Law Commission
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Scottish Law Commission
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Building families through surrogacy: a new law
Volume I: Core Report

HC 1236

SG/2023/76

Law Com No 411

Scot Law Com No 262

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Presented to Parliament and laid before the Scottish Parliament pursuant to section 3(2) of the Law Commissions Act 1965

Ordered by the House of Commons to be printed on 28 March 2023

HC 1236

SG/2023/76

This publication is available at www.gov.uk/official-documents.

Any enquiries regarding this publication should be sent to us at Enquiries@lawcommission.gov.uk or info@scotlawcom.gov.uk

978-1-5286-3959-0

E02875841 03/23

Printed on paper containing 40% recycled fibre content minimum

Printed in the UK by the HH Associates Ltd. on behalf of the Controller of His Majesty's Stationery Office

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The terms of this report were agreed on 22 February 2023.

The text of this report is available on the Law Commissions' websites at:

https://www.lawcom.gov.uk/project/surrogacy/

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Glossary

We use the following terms within this Report.

We have carefully considered what terminology is most appropriate in the context of this Report. We acknowledge that not all of the terms have universally accepted meanings, or are used the same way in all the literature. The definitions contained in this Glossary reflect how terms are used in this Report.

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 directly introduced into the reproductive system of a woman by means of a syringe or other artificial device. 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 through sexual intercourse. Examples include *artificial insemination* and *IVF*.
Baby / child / foetus	All these terms may be used in everyday language 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.

Term	Definition
British Infertility Counselling Association ("BICA")	A registered charity that represents professional infertility counsellors in the UK.
Biological parent/parentage	A term which can be used to refer to gestational and/or genetic parentage. In this Report, we prefer to specify whether we mean *gestational* or *genetic parentage*, as applicable, but we may quote from sources that use the term "biological."
Blended family	A family where, typically, one or both of the parents have children from previous relationships who come together to form one family unit.
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 surrogacy cases.
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 surrogacy cases.
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 arrangement in jurisdictions overseas may also be characterised by the existence of an enforceable surrogacy contract between the intended parents and the surrogate.
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.

Term	Definition
The European Convention on Human Rights (the "ECHR")	The ECHR is an international convention in 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.
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.

[1] https://www.nhs.uk/conditions/pregnancy-and-baby/8-weeks-pregnant/ (last visited 23 March 2023).

Term	Definition
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 *in-vitro fertilisation* ("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*.
The Human Fertilisation and Embryology Authority (the "HFEA")	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, revised October 2021) (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 a heterosexual 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 initiated 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 at a fertility clinic, to create an *embryo*. The embryo is then implanted in a woman with a view to her becoming pregnant.

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

Term	Definition
Legal parental status	A term that we use in this Report to describe a child's legal parent, distinct from who has parental responsibility (in England and Wales) or parental responsibilities and parental rights (in Scotland), in respect of that child. We have preferred this term to "legal parenthood" as we think that this latter term can sometimes be used in the context of parental responsibility/PRRs and therefore risks confusion. At common law the woman who gives birth to the child is their legal mother.[3] In England and Wales the man whose sperm fertilised the egg is the legal father.[4] There is a presumption that the mother's husband or civil partner is the father, but this can be displaced.[5] In Scotland he is the father if he was the husband or male civil partner of the mother between conception and birth, if he took steps to be registered as such in the Register of Births and Still-Births, or if a court grants a declarator of parentage in his favour.[6] Where a woman gives birth to a child and her egg has not been used for conception, the HFEA 2008 provides that a woman who carries the child as a result of implantation of the egg and sperm (or embryo) has the legal status of a mother upon birth regardless of any genetic link to the child.[7] Further special rules defining the legal parental status of a father or second female parent in such a situation exist also.[8]

3 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.

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

5 Family Law Reform Act 1969 s 23(1).

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

7 HFEA 1990, s 27; HFEA 2008, ss 33 and 48.

8 See HFEA 2008, ss 48 and 35 to 47.

Term	Definition
Legal parenthood	A person or persons being recognised by law as being the parents of a child. We prefer the term legal parental status in this Report.
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 withdraw her consent within a defined period of time, would enable the *intended parents* to become the child's legal parents at birth.
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 her spouse or civil partner, where relevant) to the *intended parents*, and extinguishes the *legal parenthood* of the surrogate and her spouse or civil partner, if any.
Parental order process	A term that we use to describe the existing process of the *intended parents* obtaining a *parental order*.

Parental responsibility, and parental responsibilities and parental rights ("PRRs")	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, as set out in section 3(1) of the Children Act 1989. In Scotland, the legal concept of parental responsibilities and parental rights ("PRRs") 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, as set out in part 1 of the Children (Scotland) Act 1995. Section 1(1) of that Act defines parental responsibility as 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 — (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. Section 2(1) defines parental rights as 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.

Term	Definition
	The concepts of PRRs 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/PRRs by virtue of that status, but parental responsibility/PRRs can also be conferred on people who are not the legal parents.
Pre-conception child welfare assessment	An assessment of the welfare of any child who might be born as a result of a course of action, such as a surrogacy agreement proceeding on the new pathway, or in relation to existing assisted reproduction procedures carried out at a licenced clinic.
Regulated Surrogacy Organisation ("RSO")	Organisations created by the draft Bill which are licensed by the *HFEA* in order to be able to decide whether a surrogacy can proceed on the new pathway and to supervise those agreements.
Regulated Surrogacy Statement	A document signed by the surrogate, the intended parents and the RSO stating their intention or approval that the intended parents will be the parents at birth of any child born from the surrogacy agreement, and that the required statutory checks have been carried out. This document is mandatory on the new pathway.
Sexually transmitted infection ("STI")	An infection which is passed from one person to another through sexual contact. Some STIs can also be transmitted in other ways, such as during pregnancy, childbirth, or through infected blood or blood products.
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.

Term	Definition
Surrogacy Register	A register of surrogacy agreements created by the draft Bill, which holds information on the *intended parents, surrogate, gamete donors,* any fertility clinic used, and the surrogate-born child. It is maintained by the *HFEA*.
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	An agreement between the *surrogate* and the *intended parents* regarding their intention to enter into a *surrogacy arrangement*.
Surrogacy team	Collectively, the *surrogate* and the *intended parents* who are entering, or considering entering into, a *surrogacy agreement* with each other
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 parental status* to them. From our discussions with those involved in surrogacy, 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”.

Term	Definition
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.

ABBREVIATIONS OF LEGISLATION

Throughout this Report, 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[9]	The 2018 Regulations

LIST OF COMMON ABBREVIATIONS

Other abbreviations frequently used in this report, including those used for consultees, are set out in the table below:

Abbreviation	Full name
BICA	British Infertility Counselling Association

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

Abbreviation	Full name
Cafcass	The Children and Family Court Advisory Support Service (a non-departmental public body which represents children in family court cases in England. Cafcass Cymru represents children in family court cases in Wales.)
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
ECHR	The European Convention on Human Rights
ECtHR	The European Court of Human Rights
HFEA	Human Fertilisation and Embryology Authority
IVF	*In vitro* fertilisation
Nagalro	The National Association of Guardians Ad Litem and Reporting Officers
PROGAR	Project Group on Assisted Reproduction (a special interest group of the British Association of Social Workers)
PRRs	Parental responsibilities and parental rights
RSO	Regulated Surrogacy Organisation
STI	Sexually transmitted infection

OUR RECOMMENDATIONS FOR A NEW LAW ON SURROGACY

Society's understanding of family and parenthood has changed considerably since the laws which currently govern surrogacy were passed over thirty years ago. Those laws do not work in the best interests of the child, or to support any of the people involved in surrogacy arrangements.

Although surrogacy has always been legal in the UK, at the time the current laws were passed, surrogacy was, at best, tolerated. Our review has examined the problems with the current law in a context in which the UK Government supports the use of surrogacy as a means of building a family.

The current law, which makes the surrogate the legal parent at birth, does not reflect the intentions of surrogates or intended parents. The law creates a degree of uncertainty and stress for the parties, which is not in the best interests of the child, in the period from the birth of the child to the recognition of the intended parents as the legal parents through the grant of a parental order. It can typically be six months to a year after the birth of the child before a parental order is made.

We recommend the introduction of a new pathway for surrogacy which will enable intended parents to be the legal parents at birth. It will involve screening and safeguarding checks before conception, allowing meaningful scrutiny at an early stage by a Regulated Surrogacy Organisation, rather than the current law which only involves scrutiny by the court after the child is born.

Our reforms respect the autonomy of the surrogate – if she withdraws her consent, the courts will make the final decision on parental status. Our reforms also keep the existing need for a genetic link between at least one of the intended parents and the child, so that "double donation" is not permitted.

Because the current law does not provide for the intended parents to be recognised as legal parents at birth, many enter into surrogacy arrangements abroad, a practice which raises particular concerns about the risk of exploitation of women. Our recommended reforms reduce that risk by putting in place a framework which will encourage intended parents to enter into a surrogacy agreement here rather than overseas.

We also recommend that for all surrogacy agreements, intended parents have the legal right – called parental responsibility in England and Wales, and parental responsibilities and parental rights in Scotland – to make decisions for the child they are caring for, for example about their medical care. This will mean that the surrogate is not required to make decisions for a child when she does not view herself as the parent and does not want to be responsible for those decisions.

The current law on the payments that intended parents can make to surrogates is unclear. We recommend changes which will set out clearly the payments which intended parents are permitted to make. Importantly, we

recommend that payments should be made to reimburse the surrogate for costs she incurs arising from the surrogate pregnancy: but payments for carrying the child and living expenses are prohibited, to protect against women being pressured or coerced into becoming a surrogate for financial gain.

In some surrogacy agreements a parental order application will continue to need to be made after the birth of the child in order for the intended parents to be recognised as the child's legal parents. We make recommendations to ensure that the best interests of the child is the paramount consideration in those cases. In particular, we recommend that the child's welfare should be placed at the heart of parental orders, by giving the court discretion to dispense with the surrogate's consent where the welfare of the child requires it.

Finally, we recommend the creation of a Surrogacy Register, which will enable surrogate-born people to access information about their origins. This may have practical value in helping them to understand their genetic and gestational heritage for health reasons, and positively contribute to the quality of family relationships.

Collectively, our recommendations ensure that surrogacy continues to operate in the UK on an altruistic, rather than a commercial basis. Regulated Surrogacy Organisations will be required to act on a non-profit-making basis, and surrogacy agreements will not be enforceable. A woman who becomes a surrogate should be no better or worse off financially from doing so.

Taken together, our recommendations for a reformed surrogacy law respect the intentions of all parties, safeguard against exploitation, and place the best interests of the child at their heart.

Chapter 1: Introduction

ABOUT THIS REPORT

1.1 This Report offers a summary of our recommendations for reform of surrogacy law. It focusses on how our recommendations will apply in surrogacies where the surrogate and intended parents form a surrogacy team and enter into a successful surrogacy agreement. In our Full Report we explore in detail the legal provisions we recommend for all surrogacy cases, including the measures that apply when things do not go to plan. The Full Report also covers issues that are not central to our recommended reforms, such as consequential reforms to employment, succession and nationality law.

1.2 This Report is written for a wide audience. In some places, we use non-technical or simplified language to describe our recommendations. We avoid using legal terms where possible and limit our use of footnotes. Our Full Report also sets out the responses we received to our Consultation Paper, which are not included in detail in this Report.

1.3 For the avoidance of doubt, the Full Report should be considered to be the authoritative statement of our recommendations.

1.4 Our recommendations ensure that surrogacy continues to operate on an altruistic, rather than a commercial basis. They seek to protect the best interests of the child by providing greater certainty to surrogates and to intended parents as regards legal parental status. In line with the shared intentions of the surrogate and the intended parents, our recommendations enable the intended parents to be recognised as the legal parents from birth, as long as that remains the wish of the surrogate, while protecting the surrogate's autonomy throughout pregnancy and childbirth.

1.5 Our recommendations provide important protections against the exploitation of women who become surrogates, by putting in place safeguards and checks before conception takes place. Finally, in view of the particular concerns associated with international surrogacy, our recommendations will incentivise intended parents in England, Wales and Scotland who are interested in surrogacy to enter into an agreement here, rather than going abroad.

WHAT IS SURROGACY?

1.6 Surrogacy is when a woman (who we refer to as the "surrogate") becomes pregnant with a child who may, or may not, be genetically related to her, carries the child, and gives birth to the child with the intention that another couple or individual (who we refer to as the "intended parents") will be the child's legal parents.

1.7 Surrogacy is a possible option for forming a family for people who, for medical reasons (whether relating to sex, or physical or mental health) are unable to carry a foetus to term, or deliver a baby. As a result, the intended parents who enter into surrogacy agreements belong to one of two groups:

(1) opposite-sex couples, same-sex female couples, or single women who are unable to carry a foetus to term; or

(2) same-sex male couples or single men.

1.8 Traditional surrogacy (where the surrogate uses her own egg) has long-standing historical origins. In the past, conception happened through sexual intercourse. Now, however, surrogacy requires the child to be conceived through artificial insemination. The development of in-vitro fertilisation ("IVF") in the 1970s enabled gestational surrogacy agreements (where the surrogate's own egg is not used).

1.9 This change gave rise to discussions about the legal regulation of surrogacy. These discussions resulted in the publication of two reports into surrogacy: the Warnock Report[10] and the Brazier Report.[11] The first of these reports influenced the introduction of the first surrogacy legislation in the 1980s.

WHY WE NEED TO REFORM SURROGACY LAW

1.10 Much of our current law on surrogacy comes from legislation passed over 30 years ago. That period has seen significant changes to society and medicine (such as the continued development of assisted reproduction technology), which have changed our understanding of family and parenthood. The Court of Appeal has said 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' are but examples."[12]

1.11 The UK Government's attitude towards surrogacy has also evolved in that time. Current guidelines published by the Department of Health and Social Care and in effect in England and Wales state clearly that "the Government supports surrogacy as part of the range of assisted conception options."[13]

1.12 However, surrogacy continues to attract strongly held and conflicting views. During this project, we have heard from many individuals and organisations who support and endorse the use of surrogacy. We have also heard from many individuals and organisations who oppose surrogacy as a matter of principle and wish to see it prohibited. This project, in line with its Terms of Reference, was not designed to consider whether surrogacy should be prohibited – it was undertaken in order to review problems with the current law, in a context in which Parliament permits surrogacy and the UK Government supports its use.

1.13 It is clear that the current law governing surrogacy does not work in the best interests of any of the people involved: children born though surrogacy, women who become surrogates, or intended parents. On the most crucial issues the law does not reflect

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

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

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

13 Department of Health and Social Care, *The surrogacy pathway: surrogacy and the legal process for intended parents and surrogates in England and Wales* (February 2018) p 4.

the shared intentions of the surrogate and intended parents. On some issues – such as payments – the law is not clear. For the child, the law creates a disconnect between the family raising the child, and who the law says their parents are. The law does not do enough to make sure that information on a surrogate-born child's origins is available so they can fully understand their identity.

1.14 As the use of surrogacy has increased, these problems have become more obvious and the need to address them has become more urgent.

Problems with the current law

1.15 Under the current law, the surrogate and her spouse or civil partner are the legal parents of a child born from a surrogacy arrangement unless a parental order is obtained by the intended parents. A parental order, which is typically obtained six months to a year after the birth of the child, is a court order that recognises the intended parents as the child's legal parents in place of the surrogate and her spouse or civil partner.

1.16 Of particular concern is that the law does not protect the best interests of the child. In the vast majority of cases, where the child is cared for by the intended parents from birth, the law means that those raising the child have no legally recognised relationship with the child until a parental order is granted.

1.17 This approach does not serve the interests of any of those involved. It means that surrogates, who do not intend to raise the child as their own, are legally responsible for the child until the parental order is granted. At worst, it means that the intended parents, at least one of whom is genetically related to the child, can legally exit the arrangement leaving the surrogate as the legal parent.

1.18 In short, it means that the risks of any breakdown in the surrogacy arrangement lie with the surrogate. Indeed, while intended parents say that one of their biggest worries in surrogacy is that the surrogate will change her mind, surrogates have explained to us their serious concerns about the intended parents changing theirs.

1.19 This situation has practical consequences. It can result in the intended parents being unable to make any decisions in respect of the child, such as decisions in respect of medical treatment, and the surrogate being required to do so.

1.20 The current law also means that there is no formal, legal scrutiny of a surrogacy agreement until the child is born and a parental order is applied for. That is often too late a stage for reservations about the agreement to be satisfactorily dealt with. The court is presented with a child who has been born and is being raised by the intended parents, and whose best interests will almost invariably point towards the grant of a parental order, in all but the most exceptional of circumstances.

1.21 One clear consequence of the current law is that it operates to encourage intended parents to use international surrogacy, particularly in countries where the intended parents are recognised in the child's country of birth (but not by our domestic law) as the legal parents of the child from the time of their birth. In some instances, however, international arrangements raise significant concerns about the exploitation of women as surrogates.

1.22 The current law on payments that the intended parents are able to make to the surrogate lacks clarity. Payments can be made by the intended parents to the surrogate to reimburse "expenses reasonably incurred", but there is no definition of what this includes. This has resulted in concerns that surrogates may in some cases in fact receive payments beyond their expenses.

1.23 Further, there is no effective means of enforcing limitations on payments. The only option open to a court where payments have been made beyond expenses reasonably incurred is to refuse the grant of a parental order. There is, however, no case in which a parental order has been refused on the grounds of payments that have been made. Unless there was evidence of potential child trafficking, or that payment had been made for the sale of the child, it will almost always be in the best interests of the child for the court to grant the parental order.

1.24 A further weakness in the current law is that it does not provide a clear route for children born through surrogacy to access information about their genetic and gestational origins. Being able to do so is considered fundamental for a child's development and can contribute positively to the quality of relationships and wellbeing within a family. There can also be important health reasons to know this information.

Our reforms

1.25 Our recommendations provide a new pathway for domestic surrogacy agreements that will enable intended parents to be the child's legal parents from the time of the birth, as long as that remains the shared intention of the surrogate. To enter this new pathway, scrutiny of a surrogacy agreement will take place prior to the child being conceived. Screening and safeguarding measures will ensure that the decision to enter into a surrogacy agreement is fully informed and considered, and will include a pre-conception assessment of the welfare of any child born as a result of the agreement.

1.26 Our new pathway therefore brings scrutiny of surrogacy agreements up front, to a much earlier stage – before conception – rather than waiting until some months after the child has been born. By doing so, the law can then reflect and respect the shared intentions of the surrogate and the intended parents that the intended parents should be the legal parents of the child from birth.

1.27 At the same time, our recommendations ensure that the surrogate's autonomy is protected throughout. In particular, all decisions relating to the pregnancy and childbirth remain in the exclusive control of the surrogate. Another important provision is the surrogate's ability to withdraw her consent to a new pathway agreement, so that the final decision regarding the child's legal parents will be made by the courts by way of the parental order process. If she withdraws her consent during the pregnancy, she will be the legal parent at birth, and the intended parents may apply for a parental order. If the surrogate withdraws her consent at any point in the six-week period after the birth of the child, the intended parents will remain the legal parents, and she may apply for a parental order to make her the legal parent.

1.28 Central to our reforms is the creation of Regulated Surrogacy Organisations ("RSOs"). RSOs will be non-profit-making bodies that are regulated by the Human Fertilisation and Embryology Authority ("HFEA"). Only RSOs will be able to approve a surrogacy

agreement to enter the new pathway, after confirming the mandatory screening and safeguarding measures have happened. After that, the RSO will continue to oversee the agreement, and to support the surrogate and intended parents, until the agreement comes to an end.

1.29 The greater certainty provided by the new pathway, coupled with the recognition of the intended parents as legal parents from birth, and the removal of the requirement to go to court to seek a parental order, should ensure that surrogates and intended parents will want to use it. It will also encourage intended parents who live in this country to enter into a surrogacy agreement here, rather than overseas. However, not all surrogacy agreements will be eligible for the new pathway and a parental order will continue to be required for some surrogacy agreements.

1.30 A parental order application will be required following a domestic surrogacy in cases where either an RSO has not been involved, or where the agreement has not been admitted by the RSO onto the new pathway. It will also be necessary where a surrogacy agreement begins on the new pathway, but the surrogate subsequently withdraws her consent. A parental order will be required for all international surrogacy arrangements, as these will not be eligible for the new pathway. Therefore, alongside our recommendations for the new pathway, we also make recommendations to reform the law that applies to parental order applications.

1.31 Whether a surrogacy agreement follows the new pathway, or a parental order is applied for, our recommendations provide clarity as to the payments that intended parents can make to the surrogate. They ensure a clearer correlation between payments made and costs incurred by the surrogate and (for cases on the new pathway) greater oversight of agreements made in relation to payments. Our recommendations separate any dispute that arises over payments from the identification of the legal parents of the child, and we provide options for the UK Government as to how limitations on payments are enforced.

1.32 Finally, we recommend the creation of a Surrogacy Register, which will enable surrogate-born people to access information about their origins. This may have practical value in helping them to understand their genetic and gestational heritage for health reasons, and positively contribute to the quality of family relationships.

1.33 Our recommendations provide for a comprehensive surrogacy law that is reflective of a scheme in which surrogacy is properly supported by the law. Our recommendations provide much greater certainty to surrogates and intended parents and operate in the best interests of children born through surrogacy. Importantly, they do so without altering the fundamental ethos within which surrogacy takes place, based on "altruistic" rather than "commercial" principles: RSOs will be required to be non-profit-making bodies; our recommendations on payments ensure that women are not paid for carrying a baby for the intended parents; and surrogacy agreements are not contracts enforceable by the parties against each other.

CURRENT LAW ON SURROGACY

1.34 The two main pieces of legislation that govern surrogacy are the Surrogacy Arrangements Act 1985 (which we refer to throughout this Report as the "SAA 1985"),

and the Human Fertilisation and Embryology Act 2008 ("HFEA 2008"). The SAA 1985 makes clear that surrogacy arrangements are unenforceable by law.

Legal parental status and parental responsibility

1.35 Under the current law, the surrogate is the child's legal mother at birth, and will be registered on the child's birth certificate. Her spouse or civil partner, if she has one, will be registered as the child's father or second parent. Alternatively, in some circumstances (including where the surrogate is single), one of the intended parents may be listed as the other legal parent on the birth certificate.

1.36 After the birth of the child, the intended parents must apply to the court for a parental order so that they can become the legal parents of the child, using provisions in section 54 or 54A of the HFEA 2008. A parental order is a formal order of the court which ends the legal parental status of the surrogate and any second parent listed on the birth certificate, and makes the intended parents the child's legal parents. This order enables a parental order certificate to be issued in the intended parents' names, which can be used in the same way as a child's birth certificate.

1.37 The paramount consideration for the court when deciding whether or not to make a parental order is the child's lifelong welfare. On that basis courts rarely refuse to grant parental orders, because the child is usually living with the intended parents and they are the people who want to and plan to care for the child. Other requirements for making an order include that:

(1) one of the intended parents must be genetically related to the child;

(2) the child's home must be with the applicants, at the time of the application and the making of the order; and

(3) the surrogate and any other legal parent of the child must have given their consent to the grant of the parental order.

1.38 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. However, even in cases where payments have been made beyond reasonable expenses, the court is able to authorise those payments and grant a parental order. Also, the meaning of "expenses reasonably incurred", the language used in the HFEA 2008, is not defined in that Act. Although payments in some parental order cases do exceed "expenses reasonably incurred", we are not aware of a case where a court has refused a parental order because of such payments.

1.39 Until 3 January 2019, an application for a parental order could only be made by a couple who were married, in a civil partnership, or living together in an enduring family relationship. The law was then changed so that single intended parents can apply for a parental order.[14]

1.40 The law distinguishes between legal parental status and parental responsibility, in England and Wales, or parental responsibilities and parental rights in Scotland

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

("PRRs"). Parental responsibility/PRRs describe the set of responsibilities, rights, duties, and powers a person has in relation to a child. Currently, intended parents do not hold parental responsibility/PRRs for the child at birth. That means that even though the intended parents are caring for the child from birth they cannot make decisions about the child, such as about medical care. Those decisions must be made by the surrogate.

1.41 If a parental order is made in favour of the intended parents, they will have parental responsibility/PRRs for the child, and the surrogate will cease to have them. If the surrogate does not consent to a parental order, the court may still grant intended parents parental responsibility/PRRs, but it cannot change a child's legal parental status.

Access to information

1.42 Currently, a surrogate-born person can find out information about their origins from three sources.

(1) They can access their parental order certificate, which will tell them that a parental order was granted in relation to them. In England and Wales, they cannot access their original birth certificate, and therefore cannot find out the identity of the surrogate through this route.

(2) They can access information from the court in relation to the parental order. In England and Wales, they can access certain documents from the age of 18, but not the full court file, and in particular not statements filed in the proceedings which would set out a full narrative of the surrogacy journey. In Scotland, a 16-year-old can access the full court file.

(3) They can access the register of information on donor conception operated by the HFEA, which regulates fertility clinics. This would only be relevant in gestational, not traditional surrogacy agreements. It does not include information on surrogates who use their own egg or intended parents who provide gametes.

Criminal offences

1.43 The SAA 1985 provides for criminal offences in relation to surrogacy. It makes it a criminal offence to initiate, take part in, or agree to negotiate a surrogacy arrangement on a commercial basis, or compile information for use in doing so. Surrogates and intended parents are excluded from this offence, so they can legally negotiate their own surrogacy arrangement. But, for example, a solicitor cannot give professional advice on a surrogacy arrangement in exchange for payment.

1.44 The SAA 1985 also prohibits placing advertisements that someone is willing to be a surrogate, or is looking for one. This prohibition applies across all media, from newspapers to the internet. Breaching either of these provisions can result in a prison sentence of up to three months, although we are not aware that any prosecutions have happened.

1.45 The HFEA 2008 introduced an exception to these offences for non-profit-making bodies. Non-profit surrogacy organisations, for example, can now initiate negotiations

and compile information on surrogacy in return for reasonable payments, and can advertise that they are able to do so.

1.46 The SAA 1985 also makes it clear that surrogacy arrangements are unenforceable – so, for example, a surrogate cannot be required by law to hand over a child to intended parents because she previously said that she would.

NATIONAL DIFFERENCES

1.47 The two main laws which govern surrogacy, the SAA 1985 and the HFEA 2008, apply across the UK. Because of devolution, some powers previously held by the UK Parliament have been transferred to Wales, Scotland and Northern Ireland, while those which have not been transferred are "reserved" to the UK Parliament.

1.48 The law relating to surrogacy is reserved in relation to Scotland and Wales. Scotland has its own legal system, and in relation to parental responsibilities and parental rights and court procedure there are key differences that are relevant to surrogacy. Further, aspects of parental orders are regulated by reference to adoption law, which is also different in Scotland. Where the law or its application differs significantly in England, Wales and Scotland we note it in this Report, and further detail is available in the Full Report.

1.49 Northern Ireland also has its own legal system, and its own Law Commission. The Northern Ireland Law Commission has not been operational since April 2015 due to budgetary pressures, and without their involvement we have not been able to include a review of surrogacy law in Northern Ireland within the remit of this project.

THE CURRENT PICTURE

1.50 The numbers of children born each year as a result of a surrogacy agreement are unknown. According to statistics from the Ministry of Justice, 436 parental order applications were made in England and Wales in 2021.[15] The actual number of surrogacy agreements is likely to be higher, because a number of intended parents and surrogates may not know that they ought to apply for a parental order. In Scotland, 15 parental orders were made in the period covering 2021 and the last four to five months of 2020.[16]

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15 Ministry of Justice, *Family Court Statistics Quarterly - Family Court Tables January to March 2022* (June 2022) Table 4: Number of orders and children involved in Public and Private law (Children Act) applications made in the Family courts in England and Wales, by type of order, annually 2011-2021 and quarterly Q1 2021 - Q1 2022. Accessible at https://www.gov.uk/government/statistics/family-court-statistics-quarterly-january-to-march-2022 (last visited 23 March 2023).

16 NRS' Vital Events Statistics 1999-2020, Table 2.03: Adoptions by type of adoption and by type of adopter(s). Accessible at https://www.nrscotland.gov.uk/statistics-and-data/statistics/statistics-by-theme/vital-events/general-publications/vital-events-reference-tables (last visited 23 March 2023).

1.51 The number of parental orders made each year has risen significantly in England and Wales, from 117 in 2011 to 435 in 2021. The number of orders made in Scotland has fluctuated over the past decade.[17]

1.52 Whilst the exact number of surrogate births is uncertain, they certainly represent a tiny fraction of the 700,000 live births in the UK each year. While surrogacy affects a small proportion of the UK population, its impact on the lives of the surrogates, intended parents and children whom it does affect is profound.

OUR PROJECT

1.53 The Law Commissions consult widely when drawing up programmes of law reform, to ensure that our work is as relevant and informed as possible. In the Law Commission of England and Wales' consultation for our 13th Programme of Law Reform in 2016 we suggested surrogacy as a possible law reform project. This suggestion had the highest number of responses (a total of 343) of all the projects in the 13th programme. Consultees responding to the consultation on the 10th Programme of the Scottish Law Commission also supported the view that this was an area in need of reform.

1.54 In light of this support, the Law Commission of England and Wales entered into discussions with the Department of Health and Social Care about taking on a project to reform the law on surrogacy, and the Minister with responsibility confirmed their support for us to do so. The Scottish Law Commission accepted a reference from the Minister to conduct the project jointly with the Law Commission of England and Wales. Work started on the project in May 2018.

1.55 To prepare the ground we met with those involved in surrogacy, and representatives from Government departments and non-Governmental agencies. This informed the publication of our Consultation Paper.[18] Our consultation period ran from 6 June to 11 October 2019, and included ten open public events and two events for invited audiences. We received 681 responses to the Consultation Paper. The project has also been covered widely in national media, including on radio and television.

OUR APPROACH

1.56 Our project takes as its starting point the UK Government's view that "the Government supports surrogacy as part of the range of assisted conception options".[19] The question whether the law should permit or prohibit surrogacy is not one the Law Commissions were asked to consider in our project. Indeed, it is a question of social

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17 Ministry of Justice, Family Court Statistics Quarterly - Family Court Tables January to March 2022 (June 2022) Table 4: Number of orders and children involved in Public and Private law (Children Act) applications made in the Family courts in England and Wales, by type of order, annually 2011 - 2021 and quarterly Q1 2021 - Q1 2022. Accessible at https://www.gov.uk/government/statistics/family-court-statistics-quarterly-january-to-march-2022 (last visited 23 March 2023); National Records of Scotland, Vital Events Reference Tables 2021 (Section 2, Table 2.02), accessible at: https://www.nrscotland.gov.uk/statistics-and-data/statistics/statistics-by-theme/vital-events/general-publications/vital-events-reference-tables/2021/list-of-data-tables (last visited 23 March 2023).

18 Building Families through Surrogacy: A New Law (2019) Law Commission Consultation Paper No 244; Scottish Law Commission Discussion Paper No 167 (hereafter, "Consultation Paper").)

19 Department of Health and Social Care, *The surrogacy pathway: surrogacy and the legal process for intended parents and surrogates in England and Wales* (February 2018) p 4.

policy that would probably be considered unsuitable for expert law reform bodies to consider. During the course of the project, we have heard a spectrum of views, from those who are fully supportive of surrogacy, to those who are campaigning for it to be prohibited.

1.57 Many of the responses that we received to our Consultation Paper were from consultees who were generally favourable to our provisional proposals for reform, or would like law reform to go further to support surrogacy than we had provisionally proposed. A significant number of these responses were from representative bodies, whose submissions represent the views of their members, and therefore can be taken to reflect a larger number of respondents. Over half of the Consultation Paper responses that we received were from consultees who advocated for surrogacy to be prohibited. The majority of these responses were based on a template produced by the campaigning organisation Nordic Model Now!.

1.58 The Law Commissions have never made decisions about our recommendations for reform just on the basis of the numbers of consultees who favour a particular approach. Instead, in each of our projects we take into account a careful analysis of the arguments made by consultees, along with other evidence. We also draw on academic research and evidence of practice in other countries. The arguments raised by those consultees in favour of surrogacy and by those opposed to surrogacy have been taken into account in this way.

ISSUES NOT COVERED IN THIS REPORT

1.59 This Core Report aims to provide a concise summary of the recommendations for reform that we make, and our reasoning. It does not cover a number of issues which are addressed in the Full Report, and which are not central to the scheme of our recommendations. They are:

(1) employment rights, which are covered in Chapter 15;

(2) succession, which is covered in Chapter 15;

(3) interactions with health services, which are covered in Chapter 15;and

(4) issues specific to international surrogacy, which are covered in Chapter 16.

Chapter 2: The new pathway

HOW THE NEW PATHWAY WILL WORK

2.1 We think that the most effective way of tackling the problems with the current law is to introduce a new surrogacy pathway. The new pathway will introduce essential safeguards before conception, so that state regulation comes before, not after, the birth of the child. If these safeguards are complied with, and eligibility conditions are met, then the intended parents and surrogate will be eligible for admission to the new pathway, which will enable the intended parents to become the child's legal parents at birth.

2.2 There was much support for this change among consultation responses, as well as much concern and objection. We think that recommending the new pathway is justified by the need to protect the best interests of the child. The safeguards we propose on the new pathway are intended to address the concerns and objections raised by some consultees.

2.3 Under the new pathway there will be no requirement for an application to be made to the court for a parental order. Instead, the new pathway will be overseen by non-profit-making surrogacy organisations who will be regulated by the Human Fertilisation and Embryology Authority ("HFEA"). We refer to these organisations as Regulated Surrogacy Organisations ("RSOs"). The new pathway represents a significant shift from the current regime, from a judicial to an administrative process. It is a shift which prioritises the child's best interests and respects the intentions of all the parties when they enter into the surrogacy agreement.

2.4 We hope that a system which recognises the intended parents as the child's legal parents from birth should ensure that surrogacy parties follow the new pathway. Where they do not (or are not eligible for admission to the new pathway), it may be possible for the intended parents to seek a parental order instead, as set out in Chapter 3. We have sought to make our recommendations on payments, eligibility and other areas consistent between the new pathway and parental orders.

2.5 We recommend that the new pathway be available to all domestic surrogacy agreements, where the surrogate and intended parents are based here and assisted reproduction procedures take place here, whether they involve traditional or gestational surrogacy. We heard no evidence that traditional agreements break down more frequently, and we view both types of agreement as based on the same shared intentions. RSOs alone will be able to authorise a surrogacy agreement to access the new pathway. International surrogacy arrangements will not be eligible for the new pathway.

2.6 To demonstrate our recommendations for the new pathway, in this chapter we use the example of a hypothetical couple of male intended parents, Rahul and Steve. They meet a woman, Emma, who is willing to act as a surrogate. The child that is born from this surrogacy agreement is Olivia. We acknowledge that this scenario does not reflect the full diversity of couples and individuals who enter surrogacy agreements, but it

allows us to set out how we see the new pathway working. We will continue their story later in the Report to illustrate how our recommendations will work.

A new pathway surrogacy story – Rahul, Steve, Emma, and Olivia

2.7 Steve and Rahul are married, and they live in Manchester. They decide that they want to have a child together, so they explore surrogacy as an option. They get in touch with an RSO.

2.8 Emma has acted as a surrogate once before and is interested in doing so again. The RSO introduces Emma to Steve and Rahul, and the three of them meet a number of times and build a good relationship with each other. They all decide that they would like to move forward with the surrogacy.

ELIGIBILITY CONDITIONS

2.9 We recommend that a surrogacy agreement must meet a number of eligibility conditions, whether it is on the new pathway or if it is the subject of a parental order application. These conditions are there to protect the surrogate, the intended parents and any child born from the agreement. They are an essential first step to surrogacy.

2.10 We have sought to make the eligibility conditions as similar as possible between the new pathway and the parental order process. We recommend that conditions (1) to (4) below are also requirements for a parental order to be made. There are some differences in how condition (5) works on the new pathway and for parental orders, which we address below.

2.11 The eligibility conditions for surrogacies to proceed on the new pathway are:

(1) the surrogate is over the minimum age required for surrogates, which is 21;

(2) the intended parents are over the minimum age, which is 18;

(3) at least one of the intended parents has a genetic link to the child;

(4) where the intended parents are in a couple, they are married, in a civil partnership, or living as partners in an enduring family relationship with each other; and

(5) the intended parents and surrogate are domiciled or habitually resident in the UK when they sign the Regulated Surrogacy Statement (the document which must be completed for an agreement to proceed on the new pathway) and at the birth of the child, and the assisted reproduction procedure is carried out in the UK.

2.12 When we made decisions about the eligibility conditions, we were guided by three principles.

(1) What would best serve the interests of any child born through the surrogacy?

(2) What would respect the autonomy of the surrogate in making decisions about her own body?

(3) What would provide a balance between clarity in the rules, and ensuring that the RSO has the ability to take the right decision in each case which reflects the individuals' circumstances?

Requirements of the eligibility conditions

2.13 The first eligibility condition that we recommend is that the surrogate is over 21 years old when entering into the surrogacy agreement. Currently, there is no minimum age for surrogates. We sought to balance the surrogate's autonomy, recognising that adults should not be constrained in taking decisions about their own bodies, with the need to protect young women from the risk of exploitation. The fact that a woman is over 21 does not automatically mean she can be a surrogate: the minimum age is not a substitute for the RSO assessing in each case, on the basis of all the information they receive, whether a woman is physically and emotionally ready to be a surrogate, which will happen on the new pathway.

2.14 Secondly, we recommend that intended parents must be a minimum of 18 years old when entering into the surrogacy agreement, reflecting the current age limit for a parental order to be granted. We felt there was no evidence that this existing age limit caused any problems. Further, on the new pathway, any issues around the maturity required to be parents would be addressed by the pre-conception welfare of the child assessment that the RSO must make as part of screening and safeguarding requirements.

2.15 Thirdly, we recommend keeping the rule that at least one of the intended parents in the surrogacy agreement must have a genetic link with the child, meaning that their sperm or egg must have been used in the child's conception. That means that "double donation", where both donor sperm and a donor egg (which might be the surrogate's own egg) are used, is not permitted.

2.16 Fourthly, we recommend keeping the rule that where there are two intended parents in a surrogacy agreement, they must be either married, in a civil partnership, or living as partners in an enduring family relationship. Existing law has been flexible to accommodate changes in relationships over time, such as separation,[20] so we did not see the need to reform this existing requirement.

2.17 Finally, we recommend that on the new pathway at least one of the intended parents, and the surrogate, meet a test of connection with the UK at the time when they sign the Regulated Surrogacy Statement, and at the time of the child's birth. We recommend that two tests be available: either domicile (which the law currently uses for parental orders) or, in the alternative, habitual residence.

2.18 The second of these tests is simpler and is widely used in family law, and its introduction was particularly supported by law firms and legal representative bodies.

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[20] *Re F (Children) (Thai Surrogacy: Enduring Family Relationship)* [2016] EWHC 1594 (Fam), [2016] 4 WLR 126; *Re N (A Child)* [2019] EWFC 21, [2019] 3 WLR 317; *Re A (A Child) (Surrogacy: s. 54 Criteria)* [2020] EWHC 1426 (Fam), [2020] 6 WLUK 312.

The assisted reproduction procedure by which the child is conceived must also take place in the UK. These conditions mean that the new pathway is not open to international surrogacies, because of the potential for exploitation in agreements which happen outside the reach of domestic law and Government bodies.

Effect of eligibility conditions

2.19 These five eligibility conditions are a strict requirement for the new pathway. If they are not met, the arrangement is not recognised by the law, and the intended parents cannot be the legal parents from birth.

2.20 For parental orders, the first four eligibility conditions also apply. However, the fifth condition is slightly different. Where a parental order application is made, domicile and habitual residence rules apply only to the intended parents, at the point when the application is made and the order is granted. There is also no requirement that the assisted reproduction procedure happens in the UK. This means parental orders cover intended parents who have used international surrogacy. Otherwise, the same eligibility conditions also apply to parental orders, namely the age limits, requirement for a genetic link, and requirement for an enduring family relationship where the applicants are a couple.

2.21 Where these conditions are not met, a court will not be able to grant a parental order, and the only route for the intended parents to be recognised as the legal parents would be through adoption. Where a parental order cannot be granted to a couple because they are not in an enduring family relationship, one of them may be eligible to apply for a parental order as a single intended parent.

2.22 We view the eligibility requirements as being important "bright lines" – that is, absolute requirements. Minimum age requirements are an important protection against exploitation. The requirement for an enduring family relationship reflects existing law on parent/child relationships, and any change to it lies outside the bounds of our review. Finally, permitting only domestic surrogacies on the new pathway reflects our aim of incentivising UK parents to enter into agreements domestically, given the risk of exploitation of women in overseas jurisdictions. Where any part of the surrogacy agreement takes place overseas, there is no way for Government or UK agencies to ensure that the safeguarding and screening required on the new pathway happens.

Changes to the proposals we consulted on

2.23 We had proposed that surrogates should be a minimum of 18 years old at the time of entering the agreement on the new pathway, and conception for a parental order. We felt, though, that the considerable support for a higher minimum age, and the need for protection from exploitation, justified recommending a higher minimum age of 21. A number of consultees strongly supported a higher age limit of 23 or 25, but a minimum age above 23 for any lawful activity in English and Welsh or Scots law would be exceptional, and we were not persuaded that the arguments merit this.

2.24 We had proposed that "double donation" be permitted, but only where there was a medical necessity for it and only in domestic surrogacy agreements, not international ones. However, it was clear from consultees' responses that defining "medical necessity" was problematic, so the test could not be relied upon. Because we did not consult on allowing double donation in cases where there was no medical need, we

did not consider that we could recommend a change to the current requirement for a genetic link.

Suggestions we did not adopt

2.25 In the Consultation Paper we asked questions about or noted a number of potential other eligibility conditions, and consultees suggested others, which we have not adopted.

2.26 We felt that imposing as conditions a maximum age limit for surrogates, a maximum number of surrogate pregnancies, or a requirement that the surrogate had previously given birth would not sufficiently respect the autonomy and choices of women who want to be surrogates. We also felt that where the issue in question was the potential impact on the surrogate's health, this is more appropriately considered on an individual basis rather than imposing a legal rule. The screening and safeguarding requirements of the new pathway, which include medical checks, will ensure that this assessment is made.

Rahul, Steve, Emma, and Olivia's story – eligibility

2.27 The RSO works with Rahul, Steve and Emma to check that they meet the eligibility conditions for surrogacy. Intended parents must be aged over 18, and Steve and Rahul are both in their early forties. The surrogate must be aged over 21, and Emma is in her thirties. It is a requirement for surrogacy that there is a genetic link between the intended parents and the child. Steve and Rahul plan to use Steve's sperm and for Emma to do self-insemination at home, meaning that there will be a genetic link with Steve.

2.28 There is a requirement that the intended parents, if they are a couple, are married, or in a civil partnership, or in an enduring family relationship with each other. Steve and Rahul are married, so they meet this requirement. The RSO informs the surrogacy team that each of these requirements would also need to be met if they ended up exiting the new pathway and applying for a parental order.

2.29 International surrogacy agreements are not allowed on the new pathway (although intended parents who use such agreements can still apply for parental orders). On the new pathway, one or both of Rahul and Steve has to be domiciled or habitually resident in the UK when they enter the new pathway, and when the child is born – they both are. The same conditions also apply to the surrogate, and Emma also meets them. Finally, they meet the condition that the assisted reproduction procedure will be carried out in the UK, as they plan for it to happen at Emma's home.

SCREENING AND SAFEGUARDING AND THE REGULATED SURROGACY STATEMENT

2.30 Central to our recommendations for the new pathway is the introduction of RSOs. The form they will take and other elements of their role are set out in Chapter 4 below. One

of the most important functions of RSOs will be to carry out the required screening and safeguarding checks in respect of the surrogate and the intended parents. These checks will cover:

(1) health;

(2) implications counselling

(3) legal advice;

(4) criminal records checks; and

(5) a pre-conception assessment of the welfare of the child.

2.31 These checks have two main purposes. First, to make sure that surrogacy is the right choice for the surrogate and intended parents. Secondly, to make sure that the agreement being on the new pathway will be in the interests of the surrogate-born child's lifelong welfare.

2.32 At the moment, there are no RSOs and the law does not require any screening or safeguarding before a child is conceived through a surrogacy agreement – scrutiny only happens when a parental order application reaches the court. Where the surrogacy team use a fertility clinic for assisted conception, there will be some screening as part of the conception treatment.

2.33 In their responses to our consultation, some consultees felt it was unfair that surrogacy teams would be required to undergo checks, when people who conceive naturally are not. However, the fact that intended parents must involve a third person to have a child justifies a different approach. Others were concerned about the cost implications of requiring checks. We recognise those concerns, but view the welfare of the child and the importance of ensuring that the intended parents and surrogate are ready to enter into a surrogacy agreement as sufficiently important to justify those costs.

2.34 The RSO has a decision to make once they have received all of the information gathered through the checks and conducted a pre-conception assessment of the welfare of any child to be born from the surrogacy agreement. By signing the Regulated Surrogacy Statement, the RSO would be confirming that the agreement should proceed on the new pathway. If it has concerns, for example about exploitation or the health or wellbeing of anyone in the surrogacy team (that is, the surrogate and intended parents), it would choose not to sign and the agreement would not proceed on the new pathway.

The screening and safeguarding checks

Health screening

2.35 We recommend that for surrogacy agreements on the new pathway, the RSO must be satisfied that the surrogate has been assessed by a qualified medical practitioner to ensure that any risks to her health that may arise or be increased as a result of the pregnancy have been identified.

2.36 We recommend that the surrogate and her partner, and any intended parents who are providing sperm for self-insemination at home, should be tested for sexually transmitted infections. Where the surrogacy team are using a licensed fertility clinic, they will continue to be subject to clinic procedures requiring screening and quarantining of gametes, but where home insemination is used, we do not recommend that there is any need for such screening.

Implications counselling

2.37 Implications counselling is a process by which the surrogate and intended parents meet with an independent, qualified counsellor to explore the nature of surrogacy and how they will deal with its emotional and practical consequences. It is different from therapeutic counselling and from psychological testing, which we do not recommend as a requirement of the new pathway.

2.38 We recommend that both the surrogate and the intended parents should have implications counselling with a counsellor registered with the British Infertility Counselling Association ("BICA"). We recommend that, after getting the consent of the parties at the beginning of the session, the counsellor should confirm to the RSO that the counselling has taken place and pass on any concerns about the agreement.

Legal advice

2.39 Under the SAA 1985, it is an offence to charge for negotiating, facilitating or advising on surrogacy arrangements, so much legal advice on surrogacy cannot currently be provided on a commercial basis. We recommend below in Chapter 4 that this is changed. Using the new pathway will have significant legal effects for the surrogate and intended parents, so we recommend that they should be required to take independent legal advice from a qualified lawyer.

Criminal records checks

2.40 We recommend that enhanced criminal record checks are carried out for the following people, and that if the check discloses a relevant offence, the agreement cannot proceed on the new pathway:

(1) the surrogate;

(2) her spouse, civil partner, or partner;

(3) the intended parents; and

(4) any adult over the age of 18 who lives with the intended parents.

2.41 The relevant offences would be the same as those which prohibit someone from adopting a child, and include offences against children, sexual offences, and fraud. An RSO should also be able to seek an enhanced criminal record check in respect of any other adult who could be involved in the child's life, and consider the results as part of their pre-conception assessment of the child's welfare.

2.42 At present criminal record checks are carried out by the Children and Family Court Advisory and Support Service ("Cafcass") or Cafcass Cymru, the organisations which represent children as part of family court proceedings, as part of parental order

applications in England and Wales, but are not routinely carried out for applications in Scotland. We view requiring checks as an important part of the process by which the child's health and welfare and that of the surrogate is safeguarded on the new pathway.

Pre-conception welfare of the child assessment

2.43 We recommend that the RSO should carry out a pre-conception welfare of the child assessment, in line with the assessments that are currently carried out by fertility clinics under the existing HFEA Code of Practice. As part of this assessment, the intended parents and the surrogate will complete a form setting out their history, and submit a report on their medical records to the RSO. The assessment will take into account this evidence along with the other pre-conception checks, and any other information that the RSO considers it needs to obtain from other individuals or agencies, with the intended parents' or surrogate's consent. The assessment will explore issues such as:

(1) whether the parties' past or current circumstances may lead to the child experiencing serious physical or psychological harm or neglect;

(2) whether their circumstances are likely to lead to an inability to care for the child; and

(3) the child's need for supportive parenting.

Rahul, Steve, Emma, and Olivia's story – screening and safeguarding

2.44 The RSO talks Steve, Rahul, and Emma through the screening and safeguarding checks that are legally required to enter the new pathway. This is designed to ensure that surrogacy is the right choice for the surrogate and intended parents, and that the welfare of the child is protected. Rahul and Steve must offer to pay for all of the screening and safeguarding costs, so that Emma is not left out of pocket.

2.45 They undergo medical checks. The surrogate, Emma, is assessed by her GP to identify any health issues that would weigh against her undertaking a pregnancy. This is to protect her health and that of any child born from the surrogacy. Both Emma and Steve (because he is providing his sperm) are tested for sexually transmitted infections.

2.46 Steve, Rahul and Emma undergo implications counselling with a BICA counsellor. This is a process by which they have counselling sessions to explore the nature of surrogacy and how they will deal with its emotional and practical consequences. Rahul and Steve have a couple of sessions together, and Emma has a session on her own, before all three have a session together. These sessions are a good opportunity for any doubts or concerns to be picked up before conception, and a report from the counsellor is shared with the RSO, with the consent of all of them.

2.47 They receive independent legal advice, with Rahul and Steve speaking to a different solicitor from Emma. The advice covers the legal effects of going down the new pathway in terms of legal parental status, as well as issues like payments, withdrawal of consent, and what happens if one of them dies. Finally, the RSO seeks enhanced criminal record checks for all three of them and also for Rahul's adult nephew who lives with him and Steve. If these checks had shown certain offences in their history, or other offences which they felt were concerning, the RSO would stop the surrogacy using the new pathway. In this case, there were no such offences.

2.48 The RSO asks Steve, Rahul and Emma to complete a welfare of the child assessment form, and asks for reports from medical practitioners that assess similar issues. Using this, and all of the information it has gathered from the other checks, the RSO assesses the impact that allowing the surrogacy to proceed on the new pathway would have on the welfare of any child born as a result. In this case, the RSO has no concerns about the child's welfare.

Regulated Surrogacy Statements

2.49 The ability of the intended parents to hold legal parental status from the birth of the child in the new pathway is based on the agreement of the surrogate and the intended parents, with the oversight of the RSO. It is important to have a clear and unambiguous record of this agreement, and evidence that all the screening and safeguarding requirements of the new pathway have been met. Accordingly, the

surrogate, intended parents, and RSO will need to complete and sign a specific document, called a “Regulated Surrogacy Statement”. This is not a contract and will not be enforceable.

2.50 We recommend that the Regulated Surrogacy Statement must contain information on the surrogate, intended parents, and any gamete donors for inclusion on the Surrogacy Register after the child’s birth. The Surrogacy Register is discussed in Chapter 6. The Regulated Surrogacy Statement must also include a statement that the effect of the agreement is that the intended parents will be the child’s legal parents at birth, and a statement that the child’s home will be with the intended parents, as a clear expression of the parties’ intentions on entering the agreement.

2.51 We had provisionally proposed that there would be no mandatory form for the agreement on the new pathway, but consultees reasoned that a standardised form would reduce costs and be more acceptable as an official proof, and we found this persuasive. We therefore do recommend a mandatory form for the Regulated Surrogacy Statement, although we leave its format to be set out by the UK Government in regulations.

Effect of screening and safeguarding checks

2.52 Complying with the screening and safeguarding requirements will be an essential prerequisite for admission to the new pathway.

2.53 In terms of enforcement, it will be up to the RSO to satisfy itself that these checks have happened. Where the RSO certifies that the screening and safeguarding requirements have been carried out and consequently admits a team to the new pathway, but it later transpires that the tests were not carried out (or not carried out appropriately for some reason), the team will remain on the new pathway. The RSO will be subject to regulatory sanctions, because ensuring that these checks have been carried out appropriately is a key part of what it agrees to do to be licenced as an RSO.

Changes to the proposals we consulted on

2.54 We had provisionally proposed that the surrogate’s spouse, civil partner, or partner, if she had one, should be required to attend implications counselling as part of the new pathway. We have decided that while it may benefit the surrogate’s partner to do so, we do not think it is appropriate to require it, because it would mean that someone who was not a member of the surrogacy team could impact the child’s legal parental status. If the requirement was mandatory and the surrogate’s partner did not choose to participate, the agreement would exit the new pathway to the detriment of the whole surrogacy team.

Suggestions we did not adopt

2.55 Consultees suggested that implications counselling should be offered to the surrogate’s and intended parents’ other children. We felt that this may be beneficial but should not be mandatory. Others suggested requiring psychological assessment, particularly for the surrogate, but we concluded that, while some surrogates may choose to undergo a psychological assessment, making it compulsory was not appropriate.

2.56 Some consultees advocated for an assessment of the child's welfare to be carried out after the child was born, not before. This is not a requirement for natural conception or for donor conception. Instead, we believe that concerns about the safety and wellbeing of the child after birth are properly addressed through the existing safeguarding protections offered by midwives, health visitors, or social workers, which are designed expressly for that purpose, and which apply to all children, regardless of how they are conceived. Concerns about the health of the surrogate are issues for health professionals. If the surrogate had concerns about the child's welfare, she could raise them with the relevant professionals, and would also have the option of withdrawing her consent so that the court could scrutinise them as part of a parental order application.

Rahul, Steve, Emma, and Olivia's story - the Regulated Surrogacy Statement

2.57 The RSO must now decide whether, taking all factors into account, in particular the welfare of any child who may be born as a result of the surrogacy, the surrogacy agreement between Steve, Rahul and Emma should proceed on the new pathway. Having seen all the evidence, the RSO is satisfied that it should do so.

2.58 As a result, all of the parties – Steve, Rahul, Emma, and the RSO – sign the Regulated Surrogacy Statement. This document shows that the surrogacy agreement is on the new pathway, demonstrates their shared intention that Steve and Rahul should be the legal parents at birth, and is a record which Steve and Rahul will use as evidence of their legal parental status once the child is born.

2.59 The Regulated Surrogacy Statement also contains required information on the child's gestational and genetic origins. It states whose egg and sperm were used in the child's conception, and the identity of the surrogate and intended parents. It also includes non-identifying information, which may include the height, eye colour, and ethnicity, of all the parties, and this information may be accessed earlier than identifying information by the surrogate-born person.

THE SURROGATE'S RIGHT TO WITHDRAW HER CONSENT

2.60 In our Consultation Paper, we proposed that on the new pathway the surrogate should have a "right to object" to the intended parents becoming the legal parents. This would enable her to change her mind and ensure that the law respects her continuing intentions and wishes, not only those at the point of agreeing to the surrogacy.

2.61 We now think that "right to object" is not the correct term to use. It sounds unduly negative, and it suggests that the surrogate's judgement in using her right could be called into question – that she may need to give a valid reason for objecting. Also, the surrogate may or may not be "objecting" to the intended parents – rather, she is stating that she does not want the surrogacy to continue to follow the new pathway and instead she would like there to be judicial oversight after the child has been born.

For these reasons, we have decided instead to use the term “withdraw her consent”. This also reflects the fact that the surrogacy agreement is based on her ongoing consent: if she withdraws that consent, then the surrogacy agreement exits the new pathway.

2.62 Only the surrogate has the right to withdraw her consent. After the treatment which leads to pregnancy on the new pathway, the intended parents cannot change their minds – just like parents who conceive outside surrogacy cannot simply give up their legal responsibilities.

Requirements for the right to withdraw consent

2.63 We recommend that the surrogate has the right to withdraw her consent to the agreement. Her right to withdraw consent begins at the point of treatment leading to pregnancy and continues until six weeks after the birth of the child. If she does not withdraw her consent within this period, the intended parents will remain the child’s legal parents, and the surrogate cannot become the child’s legal parent.

2.64 In order to withdraw her consent, the surrogate has to give notice to the intended parents and to the RSO which is involved in the agreement. We do not recommend that she has to use any specific language when doing so. She has to give notice in a recorded format. That could be a written format, such as an email, but her withdrawal does not have to be written; for example, a video or voice message would count.

Effect of withdrawing consent

2.65 The effect of the surrogate withdrawing her consent depends on the point at which she does so. The legal parents of the child will be fixed at the time the child is born, and any change of legal parents after the birth can only be done through a court order.

2.66 If the surrogate withdraws her consent before the child is born, the surrogacy agreement exits the new pathway. That means that the surrogate will be the child’s legal parent at the point of their birth, not the intended parents – just like in agreements which are not on the new pathway. The intended parents would then have six months to apply to the court for a parental order recognising them as the child’s legal parents, in the same way as if they were not on the new pathway. The court would make a decision as to what would secure the child’s lifelong welfare.

2.67 If the surrogate has not withdrawn her consent before the child’s birth, the intended parents will be the child’s legal parents at birth. The surrogate can withdraw her consent in the six-week period after birth. If she does so, the intended parents remain legal parents, but the surrogate can apply to the court for a parental order recognising her as the child’s legal parent. She has six months from the date of birth to make this application. Again, the court would make a decision as to what is in the interests of the child’s lifelong welfare.

Changes to the proposals we consulted on

2.68 In a number of respects our position has changed after considering consultees’ responses. We had proposed that the surrogate could withdraw her consent within the period for birth registration minus one week, which would have been five weeks in

England and Wales, and 14 days in Scotland (because the period of birth registration is six weeks and three weeks respectively). Consultees felt that these periods were too short, and were also concerned at having different periods north and south of the border. We now recommend that the period to withdraw consent should not be linked to birth registration and should be the same in both jurisdictions. Thus, the surrogate can withdraw consent within six weeks of the child's birth. In the Consultation Paper we had envisaged the right to withdraw starting at birth, but we have now extended it back to conception.

2.69 We had proposed that if the surrogate withdrew her consent, the agreement would exit the new pathway and the surrogate would be the legal parent in all circumstances. However, we reconsidered this position. We wanted the child's legal parents to be established at the point of birth, and only to be changed with the intervention of the court. This is the current legal position in all instances of parenthood: there is no situation where the legal parents of the child can change post-birth without the intervention of the court. In keeping with that, we recommend that if the surrogate withdraws consent after the child has been born on the new pathway, then the intended parents remain the legal parents, and the surrogate can seek a parental order in her favour.

2.70 We had provisionally proposed that the surrogate had to give notice that she is withdrawing her consent to the HFEA, but we now recommend that she notifies the RSO as well as the intended parents. We had proposed that she had to give notice in writing, but we now recommend that she can do so in any recorded format.

Suggestions we did not adopt

2.71 Some consultees wanted a requirement that the surrogate gives further, affirmative consent after the child is born, rather than giving her the right to withdraw her consent. We felt that such a requirement would not respect the shared intentions of the surrogate and the intended parents. A requirement for further consent after birth also suggests that the surrogate's consent before conception is not adequate, which does not respect her autonomy. Instead, we think her continuing consent can be inferred from her decision *not* to withdraw her consent, rather than requiring her to make a further declaration.

2.72 We also received suggestions that the surrogate should only be able to withdraw her consent in specific circumstances, such as where important things were concealed from her by the intended parents; in cases of traditional but not gestational surrogacy; or where the child's welfare might be at risk. We did not think this approach was right, given the importance of respecting the surrogate's autonomy.

2.73 We do not agree with distinguishing between traditional and gestational surrogacy, because in both cases the intentions of the parties are the same. Also, requiring the surrogate to meet criteria to withdraw her consent would not respect her wishes or autonomy. Ultimately, we think that if the surrogate withdraws her consent, any court hearings that follow should be focused on determining the best interests of the child and not, for example, seeking to determine whether the surrogate had a valid reason to withdraw.

2.74 Some consultees did not support the surrogate having a right to withdraw consent because it would be contrary to the agreement of the parties at the outset, and it would reduce certainty for the intended parents. We acknowledge this impact, but we consider that it is important to ensure the surrogate's continuing consent to the surrogacy. We also think that the existence of a right to withdraw consent is necessary to ensure compatibility of the new pathway with requirements contained in international law.

2.75 Conversely, some consultees did not support a right to withdraw consent because they thought the surrogate should always be the legal parent at birth, meaning it would not be needed. However, we recommend that the intended parents can become legal parents at birth on the new pathway because this best reflects the intentions of all the parties, and creates certainty for the child.

2.76 We also think that the screening and safeguarding requirements should mean that surrogates rarely withdraw their consent, because they will have made informed and considered decisions to enter the agreement.

Rahul, Steve, Emma, and Olivia's story - during the pregnancy

2.77 Once the Regulated Surrogacy Statement is signed, Emma begins self-insemination at home using Steve's sperm. After five months of trying, Emma becomes pregnant.

2.78 Emma knows that while she is pregnant, and for six weeks after the birth, she can exercise her right to withdraw her consent to the surrogacy being on the new pathway. That might happen because she wants to be the child's parent, or because she has concerns about the agreement and wants it to go before a court to decide who should be the legal parents.

2.79 If she withdraws her consent before the child's birth, she will be the legal parent at birth, but Steve and Rahul can seek a parental order after the child is born. If she withdraws her consent after Olivia has been born, Steve and Rahul will be the legal parents, but Emma can apply to the court for a parental order recognising that she is the legal parent.

2.80 In either case, the court will be looking to decide what outcome will serve Olivia's best interests throughout her life. In this case, Emma continues to consent to the surrogacy agreement, so the agreement stays on the new pathway.

PARENTAL RESPONSIBILITY/PARENTAL RESPONSIBILITIES AND PARENTAL RIGHTS

2.81 Parental responsibility, in England and Wales, or parental responsibilities and parental rights ("PRRs"), in Scotland, relate to the practical day-to-day care of a child, such as where the child lives and who they have contact with. They are separate from legal parental status, and it is possible to have one without the other. Parental

responsibility/PRRs can be held by multiple people at the same time, but apart from a few exceptions, generally each person with parental responsibility/PRRs can make decisions about the child independently. In England and Wales parental responsibility is governed by the Children Act 1989, and in Scotland PRRs are governed by the Children (Scotland) Act 1995. These Acts also set out how the court can make orders about parental responsibility/PRRs, or resolve disputes between different people with parental responsibility/PRRs.

2.82 Under the current law, the surrogate has parental responsibility/PRRs at the birth of the child, as the legal mother. Intended parents do not have parental responsibility/PRRs until a parental order is granted, or until they are given them by a court order made while the parental order application is pending. This prevents intended parents from being able to make decisions about the child, for example, about medical care, and this could be harmful to the child's welfare. It also requires the surrogate to be involved in decisions about a child when she does not view herself as the child's parent.

The intended parents' parental responsibility/PRRs

2.83 We recommend that in a case that proceeds on the new pathway as planned, intended parents will acquire parental responsibility/PRRs when the child is born. If the surrogate were to withdraw her agreement after the child is born, the intended parents would still have parental responsibility/PRRs if the child is living with them or being cared for by them.

2.84 We have made this recommendation because it is not in the surrogate-born child's best interests for the intended parents, who the child will live with in most cases, not to have legal responsibility to make decisions about their life. In the new pathway, the intended parents will be the legal parents from birth, and it would be contradictory for them not to have parental responsibility/PRRs. We also want the new pathway to reflect the intentions of all parties entering into the surrogacy agreement.

2.85 If the surrogate withdraws her consent before the child is born, the case would be outside the new pathway and our recommendations in relation to parental order cases would apply, which are set out in Chapter 3.

The surrogate's parental responsibility/PRRs

2.86 We recommend that the surrogate should have parental responsibility/PRRs on the new pathway, although she is not the legal mother. Her parental responsibility/PRRs would automatically come to an end six weeks after the birth of the child.

2.87 However, if she withdraws her consent in that six-week period, she will continue to have parental responsibility/PRRs until a decision is reached on a parental order application made by her, or until her right to apply for a parental order in her favour lapses six months after the birth of the child.

2.88 We recognise that it seems counter-intuitive to allocate these practical rights to the surrogate when, in most cases, she has no intention of using them. However, if she did not have parental responsibility/PRRs she would be a legal stranger to the child after the birth, and would be dependent on the intended parents or a court order for any contact with or care of the child, including while she and the child are still in

hospital immediately post-birth. In the circumstances when she wants to withdraw her consent or have some immediate post-birth contact with the child it is important that she is supported by the law in doing so. We were not persuaded by consultees' concerns that the surrogate having parental responsibility/PRRs as well as the intended parents would be unmanageable, as the law already recognises multiple parties having parental responsibility/PRRs in other situations, and has established mechanisms for resolving any disagreements between rights holders if they arise.

Rahul, Steve, Emma, and Olivia's story – following the birth

2.89 The pregnancy goes well and nine months later, Emma gives birth to Olivia. Steve and Rahul are there at the birth. There are some complications with Olivia's health, meaning that she has to go into the neonatal unit for the first week of her life. Steve and Rahul are recognised in law as Olivia's legal parents, and each of Steve, Rahul, and Emma have parental responsibility/PRRs for Olivia. That means that Steve and Rahul can take decisions about Olivia's medical care and work with the medical staff, without needing to get Emma's consent for each decision. In addition, Steve and Rahul are each individually able to make decisions about Olivia's medical care, all of which makes that week somewhat less difficult for them and ensures that Olivia's care is not hindered.

2.90 Emma has the legal right to make these decisions, and to visit Olivia in the neonatal unit, but she does not want to, as she views Steve and Rahul as Olivia's parents, not her. The medical staff do not need to involve her in any of these decisions, and she is therefore free to leave the hospital as soon as she is ready to return home. After six weeks, her right to withdraw consent, and her parental responsibility/PRRs in respect of Olivia, both come to an end. She no longer has any legal connection with Olivia.

BIRTH REGISTRATION

2.91 In developing our policy post-consultation, it became apparent that our likely recommendations to reform birth registration in surrogacy cases were not compatible with UK Government policy on birth registration. As we set out in more detail below, our position is that, in new pathway cases, the intended parents should be registered as the parents of the child on the birth certificate. However, the UK Government has successfully defended judicial review cases on the basis that a coherent birth registration system requires the person who gives birth to be registered as the mother.

2.92 As a result, we agreed with the UK Government that we would provide a means by which our final recommendations for reform could operate in a context in which the surrogate is registered as the mother of the child on the birth certificate. We have therefore developed two separate, and alternative, models of birth registration. We describe the two alternative models as our "preferred model" and the "alternative model". We recommend that the UK Government adopt our preferred model, but we also set out how the alternative model would work.

Preferred model of birth registration

2.93 In our preferred model of birth registration, intended parents who have used the new pathway will be able to register the birth of the child. They will show the registrar the Regulated Surrogacy Statement as evidence that the birth is the result of a surrogacy agreement, and they will be named as the child's parents on the birth certificate. If the surrogate had withdrawn her consent before the birth of the child, she would register the birth instead. For that reason, we recommend that the intended parents will be required to make a declaration to the registrar that the surrogate has not withdrawn her consent when they come to register the birth. A false statement will be a criminal offence.

2.94 The full birth certificate, or full extract from the register in Scotland, will be marked to show that the birth was the result of a surrogacy agreement, which we view as important in enabling the surrogate-born child to access information on their origins. This information will not, however, be recorded on the "short" birth certificate (in England and Wales) or the "abbreviated extract" (in Scotland), so that these documents can be used without disclosing the fact of the surrogacy. The intended parents will each be registered as "parent" rather than "father" or "mother". The surrogate's name will not be on the birth certificate, but it will be recorded on the Surrogacy Register so that the child can access this information in the future if they choose.

2.95 This model would address the desire of intended parents and surrogates, expressed through our consultation, for the intended parents to be named as parents on the original birth certificate.

Alternative model of birth registration

2.96 In our alternative model of birth registration, the surrogate, not the intended parents, would be registered as the child's mother on the original birth certificate. The intended parents or the surrogate would be able to inform the registrar of the birth. They would need to provide the Regulated Surrogacy Statement as evidence that the agreement is on the new pathway, and a declaration that the surrogate has not withdrawn her consent.

2.97 At the end of the six-week period during which the surrogate may withdraw her consent, a parental order certificate, or in Scotland, an extract from the Parental Order Register, will automatically be issued to the intended parents, showing them as the parents, without the need for any judicial action or positive step on their part. In England and Wales, the original birth certificate would be sealed at that point so that it is only accessible once the child reaches a certain age, as is currently the case when a parental order is granted.

2.98 While the surrogate would be registered as the child's mother on the original birth certificate, it is important to note that she would not be the child's legal parent (unless she had withdrawn her consent before the child's birth). There would therefore be a separation between birth registration and legal parental status.

2.99 This approach would address the UK Government's concerns about maintaining the coherence of the birth registration system, but we think it does not best meet the needs of surrogates, intended parents, or surrogate-born children, or fit coherently

with our policy for the new pathway. It would also still require a shift in birth registration practice by the General Register Office and National Records of Scotland.

2.100 Table 1 below sets out the features of the two approaches.

Table 1: Preferred and alternative models of birth registration

	Preferred model	Alternative model
Who is registered on the birth certificate/ extract from the parental order register?	The intended parents	The surrogate
Who are the legal parents at birth, if the surrogate has not withdrawn consent?	The intended parents	The intended parents
How are they registered?	As “parents”	As the “mother”
Who can act as an informant for the registration?	The surrogate, the intended parents, or others who can act as informants under current law	The surrogate, the intended parents, or others who can act as informants under current law
What evidence needs to be provided?	Regulated Surrogacy Statement, and (if the intended parents or third party are registering) a declaration by the intended parents that the surrogate had not withdrawn her consent before birth	Regulated Surrogacy Statement, and (if the intended parents or third party are registering) a declaration by the intended parents that the surrogate had not withdrawn her consent before birth
What is the outcome?	Intended parents are registered on the birth certificate, which is marked as being as a result of surrogacy	Six weeks after the birth, a parental order certificate/extract from the Parental Order Register showing the intended parents as parents is automatically issued

	Preferred model	Alternative model
Advantages	Respects the intentions of the surrogate and intended parents; best records the legal parents of the child; meets the child's need for an accurate birth certificate	Compatible with UK Government policy on the coherence of the birth register

Rahul, Steve, Emma, and Olivia's story – registering the birth

2.101 In this Report, we present two different options for reform when it comes to registering the birth. Under our preferred policy, Steve and Rahul will be able to register Olivia's birth themselves, with their names on her birth certificate as her parents.

2.102 Our alternative policy reflects the UK Government position in recent legal cases. Under that policy, Olivia's birth will be registered in Emma's name, but if Emma does not withdraw her consent by the end of the six-week period following birth, a parental order certificate will be automatically issued showing Rahul and Steve as Olivia's parents.

THE STATUS OF THE SURROGATE'S SPOUSE OR CIVIL PARTNER

2.103 We recommend a change from the current law, so that the surrogate's spouse or civil partner, if she has one, will no longer be the legal father or second parent of a child born as a result of a surrogacy agreement. This will apply to surrogacy agreements, whether on the new pathway or where a parental order is required. It will only apply where the surrogate and intended parents meet the eligibility conditions on age, to ensure that no legal effect is given to purported surrogacy agreements where any party is under the required age.

2.104 Under the current law, the surrogate's spouse or civil partner will be the child's legal parent, unless they do not consent to the agreement. Currently, the spouse or civil partner also has to give consent in parental order cases. In our view, it respects the surrogate's autonomy for her alone to make the decision as to whether to carry a child for the intended parents and for legal parental status to apply only to her. This change attracted strong support during our consultation, including a petition signed by 64 surrogates, as well as support from some of those who disagreed with surrogacy in principle.

REFERENCES TO THE FULL REPORT

- This chapter sets out how the new pathway will work, and some of the detail of a number of the key recommendations that we make in relation to it. Further detail

on these recommendations is available in the Full Report, in particular in relation to what happens when things do not go according to the intended parents' and surrogate's intentions when entering into the surrogacy agreement – that is, if the surrogate withdraws her consent, or if one or more of the parties dies.

- For a more detailed overview of the new pathway, see Chapter 2. For more detail on legal parental status in the new pathway, see Chapter 4, paragraphs 4.1 to 4.46.

- On the surrogate's right to withdraw her consent, see Chapter 4, paragraphs 4.48 to 4.77 for the detail of the right; paragraphs 4.78 to 4.101 for the period when the right can be exercised and the notification requirements; and paragraphs 4.107 to 4.128 for the effect of the withdrawal of consent.

- On the eligibility conditions for the new pathway, see Chapter 6. For more on the screening and safeguarding requirements see Chapter 8, and for further detail on the Regulated Surrogacy Statement see Chapter 9. For more on parental responsibility/PRRs on the new pathway, see Chapter 5, paragraphs 5.1 to 5.42.

- On birth registration, further information about what happens if the surrogate withdraws her consent, and on protections against providing incorrect information, are in Chapter 4, paragraphs 4.244 to 4.268.

Chapter 3: Parental orders

WHY PARENTAL ORDERS ARE STILL NEEDED

3.1 The new pathway will mean that in most domestic surrogacy agreements, intended parents will not be required to apply for a parental order to become the child's legal parents. However, the parental order process needs to be retained alongside the new pathway for four reasons.

(1) First, where the surrogate exercises the right to withdraw her consent before the child is born, a surrogacy agreement will be removed from the new pathway. In those circumstances, the intended parents will be required to apply for a parental order for the court to then decide who the legal parents should be.

(2) Secondly, where the surrogate withdraws her consent after the child is born on the new pathway, the intended parents will still be the child's legal parents. If the surrogate wants to be the legal parent of the child, she will need to apply for a parental order.

(3) Thirdly, the new pathway cannot be used in international surrogacy arrangements. If intended parents enter an international surrogacy arrangement, then they will continue to be required to apply for a parental order to be recognised as the child's legal parents by the law of England and Wales, or Scots law, on their return.

(4) Fourthly, some surrogacy teams may still choose to make agreements outside the new pathway. Closing off the parental order process to them would mean that a decision by the court about legal parental status in the best interests of the child, and in line with the intentions of all parties, would be unavailable.

3.2 This chapter focuses mainly on changes that we have recommended are made to the parental order process. Chapter 10 in the Full Report contains further detail of elements of the current law on parental orders that we recommend should stay as they are.

3.3 As in the previous chapter, we use the example of a hypothetical couple to demonstrate how our recommendations for reform will work. In this case, we are looking at parental orders, through Abena and Shaun, a couple in their late twenties. They have lived together as a couple in Edinburgh for six years.

Abena, Shaun, Helena and Jack's story – parental orders

3.4 Abena and Shaun previously decided they were ready to have children, but after a few years of trying Abena was told that she isn't medically able to carry a child, and that Shaun has a low sperm count. They decide to explore surrogacy.

3.5 Helena, Shaun's sister, offers to act as a surrogate. She has three children with her husband, and is in her thirties. Abena, Shaun and Helena have a number of conversations, and agree to move forward.

3.6 With the help of a licensed fertility clinic, they use donor sperm and Abena's egg to create an embryo, which is implanted into Helena leading to a successful pregnancy. Because the agreement is with family, Abena, Shaun and Helena felt that they did not want the involvement of a Regulated Surrogacy Organisation ("RSO"), so they are not on the new pathway. There were safeguarding checks with the clinic, including a welfare of the child assessment, but not as many as on the new pathway.

3.7 The pregnancy goes well, and Helena gives birth to a boy, who Abena and Shaun call Jack. At the birth, Helena is Jack's legal mother. Abena is Jack's second legal parent, because she and Helena gave notice to the fertility clinic that they consented to this. (Without our reforms, Helena's husband would have been Jack's legal father because he consented to the fertility treatment.)

CURRENT REQUIREMENTS FOR PARENTAL ORDERS

3.8 The main issue the court must consider when deciding whether to make a parental order is whether making one would secure the welfare of the child throughout their life. We do not recommend any change to the law on this point.

3.9 We recommend that a number of the eligibility conditions that we set out in Chapter 2 above, should also apply to parental orders:

(1) the new minimum age for the surrogate of 21;

(2) as at present, the intended parents must both be at least 18 years old;

(3) the requirement for a genetic link; and

(4) the requirement that if a couple applies they are either married, in a civil partnership, or in an enduring family relationship.

3.10 Two of the conditions which apply to the new pathway differ for parental orders. The habitual residence or domicile test will apply, but for parental orders it will apply at the points when the application is made, and when the parental order is granted, and only to the intended parents, so that international surrogacy arrangements can be accommodated. For the same reason, the requirement on the new pathway that the

assisted reproduction procedure takes place in the UK does not apply to parental orders.

3.11 We also recommend that the requirement that the child's home must be with the intended parents is kept.

3.12 If a surrogacy agreement does not meet the eligibility conditions for the new pathway, the intended parents would be able to apply for a parental order. However, if they do not meet the eligibility conditions for a parental order, their only option to be the child's legal parent would be adoption.

CHANGES WE RECOMMEND TO PARENTAL ORDERS

3.13 We recommend a number of changes to the requirements for a parental order to be made, which are set out below. As well as these, we make recommendations on the information that has to be provided for the Surrogacy Register, and on the payments that can be made to the surrogate. These are set out in the next two chapters.

The time limit for a parental order

3.14 At present the HFEA 2008 states that the intended parents "must" apply for a parental order within six months of the child's birth. In a number of cases, however, the courts have interpreted the law to permit parental orders to be made when a child is much older, because doing otherwise would have detrimental long-term consequences for surrogate-born children.[21]

3.15 We had provisionally proposed in our Consultation Paper that the time limit should be abolished, because of the cases in which the time limit has been dispensed with in the child's best interests. However, in light of consultation, we think that this would remove the encouragement for intended parents to apply promptly for a parental order, and it is important to have the matter of legal parental status ascertained as quickly as possible.

3.16 We therefore recommend that the time limit is kept at six months, but that the court should have the power to dispense with it when doing so is required to secure the child's lifelong welfare.

The power to dispense with the surrogate's consent

3.17 At present, a parental order can only be made if the surrogate has freely and unconditionally consented to the order being made. The only exceptions in the current law are if the surrogate cannot be found, or if she is incapable of giving agreement. She cannot give that consent until six weeks after giving birth.

3.18 We recommend that the court should be able to dispense with the requirement that the surrogate consents to a parental order being made, in circumstances where the welfare of the child requires it. This test is the same as the one that applies to adoption, and it has been interpreted by the court as meaning that "nothing less… will

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[21] *A and B (No 2 – Parental Order)* [2015] EWHC 2080 (Fam), [2015] Fam Law 1192 at [72]; *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] Fam 186.

suffice" to satisfy the child's needs throughout their life.[22] This change was supported by the majority of consultees who were not opposed to surrogacy in principle.

3.19 This recommendation will only apply to surrogacy agreements which are entered into after our draft Bill enters into force. A surrogate who had entered into an agreement before the law changed would have expected to have a veto on a parental order, and it would be wrong to remove it after the event.

3.20 We had provisionally proposed in our Consultation Paper that the court should only be able to dispense with the surrogate's consent when the child is living with the intended parents. We no longer include this requirement in our recommendations. This rule might encourage disputes about the child's living arrangements, which we do not want to do. In addition, for a parental order to be made, the child's home must be with the intended parents, so it would be that rule, rather than the surrogate's consent, which stops an order being made if the child was living with the surrogate.

[22] *S v L* [2013] SC (UKSC) 20, [2012] UKSC 30, [32] to[35] and [43]; *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535, [2008] 2 FLR 625.

Abena, Shaun, Helena and Jack's story - the parental order application

3.21 Seven weeks after Jack is born, Abena and Shaun submit a petition to the Sheriff Court for a parental order so that they can become his legal parents. Abena and Shaun have applied within six months of Jack's birth, so their application is within the time limit.

3.22 To make a successful application, they need to meet the eligibility conditions. The age, genetic link and enduring family relationship conditions are the same as for the new pathway, and Abena and Shaun meet these conditions, while Helena meets the eligibility condition regarding her age.

3.23 For a parental order to be made, the child's home must be with the intended parents. Jack is living with and being cared for by Shaun and Abena, so this condition is met. At the time when the application is made, and when it is granted, one or more of the intended parents has to be domiciled or habitually resident in the UK, and both Abena and Shaun meet this condition.

3.24 Helena was initially happy with Shaun and Abena taking Jack home. However, a few weeks after the birth, she began to worry about her decision. They meet to discuss things, and Helena has counselling sessions. After these sessions, and visiting Jack at his home, she consents to Shaun and Abena becoming Jack's legal parents.

3.25 Making a parental order requires the surrogate's consent, which can only be given at least six weeks after the birth of the child. Under our recommended reforms this consent can be dispensed with if the welfare of the child requires it, and if nothing else will suffice but that the court makes the order. Had Helena not given her free and unconditional consent, the court would have needed to make a judgement about what outcome would secure the welfare of Jack throughout his life.

3.26 On the parental order application form, Shaun and Abena provide the required identity information about each of them, about Helena, and about the sperm donor. Under our recommendations, this is a requirement for a parental order to be made.

The court's decision

3.27 The surrogacy agreement meets the requirements for a parental order. The court still has the discretion to make a parental order, or not, based on whether doing so would secure Jack's welfare throughout his life.

3.28 In this case, the judge believes that it would, and grants the parental order when the case is eventually heard six months after Jack's birth. Abena and Shaun are now Jack's legal parents, and an extract from the Parental Order Register will be issued by the National Records of Scotland which can be used in the same way as a birth certificate. The parental order also means that Helena is no longer Jack's legal parent.

Parental responsibility/parental responsibilities and parental rights for intended parents

3.29 At present, the surrogate has parental responsibility or parental responsibilities and parental rights ("PRRs") when the child is born. Intended parents do not have parental responsibility/PRRs until a parental order is granted, or until they are given parental responsibility/PRRs by an interim court order. This prevents intended parents from being able to make decisions about the child. (In Chapter 2, paragraph 2.81 we set out our recommendations on parental responsibility/PRRs on the new pathway.)

3.30 For the parental order process, we recommend that intended parents should acquire parental responsibility/PRRs automatically where the child is living with them or being cared for by them. This will mean they can take day-to-day care of the child with the appropriate legal rights.

3.31 We had provisionally proposed that the intended parents only have parental responsibility/PRRs where they intended to apply for a parental order, but we no longer recommend that this is a requirement, because it would be difficult to prove their intention.

Abena, Shaun, Helena and Jack's story – PRRs

3.32 Because of our reforms, when Jack goes home with Abena and Shaun they have PRRs for Jack, meaning that they can make decisions about his medical care and other issues. Helena also has PRRs, but chooses not to exercise them. When the parental order is made in favour of Abena and Shaun, Helena's PRRs for Jack come to an end.

Who can apply for a parental order

3.33 Where there is a single intended parent, they will apply for a parental order in their sole name and will need to have a genetic link with the child. Where there are two intended parents, they will make a joint application and one of the intended parents will need to have a genetic link. However, there are cases where a couple enter a surrogacy agreement where one of them has a genetic link, but then that intended parent decides not to apply for a parental order – for example, if there has been a divorce and they no longer wish to be the child's parent.

3.34 We do not think it would be in the child's best interests for the remaining intended parent, who wants to be their legal parent, to be barred from applying for a parental order because they lack the required genetic link. Neither do we think it would always be in the child's best interests to require the absent intended parent to be recognised as their legal parent.

3.35 For that reason, we recommend that the remaining intended parent should be able to apply for a parental order in such a case. While this puts them in a different position to other single intended parents, who must have a genetic link, we think the fact that the surrogacy agreement originally involved an intended parent with a genetic link to the child justifies the difference.

3.36 When a sole intended parent from a couple applies to the court for a parental order, they will have to state who originally entered the surrogacy agreement. In England and Wales, the court will then use a process called "joinder" to add the other intended parent to the case, unless they cannot be found. In Scotland that process does not exist, so rules of court will deal with this. The court will then be able to make an order in favour of both, one, or neither of the parents, depending on what is in the child's best interests.

PARENTAL ORDER PROCEDURE

3.37 In England and Wales, surrogacy cases are allocated to different levels of court depending on whether the parties agree to a parental order being made, and whether the case is about a domestic or international surrogacy agreement.

3.38 If the child was born abroad the case is allocated to a judge at the High Court. In the Consultation Paper we had asked whether this should continue to be the case. We do not recommend any change on this point. While some international surrogacy cases are more straightforward than others, consultees, including High Court judges, felt that the High Court was best placed to hear them given its members' specialist knowledge and experience.

3.39 Where the child was born in the UK and all parties agree that a parental order should be made, the case can be allocated to lay judges (also known as magistrates). We recommend that this should no longer happen. As a result of the new pathway, far fewer domestic surrogacy agreements will require a parental order to be made. Those that do are likely to involve more complex situations, or will not have involved an RSO. Therefore, we recommend that parental order cases should be heard by District judges, who will have greater expertise to deal with them.

3.40 We do not make any recommendations on parental order procedure in Scotland: intended parents will continue to be able to petition either the Court of Session or the Sheriff Court.

REFERENCES TO THE FULL REPORT

- For detail on our recommendations that a surrogate should be able to apply for a parental order in her favour if she withdraws her consent on the new pathway, and that she should be able to apply for an order that the intended parents are the child's legal parents, see Chapter 10, paragraphs 10.87 to 10.94.

- For our recommendations on when intended parents and the surrogate will have or relinquish parental responsibility/PRRs in interim periods around parental order applications, and after parental order decisions have been made, see Chapter 5, paragraphs 5.70 to 5.114. For our recommendation that the court consider awarding parental responsibility/PRRs at the first instance, see Chapter 5 paragraphs 5.57 to 5.69. See Chapter 5 for more detail about parental responsibility/PRRs generally.

- For our recommendation that a person who was not originally part of a surrogacy agreement should not be able to have a parental order made in their favour, see Chapter 10, paragraphs 10.78 to 10.79.

- For the detail of our recommendations on parental order procedure, see Chapter 11. In particular, see paragraphs 11.56 to 11.82 for recommendations that the parental order reporter's report is released by default.

Chapter 4: Regulated Surrogacy Organisations, the regulator, and criminal offences

4.1 Regulated Surrogacy Organisations ("RSOs") are at the heart of our recommendations for the new pathway. RSOs' main role in our reformed surrogacy law is to support all the parties to the surrogacy agreement, and act as the gatekeepers to the new pathway. They will assess whether a surrogacy agreement meets all of the eligibility conditions and the screening and safeguarding requirements for the new pathway, and they will decide whether to sign the Regulated Surrogacy Statement so that the agreement can proceed on the new pathway.

4.2 An RSO's decision to place an agreement on the new pathway has the significant consequence that, by operation of law under our draft Surrogacy Bill, the intended parents will be the legal parents from the child's birth. When they make these decisions, RSOs will be acting as an arm of the state, and will be fulfilling a state function. This is an administrative function, which replaces the current role of the courts in the parental order process. Where the RSO carries out its functions, there is the added advantage that the screening and safeguarding measures are carried out before conception.

4.3 In order to make sure that they act appropriately when fulfilling this important function, we recommend that RSOs be regulated by the Human Fertilisation and Embryology Authority ("HFEA"). RSOs will have to appoint a person responsible for ensuring that they meet their regulatory obligations. Only non-profit-making organisations can be RSOs, to make sure that their decisions are not influenced by commercial considerations.

4.4 We think that RSOs are likely to perform the functions of existing surrogacy organisations, including the provision of support networks and matching and facilitation services. As is the case for existing surrogacy organisations, they will have exemptions from some of the criminal offences in relation to surrogacy, set out in this chapter, which we recommend are introduced to replace the existing offences.

4.5 Some consultees raised concerns that introducing the role of RSOs would increase the costs of surrogacy, creating a barrier for some intended parents. We do not think any increase in costs will be so great as to be a barrier. At present, intended parents will usually meet the costs of a surrogacy organisation that they work with, as well as the legal costs of applying to the court for a parental order. On the new pathway, they will pay the costs of working with an RSO, and will save money by not paying to seek and obtain a parental order.

RECORD KEEPING

4.6 The main role that RSOs will have is to approve agreements on the new pathway, as set out above in Chapter 2, with all the requirements to ensure the eligibility, screening and safeguarding requirements are fulfilled. We also recommend that they should

keep records that relate to surrogacy agreements on the new pathway, and to transfer them to the HFEA.

4.7 We recommend that RSOs keep copies of the following information about a surrogacy agreement:

(1) the Regulated Surrogacy Statement which the RSO, the surrogate, and the intended parents all sign. This will include the required identity information for the Surrogacy Register, which is discussed in Chapter 6 of this Report;

(2) a record of any notification by the surrogate that she has withdrawn her consent;

(3) information about the birth of the child, such as their name and date of birth; and

(4) the statutory declaration that intended parents must make about payments they have made to the surrogate, which is covered in Chapter 6 of this Report.

4.8 We recommend that RSOs should have to send these records to the HFEA within 12 weeks of the birth of a child from the surrogacy arrangement, once all of this information is available. Once they have sent this information, it is up to RSOs to decide how long they want to keep their own records, though they will need to act in line with data protection law.

4.9 We have made these recommendations because we think the HFEA, rather than RSOs, will be the right place for this information to be held. RSOs may not have the longevity or resources to store records securely for a long period of time, or make sure that surrogate-born people have the right access to them. The HFEA will also be able to use the information in these records to identify any problems in the surrogacy agreements that RSOs oversee, and to take action as a regulator accordingly.

Rahul, Steve, Emma, and Olivia's story – 12 weeks after the birth

4.10 Twelve weeks after Olivia is born, Rahul and Steve each complete a statutory declaration confirming that they did not make any payments to Emma which were outside those agreed in the Regulated Surrogacy Statement, or agreed with the RSO after the Regulated Surrogacy Statement was signed. They pass this to the RSO.

4.11 Also at this time, the RSO transfers information that it holds on the surrogacy to the HFEA. The information that the RSO transfers includes the required identity information, which will be placed onto the Surrogacy Register so that Olivia can access it in the future.

4.12 It also includes the statutory declarations made by Steve and Rahul about payments.

THE FORM THAT REGULATED SURROGACY ORGANISATIONS MUST TAKE

4.13 We recommend that RSOs must be non-profit-making, and that they can otherwise be any type of organisation.

4.14 Currently, only non-profit-making bodies are allowed to initiate negotiations for a surrogacy arrangement, compile information in relation to making a surrogacy arrangement, or advertise the fact that they can do these things. Other organisations or people who do these things would commit a criminal offence. For that reason, surrogacy organisations which currently work in the UK are non-profit-making.

4.15 We are persuaded that RSOs should be required to be non-profit-making. We think that if RSOs could make a profit, they would have a financial incentive to approve surrogacy agreements on the new pathway, and could make decisions for the wrong reasons. That would be harmful for surrogate-born children, surrogates, and intended parents. Allowing profit-making RSOs would also move our system closer to commercial surrogacy, for which our consultation showed there was little support.

4.16 Requiring RSOs to be non-profit-making will not, on its own, ensure that they act ethically and efficiently. That is why we also recommend that they are regulated by the HFEA, as set out below.

4.17 We do not recommend that RSOs should have to be a particular type of organisation – for example, that they have to be registered charities – as long as they cannot distribute profits. However, a single individual cannot be an RSO.

THE HFEA: THE ROLE OF THE REGULATOR

4.18 The HFEA already exists; it regulates the areas of activity covered by the HFEA 1990, primarily fertility clinics and embryo research. We recommend that its remit be expanded to include regulation of RSOs. The HFEA will oversee RSOs to ensure that they comply with the requirements of the law, as well as providing statutory guidance through a new Code of Practice for surrogacy.

4.19 The HFEA will also maintain the new Surrogacy Register, which is discussed in detail in Chapter 6 of this Report.

4.20 In our Consultation Paper we had proposed that the fertility clinics which the HFEA currently licenses could act as gatekeepers to the new pathway, as well as RSOs. However, we now recommend that only non-profit-making RSOs should be able to fulfil this role, so that there is no commercial incentive to approve surrogacy agreements on the new pathway. Because fertility clinics are profit-making in nature, we do not recommend that they are able to take on this role. They might have a conflict of interest between approving a surrogacy team for the new pathway and their fertility treatment work. Clinics could still choose to establish a separate non-profit-making “arm”, which could seek a licence to become an RSO.

The licensing regime

4.21 In order for an RSO to be able to operate and approve agreements on the new pathway, it will have to obtain a licence from the HFEA. As a regulated organisation, RSOs will have to meet any ongoing licence conditions set by the HFEA.

4.22 Fertility clinics which are currently licensed by the HFEA have to appoint a "person responsible", who is ultimately responsible for making sure that the clinic complies with its regulatory duties. We recommend that RSOs also appoint a "person responsible", so that it is clear who is accountable for making sure the RSO acts in line with its obligations. This also means that our scheme mirrors the way that the HFEA currently regulates other organisations.

4.23 We recommend that the roles of the person responsible are:

(1) being the point of contact between the RSO and the HFEA;

(2) managing the RSO with sufficient care, competence and skill;

(3) making sure that the RSO complies with relevant law and regulation, including making sure that it uses the right policies and procedures;

(4) making sure that appropriate arrangements are in place to train staff;

(5) ensuring their own training and development so that they can fulfil their responsibilities; and

(6) providing data to the HFEA and any other bodies, as required by law.

4.24 We do not recommend that the person responsible has to have a specific set of skills, experience or qualifications. RSOs should be capable of appointing someone who can meet the responsibilities of the role.

4.25 The HFEA currently has powers which it can use if fertility clinics do not comply with their licence conditions, or with other things that the HFEA tells them to do (known as "directions"). The current powers are the ability to revoke or suspend a clinic's licence, or to add further conditions to the licence. It will be able to use the same powers to make sure that an RSO complies with its licence.

A surrogacy Code of Practice

4.26 The HFEA currently issues a Code of Practice, which applies to the activities it licenses. The Code sets out regulatory principles and guidance. While this Code addresses surrogacy, it only covers the role that fertility clinics currently play in some surrogacy agreements. In other surrogacy agreements, for example, those traditional surrogacies where fertility clinics play no role, the Code of Practice does not apply. We recommend that the HFEA issues a bespoke Code of Practice for surrogacy, which will also reflect the new role that the HFEA has to play in regulating RSOs.

4.27 The new Code will guide RSOs in their regulated role, to ensure that they function in a way that achieves the best outcomes for surrogate-born children, surrogates, and intended parents. Our draft Surrogacy Bill sets out that the Code, in particular, should support RSOs in ensuring that pre-conception checks are carried out in the right way, conducting assessments of the welfare of the child, and in ensuring that information-sharing between intended parents and surrogates is conducted appropriately.

Changes to the proposals we consulted on

4.28 We had proposed that RSOs should have to keep a record of surrogacy agreements on the new pathway, and had asked whether they should keep this for 100 years, or another period. A substantial number of consultees felt RSOs would not be the right organisations to keep records for a long period of time, which is why we now recommend that they send information to the HFEA instead.

Suggestions we did not adopt

4.29 A few consultees felt that RSOs should be required to be charities or incorporated (for example, as companies), but we felt this would be an unnecessary extra step if an organisation was otherwise able to meet the HFEA's regulatory requirements. Similarly, some consultees felt the "person responsible" should instead be a board so that too much responsibility was not placed on one person. However, we think that having a "person responsible" makes it easier to hold them accountable if the RSO does not act as it should.

CRIMINAL OFFENCES

4.30 Currently there are criminal offences attached to initiating or negotiating surrogacy arrangements for payment and to placing or publishing certain advertisements about surrogacy (as set out in Chapter 1 of this Report).

4.31 We recommend that some activities which relate to forming surrogacy agreements be prohibited, and that engaging in them be a criminal offence. Some people or organisations, such as RSOs, will be exempt from some of those criminal offences.

4.32 These offences are set out below. The time limit for prosecuting them will be two years, and will be subject to a fine of up to level five on the standard scale, which is an unlimited fine in England and Wales and £5,000 in Scotland. The matching and facilitation offence could also lead to imprisonment for three months.

4.33 Our recommendations seek to avoid tainting the birth of a surrogate-born child with criminality, or punishing surrogates and intended parents for the behaviour of profit-seeking groups who target vulnerable people. For that reason, surrogates and intended parents will not commit an offence if they participate in unlawful matching and facilitation, respond to an unlawful advertisement, or receive unlawful advice. Using an unlawful matching and facilitation service would also not rule a surrogacy out of the new pathway, or stop the intended parents obtaining a parental order, so long as all the other requirements of the new pathway or parental order were met.

Surrogacy matching services

4.34 Under our recommendations, only RSOs will be able to match individuals to form surrogacy agreements in exchange for payment. We define matching and facilitation as "services provided with a view to assisting an individual who wants to enter into a surrogacy agreement to find another individual or individuals with whom to enter into the agreement".

4.35 Non-profit-making RSOs will be the only bodies able to do this work in exchange for payment, both in relation to the new pathway and for agreements where the intended parents apply for a parental order. The reason we have made that recommendation is

because allowing anybody to charge on a profit-making basis for matching and facilitation would risk unethical conduct and bring our system closer to commercial surrogacy. That would risk matches being made where surrogacy was not right for the parties, which would be a risk to any child who was born as a result. Instead, only RSOs will be able to offer these services for a fee, in accordance with their licence conditions and under the oversight of their regulator, the HFEA.

4.36 Consultees noted the value of existing social media groups where intended parents and surrogates can meet online. These groups will not be prohibited, as long as they are non-profit-making and also do not charge for their services.

Charging for negotiation and advising on surrogacy agreements

4.37 As part of the new pathway, we recommend that intended parents and the surrogate receive independent legal advice on the consequences of their surrogacy agreement. At present, lawyers tell us they think that if they provided advice on a surrogacy agreement for payment, they could be committing a criminal offence. We recommend that regulated legal professionals should be able to charge for negotiating, drafting, and advising on surrogacy agreements. This will allow all parties to protect their interests and ensure the surrogacy meets their needs, reducing the risk of agreements breaking down further down the line. This recommendation extends to solicitors, barristers and legal executives in England and Wales, and solicitors and advocates in Scotland.

4.38 RSOs, other non-profit-making bodies, and individuals acting otherwise than in the course of business will also be able to charge to negotiate and advise on surrogacy agreements. However, anyone else who seeks to do this work for payment would commit a criminal offence.

Advertising of surrogacy agreements

4.39 We recommend that the current blanket ban on advertising in relation to surrogacy is modified. Under the reforms we recommend:

(1) RSOs will be able to advertise for intended parents and surrogates, and about the services they can legally provide;

(2) certain people such as lawyers, counsellors and health professionals, will be able to advertise services they can provide that are relevant to surrogacy; and

(3) no-one else, including intended parents and surrogates, will be able to advertise that they: are seeking to enter a surrogacy agreement; offer surrogacy matching services; will negotiate, draft and advise on surrogacy agreements for profit; or that they provide services which are advertised as being for surrogates or intended parents.

4.40 We think it is important that RSOs can advertise, so that people can find out about and access the new pathway if it is right for them. RSOs will be regulated by the HFEA which will be able to oversee their advertisements. Similarly, professionals like lawyers and counsellors will be able to advertise their services, and they will be overseen by their professional regulators.

Changes to the proposals we consulted on

4.41 The definition of surrogacy matching services that we consulted on was wider, including providing advice and support to surrogates and intended parents. Consultees felt this was too wide, and we agreed. We had proposed that only RSOs should be able to provide matching services on the new pathway. However, we now recommend that other groups can provide matching services as long as they do not charge for them, and we do not think it would be right to stop a surrogacy team using the new pathway if they meet in this way.

4.42 We had proposed that there would be no ban at all on charging for negotiating, drafting and advising on surrogacy agreements. Our recommendation is different to that proposal, because we now recommend that only certain professionals can provide these services on a for-profit basis.

4.43 Before we consulted, surrogacy organisations told us that the current ban on advertising in relation to surrogacy was a significant constraint that stopped them from providing useful information to people who may be thinking of entering into a surrogacy agreement. We had provisionally proposed removing the ban on advertising entirely, so that anything that can lawfully be done in relation to surrogacy could be advertised. We were persuaded by consultees who were concerned that advertising could be used to target young and vulnerable women. In light of these concerns, we recommend a modified version of the ban, rather than removing it.

Suggestions we did not adopt

4.44 In relation to the rules on advertising, it was suggested that we should seek to ban advertising in the UK by organisations operating commercially overseas. However, it would be difficult to enforce any such restrictions, or to say that they were doing anything unlawful by advertising what they can legally do in other countries.

REFERENCES TO THE FULL REPORT

- For further detail on the role of RSOs in approving cases on the new pathway, see Chapter 4 on legal parental status, Chapter 6 on eligibility for surrogacy, and Chapter 8 on screening and safeguarding, in the Full Report.
- For further detail on the form of RSOs and their interaction with the HFEA as their regulator, see Chapter 7 of the Full Report.
- For further detail on the criminal offences generally, see Chapter 14 of the Full Report.
- In particular, for a discussion of the role of the Advertising Standards Authority, the existing regulator of advertising more widely, and our suggestion that they consider new rules in relation to surrogacy, see Chapter 14 paragraphs 14.113 to 14.117 and 14.134 to 14.135.
- For detail of elements common to all of the criminal offences we recommend, see Chapter 14, paragraphs 14.138 to 14.139.

Chapter 5: Payments in relation to surrogacy

5.1 This chapter looks at the payments that it should be possible for the intended parents to make to the surrogate. We use the term "payments" instead of the term "expenses" to highlight that we are not simply trying to permit payments that have been recognised as "expenses reasonably incurred" by the courts under the formula used in the current law.

5.2 We also consider how such payments might be enforced, and how the surrogate should be able to recover payments that the intended parents have agreed to make to her as part of the surrogacy agreement.

5.3 The law on payments is currently unclear. The HFEA 2008 requires that for a parental order to be made, no payments should have been made unless they are for "expenses reasonably incurred", but it does not define what that means. The courts routinely authorise larger sums in order to make a parental order in the best interests of the child.

5.4 We think that our recommendations provide a degree of clarity that does not exist in the current law, and will mean that parties better understand the types of payments that are and are not permitted. We recommend that only certain categories of payments are permitted. On the new pathway, the intended parents and surrogate will be able to identify what categories of payment are relevant to their agreement, and set limits of how much is required in each category.

5.5 This represents a change from the current law, where no payments are currently unlawful, although they may have the effect of preventing the making of a parental order.

The new pathway: Rahul, Steve, Emma and Olivia's story

5.6 Rahul and Steve have a conversation with the Regulated Surrogacy Organisation ("RSO") so that they are clear on the categories of payment they can make to Emma. The surrogacy team agree before conception on the categories of payments that Rahul and Steve will make to Emma, and the amounts that they will pay her under each category. These agreed payments are written down in the financial schedule annexed to the Regulated Surrogacy Statement that they all sign.

OUR GUIDING PRINCIPLES ON PAYMENTS

5.7 In making our decisions, we have not focussed on whether payments by the intended parents to the surrogate make an agreement "commercial" or "altruistic" in nature. Payments are only one part of what might make an agreement commercial or altruistic, and this question does not tell us much about which types of payment

should be permitted. Instead, we have considered more directly the detail of which categories of payments should be permitted.

5.8 We have been guided by four factors.

(1) First, that surrogacy law should protect against the risks of women being exploited. In making our decisions on the types of payments to permit, we considered that some categories of payment, for example those for living expenses or for the service of carrying the child, could lead to a greater risk of exploitation as they might result in pressure from other people in the surrogate's life for her to become a surrogate. This is particularly the case given the high cost of living and rising levels of income inequality. These payments might also act as an incentive for someone to become a surrogate where she does not genuinely want to, in order to benefit financially.

(2) Secondly, that the surrogate should not be left financially worse off.

(3) Thirdly, that payments should be permitted for costs which are typically incurred during pregnancy. They should be costs which would have been incurred by the intended parents themselves if one of them was pregnant, or which arise as a result of the pregnancy being a surrogate pregnancy (which can involve different costs from other pregnancies).

(4) Finally, that the birth of the child should not be tainted with criminality, as a result of imposing criminal sanctions directly on intended parents or surrogates for making payments which are not permitted. The Brazier and Warnock reports both concluded this would be wrong.

5.9 Our recommendations on payments are only one part of our approach to minimising the risks of exploitation, and should be seen alongside our recommendations for the new pathway, the eligibility conditions, and our proposed criminal offences.

5.10 We also note that the relationship between intended parents and the surrogate will not necessarily begin with the surrogacy agreement and end with the birth of the child. They may know each other beforehand and will often have continuing contact after the birth. This means that there is a limit to how far the law can, or should, regulate their relationship. We do not seek to supervise their financial relationship indefinitely.

THE PAYMENTS SCHEME

5.11 We recommend that the types of payment that are permitted are the same on the new pathway and in relation to parental order applications, so that there is consistency across all domestic surrogacy agreements and so that the payment scheme does not influence people as to what route to take.

5.12 We recommend that payments made by the intended parents to the surrogate, or on her behalf, should be based on her actual costs, rather than an allowance that is paid on a regular basis for her to spend as she wishes. Permitting the intended parents to pay the surrogate an allowance would increase the chances of women being able to profit from being a surrogate, and as a result would increase the chances of exploitation. This recommendation reflects the views of many consultees that a

scheme which reflects actual costs provides greater protection against women being financially induced to become a surrogate.

5.13 However, in our scheme a "float" can be given to the surrogate to cover costs that are likely to come up, so that she is not left financially worse off until she is reimbursed by the intended parents. The "float" should be paid to the surrogate close to the time that costs are likely to arise, and any money left over should be repaid by her. Intended parents will also be able to make payments on the surrogate's behalf, for example, directly to a cleaning service or childcare provider where they are providing these forms of support to the surrogate.

5.14 Because there is a limit to how long the law can and should regulate the relationship between intended parents and the surrogate, on the new pathway we recommend that the rules on payments should apply between the time the surrogacy agreement is entered into, and the point six weeks after the birth of the child. This is in line with the period on the new pathway when the surrogate has the right to withdraw her consent, so that payments do not influence her decision on whether or not to do so. For parental orders, the period when the rules apply continues until the parental order is made. Payments which are promised during this period are included in our scheme, even if they are to be made afterwards, so that promising to pay later is not a way for intended parents to avoid the scheme's restrictions.

5.15 The detail of which payments will be permitted is not included in our draft Bill. Instead, it gives the UK Government the power to make regulations setting out that detail, which Parliament will have to consider before they become law. This way, the scheme can be changed more easily to ensure that it works properly in practice. The Human Fertilisation and Embryology Authority's ("HFEA") surrogacy Code of Practice will add further guidance for RSOs on payments.

5.16 This section sets out the payments that intended parents can make, those they are required to offer to make, and those they cannot make under our scheme.

Payments intended parents will be permitted to make

5.17 We recommend that intended parents should be able to pay the surrogate for the following costs. These may be recovered by the surrogate, as set out in later in this chapter, provided they are within the other rules within our scheme:

(1) costs related to the decision to enter into a surrogacy agreement, like travel or refreshments for meetings;

(2) medical, wellbeing and related costs, like vitamins, private medical care, or antenatal classes;

(3) the cost of pregnancy-related items, like maternity clothing or sanitary items;

(4) costs of additional dietary requirements related to the pregnancy;

(5) costs of specified forms of domestic support, like cleaning or additional childcare;

(6) the cost of travel and occasional overnight accommodation for a purpose linked to the surrogacy agreement, like IVF appointments;

(7) the costs of the surrogate maintaining contact with the intended parents and the child after the birth, like travel costs;

(8) the surrogate's lost earnings, which means the difference between her usual earnings and any maternity pay or sick pay for time off that she takes, and any commission or overtime that she does not get due to the pregnancy; and

(9) lost earnings for up to two weeks for a person who takes time off work to support the surrogate post-birth.

5.18 We think that these payments are in line with the four guiding principles set out above. An important point to note is that a surrogate pregnancy is different to one where a woman carries a child that she intends to raise, and where her family would ideally support her throughout the pregnancy, by taking on some of her family commitments. In a surrogate pregnancy, the surrogate may want to make sure that her family is not impacted by the pregnancy. That is why we recommend that things like additional domestic support, which she might otherwise get from her partner if she was pregnant with their child, are instead paid for by the intended parents.

5.19 While consultees were not united in their view on payments, one area where there was some consensus was that surrogates should not be worse off as a result of the pregnancy. Our intention with the permitted categories of payment is that the intended parents should shield the surrogate from the costs of being pregnant, just as the intended parents would incur these costs if one of them was pregnant.

Recuperative holiday and gifts

5.20 The payments in the categories above will be enforceable by the surrogate, as set out in the section below. In addition, we recommend two types of payments which are permitted, but which the surrogate will not be able to recover through the courts if the intended parents do not pay them. These will still need to be reported to the RSO on the new pathway, or to the court where a parental order is sought.

5.21 We recommend that the intended parents are permitted to pay for a recuperative holiday for the surrogate and her family. This cost is not intrinsically connected to the pregnancy, but as consultees explained, intended parents often pay for it, and it has a clear purpose in allowing the surrogate and her family time to reconnect after the birth. We think it is closer to a gift than the other permitted payments, so we recommend that it is not recoverable by the surrogate. However, where a surrogacy is on the new pathway it should be recorded in the financial annex to the Regulated Surrogacy Statement so that the RSO and HFEA can include it in their monitoring of payments.

5.22 We also recommend that intended parents should be permitted to give the surrogate gifts of a modest nature. It is possible that expensive gifts could be used as a means of paying a woman to become a surrogate, but, equally, modest gifts, usually of a sentimental nature, are currently seen as a valuable part of the ongoing relationship between intended parents and surrogates (and indeed, we were told in consultation that surrogates often give gifts to the intended parents or new baby too). Gifts from the

intended parents to the surrogate must be disclosed to the RSO where the new pathway is used, but do not need to be recorded in the financial annex.

Payments which intended parents must offer to make

5.23 We recommend that on the new pathway the intended parents should be required to offer to pay the cost of life and critical illness insurance for the surrogate, and the costs of the screening and safeguarding requirements. Having life and critical illness insurance cover in place is a requirement of the new pathway.

5.24 To proceed on the new pathway, intended parents and surrogates will need to have medical checks, implications counselling, and independent legal advice. We recommend that intended parents must offer to pay for these checks. That will mean the surrogate does not have to pay for them unless she wants to. These costs will have to be incurred because the screening and safeguarding checks are mandatory, so if the intended parents did not have to cover them, the surrogate could be left out of pocket. We also do not want the surrogate to feel any financial pressure, for example, to have fewer implications counselling sessions than she needs.

5.25 As we set out below, generally, we think that the intended parents should not be able to make payments which are compensation for the risk that all surrogates take when becoming pregnant. However, we recommend that the intended parents must offer to pay for life and critical illness insurance because these outcomes are the worst possible ones for the surrogate and her family. The cost of this insurance should be modest where the surrogate is healthy, which she should be in order to undertake a surrogate pregnancy. The medical screening required for admission to the new pathway will check that she is.

Payments which will be prohibited

5.26 Aside from the payments described above, no other payments will be permitted. In particular, that means that intended parents will not be able to pay the surrogate:

(1) for carrying the child;

(2) compensation for any pain and inconvenience;

(3) for the “handing over of the child”, to use the language of the 2008 Act; or

(4) for general costs of living that the surrogate would need to incur if she was not pregnant, such as rent or mortgage, utility bills, entertainment subscriptions, or groceries (other than additional costs to meet the dietary requirements of the surrogate during pregnancy).

5.27 We consider that permitting payments to the surrogate for the act of carrying the child (or “gestational services”) would be a significant change to the current law. It raises significant concerns around exploitation that are greater than the potential benefits of respecting the surrogate’s autonomy and choice. Consultees highlighted to us that compensation payments for pain and inconvenience, which are sometimes paid under the current law, are hard to separate out from paying the surrogate to carry the child, as women who become surrogates will have accepted that becoming pregnant involves a degree of pain and inconvenience.

5.28 We are not aware that intended parents usually meet the surrogate's general living expenses, although we have seen some such payments listed in surrogacy agreements. However, we think there is a risk that allowing living expenses payments could mean that women who are struggling financially look to surrogacy to cover everyday costs. Equally, it could mean that other family members seek to persuade or coerce women to become surrogates in order to cover their living expenses.

5.29 These categories of payment will be prohibited, and intended parents who make them may have enforcement action taken against them, depending on the approach to enforcement that the UK Government adopts (as we explain below). We think that setting out which payments are not permitted will also have the social function of normalising the types of payments that are accepted, or not, by the law.

5.30 However, we recommend that the court continues to have the ability to authorise payments which are not permitted so that it can make a parental order. If the court did not have this power, it would be blocked from making a decision that may be in the best interests of the child.

5.31 Payments which are not permitted also often arise in relation to international surrogacy arrangements. Intended parents may have paid the surrogate for the act of carrying the child in another country where such a payment is permitted by the law. Our domestic courts will still be able to authorise these payments, and we recommend that our scheme for enforcement should not apply to international surrogacy arrangements.

The amount of payments

5.32 We do not recommend a specific cap on the amount of money that the intended parents can pay the surrogate within each category, as long as the money is spent on the items or services for which it is intended. The needs of different surrogates will vary, for example based on their usual earnings, and the requirement that money is used for a particular payment means that the surrogate will not profit from the agreement.

5.33 On the new pathway, the surrogacy team will agree on the categories of payment the intended parents will make to the surrogate (within the permitted categories), and they will agree a maximum amount for each category. These will be written down in a financial annex to the Regulated Surrogacy Statement. Any changes to this plan will need to be agreed with the RSO in advance, which can refuse to approve them.

5.34 Where the intended parents do not use the new pathway and apply for a parental order, the court will check the level of payments. As set out above, we recommend that the court will continue to be able to authorise payments outside permitted categories and for excessive amounts, so that it can make a parental order. However, despite that authorisation intended parents may still face enforcement action if they make payments which are not permitted.

The new pathway: Rahul, Steve, Emma, and Olivia's story – payments to the surrogate

5.35 There is a schedule attached to the Regulated Surrogacy Statement setting out the expenses of the pregnancy which Rahul and Steve will meet. This covers Emma's lost earnings (to the extent that they are not covered by her employer) when she is recovering during maternity leave, her maternity clothing, and travel costs to meet up with Rahul and Steve, as well as the cost of some extra childcare for Emma's other children. It also covers life and critical illness cover for Emma, which Steve and Rahul are required to offer to pay for, along with the costs of the screening and safeguarding checks.

5.36 When Emma is pregnant, Steve and Rahul are able to support her by making the payments to cover her expenses which they had negotiated and agreed when they all signed the Regulated Surrogacy Statement. Her travel costs to meet up with them during the pregnancy are much higher than they had budgeted for, so they inform the RSO which approves the increase. Steve and Rahul know that they cannot back out of these agreed payments, because Emma could enforce them through the court if they did.

Parental orders: Abena, Shaun, Helena and Jack's story – payments to the surrogate

5.37 When discussing their surrogacy agreement, Shaun and Abena agreed with Helena that they would pay for all costs associated with the fertility treatment and would cover the difference between Helena's maternity pay and her normal pay.

5.38 When Shaun and Abena made their parental order application, the court was able to review the information that they have provided on their form and in evidence about the payments that they made to Helena. These covered the time when they agreed to the surrogacy, up to the point when the application was made. The payments were all within the categories permitted by law, and were not excessive, so they fall within the rules.

ENFORCEMENT

5.39 Limits on payments are only meaningful if there is a mechanism for enforcement.

5.40 We recommend that RSOs should make sure that intended parents only make permitted payments to surrogates. If they do not, the RSO may face regulatory sanctions. We set this out in more detail below.

5.41 We think that there are advantages and disadvantages to also having a system imposing civil penalties on intended parents who make payments which are not permitted. We explain what a civil penalty scheme would look like in more detail

below. However, we recommend that the UK Government consider whether or not to introduce such a system, rather than recommending that it introduces one, primarily because of the difficulty in identifying an enforcing body. Our draft Bill contains powers for the UK Government to make regulations in line with either decision.

5.42 In the Consultation Paper we had suggested, without making a provisional proposal, that limits on payments could be enforced by removing a surrogacy agreement from the new pathway where the rules were broken. We no longer think this is appropriate, because such an approach would link legal parental status to payments. It would also undermine certainty for the child, the surrogate and the intended parents.

5.43 To enable limitations on payments to be enforced (whether or not the UK Government chooses to use a system of civil penalties) we recommend that, on the new pathway, the intended parents should have to make a statutory declaration between six and 12 weeks after the birth of the child. They will be able to declare that they have not made payments which exceed those recorded on the financial annex of the Regulated Surrogacy Statement or that have not been authorised by the RSO. If the intended parents have in fact made payments which are not permitted, then they should declare that is the case, and enforcement action may follow.

5.44 Intended parents may commit an offence under the current law if they make a false statutory declaration. It will also be an offence for the intended parents to fail to make the statutory declaration. We think that this is sufficiently removed from criminalising the surrogacy itself to mean that it does not taint the birth of the child.

5.45 No statutory declaration is needed when a parental order application is made as the intended parents will have to tell the court what payments they have made as part of the application, and may commit an offence if they make a false statement to the court.

Regulatory enforcement

5.46 Regulatory enforcement relies on RSOs being required, under our recommendations, to provide advice and guidance about the rules on payments and promoting transparency about payments that are made. If it becomes apparent that repeated or serious breaches of payment limits are being made within a particular RSO, then the HFEA, as the surrogacy regulator, will be able to take action. The information will become known to the HFEA as the statutory declaration made by the intended parents will be passed to them.

5.47 The rationale for holding the RSO responsible is that the RSO works with the intended parents and surrogate and (on the new pathway) authorises the payments that the intended parents are permitted to make. In doing so, the RSO should be aiming to create a positive culture of surrogacy, in which intended parents understand which payments they can make and accept the need for these limitations.

5.48 The HFEA will be able to tell from the statutory declarations they receive whether each RSO is creating a positive culture with the surrogacy teams it works with and making clear that intended parents must only make payments allowed by the law. If it is clear that an RSO is not doing so, the HFEA may use its powers to sanction the RSO.

5.49 The requirement to provide advice and guidance on payments would also arise when an RSO is supporting a surrogacy where a parental order application is made. What is expected of the RSO in these circumstances may, however, vary depending on the circumstances.

Civil penalties

5.50 The second, and additional, option for enforcement that we outline is for a scheme of civil penalties. If the UK Government chooses to introduce civil penalties, we recommend the following approach.

5.51 This scheme would be run by an enforcing body. We have left it up to the UK Government to decide on who the enforcing body is. We think it should be a state body, because existing civil penalty schemes are run by state bodies. The HFEA, which we considered was a candidate to be the enforcing body, does not believe it should take on this role.

5.52 Civil penalties would be financial penalties imposed by the enforcing body on intended parents who make payments which are not permitted. These would apply on the new pathway and also to agreements where a parental order is applied for, but not to international cases given that such payments may have been legal in the country in which they were made, and it is beyond the scope of an enforcing body in the UK to determine that. The enforcing body would become aware of payments which are not permitted in two ways:

(1) by the RSO reporting to the enforcing body that a statutory declaration made by the intended parents disclosed that a payment which is not permitted had been made; or

(2) when the court sent it information that either a payment outside the permitted categories, or an excessive payment within the permitted categories, had been made.

5.53 The amount of the penalty should be linked to the amount that was paid, with the penalty as a multiple or fraction of the total amount. We have left the specifics of that amount to the UK Government to decide, given that we did not consult on this point. The enforcing body would give the intended parents a notice that it intends to impose a financial penalty, which the intended parents can appeal. The enforcing body must be able to prove[23] to the criminal standard of proof (beyond reasonable doubt) that there has been a payment which is not permitted, because there is no opportunity for the intended parents to "put right" the situation.

Advantages and disadvantages of civil penalties

5.54 We believe there are advantages to using civil penalties to enforce our payments scheme, as well as the regulatory sanctions we recommend. Civil penalties would give extra teeth to the enforcement regime, and provide an effective measure against payments that might financially incentivise a woman to become a surrogate. They

[23] To a court, if the intended parents sought to appeal the penalty.

would apply across all domestic surrogacies, whereas regulatory sanctions on RSOs would only affect the new pathway.

5.55 However, there are also potential disadvantages. Using civil penalties may deter intended parents from using surrogacy in the UK rather than abroad, in particular on the new pathway given the additional scrutiny. The system of civil penalties would also be more costly to set up and administer.

5.56 In our consultation, both consultees who support surrogacy and those who oppose it felt strongly that we need effective enforcement of the payments scheme. We do not think, in light of consultees' views, that we could recommend only a regulatory scheme. But we also see the difficulties and disadvantages of introducing a civil penalties regime. We recommend that the UK Government choose whether or not to adopt a civil penalties scheme for enforcement.

Recovery of payments by the surrogate

5.57 We recommend that the surrogate should have the right to recover payments through the courts in relation to the financial terms of a surrogacy agreement. Importantly, her right to make a claim is separate to any question about legal parental status.

5.58 At present, the surrogate does not have this right, so she has no recourse if the intended parents do not meet any agreed costs, other than to withhold her consent to the making of a parental order. That connects payments and legal parental status in a way that we think is inappropriate, and is also potentially harmful to the child. Our recommendation would break that link.

5.59 We think it is particularly important to break any link between payments and legal parental status, given our recommendation that the court should have the power to dispense with the surrogate's consent in parental order cases.

5.60 The payments that the surrogate would be able to recover on the new pathway are those which are included in the financial annex to the Regulated Surrogacy Statement. In relation to a parental order, they are the payments which have been reviewed and approved by the court.

5.61 We also recommend that intended parents are able to recover payments from the surrogate, in the specific circumstance where they made payments to the surrogate, but she did not need the money to spend on the agreed costs.

5.62 Aside from these two points, the rest of the surrogacy agreement remains unenforceable, as it is under the current law.

REFERENCES TO THE FULL REPORT

- The section on permitted payments in the Full Report goes into much more detail of the arguments for permitting each category of payment, and the costs we think may fall into each category. See Chapter 12, paragraphs 12.72 to 12.198.

- For further detail on payments which are exceptions to the usual rules on enforceability by the surrogate, see Chapter 12, paragraph 1.189.

Chapter 6: The Surrogacy Register

WHY THE SURROGACY REGISTER IS NEEDED

6.1 We think it important that children learn about both their genetic and gestational origins for the following reasons.

(1) First, it is in the interests of surrogate-born people to have access to this information. A surrogate-born person might want to better understand their genetic heritage, or might wish to learn more about the surrogate and her motivations. The information may also be important for health reasons.

(2) Secondly, research shows that having access to information about the circumstances of one's conception and gestation can contribute positively to the quality of relationships and psychological wellbeing within the family,[24] and that surrogate-born children value openness when it comes to information about surrogacy agreements.[25]

(3) Thirdly, research also shows that the gestational period impacts development,[26] and therefore, knowledge of one's gestational origins could be important for the process of identity-formation.

(4) Fourthly, it respects the rights of a surrogate-born child to "know… his or her parents" under Article 7 of the United Nations Convention on the Rights of the Child ("UNCRC")[27], and to "preserve his or her identity… including family relations" under Article 8.[28]

6.2 To ensure surrogate-born people have access to information about their genetic and gestational origins, we recommend reform in this area. People can find out about their gestational and genetic origins in a number of ways, such as from their birth certificate, court files from a parental order application, or the existing Human Fertilisation and Embryology Authority ("HFEA") Register of donor-conceived people.

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24 For a summary of these findings and list of empirical studies relating to donor-conceived and surrogate families, see S Golombok, *We Are Family* (Scribe 2022), pp 260 to264; 274 to280.

25 K Wade, K Horsey, and Z Mahmoud, "Children's Voices in Surrogacy Law: Phase One Preliminary Report" (2023).

26 E Heard and R A Martienssen, "Transgenerational Epigenetic Inheritance: Myths and Mechanisms" (2014) 157 *Cell* 95; I Cowell, "Epigenetics – it's not just genes that make us" *British Society for Cell Biology*. Accessible at https://bscb.org/learning-resources/softcell-e-learning/epigenetics-its-not-just-genes-that-make-us/ (last visited 23 March 2023).

27 The UNCRC does not define the term "parent", so "parent" could be interpreted as covering the surrogate or intended parents.

28 Child Identity Protection have recently published their signature report, which provides further detail on children's rights to identity: C. Baglietto, L. Bordier, M. Dambach, and C. Jeannin, *Preserving "family relations": an essential feature of the child's right to identity* (2022) Accessible at https://child-identity.org/images/files/CHIP-Preserving-Family-Relations-EN.pdf (last visited 23 March 2023).

6.3 But none of the current ways for people to access information about their origins was originally designed for use by surrogate-born people. As a result, there are gaps in the framework for surrogate-born people, and no clear route specifically for this group to access information.

6.4 To resolve this problem, we recommend creating a bespoke Surrogacy Register. The provision of information on the Surrogacy Register will mirror the scheme used for the existing HFEA Register[29] as far as possible.

INFORMATION THAT WILL BE HELD ON THE SURROGACY REGISTER

6.5 We recommend that the Surrogacy Register should be maintained by the HFEA, which has experience of operating the existing HFEA Register on donor conception.

6.6 The Surrogacy Register will record information for all surrogacy agreements, whether in or outside the new pathway, domestic or international, and gestational or traditional. This will mean that more surrogate-born people can access the information about their origins using it.

6.7 We recommend that the Surrogacy Register contains two types of information; identifying and non-identifying information. The detail of these categories will be specified in regulations.

6.8 Identifying information will include the names and details of the surrogate, the intended parents, and any gamete donors, making clear who contributed the gametes. Where a gamete donor's identity is recorded in the existing HFEA Register of donor conception, we do not propose to duplicate that information. Instead, the Surrogacy Register will note that information is recorded on the HFEA Register. If an intended parent was party to a surrogacy agreement but has not applied for a parental order, information on them can be included if the court is satisfied that they were party to the surrogacy agreement when it began.

6.9 Non-identifying information may include a physical description of the parties, their marital status, or ethnic group. This serves a distinct and useful purpose, for example if one of the parties has died since entering the agreement or contact with them has been lost. In such circumstances, non-identifying information will allow a surrogate-born person to have as much information as possible about their origins. We do not recommend that a short description of the parties, known as a "pen portrait", is required because this would be inconsistent with the requirements of the existing HFEA Register.

6.10 The Surrogacy Register will only include surrogacy agreements entered into after the law comes into force. For surrogacy agreements which existed before the law comes into force, we recommend that the HFEA should operate or commission a separate voluntary register, as is the case for older cases of donor conception.

[29] The HFEA Register was set up in 1991. A separate voluntary Donor Conceived Register helps to connect donor-conceived people who were conceived before 1 August 1991 with their donor and siblings.

HOW INFORMATION WILL GET ONTO THE SURROGACY REGISTER

6.11 We recommend that in order to use the new pathway, the required identifying and non-identifying identity information must be recorded on the Regulated Surrogacy Statement. The Regulated Surrogacy Statement will be provided to the HFEA by the Regulated Surrogacy Organisation ("RSO") 12 weeks after the child is born, along with the other documentation relating to the surrogacy agreement. The RSO will seek information from the intended parents and surrogate about the child after they are born, which will also be provided to the HFEA at the 12-week point, so that it can match the child up with the surrogacy agreement.

6.12 For surrogacy agreements where a parental order is sought, the person applying for the order (usually the intended parents) will need to provide the required information when they make their application to the court. The court will then send this information to the HFEA once the parental order application process is complete. Information will be included on the Surrogacy Register whether or not a parental order was granted, because it is important that there is a record available to the child so they can understand their origins.

6.13 The use of anonymous sperm or eggs is not permitted in licensed fertility clinics in the UK. However, it is permitted or even mandatory in some other countries. Where anonymously donated games are used in an international surrogacy arrangement, we recommend that the court is able to dispense with the requirement for this information to be provided, and instead the Surrogacy Register will state that anonymously donated gametes were used.

6.14 In order for information to be placed on the Surrogacy Register, we recommend that the RSO or the court must be satisfied on the balance of probabilities (that is, that it is more likely than not) that the information is correct. This is a change from the provisional proposal we consulted on, which would have required information to be medically verified, because we concluded that mandatory medical or DNA testing would infringe privacy rights.

ACCESSING THE SURROGACY REGISTER

Age of access

6.15 A surrogate-born person will be able to apply to the HFEA to access information relating to their origins that is held on the Surrogacy Register – the register will not be generally accessible to the public.

6.16 Our recommendations on the age at which a surrogate-born person is able to access the Surrogacy Register differ between Scotland, and England and Wales. This is because of the different laws on capacity in the two jurisdictions.

6.17 In England and Wales, we recommend that a surrogate-born person should be able to access non-identifying information at age 16 and identifying information at age 18. Accessing identifying information is a significant decision, so we do not think it is right that it should be accessible in all cases before the age of majority.

6.18 However, some children will be mature enough to access each type of information before these ages. In setting out our approach to this, we have been guided by the

existing law on consent to medical treatment, which we felt was the closest comparable scenario. We have chosen to reflect these differences, rather than mirror the rules on access which apply across the UK to the existing HFEA Register on donor conception.

6.19 At the ages of 16 and 17, a surrogate-born person in England and Wales will be able to access identifying information unless they lack mental capacity, which is defined in sections 2 and 3 of the Mental Capacity Act 2005. Before the age of 16, they can access both identifying and non-identifying information if they are *Gillick* competent, a well-established legal test set out in a House of Lords decision.[30]

6.20 In Scotland, people aged over 16 are deemed to have capacity under the Age of Legal Capacity (Scotland) Act 1991. For this reason, in Scotland we recommend that surrogate-born people will be able to access identifying and non-identifying information from the age of 16. If they meet a statutory test of capacity, they will be able to access both types of information under the age of 16.

6.21 At any age, we recommend that a surrogate-born person must have been given a suitable opportunity to receive counselling about the implications of accessing the information contained in the Surrogacy Register. They do not have to take up the offer, but we believe it is important that it is made given the potential psychological and emotional impact that accessing such information might have.

6.22 These rules on the age of access also apply to other reasons people can access the Surrogacy Register, which we recommend are:

(1) for surrogate-born people who were carried by the same surrogate to identify each other; and

(2) for a surrogate-born person and the surrogate's own child to identify each other.

6.23 In both cases, information will only be shared if the other party has consented to their information being made available to other surrogate-born people, or the surrogate's own child, as the case may be. In each case, the information can be made available whether or not the two people are genetically related. While some surrogate-born people or children of surrogates may not be interested in finding out about people they have a gestational connection to, others may, and we see no reason not to facilitate them making that choice.

6.24 A person may also access the Surrogacy Register to find out whether a person they plan to marry, enter into a civil partnership with, or have a sexual relationship with, was carried by the same surrogate. They can only do so from the age of 16 given this is the legal age of consent across the UK. They will need the other party's consent to their information being shared for this purpose.

[30] *Gillick v West Norfolk and Wisbech AHA* [1985] UKHL 7.

The new pathway: Rahul, Steve, Emma and Olivia's story – accessing information

6.25 Rahul, Steve and Emma all provide identifying and non-identifying information about them for inclusion on the Regulated Surrogacy Statement. Twelve weeks after Olivia's birth, this information is shared with the HFEA along with information about Olivia's birth registration.

6.26 The HFEA then holds this information, and will be able to release it to Olivia at an appropriate time. Because Olivia lives in England, she can access identifying information:

(1) under the age of 16 if she is *Gillick* competent;

(2) aged 16 or 17, unless she lacks capacity; or

(3) in any case, aged 18.

She can access non-identifying information when she is 16, or at an earlier age if she is *Gillick* competent.

Parental orders: Abena, Shaun, Helena and Jack's story – accessing information

6.27 Abena and Shaun provide identifying and non-identifying information about them and Helena to the court when they apply for a parental order. Once the parental order is granted and the case is resolved, this information is shared with the HFEA.

6.28 The HFEA then holds this information, and will be able to release it to Jack at an appropriate time. Because he lives in Scotland, he has a right to access this information at the age of 16, or earlier if he has legal capacity.

OTHER WAYS TO ACCESS INFORMATION

Parental order court files

6.29 At present, a surrogate-born person can access their full parental order process (the name given to a court file) in Scotland at the age of 16. In England and Wales it can be accessed at the age of 18, but elements of the file are withheld such as statements filed as part of the proceedings.

6.30 We recommend that surrogate-born people are able to access the full court file or process in both jurisdictions, with the same rules for age of access as we recommend for accessing the Surrogacy Register. Counselling is currently provided before access is granted to any information in the court file, which will help prepare a surrogate-born person if the file contains information that they find distressing.

Birth certificates

6.31 There are two types of birth certificate: a “full” birth certificate in England and Wales or “full extract” in Scotland, which shows information about the parents, and a “short” birth certificate in England and Wales or “abbreviated extract” in Scotland, which only contains information about the child. If a parental order is made, the resulting parental order certificate effectively replaces the child’s original birth certificate. This means that they can find out, from the full form of their birth certificate, or the full extract, that they were born as a result of a surrogacy agreement.

6.32 Under our preferred approach to birth registration on the new pathway, the intended parents would be registered from birth as the child’s parents. We recommend that their full birth certificate should note that they were born as a result of a surrogacy agreement. This will protect their right to know about their origins to the same extent as the current law.

6.33 For everyday use as identification, a surrogate-born person will continue to be able to use their short form certificate in England and Wales, or abbreviated extract in Scotland. This document will not refer to the surrogacy, and so it will be able to be used without disclosing the personal information that a person was born from a surrogacy agreement.

6.34 We also recommend that surrogate-born people should be able to access their original birth certificate, rather than the parental order certificate. The fact that they cannot do so in England and Wales at present, while they can in Scotland, appears to be as a result of an oversight or mistake. For that reason, we recommend that this change is applied retrospectively. Access should be provided at the same age as the Surrogacy Register and with an offer of counselling.

REFERENCES TO THE FULL REPORT

- For further detail on the gaps in access to information for surrogate-born people in the current law, see Chapter 13, paragraphs 13.9 to 13.36.
- For the approach to inaccurate information on the Surrogacy Register, see Chapter 13, paragraph 13.82 and 13.83, and for HFEA powers in relation to the register see paragraphs 13.84 to 13.86.
- For detail of our approach to the age of access to the Surrogacy Register, see Chapter 13, paragraphs 13.110 to 13.158.
- For the detail of our recommendations for accessing the Surrogacy Register for purposes other than identifying a surrogate-born individual’s origins, see Chapter 13, paragraphs 13.159 to 13.211.

Chapter 7: Compatibility with international law

7.1 There are a number of instruments and standards of international law which are relevant to surrogacy. During our consultation, some consultees who oppose surrogacy in principle raised arguments that our proposals were not compatible with this body of international law, particularly in relation to our proposals for the new pathway. We take this suggestion very seriously. In this chapter we set out a summary of those instruments and standards, and our analysis of their status. We then set out how in the Commissions' view the new pathway is compatible with international law.

RELEVANT INTERNATIONAL LAW

7.2 When it comes to international law, the UK has what is called a "dualist" legal system. International law is not part of our domestic law, unless it has been specifically made into part of domestic law by Parliament. If Parliament has not incorporated a piece of international law in this way, individuals cannot enforce any rights they have under it in a domestic court.

7.3 Some of the most relevant international law instruments, including those which consultees raised with us, are set out below along with our analysis of their status. Not all of these are currently incorporated into domestic law.

The UNCRC and the Optional Protocol

7.4 The United Nations Convention on the Rights of the Child ("UNCRC") is an international convention which 196 states around the world have signed up to. The Optional Protocol on the sale of children, child prostitution and child pornography ("the Optional Protocol") is part of that Convention which states can choose whether or not to sign up to. Both have been ratified by the UK, but neither are incorporated into domestic law.

7.5 The European Court of Human Rights has said that the content of another international convention such as the UNCRC should inform interpretation of the rights guaranteed by the European Convention on Human Rights[31] (which was made part of domestic law by the Human Rights Act 1998). Welsh legislation also places a duty on the Welsh Ministers to pay "due regard" to the UNCRC and two of its optional protocols when exercising any of their functions.[32] In Scotland, the Scottish Parliament has attempted to incorporate the UNCRC into Scots law, which would make UNCRC rights directly enforceable in courts and place an obligation on public authorities to act compatibly with the UNCRC. The UNCRC (Incorporation) (Scotland) Bill was passed in 2021. Subsequently however, the Supreme Court ruled that parts of

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31 *Neulinger v Switzerland* (2010) 54 EHRR 1087 (App No 41615/07) at [131] and [132].

32 Rights of Children and Young Persons (Wales) Measure 2011, s 1. Ministers are to have due regard to Articles 1 to 7 of the optional protocol on the involvement of children in armed conflict, except Article 6(2), and Articles 1 to 10 of the optional protocol on the sale of children, child prostitution and child pornography.

the Bill were not within the legislative competence of the Scottish Parliament,[33] and the Bill has not yet been brought into force.

7.6 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. The question of whether commercial surrogacy constitutes the sale of children was specifically addressed by the Special Rapporteur, as explained below.

The UN Special Rapporteur's reports and the Verona Principles

7.7 The UN Special Rapporteur reports to the UN Human Rights Council and their role is to analyse the causes of the sale and sexual exploitation of children and promote measures to prevent it. The Special Rapporteur published two reports on surrogacy; the first in 2018 and the second in 2019.[34]

7.8 In 2021, International Social Services, a network of national entities and a General Secretariat that assist children and families facing complex social problems as a result of migration, published a set of principles designed to provide guidance on the protection of the rights of the child in the context of surrogacy, called the "Verona Principles".[35]

7.9 The UN Special Rapporteur's reports and the Verona Principles are important. However, in law they provide guidance on the UNCRC and the Optional Protocol, rather than being a definitive or binding interpretation. This conclusion is supported by comments from judges in the Court of Appeal and in comments made in the prefaces to the Verona Principles.

7.10 In *McConnell v Registrar General*, the Court of Appeal discussed the legal significance of General Comments issued by the UN Committee on the Rights of the Child ("the UN Committee"):

> …the views of the UN Committee on the Rights of the Child are "authoritative guidance" on the [UNCRC] … . a General Comment is no more than guidance, which is not binding even on the international plane, so that it may "influence" but never "drive" a conclusion that the [UNCRC] has been breached.[36]

7.11 General Comments have a similar function to the Special Rapporteur's reports and the Verona Principles, in that they set out how rights in the UNCRC might apply in practice. General Comments have equal or greater authority than the Special

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33 *Attorney General's Reference, United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] UKSC 42, [2021] 1 WLR 5106

34 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*, 15 January 2018, A/HRC/37/60; and 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*, 15 July 2019, A/74/162.

35 International Social Service, *Principles for the protection of the rights of the child born through surrogacy (Verona Principles)* (2021).

36 *McConnell v Registrar General* [2020] EWCA Civ 559, [2021] Fam 77 at [85].

Rapporteur's reports and the Verona Principles, because they are drafted by the UN Committee which was set up by the UNCRC to monitor how states implement the convention.

7.12 In our analysis, this means that the Verona Principles and Special Rapporteur's reports are guidance which should be taken into account in our recommendations for reform of surrogacy, but are not binding in law.

7.13 This conclusion is supported by the UN Committee's comments in the introduction to the Verona Principles. The UN Committee states that the Verona Principles may "serve as an important tool that will help identify appropriate legislative responses to the new challenge related to the protection of children's rights".[37]

7.14 It is clear that the Verona Principles are intended to help states when drafting their own national frameworks for surrogacy rather than acting as binding law, or providing the final say on the matter.

Other instruments

7.15 The Hague Conference on Private International Law (the "Hague Conference") is an intergovernmental organisation whose purpose is to unify the rules of private international law. The Conference has sought to bring states together to find a unified position on surrogacy law, but while that work is valuable, it has been slow and difficult. We do not think that domestic reform here should be delayed because of it.

7.16 Some consultees suggested that our proposed new pathway was incompatible with the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.[38] However, this convention is not applicable to surrogacy agreements.

7.17 The Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") requires states to eliminate discrimination against women in public life and in private life, including within the family. It was ratified by the UK in 1986 but has not been incorporated into domestic law.

COMPATIBILITY OF THE NEW PATHWAY WITH INTERNATIONAL LAW

7.18 Having set out the relevant international law and its status, we then show how, in the view of the Law Commissions, the new pathway is compatible with them.

The UNCRC

7.19 Because the UNCRC is an international charter of rights, how those rights are implemented in detail is left to the states that have signed up to it. By looking at the relevant Articles of the UNCRC, we can see how the new pathway is compatible.

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37 International Social Service, *Verona Principles* (February 2021), Statement of Support by UN Committee on the Rights of the Child, p 3.

38 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.

(1) Article 2 sets out the right of each child to enjoy their UNCRC rights without discrimination on the basis of the child's birth or other status. Our recommendations are compatible because by making it clear who a surrogate-born child's legal parents are from birth, rather than requiring a parental order to change the legal parents several months after birth, the new pathway makes sure they are not discriminated against compared to other children.

(2) Article 3(1) sets out that the best interests of the child are to be a primary consideration in all actions relating to them. Our recommendations are compatible because the pre-conception screening and safeguarding ensures that the best interests of a child born of a surrogacy arrangement have been considered at the earliest possible stage. If the surrogate withdrew her consent, the child's best interests would be the main consideration of the court in a hearing on a parental order, or in relation to parental responsibility/parental responsibilities and parental rights ("PRRs"). The new pathway provides greater certainty and clarity and reflects the intentions of the surrogate and intended parents, all of which we consider to be in the child's best interests.

(3) Article 7 sets out the right to know and be cared for by one's parents. "Parent" is not defined in the Article, and could be taken to mean either the intended parents or the surrogate. Our recommendations for a Surrogacy Register ensure a child can identify both their intended parents and the surrogate. If the surrogate chooses to withdraw her consent, the court will make a decision about who should be the child's legal parents, and who the child should live with and have contact with, based on the child's best interests.

(4) Article 35 says that states shall take measures to prevent the abduction, sale or traffic in children in any form. Some consultees told us that surrogacy agreements posed a risk of the sale of children and exploitation of surrogates. We think our recommendations are compatible with Article 35 because they provide safeguards against these risks. The new pathway does not extend to international surrogacy, and contains rigorous screening and safeguarding requirements, together with a right to withdraw consent to protect the surrogate from being compelled to go along with the agreement, and which would protect the child in the unlikely event of an agreement that involved trafficking.

The Optional Protocol and the Special Rapporteur's reports

7.20 Article 1 of the Optional Protocol prohibits the sale of children. Article 2(a) defines the sale of children as "any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration."

7.21 In her 2018 report on the sale of children, the Special Rapporteur is particularly concerned with commercial surrogacy arrangements in which the surrogate is contractually obliged to hand over the child to the intended parents. The Special Rapporteur, however, recommends regulating altruistic surrogacy so that payment for expenses does not actually disguise payments for the transfer of a child.

7.22 In her reports, the Special Rapporteur said that the surrogate should be the child's legal parent at birth, and that the intended parents should have to apply to the court

after birth to decide whether it is in the child's best interests for them to be the child's parents.

7.23 The new pathway is different to the Special Rapporteur's conclusions, because we recommend that the intended parents could and should be the child's legal parents from birth. In response to these conclusions, we note the following.

(1) First, enabling the intended parents to be the child's legal parents at birth does not amount to the sale of children in a regulated, altruistic framework because no child is being transferred for payment. Our recommendations on payment do not permit women to profit from being a surrogate or be paid for any services. Also, surrogates will be required to attend implications counselling prior to entering the new pathway, and if the counsellor was concerned by the woman's motivations, or the intended parents' intentions, or formed the impression that the surrogate was under pressure or at risk of exploitation, this would be reported to the Regulated Surrogacy Organisation ("RSO") and the surrogate would not be able to enter the new pathway.

(2) Secondly, the Verona Principles (discussed below) suggest a different approach to legal parental status which is more in line with our recommendations, and we note that the Verona Principles have been explicitly endorsed by the Special Rapporteur.

The Verona Principles

7.24 The Verona Principles envisage the intended parents having legal parental status from birth, without the need for an assessment of the child's best interests after they are born, if:

(1) the surrogate mother confirms consent post-birth;

(2) there have been pre-conception safeguards;

(3) there is no conflict between the surrogate and the intended parents on legal parental status and parental responsibility/PRRs; and

(4) there are no unforeseen developments, for example, relating to any party's ability to care for the child, or relating to child sale or trafficking.

7.25 The Verona Principles recommend that if the surrogate is not the legal parent at birth, she should be able to confirm or revoke her consent to the arrangement after an appropriate period, with access to a qualified, neutral third party, and with no financial consequences from revoking her consent.

7.26 These principles are similar to our recommendation for a six-week period after birth in which the surrogate can withdraw her consent, where her consent is continuing unless and until she withdraws it, and our recommendation that the surrogate's ability to enforce payments is not affected by her withdrawing her consent. The presence of an RSO on the new pathway will in practice mean that she has access to neutral support.

7.27 The Verona Principles say that if the surrogate revokes her consent, then a court should conduct a determination of the child's best interests. This is the same as our

recommendation that if the surrogate withdraws her consent, a decision about legal parental status would be taken by the court following a parental order application.

The Convention on the Elimination of All Forms of Discrimination against Women

7.28 Some consultees argued that deriving income from surrogacy was a violation of the spirit of CEDAW, which requires states to take measures to suppress traffic in women and exploitation of prostitution of women. We refute the comparison of surrogacy with prostitution. Our recommendations do not permit commercial surrogacy, and they include safeguards against the risk of trafficking. For these reasons we consider that they are consistent with CEDAW.

CONCLUSION

7.29 In light of this analysis, it is the view of the Law Commissions that the new pathway which we recommend is compatible with international law. Any distinction between the Verona Principles and the effect that we recommend the surrogate's right to withdraw consent post-birth should have, is not such as to call into question that compatibility.

7.30 We note that there are differences between the Special Rapporteur's reports and the Verona Principles, which demonstrates that different but equally legitimate approaches can be taken by states when interpreting the UNCRC and the Optional Protocol. Our recommendations accord with the legitimate interpretation of those instruments.

REFERENCES TO THE FULL REPORT

- For further detail on the compatibility of our recommendations with international law, see Chapter 3.

Chapter 8: Conclusion

8.1 This Core Report is accompanied by a more detailed Full Report and by a draft Surrogacy Bill, which, if enacted by Parliament, would reform the law in line with our recommendations.

8.2 The decision as to whether to take up our recommendations and that Bill is, as with all Law Commission projects, one for the UK Government to make. Under the terms of the Law Commission of England and Wales' protocol agreed with the UK Government, Ministers will issue an interim response to our report within six months of publication, and a full response within a year which sets out which recommendations the UK Government accepts, rejects or intends to implement in a modified form, and when.

8.3 We hope that the UK Government will endorse these essential reforms, to ensure that surrogacy properly meets the needs of surrogate-born children, surrogates, and intended parents.