

SURROGACY BILL

EXPLANATORY NOTES

OVERVIEW OF THE DRAFT BILL

- 1.1 The draft Surrogacy Bill (“the Bill”) gives effect to the recommendations of the Law Commission and the Scottish Law Commission in their joint report “Building families through surrogacy: a new law Volume II: Full Report” (Law Com No 411, Scot Law Com No 262) (the “Report”).
- 1.2 If enacted, the Bill would do the following.
- (1) Introduce a new pathway for surrogacy, allowing a child born under a regulated surrogacy agreement to become the legal child of the intended parent or parents with effect from the child’s birth.
 - (2) Replace the existing provisions in sections 54 and 54A of the Human Fertilisation and Embryology Act 2008 (parental orders).
 - (3) Make provision for the conferral of parental responsibility (in England and Wales) and parental rights and parental responsibilities (in Scotland) (“PR/PRRs”) in relation to a child carried by a woman who has entered into a surrogacy agreement.
 - (4) Introduce a legal prohibition on payments in relation to surrogacy, other than those specifically permitted by the Bill, together with a scheme for the enforcement of permitted payments.
 - (5) Introduce a new scheme for the licensing of registered surrogacy organisations (“RSOs”) and the regulation of surrogacy-related activity.
 - (6) Make miscellaneous and consequential provision related to the above.
- 1.3 The Bill consists of 129 clauses and seven Schedules.

COMMENTARY ON BILL PROVISIONS

PART 1: PARENTHOOD

- 1.4 Part 1 of the Bill makes provision governing the parenthood of children born under a surrogacy arrangement. Chapter 1 contains an introduction to the Part, together with definitions and provision concerning the non-enforceability of surrogacy agreements. Chapter 2 establishes a new pathway to parenthood via a regulated surrogacy agreement. Chapter 3 makes provision for the intended parents under a surrogacy agreement other than a regulated surrogacy agreement to become the parents of a child by way of a parental order granted by the court. Chapter 4 contains the provision for the spouse or civil partner of a surrogate not to be treated as a child’s parent. Chapter 5 contains general provisions relevant to both pathways.

CHAPTER 1: INTRODUCTORY

Clause 2: Meaning of “surrogacy agreement” and other key terms

- 1.5 Clause 2 defines a number of key terms.
- 1.6 In terms of subsection (1), a “surrogacy agreement” is an agreement between a woman (the “surrogate”) and another individual or two individuals (the “intended parent” or “intended parents”) that she will undergo one or more relevant assisted reproduction procedures with a view to any child born as the result of such procedure being treated in law as the child of the intended parent or parents (and as not being the child of the surrogate or any other individual).
- 1.7 A “relevant assisted reproduction procedure” is one which uses the gametes of an intended parent (or both intended parents), or an embryo created from such gametes (subsection (2)). A procedure which does not use any of the nuclear DNA of an intended parent is not a “relevant assisted reproduction procedure” (subsection (3)). Accordingly, there will only be a surrogacy agreement for the purposes of the Bill (with the possibility of the intended parent or parents gaining legal parenthood via Chapter 2 or 3) where there would be a genetic link between the child and at least one intended parent.
- 1.8 The use of the term “agreement” does not indicate the creation of a contractual relationship between the surrogate and the intended parent or parents: see clause 3.

Clause 3: Unenforceability of surrogacy agreements etc

- 1.9 Clause 3 provides for the unenforceability of surrogacy agreements.
- 1.10 Subsection (1) renders unenforceable, by or against the individuals entering into it, any agreement that a woman is to undergo one or more assisted reproduction procedures with a view to any child born as a result of such procedure being treated in law as the child of another individual or individuals rather than the child of the woman, regardless of whether there is a genetic link between the child and one or more of the intended parents. It substantially re-enacts the existing provision in section 1A of the Surrogacy Arrangements Act 1985 (which is repealed by clause 123).
- 1.11 Subsection (2) renders unenforceable any agreement or promise to make a payment to an individual for, or in respect of, that individual entering into an agreement mentioned in subsection (1) or, where the individuals are parties to such an agreement, in respect of costs incurred in connection with being a party to the agreement; in respect of the other individual withdrawing, or not withdrawing, from the agreement; in respect of the other individual completing a regulated surrogacy statement in relation to the agreement (see clause (5)); in respect of the other individual withdrawing, or not withdrawing, consent to clause 4(1) applying in relation to the agreement; or in respect of the individual agreeing, or not agreeing, to the making of an order under Chapter 3 of Part 1 of the Bill (parental orders).

CHAPTER 2: REGULATED SURROGACY AGREEMENTS

- 1.12 Chapter 2 deals with surrogacy under what we have termed “the new pathway”, by means of which intended parents under a regulated surrogacy agreement may

become the legal parents of a child born under that agreement with effect from the birth of the child and without the need for a court order: see, generally, Chapter 2 of the Report.

Clause 4: Parents of child where regulated surrogacy agreement

- 1.13 Clause 4(1) provides for a child born as a result of an assisted reproduction procedure carried out under a regulated surrogacy agreement to be treated in law, with effect from the time of the child's birth, as being the child of the intended parent or parents. This applies only if the conditions in clause 8 are met. It also applies only where the child is born alive (see clause 11(4)).
- 1.14 Clause 4(1) does not prevent the child from later being adopted and becoming the child of their adopted parent(s) (subsection (2)).
- 1.15 Subsection (4) defines a "regulated surrogacy agreement" as a surrogacy agreement in relation to which a regulated surrogacy statement was completed. (For the definition of "regulated surrogacy statement", see clause 5).
- 1.16 For further provision as to the effect of clause 4, see clauses 11 and 12.

Clause 5: Regulated surrogacy statement

- 1.17 Clause 5 defines "regulated surrogacy statement" and, together with clauses 6 and 8, sets out requirements as to the contents of such a statement. A "regulated surrogacy statement" is a document which is signed by the surrogate, by the intended parent or parents, and by a person acting on behalf of a relevant surrogacy organisation (as to which, see clause 52) which includes the statements required by subsections (2) to (4), and the required identity information (see section 7). It must also meet any other requirements which may be specified in regulations made by the Secretary of State under subsection (1)(e).
- 1.18 Subsection (2) requires a statement by the surrogate and the intended parent or parents that they are parties to a surrogacy agreement; that they consent to section 4(1) applying in relation to the agreement; and that they intend the home of any child born under the agreement to be with the intended parent or parents.
- 1.19 Subsection (3) requires a statement by the relevant regulated surrogacy organisation that it has carried out the pre-approval checks referred to in clause 6; that it gives its approval to the surrogacy agreement being one to which section 4(1) applies; and that before giving that approval it took into account all the circumstances of the case and, in particular, the welfare of any child which might be born under the agreement (including that child's need for supportive parenting) and of other children who may be affected by any such birth.
- 1.20 Subsection (4) requires a statement recording that, if the surrogate gives birth to a child as a result of an assisted reproduction procedure carried out under the agreement after completion of the statement, the child will (subject to certain conditions being met) be treated in law on birth as the child of the intended parent or parents and not the child of any other individual.

- 1.21 Regulations made by the Secretary of State under subsection (1)(e) are subject to negative procedure (see clause 125(4)).

Clause 6: Pre-approval checks

- 1.22 Clause 6 sets out the pre-approval checks which the relevant regulated surrogacy organisation is required to carry out for the purposes of clause 5(3)(a).
- 1.23 The regulated surrogacy organisation must satisfy itself that the surrogate and the intended parent have undergone appropriate medical assessments (subsection (2)) and received appropriate counselling (subsection (3)) and legal advice (subsection (4)) and that the surrogate has taken out an appropriate insurance policy to cover her death or critical illness (subsection (5)). It must also satisfy itself that the intended parent or parents have paid, or offered to pay, the surrogate's costs in relation to these matters (which are referred to in the Bill as "mandatory costs") (subsection (6)) and that a relevant criminal record check has been obtained in respect of each person connected to the surrogacy agreement which does not disclose an offence specified in regulations made by the Secretary of State or any other offence which the RSO considers would make it inappropriate for the RSO to state its approval to the surrogacy proceeding on the new pathway (subsection (7)).
- 1.24 Regulations made by the Secretary of State under subsection (7)(a) (specifying offences) or (8)(a)(iv) or (b)(iii) (adding a description of persons as being within the definition of "legal professional") are subject to negative procedure (see clause 125(4)).

Clause 7: "Required identity information" for regulated surrogacy statement

- 1.25 Clause 7 gives the Secretary of State a power to make regulations which specify the information which is to constitute the "required identity information" for the purposes of clause 5(1)(c).
- 1.26 This is information about the surrogate, the intended parent or parents and, where donor gametes are to be used, the donor.
- 1.27 Regulations made under this clause are subject to negative procedure (see clause 125(4)).

Clause 8: Conditions relating to regulated surrogacy agreements

- 1.28 Clause 8 specifies the conditions which must be met in terms of section 4(1) for a child born under a regulated surrogacy agreement to become the child of the intended parents from birth. If these conditions are not met, section 4(1) will not apply to the agreement and a child born under the agreement will not be the child of the intended parent or parents from birth. However, it may still be possible for the intended parent or parents to gain legal parenthood of the child via a parental order under Chapter 3 of Part 1 of the Bill.
- 1.29 The conditions are as follows.
- (1) The intended parents must have been aged 18 or over, and the surrogate aged 21 or over, at the time of entering into the surrogacy agreement (subsection (2)).

- (2) Where there are two intended parents, they must have been in close relationship with each other at the time of entering into the surrogacy agreement (subsection (3); for the definition of “close relationship”, see clause 28).
- (3) At the time when the assisted reproduction procedure was carried out, neither the surrogate nor any intended parent must have withdrawn from the surrogacy agreement or withdrawn their consent to section 4(1) applying in relation to the agreement (subsection (4)) and the RSO must not have withdrawn its approval to the agreement being one to which section 4(1) applies (subsection (5)).
- (4) The assisted reproduction procedure must have been carried out in the United Kingdom (subsection (6)).
- (5) The surrogate must not, while carrying the child, have withdrawn her consent to section 4(1) applying to the agreement (subsection (7)); and see section 9 for provision about the effectiveness of any such withdrawal).
- (6) At the time of signing the regulated surrogacy statement and (except where the surrogate or intended parent has died before then) at the time of the birth of the child, the surrogate and the intended parent or at least one of the intended parents must have been domiciled, or habitually resident, in the United Kingdom or the Channel Islands or the Isle of Man (subsections (8) and (9)).

Clause 9: Surrogate withdrawing her consent to section 4(1) applying to agreement

- 1.30 It is a condition for the application of section 4(1) that the surrogate should not, while she was carrying the child, have withdrawn her consent to clause 4(1) applying in relation to the regulated surrogacy agreement (see clause 8(7)). If she does so, the intended parent or parents will not become the child’s parents from birth and must instead apply to the court for an order under Chapter 3 of Part 1 of the Bill.
- 1.31 Clause 9 provides that the surrogate’s withdrawal of consent is effective for the purposes of clause 8(7) only if, before the child’s birth, she gives notice of her withdrawal to at least one intended parent and to the relevant RSO (subsection (1)). This notice must be in writing or in an audio or audio-visual recording (subsection (5)).
- 1.32 The requirement to notify the intended parent or at least one of the intended parents does not apply if, at the time of the child’s birth, the intended parent or both of the intended parents have died, or if the surrogate, despite taking reasonable steps, is unable to trace the intended parent or parents before the child’s birth (subsection (2)). The requirement to notify the RSO does not apply if, at the time of the child’s birth, the RSO no longer exists (subsection (3)).
- 1.33 Subsection (4) gives the Secretary of State power by regulations to make further provision about the giving of notice under subsection (1). These regulations might include, among other things, making provision about cases in which notice is deemed to have been given. Such regulations are subject to negative procedure (see clause 125(4)).

Clause 10: Death of intended parent before assisted reproduction procedure

- 1.34 Clause 10 makes provision for cases in which one or more intended parents die between entering into a regulated surrogacy agreement and the carrying out of an assisted reproduction procedure under that agreement.
- 1.35 If the intended parent or (in a case where there are two intended parents) both intended parents die prior to the assisted reproduction procedure being carried out and the surrogate was aware of this at the time that the procedure was carried out, section 4(1) does not apply (subsection (1)). The surrogate will be the legal parent of the child at birth.
- 1.36 If only one of two intended parents has died in those circumstances, section 4(1) will continue to apply in relation to the surviving intended parent, who will become the legal parent of the child at birth (subsection (5)(a)). If there is a genetic link between the deceased intended parent and the child (subsections (6), (7)), the surviving intended parent may apply to the court for an order that the deceased intended parent be treated as the parent of the child for the purpose of allowing the deceased intended parent to be entered on the relevant register of births as a parent of the child (subsections (5)(b), (8)).

Clause 11: Effect and application of section 4

- 1.37 Clause 11 makes provision about the effect and application of clause 4(1).
- 1.38 Subject to the exceptions set out in subsections (2), (3) and (5), clause 4(1) applies for the interpretation of enactments, instruments or other documents, whenever passed or made.
- 1.39 Two areas of law are excepted from this. The first exception is succession to titles of honour and to land or property which devolves along with any title or honour (such as, for example, succession to an Earldom). Such succession is unaffected by section 4(1). This reflects the equivalent exception which applies in cases of adoption (Adoption Act 1976, section 44; Succession (Scotland) Act 1964, section 37(1)(a)).
- 1.40 The second exception relates to the relationship between the surrogate and the child. Despite clause 4(1), the surrogate will still be treated as the parent of the child for the purposes of the prohibited degrees of kinship and affinity in relation to the law of marriage and civil partnership and in respect of the crime of incest (subsection (5)).
- 1.41 In relation to the law of England and Wales, a child who has a parent or parents by virtue of section 4(1) is the legitimate child of that parent or those parents (subsection (6)). Equivalent provision is not required for Scotland, given section 1 of the Law Reform (Parent and Child) Scotland Act 1996 (abolition of status of illegitimacy).

Clause 12: Interpretation of references to mother or father

- 1.42 Some enactments, instruments and other documents refer not the parent of a child but particularly to the father or mother.
- 1.43 Clause 12, which applies to enactments, instruments and other documents whenever passed or made (subsection (1)), sets out how such references apply to a child who has a parent or parents by virtue of clause 4(1).

- 1.44 A reference, however expressed, to the mother or to the father of a child is, in the case of a child who has one parent by virtue of clause 4(1), a reference to that parent. In the case of a child who has two such parents, the reference is to either parent (subsection (2)).
- 1.45 A reference, however expressed, to the mother and father of child is, in the case of a child with one parent by virtue of clause 4(1), a reference to that parent and, in the case of a child with two such parents, to both of them (subsection (3)).
- 1.46 The rules contained in subsections (2) and (3) do not apply where a contrary intention appears within the enactment, instrument or other document, or insofar as clause 11 prevents clause 4(1) from having effect in relation to that enactment, instrument or other document.

Clause 13: Declarations of parentage (England and Wales)

- 1.47 Clause 13 amends section 55A of the Family Law Act 1986 (declarations of parentage) to provide that subsection (5) of that section, which permits the court to refuse to hear an application for a declaration as to the parentage of a child if it considers that the determination of the application would not be in the best interests of the child, does not apply where the determination of the application would involve determining whether a child has a parent or parents by virtue of clause 4(1).

CHAPTER 3: PARENTAL ORDERS

- 1.48 Chapter 3 makes provision for the intended parents of a child born under a surrogacy agreement which is not, at the time of the child's birth, on the new pathway, to become the legal parents of the child by way of a court order. It replaces the existing provision for parental orders in sections 54 and 54A of the Human Fertilisation and Embryology Act 2008.
- 1.49 The intention is that the scheme for parental orders under the Bill will continue the position under the existing law that the welfare of the child throughout his or her life is the court's paramount consideration in deciding whether to grant a parental order. It also retains the existing requirement that the child's home, at the time of the application and the making of the order, be with the intended parent or parents.
- 1.50 See generally Full Report, Chapter 10.

Clause 14: Application for parental order: introductory

- 1.51 Clause 14 provides that clauses 15 to 19, which govern applications for a parental order in favour of the intended parent or parents under a surrogacy agreement, apply where (a) a child is born as an assisted reproduction procedure carried out under a surrogacy agreement and (b) clause 4(1) does not apply in relation to the child.
- 1.52 The definition of "surrogacy agreement" in clause 2(1) requires that the assisted reproduction procedure to be carried out under the agreement be an "relevant assisted reproduction procedure". This is a procedure using the gametes of one or more of the intended parents or an embryo created using such gametes (clause 2(2)). Accordingly, clauses 15 to 19 apply only where at least one of the intended parents under the surrogacy agreement have a genetic link to the child.

Clause 15: Application where one intended parent under the surrogacy agreement

- 1.53 Clause 15 applies where the surrogacy agreement was entered into only by only one intended parent (subsection (1)). On an application by that intended parent, the court may make an order providing for the child to be treated in law as the child of the intended parent (subsection (2)), but may only do so if the conditions in clause 16 are met (subsection (3)(a)) and a parental order has not previously been made in relation to the child (subsection (3)(b)).
- 1.54 For the meaning of “the court”, see clause 25(3).

Clause 16: Conditions for the purposes of section 15

- 1.55 Clause 16 sets out the conditions which must be met before the court may make an order under clause 15.
- 1.56 At the time of entering into the surrogacy agreement, the surrogate must have been aged 21 or over and the intended parent aged 18 or over (subsection (2)).
- 1.57 The application must have been made during the period of 6 months beginning with the birth of the child, or after the end of that period with the permission of the court (subsection (3)). The inclusion of statutory provision for a late application recognises the existing practice of the courts, which have permitted such applications in the interests of the welfare of the child, notwithstanding the apparently absolute 6-month time limit in sections 54 and 54A of the Human Fertilisation and Embryology Act 2008.
- 1.58 At the time both of the application and the making of the order, the child’s home must be with the intended parent (subsection (4)).
- 1.59 At the time both of the application and the making of the order, the intended parent must have been domiciled, or habitually resident, in the United Kingdom or in the Channel Islands or the Isle of Man (subsection (5)). This is a change to the existing law, which requires that the applicant be domiciled, rather than merely habitually resident. This change will provide a clearer and simpler basis for establishing the jurisdiction for the court to make a parental order.
- 1.60 The court must be satisfied that the surrogate has freely, and with a full understanding of what is involved, agreed unconditionally to the making of the order (subsection (6)), unless the surrogate has died, cannot be found or is incapable of agreeing or the welfare of the child demands that her consent be dispensed with (subsection (7)). The inclusion of a power on the face of the Bill to dispense with the surrogate’s consent where the welfare of the child demands it reflects the court’s overriding imperative to act in the best interests of the child. However, since existing surrogacy agreements may have been entered into on the understanding that the surrogate possessed a veto on the making of a parental order, this power does not apply where the surrogacy agreement was entered into before the commencement of clause 16.
- 1.61 The surrogate’s agreement to the making of a parental order is ineffective if given before the birth of the child or before 6 weeks have passed since the birth of the child (subsection (8)).

- 1.62 The intended parent must have provided the court with the “required identity information” in relation to the surrogacy agreement, unless the court has dispensed with the requirement (subsection (9)). The “required identity information” is such information as may be specified in regulations about the surrogate, the intended parent, the child and, where the gametes of a donor were used in the creation of the embryo from which the child developed, the donor (see clause 23).
- 1.63 The court must also be satisfied that no payment has been made by the intended parent during the period beginning one year before the day on which the surrogacy agreement was entered into and ending with the making of the order (the “regulated payment period” defined in clause 20(2)), other than a payment in respect of mandatory costs (see clause 6(6)) or a payment, whether or not in respect of permitted costs, authorised by the court. For the meaning of “permitted costs” see clause 40. For further provision about this condition, see clause 20.

Clause 17: Application where two intended parents under the surrogacy agreement

- 1.64 Clause 17 applies where the surrogacy agreement was entered into by two intended parents (subsection (1)).
- 1.65 An application for a parental order may be made by only one of the intended parents or by both of them.
- 1.66 Where an application is made by only one intended parent, the court may make an order providing for the child to be treated in law as the child of that intended parent, of the other intended parent, or of both of them (subsection (2)).
- 1.67 So an intended parent is not prevented from applying for a parental order by the death of the other intended parent or if the other intended parent changes their mind after entering into the surrogacy agreement. At least one of the intended parents must have a genetic link with the child in order for there to be a surrogacy agreement (see clause 2) and there must be a surrogacy agreement in order for clause 17 to apply (see clause 14) but once these requirements are met there is no requirement that the intended parent who makes an application under clause 17(2) have a genetic link with the child.
- 1.68 Where an application is made by both intended parents, the court may make an application for the child to be treated in law as the child of both of the intended parents (subsection (3)).
- 1.69 The court may make an order only if the conditions in section 18 are met and if an order under Chapter 3 has not previously been made in respect of the child (subsection (4)).
- 1.70 For the meaning of “the court”, see clause 25(3).

Clause 18: Conditions for the purposes of section 17

- 1.71 Clause 18 sets out the conditions which must be met before the court may make an order under clause 17.

- 1.72 Most of these conditions are substantially identical to those which apply in relation to an application under clause 15 where there is one intended parent under the surrogacy agreement: see clause 16 and the note to that clause. The note to this clause is confined to the differences.
- 1.73 Subsection (3) requires that at the time of entering into the surrogacy agreement, the intended parents were in a close relationship with each other. For the meaning of “close relationship” see clause 28.
- 1.74 Subsection (5) requires that if the order is to be made in relation to both of the intended parents, the child must at the time both of the application and the making of the order be living with both parents, or if in relation to only one intended parent, with that intended parent (whether or not also with the other intended parent).
- 1.75 The domicile or habitual residence requirement in subsection (6) is satisfied, where an order is to be made in relation to both intended parents, if at least one of the intended parents is domiciled or habitually resident in the United Kingdom or in the Channel Islands or the Isle of Man. Where an order is to be made only in relation to one of the intended parents, that intended parent must be so domiciled or habitually resident.

Clause 19: Application by surrogate for order that intended parent or parents are parent of child

- 1.76 Clause 19 provides for the surrogate to make an application for the intended parent or intended parents to be treated in law as the parent or parents of the child. This represents a change from the existing law under sections 54 and 54A of the Human Fertilisation and Embryology Act 2008, which permit applications to be made only by the intended parents concerned. This provides an opportunity for the surrogate to apply for a court order where might otherwise be left as the legal parent of the child against her wishes should the intended parents fail to apply for a parental order.
- 1.77 On an application made by the surrogate, the court may make an order providing for the child to be treated in law as the child of the intended parent (where there is only one intended parent under the surrogacy agreement) or of both intended parents (where there are two intended parents under the surrogacy agreement) (subsection (1)).
- 1.78 The majority of the conditions which must be met before an order may be made have already been discussed in relation to clauses 16 and 18: see the notes to those clauses.
- 1.79 Subsection (5) imposes an additional condition as to the timing of an application by the surrogate. Such an application may only be made after the expiry of the period of six months beginning with the day of the child’s birth (which is the period during which intended parents are permitted to apply for an order under clause 15 or 17 without permission of the court). The surrogate then has a further 6 months in which to make an application under clause 19 (subsection 5(a)), or may do so after the end of that 6-month period with the permission of the court (subsection (5)(b)).

Clause 20: Further provision relating to payments condition

- 1.80 Clause 20 makes further provision about the payments condition in clauses 16(10)(b), 18(11)(b) and 19(8)(b).
- 1.81 Subsection (1) provides that the court, in considering whether to authorise payment under these provisions, must have regard to the principle that the surrogate should be neither better nor worse off financially as a result of the surrogacy agreement.
- 1.82 Subsection (2) provides that in clauses 16(10)(b), 18(11)(b) and 19(8)(b) “permitted costs” has the meaning given by clause 40(1) and defines “regulated payment period” as the period beginning one year before the day on which the surrogacy agreement was entered into and ending with the making of the order.
- 1.83 Subsection (3) makes further provision about the meaning of “payment”.
- 1.84 For further provision about payments in relation to surrogacy see Part 3 of the Bill.

Clause 21: Application by surrogate for order that surrogate is parent of child

- 1.85 Clause 21 applies where a child has a parent or parents by virtue of clause 4(1) (subsection (1)) and enables the court, on the application of the surrogate, to make an order for the child to be treated in law as her child (subsection (2)).
- 1.86 Any such application must be made within 6 months of the birth of the child (subsection (4)). In contrast to the time limits for an application for an order that the intended parents be treated as the parent of a child, there is no provision for this time limit to be extended.
- 1.87 An order may only be made if the surrogate has, within 6 weeks of the birth of the child (the “relevant period”), decided that she wants to be treated in law as the parent of the child and has given notice of her decision to the intended parent or at least one of the intended parents (subsection (5)). This notice must be in writing or in an audio-visual recording (subsection (11)). Notice need not be given where the intended parent or parents to whom it would otherwise need to be given have died or cannot be traced by the surrogate before the end of the relevant period despite her taking reasonable steps to do so (subsection (6)), or where the relevant regulated surrogacy organisation to which it would otherwise need to be given has ceased to exist (subsection (7)).
- 1.88 At the time both of the application and the making of the order, the surrogate must be domiciled or habitually resident in the United Kingdom or in the Channel Islands or the Isle of Man (subsection (8)).
- 1.89 Except where the court dispenses with the requirement, the surrogate must have provided the court with the required identity information in relation to the surrogacy agreement (subsection (9)). For the meaning of “required identity information” see clause 23.
- 1.90 Regulations may make further provision about the giving of notice. These regulations, made by the Secretary of State, are subject to negative procedure (see section 125).

Clause 22: Orders where the child, intended parent or surrogate has died

- 1.91 Clause 22 introduces Schedule 1, which makes provision about court orders where the child, one or more of the intended parents or the surrogate have died.

Clause 23: “Required identity information” for parental order application

- 1.92 Clause 23 defines “required identity information” for the purposes of clauses 16(9), 18(10), 19(7) and 21(9) as such information as the Secretary of State may specify in regulations about the surrogate, the intended parent or parents, the child in relation to whom the application is made and, where the gametes of a donor were used in the creation of the embryo from which the child developed, the donor.
- 1.93 Regulations under this clause are subject to negative procedure (see section 125).

Clause 24: Informing the Human Fertilisation and Embryology Authority

- 1.94 Clause 24 makes provision requiring a court to provide the Human Fertilisation and Embryology with such information as may be prescribed in rules of court about an application under clause 15, 17, 19 or 21 following the conclusion of proceedings on that application.

Clause 25: Parental orders: supplementary provision

- 1.95 The present regime for parental orders applies much of the existing law relating to adoption, with appropriate modifications, via regulations made under section 55 of the Human Fertilisation and Embryology Act 2008 (the Human Fertilisation and Embryology (Parental Orders) Regulations 2018 (SI 2018/1412) (the “2018 Regulations”). The Bill follows the same approach of providing for regulations to be made applying the law relating to adoptions to parental orders.
- 1.96 Clause 25 gives the Secretary of State power to make two kinds of provision by regulations (made by statutory instrument subject to affirmative procedure – see clause 125).
- 1.97 The first (subsection (1)(a)) would provide any provision of the Adoption Act 2002 or the Adoption and Children (Scotland) Act 2007 to have effect, with such modifications as may be specified in the regulations, in relation to orders under clauses 15, 17, 19 and 21 and to applications for such orders as it has effect in relation to adoption. Following the model of the 2018 Regulations, we would expect regulations under clause 25(1) to apply provisions of these Acts including section 1(2) of the 2002 Act and section 14(3) of the 2007 Act (welfare of child to be paramount consideration in considering making an order).
- 1.98 The second type of provision, which may be made under subsection 1(b), would provide (i) for references in any enactment to adoption to be read as references to the effect of a parental order; (ii) for references to an adopted child to be read as references to a child in relation to whom such an order is made; (iii) to an adoptive relationship to be read as references to a relationship arising by virtue of the enactments about adoption, as applied by the regulations; and (iv) to similar expressions in connection with adoption to be read accordingly.

1.99 To give one example, regulations under clause 25(1)(b) might provide for the references in sections 23 and 24 of the Succession (Scotland) Act 1964 to an adopted child to be read as references to the effect of an order under clause 15, 17, 19 or 21 of the Bill and for similar expressions in connection with adoption to be read accordingly, with the result that a child subject to a parental order would be treated in the same way as an adopted child for all purposes related to the succession to a deceased person (whether testate or intestate).

1.100 Clause 25(3) defines “the court” for the purpose of applications under this Chapter.

Clause 26: Repeals and transitional provision in relation to Chapter 3

1.101 Clause 26 repeals sections 54 and 54A of the Human Fertilisation and Embryology Act 2008 (parental orders), with savings for children born as a result of an assisted reproduction procedure carried out prior to that repeal.

CHAPTER 4: SPOUSE OR CIVIL PARTNER OF SURROGATE

Clause 27: Spouse or civil partner of surrogate not to be treated as parent

1.102 Under the general law, the male spouse or civil partner of a woman who gives birth to a child will be presumed to be the father of the child. Where there is a surrogacy agreement, the intention of the parties to that agreement is that the surrogate should not be, or remain, the legal parent of the child; it follows that the surrogate’s spouse or civil partner should not, by virtue of that status, become the legal parent either. Clause 27 prevents the spouse or civil partner of the surrogate from being treated in law as the parent of a child born under a surrogacy agreement, whether that agreement is on the new pathway or following the parental order route.

1.103 Clause 27 applies to a person if a child is born under a surrogacy agreement and that person was, at any time during the period beginning when the assisted reproduction was carried out and ending with the birth of the child (whether live or still-born), the spouse or civil partner of the surrogate (subsections (1), (5) and (6)).

1.104 Such a person is not to be treated in law as the parent of the child if, at the time of entering the surrogacy agreement, the surrogate was aged 21 or over and the intended parents were aged 18 or over (subsection (2)); that is, if the agreement was one in which the parties met the age conditions required for the agreement to be a regulated surrogacy agreement for the purposes of clause 4(1) or for an application for a parental order under clause 15, 17 or 19.

1.105 But this does not prevent such a person from becoming a parent of the child by adoption (subsection (3)(a)) or by virtue of clause 4 should that person have been an intended parent under the surrogacy agreement as well as the spouse or civil partner of the surrogate (subsection (3)(b)).

1.106 Clause 27 has effect only in relation to a child born as a result of an assisted reproduction procedure carried out after the day on which it comes into force (subsection (10)), but where subsection (2) applies, it applies for the interpretation of enactments, instruments or other documents whenever passed or made (subsection (7)), subject to the exceptions provided for by subsections (8) and (9).

- 1.107 Subsection (8) provides that subsection (2) does not prevent the spouse or civil partner of the surrogate from being treated as a parent of the child for the purposes of the law relating to prohibited or forbidden degrees in relation to the law of marriage and civil partner or for the purpose of the crime of incest or sex with an adult relative.
- 1.108 Subsection (9) provides for the Secretary of State to make regulations providing for further exceptions to the application of subsection (2). (These are subject to negative procedure: see clause 125).
- 1.109 Subsection (11) amends section 5 of the Law Reform (Parent and Child) (Scotland) Act 1986 to disapply the presumption of fatherhood in a case to which clause 27(2) applies.

CHAPTER 5: GENERAL PROVISION IN RELATION TO PART 1

Interpretation

Clause 28: Meaning of “close relationship”

- 1.110 Clause 28 defines “close relationship” for the purposes of Part 1 of the Bill (subsection (1)).
- 1.111 Two persons are in a close relationship with each other if they are married, civil partners, or are living together in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other (subsection (2)); for the meaning of “prohibited degrees of relationship” see subsections (3) to (7).).

Clause 29: Other interpretative provision for Part 1

- 1.112 Subsection (1) of clause 29 defines “adoption” for the purposes of Part 1.
- 1.113 Subsection (2) provides that references to an assisted reproduction procedure in Chapter 3 (parental orders) and Chapter 4 (spouse or civil partner of surrogate) include a procedure carried out outside the United Kingdom. This does not apply to Chapter 2 (regulated surrogacy agreements), where clause 4(1) will only apply if the assisted reproduction procedure was carried out in the United Kingdom: see clause 8(6).

Consequential amendments

Clause 30: Consequential amendments

- 1.114 Clause 30 introduces Schedule 2, which contains amendments consequential on Part 1. Schedule 2 is not comprehensive and further consequential amendments may be made by means of regulations under clause 124.

PART 2: PARENTAL RESPONSIBILITY (ENGLAND AND WALES) AND PARENTAL RESPONSIBILITIES AND PARENTAL RIGHTS (SCOTLAND)

- 1.115 Part 2 of the Bill makes provision for parental responsibility (in England and Wales) and parental responsibilities and parental rights (in Scotland) in relation to a child born as a result of an assisted reproduction procedure under a surrogacy agreement. See generally Full Report, Chapter 6.

Clause 31: Parental responsibility (England and Wales): regulated surrogacy agreements

- 1.116 Clause 31 makes provision for parental responsibility where a child has a parent by virtue of clause 4(1). Clauses 31 to 33 extend to England and Wales only (clause 127(3)).
- 1.117 Section 2 of the Children Act 1989 confers parental responsibility on the parent of a child. Where clause 4(1) applies, the intended parent or parents under the regulated surrogacy agreement are the legal parents of the child and the surrogate is not. The intended parents under the regulated surrogacy agreement have parental responsibility under section 2 of the 1989 Act. Subsection (1) gives parental responsibility also to the surrogate.
- 1.118 Subsections (2) and (3) provide for the circumstances in which the surrogate's parental responsibility will be extinguished.
- 1.119 Unless the surrogate has, before the end of the period of six weeks beginning with the birth of the child, decided that she wants to be treated in law as the parent of the child and has given notice of this as mentioned in clause 21, her parental responsibility is extinguished at the end of that period (subsection (2)).
- 1.120 If her parental responsibility has not already been extinguished by virtue of subsection 2, it will be extinguished if she does not, within 6 months of the birth of the child, make an application for an order under clause 21 that she be treated in law as the parent of the child, or if her application, made within that period, is withdrawn or finally determined without an order being made in her favour (subsection (3)).
- 1.121 Subsections (4) and (5) provide for the circumstances in which the intended parent or parents' parental responsibility will be extinguished.
- 1.122 The parental responsibility of the intended parent or parents will be extinguished if the surrogate, before the end of before the end of the period of six weeks beginning with the birth of the child, decided that she wants to be treated in law as the parent of the child and has given notice of this as mentioned in clause 21 (subsection (4)). But the intended parent or parents will retain their parental responsibility if the child was living with, or being cared for by, them at the time that the surrogate reached her decision (subsection (5)).
- 1.123 Subsection (6) provides for the Secretary of State to make further provision about the giving of notice under this clause. These regulations are subject to negative procedure: see clause 125.
- 1.124 Subsection (7) provides that for the purposes of this clause and clause 32, an application is not to be taken as having been finally determined if an appeal in relation to the application is pending, or the time for bringing an appeal has not expired (ignoring the possibility of an appeal out of time).
- 1.125 "Parental responsibility" has the same meaning as in the Children Act 1989 (clause 126(1)).

Clause 32: Parental responsibility (England and Wales): other surrogacy agreements

- 1.126 Clause 32 makes provision for parental responsibility where a child is born under a surrogacy agreement and does not have a parent by virtue of clause 4(1). It extends to England and Wales only (clause 127(3)).
- 1.127 Subsection (3) confers parental responsibility upon the intended parent or parents if the conditions in subsection (2) are met.
- 1.128 The conditions are that (a) the child has from birth lived with, or been cared for by, the intended parent or either or both of the intended parents; (b) at the time of entering into the surrogacy agreement the surrogate was aged 21 years or over and the intended parents were aged 18 or over; (c) at the time of the child's birth, the intended parent, or at least one of the intended parents, was domiciled in the United Kingdom or in the Channel Islands or the Isle of Man; and (d) where there are two intended parents, at the time of entering into the surrogacy agreement the intended parents were in a close relationship with each other.
- 1.129 With the exception of the requirement that the child should since birth have lived with, or been cared for by, the intended parents, these conditions reflect those which must be met in seeking a parental order under Chapter 3 of Part 1. For the meaning of "close relationship" see clause 28.
- 1.130 Subsection (4) provides for the circumstances in which the intended parent or parents' parental rights will come to an end. The rights that the intended parent or parents have by virtue of subsection (3) are extinguished if the child ceases to live with or be cared for by that parent or either one of them (subsection 4(c)), if they fail to make an application for an order under section 15 or 17 (application for order that intended parent is parent of child) within 6 months of the birth of the child, or if their application, made within that period, is withdrawn or finally determined without an order being made in their favour (subsection 4(a) and (b)).
- 1.131 "Parental responsibility" has the same meaning as in the Children Act 1989 (clause 126(1)).

Clause 33: Entitlement to apply for child arrangements orders etc (England and Wales)

- 1.132 Clause 33 amends section 10 of the Children Act 1989 (power of court to make child arrangements orders under section 8) to provide that any application may be made for a section 8 order by any person who has parental responsibility for a child under clause 31 or 32 and by any intended parent if an application has been made for a parental order in respect of a child (whether or not by the intended parent) and that application has not yet been finally determined.

Clause 34: Parental responsibilities and parental rights (Scotland): regulated surrogacy agreements

- 1.133 Clause 34 makes provision about parental responsibilities and parental rights where a child has a parent or parents by virtue of clause 4(1). It extends to Scotland only (clause 127(4)).

- 1.134 Subsection (1) provides that where a child has a parent or parents by virtue of section 1, that parent or those parents have parental responsibilities and parental rights in relation to the child and the surrogate has parental responsibilities and parental rights in relation to the child.
- 1.135 Subsections (2) and (3) provide for the circumstances in which the intended parent or parents' parental responsibilities and parental rights will be extinguished.
- 1.136 The parental responsibilities and parental rights of the intended parent or parents will be extinguished if the surrogate, before the end of before the end of the period of six weeks beginning with the birth of the child, decided that she wants to be treated in law as the parent of the child and has given notice of this as mentioned in clause 21 (subsection (2)). But the intended parent or parents will retain their parental responsibilities and parental rights if the child was living with, or being cared for by, them at the time that the surrogate reached her decision (subsection (3)).
- 1.137 Subsections (4) and (5) provide for the circumstances in which the surrogate's parental responsibility will be extinguished.
- 1.138 Unless the surrogate has, before the end of the period of six weeks beginning with the birth of the child, decided that she wants to be treated in law as the parent of the child and has given notice of this as mentioned in clause 21, her parental responsibilities and parental rights are extinguished at the end of that period (subsection (4)).
- 1.139 If her parental responsibilities and parental rights have not already been extinguished by virtue of subsection 2, they will be extinguished if she does not, within 6 months of the birth of the child, make an application for an order under clause 21 that she be treated in law as the parent of the child, or if her application, made within that period, is withdrawn or finally determined without an order being made in her favour (subsection (5)).
- 1.140 Subsection (6) provides for the Secretary of State to make further provision about the giving of notice under this clause. These regulations are subject to negative procedure: see clause 125.
- 1.141 Subsection (7) provides that for the purposes of this clause and clause 35, an application is not to be taken as having been finally determined if an appeal in relation to the application is pending, or the time for bringing an appeal has not expired (ignoring the possibility of an appeal out of time).
- 1.142 "Parental responsibilities" and "parental rights" have the meanings given by sections 1(3) and 2(4) of the Children (Scotland) Act 1995 (clause 126(1)).

Clause 35: Parental responsibilities and parental rights (Scotland): other surrogacy agreements

- 1.143 Clause 35 makes provision for parental responsibility where a child is born under a surrogacy agreement and does not have a parent by virtue of clause 4(1). It extends to Scotland only (clause 127(4)).
- 1.144 Subsection (3) confers parental responsibilities and parental rights upon the intended parent or parents if the conditions in subsection (2) are met.

- 1.145 The conditions are that (a) the child has from birth lived with, or been cared for by, the intended parent or either or both of the intended parents; (b) at the time of entering into the surrogacy agreement the surrogate was aged 21 years or over and the intended parents were aged 18 or over; (c) at the time of the child's birth, the intended parent, or at least one of the intended parents, was domiciled in the United Kingdom or in the Channel Islands or the Isle of Man; and (d) where there are two intended parents, at the time of entering into the surrogacy agreement the intended parents were in a close relationship with each other.
- 1.146 With the exception of the requirement that the child should since birth have lived with, or been cared for by, the intended parents, these conditions reflect those which must be met in seeking a parental order under Chapter 3 of Part 1. For the meaning of "close relationship" see clause 28.
- 1.147 Subsection (4) provides for the circumstances in which the intended parent or parents' parental rights will come to an end. The rights that the intended parent or parents have by virtue of subsection (3) are extinguished if the child ceases to live with or be cared for by that parent or either one of them (subsection 4(c)), if they fail to make an application for an order under section 15 or 17 (application for order that intended parent is parent of child) within 6 months of the birth of the child, or if their application, made within that period, is withdrawn or finally determined without an order being made in their favour (subsection 4(a) and (b)).
- 1.148 "Parental responsibilities" and "parental rights" have the meanings given by sections 1(3) and 2(4) of the Children (Scotland) Act 1995 (clause 126(1)).

Clause 36: Parental responsibilities and parental rights (Scotland): supplementary

- 1.149 Clause 36 amends the Children (Scotland) Act 1995 to take account of the conferral of parental rights and responsibilities by clauses 34 and 35.

Clause 37: Interim orders relating to parental responsibilities and parental rights (Scotland)

- 1.150 In our consultation, doubt was expressed as to whether it was presently competent, in the course of an application for a parental order under section 54 or 54A of the Human Fertilisation and Embryology Act 2008, to make an interim application for parental rights and parental responsibilities under section 11 of the Children (Scotland) Act 1995, given the different procedures applying to the two types of application.
- 1.151 Clause 37 avoids a similar doubt arising in relation to an application under clause 15, 17 or 19 by providing that where an application is made under one of those clauses, the court considering the application may make an interim order conferring parental responsibilities and parental rights on an intended parent of the child (subsections (1) and (2)). Such an order may be made on the application of an intended parent or of the court's own volition (subsection (3)). An order under subsection (2) ceases to have effect when the application under clause 15, 17 or 19 to which it relates is determined.
- 1.152 In deciding whether to make such an order, the court must apply the same tests as would apply in relation to an order under section 11(1) of the Children (Scotland) Act 1995 (subsection (4)). Subsection (4) refers to the new, more detailed, tests in sections 11ZA and 11ZB of that Act, which are introduced by section 1 of the Children

(Scotland) Act 2020. These sections are not yet in force; should they still not be in force by the time that clause 37 is commenced, transitional provision should be made in the commencement regulations (under clause 128) to substitute a reference to the existing tests in section 11(7) to (7E) of the 1995 Act.

Clause 38: Application for parental responsibilities and parental rights order by intended parents or surrogate (Scotland)

- 1.153 Clause 38 amends section 11 of the Children (Scotland) Act 1995 (court orders relating to parental responsibilities etc.) to make provision for the circumstances in which intended parents and surrogates may apply for an order in relation to parental rights and parental responsibilities.
- 1.154 The effect of the amendments is that an intended parent or surrogate is able to apply for such an order at any point prior to the final determination of the parenthood of the child by way of an order under clause 15, 17, 19 or 21. Following the final determination of the child's parenthood by way of such an order, the surrogate or any intended parent (not being the legal parent of the child) may apply only for a contact order, with the leave of the court.

PART 3: PAYMENTS IN RELATION TO SURROGACY

- 1.155 Part 3 makes provision about payments which may be made in relation to surrogacy, including a general prohibition on such payments subject to specified exceptions. See Report, Chapter 12.

Clause 39: Payments in relation to surrogacy: general prohibition and exceptions

- 1.156 Clause 39 applies where a surrogacy agreement has been entered into (subsection (1); for the meaning of "surrogacy agreement", see clause 2(1)).
- 1.157 Subsection (2) prohibits the making of any payment by an intended parent to the surrogate during the "protected period" (defined in subsection (3)) other than:
- (1) a payment in respect of mandatory costs (that is, the costs of the medical assessment or counselling, legal advice, and insurance premiums required by the surrogate for participation in the new pathway: see clause 6(6));
 - (2) a payment in respect of "permitted costs" (see clause 40) (subject, in the case of a regulated surrogacy agreement, to clause 41); or
 - (3) a "permitted discretionary payment" (see clause 42).
- 1.158 Subsection (3) defines "the protected period" as the period beginning when the surrogacy agreement is entered into and ending: (a) if the surrogate gives birth to a child as a result of an assisted reproduction procedure carried out under the agreement, at the end of the period of six weeks beginning with the day of the birth; (b) if the agreement expires without such a child having been born, on the expiry of the agreement; or (c) if, without such a child having been born, any party gives notice that they withdraw from the agreement, on the giving of the notice.

1.159 For the meaning of “payment”, “making payment” and related expressions, see clause 50.

Clause 40: Permitted costs

1.160 Clause 40 defines “permitted costs” as costs of a description prescribed in regulations made by the Secretary of State (subsection (1)). In making these regulations, the Secretary of State must have regard to the principle that the surrogate should be neither better nor worse off financially as a result of the surrogacy agreement (subsection (2)). Regulations under subsection (1) are subject to affirmative procedure (clause 125(3)).

1.161 Subsection (3) sets out a number of things which may, among other things, be included in such regulations as permitted costs. Subsection (5) provides that the regulations may provide that costs of a particular description are “permitted costs” (and so not caught by the general prohibition on surrogacy-related payments contained in clause 39(2)) only if they are incurred before the end of the period prescribed in the regulations (the “payment period”).

Clause 41: Regulated surrogacy agreements: permitted costs limited by regulated surrogacy agreement

1.162 Clause 41 introduces additional restrictions on permitted costs in new pathway cases which apply where a regulated surrogacy statement has been completed in relation to a surrogacy agreement. Neither the intended parents nor the relevant regulated surrogacy organisation must have, prior to the carrying out of the first assisted reproduction procedure under the agreement, withdrawn their consent to clause 4(1) applying in relation to the agreement, and the surrogate must not have, before the birth of a child under the agreement, withdrawn her consent to clause 4(1) applying in relation to the agreement (subsections (1) and (2)).

1.163 The making of a payment by an intended parent to the surrogate in respect of permitted costs (as defined in regulations under clause 40) is prohibited unless they are of a description specified in the regulated surrogacy statement for the purpose of clause 41, do not “exceed the agreed limit” and are incurred before the end of the “reduced payment period” (if any) (subsection (3)).

1.164 This prohibition ceases to apply at the end of the protected period (within the meaning given by clause 39(3)) (subsection (6)).

1.165 Permitted costs do not “exceed the agreed limit” if, when taken together with any other permitted costs in respect of which payment has been made, they do not exceed the amount (if any) specified in the regulated surrogacy statement (subsection (4)).

1.166 The “reduced payment period” is the period (if any) specified in the regulated surrogacy statement in relation to costs of the particular description concerned, which must be shorter than the payment period (as defined in clause 40(5)) (subsection (5)). This enables the intended parents and surrogate to agree that the intended parents are to reimburse the surrogate for costs she incurs only during a shorter period than would be permitted by the regulations.

1.167 For the meaning of “payment”, “making payment” and related expressions, see clause 50.

Clause 42: Permitted discretionary payments

1.168 Clause 42 defines a “permitted discretionary payment” as a payment of a description prescribed in regulations made by the Secretary of State and made in accordance with any requirements prescribed in such regulations. In a case within clause 41(1), the payment is only a “permitted discretionary payment” if an intended parent has given notice to the relevant regulated surrogacy organisation that they intend to make the payment (subsection (1)). Subsections (2) to (4) make further provision about the content of regulations, including specifying that a modest gift given to the surrogate and a holiday to be taken by the surrogate and her family after the birth of the child may be prescribed as being permitted discretionary payments.

1.169 Regulations under clause 42 are subject to negative procedure (see clause 125).

Clause 43: Variation of permitted costs specified in regulated surrogacy statement

1.170 Clause 43 provides for the surrogate and intended parent or parents to vary the regulated surrogacy statement after its completion so as to add a description of permitted costs for the purposes of clause 41, to increase the limit that may be recovered in relation to a particular description of permitted costs, or to lengthen the reduced payment period in relation to a particular description of permitted costs (subsection (1)).

1.171 No variation may be made before the end of the period of 6 weeks beginning with the live birth of a child under the agreement unless the relevant regulated surrogacy organisation consents to the variation (subsection (3)). Such a variation, made with the consent of the relevant regulated surrogacy organisation, may retrospectively permit a payment which was, at the time it was made, prohibited by clause 39 or 41 (subsection (4)).

Clause 44: Regulated surrogacy agreements: recovery of costs by surrogate

1.172 An agreement, or a promise, by an individual to make a payment to another individual for, or in relation to costs relating to a surrogacy agreement is unenforceable: see clause 3(2). This clause and clauses 45 to 47 make limited exceptions to this rule by providing statutory mechanisms for the recovery of certain costs.

1.173 Clause 44 applies to a case that falls within clause 41(1), in which the surrogate has incurred any mandatory or permitted costs (subsection (1)).

1.174 The mandatory costs are recoverable (in England and Wales, recoverable summarily) as a civil debt due to the surrogate from the intended parent or either or both of the intended parents (subsection (2)).

1.175 The permitted costs are recoverable (in England and Wales, recoverable summarily) as a civil debt due to the surrogate from the intended parent or either or both of the intended parents, but only to the extent that they are of a description specified in the regulated surrogacy statement for the purposes of clause 41, do not exceed the agreed limit, and were incurred before the end of the reduced payment period (if any).

1.176 These costs are recoverable whether or not the surrogate gives birth to a relevant child and whether or not any relevant child is by virtue of clause 4(1) the child of the intended parents (subsection (4)) (so a payment due to the surrogate in respect of a mandatory or permitted cost does not cease to be enforceable as a debt due to her should she become the parent of the relevant child by means of an order under clause 21).

1.177 “Mandatory costs” has the meaning given by clause 6(6); “permitted costs” has the meaning given by clause 40(1); “reduced payment period” has the meaning given by clause 42(1); “relevant child” has the meaning given by clause 39(4).

Clause 45: Parental orders: recovery of costs by surrogate

1.178 Clause 45 makes provision for the recovery of costs by the surrogate in a case which is not, or is no longer, on the new pathway.

1.179 It applies where a surrogacy agreement has been entered into and the case is not one within clause 41(1), and the surrogate has incurred any mandatory or permitted costs (subsection (1)).

1.180 The court may, on an application made by the surrogate, make an order providing that an amount representing so much of the mandatory costs and permitted costs as the court decides is appropriate to be recoverable (in England and Wales, recoverable summarily) as a civil debt due to the surrogate from the intended parent or from either or both of the intended parents (subsection (2)). In deciding the appropriate amount, the court must take the surrogate’s usual standard of living into account (subsection (3)).

1.181 “The court” has the meaning given by subsection (3); “mandatory costs” has the meaning given by clause 6(6); “permitted costs” has the meaning given by clause 40(1).

Clause 46: Regulated surrogacy agreements: recovery of overpayments by intended parent or parents

1.182 Clause 46 allows the intended parents to recover overpayments made to the surrogate in a new pathway case.

1.183 It applies to a case that falls within clause 41, in which an overpayment has been made to the surrogate (subsection (1)).

1.184 The value of the overpayment is recoverable by the intended parent or by either or both of the intended parents as a civil debt due from the surrogate (subsection (2)).

1.185 Subsections (3) to (5) make provision about the meaning of “overpayment”.

1.186 Subsection 6 provides that clause 50(3) (which provides an expanded definition of “payment”) does not apply in relation to this clause.

Clause 47: Parental orders: recovery of overpayments by intended parent or parents

1.187 Clause 47 makes provision for the recovery of overpayments made to the surrogate in a case which is not, or is no longer, on the new pathway.

1.188 See the note to clause 46.

Clause 48: Regulated surrogacy agreements: declaration as to payments made

1.189 Clause 48, which applies where a child is born who has a parent or parents by virtue of clause 4(1) (subsection (1)) requires each parent, within 12 weeks of the birth of the child, to make a statutory declaration either that they have not made any payment to the surrogate that was prohibited by clause 39 or 41 or that they have done so, and to give the declaration to the relevant surrogacy organisation (subsection (2)) (unless that organisation no longer exists (subsection (4))).

1.190 A statutory declaration that a parent has made prohibited payments must specify the amount of any such payment and any other information about the payment as may be specified by the Secretary of State in regulations (subsection (3)). Regulations made under subsection (3) are subject to negative procedure (clause 125).

1.191 A person who without reasonable excuse fails to make the declaration required by subsection (2) commits an offence (subsection (5)) punishable on summary conviction in England and Wales to a fine and in Scotland to a fine not exceeding level 5 on the standard scale (subsection (6)).

1.192 It is an offence knowingly and wilfully to make a false statutory declaration: section 5 of the Perjury Act 1911 and section 44(2) of the Criminal Law (Consolidation) (Scotland) Act 1995.

Clause 49: Enforcement of prohibition on payments: financial penalties

1.193 Clause 49 empowers the Secretary of State by regulations to make provision for the imposition of a financial penalty on a person who has contravened a prohibition imposed by clause 39 or 41. The imposition of a civil penalty (in addition to regulatory sanctions) is one of the options for enforcement of the new payments scheme that we ask Government to consider. Such regulations are subject to affirmative procedure (see clause 125(3)).

Clause 50: Interpretation of Part 3

1.194 Clause 50 makes provision regarding the interpretation of Part 3.

1.195 Notably, subsection (3) extends the meaning of “payment” and related expressions to provide that references to a person making a payment to another person include references to the person agreeing, or promising, to make a payment to the other person.

PART 4: REGULATION OF SURROGACY-RELATED ACTIVITY

1.196 Part 4 makes provision for the regulation of surrogacy-related activity. Chapter 1 provides for the Human Fertilisation and Embryology Authority (HFEA) to licence bodies carrying out such activity (referred to in these Notes as Regulated Surrogacy Organisations (RSOs)). The licensing regime is largely based on that which is presently operated by the HFEA under the Human Fertilisation and Embryology Act 1990 in relation to activities regulated by that Act. These notes focus upon the differences. Chapter 2 creates offences in relation to activity connected with surrogacy.

CHAPTER 1: LICENSING REGIME

Licensable activity

Clause 51: Meaning of “licensable surrogacy-related activity” and other terms

1.197 Clause 51 of the draft Bill defines a number of activities, including advertising in relation to surrogacy, the provision of matching services and anything done in connection with the completion of a regulated surrogacy statement as “licensable surrogacy related activity” for the purposes of Chapter 1. These are the activities in relation to which an RSO may be granted a licence by the HFEA under clause 52, subject to the conditions in clause 53.

Grant of licences

Clause 52: Grant of licences

1.198 Clause 52(1) provides that the HFEA may grant a licence to a body of persons in relation to the carrying on of licensable surrogacy-related activity (as defined in clause 51), provided that the requirements in subsection (3) are met.

1.199 Subsection (3) requires that the application designates an individual as “the person responsible” under whose supervision licensable surrogacy-related activity is to be carried on and that the HFEA be satisfied as to the character of the individual, that the applicant is a non-profit making body suitable to hold a licence, that the individual will discharge the duty under clause 54 and that the individual consents to the making of the application. There is no requirement that the body of persons take any particular form, such as a company.

1.200 A licence may be granted for a period of up to 5 years (subsection (4)) and may be renewed (subsection (5)).

1.201 Where the HFEA is of the opinion that the information provided in the application is insufficient to allow it to determine the application, it may require the applicant to provide such further information as it considers it requires to determine the application and need not consider the application until it has received that information (subsections (6) and (7)).

1.202 Subsection (8) provides that the HFEA may not grant a licence unless a copy of the conditions of the proposed licence has been shown to, and acknowledged in writing by, the individual making the application and by the person responsible (subsection (8)).

1.203 A body of persons holding a licence under clause 52 is referred to in Chapter 2 of Part 1 of the Bill, in relation to a particular surrogacy agreement, as the “relevant regulated surrogacy organisation” (see clause 5(1)(a)(ii)).

Clause 53: Licence conditions

1.204 Clause 53(1) sets out standard licence conditions applying to all licences granted under clause 52. These include a requirement that licensable surrogacy-related activity is carried on only under the supervision of the person responsible (defined in clause 52(3)) and requirements as to the recording of information and the keeping of

records. The HFEA has power by directions to specify the form in which and the period for which records must be kept, to specify additional information which must be included in the records beyond the list in subsection (1)(d)(i) to (v), and to specify the form in which, and the intervals at which, it must be provided with copies and information from those records. In addition to these standard conditions, the HFEA may grant a licence subject to such additional conditions as it may specify in the licence (subsection (2)).

Persons to whom a licence applies

Clause 54: The person responsible and other persons to whom a licence applies

1.205 Clause 54 places “the person responsible” (defined in clause 52(3)) under obligations to ensure that the licence holder is properly managed and complies with its legal obligations and that the conditions of the licence are complied with.

1.206 This clause is derived from the Human Fertilisation and Embryology Act 1990, section 17.

Revocations, variations and suspensions of licences

Clause 55: Revocation of licences

1.207 Clause 55 provides for the circumstances in which the HFEA must, or may, revoke a licence.

1.208 The HFEA must revoke a licence if the licence-holder ceases to be a non-profit-making body (subsection (1)).

1.209 The HFEA may revoke a licence on the application of the person responsible or the licence holder (subsection (2)) or may revoke a licence without an application in the circumstances set out in subsection (3).

1.210 This clause is derived from the Human Fertilisation and Embryology Act 1990, section 18.

Clause 56: Variation of licenses

1.211 Clause 56 provides for the circumstances in which the HFEA may vary a licence.

1.212 This clause is derived from the Human Fertilisation and Embryology Act 1990, section 18A.

Clause 57: Power to suspend a licence

1.213 Clause 57 makes provision for the HFEA to suspend a licence where it has reasonable grounds to suspect that there are grounds for revoking a licence and is of the opinion that the licence should immediately be suspended.

1.214 This clause is derived from the Human Fertilisation and Embryology Act 1990, section 19C.

Procedure in relation to applications and licensing decisions

Clause 58: Procedure for applications in relation to licences

1.215 Clause 58 makes provision for applications in relation to licences, empowering the HFEA to make directions about their form and content and the information to be supplied with an application and empowering the Secretary of State by regulations to make other provision about applications.

1.216 This clause is derived from the Human Fertilisation and Embryology Act 1990, section 19B.

Clause 59: Procedure in relation to licensing decisions

1.217 Clause 59 makes provision in relation to the procedure which must be followed where the HFEA is considering the refusal of an application for the grant, revocation or variation of a licence or is considering granting an application for a licence subject to a condition imposed under clause 53(2).

1.218 This clause is derived from the Human Fertilisation and Embryology Act 1990, section 19.

Clause 60: Notification of licensing decisions

1.219 Clause 60 provides for the notice which the HFEA must give where it makes a licensing decision.

1.220 This clause is derived from the Human Fertilisation and Embryology Act 1990, section 19A.

Clause 61: Right to reconsideration of licensing decisions

1.221 Clause 61 makes provision about the circumstances in which the HFEA may be required to reconsider licensing decisions.

1.222 This clause is derived from the Human Fertilisation and Embryology Act 1990, section 20.

Clause 62: Appeals committee

1.223 Clause 62 requires the HFEA to maintain one or more committees to carry out its functions of reconsideration under clause 61 and provides for the Secretary of State to make provision in regulations regarding the membership and proceedings of appeals committees.

1.224 This clause is derived from the Human Fertilisation and Embryology Act 1990, section 20A.

Clause 63: Procedure on reconsideration

1.225 Clause 63 makes provision for the procedure to be followed on a reconsideration under clause 61 and enables the Secretary of State by regulations to make further provision about the procedure in relation to reconsideration.

1.226 This clause is derived from the Human Fertilisation and Embryology Act 1990, section 20B.

Clause 64: Appeal on a point of law

- 1.227 Clause 64 provides for a person aggrieved by a decision on reconsideration required by a notice under section 61 to appeal on a point of law to the High Court (in relation to England and Wales) or to the Court of Session (in relation to Scotland).
- 1.228 This clause is derived from the Human Fertilisation and Embryology Act 1990, section 21.

Directions and code of practice

Clause 65: Directions: general

- 1.229 Clause 65 gives the HFEA the power to give (and to vary or revoke) directions for any purpose for which directions may be given under Chapter 1 of Part 4 of the Bill.
- 1.230 This clause is derived from the Human Fertilisation and Embryology Act 1990, section 23.

Clause 66: Directions as to particular matters

- 1.231 Section 66 makes provision for particular matters which must or may be dealt with in directions.
- 1.232 Subsection (1) provides that directions must require information to be recorded about any child such as is mentioned in clause 53(1)(b)(i); any person such as is mentioned in clause 53(1)(b)(ii) to (iv); and any person falling within clause 53(1)(b)(v) who is of a description specified in the directions (that is, a child appearing to the person responsible to have been born under a surrogacy agreement in respect of which a regulated surrogacy statement was signed on behalf of the licence holder; the surrogate who carried such a child; the intended parent or parents in relation to such a child; any donor of gametes; and a person involved in organising or carrying out an assisted reproduction procedure).
- 1.233 Subsection (2) provides that directions must require copies of the records relating to the matters mentioned in clause 53(1)(d)(i) to (v) are given to the HFEA.
- 1.234 Subsections (3) to (6) make further provision about the imposition of requirements in directions, equivalent to that made by the Human Fertilisation and Embryology Act 1990, section 24(5A) to (5D).

Clause 67: Code of practice

- 1.235 Clause 67 requires the HFEA to maintain a code of practice in relation to the proper conduct of licensable surrogacy-related activity and the proper discharge of the functions of the person responsible and other persons to whom a licence applies (subsection (1)).
- 1.236 The code must include provision about the carrying out of the pre-approval checks for the purposes of clause 5(3)(a), the account to be taken of the welfare of children who may be born as a result of a surrogacy agreement (including a child's need for supportive parenting), and of other children who may be affected by such births and the sharing of information (subsection (2)).

1.237 Subsections (3) to (5) make provision in relation to the revision and publication of the code and the consequences of a failure to observe any provision of the code. This provision is equivalent to that made by the Human Fertilisation and Embryology Act 1990, section 25(4) to (6).

Clause 68: Procedure for approval of code

1.238 Clause 68 makes provision in relation to the procedure for approval of the code of practice under clause 67 by the Secretary of State.

1.239 This clause is derived from the Human Fertilisation and Embryology Act 1990, section 26.

Register of licences

Clause 69: The HFEA's register of licences

1.240 Clause 69 makes provision requiring the HFEA to keep a register recording the grant, suspension or revocation of every licence and specifies the required contents of that register.

1.241 This clause is derived from the Human Fertilisation and Embryology Act 1990, section 31A.

Fees

Clause 70: Fees

1.242 Clause 70 provides for the fees chargeable by HFEA in relation to its licensing functions.

1.243 This clause is derived from the Human Fertilisation and Embryology Act 1990, section 35B(1) and (2).

Offences and enforcement

Clause 71: Offences

1.244 Clause 71 makes provision for offences in relation to licensing.

1.245 Subsection (1) provides that a person commits an offence if, for the purposes of a grant of a licence, the person provides any information which is false or misleading in a material particular and the person knows that, or is reckless as to whether, the information is false or misleading in a material particular.

1.246 Subsection (2) makes it an offence to fail to comply with any directions given under clause 66(6) (that is, directions requiring anything kept, or information held, in pursuance of a licence to be transferred in accordance with the directions in a case where a licence has been varied or ceases to have effect).

1.247 It is a defence for a person charged with an offence under subsection (2) to prove that the person took all such steps as were reasonable and exercised all due diligence to avoid committing the offence (subsection (4)).

1.248 Subsection (3) provides for the penalties applicable to an offence under clause 71.

Clause 72: Powers of inspection, entry, search and seizure

1.249 Clause 72 introduces Schedule 3, which makes provision about powers of inspection, entry, search and seizure equivalent to that contained in Schedule 3B to the Human Fertilisation and Embryology Act 1990.

Notices

Clause 73: Notices

1.250 Clause 73 provides that section 46 of the Human Fertilisation and Embryology Act 1990 (notices) applies in relation to any notice required or authorised to be served under Chapter 1 of Part 4 of the Bill as it applies in relation to any notice required or authorised to be given or served by that Act.

Consequential amendments

Clause 74: Consequential amendments

1.251 Clause 74 introduces Schedule 4 which contains amendments to the Human Fertilisation and Embryology Act 1990 consequential on Chapter 1 of Part 4 of the Bill.

CHAPTER 2: OFFENCES

Matching services

Clause 75: Offences relating to matching services

1.252 Clause 75 creates offences relating to the provision of surrogacy matching services (defined in subsection (8) 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).

1.253 It is an offence for a person other than a non-profit-making body or an individual who is acting otherwise than in the course of business to provide surrogacy matching services (subsections (1) and (2)).

1.254 It is an offence for a person who is not acting under and in accordance with a licence either to provide surrogacy matching services in return for a payment, or to charge for the provision of surrogacy matching services (subsections (3) and (4)).

1.255 It is a defence, in proceedings for an offence of providing surrogacy matching services in return for payment, for a person to show that at the time of providing the services that person did not know that a requirement to pay for the services was being imposed (5). The burden on the defence is an evidential rather than a persuasive one (subsection (6)).

1.256 Subsection (7) provides that a person does not commit an offence merely by making use of services which another person is prohibited by this clause from providing. This removes any possible doubt about whether such a person might be guilty of an offence on the basis of aiding, abetting, counselling or procuring the commission of an offence under this clause. This reflects the similar avoidance of doubt provision in

respect of the existing offence under section 2(1) of the Surrogacy Arrangements Act 1985 (see subsection (2) of that section).

1.257 A person guilty of an offence under this clause is liable on summary conviction in England and Wales to imprisonment for a term of up to 3 months or a fine or both; and in Scotland to imprisonment for up to 3 months or a fine not exceeding level 5 on the standard scale, or to both. (For the standard scale of fines, see section 225(2) of the Criminal Procedure (Scotland) Act 1995).

Legal advice

Clause 76: Offences relating to legal advice given in connection with a surrogacy agreement

- 1.258 Clause 76 creates offences in relation to the provision of paid legal advice in connection with a surrogacy agreement.
- 1.259 Subsection (1) makes it an offence for a person to provide, in relation to a particular surrogacy agreement and in return for payment, any of the services mentioned in subsection (2) or to charge, in relation to a particular surrogacy agreement, for the provision of such services.
- 1.260 The services are (a) negotiating, or assisting in the negotiation of, the terms of the agreement; (b) drafting, or assisting in the drafting of, the terms of the agreement; or (c) advising as to the legal effect of becoming, or being, a party to the agreement (subsection (2)).
- 1.261 Subsection (1) does not apply to services provided by (a) a non-profit-making body; (b) an individual who is acting otherwise than in the course of business; (c) a legal professional (as defined in subsection (7)); or (d) a person specified, or of a description specified, in regulations made by the Secretary of State (for the procedure applying to such regulations, see clause 125).
- 1.262 It is a defence to show (with an evidential rather than a persuasive burden: subsection (5)) that the person providing the services did not know that a requirement to pay for the services was being imposed (subsection (4)).
- 1.263 Subsection (6) provides that a person does not commit an offence merely by making use of services which another person is prohibited from providing, so removing any possible doubt about whether such liability might arise on the basis (for example) of aiding, abetting, counselling or procuring the commission of the offence or, in Scotland, of art and part liability.
- 1.264 A person guilty of an offence under subsection (1) is liable on summary conviction in England and Wales to a fine; and on summary conviction in Scotland to a fine not exceeding Level 5 on the standard scale. (For the standard scale of fines, see section 225(2) of the Criminal Procedure (Scotland) Act 1995).

Advertising

Clause 77: Prohibitions on advertising

- 1.265 Clause 77 prohibits a number of activities in relation to the advertising of surrogacy-related services (which are then made offences by clause 78).
- 1.266 The first category of activities relates to non-licensed persons advertising surrogacy matching services.
- 1.267 Subsection (1) provides that a person must not make arrangements for an advertisement that states that an individual or individuals are looking for other individuals with whom to enter into a surrogacy agreement, or in which the person offers to provide surrogacy matching services (as defined in clause 75).
- 1.268 This does not apply to arrangements made under, and in accordance with, a licence (subsection (2)).
- 1.269 The second category relates to advertising the services referred to in clause 76(2) (that is, negotiating, drafting, or advising in relation to a particular surrogacy agreement). A person must not make arrangements for an advertisement in which the person offers to provide any of these services (subsection (3)). This prohibition does not apply to arrangements made by a non-profit-making body, an individual who is acting otherwise than in the course of business, or a legal professional (within the meaning of clause 76). So if a person is permitted to provide any of the services listed in clause 76(2), it is not an offence under clause 77(3) for that person to make arrangements to advertise the service.
- 1.270 The third category relates to advertising other services targeted at surrogates or intended parents. Subsection (5) provides that a person must not make arrangements for an advertisement in which the person offers to provide services which are advertised as being for an individual who is or may become a surrogate or an intended parent. This prohibition does not apply to arrangements made under, and in accordance with, a licence or by a legal professional (within the meaning of clause 76) (subsection (6)(a)). Nor does it apply where the services advertised are services in support of the physical or mental health or well-being of an individual (subsection (6)(b)(ii): so, for example, subsection (5) does not prohibit advertising the services of a doula or massage therapist which are directed at surrogates. (The exception in subsection (6)(b)(i) for the services mentioned in subsection (3) is a technical drafting provision which prevents activities which are permitted by the exceptions in subsection (4) from being prohibited by subsection (5)).
- 1.271 Subsection (7) gives the Secretary of State power by regulations to amend subsection (6) to add further exceptions to the prohibition on advertising services targeted at surrogates and intended parents. (Such regulations are subject to negative procedure: see clause 125.)
- 1.272 The fourth category relates to the removal of children for the purposes of applying for a foreign equivalent of a parental order. Subsection (8) provides that a person must not make arrangements for an advertisement indicating that a person is willing to remove a child from the United Kingdom to another country for the purpose of applying for such an order.

1.273 The prohibitions in subsections (1), (3), (5) or (8) apply to a person making arrangements for an advertisement (defined in subsection (10) as a “prohibited advertisement”), that is, the advertiser. Subsection (9) extends this prohibition to the publisher of an advertisement, providing that a person must not publish a prohibited advertisement.

Clause 78: Offences relating to advertising

1.274 Clause 78 makes provision for offences arising from a breach of the prohibitions in clause 77.

1.275 Subsection (1) provides that it is an offence to breach the prohibitions in clause 77(1), (4), (5), (8) or (9).

1.276 A person guilty of such an offence is liable on summary conviction in England and Wales to a fine, and on summary conviction in Scotland to a fine not exceeding level 5 on the Standard Scale (for the meaning of which, see section 225(2) of the Criminal Procedure (Scotland) Act 1995) (subsection (2)).

1.277 It is a defence for a person accused of publishing a prohibited advertisement to show that they did not know that the advertisement was a prohibited advertisement and that they had taken reasonable steps to establish whether or not the advertisement was a prohibited advertisement (subsection (3)). A person will have made out this defence if sufficient evidence is adduced to raise an issue with respect to it and the contrary is not proved beyond reasonable doubt (subsection (4)); that is, the defence is subject to an evidential rather than a persuasive burden.

General

Clause 79: Consent required for prosecution

1.278 Clause 79 provides that no proceedings for an offence under Chapter 2 of Part 4 of the Bill may be brought in England and Wales except by or with the consent of the Director of Public Prosecutions.

Clause 80: Time limits for prosecution

1.279 Clause 80 provides, in relation to offences under Chapter 2 of Part 4, for the usual 6-month limit for bringing summary criminal proceedings to be extended to 2 years.

CHAPTER 3: GENERAL

Offending by an organisation

Clause 81: Individual culpability for offending by an organisation

1.280 Clause 81 provides for a “relevant individual” (defined in subsection (3)) to be personally liable where an offence under Part 4 of the Bill is committed by a body corporate, partnership or unincorporated association with the connivance or consent of that individual.

Clause 82: Offences by bodies corporate and unincorporated associations (England and Wales)

1.281 Clause 82, which extends only to England and Wales (see clause 127(3)), makes provision for the prosecution of offences alleged to have been committed by unincorporated associations and, for unincorporated associations and bodies corporate, in relation to the admissibility of evidence in proceedings for an offence under clause 75, 76 or 78.

Interpretation of Part

Clause 83: Interpretation of Part 4

1.282 Clause 83 defines “body of persons”, “licence” and “non-profit-making body” for the purposes of Part 4 of the Bill.

PART 5: REGISTERS AND INFORMATION

1.283 Part 5 of the Bill makes provision for the recording of information about surrogacy agreements, the people who enter into them or are involved with them, and the people who are born following such agreements. It covers both agreements that require a parental order to be made and agreements following a Regulated Surrogacy Statement, in the new pathway. It establishes both a Surrogacy Register, which contains the information described, and a Register of Regulated Surrogacy Statements, which contains Regulated Surrogacy Statements.

1.284 With regard to the creation of the Surrogacy Register, and requests for information from it, this is modelled on the provisions in the Human Fertilisation and Embryology Act 1990, in sections 31 to 35.

Clause 84: Part 1 surrogate-born individuals and Part 1 surrogate siblings

1.285 Clause 84 defines the individuals who may make requests for information from the Surrogacy Register; these are a “Part 1 surrogate-born individual” and a “Part 1 surrogate sibling”. A Part 1 surrogate-born individual is an individual born as a result of an assisted reproduction procedure that took place either in the new pathway, or in a case where a parental order is applied for, including where the intended parent or parents have died (subsection (1)). An individual is a Part 1 surrogate sibling where one of them is a Part 1 surrogate-born individual and the same woman gave birth to both of them (subsection (3)). A Part 1 surrogacy agreement is one where a Part 1 surrogate-born individual was born, following an assisted reproduction procedure.

Clause 85: Children without capacity and competence

1.286 Clause 85 is relevant to the establishing the individuals to whom information from the Surrogacy Register or the Register of Regulated Surrogacy Statements must be provided. Because information can be provided to a child who does not lack capacity or competence in relation to a document or information, or the disclosure of information (see clauses 88(1) and 94(1)), this clause provides the necessary definition for a child without capacity or competence. This is done by reference to established principles, for both individuals habitually resident in Scotland (subsection (2)), and to any person who is habitually resident somewhere other than Scotland. Subsection (1)(a) references the Mental Capacity Act 2005 for those aged 16 and 17,

while subsection (1)(b) references an individual being competent, relying on the common-law test of competence set out in the case of *Gillick v West Norfolk & Wisbech Area Health Authority* ([1986] AC 112). Subsection (2), for Scotland, refers to capacity to understand the nature of a document or information, and the possible consequences of receipt or disclosure (as appropriate), while making clear that the Age of Legal Capacity (Scotland) Act 1991, does not prevent a request being made by, or disclosure being made to, an individual under 16.

Clause 86: Other key terms

1.287 Clause 86 provides definitions of certain key terms used in this Part.

Clause 87: Register of Regulated Surrogacy Statements

1.288 Clause 87 makes provision for the HFEA to keep a register of Regulated Surrogacy Statements and for the name of the register; such statements are only included on this register where completed before the surrogate underwent an assisted reproduction procedure under the surrogacy agreement which results in the birth of a child (subsection (3)).

Clause 88: Request for Regulated Surrogacy Statement

1.289 Clause 88 makes provision for a request to be made by an individual to the HFEA for a copy of Regulated Surrogacy Statement that relates to them – that is, if the individual were born as a result of an assisted reproduction procedure following a surrogacy agreement to which a Regulated Surrogacy Statement held on the register relates (subsection (3)). Where the individual is not a child without capacity or competence and has had an opportunity to receive counselling about the disclosure, the HFEA must give the individual who makes the request a copy of any such statement, or confirm in writing that the Register does not include such a statement (subsections (1) and (2)).

Clause 89: Requests and fees

1.290 Clause 89 makes provision for the form and manner of a request for a copy of a Regulated Surrogacy Statement to be made in such form and manner to be determined by the HFEA, and for the HFEA to charge a fee for such requests, if it thinks fit.

Clause 90: The Surrogacy Register

1.291 Clause 90 makes provision for the HFEA to keep a register of information provided to it and for the name of the register, such information to be specified in regulations made by the Secretary of State after consulting with the HFEA (subsections (4) and (5) – Clause 91 makes further provision for the information which may be specified). The information will relate to Part 1 surrogate-born individuals and to people involved with an assisted reproduction procedure as a result of which such an individual was born (subsection (1)). It will not include information provided to the HFEA for inclusion on a voluntary register (see paragraph below re clause 100).

Clause 91: Information which may be specified

1.292 Clause 91 sets out a non-exhaustive list of information that can be specified under the regulations made under Clause 90, to include:

- (1) a surrogate under a Part 1 surrogacy agreement;
- (2) an intended parent under a Part 1 surrogacy agreement;
- (3) a gamete donor whose gametes were used to create an embryo from which a Part 1 surrogate-born individual developed (information about this person could include the fact that the person donated their gametes anonymously); and
- (4) a person involved in organising or carrying out an assisted reproduction procedure as a result of which a Part 1 surrogate-born individual was born (this could include, for example, details about a regulated surrogacy organisation involved with the surrogacy agreement, or the clinic which carried out the assisted reproduction procedure).

1.293 Subsection (3) provides that regulations can make provision with regard to the source of the information and the HFEA's opinion of its accuracy; and allows information to be specified which identifies an individual.

Clause 92: Information recorded by the HFEA in another register

1.294 Clause 92 makes provision for regulations to be made that would allow reference to be made in the Surrogacy Register to information held on the existing register kept by the HFEA under section 31 of the Human Fertilisation and Embryology Act 1990. So, the Surrogacy Register could cross-refer to information about gamete donors in a surrogacy arrangement whose details are recorded on the register kept under section 31.

Clause 93: Contact details of individuals with Part 1 surrogate siblings

1.295 Clause 93 makes provision for contact details to be provided by an individual who is not a Part 1 surrogate-born individual, where the individual has, or may have, a Part 1 surrogate sibling. This provision allows for the children of a woman who has acted as a surrogate to have the possibility of contacting people whom their mother carried as a surrogate.

Clause 94: Requests for information about surrogacy

1.296 Clause 94 makes provision for a Part 1 surrogate-born individual to request information about their origins from the Surrogacy Register. Where an individual makes such a request, the HFEA must, under subsection (2):

- (1) state whether or not the Surrogacy Register contains information showing that the individual is a Part 1 surrogate-born individual;
- (2) state whether or not there is information showing that the Register includes information showing that the individual has Part 1 surrogate siblings and, if so, the number and their sex and age (however, subsection (4) prevents the HFEA providing this information about such siblings if it would increase the likelihood of identifying a sibling or a person involved in the surrogacy); and
- (3) provide the information which regulations made by the Secretary of State require the HFEA to provide.

1.297 The HFEA need only respond to a request either where the applicant is aged 16 or over, or, if under 16, has capacity or competence (as described above in relation to Clause 85) in relation to the information. The applicant must also have been given a suitable opportunity for counselling about the implications of receiving the information (subsection (1)).

1.298 Information that identifies someone cannot be given to a child without capacity or competence; information that does not do this must however be provided to a child without capacity or competence once he or she is 16 (subsection (3)).

Clause 95: Requests for information about intended spouse etc

1.299 Clause 95 makes provision for an individual to ask the HFEA whether the Surrogacy Register holds information that shows that the applicant is, or may be, a Part 1 surrogate sibling of another individual whom the applicant proposes to marry, enter into a civil partnership with, or be in a sexual relationship with.

1.300 The HFEA must give the applicant a notice stating whether or not the Surrogacy Register includes such information if three conditions are satisfied:

- (1) the age of the applicant and, if the request concerns a sexual relationship, the age of the subject of the request (16 or over in both cases);
- (2) receipt of consent in writing from the subject of the request; and
- (3) an opportunity for both the applicant and the subject to have received counselling about the implications of receiving the information.

Clause 96: Requests in relation to information about Part 1 surrogate siblings

1.301 Clause 96 makes provision for Part 1 surrogate siblings to obtain information about each other. The HFEA must provide information to a recipient where an individual (the “disclosing individual”) has asked it to disclose this information to any Part 1 surrogate siblings, and the recipient has asked for this information. Both the disclosing individual and any recipient must, if they are children, have capacity or competence, in relation to the information, and been given an opportunity for counselling on the implications of disclosure or receipt of the information. The disclosing individual can place a limit on the information provided. The disclosing individual can specify that only Part 1 surrogate siblings of a particular description should receive information, and the recipient can specify that they only want to receive information about Part 1 surrogate siblings of a particular description (see subsections (1) and (2)).

1.302 The HFEA must not provide information that would enable identification of a gamete donor, but this exemption does not apply where the donor has consented to such disclosure, or where the disclosing individual or the recipient could obtain information that identified the donor by making a request under clause 94 (subsections (3) and (4)).

Clause 97: Requests and fees

1.303 Clause 97 makes provision for the form and manner of requests to the HFEA for information under the preceding clauses, and for the HFEA to charge a fee for such requests.

Clause 98: Information to be provided to the Registrar General

1.304 Clause 98 makes provision for the disclosure of information from the Surrogacy Register by the HFEA to the Registrar General for England and Wales, and the Registrar General of Births, Deaths and Marriages for Scotland, in order to assist in determining a claim before the Registrar General about whether an individual is the parent of another individual. The Registrar General can ask whether information on the Surrogacy Register tends to show whether the individual is a parent of the other individual by way of the new pathway or a parental order.

Clause 99: Information to be provided to courts

1.305 Clause 99 makes similar provision to Clause 98 but in respect of proceedings in a court. Disclosure would follow from an order of the court made on the application of a party to the proceedings. A court cannot make an order that would require the HFEA to provide information from the Surrogacy Register that would identify a gamete donor (subsection (3)) and can only make an order where the interests of justice require it to do so, taking into account the welfare of a child who may be affected by the disclosure, and any representations made by an individual who may be affected (subsection (4)).

Clause 100: Power of the HFEA to keep a voluntary contact register

1.306 Clause 100 makes provision for the HFEA to keep a voluntary contact register. Such a register would allow the HFEA to collect information, and make arrangements for the disclosure of such information to individuals who appear to the HFEA to be connected by surrogacy, and who have expressed their wish to receive information about each other (subsection (1)). The HFEA's power to keep such a register is broadly drawn allowing it to determine, among other things, the manner in which it keeps the register, the information that should be held on the register, and the criteria for eligibility for inclusion on the register (subsection (2)).

1.307 In this clause, individuals are defined to be connected by surrogacy where one is a woman who acted as a surrogate and the other is a child to whom she gave birth as a result of being a surrogate, or where they are surrogate siblings (that is, the same woman gave birth to both of them and at least one is a surrogate-born individual). A surrogate-born individual is defined widely here, to include those people in respect of whom a parental order was made under sections 54 or 54A of the Human Fertilisation and Embryology Act 2008, or under section 30 of the Human Fertilisation and Embryology Act 1990. These are the sections under which parental orders were previously made, and the intention of this clause is that it will allow information to be recorded and disclosed for those surrogacy arrangements that precede the new law, on a voluntary basis.

Clause 101: Financial assistance for other voluntary contact registers

1.308 Clause 101 makes provision for the HFEA, instead of keeping the voluntary contact register itself, to make arrangements for another person to do so, for the HFEA to provide financial assistance to such a person, on such terms and conditions as it considers appropriate.

Clause 102: Restrictions on disclosure of relevant surrogacy-related information

1.309 Clause 102 makes provision to restrict the disclosure of information relating to people involved in a surrogacy agreement, including a surrogate; intended parent; a gamete donor; a Part 1 surrogate-born individual and a Part 1 surrogate sibling. The restriction on disclosure applies to a person who has obtained the information in their capacity as a member or employee of the HFEA; a person engaged by the HFEA to provide services; an employee of such a person; and a regulated surrogacy organisation, a person to whom a licence under Chapter 1 of Part 4 applies and a person to whom the HFEA has given directions by virtue of clause 65. Exceptions to the restriction on disclosure are set out in clause 103.

Clause 103: Exceptions from restrictions

1.310 Clause 103 provides a list of cases in which the restriction contained in clause 102(1) does not apply (subsection (1)).

1.311 The cases include, for example, a disclosure within the HFEA; a disclosure by a member or employee of the HFEA to a person to assist that person to carry out a regulatory function; a disclosure made to an RSO or a person to whom a licence under Chapter 1 of Part 4 applies for the purposes of the functions of the RSO or that person s; a disclosure by a member or employee of the HFEA in accordance with clauses 98 or 99 to establish whether a child has been born as a result of an assisted reproduction procedure carried out under a surrogacy agreement.

1.312 The list of exceptions is closed but may be added to by regulations made under subsection (3); regulations cannot however provide exceptions for a disclosure described in subsection (2).

1.313 Subsection (2) removes the exception to the prohibition in clause 103(1)(p)(i) and (iii) - these exceptions being: for the purpose of the investigation of an offence or suspected offence, and for a purpose preliminary to proceedings or in connection with proceedings – in two cases. These two cases are:

- (1) where the disclosure is of information that would enable an individual to be identified as a surrogate, intended parent or gamete donor (“identifying surrogacy information”); and
- (2) where information is being provided to a court under clause 99, that information is relevant to the question of whether an individual is or is not the parent of another individual, and the disclosure is made by someone who is not a member or employee of the HFEA.

Clause 104: Consent required to authorise certain disclosures

1.314 One of the exceptions to the prohibition on disclosure provided under clause 103(1) is where the information is not identifying surrogacy information and the disclosure is provided with consent under clause 104.

1.315 Clause 104 makes provision to require the consent of each individual who can be identified from the information being disclosed. Necessarily, this would not be the surrogate, intended parent or gamete donor, as information that identified them would

be identifying surrogacy information; instead, for example, it might be an individual born following a surrogacy agreement.

- 1.316 Consent may be provided by an individual other than a child without capacity or competence in relation to the disclosure of the information; consent could be given for such a child by a person having parental responsibility or parental responsibilities and parental rights in respect of the child (subsection (4)).
- 1.317 If a person requests another to provide consent under this section then, before such consent is given, the person making the request must take reasonable steps to explain to the other the implications of providing consent to disclosure.

Clause 105: Offence

- 1.318 Clause 105 makes provision for an offence of disclosing information in contravention of the prohibition against disclosure in clause 102(1), triable either way. There is a defence for, a regulated surrogacy organisation, a person to whom a licence under Chapter 1 of Part 4 applies and a person to whom the HFEA has given directions where the organisation or person took reasonable steps, and exercised all due diligence, to avoid committing the offence (subsection (2)). Certain enforcement provisions contained in Schedule 3 are applied to this offence (subsection (3)).

PART 6: MISCELLANEOUS AND GENERAL

Registration of births and deaths

Clause 106: Registration of child's birth (England and Wales)

- 1.319 Clause 106 introduces Schedule 5, which amends the Births and Deaths Registration Act 1953 to make provision for the registration of the birth of a child who has a parent or parents by virtue of clause 4.

Clause 107: Registration of child's birth (Scotland)

- 1.320 Clause 107 introduces Schedule 6, which amends the Registration of Births, Deaths and Marriages (Scotland) Act 1965 to make provision for the registration of the birth of a child who has a parent or parents by virtue of clause 4.

Clause 108: Registration of death: qualified informants

- 1.321 Clause 108 amends section 41(1) of the Births and Deaths Registration Act 1953 and section 56(1) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 to provide for an intended parent under a surrogacy agreement who intends to apply for a parental order under Chapter 3 of Part 1 of the Bill, or has such an application pending, to be a qualified informant in relation to the registration of the death of a child.

Clause 109: Registration of still-birth (England and Wales)

- 1.322 Clause 109 amends the Births and Deaths Registration Act 1953 to permit the intended parent or parents under a surrogacy agreement to give information as to the still birth of the child, and also to have their name(s) entered in the register as the parents of the still-born child with the consent of the surrogate.

Clause 110: Registration of still-birth (Scotland)

1.323 Clause 110 amends the Registration of Births, Deaths and Marriages (Scotland) Act 1965 to permit the intended parent or parents under a surrogacy agreement to give information as to the still birth of the child, and also to have their name(s) entered in the register as the parents of the still-born child with the consent of the surrogate.

Clause 111: Registration: interpretation

1.324 Clause 111 amends section 41 of the Births and Deaths Registration Act 1953 and section 56 of the Registration of Births, Deaths and Marriages to ensure that terms defined in the Bill have the same meaning there as they do in the Bill.

Employment rights and maternity allowance

Clause 112: Statutory rights to time of work, leave, pay and allowance

1.325 Clause 112 introduces Schedule 7 which amends the Employment Rights Act 1996, the Social Security Contributions and Benefits Act 1992 and the Social Security Act 1989. The amendments in Schedule 7 grant intended parents the right to paid and unpaid time off work to accompany the surrogate to an antenatal appointment, enable the Secretary of State to make regulations under which the intended parents would have a right to begin statutory adoption leave up to 14 days before the expected date of birth of the child, and empower the Secretary of State to make regulations to grant one intended parent the right to receive a benefit equivalent to Maternity Allowance.

1.326 Schedule 7 also makes amendments to legislative provisions dealing with statutory paternity pay, statutory adoption pay and statutory shared parental pay, as well as those relating to unfair paternity leave provisions, unfair adoption leave provisions and unfair shared parental leave provisions. Schedule 7 amends these provisions to refer to intended parents under a surrogacy agreement and as such apply to both intended parents who will gain legal parental status on the new pathway, and those who are seeking a parental order to obtain legal parental status.

Succession

Clause 113: Application of succession rules where regulated surrogacy agreement (England and Wales)

1.327 Clause 113 amends section 55 of the Administration of Estates Act 1955 to ensure that where a child has a parent or parents by virtue of clause 4(1) and any such parent dies intestate before the child is born, the child will stand to inherit from that parent and not from the surrogate.

Clause 114: Application of succession rules in case of death of intended parent (Scotland)

1.328 Clause 114 amends the Succession Scotland Act 1964 to ensure that where a child has a parent or parents by virtue of clause 4(1) and any such parent dies before the child is born, the child will stand to inherit from that parent and not from the surrogate.

Citizenship

Clause 115: Children born pursuant to surrogacy agreement: parents for purposes of conferral of citizenship

- 1.329 Clause 115 makes provision with regard to the identity of a parent for the purpose of conferring citizenship, following our reforms to legal parenthood, by amending the British Nationality Act 1981.
- 1.330 The clause makes provision at subsection (4) to signpost within the interpretation section of the 1981 Act, at section 50(9) of that Act, the effect of clause 12 (interpretation of references to mother or father). This makes it clear that, where the child has a legal parent following a new pathway surrogacy agreement, the reference to the mother in the 1981 Act should be interpreted, for the purpose of the 1981 Act, as a reference to the intended parent (or one of the intended parents). The same effect is also achieved in respect of references to father in the 1981 Act by, again, signposting to clause 12, and also to clause 27 (which makes provision for the surrogate's spouse or civil partner not to be treated as a parent). These provisions allow the child to acquire citizenship from a parent via surrogacy, in the new pathway, in the same way that he or she could acquire citizenship from a natural parent.
- 1.331 The clause also makes provision (subsections (2) and (3)) to remove a child with a legal parent via surrogacy in the new pathway from the scope of certain sections of the 1981 Act. These sections of the 1981 Act apply in the case of a child who would otherwise not become British because their mother was not married, or was married to someone other than the child's biological father, at the time of the child's birth (subsections (2) and (3)), and they are not relevant in the case of a child who has a legal parent under the new pathway.

Overseas parental orders

- 1.332 It is an offence for a person to remove from the United Kingdom a child who is a Commonwealth citizen or is habitually resident in the United Kingdom for the purpose of seeking an adoption order overseas, in the absence of a court order conferring parental responsibility (in England and Wales) or parental rights and parental responsibilities and parental rights (in Scotland) upon the person concerned. (Adoption and Children Act 2002, sections 84 and 85; Adoption and Children (Scotland) Act 2007, sections 59 and 60). Under the present law, there is no equivalent restriction on removing a child from the United Kingdom for the purposes of seeking a parental order. Clauses 115 to 120 address this lacuna.

Clause 116: Giving parental responsibility prior to application for parental status abroad (England and Wales)

- 1.333 Clause 116 makes provision for the High Court to grant parental responsibility in respect of a child to the intended parent or parents where that parent (or those parents) is not domiciled or habitually resident in the United Kingdom, the Channel Isles or the Isle of Man but meets all of the other conditions in clause 16 (or, as the case may be, clause 18) and the court is satisfied that the intended parent or parents intend to apply for the equivalent of a parental order under clause 15, 17 or 19(1) under the law of a country or territory outside the British Islands (subsections (1) to (4)).

1.334 In deciding whether or not to make an order under this clause, the paramount consideration of the court must be the child's welfare, throughout the child's life (subsection (5)).

1.335 This clause and clause 117 extend to England and Wales only (see clause 127(3)).

Clause 117: Supplementary effects of an order under section 116

1.336 Clause 117 makes supplementary provision about the effects of an order under clause 116.

Clause 118: Giving parental responsibilities and parental rights prior to application for parental status abroad (Scotland)

1.337 Clause 118 makes provision for the court in Scotland to grant parental responsibilities and parental rights in respect of a child to the intended parent or parents where that parent (or those parents) is not domiciled or habitually resident in the United Kingdom, the Channel Isles or the Isle of Man but meets all of the other conditions in clause 16 (or, as the case may be, clause 18) and the court is satisfied that the intended parent or parents intend to apply for the equivalent of a parental order under clause 15, 17 or 19(1) under the law of a country or territory outside the British Islands (subsections (1) to (4)).

1.338 In deciding whether or not to make an order under this clause, the paramount consideration of the court must be the child's welfare, throughout the child's life (subsection (5)).

1.339 In this clause "the court" means the Court of Session or a sheriff of the sheriffdom within which the child is when the application under this clause is made (subsection (7)).

1.340 This clause and clause 119 extend to Scotland only (see clause 127(4)).

Clause 119: Supplementary effects of order under section 118

1.341 Clause 119 makes supplementary provision about the effects of an order under clause 118.

Clause 120: Restriction on taking children out of the United Kingdom

1.342 Clause 120 makes it an offence for a person to remove, or arrange to remove, a child from the United Kingdom for the purpose of applying for an overseas equivalent of an order under clause 15, 17, or 19 unless the "removal condition" is met (subsections (1), (3) and (4)).

1.343 The removal condition is met if the person who would be treated as the parent or parents of the child under the law of the country or territory concerned have parental responsibility or (as the case may be) parental responsibilities and rights in respect of the child concerned by virtue of clause 32 or 35 (intended parents under a surrogacy agreement who have cared for the child from birth) or by virtue of an order under clause 116 or 118 (subsection (2)(a)). It is also met where the person who would be treated as the parent or parents of the child under the law of the country of the territory concerned is already the legal parent by virtue of clause 4(1) (subsection (2)(b)).

1.344 A person is not guilty of an offence under this clause of causing a person to enter into an arrangement for facilitating the removal of a child from the United Kingdom or of causing a person to initiate or take part in negotiations of which the purpose is the conclusion of such an arrangement unless it is proved that the person knew, or had reason to suspect, that the step taken would contravene subsection (1) (see subsection (6)).

1.345 A person guilty of an offence under this clause is liable on summary conviction in England and Wales to imprisonment for a term not exceeding the maximum term for summary offences, or a fine, or to both; in Scotland, to imprisonment for a term not exceeding 3 months or a fine not exceeding level 5 on the standard scale, or to both (subsection (7)). (For the standard scale, see section 225(2) of the Criminal Procedure (Scotland) Act 1995).

1.346 Subsection (8) makes provision for the admissibility of a report by a British consular officer or a deposition made before such an officer.

Proceedings

Clause 121: Certain proceedings under this Act to be family proceedings (England and Wales)

1.347 Clause 121 amends section 8(4) of the Children Act 1989 to add proceedings under clause 10, Chapter 3 of Part 1 and clauses 45 and 116 to the list of enactments under which proceedings are family proceedings for the purposes of that Act.

Clause 122: Competence of summary sheriffs in relation to orders under this Act (Scotland)

1.348 Clause 122 amends schedule 1 to the Courts Reform (Scotland) Act 2014 to provide that proceedings for or in relation to an order under clause 10, Chapter 3 of Part 1, clause 45 and clause 118 are within the civil jurisdiction of a summary sheriff.

Consequential repeal

Clause 123: Repeal of the Surrogacy Arrangements Act 1985

1.349 Clause 123 repeals the Surrogacy Arrangements Act 1985.

General

Clause 124: Power to make consequential provision

1.350 Clause 124 gives the Secretary of State power by regulations to make provision consequential on the Bill. These regulations may amend, repeal or revoke any enactment passed or made before, or in the same session as, the Bill. To the extent that they amend or repeal primary legislation, they are subject to affirmative procedure (see clause 125(3)).

Clause 125: Regulations

1.351 Clause 125 provides that regulations under the Bill are to be made by statutory instrument and sets out the procedure applicable to regulations made under particular provisions.

Clause 126: Interpretation

1.352 Clause 126 defines a number of expressions used throughout the Bill.

Clause 127: Extent

1.353 Clause 127 makes provision as to extent.

Clause 128: Commencement

1.354 Clause 128 makes provision for commencement of the Bill provisions by regulations made by statutory instrument. Commencement regulations may include transitional or saving provision in connection with the coming into force of any provision of the Bill.

SCHEDULE 1: COURT ORDERS WHERE CHILD, INTENDED PARENT OR SURROGATE HAS DIED

1.355 Schedule 1 contains provision modifying the application of clauses 15, 17 and 21 in cases where a party to the surrogacy agreement has died, or where the child born following the agreement has died.

SCHEDULE 2: CONSEQUENTIAL AMENDMENTS RELATING TO PART 1

1.356 Schedule 2 contains consequential amendments relating to Part 1.

SCHEDULE 3: ENFORCEMENT PROVISIONS RELATING TO LICENSING REGIME IN CHAPTER 1 OF PART 4

1.357 Schedule 3 contains enforcement provisions relating to the licensing of regulated surrogacy organisations. These provisions are equivalent to those applying to licensing under the Human Fertilisation and Embryology Act 1990: see Schedule 3B to that Act.

SCHEDULE 4: CONSEQUENTIAL AMENDMENTS RELATING TO CHAPTER 1 OF PART 4

1.358 Schedule 4 contains amendments to the Human Fertilisation and Embryology Act 1990 consequential on Chapter 1 of Part 4 (licensing regime).

SCHEDULE 5: REGISTRATION OF BIRTH (ENGLAND AND WALES)

1.359 Schedule 5 contains amendments to the Births and Deaths Registration Act 1953 to make provision in relation to children who have a parent or parents by virtue of clause 4(1). Part 1 makes provision for our preferred option of registering the intended parent or parents as the parent or parents of the child from birth, in place of the surrogate. Part 2 makes provision for an alternative scheme under which the surrogate would be entered in the register of births as the mother of the child at birth, with provision then to be made for the intended parents to be registered as the parents thereafter (see paragraph 20). It is anticipated that if the government prefers this alternative birth registration option, more detailed provision about how the scheme would work could be included in the Bill.

SCHEDULE 5: REGISTRATION OF BIRTH (SCOTLAND)

1.360 Schedule 6 contains amendments to the Registration of Births, Deaths and Marriages (Scotland) Act 1965 to make provision in relation to children who have a parent or parents by virtue of clause 4(1). Part 1 makes provision for our preferred option of registering the intended parent or parents as the parent or parents of the child from birth, in place of the surrogate. Part 2 makes provision for an alternative scheme under which the surrogate would be entered in the register of births as the mother of the child at birth, with provision then to be made for the intended parents to be registered as the parents thereafter (see paragraph 12).

SCHEDULE 7: STATUTORY RIGHTS TO TIME OFF WORK, LEAVE, PAY AND ALLOWANCE

1.361 Schedule 7 contains amendments to employment legislation.

1.362 Paragraphs 1 to 7 amend the Employment Rights Act 1996 to grant intended parents the right to paid and unpaid time off work to accompany the surrogate to an antenatal appointment. Paragraphs 8 to 14 amend the Employment Rights Act 1996 to enable the Secretary of State to make regulations under which the intended parents would have a right to begin statutory adoption leave up to 14 days before the expected date of birth of the child.

1.363 Paragraph 15 amends the Social Security Contributions and Benefits Act 1992, empowering the Secretary of State to make regulations to grant one intended parent the right to receive a benefit equivalent to Maternity Allowance.

1.364 Paragraphs 16 to 19 of Schedule 7 amend the Social Security Contributions and Benefits Act 1992, such that references to intended parents in the provisions of that Act dealing with statutory paternity pay, statutory adoption pay and statutory shared parental pay, now refer to intended parents under a surrogacy agreement, rather than those applying for a parental order under section 54 of the Human Fertilisation and Embryology Act 2008. These amendments will mean that the provisions of the Social Security Contributions and Benefits Act 1992 apply to both intended parents who will gain legal parental status on the new pathway, and those who are seeking a parental order to obtain legal parental status.

1.365 Paragraphs 20 to 23 amend the provisions of the Social Security Act 1989 in the same way, such that references to intended parents in the provisions of that Act dealing with unfair paternity leave provisions, unfair adoption leave provisions and unfair shared parental leave provisions, now refer to intended parents under a surrogacy agreement.