

<b>Title:</b> Building families through surrogacy: a new law <b>IA No:</b> LAWCOM0081  <b>RPC Reference No:</b> <b>Lead department or agency:</b> Law Commission <b>Other departments or agencies:</b> Department of Health and Social Care	<b>Impact Assessment (IA)</b>
	<b>Date:</b> 28/03/2023
	<b>Stage:</b> Development/Options
	<b>Source of intervention:</b> Domestic
	<b>Type of measure:</b> Primary legislation
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<b>Summary: Intervention and Options</b>	<b>RPC Opinion:</b> RPC Opinion Status
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**Cost of Preferred (or more likely) Option (in 2022 prices)**

Total Net Present Social Value	Business Net Present Value	Net cost to business per year	Business Impact Target Status
£24.24M	£m	£m	Qualifying provision

**What is the problem under consideration? Why is government action or intervention necessary?**

The key aspects and principles of the current law governing surrogacy in the UK date from legislation passed over 30 years ago.<sup>1</sup> Although some changes have been made, the law on surrogacy is now overdue for re-examination in light of the societal and medical changes that have occurred during this intervening period. The current law poses five significant problems, which are outlined in this IA below.<sup>2</sup> Government intervention through primary legislation is required to resolve these issues and provide a clear legislative framework for surrogacy arrangements.

**What are the policy objectives of the action or intervention and the intended effects?**

An updated and reformed law regulating surrogacy which:

- protects the welfare of all participants to the arrangement: the surrogate, intended parents and, most importantly, the child;
- is fairer, more consistent and in line with changing societal attitudes; and
- supports and encourages people wishing to enter into surrogacy arrangements to do so in this country, rather than travelling abroad, reducing the likelihood of exploitation and ensuring that surrogacy arrangements are properly regulated.

**What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)**

Option 0: Do nothing.

Option 1: Major reform including the introduction of the new pathway and new regulatory framework, plus reform to the existing framework for surrogacy.

Option 2: All reform outlined in Option 1 above, apart from the introduction of the new pathway, new regulatory framework, and those reforms to nationality law dependent on introduction of the new pathway. It will entail reform of the existing parental order process, including the removal of legal parental status from the surrogate's spouse/civil partner and dispensing with the requirement for the surrogate's consent to a parental order if in the best interests of the child, and reform of the rules on costs.

Option 1 is our preferred option. We see the new pathway as a complete package of law reform. Making small changes to select parts of the existing laws will not enable us to comprehensively modernise surrogacy laws. We believe an entirely new scheme based on government's policy that surrogacy is a legitimate method of family formation is necessary to achieve the policy objectives that we outline above.

<b>Will the policy be reviewed?</b> It will/will not be reviewed. If applicable, set review date: Month/Year					
Does implementation go beyond minimum EU requirements?			Yes / No / N/A		
Is this measure likely to impact on international trade and investment?			Yes / No		
Are any of these organisations in scope?		Micro Yes/No	Small Yes/No	Medium Yes/No	Large Yes/No
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)			Traded:		Non-traded:

***I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.***

Signed by the responsible SELECT SIGNATORY: \_\_\_\_\_ Date: \_\_\_\_\_

<sup>1</sup> The key legislation is the Surrogacy Arrangements Act 1985, and the central features of the parental order process (contained in the Human Fertilisation and Embryology Act 2008) derive from the Human Fertilisation and Embryology Act 1990

<sup>2</sup> See page 9.

**Description: Major reform including the introduction of the new pathway and new regulatory framework, plus reform to the existing framework for surrogacy.**

**FULL ECONOMIC ASSESSMENT**

Price Base Year 2022	PV Base Year 2022	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low:£19.00	High:£29.06	Best Estimate: £24.24

COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	0.41		2.44	20.73
High	0.52	1	3.61	30.50
Best Estimate	0.46		3.01	25.42

**Description and scale of key monetised costs by ‘main affected groups’<sup>3</sup>**

Area 1: New pathway and new regulatory framework: Transitional costs – General set-up costs for Regulated Surrogacy Organisations [RSOs], £0.21m; HFEA associated set up costs as new surrogacy regulator £0.25m / On-going costs – Intended parent [IP] screening/safeguarding requirement £0.27m per year; Increased IP RSO membership cost £0.24m per year; HFEA running costs £0.78m per year, Additional costs to NHS / NHS Scotland £0.80m per year.

Area 4: Other substantive rights for those in surrogacy arrangements: Ongoing costs – Increased employer financial burden for ante-natal leave for IPs £0.09m per year; Increased employer financial burden for ante-natal leave for additional surrogate pregnancies £0.06m per year; Transfer cost to DWP of IP work benefit, £0.21m per year; Costs to the DWP for Maternity Allowance for surrogate in additional domestic surrogate pregnancies, £0.7m per year; Costs to HMT for Statutory Maternity Pay for surrogate in additional domestic surrogate pregnancies, £0.48m per year.

**Other key non-monetised costs by ‘main affected groups’**

Changes to the birth registration process: Transitional costs: Administrative costs associated with changed format; Training of Registrars on new process.

Ongoing costs: Potential increased administrative burden on GRO of new two stage process.

Area 1: The new pathway and new regulatory framework: Ongoing cost- CPS/Police investigative costs as criminal offences are introduced.

Area 2: Parental order process: Transitional costs – Judiciary familiarisation costs.

Area 3: Access to information for those born of surrogacy arrangements: Transitional cost – Creation of Surrogacy Register [SR] and supporting IT systems; Ongoing costs – SR running costs; Children’s competence/capacity assessment; Administrative burden surrounding birth certificate access.

Area 5: Our payments scheme: Transitional costs – set-up costs of new payment scheme; Administration of enforcement.

Area 6: Limited reforms in relation to international surrogacy: Transitional costs – Training for staff operating nationality law; Guidance required on international surrogacy arrangements.

BENEFITS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	0		4.44	39.73
High	0		6.65	59.56
Best Estimate	0		5.54	49.66

**Description and scale of key monetised benefits by ‘main affected groups’**

No transitional benefits identified.

Ongoing benefits Area 1: The new pathway and new regulatory framework: Annual saved costs [IPs] £1.17m per year; Reduced stress for all parties in parental order proceedings, £3.49m per year; Avoided wage loss [IPs] due to court attendance, £0.08m per year; Savings to Cafcass from fewer court cases £0.26m per year; Area 4: Other substantive rights for those in surrogacy arrangements: IP benefit from DWP claim, £0.21m Area 6: Limited reforms in relation to international surrogacy: Saved costs through reduced overseas stays, £0.44m per year; Saved costs in relation to reduced citizenship applications and on certificates of no impediment, £0.07m per year.

<sup>3</sup> All monetised costs and benefits references within the narrative are with respect to the central estimates.

**Other key non-monetised benefits by ‘main affected groups’**

Area 1: The new pathway and new regulatory framework: Greater protection for children and surrogates and improved standards for surrogacy arrangements; Greater clarity and certainty on what is permitted.

Area 2: Parental order process: Greater recognition of women’s autonomy; Greater consistency for the surrogate-born child’s life story; Reduced stress/anxiety for all parties; Enhanced focus on child’s welfare; Availability of post-mortem parental order and other death provisions.

Area 3: Access to information for those born of surrogacy arrangements: Surrogate-born children enhanced access to birth information; Creation of a surrogacy specific scheme provides for greater procedural and process knowledge.

Area 4: Other substantive rights for those in surrogacy arrangements: Enhanced parent-child bonding opportunity for IPs.

Area 5: Our payments scheme: Protection against commercial surrogacy; increased court efficiency; improved enforcement mechanism.

Area 6: Limited reforms in relation to international surrogacy: Enhanced prominence of the welfare of the child principle; More efficient passport management.

Key assumptions/sensitivities/risks

**Discount rate**

3.5

Factual assumptions

Our best estimate is that there will be 500 surrogacy arrangements entered into every year, based on pre-pandemic parental order figures, rounded up.<sup>4</sup> At present, we estimate that around 50% of current surrogacy arrangements are international arrangements, and the remaining 50% are domestic arrangements. If Option 1 is implemented, we assume that international arrangements will reduce, and that of the estimated 500 surrogacy arrangements, 70% [350] will be domestic cases on our new pathway, 10% [50] will be domestic cases which require a parental order to be sought, and 20% [100] will remain international cases.

Economic assumptions

In this impact assessment we assume that new government funding will be secured for the new regulatory process. If this funding were to come from within existing health budgets, then the opportunity cost of that funding would need to be included in the assessment of costs and benefits, addressed in a future IA.

**BUSINESS ASSESSMENT (Option 1)**

<b>Direct impact on business (Equivalent Annual) £m:</b>			<b>Score for Business Impact Target (qualifying provisions only) £m:</b>
<b>Costs:</b>	<b>Benefits:</b>	<b>Net:</b>	

<sup>4</sup> See Table 1 - Pre-pandemic, in 2019, 444 parental orders were made in England and Wales, whilst 8 were made in Scotland.



# Summary: Analysis & Evidence

# Policy Option 2

**Description:** The measures in option 1, except for the introduction of a new pathway to legal parenthood for certain surrogacy arrangements, a new regulatory framework, and those nationality reforms reliant on the new pathway. It will entail reform of the existing parental order process, including the removal of legal parental status from the surrogate's spouse/civil partner and dispensing with the requirement for the surrogate's consent to a parental order if in the best interests of the child, and reform of the rules on costs.

## FULL ECONOMIC ASSESSMENT

Price Base Year 2022	PV Base Year 2022	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: £2.56	High: £3.82	Best Estimate: £3.13

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	N/A	0.60	5.01
High	N/A	0.91	7.58
Best Estimate	N/A	0.76	6.31

### Description and scale of key monetised costs by 'main affected groups' <sup>5</sup>

Area 2: Parental order process: Ongoing costs – Additional costs to NHS / NHS Scotland £0.27m per year.  
Area 4: Other substantive rights for those in surrogacy arrangements: Ongoing costs – Increased employer financial burden for ante-natal leave for IPs £0.07m per year; Increased employer financial burden for ante-natal leave for additional surrogate pregnancies £0.02m per year; Transfer cost to DWP of IP work benefit, £0.21m per year; Costs to the DWP for Maternity Allowance for surrogate in additional domestic surrogate pregnancies, £0.02m per year; Costs to HMT for Statutory Maternity Pay for surrogate in additional domestic surrogate pregnancies, £0.16m per year.

### Other key non-monetised costs by 'main affected groups'

Area 2: Parental order process: Transitional costs – Judiciary familiarisation costs.  
Area 3: Access to information for those born of surrogacy arrangements: Transitional cost – Creation of Surrogacy register [SR] and supporting IT systems; Ongoing costs – SR running costs; Children's competence/capacity assessment; Administrative burden surrounding birth certificate access.  
Area 5: Our payments scheme: Transitional costs – Set-up costs of new payment scheme; Administration of enforcement.  
Area 6: Limited reforms in relation to international surrogacy: Transitional costs – Training for staff operating nationality law; Guide required on international surrogacy arrangements.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	0	1.08	7.57
High	0	1.62	11.40
Best Estimate	0	1.34	9.44

### Description and scale of key monetised benefits by 'main affected groups'

No transitional benefits identified.  
 Ongoing benefits:  
Area 2: Annual saved costs [IPs] £0.30m per year.  
Area 4: IP benefit from DWP claim, £0.21m per year.  
Area 6: Saved costs through reduced overseas stays, £0.83m per year; Saved costs in relation to reduced citizenship applications and on certificates of no impediment, £0.002m per year.

<sup>5</sup> All monetised costs and benefits references within the narrative are with respect to the central estimates.

**Other key non-monetised benefits by ‘main affected groups’**

Area 2: Greater recognition of women’s autonomy; Greater consistency for the surrogate-born child’s life story; Reduced stress/anxiety for surrogate and her partner; Enhanced focus on child’s welfare; Potential availability of parental order following stillbirth / death of the child and other death provisions.

Area 3: Surrogate-born children enhanced access to birth information; Creation of a surrogacy specific scheme provides for greater procedural and process knowledge.

Area 4: Enhanced parent-child bonding opportunity for IPs.

Area 5: Protection against commercial surrogacy; increased court efficiency; Improved enforcement mechanism.

Area 6: Enhanced prominence of the welfare of the child principle; More efficient passport management.

Key assumptions/sensitivities/risks

Discount rate (%)

3.5

Factual assumptions

Our best estimate is that there will be 500 surrogacy arrangements entered into every year, based on pre-pandemic parental order figures, rounded up.<sup>6</sup> At present, we estimate that around 50% of current surrogacy arrangements are international arrangements, and the remaining 50% are domestic arrangements. If Option 2 is implemented, we assume that international arrangements will reduce slightly, and that of the estimated 500 surrogacy arrangements, 60% [300] will be domestic and 40% [200] international.

Economic assumptions

We assume that we are reducing stress in this IA and use QALYs on this basis.

**BUSINESS ASSESSMENT (Option 2)**

<b>Direct impact on business (Equivalent Annual) £m:</b>			<b>Score for Business Impact Target (qualifying provisions only) £m:</b>
<b>Costs:</b>	<b>Benefits:</b>	<b>Net:</b>	

<sup>6</sup> See Table 1.

# Evidence Base

Surrogacy is where a woman – the surrogate – bears a child on behalf of someone else or a couple, who intend to become the child’s parents. As society changes, surrogacy is becoming more common. According to statistics from the Ministry of Justice, 436 parental orders (the only existing measure for the number of surrogacy arrangements taking place in the UK) were made in England and Wales in 2021.<sup>7</sup> However, the actual number of surrogacy arrangements is likely to be higher than this figure, because a number of intended parents do not know that they ought to apply for a parental order and in addition, it is not technically a mandatory requirement under the current law. The number of children born this way is almost four times higher than it was a decade ago – albeit as a proportion of the total number of births in the UK, the number of surrogate births is still very small.

## Background and current legislative framework

The Law Commissions’ joint review of the law of surrogacy came out of the Law Commission of England and Wales’ 13<sup>th</sup> Programme of Law Reform. In that open public consultation, surrogacy received the most support of those projects which form part of the Programme, with over 340 responses (from individuals and groups) saying the law was not fit for purpose. Consultees responding to consultation on the 10<sup>th</sup> Programme of the Scottish Law Commission also supported the view that surrogacy was an area in need of reform.

Discussions about the legal regulation of surrogacy first commenced alongside the development of IVF in the late 1970s. IVF allowed gestational surrogacy arrangements (where the surrogate’s own egg is not used) for the first time. The first reported successful birth through a gestational surrogacy arrangement followed in 1985.<sup>8</sup> Perhaps the most famous surrogacy case in the UK also occurred in 1985, when the Baby Cotton case hit the headlines. This case involved a surrogate, Kim Cotton, who was paid £6,500 to carry a child for an anonymous couple from the USA. This arrangement attracted enormous publicity, and provoked great controversy at the time.<sup>9</sup>

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

Conclusions of the 1984 Warnock Report – which concluded that all surrogacy arrangements (whether altruistic or commercial) were “liable to moral objection”<sup>10</sup> – influenced the contents of the current law governing surrogacy in the UK: the Surrogacy Arrangements Act 1985 (the “SAA 1985”) and certain provisions of the Human Fertilisation and Embryology Acts 1990 and 2008 (the “1990 Act” and the “2008 Act”).

Although the 2008 Act made certain important updates to the law on surrogacy,<sup>11</sup> the central features of the parental order process that are now contained in sections 54 and 54A of the 2008 Act continue to derive from section 30 of the much earlier 1990 Act. The key features and principles of the current law on surrogacy therefore date from legislation passed over 30 years ago. The law on surrogacy is now

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<sup>7</sup> Ministry of Justice, *Family Court Statistics Quarterly - Family Court Tables January to March 2022* (June 2022) Table 4: Number of orders and children involved in Public and Private law (Children Act) applications made in the Family courts in England and Wales, by type of order, annually 2011 - 2021 and quarterly Q1 2021 - Q1 2022. Accessible at <https://www.gov.uk/government/statistics/family-court-statistics-quarterly-january-to-march-2022> (last visited 23 March 2023). Of these 436 applications, 435 resulted in parental orders being made.

<sup>8</sup> S F Seavello, “Are you my Mother? A Judge’s Decision in In Vitro Fertilization Surrogacy” (1992) 3(2) *Hastings Women’s Law Journal* 211, 220.

<sup>9</sup> See, for example, discussion in N Gamble, “Children of our time” [2008] *Family Law Journal* 11

<sup>10</sup> Report of the Committee of Inquiry into Human Fertilisation and Embryology (1984) Cmnd 9314 para 8.17.

<sup>11</sup> Such as, for example, allowing couples not in a marriage or civil partnership to apply for a parental order: HFEA 2008, s 54(2)(c).

overdue for re-examination in light of the societal and medical changes that have occurred during this intervening period.

## Terminology

The nature of this reform means that it is sometimes unavoidable that technical terms be used. Many of these terms have precise legal meanings and are well understood by those involved in surrogacy arrangements, academics working in the field, the courts and legal professionals. To avoid loss of precision, some of these technical terms are used in this Impact Assessment and, in order to assist the reader, the key terminology is summarised in the Glossary at Appendix 1.

### *Abbreviations of legislation*

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

Full name of legislation	Abbreviation
The Human Fertilisation and Embryology Act 1990 / 2008	The HFEA 1990 / The HFEA 2008
The Surrogacy Arrangements Act 1985	The SAA 1985
The Adoption and Children Act 2002 / The Adoption and Children (Scotland) Act 2007	The ACA 2002 / AC(S)A 2007
The Human Fertilisation and Embryology (Parental Order) Regulations 2018 <sup>12</sup>	The 2018 Regulations

## Terms of Reference

The project is governed by Terms of Reference agreed between the Department of Health and Social Care and the Law Commissions. These are as follows:

The law, regulation and practice of surrogacy, including:

- (1) the Surrogacy Arrangements Act 1985
- (2) relevant sections of the Human Fertilisation and Embryology Acts 1990 and 2008
- (3) family and regulatory law and practice insofar as it is relevant to surrogacy
- (4) domestic and international surrogacy arrangements
- (5) information about a child's genetic and gestational origins within the surrogacy context
- (6) consequential impact on other areas of the law.

The project therefore considers the legal parentage of children born via surrogacy, the regulation of surrogacy more widely, and the international context of surrogacy. It takes account of the rights of all

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<sup>12</sup> The Human Fertilisation and Embryology (Parental Order) Regulations 2018 (SI 2018 No 1412).



involved, including the question of a child's right to access information about their origin and the prevention of exploitation of children and adults.

It was not within our terms of reference to consult on whether or not surrogacy should be permitted or prohibited. Our starting point was Government's support of surrogacy as part of the range of assisted conception options.<sup>13</sup> Our terms of reference were to explore and make recommendations on ways in which to improve the law, regulation and practice of surrogacy, rather than to debate the morality of surrogacy as a practice, which is ultimately a matter of social policy for Government and Parliament as elected representatives.

## Problems under consideration

We consider there to be five main problems with the current law.

### Intended parents not legal parents on birth

The law on the attribution of legal parenthood is complex. Irrespective of the parties' pre-conception and post-birth intentions, the surrogate is automatically the child's legal mother at birth,<sup>14</sup> and will be listed as such on the child's birth certificate. If the surrogate is married or in a civil partnership, and her spouse/civil partner consented to her fertility treatment, that person will be the child's father or second female parent at birth,<sup>15</sup> and can be listed as such on the birth certificate. If the surrogate is unmarried, one of the intended parents may be the other legal parent and appear on the birth certificate, but this is not invariably the case. The law on legal parenthood is problematic for four reasons.

First, the rules on parenthood do not represent the intention of the parties involved in a surrogacy arrangement, in the majority of cases. The surrogate will be the child's legal mother,<sup>16</sup> with all its associated responsibilities and legal consequences, until such time as a parental order is made, often six months to a year after the child's birth, in circumstances where she does not want to be. As legal parental status rests with the surrogate, the intended parents can "walk away" if they do not want to care for the child; for example, following a relationship breakdown/change of circumstances, or because the child has severe health issues or low life expectancy, leaving the surrogate with responsibility for the child.

Second, intended parents have to wait until the child has been born and then apply to court to become the child's parents. The process often takes six months to a year to complete.<sup>17</sup> Moreover, if the surrogate and/or her spouse or civil partner refuse to agree to the making of the parental order, it cannot be granted. In such circumstances, the intended parents cannot become the legal parents, although the child may still live with them under a child arrangements or equivalent order, in which case the intended parents will have parental responsibility/ PRRs.<sup>18</sup> The process also affects the intended parents' ability to take decisions about the child in their care because intended parents may not, strictly, have any legal

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<sup>13</sup> DHSC, *The surrogacy pathway: surrogacy and the legal process for intended parents and surrogates in England and Wales* (February 2018).

<sup>14</sup> HFEA 2008, s 33.

<sup>15</sup> HFEA 2008, s 35, s 42.

<sup>16</sup> HFEA 2008, s 33.

<sup>17</sup> As noted in the Consultation Paper para 3.79, an application for a parental order typically takes at least six months to be decided by the court.

<sup>18</sup> This is what happened in *Re AB (Surrogacy Consent)* [2016] EWHC 2643 (Fam), where the children born via surrogacy were left in 'legal limbo.'

authority to make important decisions in relation to the child without the surrogate's express permission (if they do not have parental responsibility/PRRs).<sup>19</sup>

Third, the fact the intended parents cannot be the child's legal parents at birth incentivises some parties to enter surrogacy arrangements overseas, which raises ethical concerns (see below). Intended parents are incentivised to travel abroad to destinations where they will be recognised as legal parents on birth, sometimes not understanding that while they may be recognised as the legal parents at birth in that jurisdiction, they will not be recognised as such on their return to the UK.

Fourth, the court process provides limited protection for surrogates and surrogate-born children against exploitation. This is because the court process (the parental order) often takes six months to a year after the birth of the child to conclude, by which time the surrogacy arrangement will have already taken place, so there is no possibility of pre-conception safeguarding. Moreover, the court must make the parental order where it is in the best interests of the child to do so. It is almost invariably the case that it will be in the best interests of the child to formalise the current arrangements where the child is living with the intended parents, as a family. In effect, the court is presented with a "*fait accompli*" which it must endorse to respect the best interests of the child.

### Insufficient regulation

The SAA 1985 is a very short Act that does not provide a regulatory scheme for surrogacy in the UK. It merely makes surrogacy arrangements unenforceable and makes the commercial negotiation, and advertising, of surrogacy arrangements unlawful, as well as creating offences to enforce these prohibitions. Non-profit bodies are exempt from certain prohibitions and intended parents and surrogates themselves are not guilty of an offence for organising a surrogacy arrangement, or for making payments. With this insufficient regulation, it is difficult to monitor the surrogacy process and those involved in it, to ensure that standards throughout the process are maintained to a high standard. There is no body that acts as a surrogacy regulator, in contrast to other forms of conception such as IVF, which are licensed by the Human Fertilisation and Embryology Authority ("HFEA").

Moreover, under the current law, the welfare of those involved in a surrogacy arrangement is not suitably protected because there is no consideration of the child's welfare pre-conception. There is no law governing health and welfare checks that need to be carried out before conception can take place (for the purposes of a surrogacy arrangement). In some cases, this has led to child welfare issues.<sup>20</sup> Regulation currently takes the form of eligibility requirements for a parental order,<sup>21</sup> including time limits for bringing the application, the requirement that the child lives with the applicant(s), requirements relating to the age of applicants, and the requirement that only expenses reasonably incurred can be paid to the surrogate. However, there is no reference anywhere in surrogacy laws to safeguarding measures such as health screening for surrogates/intended parents, implications counselling, independent legal advice, or welfare of the child assessments *prior* to conception. This means that – particularly if a fertility clinic is not involved in the arrangement – the first time the arrangement is subject to any sort of regulation may be many months after the child is born, at the parental order hearing, where, as stated above, the best interests of the child will invariably require the parental order to be made where the statutory conditions for the order are met. In this sense, the courts are effectively faced

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<sup>19</sup> Other than that conferred on non-parents caring for a child by section 3(5) of the Children Act 1989 or by s5 of the Children (Scotland) Act 1995.

<sup>20</sup> For example, see *Re A* [2014] EWFC 55, [2014] 6 WLUK 424; *Re H (Domestic Surrogacy Arrangement)* [2016] EWFC 80, [2016] 12 WLUK 746. In *Re A* [2014], a care order was made for a one-year-old girl because she was deemed not safe from harm while with her intended father and his partner, the latter of whom had a significant history of alcoholism and mental health problems, and had three children previously made the subject of care orders. *Re H (Domestic Surrogacy Arrangement)* [2016] was a case of surrogacy breakdown where the surrogate, in her objections to the arrangement, cited information about the intended parents' mental health and immigration status which might have been disclosed through the new pathway process, although these concerns had been allayed by independent professionals. While the child did not come to actual harm, the court-appointed guardian expressed concerns that her needs might not be met if she remained with the surrogate, so a child arrangements order was made in favour of the intended parents.

<sup>21</sup> HFEA 2008, s54 and s54A.

with a “*fait accompli*”. Arguably, the courts have often read down the statutory requirements for a parental order to produce a result in the best interests of the child in individual cases.<sup>22</sup>

## Access to information for people born via surrogacy

Currently there are three methods to access information about one’s origins: through the birth certificate, through access to court records, or by requesting information from the HFEA Register for donor-conceived people under the information provisions in the HFEA 1990. None of these methods were originally designed for use by people born as a result of a surrogacy arrangement. As a result, there are gaps in the framework for surrogate-born people, and no clear route specifically for this group to access information.<sup>23</sup> There are also inconsistencies in relation to access to information between adopted/donor-conceived people and people born via surrogacy. This is problematic because a child’s right to know of their genetic and gestational origins is protected under the UNCRC and domestic law.<sup>24</sup>

## Payments

The issue of payments is currently addressed in the context of the court making a parental order or not. For a court to make a parental order, it must be satisfied that “no money or other benefit (other than for expenses reasonably incurred)” has been paid by the intended parents to the surrogate. This condition is given in sections 54 and 54A of the HFEA 2008.<sup>25</sup> This is an attempt to ensure that surrogacy is only permitted on an altruistic basis;<sup>26</sup> the nature of payments the law permits is seen as one key determinant of whether surrogacy operates on an altruistic or commercial model. The current way in which the issue of payments is addressed is problematic for two main reasons.

First, a lack of certainty as to what payments are permitted as “expenses reasonably incurred” has caused concerns related to transparency as to what payments are being made for. If we do not know what payments are properly included as “expenses reasonably incurred”, then we are unable to say whether payments that are being made are in fact permitted under the law.

There are concerns that the uncertainty arising from the format of the current law can be exploited so that payments other than expenses (i.e. for gestational services) are paid to surrogates. The ability to pay a surrogate for her gestational services inherently increases the risk of exploitation. The UK has high, and rising, levels of income inequality, and particularly given the current high cost of living, there are women for whom the availability of payment for gestational services could become the key factor in a decision to become a surrogate. The availability of such payments also increases the risk of women being coerced into surrogacy by others.

Second, there are difficulties in enforcing limitations on payments to surrogates when the issue arises before the court only after the baby has been born and a parental order is sought. The best interests of the child nearly always require the parental order to be made. As far as we are aware, there is no reported case in which a court has refused a parental order as a result of payments that have been made. There is therefore no consequence for those intended parents who flout the current limits on payments.

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<sup>22</sup> See K Trimmings, “Six month deadline for applications for parental orders relaxed by the High Court” (2015) 37 *Journal of Social Welfare and Family Law* 241, 243. See also A Alghrani and D Griffiths, “The regulation of surrogacy in the United Kingdom: the case for reform” [2017] 29 *Child and Family Law Quarterly* 165, 177 and Kenneth McK Norrie, “English and Scottish adoption orders and British parental orders after surrogacy: welfare, competence and judicial legislation” [2017] 29 *Child and Family Law Quarterly* 93.

<sup>23</sup> A recent case in the European Court of Human Rights (‘ECHR’) demonstrates how access to information for surrogate-born children is difficult: the ECHR dismissed the case of a six-year-old girl born from a surrogacy arrangement who sought to have her biological father named on her birth certificate, see *H v UK* (2022) 32185/20.

<sup>24</sup> UNCRC, Articles 7 and 8, and *Rose v Secretary of State for Health* [2002] EWHC (Admin), [2002] 7 WLUK 733, following precedent from the European Court of Human Rights in *Gaskin v United Kingdom* [1990] 12 EHRR 36 (App No 10454/83).

<sup>25</sup> HFEA 2008, ss 54(8) and 54A(7). See para 14.7 of the Consultation Paper for more information.

<sup>26</sup> Surrogacy Arrangements Act 1985, s2(2C).

## International surrogacy arrangements

International surrogacy arrangements can create a number of problems. They may result in exploitation of the surrogate and commodification of children, increase the complexity and cost of obtaining legal parental status as it requires a hearing in the High Court, and lead to nationality and immigration issues for the child. Currently, many intended parents go abroad for surrogacy arrangements to other jurisdictions such as California or Georgia, where they can become legal parents on birth under the law of those jurisdictions. In all the most popular jurisdictions for international surrogacy arrangements, this will be the case. It appears to be the case that international surrogacy arrangements may now account for up to half of parental order applications.<sup>27</sup> It should be noted, however, that for the intended parents to be recognised as the legal parents in the UK, a parental order application is needed when the child is brought home. Further, as parental order applications in international surrogacy arrangements are heard in the High Court, intended parents may find the application more complex and daunting to deal with themselves, compared to parental order applications before the lay justices (who currently deal with domestic arrangements).<sup>28</sup>

Intended parents also go overseas for surrogacy arrangements because it is considered easier to find a surrogate overseas and because they offer greater legal certainty to intended parents on central issues such as recognition as the legal parents of the child (in the country of birth). There is a far higher number of intended parents than surrogates in the UK and therefore, there are long waiting times for intended parents to match with a surrogate. In other jurisdictions, where commercial surrogacy is available, there are greater numbers of surrogates as a result of the financial benefits available. These views are supported by a study, which found that of those participants who chose the USA for their surrogacy arrangement, nearly all cited a “better legal framework” as the reason for their choice, while around two-thirds mentioned “easier to find a surrogate”, “better success rate at clinics” and “wanted agency to manage the surrogacy process.”<sup>29</sup>

Overseas surrogacy arrangements are problematic because they are almost all commercial in nature, so more likely than domestic arrangements to give rise to concerns of exploitation and the commodification of women and children. They are more expensive than domestic arrangements given their commercial nature: for example, during consultation we posed a question asking intended parents what they spent, in total, on the surrogacy arrangements which led to the birth of their child(ren), including the cost of fertility treatment, payments to the surrogate and payments to any surrogacy agency or organisation.<sup>30</sup> Nine consultees responded, giving costs between £38,000<sup>31</sup> and £167,000; the average<sup>32</sup> reported cost of entering an international surrogacy arrangement was £92,500. This means that international surrogacy arrangements are out of reach for many intended parents.

Furthermore, being recognised as the legal parents on birth in a foreign jurisdiction but not in the UK, can lead to problems regarding nationality of the child and immigration issues. The rules governing nationality for children born from international surrogacy arrangements are undoubtedly complex and can appear anomalous. Whether the child is a British citizen from birth is dependent, in particular, on the

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<sup>27</sup> Information provided by CAF/CASS dated 13 October 2022 in response to a Freedom of Information request, available in Appendix 2. See also the information provided by CAF/CASS dated 7 October 2015 in response to a Freedom of Information Request, accessible at: <https://www.cafcass.gov.uk/about-cafcass/transparency-information/freedom-of-information/2015-disclosure-log/> (under the title: “Number of parental order applications and information relating to international surrogacy arrangements and gender of applicants”) and V Jadvá, H Prosser and N Gamble, “Cross-border and domestic surrogacy in the UK context: an exploration of practical and legal decision-making” (2018) *Human Fertility*, 1464, 1466.

<sup>28</sup> That said, it appears many intended parents do represent themselves in parental order applications made before a High Court judge, sometimes, but not always, with legal advice in the background. The High Court gave guidance in light of the fact that many foreign surrogacy cases involve unrepresented applicants in *Re WT (Foreign Surrogacy)* [2014] EWHC 1303 (Fam), [2014] 3 WLUK 60. See for an example *Re D (Children) (Surrogacy: Parental Order)* [2012] EWHC 2631 (Fam), [2013] 1 WLR 3135

<sup>29</sup> 31% of those participants who stayed in the UK also mentioned “better legal framework”. See: V Jadvá, H Prosser and N Gamble, “Cross-border and domestic surrogacy in the UK context: an exploration of practical and legal decision-making” (2018) *Human Fertility*, 1464, Table 4.

<sup>30</sup> Consultation Question 116(2).

<sup>31</sup> The consultee stated that they had paid US\$50,000 in respect of a 2016 surrogacy arrangement; this is equivalent to £38,000 at the average exchange rate for 2016.

<sup>32</sup> Where we refer to an average figure in this impact assessment, the reference is to the mean figure.

marital status of the surrogate, and on whether the intended father is also the genetic parent of the child. There may be difficulties with establishing the surrogate's marital status and the law may incentivise either lying about a surrogate's status, or intended parents only working with unmarried surrogates who may not have a family network to support them.

However, we think that the greater part of the difficulties encountered by intended parents who have a child through an international surrogacy arrangement are caused by delay, uncertainty regarding documentation, and lack of clarity. There are concerns about intended parents as new parents in some cases being unable to travel back to the UK with the child for several months, without easy access to medical advice or to their personal support networks.<sup>33</sup> There are also practical difficulties as the intended parents will not have – in the UK – parental responsibility for the child, with that remaining with the surrogate who is in a foreign jurisdiction. This situation is not helped by the fact that official guidance on international surrogacy is spread across a number of different sources; it is, in some places, out of date; and that each piece of guidance (understandably) reflects the different responsibilities of the department or agency that produced it.

## Objectives

The project has three main objectives.

1. The first is to make surrogacy laws that work to protect the welfare of all the participants to the arrangement, including the surrogate, the parents and, most importantly, the child. The lifelong welfare of the child is to remain the paramount consideration throughout our recommendations.
2. The second is to provide a comprehensive and coherent legal and regulatory framework for surrogacy.
3. The third aim is to encourage people to stay in this country rather than go abroad for surrogacy arrangements, in order to reduce the likelihood of exploitation and to ensure that surrogacy arrangements can be properly regulated.

## Rationale for intervention

The conventional economic approach to Government intervention in order to resolve a problem is based on efficiency or equity arguments. The Government may consider intervening if there are strong enough failures in the way markets operate or in existing interventions. In both cases the proposed intervention should avoid creating a further set of disproportionate costs and distortions. The Government may also intervene for reasons of equity.

Current surrogacy arrangements are constrained by the incomplete availability of information at several levels that prevent an optimal outcome. There is uncertainty on what constitutes permitted payments for surrogate services and the law on legal parenthood is complex. Further, for those who are surrogate-born, they are unable to access information on their origins as there is no clear route to do so.

The above information constraints have contributed to the adverse effects which are subsequently imposed on children born from surrogacy arrangements. They are impacted by living arrangements that might not reflect the desires of the intended parents and risk the lack of stability as the court process decides on legal parenthood. The process can take six months to a year to conclude and extracts a significant emotional and financial cost.

Many intended parents go overseas for surrogacy arrangements so they can become legal parents at birth. There are potential surrogates for whom the availability of payment is a decisive factor and therefore, there are often higher numbers of surrogates abroad.

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<sup>33</sup> *Re X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), 2008 WL 5326758.

# Scale and scope

## Number of surrogacy arrangements under the current law

Numbers of surrogacy arrangements are small: according to statistics from the Ministry of Justice, only 436 parental orders (the only existing measure for the number of surrogacy arrangements taking place in the UK) were made in England and Wales in 2021,<sup>34</sup> all but one of which (435) were granted. In Scotland, the most recent figures available are from 2021, when 15 parental orders were made. However, due to the Covid-19 pandemic, the 2021 figure includes the last 4-5 months of 2020 and all of 2021, whilst the 2020 figure includes only the first 7-8 months of 2020. Pre-pandemic, in 2019, 444 parental orders were made in England and Wales,<sup>35</sup> whilst 8 were made in Scotland.<sup>36</sup>

The number of parental orders granted, however, does not reflect the true number of surrogate-born children each year. That is because, while the intended parents need a parental order to become the legal parents of the child, in practice not every intended parent will apply for an order.<sup>37</sup> Whilst the exact numbers of surrogate births per year is, therefore, uncertain, they certainly represent a tiny fraction of the total number of live births in the UK each year.<sup>38</sup> Yet the number of surrogate births has grown over the last decade,<sup>39</sup> and the impact that the law has on all those affected is significant.

It seems that the parental order process was not adversely affected by the Covid-19 pandemic, as the number of parental orders granted remained relatively consistent.<sup>40</sup> This is most likely due to that fact that parental order hearings were conducted online during this period and the small number of cases meant that there was less of a backlog than in other areas of family law. However, the number of surrogacy arrangements entered into during the pandemic may have reduced. Domestic lockdowns and limits on households mixing may have impacted on surrogacy teams being formed and some potential surrogates may have reassessed the risks involved in a surrogate pregnancy. International travel restrictions may have prevented intended parents accessing surrogacy overseas. It is possible, given the time gap between the birth of the child and the parental order hearing, that any reduction in surrogacy arrangements during the pandemic will not yet have been reflected in a reduction in the number of parental order applications.

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<sup>34</sup> *Family Court Statistics Quarterly - Family Court Tables January to March 2022* (June 2022) Table 4: Number of orders and children involved in Public and Private law (Children Act) applications made in the Family courts in England and Wales, by type of order, annually 2011 - 2021 and quarterly Q1 2021 - Q1 2022. Accessible at <https://www.gov.uk/government/statistics/family-court-statistics-quarterly-january-to-march-2022> (last visited 23 March 2023).

<sup>35</sup> *Family Court Statistics Quarterly - Family Court Tables January to March 2022* (June 2022) Table 4: Number of orders and children involved in Public and Private law (Children Act) applications made in the Family courts in England and Wales, by type of order, annually 2011 - 2021 and quarterly Q1 2021 - Q1 2022. Accessible at <https://www.gov.uk/government/statistics/family-court-statistics-quarterly-january-to-march-2022> (last visited 23 March 2023).

<sup>36</sup> *NRS' Vital Events Statistics 1999-2020*, Table 2.03: Adoptions by type of adoption and by type of adopter(s). Accessible at <https://www.nrscotland.gov.uk/statistics-and-data/statistics/statistics-by-theme/vital-events/general-publications/vital-events-reference-tables> (last visited 23 March 2023).

<sup>37</sup> We understand that intended parents may not apply for a parental order in respect of their child for a variety of reasons including lack of awareness, cost and an inability to fulfil the current eligibility requirements, particularly in international arrangements.

<sup>38</sup> There were 624,828 live births in England and Wales and 47,786 in Scotland in 2021. ONS, *Births in England and Wales: 2021* (9 August 2022). Accessible at <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/livebirths/bulletins/birthsummarytablesenglandandwales/2021> (last visited 20 March 2023); National Records of Scotland, *Vital Events Reference Tables: Table 3.01(b): Live births, numbers and percentages, by age of mother and marital status of parents, Scotland, 2000 to 2021*. Accessible at <https://www.nrscotland.gov.uk/statistics-and-data/statistics/statistics-by-theme/vital-events/general-publications/vital-events-reference-tables/2021/list-of-data-tables#section3> (last visited 20 March 2023).

<sup>39</sup> Data published by the Ministry of Justice in June 2022 tells us how many POs have been granted to applicants in the family courts of England and Wales from 2011 until the end of the first quarter of 2021. The data show a gradual increase in the number of POs being granted, from 117 POs in 2011, to 413 in 2020, with a peak of 444 in 2019.

<sup>40</sup> In 2020, 421 parental orders were made. Ministry of Justice, *Family Court Statistics Quarterly - Family Court Tables January to March 2022* (June 2022) Table 4: Number of orders and children involved in Public and Private law (Children Act) applications made in the Family courts in England and Wales, by type of order, annually 2011 - 2021 and quarterly Q1 2021 - Q1 2022. Accessible at <https://www.gov.uk/government/statistics/family-court-statistics-quarterly-january-to-march-2022> (last visited 23 March 2023).

## Number of children born through surrogacy

It is not possible to be certain of the exact number of children born through surrogacy arrangements every year. We have estimated this by reference to the number of applications for a parental order made to the court every year. A parental order, as detailed below, is the mechanism by which under the current law, legal parenthood is transferred from the surrogate to the intended parents.

Figure 1 below shows the total number of parental orders granted in England and Wales, and Scotland, over the period 2011-2021, based on information from the Ministry of Justice and National Records of Scotland. Table 1 shows the number of parental orders granted in each jurisdiction over that period.

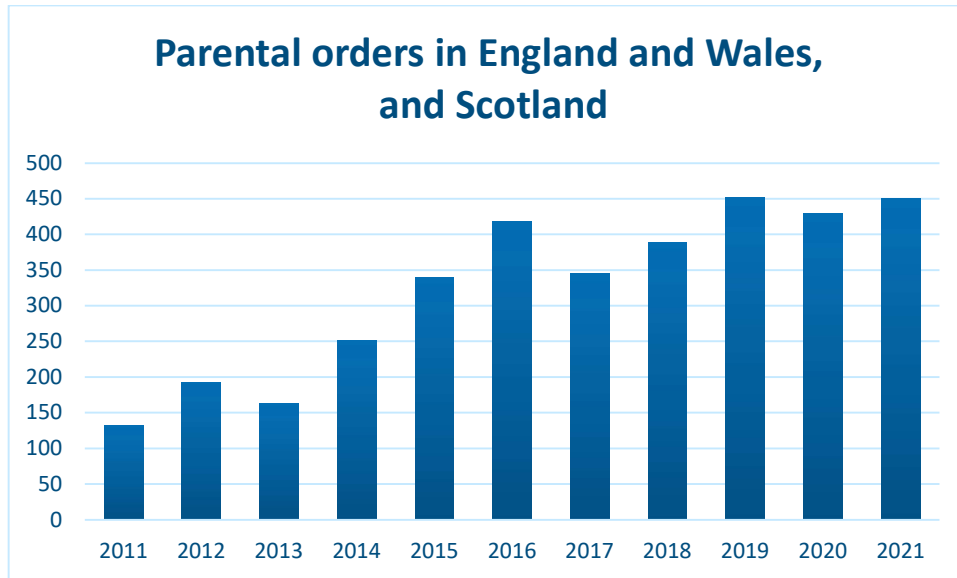


Figure 1: Number of parental orders granted in England and Wales, and Scotland, 2011-2021

Table 1: Number of parental orders granted in England and Wales, and Scotland, by jurisdiction, 2011-2021

Year	England and Wales	Scotland	Total
2011	117	15	132
2012	184	9	193
2013	158	5	163
2014	242	9	251
2015	331	9	340
2016	400	18	418
2017	332	13	345
2018	374	15	389
2019	444	8	452
2020	421	9	430
2021	435	15	450

Surrogacy is used predominantly by same-sex male couples and opposite-sex couples, but this conclusion is drawn in the majority from data that could only include couples, given it only became possible for a single person to obtain a parental order in 2018.<sup>41</sup>

In the Consultation Paper, we asked consultees who were intended parents, lived in the UK, and had entered into a surrogacy arrangement that led to the birth of a child, to tell us whether they were an opposite-sex couple, male same-sex couple, female same-sex couple, single woman or single man.<sup>42</sup> Of the 25 arrangements which were mentioned in response to this question, 16 involved an opposite-sex couple and nine involved a male couple. None involved a single intended parent or a female couple. It is possible that opposite-sex couples are overrepresented in the sample of consultees who responded to this consultation question.

We understand from My Surrogacy Journey (a surrogacy organisation) that, as of July 2022, 47% of their intended parent couples were LGBTQ+. Less recently, Surrogacy UK told us that, as of July 2018, of the 409 intended parent couples who had joined since 2009, 20% were same-sex male couples with opposite-sex couples making up the remaining 80%. Most organisations reported a significant increase in the proportion of male same-sex couples over the last few years, which was also the experience of Cafcass.<sup>43</sup> Also at the time of the Consultation Paper, COTS told us that 50% of their intended parents were same-sex couples, while Brilliant Beginnings reported the same proportion.

Data from Cafcass shows that there has been a significant increase in the proportion of parental order applications where the surrogacy arrangement was an international one. It appears to be the case that international surrogacy arrangements consistently now account for over half of parental order applications.<sup>44</sup>

Of the 25 arrangements mentioned in response to our consultation, 13 were domestic, 10 were international, and two consultees did not answer the question. Out of those 10 international arrangements, the destinations mentioned were the US, Georgia, Ukraine and Mexico.

### **Procedure for obtaining a parental order**

In a surrogacy arrangement currently, at the time of birth often neither, or at most one, of the intended parents will be the legal parents of a child born following a surrogacy arrangement. Since 1994, there has existed a legal mechanism to transfer legal parental status to the intended parents and to extinguish the surrogate's legal parental status. This is called a parental order. Currently, the law governing parental orders is set out in sections 54 and 54A of the Human Fertilisation and Embryology Act 2008. As well as transferring legal parental status, a parental order also provides the intended parents with parental responsibility (in England and Wales) or parental responsibilities and parental rights (in Scotland). These are all the duties and rights that a parent has in relation to a child, relating to, for example, making decisions about the child's living arrangements, medical care and education. Parental responsibility is not synonymous with being a legal parent; some legal parents will not have parental responsibility, and conversely, some people who are not a child's legal parents will have parental responsibility for the child.

A parental order cannot be applied for until after the child has been born. The court also cannot make a parental order less than six weeks after the child's birth. That is because the parental order requires the consent of the surrogate (and her spouse or civil partner, where she has one), and the law says that her consent can only validly be given once that period of time has passed. In practice, intended parents

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<sup>41</sup> Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018.

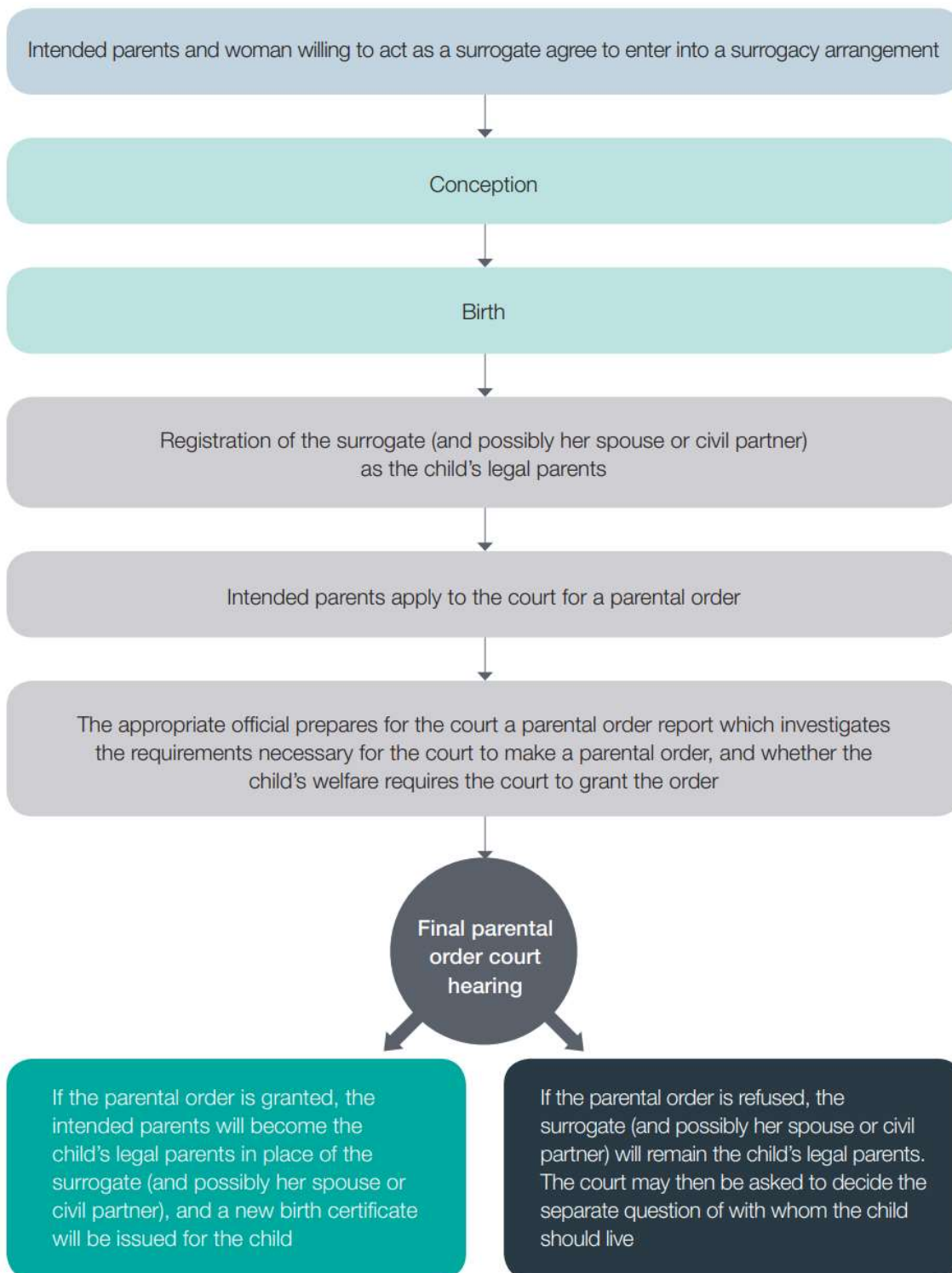
<sup>42</sup> Consultation Question 109.

<sup>43</sup> As of the end of April 2019, an additional 77 intended parent applicants had joined Surrogacy UK, of which 33 were opposite-sex couples, 30 were same-sex male couples and 3 were single intended parents.

<sup>44</sup> Information provided by CAF/CASS dated 13 October 2022 in response to a Freedom of Information request, available in Appendix 2; and V Jadvá, H Prosser and N Gamble, *Cross-border and domestic surrogacy in the UK context: an exploration of practical and legal decision-making* (2018), *Human Fertility*, 1464 at 1466.

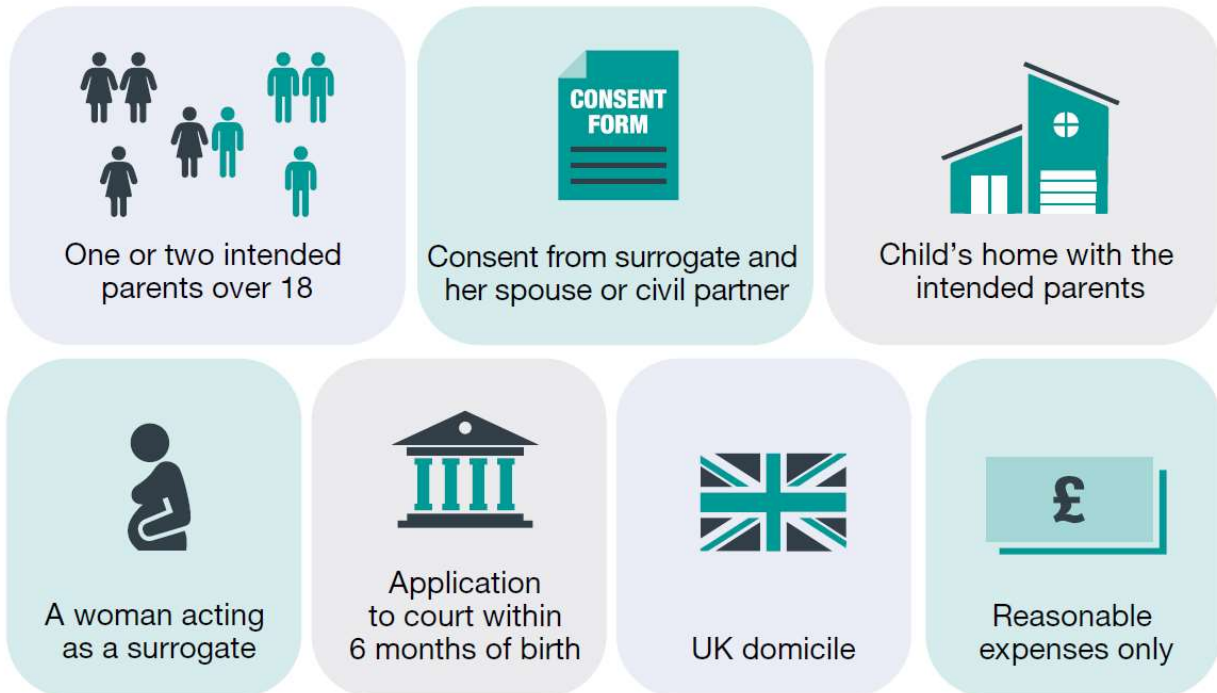


often have to wait for between six months and a year before a parental order is made because of the time it takes for the proceedings to come before the court (at least in England and Wales). Since 1994, the scope of who can obtain a parental order has changed significantly, most recently with amendments to the law allowing single intended parents to obtain a parental order. The infographic below provides an overview of the parental order process under the current law.



In order for the court to make a parental order, certain requirements must be met.<sup>45</sup> Those requirements have been interpreted in case law, so that it is not always clear, simply by looking at the statute, whether or not the requirements are met in a particular case.

### The child's welfare is the paramount consideration



### Health consequences

The legal/administrative procedures that accompany surrogacy arrangements potentially lead to adverse health consequences, in particular heightened levels of anxiety and stress. During consultation, we heard anecdotal evidence from those with direct experience of surrogacy arrangements, about the stress involved in the court process to obtain a parental order. One intended parent told us that it was stressful and emotional to have to deal with the legal process of being named as parents, especially after the often long and difficult journey for long-awaited children. Consultees who had gone overseas for surrogacy described their stressful experiences of being stranded abroad for prolonged periods of time as a result of passport/visa issues for their surrogate-born child. Surrogates may also experience stress and anxiety, for example due to the risk under the current law that they are left caring for the child when they do not want to, or are not permitted to leave hospital until the baby does.

Deterioration or improvement in health is measured by what is called a QALY (a quality adjusted life year). A QALY takes into account both the quantity and quality of life generated by healthcare interventions. It is assumed that the quality of life can be measured in increments along a continuum, where 1 is the best possible health state and 0 is death. The use of QALYs in resource allocation decisions gives an insight into the likely benefits that accrue under different law reform options.

Using the EQ-5D scale, health outcomes are measured across five dimensions (anxiety/depression, mobility, self-care, ability to perform usual activities and pain / discomfort). Each of the five dimensions has three levels, representing greater or lesser improvements, and to which coefficients are assigned to arrive at the total QALY change, where level 1 = no problem; level 2 = some problems and level 3 = major problems. The Department of Health and Social Care assigns a financial value of £70,000 to 1 QALY, which we use for the purposes of calculating the economic value of policy change. This approach is used in relation to surrogacy below, particularly in relation to calculating benefits to parties to surrogacy agreements as a result of the new pathway and other reforms.

<sup>45</sup> HFEA 2008, s54 and s54A.

## Costs of surrogacy

Surrogacy can be an expensive process and therefore out of reach for many intended parents. We asked consultees who were intended parents to tell us information about the costs of their surrogacy arrangements in our Consultation Paper.<sup>46</sup> Twenty-nine intended parents and one surrogate responded to this question. The dataset we have from which to draw conclusions about the nature of surrogacy arrangements in the UK is therefore limited.

Of the 18 domestic arrangements, 14 consultees gave an idea of how much they spent. Spending ranged between £2,000 to £200,000, averaging some £29,700.<sup>47</sup> This figure includes medical costs, potential loss of earnings, cost of maternity-related items, and payments to organisations, which can be significant.

Of the 11 international arrangements, 9 consultees gave an idea of how much they spent. Spending ranged between £45,000<sup>48</sup> and £167,000; the average reported cost of entering an international surrogacy arrangement was £92,500.<sup>49</sup>

Intended parents may make two kinds of payments during the surrogacy journey: the first type being to surrogacy organisations and the second type being to surrogates.

### Payments to organisations

During our initial stages of research, we learnt that organisations that operate as membership organisations typically charge a joining fee and then a small annual fee for continuing membership. The membership fee covers administrative and screening costs. Only intended parents, not surrogates (or their partners), pay to join the organisation.

Fees charged varied widely, depending on the level of service required by the intended parents: for example, whether the arrangement is domestic or international, and whether parents pay separately for safeguarding fees (for example, DBS and GP fees).

UK surrogacy organisations have told us that they charge fees of between £2,000 to £36,000, often plus a small ongoing annual fee. International surrogacy arrangements are more costly than domestic arrangements, as they are generally commercial in nature. For example, we were told that the total cost of surrogacy in the USA was around £140,000 to £150,000 for one child and £200,000 for twins.<sup>50</sup> Both of the UK surrogacy organisations that offer international pathways<sup>51</sup> had a higher membership fee for support with an international arrangement than with a domestic surrogacy arrangement.

### Payments to surrogate

The actual amount payable is agreed between the parties to the agreement, but organisations advise intended parents what is reasonable. One organisation mentioned a range of £12,000 to £15,000 and advise members to keep a record of what is paid, and sometimes to keep receipts. One organisation provides an online calculator to track payments and refers any change to what is paid, or expenses that seem high, to a more senior level of the organisation.

A law firm shared with us figures for sums received by surrogates in the USA, Ukraine, and Georgia, using cases from the three years before the publication of our Consultation Paper (2017-2019). In Ukraine and Georgia, surrogates received the equivalent of around £10,000 to £14,500, whereas in the USA, surrogates were receiving approximately £1,650 to £2,650 for allowances (round sums paid for expenses),<sup>52</sup> £300 to £4,000 for identified, “out of pocket”, expenses, and between £24,000 and £32,000

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<sup>46</sup> Consultation Question 116.

<sup>47</sup> This does not include two outliers, but if included the average reduces to £23,800. The median was £29,750.

<sup>48</sup> Costs converted from USD to GBP at a rate of \$1 to £0.88, Bloomberg’s stated exchange rate as at 5 October 2022.

<sup>49</sup> And roughly converting the figures in US dollars into GBP by dividing the figure by 1.3. The median was £75,000.

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

<sup>51</sup> Brilliant Beginnings and My Surrogacy Journey.

<sup>52</sup> There was an “outlier” figure recorded for an amount of expenses of almost £7,500.

by way of compensation. Payments are made to the surrogate throughout the pregnancy, with some payments being paid after birth.

A USA surrogacy agency to which we spoke confirmed that the base compensation received by surrogates for the agency's arrangements was £32,560 in Oregon and £35,200 in California, paid at around £2,640 per month following confirmation of pregnancy. Once the surrogacy contract is signed, the surrogate receives £176 per month for general expenses, and a flat fee of £704 on the occasion of the embryo transfer.<sup>53</sup>

## Court costs

To apply for a parental order, intended parents are currently charged £232 in England and Wales. In Scotland the fee is £135 in the Sheriff Court and £325 in the Court of Session. They will also need to provide a copy of the child's full birth certificate, which presently costs £11 in England and Wales and £12 in Scotland.<sup>54</sup> If the intended parents wish to be legally represented in court, they will need to pay additional fees, which may vary considerably depending on whether the case is a domestic or international arrangement.

In consultation we asked a question about the cost of any legal representation in court,<sup>55</sup> and costs varied between £1,000 to £25,000, with a median cost of £10,000. It should be noted that only five intended parents indicated costs of representation, so the dataset we have from which to draw conclusions about the nature of surrogacy arrangements in the UK is therefore limited. NGA Law provided their fees for legal representation for domestic surrogacy cases (£6,000 plus VAT) and international surrogacy cases (£20,000 plus VAT). Furthermore, although very rare, if there was a disputed case, the legal fees would be considerably larger for all parties involved. Time spent attending court rather than working, may also entail significant financial costs to the intended parents.

## Options

This Impact Assessment relates to the recommendations in the Law Commissions' Report, *Building families through surrogacy: a new law*. Implementation of the recommendations would provide an updated and reformed law on surrogacy that is fairer, modernised, and protects the welfare of all participants to a surrogacy arrangement. The Law Commissions recommend reform by means of primary and secondary legislation, to facilitate a clear legal framework. The options considered in this impact assessment are set out below.

## Description of Options considered

This impact assessment compares Option 1 against the do nothing [option 0]:

- Option 0 – Do nothing. Under this option the problems outlined above would persist.
- Option 1 – (preferred): Implement all recommendations and introduce the new pathway.
- Option 2 – Implement all recommendations excluding the new pathway (and those nationality law reforms reliant on the introduction of the new pathway).

### OPTION 0 – DO NOTHING

This option would be to retain existing arrangements. See below table outlining key features and problems caused.

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<sup>53</sup> Costs converted from USD to GBP at a rate of \$1 to £0.88, Bloomberg's stated exchange rate as at 5 October 2022.

<sup>54</sup> <https://www.gov.uk/order-copy-birth-death-marriage-certificate>; <https://www.scotlandspire.gov.uk/content/ordering-certificates>

<sup>55</sup> Consultation Question 110.

Table 2: Option 0 – Key features and associated problems

Key features	Associated problems
Surrogate is legal mother on birth and in some circumstances, her spouse/civil partner is the legal father/second parent. Necessary for intended parents to obtain a parental order after the birth.	Does not reflect the intentions of the parties nor the realities for the child; surrogate is the child's legal mother, with all its associated responsibilities and legal consequences, until such time as a parental order is made; stress and cost involved in the application for a parental order.
Involvement of unregulated surrogacy organisations.	It is difficult to monitor the surrogacy process and those involved in it and ensure that standards throughout the process are kept high.
Gaps in access to information about one's origins for surrogate-born people.	Disparity between access to information for surrogate-born people and donor-conceived people; no specific register of information for surrogacy arrangements under current law and therefore, insufficient protection of children's UNCRC and domestic law rights to access information about their genetic and gestational origins.
Lack of clarity on permitted payments.	Concerns as to transparency about the reason for which payments are being made; risk that women are being induced into becoming a surrogate for financial reasons; increases the risk of women being coerced into surrogacy by others; and no effective enforcement on limitations on payments to surrogates.
High numbers of surrogacy arrangements overseas.	Ethical concerns around risk of exploitation and commodification of women and children; nationality and immigration issues for the child; lack of recognition for intended parents as legal parents when they return to the UK (despite often being legal parents overseas).

## OPTION 1 – WIDE-RANGING REFORM – PRIMARY AND SECONDARY LEGISLATION

Option 1 involves major reform including the introduction of the new pathway and new regulatory framework. Intended parents will be legal parents on birth if they fulfil certain screening and safeguarding requirements and are signed off onto the new pathway by a regulated surrogacy organisation.

The key elements of Option 1 are:

- Intended parents are legal parents at birth on the new pathway;
- Greater regulation of surrogacy agreements;
- Access to information for people born via surrogacy;
- Other substantive rights for those involved in surrogacy agreements;
- Limited reforms in respect to international arrangements; and
- Greater clarity on the law around payments.

The recommendations outlined below are in relation to these 6 elements. They are simplified versions of those we make in the Report.

### **(1) Intended parents are legal parents at birth**

Our principal recommendation is the introduction of a new pathway for surrogacy arrangements whereby the intended parents can become legal parents on birth. This is dependent on whether the intended parents have entered into an agreement including the prescribed information, complied with procedural safeguards and met eligibility requirements, all as overseen and signed-off by an independent regulated body, as described below.<sup>56</sup> This removes the need for the intended parents to make a court application for a parental order after the birth of the child.

Our scheme aims to better reflect the intentions of the parties to the arrangement and therefore, recommends that for a child born as a result of a surrogacy arrangement, whether in or outside the new pathway, the surrogate's spouse or civil partner, if any, should not be a legal parent of the child.<sup>57</sup>

We also recommend that parental orders are reformed so that, if one is needed, the court should be able to dispense with the requirement pertaining to the surrogate's consent, where that is in the best interests of the child.<sup>58</sup>

### **(2) Greater regulation of surrogacy arrangements**

As part of the new pathway, we recommend creating a new regulatory framework which introduces pre-conception screening and safeguarding checks. We recommend the introduction of new regulated surrogacy organisations (RSOs) – regulated by the HFEA – which will be the only bodies able to sign off surrogacy teams onto the new pathway and in doing so, confirm that the required screening and safeguarding has been completed.<sup>59</sup>

We recommend that there should be no requirement for an RSO to take a particular organisational form, provided that form prohibits the making of a profit, and RSOs should be required to appoint an individual responsible for ensuring that their organisation complies with the HFEA's regulatory requirements.<sup>60</sup>

### **(3) Access to information for people born via surrogacy**

To fulfil our objective of improving access to information about origins for people born via surrogacy, we recommend the creation of a bespoke Surrogacy Register ("the SR"), to be maintained by the HFEA.<sup>61</sup> The SR should record information for all surrogacy arrangements, whether in or outside the new pathway, domestic or international, gestational or traditional, provided the parties have satisfied either an RSO or the court on the balance of probabilities that the information is accurate. We recommend the ages at which surrogate-born people should be able to access information on the SR, their original birth certificate and their complete parental order files.<sup>62</sup>

We recommend that, where children are born of surrogacy arrangements that result in the intended parents being recorded as parents on the birth certificate (that is, arrangements on the new pathway), the full form of that certificate should make clear that the birth was the result of a surrogacy arrangement.<sup>63</sup>

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<sup>56</sup> Recommendation 1.

<sup>57</sup> Recommendation 4.

<sup>58</sup> Recommendation 47.

<sup>59</sup> Recommendation 25.

<sup>60</sup> Recommendation 25.

<sup>61</sup> Recommendation 61.

<sup>62</sup> Recommendation 63.

<sup>63</sup> Recommendation 67.

#### **(4) Other substantive rights for those involved in surrogacy arrangements**

As part of our wholesale reform of surrogacy laws, we wanted to ensure that reforms followed through into rights available in other areas of law. It is important that surrogates, intended parents, and surrogate-born children are able to access the rights available for other parents and children in the areas of employment law and succession law.

##### *Employment rights*

We recommend that one of the intended parents should have the right to receive a benefit equivalent to maternity allowance where he or she fulfils the criteria for that benefit,<sup>64</sup> and that the right of intended parents to take time off work to attend ante-natal appointments and to begin their statutory leave should be aligned with that for adoptive parents.<sup>65</sup>

##### *Succession rights*

We recommend that on the new pathway, the child who is unborn at the time of the death of an intended parent should be treated as the child of the intended parents for the purposes of succession.<sup>66</sup>

#### **(5) Greater clarity on the law around payments**

Our recommendations on payments are particularly important because whether certain types of payments to surrogates are allowed or not is seen by many as the indicator of whether a jurisdiction's surrogacy framework is commercial or altruistic (although there are other factors). Throughout our recommendations on payments, we are clear that our scheme does not allow for commercial surrogacy.

We recommend that the law should not permit intended parents to pay their surrogate for her gestational services, compensation for pain and inconvenience, nor general living expenses.<sup>67</sup> We recommend that the law should permit intended parents to only pay to their surrogate costs which fall in the following categories:

- (1) costs of meeting up and, in particular, of travel, accommodation and socialising in the period leading up to the surrogacy agreement, during the pregnancy and in the 6 weeks after birth;
- (2) costs incurred by the surrogate in deciding to enter into a surrogacy arrangement;
- (3) life insurance and critical illness cover;
- (4) medical and wellbeing costs;
- (5) cost of pregnancy-related items;
- (6) costs of additional food required as a result of being pregnant;
- (7) costs of paying for help with household tasks; and
- (8) loss of earnings (whether someone is salaried or in another form of employment).<sup>68</sup>

We recommend that the payments that the intended parents are permitted to make to the surrogate in relation to the costs of the pregnancy should be based on a reimbursement of costs actually incurred, rather than an allowance.<sup>69</sup>

We recommend that although surrogacy agreements, should remain unenforceable, the financial terms of a surrogacy agreement entered into under the new pathway or where a parental order is required should be enforceable by the surrogate.<sup>70</sup>

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<sup>64</sup> Recommendation 74.

<sup>65</sup> Recommendation 76.

<sup>66</sup> Recommendation 78.

<sup>67</sup> Recommendation 54.

<sup>68</sup> Recommendation 55.

<sup>69</sup> Recommendation 53.

<sup>70</sup> Recommendation 58.

## **(6) Limited reforms in respect to international surrogacy arrangements**

We have made some limited recommendations for reform in this area with the aim of promoting the welfare of those children involved in international arrangements. The recommendations are designed to clarify aspects of nationality law and to reduce delays for intended parents to bring their children to the UK.

### *Citizenship rights*

We recommend that there be provision for a child born of an arrangement on the new pathway to acquire British nationality from his or her British intended parents.<sup>71</sup>

We also recommend that the 1981 Act should be amended to exclude the surrogate's spouse or civil partner from being the father or second legal parent of the child born of a surrogacy arrangement.<sup>72</sup>

### *Opening files earlier*

We recommend that it should be possible to open a file and begin the process for applying for a visa in respect of a child born through an international surrogacy arrangement, before the child is born. The application will need to be completed after the birth of the child, and the issue of a passport in the child's country of birth.

We recommend that the current provision made for entry clearance outside of the Immigration Rules where the intended parents are not the legal parents of the child under nationality law, should be brought within the Immigration Rules; and it should be clear within the Immigration Rules that the grant of a visa to the child born of a surrogacy arrangement should not be dependent on the child breaking links with the surrogate nor should it prevent the child having contact, and an on-going relationship, with the surrogate.<sup>73</sup>

### *Guidance on international surrogacy arrangements*

We recommend that the UK Government should provide a single, comprehensive guide for intended parents explaining the nationality and immigration consequences of having a child through an international surrogacy arrangement. We also recommend that the existing guidance on surrogacy, produced by the Department of Health and Social Care, for those entering into an arrangement be updated to include an explanation of the new pathway.

### *'Incoming' international surrogacy arrangements*

With respect to 'incoming' international surrogacy arrangements in the UK, we recommend that a child should not be removed from the UK for the purpose of becoming the subject of a parental order, or its equivalent, in another jurisdiction, without this being authorised by the court. In deciding whether to grant that order, the court's paramount consideration shall be the welfare of the child throughout his or her life and the court must appoint a parental order reporter (in England and Wales) or curator *ad litem* (in Scotland) to inform this assessment. The making of the order will authorise the removal of the child to the foreign jurisdiction by the intended parents, and will confer parental responsibility/PRRs on the intended parents. The order may also extinguish the surrogate's parental responsibility/PRRs.<sup>74</sup>

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<sup>71</sup> Recommendation 80.

<sup>72</sup> Recommendation 80.

<sup>73</sup> Recommendation 82.

<sup>74</sup> Recommendation 84.



## OPTION 2 – ALL REFORMS EXCLUDING THE NEW PATHWAY

Option 2 entails reform of the existing parental order process, focussing on the removal of legal parental status from the surrogate's spouse/civil partner, dispensing with the requirement for the surrogate's consent to a parental order if in the best interests of the child, and reform of the rules on payment. Apart from the introduction of the new pathway and the new regulatory framework, all of the reform detailed above for Option 1 also applies to Option 2. We have chosen to detail it only once, above, to avoid duplication.

### Public consultation exercise

#### Consultation

In June 2019, we published our Consultation Paper on surrogacy reform.<sup>75</sup> In the Consultation Paper, we made provisional proposals to improve surrogacy laws so they would better support the child, surrogates and intended parents. The consultation period ran from 6 June to 11 October 2019. In total, we received 681 responses. We held a series of consultation events across the UK for people to discuss their views on our provisional proposals, which were open to all (for example, professionals, surrogates, intended parents and general members of the public). In addition to these open events, we also hosted a London event for lawyers and other professionals, and a London symposium for invited attendees.

#### Main consultees

Generally, responses to the consultation came from four main categories of consultees:

1. Those with a personal interest in and experience of surrogacy: surrogates, intended parents, and surrogacy organisations.
2. Those with a professional interest in and experience of surrogacy: lawyers including representative legal organisations such as Resolution, Association of Lawyers for Children, Law Society; counsellors; doctors; academics; social workers including Cafcass.
3. Those opposed to surrogacy: such as Nordic Model Now!, OBJECT, and some religious groups.
4. Others with an interest in the topic, but who are not writing from these perspectives or from personal experience.

### Monetised and non-monetised costs and benefits of each option

This Impact Assessment identifies monetised and non-monetised impacts on individuals, groups and businesses with the aim of understanding what the overall impact to society might be from implementing these options. The costs and benefits of the proposed scheme are compared to the “do nothing” option.

Impact Assessments place a strong emphasis on valuing the costs and benefits in monetary terms (including estimating the value of goods and services that are not traded). When calculating the net present social value<sup>76</sup> (“NPSV”) we use a time frame of ten years, with the present being year 0. We assume the transitional costs and benefits occur in year 0, the current year, unless otherwise indicated. Ongoing costs and benefits accrue in years 1 to 10. We would normally apply a discount rate of 3.5%, in accordance with HM Treasury guidance. The exception being the treatment of QALY benefits, where a 1.5% discount rate is applied.

The Impact Assessment process sets out the economic, health and justice implications of reform. We acknowledge that the ability to build a family through surrogacy, or to support the creation of a family by

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<sup>75</sup> *Building families through surrogacy – a new law* (2019) Law Commission Consultation Paper No 244; Scottish Law Commission Discussion Paper No 167 (hereafter “the Consultation Paper”)

<sup>76</sup> Costs to society are given a negative value and benefits a positive value. After adjusting for inflation and discounting, costs and benefits can be added together to calculate the Net Present Social Value (NPSV) for each option. See HMT Green Book at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/685903/The\\_Green\\_Book.pdf#page=1&zoom=auto,-47,842 p 21](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/685903/The_Green_Book.pdf#page=1&zoom=auto,-47,842 p 21) (last visited 22 March 2022).

being a surrogate, cannot be reduced to a financial calculation; nor can the value of reducing the risk of exploitation to surrogates at home or abroad.

## **Option 0: Do nothing [base case]**

Because the “do nothing” option is compared against itself its costs and benefits are necessarily zero, as is its NPSV.

## **Option 1: Major reform including the introduction of the new pathway and new regulatory framework. Intended parents will be legal parents on birth if they fulfil certain screening and safeguarding requirements and are signed off onto the new pathway by a regulated surrogacy organisation.**

### *Areas of reform*

For Option 1 the costs and benefits of our recommendations are detailed in the following six key areas of reform:

1. The new pathway and new regulatory framework;
2. The parental order process;
3. Access to information for those born of surrogacy;
4. Other substantive rights for those involved in surrogacy arrangements;
5. Reforms in respect to international surrogacy; and
6. Our payments scheme.

Throughout this costs/benefit analysis, we make the assumption that there will be 500 surrogacy arrangements per year. This is based upon the pre-pandemic figure for parental orders, rounded up.<sup>77</sup>

- If Option 1 is implemented, we assume that international arrangements will reduce, and that of the estimated 500 surrogacy arrangements, 70% [350] will be domestic cases on our new pathway, 10% [50] will be independent domestic arrangements which require a parental order to be sought, and 20% [100] will remain international cases.
- We have used the same scaling system for the low and high estimates of total surrogacy arrangements throughout [400 and 600 compared to the central estimate of 500].

## **AREA 1: THE NEW PATHWAY AND NEW REGULATORY FRAMEWORK**

### ***Legal parental status provided to intended parents at birth on the new pathway***

#### **Costs**

##### Transitional costs

None identified

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<sup>77</sup> As noted at page 7 the actual number of surrogacy arrangements is likely to be higher than the current figure for parental orders, because a number of intended parents do not know that they ought to apply for a parental order and in addition, it is not technically a mandatory requirement under the current law.

### Ongoing costs

None identified.

## **Benefits**

### Transitional benefits

None identified

### Ongoing benefits

### *Welfare of the parties*

Under our recommendations the intended parents will be able to become legal parents automatically on birth without having to make a parental order application to the court. This will have enormous benefit for the child born of the surrogacy arrangement in terms of identity and stability, and in particular compliance with the UNCRC rights to identity and family life. The child will benefit from a more stable start to their life and greater opportunity to be socially and culturally embedded in their family as a result of being the legal child of the intended parents from their birth. This will have a life-long benefit for the child's welfare.

There will be emotional benefits for intended parents as a result of the reduction in stress and greater certainty resulting from not having to go to court to obtain legal parental status. In turn, this will also contribute to the welfare of the child as greater emotional and mental health for the intended parents will reduce any stress or negative impact on the child that could result from their exposure to their parents' negative emotional states.

The intended parents will also benefit fiscally from not having to pay court costs to make a parental order application and save costs related to having to take time off work for hearings.

Those intended parents who under the current system incur legal fees will save on these costs; however it is difficult to quantify those costs. Although we asked a question about the costs of legal representation in court, we received only a few responses, which covered a very wide range.<sup>78</sup> Furthermore, we understand that as the majority of cases are undisputed, many intended parents do not use legal representation, particularly for domestic arrangements heard in the Family Court. We have therefore not included a figure in this impact assessment for the costs of legal representation that would have been incurred in domestic arrangements (that is, those estimated 250 domestic arrangements which, prior to our recommended reforms, would have involved parental order applications and will now proceed on the new pathway).

However, we anticipate that savings will be made by intended parents who would otherwise have undertaken an international surrogacy arrangement, but under our new proposals choose instead to make use of the new pathway. We have attempted to quantify these savings.

Table 3: Annual saved court costs to intended parents [total in £m]

	Low estimate	Central estimate	High estimate
No of new pathway arrangements	280	350	420
Parental order cost	£243	£243	£243
Savings in parental order costs	£68,040	£85,050	£102,060

<sup>78</sup> Report Ch 8 para 8.70 to 8.75.

Estimated legal fees saved in cases which would previously have been international arrangements (£m)	£0.72	£0.90	£1.08
Total benefit	£0.79	£0.99	£1.18

Assumptions:

- Number of new pathway arrangements that would have needed to obtain a parental order in the courts before reform; under our recommendations, we assume as a central estimate that 350 of the current 500 (approximate) surrogacy arrangements will proceed on the new pathway each year. Parental order cost; this is the fee paid on application for a parental order.
- The fee for a parental order is £232 in England and Wales, plus £11 for a copy of the birth certificate from GRO; a total of £243. In Scotland the fee is £135 in the Sheriff Court and £325 in the Court of Session (we have taken an average figure of £230), plus £12 for a copy of the birth certificate from NRS; a total of £242. Given the minimal difference in the amounts involved, we have assumed a fee of £243 for each of the 350 applications for parental orders.
- Number of new pathway arrangements that would have been international arrangements before reform, but will now proceed on the new pathway; we have assumed a central figure of 150 for these arrangements. We have used the figure of £5,000+VAT (£6,000), which is an estimate based on discussions as part of the project for surrogacy organisation fees for support and advice on international arrangements. Costs which include representation in international cases will be higher, but we take into account that not all parents involved in international cases will spend as much on representation, or may self-represent.

Annual benefit to intended parents [central estimate] = £0.99

Present value over 10 years = £8.23m

Furthermore, there will be increased certainty for surrogates that they will not be left legally responsible for the child following the birth of the child, thus better reflecting their intentions. This will benefit the surrogate's emotional and mental health, and in respecting surrogates' intentions to not be the legal mother of the child which they give birth to in a surrogacy arrangement, the new pathway will contribute to greater respect for women's autonomy.

*Reduced stress for all parties involved in the parental order proceedings*

It is anticipated that the possibility of intended parents being named on the birth certificate without having to obtain a parental order from the courts, will reduce stress and uncertainty for intended parents. In turn, this will promote the welfare of the child by enabling the intended parents to provide better care for their child. The new pathway, which removes the need to seek a parental order also reduces stress for the surrogate as they are no longer deemed to be the parent in a situation where they have no desire to be, and where they potentially have no biological or gestational connection to the child.

The benefit of preventing severe anxiety for one person for one month is £3,441, and the benefit of preventing mild anxiety for one person for one month is £875.<sup>79</sup> These categories originate from the EQ-5D L scale (discussed on page 18 above).

<sup>79</sup> Calculated using the EQ-5D 3L scale from the Quality Adjusted Life Years methodology (QALYS), which enables a monetary value to be placed on the difference between health states across 5 domains. See P. Dolan *et al.*, "A Social Tariff for EuroQol: Results from a UK General Population Survey", (1995) *University of York Centre for Health Economics, Discussion Paper No. 138*.

During consultation, we heard multiple accounts from consultees about the stress and anxiety caused by parental order proceedings and the emotional impact that this had on them. For this reason, although the QALY statistics may appear large, they are appropriate to use as an indicator for what parties go through during the court process, given the highly personal and sensitive nature of legal parenthood. We have estimated that, on average, each party would experience at least mild anxiety that would affect them day-to-day throughout the parental order process. We base the duration of anxiety on the average contact time with parental order court proceedings (six months). We use the annual saved costs in relation to preventing anxiety for two people in couple IP cases, and one person in single IP cases, as a proxy measure for the cost of preventing anxiety to all parties involved in the court proceedings, given that in a particular case not all parties may experience anxiety. We assume that those experiencing mild anxiety as a result of the parental order proceedings do so for six months (six months being the average time it takes for parental order proceedings to proceed).

Table 4: Annual saved costs in relation to preventing anxiety [total in £m]

	Low estimate of number of arrangements on new pathway rather than going through court = 280	Central estimate of number of arrangements on new pathway rather than going through court = 350	High estimate of number of arrangements on new pathway rather than going through court = 420
Saved costs in relation to preventing mild anxiety for six months	£2.79	£3.49	£4.19

## Assumptions

- 90% of cases involve couple IPs and 10% involve single IPs (based on proportion of single IPs in pre-pandemic parental order data).<sup>80</sup> We reduce our proxy for the number of people experiencing anxiety in a surrogacy arrangement to one for single IP cases, as there are fewer individuals involved. This results in 532 / 665 / 798 individuals experiencing anxiety in the low / central / high scenarios.
- The benefit of preventing mild anxiety for one person for one month is £875 (see above), meaning that the benefit of preventing mild anxiety for one person for six months is £5,250.

Annual cost [central estimate] = £3.49m

Present value over 10 years = £32.19m

## *Saved costs on wages lost due to absence from work*

As a result of parental order proceedings, IPs may have to take time off work to attend court. If IPs do not use their paid leave to do so, they will therefore lose earnings by doing so. We estimate that IPs currently take approximately one day of unpaid leave to attend court. Parental order proceedings are typically either two half days in court or one full day. Under our recommendations for the new pathway, the IPs will not have to take time off to attend court as they will already be legal parents on birth (if they have fulfilled the requirements for the new pathway).

Average weekly earnings are estimated at £617 in the UK.<sup>81</sup>

<sup>80</sup> Information provided by CAF/CASS dated 13 October 2022 in response to a Freedom of Information request, available in Appendix 2.

<sup>81</sup> Office for National Statistics, *Average weekly earnings in Great Britain: October 2022*. Available at <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/averageweeklyearningsingreatbritain/october2022> (last visited 23 March 2023).

£123.40 = average earnings for one day in the UK.

Table 5: Annual savings for IPs on lost earnings attending court [total in £m]

	Low estimate of number of IPs on new pathway rather than going through court = 280	Central estimate of number of IPs on new pathway rather than going through court = 350	High estimate of number of IPs on new pathway rather than going through court = 420
Saved costs to each individual IP for 1 day of leave	£123.40	£123.40	£123.40
Total annual saved costs for IPs [M]	£0.07	£0.08	£0.10

#### Assumptions

- 90% of IPs in couples and 10% of IPs are single (based on proportion of single IPs in pre-pandemic parental order data).<sup>82</sup> This results in 532 / 665 / 798 individual IPs in the low / central / high scenarios.
- both IPs – or one IP if a sole application – take one day of leave to attend court.

Annual cost [central estimate] = £0.08

Present value over 10 years = £0.67m

#### Fewer court cases

Under our recommendations, we assume as a central estimate that 350 of the current 500 (approximate) surrogacy arrangements will proceed on the new pathway each year. This means that there will be fewer court cases where legal parental status in relation to the child is in question. HMCTS, SCTS and family court service users will benefit from increased family court availability for applications other than parental orders. We have not sought to monetise that benefit as court time and resources will simply be allocated to those other cases. However, there will also be fewer parental order reports required by the courts which will consequently reduce strain on court time and resources of Cafcass/Child Welfare reporters/curators *ad litem*.<sup>83</sup> The average cost to Cafcass to produce each parental order report is £750.<sup>84</sup>

Table 6: Annual saved costs for Cafcass [total in £m]

	Low estimate	Central estimate	High estimate
No of new pathway arrangements	280	350	420
Parental order report cost	£750	£750	£750
Total cost	£0.21	£0.26	£0.32

<sup>82</sup> Information provided by CAFCASS dated 13 October 2022 in response to a Freedom of Information request, available in Appendix 2.

<sup>83</sup> These terms refer to Scotland and CAFCASS refers to England and Wales.

<sup>84</sup> Email dated 2 August 2022 from Melanie Carew, Head of Legal at CAFCASS. No equivalent figure is available for Scotland, where curators *ad litem* are individually appointed advocates or solicitors whose fees may vary.

## Assumptions

- Number of new pathway arrangements that would have needed to obtain a parental order in the courts before reform, based on central annual figure for arrangements used throughout [500]. We assume that there will continue to be some cases that do not go on to the new pathway (e.g. independent arrangements and international arrangements).
- Parental order report cost £750 (fee paid on application).

Annual saved cost [central estimate] = £0.26m

Present value over 10 years = £2.16m

### *Provision for child bereavement/stillbirth/death of intended parent*

Under our recommendations, for the first time it will be possible for the intended parent(s) to be registered as the parents on the certificate of stillbirth where the child born of the surrogacy arrangement is stillborn, or have legal parental status where the child has died (although registration on the certificate of stillbirth, or a parental order after the child has died, can only be obtained with the surrogate's consent). This may provide the intended parent with closure and it will better reflect the reality of the circumstances in which the child was born. Where an intended parent has died, it will also be possible to attribute legal parental status to them, which, similarly, will better reflect the circumstances in which the child has been born.

## ***The regulatory framework of the new pathway***

### **Costs**

#### Transitional costs

##### *Creation of system for surrogate to make her withdrawal of consent to the arrangement*

There will be staff and administrative costs for RSOs to establish new systems for the surrogate to make her withdrawal of consent (while template forms may be provided for this purpose, their use will not be mandatory, and no specific terminology or language is required so it will be up to the individual RSO). These costs are included in the general set-up costs for RSOs below.

##### *Regulatory costs faced by surrogacy organisations*

Surrogacy organisations will incur costs spent on changes to make sure they are HFEA licence compliant: setting up and running policies and processes, and potentially employing further staff, to ensure that they can fulfil their role as 'gatekeepers' of the new pathway and provide matching and facilitation services. There will be training costs involved for staff to become the "person responsible" in each RSO. Some existing surrogacy organisations may cease to exist if they cannot meet the requirements to be an RSO, which may reduce choice for surrogates and IPs.

We think it likely that there will be no more than five UK-based RSOs in existence following implementation of the reform. Based on information from the sector, we estimate the costs of becoming an RSO to be the following.

Table 7: Costs to surrogacy organisations to become RSO compliant [total in £m]

	Low estimate	Central estimate	High estimate
Costs to become a compliant RSO	£0.03	£0.04	£0.06
No of organisations to become an RSO	5	5	5
Total cost	£0.16	£0.21	£0.27

#### Assumptions

- Costs to become an RSO could include providing an in-house counsellor/therapist, development of necessary administration and compliance systems, and development of appropriate/enhanced policies and processes. Whilst impossible to predict exact costs, the preliminary central estimate is £42,500 and we have applied a 25% decrease and 50% uplift to this figure to provide low and high estimates.
- No of organisations to become an RSO [5].

Cost to surrogacy organisations in becoming RSO compliant [central estimate]: £0.21m

#### *Creation of HFEA regulatory role*

As the new surrogacy regulator, the HFEA will face setting up costs; implementation costs (new policies, procedures); resources required including staff and IT costs. This is potentially the largest cost of the scheme. A new separate surrogacy Code of Practice will be required and the HFEA will be responsible for setting up and maintaining the new Surrogacy Register ("SR").<sup>85</sup> Consideration will need to be given by the HFEA, ASA and Committee of Advertising Practice in relation to creating guidance on surrogacy in advertising (use of resources). The HFEA will incur transitional costs involved in training HFEA officials on the new regulatory scheme. The HFEA predict that most of the costs incurred would arise from recruiting additional staff, developing policy and building a new SR. The HFEA has estimated that the overall set up costs of establishing the new regulatory regime would be £247,000, but this is indicative only and made on the basis of many unknowns.

#### Ongoing costs

##### *Intended parents screening / safeguarding cost*

As part of the regulated new pathway, we recommend introducing screening and safeguarding requirements: health screening, enhanced criminal record checks, implications counselling, independent legal advice and the welfare of the child assessment. There will be increased costs to intended parents at the outset of the arrangement to fulfil these screening and safeguarding requirements (which are conditions for entry onto the new pathway). Screening and safeguarding costs would be incurred regardless of whether the new pathway arrangement was entered into/led to the birth of a child.

By way of comparison, using our central figures in all cases, we estimate the overall cost to intended parents for screening and safeguarding is £780 per arrangement (see Table 8 below), together with £600 in increased fees for membership of an RSO (Table 11 below).

This can be compared to the current cost for court fees for a parental order of £243 (note this does not include any fees for legal representation, as we have only attempted to quantify this in cases which would previously have been international cases) and our estimate of the cost of time off work of £123 per intended parent. These, however, are only the unavoidable costs of obtaining a parental order. In reality,

<sup>85</sup> Recommendation 61.



at present, those intended parents who work with surrogacy organisations will likely spend additional sums on screening and safeguarding measures such as medical reports, criminal record checks and counselling.

### 1. Medical Professional Report

There is a requirement for a report produced by a medical professional in relation to the health of the surrogate (and the intended parents if they are donating gametes), and for the welfare of the child assessment. Production of this report may divert medical professional resources from other healthcare issues and/or increase workload of medical professionals.

A report on the unit costs of health and social care in 2021 estimates that there is a cost of £158 per hour of general medical services activity,<sup>86</sup> however it is worth considering this is for NHS work rather than private work which is likely to attract a higher premium. The British Medical Association (BMA) publish some guidance on charges for private work by providing a calculator for costs depending on the time the work takes, but ultimately it is up to each individual practitioner to determine the fee.<sup>87</sup> How long each report takes to produce will vary considerably depending on the medical professional and the extent of the medical records, but we estimate it will take between 40 minutes to two hours to produce the report for these purposes. We have calculated medical professional costs accordingly, with 40 minutes as our low estimate, 80 minutes as our central estimate and 120 minutes as our high estimate.<sup>88</sup>

We have assumed the general cost of carrying out the welfare of the child assessment itself is subsumed into the overall administrative costs of RSOs and/or clinics (provided at Table 11).

### 2. Implications counselling

Fertility counselling services within clinics range from £40 to £115 per hour, with no clear pattern by location or provider type.<sup>89</sup> Costs for independent counsellors are not easily accessible but one provider offers a rate of £70 per hour.<sup>90</sup>

### 3. Criminal record checks

The cost of obtaining an enhanced criminal records check from DBS is £38.<sup>91</sup> The surrogate, her partner, the intended parents, and any adult over the age of 18 who lives with the intended parents or surrogate must obtain an enhanced criminal records check. The cost will therefore vary depending on the number involved.

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<sup>86</sup> Personal Social Services Research Unit, University of Kent, *Unit Costs of Health and Social Care 2021*, p 111. Available at: <https://kar.kent.ac.uk/92342/25/Unit%20Costs%20Report%202021%20-%20Final%20version%20for%20publication%20%28AMENDED%29.pdf> (last visited 23 March 2023).

<sup>87</sup> British Medical Association, *What to charge your patients: guide for GPs*. Available at <https://www.bma.org.uk/pay-and-contracts/fees/fees-for-gps/what-to-charge-your-patients-guide-for-gps> (last visited 23 March 2023).

<sup>88</sup> It is important to note that in August 2022, Government made a public commitment to reduce the bureaucracy in general practice and published a set of principles to reduce unnecessary bureaucracy and administrative burdens on general practice. See the Bureaucracy Concordat: <https://www.gov.uk/government/publications/bureaucracy-busting-concordat-principles-to-reduce-unnecessary-bureaucracy-and-administrative-burdens-on-general-practice/bureaucracy-busting-concordat-principles-to-reduce-unnecessary-bureaucracy-and-administrative-burdens-on-general-practice> (last visited 23 March 2023)

<sup>89</sup> The £115 price was found at TFP-GCRM, 'Treatment Prices' <https://tfp-fertility.com/en-gb/TFP-GCRM-fertility/fertility-treatment-costs> (last visited 23 March 2023) The £40 price was found at CRGW, 'Prices' <https://crgw.co.uk/price/additional-charges/> (last visited 23 March 2023).

<sup>90</sup> Tracey Sainsbury, [www.fertilitycounselling.co.uk](http://www.fertilitycounselling.co.uk) (last visited 23 March 2023).

<sup>91</sup> Disclosure and Barring Service, "Fee reduction for DBS checks" (17 March 2022). Available at: <https://www.gov.uk/government/news/fee-reduction-for-dbs-checks#:~:text=From%206%20April%202022%2C%20the,the%20fees%20for%20DBS%20checks.&text=The%20fee%20for%20the%20Udate,remain%20free%2Dof%2Dcharge> (last visited 23 March 2023).

#### 4. Independent legal advice

In terms of the legal advice requirement, in the consultation we asked legal consultees who advise on surrogacy and parental order proceedings, to provide evidence of what they would charge to provide legal advice which would satisfy the proposed requirement.<sup>92</sup> Only eight consultees answered this question, but estimates varied from £250 to £1,000 for independent legal advice. Nearly all of the eight consultees caveated their response with the fact that the costs they charge would be heavily dependent on the circumstances.

It is important to emphasise that some of these screening and safeguarding checks are already required by certain surrogacy organisations, so the associated costs are already often payable in addition to the parental order costs. For example, surrogacy organisations may recommend that members make use of this service, but there is no legal requirement for surrogacy organisations to provide them currently. From anecdotal evidence, we are aware that there are a significant number of intended parents who already obtain medical reports and counselling prior to proceeding with a surrogacy arrangement in a clinic. Furthermore, criminal background checks of intended parents and surrogates already form part of the processes of SurrogacyUK, Brilliant Beginnings and COTS.

Table 8: Cost of screening and safeguarding checks per check in £<sup>93</sup>

	Low estimate	Central estimate	High estimate
Cost of medical professional report	£100	£220	£320
Cost of independent legal advice	£480	£720	£1,000
Cost of implications counselling	£40	£70	£120
Cost of criminal record checks	£110	£110	£110
Total cost	£730	£1,120	£1,550

To reflect our understanding that many intended parents already pay for these checks to be carried out, and indicate the increased cost to intended parents, we have applied a low, central and high reduction to our overall estimates for the screening and safeguarding costs (20%, 30% and 50%).

Table 9: Total screening and safeguarding costs in £<sup>94</sup>

	Low estimate (50% reduction)	Central estimate (30% reduction)	High estimate (20% reduction)
Lowest estimate of total screening and safeguarding costs = £730	£370	£510	£580
Central estimate of total screening and	£560	£780	£900

<sup>92</sup> Consultation Question 112.

<sup>93</sup> Rounded to nearest £10

<sup>94</sup> Rounded to nearest £10

safeguarding costs = £1,120			
Highest estimate of total screening and safeguarding costs = £1,550	£780	£1,090	£1,240

### Assumptions

- Number of new pathway arrangements that would have needed to obtain a parental order in the courts before reform, calculated as detailed above (namely 350 cases on our central estimate). We assume that there will continue to be some cases that do not proceed on the new pathway (e.g. independent arrangements and international arrangements).
- Medical professional report cost based on unit costs of general medical services per hour. Using 40 minutes as low estimate, 80 minutes as central estimate and 120 minutes as high estimate, for amount of time required to produce report.
- Assuming that 2, 3 or 4 people need to obtain criminal record checks (this number may be higher or lower).
- Using low / high / middle range of figures obtained online for fertility counselling.
- Using low / high / middle range of figures obtained from legal professionals during consultation for the provision of independent legal advice.

Table 10: Annual screening/safeguarding costs [total in £m]

	Low estimate	Central estimate	High estimate
No. impacted	280	350	420
Screening/safeguarding cost	£510	£780	£1,090
Total cost	£0.14	£0.27	£0.46

Annual cost [central estimate] = £0.27m

Present value over 10 years = £2.25m

### *Potentially higher intended parents' membership costs*

Intended parents currently pay a membership fee if they join a surrogacy organisation. We estimate that the membership fees of an RSO will potentially be higher, if RSOs need to set fees to reflect their running costs as a regulated body. We have costed this separately to the screening and safeguarding costs, assuming those will be directly recharged to intended parents, rather than as part of their membership costs. Intended parents who exit the new pathway for any reason will be required to pay for both the requirements of the new pathway, *and* a court application for a parental order.

Table 11: Annual increased IPs membership fees [total in £m]

	Low estimate of number of IPs using surrogacy organisations' services = 280	Central estimate of number of IPs using surrogacy organisations' services = 400	High estimate of number of IPs using surrogacy organisations' services = 520
Increase in membership fees per set of IPs	£600	£600	£600
Total cost	£0.17	£0.24	£0.31

Assumptions:

- RSOs directly recharging intended parents for screening and safeguarding costs but general higher running costs will be factored into IPs' membership fees.
- Increase in membership fees per set of IPs calculated using the costs to maintain RSO status which are not directly recharged to intended parents (i.e. not including the screening and safeguarding costs). Based on information from the sector, we estimated the costs of an RSO compliance/data officer (£35,000) + annual maintenance of a CRM system (£5,000) + reserve for legal fees and penalties (£50,000) = £90,000. Unit costs per IP (assuming there are 150 IPs): £90,000/150 = £600.
- Multiplied by number of IPs that we think will use surrogacy organisations' services post reform. Annual number of domestic surrogacy arrangements based on pre-pandemic 2019 figure for parental orders, rounded up, as detailed above [400, 500, 600].<sup>95</sup> Out of 500 surrogacy arrangements per year, we assume that 70% of those will go on to the new pathway (which will necessarily be domestic arrangements) [350], 20% will continue to be international arrangements [100], and 10% will continue to be independent domestic arrangements [50]. We estimate that 80% of the total number of surrogacy arrangements will continue to use some element of the surrogacy organisations' services throughout their surrogacy journey (which gives us the three figures used in the table above for IPs using surrogacy organisations' services [280, 400, 520]). We have used the same scaling system for the low and high estimates of parental orders.

Annual cost to IPs [central estimate]: £0.24m

Present value over 10 years =£2.0m

*Maintenance of system for surrogate to make her withdrawal of consent*

There will be an additional administrative burden on the RSO involved in the arrangement to notify the HFEA of the surrogate's withdrawal of consent. This may reduce efficiency of RSOs and entail extra staff and resource costs. However, from existing cases where the surrogate and intended parents are supported by a surrogacy organisation, it is extremely rare for a surrogate to change her mind. This number should be further reduced by the screening and safeguarding measures required under the new pathway, that help ensure that the decision to become a surrogate is properly informed. Therefore we expect the costs of a surrogate withdrawing her consent on the new pathway to be a negligible cost.

*Ongoing running costs for HFEA*

There will not only be initial set up costs for the HFEA, but there will also be ongoing running costs. The HFEA has estimated these costs to be in the region of £775,000 per year, but this may vary significantly

<sup>95</sup> See Table 1.

depending on the practicalities. The estimations provided are based on the assumption that the HFEA's licensing function would assess whether the RSOs met the defined standards as determined by the new Surrogacy Code of Practice and legislation via desk-based inspections and carrying out audits of materials held by the RSOs. Any additional licensing activity would incur additional costs. Adding surrogacy arrangements to its regulatory remit will include recruitment of new staff with a different skills set and additional inspectors.

Present value over 10 years =£6.24m

#### *Costs to the NHS from additional surrogate pregnancies*

We expect that as a result of our recommendations, over half of those intended parents who currently go overseas for surrogacy will instead choose to enter into a domestic arrangement on the new pathway. International surrogacy arrangements will reduce from 50% to 20% of all arrangements. We estimate that this will result in 150 surrogacy arrangements taking place in Scotland, England and Wales, rather than overseas. These 150 additional pregnancies will result in costs to the NHS for the surrogate's ante-natal, birth and post-natal care.

We have calculated these estimated costs of NHS care as shown below.

It is possible that, in addition to the cost of ante-natal, birth and post-natal care, there may be further costs to the NHS if surrogates suffer post-pregnancy or birth health complications. These costs to the NHS, like the general costs of the pregnancy, would not have been incurred had the surrogacy arrangement been one that took place overseas. We do not consider that we can calculate these potential costs with an acceptable degree of certainty, and accordingly have not included them in the calculations for this impact assessment.

In England and Wales, the NHS does not currently fund assisted reproduction for surrogacy. We have therefore assumed that any costs of assisted reproduction (IVF and similar) will be met privately by the intended parents for cases in England and Wales. In Scotland the position is different.

Table 12: Annual cost to the NHS from additional surrogate pregnancies

	Low estimate	Central estimate	High estimate
Number of additional surrogacy arrangements	120	150	180
Estimated average cost to NHS for maternity care, including delivery	£5,000	£5,000	£5,000
Cost of assisted reproduction in Scottish surrogacy arrangements, based on high / central / low estimate of number of arrangements	£38,220	£47,775	£57,330
Total (£m)	£0.64	£0.80	£0.96

## Assumptions:

- 120, 150, or 180 additional domestic surrogacies will take place in England and Wales, and Scotland, on the basis of our low, central and high estimates of the number of overall surrogacies.
- Of these additional surrogacy arrangements, 116, 145 or 174 will take place in England and Wales, and 4, 5, or 6 in Scotland, on the basis of our low, central and high estimates of the number of overall surrogacies. At present few surrogacy arrangements take place in Scotland (see Table 1); in 2021, 435 parental orders were granted in England and Wales, and only 15 in Scotland.
- The estimated average cost to the NHS for maternity care, including delivery, is approximately £5,000. These figures were provided by the Department of Health and Social Care, and are based on NHS tariff 1 for maternity care<sup>96</sup>. The average cost is estimated on the basis that surrogates will have low medical risk factors, as medical screening is part of the surrogacy process, and included a high and low estimate of the cost of delivery.
- Costs of any longer-term health complications for the surrogate arising from the pregnancy or birth are not included.
- Based on the figures available, the estimated average cost to NHS Scotland for fresh IVF is £3,185 per cycle, as per figures produced for the National Infertility Group and Scottish Government by the University of Glasgow.<sup>97</sup> We understand that NHS Scotland funds up to 3 cycles of IVF for women under 40, and have assumed that the surrogate will be under 40 and utilise the 3 funded cycles of IVF treatment. Where the treatment required is donor insemination rather than IVF, which typically incurs a lower cost. However, for the purposes of this calculation, we have opted to use the IVF figure. Total estimated cost is therefore £9,555 per surrogacy.

Annual cost to NHS [central estimate]: £0.80m

Present value over 10 years = £6.65m

### *Police and prosecution costs*

Under our recommendations, a number of criminal offences will be introduced. We have not attributed any additional costs to creating these new offences, as they will form part of the legislative drafting costs of implementing our proposals. However, there will be a cost to police and prosecution authorities in investigating and prosecuting criminal offences in relation to unlawfully acting as a RSO; providing matching and facilitation services; people charging for advice or advertising in respect of surrogacy outside what is permitted; or making a false statement on the statutory declaration. We do not consider that there will be many offences committed and, consequently, that there will be a high number of criminal prosecutions in relation to these offences, so we have not sought to monetise these costs, which we expect to be minimal.

## **Benefits**

### Transitional benefits

None identified

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<sup>96</sup> <https://www.england.nhs.uk/publication/national-tariff-payment-system-documents-annexes-and-supporting-documents/>

<sup>97</sup> University of Glasgow, *Cost of IVF/ICSI treatment in Scotland: cost analysis and setting a tariff, Report to National Infertility Group and Scottish Government* (January 2020) (unpublished). This report is based on data obtained over the period 1st January 2015 to 31st July 2018, and is therefore out of date, but represents the best information readily available to us.

## Ongoing benefits

### *Greater protection for those involved in surrogacy*

Our top priority when designing the new pathway was to place greater emphasis on the welfare of the child born of the surrogacy arrangement. Our recommendations will provide greater protection and safeguarding for children in the new pathway; because rather than the “*fait accompli*” with which the courts are presented in the case of the parental order process, there is the opportunity to prevent unsuitable surrogacy arrangements proceeding on the new pathway. Post-birth welfare intervention in the sense of safeguarding (and applications for public law children orders, such as care orders) would, of course, continue to be available where appropriate, as it is in relation to any child. A figure cannot be placed on the benefit to children – and society as a whole – of greater consideration for a child’s life-long welfare, but the value of such a benefit is clearly very high.

There will also be greater protections and safeguarding for surrogates in the new pathway, which will reduce the risk of exploitation of vulnerable women in domestic surrogacies. This was a key priority of the project, especially given the current cost of living crisis which we are aware makes the prospect of finding additional sources of income more attractive.

On the assumption that fewer intended parents will go abroad given the clearer framework for surrogacy on the new pathway, reforms will also reduce the risks of exploitation of surrogates in international arrangements. In addition, the risk of the sale of children will decrease if there are fewer intended parents going abroad for surrogacy arrangements.

Overall, there will be improved standards for surrogacy arrangements and proper regulation, which will lead to greater normalisation of surrogacy. This may protect against potential harassment, discrimination and negative mental health consequences for surrogates, intended parents and, above all, those children born of surrogacy arrangements. It may lead to greater respect and recognition for surrogates and intended parents, both in healthcare settings and everyday life.

### *Greater clarity in relation to the law*

The new regulatory scheme will create greater certainty as to what is and is not permitted which will provide a rule of law benefit (in both the new pathway and the parental order process) and create a more realistic regime that will be properly enforceable. This will benefit surrogates, intended parents and surrogacy organisations as it will be clearer what constitutes an infringement of surrogacy laws and it will provide surrogacy organisations with legitimacy as organisations. This could also encourage other organisations to set up as RSOs, increasing choice for those considering becoming surrogates or intended parents.

## ***Changes to the birth registration process***

### **Costs**

#### Transitional costs

##### *Administrative changes to birth registration*

Under our preferred recommendation for birth registration, there will be costs involved in changing the format and process of birth registration forms. For example, we recommend that intended parents should be able to register the birth and that full forms of birth certificates should make clear that the birth was the result of a surrogacy arrangement. This will require new formatting and the roll-out of a new system. We do not consider we are in a position to estimate these costs, which will depend largely on the operating costs of the General Register Office (GRO) and National Records of Scotland (NRS).

##### *Training for registrars*

It is anticipated that there will be costs involved in training registrars on the new birth registration system. In previous Law Commission impact assessments, we have estimated training for registrars on new

systems to be approximately half a day.<sup>98</sup> However, it is uncertain as to whether our reforms will affect all birth registrations or solely surrogacy births and therefore, it is disproportionate to cost this training fee.

#### *Alternative method of birth registration*

In the event that the alternative method of birth registration is implemented instead of our preferred recommendation (we are presenting Government with both options in our Report), there will be costs to GRO and NRS in relation to implementing a new procedure to automatically issue parental order certificates six weeks after the birth of the child on the new pathway.

#### Ongoing costs

##### *Additional administrative burden on GRO and NRS*

In the event that the alternative method of birth registration is adopted (whereby the surrogate is recorded on the birth certificate as the legal mother until the end of the period during which the surrogate may withdraw her consent, with a new certificate then being issued automatically to the intended parents), there will be an additional administrative burden on GRO and NRS given the new two-stage process. It is difficult to estimate this cost because it depends on the method by which GRO and NRS choose to implement the alternative method of birth registration.

#### **Benefits**

##### Transitional benefits

None identified

##### Ongoing benefits

##### *More accurate reflection of a surrogate-born child's life story narrative*

Our recommendations will ensure that the law surrounding birth registration (in circumstances where the surrogate has not exercised her right to withdraw consent) will better promote the welfare of the child by reflecting the reality of their conception story. This will have crucial emotional and psychological benefits for surrogate-born children throughout their lives. In addition, this recommendation will ensure that birth certificates more accurately reflect the intention of the parties entering into the surrogacy arrangement.

#### AREA 2: THE PARENTAL ORDER PROCESS

##### *Familiarisation costs for the judiciary*

For all of the changes in each of the below areas, it will be necessary for judges to acquaint themselves with the new scheme in law, which will divert their time from other cases or training priorities. Familiarisation with new law for the judiciary is usually done in the form of circulating a newsletter or as a series of seminars. Based on previous law reform projects we assume that the recommended changes are in line with the less costly initiative of using the newsletter to advise on legislative amendments.

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<sup>98</sup> See *A New Weddings Law: Impact Assessment* (2022) Law Commission IA No LAWCOM0079, p 37.



## ***Removal of legal parental status from surrogate's spouse/civil partner***

### **Costs**

#### Transitional costs

None identified

#### Ongoing costs

None identified

### **Benefits**

#### Transitional benefits

None identified

#### Ongoing benefits

#### *Greater consistency for the surrogate-born child's life story narrative*

No longer attributing legal parental status to someone who is not a party to the surrogacy arrangement will better reflect the parties' intentions and promote the welfare of the child as there is greater consistency in relation to their life story narrative. There is evidence to show that identity formation is extremely important for a child's lifelong welfare,<sup>99</sup> and it is possible that in cases where legal parental status is afforded to the spouse/civil partner of the surrogate, this could be disruptive to the process of identity formation for the surrogate-born child.

#### *Greater recognition of women's autonomy*

Our recommendation to no longer attribute legal parental status to another person simply on the basis that they are the spouse or civil partner of the woman carrying the child, has the benefit of recognising women's autonomy, and that they can make decisions about their reproductive health which do not directly affect their spouse or civil partner.

#### *Reduced stress/anxiety for all parties*

This recommendation for legislative change will also ensure that the surrogate's spouse/civil partner is not left with legal responsibilities that they never intended to have. This reduces stress for all parties, including the surrogate, and the surrogate's spouse/civil partner as they are no longer deemed to be the parent in a situation where they have no desire to be and where they have no biological or gestational connection to the child. We have included this saved cost in our calculation for saved costs for all parties to the parental order proceedings above, using the calculated costs of the stress-related costs for intended parents as a proxy for the stress-related costs to all involved in the arrangement.<sup>100</sup>

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<sup>99</sup> M. Klym and J. Ciecuch, "The Early Identity Exploration Scale – a measure of initial exploration in breadth during early adolescence" (2015) *Frontiers in Psychology* 6; J. Marcia (1993) "The Status of the statuses: Research review" in *Ego Identity: A Handbook for Psychosocial Research*, eds J. Marcia, A. Waterman, D. Matteson, S. Archer, J. Orlofsky (1993) pp 22 to 41.

<sup>100</sup> See pages 28 to 29.

## ***Dispensing with the surrogate's consent to a parental order***

### **Costs**

#### Transitional costs

None identified

#### Ongoing costs

None identified

### **Benefits**

#### Transitional benefits

None identified

#### Ongoing benefits

#### *Enhanced focus on child's welfare*

Our recommendation to dispense with the surrogate's consent to a parental order is made for the purpose of promoting the child's welfare where there is a legal dispute between the surrogate and the intended parents as to the making of the parental order. This will be extremely rare in practice, but will mean that the welfare of the child born of the arrangement will be promoted by allowing their legal parents to align with their social, psychological and practical parents. The surrogate-born child will not be left in "legal limbo" in the very rare scenario where the surrogate refuses to consent to a parental order following the breakdown of the surrogacy arrangement, yet does not wish to care for the child.<sup>101</sup> The current law, whereby the surrogate has an absolute veto, is the only situation in family law where the preferences of the adult take precedence over the welfare of the child. At present, the court accepts the need for the free and unconditional consent of the surrogate,<sup>102</sup> regardless of whether this is in the best interests of the child or not. In making this recommendation, we are therefore bringing surrogacy in line with other areas of family law, which place the welfare of the child at the centre of any decision-making.

Furthermore, as the surrogate's consent can only be dispensed with where it is in the best interests of the child, greater protection will be afforded to the welfare of the child.

## ***Availability of post-mortem parental order and other death provisions***

### **Benefits**

#### Transitional benefits

None identified

#### Ongoing benefits

#### *Bereavement provisions*

By introducing a post-mortem parental order for the first time, it will be possible for the intended parents to have legal parental status where the child has died or been stillborn, where the surrogate agrees to this. This provides closure and better emotional and psychological outcome for the intended parents and

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<sup>101</sup> We mention this rare set of circumstances because these were the facts in the case of *Re AB (Surrogacy: Consent)* [2016] EWHC 2643 (Fam).

<sup>102</sup> The requirement that consent be free and unconditional was recently affirmed by the Court of Appeal in *Re C (Surrogacy: Consent)* [2023] EWCA Civ 16.

the surrogate (as it better reflects the reality of the situation – the surrogate is not recorded as the mother of a child where she never considered herself as the mother).

Furthermore, for the first time, it will be beyond doubt that where an intended parent(s) has died, it is possible for the deceased intended parent(s) to have legal parental status (previous case law has allowed it but this has not been set out in legislation). This will have the lifelong benefit for the child of enabling identity formation and for them to fully understand the circumstances of their conception. It is also likely to have positive benefits for any surviving intended parent as their deceased partner's co-parentage is recognised, which may assist them in dealing with their grief and be conducive to their long-term mental health.

### AREA 3: ACCESS TO INFORMATION FOR THOSE BORN OF SURROGACY ARRANGEMENTS

#### ***Introduction of the new Surrogacy Register (the “SR”) and improved access to origins information by other means***

##### **Costs**

###### Transitional costs

###### *Creation of the surrogacy register database and IT systems*

The SR will need to be set up as an official database by the HFEA. There will be costs involved in designing the system, programming and IT costs, and creating guidance on the database. External staff may need to be brought in for these purposes and there will be costs associated with training HFEA officials about the operation of the SR. The complexity and cost involved in setting up a new Register would depend on the type of information it needs to hold, the purpose for holding this information, what information will need to be shared or disclosed and to whom, and the extent of linkage to the records contained in the existing HFEA Register, which makes an estimation of costs difficult. These costs will be a subset of the overall set-up costs for the HFEA as the surrogacy regulator, all of which have been taken into account in relation to the introduction of the new pathway on page 32.

###### Ongoing costs

###### *SR running costs*

The SR will require ongoing maintenance and policy will need to be developed to provide access to information for those who are eligible. The costs of this are included in the HFEA's estimate of its general ongoing costs on page 32 above.

###### *Assessing children's competence/capacity*

There will also be costs associated with assessing whether children below the statutory ages of access have competence/capacity to access the SR. A professional (we do not recommend a specific group of professionals) will be paid to complete this assessment. We do not think that it is appropriate to attempt to monetise this cost as there are too many unknowns. Predominantly, there is the fact that these costs would only be incurred when the first cohort started reaching the age where they could be found competent to receive the information. This would not be until approximately 13 or 14 years from commencement of the statutory provisions.

###### *Provision of information to the SR*

On the new pathway, there will be an additional administrative burden on RSOs to provide the HFEA with the information provided by the parties in the Regulated Surrogacy Statement for incorporation into the SR. This is included within the general estimate of ongoing costs to being an RSO provided above.

Outside the new pathway, there will be an additional administrative burden on the courts to send the parties' details to the HFEA for their inclusion in the SR on receipt of the parental order application.

### *Additional administrative burden on GRO and NRS*

Our recommendations will create a new administrative burden on GRO and NRS to allow access to original birth certificates for those people who have had a parental order made in relation to them (and note that this is also being applied retrospectively). It will be up to GRO and NRS how they choose to cost this administrative burden; for example, they may require payment of an administrative fee to release original birth certificates to any member of this group. Assuming it is a similar cost to that for the provision of a copy of a birth certificate currently (£11 in England and Wales and £12 in Scotland),<sup>103</sup> we think that this cost may be transferred to individuals seeking their original birth certificate. For the purpose of the IA, we assume that GRO charges for these birth certificates on a cost recovery basis. We have not estimated the cost to those born of surrogacy, as accessing the original birth certificate is voluntary, and we have no way to estimate the numbers of surrogate-born people who will choose to do so.

## **Benefits**

### Transitional benefits

None identified

### Ongoing benefits

#### *Enhanced access to origin information*

There will be emotional, mental and psychological benefits to surrogate-born children as they will no longer be barred from accessing information about their origins as a result of a gap in the law. This has the additional benefit of ensuring law across the UK better conforms to Article 8 of the UNCRC. Clarity around identity and life story promotes welfare, mental health and better familial relationships.<sup>104</sup>

Our recommendation to ensure that each person who requests access to the SR is given a suitable opportunity to receive counselling before doing so, provides greater safeguarding for surrogate-born children in relation to access to information. This will help to reduce the impact of any potentially distressing information on surrogate-born children.

In addition, our recommendations on access to information will create greater consistency between Scotland and England and Wales in relation to accessing complete parental order files by the surrogate-born person (albeit at different ages), providing a legal consistency benefit.

#### *Creation of a surrogacy-specific scheme*

There is a benefit to filling the gap of there being no surrogacy-specific register of information. It will provide clarity for producers/users of national registers as there will no longer be incomplete and inconsistent information about surrogacy arrangements. Previously, only some of surrogacy arrangements (those involving gamete donors) were recorded on any national register at all (the HFEA Donor-Conceived Register), and only in relation to the gamete donation. Under our recommendations, the SR will provide surrogate-born people with either the information that they want, or direct them to the source where they may find such information: for example, gamete donation will continue to be recorded

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<sup>103</sup> Certificate fees available at: <https://www.gov.uk/order-copy-birth-death-marriage-certificate> and <https://www.scotlandsppeople.gov.uk/content/ordering-certificates> (last visited 23 March 2023).

<sup>104</sup> See S. Golombok, "Disclosure and Donor Conceived Children" (2017) 32(7) *Human Reproduction* 1532–1536; J. Zweifel, "Donor conception from the viewpoint of the child: positives, negatives, and promoting the welfare of the child" (2015) 104(3) *Fertility and Sterility* 517. For these reasons, the Donor Conception Network recommends telling children about their origins so that they grow up 'never knowing a time when they didn't know' about their origins by donor conception: <https://www.dcnetwork.org/telling-your-child> (last visited 23 March 2023).

on the HFEA Donor-Conceived Register, but the SR will signpost to the relevant information to be found on the HFEA Donor-Conceived Register (so that the surrogate-born person is aware of its existence).

## AREA 4: OTHER SUBSTANTIVE RIGHTS FOR THOSE INVOLVED IN SURROGACY ARRANGEMENTS

### ***Employment rights***

#### **Costs**

##### Transitional costs

None identified

##### Ongoing costs

#### *Increased financial burden on employers – ante-natal leave for intended parents*

There will be costs to employers because they will be required to provide more time off work for intended parents for ante-natal appointments. We are aware that there is no scheme for reimbursement for employers in the legislation.

Take-up of paid time off to attend five ante-natal appointments is uncertain. However, if we assume that 75% of intended parents involved in domestic surrogacy arrangements take up the opportunity to attend the extra five ante-natal appointments with paid leave<sup>105</sup> that our recommendations provide, that is approximately five half days of work lost. Average weekly earnings are estimated at £617 in the UK.<sup>106</sup>

£61.70 = average earning for a half day in the UK.

£308.50 = average earnings for five half days in the UK.

Table 13: Annual costs to employers [total in £m]

	Low estimate of number of domestic surrogacy arrangements = 320	Central estimate of number of domestic surrogacy arrangements = 400	High estimate of number of domestic surrogacy arrangements = 480
Number of IPs who take up ante-natal appointments	75% of 320 = 240	75% of 400 = 300	75% of 480 = 360
Average earnings for five half days	£308.50	£308.50	£308.50
Total cost	£0.07	£0.09	£0.11

<sup>105</sup> Currently, an intended parent can only take two unpaid times-off for ante-natal appointments under the Employment Rights Act 1996, s 57ZE(7)(e).

<sup>106</sup> Office for National Statistics, *Average weekly earnings in Great Britain: October 2022*. Available at <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/averageweeklyearningsingreatbritain/october2022> (last visited 23 March 2023).

## Assumptions

- We have assumed that intended parents in international surrogacy arrangements are not taking time off work to attend five ante-natal appointments taking place overseas.<sup>107</sup> This is the reason for which we are only calculating the costs to employers where the intended parents are involved in domestic surrogacy arrangements.
- For the new pathway calculation, we assume the figures stated in the introductory paragraph [400, 500 and 600 as the estimates of number of surrogacy arrangements] and that 20% of arrangements are international arrangements.
- It is unknown to what extent intended parents might have higher or lower earnings than the average. Given this uncertainty, we have chosen to base our calculation on the assumption of average earnings in the UK.
- We also understand that some intended parents may not take time off from work to attend ante-natal appointments but rather “make-up” the time elsewhere. Again, given this uncertainty, we have chosen to assume that these are lost earnings for the employer.

Annual cost to employers if new pathway implemented [central estimate] = £0.09m

Present value over 10 years =£0.77m

### *Increased costs for employers – ante-natal leave for additional domestic surrogate pregnancies*

Under Option 1 we anticipate that a number of international surrogacy arrangements will instead be domestic arrangements. We predict that the proportion of arrangements which are domestic rather than international will rise from 50% to 80%, primarily because of the attractiveness of the new pathway rules on legal parental status. This will mean 120, 150, or 180 additional domestic surrogacies on the basis of our low, central and high estimates of the number of overall surrogacies.

This will also lead to costs to employers because they will be required to provide time off work for the additional surrogates who are based in this country rather than abroad, for ante-natal appointments. We are aware that there is no scheme for reimbursement for employers in the legislation.

They will also be required to pay the additional domestic surrogates enhanced maternity leave in accordance with the terms of their contract. As we were not able to identify reliable figures for the cost of enhanced maternity leave to employers, we have not included these within our estimates.

Take up of paid times-off to attend ante-natal appointments for surrogates is uncertain. However, current clinical guidelines suggest seven ante-natal appointments for women who have had a child before.<sup>108</sup> If we assume that surrogates involved in the additional domestic surrogacy arrangements take up their right to paid leave for these appointments, that is approximately seven half days of work lost. Average weekly earnings are estimated at £617 in the UK.<sup>109</sup>

£61.70 = average earning for a half day in the UK.

£431.90 = average earnings for seven half days in the UK.

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<sup>107</sup> However, we appreciate that intended parents in these arrangements may well incur costs through having to spend extended periods of time abroad.

<sup>108</sup> National Institute for Health and Care Excellence, *Antenatal care: number of antenatal appointments*, NICE Guideline NG201 August 2021.

<sup>109</sup> Office for National Statistics, *Average weekly earnings in Great Britain: October 2022*. Available at <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/averageweeklyearningsingreatbritain/october2022> (last visited 23 March 2023).

Table 14: Annual costs to employers [total in £m]

	Low estimate of number of additional domestic surrogacy arrangements = 120	Central estimate of number of additional domestic surrogacy arrangements = 150	High estimate of number of additional domestic surrogacy arrangements = 180
Number of additional surrogates who take up ante-natal appointments	120	150	180
Average earnings for seven half days	£431.90	£431.90	£431.90
Total cost	£0.05	£0.06	£0.08

#### Assumptions

- Assuming that all surrogates are employed and eligible for ante-natal time off. This is likely to be an overestimate as data on this matter is not available.
- For the new pathway calculation, we assume the figures stated in the introductory paragraph [400, 500 and 600 as the estimates of number of surrogacy arrangements] and that 20% of arrangements are international arrangements following reform.
- It is unknown to what extent surrogates' earnings match the average population. Given this uncertainty, we have chosen to base our calculation on the assumption of average earnings in the UK.
- We also understand that some surrogates may not take time off from work to attend ante-natal appointments but rather "make-up" the time elsewhere. Again, given this uncertainty, we have chosen to assume that these are lost earnings for the employer.

Annual cost to employers if new pathway implemented [central estimate] = £0.06m

Present value over 10 years = £0.50m

#### *Costs to the Department for Work and Pensions (DWP) for benefit payments to intended parents*

There will also be costs to DWP because it will have to pay out additional benefits equivalent to maternity allowance to one of the intended parents where they fulfil the criteria for that benefit. Maternity allowance is currently £156.66 a week or 90% of your average weekly earnings (whichever is less) for 39 weeks if you are employed or have recently stopped working.<sup>110</sup> You can get between £27 to £156.66 a week for 39 weeks if you are self-employed.<sup>111</sup> Given the uncertainty of this figure, we have assumed for the purposes of this calculation, that each claimant receives £156.66.

According to the most recent figures available from DWP, in the quarter from 1 December 2021 to 28 February 2022, there were 12,040 maternity allowance spells starting.<sup>112</sup> Assuming a consistent start-up rate, we can estimate that there are approximately 48,160 maternity allowance spells starting per year

<sup>110</sup> See <https://www.gov.uk/maternity-allowance/what-youll-get> (last visited 23 March 2023).

<sup>111</sup> <https://www.gov.uk/maternity-allowance/what-youll-get> (last visited 23 March 2023).

<sup>112</sup> Office for National Statistics, *Maternity Allowance quarterly statistics: December 2021 to February 2022*. <https://www.gov.uk/government/statistics/maternity-allowance-quarterly-statistics-december-2021-to-february-2022> (last visited 23 March 2023).

amongst the general population. There are approximately 700,000 live births in the UK per year.<sup>113</sup> Therefore, in approximately 7% of births per year, maternity allowance is claimed. In the table below, we assume a similar proportion of up-take for maternity allowance amongst surrogacy arrangements.

This will be a transfer cost to DWP. It will be a financial benefit to intended parents (see below).

Table 15: Annual costs to DWP [total in £m]

	Low estimate of number of surrogacy arrangements = 400	Central estimate of number of surrogacy arrangements = 500	High estimate of number of surrogacy arrangements = 600
Cost of maternity allowance per person for full 39 weeks	£6109.74	£6109.74	£6109.74
No. of intended parents who will take up maternity allowance per year	7% of 400 = 28	7% of 500 = 35	7% of 600 = 42
Total cost	£0.17	£0.21	£0.26

#### Assumptions

- Assume that 7% of intended parents who apply for parental orders currently (our only measure for number of surrogacy arrangements per year) would apply for maternity allowance
- Assumption that each claimant will claim maternity allowance for the full available period of 39 weeks.
- Assumption that each claimant for maternity allowance will receive £156.66 per week.

Annual cost to DWP [central estimate] = £0.21m

Present value over 10 years = £1.78m

#### *Costs to the Department for Work and Pensions (DWP) and HM Treasury (HMT) from paid leave for additional domestic surrogate pregnancies*

There will also be costs to HMT because it will have to pay out additional Statutory Maternity Pay, and DWP because it will have to pay out Maternity Allowance, to additional domestic surrogates where they fulfil the criteria for those benefits. Statutory Maternity Pay is paid at 90% of average weekly earnings for six weeks, followed by £156.66 a week or 90% of average weekly earnings (whichever is lower) for 33 weeks. Maternity Allowance is currently £156.66 a week or 90% of your average weekly earnings (whichever is less) for 39 weeks if you are employed or have recently stopped working.<sup>114</sup> You can receive between £27 to £156.66 a week for 39 weeks if you are self-employed.<sup>115</sup>

We were not able to identify the average cost of the 6-week period at 90% of pay, so we have assumed for the purposes of this calculation, that each surrogate receives £156.66 per week, and takes the full 39 weeks. This is likely to be an over-estimate of the duration taken, but an under-estimate of the period at 90% of pay.

<sup>113</sup> Office for National Statistics, *Vital statistics in the UK: births, deaths and marriages*. See <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/datasets/vitalstatisticspopulationandhealthreferencetables> (last visited 23 March 2023).

<sup>114</sup> See <https://www.gov.uk/maternity-allowance/what-youll-get> (last visited 23 March 2023).

<sup>115</sup> <https://www.gov.uk/maternity-allowance/what-youll-get> (last visited 23 March 2023).



According to the most recent figures available from DWP, in the quarter from 1 December 2021 to 28 February 2022, there were 12,040 maternity allowance spells starting.<sup>116</sup> Assuming a consistent start-up rate, we can estimate that there are approximately 48,160 maternity allowance spells starting per year amongst the general population. There are approximately 700,000 live births in the UK per year.<sup>117</sup> Therefore, in approximately 7% of births per year, maternity allowance is claimed. In the table below, we assume a similar proportion of up-take for maternity allowance by surrogates for additional domestic surrogacy arrangements.

This will be a transfer cost to DWP and HMT.

Official data is not available for the number of Statutory Maternity Pay starts. Estimates suggest that there were 361,000 starts in 2019/20,<sup>118</sup> or around 52% of all live births.

Table 16: Annual costs to DWP [total in £m] for Maternity Allowance

	Low estimate of number of additional domestic surrogacy arrangements = 120	Central estimate of number of additional domestic surrogacy arrangements = 150	High estimate of number of additional domestic surrogacy arrangements = 180
Cost of maternity allowance per person for full 39 weeks	£6109.74	£6109.74	£6109.74
No. of additional surrogates who will take up maternity allowance per year	7% of 120 = 8	7% of 150 = 11	7% of 180 = 13
Total cost	£0.05	£0.07	£0.08

#### Assumptions

- Assume that 7% of additional domestic surrogates would apply for maternity allowance
- Assumption that each claimant will claim maternity allowance for the full available period of 39 weeks.
- Assumption that each claimant for maternity allowance will receive £156.66 per week.

Annual cost to DWP [central estimate] = £0.07m

Present value over 10 years = £0.58m

<sup>116</sup> Office for National Statistics, *Maternity Allowance quarterly statistics: December 2021 to February 2022*. <https://www.gov.uk/government/statistics/maternity-allowance-quarterly-statistics-december-2021-to-february-2022> (last visited 23 March 2023).

<sup>117</sup> Office for National Statistics, *Vital statistics in the UK: births, deaths and marriages*. See <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/datasets/vitalstatisticspopulationandhealthreferencetables> (last visited 23 March 2023).

<sup>118</sup> Analysis of DWP and HMRC statistics, *Labour Pains* blog, <https://labourpainsblog.com/2022/01/09/the-mother-of-all-statistics/> (last visited 23 March 2023)

Table 17: Annual costs to HMT [total in £m] for Statutory Maternity Pay

	Low estimate of number of additional domestic surrogacy arrangements = 120	Central estimate of number of additional domestic surrogacy arrangements = 150	High estimate of number of additional domestic surrogacy arrangements = 180
Cost of SMP per person for full 39 weeks	£6109.74	£6109.74	£6109.74
No. of additional surrogates who will take up SMP per year	52% of 120 = 62	52% of 150 = 78	52% of 180 = 94
Total cost	£0.38	£0.48	£0.57

#### Assumptions

- Assume that 52% of additional domestic surrogates would apply for Statutory Maternity Pay
- Assumption that each claimant will claim for the full available period of 39 weeks.
- Assumption that each claimant will receive £156.66 per week.

Annual cost to HMT [central estimate] = £0.48m

Present value over 10 years = £3.99m

#### Benefits

##### Transitional benefits

None identified

##### Ongoing benefits

##### *Improved opportunity for bonding between the child and intended parents*

If intended parents are able to take time off work for ante-natal appointments, the child will benefit from the intended parents being more involved and knowledgeable about the child's health from the earliest possible stage.

There will also be the benefit of maternity allowance being available for intended parents which was not previously possible. This is important as it provides intended parents who do not qualify for surrogacy adoption leave (including the self-employed) with equivalent rights, allowing them to care for and bond with the child.

Formal recognition of employment rights for those involved in surrogacy will lead to a greater normalisation of surrogacy which will reduce stigma for surrogate-born children, surrogates and intended parents. This will have a positive emotional and psychological benefit for surrogate-born children in particular.

## Annual financial benefit for intended parents

There will also be a financial benefit to the intended parents because one of them (regardless of whether in a couple or not) will receive additional benefits equivalent to maternity allowance if they fulfil the criteria for that benefit. The financial benefit for intended parents is equivalent to the costs to DWP with respect to maternity allowance, detailed above.

Table 18: Annual financial benefit to intended parents [total in £m]

	Low estimate of number of surrogacy arrangements = 400	Central estimate of number of surrogacy arrangements = 500	High estimate of number of surrogacy arrangements = 600
Cost of maternity allowance per person for full 39 weeks	£6,109.74	£6,109.74	£6,109.74
No. of intended parents who will take up maternity allowance per year	7% of 400 = 28	7% of 500 = 35	7% of 600 = 42
Total cost	£0.17	£0.21	£0.26

### Assumptions

- Assume that 7% of intended parents who apply for parental orders currently (our only measure for number of surrogacy arrangements per year) would apply for maternity allowance.
- Assumption that each claimant will claim maternity allowance for the full available period of 39 weeks.
- Assumption that each claimant for maternity allowance will receive £156.66 per week.

Annual financial benefit to intended parents [central estimate] = £0.21m

Present value over 10 years = £1.78m

## AREA 5: OUR PAYMENTS SCHEME

### ***Introduction of the categories of permitted payments and enforceable financial terms***

#### **Costs**

##### Transitional costs

##### *Implementation costs of setting up the new payments scheme*

There will be costs to RSOs in setting up the administrative forms and processes for the scheme of authorisation of payments. For example, it will be necessary to create the standard form of the Regulated Surrogacy Statement and financial annex to that statement. This is included in the general set-up costs for becoming an RSO at pages 31 to 32 above.

## Ongoing costs

### *Enforcement costs of payments scheme*

The enforcing authority will incur costs in relation to enforcing the new payments scheme. It is uncertain as to how the new system will be set up, structured and operated. It is also uncertain as to who will be the enforcing authority, as this will be for the Secretary of State to determine. Therefore, we do not have the necessary detail to monetise this cost. Furthermore, there will only be a very small number of cases of enforcement, regardless.

## **Benefits**

### Transitional benefits

None identified

### Ongoing benefits

#### *Protection against commercial surrogacy*

The new payments scheme which details which categories of payments are permitted will increase certainty and consequently provide a number of benefits. It will support the rule of law; enable parties to be confident that they are not infringing the law; and reduce the risk of women being exploited and financially induced into becoming a surrogate. Furthermore, by providing clarity on the principles that lie behind permitted payments – ensuring the surrogate is not left “out-of-pocket” but also protecting against women being financially induced into becoming a surrogate – our new scheme will provide protection against “commercial” payments.

#### *Increased court efficiency*

The new scheme also has the benefit of separating out issues of payment from legal parental status, which will enable courts to deal with overpayments more effectively. This not only saves court resources, but also promotes the welfare of the child by reducing the length of children’s proceedings. However, this must be read with the caveat that savings in court resources do not necessarily translate into a tangible benefit of enabling another case to take place.

#### *Improved enforcement structure*

Our recommendation that the financial terms of a surrogacy consent should become enforceable by the surrogate is clearly of great benefit to the surrogate who previously had no mechanism to enforce payment of sums owed to her. This will provide security to the surrogate. It could also be said to promote fairness.

## AREA 6: LIMITED REFORMS IN RELATION TO INTERNATIONAL SURROGACY

### ***Changes to nationality law and reforms to processes in relation to bringing or removing the child to/from the UK***

#### **Costs**

##### Transitional costs

###### *Training for staff operating nationality law*

There will be costs in relation to providing training and guidance on changes to nationality law for consular staff and those who work with nationality law in UK government. These costs are likely to be minimal and on that basis, we have not monetised them.

###### *Producing a guide on international surrogacy arrangements*

There will also be costs to HMPO/UKVI in relation to providing a single, comprehensive guide for intended parents explaining the nationality and immigration consequences of having a child through an international surrogacy arrangement. We estimate that relevant costs will be the use of resources and costs of production. We are not monetising because the costs will be merged into a policy official's existing workload.

##### Ongoing costs

None identified.

#### **Benefits**

##### Transitional benefits

None identified.

##### Ongoing benefits

###### *Enhanced prominence of the welfare of the child principle*

Our recommendations will promote the surrogate-born child's welfare by placing welfare of the child as the court's paramount consideration in deciding whether to grant an order that the child can be removed from the UK for the purpose of becoming the subject of a parental order, or its equivalent, in another jurisdiction. This benefit is of the same nature as in all other parental order applications.

###### *More efficient passport management and less likelihood of prolonged stays overseas following the birth*

Our recommendation with regards to opening passport files earlier (before rather than after the birth of child) could decrease costs and increase efficiency for HMPO/UKVI if it encourages early compliance with documentary requirements and results in fewer repetitive requests for documents from intended parents.

Our recommendations will reduce the likelihood of citizenship issues arising for surrogate-born children. This promotes the welfare of both the child and the intended parents by ensuring they can be together from the birth and by reducing stress and uncertainty. By speeding up the process of applying for passports/visas, intended parents are not left in the child's country of birth without a support network/access to medical advice.

For example, if citizenship issues meant that the intended parents had to remain for one month after the birth of the child in a foreign country such as Georgia,<sup>119</sup> there would be a cost to the intended parents in doing so. The average monthly expenditure per household in Georgia is £372.94,<sup>120</sup> so we can assume there would be a similar cost to intended parents staying in any similar middle-income foreign country for one month. There would not be the same costs where the international arrangement took place in the US or Canada however, as there are not the same problems in relation to re-entering the UK with surrogate-born children who are not entitled to a passport in those cases.<sup>121</sup>

Furthermore, we note that the second intended parent may have foregone a month's salary as a result of the extended stay overseas. However, given this is potentially wide-ranging and circumstantial, particularly in light of the availability of remote working following the Covid-19 pandemic, we consider there to be too many unknowns to monetise this aspect.

We have heard from intended parents that being stranded overseas and unable to return to the UK for a prolonged period with a newborn child is extremely stressful. The QALY value of moving from full health to mild/severe anxiety is £10,500/£41,300 per year. Therefore, the QALY benefit of preventing severe anxiety for one person for one month is £3,442, and £6,883 for two people.<sup>122</sup>

Table 19: Annual saved costs in relation to preventing prolonged stays overseas [total in £m]

	Low estimate of number of international arrangements = 80	Central estimate of number of international arrangements = 100	High estimate of number of international arrangements = 120
Number of those international arrangements which are <i>not</i> taking place in North America	48	60	72
Saved costs in relation to preventing one month's stay overseas	£400	£400	£400
Saved costs in relation to preventing severe anxiety for one month	48 x 6883	60 x 6883	72 x 6883
Total cost (£m)	£0.35	£0.44	£0.52

<sup>119</sup> Currently, a popular surrogacy "destination" country.

<sup>120</sup> National Statistics Office of Georgia, *Households Expenditures 2021*. Available at: <https://www.geostat.ge/en/modules/categories/51/households-expenditures> (last visited 23 March 2023). 1158.3 GEL converted into sterling at current exchange rates.

<sup>121</sup> In order to obtain a visa to enter the UK, a child born through an international surrogacy arrangement must hold a passport from the country in which they are born. A surrogate child born in California, for instance, is entitled to a US passport, even though the British intended parents will be the legal parents (as a matter of Californian law) from birth, and the birth certificate will name the intended parents as the parents of the child. In contrast, a child born through a surrogacy arrangement in Georgia is not entitled to a Georgian passport. If the child cannot obtain British citizenship – either at birth or by registration – the child is stateless, at least until British citizenship is obtained through the grant of a parental order.

<sup>122</sup> Calculated using the EQ-5D 3L scale from the Quality Adjusted Life Years methodology (QALYS), which enables a monetary value to be placed on the difference between health states across 5 domains. See P. Dolan *et al.*, "A Social Tariff for EuroQol: Results from a UK General Population Survey", (1995) University of York Centre for Health Economics, Discussion Paper No. 138.

## Assumptions

- Low, central, high estimates for number of parental orders, as used throughout this assessment [400, 500, 600]. Assuming that if the new pathway is implemented, 20% of those arrangements would remain as international arrangements (compared to the current 50%). The same scaling system is used for the low and high estimates.
- Current Cafcass data shows that the proportion of North American surrogacy arrangements for which a parental order application is made in the UK, is approximately 40% of all international arrangements. If we subtract the number of North American arrangements from the number of international arrangements in total, then we have the number of international arrangements which may result in a prolonged stay overseas after the birth as a result of passport/visa issues for the child.

### Number of North American surrogacy arrangements

40% of our low estimate of international arrangements [80] = 32

40% of our central estimate of international arrangements [100] = 40

40% of our high estimate of international arrangements [120] = 48

We therefore assume there are 48, 60, and 72 arrangements outside North America which may benefit from the policy, under each of our estimates.

- Assumption that the prolonged stay overseas will be approximately one-month in length.
- Assumption that the costs of living in any similar middle-income country would be approximately the same as the average monthly expenditure per household in Georgia.
- Assuming all IPs affected by this issue are in couples given the restrictions on single people entering surrogacy arrangements in many of the countries where most international arrangements are entered into, for example Georgia.
- Assumption that both IPs experience severe anxiety for one month as a result of the citizenship issues and not being able to return to the UK with their child.
- QALY value moving from full health to mild/severe anxiety is £10,500/£41,300 per year.

Annual cost [central estimate] = £0.44m

Present value over 10 years = £4.06m

### *Saved costs in relation to reduced citizenship applications and on certificates of no impediment*

Our recommendation to exclude the surrogate's spouse or civil partner from being the father or second legal parent of the child born of a surrogacy arrangement for the purposes of nationality law will mean that it will no longer be necessary for intended parents to seek out *unmarried* surrogates abroad.

As a non-monetised benefit (albeit one for non-UK citizens), this will reduce the risk of exploitation of single women who are ostracised by communities for having a child as a single person and removes the difficulty of "proving a negative" that the surrogate was single.

As a monetised benefit, intended parents will save costs as they will no longer need to investigate or prove whether an overseas surrogate has a spouse/civil partner or not. This is usually done by obtaining a certificate of no impediment to marriage. We had heard this was something often required for surrogacy arrangements that had taken place in Georgia. The website of the Embassy of Georgia to the

USA cites a \$20 fee for obtaining a certificate of no impediment to marriage, or £17.12 on current rates of conversion.<sup>123</sup>

Intended parents will also save costs as they will no longer need to make a citizenship application for their surrogate-born child as a result of amendments to the definitions in sections 50(9) and 50(9A) of the British Nationality Act 1981, to exclude the surrogate's spouse or civil partner from being the father or second legal parent of the child born of a surrogacy arrangement and to include those intended parents who acquire legal parental status via the new pathway. The cost for a child to apply to register as a British citizen is £1012.<sup>124</sup> It should be noted that the definition change to include intended parents is reliant on the new pathway being implemented, whereas the definition change to exclude the surrogate's spouse or civil partner is not, and instead, applies to all surrogacy arrangements.<sup>125</sup>

Table 20: Annual saved costs in relation to reduced citizenship applications and on certificates of no impediment, if new pathway implemented [total in £m]

	Low estimate of number of international arrangements = 80	Central estimate of number of international arrangements = 100	High estimate of number of international arrangements = 120
Number of surrogates in international arrangements who are unmarried/not in a civil partnership	53	67	80
Cost of child under 18 applying to register as a British citizen	£1012	£1012	£1012
Cost of certificate of no impediment to marriage	£17.12	£17.12	£17.12
Total cost	£0.05	£0.07	£0.08

#### Assumptions

- Assuming that one-third of surrogates involved in international arrangements are married or in a civil partnership.
- Number of international arrangements accounting for one-fifth of total surrogacy arrangements. Same scaling system used for low and high estimates.
- Cost of certificate of no impediment to marriage being similar for most international surrogacy destinations.

Annual saved cost [central estimate] = £0.07m

Present value over 10 years = £0.57m

<sup>123</sup> The Embassy of Georgia to the United States of America, 'Certificate of non-impediment to marriage' <https://georgiaembassyusa.org/2021/05/07/certificate-of-non-impediment-to-marriage/> (last visited 23 March 2023).

<sup>124</sup> UK Visas and Immigration, *Guidance on Fees for citizenship applications and the right of abode from 6 April 2018*. Available at <https://www.gov.uk/government/publications/fees-for-citizenship-applications/fees-for-citizenship-applications-and-the-right-of-abode-from-6-april-2018> (last visited 23 March 2023).

<sup>125</sup> See Recommendation 80.



*Better understanding of legal requirements*

Lastly, the creation of official government guidance on international surrogacy arrangements will promote the welfare of the child. This is because it will result in a better understanding of legal requirements for surrogacy amongst intended parents.

## **Option 2: All reforms except new pathway and new regulatory framework**

The above costs and benefits of Option 1 reform are equally relevant to Option 2, apart from those related to the introduction of the new pathway and the new regulatory framework (Area 1) and some nationality law reforms consequential on introduction of the new pathway (in Area 6). Option 2 only covers Areas 2-6 of the areas outlined at page 26 above.

Given that the number of international arrangements will be different if Option 2 is implemented without Option 1, there are certain costs/benefits from Option 1 above that need to be calculated on a different basis in Option 2. This is done below.

For Option 2 – as we did for Option 1 – we have based our calculations on a low, central and high estimate of parental orders [400, 500, 600]. We assume that the limited reforms will only mildly incentivise intended parents to stay in the UK rather than entering into an international surrogacy arrangement. Therefore, we estimate that where the new pathway is not implemented, out of 500 surrogacy arrangements per year, 40% of those will be international arrangements [200], and 60% will be domestic arrangements [300] (compared to the current, estimated 50:50 split).

### **AREA 2: THE PARENTAL ORDER PROCESS**

#### **Costs**

##### **Ongoing costs**

##### *Costs to the NHS from additional surrogate pregnancies*

Note: This cost was included in Area 1 for Option 1, as the increase in domestic surrogacy arrangements was as a result of intended parents choosing to utilise the new pathway rather than enter into an international surrogacy arrangement. Under Option 2, there is no new pathway, but we anticipate a modest increase in the number of domestic surrogacy arrangements, due to the attraction of the reformed parental order system. This cost therefore features under Area 2 for Option 2.

We expect that as a result of our recommendations, if the new pathway is not implemented and Option 2 adopted, a small proportion of those intended parents who currently go overseas for surrogacy will instead choose to enter into a domestic arrangement, using the reformed parental order process. International surrogacy arrangements will reduce from 50% to 40% of all arrangements. We estimate that this will result in 50 surrogacy arrangements taking place in England and Wales, and Scotland, rather than overseas. These 50 additional pregnancies will result in costs to the NHS for the surrogate's ante-natal, birth and post-natal care.

We have calculated these estimated costs of NHS care as shown below.

It is possible that, in addition to the cost of ante-natal, birth and post-natal care, there may be further costs to the NHS if surrogates suffer post-pregnancy or birth health complications. These costs to the NHS, like the general costs of the pregnancy, would not have been incurred had the surrogacy arrangement been one that took place overseas. We do not consider that we can calculate these potential costs with an acceptable degree of certainty, and accordingly have not included them in the calculations for this impact assessment.

In England and Wales, the NHS does not currently fund assisted reproduction for surrogacy. We have therefore assumed that any costs of assisted reproduction (IVF and similar) will be met privately by the intended parents for cases in England and Wales. In Scotland the position is different.

Table 21: Annual cost to the NHS from additional surrogate pregnancies

	Low estimate	Central estimate	High estimate
Number of additional surrogacy arrangements	40	50	60
Estimated average cost to NHS for maternity care, including delivery	£5,000	£5,000	£5,000
Cost of assisted reproduction in Scottish surrogacy arrangements, based on high / central / low estimate of number of arrangements	£9,555	£19,110	£28,665
Total (£m)	£0.21	£0.27	£0.33

Assumptions:

- 40, 50, or 60 additional domestic surrogacies will take place in England and Wales, and Scotland, on the basis of our low, central and high estimates of the number of overall surrogacies.
- Of these additional surrogacy arrangements, 39, 48 or 57 will take place in England and Wales, and 1, 2, or 3 in Scotland, on the basis of our low, central and high estimates of the number of overall surrogacies. At present few surrogacy arrangements take place in Scotland (see Table 1); in 2021, 435 parental orders were granted in England and Wales, and only 15 in Scotland.
- The estimated average cost to the NHS for maternity care, including delivery, is approximately £5,000. These figures were provided by the Department of Health and Social Care, and are based on NHS tariff 1 for maternity care.<sup>126</sup> The average cost is estimated on the basis that surrogates will have low medical risk factors, as medical screening is part of the surrogacy process, and included a high and low estimate of the cost of delivery.
- Costs of any longer-term health complications for the surrogate arising from the pregnancy or birth are not included.
- Based on the figures available, the estimated average cost to NHS Scotland for fresh IVF is £3,185 per cycle, as per figures produced for the National Infertility Group and Scottish Government by the University of Glasgow.<sup>127</sup> We understand that NHS Scotland funds up to 3 cycles of IVF for women under 40, and have assumed that the surrogate will be under 40 and utilise the 3 funded cycles of IVF treatment. Where the treatment required is donor insemination rather than IVF, this typically incurs a lower cost. However, for the purposes of this calculation, we have opted to use the IVF figure. Total estimated cost is therefore £9,555 per surrogacy.

Annual cost to NHS [central estimate]: £0.27

Present value over 10 years = £2.25m

<sup>126</sup> <https://www.england.nhs.uk/publication/national-tariff-payment-system-documents-annexes-and-supporting-documents/>

<sup>127</sup> University of Glasgow, Cost of IVF/ICSI treatment in Scotland: cost analysis and setting a tariff, Report to National Infertility Group and Scottish Government (January 2020) (unpublished). This report is based on data obtained over the period 1st January 2015 to 31st July 2018, and is therefore out of date, but represents the best information readily available to us.

## Benefits

### *Reduced cost of legal representation*

We expect that as a result of our recommendations, if the new pathway is not implemented and Option 2 adopted, a small proportion of those intended parents who currently go overseas for surrogacy will instead choose to enter into a domestic arrangement, using the reformed parental order process. International surrogacy arrangements will reduce from 50% to 40% of all arrangements. We estimate that this will result in 50 surrogacy arrangements taking place in England and Wales, and Scotland, rather than overseas.

In Option 1, we detailed (as part of our calculations of savings to the intended parents in court costs and legal fees) the savings in respect of legal representation that we anticipate will be made by intended parents who would otherwise have undertaken an international surrogacy arrangement, but under our new proposals choose instead to make use of the new pathway. Unlike in Option 1, those intended parents will still need to seek a parental order and pay parental order fees; we have not therefore included a saving for these fees.

Table 22: Annual saved costs of legal representation to intended parents who would otherwise have entered into an international surrogacy arrangement [total in £m]

	Low estimate	Central estimate	High estimate
No of surrogacy arrangements that would otherwise have been international	40	50	60
Estimated legal fees saved per case	£6,000	£6,000	£6,000
Total benefit (£m)	£0.24	£0.30	£0.36

#### Assumptions:

- Number of new pathway arrangements that would have been international arrangements before reform, but will now proceed on the new pathway; we have assumed a low / central / high figure of 40 / 50 / 60 for these arrangements.
- Number of new pathway arrangements that would have been international arrangements before reform, but will now proceed on the new pathway; we have assumed a central figure of 550 for these arrangements. We have used the figure of £5,000+VAT (£6,000), which is an estimate based on discussions as part of the project for surrogacy organisation fees for support and advice on international arrangements. Costs which include representation in international cases will be higher, but we take into account that not all parents involved in international cases will spend as much on representation, or may self-represent.

Annual benefit to intended parents [central estimate] = £0.30m

Present value over 10 years = £2.49m

## AREA 4: OTHER SUBSTANTIVE RIGHTS FOR THOSE INVOLVED IN SURROGACY ARRANGEMENTS

### ***Employment rights***

#### **Costs**

##### Ongoing costs

##### *Additional financial burden on employers from intended parents' ante-natal leave*

There will be costs to employers because they will be required to provide more time off work for intended parents for ante-natal appointments. We are aware that there is no scheme for reimbursement for employers in the legislation. We monetised these costs at 45 and 46 above in relation to the new pathway, but due to a different number of international surrogacy arrangements in the event that the new pathway is not implemented, we have calculated these costs on a different basis below for Option 2 (for further details on the figures see page 58 above).

Table 23: Annual costs to employers, if new pathway *not* implemented [total in £m]

	Low estimate of number of domestic surrogacy arrangements = 240	Central estimate of number of domestic surrogacy arrangements = 300	High estimate of number of domestic surrogacy arrangements = 360
Number of IPs who take up ante-natal appointments	75% of 240 = 180	75% of 300 = 225	75% of 360 = 270
Average earnings for five half days	£308.50	£308.50	£308.50
Total cost	£0.06	£0.07	£0.08

#### Assumptions

- Assuming that intended parents in international surrogacy arrangements are not taking time off work to attend five ante natal appointments that are taking place overseas. This is the reason for which we are only calculating the costs to employers where the intended parents are involved in *domestic* surrogacy arrangements.
- For the parental order process calculation, we assume the figures stated in the introductory paragraph [400, 500 and 600 as the estimates of number of surrogacy arrangements] and that 40% of those estimates are international ones [160, 250 and 300]. This estimate is based on Cafcass data<sup>128</sup> and an assumption that intended parents are only mildly more incentivised (estimated 10%) to stay in the UK for arrangements rather than going abroad, if new pathway not implemented (due to limited reform to parental order process).
- We also understand that some intended parents may not take time off from work to attend ante natal appointments but rather “make-up” the time elsewhere. Again, given this uncertainty, we have chosen to assume that these are lost earnings for the employer.

<sup>128</sup> Information provided by CAF/CASS dated 13 October 2022 in response to a Freedom of Information request, available in Appendix 2.

Annual cost to employers if new pathway not implemented [central estimate] = £0.07m

Present value over 10 years =£0.58m

*Increased financial burden on employers from surrogates' ante-natal leave for additional domestic surrogacies*

Under Option 2 we anticipate that a much smaller number of international surrogacy arrangements will instead be domestic arrangements. We predict that the proportion of arrangements which are domestic rather than international will rise from 50% to 60%, primarily because of the impact that changes to the rules on the surrogate's consent may have on intended parents' concern about a domestic arrangement. This will mean 40, 50 or 60 additional domestic surrogacies on the basis of our low, central and high estimates of the number of overall surrogacies.

As with Option 1, this will lead to costs to employers because they will be required to provide time off work for the additional surrogates who are based in this country rather than abroad, for ante-natal appointments, and to pay the additional domestic surrogates enhanced maternity leave. As with Option 1, because of an absence of reliable data we do not estimate the costs of enhanced maternity leave.

Take up of paid times-off to attend ante-natal appointments for surrogates is uncertain. However, current clinical guidelines suggest seven ante-natal appointments for women who have had a child before.<sup>129</sup> If we assume that surrogates involved in the additional domestic surrogacy arrangements take up their right to paid leave for these appointments, that is approximately seven half days of work lost. Average weekly earnings are estimated at £617 in the UK.<sup>130</sup>

£61.70 = average earning for a half day in the UK.

£431.90 = average earnings for seven half days in the UK.

Table 24: Annual costs to employers [total in £m]

	Low estimate of number of additional domestic surrogacy arrangements = 40	Central estimate of number of additional domestic surrogacy arrangements = 50	High estimate of number of additional domestic surrogacy arrangements = 60
Number of additional surrogates who take up ante-natal appointments	40	50	60
Average earnings for seven half days	£431.90	£431.90	£431.90
Total cost	£0.02	£0.02	£0.03

Assumptions

- Assuming that all surrogates are employed and eligible for ante-natal time off. This is likely to be an overestimate as data on this matter is not available.

<sup>129</sup> National Institute for Health and Care Excellence, *Antenatal care: number of antenatal appointments*, NICE Guideline NG201 August 2021.

<sup>130</sup> Office for National Statistics, *Average weekly earnings in Great Britain: October 2022*. Available at <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/averageweeklyearningsingreatbritain/october2022> (last visited 23 March 2023).

- Assuming 40, 50 or 60 additional domestic surrogacies on the basis of our low, central and high estimates of the number of overall surrogacies as stated in the introductory paragraph [400, 500 and 600 as the estimates of total number of surrogacy arrangements]
- It is unknown to what extent surrogates' earnings match the average population. Given this uncertainty, we have chosen to base our calculation on the assumption of average earnings in the UK.
- We also understand that some surrogates may not take time off from work to attend ante natal appointments but rather "make-up" the time elsewhere. Again, given this uncertainty, we have chosen to assume that these are lost earnings for the employer.

Annual cost to employers if new pathway not implemented [central estimate] = £0.02m

Present value over 10 years =£0.18m

*Costs to the Department for Work and Pensions (DWP) and HM Treasury (HMT) from paid leave for surrogates in additional domestic surrogacies*

There will also be costs to HMT because it will have to pay out additional Statutory Maternity Pay, and DWP because it will have to pay out Maternity Allowance, to the smaller number of additional domestic surrogates where they fulfil the criteria for those benefits. Statutory Maternity Pay is paid at 90% of average weekly earnings for six weeks, followed by £156.66 a week or 90% of average weekly earnings (whichever is lower) for 33 weeks. Maternity Allowance is currently £156.66 a week or 90% of your average weekly earnings (whichever is less) for 39 weeks if you are employed or have recently stopped working.<sup>131</sup> You can receive between £27 to £156.66 a week for 39 weeks if you are self-employed.<sup>132</sup>

We were not able to identify the average cost of the 6-week period at 90% of pay, so we have assumed for the purposes of this calculation, that each surrogate receives £156.66 per week, and takes the full 39 weeks. This is likely to be an over-estimate of the duration taken, but an under-estimate of the period at 90% of pay.

According to the most recent figures available from DWP, in the quarter from 1 December 2021 to 28 February 2022, there were 12,040 maternity allowance spells starting.<sup>133</sup> Assuming a consistent start-up rate, we can estimate that there are approximately 48,160 maternity allowance spells starting per year amongst the general population. There are approximately 700,000 live births in the UK per year.<sup>134</sup> Therefore, in approximately 7% of births per year, maternity allowance is claimed. In the table below, we assume a similar proportion of up-take for maternity allowance by surrogates for additional domestic surrogacy arrangements.

This will be a transfer cost to DWP and HMT.

Official data are not available for the number of Statutory Maternity Pay starts. Estimates suggest that there were 361,000 starts in 2019/20,<sup>135</sup> or around 52% of all live births.

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<sup>131</sup> See <https://www.gov.uk/maternity-allowance/what-youll-get> (last visited 23 March 2023).

<sup>132</sup> <https://www.gov.uk/maternity-allowance/what-youll-get> (last visited 23 March 2023).

<sup>133</sup> Office for National Statistics, *Maternity Allowance quarterly statistics: December 2021 to February 2022*. <https://www.gov.uk/government/statistics/maternity-allowance-quarterly-statistics-december-2021-to-february-2022> (last visited 23 March 2023).

<sup>134</sup> Office for National Statistics, *Vital statistics in the UK: births, deaths and marriages*. See <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/datasets/vitalstatisticspopulationandhealthreferencetables> (last visited 23 March 2023).

<sup>135</sup> Analysis of DWP and HMRC statistics, *Labour Pains blog*, <https://labourpainsblog.com/2022/01/09/the-mother-of-all-statistics/> (last visited 23 March 2023)

Table 25: Annual costs to DWP [total in £m] for Maternity Allowance

	Low estimate of number of additional domestic surrogacy arrangements = 40	Central estimate of number of additional domestic surrogacy arrangements = 50	High estimate of number of additional domestic surrogacy arrangements = 60
Cost of maternity allowance per person for full 39 weeks	£6109.74	£6109.74	£6109.74
No. of additional surrogates who will take up maternity allowance per year	7% of 40 = 3	7% of 50 = 4	7% of 60 = 4
Total cost	£0.02	£0.02	£0.02

Assumptions

- Assume that 7% of additional domestic surrogates would apply for maternity allowance
- Assumption that each claimant will claim maternity allowance for the full available period of 39 weeks.
- Assumption that each claimant for maternity allowance will receive £156.66 per week.

Annual cost to DWP [central estimate] = £0.02m

Present value over 10 years =£0.20m

Table 26: Annual costs to HMT [total in £m] for Statutory Maternity Pay

	Low estimate of number of additional domestic surrogacy arrangements =40	Central estimate of number of additional domestic surrogacy arrangements = 50	High estimate of number of additional domestic surrogacy arrangements = 60
Cost of SMP per person for full 39 weeks	£6,109.74	£6,109.74	£6,109.74
No. of additional surrogates who will take up SMP per year	52% of 40 = 21	52% of 50 = 26	52% of 60 = 31
Total cost	£0.13	£0.16	£0.19

Assumptions

- Assume that 52% of additional domestic surrogates would apply for Statutory Maternity Pay.
- Assumption that each claimant will claim for the full available period of 39 weeks.
- Assumption that each claimant will receive £156.66 per week.



Annual cost to HMT [central estimate] = £0.16m

Present value over 10 years = £1.33m

## Benefits

### Transitional benefits

None identified

### Ongoing benefits

The cost incurred for additional surrogates to receive Statutory Maternity Pay or Maternity Allowance is incidental to one of the intentions of reform, that is, ensuring that the court can make a decision in the best interests of the child's throughout their life.

## AREA 6: LIMITED REFORMS IN RELATION TO INTERNATIONAL SURROGACY

### ***Changes to nationality law and reforms to processes in relation to bringing or removing the child to/from the UK***

## Benefits

### Ongoing benefit

*More efficient passport management and less likelihood of prolonged stays overseas following the birth*

We monetised these benefits at pages 53 to 55 above in relation to the new pathway, but due to a different number of international surrogacy arrangements in the event that the new pathway is not implemented, we have calculated these benefits on a different basis below for Option 2 (for further details on the figures see page 58 above).

As seen from the calculation below, this particular reform appears to result in a greater saved cost if the new pathway is not implemented (i.e. in Option 2). This is because Option 2 would mean that there are more international arrangements than in Option 1, so our cost-saving nationality/citizenship reforms which only affect international arrangements can save more money. However, reducing the number of international arrangements is a priority for reform in order to reduce the risk of exploitation, as set out in our terms of reference and explored above,<sup>136</sup> so Option 1 continues to be our preferred scheme overall.

Table 27: Annual saved costs in relation to preventing prolonged stays overseas, if new pathway *not* implemented [total in £m]

	Low estimate of number of international arrangements = 160	Central estimate of number of international arrangements = 200	High estimate of number of international arrangements = 240
Number of international arrangements which are <i>not</i> taking place in North America	96	120	144
Saved costs in relation to preventing	£400	£400	£400

<sup>136</sup> Page 12 above.

one month's stay overseas			
Saved costs in relation to preventing severe anxiety for one month	(90% of 96 x £6883) + (10% of 96 x £3442)	(90% of 120 x £6883) + (10% of 120 x £3442)	(90% of 144 x £6883) + (10% of 144 x £3442)
Total cost	£0.67	£0.83	£1.0

## Assumptions

- Our estimate, if the new pathway is not implemented, is that international arrangements would only be mildly less popular, so predict that they will account for approximately 40% of all arrangements (compared to the current estimated 50%). The same scaling system is used for the low and high estimates.
- Current Cafcass data shows that the proportion of North American surrogacy arrangements for which a parental order application is made in the UK, is approximately 40% of all international arrangements. If we subtract the number of North American arrangements from the number of international arrangements in total, then we have the number of international arrangements which may result in a prolonged stay overseas after the birth as a result of passport/visa issues for the child.

### Number of North American surrogacy arrangements

40% of our low estimate of international arrangements [160] = 64

40% of our central estimate of international arrangements [200] = 80

40% of our high estimate of international arrangements [240] = 96

- Assumption that the prolonged stay overseas will be approximately one-month in length.
- Assumption that the costs of living in any similar middle-income country would be approximately the same as the average monthly expenditure per household in Georgia.
- Assuming 90% of IPs in couples and 10% of IPs are single (based on proportion of single IPs in pre-pandemic parental order data).<sup>137</sup>
- Assumption that both IPs experience severe anxiety for one month as a result of the citizenship issues and not being able to return to the UK with their child.
- QALY value moving from full health to mild/severe anxiety is £10,500/£41,300 per year.

Annual cost [central estimate] = £0.83m

Present value over 10 years = £7.68m

### *Saved costs in relation to reduced citizenship applications and on certificates of no impediment*

We monetised these benefits at pages 55 to 56 above in relation to the new pathway, but due to a different number of international surrogacy arrangements in the event that the new pathway is not implemented and the non-implementation of nationality law reforms which are reliant on introduction of the new pathway, we have calculated these benefits on a different basis below for Option 2 (for further details on the figures see page 58 above).

<sup>137</sup> Information provided by CAF/CASS dated 13 October 2022 in response to a Freedom of Information request, available in Appendix 2.

Table 28: Annual saved costs on certificates of no impediment, if new pathway *not* implemented

	Low estimate of no of international arrangements = 160	Central estimate of no of international arrangements = 200	High estimate of no of international arrangements = 240
Number of surrogates in international arrangements who are unmarried/not in a civil partnership	107	133	160
Cost of certificate of no impediment to marriage	£17.12	£17.12	£17.12
<b>Total cost<sup>138</sup></b>	<b>£1,830</b>	<b>£2,280</b>	<b>£2,740</b>

#### Assumptions

- Number of international arrangements accounting for 40% of total surrogacy arrangements. Same scaling system used for low and high estimates.
- Assuming that one-third of surrogates involved in international arrangements are married or in a civil partnership.
- Cost of certificate of no impediment to marriage being similar for most international surrogacy destinations.

Annual saved cost [central estimate] = £2,280

Present value over 10 years =£0.02m

**Table 29: Summary Cost/Benefit and NSPV of Option 1 and 2 [in £m]**

	Low estimate	Central estimate	High estimate
<b>Option 1 - Costs</b>			
Transitional cost			
Area 1:	£0.41	£0.46	£0.52
<b>Total Transitional costs</b>	<b>£0.41</b>	<b>£0.46</b>	<b>£0.52</b>
Ongoing costs:			
Area 1	£1.72	£2.09	£2.51
Area 4	£0.72	£0.92	£1.10
<b>Total costs [ongoing]</b>	<b>£2.44</b>	<b>£3.01</b>	<b>£3.61</b>
<b>Option 1 – Benefits [ongoing]</b>			
Area 1	£3.86	£4.82	£5.79
Area 4	£0.17	£0.21	£0.26
Area 6	£0.40	£0.51	£0.60
<b>Total Benefit</b>	<b>£4.44</b>	<b>£5.54</b>	<b>£6.65</b>
<b>Option 1 NSPV</b>	<b>£19.00</b>	<b>£24.24</b>	<b>£29.06</b>

<sup>138</sup> Rounded to nearest £10

<b>Option 2 - Costs</b>			
Ongoing costs:			
Area 2	£0.21	£0.27	£0.33
Area 4	£0.39	£0.49	£0.58
<b>Total costs</b>	<b>£0.60</b>	<b>£0.76</b>	<b>£0.91</b>
<b>Option 2 – Benefits [ongoing]</b>			
Area 2	£0.24	£0.30	£0.36
Area 4	£0.17	£0.21	£0.26
Area 6	£0.67	£0.83	£1.00
<b>Total Benefit</b>	<b>£1.08</b>	<b>£1.34</b>	<b>£1.62</b>
<b>Option 2 NSPV</b>	<b>£2.56</b>	<b>£3.13</b>	<b>£3.82</b>

## Risks and assumptions

Risks and assumptions have been assessed throughout this IA.

## Direct costs and benefits to business calculations

Includes all businesses but our reforms will only have an impact on small businesses (the surrogacy organisations who may choose to become RSOs). Costs to business arise under option 1 under the regulatory framework on the new pathway. See Regulatory costs faced by surrogacy organisations to become compliant [central estimate, £0.13m].

## Impact on small and micro businesses

There are four main surrogacy organisations that exist currently: SurrogacyUK, Brilliant Beginnings, COTS and My Surrogacy Journey. All of these organisations currently have fewer than 20 staff members, bringing them within the definition of small and micro businesses.

Given the structure of the surrogacy market, to exempt small and micro firms from this legislation would remove its impact. The current practice is that support for surrogacy arrangements is provided by small and micro firms. In addition, we have consulted and listened to surrogacy organisations throughout the project to mitigate any impact that our reforms may have on their operations. Overall cost to surrogacy organisations is included above in the section on regulatory costs faced by surrogacy organisations.

Furthermore, the ONS statistics on business activity<sup>139</sup> show that solicitors' firms are generally small businesses. Solicitors who practice in the area of surrogacy law may be impacted by our recommendations due to the diversion from international arrangements to domestic arrangements on the new pathway, where independent legal advice is a mandatory requirement. We do not anticipate that this will impact them materially as there are 74,000 solicitors' firms in the UK and surrogacy cases are a very small proportion of their case load.

Some small businesses are also likely to benefit from the changes above. It is possible that UK fertility clinics (often small businesses)<sup>140</sup> and counsellors (often micro businesses) will see increased demand as intended parents choose to undertake surrogacy in the UK instead of seeking surrogacy overseas,

<sup>139</sup> ONS *Statistics on business activity* (28 September 2022), Table 3. Available at: <https://eur03.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.ons.gov.uk%2Fbusinessindustryandtrade%2Fbusiness%2Factivitysizeandlocation%2Fdatasets%2Fukbusinessactivitysizeandlocation&data=05%7C01%7Csarah.horne%40dhsc.gov.uk%7C00d0c40d528d454ed0a308dac7ca53ae%7C61278c3091a84c318c1fef4de8973a1c%7C1%7C0%7C638041969271909233%7CUnknown%7CTWFPbGZsb3d8eyJWljoIMC4wLjAwMDAilCJQljoiv2luMzliLCJBTil6Ik1haWwiLCJXVCi6Mn0%3D%7C3000%7C%7C%7C&sdata=LnxMOxlomeJ2qzdYLMwvXZ8FK2DbHzQ5b82fZzhSeY%3D&reserved=0> (last visited 23 March 2023).

<sup>140</sup> ONS, *Statistics on business activity* (28 September 2022), Table 4, shows that private healthcare businesses are predominantly small and micro businesses. Available at: <https://www.ons.gov.uk/businessindustryandtrade/business/activitysizeandlocation/datasets/ukbusinessactivitysizeandlocation> (last visited 23 March 2023).

and increasingly join the new pathway. We have not estimated these costs separately, as to do so would be disproportionate given the small number of intended parents and surrogates involved compared to the scale of both professions.<sup>141</sup> The equivalent costs to IPs, however, are taken account of in the IA as they are included in the screening and safeguarding costs to IPs above.

## **Wider impact (consider the impacts of your proposals)**

### **Equality impact**

Having researched extensively and consulted widely with a diverse range of interested parties we have not identified any adverse impacts of our policy on the protected characteristics. We have completed the Equality Impact Assessment Initial Screening and are not required to complete a further full assessment.

Taken as a whole, our package of proposed reforms would create greater certainty and better reflect the intentions of surrogates and intended parents, on both the new pathway and via the existing parental process, whilst upholding the best interests of the child. This will result in benefits for those who come into contact with it, when compared to the current system. Given the protected characteristics of those who come into contact with surrogacy, this is likely to especially benefit women as surrogates, and male same-sex couples.

### **Health impact**

The health impact has been assessed throughout this IA.

### **Justice impact**

The impact on the justice system has been assessed throughout this IA.

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<sup>141</sup> For example, 53,000 women underwent IVF in the UK in 2019 and there are around 60,000 members of the British Association for Counselling and Psychotherapy. See HFEA, *Fertility treatment 2019: trends and figures* (May 2021). Available at <https://www.hfea.gov.uk/about-us/publications/research-and-data/fertility-treatment-2019-trends-and-figures/> (last visited 23 March 2023) and see the British Association for Counselling and Psychotherapy *Annual review and financial statements 2021 to 2022*. Available at <https://www.bacp.co.uk/media/16681/bacp-annual-review-and-financial-statements-2021-to-2022.pdf> (last visited 23 March 2023).

## **APPENDIX 1: Glossary**

We use the following terms within this Report.

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

<b>Term</b>	<b>Definition</b>
<i>Altruistic / non-commercial surrogacy</i>	A <i>surrogacy arrangement</i> in which neither the woman who becomes the <i>surrogate</i> , nor any surrogacy agency involved, makes a profit, and the arrangement is not enforceable as a matter of contract law.
<i>Artificial insemination</i>	A procedure where sperm are directly introduced into the reproductive system of a woman by means of a syringe or other artificial device. This process can be completed at home, without the involvement of a fertility clinic, or may take place within a clinic.
<i>Assisted conception</i>	An umbrella term which covers conception that does not take place through sexual intercourse. Examples include <i>artificial insemination</i> and <i>IVF</i> .
<i>Baby / child / foetus</i>	All these terms may be used in everyday language to refer to the baby that the <i>surrogate</i> is carrying during her pregnancy.  We have generally preferred to use the term baby or child, even whilst still in utero, unless the context is medical and reference to a foetus is, therefore, more appropriate. For example, while we generally refer to the surrogate carrying a child during pregnancy, we have also referred to a woman's ability to gestate a foetus to term.
<i>British Infertility Counselling Association ("BICA")</i>	A registered charity that represents professional infertility counsellors in the UK.
<i>Biological parent/parentage</i>	A term which can be used to refer to gestational and/or genetic parentage. In this Report, we prefer to specify whether we mean <i>gestational</i> or <i>genetic parentage</i> , as applicable, but we may quote from sources that use the term "biological."
<i>Blended family</i>	A family where, typically, one or both of the parents have children from previous relationships who come together to form one family unit.
<i>The Children and Family Court Advisory Support Service ("Cafcass")</i>	The public body in England which liaises with the court to provide a parental order reporter in surrogacy cases.
<i>The Children and Family Court Advisory Support Service Cymru ("Cafcass Cymru")</i>	The public body in Wales which liaises with the court to provide a parental order reporter in surrogacy cases.
<i>Commercial surrogacy</i>	A <i>surrogacy arrangement</i> in which the woman who becomes the <i>surrogate</i> and any agency involved charge the <i>intended parents</i> a fee which includes an element of profit. A commercial arrangement in jurisdictions overseas may also be characterised by the existence of an enforceable <i>surrogacy contract</i> between the intended parents and the surrogate.

Term	Definition
<i>Curator ad litem</i>	<p>In Scotland, a court appointed person whose duty is to act on behalf of the child in litigation, including a parental order application, with a duty of safeguarding the interests of the child.</p> <p>In Scotland, a reporting officer is also appointed by the court to witness agreements to the parental order and to perform other duties prescribed by rules of court. The same person usually acts in both roles.</p>
<i>Domestic surrogacy arrangement</i>	<p>A <i>surrogacy arrangement</i> where the <i>surrogate</i> and <i>intended parents</i> are both based in the UK, and where all elements of the process, including pre-conception screening, (assisted) conception, pregnancy and birth take place in the UK. We use this term in contrast to an international surrogacy arrangement, where all or some of the elements of the process take place outside of the UK.</p>
<i>The European Convention on Human Rights (the “ECHR”)</i>	<p>The ECHR is an international convention in designed to protect human rights in Europe. Of most relevance to surrogacy are the rights contained in Articles 8 and 12 and 14 (a right to respect for an individual’s private and family life, the right to found a family, and protection from discrimination, respectively).</p> <p>The UK is a contracting state to the ECHR, and has implemented its provisions in domestic law through the Human Rights Act 1998.</p>
<i>The European Court of Human Rights (the “ECtHR”)</i>	<p>An international court established by <i>the ECHR</i>, which decides on applications alleging that a contracting state has breached one or more of the rights guaranteed by the ECHR.</p>
<i>Embryo</i>	<p>An organism formed by the fertilisation of two <i>gametes</i>. In human pregnancy, from a medical perspective, an embryo is classified as a foetus from the 8th week after the fertilisation of the egg.<sup>142</sup></p>
<i>Gamete</i>	<p>Human reproductive cells. Female gametes are called eggs and male gametes are called sperm.</p>
<i>Genetic parent or parentage</i>	<p>A term which refers to the one or both of the two persons whose <i>gametes</i> were used to conceive a child.</p>
<i>Gestational parent or parentage</i>	<p>A term which refers to the woman who gives birth to a child.</p>

<sup>142</sup> <https://www.nhs.uk/conditions/pregnancy-and-baby/8-weeks-pregnant/> (last visited 23 March 2023)

Term	Definition
<i>Gestational surrogacy</i>	<p>A <i>surrogacy arrangement</i> in which the <i>surrogate</i> is not genetically related to the child.</p> <p>Gestational surrogacy involves the implantation of the surrogate with an <i>embryo</i> or embryos created in a process known as <i>in-vitro fertilisation</i> (“IVF”). These embryos may be formed of the <i>intended mother’s</i> egg and the <i>intended father’s</i> sperm, although donor sperm or a donor egg can be used.</p> <p>We have preferred this term to that of “host” or “full” surrogacy which can also be used to describe this type of <i>surrogacy arrangement</i>.</p>
<i>Guardian ad litem</i>	<p>In Northern Ireland, a court-appointed person whose duty is to act on behalf of the child in a parental order application, with a duty of safeguarding the interests of the child.</p>
<i>The Human Fertilisation and Embryology Authority (the “HFEA”)</i>	<p>The statutory body that regulates and inspects all licensed fertility clinics in the UK. It also regulates human embryo research.</p>
<i>The Human Fertilisation and Embryology Authority’s Code of Practice (9th edition, revised October 2021) (the “Code of Practice”)</i>	<p>The Human Fertilisation and Embryology Authority publishes the Code of Practice to provide guidance to bodies such as licensed fertility clinics to help them comply with their duties under legislation. Guidance in the Code of Practice is also designed to serve as a useful reference for members of the public, including patients, donors and donor-conceived people.</p>
<i>Infertility</i>	<p>In the context of a heterosexual couple, the World Health Organisation defines infertility as a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse.<sup>143</sup> In the context of an individual, we use “infertility” to mean a person who is unable to gestate a foetus or unable to provide <i>gametes</i> for the creation of an <i>embryo</i>.</p>
<i>Intended parents</i>	<p>The persons who have initiated the <i>surrogacy arrangement</i>, and who intend to become the legal parents of a child born through surrogacy.</p> <p>Individually, we refer to an intended parent who is male as an “intended father” and an intended parent who is female as an “intended mother”.</p> <p>We prefer this term over “commissioning parent” (an alternative that is sometimes used) because of our view that the parties’ intentions are one of the defining features of a surrogacy arrangement.</p>
<i>In vitro fertilisation (“IVF”)</i>	<p>A medical procedure, used to overcome a range of fertility issues, by which an egg is fertilised with sperm outside the body, in a controlled environment at a fertility clinic, to create an <i>embryo</i>. The embryo is then implanted in a woman with a view to her becoming pregnant.</p>

<sup>143</sup> The International Committee for Monitoring Assisted Reproductive Technology and the World Health Organisation, *Revised Glossary on ART Terminology* (2009).



Term	Definition
<i>Legal parental status</i>	<p>A term that we use in this Report to describe a child’s legal parent, distinct from who has parental responsibility (in England and Wales) or parental responsibilities and parental rights (in Scotland), in respect of that child. We have preferred this term to “legal parenthood” as we think that this latter term can sometimes be used in the context of parental responsibility/PRRs and therefore risks confusion.</p> <p>At common law the woman who gives birth to the child is their legal mother.<sup>144</sup> In England and Wales the man whose sperm fertilised the egg is the legal father.<sup>145</sup> There is a presumption that the mother’s husband or civil partner is the father, but this can be displaced.<sup>146</sup> In Scotland he is the father if he was the husband or male civil partner of the mother between conception and birth, if he took steps to be registered as such in the Register of Births and Still-Births, or if a court grants a declarator of parentage in his favour.<sup>147</sup></p> <p>Where a woman gives birth to a child and her egg has not been used for conception, the HFEA 2008 provides that a woman who carries the child as a result of implantation of the egg and sperm (or embryo) has the legal status of a mother upon birth regardless of any genetic link to the child.<sup>148</sup> Further special rules defining the legal parental status of a father or second female parent in such a situation exist also.<sup>149</sup></p>
<i>Legal parenthood</i>	A person or persons being recognised by law as being the parents of a child. We prefer the term legal parental status in this Report.
<i>Maternity Allowance</i>	A social welfare benefit payment made by the Government to pregnant women and new mothers who do not meet eligibility criteria for <i>Statutory Maternity Pay</i> .
<i>New pathway</i>	A term that we use to describe our overall new regulated surrogacy scheme which, if followed and, if the <i>surrogate</i> does not exercise her right to withdraw her consent within a defined period of time, would enable the <i>intended parents</i> to become the child’s legal parents at birth.
<i>Northern Ireland Guardian Ad Litem Agency (“NIGALA”)</i>	The public body in Northern Ireland which liaises with the court to provide a <i>guardian ad litem</i> in surrogacy cases.

<sup>144</sup> See, for example, *The Amphill Peerage* [1977] AC 542, 577 and A B Wilkinson and K McK Norrie, *The Law relating to Parent and Child in Scotland* (3rd ed 2013) paras 3.04 to 3.05.

<sup>145</sup> *Clarke, Hall & Morrison on Children* (Issue 102, May 2019), div 1, para 6

<sup>146</sup> Family Law Reform Act 1969 s 23(1).

<sup>147</sup> Law Reform (Parent and Child) (Scotland) Act 1986, s 5.

<sup>148</sup> HFEA 1990, s 27; HFEA 2008, ss 33 and 48.

<sup>149</sup> See HFEA 2008, ss 48 and 35 to 47.

Term	Definition
<i>Parentage</i>	A term which focuses on the factual question of who shares a biological, principally genetic, connection with a child.
<i>Parental order</i>	An order that can be obtained from a court under sections 54 or 54A, HFEA 2008 which transfers legal parenthood from the <i>surrogate</i> (and her spouse or civil partner, where relevant) to the <i>intended parents</i> , and extinguishes the <i>legal parenthood</i> of the surrogate and her spouse or civil partner, if any.
<i>Parental order reporter</i>	In England and Wales, a court appointed person whose duty is to act on behalf of the child in a <i>parental order</i> application, with a duty of safeguarding the interests of the child.
<i>Parental order process</i>	A term that we use to describe the existing process of the <i>intended parents</i> obtaining a <i>parental order</i> (a <i>post-birth order</i> ).

Term	Definition
<p><i>Parental responsibility, and parental responsibilities and parental rights (“PRRs”)</i></p>	<p>In England and Wales, the legal concept of parental responsibility means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child’s property, as set out in section 3(1) of the Children Act 1989.</p> <p>In Scotland, the legal concept of parental responsibilities and parental rights (“PRRs”) means all the obligations that parents, and those acting in place of parents, have towards their children and the powers they have to fulfil these obligations, as set out in part 1 of the Children (Scotland) Act 1995. Section 1(1) of that Act defines parental responsibility as the responsibility:</p> <ul style="list-style-type: none"> <li>a) to safeguard and promote the child’s health, development and welfare;</li> <li>b) to provide, in a manner appropriate to the stage of development of the child — <ul style="list-style-type: none"> <li>(i) direction;</li> <li>(ii) guidance, to the child;</li> </ul> </li> <li>c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and</li> <li>d) to act as the child’s legal representative.</li> </ul> <p>Section 2(1) defines parental rights as the right:</p> <ul style="list-style-type: none"> <li>(a) to have the child living with him or otherwise to regulate the child’s residence;</li> <li>(b) to control, direct or guide, in a manner appropriate to the stage of development of the child, the child’s upbringing;</li> <li>(c) if the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis; and</li> <li>(d) to act as the child’s legal representative.</li> </ul> <p>The concepts of PRRs include things such as bringing up the child, having contact with the child, consenting to the child’s medical treatment and naming the child.</p> <p>The legal parents of a child usually have parental responsibility/PRRs by virtue of that status, but parental responsibility/PRRs can also be conferred on people who are not the legal parents.</p>
<p><i>Pre-birth order</i></p>	<p>A court order that, in some countries, in relation to surrogacy, is made before the birth of the child. It ensures that the intended parents are deemed by the law to be the child’s parents from the moment of birth. It is not possible to obtain a pre-birth order in England and Wales or in Scotland.</p>
<p><i>Pre-conception child welfare assessment</i></p>	<p>An assessment of the welfare of any child who might be born as a result of a course of action, such as a surrogacy agreement proceeding on the new pathway, or in relation to existing assisted reproduction procedures carried out at a licenced clinic.</p>

Term	Definition
<i>Post-birth order</i>	An order made by a court after the birth of the child, such as the current system of <i>parental orders</i> in operation across the UK. This order will transfer the <i>legal parenthood</i> of the <i>surrogate</i> (and her spouse or civil partner) to the <i>intended parents</i> , extinguish the legal parental status of the surrogate (and her spouse or civil partner), and allows a new birth certificate (equivalent) to be issued for the child containing the intended parents' names.
<i>Regulated Surrogacy Organisation ("RSO")</i>	Organisations created by the draft Bill which are licensed by the <i>HFEA</i> in order to be able to decide whether a surrogacy can proceed on the new pathway and to supervise those agreements.
<i>Regulated Surrogacy Statement</i>	A document signed by the surrogate, the intended parents and the RSO stating their intention or approval that the intended parents will be the parents at birth of any child born from the surrogacy agreement, and that the required statutory checks have been carried out. This document is mandatory on the new pathway.
<i>Sexually transmitted infection ("STI")</i>	An infection which is passed from one person to another through sexual contact. Some STIs can also be transmitted in other ways, such as during pregnancy, childbirth, or through infected blood or blood products.
<i>Social and / or psychological parent or parentage</i>	A term which refers to the relationship which develops through a person acting in a way that we would associate with a parent, such as providing for a child's needs.
<i>Surrogacy Register ("SR")</i>	A register of surrogacy agreements created by the draft Bill, which holds information on the <i>intended parents</i> , <i>surrogate</i> , <i>gamete donors</i> , any fertility clinic used, and the surrogate-born child. It is maintained by the <i>HFEA</i> .
<i>Surrogacy / a surrogacy arrangement</i>	The practice of a woman agreeing to become pregnant, and deliver a baby with the intention of handing him or her over shortly after birth to the <i>intended parents</i> , who will raise the child.
<i>Surrogacy agreement</i>	An agreement between the <i>surrogate</i> and the <i>intended parents</i> regarding their intention to enter into a <i>surrogacy arrangement</i> .
<i>Surrogacy contract</i>	A contract setting out the terms of a <i>surrogacy agreement</i> . Surrogacy contracts are not recognised or enforceable in the UK, but are in some jurisdictions across the world.
<i>Surrogacy team</i>	Collectively, the <i>surrogate</i> and the <i>intended parents</i> who are entering, or considering entering into, a <i>surrogacy agreement</i> with each other

Term	Definition
<i>Surrogate</i>	<p>The woman who carries and gives birth to the child in a <i>surrogacy arrangement</i>, with the intention of handing him or her over to the <i>intended parents</i> shortly after birth, and transferring <i>legal parental status</i> to them.</p> <p>From our discussions with those involved in surrogacy, we understand that surrogates themselves do not, generally, like to be referred to as the mother of the child, and so we have avoided the term “surrogate mother”.</p>
<i>Statutory Maternity Pay (“SMP”)</i>	A social welfare benefit payment made by the Government, through an eligible woman’s employer, during their maternity leave.
<i>Traditional surrogacy</i>	<p>When the <i>surrogate</i> is genetically related to the child she carries because her own egg is used to conceive the child. A traditional surrogacy arrangement typically results from the <i>artificial insemination</i> of a surrogate with the intended father’s sperm.</p> <p>We have preferred this term to that of “straight” or “partial” surrogacy which can also be used to describe this arrangement.</p>
<i>Trans man / trans woman</i>	<p>A trans man is a person who is registered female at birth, but who identifies and lives as a man.</p> <p>A trans woman is a person who is registered male at birth, but who identifies and lives as a woman.</p> <p>We acknowledge that it may not be necessary or appropriate in all contexts to refer to the person’s transgender status at all (for example following transition, many people may wish to be identified simply as a man or woman, as applicable). In the context of this Report, we have referred to a person’s transgender status to highlight the specific context in which surrogacy may apply to a transgender person.</p>

## ABBREVIATIONS OF LEGISLATION

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

Full name of legislation	Abbreviation
The Human Fertilisation and Embryology Act 1990 / 2008	The HFEA 1990 / HFEA 2008
The Surrogacy Arrangements Act 1985	The SAA 1985
The Adoption and Children Act 2002 / The Adoption and Children (Scotland) Act 2007	The ACA 2002 / AC(S)A 2007
The Human Fertilisation and Embryology (Parental Order) Regulations 2018 <sup>150</sup>	The 2018 Regulations

<sup>150</sup> The Human Fertilisation and Embryology (Parental Order) Regulations 2018 (SI 2018 No 1412).

## Appendix 2: Cafcass FOI request

### Original response from Cafcass

#### *Parental Orders Received*

Parental Orders applications received in England (Parental Order (s54 HF&E), Parental Order (s30 HF&E) and Human Fertilisation and Embryology Act) .

Applications for parental orders may be the sole application on a case, or one of several applications of different types.

Totals are based on the date the application was received (by year, 1st April to 31st March, with exception of 2020-21 which is 1st April to 28th February).

Country of surrogacy is determined by the female respondents address. Where address is not known this have been summarised under 'Address Not Known'.

Where the respondent is not listed, this data is not available, and has been recorded as 'Respondent information not held'.

Same sex couple application is determined where 2 or more applicants are of the same gender.

Data Source: Data taken from the Cafcass national database (ECMS). ECMS is a live system, continually updated and is subject to change when further updates are made.

#### Parental Orders Received by Service Area

Service Area	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21
A1	<6	<6	6	<6	<6	<6	<6
A2	6	8	6	12	6	15	9
A3	7	9	7	6	<6	6	8
A4	<6	<6	8	7	9	6	6
A5	<6	8	<6	<6	<6	<6	9
A6	<6	10	18	12	6	18	11
A7	16	18	17	15	11	18	22
A8	<6	6	<6	<6	8	10	8
A9	<6	<6	<6	<6	<6	6	12
A10	11	7	8	<6	<6	10	11
A11	<6	7	<6	<6	7	7	11
A12	10	20	14	9	11	14	11
A13	8	<6	<6	<6	<6	15	<6
A14	9	6	15	16	14	11	9
A15A	30	29	11		8	12	<6
A15B	99	112	144	151	156	187	158
A16	13	14	15	10	13	21	23
A17	<6	12	6	<6	8	10	8

Service Area	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21
A18	9	14	15	15	14	15	14
NBC		<6	<6	<6			
Grand Total	242	295	314	280	298	389	335

Financial Years	Between 18 and 29	Between 30 and 39	Between 40 and 49	Between 50 and 59	60 and over	Unknown	Total
2014-15	12	179	210	56	<6	<6	463
2015-16	17	202	279	55	6	<6	561
2016-17	23	263	266	55	<6		610
2017-18	18	227	201	70	12		528
2018-19	20	247	227	72	<6		567
2019-20	31	280	290	97	<6		703
2020-21	20	250	284	56	<6	<6	617
Total	<b>141</b>	<b>1,645</b>	<b>1,753</b>	<b>459</b>	<b>37</b>	<6	<b>4040</b>

Financial Years	Number of applications received	Number of applications with same gender applicants
2014-15	242	69
2015-16	295	66
2016-17	314	78
2017-18	280	93
2018-19	298	96
2019-20	389	139
2020-21	335	115
<b>Grand Total</b>	<b>2,355</b>	<b>682</b>

Country	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21
Australia	<6		<6				
Canada	<6	<6	<6	13	10	17	7
England	89	115	142	119	126	145	145
India	47	53	57	7	6	<6	<6
Ireland		<6	<6				<6
New Zealand			<6				

Country	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21
Nigeria	<6	<6	<6	<6	<6	7	<6
Non UK Other	6	9	10	26	23	34	32
Russia	<6						<6
Scotland	<6	<6	<6	<6	<6	9	<6
South Africa	<6			<6		<6	
Spain			<6		<6		
Thailand	12	8	<6	<6	<6	<6	<6
Ukraine	<6	<6	<6	20	31	44	44
USA	48	72	71	77	83	110	76
Wales		<6	6	6	<6	<6	<6
Unknown address	14	11	7	<6	<6	6	<6
Respondent information not held	14	16	<6	<6	1	7	6
<b>Total</b>	<b>242</b>	<b>295</b>	<b>314</b>	<b>280</b>	<b>298</b>	<b>389</b>	<b>335</b>

### Follow-up request

I also have another follow-up question – which may be a further freedom of information request, but may be an extension of this one – re the data on number of applications with same gender applicants, is there a breakdown of this that relates to the country of surrogacy (or for the country of surrogacy data, can it be said for each country how many of the applications were made by same gender applicants)?

And – for 2019 onwards – is there a breakdown for single applicants?

### Follow-up response from Cafcass

#### Parental Orders Received

Parental Orders applications received in England (Parental Order (s54 HF&E), Parental Order (s30 HF&E) and Human Fertilisation and Embryology Act).

Applications for parental orders may be the sole application on a case, or one of several applications of different types.

Totals are based on the date the application was received (by year, 1st April to 31st March, with exception of 2020-21 which is 1st April to 28th February).

Country of surrogacy is determined by the female respondent's address. Where address is not known this have been summarised under 'Address Not Known'.

Where the respondent is not listed, this data is not available, and has been recorded as 'Respondent information not held'.

Same sex couple application is determined where 2 or more applicants are of the same gender.



Data Source: Data taken from the Cafcass national database (ECMS). ECMS is a live system, continually updated and is subject to change when further updates are made.

Below shows the country of surrogacy for same sex applicants.

Country	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21
Australia							
Canada	<6	<6	<6	9	7	13	<6
England	19	21	30	32	35	53	57
India	<6	<6					
Ireland							
New Zealand							
Nigeria						<6	
Non UK Other	<6	<6	<6	<6	<6	6	<6
Russia							
Scotland	<6		<6			<6	<6
South Africa	<6			<6		<6	
Spain			<6				
Thailand	6	7		<6	<6	<6	
Ukraine						6	<6
USA	26	28	40	46	49	52	41
Wales			<6	<6	<6	<6	<6
Unknown address	10	<6		<6		<6	<6
Respondent information not held							<6
<b>Total</b>	<b>69</b>	<b>66</b>	<b>79</b>	<b>93</b>	<b>96</b>	<b>139</b>	<b>115</b>

Below shows number of applications made by single applicant from 1st January 2019 to 28th February 2021

Year	Single Applicants
2019	38
2020	20
2021 (Jan-Feb)	8