between the intended parents and the child in a traditional surrogacy arrangement which also uses donor sperm, rather than sperm from an intended father.

8.18 As a result, we anticipate that the issue will arise only in a very small number of cases: those where anonymously donated sperm is imported into the UK and is used in a traditional surrogacy arrangement without the involvement of a licensed clinic. On the one hand, we do not wish to condone what many will see as the undesirable approach of importing anonymously donated sperm, which may also pose a risk to surrogates' health. Further, we wish to promote surrogacy arrangements where the child has access to full information about their genetic and gestational origin. Restricting access to the new pathway to arrangements where such information will be available would promote that aim.

8.19 On the other hand, it is already possible, outside surrogacy arrangements, for people to be the legal parents under UK law of a child conceived with anonymously donated gametes. That would be the case, for example, if they undergo fertility treatment using donor gametes (both sperm and egg) in countries which allow anonymous donation. The use of anonymously donated gametes does not affect the fact that a woman who gives birth to a child is the child's legal mother, and her spouse or civil partner is the father or second female parent.[20] Denying access to the new pathway where anonymously donated sperm is used may therefore be unfair or anomalous when it is possible for those who use donor gametes in a non-surrogacy situation to be the legal parents at birth.

8.20 We think the arguments are finely balanced and therefore we ask for consultees' views.

Consultation Question 9.

8.21 We provisionally propose that the prohibition on the use of anonymously donated gametes should apply to traditional surrogacy arrangements with which a regulated surrogacy organisation is involved.

Do consultees agree?

[19] Although we understand that this is difficult to do, and not common practice.

[20] See HFEA 2008, ss 35 and 42 which explicitly state that they apply whether or not the woman was in the UK or elsewhere.

Consultation Question 10.

8.22 We invite consultees' views as to whether the use of anonymously donated sperm in a traditional, domestic surrogacy arrangement should prevent that arrangement from entering into the new pathway.

The surrogate's right to object

8.23 We think that in order for the new pathway to respect the rights of the surrogate and international law, the surrogate should have the right to object to the acquisition of legal parenthood by the intended parents.

8.24 We emphasise that unless the surrogate objects, the intended parents will *as a matter of law* be the legal parents of the surrogate-born child. There is no possibility within the new pathway that the intended parents could change their mind. This approach provides an important safeguard to the surrogate and the child. It ensures that she can never be required to take legal responsibility for the child, and that the intended parents can never "reject" the child. If the intended parents do not want, or are not able, to care for the child – perhaps because of a breakdown in their own relationship, or because the baby is born severely disabled – then the responsibility lies with them as legal parents to make arrangements. For example, it would be a decision for the intended parents to give up the child for adoption. This does have the effect that the care system may have to step in to look after the child, should the intended parents refuse to fulfil their responsibilities, but we do not see this as any different to the situation where natural parents abandon, or are unable to care for, a child.

8.25 In practice, we think the likelihood of the surrogate exercising her right to object will be very small. Under our proposed eligibility requirements for the new pathway, discussed in Chapter 13, the surrogate and the intended parents will have entered into the surrogacy agreement after receiving information, via implications counselling, about the implications and effect of the surrogacy arrangement (covering legal, medical, emotional and practical aspects), and legal advice on the effect of the law and of entering into the surrogacy agreement (for example, on legal parenthood).[21] Even in the absence of formal requirements, we understand that it is rare for a surrogacy arrangement to break down where screening and scrutiny of eligibility has been carried out in one of the UK surrogacy agencies.[22]

8.26 How should the surrogate's right to object work in practice? As we have seen in the previous chapter, the legislation in Ontario and British Columbia each require written consent from the surrogate after the child has been born. Are there advantages of legal certainty to this approach? The alternative would be for the surrogate to have a fixed period to raise an objection to the acquisition of legal parenthood by the intended parents. We tentatively prefer the latter approach. It avoids a further administrative

---

21 See ch 13. The surrogate's spouse, or partner, if any, will also have to attend implications counselling.

22 That said, there may always be a small number of cases where, perhaps due to a breakdown in the relationship between the intended parents and the surrogate during the pregnancy, the surrogate does wish to exercise her right to object to the intended parents becoming legal parents at birth.

step after the birth, and it allows the birth registrar and the intended parents to proceed confidently to register the surrogate-born child as the child of the intended parents once the period within which the surrogate can object has passed. Given that the surrogate will have been involved in a regulated process, where she is aware of her right to object, we do not believe that a situation where the surrogate must positively raise an objection, rather than positively consent, infringes her rights. We provisionally propose that the objection must be made in writing to both the intended parents and to any body responsible for the regulation of surrogacy arrangements.[23]

8.27 There is also the question of how long the surrogate should have to raise an objection. For the new pathway to work, we take the view that the period must be less than the period within which a child's birth must be registered, which is 42 days in England and Wales, or 21 days in Scotland.[24] In its 2005 report, the New Zealand Law Commission suggested a 21-day period in which the surrogate could object,[25] We think that a period of around two to four weeks strikes the right balance. We note that a period of this sort of length is shorter than the existing six weeks before an application can be made for a parental order. That is necessarily the case given the requirement, in England and Wales, to register the birth within 42 days. In any event, we note that the six-week period operates in a context where no screening or eligibility checks have taken place before conception. We see no reason to replicate that period when screening and procedural safeguards are in place. Given the disparity between the periods for registration of birth in England and Wales, and Scotland, we provisionally propose that the length of the period in which the surrogate has the right to object be set at one week less than the relevant period for birth registration.

8.28 We think that it should be possible for the intended parent or parents to register the birth of the child themselves, once the period for the surrogate to object has passed, without the need for the personal presence of the surrogate at the registration. To require otherwise may be impractical, for example if the surrogate and the intended parents do not live near each other. In the normal way, the registrar will be aware of the birth due to information provided by the NHS. In respect of birth registration, the position of the intended parents may be analogous to that of a father or second female parent seeking to register the birth of a child, without the presence of the birth mother. In these circumstances, declarations are required from the woman who gave birth and the person registering the birth.[26] Similar declarations might be required in the surrogacy situation. Additionally, the hospital where the child is born could make a note in the record provided to the registrar that there was a surrogacy arrangement, with the names of the intended parents provided to the registrar, along with the name of the surrogate. The registrar should also check with the relevant clinic or regulated surrogacy organisation for the record of the surrogacy arrangement within the new

---

23 In ch 9, we provisionally propose that the Authority be made responsible for the regulation of surrogacy arrangements.

24 Births and Deaths Registration Act 1953, s 2; Births, Deaths and Marriages (Scotland) Act 1965, s 14(1).

25 Law Commission: Te Aka: Matua O te Ture, *New Issues in Legal Parenthood* (April 2005) Report 88. The recommendations of the report were not implemented.

26 Births and Deaths Registration Act 1953, s 10. For Scots law, see the Births, Deaths and Marriages (Scotland) Act 1965, ss 18 and 18B.

pathway, which will be available because of the duty that we provisionally propose be applied to regulated surrogacy organisations or clinics.[27]

8.29 If the surrogate does exercise her right to object to the acquisition of legal parenthood by the intended parents, then we provisionally propose that the surrogacy arrangement exits the new pathway. The surrogate would be the legal parent of the child, and there would then be the possibility for the intended parents to seek to obtain legal parenthood by making an application for a parental order. One of the intended parents could also be the legal parent if the surrogate objects, under the current law, in any event. For example, if the intended father's sperm had been used and the surrogate was unmarried, the intended father would be the legal parent at common law.[28] Where an intended parent would be a legal parent at birth under the current law, he or she should continue to be the legal parent, together with the surrogate, following her exercise of her right to object.[29]

8.30 Practically speaking, where the surrogate has exercised her right to object, either the surrogate or the intended parents may be caring for the child. In the ordinary course, where the surrogate has not exercised her right to object, we assume that the surrogate will also be happy for the child to live with and be cared for by the intended parents. Where she has exercised her right to object, the surrogate may have done so because she wishes to raise the child, in which case she may not have given the child into the care of the intended parents. Or, she may have exercised her right to object for another reason, in which case she may be content for the child to live with the intended parents. If there is a dispute about with whom the child should live, or have contact, this dispute can be decided by the court under the current law, as we discuss later in this chapter, in a similar way to how the court decides on the care of a child where the parents have separated.[30]

The surrogate lacks capacity to consent during the period in which she may exercise her right to object

8.31 On a parental order application, the court already has the ability to make the order where the surrogate (or other legal parent) lacks the capacity to provide the required consent.

8.32 For the new pathway, the surrogate should have capacity to exercise her right to object throughout the period in which she has this right. We think that the simplest way to proceed is for the intended parents, on making an application for the registration of the birth of the child, to be required to make a statement that they have no reason to believe that the surrogate has lacked capacity at any time during this

---

27 See paras 8.12 and subsequent.

28 This is not the position in Scotland where the intended father would be the legal parent only if he took steps to have himself named on the birth certificate or a court order was made declaring that he was the child's parent. See para 4.32.

29 We discuss below what the legal parental status of the surrogate's spouse or civil partner should be in these circumstances (see paras 8.52 and subsequent). Another example of how an intended parent might be a legal parent before a parental order is made is where the intended mother or father is a legal parent under the parenthood provisions of the HFEA 2008 (in the intended father's case, this is only possible where his sperm was not used) (see paras 4.27 and subseqent).

30 See paras 8.107 and subsequent.

period. While the intended parents obviously cannot be expected to assess the surrogate's capacity, such an approach would cover the more obvious instances of a lack of capacity, such as the surrogate being unconscious during this period. We prefer the approach of the intended parents making this declaration rather than the surrogate, as it is consistent with our general policy that consent should be assumed if the surrogate does not positively exercise her right to object.

8.33 However, if the surrogate did temporarily lose capacity during the period in which she can exercise her right to object, then we take the view that she should be able to provide positive consent to the intended parents acquiring parenthood. We provisionally propose that she be able to provide such consent during the period of the right to object, if and when she regains capacity during that period.[31] Enabling the surrogate to do so will avoid short periods of incapacity preventing the intended parents from acquiring legal parenthood when this outcome accords with the surrogate's wishes.

8.34 If the intended parents were unable to provide this declaration, or, failing which, the surrogate did not provide the positive consent, then the arrangement would fall out of the new pathway into the parental order route, under which the court retains the ability to make an order where the surrogate lacks capacity. If the intended parents falsely make a declaration in respect of the surrogate's capacity, then they would potentially be guilty of an offence[32] and the entry in the birth register could be corrected.[33] The intended parents would have to apply for a parental order.

---

31 We suggest a similar mechanism in the event of a stillbirth. See paras 8.59 and subsequent.

32 Perjury Act 1911, ss 4 and 5. We understand, however, that it is not the policy of the Registrar General in England and Wales to pursue a conviction in these circumstances, the focus being on obtaining the correct information for the register. In Scotland, under the Registration of Births, Deaths and Marriages (Scotland) Act 1965, s 53(1), it is an offence to knowingly give false information to a registrar.

33 Births and Deaths Registration Act 1953, s 29.

Consultation Question 11.

8.35 We provisionally propose that:

(1) the surrogate should have the right to object to the acquisition of legal parenthood by the intended parents, for a fixed period after the birth of the child;

(2) this right to object should operate by the surrogate making her objection in writing within a defined period, with the objection being sent to both the intended parents and the body responsible for the regulation of surrogacy; and

(3) the defined period should be the applicable period for birth registration less one week.

Do consultees agree?

Consultation Question 12.

8.36 We provisionally propose that, where the surrogate objects to the intended parents acquiring legal parenthood within the period fixed after birth, the surrogacy arrangement should no longer be able to proceed in the new pathway, with the result that:

(1) the surrogate will be the legal parent of the child;

(2) if one of the intended parents would, under the current law, be a legal parent of the child, then he or she will continue to be a legal parent in these circumstances; and

(3) the intended parents would be able to make an application for a parental order to obtain legal parenthood.

Do consultees agree?

Consultation Question 13.

8.37 We provisionally propose that, in the new pathway:

(1) the intended parents should be required to make a declaration on registering the birth of the child that they have no reason to believe that the surrogate has lacked capacity at any time during the period in which she had the right to object to the intended parents acquiring legal parenthood;

(2) if the intended parents cannot provide this declaration then, during the period in which she has the right to object to the intended parents acquiring legal parenthood, the surrogate should be able to provide a positive consent to such acquisition; and

(3) if the intended parents are unable to make this declaration and the surrogate is unable to provide the positive consent within the relevant period, the surrogacy arrangement should exit the new pathway and the intended parents should be able to make an application for a parental order.

Do consultees agree?

How will the welfare of the child be protected in the new pathway?

8.38 We take the view that, within the new pathway, and consistent with our view that the law should reflect the parties' intentions in terms of legal parenthood, there should be no post-birth welfare assessment of the child. Instead, we provisionally consider that account should be taken of the welfare of any child that may be born as a result of the surrogacy arrangement at the pre-conception stage.

8.39 We think that this assessment can be achieved by using the existing process for taking account of the welfare of the child which clinics use when providing assisted reproduction treatments, including in relation to surrogacy.

8.40 The HFEA 1990 makes it a condition of every licence issued to a clinic that:

> a woman shall not be provided with treatment services[34] … unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for supportive parenting), and of any other child who may be affected by the birth.[35]

8.41 This statutory requirement has been translated into practice via the Authority's Welfare of the Child: patient history form, as well as guidance in the Code of Practice.

8.42 The form is a self-disclosure questionnaire that each patient requesting fertility treatment regulated by the Authority must complete. It includes questions intended to

---

[34] "Treatment services" means medical, surgical or obstetric services provided to the public or a section of the public for the purpose of assisting women to carry children: HFEA 1990, s 2(1).

[35] HFEA 1990, s 13(5).

elicit information about convictions related to harming children; child protection measures; serious violence or discord; mental or physical conditions; risk of transmissible or inherited disorders; and drug or alcohol problems.

8.43 The Code of Practice makes clear that the clinic should consider factors that:

> are likely to cause a risk of significant harm or neglect to any child who may be born or to any existing child of the family …[and] past or current circumstances that are likely to lead to an inability to care throughout childhood for any child who may be born, or that are already seriously impairing the care of any existing child of the family.[36]

8.44 In the context of surrogacy, both the intended parents and the surrogate (and her partner, if she has one) are required to complete the form. Answering yes to any of the questions on the form does not necessarily mean that treatment will be refused.

8.45 The Code of Practice contains specific guidance on the welfare of the child assessment in surrogacy arrangements.

> When assessing the welfare of the child in relation to a surrogacy arrangement, the centre should assess both the intended parents and the surrogate (and the surrogate's partner, if she has one). The centre should take into account the possibility of a breakdown in the surrogacy arrangement leading to the surrogate choosing to parent the child and/or refusing to relinquish her legal parenthood and whether this is likely to cause a risk of significant harm or neglect to any child who may be born or to any existing children in the surrogate's family. A welfare of the child form should be completed by each individual involved in the surrogacy arrangement (this should include the surrogate, the intended parent(s), the partner of the surrogate (if applicable) and any other individual the centre believes should be assessed in relation to the welfare of the child) in conversation with the treating clinician at the centre.
>
> The centre should satisfy itself that the information given on the welfare of the child form(s) is complete and correct so that any decisions relating to the treatment provided to the surrogate are fully informed and take account of all relevant considerations. The centre should obtain any relevant medical records from the surrogate's GP and any other relevant organisations and use that information to verify the information provided in the welfare of the child form relating to the surrogate. Any omission, discrepancy or other concern which raises questions about the woman's suitability for surrogacy, or which might impact on decisions relating to her treatment, should be investigated by the centre and discussed with the surrogate.
>
> The centre should use evidence it has gathered from the GP, surrogate and any other relevant sources to satisfy itself that the surrogate is suitable to act as a surrogate, taking into account all relevant factors (including, but not limited to, the surrogate's age, medical history, previous obstetric history, mental health, body mass index etc) and with reference to best practice guidance, including "The

[36] The Code of Practice para 8.14.

> Surrogacy Pathway" and "Care in Surrogacy" published by the Department of Health and Social Care. Further information should be sought where required so that the treating clinician can make decisions having been fully informed of all relevant considerations.[37]

8.46 The clinic, with the consent of the person, can approach "any individuals, agencies or authorities for any factual information required for further investigation…" where there is a failure to provide information; information is inconsistent; there is evidence of deception or information suggests a risk of significant harm or neglect to the child. If the person refuses to provide consent the clinic should take this into account when deciding whether to provide treatment.[38]

8.47 Reference in the Code of Practice quoted above to the surrogate choosing to parent the child, or refusing to relinquish legal parenthood, would need to be understood in the context of the new pathway; that is, to the possibility of the surrogate choosing to exercise her right to object.

8.48 We note that, in the January 2019 review of the surrogacy legislation in Western Australia, the report concluded that:

> Consideration of the various approaches to, and/or recommendations about, screening found the most suitable approach to be that taken in the United Kingdom, where guidelines stipulate the requirements and processes for conducting a child welfare check during counselling pre-treatment and steps that may be taken where there is a concern.[39]

8.49 The Report recommends that the Western Australian Government should develop guidelines, and a form for use by all providers of treatment, adopting the UK approach.[40]

8.50 We think that, in the case of traditional surrogacy arrangements, the regulated surrogacy organisation could undertake the same assessment process in relation to the welfare of the child as a clinic would. UK surrogacy organisations that we have spoken to already carry out these kinds of checks.[41] In addition, we discuss in Chapter 13 concerning eligibility requirements for the new pathway, provisional proposals relating to health screening and mental health assessments in respect of surrogates, and criminal background checks on intended parents and surrogates. Such requirements will assist with safeguarding the welfare of the child born as a result of the surrogacy arrangement.

---

37 The Code of Practice, paras 8.9 to 8.11.

38 The Code of Practice, para 8.16.

39 S Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008 (Report: Part 2)* (2019) p 106.

40 S Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008 (Report: Part 2)* (2019) p 107 (Recommendation 21).

41 See ch 3.

Consultation Question 14.

8.51 We provisionally propose that, in the new pathway, the welfare of the child to be born as a result of the surrogacy arrangement:

(1) should be assessed in the way set out in Chapter 8 of the current Code of Practice;

(2) either the regulated surrogacy organisation or regulated clinic, as appropriate, should be responsible for ensuring that this procedure is followed; and

(3) there should be no requirement for any welfare assessment of the child after his or her birth.

Do consultees agree?

Position of the surrogate's spouse or civil partner with regard to legal parenthood

Parenthood under the new pathway

8.52 Under the current law, a surrogate's spouse or civil partner will be the other legal parent of the child, unless he or she did not consent to the surrogate's treatment. This outcome is the result of the provisions for legal parenthood contained in the HFEA 2008, which work well in the situation where the woman carrying the child intends to raise the child with her spouse or civil partner, by assuring the parental status of the latter.[42] However, the effect in a surrogacy context is to make someone – the surrogate's spouse or civil partner – a legal parent when he or she has neither a gestational nor genetic connection with the child, and does not intend to raise the child. Stakeholders have questioned whether it is appropriate that the surrogate's spouse or civil partner should, therefore, be treated in law as the other legal parent.

8.53 We have provisionally proposed above that under the new surrogacy pathway a surrogate would become the legal parent of the child on the birth of the baby only where she exercises her right to object to the intended parents being legal parents. The intended parents would then be able to apply to the court for a parental order. We do not think that it is appropriate, in this situation, for the surrogate's spouse or civil partner to be that child's other legal parent. As we have explained above, the surrogate's spouse or civil partner would not be a party to the surrogacy arrangement.

Parenthood under the existing pathway

8.54 The question of whether the surrogate's spouse or civil partner should continue to be one of the child's legal parents on birth, in cases that fall outside of the new pathway, is finely balanced. One of the criticisms made to us of the existing law is that it is inappropriate that the surrogate's spouse or civil partner becomes a legal parent. Again, that outcome does not reflect the intentions of the parties. However, unlike an arrangement under the new pathway, it may not be clear that the child has, in fact, been born as a result of a surrogacy arrangement. There may not be a written

[42] See ch 4 and Appendix 1.

surrogacy agreement in place. Where a written agreement has been entered into, there may still be a dispute as to whether the arrangement is, in fact, a surrogacy arrangement.[43]

8.55 Cases in which there is a dispute as to the existence of a surrogacy arrangement – as opposed to those in which an arrangement has been entered into, but has broken down – are likely to be in the minority. In nearly all cases, the court might be able to come to a view as to the true nature of the arrangement. Nevertheless, we think that it is too uncertain for the parenthood of a child to be left to be determined by the court's interpretation of the nature of an agreement entered into between the parties. In any event, a surrogacy arrangement which is not entered into under the new pathway might be thought to offer a less secure basis for changing the law to remove legal parenthood from the surrogate's spouse or civil partner.

8.56 We do not think that the arguments point strongly towards changing the law in relation to cases that fall outside the new surrogacy pathway, but we invite consultees' views.

Consultation Question 15.

8.57 We provisionally propose that, for a child born as a result of a surrogacy arrangement under the new pathway, where the surrogate has exercised her right to object to the intended parents' acquisition of legal parenthood at birth, the surrogate's spouse or civil partner, if any, should not be a legal parent of the child.

Do consultees agree?

8.58 We invite consultees' views as to whether, in the case of a surrogacy arrangement outside the new pathway, the surrogate's spouse or civil partner should continue to be a legal parent of the child born as a result of the arrangement.

Legal parenthood in the event of the death of the child, the surrogate or the intended parents

Stillbirth of the child

8.59 When a baby is stillborn, that is born dead after 24 weeks of pregnancy, that event must be recorded in the register of stillbirths.[44] The register of stillbirths includes the names of the parents of the child.[45] This raises the question of who should be recorded as the parents: the intended parents or the surrogate?

---

43 For example, it might be argued by the mother that she had intended to enter into an arrangement where she was going to co-parent the child with those people who are claiming that there was a surrogacy arrangement and that they are the intended parents.

44 Births and Deaths Registration Act 1953, ss 1 and 41; Registration of Births, Deaths and Marriages (Scotland) Act 1965, ss 13(1)(b) and 56.

45 The Registration of Births and Deaths Regulations 1987 (SI 1987 No 2088), form 9; Registration of Births, Still-births, Deaths and Marriages (Prescription of Forms) (Scotland) Regulations (SSI 1997 No 2348), reg 4, sch 2 para 1.

8.60 We suggest that, in most cases, the intended parents will wish to be registered as the parents of the child, in the way that parents through natural conception can be registered as the parents following a stillbirth, and we see no reason why this could not happen where the surrogate consents.

8.61 In the new pathway, the intended parents will be the legal parents at birth subject to the surrogate's exercise of her right to object.

8.62 We are concerned, however, at the intended parents having to wait until the expiry of the period during which the surrogate has the right to object, before being able to register the birth, given the distressing circumstances. We therefore propose that the surrogate should be able positively to consent to the intended parents being registered as the parents of the child when registering the stillbirth, before the expiry of the period of her right to object.

8.63 Outside the new pathway, we suggest that the surrogate should also be able to consent to the intended parents being registered as the parents of a stillborn child, without having to make an application to court, but where all the relevant criteria for the making of a parental order are met.[46] The intended parents would have to make a declaration to the effect that these relevant criteria are met, on registration of the birth. The surrogate should be able to provide this consent within the period allowed for the registration of the birth.

8.64 We acknowledge that, in these circumstances, the possibility exists that a woman giving birth and either a couple or another individual could collude falsely to claim that the birth was the result of a surrogacy arrangement, and to register that individual or couple as the child's parents, as if they had been intended parents. This would have the effect of falsifying the birth record, which would be a criminal offence.[47] However, we consider that the risk of this actually happening is minimal and we do not regard this risk as a reason not to introduce such a procedure. We are not aware of any benefit that the parties may derive from falsifying the registration in this way, or why the parties would wish to do so.

8.65 A lack of consent, or exercise of her right to object, by the surrogate would be absolute and the child would be registered as the child of the surrogate.

8.66 It may be that it would be appropriate for there to be a short period of a few days or less, following the stillbirth, during which the surrogate cannot provide the necessary

---

46 For example, the requirement under HFEA 2008, ss 54(4) and 54A(3) that the child's home is with the applicants would not be relevant.

47 In England and Wales, a person may be guilty of an offence (under section 4 of the Perjury Act 1911) if he or she wilfully gives a false answer to any question put by a registrar relating to the particulars required to be registered, or deliberately gives the registrar false information about a birth, or makes a false statement with intent to have the information inserted in a birth register. He or she would be liable on summary conviction to a fine or on conviction on indictment to imprisonment or a fine. In terms of section 53 (1) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 it is an offence to knowingly give false information to a registrar. On conviction on indictment, a person is liable to a fine or to imprisonment for a term not exceeding two years or to both; on summary conviction, a person is liable to a fine or to imprisonment for a term not exceeding three months or to both.

consent (whether the arrangement was under the new pathway or not) and we welcome consultees' views on this point.

The child dies before the grant of the parental order

8.67 In the new pathway, the intended parents would be the parents at birth, subject to the exercise of the surrogate's right to object. This result would follow from the usual operation of the new pathway.

8.68 Outside the new pathway, we think it should be possible for the intended parents to be registered as the parents of a child who dies before a parental order has been granted. Intended parents have explained to us that recognition of their relationship to the child is personally and emotionally significant in dealing with their bereavement. We see no objection to such a registration being made where the surrogate consents. We think that the same procedure should apply as discussed above in relation to stillbirth; that is, to allow the surrogate to consent to the intended parents being registered as the parents. If the surrogate did not provide that consent then that would be final, and it would not be possible to register the intended parents as parents.

The surrogate dies during childbirth, or during the period within which the right to object can be exercised

8.69 Where an application is made for a parental order, the law does not require the consent to the making of the parental order of a surrogate or other legal parent who lacks capacity.[48] If the surrogate has died, it might be said that the need for her consent should automatically be dispensed with. The alternative is that the court should have the power to dispense with the surrogate's consent on application by the intended parents.[49]

8.70 For arrangements that begin in the new pathway, we ask whether the death of the surrogate during childbirth, or during the period of time during which she could exercise her right to object, should have the effect that the arrangement no longer proceeds under the new pathway. On one hand, in these circumstances, because the right to object cannot be exercised, the arrangement might benefit from judicial scrutiny. On the other hand, we acknowledge that for arrangements in the new pathway, at the time of the surrogate's death, there will exist a presumption that the intended parents, and not the surrogate, will be the child's legal parents and that, unless that presumption is rebutted, the intended parents should be afforded parental status.

Both intended parents die during the surrogate's pregnancy, or before the making of a parental order

8.71 Parents who are deceased can already be registered as the parents of a child. We see no reason not to apply this existing position in respect of surrogacy. Therefore, we take the view that where a surrogacy arrangement follows the new pathway, the intended parents should be registered as parents on the birth of the child, even where both intended parents have died. As in all cases under the new pathway, their registration would be subject to the surrogate not exercising her right to object. If the

---

48 See ch 5.

49 See ch 11.

surrogate does exercise her right to object, the arrangement will fall out of the new pathway and the surrogate will be the child's legal mother, subject to the outcome of an application made as described below. Where the arrangement is outside the new pathway, we observe that there will be no-one eligible to apply for a parental order. That might suggest that the intended parents cannot be registered as the parents of the child, and that the surrogate should be registered as the mother.

8.72 However, we acknowledge that the outcome of the surrogate being the legal mother would create what may be an unwarranted disparity between how deceased intended parents are treated for surrogacy arrangements in and outside the new pathway. Recognising the intended parents as the legal parents would give effect to the intention shared by the intended parents and the surrogate that the child would become part of the intended parents' family, develop relationships with siblings and the wider family, and be entitled to inherit from the intended parents.[50] Such an approach focuses primarily on the welfare of the child.

8.73 On the other hand, treating surrogacy arrangements outside the new pathway in exactly the same way as we have outlined above for arrangements in the new pathway would have the effect of collapsing the distinction between arrangements in and outside the new pathway in circumstances where the intended parents die.

8.74 A different option would be to allow certain categories of people to apply both for guardianship of the child,[51] and for a parental order in the name of the intended parents, subject to the surrogate's consent.[52] The category of people entitled to make such an application would (under Scots law) be those who claim an interest,[53] or (under the law of England and Wales) those who would be permitted to make an application under section 8 of the Children Act 1989 for an order regulating the exercise of parental responsibility (for example, making provision for people with whom a child is to live or have contact).[54]

8.75 We provisionally propose that the surrogate's consent should be necessary for such an application, subject to the existing law which states that such consent is not required where the surrogate is incapable of giving agreement or cannot be found. In Chapter 11, we make a provisional proposal that it should be possible for the court to

---

50 After all, as we have seen in ch 5, intended parents are encouraged by surrogacy organisations to make wills to benefit their children born through a surrogacy arrangement, in the event of their death.

51 A guardian of a child will have parental responsibility for that child: Children Act 1989, s 5(6); the Children (Scotland) Act 1995, s 7.

52 In ch 11 we provisionally propose that the court should be able to dispense with the surrogate's consent in specified circumstances that go beyond the current, narrow, situations where the surrogate's consent is not required (either that she lacks capacity or cannot be found – see HFEA 2008, ss 54 and 54A. These circumstances are where the child is living with or being cared for by the intended parents, with the surrogate's consent, or where the court has decided that the child should live with the intended parents.

53 In terms of the Children (Scotland) Act 1995, s 11(3)(a).

54 Some people are entitled to apply for a section 8 order without the court giving leave, for example a party to a marriage in respect of which the child is "a child of the family" or a person with whom the child has lived for at least three years. Any other person must seek the leave of the court – this would include those who might be most likely to make an application for guardianship and the making of the parental order in these circumstances, such as members of the deceased intended parents' extended family (for example, the parents or siblings of the intended parent). See Children Act 1989, s 10.

dispense with the surrogate's consent in further circumstances, where the child is living with or being cared for by the intended parents (or the court determines that this should be the case), subject to the paramount consideration of the welfare of the child throughout his or her life.[55] Clearly, such conditions for dispensing with consent cannot be met in a situation where the intended parents have died. However, in such extraordinary circumstances, should the court's power to dispense with consent be exercised by reference to all of the relevant facts and circumstances, with the welfare of the child being the paramount consideration? The absence of a power to dispense with consent in wider circumstances would mean, in a situation where the surrogate did not give her consent, not allowing the child to become part of the intended parents' family, which may have very clearly been part of the surrogate's and intended parents' shared intention. Such an outcome would be likely to impact negatively on the child's welfare, including upon rights of succession. On the other hand, allowing such a power might constitute an unacceptable interference with the surrogate's autonomy. We would be interested in consultees' views.

8.76 Even if, in these circumstances, the intended parents would not be the child's legal parents and, therefore, could not be registered as the child's parents on his or her birth certificate, should it be possible to record the role of the intended parents on the register of surrogacy arrangements? A record would allow the child to understand the intention of the individual or couple with respect to his or her conception (and his or her genetic parentage). Obviously, a record could not be made by an application for a parental order, but it would be possible to create a method for the surrogate to supply details of the intended parents and, if applicable, gamete donors (if substantiated with evidence) to the register. Again, we seek consultees' views on this point.

[55] See paras 11.22 and subsequent.

Consultation Question 16.

8.77 We provisionally propose that, in the new pathway, where a child born of a surrogacy arrangement is stillborn:

(1) the intended parents should be the legal parents of the child unless the surrogate exercises her right to object; and

(2) the surrogate should be able to consent to the intended parents being registered as the parents before the expiry of the period of the right to object.

Do consultees agree?

8.78 We provisionally propose that, outside the new pathway, where a child born of a surrogacy arrangement is stillborn, the surrogate should be able to consent to the intended parents being registered as the parents before the expiry of the period allowed for the registration of the birth, provided that the intended parents have made a declaration to the effect that the relevant criteria for the making of a parental order are satisfied, on registration of the stillbirth.

Do consultees agree?

Consultation Question 17.

8.79 We provisionally propose that, for surrogacy arrangements outside the new pathway, where the child dies before the making of the parental order, the surrogate should be able to consent to the intended parents being registered as the parents before the expiry of the period allowed for the registration of the birth, provided that the intended parents have made a declaration to the effect that the relevant criteria for the making of a parental order are satisfied, on registration of the birth.

Do consultees agree?

Consultation Question 18.

8.80 For surrogacy arrangements in the new pathway, we invite consultees' views as to whether, where the surrogate dies in childbirth or before the end of the period during which she can exercise her right to object, the arrangement should not proceed in the new pathway and the intended parents should be required to make an application for a parental order.

Consultation Question 19.

8.81 We provisionally propose that, for surrogacy arrangements in the new pathway, where both intended parents die during the surrogate's pregnancy, the intended parents should be registered as the child's parents on birth, subject to the surrogate not exercising her right to object within the defined period.

Do consultees agree?

8.82 We invite consultees' views as to whether, for surrogacy arrangements outside the new pathway, where both intended parents die during the surrogate's pregnancy or before a parental order is made:

(1) it should be competent for an application to be made, by a person who claims an interest under section 11(3)(a) of the Children (Scotland) Act 1995, or who would be permitted to apply for an order under section 8 of the Children Act 1989:

(a) For an order for appointment as guardian of the child, and

(b) for a parental order in the name of the intended parents, subject to the surrogate's consent; or

(2) the surrogate should be registered as the child's mother and it should not be possible for the intended parents to be registered as the child's parents, but that there should be a procedure for the surrogate to provide details of the intended parents, and, if relevant, gamete donors, for entry onto the register of surrogacy arrangements.

Position of a second intended parent after a single parent application by the first intended parent

8.83 Following the change in the law in December 2018, it is now possible for a single person to make an application for a parental order.[56] It is possible that a situation could arise where two intended parents enter into a surrogacy arrangement, separate following the child's conception, but reconcile a significant amount of time after the child's birth. If the surrogacy arrangement proceeds in the new pathway the intended parents will be the legal parents of the child despite the separation. However, if the arrangement proceeds to an application for a parental order and the couple have separated, one intended parent could make an application as a single parent (provided, under the current law, that his or her gametes were used). The second parent would then be blocked from applying for a parental order as a single parent,

[56] See para 1.7.

because one of the conditions for the making of an order under section 54 or 54A is that no previous order has been made.[57]

8.84 In Chapter 11 we provisionally propose that the time limit for the making of a parental order be removed. We have some concern that, when taken together with the ability of a single intended parent to make an application for a parental order, removal of the time limit may create an unfair situation for the second intended parent following separation. It is possible that the second intended parent, following separation and before any reconciliation, may have had little contact with the first intended parent and the child. During that time, the first intended parent may make a successful application for a parental order at any time (assuming the current six month time limit is abolished). Given the absence of a time limit, the second parent may have no sense of urgency with regard to resolving the parenthood of their child, and could then find him or herself unable to apply for a parental order – either singly, or jointly with the first intended parent.

8.85 In order to address this issue, we provisionally propose that a single intended parent who makes an application for a parental order under section 54A should have to make a declaration that it was always intended that he or she would be applying as a single parent or, if not, to provide the name and contact details of the other intended parent. If the latter applies, provision should be made for notice of the parental order proceedings to be given to the other intended parent, who would then be given the opportunity both to give notice that they oppose the application and, subsequently, to make his or her own application for a parental order, failing which the court could proceed to determine the first parent's application.[58]

---

57 HFEA 2008, ss 54(8A) and 54A(8). There is an exception if the previous order has been quashed or an appeal against that order allowed. There is no case law of which we are aware concerning the quashing of, or an appeal against, a parental order.

58 In ch 10 we ask, whether, in this situation, there should be provision for an intended parent who is not a party to the application for a parental order to be recorded in the proposed register of surrogacy arrangements.

Consultation Question 20.

8.86 We provisionally propose that, where an application is made for a parental order by a sole applicant under section 54A:

(1) the applicant should have to make a declaration that it was always intended that there would only be a single applicant for a parental order in respect of the child concerned or to supply the name and contact details of the other intended parent;

(2) if details of another intended parent are supplied, a provision should be made for notice to be given to the potential second intended parent of the application and an opportunity given to that party to provide notice of opposition within a brief period (of, say, 14 to 21 days); and

(3) if the second intended parent gives notice of his or her intention to oppose, he or she should be required to make his or her own application within a brief period (say 14 days), otherwise the application of the first intended parent will be determined by the court.

Do consultees agree?

ALTERNATIVE PROPOSALS

8.87 We have set out above our preferred model of legal parenthood under the new pathway for surrogacy arrangements. We have provisionally proposed that under the new pathway the intended parents will be the legal parents from birth of the child born as a result of the surrogacy arrangement, to the exclusion of the surrogate as legal mother, unless the surrogate exercises her right to object.[59]

8.88 If consultees do not agree with this model, an alternative approach is the "temporary three-parent" model, also discussed above.[60] Under this model, the result of following the new surrogacy pathway would be that the intended parents and the surrogate become the legal parents of the child at birth. Provision would then be made for the surrogate's legal parenthood to be extinguished. We welcome consultees' views on such a model. In particular, we would welcome views as to how the legal parenthood of the surrogate should be extinguished in this model. We see three main options:

(1) the surrogate's legal parenthood should lapse after a defined period, subject to the surrogate exercising a right to object in writing to this lapse, within that period;

(2) the surrogate should have to provide written consent within a defined period of time to removal of her legal parenthood; or

---

59 See paras 8.23 and subsequent.

60 See paras 7.85 and subsequent.

(3) the intended parents should have to make an application to court to remove the surrogate's status as legal parent.

8.89 In the case of the first and second options the result of the surrogate exercising a right to object, or not providing written consent, within a defined period of time, would be that the case would fall back into the parental order route, leaving the intended parents to apply for a parental order.

8.90 We observe that the third option may offer no practical advantages, in terms of time, cost or stress, when compared to the current application for a parental order, although the intended parents would, at least, have the status of legal parents from birth.

Consultation Question 21.

8.91 We invite consultees' views as to:

(1) a temporary three-parent model of legal parenthood in surrogacy cases; and

(2) how the legal parenthood of the surrogate should be extinguished in this model.

8.92 As we have set out above, the way in which the intended parents become legal parents under the new pathway is an administrative process, assuming that the surrogate does not exercise her right to object. We have not proposed any further oversight, provided either by a judge, or a body akin to an adoption panel.[61] We would, however, welcome consultees' views on whether they would wish there to be either judicial, or further administrative oversight, in the context of a system that provides legal parenthood to the intended parents at birth. Most obviously, that might mean that a surrogacy arrangement has to be approved either by an application to court or by a body akin to an adoption panel. An adoption panel must be constituted by an adoption agency to provide recommendations on whether a child referred to the panel should be placed for adoption,[62] and on the suitability of prospective adopters.[63] In order to provide recommendations, the panel must be composed of a chair, a vice chair, a social worker of at least three years' relevant experience or the agency's medical adviser, and at least three other persons; in Scotland, the panel must consist of at least six members and include a medical adviser and a legal adviser.[64] In the case of surrogacy, an equivalent panel could be convened by a surrogacy agency.

---

61 Adoption Agencies Regulations 2005 (SI 2005 No 389), reg 30A; Adoption Agencies (Scotland) Regulations 2009 (SSI 2009 No 154), reg 6(2)).

62 Adoption Agencies Regulations 2005 (SI 2005 No 389), reg 18; Adoption Agencies (Scotland) Regulations 2009 (SSI 2009 No 154), reg 6(2).

63 Adoption Agencies Regulations 2005 (SI 2005 No 389), reg 30A; Adoption Agencies (Scotland) Regulations 2009 (SSI 2009 No 154), reg 6(2).

64 Adoption Agencies Regulations 2005 (SI 2005 No 389), reg 6; Adoption Agencies (Scotland) Regulations 2009 (SSI 2009 No 154), reg 3.

Consultation Question 22.

8.93 We invite consultees' views:

(1) as to whether there should be any additional oversight in the new pathway that we have proposed, leading to the acquisition of legal parenthood by the intended parents at birth; and

(2) if so, as to whether should this oversight be:

(a) administrative, or

(b) judicial.

COMPETING CONSIDERATIONS

8.94 Our provisional proposals have been based on the evidence that we have obtained in the many meetings that we have had with stakeholders in preparing this paper. However, we are conscious that our evidence base is not complete and that, in any event, there are complex and sensitive issues that arise from our provisional proposals. We have also, therefore, set out potential alternatives to our proposed model.

8.95 Under our provisional proposal for reform, the intended parents will be the legal parents of the child from birth, unless the surrogate exercises her right to object. The effect of the surrogate's exercise of her right to object would be that the surrogate would be the legal parent of the child, rather than the intended parents, who would then have to apply for a parental order if they wished to become the child's legal parents. Our provisional proposal would therefore enable an outcome that is not possible under the current law; that is, it enables a woman to choose to enter into a surrogacy arrangement the effect of which will be that the intended parents, and not she, will be the legal parents of the child from his or her birth.

Autonomy

8.96 A key issue for us in developing this provisional proposal has been to ensure that the law respects the autonomy of women who become surrogates to make their own decisions. We take the view that our provisional proposals do so. Surrogacy arrangements will only be eligible for the new pathway if strict criteria are followed, and these criteria are designed to ensure that a woman's decision to become a surrogate, and to enter into a surrogacy arrangement with the intended parents, is a fully informed one. Additionally, the right for the surrogate to object to the intended parents acquiring legal parenthood automatically, on the birth of the child, ensures respect for the surrogate's wishes and intentions at that stage. Of course, where there is dispute between the surrogate and the intended parents, the decision as to parental status will ultimately be taken by a court after enquiry into all of the facts and circumstances.

8.97 We have been told by women who have been surrogates that by making them the legal mother of the child on birth, the current law goes directly against their own wishes. They do not consider themselves to be the mother of the child they have gestated for the intended parents, and do not want to be held legally responsible for a child whom they have never considered to be theirs. For example, should a need arise for the baby to have urgent medical or surgical treatment, they consider that the decision in that regard should lie not with them but with the intended parents. That view has been expressed to us by women who have been surrogates in both traditional and gestational arrangements. The views of surrogates we have spoken to have been a powerful and persuasive factor in our provisional proposal.

8.98 Others, however, may take a different view and feel that our provisional proposals diminish the surrogate's autonomy. She would no longer be recognised by law as the mother of the child to whom she has given birth, and must object to the intended parents being the legal parents and take active steps to obtain the legal status of mother. It might be argued that these changes fail to give due recognition to the surrogate's gestational (and, possibly, genetic) relationship with the child, and that they shift the balance of power in the relationship between the intended parents and the surrogate towards the intended parents.

8.99 In the new pathway the surrogate is providing her consent to the surrogacy agreement before the possibly life-changing event of the birth takes place, at a time when she may not have been able to anticipate the implications. Some may question whether a consent provided before birth is as informed or valid as one provided after birth.

8.100 It could be argued that a three-parent model would involve a lesser incursion into the surrogate's autonomy as she would, together with the intended parents, be a legal parent of the child at birth. Alternatively, requiring the surrogate positively to consent to the removal of her legal parenthood following the child's birth might also address concerns over her providing consent in advance of the birth. Our provisional view is that neither of those approaches is satisfactory. If women who become surrogates do not want to be seen in law as the mother of the child, then the three-parent model does not respect their wishes. Similarly, requiring the positive consent of the surrogate after the birth of the child undermines recognition of the autonomous decision of the woman, when she entered into the surrogacy agreement, to carry a child of whom others would be the parents.

The genetic and gestational relationship

8.101 A further potential concern is that our proposals perpetuate a legal "fiction" around who the parents of a child are. Under the new pathway, if the surrogate does not exercise her right to object, the child's birth certificate will not show the surrogate, the woman who carried and gave birth to the child, as the child's mother. In the case where both (or the only) intended parent(s) are male, the child would have no legal mother. It might be argued that this situation creates an unacceptable legal fiction. We note, however, that in Chapter 9, we provisionally propose the creation of a national register of surrogacy arrangements which would record the identity of the surrogate. We think that this identification requirement addresses any issue of the "erasure" of the surrogate. But some may consider that this does not justify the removal of the surrogate as mother from the child's birth certificate.

8.102 As we have set out in Chapter 4, there already exist "legal fictions" around parenthood, if by "fiction" we mean that parenthood is not based on a genetic or gestational relationship. For example, there is the presumption in common law, and, in Scots law, in statute, that the man married to the mother of a child is the child's father, even if he is not genetically related to the child. And, under the HFEA 2008, a person can become the second legal parent of a child by agreement with the child's mother, again, regardless of the presence of a genetic link. Irrespective of their views on those other two rules, some may feel that our proposal amounts to an unacceptable masking of the genetic or gestational truth.

8.103 A three-parent model would address the existence of such legal fictions if it recorded the surrogate as one of the legal parents on birth (and, perhaps, identified her as the parent who gave birth). However, in the paragraphs above, we discuss the three-parent model in terms of a temporary arrangement, with the surrogate's legal parenthood being removed, either by agreement or court order after the child's birth. The adoption of such a model, therefore, would not necessarily result in the surrogate being recorded on the birth certificate.

Welfare of the child

8.104 We would not put forward our provisional proposal on legal parenthood unless we considered that it is in the best interests of the child. The new pathway removes the requirement for a welfare assessment of the child after birth. We argue that the child's welfare is protected by the pre-conception requirements of the new pathway. However, it might be argued that a post-birth welfare assessment, when the child can be seen in his or her home with the intended parents, provides a more robust safeguard to protect the child than a welfare assessment undertaken before his or her conception. That would be an argument for either retaining the current model to transfer parenthood to the intended parents, or for retaining some form of judicial or administrative oversight following the birth of the child of the surrogacy arrangement. However, as we discussed in Chapter 7, we do not think that a post-birth welfare assessment works well for a surrogacy arrangement, where the court is presented with a child already in the care of the intended parents. It is even less apt in the context of our new pathway to legal parenthood. We also note that, obviously, no such assessment is considered necessary in the case of children born through natural conception.

8.105 Further, we think that our provisional on legal parenthood protects the welfare of the child in another way. It ensures that the legal position in relation to his or her parents reflects, from birth, the reality of the relationships intended by the parties to the surrogacy arrangement.

8.106 In conclusion, in framing our provisional proposal, we have accepted the views of the surrogates to whom we have spoken, and have sought to provide a provisional proposal that best protects the welfare of the child. But we are also conscious that there are divergent views on the issues that we have discussed above. It is because of the sensitive nature of these issues that we are singling out for mention the competing considerations around our provisional proposal for a new pathway to parenthood. We welcome the views of consultees on these issues when answering the questions that we have posed. Our proposals for reform are only provisional at this

stage, and we hope that the consultation responses we receive will reflect the full range of views on these significant issues.

THE FACTORS THAT THE COURT SHOULD CONSIDER WHEN MAKING DECISIONS ABOUT A CHILD BORN OF A SURROGACY ARRANGEMENT

8.107 In this section, we consider what factors the court should be directed to consider when it is making decisions in relation to a child born as a result of a surrogacy arrangement. These decisions fall into two categories:

(1) the decision about whether to make a parental order; and

(2) the decision as to the living arrangements for a child.

8.108 The first decision will only be relevant to arrangements outside the new pathway, either because the surrogacy arrangement never complied with the conditions necessary for the arrangement to fall within the new pathway, or because the arrangement has fallen out of the new pathway following the surrogate's exercise of her right to object. The intended parents will then need to make an application for a parental order.

8.109 The second decision will usually only be relevant for cases outside the new pathway where a surrogacy arrangement has broken down, and the surrogate wishes the child to live with her. It is technically possible (if unlikely), however, that in an arrangement within the new pathway, the surrogate may not exercise her right to object to the intended parents acquiring legal parenthood, but could dispute with whom the child should live.

8.110 In relation to the first decision, under the current law and, assuming the conditions for making a parental order are met, the court's paramount consideration in deciding whether to make a parental order is the child's welfare, throughout his or her life. This principle is the same as that applied when the court is deciding whether to make an adoption order.[65] The court in England and Wales, in surrogacy cases, is directed to have regard to the following checklist of matters, again derived from adoption law (although modified):

(1) the child's ascertainable wishes and feelings regarding the decision (considered in the light of the child's age and understanding),

(2) the child's particular needs,

(3) the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become the subject of a parental order,

(4) the child's age, sex, background and any of the child's characteristics which the court considers relevant,

---

[65] ACA 2002, s 1, as applied and modified by the 2018 Regulations, reg 2 and sch 1 para 2; AC(S)A 2007, s 14(3), as applied and modified by the 2018 Regulations, reg 3 and sch 2 para 2.

(5) any harm (within the meaning of the Children Act 1989) which the child has suffered or is at risk of suffering, and

(6) the relationship which the child has with relatives and with any other person in relation to whom the court considers the relationship to be relevant.[66]

8.111 In Scotland, in applications for parental orders, the court is directed to have regard to the terms of section 14(1) to (4) and (8) of the AC(S)A 2007, which, as applied and modified by regulation 3 and schedule 2 paragraph 2 of the 2018 Regulations, provide as follows:

(1) Subsections (2) to (4) (as applied with modifications by regulation 3 and schedule 2 to the Parental Order Regulations) apply where a court is coming to a decision relating to an application for a parental order.

(2) The court must have regard to all the circumstances of the case.

(3) The court is to regard the need to safeguard and promote the welfare of the child throughout the child's life as the paramount consideration.

(4) The court must, so far as is reasonably practicable, have regard in particular to—

(a) the value of a stable family unit in the child's development,

(b) the child's ascertainable views regarding the decision (taking account of the child's age and maturity),

(c) the child's religious persuasion, racial origin and cultural and linguistic background, and

(d) the likely effect on the child, throughout the child's life, of the making of a parental order.

…

(8) Without prejudice to the generality of subsection (4)(b), a child who is aged 12 or over is presumed to be of sufficient age and maturity to form a view for the purposes of that subsection.

8.112 In relation to the second decision, where the court cannot make a parental order, and the court is deciding with whom the child should live and spend time, the child's welfare is again the paramount consideration. In this context, however no reference is made to the child's welfare "throughout his or her life" as these words are more relevant in the context of an order with a transformative effect, such as an adoption or parental order. The checklist of factors is also slightly different, and the court (in England and Wales) is directed to have regard to the following considerations:

---

66 ACA 2002, s 1(4) as applied and modified by the 2018 Regulations, reg 2 and sch 1 para 2.

(1) the ascertainable wishes and feelings of the child concerned (considered in the light of his or her age and understanding);

(2) his or her physical, emotional and educational needs;

(3) the likely effect on him or her of any change in his or her circumstances;

(4) his or her age, sex, background and any characteristics of his or hers which the court considers relevant;

(5) any harm which he or she has suffered or is at risk of suffering;

(6) how capable each of his or her parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his or he needs;

(7) the range of powers available to the court under the Children Act 1989 in the proceedings in question.[67]

8.113 In Scotland, there is no checklist of this kind. Instead, in considering whether or not to make any order in relation to parental responsibilities or parental rights, and what order to make, the court is required:

(1) to have regard to the child's welfare as the paramount consideration;

(2) to make no order unless it would be better to make the order than not; and

(3) as far as practicable, having regard to the child's age and maturity, give him or her an opportunity to express views and have regard to those views.[68]

8.114 Currently, the Scottish Government is considering whether to establish a welfare checklist for the courts to consider when dealing with cases under section 11 of the Children (Scotland) Act 1995.[69] We await the outcome with interest.

8.115 Stakeholders in England and Wales have raised with us whether, in a surrogacy situation, these checklists should be modified. In particular, it has been suggested to us that the parties' intentions when entering into the surrogacy arrangement should be set out as a specific factor in both checklists, so that it is taken into account by the court making a parental order, or a decision about the child's welfare in the context of a surrogacy arrangement.

8.116 In 2005, the New Zealand Law Commission suggested specific factors that the court should take into account when determining, according to the principle of the best

---

67 Children Act 1989, s 1(3).

68 Children (Scotland) Act 1995, s 11(7). We also note the requirement in section 11(7A) to have regard to the matters in section 11(7B), being the need to protect the child from abuse or the risk of abuse.

69 Scottish Government, *Review of Part 1 of the Children (Scotland) Act 1995* (May 2018) paras 10.17 to 10.20, accessible at: https://consult.gov.scot/family-law/children-scotland-act/ (last visited 31 May 2019). The consultation closed on 28 September 2018.

interests of the child, whether it should grant legal parenthood to the intended parents.[70] The list of relevant factors proposed was:

(1) the genetic relationships between child and adults;

(2) the gestational relationships between child and adult;

(3) the intentions of all the parties;

(4) the sibling relationships of the child;

(5) the comparative potential ability of each of the parties to be fit and proper parents of the child;

(6) the ability of each of the parties to facilitate the child's relationships with other parties, should that be considered by the court to be desirable; and

(7) whether issues could be resolved by guardianship and parenting orders, rather than declarations of legal parenthood in relation to each of the parties.[71]

8.117 In a recent Court of Appeal case, the court stated that a decision about the best welfare arrangements for a child after birth, where a surrogacy arrangement had broken down:

> will depend on the circumstances, which will include, in addition to the factors in the Children Act 1989 s 1(3) checklist, the child's gestational and legal parentage, his or her genetic relationships and the manner in which the intended surrogacy came about.[72]

8.118 However, we note that, where the court is able to make a parental order, to date it invariably appears to have done so. It is therefore unclear whether any insertion of new factors into the checklist from the ACA 2002, relevant to the decision whether to make a parental order, would actually have any material effect.[73] Nevertheless, we seek consultees' views on whether the checklist in the ACA 2002 should be (further) amended where the court is making a decision about whether to make a parental order.

8.119 However, the situation may be different in respect of the welfare checklist in the Children Act 1989 where the court is being asked to decide the arrangement that would best meet the child's welfare in the context of a dispute about where the child

---

70 Law Commission: Te Aka: Matua O te Ture, *New Issues in Legal Parenthood* (April 2005) Report 88. This would apply, under the proposed New Zealand scheme, where an interim pre-birth order has been granted, transferring legal parenthood to the intended parents, but the surrogate has petitioned the court to overturn the interim order. See Law Commission: Te Aka: Matua O te Ture, *New Issues in Legal Parenthood* (April 2005) Report 88 paras 7.74 and 7.75.

71 Law Commission: Te Aka: Matua O te Ture, *New Issues in Legal Parenthood* (April 2005) Report 88 para 7.75.

72 *Re H (A Child) (Surrogacy Breakdown)* [2017] EWCA Civ 1798, [2018] 1 FCR 335.

73 On a related point, we consider, in ch 11 whether the court should have the power to dispense with the surrogate's consent to a parental order being made.

should live. It seems possible that including in a modified checklist factors such as the existence of a surrogacy agreement, the parties' intentions, the child's genetic and gestational links to the intended parents and the surrogate, and the sibling relationships of the child might affect the court's decision about the welfare arrangements that should be made for the child. The welfare principle would, of course, remain paramount.

Consultation Question 23.

8.120 In respect of England and Wales, we invite consultees' views as to:

(1) whether the welfare checklist, contained in section 1(3) of the Children Act 1989, should be amended to provide for the court to have regard to additional specific factors in the situation where it is considering the arrangements for a child in the context of a dispute about a surrogacy arrangement; and

(2) if so, as to what those additional factors should be.

Consultation Question 24.

8.121 In respect of England and Wales, we invite consultees' views:

(1) as to whether the checklist, contained in section 1(4) of the ACA 2002 (as applied and modified by regulation 2 and paragraph 1 of Schedule 1 of the 2018 Regulations) should be further amended to provide for the court to have regard to additional specific factors in the situation where it is considering whether to make a parental order; and

(2) what those additional factors should be.

8.122 Currently, in England and Wales, if the intended parents are not the legal parents of the child, they will not be able to apply for an order from the court to decide with whom the child should live or spend time without obtaining the leave of the court.[74] Section 10 of the Children Act 1989 sets out who needs leave to apply for an order determining arrangements for a child. It has been suggested to us that the section should be amended to provide that the intended parents in a surrogacy arrangement should be added to the category of those who can apply without seeking the leave of the court.[75] In Scotland, this issue does not arise. An application for a residence order may be made by a person who, not having, and never had, parental responsibilities or

[74] An order regulating with who a child should live or spend timeis a child arrangements order under section 8 of the Children Act 1989. It is possible that, in reality, one or both of the intended parents will have the ability to apply for such an order without leave. This might be because, for example, the intended father is already recognised as the legal parent by appearing on the birth certificate, in the situation where the surrogate is unmarried.

[75] Leave to apply is dealt with under the Children Act 1989, s 10.

parental rights in relation to the child, claims an interest.[76] This provision is wide enough to enable the intended parents to apply.[77]

Consultation Question 25.

8.123 We invite consultees' view as to whether section 10 of the Children Act 1989 should be amended to add the intended parents to the category of those who can apply for a section 8 order without leave.

PARENTAL RESPONSIBILITY

8.124 So far, we have discussed the acquisition of legal parenthood within the new surrogacy pathway. Parental responsibility is distinct from parenthood, as we discuss in more detail in Chapter 4.[78] In short, parental responsibility is:

> all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.[79]

8.125 People who are not parents may have parental responsibility in relation to a child, while not all parents will automatically have parental responsibility.

8.126 In Scotland, a different approach is taken to parental responsibility: as we have seen in Chapter 4 the legislation spells out the content of parental responsibilities and parental rights.[80]

8.127 Parental responsibility and, in Scotland, parental responsibilities and parental rights[81] are practically important because they allow the parent (or other person) with parental responsibility to make decisions, for example, about the upbringing of a child and give consent for medical treatment for that child.

8.128 Under the current law, the surrogate will have parental responsibility because she is the legal mother. If she is married or in a civil partnership, her spouse or civil partner will also have parental responsibility.[82]

8.129 The intended parents can acquire parental responsibility for the child in a number of ways. When a parental order is granted, the intended parents acquire parental

---

76 Children (Scotland) Act 1995, ss 11(1), (2)(c) and (3)(a)(i).

77 A B Wilkinson and K McK Norrie, *The Law relating to Parent and Child in Scotland* (3rd ed 2013) para 8.34.

78 See ch 4.

79 Children Act 1989, s 3(1).

80 Children (Scotland) Act 1995, ss 1 and 2.

81 In the following section, where we discuss parental responsibility we are referring to both parental responsibility, in England and Wales, and parental responsibilities and parental rights, in Scotland.

82 Children Act 1989, s 2(1); Children (Scotland) Act 1995, ss 3(1)(b)(i) and (c).

responsibility, as well as legal parenthood.[83] If the intended father is already a legal parent at birth, (where, for example, in England and Wales, he provided the sperm for conception and the surrogate is unmarried, or where he is the father under the legal parenthood rules contained in the HFEA 2008) he can acquire parental responsibility in the same ways as an unmarried father in a non-surrogacy situation: for example, by being named on the birth certificate or by agreement with the mother.[84] And, if the intended mother is a second legal parent under the legal parenthood rules contained in the HFEA 2008, she can also acquire parental responsibility in similar ways.[85]

8.130 In the course of a parental order application, the court can make a child arrangements order, specifying that the child is to live with the intended parents.[86] This order will provide the intended parents with parental responsibility for the child during the period before the parental order is made.[87] The court can also restrict the exercise of parental responsibility by the surrogate as legal mother by the making of a prohibited steps order.[88] In England and Wales, this practice appears to be routine at hearings before the final hearing before a High Court judge, where there is no dispute about the surrogacy arrangement.[89] It is not clear to us whether that is the case for parental order applications heard by lay justices, following domestic arrangements.

Arrangements outside the new pathway

8.131 For surrogacy arrangements outside the new pathway, where the child is living with, or being cared for by, the intended parents and they intend to apply for a parental order, we consider that it would be practically helpful for the intended parents to have

---

83 ACA 2002, s 46(1), as applied and modified by the 2018 Regulations, reg 2 and sch 1 para 7; AC(S)A 2007, s 28, as applied and modified by the 2018 Regulations, reg 3 and sch 2 para 6 vests parental responsibilities and parental rights in the intended parents.

84 See Children Act 1989, s 4(1) and, in relation to marriage, Children Act 1989, s 2 read in conjunction with the Family Law Reform Act 1987, s 1. For the relevant Scots law, see the Children (Scotland) Act 1995, ss 3(1)(b)(ii) and 4(1). In an international surrogacy situation, the biologically related intended father will not acquire parental responsibility by being named on the foreign birth certificate as the birth registration must be under a UK registration (see Children Act 1989, s 4; Children (Scotland) Act 1995, s 3(1)(b)(ii)) and considered in *F v S* [2016] EWFC 70 at [6].). However, it is possible for the father to acquire parental responsibility by agreement with, for example, the Californian surrogate who is treated in English law as the legal mother, under the Children Act 1989, s 4(1)(b). It is also possible for the spouse or civil partner of the intended father in this situation to acquire parental responsibility, with the agreement of the surrogate and the intended father, under the Children Act, s 4A(1)(a). In Scots law, the father could acquire parental responsibility by agreement; see the Children (Scotland) Act 1995, s 4. Proposals to introduce a provision equivalent to the Children Act 1989, s 4A, are contained in the Scottish Government, *Review of Part 1 of the Children (Scotland) Act 1995* (May 2018) paras 7.16 – 7.22, accessible at: https://consult.gov.scot/family-law/children-scotland-act/ (last visited 31 May 2019). The consultation closed on 28 September 2018. See A B Wilkinson and K McK Norrie, *The Law relating to Parent and Child in Scotland* (3rd ed 2013), para 21.05.

85 Children Act 1989, s 4ZA; Children (Scotland) Act 1995, ss 3(1)(d) and 4A(1)(b).

86 Children Act 1989, s 8. In Scotland, the court might make an interim residence order, or other appropriate order, if there was a need relating to the child's welfare to do so. See the Children (Scotland) Act 1995, s 11.

87 Children Act 1989, s 12(2); Children (Scotland) Act 1995, s 11(12).

88 Children Act 1989, s 8. The equivalent order in Scots law is an interdict prohibiting the taking of any step of a kind specified in the interdict. See the Children (Scotland) Act 1995, s 11(2)(f). Less commonly, an order might be granted under Children (Scotland) Act 1995, s 11(2)(a) depriving a person of parental responsibilities and parental rights.

89 These will usually be parental order applications following an international surrogacy arrangement, which are allocated to judges of the Family Division of the High Court.

parental responsibility. Having parental responsibility means that the intended parents will be able to make decisions about, for example, medical treatment for the child. In including "being cared for" by the intended parents, we have in mind the situation where the child is not living with them but is, say, receiving treatment in hospital. In some cases, as we have noted above, the court already provides the intended parents with parental responsibility, and it is difficult to see why it should not do so in all cases where there is no dispute. We think that it would be sensible to provide that intended parents in this situation have parental responsibility where the child is living with, or being cared for by, them and they intend to apply for a parental order.

Consultation Question 26.

8.132 We provisionally propose that, where a child is born as a result of a surrogacy arrangement outside the new pathway, the intended parents should acquire parental responsibility automatically where:

(1) the child is living with them or being cared for by them; and

(2) they intend to apply for a parental order.

Do consultees agree?

Arrangements in the new pathway

8.133 In the new pathway, the intended parents will be the legal parents at birth, subject to the surrogate's right to object. The law could provide that the intended parents will acquire parental responsibility in the same way as in a non-surrogacy situation. As we have seen in the previous chapter the law around acquisition of parental responsibility makes a distinction between the acquisition of parental responsibility by a father and a mother, with the mother, as we have explained above, currently being the woman who gave birth to the child. Whether the father or second female parent acquires parental responsibility automatically also depends on whether he or she is married to, or in a civil partnership with, the mother.[90] We do not think that this way of acquiring parental responsibility is best suited to a surrogacy situation in the new pathway. Instead, we think that, for arrangements under the new pathway, the law should provide that intended parents should have parental responsibility from birth, subject to the surrogate exercising her right to consent. If the surrogate does exercise that right then we take the view that the position should be the same as for surrogacy arrangements that fall outside the new pathway.

[90] Children Act 1989, s 2; Children (Scotland) Act 1995, s 3(1)(b)(i) and s 3(1)(c).

Consultation Question 27.

8.134 We provisionally propose that, where a child is born as a result of a surrogacy arrangement in the new pathway:

(1) the intended parents should acquire parental responsibility on the birth of the child; and

(2) if the surrogate exercises her right to object, the intended parents should continue to have parental responsibility for the child where the child is living with, or being cared for by, them, and they intend to apply for a parental order.

Do consultees agree?

The surrogate's parental responsibility, and restrictions on parental responsibility

8.135 In the new pathway, we take the view that the surrogate should retain parental responsibility until the expiry of the period during which she can exercise her right to object; that is, during the time in which there is the possibility that she may become a legal parent (on exercising her right to object).

8.136 With regard to the surrogate's parental responsibility, in cases outside the new pathway (including those arrangements formerly within the new pathway but where she has exercised her right to object), she will retain parental responsibility derived from her position as the legal mother, until that is extinguished by the making of the parental order.[91] Her spouse or civil partner, should they remain a legal parent, will also retain parental responsibility until that time.[92]

8.137 We have also provisionally proposed that the intended parents should acquire parental responsibility in certain circumstances.

8.138 We welcome consultees' views on whether there is any need for an automatic restriction on the exercise of either the surrogate's or the intended parents' parental responsibility where both surrogate and the intended parents are sharing parental responsibility either under the new pathway or where a parental order application must be made. For example, it would be possible to provide that, in the period where both the intended parents and the surrogate had parental responsibility, either the intended parents or the surrogate could exercise parental responsibility to the exclusion of the other party (including the surrogate's spouse or civil partner, if he or she has parental

---

91 ACA 2002, s 46(2), as applied and modified by the 2018 Regulations, reg 2 and sch 1 para 7; the AC(S)A 2007, s 35, as applied and modified by the 2018 Regulations, reg 3 and sch 2 para 8.

92 We propose at that in arrangements formerly within the new pathway, but where the surrogate has exercised her right to object, that the surrogate's spouse or civil partner should not be a legal parent following the exercise of the right to object (see para 8.53). We ask whether the surrogate's spouse or civil partner should be a legal parent of the child born as a result of the surrogacy arrangement, for arrangements outside the new pathway (see paras 8.54 and subsequent). If the surrogate's spouse or civil partner is not a legal parent of the child, then he or she will not be able to obtain parental responsibility.

responsibility).[93] That might be appropriate where the child is living with and/or being cared for by the intended parents (or the surrogate) with the other party not having day-to-day responsibility for the child, to avoid any conflict in decision-making between the party caring for the child and the other party.

Consultation Question 28.

8.139 We provisionally propose that, for surrogacy arrangements within the new pathway, the surrogate should retain parental responsibility for the child born as a result of the arrangement until the expiry of the period during which she can exercise her right to object, assuming that she does not exercise her right to object.

Do consultees agree?

Consultation Question 29.

8.140 For all surrogacy arrangements, we invite consultees' views as to:

(1) whether there is a need for any restriction to be placed on the exercise of parental responsibility by either the surrogate (or other legal parent), or the intended parents, during the period in which parental responsibility is shared; and

(2) whether it should operate to restrict the exercise of parental responsibility by the party not caring for the child or with whom the child is not living.

[93] The law places a special guardian of a child, appointed under Children Act 1989, s 14A, in this position (see Children Act 1989, s 14C(1)(b)). In Scots law, the court may make an order appointing a guardian (see Children (Scotland) Act 1995, s 11(2)(h). It would appear that the guardian would have the parental responsibilities and parental rights which could be conferred on a parent. See A B Wilkinson and K McK Norrie, *The Law relating to Parent and Child in Scotland* (3rd ed 2013) para 8.17.

Chapter 9: The regulation of surrogacy arrangements

INTRODUCTION

Why reform is needed to the regulation of surrogacy

9.1 Currently, surrogacy arrangements in the UK are governed by the SAA 1985. As we set out in the chapter on the current law, the SAA 1985 is a very short Act that does not offer a regulatory scheme for surrogacy in the UK. It merely makes surrogacy arrangements unenforceable and makes the commercial negotiation, and advertising, of surrogacy arrangements unlawful, as well as creating offences to enforce these prohibitions. Non-profit bodies are exempted from certain prohibitions, and intended parents and surrogates themselves are not guilty of an offence for organising a surrogacy arrangement, or for making payments.

9.2 The SAA 1985 is frequently criticised. It is seen largely as a product of the public attitudes existing at the time, and which have since changed. It has been suggested that the SAA 1985 was "an ill-considered and largely irrelevant panic measure".[1] As has been written, "the politics and social meaning of surrogacy arrangements have slowly changed, and the alarm and hostility that surrounded this issue have diminished substantially".[2]

9.3 One the issues that the critics of the SAA 1985 raise is that the SAA 1985 is unclear in its purpose. It might have been expected that the SAA 1985 would prohibit the practice of surrogacy altogether, considering that it appears that it was characterised as so undesirable at the time.[3] Parliament, however, did not chose this route. Instead it tried to adopt a middle course – it did not ban surrogacy, but it tried to ban the commercial practice of surrogacy.[4]

9.4 We believe that the SAA 1985 does not address many of the current legal issues surrounding surrogacy arrangements.[5] The subsequent exceptions added for non-

---

1 M Freeman, "Is Surrogacy Exploitative?" in S McLean (ed), *Legal Issues in Human Reproduction* (1989) p 165. See also the similar views of DRC Chalmers, "No Primrose Path. Surrogacy and the Role of the Criminal Law" (1989) 8 *Medicine and Law* 595, 599.

2 E S Scott, "Surrogacy and the Politics of Commodification" (2009) 72 *Law and Contemporary Problems* 109, 110. See also K Horsey, "Not Withered on the Vine, The Need For Surrogacy Law Reform" (2016) 4 *Journal of Medical Law and Ethics* 181, 186 to 187.

3 A point made by D Morgan, "Who to Be or Not to Be: the Surrogacy Story" (1986) 49 *Modern Law Review* 358, 365. Late in 1985, the Surrogacy Arrangements (Amendment) Bill was introduced in Parliament that would have, effectively, achieved this result, and banned surrogacy. Significantly, it would have removed the immunity of the surrogate and intended parents from criminal prosecution. The bill never became law.

4 See also the comment that "as the law is currently formulated, surrogacy is permitted but discouraged" K Horsey, "Surrogacy 2.0: What Can the Law Learn from Lived Experience" (2018) 14 *Contemporary Issues in Law* 305, 307.

5 On this point, see further discussion in T A Eaton, "The British Response to Surrogate Motherhood: An American Critique" (1985) 19 *Law Teacher* 163.

profit surrogacy organisations do not provide sufficient clarity to allow these organisations to operate without fear of infringing the law.

9.5 We see this reform project as an opportunity to create a better framework for surrogacy arrangements in the UK. We think that proper regulation will facilitate intended parents and surrogates entering into surrogacy arrangements in a way that is safe, clear, and puts the emphasis on both the welfare of the child and the informed consent of all parties.

9.6 In Chapter 8 we set out a new pathway to parenthood that will allow intended parents to become the legal parents at birth of a child born through a surrogacy arrangement. In Chapters 12 and 13 we set out eligibility and screening requirements for that new pathway, including procedural safeguards of implications counselling and independent legal advice.[6] These new requirements will necessitate oversight, particularly as we propose that, for surrogacy arrangements in the new pathway, intended parents will not need to make an application to court to become the legal parents of the child. Accordingly, we provisionally propose that surrogacy organisations should be regulated, and that as regulated bodies they can ensure that the eligibility and screening requirements, procedural safeguards, and the collection of information required by the reformed law, are complied with. The regulatory framework that we provisionally propose should operate within the new pathway will, in turn, protect surrogates, intended parents and the children born of surrogacy arrangements.

Structure of the chapter

9.7 We begin by looking at whether traditional, and independent traditional, surrogacy arrangements should fall within the scope of the new pathway, and therefore be subject to regulation.

9.8 We then consider the creation of regulated surrogacy organisations, in order to facilitate surrogacy arrangements within the new pathway, and whether such organisations should be able to operate commercially. In these sections, regulation is directed at supporting the creation of the new pathway to parenthood, discussed in Chapter 8.

9.9 We consider what we see as the core services that surrogacy organisations provide, which we have called matching and facilitation services, and ask whether only regulated surrogacy organisations should be able to provide these.

9.10 We provisionally propose that the Human Fertilisation and Embryology Authority (the "Authority") should be the regulator for regulated surrogacy organisations and look at how its scope might be expanded to regulate such organisations.

9.11 Finally, we look at how the new framework should deal with those aspects of surrogacy currently regulated by the SAA 1985: that is, the status of surrogacy arrangements, the negotiation of surrogacy arrangements, and the advertising of

---

6 Under our proposals for the safeguards for the new pathway, discussed in ch 13, the surrogate and the intended parents will have entered into the surrogacy agreement after receiving information, via implications counselling, about the implications and effect of the surrogacy arrangement (covering legal, medical, emotional and practical aspects), and legal advice on the effect of the law and of entering into the surrogacy agreement (for example, on legal parenthood).

surrogacy. Reformed regulation of these latter aspects of surrogacy will apply to all surrogacy arrangements, whether in or outside the new pathway.

SHOULD TRADITIONAL SURROGACY ARRANGEMENTS FALL WITHIN THE NEW PATHWAY?

9.12 In Chapter 3 on current practice, we discussed the distinction between traditional and gestational arrangements,[7] and how they compare in terms of numbers. We concluded that, while it is very difficult to be certain of the numbers, traditional arrangements, where the surrogate's own egg is used, remain significant in domestic surrogacy arrangements.[8]

9.13 We are confident that gestational surrogacy arrangements should be included in the new pathway but the question that arises is whether, like gestational arrangements, traditional arrangements should be facilitated by being included in our new regulated pathway. Our provisional view is that there should be no distinction in law between traditional and gestational surrogacy arrangements, and, therefore, that traditional arrangements should be able to fall within the new pathway to parenthood.[9]

Arguments for the inclusion of traditional surrogacy arrangements

9.14 In our chapter on parenthood,[10] we propose a new pathway to parenthood that recognises the importance of the shared intention of the surrogate and the intended parents in entering into a surrogacy arrangement: that the intended parents should be the legal parents of, and raise, the child. We take the view that this intention can be present in traditional arrangements as much as gestational arrangements.

9.15 We have also proposed that the requirement for a genetic link, at least in the new pathway, be removed.[11] We think that creating a distinction between traditional and gestational surrogacy arrangements, based on the genetic link between the surrogate and the child, would be inconsistent with that proposal and suggest an undue focus on the child's genetic relationships. There are clearly many parents who successfully raise children without either having any genetic connection to the child, or where only one parent has that connection. Adoptive parents are an example of the former, and those using donor gametes, such as lesbian parents (or indeed, many current gestational surrogacy arrangements) are an example of the latter. We note that the Court of Appeal approved the statement from the skeleton argument of the appellant in the recent case of *Whittington*:

---

7 In traditional arrangements the surrogate's own egg is used.

8 See ch 3. It appears that nearly all international surrogacy arrangements are gestational in nature.

9 See paras 9.12 and subsequent.

10 See ch 8.

11 We ask consultees whether double donation should only be permitted in cases of medical necessity (see paras 12.35 and subsequent).

> Throughout the country there are thousands of children born into families who would be appalled at the thought that simply because they have only a genetic connection to one of their parents, they were somehow of lesser value within the family.[12]

9.16 We are also concerned that a preference within the law for gestational arrangements would be unjustified, given that such arrangements bring their own disadvantages.

9.17 Gestational arrangements involve the use of IVF within a licensed clinic, which is inevitably more expensive than traditional arrangements, which typically involve self-insemination at home:

> gestational surrogacy… requires an egg retrieval procedure that would not otherwise be needed, IVF, and then transfer of the embryo. For intended parents who are price-sensitive these added costs might be prohibitive, and even for those of ample means the costs are worthy of consideration.[13]

9.18 Gestational arrangements are, potentially, medically riskier, for the surrogate and the woman providing eggs (whether the intended mother or an egg donor), in that all of the hormones and medications used in IVF (which gestational surrogacy requires):

> carry risk of side effects, ranging from headaches, weight gain, and high blood pressure to more serious issues such as ovarian hyper-stimulation syndrome, ectopic pregnancy, or an increased risk of ovarian cancer.[14]

9.19 While traditional arrangements carry risk, in terms of using sperm that may not have been medically screened (if conception is achieved outside the setting of the clinic), these risks can be minimised by a legal requirement for screening in traditional arrangements, such as that we propose in Chapter 13.[15]

9.20 We have also heard from stakeholders that some surrogates prefer traditional arrangements because they are less medicalised, and that some intended parents prefer traditional arrangements because they offer them the possibility of knowing the other genetic parent of their child. Excluding traditional arrangements would ignore the shared wishes of these surrogates and intended parents, and would restrict the freedom of surrogates who would wish to enter into such arrangements.[16]

9.21 We also bear in mind that excluding traditional arrangements from the new pathway would exclude a sizeable proportion of domestic surrogacy arrangements. We think

---

12 *XX v Whittington Hospital NHS Trust* [2018] EWCA Civ 2832, [2019] All ER (D) 30 (Jan) at [92].

13 J Shapiro, "For a Feminist Considering Surrogacy, Is Compensation Really the Key Question?" (2014) 89 *Washington Law Review* 1345, 1360.

14 C Cory, "Access and Exploitation: Can Gay Men and Feminists Agree on Surrogacy Policy" (2015) 23 *Georgetown Journal on Poverty Law and Policy* 133, 151. It is possible for IVF to proceed without the use of fertility medication in "natural cycle IVF".

15 See ch 13.

16 J Shapiro, "For a Feminist Considering Surrogacy, Is Compensation Really the Key Question?" (2014) 89 *Washington Law Review* 1345, 1360.

that exclusion would represent a missed opportunity to improve the conduct of such arrangements for the benefit of all concerned.

9.22 Finally, we give weight to the fact that, at present, the law does not make a distinction between traditional and gestational arrangements. In either case, intended parents can obtain a parental order which makes them the legal parents of the child.[17] Excluding traditional arrangements would therefore introduce a distinction into the law which does not currently exist.

Arguments against the inclusion of traditional surrogacy arrangements

9.23 Many stakeholders to whom we spoke who were involved in surrogacy commented on the difference between traditional and gestational arrangements. In particular they highlighted the genetic link the surrogate has in such arrangements and that, as a result, children born from traditional surrogacy would be the genetic half-siblings of the surrogate's own children. Some suggested that there are, as a result, additional complications in traditional arrangements. We note that the surrogacy organisation Brilliant Beginnings does not work with traditional surrogates.[18] This was also the position of the US agency with which we spoke, which said that the absence of a genetic link between the surrogate and the child provided a distinction between adoption and surrogacy. Indeed, dealing only with gestational arrangements seems to be a common practice amongst US agencies generally. While the genetic link with the surrogate that exists in traditional arrangements may point towards treating them differently to gestational arrangements, in fact, many stakeholders who commented on the difference between traditional and gestational arrangements did not suggest that they should be treated differently in law.

9.24 Practically speaking, it may be easier to exclude traditional arrangements as they may be more difficult to regulate than gestational arrangements. That is because the latter invariably require the involvement of a clinic licensed by the Authority in order to access IVF, therefore providing an opportunity for regulation through the clinic. However, we take the view that the regulation of surrogacy organisations will provide the opportunity to regulate traditional arrangements conducted with their support. We also discuss below how independent surrogacy arrangements might be brought within the scope of legislation.[19]

The comparative position

9.25 It is fair to say that many jurisdictions do make a distinction in their regulation of surrogacy arrangements between traditional and gestational arrangements. For example, Greece, Hong Kong, Israel and Russia permit gestational surrogacy, but ban traditional surrogacy. The same position is taken in the draft surrogacy bills in Iceland and Ireland.[20] California and Massachusetts in the USA, amongst other states, also

---

17 HFEA 2008, ss 54 and 54A (depending on whether there are two applicants, or one).

18 The British Surrogacy Centre took a similar stance, having only been involved with four traditional arrangements.

19 See paras 9.12 and subsequent.

20 Greece: Greek Civil Code, art 1458(1); Hong Kong: Human Reproductive Technology Ordinance, s 14; Israel: The Surrogate Motherhood Agreements (Approval of Agreement and Status of Newborn Law) 1996; Russia: Federal Law on the Basics of Protection of Citizens' Health 2011, s 55(10); Iceland (draft bill):

make a distinction in their parenthood laws between traditional and gestational arrangements. In both these states, traditional surrogates are the legal mother, but gestational surrogates are not.[21]

9.26 In South Africa there are different rules for traditional and gestational arrangements with regard to the consent of the surrogate's husband or partner, and the attribution of legal parenthood. Consent of the surrogate's husband or partner can be dispensed with only in a gestational arrangement. [22] Equally, a surrogacy agreement, and the intended parents' status as legal parents, cannot be terminated in a gestational arrangement.[23]

9.27 However, the statutes governing surrogacy in the Canadian provinces Ontario and British Columbia do not draw a distinction between traditional and gestational arrangements, allowing intended parents to become the legal parents at birth in both scenarios.[24]

Reform

9.28 We believe that the arguments for including traditional surrogacy within the scope of a regulatory scheme in order to qualify for the new pathway are more persuasive than those which might support its exclusion. While such a position is not common, viewed in its international context, we note both the example of Ontario and British Columbia and, importantly, the existing UK law in sections 54 and 54A of the HFEA 2008, which does not make such a distinction.

Consultation Question 30.

9.29 We provisionally propose that traditional surrogacy arrangements should fall within the scope of the new pathway.

Do consultees agree?

Independent traditional surrogacy arrangements

9.30 We are conscious that some domestic surrogacy arrangements are not facilitated by surrogacy organisations. While it is impossible to be certain, it may be the case that

Frumvarp til laga um staðgöngumæðrun í velgjörðarskyni, art 10; Ireland (draft bill): General Scheme of Assisted Reproduction Bill 2017, head 36(1)(b).

21 California Code, Family Code, s 7960. There is no statute governing surrogacy in Massachusetts, but key principles of the law were established in two Massachusetts Supreme Judicial Court decisions. In *Culliton v Beth Isr Deaconess Med Ctr*, 435 Mass 285 (2001), the court held that gestational surrogacy agreements are enforceable and the court can grant a pre-birth parentage order. In *RR v MH*, 426 Mass 501 (1998), the court held that traditional surrogacy agreements are not enforceable, and the rules of adoption law should be applied to the situation.

22 Children's Act (No 38 of 2005) 2005 (South Africa), s 293(3).

23 Children's Act (No 38 of 2005) 2005 (South Africa), s 298 only allows a surrogate to terminate the agreement where she is a genetic parent of the child.

24 Children's Law Reform Act 1990 (Ontario) and Family Law Act 2011 (British Columbia).

up to half of domestic surrogacies are independent arrangements.[25] Where these arrangements are also traditional surrogacy arrangements they are also unlikely to involve any engagement with clinics.[26] It appears that such arrangements may be the most likely to break down, simply because there is no oversight and the parties may not have accessed the support that would be available from clinics and surrogacy organisations (such as counselling). We have also been told that some independent surrogates value their independence to the extent that they may be unlikely to engage with either a regulated surrogacy organisation or a clinic.

9.31 We have considered whether these arrangements can or should be brought within the scope of the new pathway. We take the view that it would be beneficial for such arrangements to be brought within the new pathway, given the potential for the parties to benefit from receiving implications counselling and legal advice, for example.

9.32 We are eager to hear from independent surrogates as to how they currently deal with the sort of screening and eligibility requirements that we discuss in Chapters 12 and 13. For example, do they or the intended parents independently arrange for health screening, counselling or legal advice?

9.33 We would also like to hear from consultees with ideas as to whether it is feasible for independent surrogacy arrangements to be brought within the new pathway and, if so, how that might done. One possibility might be to allow independent surrogacy arrangements in the new pathway with oversight of compliance with the screening and eligibility requirements being provided directly by the Authority to individual arrangements. We are concerned, however, that dealing directly with individual arrangements, rather than clinics or regulated surrogacy organisations, may not fit the Authority 's regulatory model, and may involve disproportionate expense.

9.34 Another possibility might be for the independent surrogate and intended parents to provide evidence of compliance with the regulatory requirements to an independent professional, such as a lawyer, who would then make a return on their behalf to the Authority, certifying that the surrogacy arrangement had complied with the requirements for entry to the new pathway. This would fit with the proposed requirement for independent legal advice, discussed in Chapter 13. As part of certifying compliance with these requirements, the independent professional would also have to ensure that the parties completed the welfare assessment and undertake any necessary follow-up.

---

25 Again, it is not possible to know with any precision what proportion of independent arrangements are traditional arrangements, but responses to Surrogacy UK's 2018 survey suggest that the proportion of arrangements that are traditional is higher for independent arrangements compared to arrangements supported by surrogacy organisations: see Surrogacy UK Working Group on Surrogacy Law Reform, *Surrogacy in the UK, Further evidence for reform: Second Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (December 2018) p 28.

26 It appears rare for clinic to be involved with traditional surrogacy arrangements using donor insemination: in 2016 the Authority recorded only six donor insemination cycles where the patient was registered as a surrogate (compared to 232 IVF cycles): the Authority, *Fertility treatment 2014-2016 Trends and figures* (March 2018), accessible at: https://www.hfea.gov.uk/media/2563/hfea-fertility-trends-and-figures-2017-v2.pdf (last visited 31 May 2019).

Consultation Question 31.

9.35 We invite the views of independent surrogates, and intended parents who have used independent surrogacy arrangements, to tell us about their experience. In particular, we would be interested to hear about any health screening, counselling and legal advice that took place.

Consultation Question 32.

9.36 We invite consultees' views as to whether independent surrogacy arrangements should be brought within the scope of the new pathway.

9.37 We invite consultees' views as to how independent surrogacy arrangements might be brought within the scope of the new pathway.

REGULATED SURROGACY ORGANISATIONS

The regulation of adoption agencies

9.38 One model for the regulation of surrogacy arrangements can be found in the adoption regime.[27] Local authorities are under a duty to provide an adoption service.[28] Such a service may be provided by the local authority itself or outsourced to a registered adoption society;[29] both are referred to as an adoption agency.[30]

9.39 Part 2 of the Care Standards Act 2000 (which, following Welsh legislation in this area covered below, only applies to England) sets out some basic elements of the regulatory regime for adoption agencies. In addition, in England, an adoption agency

---

27 The law governing adoption agencies and their functions is devolved to the Welsh Government. These aspects of adoption law are specifically excluded from the general reservation of adoption law to the UK Parliament: see Government of Wales Act 2006, sch 7A para 1, head L. We will note, therefore, if Welsh legislation differs from English law, where necessary. Adoption law in Scotland is also devolved.

28 ACA 2002, s 3, AC(S)A 2007, s 1(1).

29 ACA 2002, s 3(4)(a). In Scotland, a local authority may carry out such duties imposed by securing the provision of its adoption service by a registered adoption service: AC(S)A 2007, s 2(2). AC(S)A 2007, s 6 permits a local authority to seek assistance in carrying out its functions under s1 from, for example, another local authority or Health Board.

30 ACA 2002, s 2(1), AC(S)A 2007, s 119(1). There is also a separate category of regulated organisation: independent providers of adoption support services who are not local authorities or voluntary adoption agencies. "Adoption support services" are defined by section 2(6) of the ACA 2002 to include "counselling, advice and information", as well as "any other services prescribed by the regulations". The additional services prescribed by regulation include assistance with adoption placements and contact arrangements, financial support and therapeutic needs (Adoption Support Services Regulations 2005 (SI 2005 No 691), reg 3(1)). For adoption support services in Scotland, see AC(S)A 2007, s 1(5) and the Adoption Support Services and Allowances (Scotland) Regulations 2009 (SSI 2009 No 152).

must be registered with Ofsted,[31] which has the power to apply to cancel or suspend an agency's registration[32] and responsibility for inspecting premises.[33] In Scotland, the adoption agencies are regulated by the Public Services Reform (Scotland) Act 2010. An adoption agency must register with Social Care and Social Work Improvement Scotland ("SCSWIS") which also has power to refuse or cancel registration and to inspect such services.[34]

9.40 In Wales, the Regulation and Inspection of Social Care (Wales) Act 2016 is currently being phased in. Under that Act, from 29 April 2019, a system of registration and inspection will apply to adoption services, similar to the existing system in England.[35] In Wales, registration will need to be made with the Care Inspectorate Wales ("CIW").[36] The CIW will be able to apply to cancel a registration, as well as taking responsibility for inspection.[37]

9.41 The regulation of adoption agencies is governed by regulations[38] and national minimum standards applicable to agencies providing adoption and adoption support services.[39] The standards fulfil various purposes: to provide an inspection framework

---

31 Care Standards Act 2000, ss 4(7A) and 5. Note that the Act refers to "Her Majesty's Chief Inspector of Education, Children's Services and Skills", which is, in fact, the Chair of Ofsted. "Ofsted" stands for The Office of Standards in Education, Children's Services and Skills.

32 Care Standards Act 2000, ss 20 and 20B.

33 Education and Inspections Act 2006, s 147.

34 Public Services Reform (Scotland) Act 2010, ss 47, 53, 59, 60, 64 and 83.

35 Regulations, statutory guidance and National Minimum Standards: Children's Services, https://careinspectorate.wales/regulations-statutory-guidance-and-national-minimum-standards-childrens-services (last visited 31 May 2019).

36 Regulation and Inspection of Social Care (Wales) Act 2016, ss 2 and 5. CIW carry out this function on behalf of Welsh Ministers, see: https://careinspectorate.wales/about-us/what-we-do (last visited 31 May 2019).

37 Regulation and Inspection of Social Care (Wales) Act 2016, s 33.

38 In England, the Adoption Agencies (Miscellaneous Amendments) Regulations 2003 (SI 2003 No 367) and The Voluntary Adoption Agencies Regulations 2005 (SI 2005 No 389). In Wales, Regulated Adoption Services (Service Providers and Responsible Individuals) (Wales) Regulations 2019 (SI 2019 No 762). In Scotland, the Adoption Agencies (Scotland) Regulations 2009 (SSI 2009 No 154).

39 Care Standards Act 2000, s 23(1). Under s 23(1ZA) of the 2000 Act, the Welsh Ministers may prepare and publish their separate standards in relation to establishments for which the Welsh Ministers (acting through CIW) are the registration authority. The Welsh Ministers have prepared national minimum standards for adoption support services and local authority adoption services. The minimum standards for voluntary adoption agencies in Wales, however, appear from the website to still be the joint minimum standards produced by the Department of Health and the Welsh Assembly Government in 2003, accessible at: https://careinspectorate.wales/regulations-statutory-guidance-and-national-minimum-standards-childrens-services (last visited 31 May 2019). Note, however, that these 2003 standards are not being used in England where they have been replaced by the 2014 minimum standards (Department of Education, *Adoption: national minimum standards* (July 2014)). It should be noted, that the Welsh Ministers published new statutory guidance in relation to adoption services and local authority adoption services in April 2019 (to coincide with the implementation of The Regulation and Inspection of Social Care (Wales) Act 2016 to adoption services), accessible at: https://gov.wales/social-care (last visited 31 May 2019).

In Scotland, Scottish Ministers must prepare and publish standards and outcomes applicable to adoption services – Public Services Reform (Scotland) Act 2010, s 50. These standards and outcomes were published on 9 June 2017, accessible at: https://www.gov.scot/publications/health-social-care-standards-support-life/) (last visited 31 May 2019). These standards came into force in April 2018 and the Care Inspectorate is required to consider the standards when making decisions during inspections and other

for Ofsted; to be used by agencies in training, and in assessing their own services; to provide those using the agency's services with a guide as to what to expect from the agency; and to provide guidance on setting up an agency.[40]

9.42 As might be appreciated, even from this brief overview, adoption agencies are strictly regulated. We take the view that the regulation of surrogacy organisations can be lighter-touch in its nature. The tasks that a surrogacy organisation undertake are qualitatively different from those of an adoption agency: such organisations will not be placing an existing child but are instead assisting in intended parents and surrogates coming together for the purpose of creating a child through a surrogacy arrangement. Unlike adoption agencies, therefore, surrogacy organisations are not working directly with children, albeit how such organisations go about their work has the ability to affect, positively or negatively, a child's welfare, as well as the welfare of surrogates and intended parents.

9.43 Notwithstanding, when considering the regulation of surrogacy, we have found it useful to draw comparisons with the role of the 'responsible individual' in relation to the operation of an adoption agency in England. We discuss this role below.

9.44 As we have set out above, we think that the need to provide greater regulation of, and to facilitate surrogacy arrangements warrants the creation of a "regulated surrogacy organisation". We see this role as one that can be taken on by existing surrogacy organisations, with reform working to create consistent standards and promote best practice, while avoiding unduly burdensome regulation. In this section we consider whether there should be any requirement as to the form of such an organisation, how regulation would be achieved, and whether such organisations should be able to make a profit.

Form of a regulated surrogacy organisation

9.45 Currently, surrogacy organisations must operate on a non-profit basis to come within the exceptions in the SAA 1985 to the commercial negotiation of surrogacy arrangements.[41]

9.46 In general, there is no specified form that a non-profit organisation must take; instead there are a variety of forms.

(1) An unincorporated organisation, such as:

(a) an unincorporated association; or

(b) a trust.

---

scrutiny or improvement work, accessible at: http://www.careinspectorate.com/index.php/new-standards-and-inspections (last visited 31 May 2019).

40 Department of Education, *Adoption: national minimum standards* (July 2014), p 5. In addition to the national minimum standards, in England, the Department of Education has also published Statutory Guidance on Adoption for local authorities, voluntary adoption agencies and adoption support agencies. See above for the situation in Wales.

41 SAA 1985, s 2A.

(2) An incorporated organisation, such as:

(a) a private company limited by shares under the Companies Act 2006 (this is less common for non-profits, but is possible if the company's Articles of Association include a provision requiring all the income to be applied towards the promotion of the objects and specifically prohibiting the payment of dividend or any other profit to the shareholders in the same way that the Articles of Association of a company limited by guarantee does);[42]

(b) a private company limited by guarantee under the Companies Act 2006 (far more common for non-profits)[43];

(c) a Community Interest Company;[44] or

(d) a charitable incorporated organisation or Scottish charitable incorporated organisation (a new corporate form designed specifically and exclusively for charities).[45]

9.47 By way of comparison, an adoption agency operated by a registered adoption society (rather than a local authority),[46] must be registered as a charity or be a non-profit organisation. An adoption society which is wishing to be registered must be an incorporated body.[47]

9.48 We understand that the rule that adoption societies have to be incorporated bodies is long-standing, appearing in the Adoption Act 1976 and the Adoption (Scotland) Act

---

42 *Tolley's Charities Manual* (Issue 126 2019) ch 2A, para 2A.9.

43 "Such a company has no share capital but, instead, the members agree that in the event of the company being wound up they will pay a specific amount (usually £1) towards the debts of the company. This limits their liability to that sum" (*Tolley's Charities Manual* (Issue 126 2019) ch 2A, para 2A.9.

44 A company operated for the benefit of the community and regulated by the Regulator of Community Interest Companies: see Part 2 of the Companies (Audit, Investigations and Community Enterprise) Act 2004, Pt 2.

45 Charities Act 2011, Pt 11; the Charities and Trustee Investment (Scotland) Act 2005, ch 7.

46 An adoption society means "a body whose functions consist of or include making arrangements for the adoption of children" (ACA 2002, s 2(5)) and a registered adoption society means a voluntary adoption society registered under the Care Standards Act 2000 (ACA 2002, s 2(2)). In Scotland an adoption society is defined as "a body of persons whose functions consist of or include the making of arrangements for or in connection with the adoption of children (AC(S)A 2007, s 119(1)). In terms of the Public Services Reform (Scotland) Act 2010, s 59(3), a person who provides an adoption service must be a voluntary organisation. This provision does not apply to a local authority seeking to provide an adoption service: Public Services Reform (Scotland) Act 2010, s 59(4).

A voluntary organisation means "a body other than a public or local authority the activities of which are not carried on for profit" (ACA 2002, s 2(5)); AC(S)A 2007, s 119 (1)).

47 Voluntary Adoption Agencies and the Adoption Agencies (Miscellaneous Amendments) Regulations 2003 (SI 2003 No 367), reg 2. The position is the same in Scotland: the Adoption Agencies (Scotland) Regulations 1984 (SI 1984 No 988), reg 4 was replaced by the Adoption (Scotland) Agencies Regulations 1996 (SI 1996 No 3266), reg 3(2), which remains in force.

1978.[48] This requirement appears to be a consequence of a feature of the previous adoption law, where a local authority could vest the parental rights and responsibilities of a child in their care to a voluntary adoption society.[49] In order to be able to vest these rights, it was the Government's view at the time that the voluntary adoption society needed to be an incorporated body.[50]

9.49 We take the view that the reason for the exclusion of unincorporated associations from acting as adoption societies is not relevant to regulated surrogacy organisations: there is no suggestion that such organisations need to hold parental responsibility, or parental responsibilities and parental rights, for the children born of surrogacy organisations. We are also mindful that, of the current non-profit surrogacy organisations operating in the UK, historically, not all were incorporated.[51]

9.50 Mindful of imposing too great a burden on what are small organisations, sometimes staffed by volunteers, we take the view that it is not appropriate to require regulated surrogacy organisations to be incorporated, or take a particular form. Equally, while some organisations may wish to apply for charitable status, we, again, do not think that this should be imposed.[52] There may also be cases where an individual wishes to act as a regulated surrogacy organisation: provided that he or she can meet the regulatory requirements that we propose we do not think that this should be prohibited by law (although, in practice, it may be difficult for one individual to meet the requirements).

A responsible individual for a surrogacy organisation

9.51 We suggest that each surrogacy organisation, rather than be regulated as to its form, should be required to appoint an individual responsible for ensuring that the organisation complies with regulation. The responsible individual would be required to register the regulated surrogacy organisation with the regulator so that it could be licensed.[53]

9.52 We have in mind two examples: that of adoption agencies in England[54] and that of clinics regulated by the Authority.

---

48 Adoption Act 1976, s 9(1) and the Adoption (Scotland) Act 1978, s 9(1): "The Secretary of State may by regulations prohibit unincorporated bodies from applying for approval under section 3; and he shall not approve any unincorporated body whose application is contrary to regulations made under this subsection".

49 Children Act 1975, s 60.

50 The then Minister of State, Dr David Owen MP, said in debate "Restricting the voluntary organisations which may apply to a local authority for parental rights and duties to those which are incorporated bodies is done because we are advised that in law only an incorporated body could be vested with these powers as a body. In fact, many voluntary organisations already are incorporated bodies, and for others it is very simple to become incorporated" (*Hansard* (HC) 28 October 1975, vol 898, col 1313).

51 COTS, Surrogacy UK and Brilliant Beginnings are now all incorporated companies, although COTS only incorporated in April 2019.

52 Registered charities are subject to a regulatory regime governed in England and Wales by the Charities Acts 2006 and 2011 and, in Scotland, by the Charities and Trustee Investment (Scotland) Act 2005.

53 See paras 9.113 and subsequent.

54 In Wales, the regulation of adoption agencies has changed following the introduction of the Regulation and Inspection of Social Care (Wales) Act 2016. The scheme does, however, broadly follow the English scheme

9.53 In an adoption agency, the registered provider must provide the contact details of an individual who is the designated responsible individual for the agency, and represents the organisation to Ofsted.[55] This person is also responsible for supervising the overall management of the agency.[56] The agency is under a requirement to ensure that the responsible individual undertake sufficient training to ensure that he or she has the experience and skills necessary for carrying on and managing the agency or branch.[57]

9.54 A responsible individual must be deemed to satisfy the following requirements:

(1) that he or she is of integrity and good character;

(2) that he or she is physically and mentally fit to carry on the agency; and

(3) full and satisfactory information is available in relation to him or her in respect of each of the following matters:

(a) proof of identity, including a recent photograph,

(b) a criminal records ("DBS") check,

(c) two written references, including one from the person's most recent employer,

(d) verification of the reason why a job working with children ended (if the person has previously held such a position),

(e) documentary evidence of any relevant qualification, and

(f) a full employment history. [58]

9.55 With regard to clinics licensed by the Authority, the "person responsible":

---

of requiring a responsible individual whom the CIW must be satisfied is a fit and proper person to be a responsible individual: see Regulation and Inspection of Social Care (Wales) Act 2016, s 21. In Scotland, the concept of the responsible individual is not used. In the case of a person who seeks to provide a care service, he or she must apply to SCSWIS for registration of the service and the application must –

(a) give such information as may be prescribed about prescribed matters,

(b) identify an individual (who may be the applicant) who is to manage the service: see Public Services Reform (Scotland) Act 2010, ss 59(1) and (2).

55 Voluntary Adoption Agencies and the Adoption Agencies (Miscellaneous Amendments) Regulations 2003 (SI 2003 No 367), reg 5(2)(a).

56 Above.

57 Voluntary Adoption Agencies and the Adoption Agencies (Miscellaneous Amendments) Regulations 2003 (SI 2003 No 367), reg 8(3).

58 Voluntary Adoption Agencies and the Adoption Agencies (Miscellaneous Amendments) Regulations 2003 (SI 2003 No 367), sch 2.

is the individual who ensures that all licensed activities are conducted at the clinic with proper regards for the regulatory framework that governs treatment and research involving gametes or embryos.[59]

9.56 The requirements placed by statute on the person responsible are specific to the clinical environment.[60]

9.57 For a regulated surrogacy organisation, we think that the person responsible must be responsible for:

(1) representing the organisation to, and liaising with, the regulator;

(2) managing the regulated surrogacy organisation with sufficient care, competence and skill;

(3) ensuring the compliance of the organisation with relevant law and regulation, including the creation, maintenance and operation of necessary policies and procedures;

(4) training any staff, including that of the person responsible; and

(5) providing data to the regulator and to such other person as required by law.

9.58 In practice, this would mean that the person responsible would need to ensure that the requirements of the new pathway to legal parenthood were met, including compliance with eligibility and screening requirements,[61] the need for a written parenthood agreement before the child's conception, and the recording of information to be entered into the surrogacy register.[62] He or she would also need to administer any matching and facilitation service offered by the organisation which facilitated the creation of surrogacy arrangements. This would involve holding information about surrogates and intended parents, potentially matching parties, assisting in the negotiation and signing of the surrogacy agreement, and providing ongoing support through conception, pregnancy and after the birth of the child.[63]

9.59 The person responsible should also be a person of integrity and good character, and possess appropriate experience, skills and qualifications. We seek consultees' views on what such a requirement would mean in practice. We also note that we would not see the use of the regulatory mechanism of the responsible person as preventing the regulator from auditing the regulated surrogacy organisation more widely. That is, the responsible person should not be used by the organisation as a device to conceal regulatory failures in the organisation itself.

---

59 The Authority, *Person Responsible Entry Programme* (2012). The expectations and requirements for the person responsible are set out in Guidance Note 1 of the Code of Practice.

60 HFEA 1990, s 17.

61 See chs 12 and 13.

62 See paras 10.90 and subsequent.

63 See paras 9.85 and subsequent.

9.60 We take the view that statute can set out the need for, and basic requirements of, an individual responsible for a regulated surrogacy organisation, with the detail to be provided in regulations.

Consultation Question 33.

9.61 We provisionally propose that:

(1) there should be regulated surrogacy organisations;

(2) there should be no requirement for a regulated surrogacy organisation to take a particular form; and

(3) each surrogacy organisation should be required to appoint an individual responsible for ensuring that the organisation complies with regulation.

Do consultees agree?

Consultation Question 34.

9.62 We provisionally propose that the person responsible must be responsible for:

(1) representing the organisation to, and liaising with, the regulator;

(2) managing the regulated surrogacy organisation with sufficient care, competence and skill;

(3) ensuring the compliance of the organisation with relevant law and regulation, including the creation, maintenance and operation of necessary policies and procedures;

(4) training any staff, including that of the person responsible; and

(5) providing data to the regulator and to such other person as required by law.

Do consultees agree?

9.63 We invite consultees to identify any other responsibilities which a responsible individual should have.

9.64 We invite consultees' views as to what experience, skills and qualifications a person responsible for a surrogacy organisation should have.

Should a regulated surrogacy organisation be required to be non-profit-making?

9.65 As we have seen, in order to benefit from the exceptions as to commercial arrangements contained in the SAA 1985, surrogacy organisations must be non-profit

making bodies.[64] A non-profit making body "means a body of persons whose activities are not carried on for profit".[65]

9.66 A non-profit making body can charge a reasonable payment for initiating negotiations with a view to the making of a surrogacy arrangement, or compile any information with a view to its use in making, or negotiating the making of, a surrogacy arrangement.[66] A reasonable payment is defined as "payment not exceeding the body's costs reasonably attributable to the doing of the act".[67]

9.67 It is possible to argue that allowing surrogacy organisations to make a profit, and compete, will both raise standards and reduce the level of their fees; this could "allow investment to provide a platform for growth and the pursuit of excellence in this field".[68] Conversely, the fact that an organisation is non-profit is also not a guarantee that it will adopt efficient and ethical practices; for example, provided an organisation is non-profit it can pay its staff whatever salary it wishes.[69] The promotion of best practice and good standards might seem to be the role of regulation, rather than depending on whether or not an organisation makes a profit.

9.68 However, the role of commercial agencies in surrogacy arrangements has been criticised. As has been written with respect to surrogacy in the USA (where many states permit commercial surrogacy):

> Another problem with exploitation of women comes from the middlemen in surrogacy arrangements … . By prohibiting surrogate brokers from recruiting or inducing surrogates to enter into surrogacy contracts, many of the coercive and exploitative elements are decreased.[70]

9.69 We see the provision of 'matching' services, where organisations facilitate or organise the bringing together of surrogates and intended parents as particularly problematic if conducted on a commercial basis, given that this would potentially incentivise organisations to create surrogacy arrangements. We are concerned that this could lead to the exploitation of all parties and, potentially, surrogates being coerced to enter into surrogacy arrangements.

---

64 See ch 4. An arrangement is commercial under the SAA 1985 where a person does an act for which payment is received (or with a view to payment being received) in respect of making, or negotiating, or facilitating the making of, any surrogacy arrangement. Payments to or for the benefit of the surrogate are excepted, see SAA 1985, s 2(4).

65 SAA 1985, s 1(7A).

66 SAA 1985, s 2(2A).

67 SAA 1985, s 2(2C).

68 R Cabeza, V Flowers, E Pierrot, A Rao, B O'Leary and L Odze, *Surrogacy: Law, Practice and Policy in England and Wales* (1st ed 2018) para 9.33.

69 See the argument developed in R Cabeza, V Flowers, E Pierrot, A Rao, B O'Leary and L Odze, *Surrogacy: Law, Practice and Policy in England and Wales* (1st ed 2018) para 9.13.

70 K B Lieber, "Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?" (1992 – 1993) 68 *Indiana Law Journal* 205, 229.

9.70 We are aware that the Brazier Report in 1998 concluded that for-profit agencies should not be allowed to operate in this country.[71] We also note the view of the 1989 Glover Report on Reproductive Technologies to the European Commission, which concluded that commercial surrogacy agencies should not be permitted:

> Intimate and commercial relationships do not fit together easily. … Commercial surrogacy agencies can be seen as contributing to a society in which parenthood is seen as another commodity. And, because, relationships are partly constituted by how they are seen, this threatens an unwelcome change in the relationship itself.[72]

9.71 We are also mindful that allowing for-profit agencies might place UK law into tension with international obligations under the Optional Protocol to the United Nations Convention on the Rights of the Child.

9.72 The UN Special Rapporteur's 2018 report on surrogacy (the "2018 Report") states that:

> The involvement of for-profit intermediaries is another indication of commercial surrogacy. …Intermediaries are often responsible for creating and participating in surrogacy markets, and often receive the largest profits.[73]

9.73 The 2018 Report defined intermediaries:

> as parties (persons or organizations/institutions) that bring together intending parents and surrogate mothers, and/or mediate the ongoing surrogacy arrangement — including medical clinics, medical professionals, attorneys, surrogacy agencies or "brokers". Medical professionals or clinics, and attorneys, receiving reasonable compensation for the professional services necessary to surrogacy, are not necessarily intermediaries, if they do not perform these functions of establishing and mediating the relationship between the intending parents and the surrogate mother.[74]

9.74 Other sections of the 2018 Report make it clear that the Rapporteur regards commercial surrogacy as currently practised in places such as California, USA, as constituting the sale of a child.[75] That said, the Rapporteur's recommendation on intermediaries is, however, equivocal on the question of their profit-making ability:

---

71 Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (1998) Cm 4068 para 6.

72 J Glover, *Ethics of new reproductive technologies: the Glover report to the European Commission* (1989) p 88. The report's editor, Jonathan Glover, is a British philosopher.

73 M de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* (January 2018), A/HRC/37/60 para 62.

74 M de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* (January 2018), A/HRC/37/60 para 40.

75 M de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* (January 2018), A/HRC/37/60 para 41.

> The Special Rapporteur invites all States to…
>
> regulate all intermediaries involved in surrogacy arrangements, in regards to the financial aspects, relevant competencies, use of contractual arrangements and ethical standards.[76]

9.75 Some commentators paint the work of commercial surrogacy agencies in starker terms:

> Given the central role played by intermediaries in commercial surrogacy arrangements, intermediaries are primary or secondary sellers of children … . If surrogacy agencies and other intermediaries are realistically selling children over whom they exercise significant de facto control, surrogacy would still constitute the sale of children regardless of whether the surrogates were participating in such sales.[77]

9.76 In Chapter 15 we consider what payments it should be possible for intended parents to make to surrogates.[78] We ask whether the surrogate should be able to be paid for her services provided as a surrogate. Depending on the outcome of our consultation, it is therefore possible that in future surrogates will be able to obtain payment beyond their expenses. We do not think it would be inconsistent to enable surrogates to be paid in this way, while requiring agencies to operate on a non-profit basis. Conversely, however, we think that it would be very difficult to sustain an argument that surrogates should not be permitted to receive payments in excess of expenses if for-profit surrogacy agencies were permitted. Surrogacy agencies deal with the central feature of surrogacy; that is bringing together intended parents with a woman who is prepared to carry a child for them. The contribution of the woman acting as a surrogate is unique. If an organisation is paid for facilitating the provision of this unique contribution, then we think that it seems unjustifiable that the woman herself would not be paid for making that contribution.

9.77 With regard to this contribution, we note that the UN Convention on the Elimination of all Forms of Discrimination against Women ("CEDAW") describes maternity as a social function,[79] which may mean that it is difficult to reconcile any law that permits commercial surrogacy with respect for the terms of the treaty.[80]

9.78 We note that the recent review of surrogacy legislation in Western Australia rejected the establishment of commercial agencies and brokers in order:

---

76 M de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* (January 2018), A/HRC/37/60 para 77.

77 D M Smolin, "Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry's Global Marketing of Children" (2016) 43 *Pepperdine Law Review* 265, 314.

78 See ch 15.

79 Convention on the Elimination of All Forms of Discrimination against Women, art 5(b). See paras 4.108 and subsequent.

80 B Stark, "Transnational Surrogacy and International Human Rights Law" (2012) 18 *ILSA Journal of International and Comparative Law* 369, 381.

to prevent the assisted reproduction clinics or other organisations profiting from assisting to arrange altruistic surrogacy arrangements, and thus transforming an altruistic arrangement into a commercial surrogacy arrangement.[81]

9.79 Our discussions with stakeholders have not suggested any strong desire for allowing for-profit agencies to operate in this country. Surrogacy UK, for example, oppose for-profit agencies in their 2018 report, stating that such organisations are linked to the profit-driven service model, a constituent part of commercial surrogacy.[82] The survey data from the report was used to back up this position. Their data showed that:

> there was very little support *for* surrogacy organisations being able to make profit… .
>
> A number of responses discussed surrogacy organisations and the need for these to remain non-profit. One suggested that surrogacy organisations ought to be able to access Government (or other) grants in order to be able to improve the services they offer. Other responses highlighted how much the surrogacy process had cost them so far (including previous attempts at IVF and other treatments) – one saying "it's taking every penny we have, and family money, and selling assets".[83]

9.80 Brilliant Beginnings told us that they did not see allowing for-profit organisations as a priority for reform. Brilliant Beginnings and Surrogacy UK both expressed concern that people would be "priced out" of working with surrogacy organisations. This outcome could have the effect of forcing people into arrangements that are less regulated, and therefore less safe and ethical for all concerned; this would be an unwelcome and unintended consequence of allowing for-profit agencies.

9.81 In the light of concerns of exploitation, coercion, the potential commodification of women and children, and the tension with international law we take the view that there would have to be strong justification for allowing surrogacy agencies to operate on a profit-making basis. We have not found such a justification, nor a strong desire for such agencies on the part of stakeholders, and, accordingly, we provisionally consider that regulated surrogacy organisations should have to operate on a non-profit basis.

9.82 We think that the definition of non-profit in section 1(7A) the SAA 1985 can be retained. This simply provides that a:

> *"Non-profit making body"* means a body of persons whose activities are not carried on for profit.

9.83 Any concerns around, for example, the payment of high salaries will simply be dealt with by the need for the organisation to cover its costs and the natural limit to what it can charge those it assists.

---

81 S Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008 (Report: Part 2)* (2019) p 148, Recommendations 34 and 35.

82 Surrogacy UK Working Group on Surrogacy Law Reform, *Surrogacy in the UK, Further evidence for reform: Second Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (December 2018) p 17.

83 Surrogacy UK Working Group on Surrogacy Law Reform, *Surrogacy in the UK, Further evidence for reform: Second Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (December 2018) pp 42 and 45.

Consultation Question 35.

9.84 We provisionally propose that regulated surrogacy organisations should be non-profit making bodies.

Do consultees agree?

Matching and facilitation services in respect of surrogacy

9.85 We see the core work, and unique role, of surrogacy organisations as facilitating surrogacy arrangements between surrogates and intended parents, sometimes in the form of actively 'matching' the parties.[84]

9.86 We do not think that this work should be conducted on a profit-making basis. To take any other view would allow organisations other than surrogacy organisations (such as clinics) to operate effectively as for-profit surrogacy agencies, circumventing the proposed prohibition against such bodies. We appreciate that the question of exactly what work falls within the definition of 'matching' will not be clear-cut and we ask for views from consultees, particularly from surrogacy organisations, on how that work should be defined. Any such definition could then be included in legislation. We believe that matching and facilitation services would include:

(1) compiling information about surrogates and intended parents;

(2) facilitating the formation of surrogacy 'teams' both by actively matching surrogates and intended parents, and in other ways such as the provision of profiles, social events and online spaces for this purpose;

(3) providing advice and support to surrogates and intended parents on the surrogacy process from the time that they join the organisation to after the birth of the child, including helping to manage the relationship between the parties;[85] and

(4) the administration necessary for, and ancillary to, the above services.

9.87 We also seek consultees' views on the definition of matching and facilitation services.

9.88 In respect of arrangements in the new pathway we take the view that only regulated surrogacy organisations should be able to provide matching and facilitation services, which would be a regulated activity.

---

84 Surrogacy UK, for example, do not adopt the term "matching" as a description of their activities, because the organisation plays no role in deciding which surrogates and intended parents have a child together.

85 While such advice and support might include advice and support in respect of the surrogacy agreement, advising on the agreement would not fall within the definition of matching and facilitation services as to do so would be to prevent other professionals, such as lawyers, from advising on the agreement. The provision by clinics of implications (and therapeutic) counselling, and advice as to the clinical aspects of surrogacy, would also fall outside this definition.

9.89 We think that the position in respect of providing such services for surrogacy arrangements outside the new pathway is less obvious. We would not seek to prevent intended parents and surrogates, as private individuals, from matching with each other. Later in this chapter, we provisionally propose to remove prohibitions on advertising and, in that context, it would be unrealistic to seek to prevent private individuals from matching.[86]

9.90 However, there may be some organisations (to use the term broadly), for example, a social media group administered by independent surrogates, which may find it hard to meet the requirements of being a regulated surrogacy organisation, but which would wish to provide matching and facilitation services. Where such groups are helping to facilitate surrogacy arrangements that are outside the new pathway, the presence of judicial scrutiny in the form of the parental order process may alleviate concerns about these organisations providing these services, and lessen the need for these organisations to be regulated.

9.91 On the other hand, it would be clear and consistent for all matching and facilitation services to be provided only by surrogacy organisations that are regulated. There is also the possibility that allowing surrogacy organisations other than those that are regulated to continue to provide matching and facilitation services would undermine efforts to steer those seeking to enter into surrogacy arrangements into the new pathway. We think the arguments are finely balanced and so we seek consultees' views.

9.92 If all surrogacy organisations offering matching and facilitation services had to be regulated, consideration would need to be given to the sanctions available against organisations that offered matching and facilitation services without being regulated to do so. Clearly, it would not be appropriate to prevent a parental order being made in respect of a child simply because matching and facilitation services had been provided by an unregulated organisation. We think that legislation would need to provide for sanctions against those who offered the services without being a regulated surrogacy organisation.

9.93 By way of comparison, we note that the law often provides for criminal sanctions against individuals who carry out regulated activities when they do not hold the required licence or qualification. For example, the HFEA 1990 provides for various criminal offences for persons who carry out licensed activities (such as the creation of an embryo, which occurs in IVF treatment) without being in possession of the required licence.[87] Another potential comparison is with the regulation of solicitors. It is a criminal offence for someone to call themselves a solicitor or act as a solicitor if they are not registered with the Law Society of England and Wales.[88]

---

86 See paras 9.136 and subsequent.

87 HFEA 1990, s 41.

88 Solicitors Act 1974, ss 20 and 21. The Solicitors (Scotland) Act 1980, s 23 (1) also provides that any person who practises as a solicitor or in any way holds himself out as entitled by law to practise as a solicitor without having in force a practising certificate shall be guilty of an offence under this Act unless he proves that he acted without receiving or without expectation of any fee, gain or reward, directly or indirectly. We have already noted above the sanction available against adoption agencies (see para 9.39).

Consultation Question 36.

9.94 We invite consultees' views as to what should be included in the definition of matching and facilitation services.

Consultation Question 37.

9.95 We provisionally propose that only regulated surrogacy organisations should be able to offer matching and facilitation services in respect of surrogacy arrangements in the new pathway.

Do consultees agree?

9.96 We invite consultees' views as to whether only regulated surrogacy organisations should be able to offer matching and facilitation services in respect of surrogacy arrangements outside the new pathway.

Consultation Question 38.

9.97 We invite consultees' views as to the sanctions that should be available against organisations that offer matching and facilitation services without being regulated to do so, and whether these should be criminal, civil or regulatory.

WHO WILL REGULATE?

9.98 We think that there is only one realistic candidate to act as the regulator of surrogacy arrangements, and to provide oversight of regulated surrogacy organisations. This is the Authority. We take this view for several reasons.

(1) While there is no precise figure for the number of surrogacy arrangements entered into by intended parents in the UK, we believe that the numbers are unlikely to exceed perhaps 500 such arrangements each year, even allowing for arrangements that are not known to the authorities because the intended parents have not applied for a parental order.[89] We suggest that this is not a figure which would justify the expense involved in creating a 'bespoke' regulator for surrogacy. The Authority is already the regulator for a very considerable number of fertility treatments. In 2016, for example, over 20,000 children were born from IVF or donor insemination.[90] The burden on the Authority of

[89] See para 1.2.

[90] The Authority, *Fertility treatment 2014-2016 Trends and figures* (March 2018), accessible at: https://www.hfea.gov.uk/media/2563/hfea-fertility-trends-and-figures-2017-v2.pdf (last visited 31 May 2019).

extending its remit to regulate surrogacy arrangements will need to be assessed.

(2) We are not aware of any other existing body that would be well placed to undertake the role of regulator.

(3) The Authority already has some expertise in regulating surrogacy arrangements where these involve the use of a clinic licensed by the Authority, either for artificial insemination or, more usually, IVF. There is already a guidance note devoted to surrogacy arrangements in the Code of Practice.[91]

9.99 We set out below a brief description of the Authority and how it regulates.

The Human Fertilisation and Embryology Authority

9.100 The Authority is an executive non-departmental public body of the Department of Health and Social Care, which currently oversees the use of gametes and embryos in fertility treatment and research. It is a statutory body, created by the HFEA 1990. The Authority is a body corporate, consisting of a chair and deputy chair, and such number of other members as the Secretary of State appoints.[92] It has a workforce of 65 staff.[93]

9.101 The Authority has the following functions:

(1) to keep under review information about embryos and any subsequent development of embryos and about the provision of treatment services and activities governed by the HFEA 1990, and advise the Secretary of State, if he or she asks it to do so, about those matters,

(2) to publicise the services provided to the public by the Authority or provided in pursuance of licences;

(3) to provide, to such extent as it considers appropriate, advice and information for persons to whom licences apply or who are receiving treatment services or providing gametes or embryos for use for the purposes of activities governed by this Act, or may wish to do so;

(4) to maintain a statement of the general principles;

(5) to promote, in relation to activities governed by the [HFEA 1990], compliance with requirements under the HFEA 1990, and its Code of Practice; and

(6) to perform such other functions as specified in regulations.[94]

---

91 The Code of Practice Guidance Note 14.

92 HFEA 1990, s 5.

93 The Authority, *Our people*, accessible at: https://www.hfea.gov.uk/about-us/our-people/ (last visited 31 May 2019).

94 HFEA 1990 s 8.

9.102 The Authority must carry out its functions effectively, efficiently and economically.[95] It must also, when carrying out its function, have regard to the principles of best regulatory practice, including the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed.[96]

How the Authority regulates

9.103 The Authority oversees the system of licensed clinics in the UK and primarily regulates through its power to give directions[97] and issue a code of practice.[98]

9.104 The Authority is responsible for granting licences to clinics in the UK. It may grant only the following licences:

(1) licences authorising certain activities[99] in the course of providing treatment services;[100]

(2) licences authorising certain activities[101] in the course of providing non-medical fertility services;[102]

(3) licences authorising the storage of gametes, embryos or human admixed embryos; and

(4) licences authorising certain activities[103] for the purposes of a project of research.[104]

9.105 The Authority may revoke a licence if it is satisfied that one of a list of specified circumstances has occurred,[105] including that the person responsible has failed to discharge his or her duties,[106] or that the premises specified in the licence are not

---

95 HFEA 1990, s 8ZA(1).

96 HFEA 1990, s 8ZA(2).

97 HFEA 1990, s 23.

98 HFEA 1990, s 25.

99 These activities are listed in HFEA 1990, sch 2. By way of example, these activities in the context of treatment services include creating an embryo *in vitro*; keeping, testing or distributing embryos; and placing a permitted embryo in a woman.

100 "Treatment services" means medical, surgical or obstetric services provided to the public or a section of the public for the purposes of assisting women to carry children: HFEA 1990, s 2(1).

101 These activities are listed in HFEA 1990, sch 2.

102 "Non-medical fertility services" means any services that are provided, in the course of a business, for the purpose of assisting women to carry children, but are not medical, surgical or obstetric services: HFEA 1990, s 2(1). An example would be the distribution of sperm.

103 These activities are listed in HFEA 1990, sch 2.

104 HFEA 1990, s 11.

105 Listed in HFEA 1990, s 18.

106 HFEA 1990, s 18(2)(b).

suitable for the licensed activity.[107] The Authority can also remove, vary or add conditions to a licence.[108]

9.106 In discharge of its duties, the Authority inspects licensed premises every two years.[109] All inspection reports are publicly available on the Authority's website.[110]

9.107 The Authority must keep a register recording the grant, suspension and revocation of licences, and which must specify in relation to each such licence the activities authorised, the address of the premises to which the licence relates, the name of the person responsible, and the name of the holder of the licence (if different to the person responsible).[111]

Directions

9.108 Certain provisions of the HFEA 1990 set the default position "unless authorised by directions". A good example of this is section 12(1)(e) which states that:

> no money or other benefit shall be given or received in respect of any supply of gametes, embryos or human admixed embryos unless authorised by directions.[112]

9.109 Remuneration is, however, now permitted under the Authority's general directions, paragraphs 5 and 6.[113]

9.110 In contrast with the Code of Practice, compliance with directions is mandatory. Failure to comply with directions given in connection with any licence is one of the reasons that the Authority may revoke a clinic's licence.[114]

Code of Practice

9.111 The Authority's Code of Practice must give guidance about the proper conduct of activities carried on in pursuance of a licence under the HFEA 1990.[115]

9.112 A failure on the part of any person to observe any provision of the Code of Practice does not of itself render the person liable to any proceedings, but:

(1) the Authority, in considering whether there has been any failure to comply with any conditions of a licence, particularly conditions requiring anything to be

---

107 HFEA 1990, s 18(2)(d).

108 HFEA 1990, s 18A(5).

109 https://www.hfea.gov.uk/about-us/how-we-regulate/ (last visited 31 May 2019).

110 https://www.hfea.gov.uk/choose-a-clinic/clinic-search/ (last visited 31 May 2019).

111 HFEA 1990, s 31A.

112 HFEA 1990, s 12(1)(e).

113 The Authority, *Directions given under the Human Fertilisation and Embryology Act 1990 (as amended)*, accessible at: http://ifqtesting.blob.core.windows.net/umbraco-website/1547/2017-04-03-general-direction-0001-version-4-final.pdf (last visited 31 May 2019). Remuneration is capped at £35 per clinic visit for sperm donors and £750 per cycle of donation for egg donors.

114 HFEA 1990, s 18(2)(c).

115 HFEA 1990, s 25(1).

'proper' or 'suitable', must take account of any relevant provisions of the Code; and

(2) may, in considering whether to vary or revoke a licence, take into account any observance of, or failure to observe, the provisions of the Code.[116]

Reform to expand the Authority's scope to regulate surrogacy arrangements

9.113 We suggest that the remit of the Authority be expanded to include the regulation of surrogacy organisations through the mechanism of the individual responsible for the regulated surrogacy organisation. This will allow the Authority to monitor regulated surrogacy organisations and, if necessary, revoke the organisation's licence, or to add conditions to the licence. Regulated surrogacy organisations and clinics will have duties in respect of overseeing the eligibility and screening requirements necessary for a surrogacy arrangement to fall within the new pathway to legal parenthood. We consider that part of the Authority's role should be to provide guidance on how regulated surrogacy organisations and clinics should carry out their duties. This could be done by an expansion of the Surrogacy Guidance Note in the Code of Practice dealing with surrogacy.

9.114 We have identified above what we see as the core service of matching and facilitation in relation to surrogacy arrangements. We have proposed that, for arrangements in the new pathway, only regulated surrogacy organisations should be permitted to provide these services; and we have asked whether that should also be the case for arrangements outside the new pathway, proceeding to a parental order. This would exclude a profit-making body such as a clinic from providing such services. That would not prevent, however, a for-profit body creating a separate non-profit business to run the matching service.[117]

9.115 Beyond this category of matching and facilitation services we do not think that regulation should specify that a particular type of organisation – a clinic or regulated surrogacy organisation – should carry out a certain activity. This would be subject to the organisation having the appropriate staff to undertake that activity. So, in respect of the requirements for legal advice or implications counselling, an organisation would need to have appropriately qualified legal or counselling staff, or, of course, refer the parties to a surrogacy arrangement to outside sources of expertise. If regulated surrogacy organisations or clinics were concerned about the duplication of services, then it would be possible for them to work together if they wished. Given that we propose that a regulated surrogacy organisation should be a non-profit body, such organisations would not be able to make a profit from providing these other services in respect of surrogacy, which may discourage them from doing so. The Authority should be able to audit the accounts of regulated surrogacy organisations to ensure that they comply with their non-profit status.

9.116 That said, we are unsure whether it would be appropriate for the entire Code of Practice to apply to regulated surrogacy organisations. For example, many sections of the Code do not appear to be relevant to the activities that such organisations would

---

116 HFEA 1990, s 25(6).

117 We note that the (non-profit) surrogacy organisation Brilliant Beginnings is owned and managed by the owners of the law firm, NGA Law, although it is a separate legal entity.

undertake, as they reflect the medical nature of the work conducted by clinics. We therefore ask consultees which additional or new areas of regulation should be covered by the Code of Practice, to apply to regulated surrogacy organisations. We also consider that it should be possible for amendments to be made to the eligibility requirements; this could be done by providing a power in statute for the Secretary of State to make regulations on the eligibility requirements, so that the requirements are set out in legislation and can be amended or added to, after consultation with the regulator and other interested parties.

Consultation Question 39.

9.117 We provisionally propose that the remit of the Human Fertilisation and Embryology Authority be expanded to include the regulation of regulated surrogacy organisations, and oversight of compliance with the proposed legal requirements for the new pathway to legal parenthood.

Do consultees agree?

9.118 If consultees agree, we invite their views as to how the Authority's Code of Practice should apply to regulated surrogacy organisations, including which additional or new areas of regulation should be applied.

REGULATION OF ALL SURROGACY ARRANGEMENTS

9.119 The aspects of regulation that we discuss above concern the creation of a regulated surrogacy organisation to support the new pathway to parenthood and what arrangements might be eligible to fall within the new pathway. The issues we discuss in this section are relevant both to cases under the new pathway to parenthood, and where an application for a parental order is made. These issues are currently regulated by the Surrogacy Arrangements Act 1985.

Enforceability of surrogacy agreements

9.120 As section 1A of the SAA 1985 simply states, "no surrogacy arrangement is enforceable by or against any of the persons making it". This means that:

> the intended parents cannot sue the surrogate mother *in contract law* if she refuses to hand over the child and she cannot sue them if they refuse to take the child after birth or fail to make any of the agreed payments.[118]

9.121 Virtually all stakeholders we have spoken to agreed that surrogacy agreements should not be enforceable, either in terms of the agreement's effect on legal parenthood, or the physical transfer of the child from the surrogate to the intended parents.

---

[118] C Purshouse, "The Problem of Unenforceable Surrogacy Contracts: Can Unjust Enrichment Provide a Solution?" (2018) 26 *Medical Law Review* 557, 560.

9.122 By ‘stakeholders’ we do not include the respondents to the survey conducted by Surrogacy UK in 2018: we note that (perhaps surprisingly) the survey data set out in Surrogacy UK’s 2018 report suggests that:

> there was majority agreement across all groups surveyed with “surrogacy contracts should be enforceable, except where the best interests of the child are not met”.[119]

9.123 The authors of the 2018 Surrogacy UK report say in respect of this finding that:

> the support for [enforceability] continues to be surprising, but we assume respondents think of enforceability in terms of the surrogate giving the baby to the intended parents.[120]

9.124 We are aware that gestational surrogacy agreements in the USA are characterised as enforceable, albeit it seems, in practice, that any issues are usually resolved by negotiation between lawyers for the parties.

9.125 The UN Special Rapporteur, in her report on surrogacy, states that for surrogacy law to comply with the provisions of the United Nations Convention on the Rights of the Child would involve the rejection of,

> the enforceability of contractual provisions regarding parentage, parental responsibility or restricting the rights ([for example] to health and freedom of movement) of the surrogate mother.[121]

9.126 We propose that a written agreement made between the surrogate and the intended parents before the conception of the child would be a key element of the new pathway allowing the intended parents to become the legal parents at birth. However, the agreement itself does not confer legal parenthood on the intended parents. Rather, the written agreement is one of the elements that must be in place that would then allow the attribution of legal parenthood to the intended parents by operation of the law, not by the enforcement of the surrogacy agreement. It would provide evidence of the intention of the parties, and record compliance with the requirements of the new pathway. We think it important that the legal status of the child remains a matter for the law to decide, not something to be negotiated between private individuals.[122] An

---

119 K Horsey, “Surrogacy 2.0: What Can the Law Learn from Lived Experience” (2018) 4 *Contemporary Issues in Law* 305, 318. There was a similar degree of support in Surrogacy UK’s 2015 report: Surrogacy UK Working Group on Surrogacy Law Reform, *Surrogacy in the UK: Myth busting and reform – Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (2015).

120 Surrogacy UK Working Group on Surrogacy Law Reform, *Surrogacy in the UK, Further evidence for reform: Second Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (December 2018) p 43.

121 Surrogacy UK Working Group on Surrogacy Law Reform, *Surrogacy in the UK, Further evidence for reform: Second Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (December 2018) p 43.

122 Y Ergas argues that the recognition and protection of maternity as a status in the United Nations Convention on the Elimination of All Forms of Discrimination against Women carries with it the idea that motherhood cannot be transferred by way of private agreement: “Babies without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy” (2013) 27 *Emory International Law Review* 117, 161 to 162.

enforceable surrogacy agreement, at least in respect of any of its provisions in relation to the attribution of parenthood, would cut across our proposed new scheme.[123]

9.127 While we note the support shown for enforceable surrogacy agreements in Surrogacy UK's survey data, we are not therefore persuaded that the law should allow surrogacy agreements to be enforceable.

9.128 We do, however, think that there may be an exception in respect of payments that are due to the surrogate under a surrogacy agreement entered into under the new pathway. We discuss this issue in Chapter 15 which deals with payments.

Consultation Question 40.

9.129 We provisionally propose that surrogacy agreements should remain unenforceable (subject to the exception we provisionally propose in Consultation Question 88 in relation to financial terms).

Do consultees agree?

Negotiating, facilitating and advising on surrogacy arrangements

9.130 The current state of the law prevents people from accessing advice. At the time of the SAA in 1985, one commentator wrote:

> Perhaps the most serious danger posed by this piecemeal legislation is its encouragement of amateurish agreements. The Act defines the criminal offence in terms of "making, or negotiating or facilitating the making of, any surrogacy agreement". This definition is sufficiently broad to include legal, medical, and psychological counsellors who, for a fee, might otherwise assist the parties. The couple and the surrogate are left to stumble through the process without the advice of experts. It is most unfortunate that a law that does not condemn the agreement itself does not permit the parties to pursue it in a professional manner.[124]

9.131 We have discussed, in Chapter 4 the exceptions that exist for non-profit organisations charging for their services. These are, however, not clearly defined: a non-profit organisation is permitted to initiate negotiations with a view to the making of a surrogacy arrangement (and to compile information), but not to take part in any negotiations with the same aim, or to offer or agree to negotiate the making of a surrogacy arrangement. It seems to us very difficult to draw a clear distinction between these activities.

9.132 Stakeholders agreed with the passage quoted above. Lawyers to whom we spoke saw the current prohibition in the SAA 1985 as a prohibition on providing advice on,

---

123 See ch 8.

124 T A Eaton, "The British Response to Surrogate Motherhood: An American Critique" (1985) 19 *Law Teacher* 163, 172.

negotiating, or drafting in respect of surrogacy agreements into which their clients had entered. One lawyer has written:

> Extra care and caution needs to be taken in respect of the offence against third party brokers as outlined above. If clients are entering into surrogacy arrangements overseas, their surrogacy contracts are likely to have been prepared by lawyers in that jurisdiction and it is quite common for clients to seek English legal advice in respect of those agreements. Advising on such arrangements could cause a family lawyer in this jurisdiction to inadvertently commit a criminal offence.[125]

9.133 In respect of the new pathway to parenthood, we have proposed that a written agreement should be in place before the conception of the child to be born through the surrogacy arrangement. We also propose that both the surrogate and the intended parents should have to receive independent legal advice to fall within the new pathway. Clearly, in the context of providing such legal advice, lawyers should be able to advise on the drafting of an agreement that will, under the new surrogacy statute, have the important legal effect of allowing the intended parents to become the legal parents at birth.

9.134 More generally, we see no reason why the current prohibition against charging for negotiating or facilitating surrogacy arrangements should not be removed entirely. If surrogacy is to be properly regulated and facilitated, advice and support should be available to intended parents and surrogates at every stage of the surrogacy journey. In Chapters 12 and 13 we discuss the screening and eligibility requirements necessary for a surrogacy arrangement to proceed along the new pathway.[126] We think that organisations, whether regulated surrogacy organisations, clinics, counsellors or law firms (as appropriate), should be able to charge to provide the necessary screening, legal advice, counselling and welfare assessment. This is subject, of course, to regulated surrogacy organisations being non-profit organisations and to matching and facilitation services only being provided by these organisations, therefore on a non-profit basis. We bear in mind that for-profit organisations, such as private clinics, already undertake some of the work that we propose be made mandatory for entry to the new pathway, for example, the welfare assessment and implications counselling.[127] We do not think that it is viable to ask commercial organisations to undertake work on a non-profit basis that they are currently doing on a for-profit basis.

---

125 C Rogerson, "What the general family lawyer should know about surrogacy law (2017), accessible at: https://www.lawsociety.org.uk/practice-areas/family-children/what-general-family-lawyer-should-know-surrogacy-law/ (last visited 31 May 2019).

126 See chs 12 and 13.

127 See paras 13.18 and subsequent.

Consultation Question 41.

9.135 We provisionally propose that there should be no prohibition against charging for negotiating, facilitating and advising on surrogacy arrangements.

Do consultees agree?

Advertising in respect of surrogacy

9.136 The prohibition of advertising in section 3 of the SAA 1985 is exhaustive, catching all means of communication.[128] There is no exception for surrogates or intended parents in the section. This means that all parties are currently at risk of committing a criminal offence by, for example, posting on a Facebook group that they "may be willing to enter into a surrogacy arrangement";[129] or are "looking for a woman willing to become a surrogate".[130] It does not matter whether the advert in question is for an "altruistic" or "commercial" surrogacy arrangement.

9.137 As we have seen there are exceptions allowing non-profit making bodies to advertise the services that they can legally provide on a paying basis.[131]

9.138 It appears that the original rationale of the ban on advertising in relation to a surrogacy arrangement was to "ensure that to all intents and purposes surrogacy will be kept "within the family.'"[132] Clearly familial surrogacy arrangements do not need to rely on advertising.

9.139 The Brazier Report recommended a continuation of the current provisions prohibiting advertisements in relation to surrogacy arrangements, although it provided no reasons for doing so.[133]

9.140 Stakeholders, however, expressed near-universal dissatisfaction with the current ban on advertising. COTS called the ban on advertising "the worst constraint" in the SAA 1985 and noted that advertising for egg and sperm donors was legal.[134] Surrogacy UK also told us that the restriction on advertising needs review because it prevents agencies from providing useful information to people who may be thinking of entering into a surrogacy arrangement.

---

128 See paras 4.18 and subsequent.

129 SAA 1985, s 1(a).

130 SAA 1985, s 1(b).

131 SAA 1985, s 3(1A).

132 D Morgan, "Who to Be or Not to Be: the Surrogacy Story" (1986) 49 *Modern Law Review*, 358, 365.

133 Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (1998) Cm 4068 para 7.3.

134 While such advertising is legal, the Code of Practice para 11.1 states that "advertising and publicity materials should be designed and written with regard to the sensitive issues involved in recruiting donors".

9.141 One of the biggest problems with the prohibition on advertising is that, as stakeholders like Surrogacy UK noted, it is routinely breached on the internet, where it is easy to find people asking for surrogates, or offering to be surrogates, particularly using social media. It is also very easy to access advertising by agencies and clinics offering surrogacy in other countries, using the internet, often on a commercial basis.[135]

9.142 To the best of our knowledge no prosecutions have ever been brought under the offences created by the SAA 1985 in relation to advertising.[136] We understand that it might be possible for those companies providing search engines and social media platforms to enforce the ban on advertising but we query whether devoting significant resources to policing this area, is either proportionate or desirable.

9.143 We provisionally propose to remove the ban on advertising surrogacy arrangements with the effect that anything that can be lawfully done with respect to a surrogacy arrangement can be advertised. Information on international surrogacy arrangements is accessible on the internet. If domestic surrogacy is to be regulated and facilitated in such a way as to increase its attraction compared to the international surrogacy arrangements, then it must be possible to convey that message freely and to provide information to those that need it. The condition that only things which can lawfully be done may be advertised would mean, for example, that an organisation other than a regulated surrogacy organisation which was advertising matching and facilitation services for arrangements under the new pathway would not be complying with the law, as it would be advertising something which it could not lawfully do.

9.144 We acknowledge that removing the current ban on advertising means that surrogates and intended parents will continue to contact each other on the internet. But it also seems clear to us that such contact will continue even if the ban remains in place. We hope, however, that the prospect of achieving legal parenthood at birth, and the security and certainty that this offers, will encourage people to enter into the new pathway, and therefore access screening, legal advice and counselling. Indeed, advertising may have an important role to play in encouraging people to access surrogacy agencies and the new pathway.

Consultation Question 42.

9.145 We provisionally propose that the current ban on advertising in respect of surrogacy should be removed, with the effect that there will be no restrictions on advertising anything that can lawfully be done in relation to surrogacy arrangements.

Do consultees agree?

---

135 Such advertising would not be effectively caught by the prohibition in SAA 1985, s 3, as while the prohibition applies to an advertisement "conveyed by means an electronic communications network so as to be seen or heard (or both) in the United Kingdom", only a "person who in the United Kingdom causes it to be so conveyed" is guilty of an offence under the legislation (SAA 1985, s 3(3)).

136 See para 4.21.

Chapter 10: Children's access to information about surrogacy arrangements

INTRODUCTION

10.1 A child born as a result of a surrogacy arrangement will not, by definition, be the gestational child of the intended parents. Currently, the law requires the child to have a genetic link to one of the intended parents.[1] In Chapter 12, however, we provisionally propose that a genetic link should not be necessary where a surrogacy arrangement is proceeding, or began in, the new pathway. We also ask whether it should continue to be required under the parental order pathway and also ask about imposing a requirement of medical necessity.[2] We take the view that it is important for the child to know the circumstances of his or her conception and gestation.[3] We note the view of the Nuffield Council on Bioethics Working Party on Donor Conception that:

> Openness to children about their means of conception is important in so far as it contributes to the quality of relationships within the family, and to the well-being both of parents and of donor-conceived people.[4]

10.2 It also appears from the research that:

> the earlier children born through reproductive donation are told about their biological origins, the more positive the outcomes in terms of the quality of family relationships and psychological wellbeing at adolescence … . The findings are in line with research on adoptive families which has similarly shown that telling children about their adoption at an early age is associated with more positive outcomes for parents and adolescents.[5]

10.3 In practice, while there is no duty on legal parents to tell a surrogate-born child of the surrogacy arrangement,[6] one academic researcher has said that:

---

1 The gametes of at least one of the intended parents must have been used if a parental order is to be obtained (HFEA 2008, ss 54(1)(b) and 54A(1)(b)).

2 We also provisionally propose that a genetic link still be required in international surrogacy cases (see paras 12.62 and subsequent)

3 Although we note some commentators have reservations about whether it is in the child's interest to learn of the fact of donation – see J Fortin, "Children's right to know their origins – too far, too fast?" (2009) 21 *Child and Family Law Quarterly* 336.

4 Nuffield Council on Bioethics, *Donor Conception: ethical aspects of information sharing* (2013) para 5.33. We also note, however, that the Working Party "received very little evidence about the value placed by people conceived through surrogacy arrangements and surrogate mothers on information about, or contact with, each other." The Working Party did not come to any specific conclusions on, or recommendations about, surrogacy (see p 2).

5 E Ilioi, L Blake, V Jadva, G Roman and S Golombok, "The role of age of disclosure of biological origins in the psychological wellbeing of adolescents conceived by reproductive donation: a longitudinal study from age 1 to age 14" (2017) 58 *The Journal of Child Psychology and Psychiatry* 315, 321.

6 See A Bainham, "Arguments about parentage" (2008) 67 *Cambridge Law Journal* 335.

> surrogacy parents are much more open with their children about the circumstances of their birth than are parents of children conceived by egg, sperm or embryo donation … . However, by the child's age of 7, the majority of parents whose children had been born through genetic surrogacy had told their children that they had been carried by another woman, but had not disclosed the use of the surrogate mother's egg … almost half of these parents had still not disclosed this information by the time their children turned 10.[7]

10.4 As we have seen in Chapter 3, surrogacy organisations and others interested in surrogacy encourage intended parents to tell children about their genetic and gestational origins. Nevertheless, not all intended parents do so. We have also explained that intended parents are more reticent to explain the use of donor gametes than they are the fact of surrogacy.[8]

10.5 Currently, it is not clear that access to information about children's genetic and gestational origins is a pressing issue for many stakeholders in surrogacy. In part, this may be due to the emphasis that most of the surrogacy organisations place on ongoing contact between the surrogate, and the intended parents and the child. For example, one of Surrogacy UK's explicitly stated values is that of friendship between the surrogate and the intended parents. Where such a friendship does exist and continues after the child's birth, the ongoing contact will promote the child's awareness of their origins. We were also told by counsellors who provided implications counselling in clinics, that they discussed with intended parents the disclosure to a child of his or her genetic origins, and the fact that the child was born of a surrogacy arrangement.

10.6 In addition, while surrogacy has been around for many years, the number of children born in this way is only a very small fraction of all children born.[9] Therefore, the question of access to information for surrogate born children has not attracted much wider discussion.

10.7 The General Register Office, National Records of Scotland and the Human Fertilisation and Embryology Authority (the "Authority") told us that they had received no requests for information about their origins from adults conceived as a result of a surrogacy arrangement.[10] No lawyers to whom we spoke had been approached by such adults seeking assistance with using legal methods to find out their origins.

10.8 In England and Wales, the issue of disclosing information about their origins to children born of a surrogacy arrangement is covered by parental order reporters in their reports. Judges also ask about this issue. CAFCASS told us that the view is taken that parents can only be encouraged, not forced, to tell their children about their origins, and that refusal to confirm that they will do so will not result in judges refusing

---

7 An extract from S Golombok, *Modern Families: Parents and Children in New Family Forms* (1st ed 2015) accessible at: https://thepsychologist.bps.org.uk/surrogacy-families (last visited 26 April 2019) (references within quote omitted).

8 See ch 3.

9 See paras 1.2 and 1.3.

10 There is no specific provision in the HFEA 1990 for disclosure to individuals that they were born of a surrogacy arrangement, but they may be able to infer this, based on information given about their donor(s).

to make the parental order. We note that the Nuffield Council on Bioethics Working Party on Donor Conception took the view that:

> we do not believe that a failure to disclose to children that they are donor-conceived should be regarded as constituting such a risk [of significant harm or neglect].[11]

10.9 In Scotland, in their reports, curators *ad litem* have been known to address the issue of disclosing information about their origins to children born of a surrogacy arrangement. They are not under a duty to do so however.

10.10 Nevertheless, we think that access to information about origins is an emerging issue. With regard to the use of donor gametes more generally, several stakeholders highlighted to us the increasing availability, and use, of genetic testing kits that can be used at home. Through the use of these kits, and without the need for any counselling around the results, individuals may discover that they are not genetically related to one or both of their parents.[12]

10.11 More generally, we think that the current law which allows children who are donor-conceived or adopted to access information about their origins is not designed to apply to children born of surrogacy arrangements, and therefore requires reform.

10.12 Access to information about origins was not a topic that was raised as frequently as other issues in our meetings with stakeholders. Generally, the right for a child to know his or her genetic origins was not questioned, but there was more debate over the right to know one's gestational origin (that is, the fact that one was carried by a surrogate, and the identity of the surrogate). The fact that it is increasingly important to know one's genetic origins for medical reasons was also mentioned by some stakeholders. Some stakeholders also suggested that it may be more difficult in some cultures to tell a child about their donor-conceived origins, or that they were carried by a surrogate.

10.13 In this chapter, we discuss the methods by which, under the current law, children born of a surrogacy arrangement may learn of their origins, and the problems with each of these methods as they apply to such children. We go on to discuss the European and international human rights perspective, before looking at stakeholders' views. We then put forward our proposals for, and questions about, reform.

THE CURRENT LAW AND ITS PROBLEMS

10.14 There are currently three ways in which a child born as a result of a surrogacy arrangement can seek to access information about their origins:

(1) through their birth certificate;

(2) through access to court records; and

---

11 Nuffield Council on Bioethics, *Donor Conception: ethical aspects of information sharing* (2013) para 5.62.

12 See M Crawshaw, "Direct-to-consumer DNA testing – the fallout for individuals and their families unexpectedly learning of their donor conception origins" (2018) 21 *Human Fertility* 225.

(3) by use of the information provisions in the HFEA 2008.[13]

Birth certificates

The system of birth registration

10.15 All births in the UK must be registered.[14] The information necessary to register the birth must be provided to the Registrar General within 42 days of the birth in England and Wales, and within 21 days of the birth in Scotland.[15] Currently, the mother and/or the married father are under a duty to give to the relevant registrar the prescribed particulars concerning the birth and, hence, a married father will be registered as the father.[16] Unmarried fathers and second female parents may only be registered as the second parent on a joint request with the mother, or by providing certain declarations confirming their relationship to the child.[17] These declarations generally rely on the mother's consent or a court order.[18]

10.16 When a birth is registered, certain other details must also be registered, including:

(1) date and time of birth;

(2) name and surname;

(3) father's name, surname, place of birth and occupation (if available);

(4) mother's name, surname and occupation; and

(5) informant's address.[19]

10.17 There are, essentially, two types of birth certificate: a 'full' birth certificate (or 'full extract' in Scotland), which shows information about the parents, and a 'short' birth certificate (or 'abbreviated extract' in Scotland), containing information about the child

---

13 The provisions are designed for use by people conceived through the use of donated sperm or eggs, rather than specifically for those born through a surrogacy arrangement.

14 Births and Deaths Registration Act 1953, s 1(1); Registration of Births, Deaths and Marriages (Scotland) Act 1965, s 13(1).

15 Births and Deaths Registration Act 1953, s 2; Registration of Births, Deaths and Marriages (Scotland) Act 1965, s 14(1).

16 Births and Deaths Registration Act 1953, s 2; Registration of Births, Deaths and Marriages (Scotland) Act 1965, s 14(1). Other people, such as a person present at the birth, may register the birth: Births and Deaths Registration Act 1953 s 1(2); Registration of Births, Deaths and Marriages (Scotland) Act 1965, s 14(2).

17 Births and Deaths Registration Act 1953, s 10. See also s 10ZA; Registration of Births, Deaths and Marriages (Scotland) Act 1965, ss 18 and 18B. See also s 18ZA.

18 Planned changes to the law in England and Wales will allow unmarried fathers to be registered if a paternity test shows them to be the father. However, these provisions are not yet in force: see explanatory notes to the Welfare Reform Act 2009, pp 6 to 8 and Welfare Reform Act 2009 s 56 and sch 6.

19 Registration of Births and Deaths Regulations 1987 (SI 1987 No 2088), regs 7 and 9; Registration of Births, Still-births, Deaths and Marriages (Prescription of Forms) (Scotland) Regulations 1997 (SI 1997 No 2348), reg 3 and sch 1. In England and Wales, where a name is given to a child, or altered, within 12 months of the registration of the birth, it can be added to the birth certificate at any time: Births and Deaths Registration Act 1953, ss 10A and 13. In Scotland, where a name is given to a child, or altered, within 12 months of the date of birth, it can be registered if an application is made within two years from the date of birth of the child, s 43(3) Registration of Births, Deaths and Marriages (Scotland) Act 1965.

only.[20] The format of the short certificate or abbreviated extract cannot include any information relating to parentage or adoption.[21]

10.18 As the register of births is public, any person can request a copy of a certificate of birth (of any person) from the Registrar General.[22]

Right to information for children born other than by surrogacy or donor conception

10.19 Before looking at children born through surrogacy, it is helpful to review the position of children who are born to their parents other than by surrogacy or donor conception.

10.20 For children born in this way, the "law does not recognise [the right to know one's genetic parentage] as a general [right]".[23] A child can access his or her birth certificate from the age of 18 in England and Wales or the age of 16 in Scotland, but this will show only those who are registered as his or her parents – who may not be his or her genetic parents.[24] The birth certificate may show no registered father. There is a common-law presumption that the mother's husband is the legal father of her child, but that may not reflect the genetic reality of the child.[25] To know their true genetic origins, children therefore have to rely on the honesty of their parents regarding such information.

Children born as a result of a surrogacy arrangement

10.21 When a child is born through a surrogacy arrangement, the surrogate mother is his or her legal mother.[26] As the legal mother, the surrogate mother will be listed on the birth certificate and recorded as the mother in the register of live births.

10.22 If the surrogate is married, her husband is the legal father and may also be named on the birth certificate (unless it can be shown that he did not consent to the surrogacy).[27] If the surrogate is unmarried, the second parent named on the birth certificate may be:

---

20 Gov.uk, *Register a birth*: https://www.gov.uk/register-birth/birth-certificates (last visited 31 May 2019); National Records of Scotland, *Registering a birth*: accessible at: https://www.nrscotland.gov.uk/registration/registering-a-birth (last visited 31 May 2019).

21 Births and Deaths Registration Act 1953, s 33; Registration of Births, Deaths and Marriages (Scotland) Act 1965, s 39E and the Registration of Births, Still-births, Deaths and Marriages (Prescription of Forms and Errors) (Scotland) Regulations 2006 (SSI 2006 No 598), reg 4.

22 Births and Deaths Registration Act 1953, s 30.

23 J Herring, *Family Law* (8th ed 2017) p 410.

24 Following a birth, the mother will have been given a card by the hospital which she should produce to the registrar. Hospitals also send weekly lists of births to the local registrars. It is therefore unlikely that a woman other than the genetic mother of the child would be named on the birth certificate. Disputes regarding paternity are however more likely as there is no equivalent to gestation or birth from which a conclusion of paternity can be drawn (See A B Wilkinson and K McK Norrie, *The Law Relating to Parent and Child in Scotland* (3rd ed 2013) paras 3.05 and 3.06).

25 See A Bainham, "Arguments about parentage" (2008) 67 *Cambridge Law Journal* 322. In Scots law, this common law presumption is enshrined in statute by the Law Reform (Parent and Child) (Scotland) Act 1986, s 5(1)(a): A man shall be presumed to be the father of a child if he was married to the mother of the child at any time in the period beginning with the conception and ending with the birth of the child.

26 HFEA 2008, s 33.

27 HFEA 2008, s 35.

1) The intended father, if he is genetically related to the child and therefore the child's legal father at common law. [28] As he is not married to the surrogate, he could be registered on the birth certificate in the same way as any unmarried father.[29] In Scotland, the commissioning father who is genetically related to the child would be the legal father only if a court order was made declaring that he was the child's parent or, similar to the position in England and Wales, he took steps to have himself named on the birth certificate.[30]

2) A person nominated as a parent under the agreed fatherhood conditions or second female parent provisions of the HFEA 2008.[31]

10.23 If donor sperm has been used in the context of treatment at a clinic licensed by the Authority, the sperm donor is not the legal father and is therefore not listed either on the record of the birth or the birth certificate.[32] If a donor egg has been used, the egg donor will not be the mother of the child because the mother is the woman who carried the child. In surrogacy arrangements, this is the surrogate only.[33]

10.24 If a child is born through an overseas surrogacy arrangement, the Foreign and Commonwealth Office may be able to issue a consular birth certificate.[34] If the commissioning father can establish paternity,[35] he will be named on the birth certificate alongside the birth mother (the surrogate).[36]

10.25 When a parental order is granted to the intended parents, the parental order is entered on the Parental Order Register, and is linked to the register of births. The arrangements for doing so, and for access to the registers, use the law that applies to adoption orders. This law is applied, and modified as necessary, by the 2018 Regulations.

10.26 When a parental order is made, the court sends a copy of the order to the General Register Office.[37] The order contains a direction for the Registrar General to update

---

28 See ch 4.

29 See para 10.15.

30 Registration of Births, Deaths and Marriages (Scotland) Act 1965, ss 18(1)(a), (b)(i), (c) and (2)(b).

31 HFEA 2008, ss 42 to 45.

32 HFEA 2008, s 41(1).

33 HFEA 2008, s 33.

34 If the commissioning father can establish paternity, the surrogate mother is unmarried at the time of the birth and the commissioning father is British otherwise than by descent, the commissioning father can register the child's birth at the Foreign and Commonwealth Office and obtain a consular birth certificate.

35 If the surrogate mother is unmarried, the commissioning father may be able to establish paternity using any relevant evidence such as DNA tests, court orders and the child's birth certificate - British Nationality (Proof of Paternity) Regulations 2006 (SI 2006 No 1496) as amended by the British Nationality (Proof of Paternity) (Amendment) Regulations 2015 (SI 2015 No 1615).

36 Foreign and Commonwealth Office guidance: Surrogacy Overseas, p 5: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/477720/new_1.pdf. (31 May 2019).

37 Family Procedure Rules 2010 (SI 2010 No 2955), r 13.21; Act of Sederunt (Rules of the Court of Session 1994) (SI 1994 No 1443) as amended, r 97.15; and Act of Sederunt (Child Care and Maintenance Rules) 1997 (SI 1997 No 291) as amended, r 2.57.

the register of births,[38] and the original entry in the register of births is marked as "re-registered"[39] in England and Wales, and with the words "Parental Order"[40] in Scotland.

10.27 The Registrar General maintains the Parental Order Register.[41] Every parental order contains a direction for the Registrar-General to record it in the Parental Order Register.[42] When a parental order is made, the Parental Order Register is updated to reflect the making of the parental order. The Parental Order Register is linked to the original birth record of any person listed in the register. However, information kept by the Registrar General for this purpose is not publicly available.[43]

10.28 Where the entry in the Parental Order Register notes the date and place of birth of the person subject to the parental order, a certified copy of the entry may be treated as "if the copy were a certified copy of an entry in the registers of live-births";[44] that is, as a birth certificate. The Parental Order certificate therefore effectively replaces the child's original birth certificate.

10.29 In England and Wales, any person may request that the Registrar General search the Parental Order Register, or request a certified copy of any entry in the Register relating to a person over the age of 18.[45]

10.30 A person may request a certified copy of the Parental Order Register for a person aged under 18 years old if he or she provides the Registrar General with the full name and date of birth of the child, and the full names of the parents.[46]

10.31 Sections 60 and 79 of the ACA 2002 permit adopted people over the age of 18 years to obtain information relating to their original birth record from the adoption agency

---

38 ACA 2002, sch 1 para 1(2), as applied and modified by the 2018 Regulations, reg 2 and sch 1 para 34; AC(S)A 2007 sch 1 para 2(2), as applied and modified by the 2018 Regulations, reg 3 and sch 2 para 28.

39 ACA 2002, sch 1 para 1(2), as applied and modified by the 2018 Regulations, reg 2 and sch 1 para 34. See also Department of Health, *Impact Assessment of the Human Fertilisation and Embryology (Parental Order) Regulations* 2010, p 4, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/213873/dh_116502.pdf(last visited 31 May 2019).

40 AC(S)A 2007, sch 1 para 2(2), as applied and modified by the 2018 Regulations, reg 3 and sch 2 para 28.

41 ACA 2002, s 77(1) as applied and modified by the 2018 Regulations, reg 2 and sch 1 para 20; AC(S)A 2007, s 53 as applied and modified by the 2018 Regulations, reg 3 and sch 2 para 13.

42 ACA 2002, sch 1, para 1(1), as applied and modified by the 2018 Regulations, reg 2 and sch 1 para 34; AC(S)A 2007, sch 1 para 1(1), as applied and modified by the 2018 Regulations, reg 3 and sch 2 para 28.

43 ACA 2002 ss 79(1) and (2), as applied and modified by the 2018 Regulations, reg 2 and sch 1, para 22; AC(S)A 2007, ss 55(1) and (2), as applied and modified by the 2018 Regulations, reg 3 and sch 2 para 15.

44 ACA 2002, s 77(5), as applied and modified by the 2018 Regulations, reg 2 and sch 1 para 20; AC(S)A 2007, as applied and modified by the 2018 Regulations, reg 3 and sch 2 para 16.

45 ACA 2002, s 78(2), as applied and modified by the 2018 Regulations, reg 2 and sch 1 para 21.

46 Parental Orders (Prescribed Particulars and Forms of Entry) Regulations 2010 (SI 2010 No 1205), reg 2, sch 1 and ACA 2002, s 78(3).

that arranged their adoption. The adoption agency can, in turn, obtain this information from the Registrar-General.[47]

10.32 However, these sections only partially apply to parental orders, with the effect that people subject to parental orders cannot request information that would enable them to access their original birth record, either from the General Register Office or from any specified agency.[48]

10.33 In Scotland, the situation is different. The provisions which allow adopted persons over 16 to obtain information about themselves from the Register of Births are applied to those over 16 subject to a parental order and to whom the information relates. [49] The subject of a parental order will therefore be able to trace his or her birth mother. Before the Registrar General discloses such information however, the person must be informed about the availability of any counselling services providing counselling in relation to the implications of compliance with the request, and be given a suitable opportunity to receive counselling.[50]

10.34 In England and Wales, a person subject to a parental order, who is under the age of 18 years, can apply to the Registrar General for confirmation that their intended spouse is not within prohibited degrees of relationship. [51]

Problems with accessing information by using a birth certificate

10.35 Adopted children and those born of a surrogacy arrangement can access the relevant entries from the Adopted Children Register or the Parental Order Register. The full certificates reproduced from these Registers make reference to the fact that a child has been adopted or is the subject of a parental order certificate. Following a parental order, where the child is entered into the Parental Order Register, a certificate produced from that register will say "Certified to be a true copy of an entry in the Parental Order Register ..." whereas, in Scotland, at the top of the certificate, the following words appear, namely, "This is an extract of an entry from a register held by the Registrar General for Scotland. Short certificates or abbreviated extracts, whether those relating to an entry in the Parental Order Register or the Adopted Children Register, do not make reference to the fact that a child has been adopted or is the subject of a parental order.[52]

10.36 A certificate of an entry in the Adopted Children Register is clearer, on its face, as to the status of a child as an adopted child. In addition to a statement that it is "Certified to be a true copy of an entry in the Adopted Children Register …", the certificate from

---

47 Persons who were adopted before 7 December 2004 (when ACA 2002, ss 56 to 64 came into force) can request this information directly from the Registrar-General.

48 ACA 2002, ss 60 and 79 as applied and modified by the 2018 Regulations, reg 2 and sch 1 paras 9 and 22. This is because the 2018 Regulations, like the previous regulations, do not apply ACA 2002, s 79(5) or ACA 2002, ss 60(2) and (3): see the 2018 Regulations, paras 9 and 22.

49 AC(S)A 2007, s 55(4)(b), as applied and modified by the 2018 Regulations, reg 3 and sch 2 para 15.

50 AC(S)A 2007, s 55(5), as applied and modified by the 2018 Regulations, reg 3 and sch 2 para 15.

51 ACA 2002, s 79(7), as applied and modified by the 2018 Regulations, reg 2 and sch 1 para 22.

52 Registration of Births, Deaths and Marriages (Scotland) Act 1965, s 39E(5)(a) as applied and modified by the 2018 Regulations, reg 5 and sch 4 para 3.

the Adopted Children Register also gives the date on which the adoption order was made, and the court that made the order. In England and Wales, the latter information is not recorded in the Parental Order Register and therefore does not appear on the certificate from the General Register Office.[53] On the other hand, in Scotland, as is the case in the Adopted Children Register, an entry in the Parental Order Register does record the date of the order and the details of the relevant court.[54] This information is reproduced in full extracts from both Registers.

10.37 The General Register Office for England and Wales have told us that, before 2010, it was *not* evident from the face of the full certificate issued after a parental order had been made that it was a copy of the Parental Order Register. The change was made after consultation with those in the field of surrogacy. At the same time, references on the certificate to "parent" were substituted for "mother" and "father" in recognition that the category of applicants able to access parental orders was broader than opposite-sex married couples.

10.38 As we mention above, it appears that, contrary to the position on adoption, it is not possible in England and Wales for a person born as a result of a surrogacy arrangement to access their original birth record. The General Register Office agree that, under the current law, it is not possible for it to provide the linking information that would allow a child born of surrogacy to obtain their original birth certificate.

10.39 We think this position in England and Wales is anomalous. We note that statutory provision is made to link the registers (the birth register and the Parental Order Register). Further, provision is made for a child born as a result of a surrogacy arrangement to find out (before he or she reaches the age of 18) whether they are within the prohibited degrees of relationship with an intended spouse. Moreover, in Scotland, a person over 16 who is subject to a parental order can access his or her original birth certificate. There is no reason for the law in Scotland and in England and Wales to differ in this respect.

10.40 The General Register Office for England and Wales have told us that, before the coming into force of the Human Fertilisation and Embryology (Parental Order) Regulations 2010, it was possible for a person subject to a parental order to access a certified copy of his or her birth certificate.

10.41 It seems likely to us that the current inability of a surrogate-born child to obtain a copy of his or her birth certificate is an oversight in the way that the adoption legislation is applied in England and Wales to surrogacy arrangements. Alternatively, it may be that the lack of an equivalent to an adoption agency in the surrogacy context meant that it was concluded that the provision could not be applied to those born as a result of a surrogacy arrangement.

10.42 As we noted in the introduction to this chapter, the General Register Office told us that they have no record of any request being made for linking information to enable the

---

53 The form of the entries of which the certificates are copies are prescribed by law. In England and Wales, in the context of adoption, the regulations are the Adopted Children and Adoption Contact Registers Regulations 2005 (SI 2005 No 924) and Parental Orders (Prescribed Particulars and Forms of Entry) Regulations 2010 (SI 2010 No 1205).

54 Registration Services (Prescription of Forms) (Scotland) Regulations 2009 (SSI 2009 No 314), schs 1 and 2.

child to find their original birth certificate. It is not operating any practical work-around, because it is prevented from doing so by the lack of statutory authority to release the information.

10.43 The General Register Office also told us that they believe that this is not a significant issue practically as children born from surrogacy arrangements are normally registered in the name in which they will be brought up. That is, there is no difference in the name recorded in the register of births and in the Parental Order Register.[55] There may be more likely to be a difference in names registered for adopted children, particularly those adopted at birth. It says that the surrogate-born child could therefore identify the relevant entry contained in the register of live births. While we think that this will be true in most cases, there may be situations where the names are not the same. That may arise, for example, where there is a dispute at birth between the intended parents and the surrogate, and the surrogate registered the child's birth in a name different to that chosen by the intended parents.

Court records

10.44 In England and Wales, when a surrogate-born child attains 18 years, he or she may apply to the court for information about the parental order using form A64A. [56] He or she has the right to receive:

(1) the application form for a parental order (but not the documents attached to that form);

(2) the parental order and any other orders relating to the parental order proceedings;

(3) a transcript of the court's decision; and

(4) a report made to the court by the parental order reporter."[57]

10.45 The court will provide this information only if the person has completed a certificate relating to counselling in form A64A.[58]

10.46 Since 6 April 2010, the courts have been able to disclose information containing identifying information.[59] The Explanatory Memorandum to the Human Fertilisation and Embryology (Parental Order) Regulations 2010 states that:

> the concern was that people who have been adopted and people who are donor conceived can access identifying information about their birth parents, but people

---

55 We understand from the National Records of Scotland that registration reflects the circumstances which pertain at the time of the registration. Accordingly, it is not possible to register the child with a surname other than that of the surrogate and spouse/partner or the surname of one of them.

56 ACA 2002 ss 60(1) and (4), as applied and modified by the 2018 Regulations, reg 2 and sch 1 para 9 and the Family Procedure Rules 2010 (SI 2010 No 2955), r 13.16(3).

57 Family Procedure Rules 2010 (SI 2010 No 2955), r 13.16 (1) and PD 5A.

58 Family Procedure Rules 2010 (SI 2010 No 2955), r 13.16 (2).

59 ACA 2002, s 60(4) ACA 2002 as applied and modified by 2018 Regulations, sch 1 para 2 and sch 1 para 9.

who are the subject of a parental order could not. The Parental Order Regulations 2010 now allow the courts to disclose such information.[60]

10.47 In Scotland, a person who is the subject of a parental order may, after he or she has reached the age of 16, apply to the court for access to the relevant court file (or "process", to use the technical term).[61]

Problems with accessing information by using court records

10.48 In England and Wales, the documents that the surrogate-born child can obtain on reaching 18 years of age contain much information, including the birth parents' full names and address. However, it appears that it is not possible to obtain statements filed in the proceedings. Typically, these statements would include one made by the intended parents.[62] We have been told by lawyers and judges that such statements, if drafted well, set out a full narrative of the surrogacy journey, which it might be very useful for a person who is the subject of the parental order to have.

10.49 Some concern has also been raised with us that parental order files may not always benefit from the same level of care and attention as adoption files in respect of how they are kept. While we do not know the extent to which this is the case, we can only note the importance to the individuals affected of court files being maintained so that no information is lost.

10.50 In Scotland, on the other hand, a person who is the subject of a parental order may, after he or she has reached the age of 16, obtain access to the complete court process relating to the grant of the parental order. [63] The court process is likely to contain information of a sensitive nature.

Register of information maintained by the Authority

10.51 The HFEA 1990 contains provisions dealing with access to information in a variety of circumstances.[64] In this chapter, we are concerned with access to information by those born as a result of a surrogacy arrangement. However, to understand how the provisions apply in the context of surrogacy it is first necessary to set out their operation in relation to donor-conceived people.

10.52 Regulations set out the information that donor-conceived children can access from the age of 16. This information includes: the height, weight, ethnic group and eye colour of the donor; the screening tests carried out on him or her; his or her personal and family

---

60 Explanatory Memorandum to the Human Fertilisation and Embryology (Parental Orders) Regulations 2010 No 985, Evidence Base, Introduction para 8.6: accessible at: http://www.legislation.gov.uk/uksi/2010/985/pdfs/uksiem_20100985_en.pdf (last visited 31 May 2019).

61 Act of Sederunt (Rules of the Court of Session 1994) (SI 1994 No 1443) as amended, r 97.17; and Act of Sederunt (Child Care and Maintenance Rules) 1997) (SI 1997 No 291) as amended, r 2.59.

62 The parties in the proceedings can make statements; the intended parents will make a statement, but it is unusual for the surrogate to do so, However, the intended parents' statement is not included within the list of the documents available to the surrogate-born child.

63 Act of Sederunt (Rules of the Court of Session 1994) (SI 1994 No 1443) as amended, r 97.17; and Act of Sederunt (Child Care and Maintenance Rules) 1997 (SI 1997 No 291) as amended, r 2.59.

64 The current provisions in the HFEA 1990 were inserted by the HFEA 2008, s 24.

medical history and whether the donor has children; and the donor's religion, occupation, interest and skills and why he or she donated.[65] The information does not identify the donor. However, the regulations also permit donor-conceived people over the age of 18 years to access identifying information about their donor, if the donor provided identifying information after 31 March 2005.

10.53 Consequently, for donations from 1 April 2005 onwards, children born of donor gametes have access to significantly more information, including:

(1) the donor's name;

(2) the last known postal address of the donor;

(3) the donor's date of birth and town of birth;

(4) the appearance of the donor; and

(5) any identifying information from the categories covered above for non-identifying information.[66]

Applying the provisions to donor-conceived people

10.54 The provisions dealing with requests for information allow the Authority to provide information about any person who ''would or might, but for the relevant statutory provisions, be the parent of the applicant''.[67] The "relevant statutory provisions" are the sections of the HFEA 1990 and HFEA 2008 that set out who will be a parent in case of assisted reproduction.[68] The Authority must comply with the request where the individual is or may have been donor-conceived, and has been given the opportunity to receive proper counselling about the implications of compliance with their request.[69]

10.55 A woman who is either the genetic or gestational mother "might" be the legal mother,[70] and therefore could fall within the request for information provisions of the HFEA 1990. The legislation specifically uses the wording "would or might", and includes a provision confirming that an egg donor cannot be a parent of a child that she has not carried.[71]

10.56 An applicant can request information about a genetic father (in donor conception, a sperm donor), because, under common law in England and Wales, the genetic father would be the legal father if (a) the child had no other father or (b) the genetic father

---

65 Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations (SI 2004 No 1511), regs 2(1), (2) and (3)(a).

66 Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004 (SI 2004 No 1511), regs 2(1), 2(2), 2(3) and 3(a).

67 HFEA 1990, s 31ZA(2). The use of "parent" here must include a biological parent.

68 HFEA 1990, s 31ZA(7). See ch 4 and Appendix 1.

69 HFEA 1990, s 31ZA(3).

70 "But for the relevant statutory provisions …", which includes HFEA 2008, s 33, which defines the legal mother as the woman who is carrying or has carried a child.

71 Except in accordance with HFEA 2008, ss 42, 43 or 46. See HFEA 2008, s 47.

used proof of paternity to rebut the common law presumption that the mother's husband was the father. In Scotland, the donor would be the legal father only if a court order was made declaring that he was the child's parent.

Problems: applying the provisions to those born as a result of a surrogacy arrangement

10.57 The disclosure provisions in the HFEA 1990 will only be relevant where a UK licensed clinic is involved; that is, where the surrogacy involves IVF or medically supervised artificial insemination. Where home insemination with a syringe is used, there is no clinic involvement and so the donor cannot be noted on the donor register. Foreign clinics may be involved in a surrogacy arrangement, but these are, obviously, not regulated by the Authority.

10.58 The disclosure provisions focus on a child being donor-conceived: a surrogacy arrangement may or may not include the use of donor gametes. It appears, from what we have been told that, if donor gametes are used, these are more likely to be eggs than sperm. The Authority told us that it is not aware of anyone having sought to use these disclosure provisions in a surrogacy context, so they remain untested. However, we set out below our understanding of how the disclosure provisions might apply in a surrogacy context.

10.59 The Authority does not regard intended parents who provide gametes as donors in the way that they would a true sperm or egg donor; that is, someone who simply donates gametes with no expectation that he or she will have an ongoing role in the life of a child conceived with those gametes.[72] Where the intended parents provide gametes their information will be recorded on the Authority's register of information technically as a donor, although, since 2013, with the prefix "IP" added to the entry to show that they are the intended parent, rather than a true donor. They will also be screened (in the same way as a donor) for infectious diseases.

10.60 A surrogate will be registered as a patient; where a surrogate's eggs are not used it will not be possible to identify her using the disclosure provisions. The Authority told us that it thought that, where the surrogate's eggs were used, it was arguable that she might meet the definition of a donor in the Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004 and therefore that, theoretically, it might be possible to identify a traditional surrogate using the provisions. However, in practice, such identification would be unlikely to be possible, as the clinic would not have treated the surrogate as a donor, and she would not have given the necessary consent to disclosure of information.

10.61 The information and counselling provided by clinics to intended parents and surrogates is therefore that relevant to those roles, rather than to the role of a donor. Because intended parents and surrogates have not been treated as donors by clinics, they would not have been made aware that their details could be disclosed in response to a request for information; nor would they have been given the opportunity

---

72 That is, intended parents (and surrogates) are not seen to fall within HFEA 1990, sch 3 para 5(1) which provides that "a person's gametes must not be used for the purposes of treatment services or non-medical fertility services unless there is an effective consent by that person to their being so used and they are used in accordance with the terms of the consent". Instead, they are seen to fall within HFEA 1990, sch 3 para 5(3): "This paragraph does not apply to the use of a person's gametes for the purpose of that person, or that person and another together, receiving treatment services".

to provide the "pen portrait" provided by a donor.[73] The Authority also take the view that it would not be possible for intended parents to vary the consent they have given from that of an intended parent to a donor because, in its view, consent cannot be varied after gametes have been used in treatment.

10.62 To summarise the current position on disclosure of information, taking into account the Authority's practices and views:

(1) Surrogates: a surrogate will be registered as a patient at the clinic, but, as we have discussed above, in practice, the disclosure provisions cannot be used to identify her. Practically speaking, in order to obtain disclosure of information about gamete donors, a person born of a surrogacy arrangement will need the surrogate's name, date of birth, time of treatment and, ideally, the name of the clinic where she was treated. Therefore, the person would already have to know the surrogate's identity.

(2) Sperm or egg donors (not including intended parents or the surrogate): the person who is the subject of a parental order can use the disclosure provisions to obtain information about a sperm or egg donor.

(3) An intended parent who has provided gametes: will be recorded on the Authority's register of information.[74] The child cannot use the disclosure provisions to identify the intended parent. There are, however, other ways of doing so; for example, using the court record.

(4) An intended parent who has not provided gametes: will not be recorded on the Authority's register of information, and therefore is not subject to the disclosure provisions. Again, such an intended parent can be identified in other ways.

10.63 We think it is unsurprising that the disclosure provisions cannot be used to identify a surrogate who did not use her own eggs. The regulations that deal with disclosure of information refer to a donor, and the donor is defined as "the person who has provided the sperm, eggs or embryos that have been used for treatment services in consequence of which the applicant was, or may have been, born".[75]

10.64 However, we take the view that the fact that surrogates who have used their own egg, and intended parents who have provided gametes, are not covered by the provision is both surprising and problematic. We also do not think that the law is sufficiently clear about access to information about origins in the context of a surrogacy arrangement. Several stakeholders, including the Authority, thought that there was not a good fit between the provisions of the HFEA 1990 dealing with disclosure of information, and surrogacy arrangements.

---

73 A pen portrait provides a description of the donor as a person.

74 The intended parent may partially complete a donor information form (but not the pen portrait section, or goodwill message); the "IP" prefix on the register allows it to be distinguished from a completed gamete donor information form.

75 Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004 (SI 2004 No 1511), reg 1(2).

10.65 Of course, a scenario where a child born of a surrogacy arrangement does not know who the intended parents are may be very unlikely. Such a situation could arise where, for example, the child was not raised by the intended parents, but was taken into care before the making of the parental order. The scenario where the child does not know that she or he was born in a surrogacy arrangement is more likely under the current law (at least for the child of an opposite-sex couple), if he or she has only ever seen his or her short birth certificate. It is not possible to tell from the short birth certificate that it is a copy of the Parental Order Register entry.

INTERNATIONAL LAW AND HUMAN RIGHTS CONTEXT

The European Convention on Human Rights

10.66 There is no European consensus on donor anonymity. In France, Belgium, Spain, Portugal, Greece, Denmark, Bulgaria and the Czech Republic, anonymity is still mandated by law (subject to some exceptions for medical information).[76]

10.67 No case in the ECtHR has considered the specific question of access by donor-conceived people to information about their donor.[77] There is increasing weight placed on the child's right to know his or her genetic origins under Article 8 of the European Convention on Human Rights ("ECHR") (right to respect for private and family life). As Tobin notes, however, the ECtHR "has not affirmed this position with respect to donor-conceived individuals (or indeed surrogacy arrangements)".[78]

10.68 The English courts considered the issue of access to information about a donor in *R (Rose) v Secretary of State for Health*.[79] The claimants (both born as a result of donor insemination) requested the provision of non-identifying information and, where possible, identifying information regarding anonymous donors. They argued that the state had a positive obligation to provide non-identifying information and to establish a contact register. It was held that such requests did fall within the scope of Article 8 of the ECHR. As the judge noted:

> here, what the Claimants are trying to obtain is information about their biological fathers, something that goes to the very heart of their identity, and to their make-up as people.[80]

---

76 L Brunet, "Donor anonymity and right of access to personal origins" (22 February 2018), accessible at: https://www.eshre.eu/-/media/sitecore-files/Publications/Strasbourg-2018/05_BRUNET_NEW.pdf?la=en&hash=2B4EC4F87CAF045E35F9E9CE52A5AC6809BDA92A (last visited 31 May 2019).

77 L Brunet, "Donor anonymity and right of access to personal origins" (22 February 2018), accessible at: https://www.eshre.eu/-/media/sitecore-files/Publications/Strasbourg-2018/05_BRUNET_NEW.pdf?la=en&hash=2B4EC4F87CAF045E35F9E9CE52A5AC6809BDA92A (last visited 31 May 2019).

78 J Tobin, "To prohibit or permit: what is the (human) rights response to the practice of international commercial surrogacy?" (2014) 63 *International Comparative Law Quarterly* 317.

79 [2002] EWHC 1593 (Admin), [2002] All ER (D) 398. This case is discussed in A B Wilkinson and K McK Norrie, *The Law Relating to Parent and Child in Scotland* (3rd ed 2013) para 3.07.

80 *R (Rose) v Secretary of State for Health* [2002] EWHC 1593 (Admin), [2002] All ER (D) 398 at [33].

10.69 As a result, he concluded that,

> Article 8 is engaged both with regard to identifying and non-identifying information … the distinction between identifying and non-identifying information is not relevant at the engagement stage of Article 8, but it is likely to become very relevant when one comes to the important balancing exercise of the other considerations in Article 8(2) … .
>
> Respect for private and family life has been interpreted by the European Court to incorporate the concept of personal identity … . That, to my mind, plainly includes the right to obtain information about a biological parent who will inevitably have contributed to the identity of his child. There is in my judgment no great leap in construing Article 8 in this way. It seems to me to fall naturally into line with the existing jurisprudence of the European Court.[81]

10.70 Due to pending ministerial decisions at the time, however, the judge stated that a decision on whether or not there was, in fact, a breach of Article 8 would be adjourned. The Government subsequently announced a change in the law (which avoided the court having to decide the issue). Clinics are now required to add information identifying donors to the register of information available to donor offspring.[82]

The United Nations Convention on the Rights of the Child

10.71 The United Nations Convention on the Rights of the Child ("UNCRC") is an international human rights treaty, providing a statement of children's rights. "It … is the most widely-ratified international human rights treaty in history".[83] We discuss the status of the UNCRC in Chapter 4.[84] Reports have been prepared by the Child Rights Information Network and International Social Service,[85] both of which include consideration of the UNCRC and its impact on the question of a child's right to know his or her origins, in the context of surrogacy. Several Articles of the UNCRC are relevant to this right. Article 7 of the UNCRC provides that:

---

81 *R (Rose) v Secretary of State for Health* [2002] EWHC 1593 (Admin); [2002] All ER (D) 398 at [46] and [48].

82 Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004 (SI 2004 No 1511).

83 See UNICEF, *UN Convention Child Rights*, accessible at: https://www.unicef.org.uk/what-we-do/un-convention-child-rights/ (last visited 31 May 2019).

84 See paras 4.100 and subsequent.

85 Child Rights Information Network, "A Children's Rights Approach to Assisted Reproduction" in Baglietto C, Cantwell N and Dambach M (eds), *Responding to illegal adoptions: A professional handbook* (2016).

The Child Rights Information Network is "an international not-for-profit organisation based in London, UK, which produces new research and thinking on human rights issues, with a focus on children's rights". (https://home.crin.org/faqs (last visited 31 May 2019).

The International Social Service is "an international NGO founded in 1924; today a network of national entities and a General Secretariat that assist children and families confronted with complex social problems as a result of migration", (https://www.iss-ssi.org/index.php/en/ (last visited 31 May 2019).

> The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his parents.[86]

10.72 This provision has been interpreted as providing a clear basis for donor-conceived children to know their origins.[87]

10.73 Article 8 of the UNCRC provides that:

> States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.[88]

10.74 Article 24 of the UNCRC, on the recognition of the right of the child to the highest attainable standard of health, is also seen as relevant by the Child Rights Information Network, as it may imply a right to know the medical history of biological parents.[89]

10.75 The Child Rights Information Network states that "a children's rights position clearly recognises a child's right to know their biological parents and any half-siblings".[90] In relation to surrogacy specifically, the Child Rights Information Network states that a child should have the right to know, and contact, the surrogate mother to which he or she is genetically related. Where the surrogate mother is not genetically related, the Child Rights Information Network believes that children should at least have access to "non-identifying medical information about the surrogate and contextual information about their environment during the period of pregnancy". This position takes account of research suggesting that the foetal environment can have long-term effects on the health of the mother and child.[91]

10.76 International Social Service also promotes the right of a child to know his or her origins, linking this to Articles 7 and 8 of the UNCRC, and drawing parallels with the field of adoption. It believes that such a right includes the right to know the circumstances of a child's birth (that is, that he or she was born to a surrogate). It states that there should be "a legal and administrative record of the resort to a surrogate mother". It also supports the idea of the surrogate preparing a book or letter, completed over the course of the pregnancy, to be given to the child at birth. It

---

86 UNCRC, art 7.

87 Child Rights Information Network, "A Children's Rights Approach to Assisted Reproduction" in Baglietto C, Cantwell N and Dambach M (eds), *Responding to illegal adoptions: A professional handbook* p 17.

88 UNCRC, art 8.

89 Child Rights Information Network, "A Children's Rights Approach to Assisted Reproduction" in Baglietto C, Cantwell N and Dambach M (eds), *Responding to illegal adoptions: A professional handbook* (2016) p 17.

90 Child Rights Information Network, "A Children's Rights Approach to Assisted Reproduction" in Baglietto C, Cantwell N and Dambach M (eds), *Responding to illegal adoptions: A professional handbook* (2016) p 18.

91 Child Rights Information Network, "A Children's Rights Approach to Assisted Reproduction" in Baglietto C, Cantwell N and Dambach M (eds), *Responding to illegal adoptions: A professional handbook* (2016) p 18.

advocates training for intended parents to understand identity and kinship, and to assist them in addressing these issues with the child.[92]

REFORM

The aim of reform

10.77 While there was consensus amongst stakeholders about the importance of the child having access to knowledge about his or her genetic origins, there were mixed views amongst those to whom we spoke about whether it was important for a child born of a surrogacy arrangement to know that he or she had been carried by a surrogate.

10.78 We take the provisional view that the child born of a surrogacy arrangement should have access to full knowledge of both their genetic and gestational origins. We note that our terms of reference for the review specifically include "information about a child's genetic and gestational origins within the surrogacy context". We are supported in our view by the provisions of the UNCRC discussed above, and by the research that suggests that the foetal environment impacts on the child's development, and the expression of his or her genes.[93] Importantly, there does not seem to us to be any reason to treat the child's gestational origin differently from his or her genetic origins, by potentially concealing one, while recording the other.

Birth certificates

10.79 We think that there is no reason why the law in England and Wales should not be brought into line with that for Scotland, so that a child born of surrogacy arrangement can access their original birth record. However, we take the view that, to maintain consistency with each country's adoption legislation, the age at which a child who is subject to a parental order can access his or her original birth certificate should remain at 18 in England and Wales and 16 in Scotland. This change will also align the law in England and Wales with that governing access to the original birth certificate for adopted children.[94]

---

92 L Métral, "Knowledge of their origins for children born through surrogacy: respect for the right to the preservation of their identity" in Baglietto C, Cantwell N, Dambach M (eds), *Responding to illegal adoptions: A professional handbook* (2016) p 169.

93 See the research into epigenetics, which looks at the way in which genes are used and expressed. For a summary see E Heard and R A Martienssen, "Transgenerational Epigenetic Inheritance: Myths and Mechanisms" (2014) 157 *Cell* 95 and I Cowell, "Epigenetics – it's not just genes that make us" *British Society for Cell Biology*, https://bscb.org/learning-resources/softcell-e-learning/epigenetics-its-not-just-genes-that-make-us/ (last visited 31 May 2019).

94 There is, however, a difference in the age at which a person can access their original birth certificate; as we set out above at para 10.20, this is 18 in England and Wales. In Scotland, a person can access their birth certificate at 16, and the AC(S)A 2007, s 55(4)(b), as applied and modified by the 2018 Regulations, reg 3 and sch 2 para 15 enables a person of 16 or over who is the subject of a parental order to access his or her original birth certificate.

Consultation Question 43.

10.80 We provisionally propose that, in England and Wales, where the making of a parental order in respect of a child born of a surrogacy arrangement has been recorded in the Parental Order Register, the child should be able to access his or her original birth certificate at the age of 18.

Do consultees agree?

10.81 We have given consideration as to whether the short parental order certificate should indicate in some way that the child is born of a surrogacy arrangement. We are concerned that the fact that it does not do so may offer the opportunity for concealment of the child's origins. Where neither of the intended parents' gametes were used, the certificate could also indicate that there was additional information about the child's genetic origins. However, we need to be cautious about making personal information about a person more public than it already is. Disclosing information about genetic origins on birth certificates (or forcing parents to disclose) could be argued to be "an unjustifiable interference with the family and privacy of both parents and child..[95] Short certificates are frequently used as a means of providing identification to Government bodies and other organisations. We therefore do not think that people should (in effect) be forced to disclose personal information about their origins whenever identification is required.

10.82 Finally, we consider that the issue of how a child's origins should be reflected on their birth record goes beyond the area of surrogacy, and therefore the scope of this project. Similar questions arise in other areas such as donor-conception and adoption. We think that the information recorded on a birth certificate would be better considered by a piece of work that looked at all these areas in the context of a review of birth registration.

10.83 For these reasons we have provisionally concluded that information about surrogacy should not be included on the short birth certificate.

10.84 However, if our provisional proposal for a new surrogacy pathway to parenthood, which we discuss in Chapter 8, were to be implemented, surrogacy arrangements in the new pathway would result in the intended parents appearing as the parents on the child's original birth certificate. In order to ensure that our proposals do not remove the child's ability to access information about his or her origins, we take the view that the full (not short) birth certificate of the child should note that he or she was born as a result of a surrogacy arrangement (without providing information as to the identity of the surrogate; this information would instead be recorded on the register which we discuss below). This proposal ensures parity of information with those children born of surrogacy arrangements falling outside the new pathway, who will be the subject of a

[95] K Wade, "The regulation of surrogacy: a children's rights perspective" (2017) 29(2) *Child and Family Law Quarterly* 113.

parental order recorded in the Parental Order Register. Surrogacy UK agreed with us that provision should be made for this information to be available.

Consultation Question 44.

10.85 We provisionally propose that where children are born of surrogacy arrangements that result in the intended parents being recorded as parents on the birth certificate, the full form of that certificate should make clear that the birth was the result of a surrogacy arrangement.

Do consultees agree?

10.86 We would like to take this opportunity to ask stakeholders for their views on wider reform of the law governing the registration of births and whether they think it reflects modern families. For England and Wales, the law is contained in the Births and Deaths Registration Act 1953, but essentially dates from 1836, when civil registration was introduced. Reform could consider the purpose of the birth register, for whose benefit it exists, what information it should provide about a child's origins, parentage and legal parenthood and what that means for those people recorded as "parents". In Chapter 7 we discussed the possibility of a reform to legal parenthood which would allow three parents to be recorded on the register of births (that is, the intended parents and the surrogate) but concluded that this was not the most appropriate reform in a surrogacy context. However, developing modern family forms, such as co-parenting relationships involving three or more parents,[96] mean that the time may now be right for a law reform project to consider more generally whether it may be appropriate to allow three or more parents to be recorded on the birth register. A law reform project might also consider how someone's gender is recorded on the register to take into account, for example, people who are born intersex.

Consultation Question 45.

10.87 We invite consultees' views as to whether the birth registration system in England and Wales requires reform and, if so, which reforms they would like to see.

Court records

10.88 We do not see any reason why, in England and Wales, the full court record, including, for example, statements filed in the proceedings, should not be provided to the child when he or she reaches the age of 18. These statements may contain information that is important to the individual. Furthermore, in Scotland, a person who is the subject of

[96] For example, a child may be conceived, and jointly parented, by a lesbian couple and a gay couple.

a parental order may, after he or she has reached the age of 16, apply to the court for access to the relevant court process.[97]

Consultation Question 46.

10.89 We provisionally propose that, in England and Wales, from the age of 18, a child who has been the subject of a parental order should be able to access all the documents contained in the court's file for those parental order proceedings.

Do consultees agree?

A NEW REGIME FOR ACCESS TO INFORMATION ABOUT SURROGACY ARRANGEMENTS

The creation of a national register of surrogacy arrangements

10.90 We think that there should be a new regime for recording and disclosing information about origins in the context of a surrogacy arrangement. It should record the identity of the intended parents, the surrogate and any other gamete donors, making it clear who contributed gametes. For the avoidance of doubt, we take the view that, where the surrogate's own egg has been used in a traditional arrangement, or the intended parents' own gametes are used, that information should be recorded and available for disclosure, in contrast with what appears to be the current position.

10.91 As we set out above, non-identifying information about donors is also recorded in the register and available for disclosure to donor-conceived children. This information is available to donor-conceived children from the age of 16.[98] We think that the same information in respect of gamete donors should also be recorded and available for disclosure from the register of surrogacy arrangements. We ask for consultees' views on whether this information, where relevant and available, should also be recorded in respect of the surrogate and intended parents.

10.92 We suggest that this new regime should take the form of a national register of surrogacy arrangements. One option might be for the register to be maintained by the UK birth registration authorities (the General Register Office, National Records of Scotland and the General Register Office for Northern Ireland). However, we think that this register would be complementary to the existing Register of Information maintained by the Authority and we suggest that it could be cheaper and more proportionate (given the number of surrogate-born children) for the register to be maintained as part of, or alongside, that Register. Such an approach would avoid the duplication of information, for example in relation to "true" donors who are already

---

97 Act of Sederunt (Rules of the Court of Session 1994) (SI 1994 No 1443) as amended, r 97.17; and Act of Sederunt (Child Care and Maintenance Rules) 1997 (SI 1997 No 291) as amended, r 2.59.

98 See para 10.52.

recorded in the Authority's Register.[99] We therefore provisionally propose that the national register of surrogacy arrangements should be held by the Authority.

10.93 We suggest that the creation of such a register is also justified by the "stewardship" role of the state, described by the Nuffield Council on Bioethics Working Party as being:

> to facilitate what are seen as beneficial behaviours: to "provide conditions", whether physical or social, that help and enable people in making their choices.[100]

10.94 In the context of donor conception, the Working Party concluded:

> that it is the proper role of a stewardship state to ensure that donor information, including identifying information, will be available for those donor-conceived people who know about the means of their conception and request it.[101]

10.95 We think that the arguments extend to the provision of identifying information about the intended parents and surrogate.

For which arrangements should information be recorded?

Gestational and traditional arrangements

10.96 We take the view that this information should be recorded for as many surrogacy arrangements as possible, provided that the information about who has contributed gametes for the conception of the child has been medically verified. So, as well as being recorded for those arrangements where a clinic has assisted with the surrogacy arrangement,[102] we also think that it should be possible for the information to be recorded where the surrogacy arrangement has not involved a clinic: that would be the case as regards a traditional arrangement not involving the use of IVF, made either through a regulated surrogacy organisation or independently. The recording of the information in the register of surrogacy arrangements for such arrangements would be subject to the identity of the person who provided sperm being medically verified.

10.97 We are aware that, currently, in traditional arrangements, there will not always be any independent verification as to the identity of the person who provided sperm for the conception of the child, usually the intended father. A CAFCASS study of parental order applications made in 2013/14 found that in more than half of the 17 traditional surrogacy arrangements in the sample no evidence of biological link was provided.[103]

---

99 By which we mean those who have contributed gametes (or an embryo) but are not the intended parents or the surrogate.

100 Nuffield Council on Bioethics, *Donor Conception: ethical aspects of information sharing* (2013) para 5.67.

101 Nuffield Council on Bioethics, *Donor Conception: ethical aspects of information sharing* (2013) para 6.30.

102 The surrogacy arrangement may be a traditional or a gestational arrangement.

103 See CAFCASS, *Cafcass Study of Parental Order Applications made in 2013/14* (July 2015), accessible at: https://www.cafcass.gov.uk/about-cafcass/research-and-data/cafcass-research/ (last visited 31 May 2019).

In relation to all the 79 cases studied, it was found that evidence as to the intended parents' genetic relationship was only provided in 71% of cases. In 12.7% of the cases the evidence was a DNA test, while in

In Chapter 12 we have provisionally proposed that, in some circumstances, including in the new pathway, it should not be necessary for there to be a genetic link between the intended parent (or parents) and surrogate-born child, in cases of medical necessity. If this provisional proposal is implemented, sperm from someone other than the intended father may be used to fertilise the surrogate's egg (in a traditional arrangement).[104] We suggest that this possibility increases the desirability of information about the child's genetic origins being recorded.

Evidence as an eligibility requirement and collection of the information

10.98 In Chapter 13 we deal with eligibility requirements for the new pathway, and for parental order applications. In that chapter we address, using eligibility requirements for the new pathway and the parental order route, the issue of providing, and verifying, information about those who provided gametes, and the surrogate. We provisionally propose that, for surrogacy arrangements in the new pathway, information identifying those who provided the gametes for the child's conception (who may or may not be the child's intended parent(s)), and the surrogate, should be provided for entry onto the national register. This information should be verified by confirmation from a clinic, if one is involved, a regulated surrogacy organisation (or, for traditional, independent arrangements, from an independent professional, such as a lawyer) of a link established by a DNA test, or another form of evidence sufficient to establish the relationship between the genetic parents and the child.[105] We also provisionally propose that it should be a condition of the making of the parental order that the identity of the surrogate is entered onto the register of surrogacy arrangements.[106]

10.99 We deal in Chapter –12 with how the information about the identity of the child's genetic parents and the surrogate would be obtained for entry onto the register of surrogacy arrangements.

10.100 We also take the view that, where medically verified information is available, it would be beneficial for information from surrogacy arrangements outside the new pathway to be recorded on the national register of surrogacy arrangements. We ask in Chapter 12 whether it should be a condition for the making of a parental order that those who contributed gametes are entered onto the register of surrogacy arrangements. However, even where this is not a condition for the making of a parental order, there is no reason why that information should not be entered onto the register, where DNA or medical evidence has been provided to substantiate it. That information could be taken from the application for the parental order and it would be the responsibility of the court to provide that information to the Authority as holder of the register. Currently, the application for the parental order simply asks whether either of the intended parents are the genetic parents of the child (and, of course, identifies the

---

49.4% it was another form of medical confirmation from the clinic (and in 8.9% of cases it was an oral or written confirmation from the surrogate).

104 We propose in ch 12 that the requirement for a genetic link is removed from the new pathway.

105 In an independent, traditional arrangement evidence to prove the link between the child and those who provided the gametes, by way of a DNA test, would have to be obtained by the intended parents.

106 See paras 12.96 and subsequent. In that chapter, having asked questions with respect to the retention of the requirement for a genetic link, we ask an open question about whether it should be a condition of the making of a parental order, for surrogacy arrangements in that pathway, that genetic parentage is recorded on the register of surrogacy arrangements.

surrogate). Similarly, in Scotland the petition for the parental order states the genetic link to one or both intended parents and identifies the surrogate.[107] These could be updated to require full information about the genetic heritage of the child to be disclosed, with supporting evidence, unless an anonymous gamete donor was used.

10.101 Non-identifying information about gamete donors is already included on the register where an Authority-licensed clinic is involved. For other arrangements in the new pathway not involving a clinic (that is, traditional arrangements),[108] it could fall to either the regulated surrogacy organisation or a professional intermediary[109] to collect and record this information. Consideration would also need to be given to the Authority's power to enforce the correct collection and submission of this information.

---

107 Act of Sederunt (Rules of the Court of Session 1994) (SI 1994 No 1443) as amended, form 97.3; and Act of Sederunt (Child Care and Maintenance Rules) 1997 (SI 1997 No 291) as amended, form 22.

108 A "true" gamete donor would only be involved in such an arrangement should reform mean that it was possible for there to be no genetic link between the intended parents and the surrogate. If a genetic link is required the intended father will always have to provide the sperm, as the egg will necessarily be the surrogate's own.

109 For traditional, independent arrangements where no clinic is involved. See ch 9 for a discussion of whether these arrangements could be brought within the new pathway.

Consultation Question 47.

10.102 We provisionally propose that a national register of surrogacy arrangements should be created to record the identity of the intended parents, the surrogate and the gamete donors.

Do consultees agree?

10.103 We provisionally propose that:

(1) the register should be maintained by the Authority;

(2) the register should record information for all surrogacy arrangements, whether in or outside the new pathway, provided that the information about who has contributed gametes for the conception of the child has been medically verified, and that the information should include:

(a) identifying information about all the parties to the surrogacy arrangement, and

(b) non-identifying information about those who have contributed gametes to the conception of the child; and

(3) to facilitate the record of this information, the application form/petition for a parental order should record full information about a child's genetic heritage where available and established by DNA or medical evidence, recording the use of an anonymous gamete donor if that applies.

Do consultees agree?

Consultation Question 48.

10.104 We invite consultees' views as to whether non-identifying information about the surrogate and the intended parents should be recorded in the national register of surrogacy arrangements and available for disclosure to a child born of a surrogacy arrangement.

When and how should the child be able to access the surrogacy register?

10.105 Our provisional view is that a child born of a surrogacy arrangement should be able to access identifying information independently from the age of 18, and non-identifying information from the age of 16.

10.106 The current provision for access to information by a donor-conceived child provides that the applicant for information must have been given "a suitable opportunity to

receive proper counselling about the implications of compliance with the request".[110] We suggest that this provision is sensible and should be replicated for requests for information from the surrogacy register.

10.107 While our provisional view does have the merit of consistency with the legislation which governs access to information by donor-conceived children, we do have some concern about the proposal in so far as it relates to Scotland. As we have already seen, in line with the legislation which provides that the age of legal capacity is 16,[111] the law in Scotland permits a person who is subject to a parental order to access, when aged 16, both his or her original birth certificate and the court process relating to the application for the parental order.[112] Both could contain sensitive information. There may also be a possible issue in relation to rights under Article 12 of the EHCR, which provides that men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right. Article 12 may be engaged because access to information could include, with respect to surrogacy arrangements, provision for disclosure of whether the person born of the surrogacy arrangement is marrying, or entering into a civil partnership, or intimate physical relationship, with a person who was carried by the same surrogate.[113]

10.108 Nonetheless, in order to maintain consistency with the legislation governing access to information by donor-conceived children, the present proposal adopts the same dual structure, permitting access to non-identifying information from the age of 16 and to identifying information from the age of 18. To achieve consistency and at the same time to remove any possible incompatibility with Article 12 of the ECHR, it would be possible to make a recommendation to amend the existing regulations.[114] The regulations could be amended to permit access by donor-conceived children to both non-identifying and identifying information from the age of 16 (along with a recommendation for an equivalent provision in relation to persons born of surrogacy arrangements), but we are of the view that such a recommendation would be outside the scope of this project.

10.109 Accordingly, we ask consultees whether it should be possible for a person born of a surrogacy arrangement who is under 16 or 18, respectively, to access non-identifying and identifying information. Some Australian statutes, in the context of donor conception or surrogacy, allow a person under 18 access to identifying information where approval has been given by a parent, or where a counsellor has provided counselling and advised that the person is mature enough to understand the

---

110 HFEA 1990, s 31ZA(3).

111 Age of Legal Capacity (Scotland) Act 1991.

112 See paras 10.33 and 10.47.

113 We discuss this below at para 10.117.

114 Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004 (SI 2004 No 1511).

consequences of disclosure.[115] We ask consultees for their views on the introduction of rights of access in such circumstances.

Consultation Question 49.

10.110 We provisionally propose that a child born of a surrogacy arrangement should be able to access the information recorded in the register from the age of 18 for identifying information, and 16 for non-identifying information (if such information is included on the register), provided that he or she has been given a suitable opportunity to receive counselling about the implications of compliance with this request.

Do consultees agree?

10.111 We invite consultees' views as to whether a child under the age of 18 or 16 (depending on whether the information is identifying or non-identifying respectively) should be able to access the information in the register and, if so, in which circumstances:

(1) where his or her legal parents have consented;

(2) if he or she has received counselling and the counsellor judges that he or she is sufficiently mature to receive this information; and/or

(3) in any other circumstances.

10.112 The HFEA 1990 provisions also allow a request to be made by a donor-conceived person, from the age of 16, for notice as to whether the register contains information that shows that they are, or might be, genetically related to a person specified in the request whom the applicant intends to marry, with whom the applicant intends to enter into a civil partnership or with whom the applicant is in, or intends to enter into, an intimate physical relationship.[116]

10.113 We ask whether there should be an equivalent provision for those born of a surrogacy arrangement to ask for disclosure of whether he or she is marrying, or entering into a civil partnership, or intimate physical relationship, with a person who was carried by the same surrogate (but to whom he or she is not genetically related). We do not think that a gestational relationship of this sort would fall within the prohibited degrees of relationship set out in the Marriage Act 1949 or the Marriage (Scotland) Act 1977. In terms of the Marriage Act 1949, where two people are related in a prohibited degree their marriage is void. The prohibited degrees include siblings but "sibling" is defined to mean a brother, sister, half-brother or half-sister, which

---

115 Both the Assisted Reproductive Treatment Act 2008 (Victoria) and the Parentage Act 2004 (Australian Capital Territories) allow disclosure with parental consent. The Australian state of Victoria additionally allows disclosure on the advice of a counsellor.

116 HFEA 1990, s 31ZB.

suggests a genetic link.[117] Similarly, in Scotland, a marriage between persons who are related to each other in a forbidden degree is void.[118] The forbidden degrees include siblings and no distinction is made between the full blood and the half blood, again suggesting a genetic link.[119] Where two people have been carried by the same surrogate, but were conceived using gametes from different people, there will be no such link. Nevertheless, it is possible that a person born of a surrogacy arrangement may not wish to marry, or enter into a civil partnership, or intimate physical relationship, with a person with whom he or she shared this link.

Consultation Question 50.

10.114 We invite consultees' views as to whether there should be any provision for those born of a surrogacy arrangement to make a request for information to disclose whether a person whom he or she is intending to marry, or with whom he or she intends to enter into a civil partnership or intimate physical relationship, was carried by the same surrogate.

Who else should be able to access the surrogacy register?

10.115 The current HFEA law on access to information allows people of 18 or over who are genetically related through a gamete donor to be identified to each other. This applies where a donor-conceived person has provided identifying information and requested that it be disclosed to his or her genetic sibling, and the sibling has requested the disclosure of information about a genetic sibling. Both must have been given the opportunity to receive counselling.[120]

10.116 Where two people are born to the same surrogate and are also genetically related (because both arrangements were traditional arrangements using the surrogate's egg) our strong provisional view is that it should be possible for them to be identified to each other, should they both wish. Currently, because a traditional surrogate would not be recorded as a donor, there would be no means by which those people could find each other.

10.117 It would be possible to make similar provision to allow those who were carried by the same surrogate, but who are not genetically related, to find out each other's identity, where both wish to do so. We ask for consultees' views on whether this would be desirable.[121]

---

117 Marriage Act 1949, s 1 and sch 1 para 1. In the interpretation section of the Marriage Act (s 78), brother and sister are defined to include brother and sister "of the half-blood". Such a definition again appears to suggest a genetic (blood) link.

118 Marriage (Scotland) Act 1977, s 2(1).

119 Marriage (Scotland) Act 1977, sch 1 and s 2(2)(a).

120 HFEA 1990, s 31ZE.

121 The HFEA 1990 also includes provision for a donor to find out the number (and the sex, and year of birth) of persons conceived with use of his or her gametes. We cannot see any need for similar provision in respect of intended parents or surrogates.

10.118 We also ask whether it should be possible for a child born of a surrogacy arrangement and the surrogate's own child or children to identify each other where both wish to do so, and whether that should only be possible where the two children are genetically related.[122] We do not, however, think that it is feasible for information about the surrogate's own children to be recorded as a matter of course on the register. While a surrogate could be required to provide details of her own children at the time when she acts as a surrogate, such information may quickly fall out of date, should she go on to have more of her own children after acting as a surrogate.

10.119 However, it might be possible to create a system where a surrogate's child, once adult, could lodge their details with the register of surrogacy arrangements (on proof that the surrogate was his or her mother). The child could request that these details be released to a child carried by his or her mother acting as a surrogate, where both wished for this to be the case. This would, of course, mean that the ability of the child born as a result of the surrogacy arrangement to identify his or her surrogate's own children, who may or may not be his genetic half-siblings, would be limited to cases where the surrogate's own children have decided to lodge their details with the register. That said, the surrogate-born child, in being able to identify his or her surrogate, may learn of the existence of her children by contacting the surrogate herself, rather than her children directly.

10.120 It is possible that a provision of this sort could create conflict where the surrogate has more than one child of her own and one of those children wishes to lodge his or her details with the register, while the other does not. The latter child may be concerned that the consequence of the first child contacting the child born of the surrogacy arrangement will mean that the surrogate-born child learns of his or her existence. It is possible that the surrogate or her spouse or partner could also object on that basis. That said, we take the view that the such objections should not outweigh any joint desire of the child born of the surrogacy arrangement and the surrogate's own child to contact each other.

Consultation Question 51.

10.121 We provisionally propose that where two people are born to, and genetically related through, the same surrogate, they should be able to access the register to identify each other, if they both wish to do so.

Do consultees agree?

10.122 We invite consultees' views as to whether there should be provision to allow people born to the same surrogate – but who are not genetically related – to access the register to identify each other, if they both wish to do so.

[122] That is, genetically related because the surrogacy arrangement was a traditional surrogacy arrangement.

Consultation Question 52.

10.123 We invite consultees' views as to whether provision should be made to allow a person carried by a surrogate, and the surrogate's own child, to access the register to identify each other, if they both wish to do so:

(1) if they are genetically related through the surrogate; and/or

(2) if they are not genetically related through the surrogate.

The position of an intended parent without a genetic link, where no parental order is made in favour of that parent

10.124 In Chapter 12 we have provisionally proposed that the requirement for a genetic link be removed from the new pathway to parenthood in the case of medical necessity and we ask an open question about whether this should also be the case with respect to surrogacy arrangements in the parental order route.[123] If the requirement for a genetic link were removed from the parental order route, and the surrogacy arrangement is proceeding along this pathway, a situation could arise where the intended parents separate before a parental order is made. One of the intended parents may then play no further part in the child's life, while the other may obtain a parental order as a single person. Another possibility would be that the intended parents separate, are in conflict, and each wants a parental order (but only one parent can obtain one). The interests of the child might require knowledge of both parents.

10.125 A similar situation could already arise under the current law, where a surrogacy arrangement is entered into by two intended parents who then separate, with the intended parent with the genetic link then applying for the parental order as a single intended parent (under section 54A of the HFEA 2008).

10.126 In either case, where the intended parent who plays no further part in the child's life has no genetic link to the child, should the child have the right to know about the parent who has played no part in his or her life? In Chapter 12 we have explained that the rationale for removing the requirement of a genetic link in cases of medical necessity is that the intention to bring the child into the world as the child of the intended parents is what characterises a surrogacy arrangement, and that this intention is not defined by the existence of a genetic link. It may be considered consistent with this argument that the child should have the right to information, given the intention that the departed intended parent (or parent without the parental order) had demonstrated to bring the child into being. However, in practice it may be difficult to ensure that the information about the other intended parent is recorded where the intended parent caring for the child applies for a parental order as a single parent. One possibility, however, might be for the parental order application to ask the single intended parent to specify whether another intended parent had been involved at any

[123] We also provisionally propose that there should be no requirement for a genetic link (again, in cases of medical necessity) where arrangements begin in, but fall out, of the new pathway, and that the requirement for a genetic link be retained in respect of international surrogacy arrangements.

point in the surrogacy arrangement, and to identify him or her, so that he or she can be recorded in the register of surrogacy arrangements.[124]

10.127 If the arrangement is proceeding along the new pathway then the intended parent will be the legal parent at birth (subject to the surrogate's right to object) and be unable to "escape" legal parenthood, having entered into the surrogacy agreement. So, in these circumstances, the issue will not arise.[125]

Consultation Question 53.

10.128 For surrogacy arrangements outside the new pathway, we invite consultees' views as to whether details of an intended parent who is not a party to the application for a parental order should be recorded in the register.

[124] In ch 8 (paras 8.83 and subsequent), we provisionally propose that a single applicant for a parental order should have to declare whether or not it was always intended that he or she should apply as a single parent, so that, if relevant, notice can be given to the other intended parent that an application for a parental order is being made.

[125] If the surrogacy arrangement began in the new pathway but fell out of it, the intended parents would be identified in the surrogacy agreement.

Chapter 11: Eligibility criteria for a parental order

INTRODUCTION

11.1 In the next three chapters, we consider reforms to the eligibility criteria for legal parenthood via surrogacy. In this chapter we consider eligibility criteria that could apply only to an application for a parental order. In the next chapter, Chapter 12, we consider the eligibility criteria that could potentially apply both to the parental order pathway and to the new pathway, which provides legal parenthood for the intended parents on birth. Finally, in Chapter 13 we consider eligibility criteria that could potentially apply only to the new pathway. Elsewhere in this Consultation Paper, we discuss the question of payments that can be made in the context of a surrogacy arrangement and the regulation of surrogacy arrangements.[1]

11.2 As we explained in Chapter 5,[2] some of the eligibility criteria for a parental order in sections 54 and 54A of the HFEA 2008 are being stretched to their limits, or simply cannot be applied. This project gives us an opportunity to reconsider the eligibility criteria for a parental order application. This allows us to ensure that they focus on what both should and can sensibly be required, keeping in mind that the paramount consideration of the court is the welfare of the child, who will nearly always have been in the care of the intended parents since birth.

11.3 We also consider what the eligibility criteria for the new pathway should be. The purpose of the new pathway is to provide greater certainty to all parties to a surrogacy arrangement by taking account of the parties' shared intention that the intended parents should be the legal parents of the child born of the surrogacy arrangement. Because the intended parents will be the legal parents on birth, it is necessary for safeguards to be in place, to minimise (or, ideally, to eliminate) the risks of exploitation of surrogates, in particular, and to ensure the welfare of surrogate-born children. Consequently, we propose that parties wanting to use the new pathway will have to satisfy more stringent requirements than parties using the parental order pathway.

11.4 Intended parents who do not or cannot meet these stricter requirements will be able to continue to use the parental order route, which will operate as a safety net with the involvement of the court. We have therefore been careful in considering whether new requirements should be imposed for a parental order – the benefits of any new requirements must be balanced against the risk of excluding intended parents from what might be their only route to legal parenthood.[3]

11.5 In this chapter, we consider two existing requirements in the HFEA 2008. These eligibility requirements could only apply to parental order applications – the time limit

---

1 See chs 9, 14 and 15.

2 See ch 5.

3 Excluding adoption, which has not been seen, judicially, as an appropriate route to parenthood for intended parents. See, for example the discussion *in Re AB (Surrogacy: Consent)* [2016] EWHC 2643 at [29] to [31].

within which intended parents must make a parental order application and the requirement that the surrogate consent to the parental order.[4]

11.6 In Chapter 12, we consider eligibility criteria that could apply in relation to both the parental order pathway and the new pathway:

(1) jurisdiction (the requirement for domicile or habitual residence);

(2) the requirement about the relationship between the intended parents;

(3) the requirement that the child lives with the intended parents;

(4) the requirement for a genetic link between the child and at least one of the intended parents;

(5) a potential requirement for surrogacy to be medically necessary;

(6) registration of origins; and

(7) age limits for both surrogates and intended parents.

11.7 In Chapter 13, in relation to the new pathway only, we consider screening requirements (that is, health screening, implications counselling, psychological assessments, legal advice, criminal background checks, and home visits); a requirement for the surrogate to have had a previous birth; and whether there should be a maximum number of surrogate pregnancies any woman can have.

11.8 In Chapter 2,[5] we canvass the debate about whether surrogacy is more comparable to other forms of assisted conception or to adoption. That debate seems relevant in considering which eligibility requirements should be imposed for either or both pathways.

11.9 In many ways, surrogacy is like natural or assisted conception – both are characterised by the intention to create a child. In natural conception, there is no opportunity for the state to consider the fitness of parents before a child is conceived – the state must have a reason to intervene to protect the child's welfare. We therefore must ask whether it is justifiable to impose eligibility requirements on people wanting to become parents through surrogacy.

11.10 Ultimately, we think the involvement of the state in recognising the intended parents as legal parents of the child, and in removing (with her consent) the surrogate's legal parenthood justifies requirements being imposed. The state's involvement in this way ultimately provides a point of distinction between surrogacy and natural or assisted conception. However, we think that any requirements that are imposed need to be

---

4 Under the new pathway, the surrogate will be able to object to the intended parents becoming legal parents after the birth of the child. If she does, the surrogacy arrangement will fall out of the new pathway and the intended parents will have to apply for a parental order to become the child's legal parents.

5 See paras 2.3 and subsequent.

carefully considered, in recognition of the common characteristic present in both natural or assisted conception of the intention to bring the child into the world.

11.11 Generally, we do not think it is appropriate to impose eligibility requirements in the new pathway that assess intended parents' fitness to parent, beyond the requirement for intended parents to complete the welfare of the child assessment required by the Code of Practice,[6] and a criminal background check. The surrogate-born child is not in existence, so it is difficult to assess the fitness of parents and, moreover, doing so denies intended parents the opportunity to develop as part of the preparation and arrival of their child. A criminal records check is a useful safeguard to highlight any specific concerns there would be for the welfare of the child (for example, a conviction for child sexual offences).

11.12 Some argue that eligibility for surrogacy should not focus on the welfare of the child, in part because considerations of the welfare of a child who is not yet born are necessarily abstract, and that it is always better for a child to be born rather than not.[7] However, there are aspects of welfare that are clear even in the abstract – including the need for a child to be the citizen of a country, to have at least one legal parent responsible for their care, and to have their right to know their genetic origins protected. We therefore think that it is justifiable to consider criteria, both for the new pathway and the old, that are focused on the welfare of the child. Because of course, as the parental order application is an order for an existing child, the court must consider the child's welfare as its paramount consideration.[8]

11.13 Although surrogacy is like natural or assisted conception in many ways, it is like adoption in one important respect – in both there is not simply one or one set of parents. There is a third party, who is or could be a parent and whose rights must be protected. In surrogacy, that is the surrogate. Some of the eligibility requirements are therefore focused on the protection of surrogates.

TIME LIMIT

11.14 To make a successful parental order application, the intended parents must apply within six months of the birth of the child.[9] We explained in Chapter 5 that, despite this requirement, courts have granted parental orders where applications were made as many as 13 years after the birth of the child.[10]

---

6 The Code of Practice para 8.2 and subsequent. See ch 6.

7 See eg D Meyerson, "Surrogacy Agreements" (1994) *Acta Juridica*; E Jackson, "Conception and the Irrelevance of the Welfare Principle" (2002) 65 *Modern Law Review* 176, 203; and G Cohen, "Regulating Reproduction: The Problem with Best Interests" (2011) 96 *Minnesota Law Review* 423, 425 to 427.

8 The welfare test in the ACA 2002 applies to parental orders in England and Wales: 2018 Regulations, sch 1 para 2. For Scotland, see the AC(S)A 2007, s 14(3) as applied and modified by reg 3 and sch 2 para 2 of the 2018 Regulations.

9 HFEA 2008, ss 54(3) and 54A(2). If the child was born before the law came into force, the application must be made within six months of the section coming into force: see HFEA 2008, ss 54(11) and 54A(11)) (see ch 5). Although an application can be made as soon as the child has been born, the surrogate's consent is not valid unless given at least six weeks after the birth (HFEA 2008, ss 54(7) and 54A(6)).

10 See paras 5.28 and subsequent.

11.15 The case law on this requirement has undermined the wording of the statute. Clearly, delay in applying for a parental order does not mean that the child's welfare is not served by a parental order being made. The intended parents may have good reasons for the delay, including that they might be unaware that an application must be made. As Mrs Justice Theis has said, barring forever a parental order application made late "is the very antithesis of sensible; it is almost nonsensical".[11]

11.16 All of our stakeholders have agreed that this requirement needs to be changed.

11.17 Some stakeholders have advocated for the six month time limit to be abolished. One stakeholder emphasised that no time limit is required at all, and commented that any time limit chosen would be inherently arbitrary.

11.18 As an alternative to abolition, some stakeholders have proposed that the court should be able to dispense with the time limit in certain circumstances. This method would have the benefit of providing statutory encouragement to intended parents to make timely applications for a parental order, as it is in the child's best interest to have the parental link recognised in law.[12]

11.19 Any time limit will necessarily be subject to the paramount consideration of the child's welfare. We think attempting to maintain a time limit, even one that could be dispensed with, adds unnecessary complexity in the law. Moreover, there are better ways to encourage intended parents to regularise their legal parenthood, including awareness campaigns and education. Our provisional view is, therefore, that it is best to abolish the time limit.

Consultation Question 54.

11.20 We provisionally propose that the six month time limits in sections 54 and 54A of the HFEA 2008 for making a parental order application should be abolished.

Do consultees agree?

11.21 Under the new pathway, the intended parents will be parents on birth, subject to the right of the surrogate to object. Consequently, there is no need to consider any time limits for the new pathway.

THE SURROGATE'S CONSENT

The current law

11.22 Under the current law, a surrogate (and any other legal parent of the child, such as the surrogate's spouse or civil partner) must consent to the making of the parental order. This consent is not required, however, where the surrogate (or other parent) cannot

[11] *Re C and D (Children) (Parental Order)* [2015] EWHC 2080 (Fam), [2015] Fam Law 1192 at [55].

[12] See para 5.106.

be found or is incapable of giving agreement.[13] Consent is currently, therefore one of the conditions which establishes the court's ability to grant a parental order to the intended parents.

11.23 This issue of the surrogate's consent would be relevant only to cases in the parental order route, including those that began as surrogacy arrangements in the new pathway, but fell out of that pathway following the surrogate exercising her right to object. For surrogacy arrangements in the new pathway, provided the surrogate does not exercise her right to object, her further consent is not required.

11.24 In Chapter 5 we discuss the case of *Re AB*.[14] This case is the paradigm example of where the requirement of consent has led to an outcome that the court did not consider to be in the children's best interests. The children lived with the intended parents, who were also their genetic parents. However, the children's legal parents, with whom they had no ongoing connection, were the gestational surrogate and her husband, who had decided not to consent to the making of a parental order.

11.25 As we discuss earlier, the option of the intended parents adopting the children was rejected by the court (despite the surrogate and her husband indicating that they would not oppose the making of an adoption order), because it was said that such an order would not reflect the lineage connection that existed, nor accurately reflect the children's identity.[15] This decision has been criticised. While an adoption order may not be the most suitable order in the circumstances, it would, however, remove the children from the potentially no less artificial situation they find themselves in, namely living with the intended parents who are not their legal parents.[16] It is also the case that an adoption order has been made in a relatively recent surrogacy case, in favour of a single father.[17]

11.26 *Re AB*[18] was a case where the surrogate refused to provide her consent to the making of the parental order, but did not object to the child living with the intended parents. There are other cases where, as well as refusing consent, the surrogate and her family wished to care for the child. For example, in the case of *Re P*,[19] a married surrogate (Mrs P) entered into a traditional surrogacy arrangement with the child's genetic father (SJ) and his wife. SJ's wife was unable to carry children herself. The surrogate became pregnant through artificial insemination and a child, N, was born. Under the provisions of the HFEA 1990 (which were in force at the time), Mrs P was

---

13 See ch 5.

14 [2016] EWHC 2643 (Fam), [2017] 2 FLR 217. See paras 5.66 and subsequent.

15 See para 5.69. We note, however, that the ECtHR, in an advisory opinion, took the view that adoption could be used as a method to recognise the intended mother as a legal parent in a situation where the intended father was recognised as a legal parent by entry on the birth register (see *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother* (Request no. P16-2018-001) (10 April 2019).

16 G Douglas, "Surrogacy – *Re A and B (Surrogacy: Consent)* [2017] *Family Law* 57.

17 *B v C and others* [2015] EWFC 17. The single intended father, at the time, would not have been eligible for a parental order. The case was unusual in that the father's mother acted as the surrogate.

18 [2016] EWHC 2643 (Fam), [2017] 2 FLR 217.

19 *Re P (Surrogacy: Residence)* [2007] EWCA Civ 1053, [2008] 1 FLR 198.

treated as the child's mother. Her husband, Mr P, who had consented to the insemination, was treated as the child's legal father.

11.27 Mr and Mrs P, however, falsely asserted to SJ that Mrs P had miscarried. It was only when P's eldest daughter informed the authorities of the truth, that SJ discovered that N had been born. By the time the case was heard in court, N was 18 months old.

11.28 The judge in *Re P* found that:

> [the surrogate and her husband] had deliberately embarked on a path of deception, driven by Mrs P's compulsive desire to bear a child or further children, and that she had never had any other objective than to obtain insemination by surrogacy, with the single purpose of acquiring for herself, and her family, another child.[20]

11.29 SJ succeeded in his application for a residence order, but, "the surrogate's legal status as the child's mother remained undisturbed. For the genetic father's wife to be considered as the child's legal mother, she will have to adopt the child".[21]

The position in adoption law

11.30 In contrast with the position for parental orders, the consent of a birth parent to the making of an adoption order may be dispensed with by the court.

11.31 Currently, parental consent for an adoption order can be dispensed with if:

(1) the parent cannot be found;[22]

(2) the parent lacks capacity to give consent;[23] or

(3) the welfare of the child requires that consent be dispensed with. [24]

11.32 In Scotland, the grounds for dispensing with parental consent to the making of an adoption order are similar:[25]

(1) that the parent or guardian is dead,

(2) that the parent or guardian cannot be found or is incapable of giving consent,

(3) that subsection (4) or (5) applies,

(4) that, where neither of those subsections applies, the welfare of the child otherwise requires the consent to be dispensed with.

---

20 *Re P (Surrogacy: Residence)* [2007] EWCA Civ 1053, [2008] 1 FLR 198 at [4].

21 J McCandless and S Sheldon, "The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form" (2010) *Modern Law Review* 73(2) 175, 184.

22 ACA 2002 s 52(1)(a).

23 ACA 2002 s 52(1)(a).

24 ACA 2002 s 52(1)(b).

25 AC(S)A 2007, s 31(3), referring to s 31(4) and (5).

11.33 Subsection (4) applies if the parent or guardian—

(1) has parental responsibilities or parental rights in relation to the child other than those mentioned in sections 1(1)(c) and 2(1)(c) of the Children (Scotland) Act 1995,[26]

(2) is, in the opinion of the court, unable satisfactorily to—

(a) discharge those responsibilities, or

(b) exercise those rights, and

(c) is likely to continue to be unable to do so.

11.34 Subsection (5) applies if—

(1) the parent or guardian has, by virtue of the making of a relevant order, no parental responsibilities or parental rights in relation to the child, and

(2) it is unlikely that such responsibilities will be imposed on, or such rights given to, the parent or guardian.

11.35 The welfare test for dispensing with parental consent to the adoption order has been criticised in England and Wales.[27] However, criticism has been alleviated by the judiciary effectively making it clear that adoption should be a last resort.

11.36 In *Re P (Placement Orders: Parental Consent)*,[28] the court provided guidance on dispensing with parental consent when the welfare of the child so requires. In brief, the court recommended:

(1) it must be shown that the child's welfare requires adoption as opposed to something short of adoption;[29]

(2) 'requires' should be equated with 'necessary' in Article 8 of the European Convention on Human Rights, that is "the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable";[30]

(3) dispensing with parental consent must be proportionate to the aim to be achieved; [31] and

---

26 Sections 1(1)(c) and 2(1)(c) of the Children (Scotland) Act 1995 relate to, if the child is not living with the parent, maintaining personal relations and direct contact with the child.

27 See, for example, C Ball, The Adoption and Children Act 2002: A critical examination (2005) *Adoption & Fostering* 6, 12.

28 [2008] EWCA Civ 535, [2008] 2 FLR 625.

29 [2008] EWCA Civ 535, [2008] 2 FLR 625 at [128].

30 *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535, [2008] 2 FLR 625 at [120] and [125].

31 *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535, [2008] 2 FLR 625 at [119].

(4) the court should begin with a preference for the least interventionalist approach.[32]

11.37 In a later case, the Court of Appeal emphasised that parental consent "can be dispensed with only if the welfare of the child 'requires' this".[33] The case also reaffirmed that "require" has "the Strasbourg meaning of necessary … . This is a stringent and demanding test".[34]

11.38 Additionally, the European Court of Human Rights ("ECtHR") has held that where the interests of the child and the interests of the parents conflict, the interests of the child prevail.[35]

Discussion

11.39 Some stakeholders, particularly certain members of the judiciary, expressed concerns that a power for the court to dispense with the surrogate's consent (and that of any other legal parent at birth) could be misused to remove protection for the surrogate. There was concern that dispensing with the surrogate's consent was not appropriate in a situation where she remains the legal mother at birth, and where there has been no finding of fault against her regarding her care of the child. This is in contrast with the usual situation of an adoption where the child is being adopted from care, because the child is suffering, or likely to suffer, significant harm.[36]

11.40 As CAFCASS pointed out to us, the court's inability to make a parental order because the surrogate will not provide her consent does not prevent the court making child arrangement orders that regulate with whom the child should live and have contact.[37] Such orders do provide the intended parents with parental responsibility and allow them to make the day-to-day decisions about the child's life and so, in this respect, do provide for the child's welfare. Similarly, in Scotland, there are a number of parental responsibilities and parental rights. The court could grant some to the intended parents and some to the surrogate, depending on all the circumstances of the case and what the child's welfare requires.[38]

11.41 On the other hand, some legal stakeholders with whom we spoke, and Surrogacy UK, supported giving the court the ability to dispense with the surrogate's consent.[39] As one of the authors of *Surrogacy: Law, Practice and Policy in England and Wales* has argued:

---

32 *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535, [2008] 2 FLR 625 at [123].

33 *Re B-S* [2013] EWCA Civ 1146, [2014] 1 FLR 1035 at [20].

34 Above.

35 *Yousef v Netherlands* (33711/96) [2003] 36 EHRR 20, [2003] 1 FLR 210.

36 The "threshold criteria" for the making of a care or supervision order under the Children Act 1989, s 31. In terms of the AC(S)A 2007, s 84(5)(c)(ii), the threshold test for the making of a permanence order (with or without authority to adopt) is that the child's residence with the parent is likely to be seriously detrimental to the child's welfare.

37 Under the Children Act 1989, s 8.

38 Children (Scotland) Act 1995, s 11.

39 Surrogacy UK's view was that consent should only be dispensed with if in the best interests of the child.

> Surely, a child's lifelong emotional and psychological welfare should not hang on the whim of birth parents who do not themselves seek to exercise any form of parental responsibility for their child?[40]

11.42 We take the view that a split between legal parenthood on the one hand, and social, psychological (and potentially genetic depending on the nature of the arrangement) parenthood on the other, is likely to be detrimental to the welfare of the child concerned. As the judge in *Re AB* said:

> the children's lifelong welfare needs require a parental order to be made, which would secure their legal relationship with the applicants in a lifelong way and extinguish the respondents' legal status with the children.[41]

11.43 The fact that a parental order could not be granted meant that, as the judge noted, "these children are left in a legal limbo".[42]

11.44 Writing on the case of *Re AB*,[43] one commentator has questioned whether the decision of the High Court was compatible with the intended parents' rights under Article 8 of the European Convention on Human Rights ("ECHR"):

> Might it be possible for [the intended parents] to make a claim under the Human Rights Act 1998 that s 54(6) is incompatible with Art 8 of the [ECHR] – the right to respect for family and private life? The absence of a parental order means that the children's birth certificates, given their regular use as an identity document, will demonstrate throughout their life that their parents are not the ones to whom they are biologically related or who cared for them on a daily basis. They will be constantly reminded that they remain the legal children of [the surrogate and her husband] who are total strangers to them. Is not this evidence of a lack of respect for the right to a private life?[44]

11.45 In Chapter 7 we examine in more detail the case law of the ECtHR, in particular the linked cases of *Mennesson v France* and *Labassee v France*.[45] We have noted that in those cases the ECtHR has focused on the human rights of the child. With that in mind, it is likely that a claim based on Article 8 of the ECHR would have a better chance of success if it proceeded on the basis of a breach of the children's right to

---

40 R Cabeza, V Flowers, E Pierrot, A Rao, B O'Leary and L Odze, *Surrogacy: Law, Practice and Policy in England and Wales* (1st ed 2018) para 9.25.

41 *Re AB (Surrogacy: Consent)* [2016] EWHC 2643 (Fam), [2017] 2 FLR 217 at [11].

42 *Re AB (Surrogacy: Consent)* [2016] EWHC 2643 (Fam), [2017] 2 FLR 217 at [9].

43 [2016] EWHC 2643 (Fam), [2017] 2 FLR 217.

44 M Welstead, "Parental orders and the refusal of consent" [2016] *Family Law* 1051.

45 See paras 7.23 and subsequent. *Mennesson v France* (App No 65192/11) and *Labassee v France* (App No 65941/11). The ECtHR has also provided a recent advisory opinion in this area, which we discuss in ch 6: see *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother* (Request no. P16-2018-001) (10 April 2019).

respect for private and family life, rather than a breach of the intended parents' rights.[46]

11.46 However, as we explain in Chapter 7, the case law of the ECtHR has only considered the situation of children born as a result of international surrogacy arrangements. The court's case law does not currently extend to requiring member states to recognise the intended parents as the legal parents of a child born of a domestic surrogacy arrangement.

Comparative law

11.47 There are examples in the laws of other jurisdictions of courts being able to dispense with the surrogate's consent (other than in situations of incapacity or where she cannot be found). In Ontario the relevant provision states that:

> Any party to a surrogacy agreement may apply to the court for a declaration of parentage with respect to the child if the consent referred to in subsection (3) is not provided by the surrogate because …
>
> (c) the surrogate refuses to provide the consent.[47]

11.48 The court's paramount consideration in making a declaration of parentage where the surrogate has refused consent is the best interests of the child.[48]

11.49 Ireland's 2017 draft bill on assisted human reproduction similarly provides for the court to dispense with consent in a wide range of circumstances, stating that:

> the court may waive a requirement… for consent from the surrogate, or her husband, where relevant…
>
> (d) for any other reason the court considers to be relevant.[49]

Reform

11.50 We take the view that the child's welfare must remain at the heart of a decision to dispense with the surrogate's consent, while ensuring that a decision by the court to do so is not undertaken lightly.

11.51 Nonetheless, we take on board concerns that using the child's welfare as the sole principle for the court to determine whether it should dispense with the surrogate's consent may not place sufficient restrictions on the court's power. We therefore provisionally propose that the court should only be able to exercise a power to dispense with the surrogate's (or other legal parent's) consent to the making of a

---

46 See *Mennesson v France* (App No 65192/11), where the ECtHR held that the children's Article 8 rights had been violated, but not the intended parents' rights.

47 Children's Law Reform Act 1990 (Ontario), s 10(6).

48 Children's Law Reform Act 1990 (Ontario), s 10(8).

49 General Scheme of the Assisted Human Reproduction Bill 2017, Head 48(2). Available here: https://health.gov.ie/wp-content/uploads/2017/10/AHR-general-scheme-with-cover.pdf (last visited 31 May 2019).

parental order in defined circumstances.[50] We think that the court should have the power to dispense with consent where the child is living with the intended parents (and the surrogate consents to this), or following a determination by the court that the child's primary residence should be with the intended parents. In its determination of where a child should live, the child's welfare is the paramount consideration for the court, which, in England and Wales, will be guided by the factors set out in section 1 of the Children Act 1989.[51]

11.52 This approach would resolve the situations where a surrogate's refusal to consent to the making of a parental order means that there is a split between legal parenthood on the one hand and other forms of parenthood on the other, which may be detrimental to the child's welfare (as in the cases of *Re AB* and *Re P* discussed above).[52] The paramount consideration for the court in making its decision about whether to dispense with consent in these circumstances would be the child's welfare throughout his or her life, guided by the factors set out in section 1 of the ACA 2002 and, in Scotland, in line with section 14(3) of the AC(S)A 2007.

11.53 We do not think that the court should be able to dispense with the surrogate's consent where the child is living with the surrogate or where the court has found that the child's primary residence should be with the surrogate. For example, in the case of *Re M*,[53] the surrogate was caring for the child, and had refused consent to the making of a parental order. The intended parents applied for a child arrangements order that the child live with them, but this was refused at first instance, and upheld on appeal. In such circumstances, regardless of any genetic link between the intended parents and the child (as was the case for one of the intended fathers in the case), we do not believe that the court should be able to override the surrogate's refusal to consent and make a parental order. Doing so would only result in a continued split between legal and social, or psychological, parenthood. As the court said at first instance in *Re M*:

> The relevance of the genetic tie is factual as well as legal but it is only one factor which has to be balanced against others in the decision making process, it is not a "trump card" which defeats all other considerations. The paramount consideration remains Z's welfare … .[54]

11.54 We appreciate that this approach may mean that a child's genetic parent is not recognised as its legal parent, potentially creating some tension with the focus on the biological link found in the European case law.[55] However, we think that this approach is justified by a focus on the welfare of the child. Any genetic relationship between the intended parents and a surrogate-born child who is not living with them could be

---

50 As we have noted above, the consent of the surrogate or other legal parent is not required where they cannot be found or are incapable of giving consent.

51 For Scots law, see the Children (Scotland) Act 1995, s 11(7).

52 *Re AB (Surrogacy: Consent)* [2016] EWHC 2643 (Fam), [2017] 2 FLR 217; *Re P (Surrogacy: Residence)* [2007] EWCA Civ 1053, [2008] 1 FLR 198 (see paras 11.22 and subsequent).

53 *Re M (Child)* [2016] EWFC 34, [2017] 1 FLR 946; *Re M (child)* [2017] EWCA Civ 228, [2017] All ER (D) 39 (Apr).

54 *Re M (Child)* [2016] EWFC 34, [2017] 1 FLR 946 at [114].

55 See paras 7.23 and subsequent.

recognised by a record in the national register of surrogacy arrangements that we propose in Chapter 10, therefore ensuring that the child is not deprived of access to information about his or her origins.

11.55 Equally, we do not think that a court's ability to dispense with consent should be affected by whether the surrogate has a genetic as well as a gestational link to the child, that is, whether the surrogacy is a traditional or a gestational arrangement. We do not think that the court's ability to dispense with consent, where the making of the parental order would meet the child's welfare needs (and in the circumstances described above), should be removed in a traditional arrangement because of the genetic link between the surrogate and the child. That would be to privilege the genetic link with the surrogate in the way that, in making decisions about with whom a child should live, the court has, to date, so far refused to do with regards to a genetic link between the intended parents and the child.

11.56 We are mindful that, for surrogacy arrangements that begin in the new pathway, the surrogate may exercise her right to object to the intended parents acquiring legal parenthood at birth. The intended parents will then have to make an application for a parental order but, depending on the circumstances, that may result in a parental order being made without the surrogate's consent. We do not think this possibility dilutes the protection provided to surrogates by the right to object. The exercise of her right to object prevents the intended parents automatically becoming the legal parents. Assuming that the intended parents wish to go ahead with a parental order application, the arrangement then becomes subject to judicial oversight guided by the paramount consideration of the child's welfare throughout his or her life. We do not think that a meaningful distinction can be made between surrogacy arrangements that started in the new pathway and those that did not. The child's welfare should be the paramount consideration for both.

11.57 We take the view that the current circumstances in which consent is not required (where a person cannot be found or is incapable of giving agreement) should continue to be available, as we are not aware of any need for their reform.

Consultation Question 55.

11.58 We provisionally propose that:

(1) the current circumstances in which the consent of the surrogate (and any other legal parent) is not required, namely where a person cannot be found or is incapable of giving agreement, should continue to be available;

(2) the court should have the power to dispense with the consent of the surrogate, and any other legal parent of the child, in the following circumstances:

(a) where the child is living with the intended parents, with the consent of the surrogate and any other legal parent, or

(b) following a determination by the court that the child should live with the intended parents; and

(3) the court's power to dispense with consent should be subject to the paramount consideration of the child's welfare throughout his or her life guided by the factors set out in section 1 of the Adoption and Children Act 2002 and, in Scotland, in line with the section 14(3) of the Adoption and Children (Scotland) Act 2007.

Do consultees agree?

Chapter 12: Eligibility criteria for both a parental order and for the new pathway

INTRODUCTION

12.1 Following our consideration of the eligibility criteria that only apply to a parental order, we turn to consideration of the eligibility criteria that could apply both to a parental order application and to the new pathway.

12.2 Some of criteria we consider are based on the existing requirements in sections 54 and 54A of the HFEA 2008 – we consider whether the criteria are in need of reform in relation to parental orders, and whether they should apply, and how they should apply, to the new pathway. We also consider new potential criteria where we think there is an argument that they should be introduced as eligibility criteria both for parental orders and also imposed as part of the new pathway.

12.3 At the beginning of Chapter 11,[1] we explained our approach to assessing the eligibility criteria for a parental order and for the new pathway. It is one of balance, with the focus on the welfare of the surrogate-born child. Because the new pathway will enable intended parents to be parents at birth, we think it is justifiable to impose stricter eligibility requirements for the new pathway, in particular to protect surrogates and surrogate-born children. We have been careful about considering imposing stricter requirements for the parental order pathway because it must remain accessible to those who do not qualify for the new pathway.

12.4 In this chapter we first consider jurisdiction, that is, the requirement for domicile or habitual residence. We then consider the relationship status of the intended parents, and the requirement that the child lives with the intended parents. Next, we consider the requirement for a genetic link between the child and at least one of the intended parents, and a potential requirement for surrogacy to be medically necessary. We next consider whether registration of genetic and gestational origins should be an eligibility requirement for both pathways. Finally, we consider age limits for both surrogates and intended parents.

JURISDICTION OF THE COURT: DOMICILE AND HABITUAL RESIDENCE

12.5 For a parental order to be made, at least one of the intended parents must be domiciled in the UK, Channel Islands or Isle of Man.[2] As we explained in Chapter 5 this requirement has posed problems for some intended parents, who live in the jurisdiction but immigrated from overseas. Indeed, we have heard from stakeholders that establishing domicile is one of the most common problems intended parents face in applying for parental orders.

---

1 See paras 11.1 and subsequent.

2 HFEA 2008, ss 54(4)(b) and 54A(3)(b).

12.6 We, therefore, consider whether domicile should continue to govern whether intended parents can apply for a parental order in the UK.

12.7 We must also consider what jurisdictional requirement should apply for the new pathway. If there were no requirement that intended parents show a link to this jurisdiction, people from around the globe could come to the UK to enter into a surrogacy arrangement with the intention of taking the child out of the country immediately after birth.

12.8 In Chapter 16 we discuss overseas surrogacy arrangements entered into by intended parents in the UK. As we explain there, we think that the law should promote domestic, rather than international, surrogacy arrangements. International surrogacy arrangements risk running into problems based on the application of each country's different laws on parenthood that may conflict with those applied in the UK, and the application of nationality and immigration rules based on the need for the child to cross international borders to be brought home.[3] International arrangements may result in laws that aim to protect the welfare of children and surrogates being circumvented, and can raise concerns about trafficking of children or the exploitation of women in specific parts of the world (including the trafficking of women to surrogacy tourism destinations). Additionally, it will be more difficult in an international arrangement for intended parents and the child to have a relationship with the surrogate.

12.9 For the same reasons, we do not think the law in the UK should encourage foreign intended parents to come to the UK solely for surrogacy. In short, we do not think that the UK should become a destination for surrogacy tourism. Accordingly, there should continue to be a jurisdictional requirement for legal parenthood to be recognised through surrogacy in the UK. For intended parents who might not apply for legal parenthood in the UK of a child born here, we also consider whether regulation on the removal of surrogate-born children from the UK is necessary in Chapter 16.

12.10 We cannot think of any reason why the two pathways should have a different jurisdictional basis. Therefore, we suggest that the new pathway should have the same jurisdictional requirement as parental orders.

12.11 Although there must be some connection to this jurisdiction to justify the application of the law, domicile is not the only available legal test. The test of habitual residence could be used. Habitual residence is a question of fact, to be determined according to all the circumstances of each case. The term has been defined as "the place where the person has established, on a fixed basis, his or her permanent or habitual centre of interests".[4] We think that, for the following reasons, there is much to be said for using habitual residence, rather than domicile, to establish a connection to the UK.

(1) Put simply, a person is domiciled in the country in which he or she has made their permanent home. However, domicile is a complex legal concept, and its determination may turn on what can be considered as artificial or technical

---

3 See ch 16.

4 *Pierburg v Pierburg* [2019] EWFC 24 at [43].

rules.[5] A person's domicile is his or her domicile of origin, unless the person has acquired a domicile of choice, which generally requires a person to reside in a new country while also forming a sufficient intention to live there permanently or indefinitely.[6] Conversely, habitual residence is a simpler test to understand and apply: it requires a person's physical presence somewhere, with some degree of integration into a social and family environment there.[7] It is clear, however, that habitual residence may be acquired (or lost) very quickly, depending upon the particular circumstances.[8] In sum, as stated above, habitual residence is a question of fact to be determined according to all the circumstances of each case.[9]

(2) Habitual residence is already used in the context of family law in the UK,[10] and (together with domicile) applies in adoption.[11]

(3) Habitual residence, as a basis for establishing a court's jurisdiction, is the test used in European Union ("EU") and international legislation, in particular the Brussels IIa Regulation,[12] and the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (the "1996 Hague Convention"),[13] which govern conflict of law issues in family law between states, including parental responsibility. It is therefore a familiar concept within international law.[14] Domicile, on the other hand, is a concept only recognised in other common law jurisdictions. As the UK is leaving the EU, after

---

5 We note the relevance of domicile in respect of liability for some taxes.

6 *CC v DD* [2014] EWHC 1307 (Fam), [2015] 1 FLR 704.

7 See *A v A (Children: Habitual Residence)* [2013] UKSC 60, [2014] AC 1; *AR v RN* [2015] UKSC 35, [2016] AC 76.

8 *AJ v DM* [2019] EWHC 702 (Fam), [2019] All ER (D) 136 (Mar); *Tan v Choy* [2014] EWCA Civ 251, [2015] 1 FLR 492 at [31]; and *Marinos v Marinos* [2007] EWHC 2047 (Fam), [2007] 2 FLR 1018.

9 *Re A (Jurisdiction: Return of Child)* [2013] UKSC 60, [2014] AC 1 at [36], citing *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562, 578.

10 For example, in the Family Law Act 1986, ss 3, 9 and 10. The Family Law Act 1986 is primarily designed to deal with conflicts of family law jurisdiction between the courts of the UK. In simple terms, primary jurisdiction vests in the UK court in which proceedings for divorce, nullity of judicial separate or dissolution or annulment of a civil partnership are continuing. If there are no such proceedings, however, primary jurisdiction vests in the UK court in which the child is *habitually resident*. For further detail, see *Clarke, Hall & Morrison on Children* (Issue 102 2019) div 1, para 996.

11 See the Law Commission of England and Wales's recommendation of a test of habitual residence in Custody of Children – Jurisdiction and Enforcement within the United Kingdom (1986) Law Com No 138 para 4.15. ACA 2002, s 49, and AC(S)A 2007, s 118 deal with jurisdiction in adoption cases. See also, AC(S)A 2007, ss 29(1), (3); 30(1), (6) and 59(2).

12 Brussels IIa Regulation concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility No 2201/2003, Official Journal L 338 of 23.12.2003. See art 8.

13 Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

14 "Habitual residence is the most important of all the jurisdictional concepts because for some time it has been the internationally accepted basis for exercising jurisdiction over children as well as being the most appropriate place to make decisions about their future care and welfare." M Everall, M Nicholls and N Lowe, *International Movement of Children: Law, Practice and Procedure* (2nd ed 2016) para 2.21.

exit day, the Brussels IIa Regulation will no longer be effective in UK law. The Government has stated that new cases after exit day will be decided according to the jurisdiction rules in the 1996 Hague Convention.[15] All EU member states are party to the 1996 Hague Convention.

(4) Habitual residence would be an easier and more straightforward test to satisfy for intended parents who are were not born in the UK but who reside here, and who may struggle to establish a domicile of choice here.[16] Stakeholders have told us that domicile poses a significant barrier for some intended parents. Indeed, we understand from stakeholders, as well as from the number of court cases on this point, that the group of intended parents that are prevented from becoming legal parents due to the requirement for domicile could be significant.

12.12 Most stakeholders have not proposed that habitual residence should replace the test for domicile, but that it should be added as an additional basis of jurisdiction. If domicile was no longer sufficient on its own to provide the court with jurisdiction, problems for a different group of intended parents would arise. For example, British intended parents who are working overseas, even if they intended to return to live in the UK in the near future, might be unable to establish habitual residence but may still be domiciled in the UK.

12.13 Although stakeholders expressed broad support for the inclusion of habitual residence, some raised concerns that it may lead to surrogacy tourism to the UK,[17] or forum shopping by intended parents. Habitual residence requires a person to have established a life in a place, but his or her residence can be short and not intended to be permanent. For example, if during the final stages of a surrogacy pregnancy, a person rented an apartment in the UK and was integrated into the community, he or she could possibly have established habitual residence even if his or her sole purpose of living in the UK was for the surrogacy. This would not be possible with domicile, as acquiring a new domicile requires a person to intend to make a permanent, or indefinite, move. Therefore, if habitual residence were sufficient, the UK could become an attractive destination for foreign intended parents to visit specifically to enter a surrogacy arrangement, leaving immediately after becoming legal parents. We therefore agree that there is a risk that habitual residence could result in surrogacy tourism to the UK.

12.14 The requirement for domicile is a barrier for some intended parents who live in the UK. It is our provisional view that habitual residence should be introduced as an alternative to domicile, for both the new and old pathways. However, given the concerns about surrogacy tourism, we wonder whether there should be any additional requirements imposed together with the test for habitual residence (for example, requiring the

---

15 The Jurisdiction and Judgments (Family) (Amendment etc) (EU Exit) Regulations 2019 (SI 2019 No 519) and the Government's guidance accessible at: https://www.gov.uk/government/publications/family-law-disputes-involving-eu-after-brexit-guidance-for-legal-professionals/family-law-disputes-involving-eu-after-brexit-guidance-for-legal-professionals#children-cases-parental-responsibility (last visited 31 May 2019).

16 For example, the facts in *AB (Surrogacy: Domicile)* [2016] EWFC 63.

17 See para 12.8 above and ch 16.

intended parents to be habitually resident for a certain period of time) to address these concerns, and ask consultees for their views.

Consultation Question 56.

12.15 We provisionally propose that, both for a parental order and in the new pathway, the intended parents or one of the intended parents must be domiciled or habitually resident in the UK, Channel Islands or Isle of Man.

Do consultees agree?

12.16 We invite consultees' views as to whether there should be any additional conditions imposed on the test of habitual residence, for example, a qualifying period of habitual residence required to satisfy the test.

12.17 We have considered whether the court's jurisdiction to grant a parental order, or for parenthood to be established under the new pathway, should be based on the domicile or habitual residence of the child, rather than the intended parents. We do not think this idea should be pursued. Surrogacy cases (generally) involve newborn babies, for whom it may be very difficult to determine habitual residence.[18] We do not think this approach would solve the concerns about the complexity caused by the existing requirement for domicile.

12.18 It has also been suggested to us that jurisdiction might be based on the domicile or habitual residence of the surrogate, rather than that of the intended parents. We are not attracted to that option as we are concerned that it would be likely to provide a strong basis for reproductive tourism, given that the intended parents without any connection to the UK would be able to obtain legal parenthood here.

THE RELATIONSHIP STATUS OF THE APPLICANTS

12.19 Where two applicants wish to obtain a parental order, they must satisfy the court that their relationship falls into one of the three qualifying categories set out in section 54(2) of the HFEA 2008. These three categories are:

(1) husband and wife;[19]

(2) civil partners of each other; or

---

18 As illustrated in *W and B v H (Child Abduction: Surrogacy) (No 1)* [2002] 2 WLUK 423, [2002] FLR 1008; and *Re G (Adduction: Withdrawal of Proceedings, Acquiescence and Habitual Residence)* [2007] EWHC 2807 (Fam), [2008] 2 FLR 351.

19 Following the passing of the Marriage (Same Sex Couples) Act 2013, this provision should be read as to apply to married couples of the same sex. For further detail, see the discussion in *Re Z (A Child)* [2015] EWFC 73, [2016] 2 All ER 83 at [7] to [14]. See also Marriage and Civil Partnership (Scotland) Act 2014.

(3) 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.[20]

12.20 Under section 54A of the HFEA 2008, single people can now apply for a parental order. Obviously, the requirement of a qualifying relationship does not apply to applications by a single person.

12.21 We note that section 54A, of the HFEA 2008, as originally drafted by the Government, would have imposed a negative requirement on a single applicant to prove that he or she was *not* married, in a civil partnership or in an enduring family relationship.[21] If he or she could not prove this, then the person would have to apply to for a parental order, as a part of a couple, with that partner.[22] The Joint Committee on Human Rights, however, expressed serious concerns at this requirement, writing that:

> trying to put a blanket ban on a person who is in a couple getting a single parental order is clumsy and inflexible, as well as discriminatory.[23]

12.22 The relevant section was, consequently, removed by the Government.

12.23 But as one stakeholder noted, the current law creates a potential inconsistency. The requirement that two applicants must prove to the court that their relationship falls into one of the three qualifying categories above, sits uneasily with the lack of any such requirement of proof of a relationship (positive or negative) with respect to a single person applicant.

12.24 The reform, or removal, of this requirement could also be an opportunity to clarify the law, and reduce the need for further case law around its application. For example, whilst the courts have held that the two married applicants did not have to be in a sexual relationship with one another to fall within the definition of "husband and wife" (a qualifying relationship),[24] it is unclear to us whether two unmarried friends living platonically together, for example, could currently jointly apply for a parental order. Could they argue that they were "living as partners," as the section requires? If the law were to remove the categories of qualifying relationship, there would be no doubt that these people could apply for a parental order.

12.25 We also have concerns about whether it should be necessary for people to have to discuss the intimacies of their relationship with a court in order to prove that their relationship qualifies to apply for a parental order. Many people will find this process difficult and intrusive. In this regard, we note the comments of the then President of

---

20 See paras 5.7 and subsequent.

21 *The Government's Response to an incompatibility in the Human Fertilisation & Embryology Act 2008: A remedial order to allow a single person to obtain a parental order following a surrogacy arrangement"* (November 2017) Cm 9525.

22 See the discussion in the House of Lords and House of Commons Joint Committee on Human Rights, *Proposals for a Draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018* (2 March 2018) paras 33 to 43.

23 House of Lords and House of Commons Joint Committee on Human Rights, *Proposals for a Draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018* (2 March 2018) para 37.

24 *Re X (A Child)* [2018] EWFC 15, [2018] 2 FLR 660 at [2]. See paras 5.11 to 5.12.

the Family Division, Sir James Munby, in his judgment on the "platonic" marriage case referenced above:

> I propose to say very little about the facts. There is no need for me to do so. It would be wrong to disclose, even in anonymised form, matters which are, of their very nature, intensely personal and private.[25]

12.26 We accept, however, that many people will think that it is important, in the interests of the child's welfare, that the law places restrictions on who can become a parent of that child. It could be argued that creating a category of qualifying relationships is a way of ensuring that, where there are two applicants for a parental order, the child (at least initially) is brought up by a couple.[26]

12.27 We also think that any reform to this requirement must continue to exclude two persons who are in a prohibited degree of relationship with one another from applying jointly for a parental order. This would prevent two sisters, for example, from applying jointly for a parental order and becoming the child's legal parents. This restriction would mirror the restriction in adoption law in England and Wales,[27] and Scotland,[28] and avoid a confusing narrative for the child.[29]

12.28 We would welcome consultees' views.

Consultation Question 57.

12.29 We invite consultees' views on whether:

(1) the qualifying categories of relationship in section 54(2) of the HFEA 2008 should be reformed and, if so, how; or

(2) the requirement should be removed, subject to two persons who are within the prohibited degrees of relationship being prevented from applying.

---

25 *Re X (A Child)* [2018] EWFC 15, [2018] 2 FLR 660 at [2].

26 We note, however, that the court has held that the requirement of HFEA 208, s 54(2) is satisfied where the parents are separated and the child is moving between two homes: see *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] Fam 186 and further discussion in paras 5.38 and subsequent.

27 ACA 2002, ss 144(4) to (6).

28 The definition of "relevant couple" in Scottish adoption legislation also restricts those who may apply for an adoption order with the effect of preventing two persons who are within the prohibited degrees of relationship from applying: AC(S)A 2007, s 29.

29 So that, in the example that we have given in this paragraph, the child's mothers would also be his or her aunts.

THE CHILD'S HOME WITH THE INTENDED PARENTS

12.30 For a parental order to be granted, the child's home must be with the intended parents.[30]

12.31 This requirement has not posed a problem in practice. Even where intended parents have divorced or separated prior to making an application for a parental order, the courts have extended the meaning of "home" to mean the home of each intended parent. As far as we are aware, this requirement has only been a barrier when the intended parents divorced, and one moved to another country so no longer saw the child.[31] With the recent amendment that allows a single intended parent to apply for a parental order, in such a case the court could now make an order in favour of the remaining intended parent who was living with and parenting the child.[32]

12.32 We do not think this requirement is posing problems. Indeed, we think that it would be odd for the court to make a parental order in favour of intended parents who were not living with (and so not parenting) the child. Therefore, we do not think reform is necessary in relation to this requirement.

12.33 A similar requirement should, in our view, be applied to the new pathway. We think it could be satisfied by a declaration by the intended parents that they intend for the child's home to be with them, made in the written surrogacy agreement required by the new pathway.

Consultation Question 58.

12.34 We provisionally propose that to use the new pathway, intended parents should be required to make a declaration in the surrogacy agreement that they intend for the child's home to be with them.

Do consultees agree?

GENETIC LINK

12.35 To be granted a parental order, at least one of the intended parents must be genetically related to the child. In the case of a single intended parent, his or her gametes must have been used in the creation of the embryo.[33] In the case of two intended parents, gametes from at least one of them must have been used.[34]

---

30 HFEA 2008, ss 54(4)(a) and 54A(3)(a). See paras 5.38 and subsequent.

31 *AB v CD* [2018] EWHC 1590 (Fam), [2018] 4 WLUK 178.

32 A requirement under the HFEA 2008, unless the remaining intended parent was not genetically related to the child, HFEA 2008, s 54A(1)(b). We discuss the requirement for a genetic link at paras 12.35 and subsequent.

33 HFEA 2008, s 54A(1)(b).

34 HFEA 2008, s 54(1)(b).

12.36 Not all jurisdictions require a genetic link between the intended parents and the surrogate-born child. A genetic link is required in, for example, the Australian Capital Territory (Australia),[35] South Australia (Australia),[36] and South Africa.[37] It is also currently required in New Zealand, but there has been a recent consultation on whether to remove the requirement.[38] Conversely, it is not required in Victoria (Australia), Ontario (Canada), British Columbia (Canada), California (the USA) or Greece.[39]

12.37 As we explained in the chapter on current law,[40] this requirement can be a barrier for some intended parents.[41] We have been told that the lack of genetic link is preventing some intended parents from seeking a parental order. Those children may therefore never have their parenthood legally recognised, which puts the relationship in a vulnerable position and can have other negative consequences, such as if a parent dies intestate.[42]

12.38 There is active debate about whether this requirement should be removed, to allow for surrogacy in cases of "double donation", that is, where the surrogate's pregnancy is the result of both gametes being provided by donors, rather than the intended parents. Stakeholders were spilt on whether double donation should be permitted in surrogacy arrangements.

Arguments in favour of abolishing the requirement for a genetic link

12.39 The requirement for a genetic link between at least one of the intended parents and the surrogate-born child poses a barrier to intended parents who cannot provide gametes. Stakeholders have, therefore, expressed their concerns that the requirement is potentially discriminatory against infertile people, on the basis of disability. For example, the law could prevent the following persons from becoming parents through surrogacy:

(1) a male same-sex couple, who are both infertile;

---

35 Parentage Act 2004 (Australian Capital Territories), s 24(d).

36 Family Relationships Act 1975 (South Australia), s 10HA(2a)(h)(ii).

37 Children's Act 37 of 2005, s 294. This requirement survived a constitutional challenge in *AB v Minister of Social Development as Amicus Curiae: Centre for Child Law* (CTT 155/15) [2016] ZACC 43.

38 Human Assisted Reproductive Technology Act 2004, s 16; New Zealand Advisory Committee on Assisted Reproductive Technology, G*uidelines on Surrogacy involving Assisted Reproductive Procedures* (December 2013). In 2017, the Committee consulted on removing the requirement.

39 Assisted Reproductive Treatment Act 2008, Part 4 (Victoria), Children's Law Reform Act 1990, Part 1 (Ontario), Family Law Act 2011, Part 3 (British Columbia) and the California Code, Family Code. Greek legal commentators tend to say that a genetic link is not required under Greek law: see E Zervogianni, "Surrogacy in Greece" in J M Scherpe, C Fenton-Glynn and T Kaan (eds), *Eastern and Western Perspectives on Surrogacy* (2019).

40 See ch 5.

41 See para 5.26.

42 See paras 17.44 and subsequent for further discussion on entitlement for a surrogate born child to succeed to the surrogate's estate.

(2) an opposite-sex couple, both of whom are infertile, and the woman cannot carry a foetus to term; or

(3) a female same-sex couple who are both infertile and neither can carry a foetus to term (although this category might be rare).

12.40 Now that a single intended parent is able to apply for a parental order, this requirement is likely to prove a growing concern. The potential unfairness may be felt particularly acutely by single women who are both infertile and cannot carry a foetus to term (which may commonly arise in older women who are contemplating surrogacy after years of trying IVF). By comparison, single women who are infertile but who can carry a foetus to term are able to become mothers using donated gametes through IVF.[43] Stakeholders have questioned why surrogacy should be treated differently.[44] Arguably, therefore, it may be that the requirement for a genetic link is both discriminatory on the basis of disability and single-parent status.

12.41 The requirement of a genetic link may also pose particular barriers to transgender people who did not preserve their gametes before a medical transition.

12.42 Stakeholders have also forcefully argued that a genetic link has no bearing on how much a parent loves his or her child, or how good a parent he or she is. In surrogacy, it is common among couples for one of the intended parents to be not genetically related to the child, with a CAFCASS study of parental orders showing that in only one quarter of cases was genetic material from both intended parents used in conception.[45] Indeed, it will always be the case that only one parent is genetically related to the child within same-sex couples. That does not mean the non-genetically related intended parent is somehow an inferior parent to the other.

12.43 These concerns apply equally to the new and the old pathway.

Arguments in favour of retaining the requirement for a genetic link

12.44 Conversely, there are arguments for retaining the requirement.

12.45 One justification rests on preserving the distinction between adoption and surrogacy. If a surrogate-born child is not genetically related to the intended parents (and, in particular, is genetically related to the surrogate), some stakeholders have questioned how the arrangement is different from adoption. Adoption is strictly regulated to protect the welfare of children and the rights of birth parents. Some stakeholders were therefore concerned that removing the requirement for a genetic link would allow

---

43 Clinics regulated by the Authority are permitted to implant a woman with an embryo from donated sperm and donated eggs in a cycle of IVF: see HFEA 1990, ss 3(2) and 3ZA.

44 We question whether the situation of double donation in IVF and in surrogacy are entirely comparable, in that although in IVF there is no genetic relationship between the legal mother and child, there is a gestational, and therefore a form of biological, relationship. We do not think that a gestational relationship can be discounted (particularly when the woman is intended to be the mother of the child), and the field of epigenetics supports this view: O B A van den Akker, *Surrogate Motherhood Families* (2017) pp 172 to 173 and 294.

45 CAFCASS, *Cafcass Study of Parental Order Applications made in 2013/14* (July 2015) accessible at: https://www.cafcass.gov.uk/about-cafcass/research-and-data/cafcass-research/ (last visited 31 May 2019) p 16.

people to circumvent the protections within adoption law. The Department for Education also flagged a concern that removing the genetic link requirement could reduce the number of people adopting children, with the Department for Education suggesting that the number of adoptions was already decreasing at least in part because of advances in IVF.

12.46 We also heard concerns that double donation would erode safeguards to protect children's rights to know their genetic origins. This concern is particularly salient in international surrogacy arrangements. In the UK, children conceived with donor gametes have a right to access information about the identity of the donor once they reach adulthood.[46] Conversely, many other countries allow for anonymous gamete donation.[47] Therefore, children born through international surrogacy arrangements may be unable to ever learn about their genetic origins. The current requirement for a genetic link means that, even in international surrogacy arrangements, children should know at least one of their genetic parents.[48] However, this is only the case if the intended parents apply for a parental order. There may be cases in which intended parents do not apply specifically because they do not have a genetic link to the child and would therefore be ineligible to do so. Removing a genetic link requirement in the case of international arrangements could mean that intended parents travel overseas to jurisdictions where anonymous and double donation is permitted, resulting in a greater risk of surrogacy arrangements where the child does not know the identity of either of its genetic parents.

12.47 Some stakeholders, including CAFCASS, were also concerned that removing the requirement for a genetic link would increase the risk of child trafficking and the commercialisation of children. We have also heard of related concerns about the risks of the commodification of genetic material and the ethics surrounding the circumstances in which donor material, particularly donor eggs, may be obtained.[49] There is also the concern about "designer babies", or people choosing gamete donors

---

46 Only children conceived via treatment at an Authority licensed clinic will be able to find information about their donor or donors on the register (see ch 10). We consider this right, and whether there should be eligibility requirements in relation to it, at paras 12.96 and subsequent. To exercise this right, children are dependent on their parents disclosing to them the details of their conception. Birth certificates record a child's legal parents at birth, so, without being told, children will not know that they were donor-conceived, and on reaching adulthood will not know to search the HFEA register: CAFCASS, *Cafcass Study of Parental Order Applications made in 2013/14* (July 2015) accessible at: https://www.cafcass.gov.uk/about-cafcass/research-and-data/cafcass-research/ (last visited 31 May 2019) p 23.

47 Moreover, data suggests that gestational surrogacy is more common in international surrogacies: CAFCASS, *Cafcass Study of Parental Order Applications made in 2013/14* (July 2015) accessible at: https://www.cafcass.gov.uk/about-cafcass/research-and-data/cafcass-research/ (last visited 31 May 2019) p 15. Accordingly, even if the intended parents know the identity of the surrogate, she is unlikely to be the genetic mother of the child.

48 How effective this requirement is in practice might be a different point. A CAFCASS study of parental order applications found that in 25.3% of applications, no evidence of an intended parent's genetic relationship with the child was provided, and in 8.9% of applications, the only evidence was confirmation from the surrogate: CAFCASS, *Cafcass Study of Parental Order Applications made in 2013/14* (July 2015) accessible at: https://www.cafcass.gov.uk/about-cafcass/research-and-data/cafcass-research/ (last visited 31 May 2019) p 14.

49 See CAFCASS, *Cafcass Study of Parental Order Applications made in 2013/14* (July 2015) accessible at: https://www.cafcass.gov.uk/about-cafcass/research-and-data/cafcass-research/ (last visited 31 May 2019) p 23.

with the traits they think are more “desirable”, raising a concern about eugenics within assisted reproduction.

Discussion

12.48 There are of course many intended parents for whom the ability to have a baby with a genetic link to one of them is a central attraction of surrogacy. And the existence of a genetic link between parents and child may be seen as more important in some cultures than in others. However, we think that surrogacy is more appropriately characterised by the shared intention of the intended parents and surrogate to create a child that the intended parents will raise as their own. Neither that intention, nor the intended parents’ acceptance of their role as parents to the baby, is defined by the existence of a genetic link. In Chapter 7 we identified the different ways in which a parent may be defined: genetic; gestational; and social or psychological. We explain in that chapter that, in surrogacy, social or psychological parenthood is seen by the parties as at least as, if not more, important than genetic or gestational parenthood. The need for a genetic link does not reflect this emphasis on social parenthood in the context of surrogacy, and may even be seen to undermine the parental role of intended parents who do not have a genetic link to the child.

12.49 Significantly, the requirement for a genetic link currently operates to prevent infertile individuals or couples from becoming legal parents through surrogacy. We do not think that people who are medically unable to contribute gametes should be excluded from surrogacy.

12.50 Nevertheless, a requirement for a genetic link does provide certain safeguards. We are therefore hesitant to entirely eliminate it.

12.51 A requirement for a genetic link is a clear way to distinguish between surrogacy and adoption. Some stakeholders expressed the view that the salient difference between adoption and surrogacy is the intentions of the intended parents in bringing about the life of the child. Although genetic parentage is not the key difference, a genetic link does offer proof that the intended parents were involved in bringing about the conception of the child. It appears to us that the distinction between surrogacy and adoption (and the protections of adoption) could be preserved so long as the intended parents are involved in the child’s conception. Safeguards may be needed to ensure that, absent a genetic link, there is evidence of their involvement in conception.

12.52 It will clearly be the case that the intended parents will be involved in bringing about the child’s conception in the new pathway: the intended parents will enter into an agreement with the surrogate prior to conception in addition to meeting any other pre-conception eligibility requirements.

12.53 The intended parents are also involved in conception for surrogacy arrangements in the old pathway. However, the grant of a parental order after the birth of a child means that the intended parents’ involvement in conception may be more difficult to establish than in the new pathway, where this will be documented. This may particularly be true in international cases. For example, CAFCASS found that, although surrogates usually do not participate in any of the hearings, the parental order reporter is invariably successful in contacting the surrogate in domestic cases. Conversely, all cases in which the parental order reporter could not make contact with the surrogate

were international, with a significant majority of international cases not involving any contact.[50] Without confirmation from the surrogate, and absent a genetic link, it may be difficult to establish definitively the intended parents' involvement in conception for a parental order application.

12.54 We consider below whether there should be additional safeguards in relation to recording of gamete donors in surrogacy cases. Separately, double donation may pose a risk to the rights of surrogate-born children to access information about their genetic parentage, by removing a requirement which means that at least one genetic (and legal) parent is known. In UK-based surrogacy arrangements, there is a lower risk that double donation will result in surrogate-born children being denied access to information about their genetic origins, as anonymous donation (at least via a licensed clinic) is not possible. That will, therefore, be the case for surrogacy arrangements following the new pathway, because only domestic arrangements will qualify. However, denial of information about origins is a significant concern for children born through international surrogacy arrangements, which will continue to be governed under the old pathway.

12.55 Therefore, both to establish intention prior to conception and to protect the rights of children to know their genetic origins, there is an argument that for a parental order, particularly in an international surrogacy arrangement, the intended parents should continue to be required to establish a genetic link to the child.

12.56 Concerns about child trafficking may be able to be addressed in ways other than by requiring a genetic link. First, some of the most egregious uses of child trafficking, for slavery including sex slavery, would be captured generally by the criminal law. We do provisionally propose criminal record checks for intended parents using the new pathway: see paragraph 13.66 and following below.

12.57 Protection against the commodification of children or gametes and the prevention of "designer babies" might be more difficult to achieve. One suggestion from stakeholders was to allow double donation only in cases of medical necessity, when the intended parents could not provide gametes due to infertility. This restriction would limit double donation to cases in which it was truly needed, going some way towards addressing concerns. We think this option is worth considering, so it is reflected in our provisional proposal.

Reform

12.58 Our provisional conclusion is that there are strong arguments for allowing double donation in the new pathway. Therefore, we make a provisional proposal along those lines.

12.59 However, we also think that there are persuasive arguments that the requirement for a genetic link is necessary in order to safeguard against the commodification of children and gametes. We therefore provisionally propose that double donation should only be

---

50 CAFCASS, *Cafcass Study of Parental Order Applications made in 2013/14* (July 2015) accessible at: https://www.cafcass.gov.uk/about-cafcass/research-and-data/cafcass-research/ (last visited 31 May 2019) pp 11 and 13 to 14.

possible in the new pathway in cases of medical necessity. By this, we mean that either the single intended parent is not, or neither of the intended parents in a couple are, capable of contributing gametes for conception due to medical infertility.

12.60 We do not provisionally propose to remove the requirement for a genetic link in an application for a parental order. We think the concerns raised about removing the requirement for a genetic link are more difficult to overcome in relation to surrogacy arrangements following the parental order pathway.[51]

12.61 We think the issue in relation to domestic arrangements in the parental order pathway is finely balanced. It may be possible to overcome some of the objections to double donation for domestic surrogacy arrangements in the parental order pathway, particularly if double donation were only permitted in cases of medical necessity.

12.62 However, we are not persuaded that the risks could be overcome in the case of international arrangements, even with a requirement of medical necessity, for the following reasons.

(1) In Chapter 10 we propose that children born of domestic surrogacy arrangements who were conceived through treatment at an Human Fertilisation and Embryology Authority (the "Authority") licensed clinic will have a right to access information about their genetic origins, which will be recorded in a national register of surrogacy arrangements, where such information has been medically verified.[52] We consider in more detail at paragraph below whether entry of information onto the national register of surrogacy agreements should be an eligibility requirement for the new pathway or the parental order pathway. However, as we discuss, it would be difficult for this requirement to be satisfied in international arrangements, particularly where gamete donors may be anonymous.

(2) Although the evidence of intended parents' involvement in conception may not be as strong in the parental order pathway as in the new pathway,[53] it should, nevertheless, be possible for the parental order reporter to contact the surrogate in domestic cases to provide evidence that conception was the result of a surrogacy arrangement, as we noted above. However, as we also noted, in international arrangements, the court and the parental order reporter is often

---

51 In a recent review of the Western Australian legislation governing surrogacy, Sonia Allan did not suggest imposing a requirement for a genetic link. Instead she focused her recommendation on the role of counsellors and medical professionals in assessing suitable options for all parties to the agreement as well as assessing the best interests of children and the importance of children having access to information about the genetic and gestational origins: S Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008 (Report: Part 2)* (2019) p 122. The recommendation applies to domestic surrogacy arrangements in Western Australia, which must have met the assessment and pre-approval process by the Reproductive Technology Council and where children have a right to access information about their genetic origins, which includes a requirement for implications counselling and involvement of medical professionals. Therefore, in Western Australia, there already appears to be safeguards to address the concerns we have raised.

52 See ch 10.

53 For example, due to a lack of written surrogacy agreement.

unable to make contact with the surrogate, so it may be difficult to prove that the child was conceived in a surrogacy arrangement.

(3) Under our provisional proposals, pre-birth welfare assessments, such as that achieved by a criminal record check, will only be required for the new pathway, rather than the parental order route. Consequently, the parental order pathway will be less robust in the face of concerns of child trafficking, a concern which will only apply in international arrangements.

12.63 Because international arrangements make it difficult to be certain of the intended parents' involvement in conception, and to prevent exploitation, commodification and trafficking of women and children in international surrogacy arrangements, we provisionally propose that a genetic link to the intended parents should continue to be required.

Consultation Question 59.

12.64 We provisionally propose that the new pathway –

(1) should not impose a requirement that the intended parent, or one of the intended parents, provide gametes for the conception of the child, so that double donation of gametes is permitted, but

(2) that double donation should only be permitted in cases of medical necessity, meaning that there is not an intended parent who is able to provide a gamete due to infertility.

Do consultees agree?

12.65 We invite consultees' views as to whether double donation should be permitted under the parental order pathway (to the same extent that it may be permitted in the new pathway) in domestic surrogacy arrangements.

12.66 We provisionally propose that the requirement that the intended parent or one of the intended parents contribute gametes to the conception of the child in the parental order pathway should be retained in international surrogacy arrangements.

Do consultees agree?

Intended parents inadvertently falling into the old pathway

12.67 Our consultation could result in a recommendation that double donation should only be possible in the new pathway, but not in domestic cases in the old pathway. This policy would create a risk to intended parents who have no genetic relationship to the surrogate-born child. If the intended parents start down the new pathway, but end up in the old pathway (for example, because the surrogate exercises her right to object), they would not be able to be recognised as the child's legal parents, absent an adoption order. We think such an outcome would be unacceptable, as the reason why a case falls outside the new pathway may have nothing to do with the intended

parents' absence of a genetic link. Therefore, if the requirement of a genetic link is retained for domestic cases under the parental order route we think an exception will need to be made for cases that begin under the new pathway but end up in the old pathway.

12.68 Clear criteria would need to be provided for a court to determine that the arrangement had started in the new pathway. The policy goal would be to avoid putting intended parents into a trap where they could unintentionally be placed in a situation in which they could not become the legal parents of the child despite their initial expectations. This policy goal needs to be balanced against the need to ensure that the criteria for accessing the new pathway are not compromised and that parties are prevented from simply alleging that they were in the new pathway when they were not.

12.69 In order to satisfy the court, intended parents might need to demonstrate that they believed in good faith that all of the requirements of the new pathway had been met, and that an agreement had been properly entered into through a clinic or regulated surrogacy organisation.[54] Alternatively, the intended parents might be required to show that all of the criteria of the new pathway were established, but that the surrogate had exercised her right to object, taking the case out of the new pathway.

12.70 We seek consultees' views on this point.

Consultation Question 60.

12.71 We provisionally propose that if the requirement for a genetic link is retained for domestic cases outside the new pathway, the requirement should not apply, subject to medical necessity, if the court determines that the intended parents in good faith began the surrogacy arrangement in the new pathway but were required to apply for a parental order.

Do consultees agree?

Medical necessity for double donation and the separation of the intended parents – a cause for concern?

12.72 Although we provisionally propose that double donation should only be permitted in cases of medical necessity, we are concerned that this policy could prevent a single intended parent from gaining legal parenthood unfairly in one particular circumstance. Above we noted a case in which a parental order was not granted to an intended parent. The intended parents had broken up, with one leaving the country and not being in contact with the child. At the time, a parental order could not be made in favour of a single intended parent.[55] It is no longer the case that a single intended

[54] Or, potentially, with the supervision of a legal professional in the case of independent, traditional arrangements. See our question on how such arrangements might be brought into the new pathway (paras 9.12 and subsequent).

[55] *AB v CD* [2018] EWHC 1590 (Fam), [2018] 4 WLUK 178.

parent cannot be granted a parental order.[56] However, along these lines, we can envisage a situation in which a break up of two intended parents could result in a parental order being denied if the ability to obtain a parental order without a genetic link is confined to cases of medical necessity. Take a case, for example, of two male intended parents, both of whom are capable of contributing sperm. A baby is conceived using sperm from one of the intended parents. The intended parents subsequently break up, and the intended parent who provided his sperm is not involved in parenting the child at the time of the application for the parental order.

12.73 If the only exception to the requirement for a genetic link is medical necessity, the intended parent who is raising the child may not be able to obtain a parental order. It could be argued that the test of medical necessity should be satisfied on the basis that, as a matter of biology, only one man's gametes could be used; therefore, choosing one of the parties to contribute gametes was itself medically necessary. However, we suggested above that the test of medical necessity should be based entirely on the infertility of the single intended parent. Accordingly, the remaining intended parent on his own will not be able to be granted legal parenthood through either of the pathways, because his sperm could have been used to create the embryo but was not.

12.74 Given the risk that a parental order may not be available, we think that if a requirement of medical necessity is imposed, an exception should be made for cases where intended parents break up, and only the intended parent without a genetic link wishes to be the child's legal parent.

12.75 We note that difficulties are confined to cases within the parental order pathway. Under the new pathway, intended parents automatically become legal parents on the birth of the baby, unless the surrogate objects. As we explain in Chapter 8 there is no provision in the new pathway for the intended parents (or one of them) to change his or her mind and decline to become the legal parent.

Consultation Question 61.

12.76 We provisionally propose that if double donation is permitted only in cases of medical necessity, an exception should be made to allow a parental order to be granted to a single parent without a genetic link where the intended parent's former partner provides gametes but the intended parents' relationship breaks down before the grant of a parental order.

Do consultees agree?

MEDICAL NECESSITY FOR SURROGACY

12.77 For a parental order to be granted, the HFEA 2008 does not currently require that the surrogacy was medically necessary for the intended parents to become parents.

[56] HFEA 2008, s 54A.

12.78 Having provisionally proposed above that double donation should only be possible in cases of medical necessity, we now consider whether the new or parental order pathways should be restricted to cases in which a surrogacy arrangement was necessary for the intended parents to become parents.[57] In this context medical necessity is not about the intended parents' inability to provide gametes (although it could also be). Rather, it is about an intended mother's inability to gestate and give birth to a baby.

12.79 Below we consider what medical necessity means, primarily in gender neutral terms. If there is any requirement for medical necessity, it must be able to be met by men, including men in a same-sex couple, single men, and trans men who are physically able to be pregnant and give birth, but for whom doing so would run contrary to their gender identity. It must also be able to be met by women who are unable to become pregnant and deliver a baby. However, in the majority of cases, any requirement for medical necessity will in practice be an assessment of an intended mother. We recognise that the test is fundamentally gendered, because pregnancy and childbirth is gendered.[58]

12.80 Restricting surrogacy to cases of medical necessity has been suggested as a means of preventing elective or social surrogacies. As the Warnock Report identified, many people perceive it to be morally objectionable for women who are physically capable of undertaking a pregnancy to use surrogacy to avoid being pregnant themselves.[59] The concern, raised within feminist literature, is that women of means might shift childbearing and labour onto poor women, to avoid taking time off work or experiencing the physical consequences and risks of pregnancy and childbirth. To prevent exploitation of women and the commercialisation of childbearing, or as one author referred to as "the development of an underclass of breeder women", a test of medical necessity has been suggested that would limit surrogacy to those who need it.[60]

12.81 Although, the current law does not impose a requirement of medical necessity, surrogacy in the UK is premised on the idea that it will only be used when a woman cannot carry a foetus herself. For example, the Department of Health and Social Care's ("DHSC") Surrogacy Pathway refers to surrogacy as an option "for people who are unable to conceive a child themselves".[61]

---

57 By which we mean parents who are involved from the time of the conception of the child. It is also possible, of course, to become the legal parents of a child through adoption.

58 Of course, trans men may also be capable of pregnancy and childbirth. We discuss the application of any test of medical necessity to trans men at para 12.92 below.

59 Report of the Committee of Inquiry into Human Fertilisation and Embryology (1984) Cmnd 9314, Expression of Dissent: Surrogacy para 8.17.

60 A Brandel, "Legislating Surrogacy: A Partial Answer to the Feminist Criticism" (1995) 54(2) *Maryland Law Review* 488, 516. See also K B Lieber, "Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?" (1992) 68 *Indiana Law Journal* 205, 226.

61 DHSC, *The Surrogacy Pathway* (February 2018) pp 4 and 5. See also British Medical Association, *Changing Conceptions of Motherhood: The Practice of Surrogacy in Britain* (1996).

12.82 Conversely, some jurisdictions do impose an explicit requirement for surrogacy to be a medical necessity.

(1) Greece requires the intended parents to show that surrogacy is required due to medical necessity.[62]

(2) South Africa requires the intended parents to show that they "are not able to give birth to a child and that the condition is permanent and irreversible".[63]

(3) In New Zealand, a clinic may only give treatment on satisfaction that "the proposed surrogacy is the best or only opportunity for an intending parent … to be the genetic parent of a child", and that "the surrogacy is not for reasons of personal or social convenience".[64]

(4) Portugal only allows a surrogacy contract to be concluded "in the case of the absence of a uterus, injury or disease of this organ that absolutely and definitively prevents the woman's pregnancy or in clinical situations that justify it".[65]

(5) Israel requires that intended parents have received a medical opinion confirming that the intended mother is unable to carry a pregnancy, or that a pregnancy would involve a significant risk to her health.[66]

12.83 We are not aware that surrogacies by choice, rather than necessity, are a real concern in the UK. The research is limited, but what research exists suggests elective or social surrogacy is rare, if it exists at all.[67] However, we have heard anecdotally that it does happen, albeit rarely, in the USA. Further, as noted in the current practice chapter, we were told of one case that was described as an elective/social surrogacy.[68]

12.84 It could be that a reformed surrogacy law makes surrogacy more attractive and so increases the risk of some surrogacy arrangements being undertaken for convenience rather than medical necessity.

---

62 Greek Civil Code, arts 1458 and 1455.

63 Children Act No 38 of 2005 (South Africa), s 295(a).

64 New Zealand Advisory Committee on Assisted Reproductive Technology, *Guidelines on Surrogacy involving Assisted Reproductive Procedures* (December 2013) pp 4 to 5.

65 Medically-Assisted Procreation Law no 32/2006 (2006), art 8 no 2.

66 The Surrogacy Agreements (approval of the agreement and the newborn's status) Law 1996, s 4. For further discussion see, R Schuz, "Surrogacy in Israel" in J M Scherpe, C Fenton-Glynn and T Kaan (eds), *Eastern and Western Perspectives on Surrogacy* (2019).

67 F MacCallum, E Lycett, C Murray, V Jadva and S Golombok, "Surrogacy: The Experience of Commissioning Parents" (2003) *Human Reproduction* 1334, 1340; R Edelmann, "Surrogacy: The Psychological Issues" (2004) 22 *Journal of Reproductive and Infant Psychology* 123, 129; K Busby and D Vun, "Revisiting *The Handmaid's Tale*: Feminist Theory Meets Empirical Research on Surrogate Mothers" (2010) 26 *Canadian Journal of Family Law* 13, 80.

68 See para 3.23.

12.85 Therefore, we think that it is appropriate for our review to consider whether a requirement for medical necessity should be introduced. We think that if a requirement for medical necessity is introduced, it should apply to both pathways. However, there are some specific concerns about introducing it for each.

(1) Requiring medical necessity for the new pathway might make the new pathway too regulatory, making it less appealing to intended parents. However, against that concern is the fact that the new pathway provides greater certainty for intended parents, which may itself be sufficiently appealing. Moreover, the new pathway only offers increased certainty together with increased protection, including protection of surrogates.

(2) The risk of requiring medical necessity for the parental order pathway is that if intended parents are barred from a parental order on this basis, they will not be able to establish legal parenthood at all. Even if a surrogacy arrangement was entered into for convenience, once the matter is presented to the court after the birth of the child, it may still be best for the child's welfare for a parental order to be made.

12.86 Below, we ask for consultees' views on whether a requirement for medical necessity should be introduced.

12.87 If a requirement of medical necessity is imposed, the problem of how to define or assess medical necessity arises.

12.88 Stakeholders have raised concerns that it would be important to ensure that women who are physically capable of pregnancy and childbirth, but who for psychological or mental health reasons are unable to do so, should fall within a definition of medical necessity.[69] We agree: there are many medical reasons why a woman might be unable to conceive, carry and give birth, both related to her physical and mental health. Concerns about the health of the resulting baby would also have to be considered.

12.89 Any requirement would need to be drafted, or assessed, broadly enough to include psychological impediments to pregnancy and physical risks both to the gestating mother and resulting child.[70]

12.90 The New Zealand guidance provides the following examples of why a surrogacy would be medically necessary for a woman, giving as examples:

(1) unable to gestate a pregnancy;

(2) unable to conceive a child for medical reasons;

---

69 A phobia of childbirth (tokophobia) is a rare but recognised medical condition: see British Medical Journal, "Sixty seconds on … tokophobia", accessible at: https://www.bmj.com/content/362/bmj.k3933/rr-1 (last visited 31 May 2019).

70 For another example, see S Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008 (Report: Part 2)* (2019) p 62, recommendation 5.

(3) unlikely to survive a pregnancy or birth;

(4) likely to have her physical or psychological health and wellbeing significantly affected by a pregnancy or birth; or

(5) likely to conceive a child who is unlikely to survive the pregnancy or birth or whose health would be significantly affected by the pregnancy or birth.[71]

12.91 Any test would also need to ensure that male same-sex couples, or single men were not barred from surrogacy.

12.92 One option would be to frame the test in terms of gender, to apply only to women, recognising the (largely) gendered nature and experience of pregnancy and labour. However, this would medicalise the decisions of women alone, and moreover would not be entirely accurate: capacity to be pregnant and give birth is more specifically a matter of having a uterus and birth canal. Therefore, putting a test in gendered terms would risk excluding trans men. Trans men may be capable of pregnancy, and may want to carry and give birth to their own children. Conversely, bearing a child may present a risk to the psychological health of some trans men, as running contrary to their gender identity. Therefore, we think any test of medical necessity would need to be satisfied in the case of a trans man who did not want to become pregnant, even if he was physically capable of doing so.

12.93 We think that the best approach involves creating a test that encompasses all the reasons why pregnancy and childbirth may not be viable for a person, ranging from not having a uterus and birth canal, to not being able to be pregnant and give birth without a risk of significant psychological harm, and which also considers the health of the potential child. While the drafting of any test would be for Parliamentary Counsel to determine, we suggest the test could be described in the following terms:

> For medical (whether physical or mental) or biological reasons, the single intended parent is, or both intended parents are, unable to gestate a foetus to term, or deliver a healthy baby.

Consultation Question 62.

12.94 We invite consultees' views as to whether there should be a requirement that a surrogacy arrangement has been used because of medical necessity:

(1) for cases under the new pathway to parenthood; and/or

(2) for cases where a post-birth parental order application is made.

12.95 We invite consultees' views as to how a test of medical necessity for surrogacy, if it is introduced, should be defined and assessed.

---

[71] New Zealand Advisory Committee on Assisted Reproductive Technology, *Guidelines on Surrogacy involving Assisted Reproductive Procedures* (December 2013) p 4.

REGISTRATION OF ORIGINS

12.96 In Chapter 10, we introduce the idea of a national register of surrogacy agreements. Here we consider whether entry of information onto the national register of surrogacy agreements should be an eligibility requirement for the new pathway or the parental order pathway.

12.97 Donor-conceived children in the UK have the right to access information about their genetic parents, or their gamete donors. However, this right is not enjoyed by all children conceived via assisted reproduction equally. Regulations have been in force since 1 July 2004, allowing the provision of information about the donor – identifying information can only be disclosed where it was provided by the donor after 31 March 2005.[72]

12.98 Therefore, surrogate-born children's rights to access information about who contributed gametes varies depending on whether the surrogacy arrangement took place in the UK, and if so whether conception took place within an Authority licensed clinic.

12.99 The protection actually afforded by the requirement for a genetic link between at least one of the intended parents and the child also appears to vary. The current requirement for a genetic link is, according to a study by CAFCASS, not being evidenced in all parental order applications. CAFCASS's 2013 to 2014 study of parental orders found that no evidence was provided of the genetic link in 25% of cases, and that the only evidence in nearly 9% of cases was written or verbal confirmation from the surrogate. In more than half of traditional surrogacies, no evidence was provided.[73]

12.100 Therefore, under the current law, surrogate-born children who are not conceived in an Authority licensed clinic will not have any information about their genetic parentage recorded on the register; and for a significant percentage of children who are the subject of parental orders there is no evidence being provided to the court of a genetic link with a least one of their intended parents. These children, when they reach adulthood, will have no information available to them about their genetic parentage.

12.101 Moreover, the current law does not allow surrogate-born children to access information about the surrogate (who will be registered as the patient) from the Authority's register.[74] Theoretically, a surrogate-born child should be able to access information about the identity of the surrogate by requesting their original birth certificate. However, this is not currently possible in England and Wales.[75] Therefore, surrogate-born children's ability to know their gestational origins rests on being able to

---

72 Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004 (SI 1511 No 2004), reg 2(3).

73 CAFCASS, *Cafcass Study of Parental Order Applications made in 2013/14* (July 2015) accessible at: https://www.cafcass.gov.uk/about-cafcass/research-and-data/cafcass-research/ (last visited 31 May 2019) p 14.

74 See ch 10.

75 See para 10.38.

access court records.[76] In Scotland, on the other hand, the provisions which allow adopted persons over 16 to obtain information about themselves from the Register of Births are applied to those over 16, subject to a parental order and to whom the information relates.[77] The subject of a parental order in Scotland will therefore be able to trace his or her birth mother.

12.102 This project is an opportunity to attempt to address some of these frailties in the protection of the rights of surrogate-born children to have access to information about their genetic and gestational parentage. Increased protections may be more important if we recommend that intended parents need not have a genetic link to the child. As we discussed above, absent a requirement for any genetic connection with an intended parent, both of the child's genetic parents could be donors.[78]

The new pathway

12.103 Our provisional view is that evidence of the genetic and gestational origins of the child should be required to be entered on the register in all surrogacy cases provided that the information about who has contributed gametes for the conception of the child has been verified. Our goal for the new pathway is to promote the rights of all parties to surrogacy arrangements, and most importantly, the rights and the welfare of surrogate-born children. It is entirely in line with this goal to protect and enhance the right of surrogate-born children to access information about their genetic and gestational origins. Therefore, we provisionally propose that, to be eligible for the new pathway, information about the child's genetic parents and the surrogate should be required to be included within the national register of surrogacy agreements for entry prior to the registration of the child's birth. Therefore, the information would have to be provided prior to registration of the intended parents as the child's parents.

12.104 This requirement for the new pathway should apply to all surrogacy arrangements, whether an Authority licensed clinic or a regulated surrogacy organisation was involved, or whether the surrogacy was an independent, traditional arrangement. However, the evidence necessary for the genetic parents to be entered onto the national register of surrogacy must, in our view, vary depending on the type of surrogacy arrangement. The evidence of the identity of the surrogate in all cases can come from the surrogacy agreement or the medical record of the birth.

12.105 The Authority will already hold information about the donors of gametes if conception took place within an Authority licensed clinic or, where conception takes place outside a clinical setting, if sperm was donated and provided through a fertility clinic. In these cases, it will be sufficient for the Authority to ensure that the information it holds about the donor's identity is included within the national register of surrogacy agreements. The clinic where conception took place or gametes were provided would send a written return to the Authority identifying the genetic parents, in advance of the registration of the child's birth.

---

76 See paras 10.44 and subsequent. The emerging field of epigenetics reveals the importance of the gestational relationship on children: see eg O B A van den Akker, *Surrogate Motherhood Families* (2017), pp 172 to 173 and 294.

77 AC(S)A 2007, s 55(4)(b), as applied and modified by the 2018 Regulations, reg 3 and sch 2 para 15.

78 See para 12.35.

12.106 If conception takes place with sperm donated outside a clinical setting (most likely by one of the intended parents or by a donor known to the intended parents), the Authority will not already have a record of the identity of the donor. In these cases, we think that a conclusive DNA test result or another form of evidence sufficient to establish the relationship between the genetic parents and the child should be required.

12.107 If the surrogacy was facilitated by a regulated surrogacy organisation, the organisation could be required to review the evidence, and then provide a return to the Authority identifying those who contributed gametes for entry on the register.

12.108 Providing reliable evidence for the register is more difficult in traditional, independent surrogacy arrangements. We have considered in Chapter 9 how the parties to a traditional, independent surrogacy arrangement might establish the requirements of the new pathway. This might, potentially, be done by requiring an independent professional, such as a lawyer, to be involved to certify that the eligibility requirements have been met. We think that a lawyer could play the same role as a regulated surrogacy organisation in this context. Again, a DNA test or other evidence would be required prior to birth registration, establishing the relationship between the genetic parents and the child. The lawyer would then be required to review the DNA test or other evidence, and send a return to the Authority certifying the identity of those who contributed gametes.

Parental orders

12.109 The rights of surrogate-born children who are born outside the new pathway are just as important. Above we discussed the risks to children's right to know their genetic parentage. We also noted the risks of commercialisation, exploitation and "designer babies" that may arise if the requirement for a genetic link with an intended parent is removed. We think that these risks also arise when there is no requirement for records to be kept of who contributed gametes, and that the risks of commercialisation and exploitation arise when there is no requirement for records to be kept of the identity of a child's surrogate. Again, these risks are particularly high in international cases. Therefore, we think that it would be in the best interests of surrogate-born children for the identities of their genetic parents and surrogates to be entered on the national register of surrogacy agreements.

12.110 Despite the clear policy benefit of registration, we are hesitant to impose registration of genetic parents as an eligibility requirement for a parental order. As we note throughout this chapter, we think it is important for the parental order pathway to act as a safety net, to ensure that intended parents can become the legal parents of the child absent meeting the eligibility requirements of the new pathway. Requiring those who contributed gametes to be entered on the national register of surrogacy agreements (based on DNA or other medical evidence) might not be feasible in some surrogacy arrangements, particularly when they take place overseas in countries that allow for anonymous gamete donation. Any registration requirement may result in a significant number of cases falling outside both pathways to legal parenthood.

12.111 We seek consultees' views on this question.

12.112 Apart from identification of gamete donors on the national register of surrogacy agreements, the question arises whether, if a genetic link continues to be required between an intended parent and the child in some or in all surrogacies, that link should be required to be demonstrated with DNA or medical evidence. Outside entry on the register, there could be a standalone requirement that, for a parental order to be granted, DNA or other medical evidence that conclusively establishes the genetic connection must be provided to the court. Again, we seek consultees' views.

12.113 A birth record should be available for all children, regardless of where they were born, showing the identity of the woman who gave birth to them. Moreover, the surrogate as the birth mother must be named in the application for a parental order. We make a provisional proposal that it should be a requirement for a parental order that the surrogate is entered on the national register of surrogacy agreements.

12.114 We have framed our consultation questions in terms of requiring the entry of information on the national register of surrogacy agreements as applying to applications for a parental order. We think it is important that this requirement applies at the time of application, rather than at the time of the making of the order, so that the information is recorded in cases where a parental order is not made. A surrogate-born child who remains a legal child of the surrogate should also have their rights to know their origins protected.

Consultation Question 63.

12.115 We provisionally propose that in order to use the new pathway to parenthood, information identifying the child's genetic parents and the surrogate must be provided for entry on the national register of surrogacy agreements prior to registration of the child's birth.

Do consultees agree?

12.116 We invite consultees' views as to whether it should be a condition for an application for a parental order that:

(1) those who contributed gametes are entered on the national register of surrogacy agreements; and/or

(2) if it remains a requirement that one of the intended parents provided gametes in the conception of the child, that the genetic link is demonstrated to the court with medical or DNA evidence.

12.117 We provisionally propose that it should be a condition for the application of a parental order that the identity of the surrogate is entered on the national register of surrogacy agreements.

Do consultees agree?

AGE OF THE SURROGATE AND INTENDED PARENTS

Age requirements for intended parents

12.118 Currently, for legal parenthood under the parental order pathway, intended parents must be at least 18 years old at the time the parental order is made.[79] The HFEA 2008 does not prescribe any upper limit on the age of intended parents.

12.119 We think requiring intended parents to be at least 18 years old is sensible, in terms of promoting the welfare of surrogate-born children. Stakeholders have not expressed to us any concerns that the age requirement should be raised. In practice, it is likely to be rare that intended parents are as young as 18 years old. For example, generally opposite-sex couples will only come to surrogacy as the last step of a long fertility journey. We do not propose that any reform to the age limit is required for a parental order.

12.120 We think that the same minimum age should be required for intended parents using the new pathway to legal parenthood. The intended parents will be parents on the birth of the child and no parental order will need to be made, so the same point in time cannot be used as for the old pathway. Because the new pathway will require a surrogacy agreement to be entered into, we provisionally think that the intended parents should be required to have reached at least 18 years old at that time.[80]

12.121 Stakeholders expressed concerns to us that an upper age limit should be imposed over which intended parents could not be granted legal parenthood. Their concerns were motivated by worries that the welfare of children was not served by granting parental orders to old, even elderly, intended parents. These concerns were among the most significant that we heard from stakeholders about the current law, and have been heightened following the amendments allowing a single person to obtain a parental order.[81]

12.122 Although not all intended parents are older, the age limitations nature imposes in natural conception (at least in relation to maternal age) do not apply to surrogacy, so there is the potential for old individuals or couples to become parents using surrogacy. For example, CAFCASS's study of parental orders in 2013 to 2014 notes that the oldest intended parent was aged 66. CAFCASS calculated that 10.4% of intended parents were between 50 and 69 years old, whereas in the general population, only 1.4% of fathers and 0.3% of mothers are older than 45.[82]

12.123 CAFCASS and some High Court judges expressed significant reservations about parental orders being granted to old or elderly intended parents. Examples were given to us of cases in which the intended mother was older than 60 and the intended father older than 70, and another case in which the intended father was in his mid-70s. We are not aware of any case in which a parental order was refused based on the

---

79 HFEA 2008, ss 54(5) and 54A(4).

80 See paras 5.56 and subsequent.

81 HFEA 2008, s 54A.

82 The average age of intended parents was 42: CAFCASS, *Cafcass Study of Parental Order Applications made in 2013/14* (July 2015) accessible at: https://www.cafcass.gov.uk/about-cafcass/research-and-data/cafcass-research/ (last visited 31 May 2019) pp 7 to 8.

intended parents' age. However, because there is no age limit for intended parents within the law, we understand that some judges feel that they are not able to refuse to grant parental orders in such cases, despite feeling very uncomfortable. The age of intended parents may also be a significant ethical issue for surrogacy organisations.

12.124 Other jurisdictions do impose age limits on intended parents. For example, in Greece there is an age limit of 50 years old for the intended mother;[83] in Israel the intended mother cannot be older than 53 years old; and in India's draft bill (as passed by its Parliament's lower house on 19 December 2018), intended mothers cannot be older than 50 years old, and intended fathers not older than 55.[84] Among jurisdictions which permit single intended parents, Ireland's draft bill requires the intended parent to be no older than 47,[85] and Iceland's draft bill requires the intended parent to be no older than 45.[86]

12.125 We agree that the age of intended parents can affect the welfare of the child: we do not think it is in children's interests for their parents to die when they are young, particularly when they are still a minor.[87]

12.126 We see the obvious appeal of imposing a clear and definite age limit on intended parents. However, stakeholders have queried whether a strict statutory limit could be challenged on the basis of non-compliance with the Equality Act 2010. Although discrimination based on age can be justified under the Act to achieve a legitimate aim, and the welfare of children is doubtless a legitimate aim, a fixed upper age limit could be seen as a disproportionate means of achieving it.[88]

12.127 Ultimately, because we see this as a matter of the welfare of the individual surrogate-born child, our provisional view is that the age of the intended parents should be considered as a part of any welfare assessment, but that a statutory age limit should not be imposed. We think this approach is more direct and also more proportionate. As in the case of the parental order pathway it would not require the court to deny a parental order contrary to the child's welfare.

12.128 Therefore, we are not provisionally proposing to introduce a statutory age limit for the parental order pathway. Instead, we suggest that the age of the intended parents should continue to be a consideration in assessing the welfare of the child, which is already the paramount consideration of the court in granting a parental order.

12.129 Our initial thinking is that there should not be a statutory age limit for intended parents for the new pathway either. However, we think there is a stronger argument

---

83 Law 3305/2005, art 4, para 1.

84 The Surrogacy (Regulation) Bill 2018, s 4(c)(I).

85 Assisted Human Reproduction Bill 2017, head 39(3)(c).

86 Frumvarp til laga um staðgöngumæðrun í velgjörðarskyni, art 9.

87 In England and Wales, childhood is usually understood to end at 18 years old: see, for example, Children Act 1989, s 105(1). In Scotland, the term "child" is applied to different ages across legislation. The Children (Scotland) Act 1995, s 15(1) however refers to a person under 18. The distinction between pupils and minors has been abolished and replaced by a distinction, for the purposes of the legal capacity, between those under 16 and those over 16: see Age of Legal Capacity (Scotland) Act 1991.

88 See Equality Act 2010, s 13(2).

for exploring an age limit for the new pathway. As we have stated before, the new pathway provides greater certainty to all parties, but as part of that provides greater protections. As the parental order route would continue to be available for older intended parents, they would still be able to seek legal parenthood of their surrogate-born children, with judicial oversight of the child's welfare.

12.130 One way of imposing such a limit would be to use a combined age limit for couples, an approach used in the USA.

12.131 For example, research into IVF providers in the USA demonstrated that clinics may use a combined age ranging from 80 to 110.[89] If this approach was used, a separate age limit would have to be prescribed for single intended parents. We think there is a sound argument for saying it should be lower than half the combined age, to reflect the fact that the child would only have one parent.

12.132 If an age limit is not imposed in the new pathway for intended parents then, in order for their age to be taken into account in the welfare assessment before the child is conceived, the age of the intended parents would have to be added to the Code of Practice as a specific consideration (in contrast to the age of the surrogate, the Code of Practice does not currently refer to the age of intended parents).

Consultation Question 64.

12.133 We provisionally propose that there should be no maximum age limit for the grant of a parental order. The age of the intended parents should continue to be taken into account in the assessment of the welfare of the child in applications to grant a parental order.

Do consultees agree?

12.134 We invite consultees' views as to whether under the new pathway there should be a maximum age limit for intended parents, and if so, what it should be.

12.135 We provisionally propose that intended parents should be required to be at least 18 years old at the time that they enter into a surrogacy agreement under the new pathway.

Do consultees agree?

Age requirements for surrogates

12.136 Currently, the law theoretically allows a woman of any age to be a surrogate. However, we wonder if the law could usefully impose age requirements on surrogates in order to protect against the exploitation of women, in particular of young women and girls, and to protect the welfare (specifically the health) of surrogates.

---

89 R L Klitzman, "How old is too old? Challenges faced by clinicians concerning age cutoffs for patients undergoing in vitro fertilization" (2016) 106 *Fertility and Sterility* 216.

12.137 Many people might be concerned if a young woman, for example a teenager, acted as a surrogate, querying whether she was sufficiently mature to give free and informed consent. In addition to not being fully prepared for the psychological demands of being a surrogate, young women may be particularly vulnerable to exploitation and to pressure (such as from family members). Feminist academics have expressed concerns that young, single and ethnic minority women may be taken advantage of, particularly in the context of commercial surrogacy.[90]

12.138 The Brazier Report suggested that there should be a minimum age of 21 to be a surrogate, in response to an account to them of a minor being approached to be a surrogate.[91] Other jurisdictions impose minimum age requirements for surrogates, ranging from 19 to 25 years old.[92]

12.139 There is no evidence that very young women or girls are acting as surrogates.[93] In practice, a "soft" minimum age requirement might be required in clinical settings in the UK based on the Authority's Code of Practice: it requires that surrogates (as well as intended parents) fully understand all aspects of the surrogacy arrangement and are entering into it freely and voluntarily, and also that they receive counselling about the implications of the proposed surrogacy.[94] A hard line may also be imposed by some organisations: for example, Brilliant Beginnings requires surrogates to be over 21 years old in order to register with them.

12.140 We think that, in practice, counselling will go some way towards preventing vulnerable young women from acting as surrogates (and we explore whether there should be eligibility requirements in the new pathway in relation to implications counselling at paragraph 13.18 and subsequent below). Nevertheless, we think that imposing a strict age requirement has the benefit of clarity and simplicity. Such a reform would rationalise requirements across surrogates and intended parents, as

---

90 D Majury, "Pre-Conception Contracts: Giving the Mother an Option" in S Rosenfeld and P Findlay (eds), *Debating Canada's Future: Views from the Left* (1991); M L Shanley, "Surrogate Mothering and Women's Freedom: A Critique of Contracts for Human Reproduction" (1993) 18 *Signs* 618.

91 Surrogacy: Review for Health Ministers of Current Arrangements and Payments and Regulation (October 1998) Cm 4068 para 8.7.

92 Aged 19 or over: Israel (Carriage of Fetuses (Approval of Agreement and Status of the New Born) Law, 5756-1996); Aged 20 or over: Russia (Federal Law on the Basics of Protection of Citizens' Health 2011, s 55(10)); Aged 21 over: Canada (Assisted Reproduction Act 2004, s 6(3)) and Hong Kong (Council on Human Reproductive Technology, *The Code of Practice on Reproductive Technology and Embryo Research* (2013) para 12.4); Aged 25 or over: Greece (National Authority of Assisted Reproduction, *Code of Ethics of Medically Assisted Reproduction*, art 9, para 1), Ireland (draft bill) (Assisted Human Reproduction Bill 2017, head 38(1)(c)), and Iceland (draft Bill) (Frumvarp til laga um staðgöngumæðrun í velgjörðarskyni, art 8).

93 In its 2013/14 study of parental orders, CAFCASS found that the average age of surrogates was 35 years: CAFCASS, *Cafcass Study of Parental Order Applications made in 2013/14* (July 2015) accessible at: https://www.cafcass.gov.uk/about-cafcass/research-and-data/cafcass-research/ (last visited 31 May 2019) p 9. See also O van den Akker, "Genetic and gestational surrogate mothers' experience of surrogacy" (2003) 21 *Journal of Reproductive and Infant Psychology* 145, 156; K Busby and D Vun, "Revisiting *The Handmaid's Tale*: Feminist Theory Meets Empirical Research on Surrogate Mothers" (2010) 26 *Canadian Journal of Family Law* 13, 42.

94 The Code of Practice paras 14.7 and subsequent.

intended parents are currently required to be at least 18 years old in order to be granted a parental order.[95]

12.141 We think that surrogates should be required to be the same minimum age as intended parents, across both pathways. We have considered whether the age should be higher for surrogates – for example, 21 – as we do not expect that many women who are under 21 years old would want to, or should, act as surrogates. However, for consistency, we think that the minimum age for intended parents and surrogates should be the same. This is not to suggest that we expect, or endorse, women becoming surrogates at the age of 18.

12.142 In the new pathway, we suggest that the surrogate should be required to be at least 18 years old at the time the parties enter into the surrogacy agreement (and therefore, before conception). At paragraph 12.134 above, we made a similar provisional proposal with respect to the age of intended parents in the new pathway.

12.143 Under the parental order pathway, the parties might not enter into a formal surrogacy agreement. Therefore, another point in time during the surrogacy arrangement must be used. The current law requires the intended parents to be at least 18 years old at the time of the making of the parental order. It would be consistent to also require the surrogate to be at least 18 years old at the time the parental order is made. However, such a policy would enable the surrogate to be 17 years old at the time of conception (or even younger, depending on when the parental order is made). We think that law should protect girls under 18 by preventing them from acting as surrogates.[96] Therefore, we provisionally propose that for surrogacy arrangements in the old pathway, the surrogate should be required to be at least 18 years old at the time of conception.[97]

---

95 HFEA 2008, ss 54(5) and 54A(4).

96 We think an analogy can be drawn to the criminal law, which provides protection to children under 18 from sexual activity with adults, specifically protecting 16 and 17-year olds from sexual activity with a person aged 18 or older in a position of trust: Sexual Offences Act 2003, s 16. If it is a crime for an adult in a position of trust to engage in sexual activity with a child aged 16 or 17, an adult should not be able to inseminate or impregnate a child either. See also the Sexual Offences (Scotland) Act 2009, s 42 which provides that a person commits the offence of sexual abuse of trust if he or she is aged 18 years or older and intentionally engages in a sexual activity with, or directed at, a person who is under 18 and in respect of whom the perpetrator is in a position of trust.

97 We think that if the surrogate was under 18 years old at the time of conception, a parental order should not be available, in order to act as a strong disincentive to prevent intended parents from using a child as a surrogate. However, it might be possible for an adoption order to be made in the intended parents' favour if the welfare of the surrogate-born child required it.

Consultation Question 65.

12.144 We provisionally propose that surrogates should be required to be at least 18 years of age (at the time of conception), in order for the court to have the power to make a parental order.

Do consultees agree?

12.145 We provisionally propose that surrogates should be required to be at least 18 years old at the time of entering into the surrogacy agreement within the new pathway.

Do consultees agree?

12.146 Although the case for imposing a minimum age requirement on surrogates is convincing, we are less convinced about the need to impose an upper age limit on surrogates. The purpose of an upper age limit on surrogates would be to protect the health of older women who may be more likely to experience complications in pregnancy and childbirth. However, we are not sure that such a limit is required in order to protect a surrogate's health.

12.147 First, in traditional surrogacies, nature itself imposes a limit, based on the age each woman stops ovulating.

12.148 Secondly, in gestational surrogacies, clinical controls already exist based on the current regulatory framework. First, the clinic will assess whether the woman is sufficiently medically fit to be treated by the clinic. Secondly, the clinic will conduct an assessment of the welfare of the child in accordance with the Authority's Code of Practice, which requires the clinic to assess whether the woman is suitable to act as a surrogate, an assessment which includes a consideration of her age.[98]

12.149 Because this question is ultimately about the woman's medical fitness to be a surrogate, we think this issue should be assessed directly by medical professionals, rather than imposing any hard age limit within the law. Therefore, we are not asking a consultation question on imposing an upper limit on the age of surrogates, for either the new or old pathway.

[98] The Code of Practice para 8.11.

Chapter 13: Eligibility criteria for the new pathway

INTRODUCTION

13.1 In this chapter, we consider potential eligibility criteria that would apply exclusively to the new pathway to parenthood, which was a concept we discussed in the previous parenthood chapter.[1]

13.2 The new pathway provides greater certainty to all parties to a surrogacy arrangement. It takes into account the parties' shared intention that the intended parents should be the legal parents of the child born of the surrogacy arrangement. Because the intended parents will be the legal parents on birth, safeguards are necessary to protect the rights and welfare of surrogates and surrogate-born children. Intended parents who do not meet these stricter requirements will continue to be able to apply for a parental order.[2]

13.3 First, we consider whether the new pathway should require the parties to undertake certain screening requirements, that is, health screening, implications counselling, legal advice, criminal background checks, and home visits. We consider whether there should be a requirement for the surrogate to have previously given birth. Finally, we consider whether there should be a maximum number of surrogate pregnancies any woman can have.

13.4 We have borne in mind that although some of the eligibility requirements for the new pathway will not be legal requirements for a parental order, they nevertheless have the potential to improve the standards of all surrogacy arrangements, particularly those that involve licensed clinics in the UK. We consider best practice at the end of the chapter.

SCREENING REQUIREMENTS

13.5 A feature of jurisdictions around the world that impose restrictions on who can enter into surrogacy arrangements is the requirement that both surrogates and intended parents undergo some form of screening to ensure they are all suitable persons to embark on surrogacy and to ensure that everyone involved gives full and informed consent.

13.6 Stakeholders have identified that the following should be the aim of a reformed law of surrogacy in the UK.

> UK policy should focus on supporting ethical surrogacy practice so far as possible, by which we mean surrogacy arrangements in which all parties are fully informed and well-supported, and there is both a strong relationship and a commitment to what is best for the child throughout their life… . We should focus on how we can

---

1 See ch 8.

2 See para 11.4.

> facilitate parents and surrogates engaging in surrogacy on a fully informed and equal basis, without either side taking advantage of the other.[3]

13.7 We agree that surrogacy arrangements must involve the fully informed and voluntary consent of all parties. Below, we explore how screening requirements for the new pathway can facilitate surrogacy in its best form and, in particular, how it can protect against exploitation, harm and the surrogacy arrangement breaking down.

13.8 The most compelling case for screening requirements relates to eligibility requirements for women considering being surrogates. These requirements are intended to be protective, as:

> the very nature of surrogacy makes women potentially vulnerable to exploitation, and a woman may, for one reason or another, enter into a surrogacy arrangement in circumstances which are to her detriment.[4]

13.9 We do not propose that the new pathway should impose many eligibility requirements on intended parents. This decision flows from the discussion at the beginning of Chapter 11 above about whether surrogacy is more akin to adoption than to natural or assisted conception. For example, we do not think that there should be an assessment of the intended parents' fitness to parent. However, we do suggest that some screening of intended parents should be considered. In some cases, the screening requirement is to protect the welfare of the surrogate, or of surrogate-born children (which may include supporting a child in having a positive relationship with the surrogate). In other cases, eligibility criteria seek to prevent parties from entering into surrogacy arrangements that are more likely to break down.

Health screening

13.10 Clinics and many surrogacy agencies already conduct medical checks on surrogates, their partners, and intended parents.

13.11 The Code of Practice requires clinics to satisfy itself that potential surrogates are "suitable to act as a surrogate", which includes considerations of her "age, medical history, previous obstetric history, mental health, body mass index".[5] The Code of Practice also requires that intended parents who are providing gametes "must be screened in line with requirements for gamete donors", which includes screening for sexually transmitted infections and autosomal recessive genes.[6] The question is whether the screening that is currently done as a matter of practice should become a requirement for a surrogacy arrangement falling within the new pathway.

13.12 The purpose of requiring health screening prior to conception is clear. It will protect the surrogate, by ensuring that pregnancy and childbirth do not pose special risks to her health, including whether there is any increased risk if she conceives multiple

---

3 H Prosser and N Gamble, "Modern surrogacy practice and the need for reform" (2016) 4 *Journal of Medical Law and Ethics* 257, 274.

4 R Cabeza, V Flowers, E Pierrot, A Rao, B O'Leary and L Odze, *Surrogacy: Law, Practice and Policy in England and Wales* (1st ed 2018) p 180.

5 The Code of Practice para 8.11.

6 The Code of Practice pp 114 to 115, and 142.

babies where multiple embryos are transferred.[7] Arguably, regulation protecting the health of surrogates is required by the Convention on the Elimination of All Forms of Discrimination against Women.[8] Health screening will also protect surrogate-born children from sexually transmitted infections and serious medical conditions. In traditional surrogacies, medical checks of the male intended parent providing sperm will also protect the surrogate from sexually-transmitted infections.

13.13 Therefore, as a part of the new pathway, we have considered proposing that medical tests should be required:

(1) to assess the health of the surrogate to ensure that she is fit for pregnancy and childbirth, without specific risk of complications that might affect the health of both herself and/or the surrogate-born child;

(2) to protect the surrogate and the surrogate-born child from sexually transmitted infections; and

(3) to protect the surrogate-born child from severe medical risks, for example, the risk of transmission of autosomal recessive genes.

13.14 To do so, the surrogate, any partner she may have, and the intended parents providing gametes should be tested. These tests will already be conducted for surrogacies that take place within clinics.

13.15 We think it would be better for this testing to be required for all surrogacy arrangements falling within the new pathway. However, we are concerned that such testing cannot realistically take place in relation to independent, traditional surrogacies. For example, a requirement to test and quarantine the specific gametes to be used in the surrogacy for sexually transmitted infections would not work. That said, parties could themselves be tested for sexually transmitted infections prior to conception. Given our concerns, we invite consultees' views on whether these tests could feasibly be required in the case of informal surrogacy arrangements.

---

7 Parental order applications involve a large number of applications for twins, reflecting the use of multiple embryos in IVF: see CAFCASS, *Cafcass Study of Parental Order Applications made in 2013/14* (July 2015) accessible at: https://www.cafcass.gov.uk/about-cafcass/research-and-data/cafcass-research/ (last visited 31 May 2019) p 6.

8 United Nations, *Convention on the Elimination of All Forms of Discrimination against Women* (New York, 18 December 1979). See: B Stark, "Transnational Surrogacy and International Human Rights Law (2012) 18:2 *ILSA Journal of International and Comparative Law* 369, 379 to 380; C Vincent and A D Aftandilian, "Liberation or Exploitation: Commercial Surrogacy and the Indian Surrogate" (2013) 36 *Suffolk Transnational Law Review* 671, 673 to 674 and 680.

Consultation Question 66.

13.16 We provisionally propose that medical testing of the surrogate, any partner of the surrogate, and any intended parent providing gametes should be required for the new pathway.

Do consultees agree?

13.17 We invite consultees' views as to whether the types of testing set out in the Code of Practice are feasible for traditional surrogacy arrangements outside a licensed clinic, and if not, which types of testing should be required for such arrangements.

Implications counselling

13.18 The law requires that "appropriate information" is provided when a woman seeks treatment services (such as treatment with donated gametes, for example).[9] Usually this information is provided by "implications counselling". Implications counselling is counselling about entering into, and receiving treatment for, a surrogacy arrangement. It is not the same as counselling for therapeutic purposes, where the emphasis would be on providing therapeutic support to clients to deal with, for example, a history of loss and distress around infertility.[10] It is also not an assessment of fitness to parent.

13.19 Counselling on the implications of entering into a surrogacy arrangement is important because of the need for informed consent on the part of both the surrogate and intended parents, which can only be provided where the parties understand what is being consented to. It is important, for example, that all parties should understand the potential risks to physical and mental health, the potential emotional impact of the arrangement, the intention for the intended parents to parent the child, and the possibility of the arrangement breaking down. Counselling should also cover the welfare of the child to be born. Where donor gametes are used, surrogacy arrangements will also raise issues associated with donor conception, for example, how the child should be made aware of his or her genetic origins.[11]

13.20 Implications counselling can also support the development of a relationship between the surrogate and the intended parents, with a strong relationship appearing to be a good predictor of a successful surrogacy arrangement. As has been reported:

> The empirical evidence clearly establishes that formal and informal pre-conception relationships building between the potential surrogate mothers and commissioning parents are key to the success of the arrangements.[12]

---

9 HFEA 1990, s 13(6).

10 BICA, *Counselling and Surrogacy in Licensed Clinics in the UK* (2nd edition 2012) p 22.

11 The provision of implications counselling was one of the reasons that the HFEA 1990 was held to comply with EU law in the case of *U v W* [1996] Fam 29.

12 K Busby and D Vun, "Revisiting *The Handmaid's Tale*: Feminist Theory Meets Empirical Research on Surrogate Mothers" (2010) 26 *Canadian Journal of Family Law* 13, 87 to 88.

13.21 The guidance of the BICA states:

> Counselling time together and separately offers a space where… expectations can be explored, maybe differences resolved, where the parties can work separately and together to gain a deeper understanding of their own and each other's needs – and where firmer foundations may be laid for managing the ongoing relationship.[13]

13.22 Brilliant Beginnings provides counselling sessions to the intended parents and the surrogate for the purpose of both psychological screening and surrogacy preparation, and COTS ask a counsellor to produce a report on the surrogate. COTS also use a counsellor to facilitate the parties reaching an agreement on the surrogacy agreement. Surrogacy UK use membership advisers to provide at least some of the sort of information that is imparted via implications counselling. We note, however, the view expressed to us by BICA that the counselling and information provision work done by surrogacy organisations is not necessarily a replacement for implications counselling.[14]

Current regulation and guidance

13.23 The latest version of the Code of Practice includes an expanded section on counselling for surrogacy arrangements. It sets out the clinic's obligations towards those parties who have already matched in a surrogacy arrangement, and have come to a licensed clinic together for treatment. It provides guidance on what the requirement for appropriate information to be provided means in practice in the context of surrogacy arrangements.

13.24 The Code of Practice distinguishes the clinic's obligations to the surrogate (and her partner) and the intended parents.

13.25 The Code of Practice recommends for the surrogate (and her partner):

(1) at least one implications counselling session with the surrogate and her partner (if she has one); and

(2) if the surrogate's partner does attend this session, at least one additional implications counselling session should be made available for the surrogate alone.

13.26 The discussion of implications in these above meetings with the surrogate (and her spouse or partner) should address potential risks and implications of surrogacy, including, but not limited to:

(1) risks to the surrogate's physical and mental health;

(2) legal implications and practical and financial matters;

---

13 BICA, *Counselling and Surrogacy in Licensed Clinics in the UK* (2nd edition 2012) p 18.

14 See para 3.98.

(3) the risk of the intended parents not wanting to parent any child born and/or not wishing to make a parental order application after a child is born; and

(4) the potential emotional impact on the surrogate and the surrogate's partner and/or family.[15]

13.27 In relation to the intended parents, the Code of Practice recommends at least one implications counselling session, covering:

(1) risks to the surrogate's physical and mental health;

(2) legal implications and practical and financial matters;

(3) the risk of the intended parents not wanting to parent any child born and/or not wishing to make a parental order application after a child is born;

(4) the potential emotional impact on the surrogate and the surrogate's partner and/or family;

(5) the risk of the surrogate not agreeing to the legal transfer of parenthood to the intended parents after a child is born; and

(6) the risk of the surrogate deciding to parent the child herself after its birth.[16]

13.28 The Code of Practice also recommends that the clinic offers the intended parents and the surrogate a joint implications discussion, covering all of the issues listed above.[17]

13.29 The Human Fertilisation and Embryology Authority (the "Authority") has issued guidance about best practice in emotional support for fertility patients, and counselling forms an integral part of that, with one of the nine guiding principles for emotional support being that clinics "offer an outstanding fertility counselling service".[18]

13.30 BICA's guidance sets out the issues that may be covered in implications counselling:

(1) expenses;

(2) requirements for wills and insurances;

(3) legal responsibilities and procedures;

---

15 The Code of Practice para 14.8.

16 The Code of Practice para 14.9.

17 The Code of Practice para 14.10. The BICA guidance also recommends the format of offering a joint counselling session for the intended parents, together with separate sessions for the intended parents and for the surrogate (and her partner) (see BICA, *Counselling and Surrogacy in Licensed Clinics in the UK* (2nd edition 2012), pp 20, 29 to 32).

18 See the Authority "Patient Support Pathway – Good emotional support practice for fertility patients", available at https://portal.hfea.gov.uk/knowledge-base/other-guidance/emotional-support-for-patients-resources/patient-support-pathway/ (last visited 31 May 2019) and https://portal.hfea.gov.uk/knowledge-base/other-guidance/emotional-support-for-patients-resources/guiding-principles-for-emotional-support/ (last visited 31 May 2019).

(4) medical tests (screening and general medical appointments), and who attends such appointments;

(5) genetic testing to verify genetic relationships;

(6) embryo abnormalities and the possibility of terminations;

(7) multiple births;

(8) how to manage difficulties and/or the breakdown in relationships between parties concerned;

(9) ongoing contact after a birth;

(10) emotions on handing over/receiving the baby; and

(11) secrecy and honesty in dealing with family, medical and social networks.[19]

13.31 BICA also make the point that the counsellor should assess whether the intended parents and surrogate need therapeutic, as well as implications, counselling.[20]

Stakeholders' and comparative views

13.32 There was a broad consensus among stakeholders that there should be a requirement for counselling when entering into a surrogacy arrangement. BICA supported such a requirement provided that it was only implications counselling that was made mandatory (therapeutic counselling must be voluntary). One stakeholder thought that counselling was intrusive and that it was wrong to subject intended parents to such a requirement when parents through natural conception did not have to attend counselling. This stakeholder felt that the necessary information about the implications of a surrogacy arrangement could be provided outside the context of counselling.

13.33 We note that the Brazier Report recommended in 1998 that best practice should involve a requirement that a surrogate should have access to (voluntary) counselling.[21]

13.34 In Australia, the legislation in each jurisdiction stipulates requirements which must be met before the court can make a parentage order. In all jurisdictions which have legislation governing surrogacy, counselling is required in some form.[22] Similarly, in New Zealand, the Advisory Committee on Assisted Reproductive Technology's guidelines on surrogacy makes clear that, in considering an application for surrogacy

---

19 BICA, *Counselling and Surrogacy in Licensed Clinics in the UK* (2nd ed 2012) p 27.

20 BICA, *Counselling and Surrogacy in Licensed Clinics in the UK* (2nd ed 2012) pp 25 to 26.

21 Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (October 1998) Cm 4068 para 8.6.

22 Parentage Act 2004 (Australian Capital Territories) s 26(3)(e); Surrogacy Act 2010 (New South Wales) s 35; Surrogacy Act 2010 (Queensland) s 22(2)(e)(ii); Family Relationships Act 1975 (South Australia) s 10HA(2a)(g), (3); Surrogacy Act 2012 (Tasmania) s 16(2)(f); Assisted Reproductive Treatment Act 2008 (Victoria) s 40(1)(c); Status of Children Act 1974 (Victoria) s 23(2)(b); Surrogacy Act 2008 (Western Australia) s 21(2)(b).

involving an assisted conception, the Ethics Committee on Assisted Reproductive Technology must determine that each party has received counselling and take into account whether that counselling has included implications counselling for all parties.[23]

Reform

13.35 We are wary of imposing too many eligibility requirements on the new pathway as we are concerned not to discourage people from entering into that pathway. However, we think that, given the nature of a surrogacy arrangement, and, in particular, the attribution of legal parenthood at birth to the intended parents in the new pathway, implications counselling performs a very valuable role.[24] We are concerned to avoid surrogacy arrangements breaking down because those entering into them have not given full consideration to their legal, medical and emotional risks and consequences. We are therefore provisionally of the view that there should be a requirement for implications counselling in the new pathway.

13.36 Given that the parental order pathway needs to deal with those cases where arrangements may not have been made pre-conception, it would not be appropriate to make implications counselling a requirement of the parental order route. We hope, notwithstanding this point, that many intended parents and surrogates using this route will have elected to receive some form of counselling.

13.37 We have considered two ways in which a requirement for counselling might apply to the new pathway to legal parenthood. First, it might be a regulatory requirement that continues to appear in the Code of Practice, but with the remit of the Code of Practice expanded so that it applies to regulated surrogacy organisations as well as to Authority licensed clinics. Second, the requirement for counselling might be set out in legislation as one of the eligibility requirements for entry into the new pathway.

13.38 We take the view that a requirement for implications counselling is important enough that it should be set out in statute as one of the eligibility requirements for entry into the new pathway. This requirement should apply to the intended parents, the surrogate and to her spouse or partner. While the surrogate's spouse or partner does not have to be a party to the written surrogacy agreement required for the new pathway,[25] he or she will clearly be affected by the arrangement and so the counselling requirement should extend to him or her.

---

23 Advisory Committee on Assisted Reproductive Technology, *Guidelines on Surrogacy involving Assisted Reproductive Procedures* (December 2013) p 5. We note that the 2019 review of surrogacy in Western Australia endorsed the existing requirement of implications counselling in that jurisdiction, saying that it was "essential in supporting parties to the surrogacy arrangement and ensuring the paramountcy of the best interests of any child born as a result and should be maintained." See S Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008 (Report: Part 2)* (2019) p 82 and Recommendation 10.

24 Moreover, protection of the surrogate's mental health may be a requirement of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979). See C Vincent and A D Aftandilian, "Liberation or Exploitation: Commercial Surrogacy and the Indian Surrogate" (2013) 36 *Suffolk Transnational Law Review* 671, 680.

25 See para 8.9.

13.39 We want implications counselling to be of a good standard, delivered by those who are qualified to do so. We note that the Code of Practice requires counsellors to:

(1) have specialist competence in infertility counselling;

(2) hold a recognised counselling, clinical psychology, counselling psychology or psychotherapy qualification to the level of diploma of higher education or above; and

(3) be accredited under the scheme of the BICA (or an equivalent body), or show evidence of working towards such accreditation.[26]

13.40 The counsellor should be able to provide evidence of being an accredited member of, or working towards accredited membership of, a recognised professional counselling body.[27]

13.41 Recognised professional counselling bodies, which have a complaints and disciplinary procedure and a code of ethics, include bodies such as the British Association for Counselling and Psychotherapy, and the UK Council for Psychotherapy.[28]

13.42 We think that the statutory requirement for implications counselling for the new pathway should be that the counselling be provided by a counsellor who meets the requirements of the Code of Practice set out above. We note concerns that, in some areas of the country, there may not be many suitably qualified counsellors. For example, the BICA website lists only one member in Scotland.[29] However, it is possible for counselling to be provided remotely, for example by telephone or video calls,[30] and we are wary of diluting the professional requirements for counsellors who provide implications counselling, given its importance.

13.43 We believe that the precise content and number of sessions for implications counselling should be left to professional guidance and/or the Code of Practice, as relevant.

---

26 The Code of Practice para 2.14.

27 The Code of Practice paras 2.14 and 2.15. The Code of Practice recognises that a counsellor who is not an infertility specialist may be appointed, but requires that such a counsellor accredit under the scheme of BICA (or an equivalent body) within two years.

28 These bodies also require their members to be insured to practise. For more information see: https://www.bacp.co.uk/media/3103/bacp-ethical-framework-for-the-counselling-professions-2018.pdf (last visited 31 May 2019) and https://www.psychotherapy.org.uk/wp-content/uploads/2017/11/UKCP-Ethical-Principles-and-Code-of-Professional-Conduct.pdf (last visited 31 May 2019).

29 See https://www.bica.net/find-a-counsellor (last visited 31 May 2019).

30 The Code of Practice recognises this possibility: see The Code of Practice para 3.11.

Consultation Question 67.

13.44 We provisionally propose that, as a condition of being eligible for entry into the new pathway:

(1) the surrogate, her spouse, civil partner or partner (if any) and the intended parents intending to enter into a surrogacy arrangement in the new pathway should be required to attend counselling with regard to the implications of entering into that arrangement; and

(2) the implications counselling should be provided by a counsellor who meets the requirements set out in the Code of Practice at paragraphs 2.14 to 2.15.

Do consultees agree?

Psychological or mental health assessment beyond implications counselling

13.45 We have considered whether we need to go further than a requirement for implications counselling with regard to evaluating the psychological fitness of intended parents and surrogates to enter into a surrogacy arrangement in the new pathway. We are aware that Brilliant Beginnings have introduced psychological screening for surrogates that goes beyond implications counselling, and that it is also a common practice for US surrogacy agencies to require such screening (for both surrogates and intended parents) even in states where it is not required by law.

13.46 In the USA, several jurisdictions require a mental health evaluation of the intended parents and surrogates, including New Hampshire,[31] the District of Columbia,[32] and Virginia.[33] A mental health evaluation of the surrogate and intended parents also features in the American Bar Association's Model Act Governing Assisted Reproductive Technology.[34] Such an evaluation is not expressly required by legislation in South Africa. However, the law requires "in all respects a suitable person to act as surrogate mother."[35] In the case of *Ex parte WH and others*,[36] the court interpreted this requirement to mean that a proper psycho-social report relating to the surrogate be attached to the surrogacy agreement's pre-authorisation application.

13.47 We are not minded to require a psychological evaluation of either the surrogate or the intended parents. We take the view that this would be too invasive and too significant a departure from what is currently required by the Authority in terms of implications

---

31 New Hampshire Revised Statutes, ss 168-B:8 and B:9.

32 Code of the District of Columbia, s 16-405.

33 Code of Virginia, s 20.160.

34 ABA Model Act Governing Assisted Reproductive Technology, Alternative B, s 702. Assisted reproductive technology is an umbrella term used to describe the range of medical procedures used to address infertility, such as IVF.

35 Children Act No 38 of 2005 (South Africa), s 295(c)(ii).

36 2011 (6) SA 514 (GNP).

counselling. We note the conclusion of the 2019 Western Australian review of surrogacy, which recommended the removal of the current requirement in the law of that state for a pre-surrogacy psychological assessment of the parties to a surrogacy arrangement. The review stated that the assessment did not:

> provide additional safeguards for, or serve the best interests of, children. The layers of requirements were found to discourage local surrogacy and have led people to seek surrogacy interstate or overseas.[37]

13.48 We are confident that properly delivered implications counselling will ensure that parties to a surrogacy arrangement are aware of its risks and consequences. We are also mindful that if unnecessary requirements are imposed to access the new pathway, then people may choose not to use it. The absence of a legal requirement would not, of course, prevent surrogacy organisations from making their arrangements for such evaluations or assessments should they wish to do so.

Independent legal advice

13.49 In the new pathway, the intended parents will, provided that the eligibility requirements have been met, be the legal parents of the surrogate-born child from birth by operation of the law, rather than the surrogate being the legal mother.[38] Entering into a surrogacy arrangement in the new pathway therefore has a very significant legal effect.

13.50 As we provisionally proposed in the chapter on regulation of surrogacy, we suggest that there should be no prohibition against charging for negotiating, facilitating and advising on surrogacy arrangements.[39] This will enable legal advice to be provided on the surrogacy agreement.

13.51 The new prominence of the surrogacy agreement and, more generally, the administrative rather than judicial framework of the new pathway both point to the need for legal advice to be given before the parties enter into the agreement. While the surrogacy agreement is not (and we would not wish it to be) a contract in the same way that it is in some states of the USA,[40] this comment regarding surrogacy in the USA holds true for arrangements in the new pathway (substituting “agreements” for “contracts”): “given the role of contracts in structuring surrogacy transactions, the lawyers' role is a critical one...”.[41]

13.52 Independent legal advice, along with the other safeguards that we identify in this chapter, will help to ensure that all parties are protected and reduce any risk of exploitation.

---

37 S Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008 (Report: Part 2)* (2019) p 82 and Recommendation 9.

38 Unless she exercises her right to object (see paras 8.23 and subsequent).

39 See paras 9.130 and subsequent.

40 As in, for example, California. See California Code, Family Code – Fam s 7962.

41 J Carbone and C O Miller, “Surrogacy Professionalism” (2018) 31 *Journal of the American Academy of Matrimonial Lawyers* 1, 53.

13.53 Most importantly, because the surrogacy agreement required by the new pathway is one of the steps towards the attribution of legal parenthood to the intended parents, we think that the law should go further. We are provisionally of the view that the law should require that the intended parents and the surrogate receive independent advice on the legal implications of the agreement. They may also wish to receive legal advice about the drafting of the agreement and for their lawyer to suggest any changes to that drafting, bearing in mind that party's particular needs and interests.

13.54 Additionally, in Chapter 15 we have provisionally proposed that the financial terms of a surrogacy agreement should be enforceable by the surrogate. While not as significant a factor as the effect on parenthood, we suggest that the enforceability of financial obligations is another reason why intended parents and surrogates should have to receive independent legal advice as a condition of entering into an arrangement in the new pathway.

13.55 We note that there are other occasions when the law requires independent legal advice be obtained as a safeguard when parties enter into agreements with financial consequences. For example, the project by the Law Commission for England and Wales on matrimonial property, needs and agreements proposed the creation of a binding nuptial agreement, regulating the distribution of the parties' assets on divorce, which would remove the court's jurisdiction.[42] In the Report, we recommended that independent legal advice, provided to the parties at the time at which the agreement was entered into, should be one of the pre-requisites for a nuptial agreement to be binding.[43]

13.56 While implications counselling can draw the attention of the parties to a surrogacy arrangement to the legal implications of the arrangement, counsellors cannot provide legal advice. Counsellors are also unlikely to have the same level of expertise as lawyers in drafting and negotiating agreements. Implications counselling is therefore no substitute for independent legal advice.

13.57 We note that there appears to be a growing trend for fertility clinics to make it a requirement of treatment that the intended parents and surrogate seek legal advice. This approach tallies with the Authority's latest version of its Code of Practice, which states that:

> The centre should satisfy itself that those involved in surrogacy arrangements have received enough information and understand the legal implications of these arrangements well enough to be able to give informed consent to treatment.[44]

13.58 We are mindful that imposing a requirement that all parties obtain independent legal advice does impose an additional financial burden, a point also raised by CAFCASS.

13.59 NGA Law, however, made the point that, in reality, a requirement for a meeting to provide legal advice and perhaps advise on the drafting of the surrogacy agreement,

---

42 Unless the agreement did not provide for the parties' financial needs.

43 Matrimonial Property, Needs and Agreements (2014) Law Com No 343.

44 The Code of Practice para 14.6 sets out the issues on which the clinic should advise those intending to enter into an international surrogacy arrangement to seek advice.

is likely to be far cheaper than providing legal advice on and preparing an application for a parental order. In our view, a requirement for each party to take independent legal advice, even if that imposes a cost of, say, £500 to £1,000 on the intended parents (assuming that it would be commonplace for intended parents to pay for the surrogate's separate advice), is reasonable in the context of arrangements where expenses currently being paid to a surrogate often amount to more than £10,000.

13.60 We note that the Brazier Report[45] recommended that a surrogacy code of practice be introduced, containing a requirement that a surrogate should have *access to* independent legal advice.[46]

13.61 A requirement for legal advice is found in numerous jurisdictions, including both American and Australian jurisdictions,[47] Ontario (Canada),[48] Israel,[49] New Zealand[50] and Hong Kong.[51] It is included in the Irish draft bill on surrogacy.[52]

Reform

13.62 We believe that all parties to a surrogacy agreement in the new pathway should be required to take independent legal advice on the effect of entering into the agreement. By "all parties" we mean the surrogate and the intended parents, but not the surrogate's spouse, civil partner or partner. We have suggested above that the surrogate's spouse, civil partner or partner should be required to have implications counselling.[53] We believe that to be practically necessary.

13.63 In contrast, however, we do not think it is necessary for the spouse, civil partner or partner of the surrogate to receive legal advice. Our view in this respect is based on the provisional proposal we make in Chapter 8 that, where the surrogate has exercised her right to object, the surrogate's spouse or civil partner should not be a legal parent of the child. And, consistently, the surrogate's spouse or civil partner would not be a party to the surrogacy agreement. If our provisional proposal in that respect is not supported by consultees, then the surrogate's spouse or civil partner

---

45 For further discussion of the Brazier Report, see ch 1.

46 Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (October 1998) Cm 4068, para 8.6

47 For example, Nevada (NRS, s 126.740), Illinois (Gestational Surrogacy Act, s 20), New Hampshire (New Hampshire Revised Statutes, s 168-B:11), California, (California Code, Family Code – Fam s 7962), New South Wales (Surrogacy Act 2010 (New South Wales), s 36), Queensland (Surrogacy Act 2010 (Queensland), s 22(2)(e)(i)), South Australia (Family Relationships Act 1975 (South Australia), s 10HA(6)), Tasmania (Surrogacy Act 2012 (Tasmania), s 16(2)(a)(i)), Victoria (Assisted Reproductive Treatment Act 2008 (Victoria), s 40(1)(c)) and Western Australia (Surrogacy Act 2008 (Western Australia), s 21(2)(c)).

48 Children's Law Reform Act 1990 (Ontario), s 10(2)(2).

49 Discussed in R Schuz, "Surrogacy in Israel" in C Fenton-Glynn, J M Scherpe and T Kaan (eds), *Eastern and Western Perspectives on Surrogacy* (2019).

50 Advisory Committee on Assisted Reproductive Technology, *Guidelines on Surrogacy involving Assisted Reproductive Procedure* (16 December 2013) para 2.

51 Council on Human Reproductive Technology, *Code of Practice on Reproductive Technology and Embryo Research* (January 2013) para 12.7(b).

52 Assisted Human Reproduction Bill (Ireland), head 43.

53 See para 13.38.

would need to be a party to the surrogacy agreement. Whether there should be a requirement for the spouse or civil partner to obtain legal advice would then need to be reconsidered.

13.64 The surrogate and the intended parents should each be separately advised by their own lawyer. Both lawyers should be members of a regulated professional body and have professional indemnity insurance in place. We do not believe that it is necessary to stipulate that the advice to either party be provided by a lawyer with particular qualifications or accreditation, albeit that we would expect only lawyers with suitable knowledge and experience to provide that advice. We trust that the requirements of lawyers' governing and regulatory bodies, and their insurers, and lawyers' obligations to satisfy those bodies of their competence, that those who are not qualified to provide advice of this kind will not do so (or, if they do, that they will potentially face disciplinary action or a claim in professional negligence).

Consultation Question 68.

13.65 We provisionally propose that, for the new pathway, there should be a requirement that the surrogate and the intended parents should take independent legal advice on the effect of the law and of entering into the agreement before the agreement is signed.

Do consultees agree?

Criminal record checks

13.66 Stakeholders have also urged us to consider whether the new pathway should require all parties to the surrogacy arrangement to pass a criminal record check. The purpose of this requirement is largely to protect surrogate-born children, for example, to prevent persons convicted of child sex abuse from becoming parents through surrogacy.[54]

13.67 Criminal background checks of intended parents and surrogates already form part of the processes of Surrogacy UK,[55] Brilliant Beginnings, COTS and the British Surrogacy Centre. Furthermore, all parties to a surrogacy arrangement are asked to declare criminal convictions by licensed clinics in the UK. As a part of the welfare assessment process, the Code of Practice guides clinics to "consider factors that are likely to cause a risk of significant harm or neglect to any child who may be born or to any existing child of the family". These factors include "previous convictions relating to harming children". These questions are asked of the surrogate and her partner (if any) to take into account the possibility of the surrogacy arrangement breaking down and

[54] Although very rare, such cases have occurred. For example, in her recent review of the Western Australian surrogacy legislation, Sonia Allan outlines cases involving Australians who used surrogacy to gain access to children to abuse or exploit: S Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008 (Report: Part 2)* (2019) p 91.

[55] Checks are also undertaken on surrogates' partners and anyone else who will have legal parental responsibility.

the surrogate choosing to parent the child, and whether this is likely to cause a risk of significant harm or neglect to the child.[56]

13.68 Similarly, in the parental order pathway, the parental order reporter will, with the parties' consent, make checks of the intended parents with the local authority and police, to see if any information is held which suggests a risk to the safety of the child.[57]

13.69 A criminal background check on intended parents could be seen as straying into an assessment of intended parents' fitness to parent. However, the basis for requiring criminal record checks on surrogates (and their partners) is the same as for the intended parents: to ensure that there are no risks to the child of harm or neglect if the child remains in her care after birth. It therefore seems justifiable in this situation; certainly, it does not seem justifiable to conduct a criminal record check of surrogates, but not of intended parents.

13.70 We do not suggest that it would be appropriate to prevent a person from entering into a surrogacy arrangement on the basis of a previous conviction or caution for *any* offence. We agree with the argument that, "excluding everyone with a criminal conviction of any kind would not be morally justifiable".[58] The assessment must focus on criminal offences for behaviour that amounts to risk of harm to a child.[59]

13.71 The checks conducted as part of the adoption process provide a good model. In adoption, the adoption agency must obtain an enhanced criminal record certificate[60] for any prospective adopter or any member of his or her household aged over 18. The adoption agency must determine that a person is not suitable to adopt if he or she has been convicted of, or received a police caution for, any offence against a child (including child pornography offences) and sexual offences, as set out on the prescribed list. Moreover, the adoption agency will consider any other offences the

---

56 The Code of Practice paras 8.9 to 8.11.

57 CAFCASS, *Surrogacy*: https://www.cafcass.gov.uk/grown-ups/parents-and-carers/surrogacy/ (last visited 31 May 2019); see also *CAFCASS, Cafcass police checks handbook*: https://www.cafcass.gov.uk/wp-content/uploads/2017/12/police_checks_handbook.pdf (last visited 31 May 2019).

58 R Walker and L van Zyl, *Towards a Professional Model of Surrogate Motherhood* (2017) p 137.

59 We discuss below that there may be other criminal convictions which could be relevant to the intended parents' and surrogate's trust in one another to abide by the surrogacy agreement (for example, a prior conviction for fraud), but we are not convinced that they should be legal barriers to parenthood through the new pathway: see paras 13.78 and subsequent.

60 Under the Police Act 1997, s 113B, which applies to England and Wales and Scotland. The check is conducted through the Disclosure and Barring Service or Disclosure Scotland respectively. An enhanced certificate can only be obtained for certain prescribed purposes, including for assessing whether a person is suitable for employment working with children. The certificate will include both spent and unspent convictions that are not subject to filtering, and information held on local police records. An application for an enhanced certificate must be signed by a registered person. See Criminal Records Disclosure: Non-Filterable Offences (2017) Law Com No 371, ch 2. Enhanced checks cost £44 and take approximately 28 days, but can take longer: Unlock, TheInformationHub, "Enhanced disclosure": http://hub.unlock.org.uk/knowledgebase/enhanced-certificate/ (last visited 31 May 2019).

person has committed, that do not appear on the prescribed list, in assessing whether the person is suitable to adopt a child.[61]

13.72 Our provisional view is that it should be a mandatory part of the screening process for the new pathway that an enhanced criminal record certificate is obtained for all parties to a surrogacy arrangement, and the spouse, civil partner or partner of the surrogate (who would not be a party to the arrangement). The certificate should be reviewed by the licensed clinic, regulated surrogacy organisation, or independent professional such as a lawyer, whoever is involved in overseeing the arrangement. We provisionally propose that they should not enable a surrogacy arrangement to be entered into where any person who is screened has been convicted of, or received a police caution for, one of the offences on the prescribed list and, in addition, consider any other offences not on that list, in order to assess the suitability of the parties, so that anyone who might present a risk of harm to a child can also be excluded. The adoption process provides a good model, and we suggest the same process and eligibility criteria in relation to offences against children or sexual offences should apply.

Consultation Question 69.

13.73 We provisionally propose that, as an eligibility requirement of the new pathway:

(1) an enhanced criminal record certificate should be obtained for intended parents, surrogates and any spouses, civil partners or partners of surrogates;

(2) the body overseeing the surrogate arrangement should not enable a surrogate arrangement to be proceed under the new pathway where a person screened is unsuitable for having being convicted of, or received a police caution for, any offence appearing on a prescribed list of offences; and

(3) the body overseeing the surrogacy arrangement may also determine that a person is unsuitable based on the information provided in the enhanced record certificate.

Do consultees agree?

13.74 We invite consultees' views as to whether the list of offences that applies in the case of adoption is appropriate in the case of surrogacy arrangements in the new pathway.

13.75 Our provisional proposal for an enhanced criminal record certificate is focused on safeguarding the welfare of surrogate-born children. We have not provisionally

[61] Adoption Agencies Regulations 2005 (SI 2005 No 389), regs 25 and 27; Adoption Agencies (Wales) Regulations 2005 (SI 2005 No 1313), regs 23 and 26(4)(e). The position is slightly different in Scotland, see: Adoption Agencies (Scotland) Regulations 2009 (SSI 2009 No 154), reg 7 and sch 1 part 1. We have set out the full list of prescribed offences for England and Wales in Appendix 2, and the full list of prescribed offences for Scotland in Appendix 3.

proposed criminal record checks for the purpose of protecting the parties to the surrogacy agreement.

13.76 However, the criminal record check we provisionally propose could also be seen as protective of other parties to the surrogacy agreement, in terms of their interest in the welfare of the child. Often, people deciding to conceive a child together naturally or through artificial insemination will be in an intimate relationship, and so will be in a good position to know the other person's character and whether they may pose a threat to a child. Parties in a surrogacy arrangement will not have that same relationship. They are nevertheless all interested in the welfare of the child. The interest of intended parents is obvious. Moreover, even though a surrogate does not intend to become a parent to the child, she certainly cannot be said to have no interest in the child's welfare. It could cause a great deal of grief, and indeed regret, for a surrogate to find out that she left a baby to the care of someone convicted of child sex abuse. Therefore, a check of a person's convictions for offences indicating a risk of harm to children could offer comfort to all parties to the surrogacy arrangement.

13.77 We have considered whether a criminal record check should also operate to protect parties to the agreement directly, in terms of their relationship with each other, as an eligibility requirement.

13.78 For example, to protect against agreements breaking down, other offences could be identified that, if they were disclosed within the enhanced criminal record certificate, would bar parties from being eligible for a surrogacy arrangement under the new pathway. Offences of dishonesty seems one obvious example. However, we have not pursued this option. First, we think it would be difficult to assess every offence which would amount to prior behaviour that the other parties should be protected against. Moreover, we think doing so would create a risk that parties could be unfairly prevented from becoming parents under the new pathway.

13.79 Alternatively, the enhanced criminal record certificate obtained for each party could be disclosed to the other party to a surrogacy arrangement, in order for the other party to consider for themselves any convictions or cautions, including offences that were not committed against children or sexual offences, that would prevent them from wanting to proceed with the arrangement.

13.80 This approach holds some attraction. It seems sensible that parties considering surrogacy might want further information about the other parties before agreeing to go forward. It is, after all, an extraordinary relationship, which requires trust. It also seems sensible that it should be left for each party considering the arrangement to decide for themselves their own requirements about whom they are willing to enter into a surrogacy arrangement with.

13.81 However, we think that there are privacy concerns in *requiring*, as a matter of eligibility for the new pathway, that an enhanced criminal record certificate be shared with the other party to a prospective surrogacy arrangement.[62] The other party might not want

[62] The licensed clinic, regulated surrogacy organisation, or solicitor obtaining the enhanced criminal record certificate under our proposal would be required to comply with the General Data Protection Regulation (2016/679/EU), including its requirements to use security measures in storing personal data. However, individuals party to a surrogacy agreement will generally not have to, qualifying as a "natural person in the

or need to see the certificate in order to decide to proceed. Instead, it seems that it should be left as a matter for the parties to decide by consent.

13.82 Parties should be entitled to ask for further evidence from the other party about their character and background as they wish. Therefore, although we do not think the law should be reformed to require, or even facilitate, disclosure of the enhanced criminal record certificate, we also do not think the law should be reformed to prevent the surrogate or intended parents from asking the other party to share it.[63] Of course, the party receiving the request could refuse to share it; the other party would then determine whether he or she wanted to continue with the agreement in light of that refusal.

13.83 Ultimately, whether individuals considering surrogacy want to seek further information about other potential parties is, we think, a matter for them. Accordingly, we do not make any provisional proposal on this issue.

Home visit

13.84 Another potential screening requirement is a home visit, to the home of either the intended parents or surrogate, or both. For example, a home visit is required in Virginia (in the USA).[64]

13.85 There are two purposes of a home visit. One is to assess whether the intended parents and surrogates are fit to be parents.[65] Indeed, a home visit to the intended parents is nearly always a part of the requirements for a parental order, conducted by the parental order reporter[66] as a part of his or her assessment of whether the criteria for a parental order and the welfare checklist are met.[67] Another purpose of home visits to surrogates, as evidenced by the home visits that Brilliant Beginnings undertakes, is to assess the surrogate's home circumstances and support.

13.86 As we explained above, we are cautious of introducing requirements that seek to assess the fitness of intended parents. We do not think that a home visit to the intended parents prior to conception of the child, let alone the birth, could be useful, nor do we think it would fit within the scheme we have envisioned. We therefore do not think it should be an eligibility requirement for the new pathway.

---

course of a purely personal or household activity" and not as a person "offering goods and services": see General Data Protection Regulation (2016/679/EU), arts 2 and 3.

63 Certificates will usually be sent to the individual concerned. For a helpful summary of the process of applying for and receiving an enhanced criminal record certificate, see Unlock, TheInformationHub, "Enhanced disclosure": http://hub.unlock.org.uk/knowledgebase/enhanced-certificate/ (last visited 31 May 2019). For the law of criminal records disclosure in England and Wales, see Criminal Records Disclosure: Non-Filterable Offences (2017) Law Com No 371, ch 2.

64 Code of Virginia, s 20.160.

65 See Code of Virginia, s 20.160.

66 In Scotland, this role is undertaken by a curator *ad litem*/reporting officer. See ch 6 on court procedure, at paras 6.80 and subsequent.

67 In its study of parental orders in 2013/14, in all but one case the parental order reporter met and interviewed the intended parents at least once: CAFCASS, *Cafcass Study of Parental Order Applications made in 2013/14* (July 2015) p 12.

13.87 Moreover, although a home visit to the surrogate to ensure that she has a supportive home environment is good practice, we do not think it needs to be introduced as an eligibility requirement. It may be difficult to delineate how such a requirement would be satisfied: there are diverse types of supportive home environments, making it difficult to identify and prescribe what the person conducting the home visit must find. We are therefore not asking a consultation question about the introduction of a requirement for a home visit of the surrogate.

FAMILY CIRCUMSTANCES OF THE SURROGATE

13.88 Some jurisdictions and agencies impose further requirements on surrogates, for example, that they have previously had at least one child before. For example, Western Australia,[68] Tasmania[69] and Victoria[70] in Australia, Greece,[71] Israel,[72] South Africa,[73] Taiwan (proposed amendments),[74] India (draft bill)[75] and Thailand[76] all require a surrogate to have had a child before, and New Zealand requires consideration (although it is not a prerequisite) of whether a surrogate has completed her own family. In terms of surrogacy organisations, Brilliant Beginnings requires potential surrogates registering with them to have at least one child. The Brazier Report also recommended that surrogates should have given birth and be living with at least one child of her own.[77]

13.89 The rationale for this requirement is to be "'protective' of a woman considering acting as a surrogate".[78] One argument is that a surrogate might be less able to give informed consent about the decision to enter a surrogacy arrangement and ultimately give up the baby she gives birth to, without having been pregnant and having given birth before. It has been said that "a strong element of the feminist argument against surrogacy is that women cannot give an informed consent until they have the experience of giving birth".[79] It might be argued that a woman's consent is not invalid if

---

68 Surrogacy Act 2008 (Western Australia), s 17(a)(ii).

69 Surrogacy Act 2012 (Tasmania), s 16(2)(d).

70 Reproductive Treatment Act 2008 (Victoria), s 40(1)(b).

71 Code of Ethics of Medically Assisted Reproduction, art 9, para 1.

72 Agreements Law for the Carriage of Fetuses, 5778-2018, amendment number 2.

73 Children Act No 38 of 2005 (South Africa), s 295(c)(vi) and (vii).

74 For details of the amendments to the Taiwanese legislation see: http://www.cedaw.org.tw/en/en-global/news/detail/35 (last visited 31 May 2019).

75 The Surrogacy (Regulation) Bill 2016, s 4(iii)(b)(I).

76 Protection of Children Born through Assisted Reproductive Technologies Act, B. E. 2558, section 21. For discussion of Thailand's law see J M Caamano, "International, Commercial, Gestational Surrogacy Through the Eyes of Children Born to Surrogates in Thailand: A Cry for Legal Attention" (2016) 96 *Boston University Law Review* 571.

77 Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (October 1998) Cm 4068, para 8.8.

78 S Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008 (Report: Part 2)* (2019) p 117.

79 L B Andrews, "Surrogate Motherhood: The Challenge for Feminists" (1988) 16 *Law, Medicine and Healthcare* 72, 75; K B Lieber, "Selling the Womb: Can the Feminist Critique of Surrogacy be Answered?" (1992) 68 *Indiana Law Journal* 205, 228 to 229.

she has not previously given birth, but that her consent is more informed if she has, because "presumably, a woman who has already experienced giving birth will understand what hormonal and emotional changes she is likely to experience".[80]

13.90 There are also suggestions that requiring the surrogate to have already had her own child will protect her from the risk that, through the surrogacy, she will suffer complications that will prevent her from becoming pregnant and giving birth to her own children.[81]

13.91 Against these arguments, others contend that consent does not require a person to have experienced the event before. If that were the case, a person could never consent to most operations; instead, the doctrine of informed consent expects that "people will be able to predict in advance of the experience whether a particular course will be beneficial to them".[82]

13.92 Moreover, it is argued that a previous experience of being a pregnant, expectant mother is not comparable to the experience of being a surrogate:

> While a woman who had previously borne a child has some understanding of the growing attachment that can occur during pregnancy when there is an intention to keep the child, she arguably would not have an understanding of the attachment that might occur despite her intention to relinquish the child at birth. Indeed, even a woman who had already been pregnant with the intention of surrendering the child at birth may not know how much she would bond with this child during pregnancy because each pregnancy is different.[83]

13.93 Each woman is different, and in some circumstances, some women may be able to recognise that they will manage the experience of surrogacy well without having been pregnant before. This was noted in the recent review of the law in Western Australia, which recommended that, given that women in Western Australia who have not given birth before can only act as a surrogate in "exceptional circumstances",[84] the individual circumstances of the particular woman must be able to be considered during the screening stage.[85]

13.94 We understand that, in practice, most surrogates have already given birth to children of their own. It makes sense that many women would wish to have their own children before entering into a surrogacy arrangement; we agree that prior experience of pregnancy and childbirth will in most cases help women assess whether they are

---

80 K B Lieber, "Selling the Womb: Can the Feminist Critique of Surrogacy be Answered?" (1992) 68 *Indiana Law Journal* 205, 229.

81 See *Report of the Ad Hoc Committee on Report of SA Law Commission on Surrogate Motherhood* (1999) p 5.

82 L B Andrews, "Surrogate Motherhood: The Challenge for Feminists" (1988) 16 *Law, Medicine and Healthcare* 72, 75.

83 Strasser, "Parental Rights Terminations: On Surrogate Reasons and Surrogacy Policies" (1992) 60 *Tennessee Law Review* 135, 144 to 145.

84 Surrogacy Act 2008 (Western Australia), s 17(a)(ii).

85 S Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008 (Report: Part 2)* (January 2019) pp 117 to 119.

good candidates to act as a surrogate. However, we are not persuaded that prior experience of giving birth to a child should be required before a woman can act as a surrogate. Aside from anything else, it would exclude women who do not want to be mothers from being surrogates, which we think is unnecessary. Therefore, we ask for consultees' views about whether there should be a prior birth requirement for surrogates to be eligible for the new pathway.

Consultation Question 70.

13.95 We invite consultees' views as to whether there should be a requirement that the surrogate has previously given birth as an eligibility requirement of the new pathway.

MAXIMUM NUMBER OF SURROGATE BIRTHS

13.96 Some jurisdictions have legal limits on the number of surrogate pregnancies that a woman can agree to undertake. In Israel and India, women are limited to one surrogate pregnancy; the draft bill in Ireland limits women to two surrogate pregnancies; and in Taiwan, proposed amendments to the Law of Assisted Reproduction state that women may only undertake three surrogate pregnancies.[86]

13.97 The purpose of a limit is twofold.

(1) First, it seeks to protect the health of women, including:

(a) their physical health, on the basis that every pregnancy is risky, and women should not put themselves at unnecessary medical risk through multiple surrogate pregnancies; and

(b) their psychological health, on the basis that it is psychologically difficult for a woman to hand over a baby she has gestated and given birth to.

(2) Secondly, it seeks to prevent the unethical commodification of women's bodies, and prevent surrogacy from developing as a profession.[87]

13.98 It is not uncommon for women to agree to undertake more than one surrogacy arrangement.[88] Our provisional view is that there should not be a limit as an eligibility

---

86 Israel: Carriage of Fetuses (Approval of Agreement and Status of the New Born Law, 5756-1996), India: (draft bill) The Surrogacy (Regulation) Bill 2018, s (4)(iii)(b)(IV), Ireland (draft bill): Assisted Human Reproduction Bill 2017, head 38(2). For details of the amendments to the Taiwanese legislation see: http://www.cedaw.org.tw/en/en-global/news/detail/35 (last visited 31 May 2019).

87 An argument used in the Brazier Report: Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (October 1998) Cm 4068, para 8.8.

88 CAFCASS found that, of 59 parental order cases where there was sufficient evidence, in 33 cases the evidence suggested that the surrogate had previously entered into another surrogacy arrangement: CAFCASS, *Cafcass Study of Parental Order Applications made in 2013/14* (July 2015) accessible at: https://www.cafcass.gov.uk/about-cafcass/research-and-data/cafcass-research/ (last visited 31 May 2019) p 21.

requirement of the new pathway. We think that the protections provided by the screening requirements in the new pathway, specifically the requirement that the surrogate's physical health be assessed, will ensure that the surrogate is not at any particular or increased risk from the proposed pregnancy and childbirth. Moreover, robust implications counselling and the requirement for consent will reduce risks to her psychological health. We also take the view that concerns about the commodification of women's bodies are best addressed by ensuring that the surrogate gives fully informed consent to entering into a surrogacy arrangement.

Consultation Question 71.

13.99 We provisionally propose that there should not be a maximum number of surrogate pregnancies that a woman can undertake as an eligibility requirement of the new pathway.

Do consultees agree?

BEST PRACTICE

13.100 We explained at the beginning of this chapter our reasons for proposing that the new pathway imposes stricter eligibility requirements.[89] We, nevertheless, think that the new pathway will still be the more attractive option for surrogacy arrangements.

13.101 We have been more cautious about introducing new eligibility requirements into the parental order pathway, on the basis that parental orders should continue to be available to intended parents who do not qualify for the new scheme. To do otherwise would mean that some children born of a surrogacy arrangement could not be the subject of a parental order, and that the surrogate (and, possibly, her spouse or civil partner) would remain that child's legal parents. That could have negative consequences for the child's welfare.

13.102 Nevertheless, we think it is for the benefit of everyone that all surrogacy arrangements to seek to protect the interests of all those involved. We think that the eligibility requirements that we propose for the new pathway should offer a model of best practice in all cases. Licensed clinics and surrogacy organisations may choose to abide by these best practices even for surrogacy arrangements falling within the parental order pathway.

13.103 Moreover, many of the eligibility requirements that we have proposed for the new pathway are derived, at least in part, from existing screening requirements within the Code of Practice. The Code of Practice is binding on fertility clinics in the UK. We also provisionally propose that surrogacy organisations can also be regulated by the Authority, resulting in the Code of Practice also being binding on such regulated surrogacy organisations.[90] Therefore, regardless of the pathway to surrogacy taken,

---

89 See also paras 11.3 and subsequent.

90 See ch 9.

similar screening requirements may be imposed for all surrogacy arrangements, so long as they take place through a licensed clinic or regulated surrogacy organisation.[91]

[91] We consider in ch 9 whether independent surrogacy arrangements could also be brought within the scope of legislation (see paras 9.12 and subsequent).

Chapter 14: Payments to the surrogate by the intended parents: the current context

INTRODUCTION

14.1 In this chapter we consider the question of what payments the intended parents should be permitted to make to the surrogate. The question is one on which stakeholders have strongly held and sometimes opposing views. That is because the nature of payments that the law permits is seen as a key determinant of whether surrogacy operates on a commercial or altruistic basis. Countries and legal jurisdictions in which commercial surrogacy is permitted (such as California and Ukraine) allow payments to be made to surrogates for the service of being a surrogate. Conversely, the fact that no such payment is currently permitted in the UK is considered to be a hallmark of the law providing for altruistic surrogacy.

14.2 We have split our discussion of payments into two. This chapter presents an overview of the current law and practice, and how it has been criticised. It also discusses approaches in other jurisdictions, which could inform reform in this country. The next chapter[1] sets out possible options for reform, and asks consultees for their views.

14.3 In our discussions with stakeholders on the question of payments we have not found the labels "commercial" and "altruistic" to be a helpful starting point.[2] While the types of payments that can be made to surrogates are clearly a feature that determines whether an arrangement is commercial, as we explain in Chapter 2 we do not think that they are the sole or defining feature. Therefore, we do not think that asking the question of whether surrogacy in the UK should be able to operate commercially, or only altruistically, answers the question of what payments the intended parents should be permitted to make to the surrogate.

14.4 Further, in the context of considering the payments made by intended parents to surrogates we think that "commercial" and "altruistic" suggest the existence of a clear division between two forms of surrogacy, when those lines may in practice be blurred. As the UN Special Rapporteur explained:

> in theory, altruistic surrogacy is not an exchange of payment for services and/or transfer of a child based on a contractual relationship. However, the development of organized surrogacy systems labelled "altruistic", which often involve substantial reimbursements to surrogate mothers and substantial payments to intermediaries, may blur the line between commercial and altruistic surrogacy … .[3]

---

1 See ch 15.

2 See paras 2.12 and subsequent.

3 M de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* (January 2018), A/HRC/37/60 para 69.

14.5 Our approach to reform has therefore been to step back from specific labels and consider directly the question of what payments the intended parents should be permitted to make to the surrogate. In light of the strongly divergent views we have heard from stakeholders we do not make any provisional proposals as to what payments should be permitted. Instead, we have decided to ask consultees a series of open questions, seeking their views on this topic.

CURRENT LAW

14.6 As has been explained in Chapter 4, the SAA 1985 makes it a criminal offence for a person to negotiate surrogacy arrangements on a commercial basis.[4] However, the SAA 1985 is careful to avoid criminalising the conduct of intended parents and surrogates, who are excluded from the scope of the offences.[5] The Warnock Report[6] was "anxious to avoid children being born to mothers subject to the taint of criminality".[7] Beyond the issue of criminalisation, however, the SAA 1985 does not address payments to surrogates.

14.7 The issue of payments is addressed in the context of making a parental order. For a court to make a parental order, it must be satisfied that "no money or other benefit (other than for expenses reasonably incurred)" has been paid by the intended parents to the surrogate. This condition is given in sections 54 and 54A of the HFEA 2008.[8] The same provision, however, enables the court to grant a parental order where payments have been made beyond reasonable expenses, where the court authorises those payments. The ability to authorise payments has been particularly significant in respect of international surrogacy arrangements, where the surrogacy has taken place in a country that permits payments to surrogates beyond expenses.[9]

14.8 The meaning of "expenses reasonably incurred" is not defined by the HFEA 2008. The Brazier Report,[10] which recommended a clarification in the law on reasonable expenses,[11] summed up its view in the following terms:

> Whereas a surrogate mother should not gain financially from entering into a surrogacy arrangement, neither should she be expected to incur any costs as a result of a surrogate pregnancy.[12]

14.9 Although no statutory clarification has been made, the approach of the courts appears to reflect this general proposition: provision for expenses should ensure that the

---

4 SAA 1985, s 2(1).

5 SAA 1985, s 2(2).

6 We discuss the Warnock Report in further detail in ch 1.

7 Report of the Committee of Inquiry into Human Fertilisation and Embryology (1984) Cmnd 9314 para 8.19.

8 HFEA 2008, ss 54(8) and 54A(7).

9 For further discussion of the requirements of a parental order, see ch 5.

10 We discuss the Brazier Report in further detail in ch 1.

11 Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (October 1998) Cm 4068 para 5.24.

12 Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (October 1998) Cm 4068 para 5.23.

surrogate neither gains financially from the pregnancy in any real sense, nor is left to incur the costs related to it.

14.10 For example, in the case of *Re A, B and C*,[13] two of the surrogates had received payments for a recuperative holiday that had been taken after they had given birth. Ms Justice Russell accepted that:

> it is entirely reasonable for any surrogate to receive payment for expenses incurred as a result from the need for physical and emotional recuperation from pregnancy and birth.[14]

14.11 In that case the intended parents accepted that they had set out to deceive the court as to the level of payments they had made to three surrogates.[15] The intended parents asked the court to authorise payments that had been made to the surrogates beyond expenses reasonably incurred. Ms Justice Russell concluded that it was not necessary for her to authorise the payments.[16] She had no doubt that the surrogates, who had received between £12,000 to £15,000 each, had each acted altruistically, and "had not made any real financial gain out of having the babies".[17]

14.12 Ultimately, however, as is discussed below,[18] there is no effective means of ensuring that payments are confined to expenses. The combination of:

(1) the HFEA 2008 avoiding criminalising the conduct of intended parents and surrogates;

(2) the post-birth application for a parental order, in which the welfare of the child is paramount; and

(3) the courts' ability to authorise retrospectively payments made,

means that a parental order will, in practice, be made even where payments exceed expenses.

Payments currently made to surrogates

14.13 There is no comprehensive record of payments that are made to surrogates in the UK. We have considered data from three sources:

(1) two surveys undertaken by Surrogacy UK in 2015 and 2018;

(2) data from court files; and

---

13 *Re A, B and C (UK surrogacy expenses)* [2016] EWFC 33.

14 *Re A, B and C (UK surrogacy expenses)* [2016] EWFC 33.

15 The deception was motivated by a desire to protect social welfare entitlements of two of the surrogates: *Re A, B and C (UK surrogacy expenses)* [2016] EWFC 33 at [23].

16 *Re A, B and C (UK surrogacy expenses)* [2016] EWFC 33 at [18].

17 *Re A, B and C (UK surrogacy expenses)* [2016] EWFC 33 at [22].

18 See paras 15.77 and subsequent.

(3) other sources, including guidelines provided by surrogacy organisations.

Surrogacy UK's surveys

Figure 1: results of Surrogacy UK's 2015 and 2018 survey on expenses received by a surrogate[19]

Amount of expenses received by a surrogate	2015 Survey	2018 Survey	% change between the two surveys
Less than £10,000	27.1%	27%	-0.1%
£10,000 to £15,000	68.2%	58.4%	-9.8%
£15,000 to £20,000	4.7%	14.6%	+9.9%
More than £20,000	0%	0%	No change

14.14 It has sometimes been suggested to us that there is, in effect, a "going rate" paid to surrogates of "£8,000 to £15,000".[20] This claim has, equally forcefully, been contested. The data from Surrogacy UK's surveys, set out in figure 1 above, suggests that payments of £10,000 to £15,000 are typical, while there has been an increase in the percentage of surrogates reporting payments of £15,000 to £20,000.

Data from court files

14.15 In March 2019, the Law Commission of England and Wales was granted permission by the Ministry of Justice to review a number of court files of parental order applications in domestic surrogacy arrangements held by the Central Family Court in London for the years 2015 to 2019.[21] We reviewed 52 files, which the court provided to us after searching their database. We took steps to record the data in a way that would not allow data to be linked to individual cases, nor individuals to be identified.

14.16 Our research revealed that, in the files reviewed, the median payment made by the intended parents to surrogates in domestic surrogacy arrangements was £14,795.54. The mean payment was £13,535.18. The range of payments varied considerably. In one familial arrangement the applicants declared paying the surrogate £470. By contrast, five of the files reviewed (9.61%) involved expenses being paid of more than £20,000.

---

19 Surrogacy UK Working Group on Surrogacy Law Reform, *Surrogacy in the UK: Myth busting and reform* (November 2015) p 34.

20 Notably Russell J used this language in *Re A, B and C (UK surrogacy expenses)* [2016] EWFC 33 at [3].

21 In view of the small number of applications for parental orders in Scotland, a similar review was not conducted there.

14.17 It was notable from the review of the files that very few parental order applications included a detailed, itemised breakdown of the expenses paid to the surrogate, along with the accompanying receipts.

14.18 In a number of cases, the intended parents had attempted to breakdown the amount they paid the surrogate into generic categories such as travel expenses, loss of earnings and clothing. Accompanying receipts, however, were not then provided. At most, evidence of the bank transfers from the intended parents to the surrogate were included in the application.

14.19 In a number of cases, the intended parents did not attempt to categorise what the payment to the surrogate was for, simply saying that the amount was "for expenses incurred as a result of the pregnancy", with no further detail provided.

14.20 Moreover, we frequently came across cases where a round figure was pre-agreed to by the parties (for example £15,000). A proportion of this amount was then paid in monthly instalments to the surrogate, followed by the balance after pregnancy.

14.21 This research should be seen in conjunction with the earlier court file research completed by the Children and Family Court Advisory Support Service ("CAFCASS") in July 2015 (in relation to 73 parental order applications made in the years 2013/2014).[22] In contrast to the Law Commission of England and Wales' research, the files examined by CAFCASS included both UK and international surrogacy arrangements. For domestic arrangements, the research found a mean payment of £10,694.13. In contrast, surrogacy arrangements from the USA had a mean payment of £39,875.69.

Other sources of evidence of payments

14.22 In the table below, we outline a list of surrogacy expenses we have seen. The inclusion of an expense in this list should not be taken as an indication that it is endorsed by any particular surrogacy organisation.

Figure 2: list of expenses that we have encountered a surrogate claiming for.

Medical costs
A flat fee paid each month in which one or more inseminations take place
A flat fee for each embryo transfer not involving drugs
A flat fee for each embryo transfer involving a drug cycle
Any costs associated with tracking ovulations or testing for pregnancy
Fees for counselling due to the pregnancy/birth
Fees for physiotherapy/massage sessions due to pregnancy/birth

[22] CAFCASS, *Cafcass Study of Parental Order Applications made in 2013/14* (July 2015) accessible at: https://www.cafcass.gov.uk/about-cafcass/research-and-data/cafcass-research/ (last visited 31 May 2019).

Private prescriptions
Loss of surrogate earnings
Loss of earnings associated with clinic visits/inseminations or if the surrogate is required to reduce her hours
Loss of earnings, if the intended parents request that the surrogate stops work
Compensation, up to a maximum payment, if the surrogate has to take early maternity leave from her paid employment
Legal and insurance fees
Costs of drafting/amending of surrogate's will
Costs of surrogate's life insurance
Childcare and other domestic costs
Childcare costs associated with clinic visits/inseminations
Childcare costs if the surrogate is ill during the pregnancy
Cleaner, or other domestic assistance provided to support the surrogate during the pregnancy (for example, when the surrogate experiences sickness)
Takeaway meals for the surrogate and her family
Travel and accommodation expenses
Travelling expenses to and from clinic/hospital visits for scans or tests
Travelling expenses to and from intended parents'/surrogate's house for inseminations
Overnight accommodation, if surrogate unable to travel to and from the clinic/the intended parents' house on the same day
Flat fee compensation
A flat fee if one or both of the surrogate's ovaries and/or fallopian tube(s) have to be removed
A flat fee for a multiple birth
A flat fee for a Caesarean-section
A flat fee for a multiple birth and a Caesarean-section
A flat fee if the surrogate requires an emergency hysterectomy

A flat fee if the surrogate requires surgery for the removal of her placenta
Pregnancy-related items
Maternity clothes
Sanitary items
Pre-natal vitamins
Food
Other
Mobile phone bills
Gas and electricity bills
Rental payments
Reasonable costs associated with attending a surrogacy organisation's socials/conferences/annual general meetings ("AGMs")
Reasonable costs associated with surrogacy "team" events
A post-birth holiday for the surrogate and her family
Post-birth gifts for surrogate and her family

CRITICISMS OF THE CURRENT LAW

14.23 We think there are three key criticisms of the current law. First, there is a lack of certainty as to what is included within expenses. The lack of certainty results in concerns as to transparency about what payments are being made for. Put simply, if we do not know what payments are properly included within expenses, then we are unable to say whether the payments that are being made to surrogates are in fact in respect of the surrogate's expenses. Secondly, there are difficulties in enforcing limitations on payments to surrogates when the issue arises before the court only after the baby has been born. Thirdly, there is a disparity, in practice, between the payments the SAA 1985 permits for domestic surrogacy arrangements, and those that the courts will authorise in respect of international agreements.

Lack of certainty and transparency

14.24 As noted above, there is no definition in the HFEA 2008 of what constitutes "expenses reasonably incurred". Ms Justice Russell's decision in *Re A, B and C*[23] suggests that the primary concern of the court lies in establishing that the surrogate has not gained financially from the surrogacy arrangement in any real sense. In other words, the

[23] [2016] EWFC 33.

current provision may be playing a role that is different to the one it purports to play. Rather than ensuring that the payments made to the surrogate are confined to her expenses reasonably incurred, the HFEA 2008 is operating, in practice, to ensure that the surrogate does not make a financial gain from the agreement.

14.25 While these questions are similar, they are not identical. In particular, the language of the HFEA 2008 may suggest a more limited range of payments than are in fact made. For example, many people may think that it is appropriate for the intended parents to provide the surrogate and her family with a recuperative holiday after the birth of their child. But while Ms Justice Russell accepted the payment as within the statutory formulation of an expense reasonably incurred, it is not obvious that a recuperative holiday is within the concept of an expense. Equally, few may question the desire of the intended parents to buy gifts for the surrogate, although these are clearly not expenses.

14.26 In the absence of clarity as to what does constitute expenses, it cannot be said with certainty that some surrogates do not in fact receive payments beyond their expenses. Sir James Munby, former President of the Family Division, has suggested that

> in reality, a market already exists, even in this country, as payments are dressed up as expenses. How is a judge supposed to assess whether the £10,000 paid, for example, is a genuine expense?[24]

14.27 As early as 1998, the Brazier Report acknowledged that:

> payments for the service provided by the surrogate, in excess of any reasonable level of actual expenses incurred as a result of the pregnancy, are currently being made.[25]

14.28 The Brazier Report suggested that in "many cases" surrogates were being paid for their services, rather than a reimbursement of their actual expenses. The Brazier Report was published a decade before an international surrogacy arrangement was considered by an English court.[26] It is, however, unclear whether the evidence received by the authors related to domestic or international surrogacy arrangements, or both. More recently, two surrogacy practitioners have suggested that in reality "most UK surrogates are compensated, not with a life-changing amount but with something for their inconvenience".[27]

14.29 Surrogacy UK, which strongly opposes commercial surrogacy, has advocated clarification as to what "payments" really are, to ensure greater transparency and

---

[24] Sir James Munby, "New Science, new families, old law: is the Human Fertilisation and Embryology Act fit for purpose?" *Keynote Presentation at the Progress Educational Trust's 2018 Annual Conference* (10 December 2018), accessible at: https://www.bionews.org.uk/page_140387 (last visited 31 May 2019).

[25] Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (October 1998) Cm 4068 para 3.20.

[26] *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] Fam 71. This case is discussed further at paras 5.85 and subsequent.

[27] H Prosser and N Gamble, "Modern surrogacy practice and the need for reform" (2016) 4 *Journal of Medical Law and Ethics* 257, 270.

openness.[28] Following its 2018 survey, Surrogacy UK suggested that case law determining what constitutes reasonable expenses could be used to provide "codified guidance" through a non-exhaustive list.[29] Further, it called for "clear guidance as to what types of payments are not acceptable".[30]

14.30 Others, however, have voiced scepticism at the idea of trying to define expenses with greater clarity. It has been written that "it is debatable how much certainty this would provide".[31]

14.31 If the only criticism of the law was the lack of certainty as to what constitutes an expense, then an option for reform would be to define "expenses reasonably incurred". Indeed, this approach was recommended by the Brazier Report. As we have noted in paragraph 14.23 above, however, the lack of certainty is not the only criticism of the current law. Further, even if it was, we do not think that seeking to define expenses is the appropriate way to address the issue. Defining expenses would provide certainty as to the payments that could be made. It would not, however, address the underlying policy question of what payments the intended parents *should* be able to make to the surrogate.

14.32 We think the better approach is to start by identifying what payments it should be possible for the intended parents to make; rather than starting with a classification – "expenses" – and seeking to decide what falls within that classification. We come back to examine this question of what payments it should be possible to be make after detailing further criticisms of the current law, starting with the problems with its enforcement.

Problems with enforcement

14.33 As far as we are aware, there is no case in which a parental order has been refused because of payments that have been made to the surrogate by the intended parents.[32]

14.34 The difficulty that arises under the current law is that the question of payments is examined by the court only after the surrogacy has taken place, and the parental order application is made. In the context of hearing the application, the welfare of the

---

28 Surrogacy UK Working Group on Surrogacy Law Reform, *Surrogacy in the UK: Myth busting and reform* (November 2015), paras 5.14 and 5.17.

29 Surrogacy UK Working Group on Surrogacy Law Reform, *Further evidence for reform* (December 2018), p 63.

30 Surrogacy UK Working Group on Surrogacy Law Reform, *Further evidence for reform* (December 2018), p 63.

31 A Alghrani and D Griffiths, "The regulation of surrogacy in the United Kingdom: the case for reform" [2017] 29 *Child and Family Law Quarterly* 165, 179.

32 The Brazier Report noted this to be the case in 1998: Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (October 1998) Cm 4068, para 5.3.

Subsequent research by C Fenton-Glynn covering the period from 2008 to 2018 reached the same conclusion: (research presented at the Eastern and Western Perspectives on Surrogacy conference at the University of Hong Kong in September 2016). We are not aware of any case between 1998 and 2008, or subsequent to Fenton-Glynn's research.

child is the paramount consideration of the court. The dilemma this situation presents to the judge is summed up by Sir James Munby:

> By and large, even in cases where the court thinks [the money paid to the surrogate] is not a proper expense, the judge nonetheless authorises it, because in reality, the judge has little choice. When the matter comes to court, the judge is presented with a *fait accompli*. The child, whose future welfare it is the duty of the judge to promote, has been born and is living with the new parents. What is the judge to do? Refuse to make the order which would otherwise be appropriate, and leave the child in legal limbo? Surely not. To authorise the payment, however distasteful the need to do so, will usually better promote the child's welfare than not to.[33]

14.35 It may be considered that this dilemma arises precisely because the limitation on payments to the surrogates is not an absolute one. As noted in paragraph 14.6 above the court has the power to authorise payments that have been made beyond expenses. Equally, it may be argued that if the right approach is to permit only payments that cover the surrogate's reasonable expenses, then the law should enforce that. On this basis, one option for reform would be to remove the ability of the court to authorise payments in excess of expenses, and to refuse parental orders where payments in excess of expenses have been made. Such an approach would, of course, need to be combined with clarification as to the payments that are permitted as expenses.

14.36 We do not think such an approach to reform is in fact practicable or desirable.

14.37 First, the ability of the court to authorise payments in excess of expenses is essential to enable parental orders to be made in respect of international surrogacy arrangements which take place in countries or jurisdictions that permit commercial arrangements. As we explain in paragraphs 14.39 and following below, not to enable parental orders to be made in such cases would clearly be to the detriment of the child's welfare: it would leave the child with legal parents who do not live in the UK, who may not want to have responsibility for the child and with whom the child may have no on-going relationship.[34]

14.38 Secondly, changing the law with a view to stricter enforcement does not overcome the fact that the court will continue to be presented with a "done deal", and that the welfare of the child will almost invariably point towards the grant of a parental order.

14.39 In Chapter 8 we set out a provisional proposal for the creation of a new pathway to parenthood in which surrogacy arrangements are authorised pre-conception and the intended parents are then recognised as legal parents on the birth of the child. In cases within the new pathway, presenting the court with a "done deal" is therefore

---

33 Sir James Munby, "New Science, new families, old law: is the Human Fertilisation and Embryology Act fit for purpose?" *Keynote Presentation at the Progress Educational Trust's 2018 Annual Conference* (10 December 2018), accessible at: https://www.bionews.org.uk/page_140387 (last visited 31 May 2019).

34 We note in this respect that practice across jurisdictions differs. For example, we understand that in Ukraine surrogates are discouraged from having any contact with the intended parents (although that does sometimes happen). In contrast, in California the matter varies depending on the joint wishes of the surrogate and the intended parents. The parties' wishes in this respect may be considered by agencies when matching surrogates with intended parents.

avoided. It may therefore be felt that there is scope under the new pathway to take a stricter approach to the question of payments. We do not, however, think that is the case. The same dilemma would ultimately arise where the surrogate in fact receives payments beyond those authorised in the surrogacy agreement. The effect of such payments would be that the surrogacy agreement would fall outside the new pathway to parenthood, and that a parental order application would then need to be made. The courts would therefore be presented, as they are now, with a decision to authorise the payments in order to protect the welfare of the child by granting a parental order.

14.40 As noted in paragraph 14.6 above, the SAA 1985 is careful to avoid criminalising the conduct of intended parents and surrogates. It might be thought that criminalisation could provide a means of ensuring that limitations on payments are maintained. We do not think that would be a viable option for reform. We agree with the conclusions of the Warnock Report in that respect, that children should not be born with the taint of criminality.

14.41 In our discussion of options for reform in the next chapter, we consider what enforcement mechanisms may be available if limitations on the payments that can be made to the surrogate are retained.

Disparity in payments between domestic and international surrogacy arrangements

14.42 As noted in paragraph 14.7 above the ability of the court to authorise payments that have been made beyond expenses may be particularly significant where a commercial international surrogacy arrangement is made.

14.43 We explain the level of payments that are made to international surrogates in Chapter 3. Where commercial surrogacy is permitted, the sums paid to the surrogate will include sums not attributable to her expenses. Therefore, even if – in some countries – the sums paid are modest by UK standards, the court must authorise the payments if a parental order is going to be made, as the payment is not related to the surrogate's expenses. In some jurisdictions (certain states of the USA like California, for example) the sums paid to surrogates are significantly in excess of those that would be paid to UK surrogates.

14.44 As we have seen in Chapter 5 courts have regularly authorised payments beyond expenses in international surrogacy arrangements since the matter was first raised by an English court in *Re X and Y (Foreign Surrogacy)*.[35] Recognition of parenthood as a result of commercial surrogacy is nearly a foregone conclusion despite the sums of money that may be paid to the surrogate. Only the "clearest case of the abuse of public policy" would preclude the grant of a parental order.[36]

14.45 Even if a stricter approach to enforcing limitations on payments was to be taken in UK law, the paramount consideration of the welfare of the child will almost invariably point towards the grant of a parental order in international arrangements. The difficulty in not doing so is even greater than is the case in domestic arrangements. As one academic noted in their response to our 13th Programme of Law Reform, commercial

---

35 [2008] EWHC 3030 (Fam), [2009] Fam 71.

36 *Re F & M (Children) (Thai Surrogacy) (Enduring family relationship)* [2016] EWHC 1594 (Fam), [2016] 4 WLR 126 at [41].

surrogacy will often result in the birth of a child whom the surrogate mother does not want to keep. The need to protect the welfare of the child, therefore, will often mean that domestic legal systems, which prohibit commercial surrogacy, nevertheless have no option other than to facilitate the child's return 'home' with his or her intended parents.[37]

14.46 The need for the courts to be able to authorise payments made in international surrogacy arrangements does not mean that the same types of payments should be permitted in domestic cases. It is not inconsistent to accept payments made to surrogates that are permitted in countries and jurisdictions in which the surrogacy has taken place, whilst limiting the payments that are permitted under domestic law. There is, nevertheless, a tension between seeking to limit payments that are made to surrogates in the UK, but accepting payments made to surrogates in international arrangements. The policy considerations that lead to limitations being placed are undermined if surrogacy agreements are simply "exported" to countries and jurisdictions where payments are permitted. This has led two academics to suggest that "commercial agreements are being permitted through the back door. This undermines the rule of law by allowing a practice that the legislature has expressly disallowed".[38]

14.47 These concerns appear particularly pertinent in the surrogacy context where the surrogacy takes place in a developing country, where women are more vulnerable to exploitation than in the UK because of the potentially life-changing impact of the payments received. At the least, current law may be said to reflect a double-standard of condemning (in its letter) payments beyond expenses being made to surrogates in domestic arrangements, while routinely condoning those made in international arrangements.

14.48 The perception of double-standards is perhaps increased by the recent decision of the Court of Appeal in *XX v Whittington Hospital NHS Trust*.[39] That case arose from medical negligence, as a result of which Ms X had been left infertile. Ms X claimed damages to enable her and her long-term partner to have four children through surrogacy in California. The claim succeeded. The Court of Appeal held that it did not offend public policy to enable Ms X to undertake commercial surrogacy arrangements in California. Domestic legislation was concerned only to prevent commercial surrogacy from taking place in the UK. The case goes further than condoning payments that have been made after the fact, by accepting in advance the legitimacy of a wish specifically to enter into commercial surrogacy arrangements.

---

37 E Jackson, *Response to the Law Commission of England and Wales 13th Programme of Law Reform*.

38 C Fenton-Glynn and J Scherpe (on behalf of Cambridge Family Law), *Surrogacy: Is the law governing surrogacy keeping pace with social change?* (2017), 4, accessible at: https://www.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.family.law.cam.ac.uk/documents/cambridge_family_law_submission.pdf (last visited 31 May 2019).

39 [2018] EWCA Civ 2832, [2019] All ER (D) 30 (Jan). For a recent article discussing this case in the broader context of how the law should compensate individuals for the loss of ability to have a family resulting from negligence, see C Thorne, "What price parenthood? The value we place on a family: Pt II" (2019) 2 *Journal of Personal Injury Litigation* 126.

THE CENTRAL DEBATE – SHOULD INTENDED PARENTS BE ABLE TO PAY A WOMAN FOR HER SERVICE AS A SURROGATE?

14.49 The central debate in relation to payments to surrogates is whether the intended parents should be permitted to pay a woman for her service as a surrogate. Such payments are different in nature to paying the surrogate her expenses, however widely the concept of expenses is understood, insofar as they enable the woman to make a profit from the service that she provides as a surrogate.

The opposing views

Arguments in favour of allowing payments

14.50 Some of the arguments advanced in favour of allowing women to be paid for their service as surrogates rely on the perception (that is contested) that some surrogates already receive money beyond expenses. For example, after expressing the belief that "a market already exists", Sir James Munby suggests "it is probably better to face up to reality and move to a proper system of regulation rather than prohibition".[40] Similarly, some other stakeholders have suggested to us that "the genie is out of the bottle" in relation to payments for surrogacy, and that the law should recognise what is happening in practice.

14.51 It is not necessarily a strong argument to say that because it is believed that payments are made for the service provided by a surrogate, the law should endorse that approach. The argument is, however, made stronger by the lack of an effective means of enforcing limitations on payments. We consider in the subsequent chapter whether our new pathway to parenthood provides further opportunities for enforcement. It should be noted, however, that more effective enforcement in relation to domestic arrangements will not remove the need for the court to authorise payments made in international surrogacy arrangements in order to grant a parental order.

14.52 Other arguments go further and suggest that as a matter of policy intended parents should be able to pay a woman for her service as a surrogate. A recent YouGov survey indicated growing support for the idea of commercial surrogacy arrangements.[41] Although, as we have noted, the designation of an arrangement as commercial is not merely a matter of payments being made to surrogates, the survey results can fairly be seen as supporting payments.

14.53 One stakeholder suggested that the expenses model does not accurately reflect the role undertaken by a surrogate. The stakeholder highlighted that expenses do not reflect the risks of pregnancy and the potential longer-term consequences (for example, on the surrogate's ability to have children of her own in future).

---

40 Sir James Munby, "New Science, new families, old law: is the Human Fertilisation and Embryology Act fit for purpose?" *Keynote Presentation at the Progress Educational Trust's 2018 Annual Conference* (10 December 2018), accessible at: https://www.bionews.org.uk/page_140387 (last visited 31 May 2019).

41 Fifty-four percent of respondents agreed that it should be legal in response to the question "Do you think that it should be legal or not to pay a woman to be a surrogate, and carry through pregnancy a fertilised egg to which she has no biological connection, for a couple who want to have children?". See http://cdn.yougov.com/cumulus_uploads/document/ubj8or4iat/InternalResults_140805_Surrogate_Mother.pdf (last visited 31 May 2019).

14.54 It is notable that other people involved in surrogacy receive payment for their contribution. Lawyers and medical staff receive their professional fees, while private fertility clinics, for example, operate on a commercial basis. Indeed, it seems that the role of surrogate – a role uniquely played by women[42] – is the only one that the law prohibits from being recognised by receipt of payment. It may therefore be argued that not permitting payments undervalues the role of the surrogate:

> Paying women to bear children should force us all to recognize this process as the socially useful enterprise that it is, and children as socially valuable creatures whose upbringing and welfare are critically important.[43]

14.55 It may be suggested, therefore, that not permitting surrogates to receive payment is a form of exploitation: surrogates are uniquely deprived of the choice whether to be paid for the service that they provide. This lack of choice is linked by some commentators to long-standing denigration of the economic value of women's work.[44]

Arguments against allowing payments

14.56 Arguments against enabling surrogates to be paid focus around concerns of exploitation of surrogates and the commodification of women and children. We have discussed these arguments in Chapter 2 There, we have seen that concerns are focused on the effect of commercial surrogacy arrangements. As we have noted above, and discuss further in Chapter 2 the payments made by the intended parents to surrogates are not the sole determinant of a surrogacy being commercial. Even outside a fully commercial model, however, we acknowledge that the level of payments the law permits intended parents to pay women to be their surrogate remains relevant to concerns around exploitation and commodification. For example, the Brazier Report noted that:

> payment increases the risk of 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.[45]

14.57 This risk was also noted in an earlier study of exploitation in surrogacy arrangements:

> Poor women in particular may decide to bear children for others in order to augment their family income".[46]

---

42 We acknowledge that there are trans women who cannot carry children, and trans men who are capable of carrying children.

43 L M Purdy, "Surrogate Mothering: Exploitation or Empowerment?" (1989) 3 Bioethics 18, 34.

44 See, for example, R A Posner, "The Ethics and Economics of Enforcing Contracts of Surrogacy Motherhood" (1989) 5 *Journal of Contemporary Health and Policy* 21, 27 to 28; and L B Andrew, "Surrogate Motherhood: The Challenge for Feminists" (1988) 16 *Law, Medicine and Health Care* 72, 73.

45 Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (October 1998) Cm 4068 para 3.1.1.

46 J L Hill, "Exploitation" (1993 – 1994) 79 *Cornell Law Review* 631, 638 to 639.

14.58 In her 2018 Report,[47] the UN Special Rapporteur linked payments to surrogates to the risk of surrogacy operating as the sale of children. Her 2018 Report is critical of arrangements that involve payments beyond reasonable and itemised expenses. Her specific concern lies with any element of a payment being made for the "transfer" of a child:

> Commercial surrogacy arrangements typically include this element of an exchange between the payment and the transfer. In commercial surrogacy arrangements, the promised and actual transfer of the child is usually of the essence of the arrangement and accompanying agreements and contracts, without which payments would be neither made nor promised.[48]

14.59 The Special Rapporteur's 2018 Report ultimately concluded that surrogacy avoids constituting the sale of children where payments are clearly separated from the transfer of the child. Payments may therefore be acceptable where they are linked solely to the gestational services provided by the surrogate. The 2018 Report explains the circumstances in which payments will not constitute the sale of the child in the following terms:

> All payments must be made to the surrogate mother prior to the post-birth legal or physical transfer of the child, and all payments made must be non-reimbursable, even if the surrogate mother chooses to maintain parentage and parental responsibility, and these conditions should be expressly stipulated in the contract. Any choice by the surrogate mother after the birth to legally and physically transfer the child to the intending parent(s) must be a gratuitous act, based on her own post-birth intentions, rather than on any legal or contractual obligation."[49]

14.60 Bad practices that have taken place have shone a light on the severe risks of exploitation. As we explain in Chapter 2 there have been instances, for example, of surrogates being required to move away from their family to live in hostels with other surrogates, where their behaviour is intensely monitored. We have heard other accounts of international surrogacy arrangements that give cause for concern as to the potential exploitation of financially-disadvantaged surrogates: for example, of young single women from villages being paid life-changing sums of money to be a surrogate, but being shunned by the village on their return.

14.61 It may be countered that the general socio-economic situation in the UK makes exploitation less likely than in countries where the worst instances of abuse have been reported. But it should not be overlooked that the UK has high, and rising, levels of income inequality,[50] and that there are women in the UK who are financially-

---

47 M de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* (January 2018).

48 M de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* (January 2018), A/HRC/37/60 para 72.

49 M de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* (January 2018), A/HRC/37/60 para 72.

50 Office for National Statistics, *Household income inequality, UK: Financial year ending 2018* (26 February 2019), accessible at:

disadvantaged and for whom the availability of payment could become the key factor in a decision to become a surrogate. The risks of exploitation may be less likely in the UK, but they remain present and real.

14.62 The risks of exploitation may be lessened without the involvement of profit surrogate agencies and, in Chapter 9, we provisionally propose that agencies in the UK should remain non-profit. Equally, other provisional proposals for reform that we make ensure that surrogacy arrangements are not transactional in their nature, and do not constitute the sale of the child. In particular, our new pathway to parenthood that we explain in Chapter 8 includes the safeguard for the surrogate to become the legal parent of the child from birth if she objects to the intended parents being legal parents. As we explain in the next chapter of this Consultation Paper, we think that the surrogate should be able to enforce the financial terms of a surrogacy arrangement regardless of whether the intended parents become the legal parents of the child.

14.63 Even with safeguards in place to protect against the exploitation of women, it may be considered that allowing payment for the gestational service a surrogate provides would send out the wrong message about how surrogacy is seen within the UK. We consider below whether a different approach to payment, in which a surrogate is paid a fixed fee, rather than leaving the matter to be negotiated by the parties, could mitigate concerns of exploitation and commodification.

14.64 Enabling surrogates to be paid for their service would undoubtedly impact on the affordability of surrogacy for intended parents. It could mean that for some who have been able to build a family through surrogacy under the current law, surrogacy would become unaffordable. In particular, opposite-sex couples and single women who look to surrogacy often do so following a long journey attempting to have children through IVF treatment. They have often already spent considerable sums of money on this treatment. Even for those, including same-sex male couples, who know that surrogacy is the obvious route to a family, it is only a realistic option if they have the financial means. Enabling surrogates to be paid will inevitably mean that the cost of surrogacy increases, unless a surrogate chooses not to accept payment. It might also be said to increase the possibility of exploitation of the intended parents by surrogates, who could, for example, demand additional payments to continue with a pregnancy. Most surrogates would not, of course, act in this way. Further, any such concerns could be alleviated by proper regulation and oversight of surrogacy arrangements.

Payment of a fixed fee

14.65 Some of the concerns around exploitation and commodification arising from enabling surrogates to be paid may be alleviated if the payment were to be a fixed fee set by the regulator and contained in secondary legislation, rather than a matter for negotiation between the parties. A fixed fee could ensure that surrogates were paid fairly, but could be set at a level that removes (or at least reduces) the risk of women being financially motivated to become surrogates. This view attracts some support from Lieber. While primarily supporting an expenses-based model, Lieber suggests in the alternative:

---

https://www.ons.gov.uk/peoplepopulationandcommunity/personalandhouseholdfinances/incomeandwealth/bulletins/householdincomeinequalityfinancial/yearending2018 (last visited 31 May 2019).

> If the legislature sets a mandatory surrogacy fee, the intended parents will not be able to shop around for a better bargain. This would differentiate surrogacy from commodities available on the open market. It would further give legislatures some control over the supply and demand of surrogacy.[51]

14.66 A comparison may be drawn with the fixed fee that is currently paid to egg and sperm donors.[52] The payments made to gamete donors were explained at the time by the Chair of the Human Fertilisation and Embryology Authority (the "Authority") as designed to represent:

> A level of compensation which will not deter those interested in donation but will retain donors already in the system, without attracting those who are merely financially motivated.[53]

14.67 A single fixed fee could similarly be permitted for the intended parents to pay the surrogate. Some stakeholders were concerned that payment of a fixed fee would not reflect the differing costs incurred by surrogates. For example, they highlighted that a surrogate with young children of her own might need to cover child care costs which would not need to be met by a surrogate without young children. These concerns would be alleviated if the fixed fee was payable in addition to payments designed to meet expenses or to be compensatory. However, payment of a fixed fee, even as an additional sum, would inevitably have a differential impact on surrogates: what constitutes a modest sum for one, may be a significant inducement to become a surrogate to another, depending on their relative economic positions.

14.68 If a fixed fee could be paid, the question arises as to what the fee should be and how it should be set. In Chapter 9 we have provisionally proposed that the Authority should regulate surrogacy agencies under the new pathway to parenthood. The Authority's role could also be extended to setting the fixed fee that intended parents are permitted to pay the surrogate. However, consideration would need to be given as to the impact on the Authority of both the work necessary to set any fixed fee, and the subsequent work required to monitor, and enforce compliance with, the limit set. Commentators have calculated the fee that would be payable to a surrogate based on the minimum wage: whether for 24 hours a day over a 40-week period,[54] or measured by reference to a 37.5 hour a week full time job over a 40-week period.[55] It has also been

---

51 K B Lieber, "Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered? (1992 – 1993) 68 *Indiana Law Journal* 205, 230 to 231.

52 E Jackson, "Learning from Cross-Border Reproduction" (2017) 25 *Medical Law Review* 23, 28. Sperm donors can receive up to £35; egg donors can receive up to £750 under directions issues by the Authority: see the Code of Practice+9 p 137.

53 The Authority's Press Release, *HFEA agrees new policies to improve sperm and egg donation services* (19 October 2011), accessible at: https://www.bionews.org.uk/page_93254 (last visited 31 May 2019).

54 A Alghrani, D Griffiths and M Brazier, "Surrogacy Law: From Piecemeal Tweaks to Sustained Review and Reform" in A Diduck, N Peleg and H Reece (eds) *Law in Society: Reflections on Children, Family, Culture and Philosophy. Essays in Honour of Michael Freeman* (2014) p 437.

55 A Alghrani and D Griffiths, "The regulation of surrogacy in the United Kingdom: the case for reform" [2017] 29 *Child and Family Law Quarterly* 165, 183.

suggested that the latter approach could be combined with an additional nightly payment for disturbance caused during sleeping hours.[56]

14.69 We think that approach has some conceptual difficulties insofar as it uses the minimum wage to calculate the value of labour that is uniquely performed by women.[57] However, we note the resulting payments in Figure 3 by way of illustration.

Figure 3: estimated payments surrogate would receive (based on the current UK National Living Wage for those aged 25 and over of £8.21 per hour)

Time the surrogate is paid for	Gross payment
24/7 for a 40-week pregnancy	£55,171.20
Equivalent to a full-time job (37.5 hours a week) for a 40-week pregnancy	£12,315
Equivalent to a full-time job (37.5 hours a week) for a 40-week pregnancy – plus an additional nightly fee of between £10 and £15	£15,115 to £16,515

The impact of allowing payments on the availability of surrogates and the use of international arrangements

14.70 Some stakeholders have also expressed practical concerns that allowing surrogates to be paid will increase the cost of surrogacy within the UK. It will be put out of reach for more intended parents. It may also act as an incentive for intended parents to look for cheaper arrangements overseas, where the risks of exploitation of surrogates are greater. It is, however, difficult to assess the impact that allowing intended parents to pay surrogates for their services will have on demand for international arrangements. We have heard competing claims on whether provision for payment would increase, or even decrease, the number of women in the UK who would be willing to act as surrogates.

14.71 Some commentators have suggested that the inability to receive payment may deter women from acting as surrogates.[58] Research suggests that a shortage of surrogates is a key reason for UK intended parents to go overseas for surrogacy.[59] Further, the

---

56 A Nelson, *Should the Law Now Permit Payments to Surrogates?* (2018) (a Masters' dissertation provided to the Law Commission of England and Wales by the author) p 49.

57 On this, see J Millbank, "Rethinking 'Commercial' Surrogacy in Australia" (2015) 12 *Journal of Bioethical Enquiry* 383.

58 See, for example, A Alghrani and D Griffiths, "The regulation of surrogacy in the United Kingdom: the case for reform" [2017] 29 *Child and Family Law Quarterly* 165, 182.

59 V Jadva, H Prosser and N Gamble, "Cross-border and domestic surrogacy in the UK context: an exploration of practical and legal decision-making" (2018) *Human Fertility* (online only, accessible at: https://www.tandfonline.com/doi/full/10.1080/14647273.2018.1540801) (last visited 31 May 2019). The

better availability of surrogates in the USA, where many states permit commercial surrogacy, is often cited as a reason for that choice of destination.[60] Those findings may offer support for the view that it is easier to find a surrogate where women are able to be paid.

14.72 In contrast, however, some surrogates we have spoken to have suggested that the ability to be paid would in fact be a disincentive, as they would not want to be perceived as being motivated by financial gain. Further, some surrogates have said that payment would be incompatible with the basis of how they see their relationship with the intended parents.

14.73 Echoing this view, data from Surrogacy UK's 2018 survey suggests that remuneration is not a motivation for women to become surrogates in the UK. Its report summarises the motivations of surrogates who responded to the survey as including:

> the love of being a parent themselves and wanting to help others have a family and experience the same; having easy pregnancies and births; knowing or having known people with fertility problems; having had fertility problems themselves and/or having seen or read something about surrogacy that inspired them.[61]

14.74 If provision for payment resulted in an increase in the number of women who wished to be surrogates, it may be questioned whether such an increase driven by the new opportunity for a surrogate to make a financial gain was desirable. On the one hand, against the background of risks of exploitation it would be a matter of concern if women agreed to be surrogates simply because payment was available. On the other hand, many factors may be likely to be taken into account by a woman who is considering being a surrogate. The ability to receive a fair payment for the service that she will provide may only be one factor that feeds into the decision.

COMPARATIVE APPROACHES

14.75 Provision for intended parents to pay surrogates for their service is made in a relatively small number of countries. As far as we are aware, provision for paying surrogates is made in Armenia, Georgia, Israel, Kazakhstan, Liechtenstein, Russia, Uganda, Ukraine, and some states in the USA, including California.[62]

---

availability of surrogates was the second most common reason cited by intended parents who opted to use overseas surrogacy, the first being a clearer legal framework.

60 V Jadva, H Prosser and N Gamble, "Cross-border and domestic surrogacy in the UK context: an exploration of practical and legal decision-making" (2018) *Human Fertility* (online only, accessible at: https://www.tandfonline.com/doi/full/10.1080/14647273.2018.1540801) (last visited 31 May 2019). 65% of intended parents who had completed surrogacy arrangements in the USA said that a reason they chose the USA was that it was "easier to find a surrogate".

61 Surrogacy UK Working Group on Surrogacy Law Reform, *Further evidence for reform, Second Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (December 2018) p 33. It is fair to note that Surrogacy UK strongly advocates an altruistic approach to surrogacy.

62 P de Sutter, Parliamentary Assembly of Council of Europe, *Children's Rights Related to Surrogacy* (September 2016) p 5 and J Pascoe, "Sleepwalking Through the Minefield: Legal and Ethical Issues in Surrogacy" (2018) 30 *Singapore Academy of Law Journal* 455, 458.

14.76 In some other countries, while payments to surrogates are confined to expenses, moves are under way to clarify the nature of these expenses.

Australia

14.77 In Australia, a 2016 federal report supported "options for altruistic surrogacy".[63] Surrogacy is regulated by the states and territories, which adopt expenses-based models. For example, a surrogacy agreement is only recognised as lawful in South Australia where the surrogate mother receives no payment, reward or other material benefit, other than for specific expenses permitted by legislation.[64]

14.78 The South Australian Law Reform Institute published its review into surrogacy in October 2018. A move towards commercial surrogacy was not within its Terms of Reference, and it agreed that any debates around moves towards commercial surrogacy were best undertaken at a national level.

14.79 The South Australian Law Reform Institute noted that:

> a strong theme in [the South Australian Law Reform Institute's] consultation was that even under the most amicable surrogacy arrangement, a surrogate mother, under the present non-commercial framework, is likely to end up out of pocket as a result of acting as a surrogate. There is a strong perception that everyone other than the surrogate mother makes a profit and the surrogate is the one who does not make a profit and even loses out financially.[65]

14.80 It said that "there was a strong view in consultation … that the notion of 'reasonable costs' is vague and imprecise and greater statutory clarity and content is needed as to the costs that can be covered in a lawful surrogacy agreement."[66]

14.81 After evaluating potential reform options, they supported a reform to allow the surrogate to recover a more detailed list of costs "directly related" to the surrogacy arrangement.[67]

14.82 It concluded that the scope of these costs should be set out in the parties' individual surrogacy agreements, however, such costs should be permitted to include:

(1) medical costs related to a pregnancy (including any attempt to become pregnant) that is the subject of the agreement;

---

63 House of Representatives, Standing Committee on Social Policy and Legal Affairs, *Surrogacy Matters: Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements* (April 2016) Foreword.

64 Family Relationships Act 1975 (South Australia), s 10HA(2)(a)(i).

65 South Australian Law Reform Institute, *Surrogacy: A Legislative Framework* (Report 12 – October 2018) para 23.1.7.

66 South Australian Law Reform Institute, *Surrogacy: A Legislative Framework* (Report 12 – October 2018) para 23.1.9.

67 South Australian Law Reform Institute, *Surrogacy: A Legislative Framework* (Report 12 – October 2018) Recommendation 53.

(2) the birth or care of a child born as a result of that pregnancy;

(3) counselling provided in connection with the agreement (including after the birth of a child);

(4) medical services provided in connection with the agreement (that is: medical services provided prior to achieving a pregnancy, and medical care provided during the pregnancy and after the birth of a child);

(5) legal services provided in connection with the agreement (including after the birth of a child);

(6) any premium paid for health, disability or life insurance which would otherwise not have been taken out, but for the agreement;

(7) loss of income of the surrogate mother as a result of leave during the pregnancy or immediately after the pregnancy when the surrogate mother was unable to work on medical grounds. Recoverable loss of income should be limited to a period of two months. Loss of income should be recoverable regardless of the surrogate mother's access to alternative sources of paid leave during the same period (such as paid parental leave), provided the leave was required on medical grounds;

(8) travel and accommodation costs of the surrogate mother (and her dependants) related to the pregnancy (including any attempt to become pregnant);

(9) reasonable out of pocket expenses (including childcare related expenses and loss of domestic services expenses) incurred by the surrogate mother in respect of the agreement; and

(10) any other costs directly related to the surrogacy agreement as prescribed by the regulations.[68]

Canada

14.83 In Canada, legislation provides that "no person shall pay consideration to a female person to be a surrogate mother, offer to pay such consideration or advertise that it will be paid".[69] Reimbursement of expenses is permitted, but only against receipts, and in accordance with the regulations.[70]

14.84 The provision in the legislation enabling reimbursement of expenses allowed by regulations is not, however, in force. The provisions anticipate that secondary legislation (in the form of regulations) will make provision about reimbursement of expenses. To date, no regulations have been made. The resulting position has been

---

68 South Australian Law Reform Institute, *Surrogacy: A Legislative Framework* (Report 12 – October 2018), Recommendation 53.

69 Assisted Human Reproduction Act 2004 (Canada), s 6(1).

70 Assisted Human Reproduction Act 2004 (Canada), s 12.

heavily criticised.[71] In response to this criticism the Government has published a fact sheet for intended parents and surrogates. The fact sheet sets out the costs that can be paid to a surrogate.

> What types of costs can be repaid under the [Assisted Human Reproduction Act 2004]?
>
> A surrogate mother can be repaid for out-of-pocket costs directly related to her pregnancy and usually a receipt is needed. Examples include costs for:
>
> maternity clothes
>
> travel for medical appointments, and
>
> medications.
>
> A surrogate mother may also be repaid for loss of work wages if a doctor certifies, in writing, that bed rest is necessary for her health and/or the health of the embryo or fetus.
>
> What are indirect and disguised payments?
>
> Indirect and disguised payments are illegal under the [Assisted Human Reproduction Act 2004]. They could include paying a surrogate mother's:
>
> mortgage
>
> credit card bills or
>
> school tuition.[72]

14.85 In 2018, a public consultation was launched on draft regulations defining what payments can be made under the [Assisted Human Reproduction Act] 2004. This public consultation closed on 10 January 2019.[73]

14.86 The draft regulations propose an exhaustive definition of what constitutes expenditures that can be claimed by the surrogate. In terms of enforcement, the draft regulations propose essentially a self-declaration approach: the intended parents are unable to reimburse the surrogate's expenses unless they are presented with the applicable receipts and a signed affirmation of the surrogate that the expenses

---

71 F Baylis, J Downie and D Snow, "Fake it Till You Make it: Policymaking and Assisted Human Reproduction in Canada" (2014) 36 *Journal of Obstetrics and Gynaecology Canada* 510, 511 to 512.

72 "Prohibitions related to surrogacy" *Government of Canada*, accessible at: https://www.canada.ca/en/health-canada/services/drugs-health-products/biologics-radiopharmaceuticals-genetic-therapies/legislation-guidelines/assisted-human-reproduction/prohibitions-related-surrogacy.html (last visited 31 May 2019).

73 "Consultation on proposed assisted human reproduction regulations", accessible at: https://www.canada.ca/en/health-canada/programs/consultation-assisted-human-reproduction-regulations.html?fbclid=IwAR2p5nEEnk5zHodCiaimIzUDF96sMDffMe5o8Y4BSKbCy4nMfZrPh0Z8Ui0 (last visited 31 May 2019).

claimed are, in effect, genuine. Section 4, set out below, of the draft regulations deals with expenses.

> Section 4
>
> Expenditures – surrogacy
>
> The following expenditures incurred by a surrogate mother in relation to her surrogacy may be reimbursed:
>
> (a) travel expenditures, including expenditures for transportation, parking, meals and accommodation;
>
> (b) expenditures for the care of dependants;
>
> (c) expenditures for counselling services;
>
> (d) expenditures for legal services and disbursements;
>
> (e) expenditures for any drug or device as defined in section 2 of the Food and Drugs Act;
>
> (f) expenditures for products or services that are provided by or recommended in writing by a person who is authorized under the laws of a province to assess, monitor and provide health care to a woman during her pregnancy, delivery or the post-partum period;
>
> (g) expenditures for maternity clothes;
>
> (h) expenditures related to the delivery;
>
> (i) expenditures for health, disability or life insurance coverage; and
>
> (j) expenditures for obtaining or confirming medical or other records.

14.87 Subsequent sections of the draft regulations make specific provision for expenses relating to the use of a vehicle and the procedural requirements for reimbursement.

South Africa

14.88 An expenses model is also adopted in South Africa. There, however, where surrogacy arrangements must be pre-authorised by the court, the legislation appears narrowly drawn.[74] Provision is made for the surrogate to be paid:

[74] Because the South African law requires a prior court authorised surrogacy agreement, this presumably avoids any conflict that may arise in a post-birth order system between the welfare of the child born of the arrangement and the court refusing to confirm an agreement because payments had been made outside of what is permitted.

compensation for expenses that relate directly to the artificial fertilisation and pregnancy of the surrogate mother, the birth of the child and the confirmation of the surrogate motherhood agreement.[75]

14.89 In addition, the surrogate may be paid for loss of earnings and insurance to cover death or disability resulting from the surrogacy.[76]

14.90 The requirement that expenses relate "directly" to the pregnancy suggests a narrower category of expenses than the UK's formula of "expenses reasonably incurred". In *ex parte K*,[77] for example, a South African court refused to confirm an agreement where it was not satisfied that monthly payments being made to the surrogate were to cover her expenses, as opposed to provide her with an income.[78] Additionally, no provision is made in the legislation for payments beyond those for which the legislation specifically provides to be authorised. It has been said therefore that "the surrogacy model adopted in South Africa [is] far more inflexible [than UK law]".

79

75 Children Act (No 38) of 2005 (South Africa), s 301(2)(a).

76 Children Act (No 38) of 2005 (South Africa), ss 301(2)(b) and (c).

77 Case no 14341/17, Gauteng Local Division, Johannesburg.

78 Case no 14341/17, Gauteng Local Division, Johannesburg.

79 A Louw, "Surrogacy in South Africa: Should We Reconsider the Current Approach?" (2013) 76 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 564, 583.

Chapter 15: Payments to the surrogate by the intended parents: options for reform

INTRODUCTION

15.1 In the previous chapter, we looked at the current law and practice in relation to payments to the surrogate by the intended parents, and how it has been criticised.[1] In this chapter we present a number of reform options and ask for consultees' views on these.

15.2 We take the view that the current position cannot be left unchanged. There is too much uncertainty around the payments that can be made to surrogates under the current provision for "expenses reasonably incurred". As we have explained, we do not think it is helpful to address the question of "what payments it should be possible for intended parents to make to a surrogate?" by asking "whether the law should permit commercial or altruistic arrangements?". We do not think that paying a woman for the service of being a surrogate necessarily defines an arrangement as commercial where, for example, for-profit agencies are not involved.

15.3 Further, we do not think the correct approach to reform is to ask whether surrogates should be able to be paid sums other than expenses, and if not, to define what expenses may include. We think the current uncertainty surrounding the meaning of expenses would limit the utility of responses to that question. For example, we would not be able to deduce from consultation responses that supported confining payments to expenses, what types of payments consultees thought that a category of expenses should include.

15.4 Therefore, we have decided on a different approach. We set out in this chapter a number of different categories of payment that the law could enable intended parents to pay to surrogates. These cover a spectrum from essential costs related to the pregnancy, to unrestricted payments. We invite consultees' views as to whether each category should be permitted. We also ask consultees for their views on how restrictions on payments could be enforced, if some restriction on payments is maintained. We think this approach will provide a clearer picture of people's views on what payments should be permitted, and the circumstances in which payments should be able to be made.

15.5 Our concern lies with identifying the categories of payments that the law should permit, and with what is included within those categories. Save in relation to the possibility of a fixed fee, we think that the sums payable within the category of permitted payment should remain a matter for the parties to agree (subject to the oversight of a regulated surrogacy organisation, as discussed below, to ensure that payments outside these categories are not being made).[2] For example, it seems to us uncontentious that one essential cost of the pregnancy for the surrogate will be

---

1 See ch 14.

2 See paras 15.85 and subsequent.

maternity clothes. Therefore, we include clothes as a payment that would be permitted as a direct cost of the pregnancy. We do not think that the law should go further and place a sum on the amount that the intended parents can pay the surrogate for clothing. Practically, it would be difficult to do so, as needs may vary widely. As a matter of policy, however, we also take the view that the law should not be overly prescriptive. Personal choice and budgets will necessarily have a role to play in what intended parents and surrogates agree.

15.6 We note that in broad terms there are three possible outcomes from our review.

(1) That surrogates will be able to be paid less than is the case under the current law. This outcome would arise if, for example, consultees support the payment of essential costs only, as the current provision for payment of expenses is clearly interpreted more broadly.

(2) That the payments that are permitted are broadly similar to those currently made. The current uncertainty means that it would be difficult to say whether the payments made were exactly the same as under the current law.

(3) That surrogates are able to receive payment for things that are not permitted under the current law (except by authorisation of the court). This outcome would most obviously be the case if consultees support women being able to be paid for the service of being a surrogate.

15.7 Our discussions with stakeholders suggest that the second or third option is the most likely outcome. We note that very few stakeholders we have spoken to consider that surrogates are paid too much under the current law, or have suggested restricting the types of payments that are made.

15.8 We provisionally take the view that reforms to the payments that can be made to a surrogate should apply equally to cases under the new pathway to parenthood set out in Chapter 8 and to those which remain under the pathway of applying for a parental order. We see no reason in principle why the payments that can be made should differ under each pathway. Further, given our conclusion that the uncertainty under the current law is such that reform is needed, we would not want cases to be left to be decided under the current law.

15.9 After setting out the possible heads of payments we address two further issues in relation to payments made by intended parents to surrogates. First, we consider how any limitations that are retained on the payments that can be made could be enforced. Secondly, we consider whether provisions in a surrogacy arrangement relating to payments should be able to be enforced by the surrogate.

WHAT PAYMENTS SHOULD IT BE POSSIBLE TO MAKE TO THE SURROGATE?

15.10 In this section we first consider an overarching question relating to payment of costs, and then set out a list of potential headings of payments that it would be possible to enable to be made to surrogates, and ask for consultees' views as to whether each should be permitted. We then ask two general questions to invite any other views about payments from consultees.

15.11 We emphasise that we are concerned only with establishing what payments it should be possible for the intended parents to agree to pay to the surrogate. There would never be any requirement that the intended parents must make all payments that are permitted by law. It would ultimately be a matter for the intended parents and the surrogate to agree.

15.12 For example, even if the law changed to permit women to be paid for the service of being a surrogate, there will be women who do not wish to receive any such payment. That may particularly be the case where the surrogate is a family member or an existing friend of the intended parents. It may also be the case that surrogates will choose not to ask for payment even if they are able to do so, particularly where the payment would put surrogacy beyond the means of intended parents who they wished to help, or out of their own beliefs and convictions.

Costs: payment of an allowance, or of costs actually incurred

15.13 The first three headings that we consider all relate to costs that may be incurred by the surrogate. We ask whether the intended parents should be able to pay the surrogate costs in three categories: essential costs relating to the pregnancy; additional costs related to the pregnancy; and costs associated specifically with a surrogacy arrangement and pregnancy. For each of these categories of cost an overarching question arises. Where payment to the surrogate is permitted, should it be possible for those payments to be made as an allowance, or should they be confined to costs actually incurred by the surrogate? By an allowance, we mean an amount agreed at the start of the surrogacy arrangement which is broadly related to the surrogate's anticipated costs, but which does not need to be an exact amount. If an expense based model is preferred, then should the requirement strictly be enforced by requiring payment against receipts?

15.14 These approaches differ both in terms of the sums the intended parents may actually pay to the surrogate and the level of evidence required. An allowance may mean that the sums paid are not actually used for their intended purpose and may therefore result, in effect, in the surrogate making a financial gain (although any such gain may in practice be modest). If the sums payable are confined to costs actually incurred by the surrogate, then permitting payment only against receipts will ensure this limitation is strictly adhered to. It may, however, create practical or administrative challenges. Where a surrogacy organisation is involved, receipts could be required to be provided to the organisation, which would need to recover its administrative costs involved in overseeing the payments. In an independent arrangement, the onus may fall on surrogates to ensure that a record is kept.

15.15 In a surrogacy agreement under the new pathway to parenthood there will be a clear incentive for the parties to comply with any limitations on how costs are recoverable. A failure to do so would mean that the surrogacy falls outside the new pathway and the intended parents would need to make an application for a parental order. Ultimately, however, there may be little that the court can do even where limitations have been infringed. It is highly unlikely that overpayment of costs will be such as to dictate against the award of a parental order, given the paramount consideration of the welfare of the child.

Consultation Question 72.

15.16 We invite consultees' views as to whether payment of costs by the intended parents to the surrogate should be able to be:

(1) based on an allowance;

(2) based on costs actually incurred by the surrogate, but without the need for production of receipts; or

(3) based on costs actually incurred by the surrogate, and only on production of receipts.

Essential costs relating to the pregnancy

15.17 This category of essential costs is designed to capture the idea that the surrogate should not be left financially worse off because of the pregnancy. It is more narrowly drawn than the current statutory formula of expenses reasonably incurred. In essence, it is designed to capture costs that are unavoidably incurred. It would therefore include some, but not all, of the items that intended parents pay to surrogates under the current law.

15.18 There are some items that seem to us clearly to be essential costs. For example, maternity or other additional clothing that the surrogate needs as a result of the pregnancy would be included in this category. We would also include additional expenditure the surrogate incurs on food as a result of the pregnancy.[3]

15.19 Essential expenses may be incurred before, during or after the pregnancy. For example, it would include costs associated with fertility treatment where a clinic is used for the surrogacy. It would also include costs that arise after the pregnancy; for example, costs incurred while the surrogate recovers from the birth (including, for example, any physiotherapy), and those associated with attending any postnatal medical appointments.

15.20 We have intentionally drawn this category narrowly. It would not include, for example, additional domestic support that the intended parents provide to the surrogate, or additional payments made to the surrogate for support for her to recuperate after the birth, such as a holiday. The former we discuss in the next category, and the latter we consider below as an expense that arises specifically because the pregnancy is for surrogacy.

---

[3] For example, women need additional calories during the final trimester of pregnancy: NHS, *New weight advice for pregnancy*, accessible at: https://www.nhs.uk/news/pregnancy-and-child/new-weight-advice-for-pregnancy/#what-about-weight-during-pregnancy (last visited 31 May 2019). Essential costs may also relate to dietary changes the surrogate makes during the pregnancy, and vitamins that she takes. The NHS recommends that pregnant women take folic acid and vitamin D supplements during pregnancy: NHS, *Pregnancy supplements*, accessible at: https://www.nhs.uk/news/pregnancy-and-child/pregnancy-supplements-dont-help-just-take-vit-d-and-folic-acid/ (last visited 31 May 2019).

15.21 We recognise that it is difficult to draw the line between the different categories; our intention is to stimulate debate and responses from consultees as to what payments should be acceptable. Our categories are an attempt to distinguish between "unavoidable" purchases because of pregnancy, and those that make a pregnancy more comfortable, and so may be considered desirable rather than essential. Given the sensitivities in trying to classify particular types of expenses, we have intentionally left the text open on this point, and have tried to confine examples to those that would be considered uncontentious to avoid deflecting from the debate. We invite consultees' views on what this category should include, bearing in mind the intention to capture essential or unavoidable costs.

Consultation Question 73.

15.22 We invite consultees' views as to:

(1) whether intended parents should be able to pay the surrogate essential costs relating to the pregnancy; and

(2) the types of expenditure which should be considered "essential".

Additional costs relating to the pregnancy

15.23 The category of additional costs relating to the pregnancy is intended to cover costs incurred by the surrogate that arise because of the pregnancy, but are not necessarily essential. It could include, for example, the cost of providing child care or domestic support to help the surrogate during her pregnancy. It might also include the cost of taxis the surrogate uses to attend medical appointments, or to travel to and from work, rather than using other public transport. It may also include payments for fitness and other classes designed to support pregnant women.[4]

15.24 By referring to these as additional expenses, we do not intend to denigrate their importance. Our intention is to acknowledge that not all costs incurred during pregnancy are essential or unavoidable, albeit that they undoubtedly help the surrogate during the pregnancy.

15.25 We think that what we are calling both essential and additional costs are paid to surrogates under the existing law, as well as costs that fall into other categories that we discuss below. As with the category of essential costs, we invite consultees' views as to what costs might be considered to be additional.

[4] For example, prenatal yoga or aquanatal classes that are recommended to help alleviate back pain experienced in pregnancy: NHS, *Back pain in pregnancy*, accessible at: https://www.nhs.uk/conditions/pregnancy-and-baby/backache-pregnant/ (last visited 31 May 2019).

Consultation Question 74.

15.26 We invite consultees' views as to:

(1) whether they consider that intended parents should be able to pay the surrogate additional costs relating to the pregnancy; and

(2) the types of expenditure which should be considered additional, rather than essential.

Costs associated with a surrogacy arrangement and pregnancy

15.27 There are some costs that arise specifically because a surrogacy arrangement is being considered by the parties, and because a pregnancy is for a surrogacy arrangement. These costs may arise particularly before and after the pregnancy. For example, before the pregnancy, costs may be incurred in the parties meeting up to get to know each other, and deciding whether to enter into a surrogacy arrangement. If the parties enter into a surrogacy arrangement under our new pathway to parenthood, then the surrogate will require implications counselling and legal advice to meet the eligibility requirements. Even outside the new pathway such expenses may be incurred. The surrogate may also be advised to make, or update, a will.[5] After the pregnancy, the surrogate may need support with her recuperation, which may include additional counselling. Further, as we have seen, it is common for intended parents to pay for the surrogate and her family to have a recuperative holiday after the birth. Expenses may continue to be incurred to enable the surrogate and her family to maintain contact with the intended parents and the surrogate-born child.

15.28 We think that the fact that these costs are specific to the surrogacy means that they should be considered separately. Costs relating to the surrogacy are usually paid by the intended parents under the current law. Consultees may feel that intended parents should be able to pay the surrogate each of the three types of costs that we have identified. Equally, however, it is possible that consultees may prefer a different approach. For example, those who prefer to restrict payment of costs relating to the pregnancy to those that are considered essential, may consider that the intended parents should also be able to pay for all costs that arise from entering into a surrogacy arrangement and those unique to a surrogate pregnancy.

[5] See para 3.58 and ch 17 for discussion of wills in surrogacy arrangements.

Consultation Question 75.

15.29 We invite consultees' views as to:

(1) whether intended parents should be permitted to pay all costs that arise from entering into a surrogacy arrangement, and those unique to a surrogate pregnancy; and

(2) the types of cost which should be included within this category.

Lost earnings

15.30 Payment for lost earnings is generally made to surrogates under the existing law. Some losses may be an essential or unavoidable consequence of the pregnancy, and could fall within the first category of expense that we discuss above; for example, time off work to recover from childbirth. In other cases, however, surrogates may stop working early, as a matter of choice, because of the pregnancy. These lost earnings may not be unavoidable, but it may be reasonable to allow the intended parents to cover such costs. They could fall within the category of additional costs that we discuss above. Therefore, we think it is appropriate to ask separately whether the intended parents should be able to pay the surrogate for her lost earnings, including those losses which may be considered voluntary in nature.

15.31 Where a surrogate is entitled to maternity payments, her lost earnings may be compensated for in whole or in part by receipt of those payments. Where that is the case, any payments made by the intended parents should take into account money the surrogate receives. In other words, the intended parents would pay only any shortfall between the surrogate's lost earnings and her maternity payments.

15.32 It is possible that medical complications resulting from the pregnancy and childbirth (whether physical or psychological) mean that the surrogate is unable to return to work, or unable to return to work full time, for a period after the birth. We would anticipate lost earnings during this period of time also being paid by the intended parents. Again, any payments made would take into account any maternity payments, or other benefits, being received by the surrogate.

15.33 Lost earnings are not, however, confined to surrogates who are employed. The same principles should apply where the surrogate is self-employed.

15.34 A separate question arises as to whether intended parents should also be able to pay the surrogate for lost potential earnings. In broad terms, these may arise in two different ways.

15.35 First, the surrogate may have had the potential to increase her income in her current employment in ways that are not reflected in any maternity benefits. For example, the surrogate may regularly take on additional hours for overtime payments; her income might be dependent in part on sales and commissions; or she may forgo opportunities for bonus payments. These potential earnings, which we describe as "employment-related potential earnings" may be calculable with some degree of certainty; perhaps

by reference to the actual income received by the surrogate during the preceding year (or during her most recent year of employment).[6]

15.36 Secondly, a surrogate may lose potential earnings by not taking new job opportunities, or forgoing seeking alternative employment. Similarly, surrogates who are self-employed may forgo the chance to expand their work or business. We call these "other potential earnings". In general, the law considers lost opportunities as too speculative to enable recovery. Similarly, we are provisionally of the view that intended parents who agreed to pay the surrogate's lost potential earnings would be undertaking an uncertain form of liability. Therefore, we provisionally consider that as a specific heading of potential payments, other potential earnings should not be permitted, but we invite consultees' views.

Consultation Question 76.

15.37 We invite consultees' views as to whether they consider that intended parents should be able to pay their surrogate her actual lost earnings (whether the surrogate is employed or self-employed).

Consultation Question 77.

15.38 We invite consultees' views as to whether they consider that intended parents should be able to pay their surrogate either or both of the following lost potential earnings:

(1) her lost employment-related potential earnings (as defined in paragraph 15.35 above); and/or

(2) other lost potential earnings (as defined in paragraph 15.36 above).

Lost entitlement to social welfare benefits

15.39 It is possible that when a surrogacy arrangement is entered into, the surrogate is in receipt of social welfare benefits.[7] If the surrogate is unemployed, is available for work, and is actively seeking employment, then she may be in receipt of a jobseeker's allowance[8] or universal credit.[9] Regardless of her employment status, the surrogate may be in receipt of other means-tested benefits, such as income support.

---

6 For example, where the surrogacy arrangement follows a period of leave from the employment.

7 Note that some social welfare benefits have been devolved under Scotland Act 2016, Pt 3.

8 Jobseekers Act 1995, s 1(2).

9 Under the universal credit legislation, a claimant will be subject to all "work-related requirements" unless he or she falls within express exceptions: Welfare Reform Act 2012, s 22.

15.40 The fact that the surrogate is pregnant will not generally impact on the money she is entitled to receive as unemployment benefit. Her benefits are not affected as long as she is available for, and actively seeking employment. She will not be required to look for work for a 26-week period (11 weeks before, and 15 weeks after giving birth), during which she will be entitled to receive the same or a very similar amount of income support[10] or universal credit.[11]

15.41 Payments that are made to the surrogate by the intended parents *may*, however, impact on her entitlement to means-tested benefits. Entitlement to means-tested benefits is dependent on the applicant's capital and income. The amount of money received as a social welfare benefit is reduced to take into account any income the applicant receives. When an applicant's income is calculated, certain expenses are deductible, in a similar way to if the person was self-employed. If the expenses are deductible, they do not affect the amount of benefit paid. However, the type of expenses that are deductible under social security law are more narrowly drawn than the categories of items for which surrogates can claim as expenses from intended parents under the current law. Therefore, some expenses that the surrogate receives would not be deductible for the purposes of calculating her income in a social security assessment. For example, money paid to the surrogate for clothing during the pregnancy would not appear to be deductible as an expense under social security law.[12]

15.42 Arguably, any impact a surrogacy arrangement has on the surrogate's entitlement to social welfare payments should be treated the same way as lost income. Therefore, if the surrogate's social welfare entitlement is reduced because of money received from the intended parents, then the intended parents should be able to make up that shortfall. That is because the money the surrogate receives from the intended parents is not a "pound for pound" substitute for her social welfare: it is money for expenditure that the surrogate would not incur if she was not pregnant.

15.43 There may, however, be difficulties in carrying this principle over to the social security context. For example, if the intended parents pay the surrogate £50 for maternity clothing, the surrogate's entitlement to means-tested social security may be reduced; in universal credit, it could be reduced by 63p for every pound, and so by £31.50.[13] If the intended parents pay the surrogate £31.50 to make up that shortfall, then that sum itself may constitute income, which will, in turn, again reduce the surrogate's entitlement to social welfare payments.

15.44 We would be concerned by any solution that had the effect that a surrogate on social welfare benefits was left out of pocket as a result of the surrogacy, in a way that a surrogate who was not claiming social welfare benefits would not be.

---

10 Social Security Contributions and Benefits Act 1992, s 124; Income Support (General) Regulations 1987 (SI 1987 No 1967) reg 4ZA and sch 1B para 14(b).

11 Welfare Reform Act 2012, s 19(2)(d); Universal Credit Regulations 2013 (SI 2013 No 376) reg 89(1)(c).

12 Clothing is not generally deductible as we all need clothing of some sort in our everyday lives. Money spent on clothing is only deductible if the clothing is wholly and exclusively for a person's trade, profession or vocation: *Mallalieu v Drummond (Inspector of Taxes)* [1983] 2 AC 861.

13 Universal Credit Regulations 2013 (SI 2013 No 376) reg 22(1)(b).

15.45 In our discussions with stakeholders we have heard very little evidence about the impact, if any, that money paid by the intended parents to a surrogate has on the surrogate's social welfare entitlement.[14] We would like to hear from consultees, and particularly from surrogates, about their experience under the current law. We would also like to hear about how any impact on the surrogate's social welfare entitlement is currently dealt with in payments that the intended parents make to surrogates.

15.46 We discuss below whether the law should be changed so that intended parents can pay a woman for her service as a surrogate, and we invite consultees' views on that issue. If the law was changed to enable such payments, then they would clearly constitute income for the purposes of means-tested social welfare benefits.[15] If the surrogate's entitlement to social welfare benefits was reduced as a result of this income, then, evidently, the intended parents should not be required to pay the surrogate additional sums to make up that shortfall, otherwise this would amount to a "double recovery".

Consultation Question 78.

15.47 We invite consultees to share their experiences:

(1) of the impact that payments received by a surrogate from the intended parents has had on the surrogate's entitlement to means-tested social welfare benefits; and

(2) where a surrogacy arrangement has had an impact on the surrogate's entitlement to means-tested social welfare benefits, how that has been addressed in their surrogacy arrangement.

Compensation for pain and inconvenience, medical treatment and complications, and the death of the surrogate

15.48 Provision could be made for intended parents to pay compensation to the surrogate for the pain and inconvenience resulting from pregnancy and childbirth, and for medical treatment she needs as a result of the surrogacy. For example, the surrogate may be paid compensation for each insemination or embryo transfer (as is already provided for in some surrogacy arrangements). Additional compensation could be paid where there is a multiple pregnancy and childbirth.

15.49 In all cases, the sums payable could be based on a fixed fee set by the regulator, or could be left to be negotiated by the parties. A fee set by the regulator would, in practice, operate as a cap. It is acknowledged that a fixed fee will not reflect the different experiences of women during pregnancy. It will, however, prevent sums

---

14 Surrogacy UK, *Surrogacy in the UK: Further evidence for reform. Second Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (2018) para 5.1 suggests that the impact of money received from intended parents on the surrogate's entitlement to benefits may be a deterrent to some women becoming surrogates.

15 The surrogate would continue to be able to deduct from the income deductible expenses that she incurs.

being agreed that circumvent limitations on payments, or disputes as to whether a threshold – such as "reasonable compensation" – has been crossed.

15.50 Pregnancy and childbirth are not risk-free, but carry with them risk of significant complications, including death, and so it may be reasonable for surrogacy agreements to make provision for compensation if complications arise.

15.51 Compensation could be payable, for example, if the surrogate has a miscarriage or termination, suffers from severe morning sickness (hyperemesis gravidarum), pre-eclampsia, or an ectopic pregnancy. Payment could also be made where the surrogate has a caesarean birth, or suffers excessive haemorrhaging or perineal tearing, and where the pregnancy results in the removal of her fallopian tubes or ovaries, or a hysterectomy. The payments should reflect the longer-term consequences of these complications; for example, the loss of the surrogate's fertility following removal of her fallopian tubes or ovaries or a hysterectomy.

15.52 In the worst-case scenario of the pregnancy or birth resulting in the death of the surrogate, provision could be made for the intended parents to ensure that the surrogate's family are financially compensated. This protection for her family may be obtained by the intended parents paying for the cost of life assurance for the surrogate.

Consultation Question 79.

15.53 We invite consultees' views as to whether intended parents should be able to pay compensation to the surrogate for the following:

(1) pain and inconvenience arising from the pregnancy and childbirth;

(2) medical treatments relating to the surrogacy, including payments for each insemination or embryo transfer; and/or

(3) specified complications, including hyperemesis gravidarum, pre-eclampsia, an ectopic pregnancy, miscarriage, termination, caesarean birth, excessive haemorrhaging, perineal tearing, removal of fallopian tubes or ovaries or a hysterectomy.

15.54 We invite consultees' views as to whether there are any other matters in respect of which intended parents should be able to pay the surrogate compensation.

15.55 We invite consultees' views as to whether the level of compensation payable should be:

(1) a fixed fee set by the regulator (operating as a cap on the maximum payable), or

(2) left to the parties to negotiate.

Consultation Question 80.

15.56 We invite consultees views' as to whether intended parents should be able to pay compensation to the surrogate's family in the event of the pregnancy resulting in the surrogate's death, including through payment of the cost of life assurance for the surrogate.

Gifts

15.57 It seems entirely natural that the intended parents may wish to express their gratitude to the surrogate by buying her a modest gift, such as an item of jewellery, as a reminder of what she has done for them. Indeed, we understand that gifts commonly form a part of surrogacy arrangements, even though they would appear not to be expenses authorised by statute. Further, we understand that surrogacy organisations like to mark the surrogate's role by sending her a gift on the birth of the baby.

15.58 There is a risk of abuse, insofar as limitations on payments could be circumscribed by presenting the surrogate with lavish or expensive gifts. Our impression is that gifts are generally sentimental in nature and of modest financial value. Notwithstanding, we think there is an advantage (assuming limitations on payments are retained) in making clear that only modest or reasonable gifts should be permitted. In the context of the new pathway to parenthood, regulated surrogacy organisations can be relied upon to provide advice as to what would be considered appropriate within the threshold. The risk that an agreement will fall out of the new pathway (and a parental order will then have to be applied for after the birth of the child) will disincentivise abuse. We have preferred consulting on a potential limit based on a "modest" or "reasonable" gift to one based on the financial value of the gift for two reasons. First, we do not want a limit to be seen as the law endorsing an expectation that a gift of a particular value be made. Second, we do not wish to give an impression that the gift should be a cash gift, nor do we wish to require the valuation of sentimental gifts, which may be worth far more to the recipient than their monetary value.

15.59 For cases that remain under the parental order route (or that fall out of the new pathway because of the gift) an attempt to circumvent limitations on payment by the provision of lavish gifts could be identified by the court in the context of the parental order application. It would fall to the court to decide, in an extreme case, whether the legislation had been abused to such an extent that a parental order should be refused. We acknowledge, however, that the paramount consideration of the welfare of the child makes it unlikely that that step would be taken save in the most egregious case of abuse.

Consultation Question 81.

15.60 We invite consultees' views as to whether:

(1) intended parents should be able to buy gifts for the surrogate; and

(2) if so, specific provision should be made for these gifts to be modest or reasonable in nature.

Payment for being a surrogate

15.61 Finally, provision could be made for the intended parents to pay a woman for her service as a surrogate.[16]

15.62 The payment could take one of two forms:

(1) any sum of money agreed between the intended parents and the surrogate; or

(2) a fixed fee set by the regulator.

15.63 The first approach, under which the surrogate can be paid any sum of money agreed with the intended parents, has the benefit of simplicity. On this approach, for example, it may not be necessary for legislation to specify the types of payment that can be made: any payment would be permitted by law. Similarly, difficulties with enforcing limitations on payments fall away. Everything is left for the parties to agree. However, as we have outlined above, enabling surrogates to be paid raises risks of exploitation and commodification of women and children.

15.64 If provision was made for the surrogate to be able to be paid a fixed fee, then the fee would operate as a cap. In other words, intended parents would be able to pay the surrogate the maximum provided by the fee, but the parties may agree that the surrogate will receive less. The fee could be the only payment that is made, or it could be permitted in addition to one or other of the heads of payment discussed above. A fixed fee may reduce problems with enforcement, but it would not remove them entirely. If the fixed fee alone is payable, then there would still be a need to ensure that the payment made does not exceed the fixed fee. If other heads of payment are allowed alongside the fixed fee, then there would still be a need to ensure that other payments have properly been made. However, the advantages of a flat fee in alleviating concerns of exploitation and commodification have been considered in paragraphs 14.65 and subsequent above.

15.65 If the intended parents are able to pay a woman for her service as surrogate, then we need to clarify what the surrogate is being paid for. In particular, to avoid the payment being for the sale of the child, it would need to be linked to the surrogate's gestational services, and not to the transfer of the child, or to the acquisition of legal parenthood. The UN Special Rapporteur concluded that to avoid constituting the sale of a child, all

[16] We note that consideration will have to be given to the tax implications of any payment to surrogates in excess of expenses.

payments must be made "prior to the post-birth legal or physical transfer of the child, and all payments must be non-reimbursable".[17]

15.66 We think it must also be the case that any fee payable to the surrogate could not be dependent on the pregnancy resulting in a live birth. Therefore, the fee would be payable even where the child is stillborn. More difficult is whether a fixed fee would be payable following a miscarriage or termination.

15.67 In the context of surrogacy, a termination is likely to be because of medical complications affecting the health of the foetus, or because the child would be born with a severe disability. The surrogate has, notwithstanding, provided the service of being a surrogate. Arguably, permitting any limitation of payment in such circumstances would – as in the case of a stillborn child – suggest that the payment is for the sale of the child, not for her service. But miscarriage is not uncommon – the NHS estimates that 1 in 8 women who know they are pregnant will suffer a miscarriage, while many more occur before a woman knows that she is pregnant.[18] Requiring full payment following a miscarriage or termination, particularly in the early stages of pregnancy, may place an undue financial burden on the intended parents, and act as an incentive for them to seek a surrogacy arrangement overseas. Any qualification on payment of a fee to a woman for her service as a surrogate must comply with international law.

15.68 We take the view that for payment to be linked to the child being born alive would be incompatible with the UN Convention on the Rights of the Child ("UNCRC").[19] We invite consultees' views as to whether any fee being paid to the surrogate for her services should be able to be reduced in the event of a miscarriage or termination and, if so, if any reduction should be confined to the case of a miscarriage or termination in the early stages of pregnancy.

---

17 M de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* (January 2018), A/HRC/37/60, para 72. We note that under our new pathway to parenthood we have provisionally proposed that the intended parents should become the legal parents on the birth of the child. We consider that our provisional proposal is consistent with international law because of the provision we make for the surrogate to veto the intended parents' parentage after the birth, and so to become the legal parent herself. We understand that it is not uncommon at the moment for final payments of allowances for expenses to be paid to the surrogate after the birth of the child.

18 NHS, *Miscarriage*, accessible at: https://www.nhs.uk/conditions/miscarriage/ (last visited 31 May 2019).

19 UNCRC, art 35, and art 1 of the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography.

Consultation Question 82.

15.69 We invite consultees' views as to whether it should be possible for the intended parents to agree to pay a woman for the service of undertaking a surrogacy.

15.70 We invite consultees' views as to whether, if provision is made for intended parents to pay a woman for the service of undertaking surrogacy, whether that the fee should be:

(1) any sum agreed between the parties to the surrogacy; or

(2) a fixed fee set by the regulator.

15.71 We invite consultees' views as to whether, if provision is made for intended parents to pay a woman a fixed fee for the service of undertaking surrogacy, what, if any, other payments the law should permit, in addition to that fixed fee:

(1) no other payments;

(2) essential costs relating to the pregnancy;

(3) additional costs relating to the pregnancy;

(4) lost earnings;

(5) compensation for pain and inconvenience, medical treatment and complications, and the death of the surrogate; and/or

(6) gifts.

Consultation Question 83.

15.72 We invite consultees' views as to whether it should be possible for any payment the law permits the intended parents to pay the surrogate for her services to be reduced in the event of a miscarriage or termination of the pregnancy.

15.73 We invite consultees' views as to whether, if the law permits a fee payable to the surrogate to be able to be reduced in the event of a miscarriage or termination, whether such provision should apply:

(1) in the first trimester of pregnancy only;

(2) to any miscarriage or termination; or

(3) some other period of time (please specify).

OTHER QUESTIONS ON PAYMENTS

Consultation Question 84.

15.74 We provisionally propose that the types of payment that are permitted to be made to surrogates should be the same, whether the surrogacy follows our new pathway to parenthood or involves a post-birth application for a parental order.

Do consultees agree?

Consultation Question 85.

15.75 We invite consultees' views as to whether there are any categories of payment we have not discussed which they think intended parents should be able to agree to pay to the surrogate.

Consultation Question 86.

15.76 We invite consultees to express any further views they have about the payments that intended parents should be able to agree to pay to the surrogate.

ENFORCEMENT OF LIMITATIONS ON PAYMENTS

15.77 As we have noted, one of the difficulties with the current law is that there is no effective means to enforce the limitation on payments to reasonable expenses. The question of whether these are the only payments that the intended parents have made to the surrogate arises only when an application is made for a parental order. Even if

payments are found to have been made in excess of expenses the court has a discretion to authorise those payments. By the time the question of payments is addressed, the baby is being raised by the intended parents, and the paramount consideration of the welfare of the child will point to the award of a parental order in all but the most egregious case. As we have explained, in fact there is no case in which a parental order has been refused because of concerns around payments.

15.78 Limitations on payments will remain unless the outcome of our consultation is that consultees consider that intended parents should be able to pay their surrogate any sum agreed. Therefore, we need to consider how any limitations may be enforced.

15.79 As we have noted Chapter 1 the Warnock Report was careful to avoid criminalising intended parents and surrogates in relation to surrogacy arrangements. The report noted:

> We conclude that the potential harm to the child involved in criminalising the couple or the surrogate outweighs any argument that effective sanctions to limit payments must include in the last resort the use of the criminal process.[20]

15.80 As noted in paragraph 14.40 above we agree, and we do not think that criminalisation of intended parents and surrogates provides an appropriate enforcement mechanism in the case of surrogacy arrangements.

15.81 We are also of the view that the courts' ability to authorise payments and make a parental order should remain. In practice, this discretion is essential in the case of international surrogacy arrangements that take place in a country or jurisdiction where commercial surrogacy is permitted. We do not think it would be logical to differentiate domestic arrangements, although we think that such a power will only rarely need to be used with respect to these arrangements, if at all. Intended parents who were concerned that any breach of the rules on payments in a domestic agreement would lead to a parental order being withheld may be incentivised to look for an international surrogacy arrangement because of the added flexibility the court would have. Such an outcome would run contrary to one of the aims of this project, namely encouraging the use of domestic arrangements.[21]

15.82 Further, we think that it would be contrary to the paramount consideration of the welfare of the child not to give the court discretion to make a parental order where any limitations on payments are exceeded. As the courts' approach demonstrates, it is only in the most egregious case that the fact of overpayments would mean that the child's welfare would be better served by not granting a parental order. That may be the case, for example, where the overpayments were such that public policy or concerns of exploitation or child trafficking pointed against the grant of a parental order.

15.83 We do not therefore think that there are specific measures that should be introduced to assist in the enforcement of limitations on permitted payments where a parental order application is made after the birth of the child. We do not think that the parental

---

20 Report of the Committee of Inquiry into Human Fertilisation and Embryology (1984) Cmnd 9314 para 7.13.

21 As we set out in ch 1.

order hearing, where the child's welfare is the paramount consideration, is the appropriate forum for enforcing any limitations that the law o imposes on payments. Nor do we think that exceeding any limitation on payments should constitute a criminal offence.

15.84 We think our new pathway to parenthood does, however, provide more effective means of ensuring compliance with limitations on payments that are permitted.

15.85 First, under our new pathway the payments that are to be made to the surrogate will be agreed pre-conception, as part of the surrogacy agreement. Where a regulated surrogacy organisation is involved, the organisation or clinics will have oversight and will be able to ensure that their terms comply with all legal requirements, including in respect of payments that are being made to the surrogate. The new pathway therefore has the advantage that the legitimacy of the payments made is established prior to conception, rather than being left for the courts to assess after the baby has been born.[22]

15.86 Regulated surrogacy organisations will be licensed by the regulator (who we have provisionally proposed should be the Human Fertilisation and Embryology Authority (the "Authority")) to arrange surrogacy agreements. If an organisation does not operate properly, then it may be subject to regulatory sanctions. Surrogacy organisations will therefore have an incentive to ensure that the agreements they oversee operate according to the law.

15.87 In Chapter 9 we ask a question on whether and how independent surrogacy arrangements could be brought within the new pathway, suggesting that an independent professional could be required to make a return to the regulator on behalf of those involved in the surrogacy arrangement. Oversight of the arrangement might therefore be provided by a solicitor or other professional, whose conduct would be subject to oversight by the appropriate regulatory body.

15.88 Secondly, where parties do not comply with an agreement, the consequence will be that they fall outside the new pathway. The intended parents will not become legal parents at birth, but will need to make a post-birth application for a parental order. We think that the loss of being recognised as legal parents at birth for the intended parents, and the surrogate becoming the legal parent when she does not wish to do so, will be an incentive for the parties to ensure that only permitted payments are made.

[22] Although the basis of the payments is established prior to conception, practically, any final account may need to wait until after the birth of the child, after all the payments have been made.

Consultation Question 87.

15.89 We invite consultees' views as to whether there are specific methods of enforcing limitations that are placed on payments to surrogates that we should consider as part of our review:

(1) for cases within the new pathway to parenthood; and

(2) for cases where a parental order is made after the birth of the baby.

ENFORCEABILITY OF TERMS RELATING TO PAYMENTS

15.90 Under the current law surrogacy arrangements are unenforceable.[23] That means that while it is not unlawful to enter into a surrogacy arrangement, a court cannot enforce its terms.[24] As a result, if, for example, the intended parents do not make payments that they have agreed to make, then the surrogate is unable to take action against them to claim the money. Equally, if the intended parents have made payments to a surrogate, but the surrogate does not agree that the intended parents can raise the baby, the intended parents have no specific recourse against the surrogate to recover payments made. It has been suggested that in some instances, however, general provisions of law may enable recovery of payments from the surrogate.[25]

15.91 In most cases the lack of enforceability does not create a difficulty. The surrogate's consent is required for a parental order to be granted, and the intended parents are unlikely to withhold any payments with that in mind.

15.92 We do not, however, think that the position is entirely satisfactory. We do not consider that any dispute that may arise over money should be left to be determined indirectly through provisions on legal parenthood.

15.93 Under the current law, it would be difficult to make provision for the enforcement of payments. While intended parents and surrogates will generally enter into surrogacy agreements (and invariably so where a surrogacy agency is involved) there is no formal oversight of these, and there is opportunity for dispute where parties have not been legally advised as to the terms of the agreement.

---

23 SAA 1985, s 1A.

24 There is a distinction drawn in contract law, in England and Wales, between those contractual claims that will not be enforced on the grounds of illegality "in a narrow sense of being contrary to public policy because the contract somehow involves the commission of a legal wrong (for example a contract for the purpose of committing a legal wrong), and cases in which the claim may not be enforced for reasons of public policy even though no otherwise unlawful act is involved." *Chitty on Contracts* (33rd ed) para 16-001. There is also a category of contractual claims which are rendered unenforceable by statute, of which surrogacy contracts are one example *Chitty on Contracts* (33rd ed) para 16-001. For Scots law, see McBryde, *The Law of Contract in Scotland* (3rd ed 2007) paras 13-24 to 13-34.

25 For discussion of a view that unjust enrichment may present a solution in such a situation, see C Purshouse, "The Problem of Unenforceable Surrogacy Contracts: Can Unjust Enrichment Provide a Solution?" (2018) 26 *Medical Law Review* 557.

15.94 Under the new pathway to parenthood, however, the surrogacy agreement will be overseen by a regulated surrogacy agency, clinic or, possibly, by a professional such as a solicitor. Further, we have provisionally proposed that the parties should receive legal advice prior to entering into the agreement.

15.95 We think the new pathway provides an opportunity to put the issue of payments on a clear legal footing. We provisionally take the view that the surrogate should be able to enforce the terms of a surrogacy agreement under the new pathway to parenthood insofar as they relate to the payment of money. We see her ability to do so as helping to remove the risk of exploitation, and as acting as a further incentive for the new pathway to be used.

15.96 We stress that we are concerned only with the enforcement of terms relating to payments. Further, their enforcement would be kept entirely separate from the issue of legal parenthood. The issue of the attribution of legal parenthood would continue to be decided by the law, rather than the contractual agreement between the parties.[26] We think that is essential to avoid the agreement being considered to constitute the sale of the baby.[27]

15.97 In particular, under the new pathway, as we explain in Chapter 8 the surrogate has a right to object to the intended parents becoming the legal parents of the baby. The consequence of her exercising her right to object is that she becomes the legal parent, and the intended parents would need to make an application for a parental order. The fact that the right to object is exercised would have no bearing on the ability of the surrogate to enforce terms of the agreement relating to payment. The surrogate would be able to enforce terms of the agreement relating to payments even if she objects to the intended parents becoming parents, and even where the outcome of her objection is that a parental order is subsequently refused.

15.98 It is not unusual for surrogacy arrangements to contain provisions relating to the surrogate's lifestyle during the pregnancy. For example, a surrogate who drinks alcohol may agree not to drink during the pregnancy. These lifestyle provisions are often reciprocal; so that if the surrogate agrees not to drink alcohol, then nor will the intended parents. If financial provisions become enforceable, then we provisionally take the view that their enforcement should be absolute, and not conditional on the surrogate complying with such lifestyle choices. To make the enforcement of payments conditional would, we think, represent an unjustifiable intrusion into the surrogate's privacy and personal life.

---

26 Cross ref to parenthood chapter.

27 See para 14.59.

Consultation Question 88.

15.99 We provisionally propose that financial terms of a surrogacy agreement entered into under the new pathway to parenthood should be enforceable by the surrogate.

Do consultees agree?

15.100 We provisionally propose that if the financial terms of a surrogacy agreement entered into under the new pathway become enforceable, the ability to do so should not be dependent on the surrogate complying with any terms of the agreement relating to her lifestyle.

Do consultees agree?

Chapter 16: International surrogacy arrangements

INTRODUCTION

16.1 It is not uncommon for intended parents in the UK to enter into surrogacy arrangements overseas. As we said in Chapter 3 it appears that up to half of applications for a parental order in the UK may involve surrogacy arrangements entered into overseas, accounting, perhaps, for over 150 surrogacy arrangements each year.[1] As we have noted in Chapter 3 there are two reasons, in particular, that intended parents do so.[2]

(1) First, because of concerns of uncertainty in UK law in respect of surrogacy. Particularly, the fact that the intended parents are not recognised as parents from the birth of the child.

(2) Secondly, because of the unavailability of surrogates. There are a number of other reasons that may also influence the intended parents' choice. For example, intended parents may want a surrogate who shares their ethnic background (even in a gestational arrangement, where the surrogate is not genetically related to the child). Or, they may wish to access anonymously donated gametes, for the child to be born in a country in which they have a familial connection, or may have a friend or relative overseas who wishes to act as their surrogate.

16.2 We hope that one of the consequences of our reform of UK law will be to reduce the incidence of international surrogacy arrangements. We have discussed elsewhere in this Consultation Paper concerns that have been expressed in relation to international surrogacy arrangements, which we also share.[3] By providing clarity and certainty in UK law, we will remove one of the key reasons why intended parents enter into international arrangements. But incidents of international surrogacy will undoubtedly remain. That is not least because not all intended parents will find a surrogate in the UK or, at the least, they are likely to find one more quickly by looking overseas. Further, depending on where it is undertaken, an international surrogacy arrangement may be cheaper than a domestic one, particularly as regards the cost of IVF treatment.

16.3 International surrogacy arrangements give rise to concerns. UK law currently permits surrogacy to take place within a defined legal framework: in particular, it does not

---

1 Although, there may well be children born as a result of international surrogacy arrangements in respect of whom no application for a parental order is made – perhaps where the intended parents are already registered as the parents on the foreign birth certificate and do not realise the need to obtain a parental order in the UK.

2 For further discussion see V Jadva, H Prosser and N Gamble, "Cross-border and domestic surrogacy in the UK context: an exploration of practical and legal decision-making" (2018) *Human Fertility* (online only, accessible at: https://www.tandfonline.com/doi/full/10.1080/14647273.2018.1540801) (last visited 31 May 2019).

3 See chs 2 and 12.

permit surrogacy agencies to operate on a profit-making basis, or women to receive payment for the service they provide as surrogate. Under a reformed surrogacy law, certain limitations will still be in place. For example, we have provisionally taken the view that surrogacy agencies should not be able to operate on a profit-making basis, and we ask a number of questions about what payments intended parents should be able to make to a woman who is their surrogate.[4] These limitations on surrogacy exist for a reason: different countries take a variety of approaches towards surrogacy, and national laws reflect the attitude of each country. Those policy decisions are, in a sense, circumvented when intended parents enter surrogacy arrangements overseas, and bring the child born through that arrangement into the UK.

16.4 Further, current surrogacy law in the UK contains safeguards designed to ensure that those involved in surrogacy arrangements are not exploited. In putting forward provisional proposals for reform, the need to guard against exploitation, particularly of the surrogate and of surrogate-born children, have been at the forefront of our minds. When intended parents use an international surrogacy arrangement, UK law is limited in the extent to which it can guard against exploitation. That fact that intended parents have used an international surrogacy arrangement is unlikely to be known unless and until they bring the child into the UK and make an application for a parental order. Such an application is required in every international surrogacy arrangement, often so both the intended parents can be recognised as the legal parents of the child in the UK, and, always, to extinguish the legal parenthood of the surrogate.[5] That is the case regardless of whether they are recognised as legal parents in the child's place of birth. But there is no guarantee that the intended parents will apply for a parental order – particularly where the child has a birth certificate that names them as parents. When an application is made, the court is presented with a "done deal" of the child living with the intended parents in the UK. The paramount consideration of the welfare of the child means that save in the most egregious of case – for example, where there was a real concern of child trafficking[6] – a parental order will be made as long as the criteria for the order are met.[7]

16.5 As we explain in Chapter 2 significant examples of the exploitation of surrogates in countries that permit international surrogacy to take place have been reported by the

---

4 See chs 9 and 15.

5 If a genetic intended father's sperm is used and the surrogate is unmarried, then the intended father will be the legal father under the common law in England and Wales (as well as potentially being the legal father under the jurisdiction where the arrangement took place). In Scots law, the intended father would be the legal parent only if he took steps to have himself named on the birth certificate or a court order was made declaring that he was the child's parent (see para 4.32).

6 The concept of child trafficking can differ depending on the context. In the context of international surrogacy arrangements, we have in mind a situation where there was no real surrogacy arrangement in place and the child was simply purchased. We think that the following, recently proposed definition is useful: "child trafficking is the specific exploitation of youth under the age of 18 years, initiated through force, fraud, coercion, deception, and the necessity for survival, and characterized by the violation of human rights, including physical, sexual, and psychological abuse, and the geographical movement of children. The promotion of the phenomenon is motivated by economic gain in which individuals, social networks, and countries profit monetarily." (A E West, Child Trafficking: A Concept Analysis" (2016) 4 *International Journal of Social Science Studies* 50, 54).

7 Although the courts have stretched the language of many of the criteria, as we set out in ch 5, we would not expect such an approach to be taken where there was a concern of child trafficking.

media. As a result, some destinations that have enjoyed popularity for surrogacy at different points in time have been closed-down by national laws confining access to surrogacy to a country's own nationals. That is the case, for example, in India, Cambodia and Thailand. Over time, therefore, the most popular destinations for surrogacy have changed. Currently, the most commonly used destinations are the USA (especially the state of California), Canada, Ukraine and Georgia.[8]

16.6 We acknowledge that the extent to which international surrogacy arrangements give rise to cause for concern is dependent, to an extent, on the level of regulation provided in each country, as well as the general legal and socio-economic context. The risks of exploitation will depend, for example, on the effectiveness of regulation provided by national laws in different countries, and the impact that the payment available to women to be a surrogate can have on the lives of the surrogate and her family. Concerns may be greatest where regulation is inadequate, the sums of money payable to women who act as surrogates are life-changing, and where women do not have equal access to employment, education or other opportunities.

16.7 It is therefore difficult to generalise, a fact that underpins our provisional proposal in relation to recognition of the legal parenthood of children born through international surrogacy arrangements. However, our understanding of some of the difficulties and challenges presented by international surrogacy arrangements has been greatly assisted by a visit to the British Embassy in Kyiv, Ukraine, and by discussions and meetings held during that visit.[9]

16.8 The difficulties that arise in international surrogacy arrangements cannot fully be addressed by national law. Ultimately, only an international convention, as exists in respect of inter-country adoption,[10] can ensure a uniformity of approach to guard against exploitation. In Chapter 4 we have noted the current work of the Hague Convention in respect of surrogacy, and the challenges presented in finding a consensus of approach to surrogacy at international level.

16.9 Nevertheless, learning about the context of international surrogacy in different countries would greatly assist us to understand international surrogacy arrangements involving British intended parents as well as the overseas implications of potential reforms of the law in the UK. The nature of how we work has limited our ability to learn about the experiences of surrogates overseas, including those involved in surrogacy arrangements with British intended parents. This Consultation Paper might provide the best opportunity for us to do so, although we recognise that this opportunity is itself limited by where and how our paper is distributed, as well as language and other barriers. We ask that overseas surrogates, or overseas surrogate representative or advocacy organisations, share with us their experiences and views.

---

8 V Jadva, H Prosser and N Gamble, "Cross-border and domestic surrogacy in the UK context: an exploration of practical and legal decision-making" (2018) *Human Fertility* (online only, accessible at: https://www.tandfonline.com/doi/full/10.1080/14647273.2018.1540801) (last visited 31 May 2019).

9 See ch 1.

10 The Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.

Consultation Question 89.

16.10 We invite overseas surrogates (or bodies representing or advocating for surrogates) to share with us their experiences f international surrogacy arrangements.

16.11 We have also been limited in our ability to engage with organisations focused on the welfare of children in the international context, including those with expertise on child trafficking. Given the paramountcy of children's welfare in the law, we consider that such expertise would be invaluable in assessing the implications of our proposed reforms, particularly for international surrogacy arrangements. We, therefore, ask international organisations focused on the welfare of children to share with us any issues that may arise in relation to the welfare of children born overseas from the possible reforms that we identify throughout this chapter.

Consultation Question 90.

16.12 We invite organisations focused on children's rights and welfare in the international context to share with us their views on our proposed reforms and consultation questions in this chapter.

16.13 In this chapter, however, we consider three key issues in international surrogacy arrangements that can be addressed, at least to an extent, on a domestic basis. The chapter then considers whether regulation is required for instances where foreign intended parents come to the UK for a surrogacy arrangement.

THREE KEY ISSUES IN INTERNATIONAL SURROGACY ARRANGEMENTS

16.14 In this chapter we consider three key issues relating to children born through international surrogacy arrangements:

(1) nationality;

(2) immigration; and

(3) legal parenthood.

16.15 The first two issues, though separate, are closely related. They are both concerned with the basis upon which intended parents bring into the UK a child born through an international surrogacy arrangement. In broad terms, there are two routes through which the child is entitled to enter into the UK to live here permanently.

(1) As a British citizen. As a British citizen, the child will be entitled to a British passport and will not be subject to immigration control. Whether a child born through an international surrogacy arrangement is a British Citizen is a matter of nationality law.

(2) As the holder of a non-British passport with entry clearance (a visa) to enter the UK.[11] The circumstances in which non-British passport holders are able to enter the UK is a matter of immigration law.

16.16 As a matter of law, every child born through an international surrogacy arrangement can only enter the UK to live here permanently through one of these two routes. In practice, however, a third route also exists. Where a child holds a non-British passport from a country whose nationals do not require a visa to visit the UK, the child may in fact enter the UK as a visitor. We understand that this route is commonly used, in particular, in respect of children born through surrogacy arrangements in the USA and Canada. In some instances, we understand from discussions with stakeholders that it is done so openly – the intended parents explain the fact of the surrogacy to the Border Force Officer, who authorises the entry on that basis. However, the fact of the surrogacy may not always be declared. Strictly, entering into the UK in this way is not permitted as a matter of immigration law; the child is not entering the UK as a visitor. There is, therefore, a risk of a Border Force Officer who is aware of the facts refusing to authorise the child's entry.

16.17 The reason the third route is popular (where it is available)[12] is simply because it is quicker. The intended parents and child can travel to the UK as soon as the child obtains his or her passport from the country of birth. Obtaining a British passport for a child born overseas who is a British citizen, or obtaining a visa for a child who is not a UK national to enter into the UK to live here permanently, both take time. During that time, the child – and therefore at least one of the intended parents who is caring for the child – are unable to travel out of the child's country of birth. It is not unusual for that period to last for several months. The need to stay in the child's country of birth can place a financial and emotional strain on the intended parents, particularly where they are coping as first-time parents in an unfamiliar country where English is not widely understood. Moreover, it raises concerns for the welfare of the child, as the intended parents may have a limited (or no) support network, or easy access to medical care if they have concerns for the health and well-being of the child. In its study of parental order applications made in 2013/14, CAFCASS reported:

> Difficulties arising from delays to parents being able to bring home their child have been highlighted as a serious issue arising from, among other things, the different legal frameworks for surrogacy internationally and have been cited by those who are seeking reform to surrogacy legislation. Such delays, where a child may be living in unsuitable accommodation and may be separated from one of their parents (for example, who must return home for work) are clearly not in the best interests of the child.[13]

---

11 "Every child who is not a British citizen and is coming to live in the UK permanently must apply for entry clearance before travelling to this country": UK Border Agency, *Inter-country surrogacy and the Immigration Rules* (June 2009) para 58.

12 The route does not assist where the child holds a passport from a country whose nationals require a visa to visit the UK, including, for example, Ukraine.

13 CAFCASS, *Cafcass Study of Parental Order Applications made in 2013/14* (July 2015) p 15, accessible at: https://www.CAFCASS.gov.uk/about-CAFCASS/research-and-data/CAFCASS-research/ (last visited 31 May 2019) p 24.

16.18 In an increasing number of cases those difficulties result in the intended parents applying for an emergency travel document in place of a passport, to enable them to travel immediately to the UK. While embassies issue the document, the decision about whether to do so is made by Her Majesty's Passport Office ("HMPO"). An application is possible only where the child is a British citizen. Further, there is no entitlement to an emergency travel document, and requests are regularly declined. An emergency travel document is not a quick alternative to applying for a passport. In our visit to Ukraine, we heard first-hand from Embassy staff of the challenges these applications present, particularly for the front-line staff. In many instances, the basis on which emergency travel documents are applied for are predictable, as simply the consequences of the need to make arrangements in relation to the child's nationality or immigration after the child has been born. Intended parents may or may not be aware of the process that will need to be followed. Even where they are aware, however, they may not fully appreciate the strain that it will place on them until they face the practical reality of being in the country with their new-born baby.

16.19 In this chapter we do not make any provisional proposals for reform of substantive nationality law. We do not think it is appropriate to do so solely to facilitate international surrogacy arrangements. We do, however, make provisional proposals for reform in relation to immigration law. We also consider what changes in practice could be made to ease the process of applying for a British passport or a visa, to reduce the time taken to do so, and so to alleviate the practical difficulties that arise following the birth of a surrogate-born child. These practical or operational changes would seem beneficial in two respects. First, they will alleviate the difficulties currently experienced by intended parents, and in particular concerns relating to the welfare of the child, by reducing the period of time that the intended parents are unable to return with the child to the UK. Secondly, they should also reduce the need for intended parents to seek to bring their child into the UK as a visitor.

16.20 In respect of the third issue – legal parenthood – it is important to note that as a matter of UK law, the intended parents of a child born through an international surrogacy agreement will not be recognised as the legal parents of the child. That is the case regardless of the position in the country in which the child is born. Hence, even if the child is born in a country in which the intended parents are named as parents on the birth certificate, and are recognised as the child's legal parents, it will be necessary for the intended parents to apply for a parental order. The parental order is required for the intended parents to be recognised as the legal parents in the UK, and for the legal parenthood of the surrogate (and, where relevant, her spouse) to be extinguished as a matter of UK law. In Chapter 8 we have provisionally proposed a new pathway to parenthood, which will enable the intended parents of surrogate-born children in the UK to be recognised as the child's legal parents from birth. We explain in that chapter, however, that we do not think the new pathway should be available in the case of international surrogacy arrangements, as it will not be possible to ensure that the safeguards that exist within the new pathway have been complied with. Therefore, our starting point is that in international surrogacy arrangements it will continue to be necessary for the intended parents to apply for a parental order when they return to the UK. However, we provisionally propose that the Secretary of State is given power

to recognise in the UK legal parenthood granted in specific countries without the need for a parental order application to be made.[14]

16.21 Finally, we note the current guidance that is available to intended parents on nationality, immigration and legal parenthood, and we provisionally propose that this guidance is consolidated into a single source.

NATIONALITY

Current law

16.22 A child born through international surrogacy can obtain British citizenship in two ways: either:

(1) at birth (by virtue of one of his or her parents being British citizens); or

(2) if (1) does not apply, through registration as a British citizen.

Obtaining British citizenship through a parent

Citizenship through a parent at birth

16.23 Nationality law has specific rules for identifying the parents of a child. The definition of "parent" in this context does not have the same meaning as in family or fertility law.[15]

16.24 For the purposes of the British Nationality Act 1981, "a child's mother is the woman who gives birth to the child".[16] This principle applies regardless of whether the woman who gives birth is the child's genetic mother (that is, regardless of whether the woman's gametes have been used in the surrogacy). Therefore, for the purposes of nationality law, the surrogate is always the child's mother. As a result, a surrogate-born child cannot acquire British citizenship by virtue of the intended mother being British, even in a gestational surrogacy arrangement in which the intended mother's gametes have been used to create the embryo.[17]

16.25 If the surrogate is married (or in a civil partnership), then her spouse (or civil partner) will be the child's father or other parent.[18] Again, this principle applies invariably, and regardless of the identity of the child's genetic father. Therefore, if the surrogate is married, or is in a civil partnership, then the child cannot acquire British citizenship by

---

14 We use the word "countries" for simplicity. In federal jurisdictions, such as the USA and Canada, the power could be used to recognise legal parenthood that is granted in a particular state, province or territory of that jurisdiction.

15 We set this law out in ch 4 (paras 4.25 and subsequent).

16 British Nationality Act 1981, s 50(9).

17 It is possible – but exceptionally unlikely – that the surrogate in an international surrogacy arrangement is herself a British citizen. If that is the case, then the child will obtain British citizenship through the surrogate: R Cabeza, V Flowers, E Pierrot, A Rao, B O'Leary and L Odze, *Surrogacy: Law, Practice and Policy in England and Wales* (1st ed 2018) para 7.15.

18 British Nationality Act 1981, s 50(9A).

virtue of the intended father being British, even if the intended father's gametes have been used to create the embryo.[19]

16.26 Where the surrogate is unmarried (whether because she is single, divorced or widowed), and the intended father is the genetic father of the child, then the intended father is the child's father for the purposes of nationality law.[20] The child will then obtain British citizenship through his or her intended father, as long as the intended father is a British citizen "otherwise than by descent".[21]

16.27 In general terms, the intended father will be a British citizen "otherwise than by descent" if he is British by birth, adoption, registration or naturalisation in the UK.[22] If the intended father is a British citizen only "by descent" – because he was born outside of the UK to a British parent (to a person who was a British citizen otherwise than by descent)[23] – then the child will not obtain British nationality through the intended father.[24]

16.28 The combined effect of these rules can be summarised as follows.

(1) A child born through an international surrogacy arrangement will be a British citizen if the surrogate is unmarried, the intended father is the genetic father of the child, and the intended father is a British citizen otherwise than by descent. The child will then be born a British citizen and, therefore, entitled to a British passport.

(2) In all other cases the child will not obtain British citizenship through his or her parents from birth, and so is not entitled to a British passport on birth.

Citizenship through a parent by the grant of a parental order

16.29 If a child is not a British citizen at the time of his or her birth, then he or she can obtain British citizenship through the grant of a parental order. The effect of a parental order is that the child is recognised as a British citizen from the time the parental order is

---

19 As is the case with the surrogate, in the unlikely event that the surrogate's spouse or civil partner is a British citizen, then the child will obtain British citizenship through the surrogate's spouse or civil partner.

20 British Nationality Act 1981, s 50(9A)(c). The intended father must satisfy the prescribed requirements as to proof of paternity. These requirements state that "the person must satisfy the Secretary of State that he is the natural father of the child": British Nationality (Proof of Paternity) Regulations 2006 (SI 2006 No 1496), as amended by the British Nationality (Proof of Paternity) (Amendment) Regulations 2015 (SI 2015 No 1615). These Regulations state that the Secretary of State may have regard to any evidence to determine the paternity of the child, including, but not limited to DNA test reports and court orders: British Nationality (Proof of Paternity) Regulations 2006 (SI 2006 No 1496), as amended by the British Nationality (Proof of Paternity) (Amendment) Regulations 2015 (SI 2015 No 1615), reg 3.

21 British Nationality Act 1981, s 2.

22 R Cabeza, V Flowers, E Pierrot, A Rao, B O'Leary and L Odze, *Surrogacy: Law, Practice and Policy in England and Wales* (1st ed 2018) para 7.26. Exceptions are noted in para 7.28.

23 British Nationality Act 1981, s 14.

24 "British citizens by descent suffer a real disadvantage, namely the inability to secure entitlement to British citizenship for their children if they are born outside the United Kingdom": *R (Ullah) v Secretary of State for the Home Department* [2001] EWCA Civ 659, [2002] QB 525 at [4].

granted, as long as the intended parent, or one of the intended parents, is a British citizen.[25]

16.30 The ability to obtain British citizenship through the grant of a parental order is not, however, a practical solution in the vast majority of cases to the need for the intended parents to bring the child into the UK after its birth.

16.31 We have explained the parental order application process in Chapter 6. As we have seen in that chapter, the process of obtaining a parental order can take several months after the birth of the child. Further, it is generally expected that the child will be in the UK when the parental order application is being considered, so that the child can be visited by a CAFCASS parental order reporter, or the appropriate officer in Scotland. Even though there is no requirement that the child is in the UK, it would potentially undermine the ability to undertake a welfare assessment of the child if the grant of the parental order was routinely used to obtain British citizenship for the child and enable the child to be brought into the UK.[26] The unattractiveness of obtaining British citizenship through the grant of a parental order means that most intended parents will look to other means to secure the child's immigration into the UK, if he or she is not born as British citizen.

Obtaining British citizenship through registration

Where an intended parent is a British citizen otherwise than by descent

16.32 Where a child is not a British citizen at birth (for example, where the surrogate is married), rather than waiting for the grant of a parental order an intended parent can apply for the child to be registered as a British citizen. In this section of the chapter we consider how registration operates where an intended parent is a British citizen otherwise than by descent. In the next section of the chapter we consider registration where the intended parent (or parents) are British by descent.

16.33 Once registered as a British citizen, a Certificate of Registration is issued and the child can then obtain a British passport.

16.34 Registration is governed by section 3(1) of the British Nationality Act 1981. The section has been described as "a very simple provision".[27] It confers a discretion on the Secretary of State for the Home Department to register a child as a British citizen where an application is made while the child is a minor and the Secretary of State "thinks fit" to do so.

16.35 Guidelines on the exercise of the discretion conferred on the Secretary of State are published by the Home Office.[28] The effect of the guidelines is that a child born

---

25 British Nationality Act 1981, s 1(5), which is extended to apply in respect of the grant of a parental order by 2018 Regulations, sch 4 para 10.

26 The courts have made it clear that, ordinarily, they would expect any parental order reporter to visit the child in the UK: *Re A (Foreign Surrogacy: South Africa*) [2015] EWHC 1756 (Fam), [2015] All ER (D) 238 (Jan). For further discussion see paras 6.73 and subsequent.

27 R Cabeza, V Flowers, E Pierrot, A Rao, B O'Leary and L Odze, *Surrogacy: Law, Practice and Policy in England and Wales* (1st ed 2018) para 7.52.

28 Home Office, *Registration as a British citizen: children* (Version 4, November 2018), accessible at: https://www.gov.uk/government/publications/children-nationality-policy-guidance (last visited 31 May 2019).

through an international surrogacy arrangement will be registered as a British citizen in the following circumstances:

(1) where the intended father is the genetic father of the child and is a British citizen otherwise than by descent;[29]

(2) where the intended father is a British citizen otherwise than by descent, but is not the genetic father, but a court order has been obtained in the child's country of birth recognising him as the child's legal father; or

(3) where the intended mother (regardless of whether she is the genetic mother), is a British citizen otherwise than by descent, and a court order has been obtained in the child's country of birth recognising her as the child's legal mother.

16.36 In all cases there is an additional requirement that consent is obtained from all those with parental responsibility for the child. This requirement includes, therefore, the consent of the surrogate, contained in a notarised statement of consent. Where a court order is required, then it appears that the order must be obtained after the birth of the child.[30]

16.37 It will be apparent that these requirements do not apply equally in the case of applications made for registration on the basis of the nationality of the intended father or the intended mother. In both cases, a court order is required where the intended parent is not the child's genetic parent. In contrast, where the application for registration is based on the British citizenship (otherwise than by descent) of the intended father, who is also the genetic father, a court order is not required; but where it is based on the British citizenship of the genetic intended mother, a court order is still required.

16.38 This difference in treatment reflects that fact that an intended father who is also the genetic father is capable of being the child's father under nationality law (where the surrogate is unmarried). An intended mother who is also the child's genetic mother can never, however, be the child's mother under nationality law. The surrogate, as the woman who gives birth to the child, is always the child's mother.

Where the intended parent or parents are British citizens by descent

16.39 A child born through an international surrogacy arrangement is not entitled, at birth, to British citizenship through a parent who is a British citizen by descent.[31] This situation is not unique to surrogacy. In general, British citizens by descent cannot normally transmit their citizenship to children born outside of the UK. Therefore, even where the surrogate is unmarried, and the intended father is the genetic father, the child will not

---

29 In these circumstances the child will be a British citizen from birth if the surrogate is unmarried. The need to rely on registration as a British citizen will therefore arise only where the surrogate is married, and her spouse or civil partner is the father or other parent under British nationality law.

30 The need for the court order to be obtained after the birth of the child is not explicit in the guidelines but is understood to be the case in practice: R Cabeza, V Flowers, E Pierrot, A Rao, B O'Leary and L Odze, *Surrogacy: Law, Practice and Policy in England and Wales* (1st ed 2018) paras 7.73 and 7.79.

31 See para 16.27.

obtain British citizenship automatically if the intended father is a British citizen by descent.

16.40 In such cases, the intended father (or mother) can apply for the child to be registered as a British citizen under section 3(2) of the British Nationality Act 1981. The child will be entitled to be registered as a British citizen (as long as specified conditions are met).[32]

16.41 Intended parents who are British citizens by descent may also apply for the child to be registered as a British citizen under the Secretary of State's discretion in section 3(1) of the British Nationality Act 1981. This will be appropriate where the surrogate is married, so that section 3(2) of the British Nationality Act 1981 cannot be used, because, at the time of the child's birth, the child's parents are the surrogate and her spouse (assuming neither is a British citizen) rather than the British intended parents. For the child to obtain British citizenship under section 3(1) of the British Nationality Act 1981, however, two sets of requirements would need to be fulfilled:

(1) the intended parents would need to establish that the child would have been entitled to be registered as a British citizen under section 3(2) of the British Nationality Act 1981 if they had been the parents in nationality law;[33] and

(2) that the requirements for the exercise of the discretion under section 3(1) of the British Nationality Act 1981 (as outlined in the previous section) are met. For example, that the consent of those with parental responsibility has been obtained, and (where necessary) that a court order has been obtained recognising the intended parent as the child's legal parent.

Criticisms and proposals for reform

16.42 The rules governing nationality for children born from international surrogacy arrangements are undoubtedly complex and can appear anomalous. Whether the child is a British citizen from birth is dependent, in particular, on the marital status of the surrogate, and on whether the intended father is also the genetic parent of the child.

16.43 We understand from stakeholders that establishing the marital status of the surrogate is not always straightforward. We have heard, for example, of cases where the intended parents initially report that the surrogate is married, but then declare that she is unmarried when the legal consequences become apparent. It is difficult, as a matter of law, to "prove" that a surrogate is unmarried. It is easier (and more common) to have to prove the fact of marriage, divorce or death of a spouse through the production of a certificate of marriage or divorce, or the death certificate of the spouse. The law appears to create an incentive for those involved in surrogacy arrangements to lie about the marital status of the surrogate. Further, it incentivises the use of

---

32 The conditions are contained in the British Nationality Act 1981, s 3(3): first, the parent must be a British citizen by descent; secondly, the father or mother of the parent must have British citizen otherwise than by descent at the time of the parent's birth (or became a British citizen by descent at commencement of the British Nationality Act 1981); thirdly the parent has been in the UK for three years ending with the date of birth of the child.

33 The conditions in British Nationality Act 1981, s 3(2) are set out in n 32.

unmarried surrogates, who may not have a family network to support them, or may not have completed their own family. In some instances, particularly where the surrogate is single (as opposed to divorced or widowed) the fact of having had a child can have significant, adverse social consequences within her own community.

16.44 We have therefore considered whether any reforms should be made to nationality law. Reforms confined to surrogacy cases could, for example, remove the rule that the woman who gives birth is always the child's mother. Reform of that rule would enable the intended mother to be recognised as a legal mother of the child for the purposes of nationality law, where her gametes have been used to create the embryo. That would put the intended mother in the same position as the intended father (where the surrogate is unmarried) of being able to pass her nationality on to the child where the intended mother is a British citizen otherwise than by descent.

16.45 Reform could also remove the presumption – irrebuttable in nationality law – that the surrogate's spouse or civil partner is the father or other parent of the child. Removing that presumption would enable the intended father to be recognised as the legal father when his gametes were used to create the embryo, regardless of the marital status of the surrogate. The intended father who is also the genetic father would then be able to pass his nationality on to the child in all cases where the intended father is a British citizen otherwise than by descent. It would also remove the difficulties involved in proving that the surrogate was unmarried.

16.46 We have concluded, however, that it is not practical within the confines of this project to propose changes to nationality law. The provisions of nationality law in question are not confined in their scope to surrogacy. They are general principles that apply in all cases. We do not feel that piecemeal reform to deal with specific difficulties that arise in surrogacy cases is merited. In reaching this conclusion, we have also borne in mind that there would be practical difficulties in obtaining amendments to the British Nationality Act 1981, as the subject of who qualifies for British citizenship is politically sensitive.

16.47 Similarly, where British citizenship is being established by registration, it seems anomalous that a court order is required where the application for registration is made by the intended mother, who is also the genetic mother of the child, but not when the application is made by the intended father, as the genetic father. We note, however, that this distinction is a consequence of the general rule that the woman who gives birth is the child's mother under nationality law. We do not therefore think that it would be rational for the guidelines to be changed, as long as that rule remains in place.

16.48 Moreover, despite their complexity and the apparent anomalous outcomes, we do not think that the difficulties encountered by intended parents who have a child through an international surrogacy arrangement are necessarily caused by nationality rules. Equally, changes to those rules will not solve the problem of bringing the child back into the UK. The cause of problems is the time taken to obtain a passport for a child who is born a British citizen, or to obtain registration and a passport for a child where an application is made for the child to obtain British citizenship through registration. We think that reform that is targeted at reducing the time taken to process applications will ultimately be more effective and achievable than changes to the rules governing nationality.

16.49 Where a child is born a British citizen, an application for a passport must be made to HMPO. Where an application is made to obtain British citizenship through registration, the application is made to the UK Visa and Immigration Service ("UKVI"). We understand that there are some operational differences between these teams.

16.50 Applications for registration of surrogate-born children are considered by a specialist team based in Liverpool. We note that stakeholders have commended the work carried out by the team. Teams within HMPO work by geographical area so that, for example, the same team will consider all applications from Ukraine. We also understand that once a child has been registered as a British citizen, some duplication of checks already carried out by UKVI may occur before a passport is issued by HMPO. We would encourage these agencies to consider whether their processes could be amended to reduce the time taken for a passport to be issued to a child born from an international surrogacy arrangement, without undermining the significant checks that must be undertaken before registration is made or a passport is issued, to ensure that the statutory conditions discussed above have been met. We do not make a provisional proposal in this respect, as we consider the matter is an operational one for UKVI and HMPO. We do, however, invite consultees to provide us with evidence of their experience of applications for registration and for a passport, to provide an evidence base to help inform any operational changes.

16.51 We think that one practical change that could assist is to put in place a formal mechanism to enable the application process for registration or for a passport to begin before the child is born. A child cannot, of course, be registered as a British citizen or be issued with a passport prior to its birth. However, we think that it should be possible for a file to be opened, and for the intended parents to begin to gather evidence, prior to the birth. That will enable the process to be completed as soon as possible after the birth of the child. We note that consideration would need to be given to any operational difficulties which might arise from the creation of a such a procedure. It would also be necessary to ensure that any changes in process did not place children born to British parents overseas outside of an international surrogacy arrangement at an unfair disadvantage.

Consultation Question 91.

16.52 We invite consultees to provide us with evidence of their experience of applying to register a child born through an international surrogacy arrangement as a British citizen and obtaining a passport for the child. In particular, we would be interested to hear how long the application took after the birth of the child, and any information consultees have about causes of delays in the process.

Consultation Question 92.

16.53 We provisionally propose that it should be possible for a file to be opened, and the application process for obtaining registration of a child born from an international surrogacy arrangement and obtaining a passport to begin, prior to the birth of the child.

Do consultees agree?

IMMIGRATION

16.54 The nationality rules that we have considered so far in this chapter determine the ability of a child born through an international surrogacy arrangement to enter the UK as a British citizen with a British passport. A child may, instead, enter the UK on a passport issued by the country of the child's birth. As noted in paragraph 16.16 to enter the UK as the holder of a non-British passport to live here, entry clearance (a visa) may be required. We have also seen, in paragraph 16.16 the possibility that surrogate children born in countries in which no visa is required to enter the UK as a visitor, will enter the UK without a visa.

16.55 In this section of the chapter we consider the current immigration rules that apply to children born through international surrogacy arrangements and we make provisional proposals for reform.

Current law

Applying for a visa within the Immigration Rules

16.56 The availability of a visa for a non-British citizen child born through an international surrogacy arrangement to enter the UK is governed by the Immigration Rules. If the child is granted indefinite leave to enter the UK, then the child would be able to enter the UK and remain in the UK permanently.[34]

16.57 There are a number of conditions that must be met for a visa to be granted under the Immigration Rules. In particular, an application on behalf of the child can only be made if one of the intended parents is recognised as the legal parent of the child for the purposes of nationality law. In practical terms, following the discussion above, that means that an application for a visa will only be possible where the surrogate is unmarried, and the intended father is a British citizen by descent, and is the genetic father of the child. A visa will be required because, in this situation, the intended father, although recognised as the child's legal father as a matter of nationality law, cannot automatically transmit his British citizenship to the child because he is a British citizen otherwise by descent. The child can apply within the Immigration Rules for a visa as the child of a British citizen who is present and settled in the UK (in other words, has indefinite leave to remain).[35]

---

34 UK Border Agency: *Inter-country surrogacy and the Immigration Rules* (June 2009) para 62.

35 Immigration Rules, paras 297(e) and (f).

16.58 In addition to an intended parent being the legal parent of the child under nationality law, the following conditions need to be met.

(1) The surrogate has renounced her parental rights at least six weeks after the birth.[36]

(2) The intended parents are present and settled in the UK.[37]

(3) The intended parents are able to maintain and accommodate the child adequately and without recourse to public funds.

(4) The child is under 18 years old.

(5) The child is not leading an independent life, is unmarried and has not formed an independent family unit.

16.59 The first of these conditions reflects the requirement that a surrogate must give her consent to the intended parents obtaining a parental order at least six weeks after the birth. The other conditions will not be relevant, or will not generally present difficulties, in the case of bringing a surrogate-born child into the UK shortly after its birth.

16.60 Guidance also suggests that it is necessary for the child to have broken any ties with the surrogate.[38]

16.61 The key limitation in the availability of a visa, however, is the requirement that one of the intended parents is recognised as the legal parent under nationality law. Where this requirement is not met, a visa is not available under the Immigration Rules. This means that there is no practical advantage to this route over recognition of the child as a British citizen.

Applying for a visa outside the Immigration Rules

16.62 However, provision is then made for a visa to be available *outside* the Immigration Rules. A visa outside of the Immigration Rules is possible where the intended parents wish to bring the child into the UK and will make an application for a parental order within six months of the child's birth. A visa outside the Rules is granted at the discretion of the Secretary of State,[39] and is likely to be granted for 12 months.[40] To obtain a visa outside the Rules, it is sufficient that one of the intended parents is the genetic parent of the child (even though he or she is not the legal parent under nationality law). In addition, the intended parents must show that they meet the other requirements to obtain a visa under the Immigration Rules (as set out in paragraph

---

36 UK Border Agency: *Inter-country surrogacy and the Immigration Rul*es (June 2009) para 40. The point is not made explicitly in the Immigration Rules.

37 Alternative criteria in the Immigration Rules para 297 may be fulfilled in place of this requirement, which seems the most pertinent in the case of international surrogacy arrangements.

38 UK Border Agency: *Inter-country surrogacy and the Immigration Rules* (June 2009) para 56.

39 UK Border Agency: *Inter-country surrogacy and the Immigration Rules* (June 2009) paras 30 and 41.

40 UK Border Agency: *Inter-country surrogacy and the Immigration Rules* (June 2009) para 62.

16.58 above), and that they are capable of meeting the criteria necessary to obtain a parental order for the child.[41]

Criticisms and proposals for reform

16.63 To some extent, the time taken to obtain a visa to bring a child into the UK is dependent on processes that must take place in the child's country of birth. In particular, an application cannot be made for the visa until the child has obtained a passport from his or her country of birth. In paragraph 16.53 above, we have provisionally proposed that it should be possible for a file to be opened before the birth of a child, so that an application for registration as a British citizen, or for a British passport, can be commenced before the birth of the child. Similarly, we think that there would be advantages in enabling the process of applying for a visa to commence prior to the birth of the child, even though the application could not be completed until the child has been born and has obtained a passport. Again, however, we are also aware of the need to ensure that the children of UK parents born overseas outside of surrogacy arrangements are not placed at a disadvantage. We would like to hear from consultees who have experience of applying for visas in respect of children born through an international surrogacy arrangement to provide an evidence base for any operational changes that are made to the process.

16.64 Stakeholders have expressed concern at the fact that where the intended father is not the legal father of the child under nationality law, the intended parents must rely on the exercise of discretion outside the Immigration Rules. They have noted that reliance on discretion (even with the guidelines as to its exercise) creates a degree of uncertainty for intended parents. We agree, and we provisionally think that the availability of a visa should be placed on a clearer footing in the Immigration Rules.

16.65 We have noted above that the availability of a visa within the Rules (and, by extension, when a visa is applied for outside of the Rules) is dependent on the child breaking any ties with the surrogate. We are not sure of the basis of this requirement. To the extent that it suggests that the child should have no relationship with the surrogate, we think that it potentially runs contrary to the child's best interests. It may be less common for surrogates in international surrogacy arrangements to maintain contact with the child, but that is not invariably the case. We do not think that immigration rules should discourage such a relationship, which can be valued by the intended parents and the surrogate, and can be an important means for the child to understand his or her origins. We are therefore provisionally of the view that any such requirement should be removed, or at least that its scope should be clarified so that it does not deter contact with the surrogate.

16.66 Finally, we have noted above that visas outside of the Immigration Rules are generally granted for 12 months, but are also granted on the condition that an application for a parental order will be made within six months of the child's birth. The latter requirement reflects the fact that under the current law an application for a parental order is required to be made within six months of the child's birth. In Chapter 11 we have provisionally proposed that the time limit for the making of an application is

---

41 UK Border Agency: *Inter-country surrogacy and the Immigration Rules* (June 2009) para 63. Note, the requirement that one of the intended parents is the child's genetic parent is also a requirement for obtaining a parental order.

removed. As we have seen in Chapter 5 the time limit given for applying for a parental order has not, in practice, been enforced by the court. Even where an application is made late, the paramount consideration of the best interest of the child is almost invariably best served by the grant of a parental order.

16.67 We also note, however, that there may be different policy considerations in relation to retaining a time limit in the immigration context, compared to retaining one for the grant of a parental order generally. In international surrogacy arrangements, if the only route to the child gaining entry to the UK is a visa outside the Rules (rather than the child obtaining British nationality, and then a passport, with which to enter the UK), it will be imperative that a parental order is applied for as soon as possible by the intended parents, to regularise the situation of a child without UK nationality. We also think that the lack of a time limit may raise questions around how long the visa for the child's entry into the UK should be granted for? If there is no time limit, should a visa of an indefinite duration be granted? We have concerns that the grant of a such a visa would be anomalous, and not in the child's best interests. In light of this debate, we have decided to invite consultees' views on this issue.

Consultation Question 93.

16.68 We invite consultees to provide us with evidence of the experience they have had of applying for a visa for a child born through an international surrogacy arrangement. In particular, we would be interested to hear how long the application took after the birth of the child, and any information consultees have of causes of delays in the process.

Consultation Question 94.

16.69 We provisionally propose that it should be possible to open a file, and begin the process for applying for a visa in respect of a child born through an international surrogacy arrangement, before the child is born. The application will need to be completed after the birth of the child, and the issue of a passport in the child's country of birth.

Do consultees agree?

16.70 We provisionally propose that the current provision made for the grant of a visa outside of the Immigration Rules where the intended parents are not the legal parents of the child under nationality law should be brought within the Rules.

Do consultees agree?

16.71 We provisionally propose that:

(1) the grant of a visa should not be dependent on the child breaking links with the surrogate; or

(2) that this condition should be clarified to ensure that it does not prevent the child having contact, and an on-going relationship, with the surrogate.

Do consultees agree?

16.72 We invite consultees' views as to whether the current requirement for the grant of a visa outside the Rules that the intended parents must apply for a parental order within six months of the child's birth should be removed (regardless of whether the availability of the visa is brought within the Rules), if our provisional proposal to remove the time limit on applications for parental orders is accepted.

Surrogate-born children who are not entitled to a passport

16.73 In order to obtain a visa to enter the UK, a child born through an international surrogacy arrangement must hold a passport from the country in which they are born. In some instances, a child will not be entitled to a passport from that country. If the child is also not entitled to a British passport, because he or she is not a British citizen, then the child will be stateless.[42] This situation is not necessarily uncommon. It arises because of a mismatch between the national law in the country in which the child was born, and the laws governing entitlement to British citizenship.[43]

---

[42] A situation faced, for example, by Hedley J in *Re: X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] Fam 71.

[43] Two academics have identified several international instruments that might be used to advance the case of children born stateless in the situation of an international surrogacy arrangement, including the UN Convention on the Rights of the Child, the European Convention on Human Rights and the UN Convention on the Reduction of Statelessness. Article 1(1) of the last convention, ratified by the UK in 1966, provides that "a Contracting State shall grant its nationality to a person born in its territory who would otherwise be

16.74 For example, where the domestic law of the country in which the child is born recognises the intended parents as the legal parents, and so the country issues a birth certificate naming the intended parents as legal parents, the child may not then acquire that country's nationality. Whether that is the case is dependent on the domestic laws in question. A surrogate child born in California, for instance, is entitled to a US passport, even though the British intended parents will be the legal parents (as a matter of Californian law) from birth, and the birth certificate will name the intended parents as the parents of the child. In contrast, a child born through a surrogacy arrangement in Ukraine is not entitled to a Ukrainian passport. If the child cannot obtain British citizenship – either at birth or by registration – the child is stateless, at least until British citizenship is obtained through the grant of a parental order.

16.75 In such cases, in addition to obtaining a visa for the child, the intended parents will need to obtain a one-way travel document, onto which the visa can be placed, known as a EU Uniform Format Form ("EU UFF"). As with other applications, we think that some of the practical problems experienced by intended parents could be alleviated by enabling the application process to be commenced prior to the birth of the child. We would also like to hear the experience of consultees who have applied for an EU UFF.

Consultation Question 95.

16.76 We provisionally propose that it should be possible to open a file, and begin the process for applying for a EU Uniform Format Form in respect of a child born through an international surrogacy arrangement, before the child is born. The application will need to be completed after the birth of the child.

Do consultees agree?

Consultation Question 96.

16.77 We invite consultees to provide us with evidence of the experience they have had of applying for a EU Uniform Format Form for a child born through an international surrogacy arrangement. In particular we would be interested to hear how long the application took after the birth of the child, and any information consultees have of causes of delays in the process.

GUIDANCE FOR INTENDED PARENTS

16.78 Stakeholders have explained to us that one of the reasons intended parents encounter difficulties bringing a child into the UK, and a key cause of delay, is because they are unaware of the process. It has been suggested that intended

stateless. See: B Ní Ghráinne and A McMahon, "A Public International Law approach to safeguard nationality for surrogate-born children" (2017) 37 *Legal Studies* 324.

parents often do not think about the issue until the surrogacy arrangement is under way, the surrogate is pregnant, or the child has been born.

16.79 While a range of guidance is available for parents from UK Government departments, the guidance is contained in a number of different sources. Separate publications are provided by the Home Office on registration as a British citizen, the UK Border Agency[44] on surrogacy and the Immigration Rules, HMPO on applying for a passport from outside the UK and by the Foreign and Commonwealth Office on overseas surrogacy generally.

16.80 Guidance, in some places, is also out of date. For example, the Home Office guidance on registration of a child as a British citizen still refers to "an order under section 30 of the Human Fertilisation and Embryology Act 1990",[45] despite that section having been repealed and replaced by sections 54 and 54A of the HFEA 2008. The Foreign and Commonwealth guidance, whilst referring to the UK Border Agency guidance, concedes that:

> This guidance was created in 2009 and as matters continue to evolve some aspects of the guidance may now be out of date.[46]

16.81 These separate publications reflect the different responsibilities of each Department or Agency. We think that intended parents will be much better placed to understand the nationality and immigration consequences of an international surrogacy arrangement if a single, comprehensive guide were made available. We note that, in another context, the Department of Health and Social Care ("DHSC") has already produced guidance for those entering into a surrogacy arrangement, and for healthcare professionals involved in caring for surrogates and intended parents.[47]

Consultation Question 97.

16.82 We provisionally propose that the UK Government should provide a single, comprehensive guide for intended parents explaining the nationality and immigration consequences of having a child through an international surrogacy arrangement.

Do consultees agree?

---

44 This agency was superseded by three new agencies in April 2013: UK Visas and Immigration, UK Border Force and Immigration Enforcement.

45 Home Office, *Registration as a British citizen: children* (Version 4, November 2018) p 26, accessible at: https://www.gov.uk/government/publications/children-nationality-policy-guidance (last visited 31 May 2019).

46 Foreign and Commonwealth Office, *Surrogacy Overseas* p 3, accessible at:https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/477720/new_1.pdf (last visited 31 May 2019).

47 DHSC, *The surrogacy pathway: surrogacy and the legal process for intended parents and surrogates in England and Wales*, and *Care in surrogacy: guidance for the care of surrogates and intended parents in surrogate births in England and Wales* (February 2018).

LEGAL PARENTHOOD

Current law

16.83 The current law governing legal parenthood of a child born through an international surrogacy arrangement can be shortly stated, but is often not fully understood.

16.84 In the UK, the legal parents of a child born through an international surrogacy arrangement are the surrogate, and (if she is married or in a civil partnership) her spouse or civil partner. That is the case regardless of whether the intended parents are recognised as the legal parents in the country of the child's birth, and are named on the child's birth certificate.

16.85 As a result, where the parents bring the child into the UK to raise him or her here, it is necessary for them to apply for a parental order. It is only on the grant of a parental order that the intended parents become the legal parents under UK law,[48] and the parenthood of the surrogate (and of her spouse or civil partner) is extinguished.

Criticisms and proposals for reform

16.86 Intended parents may often feel that it is unfair that their legal parenthood in the country of the child's birth is not recognised in the UK. The need to make a parental order application is seen as an unwanted hurdle. Practical difficulties can also arise. For example, as the intended parents are not the legal parents they will not automatically have parental responsibility for the child; if this is the case they will not be able to consent to medical treatment for the child. If the child is ill, then the surrogate (and her spouse or civil partner) are, in the first instance, the people who must give consent. That presents practical difficulties where the surrogate is overseas, and may not be able to communicate in English. It may also be the case that the surrogate does not wish to be responsible for making decisions in respect of the child. In such circumstances, not recognising the intended parents as legal parents appears to run contrary to ensuring the welfare of the child.

16.87 In Chapter 8 we have provisionally proposed a new pathway to parenthood, under which the intended parents can be recognised as the legal parents of a child from birth. We have considered whether this new pathway should be available in the case of international surrogacy arrangements. We have concluded, however, that it is not practical to do so. In particular, it would not be possible to ensure that safeguards contained within the new pathway – counselling, criminal records checks and legal advice – are met in the case of an international surrogacy arrangement. Further, as a matter of policy, we do not think that legal parentage should be conferred in the UK by an administrative procedure where the surrogacy arrangement has taken place overseas. We think that in overseas cases judicial oversight provides an important safeguard.

16.88 As a result, we think that only domestic surrogacy arrangements should be eligible for entry into the new pathway. We define an arrangement as domestic where all elements of the process, including pre-conception screening, (artificial) conception, pregnancy and birth take place in the UK. Where such arrangements are gestational

---

[48] Although, as we noted earlier in the chapter, the intended father whose sperm is used where the surrogate does not have a spouse, will be the legal father under UK law.

(or traditional in the rare cases where a clinic is used for artificial insemination) they must use a clinic licensed by the Human Fertilisation and Embryology Authority, therefore necessarily a clinic situated in the UK.[49]

16.89 Therefore, our starting point is that the intended parents of children born through international surrogacy arrangements will continue to need to apply for a parental order. Given the wide disparity in surrogacy laws that exist worldwide, we think that the parental order process provides significant safeguards that need to be maintained. In particular, the application ensures that the child has genuinely been born through a surrogacy arrangement. The process also offers some safeguards against concerns of exploitation of women as surrogates and, in particular, the sale of children. These concerns may be particularly pertinent in the case of some international surrogacy arrangements. We note, however, that concerns of exploitation of surrogates remain, even under the parental order process.[50]

16.90 As we note in paragraph 16.6 above, however, concerns of exploitation vary considerably between different countries. A wide range of issues are likely to impact on the risks of exploitation in any particular country. In some countries, the risk may be no greater than – or even less than –in the UK. In others, the risks may be considerably higher.

16.91 Given these wide variations, we do not think that UK law should recognise intended parents as the legal parents of a child born through an international surrogacy arrangement as a matter of course. We think, however, that the Secretary of State should have the power to provide that the legal parenthood of intended parents of children born through international surrogacy arrangements established under the law of a particular country will be recognised in the UK, without the need for the intended parents to make a parental order application in this jurisdiction. This power would be contained in primary legislation, and would be exercisable through secondary legislation.

16.92 We think that prior to exercising the power, the Secretary of State should be required to be satisfied that domestic law and practice[51] in the country in question provides protection against the exploitation of women acting as surrogates, and for the welfare of the child, that is at least equivalent to that provided in UK law. We note that it would not be practical to require that the law in other countries was the same as that in the UK: such a test would be far too specific. The assessment required would be that the protections available are the same, despite differences in the law as compared with the UK.

---

49 See *U v W* [1998] Fam 29.

50 *D and L (Surrogacy)* [2012] EWHC 2631 (Fam), [2013] 1 WLR 3135.

51 By “practice” we have in mind the situation where the law of a particular jurisdiction may not explicitly require, say, a specific screening requirement but, in practice, organisations, clinics or agencies in that country always undertake that particular screening.

Consultation Question 98.

16.93 We provisionally propose that international surrogacy arrangements should not be eligible for the new pathway to parenthood.

Do consultees agree?

Consultation Question 99.

16.94 We provisionally propose that:

(1) the Secretary of State should have the power to provide that the intended parents of children born through international surrogacy arrangements, who are recognised as the legal parents of the child in the country of the child's birth, should also be recognised as the child's legal parents in the UK, without it being necessary for the intended parents to apply for a parental order, but

(2) before exercising the power, the Secretary of State should be required to be satisfied that the domestic law and practice in the country in question provides protection against the exploitation of surrogates, and for the welfare of the child, that is at least equivalent to that provided in UK law.

Do consultees agree?

16.95 We note that the law could provide that a consequence of recognising legal parenthood granted in another country would be that the child would be a British citizen at birth if the intended mother or father is a British citizen.[52]

SURROGACY ARRANGEMENTS IN THE UK WITH FOREIGN INTENDED PARENTS

Current law

16.96 So far in this chapter we have focused on the situation where UK-based intended parents go overseas to enter into international surrogacy arrangements. However, the situation also occurs – although much more rarely – where foreign intended parents come to the UK for a surrogacy arrangement. The fact of such arrangements is apparent in case law.[53] It has also been drawn to our attention by Northern Irish stakeholders whom we spoke to in the course of preparing this paper.

16.97 Our view is that our proposals should aim to make the rules on who can obtain a parental order (or enter into the new pathway, if our provisional proposals were to

---

52 This is what happens in respect of adoption under British Nationality Act 1981, ss 1(5) and 1(5A) and surrogacy (those sections of the British Nationality Act 1981 are applied and modified by sch 4 para 10 of the 2018 Regulations).

53 For case law, see *Re G (Surrogacy: Foreign Domicile)* [2007] EWHC 2814 (Fam), [2008] 1 FLR 1047.

become law) clearer and more legally certain. In Chapter 12 we provisionally propose that habitual residence in the UK be added as a ground for jurisdiction, in addition to the existing ground of domicile in the UK. Our aim is not to encourage "surrogacy tourism", that is, we do not want to encourage people to come to the UK simply for the purpose of surrogacy, nor to create a UK market for overseas intended parents. We therefore want to avoid creating a forum of convenience while allowing intended parents who need to, because they are living in the UK, to apply for a parental order, or to enter into the new pathway for a surrogacy arrangement.

16.98 Unless they have domicile in the UK, foreign intended parents will not be able to obtain a parental order under the current law. That is because domicile is a requirement of the grant of a parental order under sections 54 and 54A of the Human Fertilisation and Embryology Act 2008.[54]

16.99 Therefore, foreign intended parents who enter into a surrogacy arrangement in the UK without being able to satisfy the requirement as to jurisdiction may seek to leave the UK with the child with the aim of becoming the child's legal parents in their home jurisdiction. We think that restrictions may be necessary to prevent this happening without judicial oversight, so that our policy aim of preventing people coming to the UK simply for the purpose of entering into a surrogacy arrangement is not undermined.

16.100 In the context of adoption, there are restrictions on taking children out of the UK for the purpose of adoption, in order to protect against child slavery and trafficking, and to promote children's welfare.[55]

16.101 Section 85 of the ACA 2002 and section 60 of the AC(S)A 2007 impose restrictions on taking children who are Commonwealth citizens, or habitually resident in the UK, out of the UK for the purpose of adoption. These sections make it a criminal offence to remove a child from the UK, unless the proposed adopters have obtained an order under section 84 of the ACA 2002 or section 59 of the AC(S)A 2007.[56]

16.102 An order under section 84 of the ACA 2002 or section 59 of the AC(S)A 2007 acts like an adoption order, in that it confers on the applicant parental responsibility for the child, and extinguishes the parental responsibility of any other person.[57]

16.103 When the court is deciding whether to make a section 84 order, the child's welfare throughout his or her lifetime is the court's paramount consideration (along with the checklist contained in section 1 of the Act).[58] The need to safeguard and promote the welfare of the child throughout the child's life is also the court's paramount consideration when deciding whether or not to make an order under section 59 of the

---

54 See para 5.45 and subsequent.

55 R Cabeza, "Family: Adoption without borders?" (2009) 159 *New Law Journal* 1310.

56 The offence also extends to people who negotiate or initiate arrangements which have the purpose of facilitating the removal of a child from the UK, unless the proposed adopters have obtained an order under ACA 2002, s 84: ACA 2002, ss 60(2) and 85(2).

57 ACA 2002, s 84(5); AC(S)A 2007, s 59(5).

58 The Adoptions with a Foreign Element Regulations 2005 (SI 2005 No 392), reg 11(1)(a).

AC(S)A 2007.[59] The court would also, so far as is reasonably practicable, have regard in particular to the issues in section 14(4) of the AC(S) A 2007.[60]

16.104 Before the court can make an order under section 84, it must be satisfied that the relevant requirements prescribed by The Adoptions with a Foreign Element Regulations 2005[61] have been met. Similarly, in Scotland, before the court can make an order under section 59, it must be satisfied that the relevant requirements prescribed by The Adoptions with a Foreign Element (Scotland) Regulations 2009[62] have been met.[63] These Regulations place requirements on both the UK adoption agency and the relevant foreign authority[64] and aim to prevent adoptive parents circumventing the requirements of UK adoption law.

16.105 In terms of the requirement of an English adoption agency (which is placing the child habitually resident in the UK with foreign parents), the agency must have:[65]

(1) confirmed to the court that it has complied with various requirements imposed in regulations where the agency is considering placing the child domestically;[66]

(2) submitted to the court–

(a) the child's permanence report and child's health report;

(b) the recommendations made by the adoption panel;

(c) the adoption placement report;[67]

---

59 AC(S)A 2007, s 14(3) as applied by The Adoptions with a Foreign Element (Scotland) Regulations 2009 (SSI 2009 No 182), reg 9(1).

60 AC(S)A 2007, s 14(4) as applied by The Adoptions with a Foreign Element (Scotland) Regulations 2009 (SSI 2009 No 182), reg 9(1).

61 The Adoptions with a Foreign Element Regulations 2005 (SI 2005 No 392).

62 The Adoptions with a Foreign Element (Scotland) Regulations 2009 (SSI 2009 No 182).

63 AC(S)A 2007, s 59(3).

64 This term meaning "a person, outside the British Islands performing functions in the country in which the child is, or in which the prospective adopter is, habitually resident which correspond to the functions of an adoption agency or to the functions of the Secretary of State in respect of adoptions with a foreign element" (The Adoptions with a Foreign Element Regulations 2005, (SI 2005 No 392), reg 2) or a "person or body outwith the British Islands performing functions in the country in which the child, or the prospective adopter, is habitually resident which correspond to the functions of an adoption agency or to the functions of the Scottish Ministers in respect of adoptions with a foreign element" (The Adoptions with a Foreign Element (Scotland) Regulations 2009 (SSI 2009 No 182), reg 2).

65 The Adoptions with a Foreign Element Regulations 2005 (SI 2005 No 392).

66 In England, these regulations impose duties on adoption agencies where the agency is considering placing a child with UK parents. These regulations are set out in the Adoption Agencies Regulations 2005 (SI 2005 No 389) and the Adoption Agencies (Wales) Regulations 2005 (SI 2005 No 1313). These duties include, most importantly, the duty of the adoption agency to produce a permanence report on the child, covering a broad range of information on the child and its family.

67 This is the report prepared by the agency for the purposes of matching a child with adoptive parents.

(d) the reports of and information obtained in respect of the visits and reviews; and

(e) a report on the suitability of the applicants.

16.106 In terms of the requirement of a Scottish adoption agency (which is placing the child habitually resident in the UK with foreign parents), the agency must have:

(1) confirmed to the court that it has complied with the various requirements imposed in regulations where the agency is considering placing the child domestically;[68] and

(2) submitted to the court –

(a) a copy of the recommendations of the adoption panel under regulation 6(2) of the Adoption Agencies (Scotland) Regulations 2009;

(b) if those regulations apply, a copy of the report of the reasons why continued contact is in the best interests of the child;

(c) a copy of the report from a registered medical practitioner on the health of the child and a report based on any investigations and tests carried out on the child;

(d) a copy of the report outlining information and observations on various matters; and

(e) a copy of the report on the visits to the child.[69]

16.107 In terms of the requirements of the relevant foreign authority (where one of its nationals is seeking to adopt a child habitually resident in the UK), this body must have:[70]

(1) confirmed in writing to that agency that the prospective adopter has been counselled and the legal implications of adoption have been explained to him or her;

(2) prepared a report on the suitability of the prospective adopter to be an adoptive parent;

(3) determined and confirmed in writing to that agency that he or she is eligible and suitable to adopt in the country or territory in which the adoption is to be effected; and

---

68 The Adoptions with a Foreign Element (Scotland) Regulations 2009 (SSI 2009 No 182), reg 7(3)(a)(i). The relevant regulations are set out in the Adoption Agencies (Scotland) Regulations (SSI 2009 No 154).

69 The Adoptions with a Foreign Element (Scotland) Regulations 2009 (SSI 2009 No 182), reg 8.

70 The Adoptions with a Foreign Element Regulations 2005, (SI 2005 No 392), reg 10; The Adoptions with a Foreign Element (Scotland) Regulations 2009 (SSI 2009 No 182), regs 7(3)(b)(i) to (iv).

(4) confirmed in writing to that agency that the child is or will be authorised to enter and reside permanently in that foreign country or territory.

16.108 Finally, in the case of a child placed by an adoption agency the prospective adopter must have confirmed in writing to the adoption agency that he or she will accompany the child on taking him or her out of the United Kingdom.[71]

16.109 An application for a section 84 or section 59 order may not be made unless the child's home has been with the applicant(s) at all times during the preceding 10 weeks.[72] The applicants' home does not need to be in this jurisdiction for these purposes. [73]

16.110 Prior to a section 84 order being made, a child may be subject to a care order, which provides the local authority with parental responsibility.[74] In that scenario, the local authority can, therefore, apply to the court to allow the child to be removed from the jurisdiction for the purposes of this 10-week placement period with the adoptive parents.[75] The consent of the child's parents would still be required, assuming that they had parental responsibility.[76]

16.111 In Scotland, prior to a section 59 order being made, a child may be subject to a permanence order[77] or a permanence order with authority to adopt.[78] Such orders vest specified parental responsibilities and parental rights in the local authority and allow the authority to regulate the child's residence.[79] A parent whose child is subject to such an order may however retain some parental responsibilities and parental rights, in particular the responsibility and right to maintain personal relations and direct contact with the child.[80] While the child's parents retain and exercise the parental right to have the child living with them or otherwise to regulate the child's residence, or, if the child is not living with them, to maintain personal relations and direct contact with the child, their consent to the removal of the child from the UK, or a court order, is

---

71 Or in the case of a couple, the agency and relevant foreign authority have confirmed that it is necessary for only one of them to do so: The Adoptions with a Foreign Element Regulations 2005, (SI 2005 No 392), reg 10(c); The Adoptions with a Foreign Element (Scotland) Regulations 2009 (SSI 2009 No 182), regs 7(3)(c) and (d).

72 ACA 2002, s 84(4); AC(S)A 2007, s 59(4).

73 In an overseas adoption, a child's home during the period of 10 weeks immediately prior to the making of an order for parental responsibility under the ACA 2002, s.84(1) could be with the prospective adopters, wherever they lived, and did not have to be in England and Wales: *A LBC v Department for Children, Schools and Families* [2009] EWCA Civ 41, [2010] Fam 9. Since the terms of the ACA 2002, and the AC(S)A 2007 are very similar, it seems likely that the same approach would be taken in Scotland.

74 Children Act 1989, s 33(3).

75 Children Act 1989, s 33(7), sch 2 para 19(1).

76 The consent of all those with persons with parental responsibility would be required (Children Act 1989, sch 2 para 19(3)(d)).

77 AC(S)A 2007, s 80(1).

78 AC(S)A 2007, s 83.

79 AC(S)A 2007, s 81(1)(b).

80 Children (Scotland) Act 1995, ss 1(1)(c) and 2(1)(c).

required.[81] In this scenario, a local authority would therefore require parental consent (or a court order) to remove the child from the UK for the purposes of the 10-week placement period. In Convention adoption orders,[82] a permanence order with authority to adopt must be applied for where a local authority contemplates removal of a child for adoption abroad.[83]

16.112 Where adoption is not preceded by a permanence order (with or without authority to adopt), there are other situations in which parental consent to the removal of a child from the UK would be required in terms of the Children (Scotland) Act 1995, s 2(3) and (6). These include children who are subject to a compulsory supervision order made by a children's hearing[84] and whose parents (or other relevant persons) have parental responsibilities and parental rights. A compulsory supervision order (to which most children who are looked after by a local authority will be subject) will usually contain measures specifying where the child is to live. If the plan was for removal of the child from the UK, parental consent would be required, together with variation of the compulsory supervision order. For moves within the UK, the children's hearing may vary the compulsory supervision order.

Application to international surrogacy arrangements, and reform

16.113 The potential application of sections 84 and 85 of the ACA 2002 in a surrogacy case has already been recognised in the case of *Re G (Surrogacy: Foreign Domicile)*.[85] The case concerned a surrogacy arrangement entered into by Turkish nationals who came to the UK for a surrogacy arrangement. They were unable to obtain a parental order, as they were not domiciled in the UK. The court held that the way forward was for the couple to adopt the child in Turkey. In order for this to happen, and to prevent a breach of section 85 of the ACA 2002, the High Court made an order under section 84 of that Act.

16.114 Currently, therefore, section 84 of the ACA 2002 or section 59 of the AC(S)A 2007 will be relevant where the only way for intended parents to acquire legal parenthood in their home country is for them to adopt the child. Where an order equivalent to a parental order is available in the intended parents' home country, the surrogate (as legal mother of the child) could travel with the child to that country to facilitate the parents making an application. We question whether that offers sufficient protection to the child concerned or if there is a need for a provision in respect of international surrogacy arrangements equivalent to that of sections 84 and 85 of the ACA 2002, and sections 59 and 60 of the AC(S)A 2007.

16.115 In Chapter 12, we provisionally propose that the requirement that intended parents be domiciled in the UK, in order to be eligible for a parental order, be reformed. Under our provisional proposals, intended parents would be eligible for the new pathway to parenthood, or to apply for a parental order, if they are habitually resident in the UK. We acknowledge that this proposal creates a risk of the UK becoming more attractive

---

81 Children (Scotland) Act 1995, ss 2(3) and (6).

82 The Hague Convention on Intercountry Adoption 1993.

83 The Adoptions with a Foreign Element (Scotland) Regulations 2009 (SSI 2009 No 182), reg 46(7).

84 Children's Hearings (Scotland) Act 2011, s 83.

85 [2007] EWHC 2814 (Fam), [2008] 1 FLR 1047.

as a destination for surrogacy tourism, but conclude that this risk is outweighed by the attractions of habitual residence as a link to the jurisdiction of the UK, compared to domicile.[86]

16.116 It might therefore be possible for foreign intended parents to establish habitual residence in the UK before the birth of the child under the surrogacy arrangement, before returning home after the birth. In such a case, the intended parents could qualify for the new pathway or obtain a parental order in the UK and therefore remove the child from the UK as the child's legal parents.[87] In practice, it is unlikely that the foreign intended parents would be able to establish habitual residence.[88] They would, therefore, still find themselves unable to qualify for the new pathway or to obtain a parental order and become the child's legal parents in the UK.

16.117 In such circumstances, there may be a need to put in place a procedure to protect the child's welfare by ensuring that a child born of a surrogacy arrangement is not removed from the UK for the purpose of a parental order (or equivalent) being made overseas without the court's approval. However, it may be difficult to replicate in the situation of a surrogacy arrangement the procedure which we have outlined for section 84 of the ACA 2002 or section 59 of the AC(S)A 2007.

16.118 In particular, the same infrastructure does not exist for surrogacy arrangements as there is for adoptions. As will be apparent from the description of the law above, an order under section 84 of the ACA 2002 or section 59 of the AC(S)A 2007, requires the involvement of both the domestic adoption agency and the foreign authority. There are simply not the equivalent organisations in place for surrogacy. In Chapter 9 we recommend the creation of regulated surrogacy organisations. It is possible that they could fulfil a role in providing information needed by the court to make a decision on the removal of the child from the jurisdiction for the purposes of a parental order being made overseas. We note, however, that UK surrogacy organisations may not wish to be involved in surrogacy arrangements involving foreign intended parents. It is possible that any process could be more "light-touch" than that required for adoption. It could, for example, involve a post-birth report from CAFCASS (or, in Scotland, from a curator *ad litem*/reporting officer), similar to that required for a parental order, but with the exception of the requirement that the intended parents demonstrate the link to the jurisdiction of the UK.[89] The paramount consideration for the court, as for the making of a parental order, or for an order under section 84 of the ACA 2002 or section 59 of the AC(S)A 2007, would be the child's welfare throughout his or her life. This approach still leaves the question of what involvement could be expected from the authorities in the jurisdiction to which the intended parents come from, and to which they wish to remove the child.

---

86 See paras 12.5 and subsequent.

87 Such parents would not be eligible for the new pathway as that is confined to arrangements that are entirely domestic (see para 16.88).

88 See para 12.14 where we discuss whether there should be any restriction on the use of habitual residence as a basis for jurisdiction in surrogacy cases, for example residence for a certain length of time.

89 CAFCASS also prepare reports where an application to court is necessary because a parent wishes to remove a child permanently from the UK to another country, and this is opposed by the other parent (for example, in the context of separation and divorce).

16.119 At this stage, we have limited information on the incidence of surrogacy arrangements in the UK involving foreign intended parents, and on how such cases are handled in practice. We invite consultees to tell us of their experience. We also invite consultees' views on whether regulation is needed, and on the form that could most appropriately take.

Consultation Question 100.

16.120 We invite consultees to tell us of their experience of surrogacy arrangements in the UK involving foreign intended parents.

16.121 We invite consultees' views as to whether:

(1) any restriction is necessary on the removal of a child from the UK for the purpose of the child becoming the subject of a parental order, or its equivalent, in another jurisdiction; and

(2) if such a restriction is necessary, there should be a process allowing foreign intended parents to remove the child from the jurisdiction of the UK for this purpose and with the approval of the court and, if so, what form should that process take.

Chapter 17: Miscellaneous issues

INTRODUCTION

17.1 Our Terms of Reference for this project include consideration of the issue of the consequential impact of surrogacy on other areas of the law.[1] Stakeholders have raised with us three aspects of the general law that would merit reform as regards their application to surrogacy. In this chapter, we consider issues of surrogacy that arise in respect of employment law, a surrogate-born child's entitlement to succeed to a surrogate's estate, and a surrogate-born child's right to succeed to hereditary titles. We then discuss the issue of how surrogacy is dealt with in many hospitals in the UK, and potential improvements that could be made to this process.

17.2 At the end of this chapter we also ask a general question, inviting consultees to provide us with details of any other legal issues that they have encountered as a result of surrogacy arrangements that we have not covered.

SURROGACY AND EMPLOYMENT LAW

17.3 As a general matter of policy, we think that employment law should offer the same rights to those involved in a surrogate pregnancy as those involved in any other pregnancy. We consider, as a matter of employment law, that: the surrogate should be treated in the same way as a woman carrying her own child and the intended parents should be treated in the same way as any other person with a new child.

Statutory maternity leave

17.4 The entitlement to statutory maternity leave is dependent on a person being pregnant and giving birth.[2] It is not dependent on satisfying any conditions, such as a minimum period of employment. It is, therefore, not available for intended parents. Surrogates, however, have a statutory entitlement to take their full entitlement of statutory maternity leave from their employer consisting of 52 weeks.[3] This is the case even if the surrogate is not actually caring for the child during her maternity leave.

17.5 A surrogate, however, is not required to take her full entitlement of 52 weeks of statutory maternity leave. A woman must take two weeks of compulsory leave immediately after giving birth.[4] After this two-week period, however, the surrogate is free to return to work as soon after birth as she would like, subject to her medical fitness.

---

1 See para 1.78 for discussion of our Terms of Reference.

2 The Maternity and Parental Leave etc. Regulations 1999 (SI 1999 No 3312), reg 4.

3 The Maternity and Parental Leave etc. Regulations 1999 (SI 1999 No 3312), reg 4. Statutory maternity leave is currently composed of 26 weeks of ordinary maternity leave, and a further 26 weeks of additional maternity leave.

4 Employment Rights Act 1996, s 72 and the Maternity and Parental Leave etc. Regulations 1999 (SI 1999 No 3312), reg 8.

17.6 Statutory maternity leave is not dependent on the person being the legal mother of the child to whom she gives birth. As such, we do not consider that our proposed new pathway,[5] and the removal of legal parenthood from the surrogate (subject to her right to object), would affect the surrogate's entitlement to statutory maternity leave (nor is it our intention that it should).

Statutory maternity pay

17.7 Unlike statutory maternity leave, entitlement to statutory maternity pay does not arise from the first day of employment. The surrogate will be entitled to 39 weeks of statutory maternity pay, but only if the relevant statutory conditions have been met.[6]

Statutory paternity leave

17.8 As explained in Chapter 4 if the surrogate is married, or in a civil partnership, the surrogate's spouse or civil partner will become the child's legal parent.

17.9 The law on statutory paternity leave (which can, despite its name, be taken by a man or woman), states that, to qualify, a person must be:

(1) the child's legal father; or

(2) married to, the civil partner of, or the partner of the child's mother, but not the child's father.[7]

17.10 This provision, on the face of it, provides that the spouse, civil partner or unmarried partner of the surrogate can qualify for statutory paternity leave.

17.11 There is, however, an additional condition that a person must satisfy in order to qualify for statutory paternity leave. The person who qualifies for statutory paternity leave must have, or expect to have:

(1) if he is the child's father, responsibility for the upbringing of the child; or

(2) if he or she is the mother's husband, civil partner, or partner but not the child's father, the main responsibility (apart from any responsibility of the mother) for the upbringing of the child.[8]

17.12 As noted by commentators, therefore, statutory paternity leave "will not ordinarily be available to the spouse or partner of the surrogate mother".[9]

---

5 See ch 8.

6 Social Security Contributions and Benefits Act 1992, s 164. A woman will be entitled to 39 weeks of statutory maternity pay on condition of: (1) 26 weeks continuous employment up to and including the 15th week before the expected week of childbirth; and (2) average earnings of at least the lower earnings limit for national insurance contributions during the eight-week period ending on the 15th week before the expected week of childbirth. There are also notification and other requirements which we have not covered.

7 Paternity and Adoption Leave Regulations 2002 (SI 2002 No 2788), reg 4(2)(b).

8 Paternity and Adoption Leave Regulations 2002 (SI 2002 No 2788), reg 4(2)(c).

9 R Cabeza, V Flowers, E Pierrot, A Rao, B O'Leary and L Odze, *Surrogacy: Law, Practice and Policy in England and Wales* (1st ed 2018) para 6.61.

17.13 We think that this situation is potentially inconsistent with the express statutory purpose of statutory paternity leave, namely "caring for the child *or supporting the mother* (emphasis added)".[10]

17.14 Although the spouse, civil partner or partner of the surrogate may not be involved in the care of the child born of the surrogacy arrangement, he or she may wish to support the surrogate post-pregnancy, particularly if the pregnancy led to medical complications.

Statutory paternity pay

17.15 Statutory paternity pay is only available for those who are entitled to take statutory paternity leave. The person must, therefore, have the necessary qualifying relationship with the child, set out above, to qualify.[11] There are also further requirements, which mirror the eligibility requirements for statutory maternity pay.[12]

17.16 Consequently, if the spouse, civil partner or partner of the surrogate is not entitled to statutory paternity leave (as will very likely be the case), he or she will not be entitled to statutory paternity pay.

17.17 If amendments are made to statutory paternity leave, so that the spouse, civil partner or partner of the surrogate is entitled to leave, we would expect that statutory paternity pay would also be available. However, we welcome consultees' views on this issue.

Consultation Question 101.

17.18 We invite consultees' views as to whether the current application of the law on statutory paternity leave, and statutory paternity pay, to the situation of the surrogate's spouse, civil partner or partner requires reform.

The rights of the intended parents

17.19 As we have seen, neither of the intended parents are entitled to statutory maternity leave, as this is reserved for women who are pregnant.[13]

---

10 Employment Rights Act 1996, s 80A(1).

11 The Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations 2002 (SI 2000 No 2822), reg 4.

12 Social Security Contributions and Benefits Act 1992, s 171ZA. A person will be entitled statutory paternity pay on condition of: (1) 26 weeks continuous employment up to and including the 15th week before the expected week of childbirth; and (2) average earnings of at least the lower earnings limit for national insurance contributions during the eight-week period ending on the 15th week before the expected week of childbirth. There are also notification and other requirements which we have not covered.

13 Maternity and Parental Leave etc. Regulations 1999 (SI 1999 No 3312), reg 4. The Court of Justice of the European Union has confirmed that this means that EU law contains no right to maternity leave for intended parents in surrogacy arrangements: Case C-167/12 *CD v ST* [2014] 3 CMLR 15; and C-363/12 *Z v A Government Department and the Board of Management of a Community School* [2014] 3 CMLR 20.

17.20 Since 5 April 2015, however, intended parents may be entitled to statutory adoption leave and pay.

"Parent A"

17.21 Provided that all the eligibility criteria in the regulations have been met, one of the intended parents (referred to in the Regulations as intended "Parent A") may qualify to take up to 52 weeks of statutory adoption leave.[14] Only one of the intended parents is entitled to take statutory adoption leave and, if there are two intended parents, they are free to decide which of them will exercise this right.

17.22 The intended parent taking statutory adoption leave may also be eligible to receive statutory adoption pay.[15]

"Parent B"

17.23 The second intended parent who does not take statutory adoption leave (referred to in the Regulations as intended "Parent B"), may be entitled to statutory paternity leave and statutory paternity pay, the conditions of which have been modified for the surrogacy context. Intended Parent B will qualify for this form of statutory paternity leave if:

(1) he or she is either married to, the civil partner of, or the partner of Parent A; and

(2) he or she has, or expects to have, the main responsibility (apart from the responsibility of Parent A) for the upbringing of the child.[16]

17.24 Provided the other conditions in the regulations are met,[17] Parent B will also be entitled to a modified form of statutory paternity pay.

17.25 We are also aware that, under our proposed new pathway, both intended parents would be legal parents of the child at birth. As a result, one of the intended parents would potentially qualify for the "standard" statutory paternity leave, provided the other conditions in the regulations have been met. This is because he or she will be the child's father and/or will have responsibility for the upbringing of the child, as required

---

14 The Statutory Paternity Pay and Statutory Adoption Pay (Parental Orders and Prospective Adopters) Regulations 2014 (SI 2014 No 2934). These regulations came into force on 5 April 2015.

15 The Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations 2002 (SI 2002 No 2822), as applied and modified by The Statutory Paternity Pay and Statutory Adoption Pay (Parental Orders and Prospective Adopters) Regulations 2014 (SI 2014 No 2934). Parent A must have (1) 26 weeks continuous employment up to the time that they wish to take their leave; and (2) must have normal weekly earnings for an eight-week period (the "relevant period") which are not less than the lower earnings limit for national insurance contributions. There are also notification and other requirements which we have not covered.

16 The Paternity, Adoption and Shared Parental Leave (Parental Order Cases) Regulations 2014 (SI 2014 No 3096), reg 3 (applying the Paternity and Adoption Leave Regulations 2002 (SI 2002 No 2822), reg 4).

17 The Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations 2002 (SI 2002 No 2822), as applied and modified by The Statutory Paternity Pay and Statutory Adoption Pay (Parental Orders and Prospective Adopters) Regulations 2014 (SI 2014 No 2934) require that Parent B must have (1) 26 weeks continuous employment up to the time that they wish to take their leave; and (2) must have normal weekly earnings for an eight-week period (the relevant period) which are not less than the lower earnings limit for national insurance contributions. There are also notification and other requirements which we have not covered.

by the existing paternity leave regulations.[18] This may render redundant the provisions outlined above in respect of Parent B.

A summary of employment rights in surrogacy arrangements

17.26 Figure 4 below summarises the current entitlement to employment rights for those involved in a surrogacy arrangement, provided the relevant statutory conditions for each of them have been met:

Figure 4 showing a summary of the current entitlement to employment rights for those involved in a surrogacy arrangement

Employment right	The surrogate	The surrogate's spouse, civil partner or partner	"Parent A"	"Parent B"
Statutory maternity leave and pay	Yes	No	No	No
Statutory paternity leave and pay	No	Very unlikely	No	Yes (a modified form of)
Statutory adoption leave	No	No	Yes	No

Maternity allowance

17.27 Maternity allowance is a weekly payment that a woman may be eligible to receive if she has been employed or self-employed for some of the time during and before her pregnancy. She must also have met the maternity allowance earnings threshold during this period.[19]

17.28 Maternity allowance is primarily aimed at those mothers who are self-employed, and therefore not eligible for statutory maternity pay, which is restricted to employees.

17.29 A woman will be entitled to maternity allowance if "she has become pregnant".[20] From our reading of the statute, this would mean that neither of the intended parents would be eligible for this allowance.

---

18 Paternity and Adoption Leave Regulations 2002 (SI 2002 No 2822), reg 4(2)(c).

19 Social Security Contributions and Benefits Act 1992, s 35.

20 Social Security Contributions and Benefits Act 1992, s 35(1)(a).

17.30 This situation creates a potential anomaly. If the intended mother is self-employed she will:

(1) not qualify for statutory maternity pay (as this requires a person to be pregnant);[21]

(2) not qualify for maternity allowance (as this requires a person to be pregnant);[22] and

(3) not qualify for statutory adoption pay (as this requires a person to be an employee).[23]

17.31 This situation is inconsistent with our general policy outlined at the start that employment law should offer the same rights to those involved in a surrogate pregnancy as to those involved in any other pregnancy. As a result, we provisionally propose to extend the eligibility for maternity allowance to one of the intended parents.[24]

Consultation Question 102.

17.32 We provisionally propose that provision for maternity allowance should be made in respect of intended parents, and that any such provision should be limited so that only one intended parent qualifies.

Do consultees agree?

Leave for intended parents prior to the birth of the child

17.33 We have been told of a potential issue around an intended mother taking time off work, before the baby is born, for the purposes of induced lactation, to enable her to breastfeed the baby.

17.34 This issue may have arisen since the intended parent who is taking statutory adoption leave, in relation to surrogacy, has no choice as to when his or her leave will commence: it must commence on the day that the child is born or, if the relevant intended parent is at work on that day, the next day.[25]

---

21 Social Security Contributions and Benefits Act 1992, s 164.

22 Social Security Contributions and Benefits Act 1992, s 35.

23 The Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations 2002 (SI 2002 No 2822), as applied and modified by The Statutory Paternity Pay and Statutory Adoption Pay (Parental Orders and Prospective Adopters) Regulations 2014 (SI 2014 No 2934).

24 Extending it to both parents would mean that the law was more generous to intended parents in surrogate pregnancies than parents who do not use surrogacy.

25 The Paternity, Adoption and Shared Parental Leave (Parental Order Cases) Regulations 2014 (SI 2014 No 3096), reg 14.

17.35 Equally, the intended parents only have a right to paid time off work to accompany the surrogate to ante-natal appointments on two occasions.[26] The intended parents are not entitled to paid time off work for appointments without the surrogate, or for any other reason.

Consultation Question 103.

17.36 We invite consultees' views as to:

(1) whether there is a need for reform in respect of the right of intended parents to take time off work before the birth of the child, whether for the purpose of induced lactation, ante-natal appointments or any other reason; and

(2) if reform is needed, suggestions on reform.

A rest space for breastfeeding

17.37 A related issue arises in respect of intended mothers who, through induced lactation, wish to express milk at work. It is unclear to us whether regulation 25 of the Workplace (Health, Safety and Welfare) Regulations 1992 would apply to this situation.[27]

17.38 Regulation 25 provides that:

> suitable facilities shall be provided for any person at work who is a pregnant woman or nursing mother to rest.[28]

17.39 The terms "pregnant woman" and "nursing mother" are not defined. We would welcome consultees' views and experiences on whether this duty is sufficient to cover the situation of an intended parent nursing a child.

This situation is in contrast to statutory maternity leave and statutory adoption leave in the adoption context, where there is more flexibility:

(1) A mother who qualifies for statutory maternity leave can decide when she starts her statutory maternity leave, provided that *it does not begin more than 11 weeks before the expected week of childbirth*: The Maternity and Parental Leave etc. Regulations 1999 (SI 1999 No 3312), reg 4(2)(b); and

(2) The primary adoptive parent who qualifies for statutory adoption leave in the adoption context can decide when he or she starts his or her statutory adoption leave, provided that *it does not begin more than 14 days before the date on which the child is expected to be placed with them:* The Paternity and Adoption Leave Regulations 2002 (SI 2002 No 2788), reg 16(1)(b).

[26] Employment Rights Act 1996, s 57ZE. On each of these occasions, the maximum time off during working hours to which the employee is entitled is six and a half hours.

[27] Workplace (Health, Safety and Welfare) Regulations 1992 (SI 1992 No 3004).

[28] Workplace (Health, Safety and Welfare) Regulations 1992 (SI 1992 No 3004), reg 25.

Consultation Question 104.

17.40 We invite consultees' views as to whether the duty of employers to provide suitable facilities for any person at work who is a pregnant woman or nursing mother to rest under Regulation 25 of the Workplace (Health, Safety and Welfare) Regulations 1992 is sufficient to include intended parents in a surrogacy arrangement.

Employment issues – in summary

17.41 Stakeholders that we have met with to date have not reported significant issues with the way that the law currently works. The discussion above, however, raises various specific issues that may need addressing.

17.42 We would appreciate hearing from consultees, including employers, surrogates, the partners and spouses of surrogates, and intended parents, as to their experiences of how surrogacy arrangements are dealt with under existing employment legislation. We would be interested to hear of any specific matters that have arisen that are not covered in the text above, and any suggestions for reform.

Consultation Question 105.

17.43 We invite consultees' views as to whether there are further issues in relation to employment rights and surrogacy arrangements and, if so, any suggestions for reform.

ENTITLEMENT FOR A SURROGATE-BORN CHILD TO SUCCEED TO THE SURROGATE'S ESTATE

17.44 As we discuss in Chapter 8, for the purposes of succession to property, a child's parent is his or her legal parent. As the surrogate is regarded as the legal mother of the child until a parental order is granted, questions of succession arise if the surrogate dies between the birth of the child and the grant of a parental order to the intended parents. Equally, the issue of rights on succession can also arise if an individual who is the legal father, or other legal parent, of the child dies prior to the grant of the parental order.[29]

The law of England and Wales

17.45 Under the law of England and Wales, as the Law Commission of England and Wales has explained, "the law … places a great deal of emphasis on testamentary freedom – the freedom to make a will in whatever terms the testator wishes".[30] This means that if the surrogate dies testate (that is having made a valid will) and she decides in that will

[29] See para 4.25 and subsequent for the current law of parenthood.

[30] Making a will (2017) Law Commission Consultation Paper No 231 para 1.12.

not to leave any of her estate to the surrogate-born child, that child will have no entitlement to any of her estate.[31]

17.46 If the surrogate dies intestate (that is without having made a valid will, or where a will does not dispose completely of her property), the law, by way of the intestacy rules, sets out who will inherit the deceased person's estate.[32]

17.47 In such circumstances, the surrogate-born child's entitlement to a part of the deceased's estate will depend on whether there is a surviving spouse or civil partner. The child's entitlement will be shared collectively with all other children of the deceased.

(1) Where there is a surviving spouse or civil partner, he or she will be entitled to the personal chattels of the deceased, a statutory legacy of £250,000 and half of anything that remains. The child or children will then be entitled to the other half of anything that remains (on the statutory trusts).[33]

(2) Where there is not a surviving spouse or civil partner, then the child or children will be entitled to take the whole estate on the statutory trusts.[34]

Scots law

17.48 The position is different under Scots law.[35] The Scots law of succession is covered in part by common law and in part by statutory provision. The main statute is the Succession (Scotland) Act 1964 (the "1964 Act"). Where a person dies testate, the will dictates the destination of the deceased's estate, subject to legal rights. Under Scots law, the surviving spouse or civil partner and the children of the deceased (if any) have an entitlement to legal rights. Unlike in England and Wales, these rights have been described as indefeasible as they cannot be defeated by testament (in other words by a will).[36] These legal rights, therefore, operate regardless of whether the deceased died testate or intestate. Specific provision is made where a member of a

---

31 Subject to the point that a claim under the Inheritance (Provision for Family and Dependants) Act 1975 would be possible if made before the grant of a parental order. The surrogate-born child would qualify to make a claim against the estate of the surrogate under that Act under s 1(1)(c) ("a child of the deceased").

32 The intestacy rules appear in the Administration of Estates Act 1925, s 46. The Law Commission of England and Wales produced a Report with recommendations on reform to this area of the law: Intestacy and Family Provision Claims on Death (2011) Law Com 331. This led to reform of the law in this area, by the Inheritance and Trustees' Powers Act 2014.

33 A statutory trust is a trust created automatically, by operation of law.

34 Administration of Estates Act 1925, s 46(1).

35 The Scottish Law Commission has published two reports recommending major changes to succession law, the first in 1990 (Succession (1990) Scot Law Com No 124), and the second in 2009 (Succession (2009) Scot Law Com No 215). Some of the recommendations within these reports were implemented by the Scottish Government in the Succession (Scotland) Act 2016.

The Scottish Government is currently reviewing the law of succession. A consultation was launched on 17 February 2019 seeking views on a new approach to reform of intestate succession and on cohabitants' rights in intestacy, as well as on a number of discrete succession issues. For more information see: https://www.gov.scot/publications/consultation-law-succession/ (last visited 31 May 2019).

36 G L Gretton and A J M Steven, *Property, Trusts and Succession* (3rd ed 2017) para 27.1.

cohabiting couple dies intestate; the court has power to make an order for payment of a capital sum or transfer of specified heritable or moveable property to the survivor.[37]

17.49 Legal rights are a claim for money based only on a fixed fraction of the net moveable estate, specifically the moveable estate remaining after satisfaction of prior rights and any debts.[38] "Moveable" estate excludes "heritable" (or "real") estate, notably land and houses. "Prior rights" are statutory rights enjoyed by a surviving spouse or civil partner to heritable and moveable property from an intestate estate in Scotland.[39] The entitlement to legal rights is collective, and shared equally between any other children of the deceased. Its extent depends on whether the deceased had a will and was survived by a spouse or civil partner, or children, or both.

17.50 Any remaining assets are then distributed in accordance with section 2 of the 1964 Act. The remaining estate would pass first to any surviving children and only to a surviving spouse if there were no surviving children, parents, siblings or representation.[40]

17.51 Where a surrogate (or the legal father or other parent, if applicable) dies prior to the grant of a parental order, the child born through surrogacy is entitled to part of the deceased's estate under the Scots law of succession.

17.52 The child's entitlement to a part of the deceased's estate will depend on whether there is a surviving spouse or civil partner, and whether the surrogate died testate or intestate. The surrogate-born child's entitlement is shared equally between any other children of the deceased:

(1) If the person dies intestate, then the surrogate-born child is entitled to participate in one third of the value of any net moveable estate remaining after payment of debts and the surviving spouse or civil partner's prior rights (or one half if there is no surviving spouse or civil partner), and any remaining free estate.

(2) If the person dies testate, then the surrogate-born child is entitled to participate in one third of the value of any net moveable estate remaining after payment of debts if there is a surviving spouse or civil partner (or one half if there is no surviving spouse or civil partner); this is payable before any legacies.[41]

---

37 Family Law (Scotland) Act 2006, s 29.

38 The rules of quantifying legal rights in testate cases are the same as for intestate cases except that there are no prior rights to be deducted before determining the net moveable estate.

39 The 1964 Act, ss 8 and 10(2). Prior rights have a relatively high value, such that when the deceased is survived by a spouse or civil partner, the prior rights can often exhaust the whole estate.

40 The 1964 Act, ss 2(1)(a) and 2(1)(e). Representation applies where the intestate had children or siblings who predeceased him. It allows surviving issue of the deceased (i.e. surviving grandchildren, nieces and nephews of the intestate) to take in priority to the surviving spouse or civil partner: see 1964 Act, s 5(1).

41 Note that where any part of the estate has not been disposed of by the legacies in the will, that part falls to intestacy per the 1964 Act, s 36(1). The child's entitlement to that specific part would be calculated in accordance with the rules of intestate succession outlined above.

Reform

17.53 In England and Wales, at least, the surrogate (and, for example, her husband) can make wills to avoid children that she has carried as a surrogate inheriting from her estate should she die before the making of the parental order extinguishes her legal parenthood. Surrogacy agreements frequently cover the making of wills by surrogates and intended parents (who may wish to make provision for their surrogate-born children, particularly should they die in the period before they become the children's legal parents).[42]

17.54 In Scotland, the existence of the children's legal rights means that it is not possible to exclude completely the child's right to inherit from the surrogate.

17.55 In our new pathway to legal parenthood the intended parents will be the legal parents of a child from birth;[43] this will avoid any "gap" in which the child could inherit from the surrogate.

Consultation Question 106.

17.56 We invite consultees' views as to whether they believe any reforms in relation to surrogacy and succession law are required.

SUCCESSION TO TITLES

17.57 As we explain in Chapters 4 and 5, the surrogate is regarded as the legal mother of the child until the grant of a parental order when the child is treated in law as the child of the intended parents for all purposes.[44] One result of the parental order would be therefore that the child would be entitled to succeed to the estates of the intended parents.

17.58 In relation to succession to titles such as peerages, baronetcies, dignities and coats of arms, however, the common law is preserved.[45] The common law requires that there is a genetic link and that the genetic parents are married to each other. A child created from the gametes of both intended parents who are married to each other would therefore succeed to any titles transmissible through the intended parents by virtue of the common law rather than by virtue of the parental order.[46] However, a child born of a surrogacy arrangement, where those requirements were not fulfilled, would not

---

42 The children would not benefit from inheriting under the intestacy rules in the period before they become the intended parents' children in law.

43 Subject to the surrogate's right to object (see paras 8.23 and subsequent).

44 See paras 4.25 and subsequent. See also Appendix 1.

45 ACA 2002, s 71 as applied and modified by reg 2 and sch 1 para 15 of the 2018 Regulations; Succession (Scotland) Act 1964, s 37(1) as applied and modified by reg 5 and sch 4 para 2 of the 2018 Regulations.

46 A B Wilkinson and K McK Norrie, *The Law relating to Parent and Child in Scotland* (3rd ed 2013) para 4.22. For a different view, see C Agnew and G Black, "The Significance of Status and Genetics in Succession to Titles, Honours, Dignities and Coats of Arms: Making the Case for Reform" (2018) 77 *Cambridge Law Journal* 321, 342.

succeed to a title. We note, however, that issues around the succession to titles would arise equally in the case of donor conception. We think that any consideration of reform should consider these issues holistically. We do not think that it would be desirable to make specific provision in the context of surrogacy, and, therefore, we do not make any proposals for reform of succession to titles.

SURROGACY, CHILDBIRTH AND THE HOSPITAL PROCESS

17.59 A pregnancy is always a special time for the parties involved, and this is no different in surrogacy arrangements. It can, however, also be a worrying process, particularly in surrogacy, where there are additional participants who have an interest in the outcome of the birth. We think it important that all people involved in a surrogacy arrangement feel supported and well looked after in the care that they receive in hospital.

17.60 This view is reflected in guidance provided by the Department of Health and Social Care (the "DHSC") in relation to England and Wales. The guidance states the following.

> Whilst the healthcare professional's duty of care is to the surrogate, [intended parents] should also receive sensitive and supportive care. If the hospital is talking about something that could have implications for the baby and its care and welfare, this should usually also be directed to the [intended parents].[47]

Existing DHSC guidance

17.61 In 2018, the DHSC published two guidance documents on surrogacy:

(1) *The Surrogacy Pathway*, setting out the legal process for intended parents and surrogates in England and Wales;[48] and

(2) *Care in Surrogacy*, setting out guidance for the care of surrogates and intended parents in surrogate birth in England and Wales.[49]

17.62 *Care in Surrogacy* emphasises the importance of the intended parents and surrogate preparing a surrogacy birth plan.[50] As discussed in the current practice chapter,[51] birth plans are encouraged by all of the UK surrogacy organisations, and cover such things such as preferred method of birth and who will be present in the birthing room. The guidance states that:

---

47 DHSC, *The Surrogacy Pathway: Surrogacy and the legal process for intended parents and surrogates in England and Wales* (February 2018) p 17.

48 DHSC, *The Surrogacy Pathway: Surrogacy and the legal process for intended parents and surrogates in England and Wales* (February 2018).

49 DHSC, *Care in Surrogacy: Guidance for the care of surrogates and intended parents in surrogate births in England and Wales* (February 2018).

50 DHSC, *The Surrogacy Pathway: Surrogacy and the legal process for intended parents and surrogates in England and Wales* (February 2018) p 17.

51 See para 3.57.

> with the agreement of the surrogate, a copy of the completed birth plan should be filed in the hospital records and brought to the attention of the Head of Midwifery.[52]

17.63 *Care in Surrogacy* goes on to state that:

> every effort should be made [by the hospital] to accommodate all reasonable requests [in the birth plan], making sure that other existing policies and procedures do not have the unintended consequence of blocking the wishes of the surrogate and [intended parents].[53]

17.64 On postnatal care, the *Care in Surrogacy* guidance notes that "postnatal care related to a surrogate birth will usually be very different to other births".[54] From our discussions with intended parents and surrogates, we understand that there are sometimes issues around the discharge of the baby from hospital. The intended parents and surrogate may all agree that the baby is discharged independently from the surrogate. Since, however, the surrogate remains the child's legal mother (with parental responsibility),[55] this can cause issues in practice.

17.65 The guidance on discharge differs between the two documents. *Care in Surrogacy* suggests that, provided that the hospital has the written consent of the surrogate, the child can be discharged separately from the surrogate.[56]

17.66 In *The Surrogacy Pathway*, however, the guidance is less definitive. The document merely states that:

> some hospital trusts will allow the surrogate and baby to be discharged separately, but this may be different depending on individual hospital policy.[57]

Persisting issues in hospital care and surrogacy arrangements

17.67 From our engagement with stakeholders to date, we have heard of continuing difficulties in the hospital process around pregnancy and childbirth in surrogacy arrangements. We discuss these difficulties in more detail in the current practice chapter,[58] but these include:

---

52 DHSC, *Care in Surrogacy: Guidance for the care of surrogates and intended parents in surrogate births in England and Wales* (February 2018) p 13.

53 DHSC, *Care in Surrogacy: Guidance for the care of surrogates and intended parents in surrogate births in England and Wales* (February 2018) p 13.

54 DHSC, *Care in Surrogacy: Guidance for the care of surrogates and intended parents in surrogate births in England and Wales* (February 2018) p 14.

55 See paras 8.124 and subsequent for discussion of reform to parental responsibility / parental responsibilities and parental rights.

56 DHSC, *Care in Surrogacy: Guidance for the care of surrogates and intended parents in surrogate births in England and Wales* (February 2018) p 14.

57 DHSC, *The Surrogacy Pathway: Surrogacy and the legal process for intended parents and surrogates in England and Wales* (February 2018) p 18.

58 See paras 3.69 and subsequent.

(1) issues with intended parents being present with the surrogate during her scans (where the surrogate has consented to their presence);

(2) issues with the naming of the child in hospital records (the child is automatically given the surname of the surrogate on all hospital records, to the exclusion of the intended parents);

(3) issues with hospital discharges; and

(4) concerns about how hospitals' existing safeguarding policies should apply to surrogacy arrangements.

How to improve the hospital process for surrogacy arrangements

17.68 We accept that surrogacy may still be very unusual for many hospitals. However, there is some indication that the issues listed above are persisting in some hospitals, despite the two DHSC guidance documents discussing possible solutions for each of them.

17.69 We would like to hear from consultees as to their experience of hospital care in the context of surrogacy. We are interested to know whether the reason for delay in implementation of the guidance documents is caused by a lack of training or a lack awareness around surrogacy in hospitals. We would also like to hear of any revisions or additions that could usefully be made to the existing guidance documents.

17.70 In terms of training, we have heard that there is no specific surrogacy training currently in place for midwives. It is understandable, therefore, that:

> part of [the Surrogacy UK] group's recommendations included better information and training on surrogacy for clinics, hospital staff and others.[59]

17.71 In terms of uncertainty in the guidance, we have raised one potential area of inconsistency in the existing guidance above regarding the hospital discharge. Another potential cause of the uncertainty, that the existing guidance acknowledges, is that:

> some NHS hospitals will have their own protocols for dealing with surrogacy pregnancies and some may not and so may vary their standard protocols. You may find it useful to find out what approach your local hospital takes so that you can better understand some of the issues you might face.[60]

17.72 One of the respondents to Surrogacy UK's 2018 survey, for example, suggested that a regulatory body for surrogacy (perhaps the Human Fertilisation and Embryology

---

59 K Horsey, "Surrogacy 2.0: What Can the Law Learn from Lived Experience?" (2018) 14 *Contemporary Issues in Law* 305, 317.

60 DHSC, *The Surrogacy Pathway: Surrogacy and the legal process for intended parents and surrogates in England and Wales* (February 2018) p 17.

Authority) could lead to more uniform hospital policies being put in place, the lack of which was an issue.[61]

17.73 One point of concern is the fact that the guidance, in England and Wales, is already split between two documents published by the DHSC. There are also potentially numerous other guidance documents that have been, or will be, published by individual NHS trusts around England and Wales. To this will be added the Scottish and Northern Irish guidance.[62]

17.74 A proliferation of guidance creates the potential for confusion in those seeking to enter into surrogacy arrangements. We acknowledge, however, that there may be good reasons for having different guidance, for example to reflect different legal systems (as in Scotland and Northern Ireland).

17.75 Midwives have highlighted to us that their current safeguarding process may not cater for surrogacy arrangements. In particular, we were told that safeguarding issues would generally be raised with a pregnant woman at her "booking" appointment with the midwife 8 to 12 weeks into the pregnancy. However, the intended parents, who will ultimately have care of the child, will not be present at that appointment. There may be a need, in a surrogacy arrangement, for intended parents to be involved at this stage, so that they can be included in the usual safeguarding inquiries undertaken by midwives. We would be grateful for consultees' views on this point.

Consultation Question 107.

17.76 We invite consultees' views as to whether there are any issues in how surrogacy arrangements are dealt with by the health services, and whether there are reforms to law or practice that consultees would like to see in this area.

17.77 We invite consultees' views as to any additions or revisions that they would like to see made to the guidance published by the Department for Health and Social Care for England and Wales.

17.78 We invite consultees' views as to how midwifery practice may better accommodate surrogacy arrangements, in particular with regard to safeguarding issues.

17.79 We have included a general consultation question for consultees to respond to below, asking for information on any issues of relevance that we have not covered in this Consultation Paper.

---

61 Surrogacy UK Working Group on Surrogacy Law Reform, *Surrogacy in the UK, Further evidence for reform: Second Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (December 2018) p 45.

62 We understand that the Scottish Government has been in discussion with the DHSC and plans to produce an Appendix for Scotland which will be added to the guidance. We also understand that separate guidance which was due to be published for Northern Ireland is now being revised in light of the new 2018 Regulations.

Consultation Question 108.

17.80 We invite consultees' views as to whether there are any other legal issues in relation to surrogacy, not covered in this Consultation Paper, that merit examination.

Chapter 18: The impact of our proposals

INTRODUCTION

18.1 In the preceding chapters, we have made provisional proposals for the creation of a new pathway to parenthood in surrogacy, with an accompanying regulatory framework. In order to assess the impact of what we have proposed, we set out below questions asking consultees to provide us with evidence. We start by asking a general question about surrogacy arrangements.

Consultation Question 109.

18.2 We invite consultees who are intended parents, live in the UK, and have entered into a surrogacy arrangement that led to the birth of a child to tell us:

(1) when the child was born;

(2) whether the arrangement was domestic or international and, if international, in which country the arrangement took place;

(3) whether the arrangement led to the making of a parental order in the UK; and

(4) whether they are a:

(a) opposite-sex couple;

(b) male same-sex couple;

(c) female same-sex couple;

(d) single woman; or

(e) single man.

THE PARENTAL ORDER PATHWAY

18.3 The parental order pathway requires intended parents to make an application to court for a parental order. We would like to hear from intended parents who have been through the process to tell us whether they had legal advice and/or representation in court, and if so, what it cost.

Consultation Question 110.

18.4 We invite consultees who have experience of applying for a parental order in the UK to tell us:

(1) whether the surrogacy arrangement was domestic or international;

(2) whether they had legal advice before the making of the parental order;

(3) whether they were represented by a lawyer in court; and

(4) the cost of any legal advice or representation.

THE NEW PATHWAY

18.5 We provisionally propose the creation of a new pathway to parenthood, which will mean that the intended parents will be the legal parents from birth of the child born of the surrogacy arrangement, subject to the surrogate's right to object for a defined period after the birth. We would like consultees' views on the impact (social, emotional and financial) of the current law where this is not the case. A further question below asks specifically about the costs of particular eligibility requirements for the new pathway.

Consultation Question 111.

18.6 We invite consultees' views as to the impact (social, emotional, financial or otherwise) of the current law where the intended parents are not the legal parents from birth of the child born of the surrogacy arrangement.

18.7 We provisionally propose that certain eligibility requirements, or safeguards, apply to the new pathway, which will only apply to domestic surrogacy arrangements. The eligibility requirements that we provisionally propose will impose a cost on intended parents and we would like evidence of what those costs might be.

Consultation Question 112.

18.8 We invite consultees to tell us what they have paid for, or to provide evidence about the cost of:

(1) medical screening; and

(2) implications counselling

(where possible separating out the cost of such screening, tests or implications counselling from any other costs involved with fertility treatment).

18.9 We invite legal consultees, who advise on surrogacy and parental order proceedings, to provide evidence of what they would charge:

(1) to provide advice sufficient to meet the proposed requirement for independent legal advice discussed in Chapter 13 and

(2) to draft, advise on and negotiate the written surrogacy agreement required for the new pathway.

18.10 In Chapter 12, we discuss the current requirement that at least one of the intended parents must have a genetic link with the child. We provisionally propose that this requirement be removed, in cases of medical necessity, from surrogacy arrangements in the new pathway. We have also invited consultees' views on removing the requirement for a genetic link in domestic surrogacy arrangements in the parental order pathway, again in cases of medical necessity.

Consultation Question 113.

18.11 We invite consultees to tell us of the impact of:

(1) the current requirement of a genetic link; and

(2) any removal of this requirement in cases of medical necessity:

(a) in the new pathway;

(b) in the parental order route for domestic surrogacy arrangements; or

(c) in both situations.

18.12 In Chapter 9 we ask a question about the feasibility of bringing independent traditional arrangements within the pathway and suggest that it might be possible for an independent professional, such as a lawyer, to certify that a surrogacy arrangement of this kind has met the requirements of the new pathway.

Consultation Question 114.

18.13 We invite consultees who consider that they might be able to fulfil the role of the independent professional discussed in Chapter 9 to tell us:

(1) their profession; and

(2) what they would charge to provide such a service.

ACCESSIBILITY OF SURROGACY

18.14 We have addressed in Chapter 1 that surrogacy is not accessible to all those who would wish to enter into such arrangements. We would like to hear about consultees' views on what they think the effect of our proposals might be on access to surrogacy for intended parents and the impact on whether women will choose to act as surrogates.

Consultation Question 115.

18.15 We invite consultees who are intended parents to give us their views on the impact of our proposals for reform on their ability to enter into surrogacy arrangements and, in particular:

(1) if particular proposals will increase accessibility, and why; and

(2) if particular proposals will restrict accessibility, and why.

18.16 We invite consultees who are surrogates to give us their views on the impact of our proposals for reform on their ability to enter into surrogacy arrangements and, in particular:

(1) if particular proposals will increase accessibility, and why; and

(2) if particular proposals will restrict accessibility, and why.

FUNDING SURROGACY

18.17 We appreciate that the funds required from intended parents to enter into a surrogacy arrangement can be very considerable and require financial sacrifice on the part of the intended parents. We would like more information on how intended parents fund their surrogacy arrangements.

Consultation Question 116.

18.18 We ask consultees who are intended parents to tell us:

(1) whether the surrogacy arrangement was domestic or international;

(2) what they spent, in total, on the surrogacy arrangement(s) that led to the birth of their child(ren), including the cost of fertility treatment, payments to the surrogate and payments to any surrogacy agency or organisation;

(3) how they raised the funds for the surrogacy arrangement(s);

(4) what they spent on any fertility treatment prior to entering into a surrogacy arrangement (where that treatment did not lead to the birth of a child); and

(5) how they raised the funds for the fertility treatment.

NORTHERN IRELAND

18.19 The surrogacy project is being undertaken jointly by the Law Commission of England and Wales and the Scottish Law Commission. As the Northern Ireland Law Commission is non-operational they have not been able to work jointly with us on this project. However, much of the law with which we are concerned does apply in Northern Ireland. We have undertaken some preliminary engagement with stakeholders in Northern Ireland, and will continue to engage during and beyond the formal consultation period. We would be particularly grateful for the views of stakeholders from Northern Ireland on the potential impact of our proposals there.

Consultation Question 117.

18.20 We invite consultees' views as to the specific impact of our proposals in Northern Ireland.

GENERALLY

18.21 Finally, we ask for evidence of any other impact – financial or otherwise – that our proposals may have.

Consultation Question 118.

18.22 We invite consultees' views as to any other impact that we have not specifically addressed in this chapter, or the preceding chapters, of this paper.

Chapter 19: Consultation Questions

Consultation Question 1.

19.1 We invite consultees' views as to whether, in England and Wales:

(1) all international surrogacy arrangements should continue to be automatically allocated to a judge of the High Court; and

(2) if international surrogacy arrangements are not automatically allocated to a judge of the High Court, circuit judges should be ticketed to hear such cases.

Paragraph 6.42

Consultation Question 2.

19.2 We invite consultees' views as to whether, in respect of England and Wales

(1) domestic surrogacy cases which continue to require a post-birth parental order should continue to be heard by lay justices, or whether they should be allocated to another level of the judiciary; and

(2) If consultees consider that such cases should be allocated to another level of the judiciary, which level of the judiciary would be appropriate.

Paragraph 6.51

Consultation Question 3.

19.3 We invite consultees to provide any evidence that would support either the retention of the current allocation rules, or their reform along the lines that we discuss in Consultation Questions 1 and 2.

Paragraph 6.53

Consultation Question 4.

19.4 We provisionally propose that, in England and Wales, the court should be placed under a duty to consider whether to make an order awarding the intended parents parental responsibility at the first directions hearing in the proceedings.

Do consultees agree?

(Note that this provisional proposal would be necessary only if our provisional proposal in Chapter 8 that all intended parents (whether in the new pathway or not) automatically acquire parental responsibility if the child is living with or being cared for by them is not supported by consultees).

Paragraph 6.58

Consultation Question 5.

19.5 We provisionally propose that the rule currently contained in rule 16.35(5) of the FPR 2010 should be reversed, so that a parental order report is released to the parties in the proceedings by default, unless the court directs otherwise.

Do consultees agree?

Paragraph 6.72

Consultation Question 6.

19.6 We invite consultees' views as to whether they are of the view that, in Scotland:

(1) there is a need for greater consistency and clarity in provisions relating to the expenses of curators ad litem and reporting officers and, if so, how this should be addressed;

(2) it should be provided by statute that, at the initial hearing or any subsequent hearing for a parental order, the court may make any such interim order or orders for parental responsibilities and parental rights as it sees fit; and/or

(3) further procedural reform is needed and, if so, what that reform should be.

Paragraph 6.110

Consultation Question 7.

19.7 In respect of a domestic surrogacy arrangement, we provisionally propose that, before the child is conceived, where the intended parents and surrogate have:

(1) entered into an agreement including the prescribed information, which will include a statement as to legal parenthood on birth,

(2) complied with procedural safeguards for the agreement, and

(3) met eligibility requirements,

on the birth of the child the intended parents should be the legal parents of the child, subject to the surrogate's right to object.

Do consultees agree?

Paragraph 8.13

Consultation Question 8.

19.8 We provisionally propose that regulated surrogacy organisations and licensed clinics should be under a duty to keep a record of surrogacy arrangements under the new pathway to which they are a party, with such records being retained for a specified minimum period.

Do consultees agree?

19.9 We invite consultees' views as to what the length of that period should be: whether 100 years or another period.

Paragraph 8.14

Consultation Question 9.

19.10 We provisionally propose that the prohibition on the use of anonymously donated gametes should apply to traditional surrogacy arrangements with which a regulated surrogacy organisation is involved.

Do consultees agree?

Paragraph 8.21

Consultation Question 10.

19.11 We invite consultees' views as to whether the use of anonymously donated sperm in a traditional, domestic surrogacy arrangement should prevent that arrangement from entering into the new pathway.

Paragraph 8.22

Consultation Question 11.

19.12 We provisionally propose that:

(1) the surrogate should have the right to object to the acquisition of legal parenthood by the intended parents, for a fixed period after the birth of the child;

(2) this right to object should operate by the surrogate making her objection in writing within a defined period, with the objection being sent to both the intended parents and the body responsible for the regulation of surrogacy; and

(3) the defined period should be the applicable period for birth registration less one week.

Do consultees agree?

Paragraph 8.35

Consultation Question 12.

19.13 We provisionally propose that, where the surrogate objects to the intended parents acquiring legal parenthood within the period fixed after birth, the surrogacy arrangement should no longer be able to proceed in the new pathway, with the result that:

(1) the surrogate will be the legal parent of the child;

(2) if one of the intended parents would, under the current law, be a legal parent of the child, then he or she will continue to be a legal parent in these circumstances; and

(3) the intended parents would be able to make an application for a parental order to obtain legal parenthood.

Do consultees agree?

Paragraph 8.36

Consultation Question 13.

19.14 We provisionally propose that, in the new pathway:

(1) the intended parents should be required to make a declaration on registering the birth of the child that they have no reason to believe that the surrogate has lacked capacity at any time during the period in which she had the right to object to the intended parents acquiring legal parenthood;

(2) if the intended parents cannot provide this declaration then, during the period in which she has the right to object to the intended parents acquiring legal parenthood, the surrogate should be able to provide a positive consent to such acquisition; and

(3) if the intended parents are unable to make this declaration and the surrogate is unable to provide the positive consent within the relevant period, the surrogacy arrangement should exit the new pathway and the intended parents should be able to make an application for a parental order.

Do consultees agree?

Paragraph 8.37

Consultation Question 14.

19.15 We provisionally propose that, in the new pathway, the welfare of the child to be born as a result of the surrogacy arrangement:

(1) should be assessed in the way set out in Chapter 8 of the current Code of Practice;

(2) either the regulated surrogacy organisation or regulated clinic, as appropriate, should be responsible for ensuring that this procedure is followed; and

(3) there should be no requirement for any welfare assessment of the child after his or her birth.

Do consultees agree?

Paragraph 8.51

Consultation Question 15.

19.16 We provisionally propose that, for a child born as a result of a surrogacy arrangement under the new pathway, where the surrogate has exercised her right to object to the intended parents' acquisition of legal parenthood at birth, the surrogate's spouse or civil partner, if any, should not be a legal parent of the child.

Do consultees agree?

19.17 We invite consultees' views as to whether, in the case of a surrogacy arrangement outside the new pathway, the surrogate's spouse or civil partner should continue to be a legal parent of the child born as a result of the arrangement.

Paragraph 8.57

Consultation Question 16.

19.18 We provisionally propose that, in the new pathway, where a child born of a surrogacy arrangement is stillborn:

(1) the intended parents should be the legal parents of the child unless the surrogate exercises her right to object; and

(2) the surrogate should be able to consent to the intended parents being registered as the parents before the expiry of the period of the right to object.

Do consultees agree?

19.19 We provisionally propose that, outside the new pathway, where a child born of a surrogacy arrangement is stillborn, the surrogate should be able to consent to the intended parents being registered as the parents before the expiry of the period allowed for the registration of the birth, provided that the intended parents have made a declaration to the effect that the relevant criteria for the making of a parental order are satisfied, on registration of the stillbirth.

Do consultees agree?

Paragraph 8.77

Consultation Question 17.

19.20 We provisionally propose that, for surrogacy arrangements outside the new pathway, where the child dies before the making of the parental order, the surrogate should be able to consent to the intended parents being registered as the parents before the expiry of the period allowed for the registration of the birth, provided that the intended parents have made a declaration to the effect that the relevant criteria for the making of a parental order are satisfied, on registration of the birth.

Do consultees agree?

Paragraph 8.79

Consultation Question 18.

19.21 For surrogacy arrangements in the new pathway, we invite consultees' views as to whether, where the surrogate dies in childbirth or before the end of the period during which she can exercise her right to object, the arrangement should not proceed in the new pathway and the intended parents should be required to make an application for a parental order.

Paragraph 8.80

Consultation Question 19.

19.22 We provisionally propose that, for surrogacy arrangements in the new pathway, where both intended parents die during the surrogate's pregnancy, the intended parents should be registered as the child's parents on birth, subject to the surrogate not exercising her right to object within the defined period.

Do consultees agree?

19.23 We invite consultees' views as to whether, for surrogacy arrangements outside the new pathway, where both intended parents die during the surrogate's pregnancy or before a parental order is made:

(1) it should be competent for an application to be made, by a person who claims an interest under section 11(3)(a) of the Children (Scotland) Act 1995, or who would be permitted to apply for an order under section 8 of the Children Act 1989:

(a) for an order for appointment as guardian of the child, and

(b) for a parental order in the name of the intended parents, subject to the surrogate's consent; or

(2) the surrogate should be registered as the child's mother and it should not be possible for the intended parents to be registered as the child's parents, but that there should be a procedure for the surrogate to provide details of the intended parents, and, if relevant, gamete donors, for entry onto the register of surrogacy arrangements.

Paragraph 8.81

Consultation Question 20.

19.24 We provisionally propose that, where an application is made for a parental order by a sole applicant under section 54A:

(1) the applicant should have to make a declaration that it was always intended that there would only be a single applicant for a parental order in respect of the child concerned or to supply the name and contact details of the other intended parent;

(2) if details of another intended parent are supplied, a provision should be made for notice to be given to the potential second intended parent of the application and an opportunity given to that party to provide notice of opposition within a brief period (of, say, 14 to 21 days); and

(3) if the second intended parent gives notice of his or her intention to oppose, he or she should be required to make his or her own application within a brief period (say 14 days), otherwise the application of the first intended parent will be determined by the court.

Do consultees agree?

Paragraph 8.86

Consultation Question 21.

19.25 We invite consultees' views as to:

(1) a temporary three-parent model of legal parenthood in surrogacy cases; and

(2) how the legal parenthood of the surrogate should be extinguished in this model.

Paragraph 8.91

Consultation Question 22.

19.26 We invite consultees' views:

(1) as to whether there should be any additional oversight in the new pathway that we have proposed, leading to the acquisition of legal parenthood by the intended parents at birth; and

(2) if so, as to whether should this oversight be:

(a) administrative, or

(b) judicial.

Paragraph 8.93

Consultation Question 23.

19.27 In respect of England and Wales, we invite consultees' views as to:

(1) whether the welfare checklist, contained in section 1(3) of the Children Act 1989, should be amended to provide for the court to have regard to additional specific factors in the situation where it is considering the arrangements for a child in the context of a dispute about a surrogacy arrangement; and

(2) if so, as to what those additional factors should be.

Paragraph 8.120

Consultation Question 24.

19.28 In respect of England and Wales, we invite consultees' views:

(1) as to whether the checklist, contained in section 1(4) of the ACA 2002 (as applied and modified by regulation 2 and paragraph 1 of Schedule 1 of the 2018 Regulations) should be further amended to provide for the court to have regard to additional specific factors in the situation where it is considering whether to make a parental order; and

(2) what those additional factors should be.

Paragraph 8.121

Consultation Question 25.

19.29 We invite consultees' view as to whether section 10 of the Children Act 1989 should be amended to add the intended parents to the category of those who can apply for a section 8 order without leave.

Paragraph 8.123

Consultation Question 26.

19.30 We provisionally propose that, where a child is born as a result of a surrogacy arrangement outside the new pathway, the intended parents should acquire parental responsibility automatically where:

(1) the child is living with them or being cared for by them; and

(2) they intend to apply for a parental order.

Do consultees agree?

Paragraph 8.132

Consultation Question 27.

19.31 We provisionally propose that, where a child is born as a result of a surrogacy arrangement in the new pathway:

(1) the intended parents should acquire parental responsibility on the birth of the child; and

(2) if the surrogate exercises her right to object, the intended parents should continue to have parental responsibility for the child where the child is living with, or being cared for by, them, and they intend to apply for a parental order.

Do consultees agree?

Paragraph 8.134

Consultation Question 28.

19.32 We provisionally propose that, for surrogacy arrangements within the new pathway, the surrogate should retain parental responsibility for the child born as a result of the arrangement until the expiry of the period during which she can exercise her right to object, assuming that she does not exercise her right to object.

Do consultees agree?

Paragraph 8.139

Consultation Question 29.

19.33 For all surrogacy arrangements, we invite consultees' views as to:

(1) whether there is a need for any restriction to be placed on the exercise of parental responsibility by either the surrogate (or other legal parent), or the intended parents, during the period in which parental responsibility is shared; and

(2) whether it should operate to restrict the exercise of parental responsibility by the party not caring for the child or with whom the child is not living.

Paragraph 8.140

Consultation Question 30.

19.34 We provisionally propose that traditional surrogacy arrangements should fall within the scope of the new pathway.

Do consultees agree?

Paragraph 9.29

Consultation Question 31.

19.35 We invite the views of independent surrogates, and intended parents who have used independent surrogacy arrangements, to tell us about their experience. In particular, we would be interested to hear about any health screening, counselling and legal advice that took place.

Paragraph 9.35

Consultation Question 32.

19.36 We invite consultees' views as to whether independent surrogacy arrangements should be brought within the scope of the new pathway.

19.37 We invite consultees' views as to how independent surrogacy arrangements might be brought within the scope of the new pathway.

Paragraph 9.36

Consultation Question 33.

19.38 We provisionally propose that:

(1) there should be regulated surrogacy organisations;

(2) there should be no requirement for a regulated surrogacy organisation to take a particular form; and

(3) each surrogacy organisation should be required to appoint an individual responsible for ensuring that the organisation complies with regulation.

Do consultees agree?

Paragraph 9.61

Consultation Question 34.

19.39 We provisionally propose that the person responsible must be responsible for:

(1) representing the organisation to, and liaising with, the regulator;

(2) managing the regulated surrogacy organisation with sufficient care, competence and skill;

(3) ensuring the compliance of the organisation with relevant law and regulation, including the creation, maintenance and operation of necessary policies and procedures;

(4) training any staff, including that of the person responsible; and

(5) providing data to the regulator and to such other person as required by law.

Do consultees agree?

19.40 We invite consultees to identify any other responsibilities which a responsible individual should have.

19.41 We invite consultees' views as to what experience, skills and qualifications a person responsible for a surrogacy organisation should have.

Paragraph 9.62

Consultation Question 35.

19.42 We provisionally propose that regulated surrogacy organisations should be non-profit making bodies.

Do consultees agree?

Paragraph 9.84

Consultation Question 36.

19.43 We invite consultees' views as to what should be included in the definition of matching and facilitation services.

Paragraph 9.94

Consultation Question 37.

19.44 We provisionally propose that only regulated surrogacy organisations should be able to offer matching and facilitation services in respect of surrogacy arrangements in the new pathway.

Do consultees agree?

19.45 We invite consultees' views as to whether only regulated surrogacy organisations should be able to offer matching and facilitation services in respect of surrogacy arrangements outside the new pathway.

Paragraph 9.95

Consultation Question 38.

19.46 We invite consultees' views as to the sanctions that should be available against organisations that offer matching and facilitation services without being regulated to do so, and whether these should be criminal, civil or regulatory.

Paragraph 9.97

Consultation Question 39.

19.47 We provisionally propose that the remit of the Human Fertilisation and Embryology Authority be expanded to include the regulation of regulated surrogacy organisations, and oversight of compliance with the proposed legal requirements for the new pathway to legal parenthood.

Do consultees agree?

19.48 If consultees agree, we invite their views as to how the Authority's Code of Practice should apply to regulated surrogacy organisations, including which additional or new areas of regulation should be applied.

Paragraph 9.117

Consultation Question 40.

19.49 We provisionally propose that surrogacy agreements should remain unenforceable (subject to the exception we provisionally propose in Consultation Question 88 in relation to financial terms).

Do consultees agree?

Paragraph 9.129

Consultation Question 41.

19.50 We provisionally propose that there should be no prohibition against charging for negotiating, facilitating and advising on surrogacy arrangements.

Do consultees agree?

Paragraph 9.135

Consultation Question 42.

19.51 We provisionally propose that the current ban on advertising in respect of surrogacy should be removed, with the effect that there will be no restrictions on advertising anything that can lawfully be done in relation to surrogacy arrangements.

Do consultees agree?

Paragraph 9.145

Consultation Question 43.

19.52 We provisionally propose that, in England and Wales, where the making of a parental order in respect of a child born of a surrogacy arrangement has been recorded in the Parental Order Register, the child should be able to access his or her original birth certificate at the age of 18.

Do consultees agree?

Paragraph 10.80

Consultation Question 44.

19.53 We provisionally propose that where children are born of surrogacy arrangements that result in the intended parents being recorded as parents on the birth certificate, the full form of that certificate should make clear that the birth was the result of a surrogacy arrangement.

Do consultees agree?

Paragraph 10.85

Consultation Question 45.

19.54 We invite consultees' views as to whether the birth registration system in England and Wales requires reform and, if so, which reforms they would like to see.

Paragraph 10.87

Consultation Question 46.

19.55 We provisionally propose that, in England and Wales, from the age of 18, a child who has been the subject of a parental order should be able to access all the documents contained in the court's file for those parental order proceedings.

Do consultees agree?

Paragraph 10.89

Consultation Question 47.

19.56 We provisionally propose that a national register of surrogacy arrangements should be created to record the identity of the intended parents, the surrogate and the gamete donors.

Do consultees agree?

19.57 We provisionally propose that:

(1) the register should be maintained by the Authority;

(2) the register should record information for all surrogacy arrangements, whether in or outside the new pathway, provided that the information about who has contributed gametes for the conception of the child has been medically verified, and that the information should include:

(a) identifying information about all the parties to the surrogacy arrangement, and

(b) non-identifying information about those who have contributed gametes to the conception of the child; and

(3) to facilitate the record of this information, the application form/petition for a parental order should record full information about a child's genetic heritage where available and established by DNA or medical evidence, recording the use of an anonymous gamete donor if that applies.

Do consultees agree?

Paragraph 10.102

Consultation Question 48.

19.58 We invite consultees' views as to whether non-identifying information about the surrogate and the intended parents should be recorded in the national register of surrogacy arrangements and available for disclosure to a child born of a surrogacy arrangement.

Paragraph 10.104

Consultation Question 49.

19.59 We provisionally propose that a child born of a surrogacy arrangement should be able to access the information recorded in the register from the age of 18 for identifying information, and 16 for non-identifying information (if such information is included on the register), provided that he or she has been given a suitable opportunity to receive counselling about the implications of compliance with this request.

Do consultees agree?

19.60 We invite consultees' views as to whether a child under the age of 18 or 16 (depending on whether the information is identifying or non-identifying respectively) should be able to access the information in the register and, if so, in which circumstances:

(1) where his or her legal parents have consented;

(2) if he or she has received counselling and the counsellor judges that he or she is sufficiently mature to receive this information; and/or

(3) in any other circumstances.

Paragraph 10.110

Consultation Question 50.

19.61 We invite consultees' views as to whether there should be any provision for those born of a surrogacy arrangement to make a request for information to disclose whether a person whom he or she is intending to marry, or with whom he or she intends to enter into a civil partnership or intimate physical relationship, was carried by the same surrogate.

Paragraph 10.114

Consultation Question 51.

19.62 We provisionally propose that where two people are born to, and genetically related through, the same surrogate, they should be able to access the register to identify each other, if they both wish to do so.

Do consultees agree?

19.63 We invite consultees' views as to whether there should be provision to allow people born to the same surrogate – but who are not genetically related – to access the register to identify each other, if they both wish to do so.

Paragraph 10.121

Consultation Question 52.

19.64 We invite consultees' views as to whether provision should be made to allow a person carried by a surrogate, and the surrogate's own child, to access the register to identify each other, if they both wish to do so:

(1) if they are genetically related through the surrogate; and/or

(2) if they are not genetically related through the surrogate.

Paragraph 10.123

Consultation Question 53.

19.65 For surrogacy arrangements outside the new pathway, we invite consultees' views as to whether details of an intended parent who is not a party to the application for a parental order should be recorded in the register.

Paragraph 10.128

Consultation Question 54.

19.66 We provisionally propose that the six month time limits in sections 54 and 54A of the HFEA 2008 for making a parental order application should be abolished.

Do consultees agree?

Paragraph 11.20

Consultation Question 55.

19.67 We provisionally propose that:

(1) the current circumstances in which the consent of the surrogate (and any other legal parent) is not required, namely where a person cannot be found or is incapable of giving agreement, should continue to be available;

(2) the court should have the power to dispense with the consent of the surrogate, and any other legal parent of the child, in the following circumstances:

(a) where the child is living with the intended parents, with the consent of the surrogate and any other legal parent, or

(b) following a determination by the court that the child should live with the intended parents; and

(3) the court's power to dispense with consent should be subject to the paramount consideration of the child's welfare throughout his or her life guided by the factors set out in section 1 of the Adoption and Children Act 2002 and, in Scotland, in line with the section 14(3) of the Adoption and Children (Scotland) Act 2007.

Do consultees agree?

Paragraph 11.58

Consultation Question 56.

19.68 We provisionally propose that, both for a parental order and in the new pathway, the intended parents or one of the intended parents must be domiciled or habitually resident in the UK, Channel Islands or Isle of Man.

Do consultees agree?

19.69 We invite consultees' views as to whether there should be any additional conditions imposed on the test of habitual residence, for example, a qualifying period of habitual residence required to satisfy the test.

Paragraph 12.15

Consultation Question 57.

19.70 We invite consultees' views on whether:

(1) the qualifying categories of relationship in section 54(2) of the HFEA 2008 should be reformed and, if so, how; or

(2) the requirement should be removed, subject to two persons who are within the prohibited degrees of relationship being prevented from applying.

Paragraph 12.29

Consultation Question 58.

19.71 We provisionally propose that to use the new pathway, intended parents should be required to make a declaration in the surrogacy agreement that they intend for the child's home to be with them.

Do consultees agree?

Paragraph 12.34

Consultation Question 59.

19.72 We provisionally propose that the new pathway –

(1) should not impose a requirement that the intended parent, or one of the intended parents, provide gametes for the conception of the child, so that double donation of gametes is permitted, but

(2) that double donation should only be permitted in cases of medical necessity, meaning that there is not an intended parent who is able to provide a gamete due to infertility.

Do consultees agree?

19.73 We invite consultees' views as to whether double donation should be permitted under the parental order pathway (to the same extent that it may be permitted in the new pathway) in domestic surrogacy arrangements.

19.74 We provisionally propose that the requirement that the intended parent or one of the intended parents contribute gametes to the conception of the child in the parental order pathway should be retained in international surrogacy arrangements.

Do consultees agree?

Paragraph 12.64

Consultation Question 60.

19.75 We provisionally propose that if the requirement for a genetic link is retained for domestic cases outside the new pathway, the requirement should not apply, subject to medical necessity, if the court determines that the intended parents in good faith began the surrogacy arrangement in the new pathway but were required to apply for a parental order.

Do consultees agree?

Paragraph 12.71

Consultation Question 61.

19.76 We provisionally propose that if double donation is permitted only in cases of medical necessity, an exception should be made to allow a parental order to be granted to a single parent without a genetic link where the intended parent's former partner provides gametes but the intended parents' relationship breaks down before the grant of a parental order.

Do consultees agree?

Paragraph 12.76

Consultation Question 62.

19.77 We invite consultees' views as to whether there should be a requirement that a surrogacy arrangement has been used because of medical necessity:

(1) for cases under the new pathway to parenthood; and/or

(2) for cases where a post-birth parental order application is made.

19.78 We invite consultees' views as to how a test of medical necessity for surrogacy, if it is introduced, should be defined and assessed.

Paragraph 12.94

Consultation Question 63.

19.79 We provisionally propose that in order to use the new pathway to parenthood, information identifying the child's genetic parents and the surrogate must be provided for entry on the national register of surrogacy agreements prior to registration of the child's birth.

Do consultees agree?

19.80 We invite consultees' views as to whether it should be a condition for an application for a parental order that:

(1) those who contributed gametes are entered on the national register of surrogacy agreements; and/or

(2) if it remains a requirement that one of the intended parents provided gametes in the conception of the child, that the genetic link is demonstrated to the court with medical or DNA evidence.

19.81 We provisionally propose that it should be a condition for the application of a parental order that the identity of the surrogate is entered on the national register of surrogacy agreements.

Do consultees agree?

Paragraph 12.115

Consultation Question 64.

19.82 We provisionally propose that there should be no maximum age limit for the grant of a parental order. The age of the intended parents should continue to be taken into account in the assessment of the welfare of the child in applications to grant a parental order.

Do consultees agree?

19.83 We invite consultees' views as to whether under the new pathway there should be a maximum age limit for intended parents, and if so, what it should be.

19.84 We provisionally propose that intended parents should be required to be at least 18 years old at the time that they enter into a surrogacy agreement under the new pathway.

Do consultees agree?

Paragraph 12.133

Consultation Question 65.

19.85 We provisionally propose that surrogates should be required to be at least 18 years of age (at the time of conception), in order for the court to have the power to make a parental order.

Do consultees agree?

19.86 We provisionally propose that surrogates should be required to be at least 18 years old at the time of entering into the surrogacy agreement within the new pathway.

Do consultees agree?

Paragraph 12.144

Consultation Question 66.

19.87 We provisionally propose that medical testing of the surrogate, any partner of the surrogate, and any intended parent providing gametes should be required for the new pathway.

Do consultees agree?

19.88 We invite consultees' views as to whether the types of testing set out in the Code of Practice are feasible for traditional surrogacy arrangements outside a licensed clinic, and if not, which types of testing should be required for such arrangements.

Paragraph 13.16

Consultation Question 67.

19.89 We provisionally propose that, as a condition of being eligible for entry into the new pathway:

(1) the surrogate, her spouse, civil partner or partner (if any) and the intended parents intending to enter into a surrogacy arrangement in the new pathway should be required to attend counselling with regard to the implications of entering into that arrangement; and

(2) the implications counselling should be provided by a counsellor who meets the requirements set out in the Code of Practice at paragraphs 2.14 to 2.15.

Do consultees agree?

Paragraph 13.44

Consultation Question 68.

19.90 We provisionally propose that, for the new pathway, there should be a requirement that the surrogate and the intended parents should take independent legal advice on the effect of the law and of entering into the agreement before the agreement is signed.

Do consultees agree?

Paragraph 13.65

Consultation Question 69.

19.91 We provisionally propose that, as an eligibility requirement of the new pathway:

(1) an enhanced criminal record certificate should be obtained for intended parents, surrogates and any spouses, civil partners or partners of surrogates;

(2) the body overseeing the surrogate arrangement should not enable a surrogate arrangement to be proceed under the new pathway where a person screened is unsuitable for having being convicted of, or received a police caution for, any offence appearing on a prescribed list of offences; and

(3) the body overseeing the surrogacy arrangement may also determine that a person is unsuitable based on the information provided in the enhanced record certificate.

Do consultees agree?

19.92 We invite consultees' views as to whether the list of offences that applies in the case of adoption is appropriate in the case of surrogacy arrangements in the new pathway.

Paragraph 13.73

Consultation Question 70.

19.93 We invite consultees' views as to whether there should be a requirement that the surrogate has previously given birth as an eligibility requirement of the new pathway.

Paragraph 13.95

Consultation Question 71.

19.94 We provisionally propose that there should not be a maximum number of surrogate pregnancies that a woman can undertake as an eligibility requirement of the new pathway.

Do consultees agree?

Paragraph 13.99

Consultation Question 72.

19.95 We invite consultees' views as to whether payment of costs by the intended parents to the surrogate should be able to be:

(1) based on an allowance;

(2) based on costs actually incurred by the surrogate, but without the need for production of receipts; or

(3) based on costs actually incurred by the surrogate, and only on production of receipts.

Paragraph 15.16

Consultation Question 73.

19.96 We invite consultees' views as to:

(1) whether intended parents should be able to pay the surrogate essential costs relating to the pregnancy; and

(2) the types of expenditure which should be considered "essential".

Paragraph 15.22

Consultation Question 74.

19.97 We invite consultees' views as to:

(1) whether they consider that intended parents should be able to pay the surrogate additional costs relating to the pregnancy; and

(2) the types of expenditure which should be considered additional, rather than essential.

Paragraph 15.26

Consultation Question 75.

19.98 We invite consultees' views as to:

(1) whether intended parents should be permitted to pay all costs that arise from entering into a surrogacy arrangement, and those unique to a surrogate pregnancy; and

(2) the types of cost which should be included within this category.

Paragraph 15.29

Consultation Question 76.

19.99 We invite consultees' views as to whether they consider that intended parents should be able to pay their surrogate her actual lost earnings (whether the surrogate is employed or self-employed).

Paragraph 15.37

Consultation Question 77.

19.100 We invite consultees' views as to whether they consider that intended parents should be able to pay their surrogate either or both of the following lost potential earnings:

(1) her lost employment-related potential earnings (as defined in paragraph 15.35 above); and/or

(2) other lost potential earnings (as defined in paragraph 15.36 above).

Paragraph 15.38

Consultation Question 78.

19.101 We invite consultees to share their experiences:

(1) of the impact that payments received by a surrogate from the intended parents has had on the surrogate's entitlement to means-tested social welfare benefits; and

(2) where a surrogacy arrangement has had an impact on the surrogate's entitlement to means-tested social welfare benefits, how that has been addressed in their surrogacy arrangement.

Paragraph 15.47

Consultation Question 79.

19.102 We invite consultees' views as to whether intended parents should be able to pay compensation to the surrogate for the following:

(1) pain and inconvenience arising from the pregnancy and childbirth;

(2) medical treatments relating to the surrogacy, including payments for each insemination or embryo transfer; and/or

(3) specified complications, including hyperemesis gravidarum, pre-eclampsia, an ectopic pregnancy, miscarriage, termination, caesarean birth, excessive haemorrhaging, perineal tearing, removal of fallopian tubes or ovaries or a hysterectomy.

19.103 We invite consultees' views as to whether there are any other matters in respect of which intended parents should be able to pay the surrogate compensation.

19.104 We invite consultees' views as to whether the level of compensation payable should be:

(1) a fixed fee set by the regulator (operating as a cap on the maximum payable), or

(2) left to the parties to negotiate.

Paragraph 15.53

Consultation Question 80.

19.105 We invite consultees views' as to whether intended parents should be able to pay compensation to the surrogate's family in the event of the pregnancy resulting in the surrogate's death, including through payment of the cost of life assurance for the surrogate.

Paragraph 15.56

Consultation Question 81.

19.106 We invite consultees' views as to whether:

(1) intended parents should be able to buy gifts for the surrogate; and

(2) if so, specific provision should be made for these gifts to be modest or reasonable in nature.

Paragraph 15.60

Consultation Question 82.

19.107 We invite consultees' views as to whether it should be possible for the intended parents to agree to pay a woman for the service of undertaking a surrogacy.

19.108 We invite consultees' views as to whether, if provision is made for intended parents to pay a woman for the service of undertaking surrogacy, whether that the fee should be:

(1) any sum agreed between the parties to the surrogacy; or

(2) a fixed fee set by the regulator.

19.109 We invite consultees' views as to whether, if provision is made for intended parents to pay a woman a fixed fee for the service of undertaking surrogacy, what, if any, other payments the law should permit, in addition to that fixed fee:

(1) no other payments;

(2) essential costs relating to the pregnancy;

(3) additional costs relating to the pregnancy;

(4) lost earnings;

(5) compensation for pain and inconvenience, medical treatment and complications, and the death of the surrogate; and/or

(6) gifts.

Paragraph 15.69

Consultation Question 83.

19.110 We invite consultees' views as to whether it should be possible for any payment the law permits the intended parents to pay the surrogate for her services to be reduced in the event of a miscarriage or termination of the pregnancy.

19.111 We invite consultees' views as to whether, if the law permits a fee payable to the surrogate to be able to be reduced in the event of a miscarriage or termination, whether such provision should apply:

(1) in the first trimester of pregnancy only;

(2) to any miscarriage or termination; or

(3) some other period of time (please specify).

Paragraph 15.72

Consultation Question 84.

19.112 We provisionally propose that the types of payment that are permitted to be made to surrogates should be the same, whether the surrogacy follows our new pathway to parenthood or involves a post-birth application for a parental order.

Do consultees agree?

Paragraph 15.74

Consultation Question 85.

19.113 We invite consultees' views as to whether there are any categories of payment we have not discussed which they think intended parents should be able to agree to pay to the surrogate.

Paragraph 15.75

Consultation Question 86.

19.114 We invite consultees to express any further views they have about the payments that intended parents should be able to agree to pay to the surrogate.

Paragraph 15.76

Consultation Question 87.

19.115 We invite consultees' views as to whether there are specific methods of enforcing limitations that are placed on payments to surrogates that we should consider as part of our review:

(1) for cases within the new pathway to parenthood; and

(2) for cases where a parental order is made after the birth of the baby.

Paragraph 15.89

Consultation Question 88.

19.116 We provisionally propose that financial terms of a surrogacy agreement entered into under the new pathway to parenthood should be enforceable by the surrogate.

Do consultees agree?

19.117 We provisionally propose that if the financial terms of a surrogacy agreement entered into under the new pathway become enforceable, the ability to do so should not be dependent on the surrogate complying with any terms of the agreement relating to her lifestyle.

Do consultees agree?

Paragraph 15.99

Consultation Question 89.

19.118 We invite overseas surrogates (or bodies representing or advocating for surrogates) to share with us their experiences f international surrogacy arrangements.

Paragraph 16.10

Consultation Question 90.

19.119 We invite organisations focused on children's rights and welfare in the international context to share with us their views on our proposed reforms and consultation questions in this chapter.

Paragraph 16.12

Consultation Question 91.

19.120 We invite consultees to provide us with evidence of their experience of applying to register a child born through an international surrogacy arrangement as a British citizen and obtaining a passport for the child. In particular, we would be interested to hear how long the application took after the birth of the child, and any information consultees have about causes of delays in the process.

Paragraph 16.52

Consultation Question 92.

19.121 We provisionally propose that it should be possible for a file to be opened, and the application process for obtaining registration of a child born from an international surrogacy arrangement and obtaining a passport to begin, prior to the birth of the child.

Do consultees agree?

Paragraph 16.53

Consultation Question 93.

19.122 We invite consultees to provide us with evidence of the experience they have had of applying for a visa for a child born through an international surrogacy arrangement. In particular, we would be interested to hear how long the application took after the birth of the child, and any information consultees have of causes of delays in the process.

Paragraph 16.68

Consultation Question 94.

19.123 We provisionally propose that it should be possible to open a file, and begin the process for applying for a visa in respect of a child born through an international surrogacy arrangement, before the child is born. The application will need to be completed after the birth of the child, and the issue of a passport in the child's country of birth.

Do consultees agree?

19.124 We provisionally propose that the current provision made for the grant of a visa outside of the Immigration Rules where the intended parents are not the legal parents of the child under nationality law should be brought within the Rules.

Do consultees agree?

19.125 We provisionally propose that:

(1) the grant of a visa should not be dependent on the child breaking links with the surrogate; or

(2) that this condition should be clarified to ensure that it does not prevent the child having contact, and an on-going relationship, with the surrogate.

Do consultees agree?

19.126 We invite consultees' views as to whether the current requirement for the grant of a visa outside the Rules that the intended parents must apply for a parental order within six months of the child's birth should be removed (regardless of whether the availability of the visa is brought within the Rules), if our provisional proposal to remove the time limit on applications for parental orders is accepted.

Paragraph 16.69

Consultation Question 95.

19.127 We provisionally propose that it should be possible to open a file, and begin the process for applying for a EU Uniform Format Form in respect of a child born through an international surrogacy arrangement, before the child is born. The application will need to be completed after the birth of the child.

Do consultees agree?

Paragraph 16.76

Consultation Question 96.

19.128 We invite consultees to provide us with evidence of the experience they have had of applying for a EU Uniform Format Form for a child born through an international surrogacy arrangement. In particular we would be interested to hear how long the application took after the birth of the child, and any information consultees have of causes of delays in the process.

Paragraph 16.77

Consultation Question 97.

19.129 We provisionally propose that the UK Government should provide a single, comprehensive guide for intended parents explaining the nationality and immigration consequences of having a child through an international surrogacy arrangement.

Do consultees agree?

Paragraph 16.82

Consultation Question 98.

19.130 We provisionally propose that international surrogacy arrangements should not be eligible for the new pathway to parenthood.

Do consultees agree?

Paragraph 16.93

Consultation Question 99.

19.131 We provisionally propose that:

19.132 the Secretary of State should have the power to provide that the intended parents of children born through international surrogacy arrangements, who are recognised as the legal parents of the child in the country of the child's birth, should also be recognised as the child's legal parents in the UK, without it being necessary for the intended parents to apply for a parental order, but

19.133 before exercising the power, the Secretary of State should be required to be satisfied that the domestic law and practice in the country in question provides protection against the exploitation of surrogates, and for the welfare of the child, that is at least equivalent to that provided in UK law.

Do consultees agree?

Paragraph 16.94

Consultation Question 100.

19.134 We invite consultees to tell us of their experience of surrogacy arrangements in the UK involving foreign intended parents.

19.135 We invite consultees' views as to whether:

(1) any restriction is necessary on the removal of a child from the UK for the purpose of the child becoming the subject of a parental order, or its equivalent, in another jurisdiction; and

(2) if such a restriction is necessary, there should be a process allowing foreign intended parents to remove the child from the jurisdiction of the UK for this purpose and with the approval of the court and, if so, what form should that process take.

Paragraph 16.120

Consultation Question 101.

19.136 We invite consultees' views as to whether the current application of the law on statutory paternity leave, and statutory paternity pay, to the situation of the surrogate's spouse, civil partner or partner requires reform.

Paragraph 17.18

Consultation Question 102.

19.137 We provisionally propose that provision for maternity allowance should be made in respect of intended parents, and that any such provision should be limited so that only one intended parent qualifies.

Do consultees agree?

Paragraph 17.32

Consultation Question 103.

19.138 We invite consultees' views as to:

(1) whether there is a need for reform in respect of the right of intended parents to take time off work before the birth of the child, whether for the purpose of induced lactation, ante-natal appointments or any other reason; and

(2) if reform is needed, suggestions on reform.

Paragraph 17.36

Consultation Question 104.

19.139 We invite consultees' views as to whether the duty of employers to provide suitable facilities for any person at work who is a pregnant woman or nursing mother to rest under Regulation 25 of the Workplace (Health, Safety and Welfare) Regulations 1992 is sufficient to include intended parents in a surrogacy arrangement.

Paragraph 17.40

Consultation Question 105.

19.140 We invite consultees' views as to whether there are further issues in relation to employment rights and surrogacy arrangements and, if so, any suggestions for reform.

Paragraph 17.43

Consultation Question 106.

19.141 We invite consultees' views as to whether they believe any reforms in relation to surrogacy and succession law are required.

Paragraph 17.56

Consultation Question 107.

19.142 We invite consultees' views as to whether there are any issues in how surrogacy arrangements are dealt with by the health services, and whether there are reforms to law or practice that consultees would like to see in this area.

19.143 We invite consultees' views as to any additions or revisions that they would like to see made to the guidance published by the Department for Health and Social Care for England and Wales.

19.144 We invite consultees' views as to how midwifery practice may better accommodate surrogacy arrangements, in particular with regard to safeguarding issues.

Paragraph 17.76

Consultation Question 108.

19.145 We invite consultees' views as to whether there are any other legal issues in relation to surrogacy, not covered in this Consultation Paper, that merit examination.

Paragraph 17.80

Consultation Question 109.

19.146 We invite consultees who are intended parents, live in the UK, and have entered into a surrogacy arrangement that led to the birth of a child to tell us:

(1) when the child was born;

(2) whether the arrangement was domestic or international and, if international, in which country the arrangement took place;

(3) whether the arrangement led to the making of a parental order in the UK; and

(4) whether they are a:

(a) opposite-sex couple;

(b) male same-sex couple;

(c) female same-sex couple;

(d) single woman; or

(e) single man.

Paragraph 18.2

Consultation Question 110.

19.147 We invite consultees who have experience of applying for a parental order in the UK to tell us:

(1) whether the surrogacy arrangement was domestic or international;

(2) whether they had legal advice before the making of the parental order;

(3) whether they were represented by a lawyer in court; and

(4) the cost of any legal advice or representation.

Paragraph 18.4

Consultation Question 111.

19.148 We invite consultees' views as to the impact (social, emotional, financial or otherwise) of the current law where the intended parents are not the legal parents from birth of the child born of the surrogacy arrangement.

Paragraph 18.6

Consultation Question 112.

19.149 We invite consultees to tell us what they have paid for, or to provide evidence about the cost of:

(1) medical screening; and

(2) implications counselling

(where possible separating out the cost of such screening, tests or implications counselling from any other costs involved with fertility treatment).

19.150 We invite legal consultees, who advise on surrogacy and parental order proceedings, to provide evidence of what they would charge:

(1) to provide advice sufficient to meet the proposed requirement for independent legal advice discussed in Chapter 13; and

(2) to draft, advise on and negotiate the written surrogacy agreement required for the new pathway.

Paragraph 18.8

Consultation Question 113.

19.151 We invite consultees to tell us of the impact of:

(1) the current requirement of a genetic link; and

(2) any removal of this requirement in cases of medical necessity:

(a) in the new pathway;

(b) in the parental order route for domestic surrogacy arrangements; or

(c) in both situations.

Paragraph 18.11

Consultation Question 114.

19.152 We invite consultees who consider that they might be able to fulfil the role of the independent professional discussed in Chapter 9 to tell us:

(1) their profession; and

(2) what they would charge to provide such a service.

Paragraph 18.13

Consultation Question 115.

19.153 We invite consultees who are intended parents to give us their views on the impact of our proposals for reform on their ability to enter into surrogacy arrangements and, in particular:

(1) if particular proposals will increase accessibility, and why; and

(2) if particular proposals will restrict accessibility, and why.

19.154 We invite consultees who are surrogates to give us their views on the impact of our proposals for reform on their ability to enter into surrogacy arrangements and, in particular:

(1) if particular proposals will increase accessibility, and why; and

(2) if particular proposals will restrict accessibility, and why.

Paragraph 18.15

Consultation Question 116.

19.155 We ask consultees who are intended parents to tell us:

(1) whether the surrogacy arrangement was domestic or international;

(2) what they spent, in total, on the surrogacy arrangement(s) that led to the birth of their child(ren), including the cost of fertility treatment, payments to the surrogate and payments to any surrogacy agency or organisation;

(3) how they raised the funds for the surrogacy arrangement(s);

(4) what they spent on any fertility treatment prior to entering into a surrogacy arrangement (where that treatment did not lead to the birth of a child); and

(5) how they raised the funds for the fertility treatment.

Paragraph 18.18

Consultation Question 117.

19.156 We invite consultees' views as to the specific impact of our proposals in Northern Ireland.

Paragraph 18.20

Consultation Question 118.

19.157 We invite consultees' views as to any other impact that we have not specifically addressed in this chapter, or the preceding chapters, of this paper.

Paragraph 18.22

Appendix 1: The Human Fertilisation and Embryology Authority's decision tree: legal parenthood in surrogacy arrangements

1.1 *Kindly reproduced with permission of the Human Fertilisation and Embryology Authority. Please note that the Human Fertilisation and Embryology Authority is in the process of a review to update and reflect the change in law allowing for single people to obtain parental orders.*

Please see the next page.

Human Fertilisation & Embryology Authority

Legal parenthood and surrogacy decision tree

Scenario 1
Is the surrogate married or in a civil partnership?

Yes — The **husband** or **civil partner** will be the legal father or parent of any child born as a result of her treatment, unless:
(a) the surrogate and her husband or civil partner were judicially separated at the time of the treatment, or
(b) it is shown, 'as a question of fact' (see box 6H), that her husband or civil partner did not consent to her treatment.

No

Scenario 2
Has both the intended father provided sperm and the intended female parent provided eggs for the surrogacy treatment?

Yes — The **intended father** can be the legal father at common law when the child is born (if no one else has been nominated).

or — The **intended female parent** can be the legal parent when the child is born if:
(a) both she and the surrogate have given the relevant consent
(b) neither consent has been withdrawn (or superseded), and
(c) they are not within prohibited degrees of relationship to each other.

No

Scenario 3
Has donor sperm and the intended female parent's eggs been used for the surrogacy treatment?

Yes — The **intended father** can be the legal father when the child is born if:
(a) both he and the surrogate have given the relevant consent
(b) neither consent has been withdrawn (or superseded), and
(c) they are not within prohibited degrees of relationship to each other.

or — The **intended female parent** can be the legal parent when the child is born if:
(a) both she and the surrogate have given the relevant consent
(b) neither consent has been withdrawn (or superseded), and
(c) they are not within prohibited degrees of relationship to each other.

No

Scenario 4
Have donor eggs (or the surrogate's eggs) and the intended father's sperm been used for the surrogacy treatment?

Yes — The **intended father** can be the legal father at common law when the child is born (if no one else has been nominated).

or — The **intended female parent** can be the legal parent when the child is born if:
(a) both she and the surrogate have given the relevant consent
(b) neither consent has been withdrawn (or superseded), and
(c) they are not within prohibited degrees of relationship to each other.

No

Scenario 5
Is a male same-sex couple (of whom one has provided sperm) commissioning the surrogacy treatment?

Yes — The **biological intended father** can be the legal father at common law when the child is born (if no one else has been nominated).

or — The **non-biological intended father can** be the legal father when the child is born if:
(a) both he and the surrogate have given the relevant consent
(b) neither consent has been withdrawn (or superseded), and
(c) they are not within prohibited degrees of relationship to each other.

No

Scenario 6
Is a female same-sex couple (of whom one has provided eggs) commissioning the surrogacy treatment?

Yes — Either the **biological** or **non-biological intended female parent** can be the legal parent when the child is born if:
(a) both the intended female parent and the surrogate have given the relevant consents
(b) neither consent has been withdrawn (or superseded), and
(c) they are not prohibited degrees of relationship to each other.

Appendix 2: Ascertainment of previous convictions of prospective adopters in England and Wales

2.1 The following list of offences are set out in the Adoption Agencies Regulations 2005[1] and the Adoption Agencies (Wales) Regulations 2005.[2]

2.2 An adoption agency may not consider a person suitable to adopt a child if that person or any member of that person's household aged 18 or over:

(1) has been convicted of a specified offence committed at the age of 18 or over; or

(2) has been cautioned by a constable in respect of any such offence which, at the time the caution was given, was admitted.

2.3 A "specified offence" means:

(1) an offence against a child;

(2) an offence specified in Part 1 of Schedule 3;

(3) an offence contrary to section 170 of the Customs and Excise Management Act 1979 in relation to goods prohibited to be imported under section 42 of the Customs Consolidation Act 1876 (prohibitions and restrictions relating to pornography) where the prohibited goods included indecent photographs of children under the age of 16;

(4) any other offence involving bodily injury to a child, other than an offence of common assault or battery,

2.4 The expression "offence against a child" has the meaning given to it by section 26(1) of the Criminal Justice and Courts Services Act 20004 except that it does not include an offence contrary to section 9 of the Sexual Offences Act 2003 (sexual activity with a child) in a case where the offender was under the age of 20 and the child was 13 or over at the time the offence was committed.

2.5 The offences specified in Part 1 of Schedule 3 are:

(1) Any of the following offences against an adult–

(a) an offence of rape under section 1 of the Sexual Offences Act 2003;

(b) an offence of assault by penetration under section 2 of that Act;

---

1 Adoption Agencies Regulations 2005 (SI 2005 No 389).

2 Adoption Agencies (Wales) Regulations 2005 (SI 2005 No 1313).

(c) an offence of causing a person to engage in sexual activity without consent under section 4 of that Act, if the activity fell within subsection (4) of that section;

(d) an offence of sexual activity with a person with a mental disorder impeding choice under section 30 of that Act, if the touching fell within subsection (3) of that section;

(e) an offence of causing or inciting a person with mental disorder impeding choice to engage in sexual activity under section 31 of that Act, if the activity caused or incited fell within subsection (3) of that section;

(f) an offence of inducement, threat or deception to procure sexual activity with a person with a mental disorder under section 34 of that Act, if the touching involved fell within subsection (2) of that section; and

(g) an offence of causing a person with a mental disorder to engage in or agree to engage in sexual activity by inducement, threat or deception under section 35 of that Act, if the activity fell within subsection (2) of that section.

(2) An offence under section 1 (rape) and section 18 (rape of a young child) of the Sexual Offences (Scotland) Act 2009

(3) An offence specified in Schedule 1 to the Criminal Procedure (Scotland) Act 1995 except, in a case where the offender was under the age of 20 at the time the offence was committed.

(4) An offence of plagium (theft of a child below the age of puberty).

(5) Section 52 or 52A of the Civil Government (Scotland) Act 1982 (indecent photographs of children)

(6) An offence under section 3 of the Sexual Offences (Amendment) Act 2000 (abuse of trust).

(7) An offence under Article 5 (rape) and Article 12 (rape of a child under 13) of the Sexual Offences (Northern Ireland) Order 2008

(8) An offence specified in Schedule 1 to the Children and Young Persons Act (Northern Ireland) 1968, except in the case where the offender was under the age of 20 at the time the offence was committed.

(9) An offence under Article 3 of the Protection of Children (Northern Ireland) Order 1978 (indecent photographs).

(10) An offence contrary to Article 15 of the Criminal Justice (Evidence, Etc.) (Northern Ireland) Order 1988 (possession of indecent photographs of children).

2.6 An adoption agency may not consider a person suitable to adopt a child if that person or any member of that person's household aged 18 or over:

(1) has been convicted of an offence specified in paragraph 1 of Part 2 of Schedule 3 committed at the age of 18 or over or has been cautioned by a constable in respect of any such offence which, at the time the caution was given, was admitted; or

(2) falls within paragraph 2 or 3 of Part 2 of Schedule 3.

2.7 The offences specified in paragraph 1 of Part 2 of Schedule 3 are:

(1) An offence under any of the following sections of the Sexual Offences Act 1956–

(a) section 1 (rape);

(b) section 5 (intercourse with a girl under 13);

(c) subject to paragraph 4, section 6 (intercourse with a girl under 16);

(d) section 19 or 20 (abduction of girl under 18 or 16);

(e) section 25 or 26 of that Act (permitting girl under 13, or between 13 and 16, to use premises for intercourse); and

(f) section 28 (causing or encouraging prostitution of, intercourse with or indecent assault on, girl under 16).

(2) An offence under section 1 of the Indecency with Children Act 1960 (indecent conduct towards young child).

(3) An offence under section 54 of the Criminal Law Act 1977 (inciting girl under sixteen to incest).

(4) An offence under section 3 of the Sexual Offences (Amendment) Act 2000 (abuse of trust).

2.8 The offences specified in paragraph 2 of Part 2 of Schedule 3 are:

(1) A person falls within this paragraph if he has been convicted of any of the following offences against a child committed at the age of 18 or over or has been cautioned by a constable in respect of any such offence which, at the time the caution was given, he admitted–

(a) an offence under section 2 or 3 of the Sexual Offences Act 1956 Act (procurement of woman by threats or false pretences);

(b) an offence under section 4 of that Act (administering drugs to obtain or facilitate intercourse);

(c) an offence under section 14 or 15 of that Act (indecent assault);

(d) an offence under section 16 of that Act (assault with intent to commit buggery);

(e) an offence under section 17 of that Act (abduction of woman by force or for the sake of her property); and

(f) an offence under section 24 of that Act (detention of woman in brothel or other premises).

2.9 The offences specified in paragraph 3 of Part 2 of Schedule 3 are:

(1) A person falls within this paragraph if he has been convicted of any of the following offences committed at the age of 18 or over or has been cautioned by a constable in respect of any such offence which, at the time the caution was given, he admitted –

(a) an offence under section 7 of the Sexual Offences Act 1956 (intercourse with defective) by having sexual intercourse with a child;

(b) an offence under section 9 of that Act (procurement of defective) by procuring a child to have sexual intercourse;

(c) an offence under section 10 of that Act (incest by a man) by having sexual intercourse with a child;

(d) an offence under section 11 of that Act (incest by a woman) by allowing a child to have sexual intercourse with her;

(e) subject to paragraph 4, an offence under section 12 of that Act by committing buggery with a child under the age of 16;

(f) subject to paragraph 4, an offence under section 13 of that Act by committing an act of gross indecency with a child;

(g) an offence under section 21 of that Act (abduction of defective from parent or guardian) by taking a child out of the possession of her parent or guardian;

(h) an offence under section 22 of that Act (causing prostitution of women) in relation to a child;

(i) an offence under section 23 of that Act (procuration of girl under 21) by procuring a child to have sexual intercourse with a third person;

(j) an offence under section 27 of that Act (permitting defective to use premise for intercourse) by inducing or suffering a child to resort to or be on premises for the purpose of having sexual intercourse;

(k) an offence under section 29 of that Act (causing or encouraging prostitution of defective) by causing or encouraging the prostitution of a child;

(l) an offence under section 30 of that Act (man living on earnings of prostitution) in a case where the prostitute is a child;

(m) an offence under section 31 of that Act (woman exercising control over prostitute) in a case where the prostitute is a child;

(n) an offence under section 128 of the Mental Health Act 1959 (sexual intercourse with patients) by having sexual intercourse with a child;

(o) an offence under section 4 of the Sexual Offences Act 1967 (procuring others to commit homosexual acts) by–

(p) procuring a child to commit an act of buggery with any person; or

(q) procuring any person to commit an act of buggery with a child;

(r) an offence under section 5 of that Act (living on earnings of male prostitution) by living wholly or in part on the earnings of prostitution of a child; and

(s) an offence under section 9(1)(a) of the Theft Act 1968 (burglary), by entering a building or part of a building with intent to rape a child.

2.10 This provision is notwithstanding that the offences specified in Part 2 of Schedule 3 have been repealed.

2.11 Where an adoption agency becomes aware that a prospective adopter or a member of the prospective adopter's household falls within paragraph (2) or (4), the agency must notify the prospective adopter as soon as possible in writing that they cannot be considered suitable to adopt a child.

Appendix 3: Ascertainment of previous convictions of prospective adopters in Scotland

3.1 The Adoption Agencies (Scotland) Regulations[1] require that an adoption agency, where it determines that a person should be accepted for assessment as an adoptive parent, must, so far as is reasonably practicable, obtain the information about the prospective adopter listed in Part I of Schedule 1.[2]

3.2 This process includes gathering information on whether the prospective adopter or any other member of their household has previously –

(1) been convicted of an offence mentioned in Schedule 1 to the Criminal Procedure (Scotland) Act 1995 or an offence under Schedule 1 to the Children and Young Persons Act 1933;[3] or

(2) been convicted of an offence under section 11 of the Protection of Children (Scotland) Act 2003 or has been disqualified from working with children within the meaning of that Act.[4]

3.3 The offences specified in Schedule 1 to the Criminal Procedure (Scotland) Act 1995 are:

(1) Any offence under Part I of the Criminal Law (Consolidation) (Scotland) Act 1995.

(2) Any offence under section 18 (rape of a young child) or 28 (having intercourse with an older child) of the Sexual Offences (Scotland) Act 2009 (asp 9).

(3) Any offence under section 19 (sexual assault on a young child by penetration) or 29 (engaging in penetrative sexual activity with or towards an older child) of that Act.

(4) Any offence under section 20 (sexual assault on a young child) or 30 (engaging in sexual activity with or towards an older child) of that Act.

(5) Any offence under section 42 of that Act (sexual abuse of trust) towards a child under the age of 17 years but only if the condition set out in section 43(6) of that Act is fulfilled.

---

1 Adoption Agencies (Scotland) Regulations 2009 (SSI 2009 No 154).

2 Adoption Agencies (Scotland) Regulations 2009 (SSI 2009 No 154) reg 7(5)(a).

3 Adoption Agencies (Scotland) Regulations 2009 (SSI 2009 No154) sch 1 Part I para 14(f).

4 Adoption Agencies (Scotland) Regulations 2009 (SSI 2009 No 154) sch 1, Part I, para 14(g).

(6) Any offence under section 12, 15, 22 or 33 of the Children and Young Persons (Scotland) Act 1937.

(7) Any offence under the Prohibition of Female Genital Mutilation (Scotland) Act 2005 where the person mutilated or, as the case may be, proposed to be mutilated, is a child under the age of 17 years.

(8) Any offence under section 52 or 52A of the Civic Government (Scotland) Act 1982 in relation to an indecent photograph [or pseudophotograph] of a child under the age of 17 years.

(9) Any offence under section 1, 9, 10, 11 or 12 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 in respect of a child under the age of 17 years.

(10) Any other offence involving bodily injury to a child under the age of 17 years.

(11) Any offence involving the use of lewd, indecent or libidinous practice or behaviour towards a child under the age of 17 years.

(12) Any offence under section 5 (coercing a person into being present during a sexual activity), 6 (coercing a person into looking at a sexual image), 7 (communicating indecently etc.), 8 (sexual exposure) or 9 (voyeurism) of the Sexual Offences (Scotland) Act 2009 (asp 9) towards a child under the age of 17 years.

(13) Any offence under any of sections 21 to 26 or 31 to 37 of that Act (certain sexual offences relating to children).

3.4 The offences specified in Schedule 1 to the Children and Young Persons Act 1933 are:

(1) The murder or manslaughter of a child or young person.

(2) Infanticide.

(3) An offence under section 2(1) of the Suicide Act 1961 (encouraging or assisting suicide) where the relevant act is an act capable of, and done with the intention of, encouraging or assisting the suicide of a child or young person.

(4) An offence under section 5 of the Domestic Violence, Crime and Victims Act 2004, in respect of a child or young person.

(5) Any offence under sections twenty-seven, or fifty-six of the Offences against the Person Act 1861, and any offence against a child or young person under sections five of that Act.

(6) Any offence under sections one, three, four, eleven or twenty-three of this Act.

(7) Any offence against a child or young person under any of sections 1 to 41, 47 to 53, 61, 66, 67 and 67A of the Sexual Offences Act 2003, or any attempt to commit such an offence.

(8) An offence against a child or young person under section 2 of the Modern Slavery Act 2015 (human trafficking), or any attempt to commit such an offence.

(9) Any offence under section 62 or 63 of the Sexual Offences Act 2003 where the intended offence was an offence against a child or young person, or any attempt to commit such an offence.

(10) Any other offence involving bodily injury to a child or young person.

(11) Common assault, or battery.

3.5 Section 11 of the Protection of Children (Scotland) Act 2003 was repealed by the Protection of Vulnerable Groups (Scotland) Act 2007.[5] The offences specified in section 11 of the Protection of Children (Scotland) Act 2003 as last in force were:

(1) It is an offence for an individual who is disqualified from working with children to apply for, offer to do, accept or do any work in a child care position.

(2) It is a defence for an individual charged with an offence under subsection (1) above to prove that the individual did not know, and could not reasonably be expected to have known, that the individual was, at the time of the offence, disqualified from working with children.

(3) An act which would, but for this subsection, be an offence under subsection (1) [….] above is not an offence if —

(a) the individual who commits the act [….] is disqualified from working with children by virtue only of paragraph (c) of section 17(1) below;

(b) that individual is, by virtue of subsection (1)(b) or (c) of section 142 (prohibition from teaching etc.) of the Education Act 2002 (c.32), allowed to carry out work to which that section applies only—

in circumstances specified in a direction under that section; or

if conditions specified in such a direction are satisfied; and

(c) the act relates to such work or to any other work in a child care position being carried out in such circumstances or, as the case may be, in satisfaction of such conditions.

5 Protection of Vulnerable Groups (Scotland) Act 2007 sch 1, para 42. The offences relating to work in a child care position specified in the Protection of Children (Scotland) Act 2003, s 11 are now provided for in the Protection of Vulnerable (Groups) (Scotland) Act 2007, s 34.