Law Commission
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Building families through surrogacy: a new law
Volume II: Full Report

HC 1237

SG/2023/77

Law Com No 411

Scot Law Com No 262

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

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

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Glossary

We use the following terms within this Report.

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

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

Term	Definition
British Infertility Counselling Association ("BICA")	A registered charity that represents professional infertility counsellors in the UK.
Biological parent/parentage	A term which can be used to refer to gestational and/or genetic parentage. In this Report, we prefer to specify whether we mean *gestational* or *genetic parentage*, as applicable, but we may quote from sources that use the term "biological."
Blended family	A family where, typically, one or both of the parents have children from previous relationships who come together to form one family unit.
The Children and Family Court Advisory Support Service ("Cafcass")	The public body in England which liaises with the court to provide a parental order reporter in surrogacy cases.
The Children and Family Court Advisory Support Service Cymru ("Cafcass Cymru")	The public body in Wales which liaises with the court to provide a parental order reporter in surrogacy cases.
Commercial surrogacy	A *surrogacy arrangement* in which the woman who becomes the *surrogate* and any agency involved charge the *intended parents* a fee which includes an element of profit. A commercial arrangement in jurisdictions overseas may also be characterised by the existence of an enforceable *surrogacy contract* between the intended parents and the surrogate.

Term	Definition
Curator ad litem	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. 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.
Domestic surrogacy arrangement	A *surrogacy arrangement* where the *surrogate* and *intended parents* are both based in the UK, and where all elements of the process, including pre-conception screening, (assisted) conception, pregnancy and birth take place in the UK. We use this term in contrast to an international surrogacy arrangement, where all or some of the elements of the process take place outside of the UK.
The European Convention on Human Rights (the "ECHR")	The ECHR is an international convention in designed to protect human rights in Europe. Of most relevance to surrogacy are the rights contained in Articles 8 and 12 and 14 (a right to respect for an individual's private and family life, the right to found a family, and protection from discrimination, respectively). The UK is a contracting state to the ECHR, and has implemented its provisions in domestic law through the Human Rights Act 1998.
The European Court of Human Rights (the "ECtHR")	An international court established by *the ECHR*, which decides on applications alleging that a contracting state has breached one or more of the rights guaranteed by the ECHR.

Term	Definition
Embryo	An organism formed by the fertilisation of two *gametes*. In human pregnancy, from a medical perspective, an embryo is classified as a foetus from the 8th week after the fertilisation of the egg.[1]
Gamete	Human reproductive cells. Female gametes are called eggs and male gametes are called sperm.
Genetic parent or parentage	A term which refers to the one or both of the two persons whose *gametes* were used to conceive a child.
Gestational parent or parentage	A term which refers to the woman who gives birth to a child.
Gestational surrogacy	A *surrogacy arrangement* in which the *surrogate* is not genetically related to the child. Gestational surrogacy involves the implantation of the surrogate with an *embryo* or embryos created in a process known as *in-vitro fertilisation* ("IVF"). These embryos may be formed of the *intended mother's* egg and the *intended father's* sperm, although donor sperm or a donor egg can be used. We have preferred this term to that of "host" or "full" surrogacy which can also be used to describe this type of *surrogacy arrangement*.
Guardian ad litem	In Northern Ireland, a court-appointed person whose duty is to act on behalf of the child in a parental order application, with a duty of safeguarding the interests of the child.

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

Term	Definition
The Human Fertilisation and Embryology Authority (the "HFEA")	The statutory body that regulates and inspects all licensed fertility clinics in the UK. It also regulates human embryo research.
The Human Fertilisation and Embryology Authority's Code of Practice (9th edition, revised October 2021) (the "Code of Practice")	The Human Fertilisation and Embryology Authority publishes the Code of Practice to provide guidance to bodies such as licensed fertility clinics to help them comply with their duties under legislation. Guidance in the Code of Practice is also designed to serve as a useful reference for members of the public, including patients, donors and donor-conceived people.
Infertility	In the context of a heterosexual couple, the World Health Organisation defines infertility as a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse.[2] In the context of an individual, we use "infertility" to mean a person who is unable to gestate a foetus or unable to provide *gametes* for the creation of an *embryo*.
Intended parents	The persons who have initiated the *surrogacy arrangement*, and who intend to become the legal parents of a child born through surrogacy. Individually, we refer to an intended parent who is male as an "intended father" and an intended parent who is female as an "intended mother". We prefer this term over "commissioning parent" (an alternative that is sometimes used) because of our view that the parties' intentions are one of the defining features of a surrogacy arrangement.

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

Term	Definition
In vitro fertilisation ("IVF")	A medical procedure, used to overcome a range of fertility issues, by which an egg is fertilised with sperm outside the body, in a controlled environment at a fertility clinic, to create an *embryo*. The embryo is then implanted in a woman with a view to her becoming pregnant.

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

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

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

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

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

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

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

Term	Definition
Legal parenthood	A person or persons being recognised by law as being the parents of a child. We prefer the term legal parental status in this Report.
Maternity Allowance	A social welfare benefit payment made by the Government to pregnant women and new mothers who do not meet eligibility criteria for *Statutory Maternity Pay.*
New pathway	A term that we use to describe our overall new regulated surrogacy scheme which, if followed and, if the *surrogate* does not exercise her right to withdraw her consent within a defined period of time, would enable the *intended parents* to become the child's legal parents at birth.
Northern Ireland Guardian Ad Litem Agency ("NIGALA")	The public body in Northern Ireland which liaises with the court to provide a *guardian ad litem* in surrogacy cases.
Parentage	A term which focuses on the factual question of who shares a biological, principally genetic, connection with a child.
Parental order	An order that can be obtained from a court under sections 54 or 54A, HFEA 2008 which transfers legal parenthood from the *surrogate* (and her spouse or civil partner, where relevant) to the *intended parents*, and extinguishes the *legal parenthood* of the surrogate and her spouse or civil partner, if any.
Parental order reporter	In England and Wales, a court appointed person whose duty is to act on behalf of the child in a *parental order* application, with a duty of safeguarding the interests of the child.
Parental order process	A term that we use to describe the existing process of the *intended parents* obtaining a *parental order* (a *post-birth order*).

Parental responsibility, and parental responsibilities and parental rights ("PRRs")	In England and Wales, the legal concept of parental responsibility means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property, as set out in section 3(1) of the Children Act 1989. In Scotland, the legal concept of parental responsibilities and parental rights ("PRRs") means all the obligations that parents, and those acting in place of parents, have towards their children and the powers they have to fulfil these obligations, as set out in part 1 of the Children (Scotland) Act 1995. Section 1(1) of that Act defines parental responsibility as the responsibility: a) to safeguard and promote the child's health, development and welfare; b) to provide, in a manner appropriate to the stage of development of the child — (i) direction; (ii) guidance, to the child; c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and d) to act as the child's legal representative. Section 2(1) defines parental rights as the right: (a) to have the child living with him or otherwise to regulate the child's residence; (b) to control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing; (c) if the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis; and (d) to act as the child's legal representative.

Term	Definition
	The concepts of PRRs include things such as bringing up the child, having contact with the child, consenting to the child's medical treatment and naming the child. The legal parents of a child usually have parental responsibility/PRRs by virtue of that status, but parental responsibility/PRRs can also be conferred on people who are not the legal parents.
Pre-birth order	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.
Pre-conception child welfare assessment	An assessment of the welfare of any child who might be born as a result of a course of action, such as a surrogacy agreement proceeding on the new pathway, or in relation to existing assisted reproduction procedures carried out at a licenced clinic.
Post-birth order	An order made by a court after the birth of the child, such as the current system of *parental orders* in operation across the UK. This order will transfer the *legal parenthood* of the *surrogate* (and her spouse or civil partner) to the *intended parents*, 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.
Regulated Surrogacy Organisation ("RSO")	Organisations created by the draft Bill which are licensed by the *HFEA* in order to be able to decide whether a surrogacy can proceed on the new pathway and to supervise those agreements.

Term	Definition
Regulated Surrogacy Statement	A document signed by the surrogate, the intended parents and the RSO stating their intention or approval that the intended parents will be the parents at birth of any child born from the surrogacy agreement, and that the required statutory checks have been carried out. This document is mandatory on the new pathway.
Sexually transmitted infection ("STI")	An infection which is passed from one person to another through sexual contact. Some STIs can also be transmitted in other ways, such as during pregnancy, childbirth, or through infected blood or blood products.
Social and / or psychological parent or parentage	A term which refers to the relationship which develops through a person acting in a way that we would associate with a parent, such as providing for a child's needs.
Surrogacy Register ("SR")	A register of surrogacy agreements created by the draft Bill, which holds information on the *intended parents, surrogate, gamete donors,* any fertility clinic used, and the surrogate-born child. It is maintained by the *HFEA*.
Surrogacy / a surrogacy arrangement	The practice of a woman agreeing to become pregnant, and deliver a baby with the intention of handing him or her over shortly after birth to the *intended parents*, who will raise the child.
Surrogacy agreement	An agreement between the *surrogate* and the *intended parents* regarding their intention to enter into a *surrogacy arrangement*.

Term	Definition
Surrogacy contract	A contract setting out the terms of a *surrogacy agreement*. Surrogacy contracts are not recognised or enforceable in the UK, but are in some jurisdictions across the world.
Surrogacy team	Collectively, the *surrogate* and the *intended parents* who are entering, or considering entering into, a *surrogacy agreement* with each other
Surrogate	The woman who carries and gives birth to the child in a *surrogacy arrangement*, with the intention of handing him or her over to the *intended parents* shortly after birth, and transferring *legal parental status* to them. From our discussions with those involved in surrogacy, we understand that surrogates themselves do not, generally, like to be referred to as the mother of the child, and so we have avoided the term "surrogate mother".
Statutory Maternity Pay ("SMP)	A social welfare benefit payment made by the Government, through an eligible woman's employer, during their maternity leave.
Traditional surrogacy	When the *surrogate* is genetically related to the child she carries because her own egg is used to conceive the child. A traditional surrogacy arrangement typically results from the *artificial insemination* of a surrogate with the intended father's sperm. We have preferred this term to that of "straight" or "partial" surrogacy which can also be used to describe this arrangement.

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

ABBREVIATIONS OF LEGISLATION

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

Full name of legislation	Abbreviation
The Human Fertilisation and Embryology Act 1990 / 2008	The HFEA 1990 / HFEA 2008
The Surrogacy Arrangements Act 1985	The SAA 1985
The Adoption and Children Act 2002 / The Adoption and Children (Scotland) Act 2007	The ACA 2002 / AC(S)A 2007
The Human Fertilisation and Embryology (Parental Order) Regulations 2018[9]	The 2018 Regulations

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

LIST OF COMMON ABBREVIATIONS

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

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

Abbreviation	Full name
SR	Surrogacy Register
STI	Sexually transmitted infection

Chapter 1: Introduction

1.1 Surrogacy is the practice of a woman, who we refer to as the "surrogate", becoming pregnant with a child that may, or may not, be genetically related to her, carrying the child, and giving birth to the child for another individual or couple, who we refer to as the "intended parents", at least one of whom must be genetically related to the child. Current law across the UK provides that the surrogate is the child's legal mother at birth, and the intended parents must apply to court for a parental order after the birth of the child, in order to become the legal parents.

1.2 The numbers of UK children born each year as a result of a surrogacy arrangement are unknown. We do know that 435 parental orders were granted in England and Wales and 15 in Scotland in 2021, which is the most recent year for which statistics are available.[1]

1.3 The number of parental orders granted, however, does not reflect the true number of surrogate-born children each year. That is because, while the intended parents need a parental order to become the legal parents of the child, in practice not all intended parents will apply for an order.[2] Whilst the exact numbers of surrogate births per year are, therefore, uncertain, they certainly represent a tiny fraction of the total number of live births in the UK each year.[3] Yet the number of surrogate births continues to grow,[4] and the impact that the law has on all those affected is substantial.

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

2 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. Those who do not seek a parental order may be parenting the child, even without formalising their legal position, as was the case in in *X v Z (Parental Order: Adult)* [2022] EWFC 26.

3 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 23 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 23 March 2023).

4 From 117 parental orders in England and Wales in 2011. 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).

1.4 The two primary pieces of legislation that govern surrogacy across the UK are the Surrogacy Arrangements Act 1985 (which we refer to throughout this Report as the "SAA 1985"), and the Human Fertilisation and Embryology Act 2008 (which we refer to throughout this Report as the "HFEA 2008"). Although the HFEA 2008 made certain important updates to the law on surrogacy,[5] the central features of the parental order process that are now contained in sections 54 and 54A derive from section 30 of the much earlier Human Fertilisation and Embryology Act 1990 (which we refer to throughout this Report as the "HFEA 1990").

1.5 The key aspects and principles of the current law on surrogacy therefore date from legislation passed over 30 years ago and which was shaped ideologically 40 years ago through the work of the Warnock Committee.[6] The period since then has seen significant societal and medical changes (particularly, in the latter context, as regards the development of assisted reproductive technology) through which our understanding of family and parenthood has continued to evolve. The Court of Appeal has noted that changes in this period have included the "current acceptance of an infinite variety of forms of family life of which single sex, single person and so called 'blended families' are but examples".[7]

1.6 The UK Government's attitude towards surrogacy has also evolved since the current legislation was enacted. The UK has been described as adopting a "tolerant approach" to surrogacy, in which altruistic surrogacy is permitted, somewhat reluctantly, within certain confines.[8] A reluctant acceptance of altruistic surrogacy may fairly characterise the SAA 1985. That Act was passed in the context of a largely negative view of surrogacy taken by the 1984 Warnock Committee, and the controversy surrounding the "baby Cotton"[9] case.[10] In contrast, current UK Government guidelines applicable to England and Wales and published by the Department of Health and Social Care state clearly that "the Government supports surrogacy as part of the range of assisted conception options". Therefore, it is clear that the legislation that governs surrogacy reflects an ethos at odds with the UK Government's support of surrogacy.[11]

1.7 Surrogacy continues to attract strongly held and conflicting views. During this project, we have heard from many individuals and organisations who support and endorse the use of surrogacy. We have also heard from many individuals and groups who oppose

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5 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).

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

7 *XX v Whittington Hospital NHS Trust* [2018] EWCA Civ 2832, [2019] All ER (D) 30 (Jan) at [101]. Typically, a blended family is one where one or both of the parents have children from previous relationships, but all the people come together as one family unit.

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

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

10 The Warnock Report and the background to the SAA 1985 are discussed in the Consultation Paper, paras 1.13-1.19 and 4.7-4.8.

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

surrogacy as a matter of principle, and wish to see it prohibited. We explain their views and our response to them below. Surrogacy has never been prohibited in the UK and this project, in line with its terms of reference, was not designed to consider whether it should be – it was agreed in order to review problems with the current law, in a context in which Government supports its use.

1.8 Regardless of this range of views, it is clear that the current law governing surrogacy does not work in the best interests of any of the people involved: children born though surrogacy, women who become surrogates, or intended parents. On the most crucial issues the law does not reflect the expectations and common intentions of the surrogate and intended parents. On some such issues – such as payments – the law does not provide the clarity that is needed. For the child, the law creates a disconnect between legal parenthood and the family raising them, and does not adequately ensure that information on their genetic and gestational origins is available for them fully to understand their identity. As the use of surrogacy has increased, the problems with the current law have become more apparent and the need for them to be addressed more pertinent. While surrogacy affects a small proportion of the UK population, its impact on the lives of the children, surrogates and intended parents whom it does affect is profound.

1.9 It is clear from the engagement we have had with consultees throughout this project, and in particular from those personally affected by the impact of the current law, that the law must be reformed. This is particularly so in the ways set out below.

(1) The current law, under which the surrogate and her spouse or civil partner are the legal parents of the child unless and until a parental order is obtained by the intended parents, does not serve the best interests of any of those involved. It means that surrogates, who do not intend to raise the child as their own, are legally responsible for the child until the parental order is granted. It creates a legal environment in which the intended parents, at least one of whom is genetically related to the child, can exit the agreement. In short, it means that the risks of any breakdown in the surrogacy agreement lie with the surrogate. Indeed, while intended parents say that one of their biggest concerns in a surrogacy is with the surrogate changing her mind, surrogates have explained their concern at the intended parents changing their mind. In particular, however, the law does not reflect the best interests of the child. In the vast majority of cases, where the child is cared for by the intended parents from birth, the law means that those raising the child have no legally recognised relationship with the child until the grant of the parental order.

(2) The fact that the intended parents are not recognised as the legal parents of the child prior to the grant of a parental order has practical consequences for the child, the surrogate and the intended parents. It means (unless the intended parents have been granted parental responsibility/parental responsibilities and rights (“PRRs”), which are the rights and duties that by law a parent has in relation to their child) that the intended parents have no legal right to make any decisions in respect of the child, such as decisions in respect of medical treatment. Such decisions lie with the surrogate and her spouse or civil partner, who are not caring for and raising the child. Beyond these practical concerns, it contributes to uncertainty as regards the status of the intended parents – and

sometimes suspicion about the nature of the arrangement being directed towards surrogates and intended parents.

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

(4) One clear consequence of the current law is that it operates to encourage intended parents to undertake an international surrogacy arrangement, in a country that provides them with much greater certainty as to the outcome of the arrangement. In particular, international surrogacy arrangements take place predominantly in countries and jurisdictions where the intended parents are recognised as the legal parents of the child from the time of their birth, and are named as such on the child's birth certificate. In some instances, however, international arrangements raise particular and significant concerns at the exploitation of women as surrogates and of the longer-term consequences for them of acting as a surrogate. Children born from international surrogacy arrangements are also more likely to lack access to information on their origins, so such arrangements can be problematic for them too.

(5) The current law relating to payments that the intended parents are able to make to the surrogate lacks clarity. There is no definition of what payments may be paid to the surrogate as "expenses reasonably incurred",[12] which has resulted in concerns surrogates may in some cases in fact receive payments beyond their reasonably incurred expenses. The lack of clarity can lead to a lack of transparency as to whether, and to what extent, payments are made beyond those related to expenses. Further, there is no effective means of enforcing limitations on payments. The only avenue open to a court where payments have been made beyond expenses reasonably incurred is to refuse the grant of a parental order. There is, however, no case in which a parental order has been refused on the grounds of payments that have been made. It will almost invariably be in the best interests of the child for the court to exercise its discretion to authorise payments that have been made and to grant the parental order, unless there was evidence of potential child trafficking, or that payment had been made for the sale of the child.

1.10 Our recommendations for reform provide what we term a "new pathway" for domestic surrogacy agreements. The new pathway will enable intended parents to be the legal parents of the child from the time of their birth, as long as that remains the intention of the surrogate. In order to do so, scrutiny of a surrogacy agreement will take place prior to the child being conceived, with screening and safeguarding measures put in place to ensure that the decision to enter into a surrogacy agreement is fully informed and

[12] HFEA 2008, s 54(8).

considered, and to ensure the welfare of any child born as a result of the arrangement has been assessed.

1.11 Central to our reforms is the creation of Regulated Surrogacy Organisations ("RSOs"). RSOs will be non-profit-making bodies regulated by the Human Fertilisation and Embryology Authority ("HFEA"), which currently regulates fertility clinics and embryology research. Only an RSO will be able to approve a surrogacy agreement to enter the new pathway, once the statutory screening and safeguarding measures have been undertaken. The RSO will continue to have oversight of the agreement, and to support the surrogate and intended parents, until the agreement comes to an end.

1.12 Our new pathway will exist alongside a reformed parental order process. A parental order will continue to be needed for surrogacy agreements that do not follow the new pathway. A parental order application will need to be made following a domestic surrogacy, where an RSO has not been involved, or where the agreement has not been admitted by the RSO onto the new pathway. A parental order application will be required in all international surrogacy arrangements, as these will not be eligible for the new pathway. A parental order application will also be necessary where a domestic surrogacy agreement begins on the new pathway, but the surrogate subsequently withdraws her consent to the agreement, or where one of the other conditions is not met.

1.13 Taken together, our recommendations address the key problems with the current law.

(1) The new pathway enables the intended parents to be the legal parents of the child from the time the child is born, reflecting the shared intentions of the surrogate and the intended parents, and providing an outcome that reflects the best interests of the child.

(2) Under the new pathway, the intended parents will be required to take legal responsibility for the child. In the same way that any parent who conceives a child cannot absolve themselves of their responsibility towards that child, the intended parents will be responsible for the child, and be recognised as the legal parents from birth. The surrogate only become responsible if she chooses to withdraw her consent from the agreement.

(3) The new pathway also protects and supports a woman's autonomous decision to become a surrogate and ensures that her bodily autonomy is protected throughout. In particular, all decisions relating to the pregnancy and birth remain in the control of the surrogate.

(4) The new pathway requires screening and safeguarding measures and an assessment of the welfare of the child to take place prior to the child being conceived, rather than waiting until after the child has been born.

(5) For surrogacy agreements that continue to require a parental order application in order for the intended parents to become the child's legal parents, we make recommendations for reform of the parental order process. The surrogate's spouse or partner will no longer be the legal parent on the birth of the child and courts will have a specific power to enable applications to be made late (beyond

six months after the birth of the child). To ensure that the best interests of the child are at the heart of proceedings, the court will be able to dispense with the requirement that the surrogate gives consent to the parental order where the welfare of the child requires it.

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

(7) Our recommendations provide a clear regulatory framework within which surrogacy will take place. The new pathway confers a central role on RSOs, as non-profit-making organisations regulated by the HFEA.

1.14 We consider that our recommendations provide for a comprehensive surrogacy law that is reflective of a scheme in which surrogacy is properly supported. By doing so, our recommendations are in the best interests of children born through surrogacy, women who become surrogates, and intended parents.

THE CURRENT CONTEXT OF SURROGACY

1.15 Surrogacy is a way in which people who are unable to carry a child to term, or deliver a healthy baby, are able to have a child. Accordingly, intended parents who enter into surrogacy agreements belong to one of two groups:

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

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

1.16 In meetings and discussions we have had during this project, people have commonly drawn comparisons between surrogacy, adoption and assisted reproduction. Assisted reproduction enables a person to gestate and give birth to their own child, where they are unable to conceive the child naturally, or where they choose to use donor sperm in the case of single women. Adoption enables a person, or a couple, to become legal parents of a child who has already been born, and to raise the child as their own.

1.17 These comparisons between surrogacy, assisted reproduction and adoption have often been drawn with a view to identifying an appropriate legal analogy for how surrogacy law should operate. But the comparison also reflects more broadly how people view surrogacy socially as well as legally. Perceptions of surrogacy range across a spectrum from those who consider the intended parents to be most analogous to parents who are adopting a child, to those who see them as analogous to parents who have a child through natural conception.

1.18 Some consultees consider that surrogacy should be viewed no differently to other means of having a family using assisted reproduction. In particular, some consultees object to any sense in which intended parents are treated differently to anyone else

who accesses assisted reproduction to have a child. Differences in treatment are seen by them as penalising the intended parents because they are not able to gestate and deliver their own child. Other consultees, however, consider that the dependence of surrogacy on another person to carry and give birth to the child points strongly to a comparison with adoption.

1.19 Surrogacy shares some features with assisted reproduction and with adoption; but it is distinct from both of them. Surrogacy necessarily involves the use of assisted reproduction, but the involvement of a surrogate to gestate and give birth to the child distinguishes surrogacy from instances where a person uses assisted reproduction to conceive and carry a child themself. The fact that a person, other than the parents, gives birth to the child, is an apparent point of comparison between surrogacy and adoption. In other respects, however, surrogacy is significantly different to adoption. In particular:

(1) in surrogacy, the surrogate and the intended parents have a shared intention, prior to conception, that the surrogate will gestate and give birth to a child and the intended parents will be the parents of that child; and

(2) under the current law, and under our recommendations for reform, the intended parent, or at least one of the intended parents, must be genetically related to the child.

1.20 The points of similarity between surrogacy, assisted reproduction and adoption mean that when considering surrogacy law, we have often found it useful to consider what happens in the case of assisted reproduction or adoption. The differences between them mean that ultimately surrogacy must be viewed through its own lens.

Governmental and parliamentary engagement in surrogacy

1.21 Since the enactment of the SAA 1985, following the Warnock Report,[13] there has only been one committee established by the UK Government to review surrogacy. The Brazier Committee, chaired by Professor Margaret Brazier[14] was set up by UK Health Ministers in 1997 to review certain aspects of surrogacy law and regulation.[15] Its recommendations were not adopted and, as far as we are aware, there was no official UK Government response to the report.

1.22 Following the Brazier Committee, there was a period of relative inactivity within Government and Parliament with respect to surrogacy. Engagement in the topic has, however, grown in recent years. The Law Commissions' review of surrogacy, and the support and funding from the Department of Health and Social Care for the Law Commission of England and Wales' participation in it, reflects that growing interest. Other key developments include:

(1) The publication of two sets of guidance, applicable in England and Wales, by the Department of Health and Social Care in February 2018, which included the

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

14 Professor Brazier was Professor of Law at the University of Manchester.

15 Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (October 1998) Cm 4068. The Brazier Committee is discussed in the Consultation Paper, paras 1.20-1.28.

UK Government's statement of support for surrogacy noted in paragraph 1.6 above.[16] One set of guidance is directed at intended parents and surrogates, while the other is directed at healthcare professionals.

(2) The creation of an All-Party Parliamentary Group ("APPG") on surrogacy in late 2017. The APPG is chaired by Andrew Percy MP, and its purpose is stated to be:

> To fully review our surrogacy laws, encourage and promote debate on the issues, facilitate further research into how surrogacy is conducted, bring the law into line with modern social realities, and encourage domestic surrogacy in the first instance.[17]

In October 2020, the APPG published its report on understandings of the law and practice of surrogacy.[18] The Report welcomes the UK Government's recognition of the important role played by surrogacy in building families. It calls for "urgent reform" of the legislation, "which has prevented some from becoming parents, or has driven others overseas".[19]

(3) A Westminster Hall debate in Parliament on Government policy on surrogacy, moved by Andrew Percy MP and with contributions from five other Members of Parliament and the then Minister for Care, Caroline Dinenage MP, four of whom spoke in favour of reform to surrogacy law.[20]

International developments

1.23 Since the publication of our Consultation Paper, a number of other jurisdictions have considered or enacted reforms to their laws on surrogacy.

1.24 In South Australia, the proposals of the South Australian Law Reform Institute[21] have been implemented in the Surrogacy Act 2019. Their system requires a post-birth court order in all cases and provides that the surrogate and intended parents must be aged over 25. There is a system of criminal fines for intended parents where screening and safeguarding requirements are not met. In our Consultation Paper we ruled out the use of the criminal law in matters related to the birth of the child,[22] echoing the consistent view of previous reviews of surrogacy in this jurisdiction that have been careful not to taint the birth of the child with criminality.

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16 Department of Health and Social Care, *The surrogacy pathway: surrogacy and the legal process for intended parents and surrogates in England and Wales*, and Department of Health and Social Care, *Care in surrogacy: guidance for the care of surrogates and intended parents in surrogate births in England and Wales* (both published February 2018, updated 2021 and 2019 respectively).

17 https://publications.parliament.uk/pa/cm/cmallparty/210602/surrogacy.htm.

18 https://www.andrewpercy.org/storage/app/media/appgs/Surrogacy%20APPG%204.pdf.

19 https://www.andrewpercy.org/storage/app/media/appgs/Surrogacy%20APPG%204.pdf, p 3.

20 *Hansard* (HC) 21 January 2020, vol 670, col 68WH.

21 D Plater, M Thompson, S Moulds, J Williams and A Brunacci, *Surrogacy: A Legislative Framework: A Review of Part 2B of the Family Relationships Act 1975 (SA)* (South Australian Law Reform Institute, 2018).

22 Consultation Paper, para 14.40.

1.25 In the State of Victoria in Australia, reform is taking place gradually following the 2019 Gorton Review.[23] They have recently legislated to reimburse the surrogate's partner's expenses, and for the surrogate's right to autonomy; but proposals to lift advertising prohibitions or put traditional surrogacy on an equal footing with gestational surrogacy are yet to progress.

1.26 The New Zealand Law Commission published its report on surrogacy in May 2022.[24] Like the new pathway set out in our Consultation Paper, their report proposes a means of recognising intended parents as the legal parents of a surrogate-born child from birth without requiring a court process. Their proposed system would, however, require an application to the Ethics Committee on Assisted Reproductive Technology, a ministerial committee. That system would operate alongside a court route similar to our parental orders. Their report proposes a national surrogacy birth register which is similar to our recommendations for a Surrogacy Register in Chapter 13. The report is yet to receive a response from the New Zealand Government.

1.27 In the Republic of Ireland, the Health (Assisted Human Reproduction) Bill 2022 reached its third stage in the Dáil Éireann (lower house of Parliament) on 23 March 2022 (similar to Committee stage in the UK House of Commons). The Bill currently only covers domestic surrogacy, although a report of a parliamentary Joint Committee has recommended that it be extended to cover international arrangements.[25] Under the Bill, surrogacy arrangements would require approval by a new regulator of assisted reproduction, and a post-birth parental order would also be required. The Irish Bill only covers gestational surrogacy. While an earlier draft enabled the court to dispense with the surrogate's consent to the parental order, the Bill as laid does not do so (save in cases where the surrogate has died or cannot be found). The Bill requires that at least one of the intended parents has a reasonable expectation of living until the child reaches the age of 18.

1.28 The US State of New York passed its Child Parent Security Act in 2020, coming into force in February 2021. The Act provides for surrogates to have a right to independent counselling and health insurance, and for legal parenthood from birth for the intended parents. Unlike our recommendations for the new pathway, however, it requires a court procedure with attorney representation to secure legal parenthood. The New York legislation does not cover traditional surrogacy, which remains prohibited in the State.

1.29 As ever in surrogacy, the picture is of a gradual process of change and recognition, informed by the particular socio-cultural and legal traditions of each jurisdiction.

Access to surrogacy

1.30 While surrogacy is now recognised as part of the range of assisted conception options, it is important to acknowledge that, in practice, it is not an option that is open

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23 Victoria Department of Health and Human Services, *Final Report of the Independent Review of Assisted Reproductive Treatment* (2019).

24 Te Aka Matua o te Ture | New Zealand Law Commission, *Te Kōpū Whāngai: He Arotake | Review of Surrogacy* (R146, 2022).

25 Joint Committee on International Surrogacy, *Final Report of the Joint Committee on International Surrogacy* (July 2022).

to everyone. Surrogacy involves additional costs to other forms of assisted conception, in particular because of the payments that will, in most cases, be made to the woman who agrees to be the surrogate. Some intended parents know from the outset that surrogacy is the only way for them to have a child of their own (for example, women who know that they are unable to carry a child, single fathers and same-sex male couples). Other intended parents may have already funded multiple rounds of IVF treatment to try and carry their child before they turn to surrogacy. For these intended parents the financial strain can be much more significant.

1.31 In making our recommendations for reform we have been aware of the fact that an increase in the cost of surrogacy may mean that some intended parents who are able to access surrogacy presently, may be precluded from doing so in future. In forming our recommendations we have taken into account their effect on the cost of accessing surrogacy. We also consider, however, that given the fundamental issues at stake in surrogacy, cost is not a primary determinant of any change to the law. In making our recommendations for reform, we have sought to balance all factors, including in particular the welfare of the child, and the interests of women who agree to be surrogates.

THE CASE FOR REFORM

1.32 Surrogacy is a topic that continues to attract strong views. During the course of the project we have heard a spectrum of views, from those fully supportive of surrogacy, to those who are campaigning for it to be prohibited.

1.33 We have heard first-hand from surrogates and intended parents of the hugely significant and positive impact that surrogacy has had on them. We have been struck, in particular, by meeting women with the intended parents for whom they have been a surrogate, and the children born though surrogacy, who see themselves very much as having worked together to achieve a shared goal. It is perhaps unsurprising that parents who have children through a successful surrogacy should speak positively about their experience. But women who have been surrogates have spoken with equal enthusiasm of their experience of being a surrogate. Some reject suggestions that they have acted “selflessly” in doing do, and emphasise the value they have in seeing the family that they have made possible, and of the ongoing relationship they (and their family) have with the intended parents and children.

1.34 We have also heard first-hand from women who have been surrogates for whom the experience has been negative. In particular, we have heard of the devastating long-term physical and psychological effects that some women have suffered as a result of the surrogate pregnancy. We are particularly grateful to these women for sharing their experiences with us.

1.35 The question whether the law should permit or prohibit surrogacy is not one which the Law Commissions were asked to consider in our project. We note that surrogacy has never been prohibited in the UK. Indeed, this is a question of social policy that would probably be considered unsuitable for expert law reform bodies to consider and is a matter for the UK Government and Parliament, as democratically elected representatives. We present our recommendations for reform in this Report: it is ultimately a matter for those representatives to take them forward as they think best meets society’s needs.

1.36 Our project takes as its starting point the UK Government's support of surrogacy as a means of having a family. Given that starting point, it is clear that the current law is in need of reform. On central issues, such as identifying the legal parents of a child, and who is able to make decisions in respect of the child, the law operates against the best interests of all of those involved, and often against the shared intentions and interests of the surrogate and the intended parents.

1.37 The report of the APPG on Surrogacy states:[26]

> Legislation that was created at a time when many still viewed surrogacy with suspicion, is no longer fit for purpose. Crucially, that legislation is no longer operating in the best interests of surrogates, children or intended parents. Legislation which has prevented some from becoming parents, or has driven others overseas is now in need of urgent reform.

CONSULTATION

1.38 To prepare the ground for this project we met with those involved in surrogacy, and representatives from Government departments and non-Governmental agencies, and attended two academic and practitioner conferences, in Hong Kong and Cambridge respectively, at the invitation of Professor Jens Scherpe, Professor Claire Fenton-Glynn and Associate Professor Terry Kaan. We also attended an annual conference of SurrogacyUK. Those discussions informed the publication of our Consultation Paper.[27]

1.39 During this period, we engaged with representatives from the relevant Government departments and non-governmental agencies in addition to the Department of Health and Social Care, including the Home Office, the Scottish Government, the General Register Office, the National Records of Scotland, Ministry of Justice, Department for Education and the Foreign and Commonwealth Office. The Foreign and Commonwealth Office also invited us to visit Ukraine in February 2019 to meet with some of the various actors in international surrogacy arrangements based in the capital Kyiv, including representatives of fertility clinics, surrogacy lawyers, the police and consular staff.[28]

1.40 Our consultation period ran from 6 June to 11 October 2019. Consultees were able to respond through an online portal or by email, and a concise version of the questions aimed at surrogates and intended parents with personal experience was made available. The consultation period included ten open public events[29] and two events for invited audiences.

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26 https://www.andrewpercy.org/storage/app/media/appgs/Surrogacy%20APPG%204.pdf, p 3.

27 Law Commission of England and Wales and Scottish Law Commission, *Building families through surrogacy: a new law. A joint consultation paper*. (Law Com No 244; Scot Law Com No 167).

28 Representatives from the Law Commission of England and Wales, and not the Scottish Law Commission, made this visit.

29 In Manchester, Exeter, Brighton, Cardiff, Newcastle, Birmingham, Edinburgh, Aberdeen, Belfast, and London.

1.41 The project has also been covered widely in national media, including on radio and television. On its launch, the Consultation Paper was covered on the BBC Today programme, BBC Radio 5 Live, BBC Scotland, and in the Guardian, Telegraph, Times, Daily Mail, Metro and Independent, and by the Law Society Gazette, The Journal and Scottish Legal News. Since then our proposals have had further coverage including on the BBC website, and in the Guardian and the Times.

1.42 Following the consultation period, we have continued to engage with Government departments and agencies, such as the HFEA and the General Register Office. We have also had discussions further to their consultation responses with a number of consultees, and with academics working on the issue of surrogacy.

Consultation responses

1.43 We received 681 responses to our Consultation Paper. Many of these responses were from consultees who were generally favourable to the provisional proposals in our Consultation Paper, or would like law reform to go further than we had provisionally proposed in supporting surrogacy. These responses came from a range of individuals and groups, including surrogacy organisations, individuals with personal experience of surrogacy (as surrogates, intended parents, or being born through surrogacy) and those with a professional interest, as legal and other practitioners, and academics.

1.44 Over half of the responses we received were from consultees who opposed most or all of our provisional proposals for reform, and advocated instead for surrogacy to be prohibited. These responses came from individuals and groups. The majority of these responses were based wholly or partly on a template produced by Nordic Model Now!. Responses from those opposed to surrogacy tended to centre their critique of surrogacy on (i) the exploitation of women and commodification of their bodies; and/or (ii) the fragmentation of motherhood caused by the separation of pregnancy and parenthood in surrogacy, and the commodification of children.

1.45 The preponderance of consultation responses we received based on the Nordic Model Now! template mean that numerically most of our provisional proposals for reforms were opposed by a majority of consultees. It was often the case, however, that our provisional proposals were supported by a majority of those consultees who were not opposed to surrogacy. The percentage of consultees agreeing and disagreeing with each provisional proposal is reflected in statistical analysis of responses to each consultation question which will be published as soon as possible following this Report. We note in this Report, where it is useful to do, situations where a majority of consultees who support surrogacy agreed with a provisional proposal.

1.46 The Law Commissions have never determined our recommendations for reform simply on the basis of a numerical count of consultees who favour a particular approach. Our recommendations for reform take into account a careful analysis of the arguments made by consultees, along with other evidence available to the Commissions, including academic research. This is not specific to this project: it is the approach adopted by both Commissions on all projects.

1.47 As our policy is not determined by a numerical count of responses, the fact we received a large percentage of responses based on the template does not determine our recommendations for reform. We take into account the views of all individuals who engaged with the topic and sent in a response. We also take into account that some responses, for example those received from representative bodies, represent the views of the members of that organisation, who may be numerous, and who have relied on their organisation's response to convey their views, rather than sending in individual responses. Accordingly, responses from representative organisations represent more than just a single consultee. To fail to take this into account would, therefore, provide an unreliable measure of the number of individuals who engaged with, and are affected by, our project, and who hold particular views and opinions.

1.48 The arguments raised by those opposed to surrogacy have been taken into account, along with all other consultation responses, in reaching our recommendations for reform. As noted at paragraph 1.35 above the starting point of these consultees – that surrogacy should be prohibited – is not a matter within the scope of the Commissions' project. Notwithstanding, some of the concerns that led consultees to advocate for that approach are relevant to how surrogacy law is framed and, indeed, were matters that we considered in our Consultation Paper. As these points relate to the general approach taken by the law to surrogacy, rather than (or in addition to) specific consultation questions, we address those concerns here. In Chapter 3 we respond to specific suggestions made by consultees that our provisional proposals for reform are contrary to international law.

1.49 In the discussion of consultation responses in the Report we address questions by reference to the Consultation Question number provided in the Consultation Paper. Some of the questions that we asked were more general in nature. We have considered the responses to these questions as part of our general discussions on surrogacy and incorporated them where relevant, without including specific sections in the Report to address them: these are Consultation Questions 108 (views on any other legal issues); 109 (information about surrogacy arrangements), 115 (views from intended parents and surrogates on the impact of our reforms), 117 (specific impact in Northern Ireland) and 118 (any other impact).

Exploitation of women who act as surrogates

1.50 The most frequently raised objection to surrogacy is that it is either an inherently exploitative practice, or that the risks of exploitation are so great that a legal system which permits any kind of surrogacy cannot be justified.

1.51 As we discussed in the Consultation Paper,[30] a central facet of exploitation-based arguments is the idea that surrogates cannot validly consent to their involvement in surrogacy arrangements. This point was raised in different ways in consultation responses, including:

(1) that the systematic oppression of women in a patriarchal society and their social and economic status relative to intended parents inevitably impairs or inhibits

[30] Consultation Paper, paras 2.45 – 2.64.

their consent to being a surrogate, especially where there is any financial incentive to do so;[31]

(2) that the socialisation of women to prioritise the desires of others to their own detriment inhibits or impairs their consent to surrogacy, even in purely altruistic arrangements; and, relatedly

(3) that women are especially vulnerable to manipulation or coercion by spouses, partners or other family members to become surrogates. While these risks are greater when financial gain is possible,[32] it is not confined to such cases; for example, women may be coerced through emotional manipulation into becoming surrogates for family members or friends even in an altruistic scheme.

1.52 We noted in the Consultation Paper[33] that, particularly in international arrangements where the economic disparity between the intended parents and the surrogate is large and alternative employment opportunities for women are limited, contextual factors affect the notion that women can meaningfully and freely choose to become surrogates. We further acknowledge that an unequal distribution of knowledge and wealth can create power imbalances between the surrogate and the intended parents in all surrogacy arrangements, including domestic ones.[34]

1.53 We share these concerns about the risks of exploitation but we do not agree that these risks are inevitable.[35] We are also acutely conscious that to prohibit women from choosing to become surrogates would constitute a very real interference with their autonomy in relation to their bodies and their choices. With a rigorous and robust legal regime in place, these competing risks can be managed. Mitigating the risk of exploitation is fundamental to the recommendations we make for a new pathway to surrogacy, as well as our explicit aim to reduce the incentive to use international surrogacy arrangements. We reject the suggestion made by some consultees that "little or no regard in the consultation process to the safeguarding of these vulnerable women and the potential harms they may suffer"[36] has been paid by the Law Commissions. It is precisely because we are concerned about the risk of the exploitation of surrogates that we provisionally proposed, and now recommend, novel legal requirements in surrogacy (e.g. counselling, independent legal advice, medical checks) intended to safeguard and promote the surrogate's autonomy.

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31 See, for example, the view in the Nordic Model Now! response and the point made by the End Violence Against Women coalition: "The reality is that inequality will and does underpin arrangements where women's bodies are being purchased, and as such cannot be said to be based on abstract 'free choice'".

32 See, for example, the statement in the Nordic Model Now! response that: "There is a very real risk that spouses and partners will coerce women into being a 'surrogate' for financial gain".

33 Consultation Paper, paras 2.54 – 2.57; and Ch 3.

34 Consultation Paper, para 2.57.

35 The Report of the Committee of Inquiry into Human Fertilisation and Embryology, chaired by Dame Mary Warnock, was of the view that "Where agreements are genuinely voluntary, there can be no question of exploitation" (1984) Cmnd. 9314, para 8.14.

36 Open letter and consultation response of the End Violence Against Women coalition, p 3.

1.54 We also provisionally proposed, and now recommend, a right for the surrogate to withdraw her consent to the agreement continuing on the new pathway (referred to in the Consultation Paper as a right to object) in order to ensure the surrogate's continuing consent to the agreement after the birth of the child.

1.55 We are alive to the range of gendered factors which can profoundly inhibit a woman's autonomy and thus her decision to become, or to continue to act as, a surrogate. However, we reject arguments that women can never meaningfully consent to acting as surrogates, or that there are no circumstances in which such a purported consent can be valid. Such a position would require a comprehensive dismissal of the perspectives and experiences of those women who do regard their choice to become a surrogate as a genuine one.[37]

1.56 We do accept the existence of circumstances capable of vitiating a woman's consent to being, or continuing to act as, a surrogate. We consider this factor points to the need for regulation of a practice carrying a risk of exploitation. The new pathway that we recommend includes safeguards intended to ensure that a woman acting as a surrogate gives her free and informed consent to the surrogacy agreement, including implications counselling and independent legal advice.

Commodification of children and women's bodies

1.57 In response to almost all questions posed in the consultation about what (if any) payments the law should permit intended parents to pay to surrogates, Nordic Model Now! responded:

> We are opposed to paid surrogacy because it commercialises women's reproductive functions, commodifies children, and risks the sale of children, against which there is an international prohibition. Surrogacy is therefore a violation of the human rights of both women and children.

1.58 Similarly, the Scottish Council for Human Bioethics stated:

> The SCHB is opposed to surrogacy in principle and believed that any payment to the surrogate would be completely unethical. It would represent the unacceptable exploitation and rental sale of a woman's body, as such, for reproduction and would be contrary to international law. Moreover, no child should ever be brought into existence through a payment.

1.59 Although concerns in relation to commodification are not confined to commercial surrogacy arrangements, they are at their strongest in that context. Some consultees wrongly considered that the Consultation Paper was designed to introduce commercial surrogacy. That was not the case. There are three key hallmarks of a commercial model of surrogacy. These are:

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37 See O van den Akker "Psychosocial aspects of surrogate motherhood" (2007) *Human Reproduction Update*, 13(1) 53 for a review of the psychosocial research carried out on the views, feelings and motivations and surrogates; see also V Jadva, C Murray, E Lycett and S Golombok "Surrogacy: The experiences of surrogate mothers" (2003) *Human Reproduction*, 18(10), 2196.

(1) surrogacy agreements are treated in law as contracts and are enforceable as such;

(2) surrogacy organisations are permitted to operate on a profit-making basis; and

(3) surrogates are able to be paid for the service of carrying and giving birth to the child (which we referred to in the Consultation Paper as payment for gestational services).

1.60 The current law provides that surrogacy arrangements are unenforceable[38] and we retain that position.[39] We consider that retaining the current position is essential to ensure that a change in the status of a child cannot be effected by a private agreement between individuals, which would be entirely at odds with the general legal position which places the best interests of the child at the heart of any question regarding the status of the child. Moreover, recognising surrogacy enforcements as legally enforceable fails to respect the surrogate's autonomy and the fundamental need for her to be able to withdraw her consent from continuing with the surrogacy agreement. Some consultees considered that surrogacy agreements should be enforceable to promote certainty for those entering into surrogacy agreements. We are clear, however, that a desire for certainty cannot outweigh the rights of the child and the surrogate.

1.61 Under our recommendations a surrogate would never be required, by virtue of having agreed to be a surrogate, to hand a baby to whom she has given birth into the care of the intended parents. As in any situation in England and Wales and Scotland, any dispute relating to a child should ultimately be determined by the court on the basis of the best interests of the child.

1.62 We do make recommendations to ensure that surrogates can recover the financial terms of a surrogacy agreements against the intended parents. Those recommendations are, however, designed specifically to protect surrogates from being left financially out of pocket as a result of the surrogacy. They are designed to remove any connection between a financial dispute between the parties and determining the legal parents of a child. Importantly, the ability of the surrogate to recover the terms of the agreement relating to payments applies regardless of whether the surrogate has carried a child to term, and regardless of whether the intended parents have care of the child.

1.63 In the Consultation Paper we drew on the potential commodification of women and children as a justification for the provisional proposal that surrogacy organisations should be required to operate on a non-profit-making basis.[40] We recommend accordingly in this Report.

1.64 On the topic of payments, in the Consultation Paper we did not put forward provisional proposals, but asked a series of open questions to ascertain the views of consultees on the different sort of payments that the law might sanction. We explained that while

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38 SAA 1985, s 1A.

39 Clause 3 of the draft Bill provides that surrogacy agreements are unenforceable.

40 Consultation Paper, para 9.81.

views on payments differ widely, there is consensus that the current provision for payments to the surrogate of "expenses reasonably incurred" is in need of reform as it lacks clarity. Concerns around the risks of exploitation of surrogates have been a key factor in developing our recommendations for reform on the issue of payments, which are given in Chapter 12.

1.65 In particular, we recommend that surrogates should not be able to be paid for their gestational services, or receive other compensatory payments which consultees considered to be indistinguishable from payments for gestational services. Our recommendations provide for greater scrutiny and oversight of payments than the current law. They are designed to ensure that while a surrogate is not left financially disadvantaged by virtue of being a surrogate, there is no evident financial incentive or inducement for a woman to consider being a surrogate.

1.66 We note that concerns in relation to exploitation are not, however, confined to commercial surrogacy agreements. It is impossible to say that a woman will never be induced into becoming a surrogate, even on the basis of non-commercial reimbursement. Indeed, the very fact of not being left financially worse off could be said to "induce" women into becoming surrogates, as few would be willing or able to fund the cost of a pregnancy for the benefit of the intended parents. However, a law that enabled surrogacy only where the surrogate had to bear all the costs of the pregnancy could itself be seen as exploiting the surrogate.

Fragmentation of motherhood

1.67 Some consultees characterised the physical separation between gestational mothers and children inherent in the practice of surrogacy as harmful, and a justification for the prohibition of surrogacy. For example, the Parliamentary Office of the Catholic Bishops' Conference of Scotland stated:

> A huge oversight in this consultation is the incomprehensible failure of the Law Commission and the Scottish Law Commission to fully take into account the possible views and emotional and psychological harm of children brought into the world through surrogacy, especially when they discover later in life that they were the product of a surrogacy 'arrangement' and that they do not know one or more of their biological parents…
>
> Further, there is little consideration given to the emotional and psychological impact of surrogacy on surrogates, especially the impact of the 'loss' of her baby. There is also no consideration of the physical impact on a woman who gives of her body to surrogacy. Indeed, it is nigh impossible to calculate the emotional distress and heartache experienced by a woman who carries a child in her womb for nine months and then, almost immediately on birth, is separated from that child forever.

1.68 The claim that surrogacy is harmful to women and children is not supported by the available longitudinal empirical research on UK-based surrogate families which has been peer-reviewed. We accept that these studies emanate from the Cambridge Centre for Family Research and have been criticised (for example, by PROGAR and Nagalro) for their small sample size; but they are peer-reviewed independent studies and offer the most comprehensive longitudinal studies of surrogacy in the UK. That evidence suggests that:

(1) the absence of a genetic or gestational link between the mother and child does not impact negatively on parent-child relationships in surrogacy arrangements;[41]

(2) children born through surrogacy do not suffer negative psychological adjustment as a result of their family type;[42]

(3) surrogacy is generally experienced positively by UK surrogates, and when surveyed one year after the birth, surrogates are happy with their decision to give the child to the intended parents;[43]

(4) overall, the children of surrogates do not experience negative psychological health or family functioning;[44] and

(5) in general, children whose mothers have acted as surrogates do not experience adverse social consequences or negative family functioning.[45]

1.69 Moreover, we reject the suggestion that these issues are overlooked in the Consultation Paper. The Consultation Paper considers the available empirical research as to the outcomes of children and surrogates[46] and the health risks in pregnancy.[47]

OUR REPORT

1.70 Our Report is published in three parts: the Full Report, the Core Report, and the draft Bill. This document, the Full Report, provides a comprehensive account of our recommendations for reform, including summaries of responses received from consultees to the Consultation Paper. A draft Bill which we publish alongside implements our recommendations for reform. We explain in this Full Report how our recommendations are implemented in the draft Bill. Not all of our recommendations require legislation; for example, some are concerned with the provision of guidance.

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

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

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

44 V Jadva and S Imrie, "Children of surrogate mothers: psychological well-being, family relationships and experiences of surrogacy" (2014) 29 *Human Reproduction* 90, 95 and S Imrie, V Jadva and S Golombok, "The long-term psychological health of surrogate mothers and their families" (2012) 98 *Fertility and Sterility* 46.

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

46 Consultation Paper, paras 2.19 – 2.33.

47 Consultation Paper, paras 2.36 – 2.40.

1.71 The draft Bill is much longer than existing surrogacy statutory law. The current statutory law relating to surrogacy is not comprehensive. The SAA 1985 is designed only to regulate certain activities in respect of surrogacy, while the HFEA 2008 makes provision for the grant of parental orders. Our recommendations for reform, and the draft Bill, cover all aspects of surrogacy, and repeal the existing statutory provisions. We consider that the issues involved are so fundamental that the law must provide certainty as to the outcome when a surrogacy agreement is entered into, and clear processes for any disputes that may arise to be resolved. In the vast majority of cases, surrogacy arrangements that take place in the UK take place smoothly. Situations where they do not do so – for example, because the relationship between the intended parents and surrogate breaks down, or there is a death (of an intended parent, the surrogate or the child) are rare. But it is these situations in which the law is subject to the closest scrutiny for its response. Our recommendations and the draft Bill seek to ensure that the law provides clarity in the most difficult and distressing times.

1.72 Additionally, surrogacy arrangements interact with a range of other aspects of law, including laws governing nationality, employment rights and succession. A comprehensive surrogacy law must, therefore, make provision for surrogacy across a broad range of areas.

1.73 The shorter Core Report sets out how our recommendations will apply in the vast majority of surrogacy arrangements, in which no particular difficulties arise from the time the surrogacy agreement is entered into and until the conclusion of that agreement. That document does not include summaries of consultation responses or repeat our recommendations for reform. In providing a straightforward account it necessarily summarises issues at a higher level of policy than this document. For the avoidance of doubt, in the event of any ambiguity between a statement in the Core Report and in the Full Report, it is the Full Report which represents the definitive conclusions of the Commissions.

1.74 In addition to these Reports and the draft Bill, we have also published the following documents:

(1) an impact assessment, which sets out the economic impact of our recommended reforms on individuals, businesses and the state;

(2) an equalities impact screening document, which explores the impact of our recommended reforms on people who hold different protected characteristics under the Equality Act 2010;

(3) explanatory notes setting out the effect of our draft Bill; and

(4) a summary of our Report in English.

1.75 A summary of our Report in Welsh, consultation responses which have been redacted, that is, they have had personal information removed, and a statistical analysis of consultation responses received for each consultation question will be published as soon as possible following publication of this Report.

OUR PROJECT

1.76 This project has been conducted jointly by the Law Commission of England and Wales and the Scottish Law Commission. The Chair of the Law Commission of England and Wales is Sir Nicholas Green; and the Chair of the Scottish Law Commission is Lady Paton.

1.77 The project forms part of the 13th Programme of Law Reform for the Law Commission of England and Wales,[48] and of the Scottish Law Commission's 10th Programme of Law Reform.[49] Consultation for the Law Commission of England and Wales' 13th Programme of Law Reform was launched on 11 July 2016 and ran until 31 October 2016. In this consultation, the Law Commission of England and Wales suggested surrogacy as a possible law reform project. This suggestion prompted the highest number of responses of all projects proposed – 343.[50] This included many submissions for those who favoured reform, and four from organisations which did not support a project taking place.

1.78 The Department of Health and Social Care has provided funding for the project for the Law Commission of England and Wales.

1.79 The Law Commissions' final policy on surrogacy was reviewed and agreed by the two Chairs and eight other Commissioners of the Law Commissions at joint meetings held on the 8 May 2019, 15 November 2021, 8 December 2021, and 22 February 2023.

1.80 When the consultation was conducted in 2019, Professor Gillian Black was a full time academic and responded to the consultation in that capacity. She was subsequently appointed to the Scottish Law Commission as a Commissioner in April 2020. Her consultation response was not shared with the appointment panel, nor were her views on surrogacy made known to them. We included her consultation responses in our policy discussions where relevant, as we did with the responses from all consultees, but we have been clear from the start that Professor Black was not bound by any of her consultation responses and conversely no additional weight was given to her responses. Following her appointment, she approached the project as all Commissioners do, taking account of the evidence and public consultation, rather than advancing her personal views.

1.81 The Terms of Reference agreed between the Department of Health and Social Care and the Law Commissions on the surrogacy project are as follows:

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48 13th Programme of Law Reform (2017) Law Com No 377.

49 10th Programme of Law Reform (2018) Scot Law Com No 250 para 2.32.

50 13th Programme of Law Reform (2017) Law Com No 377 para 1.8.

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.

1.82 These Terms of Reference define the scope and boundaries of the project. The Terms of Reference agreed reflect our own, and the UK Government's desire, to keep the scope of this project as broad as possible.[51]

THE IMPACT OF DEVOLUTION AND SEPARATE LEGAL JURISDICTIONS

1.83 The two primary statutes governing surrogacy arrangements in the UK – the SAA 1985 and the HFEA 2008 – apply across the UK. Beyond the areas covered by these two statutes, however, the law differs to various extents in England, Wales, Scotland and Northern Ireland, and operates in three separate legal systems: England and Wales, Scotland, and Northern Ireland each have their own legal system. Furthermore, as a consequence of devolution, varying amounts of legislative and administrative power, previously held by the UK Parliament, are now held in Wales, Scotland and Northern Ireland.[52]

Wales

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

(1) human genetics, human fertilisation, human embryology and surrogacy arrangements;[53]

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

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

53 Government of Wales Act 2006, sch 7A para 146.

(2) parenthood, parental responsibility, child arrangement and adoption;[54] and

(3) immigration and nationality (areas which are touched on by our recommended reforms).[55]

1.85 Services and facilities related to adoption, adoption agencies and their functions are all, however, devolved to the Senedd Cymru.[56] As a result, the Senedd Cymru passed the Regulation and Inspection of Social Care (Wales) Act 2016. This Act replaces much of the existing regulatory framework of social care that currently applies jointly to England and Wales, including replacing the regulation of adoption agencies and adoption support agencies in Wales.

1.86 Where the law of England and Wales applies differently within Wales, this is reflected in the text of this Report.

Scotland

1.87 Surrogacy arrangements and the subject-matter of the HFEA 1990 are reserved matters under the Scotland Act 1998 in respect of which the UK Parliament retains the power to make laws.[57] Immigration and nationality are also reserved under the Scotland Act 1998.[58]

1.88 As Scotland is a separate legal jurisdiction from that of England and Wales, several areas of substantive family law differ between these jurisdictions. The areas of difference in family law of relevance to this Report include adoption law,[59] the concept of parental responsibilities and parental rights,[60] and court procedure.

1.89 Where Scots law differs from the law of England and Wales, this is reflected in the text of this Report.

Northern Ireland

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

1.91 Due to ongoing budgetary pressures, however, the Northern Ireland Law Commission has been non-operational since April 2015.[61] This has meant that we have not been able to offer to work on this project with the Northern Ireland Law Commission on a

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54 Government of Wales Act 2006, sch 7A para 177.

55 Government of Wales Act 2006, sch 7A paras 28 and 29.

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

57 Scotland Act 1998, sch 5 Pt II, head J, para J3.

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

59 Contained in the Adoption and Children (Scotland) Act 2007.

60 Children (Scotland) Act 1995.

61 Northern Ireland Law Commission: http://www.nilawcommission.gov.uk/ (last visited 23 March 2023).

similar basis to the relationship between the Law Commission of England and Wales and the Scottish Law Commission. As a result, it has not been possible to cover in this Report how Northern Irish law differs from English and Welsh and Scots law, nor does the draft Bill extend to Northern Ireland. We hope that, if the UK Government accepts our recommendations and takes forward the draft Bill to Parliament, that the Bill can, at that time, be extended to Northern Ireland, to achieve the same reforms to surrogacy in that jurisdiction as we propose for England and Wales, and for Scotland.

1.92 We have, however, engaged with a variety of interested parties in Northern Ireland on the issue of surrogacy and law reform, to ensure that we are alive to specific issues affecting Northern Ireland. These included Northern Irish solicitors and barristers who are involved in surrogacy; and the Northern Ireland Guardian Ad Litem Agency ("NIGALA"), who prepare parental order reports in Northern Ireland. We ran a consultation event in Belfast, kindly hosted by the Northern Ireland Law Society in September 2019, during our consultation period.

TERMINOLOGY

1.93 We are aware that the terminology used in the context of surrogacy is a sensitive issue. We have carefully considered what terminology is most appropriate in the context of this Report.

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

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

1.96 We describe a woman who carries the child in a surrogacy arrangement as a "surrogate". From our discussions with consultees, and particularly with women who have been surrogates, 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".

1.97 We describe the person, or persons, who have initiated the surrogacy arrangement, and who intend to become the legal parents of the surrogate-born child, as the "intended parents". Where necessary to refer to an individual intended parent, we refer to the "intended mother" and the "intended father", as appropriate. 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

agreement. We use the term intended parents to cover the situation of a single intended parent, as well as two intended parents.[62]

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

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

1.100 A "gestational surrogacy arrangement" is where the surrogate is not genetically related to the child she carries. Gestational surrogacy involves the surrogate being implanted with an embryo or embryos created in a process known as IVF. These embryos may be formed from the intended mother's egg and the intended father's sperm, although donor sperm or a donor egg can be used.[63] We have preferred this term to that of "full" or "host" surrogacy which can also be used to describe this arrangement.

1.101 We have used the term "legal parental status" to discuss who is a child's legal parent, distinct from who has parental responsibility (in England and Wales) or parental responsibilities and parental rights (in Scotland). 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 can risk confusion.

1.102 At common law the woman who gives birth to a child is the child's legal mother.[64] In England and Wales the man whose sperm fertilised the egg is the legal father,[65] and there is a presumption that the mother's husband or civil partner is the father, but this can be displaced.[66] 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.[67]

1.103 When a woman gives birth to a child and her egg has not been used for conception, the HFEA 2008 provides that she, as the 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.[68] Further special rules defining the

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62 See para 1.7.

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

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

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

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

67 Law Reform (Parent and Child) (Scotland) Act 1986, ss 5 and 7.

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

legal parental status of a father or second female parent in such a situation exist also.[69]

1.104 We have also produced a Glossary at the beginning of this Report defining a longer list of the terminology that we have used.

STRUCTURE OF THIS REPORT

1.105 Chapter 2 concisely summarises our recommendations for the new pathway. Chapter 3 sets out instruments of international law and guidance which are or may be applicable to surrogacy, and our analysis of how our recommendations are compatible with them.

1.106 The subsequent chapters follow a consistent format, setting out the proposals on which we consulted, summarising consultees' responses, and then presenting our analysis of the issue and recommendations for reform.

1.107 Chapter 4 sets out our approach to legal parental status and birth registration on the new pathway, our approach to the surrogate's spouse or civil partner's legal parental status as well as provisions on the death of the surrogate, intended parents or child in relation to the new pathway and parental orders. Chapter 5 addresses the question of who holds parental responsibility (in England and Wales) and PRRs (in Scotland) in relation to surrogacy agreements on the new pathway, and where a parental order must be sought.

1.108 Chapter 6 sets out eligibility criteria for surrogacy under our reforms. Chapter 7 addresses the role of the HFEA as the regulator for surrogacy, and the form and licensing of RSOs. Chapter 8 addresses the screening and safeguarding requirements for a surrogacy agreement to proceed on the new pathway, and Chapter 9 addresses the form and content of Regulated Surrogacy Statements, which the surrogacy team and RSO sign to bring an agreement within the new pathway.

1.109 Chapter 10 addresses parental order applications, setting out which provisions of the current law we recommend are retained and which we recommend are reformed, including in relation to the consent of the surrogate. Chapter 11 addresses parental order procedure, including the allocation of cases to different levels of court in England and Wales.

1.110 Chapter 12 addresses payments, setting out the scope of the scheme on payments which will apply to the new pathway and parental orders, the categories of payments which are and are not permitted, and the issues of recovery by the surrogate and enforcement of the payments scheme. Chapter 13 sets out our proposals for a new Surrogacy Register, and in relation to other ways information about their origins might be accessed by a surrogate-born person.

1.111 Chapter 14 addresses activities in relation to forming surrogacy arrangements, and sets out reformed criminal offences on matching and facilitation, charging for negotiating and advising on surrogacy agreements, and the advertising of surrogacy arrangements. Chapter 15 addresses interactions between surrogacy and other

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

substantive rights, namely employment law, succession, and healthcare. Chapter 16 addresses issues of law and practice in relation to international surrogacy arrangements. Chapter 17 sets out our recommendations in full.

ACKNOWLEDGEMENTS

1.112 We are grateful to all of the individuals and organisations who responded to our consultation in 2019, as well as those who responded to the Law Commission of England and Wales's consultation on its 13th Programme of Law Reform in 2016 and the Scottish Law Commission's consultation on its 10th Programme of Law Reform in 2017, for sharing their views on the operation of the current law and proposals for reform.

1.113 We are grateful to the following organisations who shared their time and expertise with us: the members of the APPG on Surrogacy; the Bar Council; Brilliant Beginnings; the Center for Bioethics and Culture; COTS; EVAW; Family Justice Council; Hope Independent Surrogates; Maternity Action; NGA Law; NIA; Nordic Model Now!; Nuffield Bioethics; OBJECT UK; PROGAR; Stop Surrogacy Now UK, SurrogacyUK; Woman's Place UK.

1.114 We are further grateful to the following individuals: Beverley Addison; Dr Teresa Baron; Dr Maya Chetty; Dr Mat Campbell; Dr Marilyn Crawshaw; Professor James Chalmers; Louisa Ghevaert; Robert Gilmour; David Haynes; Professor Laura Macgregor; Lillian Odze; Professor Bronwyn Parry; Dr Sharon Pettle; Jerome Tierney; Dr Katarina Trimmings.

1.115 We benefitted greatly from the work of a number of academics. The work of Dr Kirsty Horsey with the SurrogacyUK Working Group on Law Reform provided insight into surrogates' and intended parents' experiences, and with Dr Katherine Wade and Zaina Mahmoud as part of the Children's Voices in Surrogacy Law informed our understanding of how reform might be perceived by the children it affects.

1.116 The work of Professor Jens Scherpe, Professor Claire Fenton-Glynn and Associate Professor Terry Kaan has assisted us greatly by providing evidence on surrogacy practices in other countries and jurisdictions, in particular, a greater understanding of how UK laws are seen in the international context, and greater awareness of different legal approaches and the benefits and challenges that they present.

1.117 The work conducted at the University of Cambridge's Centre for Family Research, led until recently by Professor Susan Golombok, and now by Professor Pasco Fearon, has provided valuable longitudinal insight into the experiences of surrogates, intended parents, and children born from surrogacy arrangements.

1.118 We are thankful to officials from the Department of Health and Social Care; the Foreign, Commonwealth and Development Office; the Government Equalities Office; the Home Office; the Ministry of Justice; the Department for Education; The Scottish Government; The Human Fertilisation and Embryology Authority; The General Register Office; The National Records of Scotland; the Northern Ireland Department for Health and Department for Justice; and to staff at the Central Family Court.

1.119 The Commissioners would like to record their thanks to the following members of staff who worked on this Report: at the Scottish Law Commission, Gillian Swanson, Alison Fraser, Alastair Smith (project managers); Victoria Hayward, Molly Little, Lucy Robertson, and Nic Vetta (legal assistants); and at the Law Commission of England and Wales, Spencer Clarke (team lawyer), Verity Bell, Robert Marsh, Isabel Williams, Christine Gentry, Serena Weatherstone and Andrew Bazeley (research assistants), and Matthew Jolley (head of legal services and team head, Law Commission of England and Wales).

Chapter 2: Introducing the new pathway

2.1 At the heart of our proposals for the reform of surrogacy law is the introduction of a "new pathway" to legal parental status, accessed through the completion of a "Regulated Surrogacy Statement" by the intended parents, surrogate, and a Regulated Surrogacy Organisation ("RSO") who will oversee their entry onto the new pathway. This new pathway would enable the intended parents to become the child's legal parents at birth based on an administrative process, without the need to apply for a parental order. The new pathway will operate alongside the existing parental order process, whereby there is a judicial transfer of legal parental status which takes effect after the birth. This process will remain, subject to a number of recommended reforms to resolve problems which have emerged with it.

2.2 This chapter will provide a broad overview of what the new pathway to legal parenthood will look like. It will set out the current law and problems with it and detail the scope of the new pathway, including the role of Regulated Surrogacy Organisations ("RSOs"), eligibility requirements and procedural safeguards.

CURRENT LAW, PROBLEMS WITH IT AND OUR PROPOSAL FOR A NEW SURROGACY PATHWAY

Current law

2.3 The current law provides that, upon the birth of a surrogate-born child, the surrogate will be recognised as the legal mother and her spouse or civil partner, if she has one, will be recognised as the father or second parent.[1] Where the surrogate is not married or in a civil partnership, legal parental status may also be acquired by a person who fulfilled the agreed fatherhood or female parenthood conditions at the time of conception, in accordance with sections 36 or 43 of the Human Fertilisation and Embryology Act 2008 ("HFEA 2008"). This can be used to recognise one of the intended parents as a legal parent from birth, until the parental order is granted, transferring legal parental status to both the intended parents – although it is certainly possible that neither of the intended parents will be so recognised. It follows that, while it is possible for one intended parent to acquire legal parental status upon the birth of the child, it is never possible for both intended parents to be the legal parents at birth. Further, the surrogate will always be the legal parent, whether she wishes to be or not.

2.4 Legal parental status will remain with the surrogate (and the second parent, if there is one) until such time as it is transferred to the intended parents upon the grant of a parental order by the court under section 54 or 54A of the HFEA 2008. The effect of such an order is for the applicants to be treated in law as the parents of the surrogate-born child, and for the legal parental status of the surrogate and any other person to be extinguished.

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[1] Subject to the father or second parent having consented to any fertility treatment, where that is required.

2.5 Under the current regime, the paramount consideration for the court in deciding the parental order application is the welfare of the child.[2] If the child is living with and being cared for by the intended parents, it will almost always be in the child's best interests for a parental order to be made. The courts are consequently generally reluctant to refuse to grant parental orders, due to their legally transformative nature in making the child a member of the intended parents' family. Some of the requirements of sections 54 and 54A have, therefore, been interpreted generously by the courts in order to enable a parental order to be made.[3]

Problems with the current law

2.6 There are various problems with the existing law on surrogacy. Concerns range from the legal allocation of parental status to safeguards for all parties, including the child.

2.7 First, in relation to legal parenthood, the current allocation of legal parental status to the surrogate at birth is contrary to the fundamental objective of a surrogacy agreement which is that all parties intend the intended parents, and not the surrogate, to be the legal parents. This current allocation operates against the interests of the child, who is initially raised in a family that is not legally recognised as their family. It also runs counter to the interests of the surrogate, who will be the legal parent of a child that she does not consider to be her own or part of her family. The surrogate is forced to be the child's legal mother, with all its associated legal consequences, until such time as a parental order is made, often six months to a year after the child's birth. It follows that the intended parents can "walk away" if they no longer wish to be the child's parents; for example, following a relationship breakdown or change of circumstances, thus leaving the surrogate with responsibility for the child. Indeed, while it is often said that intended parents' greatest fear is that the surrogate will change her mind, surrogates have related that their greatest fear is that the intended parents will change their minds. Further, at birth, the intended parents are denied legal recognition of their parental relationship with the child, despite their significant emotional and practical commitment to bringing the child into the world. The current legal regime does not recognise any of these aspects: the best interests of the child; the surrogate's intention and desire not to be the legal parent or to be left responsible for the baby; and the intended parents' intention and desire to have that recognition.

2.8 Secondly, as previously noted, an application for a parental order typically takes at least six months to be decided by a court. During this interim period, the identity of the child's legal parents does not typically reflect the lived reality of who is caring for them. This is contrary to the child's best interests, particularly to the extent that the intended parents may not, during this period, have any legal authority to make important decisions in relation to the child without the surrogate's express permission as the

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2 The welfare test in the Adoption and Children Act 2002 applies to parental orders in England and Wales by virtue of the Human Fertilisation and Embryology (Parental Orders) Regulations 2018 (2018/1412), sch 1 para 2. For Scotland, see the Adoption and Children (Scotland) Act 2007, s 14(3) as applied and modified by reg 3 and sch 2 para 2 of the Human Fertilisation and Embryology (Parental Orders) Regulations 2018 (2018/1412).

3 See, for example, *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] Fam 186; *A and B (No 2 – Parental Order)* [2015] EWHC 2080 (Fam), [2015] Fam Law 1192; *D v ED (Parental Order: Time Limit)* [2015] EWHC 911 (Fam), [2016] 2 FLR 530; *A v C* [2016] EWFC 42, [2017] 2 FLR 101; see also A Brown, "Two means two, but must does not mean must: an analysis of recent decisions on the conditions for parental orders in surrogacy" (2018) 30(1) *Child and Family Law Quarterly*, 23.

legal mother. This imposes on the surrogate a responsibility of ongoing involvement in the life of the child, and impedes the intended parents from performing their parental role. There are further practical consequences, not least arising from the law of succession in Scotland: since children cannot be disinherited, if the surrogate were to die while still the child's legal parent, the child would have a claim on her estate, thereby diminishing the estate for distribution to her other beneficiaries.

2.9 Thirdly, the unsatisfactory allocation of legal parenthood, and the uncertainty surrounding it, incentivises some parties to enter surrogacy arrangements overseas, in jurisdictions where pre-conception intentions are reflected in the legal allocation of legal parental status at birth. International surrogacy arrangements may now account for up to half of parental order applications in the UK.[4] However, international arrangements bring many ethical and practical problems. These problems have been brought into sharp focus since the publication of our Consultation Paper, by two events: the Covid-19 pandemic and the Russian invasion of Ukraine, which had become a preferred destination for UK intended parents seeking international surrogacy. These issues are described in further detail in Chapter 16.

2.10 Beyond such extreme events, concerns with international surrogacy arrangements are numerous. As the arrangement is taking place outside jurisdictions in the UK, there is no way for bodies in the UK to ensure the welfare of the child or the surrogate. The surrogate may be exploited during and after the arrangement, or have been pressured into entering the arrangement.[5] There is no certainty that the welfare of the child born will have been taken account of; for example, in any screening and safeguarding of the intended parents and surrogate pre-conception, and in relation to knowing the identity of the surrogate or any sperm or egg donor. Further, there may also be practical hurdles and delays for the intended parents – often contrary to the welfare of the child – in bringing the child back to the UK. Another issue is that, even if legal parental status is conferred on the intended parents at birth in the country where the child is born, this will not be recognised in these jurisdictions and the intended parents still have to apply for a parental order on their return to the UK, with the consequent delay, uncertainty, and anxiety which that entails.

2.11 Fourthly, there is an issue about the timing of the scrutiny of the surrogacy arrangement in relation to domestic arrangements. Currently, this only happens some months after the surrogacy has taken place, during the parental order proceedings.[6] The lack of screening before the parties enter into a surrogacy agreement and before conception takes place gives rise to risks for all parties: the child, the surrogate, and the intended parents. Once the matter is before the court, the child's welfare is the

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

5 See Yingyi Luo, "The Human Rights Implications of Not-for-Profit Surrogacy Organizations in Cross-Border Commercial Surrogacy: An Australian Case Study" *Business and Human Rights Journal* 7 (2022): 163–167.

6 If a surrogacy team works with a licensed fertility clinic, they will conduct screening and a welfare of the child assessment before treatment in line with the HFEA Code of Practice, but such checks are more limited than those we propose for the new pathway.

paramount consideration for the court when deciding whether to make the parental order. Coupled with the situation of the child – usually living with the intended parents and with there being no other party who has a bond with the child or could care for them – this means that the courts lack options when deciding whether to grant a parental order. The welfare of the child will nearly always be best served by making the order to recognise the intended parents as the legal parents. Only in the most egregious cases – such as where there is evidence of child trafficking – will the welfare of the child not be met by the making of a parental order. One consequence of this "fait accompli" situation is that, although surrogacy in the UK is altruistic, with only reasonable expenses allowed to be paid by the intended parents to the surrogate, the welfare of the child will nearly always dictate that a parental order is made, even where payments beyond reasonable expenses have been made.[7] This will routinely be the case in parental order proceedings following international commercial surrogacy arrangements. Indeed, the Supreme Court has accepted that payments in respect of commercial surrogacy arrangements overseas are not against public policy and can form part of a personal injury award.[8]

Proposal for a new surrogacy pathway

2.12 It is our view that the most effective way of tackling the many problems with the current law is the introduction of a new pathway, which will introduce essential safeguards prior to conception, and enable the intended parents to become the child's legal parents at birth. This will be an administrative process, without the need for (post-birth) judicial involvement. This represents a significant shift from the current regime.

2.13 We hope that surrogacy parties will be encouraged to follow the new pathway because it will mean that the intended parents are recognised as the legal parents of the surrogate-born child from birth. However, where the parties do not take this route, it will still be open to the intended parents to seek a parental order. We do not propose to limit surrogacy to the new pathway, but instead we recommend that the parental order process continues to be available for those who do not or cannot meet the requirements of the new pathway. The two means by which intended parents' legal parental status can be recognised in surrogacy will thus operate in tandem.

2.14 While the parental order process is being retained, we recommend some modifications in order to improve the current scheme and to ensure consistency with the new pathway, where relevant. For example, certain requirements, such as the minimum age for surrogates and intended parents, and the regulations regarding the payments that intended parents are permitted to make to surrogates, will apply both to agreements on the new pathway and the parental order process. The need for consistency is particularly acute given the potential interaction between the new pathway and the parental order process. While an agreement may initially commence on the new pathway, it is possible that an agreement will exit that pathway and the intended parents will need to seek a parental order. This would happen where a surrogate on the new pathway withdraws her consent to the agreement prior to the

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7 See, for example, *Re X and Y* (Foreign Surrogacy) [2008] EWHC 3030 (Fam), [2009] Fam 71; *Re P-M* [2013] EWHC 2328 (Fam), [2014] 1 FLR 725; *Re C (Parental Order)* [2013] EWHC 2413 (Fam), [2014] 1 FLR 654.

8 *Whittington Hospital NHS Trust v XX* [2020] UKSC 14.

birth of the child.[9] We therefore propose a coherent and unified scheme which places the best interests of the child at the heart of both the new pathway and the parental order process.

OVERVIEW OF THE NEW PATHWAY

Overview

2.15 Under the current regime, as previously noted, legal parenthood transfers from the surrogate to the intended parents upon the making of a parental order by the court. Prior to this point, a surrogacy agreement may remain entirely unknown, other than to the parties. Parties may choose to obtain help and support from a surrogacy organisation, but there is no obligation on them to do so, and an agreement will first be subject to scrutiny at the point at which a parental order is granted or refused by the court. At this stage, a backward-looking assessment will be undertaken by the court, to establish whether the various eligibility criteria have been met[10] and whether, ultimately, the grant of a parental order is in the best interests of the child.

2.16 We consider that a regime in which the state is not involved until after the birth of the child is not the best option. We therefore recommend a scheme which instead places an emphasis on pre-conception regulation. This essentially "front loads" the process, through pre-conception screening and safeguarding, to better serve the welfare of the child, the surrogate, and the intended parents. If a state-regulated surrogacy organisation has verified that all requirements of the new pathway have been met, and safeguards have been complied with, legal parental status will automatically be acquired by the intended parents on the birth of the child. Enabling the intended parents to be identified as such from birth provides a surrogate-born child with security and certainty about their parentage from the outset, which is absent from the current regime. That certainty is subject to the surrogate's right to withdraw her consent to the agreement proceeding on the new pathway. Allowing legal parental status to be acquired by a purely administrative process on the birth of the child is a fundamental shift from the current legal position. The system of regulation implemented must therefore be sufficiently robust to protect the welfare of the surrogate-born child, to ensure that the surrogate is safe and not exploited, and to ensure that surrogacy is the right decision for the intended parents and the surrogate.

Eligibility requirements for both the new pathway and parental orders

2.17 The eligibility requirements and procedural safeguards that we recommend for the new pathway are extensive. In addition to these specific safeguards and eligibility criteria there are also eligibility criteria for surrogacy generally, which will apply equally to the new pathway and to parental order applications.

2.18 First, a minimum age of 21 will be introduced for surrogates, both for the new pathway and for parental orders, and the current minimum age of 18 for intended parents in relation to parental orders will also be applied on the new pathway.

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9 Where the surrogate withdraws her consent after the birth, the intended parents would remain the legal parents of the child and an application could be made by the surrogate for an order that she is the parent of the child. See ch 4.

10 See Consultation Paper, ch 5.

2.19 Secondly, as is currently the case, at least one of the intended parents will have to provide gametes for the conception of the child, so that they share a genetic link.

2.20 Thirdly, information identifying the surrogate and those who contributed gametes must be recorded as part of entry to the new pathway, or as part of the parental order application, to be entered on a new Surrogacy Register.[11]

2.21 Fourthly, in order to prevent surrogacy tourism (where intended parents based overseas come to the UK for surrogacy) one or both of the intended parents must be domiciled or habitually resident in the UK, Channel Islands or Isle of Man (i) both at the time of the signing of the Regulated Surrogacy Statement and at the time the child is born on the new pathway, or (ii) both at the time of applying for and the time of the making of the parental order. In the new pathway, the surrogate must also meet this requirement of domicile or habitual residence.

Eligibility requirements and screening and safeguarding on the new pathway

2.22 Before admission to the new pathway, we recommend that various additional eligibility requirements and screening and safeguarding checks will have to be met. These include a requirement that parties to a surrogacy agreement undergo health and gametes screening; take part in implications counselling, exploring the nature of surrogacy and how to deal with its emotional and practical consequences; take independent legal advice on the legal consequences of entering a surrogacy agreement; and undergo criminal record checks. Additionally, a pre-conception welfare of the child assessment will be required to be undertaken in terms akin to those of Chapter 8 of the HFEA Code of Practice, and to be set out in a new Code of Practice specific to surrogacy.

2.23 We also recommend restrictions on the type of surrogacy agreements that are able to access the new pathway. International arrangements are not eligible for the new pathway, since the conception and/or pregnancy takes place outside the UK and beyond the regulatory oversight of the HFEA. The new pathway will be open to both traditional and gestational domestic surrogacy arrangements.[12] It will not, however, be possible to use anonymously donated gametes on the new pathway.[13] Finally, a surrogacy agreement will only be able to be approved to access the new pathway by an RSO. Along with the intended parents and the surrogate, the RSO will sign a Regulated Surrogacy Statement which enables the agreement to proceed on the new pathway. These regulated bodies will therefore play a central role as the gatekeepers of access to the new pathway, as a means of ensuring that all statutory requirements, including the critical screening and safeguarding provisions, are met.

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11 This court can dispense with this requirement for international cases on the parental order process where anonymously donated gametes were used or the surrogate cannot be identified. See ch 10.

12 Described at paras 1.98 and 1.100.

13 The use of anonymously donated gametes is not permitted, in any event, where treatment is undertaken at a HFEA-licensed fertility clinic This is the effect of the provisions giving donor-conceived people the right to identifying information about their donors, for example under HFEA 1990, s 31ZA. Licence Condition T54 in the Code of Practice (Guidance Note 20) also prevents the use of non-identifiable donors except in certain circumstances (for example, where the gametes or embryo were supplied to the clinic before 1 April 2005). Where the surrogate self-inseminates in a traditional arrangement, a surrogacy will not qualify for the new pathway if anonymously donated sperm is used.

2.24 While the new pathway will not, therefore, be open to all surrogacy agreements, for those agreements which do not follow the new pathway, transfer of legal parental status from the surrogate to the intended parents may be attained by way of a parental order, subject always to meeting the general eligibility criteria. Here, judicial oversight will continue to provide an important safeguard.

2.25 These eligibility criteria and screening and safeguarding requirements are designed to protect both surrogates and intended parents from exploitation. There is a risk that a surrogate could face exploitation, including if she is unaware of her legal rights, if pressure is exerted on her by other parties to enter a surrogacy agreement, or if she is financially induced to enter or continue a surrogacy agreement. Intended parents could face exploitation due to a combination of their desire to have a child, and the fact that there are more intended parents than there are women who are interested in being surrogates.

The role of RSOs

2.26 At the heart of our recommendations for the new pathway are RSOs. Their role is to act as the gatekeepers of the new pathway. They will be regulated, and subject to regulatory sanctions, by the HFEA. RSOs will assess whether a surrogacy agreement is permitted to enter the new pathway, including whether all of the eligibility requirements and procedural safeguards of the new pathway have been complied with by individual surrogacy teams. If satisfied, they will sign them off on the new pathway, with all the legal consequences that entails. In authorising a surrogacy agreement to enter the new pathway with the consequence that the intended parents will be the legal parents from the child's birth, RSOs will be acting as an arm of the state, and will be fulfilling a state function. This is an administrative function which replaces the current role of the courts in the parental order process, with the added advantage of the screening and safeguarding measures being carried out pre-conception.

2.27 In addition to the roles required by statute,[14] RSOs could continue to perform the functions of existing surrogacy organisations, including the provision of support networks and matching and facilitation services. Services offered by RSOs could also be open to surrogacy teams choosing to seek legal parental status by way of a parental order, or where they have exited the new pathway and need to seek a parental order. Such services might include the identification of suitable professionals for them to work with; helping them to draft a written surrogacy agreement; or offering information and support in respect of parental order applications.

2.28 While RSOs will not be required to assume a particular organisational form, they will need to operate on a non-profit-making basis. They will need to apply to the HFEA in order to be licensed by them and attain regulated status. A condition of an RSO's licence is that they will be required to appoint an individual responsible for ensuring that the organisation complies with its regulatory obligations. This person will be responsible for liaising with the regulator; ensuring that the RSO is properly managed and complies with any legal obligations to which it is subject; securing compliance with the conditions of the licence; and ensuring that any other person to whom the licence applies undertakes training.

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[14] See draft Bill, cl 51 to 54.

Payments that intended parents are permitted to make to the surrogate

2.29 A major issue with the current surrogacy framework is the regime that governs the payments that intended parents are permitted to make to the surrogate. Surrogacy is permitted on an altruistic basis, with the existing eligibility criteria for parental orders requiring that "no money or other benefit (other than for expenses reasonable incurred)"[15] has been paid to the surrogate by the intended parents. However, in practice, this is tempered by the principle of the paramountcy of the best interests of the child: in situations in which a child is living with (and has lived their whole life with) intended parents who have made payments in excess of reasonable expenses, the child's best interests typically dictate that the court makes the parental order in favour of the intended parents. The courts are thus placed in the invidious position of having to retrospectively approve such excess costs (as the statute permits them to do), with no consequences arising from the breach.[16]

2.30 A new regime governing the payments that intended parents are permitted to make to the surrogate forms a key part of our recommendations for reform. Our recommendations separate the issue of compliance with the payments regime from the recognition of legal parental status. Under the new pathway, surrogacy teams will be required to produce a payments schedule. This schedule will set out what costs are anticipated to be incurred under specified categories, and maximum figures will be agreed for each, at the outset of the agreement. This schedule will then be approved by the RSO.

2.31 The categories will include getting-to-know-you and other pre-conception costs, medical and wellbeing costs, costs of pregnancy-related items including additional food required as a result of being pregnant, costs of paying for help with household tasks, and loss of earnings, and costs which it will be mandatory for the intended parents to offer to provide, such as the costs of any medical assessment, psychological counselling, or legal advice as part of the safeguarding and screening process, or life and critical illness insurance cover. The intended parents can meet the surrogate's costs of being pregnant, but they cannot cover daily living costs, such as mortgage or rent payments, energy bills, or weekly food shops. There is also no provision for the intended parents to compensate the surrogate for the pregnancy or to make any payment in relation to the conception, the pregnancy itself, or the birth of the child. There will be some discretion for intended parents to be able to express their thanks and gratitude to the surrogate through the giving of small gifts and/or paying for a recuperative holiday for the surrogate and her family, as is current practice.

2.32 Twelve weeks after the child is born, the intended parents will be required to make a statutory declaration stating whether or not they have made payments in excess of those recorded in the financial schedule. It will be a criminal offence to make a false statement or to fail to make a statutory declaration at all. Enforcement will not be the

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15 HFEA 2008, s54(8).

16 For discussion on the approach to the interpretation of the requirements of sections 54 and 54A of the HFEA 2008 taken by the courts, see A Brown, "Two means two, but must does not mean must: an analysis of recent decisions on the conditions for parental orders in surrogacy" (2018) 30(1) *Child and Family Law Quarterly*, 23.

job of the RSO but of a state enforcer. We set out our recommendations for enforcement in Chapter 12.

2.33 In those surrogacy cases where a parental order application is made, the same regime of permitted payments will apply. In those cases, the court will have discretion (as at present) to grant a parental order where costs have been paid which go beyond those expressly permitted by statute. Even if they do so, the court can refer the intended parents to the state enforcing body.

2.34 While surrogacy agreements are not enforceable between the parties, payments may be recoverable. This means that a surrogate can recover payments for reimbursement of her pre-agreed costs against the intended parents. This helps to ensure that women who become surrogates are not left financially worse off as a result. It also ensures that where a dispute arises between the surrogate and the intended parents as to payments, this dispute can be resolved separately to the issue of legal parental status. The surrogate is not left in the position whereby the only action she can take is to withdraw her consent to the surrogacy proceeding on the new pathway, or refuse consent to a parental order.

2.35 Having provided this overview of the new pathway, we move on, in the next chapter, to consider our new pathway recommendations in the context of the UK's international law obligations, before beginning to discuss, in detail, all of our recommendations for the reform of surrogacy law.

Chapter 3: International law considerations

3.1 In this chapter we provide a summary of the international law in relation to surrogacy, and the status of discussions, which are still ongoing, on a possible international convention on international surrogacy arrangements. We also consider the impact of international law on our recommendations for reform, having regard to arguments made by consultees that some of the provisional proposals in the Consultation Paper which form the basis of those recommendations are incompatible with international law.

3.2 It is the view of the Law Commissions that the recommendations we make in this Report are compliant with the relevant international law instruments, conventions and standards. We address here the general concerns raised and demonstrate the compatibility of our recommendations with international law.

3.3 During the consultation period, arguments were raised by consultees who opposed surrogacy in principle that our provisional proposals were not compatible with international law. Consultees who submitted the Nordic Model Now! template response[1] argued that our provisional proposals for reform in the Consultation Paper, particularly those relating to the new pathway that enables the intended parents to be the legal parents of the child on birth, are incompatible with the recommendations of the UN Special Rapporteur. Some consultees also suggested that the new pathway was incompatible with the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption,[2] and contradicted obligations under the UN Convention on the Rights of the Child, the Optional Protocol to the UNCRC on the sale of children, child prostitution and child pornography and the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW").[3]

3.4 We address the suggestion that our provisional proposals might breach obligations under international law here before putting forward our recommendations for reform in subsequent chapters.

RELEVANT INTERNATIONAL LAW

3.5 The relevant international law instruments, standards and bodies relevant to surrogacy are:

(1) The UN Convention on the Rights of the Child ("UNCRC");

(2) The Optional Protocol to the UNCRC on the sale of children, child prostitution and child pornography ("the Optional Protocol");

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1 See para 1.44.

2 The Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.

3 https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&clang=_en (last visited 23 March 2023).

(3) The 2018 and 2019 reports of the UN Special Rapporteur on the sale of children, child prostitution and child pornography on surrogacy ("the Special Rapporteur's reports");[4]

(4) The Verona Principles;[5]

(5) The Hague Conference on Private International Law and The Hague Convention on Parental Responsibility and Protection of Children;[6]

(6) CEDAW; and

(7) The International Covenant on Economic, Social and Cultural Rights.[7]

3.6 We also deal below with one other international law instrument that is not directly relevant to surrogacy; the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.[8]

3.7 As we stated in the Consultation Paper when considering the international law relating to surrogacy, it is important at the outset to clarify the status of these international treaties as a matter of constitutional law in the UK.[9] The UK legal systems have been characterised by legal academics as "dualist". This means that international law does not form part of domestic law, unless it has been expressly incorporated with parliamentary authority.[10] Such parliamentary authority could be provided through an Act of Parliament or secondary legislation, such as regulations. We note below the current status of the respective international law instruments in the UK.

The UNCRC and the Optional Protocol

3.8 The UNCRC and the Optional Protocol have by far the greatest relevance to surrogacy of the international law instruments and standards listed above.

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4 M de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material*, 15 January 2018, A/HRC/37/60; and M de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material*, 15 July 2019, A/74/162.

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

6 The Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

7 United Nations (General Assembly), *Resolution 2200A (XXI).*

8 The Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (HCCH 1993 Adoption Convention)

9 Consultation Paper, para 4.81.

10 Bradley and Ewing, *Constitutional and Administrative Law* (18th ed 2022), pp 316 to 321. See also discussions in *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964 at [252] and *R (on application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61 at [56].

3.9 The UNCRC is an international convention which has 196 state parties around the world.[11] The Optional Protocol is one of three optional protocols to the UNCRC, and is the protocol with most relevance to surrogacy.

3.10 Both the UNCRC and the Optional Protocol have been ratified by the UK, and entered into force on 15 January 1992[12] and 20 March 2009[13] respectively.

3.11 Currently, neither the UNCRC nor the Optional Protocols have been incorporated into domestic law across the UK, such that individuals in England and Wales or Scotland cannot directly enforce those rights in domestic courts.[14]

3.12 In Scotland, the Scottish Parliament has attempted to incorporate the UNCRC into Scots law, which would make UNCRC rights directly enforceable in courts in Scotland and place an obligation on public authorities to act compatibly with the UNCRC. The UNCRC (Incorporation) (Scotland) Bill[15] was passed, unanimously, on 16 March 2021. Subsequently however, the Supreme Court on the application of the UK Government, ruled that parts of the Bill were not within the legislative competence of the Scottish Parliament.[16] The Bill has therefore not yet been enacted.

3.13 Although not directly justiciable in the UK, the UNCRC is nevertheless an international law treaty which has been ratified by the UK. As Lord Justice Thorpe noted, the rights under the UNCRC:

> may not have the force of law but, as international treaties, they command and receive our respect.[17]

3.14 Lord Hope of Craighead has further noted that when construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with an international treaty, the courts will presume that Parliament intended to legislate in conformity with the treaty and not in conflict with it.[18]

3.15 The European Court of Human Rights has made it clear that, where relevant, the content of another international convention such as the UNCRC should inform

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11 For a full list of signatories see: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en (last visited 23 March 2023).

12 Treaty Series No 44 (1992) Cm 1976.

13 Treaty Series No. 13 (2011) Cm 8074.

14 This has recently been confirmed by the Supreme Court in *R (on the applications of DA and others) v Secretary of State for Work and Pensions* [2019] UKSC 21 at [67] at [178].

15 United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill 2021 (SP Bill 80B)

16 *Reference by the Attorney General and the Advocate General for Scotland - United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] UKSC 42. The Supreme Court ruled that sections 6, 19(2)(a)(ii), 20(10)(a)(ii) and 21(5)(b)(ii) of the Bill were not within the legislative competence of the Scottish Parliament under the Scotland Act 1998.

17 *Re P (A Minor) (Residence Order: Child's Welfare)* [2000] Fam 15, 42.

18 *T, Petitioner* [1997] SLT 724, at [733L] to [734C]. This dicta related to the ECHR but has been applied specifically for the UNCRC in *White v White* [2001] SC 689 at [703] (Lord McCluskey).

interpretation of the rights guaranteed by the European Convention on Human Rights[19] (which by operation of the Human Rights Act 1998 is part of domestic law).

3.16 The Scotland Act 1998 restricts the Scottish Parliament's ability to legislate, and Scottish Government Ministers' powers to act, in contravention of international obligations.[20] In addition, Welsh legislation places a specific duty on the Welsh Ministers to pay "due regard" to the UNCRC and two of its optional protocols when exercising any of their functions.[21]

3.17 As we noted in the Consultation Paper,[22] the Committee on the Rights of the Child, which monitors states' compliance with the UNCRC, has become increasingly vocal about the issue of surrogacy in recent years, in particular commercial surrogacy. The question of whether commercial surrogacy constitutes the sale of children was specifically addressed by the Special Rapporteur, as explained below.

The UN Special Rapporteur's reports and the Verona Principles

3.18 The UN Special Rapporteur[23] reports to the UN Human Rights Council and is mandated to analyse the causes of the sale and sexual exploitation of children and promote measures to prevent it. The Special Rapporteur's 2018 report contained a thematic study on surrogacy, which is referred to in the Consultation Paper.[24] This report was added to and qualified by the Special Rapporteur's 2019 report, a thematic study on safeguards for the protection of the rights of children born from surrogacy arrangements.

3.19 In addition to the work of the UN Special Rapporteur, since the publication of the Consultation Paper, International Social Services, a network of national entities and a General Secretariat that assist children and families facing complex social problems as a result of migration, has developed principles designed to provide guidance on the protection of the rights of the child in the context of surrogacy, endorsed by the Special Rapporteur and the UN Committee on the Rights of the Child. These 'Verona Principles' were published in March 2021.[25]

3.20 The UN Special Rapporteur's reports and the Verona Principles command respect. However, in law they provide guidance on the UNCRC and the Optional Protocol, rather than being a definitive or binding interpretation. This conclusion is supported by

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19 *Neulinger v Switzerland* (2010) 54 EHRR 1087 at [131] and [132].

20 Scotland Act 1998 ss 35 and 58.

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

22 Consultation Paper, para 4.105.

23 The current UN Special Rapporteur is Ms Mama Fatima Singhateh. The UN Special Rapporteur who produced the two reports discussed here was Ms Maud de Boer-Buquicchio.

24 Consultation Paper, para 4.106.

25 See https://www.iss-ssi.org/index.php/en/what-we-do-en/surrogacy and https://www.iss-ssi.org/index.php/en/news1/459-march-2021-iss-launches-the-verona-principles-for-the-protection-of-the-rights-of-the-child-born-through-surrogacy.

judicial commentary from the Court of Appeal and, as we discuss below, also in prefatory comments made in the Verona Principles.

3.21 In *McConnell v Registrar General*,[26] the Court of Appeal discussed the legal significance not of the Special Rapporteur's reports or the Verona Principles, but of General Comments issued by the UN Committee on the Rights of the Child ("the UN Committee"):

> …the views of the UN Committee on the Rights of the Child are "authoritative guidance" on the CRC: see e.g. *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21; [2019] 1 WLR 3289, at para. 69 (Lord Wilson JSC). But, as Lord Wilson emphasised in that passage, a General Comment is no more than guidance, which is not binding even on the international plane, so that it may "influence" but never "drive" a conclusion that the CRC has been breached.[27]

3.22 General Comments serve a similar function to the Special Rapporteur's reports and the Verona Principles. General Comments elaborate on the rights enshrined in the UNCRC and the Optional Protocol and illustrate their application in different contexts, while the Special Rapporteur's reports and the Verona Principles suggest a framework for surrogacy based on the rights enshrined in the UNCRC and the Optional Protocol.

3.23 Further, General Comments have equal or greater authority than the Special Rapporteur's reports and the Verona Principles as an interpretation of the UNCRC and the Optional Protocol. This is by virtue of the fact they are drafted by the UN Committee; in other words, the body specifically set up by the UNCRC to monitor States' progress towards realising the rights set out in the UNCRC.[28]

3.24 Therefore, by applying the Court of Appeal's reasoning to the Verona Principles and the Special Rapporteur's reports the following conclusion can be reached: the Verona Principles and Special Rapporteur's reports constitute guidance which should – to put the position at its highest – be taken into account in our recommendations for reform of surrogacy, but are not binding in law.

3.25 This conclusion is supported with respect to the Verona Principles by comments made by the UN Committee in the introductory sections to the Verona Principles. The UN Committee state that the Verona Principles may:

> serve as an important tool that will help identify appropriate legislative responses to the new challenge related to the protection of children's rights.[29]

3.26 A prefatory note, signed by the UN Special Rapporteur among others, goes on to say:

> The Verona Principles are drafted to assist States and other stakeholders in their discussions about possible responses to surrogacy. …It is our sincere hope that the

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26 [2020] EWCA Civ 559.

27 *McConnell v Registrar General* [2020] EWCA Civ 559 [85].

28 UNCRC, Article 43(1).

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

Principles will assist lawmakers and society as a whole to hold informed discussions on such complex issues.[30]

3.27 It is clear then that the Verona Principles are intended to provide assistance for States when drafting their own national frameworks for surrogacy rather than providing the final say on the matter.

The Hague Conference on Private International Law and The Hague Convention on Parental Responsibility and Protection of Children

3.28 The Hague Conference on Private International Law (the "Hague Conference") is an intergovernmental organisation, formally established in 1955, whose explicit purpose is "to work for the progressive unification of the rules of private international law".[31]

3.29 The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (the "1996 Hague Convention") became effective on 1 January 2002 and currently has 54 contracting parties.

3.30 The UK signed the 1996 Hague Convention on 1 April 2003, and ratified it on 27 July 2012.[32] It entered into force in the UK on 1 November 2012,[33] and has been incorporated into domestic law.[34]

The Hague Conference's current work on international surrogacy arrangements

3.31 There is currently no regulation of international surrogacy arrangements at an international level.[35] The Hague Conference has produced various notes and reports on the issues arising from international surrogacy arrangements, in an attempt to find a workable compromise between the positions taken in different states. In its 2014 Report,[36] it admitted that work in this area would be difficult given the:

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30 International Social Service, *Verona Principles* (February 2021), Prefatory note, p 4.

31 Statute of the Hague Conference on Private International Law, art 1.

32 https://www.hcch.net/en/instruments/conventions/status-table/?cid=70 (last visited 23 March 2023).

33 Treaty Series No 44 (2012) Cm 8477.

34 Parental Responsibility and Measures for the Protection of Children (International Obligations) (England and Wales and Northern Ireland) Regulations 2010 (SI 2010 No 1898); Parental Responsibility and Measures for the Protection of Children (International Obligations) (Scotland) Regulations (SSI 2010 No 213).

35 "There is a complete void in the international regulation of surrogacy arrangements, as none of the existing international instruments contains specific provisions designed to regulate this emerging area of international family law": K Trimmings and P Beaumont, "International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level" (2015) 11 *Journal of Private International Law* 627, 630.

See also F Banda and J Eekelaar, "International Conceptions of the Family" (2017) 66 *International and Comparative Law Quarterly* 833, 845.

36 Hague Conference on Private International Law, *The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project* (Preliminary Document No 3B) (March 2014).

diverse approach of States to questions concerning legal parentage in internal and private international law, as well as the difficult questions of public policy raised in an area traditionally strongly connected with States' cultural and social milieu … .[37]

3.32 In 2015 the Hague Conference convened an Experts' Group on parentage and surrogacy. The Experts' Group submitted its final report (the "Experts' Group final report") in November 2022.[38] Following on from an approach it had proposed in 2018,[39] the Experts' Group had considered the feasibility of two private international law separate instruments on legal parentage; a convention dealing with legal parentage in general, and an optional protocol dealing with legal parentage established as a result of an international surrogacy arrangement.

3.33 In respect of international surrogacy arrangements, the Experts' Group final report concluded:

> … in order to respect the policy concerns of many States, as well as the various approaches to surrogacy globally, the most feasible way forward would be to exclude legal parentage resulting from ISAs [international surrogacy arrangements] from the scope of an instrument on legal parentage generally (a Convention) and address such legal parentage in a separate instrument (a Protocol).[40]

3.34 The Experts' Group final report noted that the group had discussed various safeguards or standards for an optional protocol dealing with international surrogacy arrangements, including consent of the surrogate and intended parents, a requirement of a genetic link, the eligibility and suitability of the surrogate and intended parents, and regulation of the financial aspects of the arrangement. The final report concluded:

> There was general agreement that to be feasible, a Protocol would need to include safeguards / standards. However, with respect to overall feasibility, experts had different views on:
>
> - which safeguards / standards to include;
> - how safeguards / standards should be included (i.e., as part of a definition, as conditions for recognition, as grounds for refusal, as general obligations, with an opt-in or opt-out mechanism, through a declaration procedure); and

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37 Hague Conference on Private International Law, *The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project* (Preliminary Document No 3B, March 2014) para 41.

38 Hague Conference on Private International Law Experts Group on the Parentage / Surrogacy project, *Final Report: The feasibility of one or more private international law instruments on legal parentage*, 1 November 2022. Available at https://assets.hcch.net/docs/6d8eeb81-ef67-4b21-be42-f7261d0cfa52.pdf (last visited 23 March 2023).

39 Hague Conference on Private International Law, *Report of the Experts' Group on Parentage/Surrogacy* (Meeting of 6 – 9 February 2018). This proposal was endorsed at a meeting of the Hague Conference in March 2019, see Council on General Affairs and Policy of the Conference – March 2019 para 25.

40 Experts' Group final report, Conclusion No 8: The reasons for a differentiated instrument for legal parentage established as a result of an ISA, p26. Available at https://assets.hcch.net/docs/6d8eeb81-ef67-4b21-be42-f7261d0cfa52.pdf (last visited 23 March 2023).

- how these should feature, either (i) as uniform safeguards / standards directly included in a Protocol or (ii) as State-specific safeguards / standards included indirectly in a Protocol (i.e., safeguards / standards applicable in the domestic law of the State of establishment of legal parentage).

> Experts acknowledged that safeguards / standards represent a challenge. Notwithstanding this, most of them considered that having uniform safeguards / standards is the best way to guarantee the protection of the human rights of the child and the persons concerned. Others considered that State-specific safeguards / standards would be preferable as they would give States flexibility to decide whether another State Party's legal framework was sufficient to apply a Protocol with that State.[41]

3.35 In respect of domestic surrogacy arrangements, the Experts' Group agreed that it would be desirable to include legal parentage established as a result of a domestic surrogacy arrangement in the scope of either a convention or (as proposed for international surrogacy arrangements) a protocol. It considered that further discussion would be needed to determine in which type of instrument legal parentage as a result of domestic surrogacy should be included. The Group also concluded that further discussion would be needed on whether such legal parentage should be dealt with in either a chapter of the proposed convention, or in rules, that were separate from those dealing with children who were not born of surrogacy arrangements. It noted that such an approach risks being discriminatory towards those born of surrogacy arrangements. The final report noted that favouring either one of these options might have an impact on the overall feasibility of both instruments.[42]

3.36 Finally, the Experts' Group final report recommended that the Council on General Affairs and Policy (CGAP) consider establishing a working group to further inform policy considerations and decisions in relation to the scope, content and approach of any convention, and any protocol on international surrogacy arrangements. Any such working group should

> proceed on the basis that the aim of any new instrument would be to provide greater predictability, certainty and continuity of legal parentage in international situations for all persons concerned, taking into account their human rights, including, for children, those enshrined in the UNCRC and in particular their right that their best interests be a primary consideration in all actions taken concerning them… .[43]

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41 Experts' Group final report, Conclusion No 14: Safeguards / Standards in a Protocol, p38. Available at https://assets.hcch.net/docs/6d8eeb81-ef67-4b21-be42-f7261d0cfa52.pdf (last visited 23 March 2023).

42 Experts' Group final report, Conclusion No 17: Other scope matters for both a Convention and a Protocol, p47. Available at https://assets.hcch.net/docs/6d8eeb81-ef67-4b21-be42-f7261d0cfa52.pdf (last visited 23 March 2023).

43 Experts' Group final report, p50.

3.37 The Hague Conference's work, whilst valuable, is slow and difficult. It is certainly true that progress has been made since the 1990s, when commentators were reporting that regulation at an international level was simply not possible.[44]

3.38 CGAP, which is due to meet in March 2023, has been invited to make a decision on possible further work on the subject, taking into account the Experts' Group final report, and its recommendation that CGAP establish a working group. There is at present no indication of the timescale for that further work should the CGAP decide to proceed with it. Furthermore, the Experts' Group final report notes that in order to be feasible, both a convention and a protocol should "ensure recognition of legal parentage is still possible under domestic law, even if not possible under one or both instruments."[45] We therefore do not consider that any domestic reform in the form of the recommendations in this Report should be delayed in anticipation of the decisions of the CGAP of the Hague Conference.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[46]

3.39 CEDAW is a multilateral treaty adopted by the UN on 3 September 1981, and has been ratified by 189 parties.[47] States parties are required by the Convention to eliminate discrimination against women in public life and in private life, including within the family.

3.40 CEDAW was ratified by the UK on 7 May 1986,[48] but it has not been incorporated into UK domestic law.

The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption[49]

3.41 Consultees who submitted the Nordic Model Now! template response also suggested that our proposed new pathway was incompatible with the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (the "Hague Adoption Convention").

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44 See, for example, comments in I Leibowitz-Dori, "Womb for Rent: The Future of International Trade in Surrogacy" (1997) 6 *Minnesota Journal of Global Trade* 329, 350 and A Godwin McEwen, "So You're Having Another Women's Baby: Economics and Exploitation in Gestational Surrogacy" (1999) 32 *Vanderbilt Journal of Transnational Law* 271, 297.

45 Experts' Group final report, Conclusion No 2: Elements of scope common to both a Convention and a Protocol, p13. Available at https://assets.hcch.net/docs/6d8eeb81-ef67-4b21-be42-f7261d0cfa52.pdf (last visited 23 March 2023).

46 For further discussion of the relevance of CEDAW to the surrogacy context, see Y Ergas, "Babies without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy" (2013) 27 *Emory International Law Review* 117 and C Vincent and A D Aftadilian, "Liberation or Exploitation: Commercial Surrogacy and the Indian Surrogate" (2013) 36 *Suffolk Transnational Law Review* 671.

47 https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CEDAW&Lang=en (last visited 23 March 2023).

48 Treaty Series No. 2 (1989) Cmnd 8444.

49 The Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (HCCH 1993 Adoption Convention).

3.42 Article 4 of the Hague Adoption Convention provides that consent to a child's adoption must be given freely,[50] and must not have been induced by payment or compensation of any kind.[51] In particular, the consent of the mother, where required, must be given only after the birth of the child.[52]

COMPATIBILITY OF OUR RECOMMENDED NEW PATHWAY WITH INTERNATIONAL LAW

3.43 Under our recommendations, intended parents using the new pathway will acquire legal parental status upon the birth of the child, unless the surrogate exercises her right to withdraw her consent before the child is born. If the surrogate does withdraw consent pre-birth, then she will be the legal parent, and the question of legal parental status will ultimately be resolved by the court in a parental order hearing. If the surrogate withdraws consent after birth the intended parents will be the child's legal parents, and it would be for the surrogate to apply for a parental order, should she wish to become the child's legal parent. In all circumstances, the identity of the child's legal parents is crystallised at the time of the child's birth pending any final judicial parental order hearing.

The UNCRC

3.44 By its nature as an international charter of rights, the UNCRC does not provide conclusive answers to technical legal issues, the detail of the implementation of those rights being left to the signatory states. Determining whether the provisions of our new pathway are compatible with the UNCRC is a matter of interpreting its relevant articles. We do that below, for each of the articles that are relevant.

UNCRC Article 2

3.45 Article 2 provides that signatory states shall ensure the enjoyment for each child of UNCRC rights without discrimination, including on the basis of the child's birth or other status. In a surrogacy situation, therefore, the child should not be discriminated against in the enjoyment of their UNCRC rights due to the fact they were conceived through a surrogacy arrangement.

3.46 A legal framework for surrogacy could discriminate against surrogate-born children if, under the scheme, the identity of a child's legal parents was left unclear.[53] We are confident that our recommended legal framework does not discriminate against the surrogate-born child in this or any other way.

UNCRC Article 3(1)

3.47 Article 3(1) provides that the best interests of the child shall be a primary consideration in all actions concerning the child.

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50 Article 4(c)2.

51 Article 4(c)2.

52 Article 4(c)4.

53 The child has a right to know "their parents", for example, under Article 7 of the UNCRC.

3.48 If the surrogate withdraws her consent to the agreement (either before or after the birth of the child), the intended parents could make an application for an order under section 8 of the Children Act 1989 or section 11 of the Children (Scotland) Act 1995 to decide with whom the child should live and have contact. At this hearing, the paramount consideration for the court would be the child's welfare (giving paramount consideration to the child's welfare is a higher standard than their welfare simply being a primary consideration as required by the UNCRC). If withdrawal of consent led to a parental order hearing, the court's paramount consideration in deciding whether to make the parental order would be the child's lifelong welfare.[54]

3.49 We consider that it is in the child's best interests for legal parental status to remain with the intended parents in the event the surrogate withdraws her consent after birth, pending the final determination of legal parental status by the court. This would reduce the number of times that a child's legal parent(s) can change, and provide certainty for all parties. That certainty will benefit the child's best interests in that it will enable them, later in their life, to know that there had been stability in relation to their origins.

UNCRC Article 7

3.50 Article 7 states the right of a child, as far as possible, to know and be cared for by one's parents. The UNCRC does not define a "parent", so this cannot ineluctably mean a birth or gestational parent.

3.51 The rights set out in Article 7 are not absolute and can be separated into a right for a child to know their parents, including knowing their identity, and a right to be cared for by them. In a surrogacy context, they could mean that a surrogate-born child has the right to "know" the identity of their surrogate, or the intended parents. It could also mean that they have a right as far as possible to have an ongoing relationship, that is, "be cared for", by either of them. This would be the case if "parents" is interpreted to include either the intended parents or the surrogate.[55]

3.52 Regarding the child's potential right to know their surrogate and the intended parents, we recommend the creation of a Surrogacy Register,[56] which would include identifying information relating to the surrogate and the intended parents to which the child would have access. As long as the child is aware they were born through a surrogacy arrangement, they can explore having a relationship with their surrogate and the intended parents (if one did not already exist).[57] We also recommend that a child should have full access to their parental order court file when they reach the age of 16 (Scotland) or 18 (England and Wales), or younger if they have the requisite level of

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54 ACA 2002, s 1(2), as applied and modified by the 2018 Regulations, sch 1 para 2; AC(S)A 2007, s 14 (3) as applied and modified by the 2018 Regulations, reg 3 and sch 2 para 2.

55 Note that the UNCRC does not provide a definition of "parent", so that it could encompass social or genetic parents, if recognised by the State Party.

56 Ch 13, para 13.87, Recommendation 61.

57 We also recommend that, if our preferred approach to birth registration is followed, the birth certificate will be marked so as to indicate that the person's birth was as a result of a surrogacy arrangement, ch 13 para 13.268, Recommendation 70.

competence or capacity. This access to their file would give the child a fuller understanding of the circumstances of their birth.[58]

3.53 As regards the child's potential right to an ongoing relationship with the surrogate, surrogates cannot be compelled to have an ongoing relationship with the child any more than a parent can be. Surrogates who wish to do so can make clear to the intended parents at the outset of the agreement that they would like an ongoing relationship with the child in some form. This is a matter that surrogacy organisations already encourage would-be surrogates and intended parents to discuss, and which could form part of a written surrogacy agreement, to ensure all parties are clear about expectations.[59]

3.54 If the surrogate withdraws her consent and wishes to raise the child, and she and the intended parents cannot agree about living arrangements, the surrogate or the intended parents could apply to the court for an order regulating with whom the child should live or have contact in the interim. The court would decide where the child should live pending a final parental order hearing: exclusively with the intended parents, or exclusively with the surrogate, or in a shared care arrangement. The court would also decide who should have contact with the child, and of what kind: for example, direct contact such as face-to-face or residential or non-residential contact; or indirect contact through letters, cards or photographs.[60] The paramount consideration for the court would be the best interests of the child. In addition, at the point when a parental order is issued recent case law suggests that an ongoing relationship with the party on whom legal parental status is not settled could be protected by the court through a dual parental order and child arrangements order being made.[61]

UNCRC Article 35

3.55 Article 35 provides that signatory states shall take measures to prevent the abduction, sale of or traffic in children in any form. The Nordic Model Now! template response expressed the view that "all surrogacy arrangements pose opportunities for the sale and trafficking of children and the exploitation of birth mothers". We have been very conscious of the need to tackle risks, and we consider that our recommendations provide sufficient safeguards against the risks of sale or trafficking.

3.56 Intended parents will only acquire legal parental status at birth on the new pathway. Intended parents who do not use the new pathway would need to make a parental order application if they wished to be the child's legal parents.

3.57 The new pathway requires that both the surrogate and at least one of the intended parents be habitually resident in the UK at the time of signing the surrogacy

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58 Ch 13, para 13.245, Recommendation 68.

59 However, any such agreement about an ongoing relationship with the surrogate would not be part of the Regulated Surrogacy Statement, that is the terms of the agreement to be mandated by statute, as covered by our Recommendation 38, ch 9, para 9.48.

60 The court's powers to do so are set out in section 8 of the Children Act 1989, and section 11 of the Children (Scotland) Act 1995.

61 *Re C (Surrogacy: Consent)* [2023] EWCA Civ 16, at [59].

agreement and at the time the child is born.[62] This requirement will help prevent women being exploited by being brought to the UK simply for the purpose of being a surrogate on the new pathway.

3.58 Surrogates and intended parents would also have to go through rigorous screening requirements in order to enter the new pathway.[63] Surrogates and intended parents would have to sign a written statement (a Regulated Surrogacy Statement), undergo criminal records checks, have independent legal advice and implications counselling, and undergo health checks and a pre-conception welfare of the child assessment. Agreements must be approved to access the new pathway by a Regulated Surrogacy Organisation ("RSO"). Surrogates would also have to be at least 21 years of age.

3.59 We consider that these rigorous screening requirements will provide effective protection for surrogate-born children from the risks of sale and trafficking, such that, as a starting point, it is appropriate to grant legal parental status to intended parents at birth on the new pathway. We do not accept that it is likely that, if the intended parents wished to traffic the child, they would pursue surrogacy through our new regulated pathway.

3.60 A surrogate who had concerns about child trafficking could, for example, contact the appropriate authorities, including the local authority, and the RSO. Were there serious concerns about the welfare of the child, the local authority could apply for a care or an emergency protection order.[64] Any concerned party could contact the local authority or the police. As such, concerns about child trafficking would not necessarily lead to the conclusion that the surrogate should be the legal parent.

3.61 In the very unlikely event that, despite these screening requirements, a surrogacy arrangement involved the sale or trafficking of a child, our recommendations would enable the surrogate to take steps to protect the child. For example, she could prevent the intended parents becoming the child's legal parents if she withdraws her consent before birth. The provisions governing withdrawal of consent after birth would enable the surrogate to apply for a parental order hearing to transfer legal parental status to her. The surrogate would also be able to make an application for the child to live with her, if she wished, and raise her concerns to the court in the course of this application. Both of these options would result in the surrogate becoming the legal parent. However, the primary intention of our recommendations governing the surrogate's withdrawal of consent is to protect the surrogate's autonomy. She is under no obligation to withdraw consent where she does not wish to. Instead, there are other steps she can take to protect the child if she has concerns regarding trafficking.

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62 Habitual residence has been defined as "the place where the person has established, on a fixed basis, his or her permanent or habitual centre of interests", *Pierburg v Pierburg* [2019] 4 WLUK 213, [2019] EWFC 24 at [43].

63 See ch 8.

64 Children Act 1989, sections 31 (care and supervision orders) and 44 (orders for emergency protection of children); Child Protection Order, Children's Hearings (Scotland) Act 2011, ss.37 -54. See also Compulsory Supervision Orders, and Interim Compulsory Supervision Orders under the Children's Hearings (Scotland) Act 2011 ss 83 and 86.

3.62 On this basis we consider that the provisions of the new pathway governing acquisition of legal parental status and the surrogate's withdrawal of consent are compatible with Article 35.

The Optional Protocol and the Special Rapporteur's reports

3.63 Article 1 of the Optional Protocol prohibits the sale of children. Article 2(a) defines the sale of children as:

> any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.

3.64 In her 2018 report, the Special Rapporteur suggests that the Optional Protocol's definition of the sale of children has three components:

(1) remuneration or any other consideration, that is payment;

(2) transfer of a child; and

(3) the exchange of payment for the transfer of a child.[65]

3.65 In so defining the sale of children, the Special Rapporteur is particularly concerned with commercial surrogacy arrangements in which the surrogate is contractually obligated to hand over the child, physically and legally, to the intended parents.[66] In these circumstances it is clearest that the surrogate entered an arrangement to provide a child for the intended parents in exchange for payment.

3.66 The Special Rapporteur, however, recommends regulating altruistic surrogacy to avoid any reimbursements made to surrogates and intermediaries, such as surrogacy organisations, blurring the line between altruistic and commercial arrangements:

> Courts or other competent authorities must require all "reimbursements" to surrogate mothers to be reasonable and itemized, as otherwise "reimbursements" may be disguised payments for transfer of the child.

3.67 The Special Rapporteur goes on to say that the norm against the sale of children requires, in all cases, that the surrogate is the child's legal parent at birth.[67] This recommendation applies to commercial and altruistic surrogacy arrangements. If the surrogate wishes for the intended parents to raise the child, an application should be

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65 M de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* (January 2018), A/HRC/37/60 para 42.

66 M de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* (January 2018), A/HRC/37/60 paras 47 to 51.

67 The Special Rapporteur's report uses the term "non-exclusive parentage and parental responsibility at birth". We have interpreted this as requiring that the surrogate have legal parental status, which we use in a different manner to parental rights/PRRs (see Glossary).

made to the court after birth to determine whether this arrangement would be in the child's best interests.[68]

3.68 In her 2019 report, the Special Rapporteur reaffirmed that:

> Post-birth best interests assessments are an essential measure to guarantee the rights of the child in the context of surrogacy arrangements.[69]

3.69 Our new pathway therefore diverges from the Special Rapporteur's conclusions. The Special Rapporteur is clear that even in altruistic surrogacy arrangements only a court should be able to displace the surrogate's legal parental status after birth, whereas we propose that the intended parents could be the child's legal parents at birth.

3.70 We would respond to the Special Rapporteur's recommendation in two ways.

3.71 First, enabling the intended parents to be the child's legal parents at birth does not amount to the sale of children in a regulated, altruistic framework such as the one we are proposing, because no child is being transferred for payment. Our scheme does not permit women to profit from being a surrogate. Our recommendations on those payments which it is permitted for intended parents to make to surrogates allow the surrogate's costs to be met, for example, for travel to medical appointments and lost earnings, but do not permit profit or compensatory payments. Intended parents would only be able to make payments for costs falling within specified categories permitted by legislation.

3.72 Moreover, surrogates would be required to attend implications counselling prior to entering the new pathway, where the woman's reasons for becoming a surrogate could be addressed. If the counsellor was concerned by the woman's motivations, or formed the impression that the surrogate was under pressure or at risk of exploitation, this would be reported to the RSO and the surrogate would not be able to enter the new pathway.

3.73 Therefore, we are confident that the intended parents would be the child's legal parents at birth through the new pathway only when the arrangement does not amount to the transfer of a child in exchange for payment.

3.74 Secondly, the Verona Principles (discussed below) suggest an approach to legal parental status divergent from that proposed by the Special Rapporteur and more in line with our proposals, and we note that the Verona Principles are explicitly endorsed by the Special Rapporteur.[70]

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68 M de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* (January 2018), A/HRC/37/60 para 71.

69 M de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* (July 2019), A/74/162 para 54.

70 International Social Service, *Verona Principles* (February 2021), Prefatory note, p 4.

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

3.75 We noted in the Consultation Paper that we considered it might be difficult to reconcile any law which permitted commercial surrogacy with respect for the terms of CEDAW, because that convention describes maternity as a social function, payment for which might not be compatible with its terms.[71] The recommendations in this report do not permit commercial surrogacy; permitted payments which intended parents can make to surrogates allow the surrogate's costs to be met, but do not permit profit or compensatory payments.

3.76 Objections were made to our proposals for the creation of non-profit-making RSOs,[72] and our proposal that there be no prohibition against charging for negotiating, facilitating and advising on surrogacy agreements.[73] Those submitting the Nordic Model Now! template response argued that deriving income from surrogacy was a potential violation of "the spirit if not the letter" of Article 6 of CEDAW. This provision requires states parties to take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women. We strongly refute the parallel drawn by these consultees between surrogacy and prostitution. Nor is there any reason to consider that our recommendations risk women being trafficked into the UK to become surrogates. As we explain above,[74] we consider that our recommendations provide safeguards against the risks of trafficking. Furthermore, as noted above, our recommendations do not permit commercial surrogacy. On this basis, we do not consider that our recommendations are inconsistent with CEDAW.

The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption

3.77 The Hague Adoption Convention is not applicable to surrogacy arrangements. The suggestion made by consultees who used the Nordic Model Now! template response that our new pathway is incompatible with the Hague Adoption Convention is therefore misleading and incorrect. The Hague International Conference's attempts to find international consensus on surrogacy arrangements, with a view to creating an international convention on surrogacy, are ongoing, as detailed above.

The Verona Principles

3.78 The Special Rapporteur recommended always recognising the surrogate as the child's legal parent at birth. However, the Verona Principles do envisage conferring legal parental status on the intended parents at birth, without the need for a post-birth best interests assessment, if:

(1) the surrogate confirms consent post-birth;

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71 Consultation Paper, para 9.77. Convention on the Elimination of All Forms of Discrimination against Women, art 5(b) paras 4.108 onwards.

72 Consultation Question 35.

73 Consultation Question 41.

74 Paras 3.55 to 3.61.

(2) the parties have complied with pre-conception safeguards, similar to those we recommend in our new surrogacy pathway;

(3) there is no conflict between the surrogate and the intended parents with regard to legal parental status or parental responsibility/ parental rights and responsibilities; and

(4) there are no unforeseen developments, for example, relating to any party's ability to care for the child, or relating to child sale or trafficking.[75]

3.79 As regards the surrogate's consent, this requirement is met in our new pathway by the fact of her ongoing consent, evidenced by the fact that she has not withdrawn her consent during the six weeks after the birth of the child.[76]

3.80 If the surrogate is not a legal parent by operation of law at birth the Verona Principles recommend providing for an expeditious procedure that comes into effect after an appropriate reflection period post-birth. Under this procedure the surrogate would:

(1) have access to a suitably qualified neutral third party as part of informed consent procedures;

(2) freely confirm or revoke her consent that the intending parent(s) have exclusive legal parentage;

(3) provide her consent without any financial consequences as to either payments or reimbursements related to the surrogacy arrangement.[77]

3.81 This is similar to our recommendation that the surrogate should have a six-week period in which to withdraw her consent to the agreement. We also recommend that the surrogate's entitlement to permitted payments relating to the surrogacy agreement would be unaffected by her decision to withdraw her consent.[78] While we have not recommended that the surrogate should have access to a neutral third party during the time she has to withdraw her consent to the agreement continuing on the new pathway, agreements on the new pathway will necessarily involve use of an RSO which will, in practice, provide such support. She can also seek independent legal advice at any stage.

3.82 The Verona Principles go on to say that if the surrogate either:

> revokes consent or fails to confirm consent, then a court or other competent authority should conduct a best interests of the child determination with particular attention to a psycho-social assessment of both parties.[79]

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75 International Social Service, *Verona Principles* (February 2021) paras 10.6 and 10.7.

76 Our recommendations in Chapter 8 for screening and safeguarding requirements mean that a surrogate will be aware of her right to notify her withdrawal of consent at any point up to six weeks following the birth.

77 International Social Service, *Verona Principles* (February 2021) para 10.5.

78 Ch 12, para 12.228, Recommendation 58.

79 International Social Service, *Verona Principles* (February 2021) para 10.9.

3.83 This process is the same as that which we recommend in the event the surrogate withdraws her consent to continuing on the new pathway. If this is done pre-birth, then the intended parents would need to seek a parental order if they still wished to become legal parents. If withdrawn post-birth, it would be up to the surrogate to make the application for an order that she is the parent of the child, if she wished to pursue becoming the legal parent, as the intended parents would still be the legal parents on the birth of the child. In deciding whether to grant a parental order in either situation, the court would have the best interests of the child throughout their life as its paramount consideration. While the parental order process does not involve a psycho-social assessment of the intended parent and the surrogate, a parental order reporter, (in England and Wales), or curator *ad litem* (in Scotland), would be appointed; they would conduct an assessment of the welfare of the child.

3.84 The Verona Principles do not address specifically who should hold legal parental status for the child in the event the surrogate revoked her consent to the agreement *before* birth. We assume that in these circumstances the surrogate would be the child's legal parent at birth, because the Verona Principles make her consent to the agreement a condition of the intended parents being the child's legal parents at birth. This approach, if that is what was intended, is in line with our recommendations that the surrogate who withdraws her consent before birth is the child's legal parent at birth.

3.85 It is also unclear from the Verona Principles who should be the child's legal parent(s), in the event the surrogate revokes her consent after birth, pending a final best interests determination by the courts on who should be the child's legal parent(s). Under our recommendations the intended parents would remain the child's legal parents unless and until a court order is made on an application by the surrogate. We consider this position is justified by ensuring that once the child has been born, legal parental status can be changed only through judicial intervention (as is the case for all children, regardless of the circumstances of their birth). The surrogate's lack of consent to the intended parents being the child's parents will be apparent from the proceedings. The intended parents will remain legal parents only if that outcome is considered by the court to be in the best interests of the child.

CONCLUSION

3.86 In light of this analysis it is the view of the Law Commissions that our recommendations in respect of the new pathway are compatible with the requirements of international law. Where the agreement moves to the parental order process, the court's paramount consideration will be the welfare of the child, which is consistent with international law requirements that also privilege the child's best interests.

3.87 If there is any distinction between the Verona Principles and our recommended effect of the surrogate's right to withdraw her consent after birth, which is not clear as the Verona Principles operate at a fairly high level, we do not think it is such as to call into question whether our recommendations are compatible with the UNCRC and the Optional Protocol. We note that the Special Rapporteur's reports and the Verona Principles do not propose identical schemes for protecting the rights of children born through surrogacy, which demonstrates that different but equally legitimate approaches can be taken in a national legal framework. The UNCRC and the Optional

Protocol are capable of different interpretations and our recommendations accord with the legitimate interpretation of those instruments.

Chapter 4: Legal parental status

4.1 Identifying the legal parents of the child is one of the most fundamental questions in family law, for the child and the parents. The parent/child relationship is lifelong, and does not come to an end when the child reaches adulthood.[1] It shapes the whole course of that child's life, and impacts on identity, kinship and wider family relationships, and specific legal matters such as succession, nationality, and domicile. As Sir James Munby observed, in the context of identifying parents through assisted conception:

> What, after all, to any child, to any parent, never mind to future generations and indeed to society at large, can be more important, emotionally, psychologically, socially and legally, than the answer to the question: Who is my parent? Is this my child?[2]

4.2 For children born of surrogacy, the recognition of the intended parents as their legal parents is critically important. Citing the evidence to the court of an adult born through surrogacy, Mrs Justice Theis related the adult's views in support of his parent's application for a parental order in respect of him:

> If this application is not granted, I will never be able to be considered in law to be their son. That is simply unimaginable for us all… . My parents have been my parents in every way since birth. They have made all of the decisions about my care and welfare; they have always been there for me as a child and now as an adult. My identity as their legal child is wholly dependent on this application being granted. It is of fundamental importance to me and to any children I might go on to have.[3]

4.3 It is well-recognised that different adults can play differing roles in relation to a child, depending on genetics, gestation, and social parenting.[4] This can be the case for any child, including (but not only) those born into blended families or who are donor conceived, as well as for surrogacy. As Lady Hale has said, "each of [genetics, gestation and psychological/social parenting] may be a very significant factor in the child's welfare, depending upon the circumstances of the particular case".[5]

4.4 In this project, we have set out to recommend rules for the identification of the legal parents of a child born through surrogacy, taking into account the relevant factors of

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1 For that reason, Mrs Justice Theis has granted a parental order in respect of an adult, in *X v Z (Parental Order: Adult)* [2022] EWFC 26. The HFEA 2008 s 54 does not limit parental orders to children who are in minority.

2 *A and others in the matter of the Human Fertilisation and Embryology Act 2008* [2015] EWHC 2602 (Fam), para 3, per Sir James Munby. See also A Brown and K Wade, "The incoherent role of the child's identity in the construction and allocation of legal parenthood" (2022) *Legal Studies* 1-18.

3 *X v Z (Parental Order: Adult)* [2022] EWFC 26, para 45; See A Brown and K Wade, "'Everyone remains the child of someone': a parental order for an adult" (2022) *Journal of Social Welfare and Family Law*, 44:3, 411.

4 See Z Mahmoud and EC Romanis, "On gestation and motherhood" (2022) *Medical Law Review* 1-32.

5 *In re G (children)* [2006] UKHL 43, para 33.

gestation, genetics, intention, and social parenting. Our recommendations therefore set out the bases on which the legal parents of the child will be identified. In keeping with current law, under our recommendations there can only be two legal parents at any one time. (We discuss an alternative regime recognising three or more parents at paragraph 4.129 onwards below.) Our focus in this chapter is primarily on the new pathway to parenthood, leaving the current position for those intended parents seeking a parental order largely unchanged. However, where we propose changes to the legal parents when a parental order is sought, and where we propose new rules to apply uniformly to all surrogacy agreements, then these are also addressed in this chapter.

4.5 It is important that our review of surrogacy seeks to identify the legal parents of the child appropriately, to protect the best interests of the child, reflect the intentions of the parties, and meet international legal standards, recognising that legal parental status reflects social norms as well as biological practicalities. In this chapter, we set out the current law regulating the legal parents of children born through surrogacy, our provisional proposals as outlined in the Consultation Paper for the creation of a new pathway to parenthood, the consultation responses, and our recommendations. After setting out our recommendations for parenthood on the new pathway, we discuss the surrogate's "right to object", and the status of the spouse or civil partner of the surrogate. We then turn to recommended reforms in the tragic event that the surrogate, child, or intended parents die during the surrogacy process. The chapter concludes by setting out our recommendations for birth registration, to ensure that the system of registration reflects our proposals for who is to be recognised as the legal parent of the child.

4.6 One point we wish to emphasise at the outset is that this chapter is concerned with identifying the *legal parents*. This is a different question from the issue of who has day-to-day care of the child and the responsibility for looking after them and taking decisions about them, by virtue of having parental responsibility/parental responsibilities and rights in respect of the child.[6] Although the legal parents are usually also the people who have parental responsibility/parental responsibilities and rights, these are separate legal concepts and must be addressed separately.[7] The practical question of who has day-to-day care of the child in surrogacy is considered in Chapter 5.

4.7 We use the phrase "legal parental status" to refer to the legal recognition of who the parents are, in preference to terms such as parenthood, parentage, or parenting, all of which terms can be used interchangeably and to represent slightly different concepts.[8]

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6 In terms of s8 of the Children Act 1989 and ss1 and 2 of the Children (Scotland) Act 1995.

7 This is not unique to surrogacy: there are many cases where the law recognises someone as the legal parent, but that person has no, or only limited, parental responsibility/PRRs. Looked after children, or children who are the subject of a permanence order, for example, may be in the care of someone who has parental responsibility/PRRs, but who is not their legal parent: conversely, their legal parent may have no parental responsibility/PRRs at all in respect of the child.

8 Alison Diduck, "'If only we can find the appropriate terms to use the issue will be solved': Law, identity and parenthood" (2007) 19(4) *Child and Family Law Quarterly* 458; Leanne Smith, "Clashing Symbols? Reconciling support for fathers and fatherless families after the Human Fertilisation and Embryology Act 2008" (2010) 22(1) *Child and Family Law Quarterly* 46.

CURRENT LAW

4.8 In the current law, the intended parents can legally enter an arrangement with a surrogate to conceive, gestate, and bear a child for them. Such an arrangement is not legally enforceable. However, the parties cannot all be the child's legal parents or hold parental responsibility/parental responsibilities and parental rights ("PRRs") for the child at birth. Irrespective of the parties' intentions before conception, during pregnancy, and after the birth, the surrogate is automatically recognised as the child's legal mother at birth,[9] and will be named as such on the child's birth certificate.

4.9 If the surrogate is married or in a civil partnership, and her spouse/civil partner did not object to her fertility treatment, that person will be the child's father or second female parent at birth,[10] 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,[11] but this is not invariably the case.

4.10 When the child is born, the intended parents can apply to the court for a parental order,[12] the effect of which is to extinguish the legal parental status of the surrogate (and any second parent named on the birth certificate), and confer legal parental status on the intended parents.[13] The order also enables an entry to be made on the Parental Order Register, from which a parental order certificate can be issued in the intended parents' names.[14] This can be used in the same way as a child's birth certificate.

4.11 The paramount consideration for the court in deciding the parental order application is the welfare of the child.[15] The applicants must also meet requirements set out in either section 54 or 54A of the Human Fertilisation and Embryology Act 2008 ("HFEA 2008"), which include:

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9 HFEA 2008, s 33 and common law, reflecting the maxim *mater semper certa est*, or "the mother is always certain". The first case to support the common law position was *R (on the application of TT) v The Registrar General for England and Wales and others* [2019] EWHC 2384 (Fam); [2020] Fam 45; in Scots law, *Douglas v Duke of Hamilton* (1769) 2 Pat App 143 (HL).

10 HFEA 2008, s 35, s 42.

11 In terms of HFEA 2008, ss 36 and 37 for a male partner, or ss 43 and 44 for a female partner, if they meet the agreed fatherhood/agreed second parenthood conditions. If they do not meet these conditions, they may be the legal parent if the genetic father, and (in Scotland) if registered on the child's birth certificate. For example, there is a rebuttable presumption that a man is the father of a child if he is registered as such on the birth certificate in terms of Law Reform (Parent and Child) (Scotland) Act 1986, s 5(1)(b), and under s7 of that Act a man can seek a declarator of parentage if he can demonstrate he is the father. For England and Wales, see for example *Leeds Teaching Hospitals NHS Trust v A* [2003] EWHC 259 (QB); [2003] 1 FLR 1091, and the Births and Deaths Registration Act 1953 s 10(1).

12 HFEA 2008, ss54 and 54A.

13 Where one of the intended parents has been named on the birth certificate their legal parental status as recorded on the birth certificate is extinguished (along with that of the surrogate) and legal parental status is (re)conferred on them by the parental order.

14 The 2018 Regulations, sch 1 paras 20 to 22, sch 2 paras 13 to 15.

15 The welfare test in the Adoption and Children Act 2002 applies to parental orders in England and Wales: The 2018 Regulations, sch 1 para 2. For Scotland, see the Adoption and Children Scotland Act 2007, s 14(3) as applied and modified by reg 3 and sch 2 para 2 of the 2018 Regulations.

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

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

(3) the surrogate and any other legal parent of the child must have freely and with full understanding of the consequences agreed to the making of the order;

(4) only payments for reasonable expenses have been made to the surrogate (unless the court authorises excess payments).

4.12 There is currently only very limited provision for dispensing with the surrogate's and her spouse's/civil partner's consent, which applies where they cannot be found or are incapable of giving consent.[16] In all other cases then, if the surrogate and/or her spouse or civil partner refuse to agree to the making of the parental order, it cannot be granted and the intended parents cannot become legal parents, though the child may still live with them under a child arrangements order under section 8 of the Children Act 1989 (in England and Wales), or a residence order under section 11 of the Children (Scotland) Act 1995 (in Scotland). In this circumstance, the intended parents may still have parental responsibility/PRRs, and have the child living with them. Legal parental status does not therefore determine who raises the child, but unless granted the child would remain, in law, the child of the surrogate and her spouse or civil partner for the rest of their life.[17] Where the surrogate and/or her spouse or civil partner refuse to agree to the parental order, the only other option for intended parents to be recognised as the legal parents would be to seek to adopt the child. Adoption is not, however, considered appropriate in the context of surrogacy as it would involve the intended parents "seeking to adopt their own children".[18]

The problems with the existing law

4.13 As we outlined in our Consultation Paper, there are various problems with the existing law on surrogacy related to parenthood, which this project aims to address.

4.14 First, of central importance is the fact that it is not possible for the intended parents to be the child's legal parents or automatically to hold parental responsibility/PRRs at birth, which contradicts the intentions of everyone involved in the agreement. The surrogate is compelled to be the child's legal mother, with all the associated responsibilities and legal consequences, until such time as a parental order is obtained, often nine to 15 months after the child's birth, whether she wishes to be or not. As legal parental status rests with the surrogate, the intended parents can "walk away" if they change their minds, for example, following a relationship breakdown or other change of circumstances, leaving the surrogate with responsibility for the child.

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16 2008 Act, s54(7).

17 With lifelong consequences for the child: see *X v Z (Parental Order: Adult)* [2022] EWFC 26, especially para 45, also quoted above.

18 *Re AB (Surrogacy: Consent)* [2016] EWHC 2643 (Fam), para [31]. See also the decision of Sir James Munby in *Re X (A Child)(Parental Order: Time Limit)* [2014] EWHC 3135 (Fam). It is not, in any event, necessarily the case that it will be possible for an adoption order to be made, since the legal test to be fulfilled, in adoption cases where the birth parent(s) do not consent, sets a high bar, that "nothing less than adoption will suffice", *S v L* [2013] SC (UKSC) 20, [2012] UKSC 30 paras [32]-[35] (Lord Reed).

Indeed, while it is often said that intended parents' greatest fear is that the surrogate will change her mind, surrogates have explained to us that their greatest fear is that the intended parents will change their mind. Further, at birth the intended parents are denied legal recognition of their parental relationship with the child, despite the fact that the child was conceived as a direct result of their intention and actions, and will have a genetic relationship with at least one of them.

4.15 Secondly, an application for a parental order typically takes at least several months to be processed. During this interim period, the identity of the child's legal parents does not typically reflect the lived reality of who is caring for the child: this is contrary to the child's best interests. There is a risk that this uncertainty causes stress and anxiety for the intended parents, and through them, adversely impacts on the child. Moreover, during this interim period the intended parents may not, strictly, have any legal authority to make important decisions in relation to the child without the surrogate's express permission.[19] This can make it more difficult for the intended parents to perform their parental role, not least in relation to taking decisions regarding any medical treatment of the child. It can also impose ongoing responsibilities on the surrogate, for example to take medical decisions, in a situation where she has no on-going caring or parenting role in the life of the child, and does not want to take such responsibility. In Scotland, if the surrogate were to die whilst still the child's legal parent, that child would have a claim on her estate, thereby diminishing the estate for distribution to her own children. Unlike the position in England and Wales, a child always has a claim for legal rights and therefore cannot be entirely disinherited in Scotland.[20]

4.16 Thirdly, the fact the intended parents cannot be the child's legal parents at birth incentivises some parties to enter surrogacy arrangements overseas, in jurisdictions where pre-conception intentions are determinative of legal parental status. International surrogacy arrangements may now account for up to half of parental order applications.[21] While we are seeking to reform domestic law to ensure robust safeguards for all parties, especially the surrogate, such measures are not guaranteed to be present in surrogacy that takes place overseas, with an increased risk that the surrogate may be exploited during and after the arrangement, or have been pressured into entering the arrangement, with inadequate support and safeguarding. Moreover, even if legal parental status is conferred on the intended parents at birth under the law of the country where the child is born, this will not be recognised in England and Wales or Scotland, and the intended parents will still have to apply for a parental order

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19 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.

20 See ch 15 on succession.

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

in one of those jurisdictions. The need to do so is not always understood by intended parents.[22]

4.17 Fourthly, the current parental order regime only provides for judicial overview of the situation at an advanced stage in the process, when the surrogate-born child will have been living with the intended parents for many months since their birth. Because the court only gets involved at this late stage, the court process provides limited protection for surrogates and surrogate-born children against exploitation, such as women being pressured into acting as surrogates, and surrogate-born children being trafficked.

4.18 In order to address these problems with the current law, in the Consultation Paper we provisionally proposed introducing a new surrogacy pathway for domestic surrogacy agreements which would ensure much greater oversight of the process before conception through screening and safeguarding, and would ultimately enable the intended parents to become the child's legal parents at birth, reflecting the shared intentions of the surrogate and the intended parents.

4.19 However, we also proposed that the new pathway should exist alongside the existing parental order process, subject to a range of amendments to that process. The parental order process and recommended reforms are discussed in more detail in Chapter 10.

The impact of the current law

4.20 In the Consultation Paper, we asked a question seeking views as to the impact (social, emotional, financial, or otherwise) of the current law where the intended parents are not the legal parents from birth of the child born of the surrogacy arrangement.[23]

Consultation

4.21 Consultees who are intended parents highlighted in their responses the stress, uncertainty and perceived intrusive nature, cost and delay of the parental order proceedings. The significance of birth registration for intended parents was also strongly highlighted in these responses. A range of concerns were raised in this respect: the fact that the surrogate and her partner were named as the parents of a child who was genetically the child of the intended parents; the oddity of having the surrogate and a female intended parent both named as parents on the birth certificate even though they were not in a same sex relationship; and the need on occasion to show the birth certificate and then face intrusive questions about the surrogacy.

4.22 One consultee, a surrogate, commented that the current law had a significant adverse impact on her mental health which affected her social interactions and, ultimately, her finances due to an inability to work.

4.23 Some consultees highlighted other impacts caused by the current law. For example, Dr Kirsty Horsey drew attention in her response to the SurrogacyUK 2015 and 2018 surveys and gave some examples from that research. These included the issue of

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22 See, for example *X v Z* [2022] EWFC 26.

23 Consultation Question 111.

premature births and/or infant death and the inability of the intended parents to arrange a funeral, make emergency medical decisions or access neo-natal units as they are not the legal parents of the child. Dr Horsey also explained that it was fairly common for a surrogate to be reported to social services simply because of her involvement in a surrogacy arrangement, because of suspicion that she is giving "her" baby away to the intended parents.

4.24 Some consultees supported the current legal position, on the basis that it offers protection for women against exploitation. For example, Dr Philippa Brice recognised that the current law is potentially inconvenient and stressful for intended parents, but thought this was justified in the interests of protecting surrogate mothers and the babies, because they are the most vulnerable.

INTENDED PARENTS GAINING LEGAL PARENTAL STATUS AT BIRTH

4.25 In the Consultation Paper we provisionally proposed a new pathway to legal parental status for domestic surrogacy agreements. Where the parties had complied with the stipulated safeguards, met the eligibility requirements, and entered into an agreement including a statement as to legal parental status on birth then the intended parents would be the legal parents of the child at birth. This would be subject to the surrogate's right to object. We asked whether consultees agreed.[24]

Consultation

4.26 There was near-universal support for this proposal across those surrogates and intended parents personally involved with surrogacy agreements; those few who disagreed did so on the basis that the proposals should go further, for example that the surrogate should not have a right to object, either in any case, or at least not in cases of gestational surrogacy. There was also widespread support from representative legal organisations, and law firms, and from surrogacy organisations, although SurrogacyUK objected to the proposal because of the effect of the right to object.

The intentions of the parties

4.27 Consultees who supported the proposal gave a number of reasons for doing so. These included that the proposal would reflect the shared intentions of the parties; for example, the Bar Council said:

> The current law does not give effect to any of the intentions of the parties who enter into surrogacy arrangements in a timely or effective way. In nearly all surrogacy arrangements, the surrogate has no intention of becoming the parent of the child, nor does she wish to exercise parental responsibility for the child, whereas in contrast, the Intended Parents do wish to be the legal parents of the surrogate-born child. Therefore any new law should indeed give way to this arrangement being put into place in practice, and it is positive that the consultation seeks to do so.

4.28 The Bar Council's comment on the intentions of surrogates was reflected by a surrogate consultee, who explained that the law left her vulnerable because the

[24] Consultation Question 7.

intended parents could walk away and leave her responsible for a child that is not hers.

4.29 PROGAR and Nagalro disagreed with linking parenthood to intentions rather than the act of giving birth. They said:

> Neither, crucially, do we accept that surrogacy is closer to assisted conception than to adoption among the different routes to alternative family formation so have grave concerns about the appropriateness of the proposed scrutiny approaches that have been put forward as sufficient to warrant the link being severed and/or linked to intentions.

The child's best interests

4.30 Other consultees focused on the proposal being in line with children's best interests. This argument was sometimes expressed specifically through the language of best interests, and other times in responses that referred to providing certainty and security for the child. For example, an adult born of a surrogacy arrangement said:

> I believe this is in the best interests of IPs, surrogates and most importantly the child… It is vital that [the IPs] are secured in their status of parents from the beginning, as long as the safety criteria have been met. It is also in the best interests of children who then have security and certainty about their parentage from the beginning.

4.31 Another aspect of best interests specifically discussed by consultees was the difficulty around intended parents being able to make decisions about a child's medical care under the current system. Consultees noted that the proposal would have a positive effect in this regard, by ensuring that the intended parents are able to do so.

4.32 Dr Katherine Wade commented:

> Currently, if a surrogate needed to remain in hospital after the birth of the child, it is likely that the child could not be removed from the hospital by the intending parents. Such a situation would be not be in the best interests of a newborn child.

4.33 Other positive arguments put forward by consultees related to the provision of certainty for surrogates and intended parents, and the "normalising" effect that such a legal change would have on surrogacy, helping to foster a positive perception of surrogacy agreements as legitimate and legally recognised.

Compatibility with international law

4.34 Those who opposed the proposal did so for a wide range of reasons: some were opposed to surrogacy in general; some had specific concerns; and some disagreed because they wanted the proposal to go further than it did.

4.35 Of those who were opposed to surrogacy in general, most submitted the Nordic Model Now! template response and conveyed their strong disagreement. Their views on compatibility of our proposals with international law are addressed in Chapter 3.

Challenges for birth registration

4.36 The National Panel for Registration disagreed with the proposal, on the basis that the proposal changes the definition of a mother and creates challenges for registration officers. Some consultees also objected to the effect of the proposal on birth registration, saying that it would create a 'fiction' or result in facts not being recorded, because the intended parents, not the surrogate, would be recorded as the parents on the birth certificate.[25]

4.37 Disagreement was also voiced by those who wished for more extensive reform. Dr Kirsty Horsey disagreed, on the basis that *all* intended parents should have legal parental status at birth, not just those who follow the new pathway, while Dr Alan Brown favoured a three-parent model, recognising the surrogate and the intended parents together as the legal parents.[26]

Analysis

4.38 This proposal represents a significant change in the law. There was much support and enthusiasm for it in the consultation responses – and much concern and objection. We have concluded that (i) the support from those with personal experience of surrogacy and professionals and the need to protect the best interests of the child involved justifies bestowing legal parent status on the intended parents at birth under the new pathway and that (ii) the concerns and objections raised will be addressed as far as practicable by the range of safeguards included within our recommendations.

4.39 The intended parents can only be the legal parents at birth in surrogacy agreements on the new pathway, which must be seen as a whole. Where the surrogate and intended parents have met and agreed to form a surrogacy team, they would need to complete the pre-conception screening and safeguarding, and (contrary to the provisional proposals in the Consultation Paper) this whole process will need to be overseen and facilitated by a Regulated Surrogacy Organisation ("RSO"), thus offering further support and protection for the parties. Detailed discussion of this process, the required screening and safeguarding, and the role of the RSO, is provided in subsequent chapters (see in particular Chapters 7 and 8). In brief, however, the mandatory screening and safeguarding would include medical screening, implications counselling, legal advice, and criminal records checks of all parties to the agreement. There would also be a welfare check pre-conception, to ensure the best interests of any child born from a surrogacy arrangement have been assessed. The completion of this screening and safeguarding, together with agreement as to the core elements of the agreement, would be recorded in a Regulated Surrogacy Statement, completed pre-conception (see Chapter 9).

4.40 Only once the parties had completed this mandatory safeguarding process could they be authorised by the RSO to proceed on the new pathway. Where this authorisation was granted, the agreement would be a "new pathway" surrogacy agreement, and the

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25 Note however that while we recommend that the intended parents should be named as the parents on the birth certificate, we also set out an alternative approach to birth registration which would align with UK Government policy on the birth register: see paras 4.244 to 4.268..

26 See also the discussion of the binary, two-parent model in A Brown and K Wade, "The incoherent role of the child's identity in the construction and allocation of legal parenthood" (2022) *Legal Studies* 1-18, at 7.

legal consequence of this would be that the intended parents would be the legal parents of the child from birth.

4.41 In the Consultation Paper, we also asked (at Consultation Question 22) whether there should be any additional administrative or judicial oversight in the new pathway. We reached the conclusion that there was no need for any additional oversight, in the context of our recommendations for the new pathway, which provide robust safeguards, and the ability for the surrogate to withdraw consent up to six weeks after the birth of the child.

4.42 Several of those who supported the proposal were concerned that it did not go far enough, because the surrogate retained what we described in the Consultation Paper as a "right to object" and refer to in this report as a right to withdraw her consent. We do not think the evidence justifies removing the surrogate's right to withdraw her consent, or that doing so would meet the UK's international obligations.[27] A fundamental element of our proposals is that the surrogate retains complete autonomy over her body and the pregnancy. This includes the right for the surrogate to withdraw her consent to the surrogacy agreement. We explain this right in paragraphs 4.48 to 4.128.

4.43 Those who opposed the proposal typically advocated for surrogacy to be prohibited as intrinsically harmful to women and to surrogate-born children. Others said that we had mischaracterised surrogacy as akin to assisted conception; or that there existed insufficient evidence to proceed with the proposal. We have addressed the first of these concerns in Chapter 1 above, where we explain the remit of the project and the evidence available as to the potential harms to surrogates and surrogate-born children.

4.44 As to the question of evidence, we have drawn on empirical research throughout this project. Research has been done on surrogacy by the Cambridge Centre for Family Research, which shows that outcomes for surrogate-born children are in line with naturally conceived children, and that surrogacy is not harmful to children.[28] In relation to surrogates, research shows that the longer term psychological well-being of surrogates is positive: 10 years after the birth, they typically reported good mental health and remained positive about the surrogacy arrangement.[29] Research also suggests that the majority of surrogates support intended parents having legal parenthood at birth.[30] We have also consulted widely during the project and have been very grateful to those surrogates who have spoken to us personally, about

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27 See para 4.66

28 Consultation Paper, paras 2.21 to 2.35. These studies emanate from the Cambridge Centre for Family Research and we accept they have been criticised (for example, by PROGAR and NagaIro) for their small sample size, but they are the most comprehensive and rigorous longitudinal studies of surrogacy in the UK which currently exist. See also generally S Golombok, *We Are Family* (Scribe 2022).

29 V. Jadva, S. Imrie and S. Golombok "Surrogate mothers 10 years on: a longitudinal study of psychological well-being and relationships with the parents and child" (2014) 30(2) *Human Reproduction* 373.

30 K Horsey, M Arian-Schad, N Macklon, K Ahuja, "UK surrogates' characteristics, experiences, and views on surrogacy law reform", [2022] 36(1) *International Journal of Law, Policy and the Family*.

different positive and negative experiences of surrogacy. Their experiences have informed our recommendations.

4.45 However, international arrangements are not eligible for the new pathway,[31] some surrogacy teams may continue to choose not to use the new pathway, and some agreements may start on the new pathway but then exit because the surrogate exercises her right to object. Accordingly, there is a need to retain the existing parental order process to provide an alternative route, and a "safety net" for those children born of arrangements where, for one reason or another, the requirements of the new pathway are not met.

Recommendation 1.

4.46 In respect of a domestic surrogacy agreement, we recommend that, where:

(1) before the child is conceived, the intended parents, surrogate, and Regulated Surrogacy Organisation (RSO) have made a regulated surrogacy statement, which will include a statement agreeing to the intended parents having legal parenthood on birth, and that they have complied with the screening and safeguarding requirements; and

(2) the intended parents and surrogate have met eligibility requirements;

then on the live birth of the child the intended parents should be the legal parents of the child.

4.47 Clause 4 of the draft Bill gives effect to this recommendation.

The right to object

4.48 In the Consultation Paper we provisionally proposed that the surrogate should have a "right to object" to the intended parents acquiring legal parental status.[32] The right to object was designed primarily to enable the surrogate to change her mind about the surrogacy agreement, and express her objection to the intended parents automatically becoming legal parents. This ensures respect for the surrogate's wishes and intentions.

4.49 We proposed that the surrogate should have the right to object to the acquisition of legal parental status by the intended parents, for a fixed period after the birth of the child,[33] and that the surrogate could exercise this right by giving notice in writing to the intended parents and the body responsible for regulating surrogacy.[34] The

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31 See para 8.239 onwards.

32 Consultation Question 11.

33 Consultation Question 11(1).

34 Consultation Question 11(2).

Consultation Paper proposed that the period in which the surrogate could object should be the period of birth registration, less one week.[35]

4.50 It is important to note that the right to object we proposed would rest *only* with the surrogate. Once the surrogate has conceived on the new pathway (or has had treatment that results in conception), there is no opportunity for the intended parents to change their minds. This is a deliberate policy choice, to reflect the position for those who conceive in non-surrogacy situations, and who cannot give up their responsibility for the child after conception. Since the intended parents are the ones whose actions and intentions are responsible for the conception of the child, they are the ones who must take that responsibility, with no right to withdraw.

4.51 In the following sections we examine the right to object and a range of related issues, including whether there should be any positive affirmation of consent from the surrogate post-birth; whether there should be any restriction on when she can exercise her right to object; the starting point and end point for exercising the right; who should be notified; and the need for writing. The final section considers the terminology used and whether "right to object" properly captures the rationale for this right. As discussed at paragraph 4.105 we favour conceptualising the surrogate's right as the "right to withdraw her consent", and we adopt that language for the rest of the Report. However, for the purposes of the following consultation and analysis, we have retained the terminology of the "right to object", as used in the Consultation Paper and the consultee responses. We start with an assessment of the right to object itself.

Consultation

4.52 The majority of consultees who supported surrogacy in principle agreed with the proposal that the surrogate should have a right to object to the intended parents obtaining legal parental status. There was widespread support among surrogates, intended parents, representative legal organisations and law firms. The main reason that consultees supported the right to object was to ensure that surrogacy agreements respect the views and rights of surrogates. A further reason was to protect the surrogate from coercion.

4.53 However, there were also those in favour of surrogacy who nevertheless disagreed with the proposal, because they thought that there was no need for the surrogate to have a right to object. Around half of surrogates and intended parents who responded disagreed primarily on the basis that the surrogate should not be able to change her mind, if the requirements of the new pathway have been met. They argued that doing so undermines the ethos and certainty of the new pathway, and arguably suggests women are incapable of making a decision and seeing it through.

4.54 The Bar Council and Mills & Reeve LLP disagreed on the basis that the right to object undermines the legal certainty that the new pathway is designed to bring intended parents and children, and fails to reflect the screening and safeguarding that is an intrinsic part of the new pathway.

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[35] Consultation Question 11(3).

4.55 SurrogacyUK referred to survey findings indicating that very few of the surrogates they work with support the right to object. NGA Law and Brilliant Beginnings suggested that the right to object undermines the parties' shared intentions pre-conception:

> We support [our surrogates], and feel that this goes to the core of what a surrogacy arrangement is: the conception of a child on the basis of a shared intention that the intended parents will be the child's legal parents. Fundamentally, we do not believe that a woman who has given informed consent to carrying a child for someone else is ever that child's legal mother. We think the current proposals perpetuate the misunderstanding about the nature of surrogacy, and about the lack of capacity of women to confidently commit to carrying someone else's child.

4.56 Some intended parents emphasised the stress that the right to object would cause them. One intended parent said that it was unreasonable to be left with the anxiety that the baby could be taken away from them where the screening and assessments have been carried out pre-conception.

4.57 This stress and uncertainty caused by the right to object was also reflected in the response from SurrogacyUK's Working Group on Law Reform, which suggested that the right creates uncertainty as to the child's legal parents, which could disincentivise intended parents and surrogates from pursuing the new pathway.

4.58 Some consultees argued in favour of affirmative consent, rather than a right to object, on the basis that requiring the surrogate to confirm her consent would be a more robust safeguard of the surrogate's rights. PROGAR and Nagalro said:

> We consider [a right to object] to be an inadequate safeguard; post delivery consent should be active not by default and any consent prior to conception should only ever be provisional and this should be made clear in any surrogacy agreement.
>
> We also consider it is likely to be important for the surrogate-born person to know that their gestational/genetic mother confirmed her consent once s/he had been born.

4.59 There was also widespread disagreement with the proposal from those consultees who opposed surrogacy in principle, such as Nordic Model Now!, and those responses based on the Nordic Model Now! template. Those consultees disagreed with the proposal on the basis that the surrogate should automatically be the child's legal parent, unless a court rules otherwise post-birth. Accordingly, there would be no need for a "right to object", as the surrogate should be the legal mother at birth.

4.60 The End Violence Against Women Coalition argued that to expect any woman who has just given birth to make decisions and proactively take legal steps is unreasonable. The emotional changes affecting mothers after the delivery of a child could make surrogates incapable of making such an important decision as to object or not.

Analysis

4.61 We have concluded that the surrogate should have the right to object to the intended parents obtaining legal parental status.

4.62 We acknowledge that incorporating the right to object into our proposals reduces to some extent the certainty that the intended parents will become the child's legal parents. This ongoing uncertainty could incentivise some to enter overseas arrangements in jurisdictions where pre-conception intentions are determinative of legal parental status in that jurisdiction – albeit that that status will not be recognised by the law of England and Wales or Scots law. For agreements in England and Wales, or Scotland, that follow the new pathway, however, then in light of the mandatory pre-conception screening requirements to be fulfilled we are confident that surrogates and intended parents will have a clear idea of what is involved before they enter into the surrogacy agreement. Accordingly we envisage that the right to object will rarely be exercised. As a matter of course the intended parents would automatically become the child's legal parents at birth, which we consider a significant incentive for intended parents to enter the new pathway.

4.63 We accept the argument made by NGA Law and Brilliant Beginnings that the right to object contradicts the parties' pre-conception shared intention that the intended parents, and not the surrogate, will be the child's legal parents. However, post-conception the surrogate may no longer share those intentions. During the course of pregnancy, birth or afterwards, the surrogate may decide that she does not wish for the intended parents to acquire legal parental status automatically without scrutiny by the court through the parental order hearing. In those circumstances, it is essential for the surrogate to be able to voice her wishes in a legally recognised way. The right to object is, therefore, designed to ensure that the surrogate's consent to the agreement is ongoing, and that her autonomy is being respected.

4.64 If a surrogate had no right to object, the surrogacy agreement would be closer in character to a binding contract. It is not our intention that the agreement between the parties be an enforceable contract. Instead, we see the agreement as more comparable to other situations where we recognise that individuals are entitled to change their mind especially concerning their bodily autonomy, even after initially giving consent, and where the need for ongoing consent is required to respect the autonomy of the individual.

4.65 With respect to the suggestion that a surrogate should give affirmative consent post-birth, we have concluded that this is not appropriate. Requiring affirmative consent as a further stage in the surrogacy process would not respect the shared intentions of surrogates and intended parents at the outset. The surrogate has given explicit consent at the pre-conception stage of signing the Regulated Surrogacy Statement[36] and entering into the surrogacy agreement, and that consent can be presumed to continue unless and until she takes steps to withdraw it. If she were required actively to give consent a second time, it would imply that her pre-conception consent is inadequate, and that that women do not have the capacity or autonomy to make informed decisions regarding their bodies.

4.66 Moreover, requiring the surrogate to give affirmative consent points to a lack of confidence in the screening and safeguarding process on the new pathway. It would also have consequences for all parties involved, as any post-birth consent could not be given immediately (because the surrogate would require time to recover from the

[36] Discussed further in ch 9.

birth). This would build in a delay before the intended parents were confirmed as legal parents, potentially requiring the surrogate to be the legal mother at birth, contrary to her wishes, and would undermine certainty and peace of mind for *all* parties, including the security of the child. This period of uncertainty would render the new pathway less attractive to surrogates and intended parents alike. Accordingly, while we strongly support the surrogate's right to object, we do not recommend any post-birth affirmative consent from the surrogate. That ongoing consent can be inferred from her choosing not to exercise her right to object.

4.67 Incorporating the right to object into our proposals also, in our view, means that the new pathway meets the standards required by Article 35 of the UNCRC, and the Optional Protocol on the Sale and Sexual Exploitation of Children. The international law position is discussed in more detail in Chapter 3 above. In brief, Article 35 requires State parties to take all appropriate measures to prevent the sale of children for any purpose or in any form. The UN Special Rapporteur on the sale and sexual exploitation of children has considered the subject of surrogacy in the context of her area of responsibility, interpreting Article 35 to mean that altruistic (as well as commercial) surrogacy arrangements must be regulated, and that surrogates should retain legal parental status and parental responsibility/PRRs at birth. She has also endorsed the Verona Principles, which envisage conferring legal parental status on intended parents at birth if safeguards are in place.

4.68 We take the view that the Special Rapporteur's report commands respect but is, in law, at most guidance on the UNCRC. By providing an opportunity for the surrogate to be recognised as the legal parent, in accordance with the provisions explained below at paras 4.117 to 4.127, the right to object balances the need to safeguard the surrogate's rights with the need to respect the rights of all parties by upholding their shared pre-conception intention.

Limiting the circumstances in which the right to object can be exercised

Consultation

4.69 A further suggestion from some consultees was that the surrogate should only be able to exercise the right to object in specific circumstances and that those should be outlined in legislation. Various reasons were given for this.

4.70 In the first place, the rigour of the pre-conception screening requirements pointed to restricting the right to object to situations where her original consent was fundamentally flawed for some reason. The Bar Council said:

> it is difficult to see why the surrogate should retain any right to object save only, perhaps, in an instance where there has been a fraud, concealment or other form of serious misrepresentation during the pathway process which in some way does or should vitiate the consent already given to legal parenthood being acquired by the intended parents at birth.

4.71 A number of surrogates argued that the surrogate should only be permitted to object on child welfare grounds. One surrogate said:

> The right to object should only be on the grounds of safeguarding, i.e. the surrogate believes the child would be in danger should the Intended Parents become the legal

parents. This is to avoid a surrogate using the right to object as a means of revenge or holding the IPs to account over disagreements during the pregnancy.

4.72 Similarly, Zaina Mahmoud said that in her fieldwork with surrogates, the only reason they suggested for a right to object would be unforeseen circumstances that would impair the intended parents' ability to raise a child. Some consultees suggested that the surrogate should only be able to object for a set of specified reasons, or if relevant information came to light after the birth.

4.73 A number of consultees suggested that the surrogate should only be able to object if she is the child's genetic parent, that is, in a traditional surrogacy arrangement, on the basis that in gestational arrangements she would have no genetic link to the child.

Analysis

4.74 We have concluded that the surrogate should not have to give a specific reason in order to exercise the right to object. We do not agree that the surrogate should only be able to exercise the right to object for child welfare related reasons. Further, if the surrogate had concerns about the intended parents' parenting capacity, it might be more apt for her to inform social services in order to trigger child protection measures. Placing the onus on the surrogate to exercise her right to object in these circumstances might, depending on its legal effect, confer legal parental status and all its associated responsibilities on her, in circumstances where she does not want it. Thus, concerns about safeguarding, which is imperative and must be taken seriously, would be better met through other routes, including existing child protection systems.

4.75 Surrogates might also be discouraged from exercising the right to object if they are worried about whether their reason for objecting satisfies specified, legislatively-defined criteria. This would undermine the significance of the right to object as a means of respecting the surrogate's wishes and autonomy post-conception.

4.76 We are not persuaded that a surrogate should only be able to exercise her right to object in relation to gestational, not traditional, surrogacy arrangements. We set out in Chapter 1 our reasons for not distinguishing between the two types of surrogacy, and we think it is important that the law respects her autonomy in each case.

4.77 We are also of the view that it would be undesirable to expect the court to scrutinise the validity of her objection to ensure that she had acted for a permitted reason. If an objection has been made, then we think the court will want to – and should – consider the best outcome for the welfare of the child. It would clearly be undesirable for the court to be placed in a position that while the best interests of the child dictated that the court consider whether or not to make a parental order, the court was rendered unable to do so because the surrogate had not objected for a "valid" reason.

Starting point for the period in which the surrogate may object

4.78 In the Consultation Paper, we proposed that the surrogate should have the right to object for a fixed period after birth.[37] This requires a clear starting point as well as a fixed end point. We consider first the point in time when the right to object first arises.

[37] Consultation Question 11(1).

Consultation

4.79 Some consultees suggested that the surrogate should be able to exercise the right to object before birth, either from conception or from some point during pregnancy.

4.80 The British Pregnancy Advisory Service were of the view that the surrogate should be able to exercise the right to object from the outset: if she changes her mind during the pregnancy, it is unreasonable to compel her to wait until she has given birth before taking further steps. It would also risk confusion at birth if the surrogate had to exercise her right then, especially for midwives and medical staff.

Analysis

4.81 We recommend that the period in which the surrogate can exercise her right to object should begin at conception. There is no need for it to exist prior to conception, as a surrogate who has changed her mind at that stage can withdraw from the surrogacy agreement by declining to go through the process of conception. To be as clear as possible, we recommend that the surrogate's right to object in fact commences at the time of treatment leading to conception, since there is of course a period (of approximately two weeks) after treatment where the surrogate will not know whether she has in fact conceived. She should be able to object within that period, even if she does not yet know whether she is pregnant.

4.82 Enabling the surrogate to object from the time of treatment, rather than from birth, means she is not limited to (or pressured into) making a decision in the period immediately after the birth.

4.83 Enabling the surrogate to object from the point of treatment is also practically beneficial and in the child's best interests. If the surrogate has decided during pregnancy that she wishes to object, and can do so, then both the surrogate and intended parents can seek support and advice at as early a stage as possible. It may also be possible for the surrogate and intended parents to reach agreement during the pregnancy as to longer-term arrangements for the care of the child, that could be addressed in subsequent proceedings for a parental order or a child arrangements order. Failing that, legal proceedings to determine the child's living arrangements can be ready to be issued once the child is born. This reduces the period of uncertainty for all parties, which could be damaging to the child's welfare.

Length of the period to object post-birth

4.84 In the Consultation Paper, we proposed that the surrogate should be required to make an objection within the applicable period for birth registration minus one week. This meant that in England and Wales, the surrogate would have five weeks to object post-birth; in Scotland, the surrogate would have 14 days post-birth, reflecting the shorter period in which parents must register a birth in Scotland.

Consultation

4.85 Our proposal received significant criticism from consultees as to the length of time that we were suggesting that the surrogate should have to exercise her right to object. The fact that the length of the objection period was linked to the birth registration period in the proposal was criticised by some consultees, especially since it resulted in disparity between timeframes in Scotland and in England and Wales. Birth registration was also

seen an arbitrary guide for a provision intended to ensure the surrogate's continuing consent to the agreement. The Family Justice Council noted:

> The main rationale for the proposed time periods is the current time limit for birth registration within each jurisdiction which arguably subordinates human reality to administrative convenience. The time periods for birth registration should be adapted rather than the proposed arbitrary (and postcode lottery) time limit within which to make a potentially life changing decision for all involved.

4.86 Some consultees suggested that the proposed period in which the surrogate could make an objection was too short. Cambridge Family Law[38] thought that the international law requirement for birth mothers to wait at least six weeks before consenting to their child's adoption should also apply in the surrogacy context. They said:

> The reduction from 6 weeks to 35 days (England) or 14 days (Scotland) fails to fully protect the rights of surrogates, as it does not give them sufficient time to recover physically, psychologically and emotionally from the child's birth before having to make such an important decision.

4.87 In contrast, some consultees considered that the period proposed was too long and might complicate birth registration. Reasons here were based on the protections offered by the pre-conception screening, and that any delay could be detrimental to the child's welfare. COTS advocated for a very short period on the basis that "a surrogate is most likely to know before the birth that she had no intention of relinquishing the baby so the decision should be made quickly".

4.88 Nordic Model Now! and responses based on their template also disagreed with the proposed period. While objecting to the new pathway in general, they were also of the view that the period to object is too short in both Scotland and the rest of the UK in light of the physical, physiological and emotional change after childbirth.

Analysis

4.89 In light of the very clear opinion expressed by consultees, we have concluded that the length of the right to object cannot be linked to the applicable birth registration periods in Scotland and in England and Wales. This is due to the desirability of parity between the two jurisdictions and, critically, because linking the right to object to the birth registration period in Scotland would mean that the period for surrogates in Scotland was very short indeed. Nevertheless, it is important that there is an end point, to provide certainty for all parties and most especially the child, to ensure that there is no protracted uncertainty about their legal parents. We have therefore concluded that the surrogate should be able to exercise her right to object up to six weeks post-birth.

4.90 We note the existing significance of a six-week period in the context of a parental order application: the surrogate must wait six weeks after birth before her consent to a

[38] A group of Cambridge academics from Cambridge Family Law, University of Cambridge led by Professor Jens Scherpe.

parental order is valid.[39] In addition, the period is also significant in international standards governing adoption, as noted in the response from Cambridge Family Law.

4.91 Also significantly, the World Health Organisation recognises that the postnatal period extends to six weeks post-birth.[40] In the UK, most women typically have a medical check-up around six weeks after birth.[41] For the surrogate, it provides a reasonable period within which to seek counsel and support, if she requires it, as to whether to exercise her right to object.

Should the right to object be exercised in writing?

4.92 In the Consultation Paper, we proposed that the right to object could only be exercised by the surrogate in writing.

Consultation

4.93 Many consultees thought that a writing requirement was too onerous in light of the physiological and psychological effects of childbirth. Nordic Model Now! said:

> It is totally inappropriate to expect the birth mother to make a calm and considered decision of such huge and life-changing significance at such a time – not to mention following through with the practical requirements of putting it in writing and ensuring it is received before the expiry of the deadline.

4.94 Other consultees thought that a writing requirement was impractical, and the surrogate might, for example, only inform the intended parents verbally that she wishes to raise the child. The BPAS noted that it is impractical to require writing if the surrogate changes her mind during labour. They were concerned at difficulties that may arise as regards parental responsibility and decision-making in respect of the child where there is confusion as to whether the right has been exercised.

Analysis

4.95 It is necessary to strike a careful balance between ensuring that the right to object is expressed in sufficiently certain terms, and not imposing too onerous a requirement on the surrogate. There is a need for both clarity and simplicity, as well as certainty.

4.96 Accordingly, we recommend that the surrogate can exercise the right to object in any format which is recorded in some way and is capable of being produced in the event of any dispute. This could be in writing, including a handwritten note, a typed note, or via email or a messaging platform. An audio or audio-visual recording would also suffice, such as a voice message or video message. In all cases, the evidence ought

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39 HFEA 2008, s 54(7).

40 World Health Organisation *WHO recommendations on maternal and newborn care for a positive postnatal experience: executive summary* (28 March 2022). Available at: https://www.who.int/publications/i/item/9789240044074 (last visited 23 March 2023).

41 The National Institute for Clinical Excellence recommend that a GP carries out a postnatal assessment at six to eight weeks post birth: *NICE Postnatal Care NICE guideline [NG194]* (April 2021), recommendation 1.2. Available at https://www.nice.org.uk/guidance/ng194/chapter/Recommendations#postnatal-care-of-the-woman (last visited 23 March 2023).

to be capable of being provided to a court in case of doubt and should therefore be capable of being reproduced in such a way so as to be lodged in court.

4.97 We do not recommend that any specific form of words or language must be used.

Who should be notified if the surrogate exercises her right to object?

4.98 In the Consultation Paper we provisionally proposed that an objection should be sent to both the intended parents and the body responsible for the regulation of surrogacy agreements.

Consultation

4.99 Few consultees responded to this question, and those who did tended simply to agree.

Analysis

4.100 We recommend that the surrogate should be required to send her objection to the intended parents, and to the RSO involved in the agreement. Separately, the RSO should be required to inform the surrogacy regulator (the HFEA[42]) of the objection for regulatory purposes.

4.101 The intended parents very obviously have an interest in being notified of the surrogate's objection. If the surrogate uses her right to object before the birth of the child, once they are notified the intended parents would have the right to instigate parental order proceedings after the child is born, in order for the court to make a final determination as to the child's legal parents and childcare arrangements, as discussed in Chapter 10. If the surrogate uses her right to object after the child is born, the intended parents would want to know that the surrogate may seek a court order that she is the child's legal parent. Further, it is in both the intended parents' and the surrogate's interests for the RSO to be notified, so that it can offer to provide appropriate support.

4.102 In some cases it may not be possible for the surrogate to give notification that she has used her right to object, either because the intended parents have both died, or cannot be traced despite the surrogate taking reasonable steps; or because the RSO has ceased to exist as an organisation. In these circumstances, the requirement to give notification in order for the right to have effect would not apply.

Terminology

4.103 In the Consultation Paper, we used the terminology of "the right to object". However, we have concluded that this terminology is inappropriate. The word "object" has negative connotations and also implies a judgement on the part of the surrogate which could (mistakenly) be called into question: was she right to object or not? This is not appropriate, since the surrogate's decision to exercise this right is not open to question or challenge. Further, the word "object" is inaccurate, because the surrogate is not necessarily "objecting" to the intended parents' parenting capacity, or to the process that was followed. Rather, she is expressing, in a legally recognised way, that she no longer wishes to continue with the surrogacy agreement in such a way that the

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42 See ch 7.

intended parents gain legal parental status without some further judicial overview. Critically, the law recognises the woman who gives birth as the legal mother: it is only as a result of the consent of the surrogate to the new statutory regime that that position is changed on the new pathway, to recognise the intended parents as legal parents from birth. If she no longer wishes to proceed on that basis, she is withdrawing her consent to proceeding on the new pathway.

4.104 We therefore conclude that "withdrawal of consent" is more appropriate, in reflecting what the surrogate is doing. As set out below, the surrogate's withdrawal of consent has a different effect depending on whether it occurs before or after the birth of the child. For convenience, we use the term "withdrawal of consent" for both pre-birth and post-birth withdrawals in this Full Report and in the Core Report. The language used in the draft Bill differs. In the draft Bill, it is a condition of the new pathway having effect that the surrogate has not withdrawn her consent pre-birth, as set out in clause 8(7) and clause 9. Giving notice of her post-birth withdrawal of consent within the stipulated time limit is a requirement in order for the surrogate to apply for an order that she is the parent of the child, as set out in clause 21(5), (6) and (7) of the draft Bill. There, the condition is that she "has decided she wants to be treated in law as the parent of the child" and has given notice of this decision within the six-week time limit.

4.105 For the rest of the Report, we will refer to the right to object as the surrogate's "right to withdraw her consent". We will adopt this approach consistently from here on, except where we are quoting from the Consultation Paper itself or any responses from consultees, which refer to the "right to object".

Recommendation 2.

4.106 We recommend that:

(1) the surrogate should have the right to withdraw her consent to the surrogacy agreement in the period from the treatment which leads to pregnancy until six weeks after the birth of the child;

(2) this withdrawal should operate by the surrogate notifying her withdrawal of consent in any recorded format to the intended parents and to the RSO involved in the agreement;

(3) the requirement to notify the intended parents of her withdrawal of consent should not apply where they have both died, or where they cannot be traced despite the surrogate taking reasonable steps to do so;

(4) the requirement to notify the RSO should not apply where it has ceased to exist as an organisation; and

(5) the RSO involved in the agreement should notify the HFEA of the surrogate's withdrawal of consent.

4.107 Clause 8(7) of the draft Bill prevents clause 4, which makes the intended parents the child's legal parents at birth, from applying if the surrogate has withdrawn her consent to this happening before the birth. Clause 9 sets out the circumstances in which the withdrawal of consent before birth will be effective, including on notification. Subsections (5) to (7) of clause 21 enable a surrogate who has withdrawn her consent (described here as deciding that she wants to be treated in law as the parent of the child), before the end of the six-week period post-birth, to apply for a parental order in her favour, and sets out the requirements of that withdrawal. Subsections (1)(d)(iii) and (iv) of clause 53 make it a licence condition for RSOs that they maintain records of the notice of withdrawal, and subsection(1)(e) of clause 53 makes it a licence condition that they provide those records to the HFEA in a form and at intervals specified in directions.

Effect of the surrogate's withdrawal of consent

4.108 In the Consultation Paper it was proposed that, upon the surrogate exercising her right, the agreement should exit the new pathway and the intended parents could then seek a parental order. As a result, the surrogate would be the child's legal parent, and where one of the intended parents would, under the current law, be a legal parent, then they would continue to be recognised as a legal parent in these circumstances. The court would decide whether the surrogate or the intended parents should be the child's legal parent(s).[43]

Consultation

4.109 There was wide support for this proposal. The principal reasons given for supporting our proposal were to protect the surrogate from exploitation or coercion, and to safeguard the best interests of the child. The Church of England considered it essential that surrogates are protected and can exercise freedom of choice in all circumstances, whilst noting that it is in the child's best interests to have their legal parenthood and living arrangements fixed as soon as possible.

4.110 There was some disagreement with the proposal and the consequences of the surrogate withdrawing consent, for a range of reasons.

4.111 Professor Kenneth Norrie thought an objection should prevent the intended parents from ever becoming the child's legal parents. In contrast, Professor Emily Jackson disagreed with the right to object at all, but if it were to be adopted supported the ability for intended parents to bring parental order proceedings.

4.112 NGA Law and Brilliant Beginnings, SurrogacyUK and SurrogacyUK's Working Group on Law Reform thought the proposal contradicts the parties' pre-conception intentions and undermined the certainty provided by the new pathway. All three suggested that the exercise of the right to object by the surrogate should trigger court proceedings, but that the intended parents should be the legal parents in the interim.

4.113 Some consultees also expressed concern that this would undermine the attractiveness of the new pathway, and disincentivise people from using it.

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[43] Consultation Question 12.

4.114 Concerns were also raised that the proposal reflected gendered assumptions about the capacity of a woman to choose to become a surrogate. Natalie Smith, an intended parent said:

> I think it is unfair to put the burden of legal parenthood on the surrogate if she lodges an objection. The overwhelming majority of surrogates have no desire to ever be treated as the parent. They deserve the right to not be treated as the mother. I believe refusing to give them this right is tied into sexist views about women and motherhood and how they should feel in relation to children and child birth.

4.115 A handful of consultees thought that the surrogate and the intended parents should share legal parental status if the surrogate made an objection.

4.116 OBJECT argued that the surrogate should not be expected to "hand over her baby even if she immediately changes her mind" and that she should be "given custody of the baby she has birthed".

Analysis

4.117 The responses here covered a broad spectrum, especially from those consultees who disagreed with the proposal: some disagreed because they thought the right to withdraw consent goes too far, while others disagreed because the right does not go far enough. However, almost all consultees supported the rationale that there should be judicial involvement if the surrogate withdraws her consent. We have concluded that if the surrogate withdraws her consent, the surrogacy agreement should no longer be governed by the new pathway and instead the child's legal parental status could be decided following the judicial oversight provided by the parental order process. An application for a parental order would be required, to allow the court to determine, finally, who should be the child's legal parent(s): the surrogate, or the intended parents.

4.118 However, consultation responses have caused us to reconsider the precise legal consequences of the surrogate withdrawing consent. We now recommend that the consequences of the surrogate's withdrawal of consent should depend on whether she withdraws consent pre- or post-birth. Legal parental status would therefore crystallise at birth and could only be changed thereafter by a parental order. A pre-birth withdrawal would mean that the surrogate would be the legal mother at birth, and the intended parents could seek a parental order. A post-birth withdrawal would mean that the intended parents would remain the legal parents, as they were recognised at birth, pending a parental order hearing to determine whether the intended parents should remain the legal parents, or whether the surrogate should be recognised as the legal parent.[44]

4.119 We have concluded that this option best balances the competing concerns, and provides the greatest clarity and certainty for all parties involved.

4.120 In the first place, and very importantly, it means that once the child's legal parents are identified at birth, they cannot be changed thereafter without the intervention of the court. This respects the intention of the surrogate at birth. It also reflects the general

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[44] A parental order application in this situation is discussed further in ch 10.

position as regards the legal parents of all children: only the courts have the authority to change the legal parents of a child, by way of a declarator, parental order or adoption order.

4.121 This proposal also provides certainty for all parties. If the surrogate withdraws consent during the pregnancy, all parties know that she will be the legal parent at birth, and can plan for the birth accordingly, for example by seeking to agree who will be caring for the child on birth. If the surrogate has not withdrawn consent at birth, then the parties know that the intended parents are the legal parents at birth. There is no risk of the legal parental status "flipping" once the child has been born, with the attendant anxiety and practical complications that would arise from such uncertainty.

4.122 In the Consultation Paper we made a provisional proposal,[45] dealing with a loss of capacity by the surrogate during the period in which she had the right to object. In the light of responses to this question, we decided that the proposal was unworkable, and we have not taken it forward. In the very unlikely event that the surrogate loses capacity such that she cannot meaningfully exercise her right to withdraw her consent, during the time that she is able to do so, we suggest that the appropriate remedy would be an application for a declaration/declarator that the intended parents are not the parents because the statutory criteria for their legal parental status has not, in fact, been met.

4.123 It is important to note that this proposal says nothing about the day-to-day practicalities, such as the residence of the child. It would be possible for the party without legal parental status to have the child living with them, or to have contact. Matters of contact and residence would be assessed separately by the court, with any decision being taken in the best interests of the child.[46] The question at issue is solely who should be recognised as the legal parents at birth, potentially pending a parental order hearing.

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[45] Consultation Question 13.

[46] As set out at paras 5.24 to 5.30, where the surrogate withdraws her consent post-birth she will have parental responsibility/PRRs for the child until a parental order application is concluded, or until six months after the birth of the child.

Recommendation 3.

4.124 We recommend that, if the surrogate withdraws her consent to the surrogacy agreement, the party without legal parental status can apply to the court for a parental order to determine, finally, who should be the child's legal parent(s): the surrogate, or the intended parents. Until the parental order is made, issues regarding care of the child and parental responsibility/parental responsibilities and rights would be determined in accordance with the proposals in Chapter 5.

4.125 Where the surrogate withdraws her consent before the birth of the child, she would be the legal mother at birth, and it would be a matter for the intended parents to apply for a parental order.

4.126 Where the surrogate withdraws her consent after the birth of the child, within the six-week period for doing so, the intended parents (who would already be the legal parents) should remain the legal parents, and the surrogate would be entitled to apply for a parental order.

4.127 We recommend that guidance in the HFEA Surrogacy Code of Practice should provide that where a surrogate withdraws her consent after the birth of the child and seeks a parental order, the RSO should provide social, emotional and financial support to the surrogate.

4.128 Clause 8(7) of the draft Bill sets out the requirement that, for clause 4 to operate so that the intended parents are the child's legal parents at birth, the surrogate must not have withdrawn her consent before the birth. If clause 4 does not operate, the intended parents will not be the legal parents at birth and will be required to apply for a parental order under clauses 15 or 17 of the draft Bill to become so. Clause 21 enables the surrogate to apply for a parental order in her favour if she has withdrawn her consent before the end of the six-week period post-birth. We have not specified in clause 67 which requires the HFEA to maintain a code of practice that the RSO should provide support to the surrogate where she withdraws her consent. Clause 67 specifies that the code should cover the proper conduct of licensable surrogacy-related activity and we do not wish to fetter the freedom of the HFEA in setting out the code, following consultation.

AN ALTERNATIVE MODEL: THREE-PARENT FAMILIES

4.129 In the Consultation Paper we set out an alternative model for how legal parenthood might operate under a reformed model of legal parental status in surrogacy, and invited consultees to provide their views. Under this model, the result of following the new pathway would be that the intended parents and the surrogate would all be the legal parents, thus recognising up to three parents, on a temporary basis. Provision would then be made for the surrogate's legal parental status to be extinguished.[47]

[47] Consultation Question 21.

4.130 Support for a temporary three-parent model was very limited; generally only academics and PROGAR and Nagalro showed real enthusiasm for the idea.

4.131 Otherwise, responses from a wide range of consultees were opposed to this approach – either because they supported the surrogate being the legal parent at birth, or because it would not reflect the intentions of the parties to the surrogacy agreement that the intended parents alone should be the legal parents at birth. Other consultees expressed concern that it would be too complex a model to introduce.

4.132 The positive responses were based on a belief that a three-parent model would more accurately reflect the situation of surrogacy with the involvement of both surrogate and intended parent. For example, Dr Alan Brown said "A three-parent model would allow law to more accurately capture the reality of what a surrogacy arrangement involves (multiple contributions to parenthood)."

4.133 There was no consensus amongst consultees as to how (if at all) the surrogate's legal parental status would be removed if a three-parent model were used.

4.134 We have concluded that there is insufficient support for a three-parent model in surrogacy. However, we note that a few consultees raised the issue of situations where it is intended that a child will have three or more parents permanently, in what would be a 'co-parenting' situation. While a three-parent model might work for co-parenting situations, these are different from surrogacy, and fall outside the scope of this project. We therefore think there would be merit in the issue of co-parenting being considered by the UK Government in future, potentially as part of a wider review of parents and families.

LEGAL PARENTAL STATUS OF THE SURROGATE'S SPOUSE OR CIVIL PARTNER

4.135 So far, we have considered the legal parenthood of the surrogate and the intended parents. Under the current law, the surrogate's spouse or civil partner will be the legal father or second parent of the child born as a result of the surrogacy arrangement (unless he or she does not consent to the arrangement). We turn now to consider the position of such a spouse or civil partner in relation to a surrogate-born child.

4.136 In the Consultation Paper, we provisionally proposed that, for a child born as a result of a surrogacy agreement on the new pathway, the surrogate's spouse or civil partner should not be a legal parent of the child, and should not acquire legal parental status where the surrogate withdrew her consent to the agreement. We also sought views as to whether the surrogate's spouse or civil partner should continue to be a legal parent of the child born as a result of an agreement which proceeds under the parental order process.[48]

Consultation

The new pathway

4.137 The provisional proposal that the surrogate's spouse or civil partner should not become a legal parent in the new pathway attracted strong support. This included a petition signed by 64 surrogates and their partners which strongly supported our

[48] Consultation Question 15.

provisional proposal. They were of the view that surrogates' husbands should be "removed from the picture altogether".

4.138 The principal arguments advanced against the surrogate's spouse or civil partner being a legal parent in fact applied both to the new pathway and to the parental order process:

(1) the surrogate's spouse or civil partner becoming a legal parent implies a connection to the child – either through pre-conception intention or genetics – where none exists;

(2) the spouses or civil partners of surrogates do not wish to be legal parents; and

(3) the result undermines the policy of sections 35 and 42 of the HFEA, which uses intention as a basis for attributing legal parental status when donor sperm has been used, and the parties intended to parent the child as a couple.

4.139 Professor Kenneth Norrie wrote:

> Imposing parenthood on the spouse or partner of a mother in a traditional environment was designed to reflect genetic probability, social reality and social expectation. None of that works in the surrogacy situation and there is no justification other than a thoughtless application of existing rules to impose parenthood on the surrogate's domestic partner.

4.140 Responses highlighted a number of practical problems with the current position of the surrogate's spouse or civil partner being legally implicated in the surrogacy arrangement, whilst acknowledging their significant role in supporting the surrogate throughout the pregnancy.

4.141 Some consultees who disagreed in principle with surrogacy and with the new pathway nevertheless supported this proposal. OBJECT wrote that "the surrogate's partner/husband, unless genetically related to the baby, should have no part in the surrogacy arrangement".

4.142 One surrogate thought that the current rule on the legal parent status of the surrogate's spouse or civil partner was still relevant in traditional surrogacy where the surrogate and her partner already have children, as a child born through the surrogacy arrangement would be their children's half-sibling.

4.143 The principal argument against the provisional proposal made by organisations opposed to surrogacy was that requiring surrogates' spouses or civil partners to remain legal parents (as in the current law) would reduce the risk of spouses or civil partners coercing their partners into acting as surrogates. Nordic Model Now! also expressed concerns that the proposal would set a precedent as a significant change in the rules relating to legal parental status and, as such, it would have an implication for all children.

4.144 A further basis for disagreeing with the proposal was that, in the event the surrogate withdraws her consent and seeks to be recognised as the legal parent, then her spouse may be the co-parent in this situation.

Parental order applications

4.145 There was less consensus between consultees about the position of the surrogate's spouse or civil partner outside the new pathway.

4.146 There was consensus amongst surrogates and intended parents that legal parental status should be removed in agreements outside the new pathway as well. Some consultees made the point that it would incentivise parties to use the new pathway with its consequent safeguards.

4.147 A practical point was raised by Dr Katarina Trimmings and Dr Michael Wells-Greco in their joint response. They noted that in the absence of a written agreement, outside the new pathway, it may not be possible to evidence that the arrangement is one of surrogacy (although they thought that, for cases outside the new pathway where it was clear that it was a surrogacy arrangement, the spouse/civil partner should not be a legal parent).

4.148 Several consultees thought that outside the pathway, it should be open to the court to attribute legal parental status to the surrogate's spouse or civil partner, if that is in the best interests of the child.

Analysis

4.149 We note the argument advanced by some consultees that excluding the spouse or civil partner from being the legal parent will increase the risk of exploitation of the surrogate. However, we think the opposite argument carries equal weight: there is a risk that making a spouse or civil partner a legal parent gives them power in relation to the surrogate (and the intended parents) because of their legal status. Even more concerningly, the partner might put pressure on the surrogate *not* to withdraw her consent on the new pathway or withhold consent to the parental order – even where she wishes to – because doing so would result in the partner becoming a legal parent.

4.150 We are also mindful of the fact that in many arrangements it is possible for the intended parent to appear on the birth certificate – even where the surrogate is married or in a civil partnership – provided that the spouse or civil partner did not consent to her treatment. However, under the current law, the existence of a spouse or civil partner can displace an intended parent from recognition as a legal parent. Commentators have suggested that the requirement that the surrogate's partner agrees to a parental order, even if they have had little to no role in the arrangement, may be open to challenge under Article 8 of the ECHR because the surrogate's spouse or civil partner's right to 'veto' the making of the parental order might be said to serve no legitimate aim.[49]

4.151 We have concluded that there is a clear rationale for not attributing legal parental status to the surrogate's spouse or civil partner on the new pathway in any situation where there surrogate herself is recognised as the legal parent. We recognise that her spouse or civil partner will usually be fully involved in the arrangement through the support they offer to her, and our scheme for the new pathway gives expression to that by applying certain screening requirements to them. However, we think that it is

[49] R Marsh, 'Surrogacy breakdown, birth registration and Article 8: a missed opportunity in Strasbourg' (2022) *Journal of Social Welfare and Family Law* DOI: 10.1080/09649069.2022.2102758.

for the surrogate to make the decision as to whether she wishes to carry a child for intended parents, which is why we do not require that the surrogate's spouse or civil partner be a party to the surrogacy agreement. The spouse or civil partner not being a legal parent of the child born of the arrangement is consistent with the surrogate's autonomy.

4.152 We do not think that it would be appropriate to distinguish between the new pathway and agreements where a parental order is required, whereby the spouse or civil partner remains the legal parent unless and until a parental order is granted. One suggested reason for making such a distinction is to encourage parties to follow the new pathway. However, we think that this fails to take account of the best interests of the child, in a situation where other factors point towards the position being the same across both pathways: in each case, it is not in the child's best interests to have someone unconnected (legally and physically) with the surrogacy being recognised as a legal parent.

4.153 Dr Katarina Trimmings and Dr Michael Wells-Greco raised a concern for cases outside the new pathway: how would the fact this was a surrogacy arrangement be evidenced, in order to exclude the spouse or civil partner as a legal parent? We consider this concern is addressed by the requirement in clause 2 of the draft Bill that the parties enter into a surrogacy agreement in *all* cases, including those where a parental order will be sought. Therefore, even in cases outside of the new pathway there will be evidence of the fact that the child was born through surrogacy.

4.154 The effect of removing the surrogate's spouse or civil partner as a legal parent will be that, outside the new pathway, the child's second parent at birth will either be the genetically related intended father or, by using the agreed parenthood provisions of the HFEA, the intended mother or the (genetically unrelated) intended father.[50] Alternatively, the child may only have one legal parent recognised, the surrogate. The surrogate will remain as the legal mother outside the new pathway.

4.155 If the agreement is on the new pathway, the intended parents will be the legal parents at birth. If the surrogate has withdrawn consent during the pregnancy, she will be the legal parent at birth, although, in accordance with the position for all cases where a parental order is needed, one of the intended parents may also be the legal parent at birth (as discussed in the preceding paragraph). However, her spouse or civil partner will not become the second legal parent in this situation. If she withdraws her consent after birth, during the six-week period, then the intended parents will be the legal parents from birth. In either case, the party/parties who are not the legal parents would be entitled to apply for a parental order.

4.156 We recommend that these reformed rules on the status of the surrogate's spouse or civil partner should only apply where the surrogate and intended parents meet the eligibility criteria on age that we apply on the new pathway and to parental orders, to

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50 HFEA 2008, ss 36 and 43. If a man uses the agreed parenthood provisions to acquire parenthood at birth in an assisted conception (or surrogacy) case, his sperm cannot have been used in the child's conception under the statutory conditions (because, if his sperm had been used, his legal parental status would be based on his genetic parenthood).

ensure that no legal effect is given to purported surrogacy agreements where any party is under the required age.

Recommendation 4.

4.157 We recommend that, for a child born as a result of a surrogacy agreement, whether on or outside the new pathway, and where at the time of entering into the surrogacy agreement the surrogate was aged 21 or over and the intended parents were aged 18 or over, the surrogate's spouse or civil partner, if any, should not be a legal parent of the child.

4.158 Clause 27 of the draft Bill gives effect to this recommendation.

EFFECT OF STILLBIRTH OR DEATH ON THE SURROGACY AGREEMENT

4.159 While the focus in surrogacy is on the safe arrival of a healthy child there is the risk, as with every pregnancy, of a tragic outcome, through the death of the child or the surrogate. It is very important to recognise this and to address the specific legal consequences that arise in the context of surrogacy. These can be complex, and we have sought to set out the eventualities clearly and sensitively. We also need to address what would happen in the event of one or both of the intended parents dying (which would be comparable to the spouse or partner dying in a non-surrogacy pregnancy).

4.160 In this section, we set out the consultation questions and responses, and our recommendations. Consultee responses tended to be consistent across the different aspects of death affecting a surrogacy agreement either on the new pathway or where a parental order is sought. Accordingly, we deal with the consequences of each situation below for both the new pathway and the parental order process together. We discuss the general nature of the responses to each question, covering both the new pathway and the parental order route, before moving onto a discussion of the points that emerged from responses, and then setting out our recommendations.

4.161 In reaching our conclusions, we have been very mindful of the concerns raised by consultees with different views towards surrogacy in general and legal parental status in particular, and the need for all parties to be treated with respect and compassion in these very difficult situations. We are also conscious that, in a situation where the surrogate or intended parent(s) has died, it is in the best interests of children to ensure that, both practically and legally, there is clarity and certainty as to their legal parents. Delay and litigation adds to the stress and uncertainty for the adults, at an already difficult time, which risks an adverse impact on them and consequently the child. A clear and consistent approach therefore benefits all parties involved. In seeking that, we were conscious that the most common theme underlying responses to these questions was the need to reflect the shared intentions of the parties at the outset.

Stillbirth of the child

4.162 In the Consultation Paper, we set out proposals covering the situation where the child was stillborn. On the new pathway, we proposed that the intended parents should be

recognised as the legal parents unless the surrogate had withdrawn consent; and as an additional measure, we proposed that the surrogate should be able to give positive consent to the intended parents being registered as the parents before the expiry of the period of the surrogate's right to withdraw consent. For agreements where a parental order would have been required, we proposed that where the child is stillborn, the surrogate should be able to consent to the intended parents being registered as the parents before the expiry of the period allowed for the registration of the birth, provided that the intended parents have made a declaration to the effect that the relevant criteria for the making of a parental order are satisfied, on registration of the stillbirth.[51]

Consultation: the new pathway

4.163 Amongst consultees who supported surrogacy, there was widespread agreement with the new pathway element of this proposal. Nearly all intended parents and surrogates agreed (some surrogates expanding in comments to say that stillbirth did not change the parties' intentions), as did legal professionals and legal representative organisations. Zaina Mahmoud highlighted the preference of surrogates to whom she spoke as part of her research for the intended parents to be the legal parents. Some intended parents highlighted the grief felt by intended parents and the need for a humane approach. However, legal representative organisations differed in comments around whether or not early positive consent by the surrogate was a desirable feature.

4.164 SurrogacyUK and its Working Group on Law Reform disagreed because of their stance that the intended parents should always be the legal parents unless a court decides otherwise.

4.165 Disagreement with our proposals came almost entirely from those who submitted a template response based on that of Nordic Model Now!. The template response was:

> I profoundly disagree with the proposals for the 'new pathway' – particularly the 'intended parents' acquiring legal parenthood automatically at birth unless the birth mother objects. The birth mother should always be the legal parent of the child at birth and this should not change if the child is stillborn.

4.166 This response, or a similar one, was repeated in their response to each of the questions dealing with death.

Consultation: parental orders

4.167 Responses to the proposal regarding parental orders did not differ significantly from responses on the new pathway proposal. However, SurrogacyUK did agree with this aspect of the proposal.

4.168 The Nordic Model Now! template response was worded in a similar fashion and disagreement was focused on the intended parents being registered as the birth parents.

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[51] Consultation Question 16.

4.169 PROGAR and Nagalro commented that there should be consistency so that the same rules should apply to a stillbirth as much as to a live birth, and that the surrogate should actively consent in each case.

Analysis

4.170 In legal terms, "stillbirth" or 'stillborn child' refers to:

> a child which has issued forth from its mother after the twenty-fourth week of pregnancy and which did not at any time after being completely expelled from its mother, breathe or show any other signs of life….[52]

4.171 In England and Wales, if a child is stillborn, the doctor or midwife will issue a medical certificate of stillbirth and this enables the woman who gave birth or the couple to register the stillbirth.[53] The stillbirth is entered on to the stillbirth register, and a Certificate of Stillbirth is issued as well as a form for burial or cremation.[54] As the child is not considered to have been born, there is no provision requiring their birth or death to be registered. By contrast, in Scotland a stillbirth must be registered within 21 days with the registrar of births, deaths and marriages and there is no reference to a specific "stillbirth register".[55] However, the procedure is the same in that the hospital issues a certificate of stillbirth and it is necessary to register the stillbirth (which can only be registered by the mother, or her spouse or civil partner).[56]

4.172 Our view with regard to stillbirth has been informed by considering guidance produced by the Human Tissue Authority. It is clear from that guidance that decisions concerning a stillborn child should be taken by the person who has given birth.[57] With that in mind, we have revised our proposal set out in the Consultation Paper to move away from the idea that the intended parents in the new pathway would be able automatically to register as the parents of the child on the certificate of stillbirth, subject to the surrogate's right to withdraw her consent. On reflection, we consider that this approach does not sufficiently respect the connection between the surrogate and the stillborn child. We also think that our approach in the Consultation Paper

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52 In England and Wales, Births and Deaths Registration Act 1953 s 41 as amended by the Still-Birth Definition Act 1992, s 1(1); in Scotland, Registration of Births, Deaths and Marriages (Scotland) Act 1965 s 53(1) as amended by the Still-Birth (Definition) Act 1992 s1(2).

53 Royal College of Obstetricians and Gynaecologists, *Registration of Stillbirths and Certification for Pregnancy Loss Before 24 Weeks of Gestation, Good Practice Note No. 4*, (2005). Accessible https://www.rcog.org.uk/globalassets/documents/guidelines/goodpractice4registrationstillbirth2005.pdf (last visited 23 March 2023)

54 Unless the case is required to be reported to the coroner under the Registration of Births and Deaths Regulations 1987 (SI No. 2088) and/or a post-mortem is required.

55 Section 21 of the Registration of Births, Deaths and Marriages (Scotland) Act 1965; also see: https://www.nhsinform.scot/care-support-and-rights/death-and-bereavement/death-of-a-baby#registering-the-death.

56 It is this certificate of registration of stillbirth in Scotland that is necessary to then bury or cremate the stillborn child. Part 3 of the Burial and Cremation (Scotland) Act 2016 makes express provision for arrangements on stillbirth.

57 Human Tissue Authority, *Code of Practice, Code A: Guiding Principles and the Fundamental Principle of Consent* (2017), para 142, https://www.hta.gov.uk/sites/default/files/HTA%20Code%20of%20Practice%20A%20-%20Guiding%20principles%20and%20the%20fundamental%20principle%20of%20consent%201.pdf.

unhelpfully addressed the question of legal parental status alongside birth or stillbirth registration, rather than taking them separately.

4.173 Instead, we recommend that following a stillbirth, the surrogate will be the legal parent of the stillborn child regardless of whether the agreement was on the new pathway, or one for which a parental order would have been required. The surrogate will be able to affirmatively consent, after birth, to the intended parents being the legal parents. If the surrogate does not provide that consent, her decision is final; to take a position otherwise, in our view, would not sufficiently respect the bodily autonomy of the surrogate.

4.174 If the surrogate consents to the intended parents being the legal parents of the stillborn child, they will be able to register the stillbirth, and, in Scotland, will be able to make arrangements for burial or cremation.[58]

4.175 A further issue which we addressed after the consultation process was the question of who should be able to consent to a post-mortem examination of the stillborn child. We consider that only the surrogate should be able to consent to such an examination. In both jurisdictions, as there has not been a death of 'person' there is no right to a post-mortem, and the coroner (in England and Wales) or the procurator fiscal (in Scotland), has no standing in the matter.[59] However, it is accepted practice in both jurisdictions that there can be an equivalent of a 'post-mortem', and that the Human Tissue Authority recommends that this should require the consent of the person who has given birth.[60] We therefore do not propose to make any recommendations making special provision for intended parents in these circumstances.

Recommendation 5.

4.176 We recommend that, where there is a stillbirth following a surrogacy agreement:

(1) in all cases, the surrogate would be the legal parent;

(2) the surrogate may consent to the intended parents being the legal parents of the child, which would enable them to register the stillbirth; and

(3) in all circumstances, only the surrogate should be able to consent to any post mortem examination of the stillborn child.

4.177 Clause 109 of the draft Bill, inserting new subsections into sections 1, 9, and 11 of the Births and Deaths Registration Act 1953, and clause 111(1), inserting a new subsection into section 41 of that Act, gives effect to this recommendation in relation to England and Wales. Clause 110 of the draft Bill, inserting new subsections into

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58 Burial and Cremation (Scotland) Act 2016 s 74.

59 Human Tissue Authority, *Code of Practice and Standards B: Post-mortem Examination* (2017) para 95, https://content.hta.gov.uk/sites/default/files/2020-11/Code%20B.pdf. (last visited 23 March 2023).

60 Human Tissue Authority, *Code of Practice and Standards B: Post-mortem Examination* (2017) para 95, https://content.hta.gov.uk/sites/default/files/2020-11/Code%20B.pdf (last visited 23 March 2023).

section 21 of the Registration of Births, Deaths and Marriages (Scotland) Act 1965, and clause 111(2) inserting a new subsection into section 56 of that Act, gives effect to this recommendation in relation to Scotland.

Death of the child

4.178 Where the surrogacy agreement has proceeded on the new pathway, we take the view that the death of the child more than six weeks after birth is covered by the general proposal we make regarding the legal parental status of the intended parents.[61] That is, in the new pathway, where:

(1) the child dies having survived beyond the six-week period of the surrogate's right to withdraw her consent; or

(2) dies within six weeks but the surrogate does not exercise her right to withdraw her consent during the six-week period

then the child will, for all purposes, be the legal child of the intended parents.

4.179 In these circumstances, in our preferred model of birth registration the intended parents can simply register the child's birth and there is no need for a separate recommendation on this point. In the alternative model of birth registration, the surrogate would need to register the birth, and a parental order certificate would still be automatically produced in the names of the intended parents after six weeks.[62]

4.180 A specific issue arises in respect of cases outside the new pathway where the child is born alive but subsequently dies before the parental order is made. In this case, the child may have died very shortly after birth, possibly as a result of complications or significant health issues; or alternatively, they may have had a healthy start to life and have been living with the intended parents in an established family for many months before their death. Whenever the death happens, it will be a tragedy for the parents and wider family, as it is where any child of a family dies. In the Consultation Paper, we provisionally proposed that where the child died before the making of the parental order, the surrogate should be able to consent to the intended parents being registered as the parents (before the expiry of the period allowed for registration of the birth), provided that the intended parents have made a declaration to the effect that the relevant criteria for the making of a parental order are satisfied, on registration of the birth.[63]

Consultation

4.181 Almost all of those personally involved in surrogacy agreed with this proposal. There was also widespread support from legal practitioners and legal representative organisations.

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61 See above, para 4.46 Recommendation 1.

62 See our discussion of birth registration below.

63 Consultation Question 17.

4.182 One intended parent noted a very practical consequence of permitting such birth registration: "[the intended parents] will be grieving and that piece of paper will give them protection to take leave from work. Work places rarely understand surrogacy."

4.183 Those who disagreed did so consistently with their belief that the surrogate should be the legal mother at birth and named on the birth certificate. Dr Rita D'Alton-Harrison disagreed on the basis that a declaration by the parents would usurp the function and jurisdiction of the court.

4.184 PROGAR and Nagalro were of the view that whether the child dies before registration, or after registration but before a parental order, the birth certificate must reflect the existing law as to who the parents are. They were also unsure how it is envisioned that legal parentage can be transferred to the intended parents. If it were an expedited parental order of some sorts, they may be inclined to support that but were unsure whether it is feasible. PROGAR and Nagalro also thought that there should be a minimum time set before which the surrogate can provide her consent.

Analysis

4.185 In their response, PROGAR and Nagalro pointed out that we had not dealt with a situation with regard to the death of a child born within the new pathway where the child dies before the intended parents register the birth and within the time in which the surrogate could object. We think that this situation can be covered by the same mechanism that we propose for those agreements outside the new pathway, which we now discuss.

4.186 Despite the support for our provisional proposal among those consultees who support surrogacy, we consider that we should amend it. We are concerned that, to follow the proposal in the Consultation Paper, would mean that we were effectively allowing, outside the new pathway, legal parental status to be assigned from the surrogate to the intended parents by private agreement between the parties. We do not think that this is consistent with how the parental order process (or indeed, legal parental status) should operate.

4.187 Instead, we now recommend that, where the child has died, there be a post-mortem parental order process. This would be available where the child has died:

(1) following an agreement which was never on the new pathway, and a parental order would in any event have been required in order for the intended parents to be the child's legal parents;

(2) following an agreement in the new pathway where the surrogate had withdrawn consent prior to the birth, so that the surrogate would be the legal parent at birth and the intended parents would need to seek a parental order; or

(3) following an agreement in the new pathway where the child has died, and the surrogate had withdrawn her consent within the six-week period after birth (regardless of whether the surrogate withdrew consent before or after the child's death). In this situation, the intended parents would be the legal parents.

4.188 In these first two situations (that is, where the surrogate is the legal parent at the time of the child's death), it should be possible for the intended parents to apply for a post-

mortem parental order so that they can be recognised as the parents of the deceased child. We recommend that the court be obliged to make such an order where the agreement meets relevant criteria for a parental order to be granted in the case of a living child. Clearly, in the instance of the child's death, the criterion that the child's home be with the intended parents would simply not be relevant. The best interests of the child test would also not apply.

4.189 For an order to be made, the surrogate would need to consent. There would be no power for the court to dispense with her consent, in contrast to the position that we recommend in respect of a living child, because the test for doing so would be the best interests of the child, which cannot apply.

4.190 In the new pathway situation set out above at (3), where the intended parents are the legal parents and the surrogate then withdraws consent, the surrogate would be able to apply for a post-mortem parental order. Again, the court may only make the order with the consent of the intended parents. Where this consent is forthcoming and the relevant criteria for an order to be made in the case of a living child are met, we recommend that the court be obliged to make an order.

4.191 We are conscious that all these options place grieving parties under a burden to make a parental order application. There is no easy solution here, given the very distressing nature of the circumstances. However, there is also no compulsion on any party to seek a post-mortem parental order.

4.192 The system of birth registration in relation to surrogacy that we recommend at paragraph 4.244 to 4.268 below would apply in these circumstances in the same way as it would if the child had not died.

4.193 With regard to the registration of death we recommend that the intended parents and surrogate, whichever is not the legal parent, should be added to the list of those able to act as informants of a death in the Births and Deaths Registration Act 1953 in England and Wales, and the Registration of Births, Deaths and Marriages (Scotland) Act 1965, if they intend to apply for a parental order or have such an application pending.

Recommendation 6.

4.194 We recommend that:

(1) where the child dies at any point before the court makes a parental order following an agreement governed by the parental order process, including where the surrogate has withdrawn her consent before the birth, then the intended parents may apply for a post-mortem parental order. The court will not have the power to dispense with the surrogate's consent to the making of a post-mortem parental order; and

(2) where the surrogacy agreement is on the new pathway, the child dies, and the surrogate withdraws her consent within six weeks of birth (whether before or after the death of the child), then she may apply for a post-mortem parental order. The court can only make the order with the intended parents' consent.

4.195 We also recommend that whichever of the surrogate and the intended parents is not the legal parent be added to the list of those in the Births and Deaths Registration Act 1953 in England and Wales, and the Registration of Births, Deaths and Marriages (Scotland) Act 1965 who can act as informants in the case of death, if they intend to apply for a parental order or have such an application pending.

4.196 Part 1 of Schedule 1 to the draft Bill gives effect to this recommendation. It operates, generally, by providing that a parental order under clauses 15, 17, or 21 may be made or continued after the death of the child, and by modifying those clauses so that they can take effect in relation to a deceased child and in line with the recommendations on consent.

Death of the surrogate

4.197 The Consultation Paper also sought views on the situation where, on the new pathway, the surrogate dies before the end of the period in which she can withdraw consent (where she has not already withdrawn consent). The Consultation Paper asked whether the agreement should not proceed in the new pathway, so that the intended parents would then be required to apply for a parental order.[64]

Consultation

4.198 There was limited support from surrogates and intended parents for the proposal that the automatic consequence of the surrogate's death should be that the intended parents have to apply for a parental order.

4.199 Of those who did support the proposal, some (such as PROGAR and Nagalro) thought that it should be possible for the intended parents to continue on the new pathway route if the surrogate's wishes could be reliably ascertained (while pointing out that this may be difficult to do). Professor Emily Jackson's view was similar; she thought that a compromise may be if the surrogate has died, the agreement can

[64] Consultation Question 18.

nevertheless proceed on the new pathway unless a relevant party has reasonable grounds for believing the surrogate would have raised an objection at a later period.

4.200 A few consultees advocated that the surrogate's family should decide what should happen or be involved.

4.201 All the surrogacy organisations and the majority of surrogates and intended parents were of the view that the intended parents should not have to apply for a parental order in this situation, typically based on the intention of the parties. One surrogate said:

> As a surrogate I would want the intended parents granted immediate legal parenthood whether I was alive or not. We go into surrogacy in the full knowledge that the baby we are carrying is not ours and being able to give that child back to its parents is the greatest joy.

4.202 COTS applied the "but for" reasoning – that is, but for the surrogate's death, they would have wanted the intended parents to be the parents and so it should continue on this basis. SurrogacyUK requires members to set out their wishes in wills before signing the surrogacy agreement, so wishes and intents are clearly expressed. NGA Law and Brilliant Beginnings did not think the default should be that the intended parents lose the right to be registered as legal parents. They queried why greater judicial oversight is required in these circumstances.

4.203 One point was raised concerning the practical implications of the proposal. Mills & Reeve LLP said:

> In the context of the surrogate's death the issue of a right to object may give rise to inheritance issues if she is treated as a legal parent at birth and the intended parents must then apply for a parental order. For example if the surrogate has not made a will excluding the child from inheriting from her.[65]

Analysis

4.204 We asked whether, if the surrogate died, in an agreement in the new pathway, during the period in which she could withdraw her consent, this should remove the agreement from the new pathway with the consequence that the intended parents would have to apply for a parental order. Intended parents, surrogates and surrogacy organisations generally did not agree that this should be the case, querying why the surrogate's death should mean that her intention that the intended parents should be the child's legal parents should be taken to have changed.

4.205 Since surrogacy is predicated on the intention of the parties, and it is important to respect those views, as expressed through the surrogacy agreement, we agree that the agreement should stay on the new pathway in the event of the surrogate's death. This would mean that it would only exit the new pathway where the surrogate has withdrawn her consent at any point prior to her death.

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[65] We note that in Scotland, a parent cannot disinherit their child entirely through testamentary provision. This is discussed in more detail at Chapter 15.

4.206 In the parental order route it is possible that the existing provision in sections 54 and 54A - for the surrogate's consent to be waived where she is incapable of giving agreement - could be interpreted to include circumstances where the surrogate has died without being able to give consent. We are not aware of a case where this has occurred. Nonetheless, we think it sensible for a new Act to specifically provide that consent may be dispensed with in these circumstances.

4.207 In the Consultation Paper we did not ask what should happen if a surrogate withdrew her consent within the six-week period post-birth, but then died either before she could make a parental order application, or before such an application was decided. We take the view that the surrogate's death should not bring an end to the legal effect of her withdrawal of consent, so we recommend that the application could be continued or made by certain people.

4.208 First priority to make or continue an application would go to any person named in the surrogate's will, or otherwise in writing, as the child's guardian. After any such person, we recommend that the surrogate's relatives should be able to make or continue an application, in the same priority order as set out in section 50(1) of the Human Tissues (Scotland) Act 2006 which governs decisions about organ donation or post-mortem examinations.[66]

4.209 The application would be for the surrogate, not the applicant, to be treated in law as the parent of the child. If an order was made, it would have the effect of removing the intended parents' legal parental status. As with any other parental order proceedings, the court's paramount consideration in deciding whether or not to make an order would be whether the lifelong welfare of the child would be served by recognising the deceased surrogate as their legal parent.

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66 That order is:

(1) the adult's spouse, civil partner or partner;

(2) the adult's child;

(3) the adult's parent;

(4) the adult's brother or sister;

(5) the adult's grandparent;

(6) the adult's grandchild;

(7) the adult's uncle or aunt;

(8) the adult's cousin;

(9) the adult's niece or nephew;

(10) a friend of longstanding of the adult.

Recommendation 7.

4.210 We recommend that:

(1) for a surrogacy agreement in the new pathway, where the surrogate dies within six weeks of the child's birth, the intended parents will automatically gain legal parental status in respect of the child unless the surrogate has previously exercised her right to withdraw her consent;

(a) if the surrogate does so before the birth of the child, she will be the legal mother and the intended parents will be able to apply for a parental order;

(b) if the surrogate does so in the six weeks following the child's birth, the intended parents will be the child's legal parents but the surrogate's representatives will be able to make, or continue, an application for a parental order in the surrogate's favour.

(2) the following people (in priority order) will be able to make or continue with the application on the surrogate's behalf:

(a) a person named by the surrogate as the guardian of the child;

(b) a person in a close relationship with the surrogate; or

(c) the relatives or a longstanding friend of the surrogate; and

(3) for a surrogacy agreement outside the new pathway, the law should specifically provide that the consent of the surrogate will not be required for a parental order where she has died before being able to provide such consent.

4.211 Part 3 of Schedule 1 to the draft Bill gives effect to this recommendation. It does so by providing that an order under clause 21 that the surrogate is the legal parent of the child can be made or continued by a relevant person, and by modifying clause 21 so that it can take effect in relation to a surrogate who has died.

Death of the intended parents

4.212 We proposed similar routes for both the new pathway and the parental order process in the event that both intended parents die.[67] For surrogacy agreements in the new pathway, the Consultation Paper provisionally proposed that, where both intended parents die during the surrogate's pregnancy, the intended parents should be registered as the child's parents on birth, subject to the surrogate not withdrawing her consent within the defined period.

4.213 For surrogacy agreements outside the new pathway, where both intended parents die during the surrogate's pregnancy or before a parental order is made, we asked

[67] Consultation Question 19.

whether it should be competent for an application to be made by an appropriate person[68] to be appointed as a guardian of the child and also to apply for a parental order in the name of the intended parent, subject to the surrogate's consent. Alternatively, we asked whether the surrogate (having registered the child's birth) should continue to be recognised as the legal parent, with a process for details of the intended parents (and any gamete donors) to be named in a surrogacy register. We refer to these respectively in the discussion that follows as the first and second options.

Consultation: the new pathway

4.214 Nearly all consultees in favour of surrogacy agreed with the proposal regarding the death of the intended parents in the new pathway. One surrogate said the surrogacy arrangement should stipulate who the legal guardians should be if the intended parents die, and this stipulation should be legally enforceable. Intended parents expressed their anxiety about what would happen to their child in this situation, with one saying that he personally was "very paranoid" that his daughter would be left in legal limbo if something happened to him and his partner.

4.215 The Church of England and a person born through surrogacy said that, if this were a non-surrogate birth, the parents would still be registered.

4.216 Responses that disagreed with the proposal were, in the majority, from those who disagreed with surrogacy, and advocated for a prohibition. The Nordic Model Now! template response stated that the deceased intended parents should not be registered as the legal parents and that the birth mother should always be the legal parent.

4.217 SurrogacyUK did not agree because of their view that the intended parents should be registered as the child's parents until the court decides otherwise. NGA Law and Brilliant Beginnings took a similar position.

4.218 PROGAR and Nagalro said that, in their view, appointed testamentary guardians should be a requirement under the new pathway, and should assume parental responsibility for the child upon birth. They considered that the surrogate should retain the right to object – and if she does so, she can then register the birth.

Consultation: parental orders

4.219 This question generated a range of answers, not only in favour and against, but also expressing support for the two different options outlined above. The first option would allow a person with an interest to apply for appointment of themselves as guardian of the child, and then to apply for a parental order to be made in favour of the deceased intended parents.

4.220 Resolution supported this option, but queried whether a local authority should have the ability to apply for a parental order in favour of the intended parents.

4.221 Other consultees, including Nordic Model Now! and those who replied using the Nordic Model Now! template, favoured the second option we outlined, of the surrogate

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[68] In terms of section 8 of the Children Act 1989 or s11 of the Children (Scotland) Act 1995.

being the legal mother in these circumstances and supplying information about the intended parents to the Surrogacy Register.

4.222 Dr Philippa Brice raised the scenario where the surrogate was happy for the intended parents to take care of the child but not persons unknown to her.

4.223 The HFEA did not express a view on their preferred option but, regarding the second option, raised a practical concern, of the need for a mechanism to verify the details of the intended parents provided by the surrogate. It questioned how the regulator would verify the accuracy of the details provided, and whether there would be a mechanism to enforce the surrogate to provide the information if she refused.

4.224 Professor Kenneth Norrie thought that the intended parents could be registered on the birth certificate as parents, but with no legal consequences (drawing an analogy with the provisions in sections 30 and 40 of the HFEA 2008). He said that allowing a parental order to be made in the name of the dead parents "would be losing touch with reality completely".

4.225 One surrogate thought the surrogate should be given the first right to become the legal parent, whereas another was not sure, saying that she would feel a duty of care to the child but that applying for a parental order might be best so that the judge could decide.

4.226 Some intended parents commented that there should be wills in place setting out who would be guardians for the child, and that our proposals made an already complex and emotional situation more complex.

Analysis

4.227 In respect of the new pathway, we note the high level of support for the proposal that, if the intended parents die within six weeks after the birth of the child, they will be the legal parents, subject to the surrogate's right to object. We remain of the view that the intended parents should be the child's legal parents in this situation.

4.228 For the avoidance of doubt, we do not recommend any specific provision for the death of the intended parents more than six weeks after the birth of the child, following a new pathway surrogacy agreement. If the surrogate did not withdraw her consent within the six-week period, the intended parents will be the legal parents of the child and there will be no scope to challenge this, in just the same way as it is for a child who has been conceived naturally. Since the publication of the Consultation Paper, case law has confirmed that where one intended parent dies but the other (if any) survives, a parental order can be made in favour of both parents, so that the deceased parent is recognised in law.[69] We think that this approach should be confirmed in statute, consistently with allowing two deceased parents to be recognised as legal parents, for both the new pathway and in the parental order process.

4.229 In respect of agreements outside the new pathway, we note that there was a mix of views regarding which option was to be preferred. Amongst those who supported

[69] *Re X* [2020] EWFC 39.

surrogacy, more favoured the option of it being possible to seek a parental order in favour of the deceased intended parents.

4.230 Where an agreement was never on the new pathway, or where the surrogate has withdrawn her consent before the birth, we note that the intention of all parties when entering into a surrogacy agreement is that the intended parents should be the parents of the child, and we acknowledge the importance of recognising that consistently across our surrogacy proposals. In non-surrogacy situations, a child would be recognised from birth as the child of deceased parent(s) and we see no reason why the position should be different here. Allowing the deceased intended parents to be recognised in law as the parents of the child respects the fact that the intended parents are the ones who initiated the pregnancy. It is also important to respect the right of the child to an identity and kinship based on that intended parental relationship.

4.231 In the Consultation Paper, we discussed whether it should be possible for an application to be made by a wide range of people to be appointed as the guardian of the child concerned, with that guardian then being able to apply for a parental order in the name of the intended parents. On reflection, we take the view that it is not necessary to link an application for guardianship to an application for a parental order in favour of the deceased intended parents.

4.232 That is because the provision of a process to recognise the deceased intended parents as legal parents for an agreement outside the new pathway would not prevent applications being brought before the court under the Children Act 1989 or the Children (Scotland) Act 1995 regarding guardianship. If the application for the deceased intended parents to be recognised as the legal parents through a parental order is successful, then their wishes, if any, as to who should be appointed as guardians for the child, can be implemented. Such wishes may well have been expressed in the intended parents' wills.

4.233 Instead, we recommend that certain people should be able to apply for a parental order on the deceased intended parents' behalf. These people will also be able to apply for a parental order if the surrogacy is on the new pathway and the surrogate withdraws her consent pre-birth. In order of priority, these people would be:

(1) a person named by the intended parents as the guardian of the child;

(2) the surrogate;

(3) a person in a close relationship with the intended parent at the time of their death; and

(4) another relative or longstanding friend of the intended parent.[70]

4.234 An appointment of a guardian by an intended parent's will would not have legal effect, because the intended parents would not be the child's legal parents, but we think that enabling such a person to apply for a parental order respects the intended parents' express intentions, and the surrogate's intention in entering into the surrogacy

[70] Set out in Schedule 1 paragraph 29 to the draft Bill.

agreement that the intended parents should make such decisions. This would reflect the situation in non-surrogacy births, where a child of deceased parents would be looked after by their named guardian.

4.235 If the guardian does not apply for a parental order, the surrogate would not have to do so if she did not wish to; the ability for the surrogate to do so would be an option for her, rather than a requirement. If none of the people listed above applied for a parental order in favour of the deceased intended parents, the surrogate would remain the legal parent of the child.

4.236 Making the intended parents the child's legal parents after their death would come with some legal effects but not others. For example, because the intended parents' death would occur before they became the child's legal parent, the child would not inherit from them in cases where the parents died intestate, or where their wills referred to bequests to their 'children'. However, a parental order making deceased intended parents the child's legal parents would have the effect of establishing wider kinship links with the intended parents' other relatives, which may be significant to the relationship the child has with those relatives as well as being relevant to any future inheritances.

4.237 A parental order naming a deceased intended parent would not give effect to any guardianship nominated in the intended parents' wills, because the intended parents would not have been the child's parents when any such nomination was made.[71] Any guardian nominated by the intended parents would still be able to be named as the child's guardian by the court.

4.238 Importantly, the making of an order that the deceased intended parents are the child's legal parents would mean that the surrogate is not the child's legal parent.

4.239 In circumstances where none of those listed above wishes to apply for a parental order in favour of the deceased intended parents, we also think that there is merit in creating a route for the surrogate to provide information about the intended parents (and gamete donors) to the Surrogacy Register in cases which have never been on the new pathway. In cases on the new pathway where the surrogate withdraws her agreement, that information will be placed on the SR through the RSO fulfilling their usual duties.

4.240 Where a sole intended parent, or both intended parents in a couple, die before the assisted reproduction procedure is carried out (and the surrogate is aware that they have died), they will not be the parents of any child born as a result of the procedure. However, in a new pathway case where one parent dies in this way but the other survives, we recommend that the surviving intended parent should be able to be the child's legal parent from birth, and that they are able to obtain an order that the deceased intended parent is a parent for the purposes of the birth register. This reflects precedent that the gametes of a deceased spouse can be used in a

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[71] Children Act 1989 s 5(3); Children (Scotland) Act 1995 s 7(1). And to note that a guardian purportedly nominated in this way is one of the categories of people given the ability to apply for a parental order on behalf of the deceased parents, in the draft Bill (see Sch 1, Part 2, paras 29 and 30).

surrogacy,[72] and that a parental order can be made in the name of an intended parent who dies before the child's birth.[73]

[72] *Jennings v Human Fertilisation and Embryology Authority* [2022] EWHC 1619 (Fam), [2022] 6 WLUK 259.

[73] *Y v Z* [2020] EWFC 39, [2020] 5 WLUK 343.

Recommendation 8.

4.241 We recommend in the event of the death of both intended parents, or a sole intended parent, that:

(1) for a surrogacy agreement in the new pathway, where the deaths occur less than six weeks after the birth of the child, the intended parents will be the legal parents of the child, subject to the surrogate having the right to withdraw her consent;

(2) for a surrogacy agreement outside the new pathway, the following people, in priority order, will have the standing to apply for a parental order in favour of the deceased intended parents:

(a) a person named as the guardian of the child by the intended parents;

(b) the surrogate;

(c) a person who was in a close relationship with the intended parent at the time of their death; or

(d) another relative or friend of longstanding of the intended parents; and

(3) for a surrogacy agreement outside the new pathway, where none of the above persons wishes to apply for a parental order in favour of the deceased intended parents, that it be possible for the surrogate to provide information about the intended parents (and gamete donors) to the HFEA for inclusion on the Surrogacy Register.

4.242 We also recommend that, where there are two intended parents and one dies:

(1) for a surrogacy agreement in the new pathway:

(a) where an intended parent dies less than six weeks after the birth of the child, both intended parents will be the legal parents of the child (where the surrogate has not withdrawn her consent pre-birth); and

(b) where an intended parent dies before the assisted reproduction procedure, the surviving intended parent can be the child's legal parent from birth, and can, if the deceased intended parent is genetically linked to the child, apply for an order so that the deceased intended parent is named on the child's birth certificate; and

(2) for a surrogacy agreement outside the new pathway, where an intended parent dies before the application for the parental order, it shall be possible, on an application by the surviving intended parent, for a parental order to be made in favour of both parents.

4.243 Part 2 of Schedule 1 to the draft Bill gives effect to these recommendations. It does so by providing that the court may make an order under clause 15 or 17 for a child to be treated in law as the child of an intended parent who has died, following an application by a relevant person, and by modifying those sections so that they can function in relation to an intended parent who has died. Different provision is made for circumstances where one or both intended parents in a couple has died, and for whether the intended parents have died before or after an assisted reproduction procedure. Clause 10 of the draft Bill gives effect to our recommendation in relation to the death of one intended parent before the procedure is carried out in a new pathway case.

BIRTH REGISTRATION

How birth registration works in the new pathway

4.244 In developing our policy post-Consultation, it became apparent that our likely recommendations for reform of birth registration in surrogacy cases were not compatible with UK Government policy on birth registration. As we set out in more detail below, our position is that, on new pathway cases, the intended parents should be registered as the parents of the child on the birth certificate. However, the UK Government has successfully defended judicial review proceedings regarding birth registration on the basis that the coherence of the birth registration system requires the person who gives birth to be registered as the mother.[74] The Divisional Court held that the need to maintain that coherence meant that any interference with Article 8 ECHR rights was proportionate, as it served a legitimate aim.

4.245 In light of the UK Government's policy position on birth registration, we agreed with the UK Government that we would provide a means by which our final recommendations for reform could operate in a context in which the surrogate is registered as the mother of the child on the birth certificate. We have therefore developed two separate, and alternative, models of birth registration:

(1) our "preferred" model, which meets the needs of the child, the surrogate and the intended parents on the new pathway and fits conceptually with it; and

(2) an "alternative" model, which attempts to provide the best outcome for the child, the surrogate and intended parents, within the confines of Government's policy on birth registration, while noting that it is insufficient to meet their needs, and does not fit coherently with our policy for the new pathway.

4.246 In this section, we set out both our "preferred" model of birth registration, and the "alternative" one. Which one is eventually adopted is a matter for the UK

[74] *R (on the application of McConnell & Anor) v The Registrar General for England and Wales* [2020] EWCA Civ 559.

Government,[75] but we note our very strong view that the preferred model is the best option for a reformed law of surrogacy, as best meeting the needs of all concerned.[76]

Preferred model of birth registration

4.247 In the Consultation Paper, we anticipated that where the intended parents were the legal parents of the child on birth, they would be able to register the child's birth and would be named as parents on the birth certificate. In line with our provisional proposal that the surrogate would have a right to object lasting for one week less than the applicable birth registration period, we took the view that the intended parents would then have to register the birth within that final week of the period allowed for birth registration. The applicable birth registration period for England and Wales is six weeks and in Scotland it is three weeks. As such, we proposed that the surrogate's right to object would last for five weeks in England and Wales and two weeks in Scotland.

4.248 In this Chapter we have recommended a different approach to the surrogate's right to withdraw her consent than that provisionally proposed in the Consultation Paper. We no longer link the surrogate's right with the period of birth registration. Instead, we recommend that the surrogate's right to withdraw her consent should, in all cases, last for six weeks from the birth of the child. As a result, we now take the view that the intended parents should be able to register the child's birth during the usual birth registration period. This means that birth registration can happen immediately or soon after birth, which promotes compliance with Article 7 of the UNCRC, which requires (amongst other things) that "The child shall be registered immediately after birth…".

4.249 As is the case for all births, the registrar will have been informed by the hospital of the child's birth.[77] From the registrar's perspective, either the surrogate or intended parents would be permitted to register the birth (that is, to act as an informant), with the intended parents being named as the permitted informants in the relevant statutes. Although it is expected that the intended parents will want to, and will, register the birth, this approach avoids placing the burden on the registrar of seeking to control who can act as an informant of the birth. The intended parents or surrogate would be required to produce the Regulated Surrogacy Statement, when registering, and, in addition, the intended parents would be required to make a declaration that the surrogate had not withdrawn her consent to the new pathway agreement before the child was born. The provision of the Regulated Surrogacy Statement by the intended

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75 The registration of births is generally within the legislative competence of the Scottish Parliament. However, the provisions considered in this Report are particular to surrogacy, which is a reserved matter (Scotland Act 1998, Sch 5, Pt II, Section J3). We think it likely that these provisions would relate to the reserved matter of surrogacy, within the terms of section 29(2)(b) of the Scotland Act 1998 and be outwith the legislative competence of the Scottish Parliament. As such, policy responsibility for special rules relating to the registration of births arising through surrogacy arrangements would rest with the UK Government.

76 In the Consultation Paper, at Consultation Question 45, we invited consultees' views on whether the entire birth registration system in England and Wales required reform, and the nature of any possible reform. Given that this question was a call for evidence and would have an impact beyond the scope of this project, we do not discuss it further in this paper. The Law Commission of England and Wales is considering the evidence provided by consultees in its discussions with Government in relation to its 14th Programme of Law Reform.

77 For England and Wales see National Health Service Act 2006, s 269 and National Health Service (Wales) Act 2006, s 200. For Scotland see Registration of Births, Deaths and Marriages (Scotland) Act 1965, s 16A.

parents ensures that the registrar knows that the birth is the result of a surrogacy agreement, that they are the legal parents, and can therefore appear on the birth certificate. It is not necessary for the surrogate to produce the Regulated Surrogacy Statement as she would not be seeking to register the intended parents as legal parents on the birth certificate if she had withdrawn her consent pre-birth.

4.250 If the surrogate had withdrawn her consent pre-birth, she would be the legal parent and should be named as such on the birth register. If the intended parents were to seek to register the birth in their names, and made a false declaration that the surrogate had not withdrawn consent, they would be guilty of an offence under the existing birth registration legislation of providing incorrect information to the registrar.

4.251 The usual other informants[78] would still be permitted to act as informants. They would have to provide to the registrar both the Regulated Surrogacy Statement and a declaration by the intended parents that the surrogate had not withdrawn her consent to the new pathway agreement before the child was born. If the informants are unable to provide these documents, the registrar would be prohibited from entering the name of the intended parents, or indeed any name for parents, on the birth certificate (but not prohibited from registering the birth at all, so it will be possible for the child, in these circumstances, to be issued with a birth certificate with the parents' names omitted, as is already possible in other circumstances).

4.252 In the ordinary course of events, where the surrogate has not withdrawn her consent, we expect it to be the intended parents who would register the child's birth, in their names. As such, the names of the intended parents would appear on the full birth certificate, which would also be marked to reflect that the birth was the result of a surrogacy arrangement. The intended parents would each be registered as a "parent" of the child (rather than "father" or "mother"). The surrogate's name would not appear on the birth certificate but would be recorded on the Surrogacy Register so as to ensure that the surrogate-born child will be able to access this information in the future, if they so choose.

4.253 The names of a child's parents are not recorded on the short certificate,[79] and we do not recommend that the short form birth certificate should include information about whether the birth was the result of a surrogacy arrangement. The omission of any reference to the surrogacy on the short certificate is justified by the need to respect the surrogate-born person's right to privacy, as short certificates may be used as a

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78 Aside from the mother and father of the child the following persons are qualified informants for the purposes of birth registration: (a) any relative of either parent of the child, being a relative who has knowledge of the birth; (b) the occupier of the premises in which the child was, to the knowledge of that occupier, born; (c) any person present at the birth; (d) any person having charge of the child. See Registration of Births, Deaths and Marriages (Scotland) Act 1965, s 14(2). For England and Wales see the Births and Deaths Registration Act 1953, s 1(2) and 1(3) which provides the persons who shall be qualified to give information concerning a birth. Those persons, for the purposes of the 1953 Act, are (a) the father and mother of the child; (b) the occupier of the house in which the child was to the knowledge of that occupier born; (c) any person present at the birth; (d) any person having charge of the child; (e) in the case of a still-born child found exposed, the person who found the child.

79 There are, essentially, two types of birth certificate: a "full" birth certificate (or "full extract" in Scotland), which shows information about the parents, and a "short" birth certificate (or "abbreviated extract" in Scotland), containing information about the child only. We have referred only to certificates here for ease of reference.

means of providing identification to Government bodies and other organisations. We do not think that people should (in effect) be forced to disclose personal information about their origins whenever identification is required.

4.254 If the surrogate has withdrawn her consent during the six weeks following the birth of the child, then in accordance with our recommendations on legal parental status,[80] legal parental status in this context would remain with the intended parents (pending a parental order hearing). Under such circumstances, the intended parents will register the birth as legal parents.

4.255 If the surrogate were to seek to register the birth in her name (rather than as an informant), she would be guilty of an offence under the existing birth registration legislation of providing incorrect information to the registrar.[81]

4.256 Where the surrogate withdraws her consent after the birth of the child, legal parental status can be transferred to her through an application for a parental order. Following the parental order hearing, two scenarios may arise:

(1) the court may make a parental order in favour of the surrogate. If so, then a parental order certificate would be issued showing the surrogate as the legal parent. The parental order certificate then replaces the original birth certificate, which would be sealed; or

(2) if the court does not make a parental order in the surrogate's favour, then no change would be necessary to the existing registration of the intended parents.

4.257 If the surrogate has withdrawn consent prior to the birth of the child, then legal parental status would remain with the surrogate and the surrogate's name would appear on the birth certificate as parent.[82] The intended parents will be required to apply for a parental order. If granted, then – as is the case now – the parental order certificate replaces the original birth certificate, which would be sealed.

4.258 In all scenarios, the surrogate's name would be recorded in the Surrogacy Register, as would the intended parents', with signposting to the existing HFEA Register, where the details of any gamete donors would be recorded.

4.259 In cases of stillbirth, we recommend that the surrogate's written consent, rather than a copy of the Regulated Surrogacy Statement and a declaration by the intended parents, would be required in order to register the stillbirth in the intended parents' names.

Alternative model of birth registration

4.260 As noted above, while our preferred model provides a conceptually coherent approach to birth registration in surrogacy, it is not compatible with the UK Government's stance

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80 Recommendation 3, para 4.124 to 4.127.

81 Births and Deaths Registration Act 1953 s 36(a) in England and Wales, and the Registration of Births, Deaths and Marriages (Scotland) Act 1965 s 53(3) in Scotland.

82 Together with any other legal parent, for example an intended father or mother named as second legal parent under the HFEA rules.

that the birth certificate must name the person who gives birth as mother. We have therefore mapped out an alternative model of birth registration which seeks to meet the needs of the surrogate-born child, the surrogate, and the intended parents, as best it can, while respecting UK Government policy.

4.261 We therefore suggest, as an alternative, that following a surrogacy agreement in the new pathway, the surrogate (as now, when following the parental order route) would be registered as the mother on the birth certificate. However, at the end of the six-week period during which the surrogate may withdraw her consent, and assuming that she has not done so, a parental order certificate would automatically be issued to the intended parents, showing them as the parents, without the need for any judicial action or positive step on their part. The original birth certificate would be sealed at that point, as is currently the case when a parental order is granted.

4.262 As in our preferred model, the intended parents would be eligible to act as informants, and would need to provide a copy of the Regulated Surrogacy Statement to the registrar, together with the declaration that the surrogate had not withdrawn her consent pre-birth. This enables the registrar to note that it is a surrogacy birth, and that the parental order certificate should be issued automatically six weeks after birth. Alternatively, the surrogate could act as informant, and again would need to provide the Regulated Surrogacy Statement. As in any circumstance, if the informants were to give false information, this would be an offence under the existing birth registration legislation of providing incorrect information to the registrar.

4.263 It is important to note that while being *registered* as the mother, the surrogate in this scenario would not have legal parental status unless she had withdrawn her consent prior to the child's birth. If she had done so, then a parental order certificate would not be issued, and the intended parents would need to apply for a parental order to become the legal parents.

4.264 If the surrogate withdraws her consent after the child has been born, then the parental order certificate would still be automatically issued to the intended parents after six weeks. The automatic issue of the certificate reflects the fact that, under our recommendations, the surrogate's withdrawal of consent post-birth does not affect legal parental status. Parental order proceedings can then be brought by the surrogate. If the surrogate's parental order application is unsuccessful, then no further action would need to be taken. If the surrogate's parental order application succeeds, then there are two ways to reflect the child's birth registration:

(1) First, the surrogate could be issued with a parental order certificate to replace the original birth certificate, as is the usual outcome in parental order applications.

(2) Secondly, the entry in the parental order register relating to the initial parental order certificate issued to the intended parents could be removed, and the original birth certificate showing the surrogate's name could stand.

We consider that General Register Office/National Records of Scotland ("GRO/NRS") are best placed to determine which approach is to be preferred, given that they raise operational considerations.

4.265 This alternative proposal on birth registration would address the UK Government's concerns about maintaining the coherence of the birth registration system. It is not, however, our preferred approach. Crucially, it fails to address the desire of intended parents and surrogates for the intended parents to be named as parents on the original birth certificate. In addition, while it would be unlikely to require as significant a shift in birth registration practice as our preferred approach, GRO/NRS would still have to devise a process for the automatic issuing of the parental order certificate. We have not sought to provide details of that process, as it will, in part, depend on GRO's/NRS' operational requirements.

Recommendation 9.

4.266 We recommend that, for surrogacy agreements on the new pathway where the surrogate has not withdrawn her consent before the birth of the child:

(1) the intended parents will be named as the child's parents on the birth certificate;

(2) in order for the intended parents to be named as the child's parents on the birth certificate:

(a) any informant registering the birth will be required to provide the registrar with the Regulated Surrogacy Statement; and

(b) any informant other than the surrogate will be required to provide the registrar with a declaration made by the intended parents that the surrogate had not withdrawn her consent before the child was born;

(3) the intended parents or the surrogate will be named as informants who can register the birth;

(4) the full birth certificate in England and Wales, or full extract in Scotland, will be marked to reflect that the birth was a result of a surrogacy agreement;

(5) the short certificate in England and Wales, or abbreviated extract in Scotland, will not include information about whether the birth was a result of a surrogacy agreement.

4.267 Clause 106 and Part 1 of Schedule 5 (for England and Wales) and clause 107 and Part 1 of Schedule 6 (for Scotland) give effect to this recommendation, that is, to our preferred model of birth registration. In England and Wales, the provisions would operate by amending sections 9, 10, 10A, 29 and 41(1) of, and by inserting a new section 10ZB into the Births and Deaths Registration Act 1953. They would also amend uncommenced provisions about birth registration which are found in the Births and Deaths Registration Act 1953 as amended by schedule 6 to the Welfare Reform Act 2009 and the draft Bill. In Scotland, the provisions would operate by amending sections 14, 18, and 20 of, and inserting new sections 18C and 18D into, the Registration of Births, Deaths and Marriages (Scotland) Act 1965.

4.268 In each of Schedules 5 and 6, to the draft Bill Part 2 gives effect to the alternative model, again by amending the Births and Deaths Registration Act 1953 (England and Wales) and the Registration of Births, Deaths and Marriages (Scotland) Act 1965.

Chapter 5: Parental responsibility and parental responsibilities and parental rights

5.1 Having considered the acquisition of legal parental status by the intended parents, this chapter looks at the issue of parental responsibility/parental responsibilities and parental rights ("PRRs") [1] in respect of children born as a result of a surrogacy arrangement. Parental responsibility/PRRs govern the practical day-to-day care of the child, and include the right to have contact and residence with the child.[2] Parental responsibility/PRRs are separate from legal parental status, and it is possible to have one without the other. A legal parent with no parental responsibility/PRRs cannot take practical decisions in relation to the care and upbringing of the child. Parental responsibility/PRRs come to an end when the child reaches the age of 16/18.[3]

5.2 In this chapter we consider who should have parental responsibility/PRRs where a child is born as a result of a surrogacy agreement on the new pathway; whether any restrictions should be placed on either party's parental responsibility/PRRs on the new pathway; whether any reform to parental responsibility/PRRs is required when intended parents seek a parental order; whether there should be provision for parental responsibility/PRRs as an interim measure as part of the parental order process, in England and Wales, and in Scotland; and whether the surrogate or intended parents should be able to seek any parental responsibility/PRRs in respect of the child after legal parental status has been finally determined in favour of the other party.

PARENTAL RESPONSIBILITY/PARENTAL RESPONSIBILITIES AND PARENTAL RIGHTS OF THE INTENDED PARENTS ON THE NEW PATHWAY

5.3 Under the current law, intended parents will not have parental responsibility/PRRs in respect of the child until the parental order is granted, unless they seek interim

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1 In England and Wales, the term is "parental responsibility", while in Scotland it is "parental responsibilities and parental rights", or PRRs. The substance of the responsibilities/rights is largely the same in both jurisdictions.

2 In Scotland, PRRs are set out in the Children (Scotland) Act 1995, ss 1 and 2 (see Glossary). It is possible for a legal parent to have only some or no PRRs, ie by reason of an order under s 11(2)(a) of the Children (Scotland) 1995 Act depriving them of PRRs, or on the making of a permanence order under s 80 of the Adoption & Children (Scotland) Act 2007, whereby the only remaining parental responsibility/right (usually) relates to contact (ss 81 and 82). A legal parent will lose PRRs on adoption of the child by another person(s), as they will cease to be a legal parent of the child (s 35 of the Adoption and Children (Scotland) Act 2007).

In England and Wales, s 3(1) of the Children Act 1989 defines parental responsibility as "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property". A legal parent can lose parental responsibility on adoption of the child by another person(s), as they will cease to be a legal parent of the child (s 46 Adoption and Children Act 2002).

3 In England and Wales, parental responsibility for a child continues until 18, as a child is defined as a person under the age of 18 (s105 Children Act 1989); however s9(6A) of the Act provides that the court will not make an order under s8 of the Act (a child arrangements order or other order in respect to a child) which will continue after the child has reached the age of 16, save in exceptional circumstances. In Scotland, PRRs come to an end when the child turns 16, in terms of the Children (Scotland) Act 1995, s1(2), but note that s1(2)(b) provides for the responsibility of providing guidance to the child continues until the child is 18.

parental responsibility (in England and Wales) or raise a separate action for PRRs under the Children (Scotland) Act 1995 (in Scotland). In the Consultation Paper we provisionally proposed that where a child is born as a result of a surrogacy agreement on the new pathway, the intended parents should acquire parental responsibility (or PRRs) on the birth of the child. Secondly, we provisionally proposed that if the surrogate were to withdraw her consent to the agreement up to six weeks after the birth of the child, the intended parents should continue to have parental responsibility (or PRRs) where the child is living with them or being cared for by them, and they intend to apply for a parental order.[4]

5.4 This question concerns the parental responsibility/PRRs of the intended parents. It is possible (in any circumstance)[5] for more than two adults to hold parental responsibility/PRRs in respect of a child.[6] Accordingly, any recommendations here regarding the parental responsibility/PRRs held by the intended parents do not inevitably exclude or include the surrogate: whether she has parental responsibility/PRRs is a separate question, which we deal with in paragraphs 5.18 to 5.35.

Consultation

5.5 There was a high level of support from those personally involved in surrogacy agreements for the proposal for the intended parents on the new pathway to have automatic parental responsibility/PRRs from the birth of the child. However, there was some confusion amongst consultees, with some conflating parental responsibility/PRRs (being the legal rights required for day-to-day care of the child) with legal parental status.

5.6 Of those who supported the proposal, a range of reasons were given, including the welfare of the child, which will typically be best served where the people taking care of them have these rights. The importance to the child was drawn out by Zaina Mahmoud (legal academic), who emphasised the need for certainty and clarity: "(t)o allow the IPs [intended parents] parental responsibility on birth would be a great step in a more open, certain, and safe environment for surrogacy to thrive in." Referring to her research with surrogates, she highlighted that every surrogate interviewed as part of her fieldwork agreed that the intended parents should be vested with parental responsibility/PRRs from birth. This was principally because none of the surrogates

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4 Consultation Paper, para 8.134, Consultation Question 27.

5 Children Act 1989, s 2(5) and Children (Scotland) Act 1995, s 2(2).

6 For example, parental responsibility could be held by both parents and by a person (such as a relative) with whom the child lives who has obtained a child arrangements order under s 8 of the Children Act 1989 (which by operation of s 12 grants them parental responsibility whilst the child lives with them). Similarly, PRRs could be granted to a non-parent, (for example, someone with whom the child is living under a residence order, by operation of s 11 of the Children (Scotland) Act 1995), and shared with the legal parent(s) who have PRRs.

A local authority may also hold parental responsibility in England and Wales under s 33 of the Children Act 1989 where the child is subject to an interim or final care order, or PRRs in Scotland where a child is subject to a permanence order (Adoption and Children (Scotland) Act 2007, ss 81 and 82). These may be shared with the child's parents or with other persons (eg a relative).

felt that they should be responsible for a baby whom they had no intention of raising or caring for.

5.7 A further reason provided by consultees for supporting the proposal was the stress for intended parents of not having parental responsibility/PRRs until the parental order is made (which can also adversely impact on the child). An intended parent explained that:

> it creates a situation of stress - if something were to happen to us or to the surrogate or her husband while [the baby] was still not legally our responsibility, would have created a very complex situation. This would only have occurred in the event of a tragedy, which is certainly not when you would want to have to deal with an additional court procedure.

5.8 Other consultees restated their opposition to the new pathway, and its implications for legal parenthood, generally.

Parental responsibility/PRRs where the surrogate has withdrawn her consent

5.9 In relation to the parental responsibility/PRRs of the intended parents where the surrogate withdraws her consent, the intentions of the intended parents were considered significant by some consultees. For example, some believed that the intended parents should retain parental responsibility/PRRs only where they have actually applied for a parental order, or where there is some other evidence provided of the acquisition of parental responsibility/PRRs by the intended parents. The Family Justice Council was concerned about what would happen where a parental order was not applied for.

5.10 In contrast, other consultees did not consider the intended parents' intentions in relation to applying for a parental order to be significant. For example, one consultee suggested that intended parents should have parental responsibility where they have care of the child or wish to do so.

Analysis

5.11 The question of whether intended parents should have parental responsibility/PRRs automatically at the birth of the child produced both strong support and strong opposition. Those opposed to surrogacy were concerned about the impact that this would have on surrogates, and the potential conflict with the UN Special Rapporteur's recommendations. Those who supported it focused primarily on the best interests of the child, and the advantage that this would bring to the parent/child relationship. We recognise the significance of the UN Special Rapporteur's Report and the Hague Convention. We have set out our analysis of these and of the Verona Principles in Chapter 3.

5.12 As a matter of law, the best interests of the child are the paramount consideration in any question regarding parental responsibility/PRRs.[7] The best interests of a child born as a result of a surrogacy arrangement require that the intended parents have the legal tools which they need to take care of the child from birth, where they have

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7 Children Act 1989 s 1(1); Children (Scotland) Act 1995, s 11(7)(a); The Human Fertilisation and Embryology (Parental Order) Regulations 2018 (SI 2018 No 1412) ("the 2018 Regulations").

care of the child. This care and responsibility from birth by the intended parents, rather than the surrogate, reflects the intentions of all parties in entering into the surrogacy agreement. It is not in the child's best interests to live with intended parents who do not have the legal responsibility or right to take such vital decisions as those concerning health care and treatment, or living arrangements. Equally, the child's welfare can be put at risk by delay in obtaining agreement to matters such as medical care, or by disputes relating to care arrangements for the child. While any stress caused to the intended parents by the current legal position is not by itself a reason to recommend reform, we note that situations that cause additional stress for any adult caring for a newborn child (a time which is in itself stressful) can have negative consequences for the child. It is therefore in the best interests of the child to remove these sources of stress and uncertainty for intended parents.

5.13 It is also important to emphasise that this question focuses on surrogacy agreements on the new pathway, where the parties will have undertaken significant pre-conception screening and safeguarding before entering into the agreement. As a result of this, the intended parents will be the legal parents from birth.[8] To propose a regime which recognises one party as the legal parent at birth but nevertheless denies them parental responsibility/PRRs would be counter-productive and contradictory.

5.14 Accordingly, we recommend that, on the new pathway, intended parents should have parental responsibility/PRRs from the birth of the child.

5.15 This recommendation is predicated on the consent of the surrogate to the new pathway from before conception, and her continuing consent throughout pregnancy and after birth. If the surrogate withdraws her consent, then different considerations arise.

5.16 Where the surrogate withdraws her consent during pregnancy, then the agreement will exit the new pathway, and the surrogacy will proceed as for any surrogacy where the intended parents seek a parental order. However, where the surrogate withdraws her consent at any point in the six weeks following the birth of the child, the intended parents will be the legal parents until such time as a court determines a parental order application.[9] In this situation, the question to be addressed is whether the intended parents should still have parental responsibility/PRRs until the parental order application is determined.

5.17 We think that intended parents should retain parental responsibility/PRRs. The key factor is who the child is living with, or who is caring for the child: the aim of the proposal was to ensure that where this was the intended parents, they would have the parental responsibility/PRRs necessary to do so effectively. However, the proposal in the Consultation Paper required not only that the child be living with the intended parents but also that they intended to apply for a parental order. This was predicated on our provisional proposals for the operation of the new pathway in the Consultation Paper, under which if the surrogate withdrew her consent, she would be the legal parent (even when this withdrawal of consent took place after the birth of the child). Under our recommendations, the position in the situation where the surrogate

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8 Ch 4, para 4.46, Recommendation 1.

9 Ch 4, para 4.124, Recommendation 3.

withdraws her consent in the six weeks after birth is different; the intended parents will remain the legal parents of the child. As such, there will be no need for them to apply for a parental order. Accordingly, the criterion of intention to apply for a parental order is unnecessary. Thus, intended parents will have the parental responsibility/PRRs that they need to make decisions about the child, most crucially in the case of medical treatment, where the child is living with them or being cared for by them. We include the second part of this formulation to make clear that the intended parents should have parental responsibility/PRRs in a situation where, for example, the child is in hospital (should 'living with' not be interpreted to cover this situation) and where the child is primarily living with the surrogate, but the intended parents are caring for the child on occasion.

PARENTAL RESPONSIBILITY/PARENTAL RESPONSIBILITIES AND PARENTAL RIGHTS OF THE SURROGATE ON THE NEW PATHWAY

5.18 Under the current law, the surrogate, as legal mother at birth, automatically has full parental responsibility/PRRs upon the birth of the child. These are removed by the court, with her consent, when the parental order is made. However, as the essence of a surrogacy agreement is that the surrogate will not have day-to-day care of the child after birth, it raises the question as to whether she needs the day-to-day responsibilities and rights which the law provides. We recognise that the surrogate may not need – or even want – parental responsibility/PRRs for the child, but that ensuring that she has them offers her (and potentially the child) protection in the period immediately following birth. In the Consultation Paper we provisionally proposed that, for surrogacy agreements on the new pathway, the surrogate should retain parental responsibility/PRRs for the child born as a result of the agreement until the expiry of the period during which she can withdraw her consent, assuming that she does not withdraw her consent in that period.[10]

Consultation

5.19 As with the previous question, it was apparent that some consultees were confused in their responses about the difference between legal parental status and parental responsibility/PRRs, or did not appreciate that parental responsibility/PRRs can be shared by more than two people. The practical significance of parental responsibility/PRRs, and the fact that (even in non-surrogacy situations) they may be shared between more than two adults, are both at the heart of this discussion.

5.20 This proposal was largely supported by those professionally involved in surrogacy. Most of those supporting the proposal did not give reasons. It was generally not supported by those involved in surrogacy as surrogates, intended parents, or the surrogacy organisations. The following arguments were put forward by consultees:

(1) requiring surrogates to be holders of parental responsibility/PRRs is contrary to their intention not to parent the child to whom they give birth;

(2) the surrogate holding parental responsibility/PRRs in the new pathway undermines the certainty offered in the new pathway to intended parents; and

[10] Consultation Question 28.

(3) sharing parental responsibility/PRRs with up to two intended parents could needlessly complicate decision-making, which could be contrary to the child's best interests (for example, in medical decision-making).

5.21 Surrogates and intended parents who disagreed with the provisional proposal typically advanced arguments of the first type. One consultee who is a surrogate said simply: "I am a surrogate and do not want to bear any responsibility for the child after they are born".

5.22 Consultees also disagreed on the basis that it could cause confusion for health professionals, or that the surrogate should only have parental responsibility/PRRs if she had withdrawn her consent.

5.23 Consultees who did not support surrogacy or the new pathway, disagreed with the intended parents acquiring parental responsibility/PRRs automatically. However, some consultees who disagreed with the new pathway nevertheless supported this proposal, to recognise the surrogate's parental responsibility/PRRs.

Analysis

5.24 Whether the surrogate has parental responsibility/PRRs is a critical issue. It seems counter-intuitive in a surrogacy agreement to allocate very practical childcare rights and responsibilities to someone who has entered the agreement with no intention of providing that practical care. Giving surrogates parental responsibility/PRRs (where they had not withdrawn their consent) would run contrary to the intentions behind the agreement, and we found there to be force in this argument.

5.25 On further reflection, however, we have decided against the approach of removing parental responsibility/PRRs for the surrogate during the period within which she can withdraw consent. In the rare instances where the surrogate may change her mind about the arrangement, or where she may simply want more time to come to a decision about whether she is going to withdraw consent, we feel that it is important that she is supported in doing so. If the surrogate had neither legal parental status nor parental responsibility/PRRs for the child born of the agreement, she would effectively be a legal stranger to the child once born. There would be nothing to legally underpin her continuing care of the child and the intended parents could simply remove the child from her care, from the moment of birth. If she wished to have any post-birth contact with the child, she would be dependent on the agreement of the intended parents or a court order for contact, in the absence of having parental responsibility/PRRs herself.

5.26 We do not think that this outcome would be appropriate for the child, the surrogate, or medical professionals faced with this situation.

5.27 We are not persuaded by counter-arguments based on the potential confusion arising from multiple people holding parental responsibility/PRRs. Across family law, it is not unusual for parental responsibility/PRRs to be shared by more than two people. Given that existing law allows parental responsibility/PRRs (unlike legal parental status) to be shared amongst more than two parties, we were not persuaded that it would be confusing for parental responsibility/PRRs to be shared between the surrogate and the intended parents for a relatively short period of time (six weeks). There are

currently provisions which operate to resolve any issues when there is a disagreement between holders of parental responsibility/PRRs, and there would be no reason for those provisions not to apply here.[11]

5.28 We also note that some consultees were not aware of what happens when more than one person holds parental responsibility/PRRs. In England and Wales, generally, the consent of only one holder of parental responsibility is sufficient to enable medical treatment for a child (except in specified circumstances set out in case law, such as the circumcision of a child).[12] In Scotland, any adult with PRRs can exercise them independently of other PRR holders, subject only to one statutory exception, whereby consent of the other PRR holder(s) is required when taking the child out of the country.[13] Consequently, any concerns raised by consultees that the law would impose parental responsibility/PRRs contrary to the surrogate's intentions can be answered by the fact that, provided the intended parents exercise their parental responsibility/PRRs, there is no requirement for the surrogate to exercise her own.

5.29 Accordingly, we recommend that the surrogate should have parental responsibility/PRRs from birth, for a specified period. The next question is what the specified period should be.

5.30 We have concluded that the most straightforward approach is to align this with the period in which she can withdraw her consent; in other words, the six-week period after the birth of the child. During that period, the surrogate will have parental responsibility/PRRs, as will the intended parents. If she continues to consent to the surrogacy agreement, she can effectively ignore the parental responsibility/PRRs: the intended parents will be able to care for the child and take any medical or other decisions required. At the end of the six-week period, when her right to withdraw her consent comes to an end, so will her parental responsibility/PRRs. If she does withdraw her consent in this period, her parental responsibility/PRRs will continue until the parental order application is decided by a judge, or until six months after the birth of the child, when her right to make an application for a parental order in her favour lapses. This ensures that she has the necessary responsibilities and rights to be involved in the child's life until the question of legal parental status is resolved.

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11 Children Act 1989 s 8; Children (Scotland) Act 1995, s 11. In Scotland, the ability of persons to co-operate with each other in matters affecting the child is a material consideration for a court determining an application for an order in relation to PRRs under s11 of the Children (Scotland) Act 1995 Act (s 11(7D)).

12 For example, *Re J (a minor) (prohibited steps order: circumcision)* [2000] 1 Family Law Review 571.

13 The Children (Scotland) Act 1995, ss 2(2) and 2(3).

Recommendation 10.

5.31 We recommend that where a child is born as a result of a surrogacy agreement in the new pathway:

(1) the intended parents should acquire parental responsibility/PRRs on the birth of the child, unless the surrogate withdraws her consent before the child is born;

(2) where the surrogate withdraws her consent before the child is born, the position will be the same as that for agreements outside the new pathway; and

(3) if the surrogate withdraws her consent in the six weeks after birth, the intended parents should continue to have parental responsibility/PRRs for the child where the child is living with, or being cared for by, them.

Recommendation 11.

5.32 We recommend that, for surrogacy agreements on the new pathway, the surrogate should have parental responsibility/PRRs from the time the child is born:

(1) until six weeks after the birth of the child, should the surrogate not withdraw her consent during that period (the end of that period being when the surrogate's right to withdraw consent ceases); or

(2) should she withdraw her consent in that six-week period after birth, until such time as the question of the child's legal parental status is decided by a court following an application for a parental order, or until six months after the birth of the child, when her right to make an application for a parental order in her favour lapses.

5.33 Recommendation 10 is given effect in the draft Bill in the following way for England and Wales. Clause 4(1) of the draft Bill provides that, where a surrogacy agreement meets the conditions of the new pathway, the intended parents are to be treated in law as the child's parents from birth. Clause 12 of the draft Bill provides that any reference in an enactment to a mother or father is to apply to one or either parent under clause 4(1). This means that section 2 of the Children Act 1989 which provides that a child's mother has parental responsibility can apply to an intended parent of any sex. Schedule 2, paragraph 1 to the draft Bill amends the Family Law Reform Act 1987 to include a child who has a parent or parents through clause 4(1) of the draft Bill within the category of children who are treated as though their father and mother were married at the time of their birth. This means that both intended parents in a couple

will have parental responsibility through interpretation of the Children Act 1989, section 2(1) in light of these amendments. Clause 31(5) and (6) give effect to the recommendation that the intended parents lose their parental responsibility if the surrogate withdraws her consent and the child is not living with or being cared for by the intended parents.

5.34 Clauses 31(1), (2) and (3) of the draft Bill give effect to Recommendation 11 for England and Wales.

5.35 Clause 34 of the draft Bill gives effect to 10 and 11 for Scotland.

RESTRICTIONS ON PARENTAL RESPONSIBILITY/PARENTAL RESPONSIBILITIES AND PARENTAL RIGHTS ON THE NEW PATHWAY

5.36 The effect of other recommendations we make in this Report (specifically Recommendations 10 and 11 above, and 12 in this chapter) is that there will be periods both inside and outside the new pathway where the surrogate and the intended parents are sharing parental responsibility/PRRs for the child born of the agreement. We have discussed above why we think that it is necessary that both parties should hold parental responsibility/PRRs for these periods. As explained at paragraph 5.28 above it is important to bear in mind that when parental responsibility/PRRs are shared, they can usually be exercised by any one of those who hold them, and there is no requirement for one holder to exercise them if they do not wish to.

5.37 However, it would be possible to limit parental responsibility/PRRs in surrogacy situations. In all family circumstances, the law enables parental responsibility/PRRs to be limited. This can be achieved either by a restriction being placed on parental responsibility under the Children Act 1989, or by the court making an order conferring certain PRRs on each party, or depriving either party of some or all of the PRRs they already hold, under the Children (Scotland) Act 1995.[14] In the Consultation Paper we sought views as to whether there was any need for a restriction to be placed on the exercise of parental responsibility/PRRs in respect of the surrogate (or other legal parent) or the intended parents in the period during which parental responsibility/PRRs are shared.[15] We also asked whether any restriction should operate in respect of the party not caring for the child, or with whom the child is not living.[16]

Consultation

5.38 Responses to this question were mixed. Of those that opposed it, some were opposed to the sharing of parental responsibility/PRRs at all. For example, a range of surrogates and intended parents used their answers to restate their opposition to any

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14 In a situation where the court makes such an order in respect of PRRs, more than two people could hold the same parental right/responsibility simultaneously. For example, where a child lives with a grandparent in terms of a residence order, that person would have PRRs. In addition, the child's parents might have the right and responsibility of contact, so that there are three adults who have the right/responsibility of contact in relation to the child.

15 Consultation Question 29(1).

16 Consultation Question 29(2).

sharing of parental responsibility/PRRs by the intended parents with the surrogate, and considered that they should be held by the intended parents alone. In contrast, those who opposed surrogacy in general also opposed this proposal, but for the opposite reason, based on the view that intended parents should not have any parental responsibility/PRRs before being awarded them by the court.

5.39 Most of those opposed to restricting the exercise of parental responsibility/PRRs did so on the basis that existing court powers to make specific orders in the event of a dispute were already available.[17] Any party in disagreement could simply apply to the court, for the court to determine what should be done.

5.40 Of those consultees who did agree with the proposal, suggestions on possible restrictions ranged from limits being placed on the exercise of parental responsibility/PRRs by those not caring for the child, to limits on specific areas of responsibility, such as medical treatment.

Analysis

5.41 We were impressed by arguments made that to impose automatic restrictions on either the surrogate or intended parents (or, indeed, any party with care of the child) would be both over-complicated and unnecessary in practice. The existing framework for the court to resolve disputes between holders of parental responsibility/PRRs is capable of dealing with any disputes between the surrogate and intended parents as to their exercise.[18] We would expect the take-up of the new pathway to reduce the already low number of disputes that are resolved in the court arena, given the new pathway's emphasis on shared intentions and informed consent.

5.42 In contrast, there was no clear rationale for whether and when limits should be introduced, nor what those limits should be. In the absence of any clear basis, we recommend that no restriction should be placed on the exercise of parental responsibility/PRRs by either the surrogate or the intended parents, during any period in which these are shared. This will be governed by the current law that applies where parental responsibility/PRR is shared in any circumstance.

PARENTAL RESPONSIBILITY/PARENTAL RESPONSIBILITIES AND PARENTAL RIGHTS IN THE PARENTAL ORDER PROCESS

5.43 We now turn to the acquisition of parental responsibility/PRRs in the parental order process. At present, the surrogate has parental responsibility/PRRs from birth until such time as the court divests her of them – typically with the making of the parental order in favour of the intended parents. The intended parents do not have any of the responsibilities and rights they need for the day-to-day care of the child until the court awards them, either through the grant of the parental order or under a separate interim application.

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17 Under Children Act 1989 s 8 and Children (Scotland) Act 1995 s 11.

18 For discussion on the existing framework see: for Scotland, A Wilkinson and K Norrie, *The Law Relating to Parent and Child in Scotland* (3rd ed 2013) paras 6.03 and 6.11; and for England and Wales, *Clarke Hall and Morrison on Children*, Division 2, Chapter 2, Section 8 Orders (last visited 23 March 2023).

5.44 In the Consultation Paper, we proposed that, where a child is born as a result of a surrogacy arrangement outside the new pathway, the surrogate should continue to have parental responsibility/PRRs, and the intended parents should also acquire parental responsibility/PRRs automatically where:

(1) the child is living with them or being cared for by them; and

(2) they intend to apply for a parental order.[19]

Consultation

5.45 Responses to this question were very similar to those received in relation to the allocation of parental responsibility/PRRs in the new pathway. There was again some confusion shown between legal parent status and parental responsibility/PRRs, and a couple of consultees thought that we were proposing that the surrogate's parental responsibility/PRRs be removed, which is not the case. The surrogate, as legal mother, would retain parental responsibility/PRRs until such time as her responsibility was extinguished by termination of her legal parenthood on the making of a parental order (as is the case under the current law).

5.46 Responses from surrogates, intended parents, and surrogacy organisations were typically supportive. A number of consultees supported the proposal as being in the best interests of the child, and with a view to minimising any delay in settling such questions.

5.47 The Bar Council considered that the law should give effect to the shared intentions of the intended parents and the surrogate in all cases, not only those on the new pathway. They noted that a surrogate's intention not to be legally responsible for making decisions in respect of a child may be demonstrated by her consenting to the child living with the intended parents whilst a parental order is awaited.

5.48 A number of consultees who supported shared parental responsibility/PRRs on the new pathway were more cautious here, neither agreeing nor disagreeing with the proposal.

5.49 For example, a few consultees took the view that the surrogate's consent should be required for intended parents to acquire parental responsibility/PRRs, while others thought that the intended parents should be scrutinised by a court before they were given parental responsibility/PRRs. The potential for the proposal to create inconsistency with other ways in which adults acquire parental responsibility/PRRs was also raised, with some consultees taking the view that intended parents should only acquire parental responsibility/PRRs automatically where there had been a written surrogacy agreement.

5.50 Other consultees thought that, rather than an intention to apply being the criterion, the intended parents should in fact have to apply for a parental order before parental responsibility/PRRs was granted to them. On the other hand, SurrogacyUK thought

[19] Consultation Question 26.

that any additional requirement would go against the immediate best interests of the child.

5.51 Those who submitted the Nordic Model Now! template said that the surrogate should have parental responsibility and that the intended parents should only acquire parental responsibility by virtue of a post-birth parental order.

Analysis

5.52 We recommend the automatic allocation of parental responsibility/PRRs to the intended parents on the birth of the child, to enable them to take responsibility for the day-to-day care of the child. This is only required where, as outlined in the proposal, the child is living with them or being cared for by them. Ensuring that intended parents in this situation have parental responsibility/PRRs is certainly in the best interests of the child.

5.53 However, we also take the view that the further requirement in our provisional proposal, that the intended parents intend to apply for a parental order, is not in fact needed. Such a requirement would be difficult to prove because it relies on a party's intention, and is unnecessary given that it can be demonstrated that the parties have entered into a surrogacy agreement and the intended parents have the child living with them or are caring for the child. We consider that it is important that our recommendation ensures that the intended parents are equipped with the necessary legal tools – parental responsibility/PRRs – to make decisions regarding the care and wellbeing of the child, from the moment of the child's birth where they are caring for the child. Moreover, there will be a surrogacy agreement which provides evidence of the shared intention of the parties, further supporting the recognition of parental responsibility/PRRs for the intended parents at birth, if they have care of the child.

5.54 With the best interests of the child in mind, we also take the view that it is not appropriate to impose any further, or different, requirements for parental responsibility/PRRs to be granted automatically. Accordingly, we do not think that a written surrogacy agreement or an application for a parental order should be a prerequisite for the allocation of parental responsibility/PRRs to the intended parents. The existing position in law, which provides parental responsibility/PRRs to the intended parents on the making of the parental order, and extinguishes the parental responsibility/PRRs of others, should continue to apply.[20]

[20] Currently, this is by application of ss 46 and 28 respectively of the Adoption and Children Act 2002 and the Adoption and Children (Scotland) Act 2007, which apply to parental order applications and orders by operation of the Human Fertilisation and Embryology (Parental Orders) Regulations 2010 (SI 2010 No 985). Updated regulations following the introduction of our draft Bill will need to continue to apply these sections to parental orders. Their application will also need to be extended to cover the position where a surrogate obtains a parental order in her favour, following a withdrawal of consent in the six weeks following birth, in a surrogacy arrangement on the new pathway.

Recommendation 12.

5.55 We recommend that:

(1) where a child is born as a result of a surrogacy agreement outside the new pathway, the intended parents should acquire parental responsibility/PRRs automatically where the child is living with them or being cared for by them; and

(2) the making of a parental order should continue to provide parental responsibility/PRRs to those in whose favour it is made, and to extinguish the parental responsibility/PRRs of any other individuals.

5.56 Clause 32 of the draft Bill gives effect to this recommendation for England and Wales. Clause 35 gives effect to this recommendation for Scotland.

COURT TO CONSIDER AWARDING PARENTAL RESPONSIBILITY AT THE FIRST DIRECTIONS HEARING: ENGLAND AND WALES

5.57 While parental responsibility can be granted to the intended parents at a first directions hearing in England and Wales, currently there is no duty on the court to consider whether to do so, nor is parental responsibility automatically bestowed upon the intended parents. Parental responsibility may thus only be considered by the court at a first directions hearing if raised by the parties. This has led to concerns that litigants in person may be at a disadvantage and that intended parents may find it difficult to make important decisions such as medical and travel decisions for the child living with them or being cared for by them, whilst waiting for a parental order to be granted.

5.58 In the Consultation Paper, we provisionally proposed that in England and Wales the court should have a duty to consider awarding parental responsibility to the intended parents at the first directions hearing.[21] We said that this provisional proposal would fall away if we recommended that the intended parents should automatically acquire parental responsibility if the child is living with them. We have made such a recommendation above (see Recommendation 10 above). However, contrary to the view we expressed in the Consultation Paper, we now take the view that this proposal still has some application. There may still be surrogacy cases in which a parental order application is made when the child is not living with or being cared for by the intended parents. In those cases, the need would still arise for parental responsibility to be addressed by the court on the first directions hearing. Accordingly, we now consider this question and the responses to it.

5.59 A similar duty, to apply in Scotland, is discussed below in our consideration of Scots procedure.[22]

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21 Consultation Question 4.

22 See para 5.71.

Consultation

5.60 The majority of consultees disagreed with the proposal. From the responses given, it seems that this was primarily a result of a misunderstanding of the proposal: that the court would be under a duty to grant the intended parents parental responsibility, rather than being a under a duty to consider doing so. In that respect, these responses echoed the opposition to our separate provisional proposal that the intended parents should automatically have parental responsibility where the child is living with them.

5.61 Concerns were also expressed that the grant of any kind of parental rights to the intended parents only because the child is living with them could undermine the ability of the surrogate to withdraw her consent to the surrogacy agreement. There was further concern as to whether a default rule regarding a child's best interests could ever be appropriate.

5.62 Jason Brown, an intended parent, supported the proposal. He noted that unrepresented intended parents may be at a disadvantage. Parental responsibility can already be granted at a first directions hearing. However, unrepresented intended parents may not be aware that they should seek parental responsibility at the first directions hearing. Mandatory consideration would therefore direct the judge actively to consider whether parental responsibility should be granted, and is not reliant on the litigant (or their agent, where they are represented) raising it.

5.63 NGA Law and Brilliant Beginnings noted that they supported the proposal as "this reflects what the court routinely does in practice in any event (certainly in the High Court)." They additionally recommended removing the routine requirement for a directions hearing in parental order applications.

Analysis

5.64 Overall, a significant proportion of those who disagreed with the provisional proposal did so on a misunderstanding that we were proposing imposing a duty on the court to grant parental responsibility at a first directions hearing. Moreover, the element of the proposal which requires the child to be living with the intended parents has now fallen away, in light of Recommendation 10 above.

5.65 It is possible that the child may not be living with the intended parents after birth, if the surrogate is caring for the child. Whilst the court might choose not to grant parental responsibility to the intended parents in that circumstance, we think there is value in the court considering the issue of whether to do so at the first directions hearing. Our policy intention is simply to ensure that the court turns its attention to dealing with parental responsibility at any interim hearing, in advance of the final hearing for a parental order. It would not be in the best interests of the child to mandate that the court awards parental responsibility to the intended parents at this time: all that we recommend is that the court must consider whether it would be in the best interests of the child to do so.

5.66 The argument advanced by Jason Brown seemed to us to be highly persuasive. Where intended parents are unrepresented, they may be unaware of the need for, or of the possibility to seek, parental responsibility at this interim stage. Ensuring that the

court turns its mind to this question, irrespective of whether the intended parents raise it, would be in the best interests of the child.

5.67 We therefore make a recommendation reflecting our provisional proposal. We have expanded the recommendation to take into account the possibility that a case may come before the court for an interim hearing other than a first directions hearing. Should that happen, the same reasoning suggests that the court should consider whether an interim order awarding parental responsibility should be made. We have not adopted the suggestion that the requirement of a first directions hearing be removed. We note that the court already has case management powers to waive a first directions hearing if it is considered unnecessary. Furthermore, removing all first directions hearings would reduce the level of judicial scrutiny of parental order cases, which we do not wish to do.

Recommendation 13.

5.68 We recommend that the court in England and Wales considers whether to make an order awarding parental responsibility to the intended parents at the first directions hearing or any other interim hearing.

5.69 We do not make provision for this recommendation in the draft Bill, as it could be achieved through amendment to the Family Procedure Rules or a Practice Direction.

INTERIM ORDERS FOR PARENTAL RESPONSIBILITIES AND PARENTAL RIGHTS IN SCOTLAND IN THE PARENTAL ORDER PROCESS

5.70 To ensure that intended parents and surrogates in Scotland are not hindered by any procedural issues, the Consultation Paper asked for views as to three different issues relating to the parental order procedure in Scotland:

(1) whether there is a need for greater consistency and clarity in provisions relating to the expenses of curators *ad litem* and reporting officers and, if so, how this should be addressed;

(2) whether it should be provided by statute that, at the initial hearing or any subsequent hearing for a parental order, the court may make any such interim order or orders for PRRs as it sees fit; and

(3) whether any further procedural reform is needed.[23]

5.71 Elements (1) and (3) are discussed at paragraphs 11.85 and 11.97 respectively: we consider here whether there should be provision for the court to make any interim order(s) for PRRs, prior to a final decision regarding a parental order.

[23] Consultation Question 6.

Consultation

5.72 There was general support for reform from the responses received, in particular to secure the best interests of the child.[24]

5.73 SKO Family Law Specialists highlighted the risk of not making statutory provision for the court to consider PRRs at an interim stage:

> The alternative is that where such orders are necessary, separate proceedings would require to be raised, which in our view simply adds unnecessary complexity to the process.

5.74 The Law Society of Scotland questioned whether there is in fact doubt that an interim order can be made, but supported clarification of the position.

Analysis

5.75 As a preliminary point, we note that, as for England and Wales, once our wider surrogacy reforms are implemented, this issue will arise in far fewer situations. It will apply only in agreements which are not on the new pathway, where the intended parents or the surrogate need to seek a parental order. Even then, it will only arise where the child is not living with the intended parents, so they do not automatically have PRRs. Those facts are likely to be indicative of a dispute between the surrogate and intended parents. This contrasts with the current position where the intended parents may need PRRs even if all has gone smoothly.

5.76 A number of consultees who responded to the Consultation Question did not think that it was currently possible for an application for a section 11 order (under the Children (Scotland) Act 1995) regulating PRRs to be made at the interim hearing or hearing for a parental order.[25] We believe this confusion has arisen because, although section 11(1) of the 1995 Act provides that an order can be made "whether those proceedings are or are not independent of any other action", the procedure for applying for a section 11 order is different from the procedure for applying for a parental order in both the Sheriff Court and Court of Session.

5.77 The Consultation Paper noted that:

> The petition procedure does not appear to accommodate applications for interim orders of that kind, and we therefore think that, in current practice, separate proceedings would need to be raised in the Court of Session or in the Sheriff Court under section 11 of the Children (Scotland) Act 1995.[26]

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[24] There was also support for this proposal from the majority of practitioners and judges interviewed by Dr Trimmings: K Trimmings, "UK Surrogacy Law Reform: Exploring attitudes amongst Judges and Legal Practitioners in Scotland" (2020) University of Aberdeen, pp 15-16.

[25] We note that the same issue does not exist in England and Wales, and we think that this is because s 54(9)(ii) of the HFEA 2008 provides that such proceedings are to be "family proceedings" for the purposes of the Children Act 1989. The structure of the Scots equivalent, the Children (Scotland) Act 1995, is not the same and does not contain a definition of "family proceedings" or similar.

[26] See para 6.94 of the Consultation Paper.

5.78 In Scotland, there are separate procedural rules for actions in the Court of Session and Sheriff Court.[27] In the Sheriff Court, petitions for parental orders are dealt with under different court rules to those governing applications for section 11 orders for PRRs.[28] In the Court of Session, all actions are governed by the Rules of the Court of Session, but again the procedure for section 11 applications for PRRs are contained in a different chapter from the procedure governing parental order applications.[29] Thus, if intended parents wish to seek an interim order relating to PRRs, they must raise a separate action, adding to the complexity and expense of the process. In addition, there are clear advantages to having all matters concerning the same child heard within a single action, rather than multiple actions.

5.79 We therefore recommend that, where a parental order is applied for in Scotland, the applicant should, in the context of those proceedings, be able additionally to apply for an order conferring and/or regulating PRRs pending the full hearing on the parental order. The parental order, when granted, would then extinguish any PRRs which had been granted in the interim. The policy intention is that the sheriff or judge should be able to make any or all of the following orders at the interim hearing:

(1) conferring or extinguishing any or all of the PRRs,

(2) regulating residence,

(3) regulating contact,

(4) resolving specific issues, such as medical care or travel,

in favour of either the petitioner or respondent (being the intended parents and the surrogate in either position).

5.80 As with Recommendation 13 regarding interim orders for parental responsibility in England and Wales, we also recommend that the court in Scotland should be able to make an interim order regulating PRRs in the parental order process at its own instance.

5.81 As in any case where a court makes an order concerning PRRs, that order should only be made where it is in the best interests of the child to make the order.

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27 Act of Sederunt (Rules of the Court of Session) 1994 (SI 1994 No 1443), ch 97 as amended, and the Act of Sederunt (Child Care and Maintenance Rules) 1997 (SI 1997 No 291), ch 2, Pt VI as amended.

28 The relevant procedure for parental order applications is set out in the Child Care and Maintenance Rules 1997. Actions in respect of orders under s 11 of the 1995 Act, for PRRs, are family actions and are governed by Ch 33 of the Sheriff Court Ordinary Cause Rules.

29 Ch 49 covering family actions (including s 11 orders under the 1995 Act), and Ch 97 covering petitions under the HFEA 2008.

Recommendation 14.

5.82 We recommend that, as regards parental order petitions in Scotland:

(1) when an application for a parental order is made by or for the intended parents, they should be able, in the context of those proceedings, to obtain an interim order conferring parental responsibilities and parental rights pending the full hearing on the parental order; and

(2) the court should have the discretion to make an interim order regulating parental responsibilities and parental rights at an initial or subsequent parental order hearing either on application by or for the intended parents or at its own instance.

5.83 Clause 37 of the draft Bill gives effect to this recommendation. It enables the court to make an interim order conferring PRRs when either the intended parents apply for a parental order under clauses 15 or 17, or the surrogate applies for an order that the intended parents are the child's legal parents under clause 19. The Children (Scotland) Act 1995, sections 11ZA and 11ZB, which set out the paramountcy of the child's welfare, the non-intervention presumption, and the regard to be had to the child's views, are applied to a decision by the court on an interim order.

PARENTAL RESPONSIBILITY/PARENTAL RESPONSIBILITIES AND PARENTAL RIGHTS: THE INTERIM PERIOD

5.84 Following the birth of the child, there will be a short interim period before legal parental status is finally settled.

(1) On the new pathway, this will be the period of six weeks post-birth, provided that the surrogate does not withdraw her consent in this time. During this period, we recommend that the intended parents will be the legal parents and have parental responsibility/PRRs, and the surrogate will have parental responsibility/PRRs. Six weeks after the birth of the child, the intended parents' legal status will be finalised, and the surrogate's parental responsibility/PRRs will end;

(2) If the surrogate withdraws consent in this period, the intended parents will remain legal parents and their parental responsibility/PRRs will continue, so long as the child is living with them or they are caring for the child when the surrogate withdraws her consent. The surrogate's parental responsibility/PRRs will also continue and the surrogate may seek a parental order. If she does so, then when the order is made or refused by the court the legal parents of the child will be confirmed (as either the intended parents or the surrogate), and the interim period will come to an end;

(3) Where the agreement was not on the new pathway at the time of birth (either because it never was, or because it was on the new pathway and the surrogate has withdrawn consent pre-birth), then the interim period will last until a parental

order is made or refused by the court. At that stage, the legal parents of the child will be confirmed (as either the intended parents or the surrogate) and the interim period will come to an end. During the interim period, the surrogate will be the legal parent and have parental responsibility/PRRs, and we recommend that the intended parents should also have parental responsibility/PRRs, so long as the child is living with them, or they are caring for the child, from birth. If they no longer have the child living with them, or are no longer caring for the child, their parental responsibility/PRRs will fall away.

5.85 The question then arises, if the intended parents do not have parental responsibility/PRRs during this interim period because they were never, or are no longer, caring for the child, should they be able to apply to court for an award of parental responsibility/PRRs under section 8 of the Children Act 1989 or section 11 of the Children (Scotland) Act 1995? A surrogate will always have parental responsibility/PRRs in this period, either because she is the legal mother (outside the new pathway) or by virtue of our recommendation on the new pathway. The Consultation Paper asked for views as to whether section 10 of the Children Act 1989 should be amended to add the intended parents to the category of those who can apply for a section 8 order regarding parental responsibility without leave.[30]

5.86 The question only addressed the position in England and Wales, and in the following sections we set out the current law and consultation in respect of England and Wales. However, related questions also arise in respect of Scotland, and we therefore deal with those in the subsequent sections.

Current law: England and Wales

5.87 Section 8 of the Children Act 1989 provides that a child arrangements order includes an order regulating arrangements relating to any of the following:

(a) with whom a child is to live, spend time or otherwise have contact, and

(b) when a child is to live, spend time or otherwise have contact with any person.[31]

5.88 Section 10 of the Children Act 1989 provides that:

in any family proceedings in which a question arises with respect to the welfare of any child, the court may make a section 8 order with respect to the child if –

(a) an application for the order has been made by a person who –

(i) is entitled to apply for a section 8 order with respect to the child; or

(ii) has obtained leave of the court to make the application; or

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30 Consultation Question 25.

31 Children Act 1989, s 8(1).

(b) the court considers that the order should be made even though no such application had been made.[32]

5.89 Section 10(4) of the 1989 Act provides for who is entitled to apply without leave, namely: any parent of the child; any person with parental responsibility for the child; and any person named in a child arrangements order as a person with whom the child is to live. This does not include intended parents in a surrogacy agreement. Therefore, intended parents must obtain leave of the court in order to make an application for an order under Part 2 of the 1989 Act (including a child arrangements order) in the interim period, or the court may make such an order of its own volition. If the court makes an order under section 8 in favour of the intended parents, it will be superseded when the court then makes a parental order in due course.

Consultation

5.90 Nearly all consultees who supported surrogacy believed that the intended parents should be added to the category of those who can apply for a section 8 order regarding parental responsibility without leave. PROGAR and Nagalro thought that the suggested amendment would be "sensible and helpful all round".

5.91 The Bar Council, which favoured amending section 10 to allow intended parents to apply without leave, thought that this made sense as, in its view, intended parents fall within the rationale for the category of people who can make applications without leave:

> Those persons detailed in section 10 of the Children Act 1989 who are entitled to make an application without leave, can be summarised and defined as, 'those who have care of or legal connection to the child'…
>
> It is clear that an Intended Parent does fall into the category of a person with care of, or connection to the child (it is indeed akin to a party to a marriage or civil partnership), therefore they should be added to the list of those entitled to apply for a parental order without leave.

5.92 Mills & Reeve LLP characterised the suggested reform as "removing an unnecessary hurdle… for intended parents bringing section 8 applications." They thought that the leave requirement was unnecessary because the court would always grant leave in such a situation.

5.93 The Church of England raised the potential benefit of the reform in terms of the best interests of children, in allowing a speedier conclusion to proceedings involving children by removing the leave requirement.

5.94 OBJECT argued that allowing intended parents to apply only with leave of the court was protective of the rights of the birth mother and child, particularly in the context of a power imbalance between intended parents and surrogate, and would enable judicial scrutiny of their reasons for making an application. In contrast to the response from the Bar Council, OBJECT argued that intended parents did not come within the

[32] Children Act 1989, s 10(1).

intention of the policy behind the categories of those who could apply without leave for a section 8 order:

> Currently those who may apply for a section 8 order without the leave of the court include only those who are already recognised in law as a parent of the relevant child, or who come within categories of persons who have an existing relationship with the child which is formalised in law. 'Intended parents' do not come within either of these categories.

5.95 Nordic Model Now! said that they did not believe that intended parents should be added to the list of those who can apply for a section 8 order without leave.

Analysis

5.96 There was support for the position that section 10 of the Children Act 1989 should be amended to add the intended parents to the category of those who can apply for a section 8 order without leave. We consider that it is in the best interests of the child to have any disputes as to parental responsibility resolved as swiftly as possible: requiring leave to apply creates additional delay and uncertainty.

5.97 The response from OBJECT raised the question of whether intended parents were within the type of applicants already recognised by the 1989 Act as being entitled to apply without leave of the court. We note that their assessment of this differed from that of the Bar Council. We accept OBJECT's concern that such an issue is most likely to arise in situations where the intended parents and surrogate are in dispute. However, we consider that ultimately, where this kind of dispute cannot be resolved, the appropriate and required forum would be the court. As such, the requirement for intended parents to seek leave to bring the application would simply be delaying the inevitable, and adding to the stress and delay for all parties.

5.98 With regard to Resolution's concern about identifying the intended parents, this will be addressed by the requirement for the parties to have entered into a surrogacy agreement.[33]

5.99 We therefore recommend that intended parents are added to the category of those listed in section 10 as being able to apply for a section 8 order without leave of the court, pending the determination of a parental order application.

5.100 We note that this does not affect intended parents on the new pathway if they lose parental responsibility as a result of a post-birth withdrawal of consent, as they will be entitled to apply to court to seek a section 8 order by virtue of being the child's legal parents.[34]

Current law: Scotland

5.101 No question was asked in the Consultation Paper in respect of applications to court for an order seeking to confer or regulate PRRs under the Children (Scotland) Act 1995 in the interim period. However, it was clear as a result of discussion in relation to the

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33 See Ch 10, para 10.49 onwards.

34 Children Act 1989, ss 8 and 10; Children (Scotland) Act 1995, s 11.

proposals for England and Wales that there were issues for Scots law which this Report should address also.

5.102 The current law in Scotland enables certain parties to seek a section 11 order regulating PRRs. This covers those who hold PRRs in respect of the child and any person who, not having and never having had PRRs, claims an interest. Under the current legal regime, surrogates always have PRRs in the interim period,[35] and intended parents will not have PRRs: the current regime therefore covers both surrogates and intended parents in terms of the right to seek a section 11 order.

Effect of our reforms

5.103 Under our recommended reforms, the surrogate will always have PRRs, and be able to seek a section 11 order. The only situation in which she would lose PRRs is if she withdraws her consent and then fails to apply for a parental order within six months; however, in a situation where the surrogate has specifically withdrawn her consent in the six-week period following birth, we consider it highly unlikely that she would then fail to apply for a parental order, unless she had decided against seeking further involvement in the life of the child.

5.104 Intended parents will also typically have PRRs on the new pathway, or in circumstances where they are seeking a parental order. However, it would be possible in rare cases for the intended parents to have PRRs at birth and then to lose them during the interim period before legal parental status is finally settled, if they are no longer caring for the child or the child is no longer living with them. In this circumstance, the intended parents may be excluded from applying for a section 11 order.[36] We consider that this is not appropriate and that intended parents should be able to apply for an interim order granting PRRs as part of applying for a parental order.[37] Where the intended parents are the legal parents by virtue of the new pathway, we recommend that they should be entitled to apply for a section 11 order while they remain the legal parents. In either scenario, these provisions would enable the intended parents to apply to court for an order concerning PRRs: whether the court grants it is entirely a matter for the court, to be determined in the best interests of the child.

PARENTAL RESPONSIBILITY/PARENTAL RESPONSIBILITIES AND PARENTAL RIGHTS: AFTER THE INTERIM PERIOD

5.105 As discussed above, regardless of whether the surrogacy agreement is on the new pathway or in the parental order process, there will be a short interim period after the birth of the child before legal parental status is finalised, typically in favour of the intended parents (albeit with provision for the surrogate if that is in the best interests of the child). After the interim period the legal parents will be fixed, either through the completion of the new pathway or through judicial action, in determining the parental order application.

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35 Ss 1 and 2 of the Children (Scotland) Act 1995, as read with s 15 of the 1995 Act and s 33 of the HFEA 2008.

36 Children (Scotland) Act 1995, s 11(3)(ab) and (4).

37 Ch 5, para 5.117, Recommendation 15.

5.106 We now consider the position of surrogates and intended parents to seek further orders of the court in relation to parental responsibility/PRRs after the finalisation of legal parental status, first in England and Wales, and then in Scotland.

England and Wales

5.107 At present, after a parental order has been determined in England and Wales in a surrogacy agreement under section 54 or 54A of the HFEA 2008 in favour of the intended parents, a surrogate could seek leave of the court for a child arrangements order under section 8. The same is true of the intended parents, were the court not to make the parental order in favour of them, leaving the surrogate as the legal mother with parental responsibility.

5.108 We did not ask a specific question about parental responsibility after the interim period in the Consultation Paper.[38] However, in their response to the Consultation Question regarding including intended parents within section 10 of the 1989 Act, NGA Law and Brilliant Beginnings suggested that surrogates should also be able to apply for a child arrangements order without the court's leave.

5.109 It is very important to ensure that the long-term family life of the parents and child is secure and is not subject to the stress of ongoing litigation concerning the child, if the non-parent party seeks contact or residence through a section 8 order. We are conscious of the fact that a key reason for intended parents entering into international arrangements is because of the lack of certainty as to their status under the current law across the UK. A central aim of our reforms is to provide greater certainty for all parties, as a means of encouraging UK intended parents to look to the UK as the best place for them to enter into a surrogacy agreement. Anything that detracts from certainty is considered to undermine our reforms. Conferring a right on the surrogate to apply for an order under section 8 of the Children Act 1989, without the requirement for leave, might have that effect.

5.110 Against that, we are also aware that this has to be seen in the context of our recommendation that, in future, the court will be able to make a parental order even in the face of an objection from the surrogate, as the court will be able to dispense with her consent where it is in the best interests of the child to do so.[39] It therefore cannot be said that, in future, a surrogate will only lose her parental responsibility with her own consent.

5.111 As such, we consider the right of the surrogate to seek a section 8 order after a parental order has been made to be an important one and we consider that the current law governing this area strikes a fair balance. Accordingly, we recommend no change to the current law, such that a surrogate may make an application for any order under section 8 of the Children Act 1989 only with leave of the court. Again, the

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38 With the exception of Consultation Question 23, which asked an open question as to whether the welfare checklist in section 1(3) of the Children Act 1989 should be amended to provide for the court to have regard to specific factors when considering the arrangements for a child (and therefore, the exercise of parental responsibility) in the context of a surrogacy arrangement, and, if so, what those factors should be. In the light of some consultation responses that opposed such a change, and a lack of consensus amongst those consultees who thought that specific factors should be added to the checklist, we have decided not to make any recommendation for change.

39 Ch 10, para 10.142, Recommendation 47.

same will be true for the intended parents, were they not to remain or become the legal parents of the child born following the surrogacy agreement.

Scotland

5.112 As with England and Wales, we did not ask a specific question about this in the Consultation Paper. Moreover, the existing legal regime is slightly different in Scotland. At present, where a parental order has been made in favour of the intended parents, the surrogate is specifically precluded from making an application for a section 11 order.[40] If the parental order petition were not granted, then the intended parents could currently seek a section 11 order by virtue of the fact that they are typically persons who do not have and have never had PRRs. Therefore, Scots law treats intended parents and surrogates unequally after legal parental status has been determined. The current law is also not consistent with our policy that the rights of the parents and child require a balance to be struck between protecting their family life and allowing the other party to seek ongoing contact.

5.113 We therefore recommend reform to ensure that the party who is not the legal parent on completion of the new pathway or determination of a parental order application is treated equally regardless of whether they are a surrogate or intended parent, and regardless of whether the agreement was on the new pathway or a parental order was granted. In order to balance the rights of all parties and to respect the family life of the child, we recommend that the non-parent should be able to seek an order for contact with leave of the court.[41]

5.114 We are conscious that, in Scotland, the requirement to obtain leave of the court to make an application for a section 11 order is rare, and currently arises only where a birth parent seeks contact after adoption.[42] However, it seems to us that the position of the party who is not the legal parent in surrogacy is analogous to that of the birth parent in adoption. Where the surrogate is not the legal parent, she has previously had an intimate connection to the child, through gestation. In the case of the intended parents, at least one of them will have a genetic connection to the child, and they will also be the ones who intended and, with the surrogate, took all steps towards, the child's conception. They may also have had the child living with them or have had care of the child for some time.

5.115 Therefore, we recommend that, once legal parental status has been established in respect of the child, through either: (a) completion of the new pathway, with the surrogate not withdrawing her consent at any point; or (b) the grant or refusal of a parental order, then whichever party (whether the surrogate or the intended parents)

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40 Children (Scotland) Act 1995, s 11(3)(ab) and s 11(4)(c).

41 Although the proposal for Scotland is different from that in England and Wales where an order regarding parental responsibility could be sought, this arises from the different nature of parental responsibility and PRRs, whereby parental responsibility cannot be fragmented. The outcome ensures that the position in each jurisdiction is internally consistent with the existing statutory provisions regarding parental responsibility/PRRs.

42 Children (Scotland) Act 1995, s 11(3)(aa).

does not have legal parental status will be able to seek an order for contact, subject to first obtaining leave of the court.[43]

5.116 Further, intended parents who have never had PRRs and are unsuccessful in their petition for a parental order should also be precluded from seeking any order under section 11, other than an order for contact and only with leave of the court. The refusal by the court to make a parental order in their favour indicates that the child's best interests will not be served by residing with them and this decision settles the long-term future of the child. Thus, the child's best interests will be best respected and preserved by restricting the ability of the intended parents in these circumstances to seek orders, by making an application for contact available only where leave of the court has been granted.

Recommendation 15.

5.117 We recommend that, in relation to the period between the making of a parental order application and the determination of that application:

(1) in England and Wales intended parents are added to the list of persons in section 10 of the Children Act 1989 who are able to apply for a section 8 order without leave of the court;

(2) in Scotland, intended parents should be able to apply to court for an order granting PRRs, regardless of whether they have had and no longer have PRRs; and

(3) in Scotland, intended parents who are the legal parents under a new pathway arrangement should be entitled to apply for an order under section 11 of the Children (Scotland) Act 1995.

5.118 We recommend that, in England and Wales, whichever party to a surrogacy agreement is not the legal parent after either the conclusion of the new pathway or the determination of a parental order application, may make an application for any order under section 8 of the Children Act 1989 only with leave of the court.

5.119 We recommend that, in Scotland, whichever party to a surrogacy agreement is not the legal parent after either the conclusion of the new pathway or the determination of a parental order application may apply, with leave of the court, for an order regarding contact only.

5.120 Clause 33 of the draft Bill gives effect to the recommendation that in England and Wales the intended parents should be able to apply for an order under the Children Act 1989, section 8 without leave of the court during the interim period, by amending

[43] For the avoidance of doubt, we appreciate that obtaining leave of the court to apply for an order is highly unusual in Scotland. Nevertheless, it is already a statutory requirement in the case of a birth parent seeking contact, and we therefore seek to bring surrogacy into line with this established instance. We can also see good reason for the court to have oversight of whether an application should be allowed, in order to protect the integrity of the established family life of the child and legal parents.

section 10 of that Act to include a new subsection (4A). No provision is necessary for the recommendation that the party who is not a legal parent following the conclusion of the new pathway or a parental order application can only apply with the leave of the court, as this reflects the existing law in England and Wales.

5.121 Clause 38 of the draft Bill gives effect to this recommendation in Scotland, by amending section 11 of the Children (Scotland) Act 1995.

Chapter 6: Eligibility for surrogacy

6.1 In this chapter, we set out the criteria for eligibility for surrogacy, both on the new pathway and where intended parents seek a parental order. These provisions are intended to work individually and cumulatively to protect women who propose to act as surrogates, intended parents, and any children born of surrogacy agreements. We consider whether there should be minimum and maximum ages for those taking part in surrogacy agreements, whether surrogates should have had a previous pregnancy, and whether there should be a maximum number of surrogate pregnancies that a surrogate should undertake.

6.2 The eligibility criteria discussed in this chapter regulate who is eligible to enter into a surrogacy agreement on the new pathway. However, having met these criteria, surrogates and intended parents must still go through the screening and safeguarding process for entry to the new pathway, as detailed in Chapter 8. Meeting the proposed eligibility criteria does not automatically give rise to a right to enter into a surrogacy agreement, but it is an essential first step.

6.3 In recommending eligibility criteria we have, in addition to the views of consultees, been guided by three key principles. The first is the need to protect the welfare of the child: what eligibility criteria would best serve the interests of any child born through surrogacy? The second is the need to respect the autonomy of the surrogate as a free, autonomous individual who is in control of, and can make decisions about, her own body. The third guiding principle has been to seek a balance between clarity and certainty on the one hand, and ensuring that any rules do not undermine individualised decision-making on the other. It is imperative that the decision to become a surrogate or intended parents, and the assessment as to whether a particular surrogacy agreement should proceed, is made on a case-by-case basis, informed by the facts and circumstances specific to that surrogate and those intended parents. There is a danger, as in any area of law, that imposing bright line rules becomes a substitute for genuine assessment of the individuals. Nevertheless, we recognise that in many cases these bright line rules are necessary and serve an essential function. We have therefore sought to balance these competing interests when putting forward our recommendations for eligibility criteria for surrogacy.

MINIMUM AGE LIMIT FOR THE SURROGATE

6.4 Currently, although there is a statutory minimum age for intended parents,[1] there is no statutory minimum age for surrogates. In the Consultation Paper, we considered that the imposition of a minimum age limit would help to protect women, particularly young women, from exploitation and pressure, to which they may be vulnerable. A minimum age limit would also help to protect the welfare and health of surrogates. We noted the lack of evidence that very young women are acting as surrogates, and the fact that in a number of clinical settings, and within Regulated Surrogacy Organisations ("RSOs"), either a "soft" minimum age requirement or hard line will be imposed. Nevertheless,

[1] The minimum age at which intended parents can obtain legal parental status through the grant of a parental order under the current law is 18 years old; HFEA 2008, s 54(5) and s 54A(4).

we considered that the imposition of a strict age requirement on the new pathway would be clearer and simpler, and would rationalise requirements across surrogates and intended parents. Accordingly, we provisionally proposed that surrogates should be required to be at least 18 at the time of conception for both the new pathway and the parental order process.

6.5 Our provisional proposal was divided into two parts. The first part proposed that a court should only make a parental order where the surrogate had been at least 18 years old at the time of conception, while the second part proposed that surrogates should be at least 18 years old at the time of entering into a surrogacy agreement on the new pathway.[2]

Consultation

6.6 The main focus of responses was on the need to ensure the surrogate had sufficient maturity and understood what she was doing. Even consultees who supported a minimum age of 18 framed their support in terms of it being necessary to protect the welfare of the surrogate and to ensure that she can make a fully informed decision.

6.7 NGA Law and Brilliant Beginnings said they had never seen a surrogacy case involving minors in their experience of over a thousand surrogacy agreements. They also noted that at Brilliant Beginnings surrogates must typically be over 21 to reflect the level of maturity in understanding the commitment involved. They have not taken on a surrogate younger than this to date.

6.8 The HFEA agreed with our proposal, saying that imposing minimum age requirements "has the benefit of clarity and simplicity".

6.9 Of the consultees who disagreed, many suggested a higher minimum age: 21, 23 and 25 were all put forward by a number of consultees. Reasons given for supporting a higher minimum age for surrogates related to the need to ensure that they were physically and emotionally ready. Many considered that 18 is too young: in the words of one consultee who is a legal practitioner, this is too young to undergo the "physical and emotional upheaval of a pregnancy when you are not going to be a full-time parent at the end of it". Nordic Model Now! said that, at 18, a woman is barely out of childhood and is "particularly vulnerable to coercion and manipulation". The responses received demonstrated widespread support for a higher minimum age, across a wide range of consultees.

Analysis

6.10 As a preliminary point, we have concluded that both the new pathway and the parental order process should be subject to the same minimum age for surrogates. The justification for a minimum age operates regardless of which of the two surrogacy routes teams use. Moreover, having a differing age limit would undermine the protection for surrogates, as there is a risk that surrogate teams would use the option with the lower age limit. Thus, any minimum age limit should be consistent across both the new pathway and the parental order process.

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[2] Consultation Question 65.

6.11 We have also concluded that, in order to ensure that the minimum age limit is enforced, for the protection of surrogates and of children born through surrogacy, it should be a mandatory requirement. A surrogacy agreement will not be eligible for the new pathway if the surrogate is below the minimum age. Further, if a surrogacy goes ahead outside of the new pathway, there will be no discretion for the court to disapply the minimum age requirement and so a parental order will not be available. The only way for the intended parents to be recognised as the legal parents in such a case would be through an adoption order, and thus subject to the regulation of the adoption regime.

6.12 In establishing what the minimum age should be, the responses highlight the two competing concerns: balancing the autonomy of the surrogate against the need to protect young women from the risk of exploitation. Most responses recognised the need to ensure women were old enough to make an informed decision to become a surrogate.

6.13 We recognise that there was considerable support for a higher minimum age, and we were convinced by the concerns expressed that there is good reason to increase the minimum age for surrogates from 18 to 21. This reflects the fact that teenage women may be more vulnerable to pressure, and an extra three years allows them additional time to mature, physically and emotionally. While we recognise the need to respect the autonomy and freedom of choice for all adults, we have concluded that the need to protect younger adults from exploitation justifies this. The risk of a young surrogate suffering harm outweighs the risk of an 18- to 20-year-old being denied the opportunity to exercise their autonomy to become a surrogate. Imposing a minimum age limit for surrogate pregnancies, compared to natural conception, also emphasises that there are additional considerations for surrogates to weigh and factor into their decision making.

6.14 Moreover, on the new pathway surrogacy organisations will be required to carry out pre-surrogacy screening as detailed in Chapter 8 to ensure that a potential surrogate is ready – physically and emotionally – to be a surrogate. This is a critical element of the new pathway. Setting a minimum age is not a replacement for that holistic screening and assessment.

6.15 A range of consultees strongly supported a higher minimum age of 23 or 25. A minimum age above 21 for any lawful activity in English or Scots law would be exceptional, and we were not persuaded that the arguments merit this.

6.16 Our provisional proposal referred to the surrogate's age at the time of conception for parental orders, and at the time of entering into a surrogacy agreement on the new pathway.[3] We now consider that it is more appropriate to refer in both cases to the surrogate's age at the time of entering into the surrogacy agreement.

[3] Consultation Question 65.

Recommendation 16.

6.17 We recommend that surrogates should be at least 21 years old at the time of entering into the surrogacy agreement.

6.18 Clause 8(2)(a) of the draft Bill gives effect to this recommendation in relation to the new pathway. Clauses 16(2)(a), 18(2)(a), and 19(3)(a) give effect to this recommendation in relation to parental orders.

MAXIMUM AGE LIMITS FOR SURROGATES

6.19 Currently, there is no statutory maximum age for surrogates. Although we consider the case for imposing a minimum age requirement on surrogates convincing, as we noted in the Consultation Paper the case for imposing an upper age limit on surrogates is less persuasive.[4] As such, no question was posed to consultees regarding the imposition of an upper age limit for surrogates.

6.20 The primary purpose of an upper age limit on surrogates would be to protect the health of older women who would be more likely to experience complications in pregnancy and childbirth. However, we considered that such a limit would not be required to protect a surrogate's health. In traditional surrogacies, there is a natural age limit based on the age at which each woman stops ovulating. In the case of gestational surrogacies, clinical controls already exist based on the current regulatory framework. Where a woman is seeking a pregnancy on her own behalf, clinics assess whether she is sufficiently medically fit to be treated by the clinic.[5] We support the same approach in the case of surrogate pregnancies.

6.21 Moreover, the clinic will also conduct an assessment of the welfare of the child in accordance with the HFEA's Code of Practice, which requires the clinic to assess whether the woman is suitable to act as a surrogate, an assessment which includes a consideration of her age.[6] This operates to protect surrogates both on the new pathway (where an RSO is also involved) and where a parental order is sought (where there may or may not be any additional support from a surrogacy organisation). Further, on the new pathway, the health of a prospective surrogate will also be addressed by the proposed screening and safeguarding measures.[7]

6.22 Since this question is ultimately about a woman's medical fitness to be a surrogate, it should be assessed directly by medical professionals rather than imposing any hard age limit within the law.

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4 Consultation Paper, paras 12.146-12.149.

5 The Code of Practice para 8.11.

6 The Code of Practice para 8.11.

7 See further ch 8, paras 8.2 onwards.

REQUIREMENT THAT THE SURROGATE HAS PREVIOUSLY GIVEN BIRTH

6.23 As part of the pre-surrogacy screening, it would be possible to require that a surrogate has previously given birth before she is eligible to enter the new pathway. Currently, there is no requirement that surrogates have previously given birth. Nonetheless, such a requirement is imposed in a number of other jurisdictions[8] and its introduction in the UK was recommended by the Brazier Report.[9]

6.24 The rationale for such a requirement is the protection of women considering acting as surrogates, who may be better informed when deciding whether to consent to a surrogacy agreement if they have had the experience of being pregnant and giving birth before. However, these considerations must be balanced with the need to respect the autonomy of women who may not wish to have children of their own; furthermore, informed consent does not require a person to have experienced an event before. Given the competing arguments we asked an open question as to whether such a requirement should be imposed on the new pathway, inviting consultees' views as to whether a surrogate should previously have given birth.[10]

Consultation

6.25 The consultees in favour of this requirement typically focused on the need for a surrogate to have experienced pregnancy and childbirth and to appreciate its implications.

6.26 Some women who had experience as surrogates agreed with introducing this requirement. Natalie Dunn said that "a woman cannot know 100% how she might feel giving birth to a surrogate baby if [she] has never had her own", and noted that this puts all parties at risk of disagreement. For some medical professionals, having given birth before was closely linked to a surrogate's ability to give informed consent. Some intended parents also agreed with the requirement, in some cases with reference to their own experience in California, where this is a requirement.

6.27 A related concern was expressed by PROGAR and Nagalro who considered it important that a surrogate has previously given birth, and who described pregnancy as a "major life event with expected and potentially unanticipated physical and psychological consequences". PROGAR and Nagalro noted that both antenatal and postnatal conditions, from moderate to severe, are not uncommon and a previously pregnant surrogate may interpret these differently from one who has not given birth.

6.28 Another consideration was put forward, typically by medical professionals, about the higher risks to women during a first pregnancy. One GP said that she was "appalled"

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8 For example, a number of Australian states make this provision (namely Western Australia (Surrogacy Act 2008, s 17(a)(ii)); Tasmania (Surrogacy Act 2012, s 16(2)(d)); and Victoria (Assisted Reproductive Treatment Act 2008, s 40(1)(ac)), as well as Greece (Code of Ethics of Medically Assisted Reproduction, art 9, para 1(2)), Israel (Agreements Law for the Carriage of Fetuses, 5778-2018, amendment number 2), South Africa (Children Act No 38 of 2005, s 295(c)(vi) and (vii)), and Thailand (Protection of Children Born through Assisted Reproductive Technologies Act, B. E. 2558, section 21).

9 UK Government, *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation, Report of the Review Team* (1998).

10 Consultation Question 70.

that the consultation was considering letting women who have never given birth be surrogates: women in their first pregnancy have more antenatal complications like pre-eclampsia; are more likely to be induced; and are more likely to have longer and more painful labours.

6.29 A final consideration identified within the consultee responses was the risk of complications of pregnancy leading to infertility: if a surrogate had not already completed her family, it could be traumatic to go through a surrogate pregnancy and then discover that she could have no further children.

6.30 The responses which opposed this requirement tended to focus around two distinct themes. First, consultees considered that it infantilises women to suggest that women who have not previously had children are not able to make an informed decision: Katie Bezant, a surrogate, said that it was "incredibly insulting". Secondly, consultees highlighted the fact that no two pregnancies or deliveries are alike and suggested that, as a result, a previous pregnancy cannot provide any guarantee of how a subsequent pregnancy will develop, and this therefore cannot offer the desired safeguard.

6.31 These themes were supported in a response from Martha Hankins, a surrogate who did not have children, who noted that she had suffered "no adverse effects and [had] been delighted to have been able to give the gift of life" to other people. She questioned the reason for this requirement, asking how you can judge surrogates who have not had children as requiring extra legal regulation. SurrogacyUK reported that it has worked with surrogates in this position and has seen no difference in outcomes.

6.32 Professor Emily Jackson (legal academic) said that the suggested requirement was in many ways sensible, but provided that a woman seeking to act as a surrogate is given sufficient information about what surrogacy will entail, it seems patronising to penalise her and the intended parents for her choices.

6.33 Responses also suggested that any concerns a surrogate without children has about her own fertility (including in the future) can be addressed at implications counselling. Likewise, it was also highlighted that there are many other activities to which persons can consent without having experienced it before (like sex, marriage, an operation, any pregnancy, etc.).

Analysis

6.34 Responses to this question from consultees who supported a requirement that a woman must have previously given birth to be a surrogate typically focused on protecting the surrogate, by ensuring that she had experienced pregnancy and childbirth so that she "knew what she was getting into", and making sure that she had completed her own family before helping other people with theirs.

6.35 On the other hand, several consultees questioned why surrogates who have not previously had children should be judged as needing extra regulation. SurrogacyUK reported that they have seen no difference between the surrogates they work with who have previously had children, and those who have not. Treating women as unable to make a reasoned decision or give informed consent because they have not had children risks significant interference with their autonomy. Moreover, past

pregnancies are not a reliable predictor of future pregnancies and childbirth: each pregnancy is different, so cannot be used as a predictor of future experiences.

6.36 If the concern is to ensure that the woman has completed her own family, then demonstrating that she has previously given birth does not necessarily address that, since she may want other children in the future. Moreover, a family can be complete without children: requiring a surrogate to have previously had children in order to have "completed" her family imposes external values on her that she may not accept.

6.37 We have reached the conclusion that requiring women to have given birth before becoming surrogates does not secure the protection that is sought to be achieved. In the absence of a clear justification, it would constitute a paternalistic interference with a woman's bodily autonomy. It is imperative that women should only enter into surrogacy having taken an informed decision, but this can be achieved through implications counselling and discussions with medical practitioners, clinics, and surrogacy organisations. Concerns as to whether it is physically safe for women to undertake a pregnancy are best addressed through individual medical checks and screening, focusing on that surrogate's medical and obstetric history, rather than pointing to a past successful pregnancy. Thus, the concerns which this proposal seeks to address can be better met through pre-surrogacy screening and safeguards. At most, questions concerning previous pregnancies and childbirth should be a matter for screening, not statutory regulation.

6.38 Although the question we asked in the Consultation Paper was in respect of eligibility for the new pathway, we also recommend that there should be no eligibility requirement added to the parental order route requiring that the surrogate has previously given birth.

Recommendation 17.

6.39 We recommend that the surrogate should not be required to have previously given birth to be eligible for the new pathway, or where a parental order is sought.

6.40 The draft Bill sets out the requirements that must be met for a surrogacy agreement to be eligible for the new pathway and for the grant of a parental order. It is not necessary to specify in the Bill matters that do not affect eligibility for the new pathway or for a parental order, and so no provision is required to implement this recommendation.

MAXIMUM NUMBER OF SURROGATE PREGNANCIES

6.41 Closely aligned to whether the surrogate should be required to have previously given birth is the issue of whether there should be a limit on the number of pregnancies that a surrogate can undertake. Currently, there is no limit on the number of surrogate births that a woman can agree to undertake. While such a requirement is imposed in a number of other jurisdictions, including India and Israel, it is not uncommon in the UK for a woman to have multiple surrogate pregnancies. A limit on the number of surrogate pregnancies seeks to protect the health of the surrogate, both physical and

psychological. It also seeks to prevent the development of surrogacy as a profession. In the Consultation Paper, we took the view that the question of the number of surrogate pregnancies a woman should be able to undertake was better left to be determined by reference to her own medical history during the screening process for the new pathway. Therefore, we provisionally proposed that there should be no maximum number of surrogate pregnancies that a woman can undertake as an eligibility requirement of the new pathway.[11]

Consultation

6.42 Of the consultees who supported the proposal, the primary view was that individualised medical advice and assessment was a better way to protect surrogates and ensure that they were fit to proceed with a pregnancy, rather than a general limit on the number of pregnancies.

6.43 One consultee, who works as a medical professional, said that to provide a maximum number would be "paternalistic" but that there should be obstetric review for increased numbers of pregnancies due to increased risk to the surrogate. Consultees recognised the need to ensure the safety of the surrogate, with responses recommending rigorous medical assessment, and the surrogate's ability to carry another pregnancy safely being assessed.

6.44 The SurrogacyUK Working Group on Law Reform also thought that the total number of pregnancies should be considered as part of a child welfare assessment and discussed in implications counselling. There should be no maximum number, as it is the surrogate's overall health that is the most relevant factor.

6.45 Those who supported a maximum number did so on the basis of the need to protect the surrogate, both as regards her health and the risk of exploitation.

6.46 OBJECT said that the fact women, under this proposal, could undergo unlimited pregnancies is both "exploitative and repugnant".

6.47 The British Fertility Society noted the risks of pregnancy for woman who have had multiple (ie five or more) pregnancies. They suggested that these risks should be reflected in the regulations, and licensed clinics should take into account the previous obstetric history of the surrogate.

6.48 PROGAR raised a further point: a limit would reduce the number of other surrogate-born individuals, offspring of surrogates, offspring of donors and all their associated families and networks that the surrogate-born person will have to "accommodate" practically and emotionally during their lifetime.

6.49 Of those who favoured a limit, most recommended a limit of two surrogate pregnancies. This was to allow for an initial surrogacy and a subsequent surrogacy to give birth to a sibling.

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[11] Consultation Question 71.

Analysis

6.50 The vast majority of those who opposed this proposal, and were in favour of a limit, were concerned to ensure that the health of the surrogate was protected and that she was not exposed to the physical and mental toll of multiple pregnancies. Thus, health was at the heart of the arguments in favour of introducing a maximum number of surrogate pregnancies.

6.51 Those in favour of a cap also argued that it was needed in order to send a strong signal to society that surrogacy should be a rare and altruistic endeavour. A strict limit in this manner would ensure that being a surrogate does not become a "career choice" for women. There were also concerns that it is not appropriate for too many children to be born to the same surrogate, in the same way that egg and sperm donors are limited as to how many different families they can create.[12]

6.52 Those who supported no maximum limit were also strongly supportive of the need to protect the surrogate's health. They noted that introducing a cap on the number of surrogate pregnancies is too blunt a tool, in that it does not take into account the age or health of the surrogate. Moreover, it fails to distinguish between the number of single babies carried or delivered, and the considerably higher risks of a multiple pregnancy. The effect on a woman's body of having two twin pregnancies is different from that of two single pregnancies, yet a cap on the number of pregnancies would treat them both equally.

6.53 A further concern is that the question (rightly) focuses on a maximum number of surrogate pregnancies, as there is no suggestion that the law could or should regulate the number of personal pregnancies a woman could have. That would be an unacceptable interference with her autonomy. However, the medical risks of a surrogate pregnancy are inextricably linked with the number of personal pregnancies each woman has had. To provide in law that a woman could have no more than X surrogate pregnancies is arguably meaningless, unless the limit were to be tied to her personal pregnancies. However, then to impose a limit on her non-surrogate pregnancies would rightly be viewed as an unacceptable interference with her autonomy.

6.54 Our conclusion is that there should not be a statutorily mandated limit on the number of surrogate pregnancies a woman is permitted to undertake. We note the grave importance of protecting the health of the surrogate, and of any child born from the surrogacy arrangement. The critical driver behind arguments in favour of a cap is to protect the health of the surrogate, and this is far better achieved through an individual medical assessment, specific to each surrogate. To introduce a general bright line rule would risk the rule being treated as a shorthand for whether a specific surrogate pregnancy was appropriate, with the attendant risk that a surrogate below that limit

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[12] For example, under HFEA rules, a sperm donor can only create a maximum of 10 families – but within each family, there is no maximum number of children conceived: HFEA Code of Practice 2021, Guidance Note 11, paragraphs 11.55 to 11.65. Thus, if each family went on to have four children, there would be 40 children conceived using sperm from one donor, in addition to any children he had himself. Even at considerably lower levels of conception, the number of children conceived from one donor could easily be more than 20. This is far beyond the maximum number of children any one surrogate could have, so the need to ensure parity with donor limits would only operate to justify an unfeasibly high limit on the number of surrogate pregnancies.

would be assumed to be fit and able to carry a further pregnancy. There cannot be a ceiling, because the appropriate maximum number of pregnancies will vary for each woman.

6.55 We are very aware of the need to ensure that women do not undertake pregnancies beyond their physical capability. We think robust and stringent medical scrutiny of the surrogate's medical history should be built into the pre-conception screening as a regulatory safeguard, rather than a statutory bright line rule. Medical screening should pick up on the total number of pregnancies the surrogate has already had, whether surrogate pregnancies or otherwise, along with any complications or other relevant factors arising from those, and then assess the medical risks of the proposed surrogate pregnancy before the surrogate enters the new pathway. This will offer a substantially more meaningful protection than setting a universal but ultimately arbitrary cap. Although we would encourage such pre-conception safeguarding before any surrogate pregnancy, we can only mandate it in relation to the new pathway. This underlines the importance of the new pathway in protecting surrogates and their health.

6.56 On the parental order process, were we to be considering a limit on the maximum number of pregnancies a surrogate can undertake, we would not wish to remove the court's ability to make a parental order following a pregnancy that exceeded the maximum number, if the order was required in the best interests of the child. To do so would penalise the child without offering meaningful protection to the surrogate.

6.57 Counselling and screening will also help all parties to reflect on and consider the welfare of a child born through surrogacy, including their relationship with siblings and other adults in their life.

Recommendation 18.

6.58 We recommend that there should be no statutorily imposed maximum on the number of surrogate pregnancies that a surrogate can undertake.

6.59 The draft Bill sets out the requirements that must be met for a surrogacy agreement to be eligible for the new pathway and for the grant of a parental order. It is not necessary to specify in the Bill matters that do not affect eligibility for the new pathway or for a parental order, and so no provision is required to implement this recommendation.

AGE LIMITS FOR INTENDED PARENTS

6.60 Currently, the minimum age at which intended parents can obtain legal parental status through the grant of a parental order is 18 years old,[13] while no maximum age is prescribed by law.

[13] HFEA 2008, s 54(5) and s 54A(4).

6.61 In the Consultation Paper, we provisionally proposed that there should be no maximum age for intended parents for the granting of a parental order, but that their ages should be taken into account in assessing the welfare of the child. In respect of the new pathway, we proposed that intended parents should be at least 18 years old at the time they enter into a surrogacy agreement on the new pathway. We asked an open question, seeking consultees' views as to whether there should be a maximum age for intended parents on the new pathway.[14]

6.62 We did not consult on whether the existing minimum age for intended parents in the parental order process should be increased, given the absence of any concerns noted with the current legal measure, and given widespread recognition of the practicality of the existing age limit in the interest of promoting the welfare of surrogate-born children.

Consultation

6.63 The responses to this question are divided into three parts:

(1) maximum age of intended parents for the grant of a parental order;

(2) maximum age of intended parents to enter the new pathway; and

(3) minimum age of intended parents to enter the new pathway.

Maximum age of intended parents for the grant of a parental order

6.64 One of the main reasons cited by consultees for disagreeing with the imposition of a maximum age for intended parents applying for a parental order was the fact that age has no necessary bearing on whether one is a good parent. The Law Society noted that "age is a fairly arbitrary metric and there can be a huge discrepancy in health, appearance, and attitude of two persons of the same chronological age".

6.65 One intended parent, Erica, asked whether we were missing the point in focusing on age if what we really care about is the parents being able to see their child into adulthood. She also suggested that, in respect of the health of the child, "the only real concern is the age of the gametes, when older people have children via surrogacy. It is these [gametes] that pose the risk to a child's welfare."

6.66 Accordingly, consultees who favoured no age limits made the case for addressing concerns through the assessment of the welfare of the child. As the HFEA said:

> There should be no maximum age limit for the granting of a parental order and the age of the intended parents should continue to be taken into account in the assessment of the welfare of the child in applications to grant a parental order.

6.67 A further objection raised was the potential for age discrimination: a blanket age limit could be discriminatory and run counter to the principles in the Equality Act 2010.

6.68 Of the consultees who favoured introducing a maximum age, the primary focus was on the need for the child to have healthy and energetic parents, who would still be

[14] Consultation Question 64.

alive and active into the child's adulthood. For example, consultees who submitted the Nordic Model Now! template response viewed surrogacy as particularly unethical when the intended parents are old because parents should be reasonably expected to survive in good health until the child reaches adulthood.

6.69 PROGAR and Nagalro disagreed with all of our proposals. They did not think that an age limit could be successfully challenged on the basis of discrimination under the Equality Act 2010. They suggested that the limit be one that reflects the likelihood that at least one parent can raise the child through to adulthood while still in good health. PROGAR were not convinced by the suggestion that the decision be left to the welfare assessment. They further suspect that clinics and surrogacy organisations would welcome the setting of a limit to absolve them of this decision.

Maximum age of intended parents to enter the new pathway

6.70 Many of the concerns raised generally mirrored those for a maximum age when seeking a parental order. We focus here on additional considerations which would apply to the new pathway.

6.71 JMW Solicitors argued that there was a stronger argument for an age limit in new pathway cases because of the lack of judicial oversight. They asked whether public awareness of an age limit in the new pathway could "foster a (desirable) sense that elderly IPs should think twice before entering into a surrogacy arrangement?" They made a separate point that relying on a welfare of the child assessment, rather than on a clear rule as regards age, would require surrogacy organisations to make difficult age-based decisions: an objective age limit would relieve them of this.

6.72 Dr Alan Brown (legal academic) noted that there was a stronger case for an upper age limit in the new pathway, because intended parents could always then fall back on the parental order process. Contrary to that, it was noted by JMW Solicitors and the solicitors' firm Dawson Cornwell that this would require intended parents to undertake arguably unnecessary (and stressful) parental order proceedings, when the reality is that a court would invariably make the parental order (absent any other reason to refuse it): age alone would not otherwise outweigh the best interests of the child.

Minimum age of intended parents to enter the new pathway

6.73 Of the responses in favour of a minimum age of 18 for the intended parents on the new pathway, there were not many additional comments. Dr Pauline Everett raised the concern that there is potential for a minimum age requirement to be seen as age discrimination, especially as 16-year-olds can lawfully have a child together through natural conception. But she said that surrogacy should be seen as a "special case", and that setting the limit to 18 would mean that the couple are adults and have the maturity to look after the child.

6.74 Of those who favoured a higher minimum age, the main concern was the need to ensure that the intended parents had the emotional maturity to see the process through. Natalie Orton-Rose, a surrogate, supported a higher age than 18 to enter the new pathway, saying:

> Surrogacy is hard and can be expensive and requires real grounding in the lives of those involved. To think an 18-year-old can pursue surrogacy as a surrogate or intended parent is madness.

6.75 Some consultees who supported a higher minimum age also noted the reality that, in practice, it is unlikely for someone at 18 to consider using surrogacy to form their family. Other consultees pointed to the fact that an age limit of 23 or 25 would reinforce the message that surrogacy is not the same as natural conception and requires additional thought, planning and safeguards. For example, the Nordic Model Now! template response stated:

> … We suggest that 25 would be more appropriate. Any age limits in the legislation will have a normative effect – and will inevitably be understood as society sanctioning entering a surrogacy arrangement at that age.

Analysis

Maximum age for intended parents for the grant of a parental order and on the new pathway

6.76 In terms of a maximum age for intended parents, there was a clear sense within the responses that the focus on age was misleading when the primary rationale was to ensure that intended parents should be likely to be able to support their child throughout childhood and see them reach adulthood. On this basis, the health of the intended parents would be more relevant than their age. Using age as a proxy for health was too blunt a tool: put plainly, a maximum age limit could screen out a healthy 60-year-old, but not a 25-year-old with terminal cancer.

6.77 Consultees also pointed out that, in natural conception, the age of parents is often a concern in relation to the health of the gametes used to create the embryo. In surrogacy, the age and health of the gametes is a separate question to the age and health of the intended parents, because donor gametes may be used. Consequently, concerns about the gametes used to create the pregnancy cannot be addressed by imposing maximum age limits on the intended parents themselves.

6.78 Amongst those who disagreed with the proposal and favoured the introduction of an age limit, a key concern was to mirror the reality of natural conception, whereby biology has effectively set a maximum age limit. One suggestion to reflect this was to introduce a maximum total age (for example, 110 years between both intended parents, giving an average maximum age of 55). This would ensure that, if one of the intended parents was older than the average maximum, the other would necessarily have to be younger.

6.79 Other responses in favour of introducing an age limit were framed in terms of needing to be young enough to have the health and energy required to look after children.

6.80 Although we accept the merit of these concerns, we remain of the view that introducing a maximum age limit is not an appropriate tool to address them. Imposing an age limit does not guarantee that a child will have parents until they reach adulthood, nor that the parents will be healthy. There is a possibility of younger intended parents experiencing health issues and premature death, especially if the reason they are seeking to use surrogacy is because of long-term ill-health. Accordingly, age is not an effective way of seeking to protect the wellbeing of the

child, when the real issue at the heart of these concerns is the health of the intended parents. The underlying concern is to ensure a greater chance that the intended parents are alive throughout the child's childhood: reducing this to a maximum age limit would encourage box ticking, rather than a genuine assessment of the welfare of the child. We therefore propose that there should be no upper age limit for intended parents, but that age should be one factor taken into account when carrying out the welfare of the child assessment, to ensure an individualised assessment, rather than an arbitrary cut-off.

6.81 There was slightly more support for a maximum age for intended parents on the new pathway, on the basis that the new pathway does not involve judicial scrutiny and, if intended parents were not eligible for the new pathway, they could revert to applying for a parental order. However, a number of consultees, including the HFEA, were of the view that the welfare of the child assessment was the best route for assessing the fitness of the intended parents, looking at all factors and not simply at age.

6.82 We have reached the conclusion that concerns regarding the age of the intended parents are a proxy for health and lifespan concerns, and that these are most appropriately met through the welfare of the child assessment and, on the new pathway, pre-conception screening and safeguarding. Rather than using a maximum age as a blunt instrument, age and health are appropriately considered holistically as part of welfare concerns.[15] Introducing an age cut-off on the new pathway which automatically pushes older intended parents towards applying for a parental order is likely to be detrimental to the welfare of the child, as any assessment of the welfare of the child (and the opportunity to take appropriate steps to support the intended parents, thereby safeguarding the best interests of the child) would come several months after the birth of the child rather than pre-conception. Automatic barring of access to the new pathway based on age is very different from a considered decision by the RSO, in a welfare assessment, that the intended parents are too old, or in too poor health, to secure the future welfare of the child.

6.83 Moreover, there is no case in which a parental order has been refused because of the age of the intended parents (suggesting that age is not likely to stop them ultimately being recognised as the child's parents). It is therefore preferable to keep them within the new pathway where possible, so that they, the surrogate, and the surrogate-born child can benefit from additional screening and support.

6.84 As we stated in the Consultation Paper:

> If an age limit is not imposed in the new pathway for intended parents then, in order for their age to be taken into account in the welfare assessment before the child is conceived, the age of the intended parents would have to be added to the Code of Practice as a specific consideration (in contrast to the age of the surrogate, the Code of Practice does not currently refer to the age of intended parents).[16]

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15 The Irish draft Assisted Human Reproduction Bill 2017 had proposed a maximum age limit of 47 for intended parents, but once it was laid as the Health (Assisted Human Reproduction) Bill 2022 this had been replaced by a requirement for a reasonable expectation of living to parent the child until the age of 18.

16 Consultation Paper, para 12.132.

We continue to support this approach.

6.85 In respect of intended parents seeking a parental order, the court's decision will turn on the welfare of the child, using the factors set out in the Adoption and Children Act 2002 or the Adoption and Children (Scotland) Act 2007.[17] These currently enable the court to consider the age of the intended parents as part of the assessment of the needs of the child (in England and Wales), all the circumstances of the case (in Scotland), and the welfare of the child throughout the child's life.

Minimum age for intended parents

6.86 We also asked whether there should be a minimum age for intended parents on the new pathway. The minimum age for the grant of a parental order is 18, which is the age of majority.[18] There was no evidence brought to show that this minimum age was inappropriate or was causing problems in the parental order process. We are not aware of any 18-year-old intended parents.

6.87 There was widespread support for introducing 18 as the minimum age for intended parents on the new pathway.

6.88 A significant number of consultees favoured introducing a minimum age of 21 or 25 for intended parents, on the basis that 18-year-olds would lack the necessary maturity to enter into a surrogacy agreement and to be parents. Some drew parallels with adoption, where adoptive parents must be 21. Some consultees also made the practical point that intended parents are highly unlikely to be as young as 18 simply because of the length of time taken to meet a surrogate and enter into a surrogacy agreement.

6.89 As with the discussions around a maximum age limit, we see the rationale for any minimum age limit as being better addressed as part of the welfare of the child assessment, rather than through an arbitrary age limit. We should not interfere with the family life of adults unless there are risks of exploitation or child welfare concerns. These can be addressed through medical screening, implications counselling, and the welfare of the child assessment. Therefore, we do not propose to introduce a minimum age for intended parents above the age of majority, which is 18.

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[17] As adapted and applied to parental orders by the Human Fertilisation and Embryology (Parental Orders) 2018 (SI 2018 No 1412).

[18] Age of Majority (Scotland) Act 1969, s 1 and Family Law Reform Act 1969, s 1. The UNCRC also defines a child as anyone under the age of 18, Article 1.

Recommendation 19.

6.90 We recommend that:

(1) there should be no maximum age imposed for intended parents for the granting of a parental order;

(2) there should be no maximum age imposed for intended parents on the new pathway; and

(3) there should be a minimum age of 18 for intended parents on the new pathway, and 18 should continue to be the minimum age for intended parents seeking a parental order. These requirements relate to the age of the intended parents at the time of entering into the surrogacy agreement.

6.91 The draft Bill sets out the requirements that must be met for a surrogacy agreement to be eligible for the new pathway and for the grant of a parental order. It is not necessary to specify in the Bill matters that do not affect eligibility for the new pathway or for a parental order, and so no provision is required to implement our recommendations in relation to maximum age. Clause 8(2)(b) of the draft Bill gives effect to the minimum age for intended parents on the new pathway, and clauses 16(2)(b), 18(2)(b) and 19(3)(b) give effect to the minimum age for intended parents in relation to parental orders.

MEDICAL NECESSITY AS A REQUIREMENT FOR SURROGACY

6.92 There is nothing in the current law that restricts the use of surrogacy to where it is medically necessary; that is, where there is a diagnosis of infertility, such that the intended parents are unable to carry and give birth to a baby. In many cases, this inability will be on the part of the intended mother; however, it may also result from the individual or couple not having a womb (for example, a single man or male same-sex couple). There may be other reasons why someone would choose to use surrogacy. For example, while some trans men may wish to carry their own child, others may find that pregnancy causes psychological distress and runs counter to their gender identity.

6.93 The policy driver behind restricting surrogacy to where it is 'medically necessary' would be to prevent an elective use of surrogacy (which is where the intended mother could carry a pregnancy but does not wish to for reasons of convenience, and therefore seeks a surrogacy agreement), which would raise concerns that poorer women could be exploited by women who wish to have a child without going through pregnancy and childbirth. Some jurisdictions do use a requirement of medical necessity, or a similar restriction, to address this concern.[19]

[19] For example, Greece and South Africa both require intended parents to show that the surrogacy is required due to medical necessity: see Greek Civil Code, Arts 1458 and 1455 and Children Act No 38 of 2005 (South

6.94 In the UK, the assumption is very much that surrogacy would not be used for elective reasons. We are not aware of any such cases, compared to anecdotal evidence of occasional cases in the USA.[20]

6.95 In the Consultation Paper, we thought that there was some risk that a reformed surrogacy law which makes domestic surrogacy more attractive might increase the risk of elective surrogacy. We also took the view that any restriction would have to apply to the new pathway and the parental order process. However, we saw difficulties with introducing a medical necessity requirement: in particular, that refusing to recognise the intended parents as the legal parents may be contrary to the best interests of the child despite the elective nature of the agreement. We felt that there was no very clear case for a requirement of medical necessity and therefore asked an open question on this point in the Consultation Paper, both in relation to the new pathway and in respect of agreements where a parental order is sought. We also sought consultees' views as to how "medical necessity" should be defined and assessed.[21]

Consultation

6.96 The majority of consultees were against surrogacy being used for elective reasons, but there was not a complete consensus on the issue.

Preventing elective surrogacy

6.97 The strongest arguments for a requirement that surrogacy should be carried out only because of medical necessity were generally made in terms of the need to prevent any risk – however small – of the law sanctioning elective surrogacy. Cambridge Family Law explained their ethical objection to elective surrogacy and argued that, if it were permitted, it would have a normative effect that would result in the commodification of the gestational process. Accordingly, allowing such a practice would be liable to create a "dystopian world" where affluent individuals would pay financially disadvantaged women for gestational services.

6.98 Nordic Model Now! and those who responded using their template reiterated their support for banning surrogacy as a practice on the basis that it is a violation of the rights of women and children, adding that there is never a medical necessity for surrogacy. They emphasised that not being able to have a child is not a medical disorder or disease.

Ensuring that the best interests of the child are met

6.99 Consultees did not typically engage with a distinction between the new pathway or the parental order process when considering if the law should require intended parents to

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Africa), s 295(a), respectively. Portugal and Israel also prescribe similar restrictions on surrogacy: Medically-Assisted Procreation Law no 32/2006 (2006) Art 8 no 2; The Surrogacy Agreements (approval of the agreement and the newborn's status) Law 1996, s 4, respectively.

[20] See, for example, The Guardian, 25 May 2019, https://www.theguardian.com/lifeandstyle/2019/may/25/having-a-child-doesnt-fit-womens-schedule-the-future-of-surrogacy, (last visited 23 March 2023); The Telegraph, 17 April 2014, https://www.telegraph.co.uk/women/womens-health/10772725/The-rise-of-social-surrogacy-to-protect-careers-or-bodies-Would-you-ever-do-it.html (last visited 23 March 2023).

[21] Consultation Question 62.

demonstrate a medical necessity for surrogacy. Where they did, it was usually to state that the requirement should not apply to parental orders as this could be contrary to the best interests of the child.

6.100 Expressing concern about introducing such a requirement, Dr Herjeet Marway was cautious about the state prescribing the "wrong" and "right" motivations for surrogacy. Her concerns focussed on the view that it would be punitive to individuals who do not wish to carry a child and disproportionately affects women since only they can carry a child.

6.101 SurrogacyUK opposed a requirement for medical necessity in all cases, because it would inappropriately distinguish surrogacy from other forms of assisted conception where there is no such requirement.

Concerns over prevalence and discriminatory impact

6.102 A number of consultees who opposed a requirement of medical necessity were concerned by the absence of evidence that elective surrogacy is a genuine problem, as opposed to a purely hypothetical concern. NGA Law and Brilliant Beginnings noted that they have never seen a case of "social surrogacy" across over a thousand cases that they have dealt with.

6.103 A separate point was made by Bethan Carr (solicitor), who said that ultimately people who are using surrogacy out of pure convenience will not be able to access surrogacy because surrogates will not want to work with them.

6.104 A number of consultees noted that a requirement for medical necessity, or its definition, could disproportionately and inappropriately affect the following groups:

(1) women, on the basis that only they would be subject to any kind of medical requirement for surrogacy;

(2) men in same-sex couples and single men, on the basis that their infertility is not medical but structural; and

(3) transgender people, on the basis that their infertility could be either structural (by virtue of their single status or partner's reproductive capacity) or related to their gender identity (for example, a trans man who might have the ability to become pregnant).

Issues with definition

6.105 The difficulties in defining "medical necessity" were also highlighted by consultees. The HFEA noted that if a requirement of medical necessity were adopted, it would be imperative to have a statutory definition which was clear and workable in practice. Without such a definition, they said:

> it will be untenable for a regulator to determine what amounts to 'medical necessity' in the case of any female intended parents or both members of a same-sex female intended parent couple.

6.106 Regarding the definition of medical necessity, consultees who responded to this part of the question typically observed that there would need to be medical evidence of medical necessity provided by a general practitioner or other medical practitioner. Nearly all consultees who addressed the question supported the inclusion of those who might be termed 'structurally' infertile within a definition of medical necessity (that is, single men and same-sex male couples).

Analysis

6.107 There was broad, although not universal, support from consultees for a requirement of medical necessity. Despite this, we are not convinced that this requirement is necessary or workable. Before setting out our reasoning, we think it is important to emphasise that there was widespread agreement that surrogacy for elective reasons should not be encouraged or normalised. We strongly agree with this. However, discouraging elective surrogacy is a different issue from mandating a test of "medical necessity". Given the issues outlined above, we think that there are very significant problems with restricting access to surrogacy by reference to medical necessity.

6.108 There were two separate concerns. The first was whether it would be possible to define the "medical" element of medical necessity. This risks unnecessarily penalising women who may be physically capable of carrying a pregnancy, but would incur very severe risks to their life through doing so, perhaps because they would need to stop taking life-saving medication for the period. It also risks stigmatising women who have under-researched or poorly understood conditions, such as tokophobia (fear of pregnancy and/or childbirth). Thus, there was no obvious consensus or understanding of what medical necessity would involve.

6.109 Secondly, while there was widespread opposition to elective surrogacy, many consultees were anxious to ensure that people who were structurally infertile were not excluded from surrogacy as a result of this test.[22] However, introducing a medical necessity requirement would mean that those who are structurally infertile (by virtue of their sexual orientation, gender identity or decision to become a single parent) would be prevented from using surrogacy. If we accept that the law should not restrict the access to surrogacy of those who are structurally infertile rather than medically infertile, it follows that the law should not seek to regulate the reasons for seeking surrogacy, outside of preventing elective surrogacy if this is possible.

6.110 We considered whether we could approach any restriction from a different perspective, by seeking to prohibit elective surrogacy, as opposed to requiring intended parents to show that it is medically (or structurally) necessary for them to do so. Ultimately, however, we think that such a requirement could suffer from similar problems of definition; in the same way that medical practitioners may disagree about whether a surrogacy agreement is medically necessary, there is ample scope for disagreement over whether a surrogacy is "elective" in nature.

6.111 Most importantly, we do not think that such a restriction is required. There was no evidence presented to us that elective surrogacy happens in the UK. Anecdotal evidence supports the view that women would far rather carry a pregnancy, and turn

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[22] See also R Marsh, "Upholding the dignity of gay men who are (prospective) parents: an analysis of adoption and surrogacy law" (2022) 44 *Journal of Social Welfare and Family Law* 3, 306.

to surrogacy only as a last resort. Those consultees with extensive experience of surrogacy agreements, such as NGA Law and Brilliant Beginnings and SurrogacyUK, were of the firm view that elective surrogacy is not occurring in the UK. In addition, within the new pathway, surrogates will be supported to make an informed decision about whether to enter into a particular surrogacy agreement: it would be their choice whether or not to work with intended parents seeking surrogacy purely for convenience.

6.112 Our final reason against introducing a medical necessity requirement is that even if it were to be introduced in the new pathway, we cannot see that it could be introduced for parental orders. Even following an elective agreement, the child's welfare throughout their life may be best served by the making of a parental order, and the court would therefore make the parental order sought. Thus, any limit in the new pathway could be easily avoided by seeking a parental order, thereby depriving the surrogate, intended parents, and child of all the safeguards and protections that come with the new pathway.

6.113 We acknowledge that medical necessity is used as a test in other jurisdictions (whether as a gateway to access surrogacy in the first place, or in the specific context of double donation), but evidence casts doubt on the efficacy of such a test. For example, in relation to Greek practice, where surrogacy can be accessed only in cases of "medical inability", Milapidou and Kipouridou identify that cases are often enabled to proceed by relying on an explanation of "inexplicable infertility". They note that the test of "medical inability" is essentially becoming "void wording", and they urge reform so that people do not have to rely on "false statements or tricks" to access surrogacy.[23] In New Zealand, the 2021 Report of the Advisory Committee on Assisted Reproductive Technology replaced their previous medical condition requirement with a requirement that the procedure is "the best or only opportunity for the person to have a child."[24]

6.114 We therefore do not recommend that medical necessity should be an eligibility requirement for surrogacy agreements within or outside the new pathway. We do, however, suggest that the HFEA Code of Practice should emphasise that elective surrogacy is not supported, but that each situation should be assessed on its own merits.

Recommendation 20.

6.115 We recommend that there should be no requirement that a surrogacy agreement has been used because of medical necessity.

6.116 The draft Bill sets out the requirements that must be met for a surrogacy agreement to be eligible for the new pathway and for the grant of a parental order. It is not necessary to specify in the Bill matters that do not affect eligibility for the new pathway

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23 M Milapidou and K Kipouridou, "Deficiencies and Shortcomings in the Greek Legal Framework on Medically Assisted Reproduction" (2019) *Rivista IUS et SALUS*.

24 ACART, *Advice and Guidelines for Gamete and Embryo Donation and Surrogacy*, June 2021, para 72.

or for a parental order, and so no provision is required to implement this recommendation.

DOUBLE DONATION

Current law

6.117 The current law on surrogacy requires that the gametes of at least one intended parent be used to conceive the child in respect of whom the parental order is sought.[25]

6.118 The situation where there is no genetic link between the child and either of the intended parents is referred to as "double donation", that is to say, both sperm and egg are donated (or, as is possible, an embryo is donated). The donation of the egg might take the form of traditional surrogacy where the surrogate's own egg is used, or gestational surrogacy, where an egg donor has provided the egg.

6.119 However, a genetic link is not a prerequisite for the formation of a loving parent-child relationship.[26] Other family forms feature the absence of a genetic link: for example, adoption; donor conception (as regards the parent whose gametes are not used); and step-parent relationships. We were also aware that the requirement for a genetic link means that where an individual or couple cannot carry a child or provide gametes, they will be barred from using surrogacy under the current law. This may disproportionately impact on single women who wish to be (single) intended parents but are unable to use their own eggs, because an inability to carry a child may be associated with a lack of gametes.

6.120 In the Consultation Paper we put forward our view that permitting double donation in surrogacy was consistent with intention being the defining feature of surrogacy, but that caution was needed. We therefore provisionally proposed that double donation should be possible in the new pathway, but that this should only be permitted where there is a medical necessity for it.[27] We also proposed that the requirement for a genetic link should be retained for international surrogacy arrangements. We asked an open question as to whether double donation should be possible for domestic agreements not on the new pathway, that is, where a parental order was sought.[28] We also provisionally proposed that, if the requirement for a genetic link was retained for domestic surrogacy cases outside the new pathway, then that requirement should not apply (subject to medical necessity), if the court determined that the intended parents in good faith began the surrogacy arrangement in the new pathway but were required to apply for a parental order.[29] This proposal falls away given our recommendation below that a genetic link still be required on the new pathway.

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25 HFEA 2008 s 54(1)(b) and s 54A(1)(b) for joint and single applicants respectively.

26 A theme explored in S Golombok, *We are Family* (2020).

27 Discussed in the preceding section.

28 Consultation Question 59.

29 Consultation Question 60.

6.121 We asked for evidence of the impact of the current requirement for a genetic link, and any removal of it, in the new pathway, and where a parental order was sought.[30]

6.122 This section therefore considers whether double donation should be permitted in the new pathway and for those intended parents seeking a parental order.

Consultation

6.123 The responses to the open question asking for evidence in this area were not markedly different from those to the specific proposals to permit double donation or asking whether it should be permitted, so we have included discussion of responses to both questions here.

6.124 Some consultees advocated for having no restriction on the use of double donation. The British Pregnancy Advisory Service ("BPAS") recognised that "families can be created in many different ways, and that genetic and/or gestational links are not a necessary prerequisite to becoming a parent or building a family."

6.125 There was opposition to allowing double donation in any form from the consultees who adopted the Nordic Model Now! template response. Their objection was founded on the disagreement with the new pathway as a whole and the view that surrogacy was never a medical necessity.

6.126 The provisional proposal drew support from other consultees, albeit this was varied.

Consistency and discrimination

6.127 The main argument raised by many consultees in favour of allowing double donation was that this would be consistent with what was already permitted in assisted conception and that not to do so would be discriminatory, particularly against single women.

Harm to children and human rights arguments

6.128 One of the main arguments raised against double donation was that it could result in the commodification of, or harm to, children. Some consultees expressing this view opposed double donation and nearly all opposed surrogacy in general.

6.129 For example, one consultee who is a medical practitioner/counsellor said that the genetic link was important because it strengthened the bond between parent and child, and that if there was no such link, 'the couple are just buying a baby'.

6.130 However, the need to prevent harm to children was also advanced to support the introduction of double donation. Professor Emily Jackson (legal academic) thought that the current requirement for a genetic link was "in conflict with the need to make the child's welfare the court's paramount consideration, where a parental order would best meet the child's needs."

[30] Consultation Question 113.

Adoption

6.131 A further argument made against removing the requirement of a genetic link drew on surrogacy's relationship to, and distinction from, adoption. This point was articulated by a range of consultees. For example, Cafcass expressed concern about the consequences for the child's identity if the link were to be removed, saying:

> The requirement of a genetic link separates the arrangement from adoption and justifies the relatively light touch assessment and regulation of the birth of children through surrogacy. The impact on the child is that this contributes to their sense of identity.

6.132 JMW Solicitors also thought that the removal of the genetic link could be abused and could be "a dangerous step towards designer babies".

6.133 Dr Rita D'Alton-Harrison (legal academic) thought that, because parental orders were specifically created to provide legal parenthood to those with a genetic connection to the child (and their spouse, civil partner or partner), they should remain available only to those with this connection. However, she thought that a different sort of order (only available by application to a court) should be available in the specific circumstances of double donation – which she also saw as more akin to adoption.

The medical necessity requirement

6.134 Many consultees commented on the part of our proposal relating to medical necessity and queried whether it provided a necessary or suitable restriction on the use of double donation in surrogacy agreements.

6.135 Some consultees advocated for having no restriction on the use of double donation in the new pathway. Other consultees drew attention to the current law, the risk of discrimination, and the practical difficulties in defining "medical necessity". NGA Law and Brilliant Beginnings commented that the UK has never had a requirement of medical necessity for surrogacy, and that there was no practical need to introduce one. Their concerns centred around the marginalising effects it could have on women suffering from tokophobia (fear of pregnancy and/or childbirth) and the potential discrimination against trans parents and others who "may have good but non-medical/non-necessary reasons for using donors".

6.136 In terms of the difficulty in defining "medical necessity", the Family Law Bar Association queried where the line would be drawn:

> would, for example, an older couple or individual who was rendered infertile as a result of the natural aging process be permitted to rely on this proposal? … 'medical necessity' may also need to include the desire of the intended parent(s) not wishing to transmit a genetic condition to a child and therefore sought to use donor gametes.

6.137 Some consultees suggested variations on the test – "medical or other necessity" or "medical reason" – while others thought that a case-by-case approach would be better, with the reasons for double donation assessed in implications counselling or, in the parental order route, approved by the court.

Analysis

6.138 Considering the range of responses from consultees and the finely balanced arguments for and against double donation, we recommend that the requirement of a genetic link is maintained. In reaching this conclusion, we have been heavily influenced by the difficulties and disadvantages in seeking to tie double donation to a need for medical necessity.[31]

6.139 We accept that it is difficult to identify precisely who should be covered by this concept of "medical necessity". Providing a very precise category of those who should be able to benefit from double donation would risk inadvertently excluding those who should be covered; for example, those cases where – due to their age or health – there might only be a very small chance of the intended parents successfully using their own gametes to produce an embryo, but where the use of donated gametes would greatly increase the chance of the surrogate conceiving and carrying a successful pregnancy. Conversely, if we were to recommend "medical necessity" being fulfilled by subjective judgement rather than a strict definition, this could introduce uncertainty and an element of inconsistency to the process. Finally, medical necessity appears to be unnecessary as a restriction on the use of double donation as there is no evidence that, in the UK, intended parents are opting for double donation in circumstances where they could have used their own gametes.

6.140 Accordingly, we do not think that any test which relies on medical necessity is workable or appropriate in this jurisdiction.

6.141 In our Consultation Paper, we specifically consulted on permitting double donation only where there was a medical necessity: we therefore have not obtained consultees' views in relation to double donation without any test of medical necessity.

6.142 We acknowledge the arguments in favour of allowing double donation, at least on the new pathway where there are safeguards in place. Not permitting double donation risks discriminating against single applicants, and in particular single women.[32] Surrogacy can still robustly be differentiated from adoption even without maintaining a genetic link between parent and child, because of the clearly evidenced pre-conception intention of the parties.[33]

6.143 Some consultees were concerned that an increase in surrogacy would lead to a reduction in the pool of adults looking to adopt. We were not convinced by these arguments. It is not evident why adults seeking to create a family through surrogacy should have a "duty" or responsibility to adopt, when that is not expected of those who conceive through donor conception, assisted conception, or natural conception. Moreover, surrogacy involves only a few hundred cases per year at present. Even if permitting double donation for surrogacy agreements on the new pathway caused a

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31 This of course echoes the earlier discussion in this chapter about whether there should be a need for medical necessity for surrogacy in itself and our conclusions there. See paras 6.107 onward.

32 For an analysis of the potential discrimination here, see A Brown and K Wade, "Parental orders for deceased intended parents: Re X (Foreign Surrogacy: Death of Intended Parent) [2022] EWFC 34" (2022) 30 *Medical Law Review* 744.

33 See Lydia Bracken, "Surrogacy and the genetic link" (2020) *Child and Family Law Quarterly* 303.

significant rise in those numbers, we take the view that it is unlikely that there would be any significant impact on the number of adoptions.[34]

6.144 For these reasons we suggest that the UK Government may wish to consider whether a policy permitting double donation in surrogacy agreements could be introduced. Nevertheless, we recommend no change to the current position, such that a genetic link is required for surrogacy, whether the agreement takes place on the new pathway or where a parental order is sought.

Recommendation 21.

6.145 We recommend that:

(1) a genetic link between the child and the intended parents continues to be required for surrogacy agreements where a parental order is sought; and

(2) a genetic link between the child and the intended parents is a requirement for surrogacy agreements proceeding on the new pathway.

6.146 Clause 2 of the draft Bill gives effect to the requirement for a genetic link. The clause defines a "surrogacy agreement" for the purposes of the Bill – a surrogacy agreement must meet this definition in order to be eligible for either the new pathway or a parental order. That definition states that the surrogate is to undergo one or more "relevant assisted reproduction procedures". Clause 2(2) defines a relevant assisted reproduction procedure as one using the gametes of the intended parent, or either or both of the intended parents in a couple, or an embryo created using such gametes.

THE RELATIONSHIP STATUS OF THE APPLICANTS

6.147 Currently, where two applicants wish to obtain a parental order, they must satisfy the court that their relationship falls into one of the three qualifying categories set out in section 54(2) of the HFEA 2008. These three categories are:

(1) husband and wife;[35]

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34 4,417 adoption orders were made in England and Wales in 2021, compared to 436 parental orders. See Ministry of Justice, Family Court Statistics Quarterly: January to March 2022, https://www.gov.uk/government/statistics/family-court-statistics-quarterly-january-to-march-2022 (last visited 23 March 2023). 465 adoption orders were made in Scotland in 2021, compared to 15 parental orders; however, these figures include 4-5 months of 2020 in addition to 2021, because of delays in registration caused by the Covid-19 pandemic. The figures for the previous year for which there are complete records, 2019, were 464 adoption orders and eight parental orders. See National Records of Scotland, Vital Events Reference Tables 2021 https://www.nrscotland.gov.uk/statistics-and-data/statistics/statistics-by-theme/vital-events/general-publications/vital-events-reference-tables/2021 (last visited 23 March 2023).

35 Following the passage of the Marriage (Same Sex Couples) Act 2013, this provision should be read so as to apply to married couples of the same sex. For further detail, see the discussion in *Re Z (A Child)* [2015] EWFC 73, [2016] 2 All ER 83 at [7] to [14]. See also the Marriage and Civil Partnership (Scotland) Act 2014, s 4.

(2) civil partners of each other; or

(3) two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other.

6.148 We asked a question about this aspect of section 54 partly because of the inconsistency created by the introduction of section 54A, which allows single applicants to apply for a parental order. Single applicants do not have to prove that they are not in a relationship,[36] whereas joint applicants under section 54 do have to prove the status of their relationship.

6.149 We were also concerned that the law was unclear on which categories of applicant could fall within the definition of a couple "living as partners in an enduring family relationship", and whether it was appropriate for applicants to have to disclose information about the intimate details of their relationship in order to establish whether they qualify for a parental order.

6.150 In the Consultation Paper, we sought views on whether the qualifying categories of relationship in section 54 should be reformed or removed. Any (reformed) law would apply to agreements both in and outside the new pathway.[37]

Consultation

6.151 The prevailing concern of consultees, whether favouring reform or not, was that surrogate-born children should be raised in a stable family unit. For example, Cafcass said: "the birth of the child should be in as secure an arrangement as possible and an enduring family relationship should be evidenced by the applicants."

6.152 The Nordic Model Now! template response simply stated: "The qualifying categories of relationship should not be reformed or removed."

6.153 Of those who suggested reform, some suggested that parental orders could be made jointly to couples who separate between conception and birth.[38] Professor Kenneth Norrie (legal academic) suggested that the role of a qualifying relationship requirement could be performed by the welfare test, removing the need for the requirement.

6.154 Some expressed concern that the concept of requiring a certain category of relationship was not reflective of modern families, and risked precluding alternative family forms. Moreover, the inconsistency between sole applicants, who are not subject to this scrutiny, and joint applicants who are, was also raised. The Bar Council said that this was potentially discriminatory compared with single applicants and indeed with those becoming parents through non-surrogacy routes: "If having a child

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36 In the first draft of the legislation this was the case, but the UK Government amended the drafting in response to criticism from the House of Lords and House of Commons Joint Committee on Human Rights.

37 Consultation Question 57.

38 This is not straightforwardly permissible on the face of s 54(2) HFEA 2008 where the couple are no longer married or in a civil partnership (or were simply cohabiting), but this situation has been tempered by case law, where parental orders have been made in these circumstances: *Re A (Surrogacy: s.54 Criteria)* [2020] EWHC 1426 (Fam).

is not the preserve of the married or coupled then what place does section 54(2) have now?".

Prohibited degrees of relationship

6.155 Some consultees specifically mentioned the restriction based on prohibited degrees of relationship, and questioned why those within the prohibited degrees of relationship should be prohibited from making a joint application for a parental order. Professor Kenneth Norrie said:

> There must have been many cases, perhaps more common in the past than today, when two sisters took in an orphaned nephew or niece to bring up as their own. I think it better to let the family unit develop its own narrative and to avoid artificial restrictions.

6.156 In contrast, other consultees favoured retaining the restriction on applicants for parental orders whose relationship falls within prohibited degrees. The Bar Council observed that the prohibition is directed at incest but also

> underpins a societal structure which remains largely intact i.e. that one does not have children with someone who is within the prohibited degrees of relationship.

Analysis

6.157 We do not think that there is a clear consensus for reform.

6.158 We acknowledge the inconsistency between the requirements placed on single and joint applicants. However, while there may be a case to be made for allowing two (or more) individuals not involved in a romantic relationship to co-parent, this question goes far beyond the bounds of surrogacy and therefore of our review.[39] We think that it would need to be looked at as a wider policy issue affecting all parent/child relationships.

6.159 The law needs to respond to difficult cases where, for example, an unmarried couple separate between conception and the application for a parental order. It has already done so,[40] and we suggest that judges can simply continue to apply the law pragmatically, within the permissible interpretation of section 54(2). We suggest that the court is likely to take the same view of a couple who divorce between conception and the birth of the child, although this has not yet been tested judicially. Where one of the intended parents dies before the birth of the child or before the parental order is made, we have put forward proposals separately, in Chapter 4.

6.160 Where concerns arise that a single applicant could conceal a partner who may pose a risk to the child, we have addressed this on the new pathway through specific pre-

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39 See *X v B* [2022] EWFC 129, [2022] 10 WLUK 506.

40 The definition of an enduring family relationship was deemed to be fact sensitive and for the court to decide in *Re F (Children) (Thai Surrogacy: Enduring Family Relationship)* [2016] EWHC 1594 (Fam), [2016] 4 WLR 126. This approach was applied to intended parents who were in an enduring relationship at the time of application, but not at the time of the grant of a parental order in *Re N (A Child)* [2019] EWFC 21, [2019] 3 WLR 317; and in *Re A (A Child) (Surrogacy: s. 54 Criteria)* [2020] EWHC 1426 (Fam), [2020] 6 WLUK 312 it was applied to intended parents who were together when a surrogacy arrangement was entered into, but separated before the child's birth.

conception safeguarding measures, as discussed further in Chapter 8. In the parental order process, the parental order reporter would consider issues of risk to the child's welfare posed by the living situation of the applicant for the parental order.

6.161 Moreover, as noted in the Consultation Paper,[41] the Joint Committee on Human Rights previously expressed serious concerns at a comparable requirement in the draft clause 54A of the 2008 Act (whereby single applicants would have to prove they were single), writing that: "trying to put a blanket ban on a person who is in a couple getting a single parental order is clumsy and inflexible, as well as discriminatory." The relevant clause was not included in the final version of the Bill that became the 2008 Act.

6.162 We therefore conclude that the current requirement should remain in place, and consequently the secondary question of whether to permit joint applicants within the prohibited degrees of relationship falls away. However, we think it is helpful to note that, even if the current requirement were not to remain in place, we would be concerned at the removal of restrictions on applicants within the prohibited degrees. From the consultation, there was very little demand for such a step, in contrast to considerable concerns. We think that such a step would need much more rigorous research before it was introduced, in the context of wider family law reform.

6.163 In respect of intended parents seeking a parental order, we recommend that the requirement for a qualifying relationship should apply at the time the surrogacy agreement was entered into, rather than at the time of the application for the parental order. This would make clear that the court could make a joint parental order where the two applicants had been in a relationship at the outset but had separated before the application was made.

Recommendation 22.

6.164 We recommend that the qualifying categories of relationship set out in section 54(2) of the Human Fertilisation and Embryology Act 2008 should continue to apply to agreements where a parental order is sought, without reform, and should also apply to agreements on the new pathway.

6.165 Clause 28 of the draft Bill defines two people as being in a "close relationship" if they meet the qualifying categories of relationship in section 54(2) of the HFEA 2008. This definition is then applied to give effect to the recommendation in clause 8(3) for the new pathway, and clauses 18(3) and 19(4) for parental orders.

DOMICILE OR HABITUAL RESIDENCE

6.166 Currently, for the court to have the jurisdiction to make a parental order, one of the intended parents must be domiciled in the United Kingdom. Establishing domicile has proved to be one of the most common problems that intended parents face in applying

[41] Consultation Paper, paras 12.21-12.22.

for parental orders, particularly for those who have immigrated to this jurisdiction from overseas.

6.167 While conscious of this issue, we consider it important that there should continue to be a jurisdictional requirement for the court to have the power to make a parental order, or for parties to enter into a new pathway agreement. We unequivocally wish to avoid the UK becoming a destination for "surrogacy tourism", given that international arrangements may raise problems in terms of trafficking concerns, difficulties of maintaining a relationship between the surrogate and the child born of the arrangement, and conflicting laws on parenthood.

6.168 In the Consultation Paper we took the view that, as an alternative to a test using domicile, it should also be possible to prove a connection using the test of habitual residence. Habitual residence is a question of fact, to be determined according to all the circumstances of the case. The term has been defined as "the place where the person has established, on a fixed basis, his or her permanent or habitual centre of interests".[42] This test is simpler to understand and apply and is already widely used in the family law context in the UK and internationally.

6.169 We therefore provisionally proposed that habitual residence be adopted as a second ground of jurisdiction for surrogacy, as an alternative to domicile.[43] Because habitual residence is easier to establish than domicile, we also asked an open question on whether there should be additional conditions imposed on the test of habitual residence, such as a qualifying period of habitual residence.[44]

Consultation

6.170 Consultees who supported the introduction of habitual residence as an alternative to domicile did so for a number of reasons. The advantages of habitual residence were recognised by a number of law firms and representative bodies. Mills & Reeve LLP commented that adopting a habitual residence test would be consistent with the jurisdiction of the family court under the Children Act 1989.

6.171 A further argument in support was put forward by NGA Law and Brilliant Beginnings, who noted that domicile was problematic because it was subjective and inconsistently applied by the courts, and difficult for surrogacy organisations to assess whether intended parents are indeed domiciled in the UK. This can lead to delay and uncertainty.

6.172 That said, the need to retain domicile was also recognised by consultees. Dawson Cornwell (law firm) highlighted that:

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42 *Pierburg v Pierburg* [2019] 4 WLUK 213, [2019] EWFC 24 at [43].

43 We proposed that habitual residence be added to domicile as a jurisdictional requirement, rather than replacing it, as British intended parents working overseas would likely be unable to establish habitual residence in the UK but would retain their UK domicile. Domicile therefore provides a way for such intended parents to access a parental order (or the new pathway, provided that the surrogate was in the UK and any assisted conception took place here).

44 Consultation Question 56.

> domicile would be a useful and legitimate jurisdictional basis where the intended parents are temporarily habitually resident in another jurisdiction but it is in the child's best interests to have their legal parentage recognised in the UK because it is intended that they will return to live in the UK in the future.

6.173 A few consultees suggested different connecting factors other than domicile or habitual residence. These included a test of "sufficient connection to the UK", tax residence, citizenship, and intention to stay in the UK.

6.174 Consultees who opposed the proposal, and preferred the current legal requirement of domicile, were typically concerned about the risk of attracting surrogacy tourism to the UK. This also gave rise to concerns of the pressure that this would place on the NHS, if intended parents from overseas could seek surrogacy in the UK, to take advantage of the NHS providing maternity care for free.

6.175 However, some opposition to the proposal also came from consultees who thought that there should be no jurisdictional test at all: one consultee said, "A surrogate should be free to help whomever she chooses, subject to care taken around any child safeguarding issues in other countries." Strictly, of course, a surrogate is free to make this choice: we are concerned with the jurisdiction to obtain a parental order.

6.176 SKO Family Law Specialists felt that it was "anomalous and unjustifiable" that there is no procedural barrier to intended parents whose habitual residence and domicile are in Scotland applying for a parental order in an English court, or vice versa.

6.177 Dr Katarina Trimmings and Dr Michael Wells-Greco (legal academics) thought that a test should also apply to the surrogate:

> Additionally, we believe that the same jurisdictional filters should also apply to the surrogate mother. This will help to prevent situations where a woman with no prior connection to the UK is brought to this country for the sole purpose of surrogacy.

6.178 Some consultees who also took this view suggested that an exception should be made for surrogates with a family connection, for example where intended parents seek to bring a sister or cousin to the UK to act as a surrogate.

Qualifying period

6.179 Where consultees also responded to the separate question of whether there should be a qualifying period for habitual residence, most considered that there should be such a period, but without necessarily agreeing as to what that period should be. Suggestions for 12 months and six months were most popular.

6.180 In contrast, some consultees thought that a qualifying period was superfluous for habitual residence, since this is a well-established and understood legal principle. The Bar Council took this view, commenting in particular on the effect of establishment in the former state:

> The test for habitual residence is now clearly established in family jurisprudence and it is that test which should prevail in these circumstances. The considerations within that same test, narrows down the ease with which intended parents can "forum shop" or establish surrogacy tourism in the UK…Thus, given the thorough nature of

the law of habitual residence at present, there is arguably little benefit in adding a further qualifying period of habitual residence.

Analysis

6.181 There was support for adopting the provisional proposal retaining domicile and introducing habitual residence as an alternative jurisdictional basis. We were particularly persuaded by the responses from law firms and legal representative bodies, who explained the difficulties with domicile and the clarity that is provided by the widely recognised and understood test of habitual residence. While we are strongly opposed to surrogacy tourism, we did not see evidence that introducing habitual residence as an alternative would give rise to that. To further ensure that the intended parents are genuinely connected to the UK via domicile or habitual residence, we propose that this test should be satisfied at two points in each process:

(1) on the new pathway, both at the point of signing the Regulated Surrogacy Statement and at the time of the birth of the child; and

(2) for intended parents seeking a parental order, both at the time of applying for and at the time of the making of the parental order.

6.182 We were also impressed by the arguments put forward by consultees that the jurisdictional criteria should be satisfied by the surrogate as well as the intended parents; this is likely to help prevent exploitation of women brought to the UK simply for the purpose of being surrogates on the new pathway. We did not agree with the suggestion by some consultees that there should be an exception in certain cases, such as intra-familial agreements. Such agreements also carry the possibility of exploitation and emotional pressure and we therefore do not think surrogates from within an intended parent's family should be exempt from any jurisdictional criteria. The jurisdictional criteria for surrogates can only apply on the new pathway however, to recognise the fact that some intended parents from the UK enter into surrogacy arrangements overseas: as UK nationals, they still need to apply for a parental order on their return, and imposing a jurisdictional requirement on the surrogate would operate to preclude a parental order being granted following international surrogacy.

6.183 In relation to a minimum period of habitual residence, we were not persuaded that one should be adopted. We do not think that there is any legal advantage to imposing a minimum period of habitual residence, and we concluded that any period adopted would be arbitrary. We are also conscious that we should not do anything to disturb the settled nature of the law of habitual residence.[45]

6.184 In respect of those consultees who suggested alternative bases for qualifying (such as tax residence, intention, or citizenship) we have concluded that there is no reason to prefer any of them to the test of habitual residence, which is widely used in family cases and well understood as a legal test. Moreover, some of the alternatives were too uncertain to introduce as a legal test.

6.185 Some consultees also raised concerns about placing additional pressure on the NHS, if intended parents from overseas could seek surrogacy in the UK to take advantage

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[45] *Re N (Children) (Adoption: Jurisdiction)* [2015] EWCA Civ 1112; [2016] 2 WLR 713.

of the NHS providing all maternity care for free. In fact, concerns about increasing the financial burden on the NHS in such circumstances do not arise, assuming that the surrogate is a UK resident, as NHS bodies are required to make and recover charges for services, including maternity care, provided to people who are not ordinarily resident in the UK.[46] Where a surrogate from a foreign jurisdiction comes to the UK to participate in a surrogacy agreement, a charge may be made. However, one of our recommended reforms, relating to the removal of a child from the UK for the purpose of being subject to (the equivalent of) a parental order overseas, is likely to dissuade foreign intended parents from coming to the UK for surrogacy agreements.[47] Bearing in mind that we have heard no evidence that people come to the UK in large numbers for such a purpose, any additional pressure on the NHS is likely to be very small.

6.186 We therefore propose that habitual residence should be introduced as an alternative to domicile and, for surrogacy proceeding on the new pathway, should apply to the surrogate as well as to intended parents. We have concluded that there is no need to introduce a minimum period of habitual residence. Doing so would go against the well-established and accepted principle of habitual residence, which must be fulfilled in its own right but thereafter needs no further qualification.

6.187 We did not agree that there was a need for reform to ensure that applications were made within a specified part of the UK jurisdiction, either in England and Wales, or in Scotland, given that surrogacy within the UK can be cross-border (as where the surrogate lives within one jurisdiction in the UK and the intended parents within another). In addition, we consider that imposing such a requirement could complicate the process of applying for a parental order.

Recommendation 23.

6.188 We recommend that:

(1) for an agreement in the new pathway, both the surrogate and one of the intended parents must be domiciled in or be habitually resident in the UK, Channel Islands or Isle of Man at the time of signing the Regulated Surrogacy Statement and at time the child is born; and

(2) for an agreement outside the new pathway, one of the intended parents must be domiciled in or be habitually resident in the UK, Channel Islands or Isle of Man at the time of applying for, and the time of the making of, the parental order.

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46 The National Health Service (Charges to Overseas Visitors) Regulations 2015 No 238, which apply in England and Wales, and the National Health Service (Charges to Overseas Visitors) (Scotland) Regulations 1989, which apply in Scotland.

47 Ch 16, para 16.269, Recommendation 84

6.189 Clauses 8(8) and (9) of the draft Bill give effect to this recommendation for the new pathway. Clauses 16(5), 18(6), 19(6) and 21(8) give effect to this recommendation for parental orders.

Chapter 7: The regulator and Regulated Surrogacy Organisations

7.1 This chapter sets out our recommendations for a new regulatory scheme for surrogacy in the UK. The scheme largely remains the same as that proposed in the Consultation Paper and is designed to ensure that the requirements of the new pathway are adhered to by surrogacy teams, and that individuals can access appropriate professional support throughout their surrogacy journey.

7.2 The key aspect of our recommendations is the introduction of Regulated Surrogacy Organisations ("RSOs"). Regulated by the Human Fertilisation and Embryology Authority ("HFEA"), RSOs would be responsible for assessing in individual cases whether the requirements for entering onto the new pathway have been met, including the screening and safeguarding measures that we recommend. If satisfied, the RSO would approve the surrogacy team onto the new pathway with all of its consequences, including that the intended parents would be the child's legal parents at birth (subject to any pre-birth withdrawal of agreement by the surrogate).

7.3 This chapter starts by setting out our recommendations for a surrogacy regulator and the recognition of RSOs, and then moves on to look at their responsibilities, including screening and safeguarding, and the Regulated Surrogacy Statement.

THE SURROGACY REGULATOR

7.4 In the Consultation Paper, we proposed that the HFEA should become the new surrogacy regulator, with oversight of compliance by RSOs with the legal requirements for entry to the new pathway. We also invited consultees to share any views as to how the HFEA's Code of Practice should be adapted if the HFEA served in this new regulatory role.[1]

Consultation

7.5 There was widespread recognition that the HFEA was an appropriate regulator for surrogacy practice. Consultees who supported surrogacy generally supported this proposal, recognising the crossover between surrogacy and other areas that already fall within the HFEA's remit, such as donor conception. They also recognised the absence of any other body that could feasibly undertake the role of regulator, and (closely related to this) the fact that the limited numbers of surrogacy agreements do not justify the creation of a new, specialist regulator. Notably, the HFEA itself agreed that it could become the new surrogacy regulator, on the condition that it is properly resourced and given adequate regulatory powers.

7.6 Some consultees who supported the proposal nevertheless drew attention to the fact that, in their view, the HFEA's expertise is largely clinical and does not necessarily

[1] Consultation Question 39.

cover the social and interpersonal dynamics at the heart of surrogacy agreements. PROGAR said:

> The HFEA will need to significantly improve its regulation of counselling standards and take up and significantly increase its social work/child welfare expertise, including on the Licensing Panel.

7.7 Those who supported surrogacy but did not support the HFEA becoming the surrogacy regulator typically made the case that surrogacy is a unique form of family-building which should have its own, specialist regulator.

7.8 A few consultees did not favour the remit of the HFEA being extended to surrogacy because they were critical of how the HFEA discharges its current responsibilities.

7.9 Consultees who were opposed to surrogacy disagreed with the introduction of a regulator for surrogacy organisations on the basis that it would sanction surrogacy. They reiterated this opposition in response to subsequent questions concerning the introduction of RSOs.

Analysis

7.10 We recommend that the remit of the HFEA is expanded to include the regulation of RSOs, and oversight of compliance with the proposed legal requirements for the new surrogacy pathway.

7.11 While we acknowledge that an independent surrogacy regulator could have more tailored expertise than the HFEA does at present, it would be impractical and disproportionately expensive to establish a new regulator in light of the limited numbers of people who enter into surrogacy agreements in the UK. It is more feasible and cost-effective for the HFEA to gain the expertise it needs to fulfil this role of surrogacy regulator than for a new body to be created.

Applying the HFEA's Code of Practice to RSOs

Consultation

7.12 Comments provided by consultees in relation to the HFEA's Code of Practice and its application to RSOs fell into three categories: those who supported a separate Code of Practice for surrogacy; those who thought that any Code was a matter for the regulator and that it was not the place of the Law Commissions to make recommendations in this area; and those who made various suggestions regarding the content of any Code.

7.13 Notably, the HFEA itself, amongst others, supported the introduction of a separate Code of Practice for surrogacy.

7.14 In relation to specific suggestions regarding content, a number of comments focused on contact between the RSOs and the parties – especially the surrogate – both pre-conception and post-birth. For example, Dr Sharon Pettle (clinical psychologist) recommended introducing a requirement for "preparation sessions", and minimum standards of ongoing contact with parties after birth. Dr Pettle also thought that there should be a minimum requirement for contact with surrogates before conception, and

"couple and individual consultations including mapping of extended family and social network ramifications of ethnic, gender and/or faith issues".

7.15 Dr Rita D'Alton Harrison thought that the Code should address how clinics are to conduct welfare of the child assessments, given that the new pathway does not involve a parental order reporter.

7.16 Other suggestions for the Code included guidance to address the risk of coercion and exploitation, the need to respect confidentiality and privacy of the surrogate and intended parents, and various aspects of the RSOs operations, including matching and facilitation services, advertising, and their non-profit-making status.

7.17 Stonewall thought that the Code should include guidance for RSOs on how to meet their Equality Act duties with respect to discrimination and how to meet the needs of LGBT clients, should require RSOs to collect demographic data on clients, and should encourage RSOs to meet the public sector equality duty under the Equality Act.

Analysis

7.18 We recommend that a separate Code of Practice be issued for surrogacy. A bespoke Code of Practice will ensure that it fully reflects the surrogacy context, and will draw a clearer distinction between the HFEA's role as regulator for surrogacy and its current regulatory responsibilities in respect of clinics.

7.19 A new Code would set out details of the new surrogacy pathway as well as the reformed requirements for a parental order, and would provide guidance to RSOs and clinics involved in surrogacy agreements. The Code should place particular emphasis on the child's welfare, and address information-sharing between intended parents and surrogates to ensure the confidentiality of the surrogate's medical records as appropriate during the pregnancy. It could carry over the relevant parts of the existing Code, such as sections 8 and 9 (welfare of the child, and pre-implantation genetic screening).

7.20 We take the view that the Code does not need to include non-discrimination provisions going over and above those included in the HFEA's existing Code; we are content to rely on the general law in relation to non-discrimination. Further, while preparation sessions – focusing on parenting skills and the importance of informing the child about their origins – and "mapping" sessions might be useful, we consider that the HFEA would be best placed to decide whether to include them in the Code.

Recommendation 24.

7.21 We recommend that:

(1) The remit of the HFEA be expanded to include the regulation of Regulated Surrogacy Organisations, and oversight of compliance with the proposed legal requirements for the new surrogacy pathway; and

(2) A separate Code of Practice should be issued by the HFEA for surrogacy agreements that would address the legal requirements for the new surrogacy pathway and parental orders, together with any other guidance the HFEA deems appropriate to include.

7.22 Part 4, chapter 1 of the draft Bill sets out the licensing regime whereby RSOs are regulated by the HFEA. The scheme is similar to the regime in place for the organisations that the HFEA currently regulates under the HFEA 1990. Clauses which relate to specific recommendations discussed in this chapter are noted below. In addition: clauses 55 to 57 deal with the revocation and variation of licences; clauses 58 to 64 deal with the procedure for applications for and decisions about licences; clauses 65 and 66 deal with the HFEA's powers to make directions which apply to licensees; and clauses 69 to 73 deal with record keeping, fees, and offences relating to licensing.

7.23 Clauses 67 and 67 of the draft Bill set out the requirement for the HFEA to issue a Code of Practice on surrogacy, and the procedure for the approval of a Code.

The role of HFEA-licensed fertility clinics on the new pathway

7.24 In the Consultation Paper, we envisaged that both RSOs and HFEA-licensed fertility clinics would be the gatekeepers to the new pathway. We proposed that both RSOs and licensed clinics could assess whether the requirements of the new pathway have been met in individual cases, and approve agreements on the new pathway with all of its legal consequences, including that the intended parents would be the child's legal parents at birth.[2]

7.25 We proposed that, with regard to their role in authorising surrogacy teams to enter the new pathway, RSOs and fertility clinics would be regulated by the surrogacy regulator; that is, the HFEA.

7.26 As discussed below,[3] we also proposed that RSOs, in line with the law's current approach to surrogacy organisations,[4] should be required to be non-profit-making bodies. One of our concerns was that, were this not so, profit-driven RSOs could be set up, which would have a financial incentive to authorise surrogacy teams to enter the new pathway without properly assessing if the requirements of the new pathway

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2 See Consultation Paper, paras 8.2 to 8.14.

3 See para 7.54 onwards.

4 SAA 1985, s 2(2A).

have been met. We nevertheless accepted that it would be unrealistic to expect licensed clinics to undertake work on a non-profit-making basis, given that they currently provide medical treatment and implications counselling for profit. Accordingly, our provisional proposal envisaged non-profit-making RSOs and profit-making clinics both being permitted to facilitate access to the new pathway.

7.27 On reflection, we have concluded that only RSOs should be able to authorise surrogacy teams to enter the new pathway. We do not consider that licensed clinics should be able to do so. Our reasons are as follows. First, we have concluded that no profit-making organisation should be able to perform this role. The requirements of the new pathway are designed to protect the surrogate and the intended parents from exploitation, and to ensure that they are fully aware of the legal, practical and emotional consequences of entering into an agreement. It is only these safeguarding and screening requirements that justify recognising the intended parents as the child's legal parents at birth. We are concerned that there would be greater risk of exploitation if commercially-driven organisations were involved in the process of safeguarding, as they would have a commercial incentive to recruit and to approve parties on the new pathway. We note that concerns of exploitation are a key factor in our recommendation below that RSOs should be required to operate on a non-profit-making basis. Their non-profit-making nature helps to ensure that they will exist solely or primarily to support surrogacy teams on their surrogacy journey. Additionally, it seems not only inconsistent but also wrong in principle that clinics could approve surrogacy teams on the new pathway for profit, whereas RSOs could only charge on a non-profit-making basis.

7.28 With this in mind, HFEA-licensed fertility clinics could still provide the services they currently provide with respect to surrogacy, for profit, including fertility treatment, welfare of the child assessments,[5] and implications counselling. HFEA-licensed fertility clinics could also set up a non-profit-making "arm" if they wished, which could apply to become an RSO.

7.29 For the avoidance of doubt, although it is a slightly separate issue, we do not expect professionals who provide other services to surrogacy teams on the new pathway to operate on a non-profit-making basis. This includes lawyers, clinicians and counsellors, who would be permitted to provide their services for a commercial fee, as is currently the case. The critical question is who is able to approve parties on the new pathway, and that must be done by a non-profit-making, regulated, entity.

REGULATED SURROGACY ORGANISATIONS

7.30 In the Consultation Paper, we proposed the introduction of RSOs,[6] which are a cornerstone of our proposals for the new pathway. RSOs would act as the sole gatekeepers to the new pathway and would be regulated by the HFEA.

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5 Elsewhere, at para 8.167, we recommend that RSOs must confirm that all elements of the welfare of the child assessment have been carried out to its satisfaction. However, in doing so, the RSO can rely on an assessment carried out and information gathered by the clinic, if the intended parents have consented to that information being shared.

6 Consultation Question 33.

7.31 RSOs would assess whether individual surrogacy teams have met the requirements of the new pathway and, if satisfied, would sign them off onto the new pathway with all of its legal consequences, including that the intended parents would be the child's legal parents at birth.

7.32 RSOs could also perform the same functions as existing surrogacy organisations. For example, they could provide informal support networks for those going through surrogacy, drawing on the experiences of their members, and they could work with surrogacy teams who want to follow the parental order process by identifying suitable professionals for them to work with, helping them to draft a written surrogacy agreement, and offering advice on parental order applications.

7.33 In the Consultation Paper, we also sought consultees' views on various aspects of RSOs. We proposed that RSOs should not have to take a particular organisational form, and should be required to appoint an individual who would be responsible for ensuring that the organisation complied with the regulatory framework and obligations.[7]

The introduction of surrogacy organisations that are regulated by the HFEA

Consultation

7.34 There was widespread support for the proposal from those personally involved in surrogacy and from professional bodies. The Family Law Bar Association said:

> It is necessary that any surrogacy arrangement has 'proper regulation' which 'will facilitate intended parents and surrogates entering into surrogacy arrangements in a way that is safe, clear, and puts the emphasis on both the welfare of the child and the informed consent of all parties'.

7.35 Some consultees suggested that introducing RSOs would help to ensure consistent adherence to best practice and ensure accountability for regulatory breaches.

7.36 Responses also highlighted the need for the regulatory framework to be sufficiently flexible to allow RSOs with different working practices and core values to flourish.

7.37 On the other hand, of those who disagreed with the proposal to introduce RSOs, some were concerned that their introduction would come with a financial cost which would be borne by intended parents, and which could prove prohibitive for some of those seeking to work with an RSO and to enter a surrogacy agreement.

7.38 Opposition also came from some consultees who were concerned that RSOs would not adequately safeguard surrogates given they would be driven by their own financial needs.

Analysis

7.39 Having considered the range of responses, we recommend the introduction of RSOs, to be the gatekeepers of the new pathway and to ensure that the requirements of the new pathway are met in individual cases.

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7 Consultation Question 33.

7.40 We did not find any of the reasons against introducing RSOs compelling. The benefits of having a regulated body which oversees the essential screening and safeguarding outweigh the concerns raised. So long as the RSO meets the criteria for regulation, there will be nothing to stop it developing its own ethos and approach to surrogacy. We were not provided with any empirical evidence that regulated surrogacy would lead to an increase in prevalence. We accept that it may legitimise the process *of regulated surrogacy* and we would argue that this is a clear benefit: recognising that surrogacy should be carried out under the auspices of a state regulator, with clear screening and safeguarding measures in place to protect all parties, rather than the current unregulated position in which surrogacy only comes to the attention of the state after the child has been born when a parental order application is made.

7.41 In response to concerns about an increase in costs as a result of the new regulatory scheme, we do not think any additional costs would be a barrier to entry to surrogacy. At present, intended parents typically meet the costs of a surrogacy agency, together with the legal and court costs of applying for a parental order. Under the new regime, there will be the costs of working with an RSO, with a cost saving for the intended parents in not having to apply for a parental order.

The organisational form of RSOs

7.42 As outlined in the Consultation Paper,[8] surrogacy organisations do not currently have to take a particular organisational form. Instead, they can take many different forms; for example, an unincorporated organisation, such as a trust, or an incorporated organisation, such as a company.

7.43 Historically, not all surrogacy organisations operating in the UK were incorporated organisations, but COTS, Brilliant Beginnings, SurrogacyUK and My Surrogacy Journey now are. As we noted in the Consultation Paper,[9] the ability of a surrogacy organisation to take on an unincorporated or incorporated form is in contrast to the requirement that an adoption agency operated by a registered adoption society (rather than a local authority)[10] must be registered as a charity or be a non-profit-making organisation. An adoption society which wishes to be registered must be an incorporated body.[11] We observed in the Consultation Paper that the rule that

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8 Consultation Paper, para 9.46.

9 Consultation Paper, paras 9.47 to 9.49.

10 An adoption society means "a body whose functions consist of or include making arrangements for the adoption of children" (ACA 2002, s 2(5)), and a registered adoption society means a voluntary adoption society registered under the Care Standards Act 2000 (ACA 2002, s 2(2)). In Scotland, an adoption society is defined as "a body of persons whose functions consist of or include the making of arrangements for or in connection with the adoption of children (AC(S)A 2007, s 119(1)). In terms of the Public Services Reform (Scotland) Act 2010, s 59(3), a person who provides an adoption service must be a voluntary organisation. This provision does not apply to a local authority seeking to provide an adoption service: Public Services Reform (Scotland) Act 2010, s 59(4).

A voluntary organisation means "a body other than a public or local authority the activities of which are not carried on for profit" (ACA 2002, s 2(5); AC(S)A 2007, s 119 (1)).

11 Voluntary Adoption Agencies and the Adoption Agencies (Miscellaneous Amendments) Regulations 2003 (SI 2003 No 367), reg 2. The position is the same in Scotland: the Adoption Agencies (Scotland) Regulations 1984 (SI 1984 No 988), reg 4 was replaced by the Adoption (Scotland) Agencies Regulations 1996 (SI 1996 No 3266), reg 3(2), which remains in force.

adoption societies must be incorporated bodies is long-standing,[12] and appears to be a consequence of a feature of the previous adoption law, where a local authority could vest the parental rights and responsibilities of a child in their care to a voluntary adoption society.[13] In order to be able to vest these rights, it was the UK Government's view at the time that the voluntary adoption society needed to be an incorporated body.[14] This is not a concern for RSOs, which would not hold parental responsibility/PRRs.

7.44 In the Consultation Paper we proposed that we should not require RSOs to take a particular form, because it would impose an unnecessary burden. We also took the view that an individual acting alone should be permitted to run an RSO, provided that they can meet the regulatory requirements for RSOs.[15]

Consultation

7.45 Relatively few consultees gave reasons for their response (positive or negative) to this part of the question. A number of consultees conflated this question with the question of whether RSOs should be non-profit-making organisations, which was addressed separately.[16]

7.46 There was broad support for this proposal from those consultees who supported surrogacy. The British Pregnancy Advisory Service ("BPAS") said that this approach was consistent with the approach taken elsewhere in the healthcare sector and wrote "we would be reluctant to exceptionalise surrogacy by demanding, for instance, that surrogacy organisations would have to be charities."

7.47 The Church of England thought that requiring RSOs to take a particular organisational form was unnecessary in the wider context of our regulatory scheme.

7.48 Some consultees who disagreed with the proposal thought that the form of RSOs should be prescribed. Turcan Connell (law firm) thought that the proposal would leave too much discretion to RSOs and "risks creating different standards across the country". Similarly, some consultees were concerned that not prescribing the form of RSOs could lead to commercial surrogacy being permitted through the back door.

7.49 It was also suggested that prescribing the form of RSOs would provide an extra layer of regulation, to the benefit of surrogacy teams. For example, SurrogacyUK thought that the role and breadth of responsibilities that RSOs will have to undertake

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12 The requirement appears in the Adoption Act 1976, s 9(1) and the Adoption (Scotland) Act 1978, s 9(1): "The Secretary of State may by regulations prohibit unincorporated bodies from applying for approval under section 3; and he shall not approve any unincorporated body whose application is contrary to regulations made under this subsection".

13 Children Act 1975, s 60.

14 The then Minister of State, Dr David Owen MP, said in debate: "Restricting the voluntary organisations which may apply to a local authority for parental rights and duties to those which are incorporated bodies is done because we are advised that in law only an incorporated body could be vested with these powers as a body. In fact, many voluntary organisations already are incorporated bodies, and for others it is very simple to become incorporated" (*Hansard* (HC) 28 October 1975, vol 898, col 1313).

15 Consultation Question 33.

16 Consultation Question 35.

necessitates such entities being incorporated and/or charities. They also highlighted that RSOs would require employees, contracts, and insurance, which suggests the need for such legal forms.

Analysis

7.50 We consider that, if an organisation can meet the regulatory requirements set out by the HFEA, it is unnecessary to require that the organisation also complies with an additional layer of regulation. The new pathway relies on the HFEA regulating RSOs, and that system of regulation does not need to be supplemented. In addition to the HFEA regulating the relevant surrogacy organisations, the important factor is the not-for-profit status of RSOs. We discuss this at paragraph 7.53 below.

7.51 Whilst in the Consultation Paper we took the view that an individual acting alone should be permitted to run an RSO, provided that they can meet the regulatory requirements, we have revised our position. Incorporation is not a significant barrier and brings regulatory advantages and certainty for intended parents and surrogates.

7.52 We therefore recommend that RSOs should not be required to take a particular organisational form. However, we do recommend that they must be organisations and not individuals.

Non-profit-making status

7.53 Under the current law, surrogacy organisations must operate on a non-profit-making basis. A non-profit-making body is defined in statute as "a body of persons whose activities are not carried on for profit".[17] A non-profit-making body can charge a reasonable payment for initiating negotiations with a view to the making of a surrogacy agreement or compiling any information with a view to its use in making, or negotiating the making of, a surrogacy agreement.[18] A reasonable payment is defined as "payment not exceeding the body's costs reasonably attributable to the doing of the act".[19]

7.54 It is possible to argue that allowing surrogacy organisations to make a profit and compete will both raise standards and reduce the level of their fees; this could "allow investment to provide a platform for growth and the pursuit of excellence in this field".[20] Conversely, the fact that an organisation is non-profit-making is not a guarantee that it will adopt efficient and ethical practices; for example, provided an organisation is non-profit-making, it can pay its staff whatever salary it wishes.[21] The promotion of best practice and good standards might seem to be the role of regulation, rather than depending on whether or not an organisation makes a profit.

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17 SAA 1985, s 1(7A).

18 SAA 1985, s 2(2A).

19 SAA 1985, s 2(2C).

20 R Cabeza, V Flowers, E Pierrot, A Rao, B O'Leary and L Odze, *Surrogacy: Law, Practice and Policy in England and Wales* (1st ed 2018), para 9.33.

21 See the argument developed in R Cabeza, V Flowers, E Pierrot, A Rao, B O'Leary and L Odze, *Surrogacy: Law, Practice and Policy in England and Wales* (1st ed 2018), para 9.13.

7.55 However, the role of commercial agencies in surrogacy agreements has been criticised. As has been written with respect to surrogacy in the USA:

> Another problem with exploitation of women comes from the middlemen in surrogacy arrangements… By prohibiting surrogate brokers from recruiting or inducing surrogates to enter into surrogacy contracts, many of the coercive and exploitative elements are decreased.[22]

7.56 In the Consultation Paper it was acknowledged that there is limited appetite, including amongst surrogacy organisations themselves, for RSOs to be able to operate on a profit-making basis.[23] We were also mindful that allowing for-profit surrogacy organisations might place UK law into tension with international obligations under the Optional Protocol to the UNCRC, which prohibits the sale of children. This is because the UN Special Rapporteur believes that the involvement of for-profit intermediaries is a sign of commercial surrogacy, which has a higher risk of leading to the sale of children.[24]

7.57 In light of concerns of exploitation, the potential commodification of women and children, and the tension with international law, we took the view that there was no strong justification for allowing RSOs to operate on a profit-making basis. We therefore proposed that RSOs should be non-profit-making bodies.[25]

Consultation

7.58 Most consultees in favour of our proposed reforms also favoured RSOs being non-profit-making bodies. Reasons given in support of the proposal included that the non-profit-making requirement would help to keep costs down for intended parents, and would ensure that surrogacy teams can access safe, regulated services.

7.59 Several consultees thought that maintaining the prohibition on profit-making surrogacy organisations would help to preserve the altruistic nature of surrogacy agreements in the UK and prevent their commercialisation.

7.60 In contrast, some consultees considered that regulation was the most effective way to avoid commodification and to tackle exploitation of women and children, rather than imposing obligations concerning profit-making. Other consultees thought that allowing RSOs to profit might ensure good standards of practice and drive up the quality of services.

7.61 NGA Law and Brilliant Beginnings thought that the non-profit-making requirement should relate to “introduction services”, rather than to the activities of the RSO as a whole. Their view was that if HFEA licences can only be granted to non-profit-making bodies, this would take “the non-profit restriction significantly further than the current

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22 K B Lieber, “Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?” (1992 – 1993) 68 *Indiana Law Journal* 205, 229.

23 Consultation Paper, paras 9.79 and 9.80.

24 M de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* (January 2018), A/HRC/37/60, para 41.

25 Consultation Question 35.

law". It was also concerned that the non-profit-making requirement may have "unforeseen implications" which may inadvertently prevent professional involvement in aspects of surrogacy which are not related to the initial introduction (such as legal advice, medical screening, counselling, mediation and therapy, which are all routinely provided on a profit-making basis).

Analysis

7.62 We are persuaded that RSOs should be required to be non-profit-making organisations. Our primary concern is that if RSOs were permitted to be profit-making bodies, they would have a financial incentive to approve surrogacy teams on the new pathway. This would create a direct conflict of interest for the RSO when assessing whether to admit onto or exclude a surrogacy team from the new pathway. The profit-making incentive might also encourage new organisations to set up and apply to become RSOs primarily in the interests of profit rather than to support surrogates and intended parents. This could introduce risks of exploitation and commodification of women, and it could increase the likelihood of breakdown in the parties' relationships, because profit-driven organisations may focus on creating surrogacy teams quickly without proper regard to the nature and quality of the relationship between the surrogate and the intended parent. In turn, such risks would run contrary to the welfare of the surrogate-born child, as well as of the parties themselves.

7.63 We accept that regulation will have a significant part to play in ensuring that RSOs operate properly, and that this could arguably be expected to apply to a profit-making surrogacy agency in the same way that it does for a non-profit-making body. However, we think that the ability to rely on regulation is outweighed by the particular concerns around exploitation where surrogate agencies work on a profit-making basis.[26] Those concerns may be amplified in a scheme that enabled "middlemen" agencies to work on a profit-making basis, while women who became surrogates would not be paid on a commercial basis for their gestational services. For the same reasons, we do not think that it would be desirable to adopt the suggestion from NGA Law and Brilliant Beginnings and confine the non-profit-making role to introduction services. RSOs will, of course, be able to refer intended parents and surrogates to professionals operating on a for-profit basis to provide services necessary for surrogacy to proceed on the new pathway, such as counsellors and lawyers.

7.64 We acknowledge that operating on a non-profit-making basis does not impose a limit on the salaries that RSOs can pay their employees, but this argument applies far beyond the surrogacy context to all non-profit-making bodies, including charitable organisations. In reality (as with charities), RSOs will be likely to pay only the salaries which they can reasonably afford, bearing in mind the membership fees that members will be prepared to pay. Further, maintaining the non-profit-making requirement signals our strong support for non-commercial surrogacy in the UK.

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[26] Consultation Paper, paras 9.68 and 9.69.

Recommendation 25.

7.65 We recommend that:

(1) there should be Regulated Surrogacy Organisations;

(2) an individual should not be capable of being a Regulated Surrogacy Organisation but there should be no requirement for a Regulated Surrogacy Organisation to take a particular organisational form;

(3) Regulated Surrogacy Organisations should be non-profit-making bodies; and

(4) only Regulated Surrogacy Organisations should be able to approve surrogacy teams on the new pathway.

7.66 Clause 51 of the draft Bill defines a number of activities as "licensable surrogacy-related activity". These are the activities in relation to which an RSO may be granted a licence by the HFEA under clause 52 of the draft Bill, subject to the conditions in clause 53 (and any others which may be specified under clause 53(2)), and the possession of that licence is what makes an organisation an RSO. Clause 52(1) specifies that the HFEA may grant a licence only to a body of persons, which gives effect to the recommendation that an individual cannot be an RSO, and that there is no other organisational form specified. Clause 52(3)(e) of the draft Bill specifies that the RSO must be a non-profit-making body.

7.67 The recommendation that only an RSO should be able to approve a surrogacy team onto the new pathway is given effect by clause 5 of the draft Bill. Clause 5(1)(a)(ii) requires that a Regulated Surrogacy Statement, which is a requirement of an agreement proceeding on the new pathway, is signed by a person acting on behalf of a body of persons holding a licence under clause 52 – that is, an RSO.

The appointment of a "person responsible"

7.68 In the Consultation Paper, we proposed that RSOs should be required to appoint a "person responsible",[27] who would have ultimate responsibility for ensuring that the RSOs complied with the HFEA's regulatory scheme. The proposal was modelled on the mechanism used by the HFEA to regulate licensed fertility clinics.

Consultation

7.69 Professionals and consultees personally involved in surrogacy tended to support this proposal. Some consultees supported the proposal on the basis that it would introduce an effective system of accountability, to ensure that RSOs comply with their regulatory duties. For example, the Law Society of Scotland wrote:

[27] Consultation Question 34.

> Our view is that it is important for there to be standardised regulation and registration for any surrogacy organisation and checks to ensure that appropriate individuals are entrusted with reporting compliance.

7.70 BPAS supported the proposal on the basis of simplicity:

> We agree with the appointment of a single person as the simplest way to enforce regulation. This is how other comparable medical care works – such as with clinic managers being the single responsible person for the CQC.

7.71 A minority of consultees disagreed with the proposal. Some consultees raised concerns that appointing a person responsible would not ensure the effective accountability of RSOs. The HFEA wrote:

> We believe that there is an opportunity here to learn from the framework that currently exists to ensure that any new framework is more workable and fits with a modern regulatory approach, with appropriate sanctions available.
>
> The [HFE] Act 1990 (as amended) currently requires that each licensed clinic has a Person Responsible (PR)… As such the HFEA can see the value in requiring that a surrogacy organisation appoint an individual responsible for ensuring that the organisation complies with regulation. We do, however, wish to draw the Law Commissions' attention to the fact that in our experience of regulating fertility clinics, this model has, on occasion, made it difficult to hold the PR responsible when, for example, something has gone wrong as a result of the actions of a staff member, rather than directly by the actions of the PR.
>
> …legislation [must also] prescribe the criteria for appointment of such individuals and perhaps even more importantly, provide the regulatory mechanisms to take action against PRs or individuals who flout the regulatory framework.

7.72 Some consultees disagreed, proposing instead that a board should be appointed to ensure compliance with the regulatory requirements, rather than an individual, given that surrogacy organisations are largely volunteer-run and such a role would place considerable responsibility on a volunteer. Two intended parents pointed out that the leadership of surrogacy organisations is fast-changing. SurrogacyUK's Working Group on Law Reform were concerned at the burden on non-profit-making surrogacy agencies of having to appoint a person responsible and suggested that the trustees or directors could collectively be the responsible parties.

Analysis

7.73 There was both support for and opposition to the proposal to require a "person responsible" to be appointed in each RSO.

7.74 We acknowledge that being designated as the "person responsible" would be a significant responsibility, especially if placed on a volunteer. Nevertheless, we think that there is value in having one person, rather than a board or group, identified within an RSO as ultimately responsible for its regulatory compliance. It would help to make clear who the HFEA's point of contact was within that RSO. It would be easier to hold an individual accountable if the RSO breached its regulatory obligations. Further, the person responsible could delegate some of their responsibilities to others within the

RSO as appropriate, in order to reduce their workload while still retaining overall responsibility.

7.75 We are conscious of the key role that RSOs will have in the new pathway, including as gatekeepers to a unique process which will, by statute, confer legal parental status on a person other than the surrogate who gives birth. A "person responsible" role is integral to a licensing scheme (albeit that the individual may be variously described, such as a designated individual or responsible individual). We are of the view that a licensing regime with a "person responsible" model is the most appropriate for an RSO.

7.76 We note the HFEA's concerns about the model of regulation based on a person responsible. Holding trustees and directors or a board responsible instead of an individual would mean that RSOs would need to take a particular organisational form, which could limit accessibility to surrogacy. Our proposal envisages that enforcement in the surrogacy context would be fitted into the HFEA's current enforcement model, and we do not think that it would be realistic to create a surrogacy-specific enforcement model. It is possible that the HFEA's concerns reflect wider concerns about their powers as regulator and that any wider review of the HFEA's powers could consider the regulatory effectiveness of the model.

The responsibilities, skills and qualifications of the person responsible

7.77 In the Consultation Paper we set out in some detail the responsibilities to be undertaken by the "person responsible":

(1) representing the organisation to, and liaising with, the regulator;

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

(3) ensuring the compliance of the organisation with relevant law and regulation, including the creation, maintenance and operation of necessary policies and procedures;

(4) training any staff, including that of the person responsible; and

(5) providing data to the regulator and to such other person as required by law.

7.78 We also asked if there were any other responsibilities which the person responsible should have, and if there should be any specified experience, skills, or qualifications.[28]

The responsibilities of the person responsible

Consultation

7.79 Among consultees who supported surrogacy, there was general agreement that the person responsible should be responsible for:

(1) representing the organisation to, and liaising with, the regulator;

[28] Consultation Question 34.

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

(3) ensuring the compliance of the organisation with relevant law and regulation, including the creation, maintenance and operation of necessary policies and procedures; and

(4) providing data to the regulator and to such other person as required by law.

7.80 With the exceptions of the Glasgow Bar Association and SurrogacyUK's Working Group on Law Reform, consultees unanimously disagreed that the person responsible should train staff. This disagreement may have stemmed from the suggestion that the person responsible would have to train someone for their position, which some consultees interpreted to mean that they would have to train themselves. That was not what we had intended. Instead, the intention was for the person responsible to be responsible for arranging for themselves or other members of staff to attend appropriate training courses, rather than for personally delivering it.

7.81 A minority of consultees supported only two or three of these responsibilities, usually to the exclusion of the second duty proposed: managing the RSO.

7.82 The HFEA and SurrogacyUK agreed with the creation of the person responsible but thought the final decision on their responsibilities should be left to the regulator.

7.83 Consultees made a range of suggestions of other responsibilities for the person responsible, including: monitoring the wellbeing of all parties to a surrogacy agreement; explaining to surrogates and intended parents the medical and legal consequences of entering into a surrogacy agreement; attracting surrogates and intended parents to join the RSO; having a public facing role; ensuring that the RSO complies with equalities legislation; and escalating issues as appropriate to an ethics committee.

Analysis

7.84 We recommend that the person responsible have the five responsibilities proposed in the Consultation Paper.

7.85 Four of the responsibilities were supported by consultees, and the fifth, training staff, was apparently rejected based on the misapprehension that the person responsible would have to train staff themselves (rather than ensuring that they are trained, using external/internal trainers as appropriate). For this reason, we continue to recommend a training requirement, but subdivide this requirement into two separate issues for the purpose of clarity:

(a) ensuring that appropriate arrangements are in place for training staff; and

(b) undertaking professional training and development as appropriate to facilitate the discharge of their responsibilities.

7.86 With respect to consultees' suggestions for other responsibilities, we think that some, such as monitoring wellbeing and explaining the consequences of entering into a surrogacy agreement, would be performed by others within the organisation (or by professionals engaged by, or referred to by, the RSO), with the person responsible

having oversight. We also think that some of the suggestions were already covered by the five proposed responsibilities, including compliance with equalities legislation which would fall under "compliance with relevant law and regulation". Therefore, we do not think it is necessary to expand the list of five responsibilities of the person responsible.[29]

The experience, skills and qualifications of the person responsible

Consultation

7.87 A number of consultees, including some surrogates and intended parents, thought that the person responsible should be a former surrogate or intended parent. Some consultees thought that the person responsible should have legal experience, either as a practising lawyer or by having at least a working understanding of the relevant legislation and regulations. Several consultees thought that the person responsible should have social work experience or should have worked in the child welfare sector.

7.88 Consultees also referred to essential 'soft' skills, including interpersonal skills, empathy, compassion, integrity, listening skills and positivity.

Analysis

7.89 We are minded not to make a recommendation about the relevant experience, skills and qualifications of the person responsible.

7.90 We agree with many of the suggestions put forward by consultees; for example, that someone with personal experience of surrogacy would have much to offer, as would someone with the relevant 'soft' skills, and with knowledge of the relevant law and policy. Nevertheless, we are of the view that RSOs should be capable of appointing a person responsible who they think can meet the responsibilities of the role, without introducing specific criteria as to the professional experience or background of the person. There was no consensus among consultees as to the necessary experience or background the person responsible should have, and we anticipate that people from different backgrounds might be able to perform the role successfully.

[29] Consultation Paper, paras 9.53 to 9.56.

Recommendation 26.

7.91 We recommend that Regulated Surrogacy Organisations should be required to appoint an individual responsible for ensuring that their organisation complies with the HFEA's regulatory requirements.

7.92 We recommend that the designated "person responsible" within a Regulated Surrogacy Organisation must be responsible for:

(1) representing the organisation to, and liaising with, the HFEA;

(2) managing the Regulated Surrogacy Organisation with sufficient care, competence and skill;

(3) ensuring the compliance of the organisation with relevant law and regulation, including the creation, maintenance and operation of necessary policies and procedures;

(4) training and development, including:

(a) ensuring that appropriate arrangements are in place for training staff; and

(b) undertaking professional training and development as appropriate to facilitate the discharge of their responsibilities; and

(5) providing data to the regulator and to such other person as required by law.

7.93 Clauses 52 and 54 of the draft Bill give effect to this recommendation. Clauses 52(3)(a) to (d) provide that the licence must designate an individual as the person responsible, and set out requirements as to their character and consent to the application, while clause 54 sets out the responsibilities of the person responsible.

Recordkeeping on the new pathway

7.94 In the Consultation Paper, we provisionally proposed that RSOs and fertility clinics should keep a record of surrogacy agreements with which they are involved on the new pathway. We recommended elsewhere that information relating to the surrogate, intended parents and gamete donor(s) should be recorded on the Surrogacy Register.[30]

7.95 The duty proposed in this question would require RSOs and clinics to keep a record of the completed Regulated Surrogacy Statement. This document, and its form and content, are discussed in Chapter 9. We also invited consultees' views as to the

[30] See ch 8, para 8.190, Recommendation 34.

length which should be provided for document retention: whether 100 years or another period.[31]

Consultation

7.96 Almost all consultees who responded to this question were concerned to ensure that records of surrogacy agreements were properly retained. Consultees suggested that recordkeeping would ensure effective oversight of clinics and RSOs, and could also be significant in the event of a dispute arising.

7.97 Other consultees also pointed out the need for clarity and certainty as to what records should be retained. For example, the Law Society supported the proposal and recommended that records and copies of "any post-delivery objection" should be included in the records held by the RSO, in addition to the Surrogacy Register.

7.98 On the other hand, concerns were raised by some consultees regarding RSOs and clinics being responsible for holding these records. The HFEA, amongst others, raised practical difficulties with the proposed duty, where clinics have the legal duty to retain records for long periods of time. Such difficulties could be experienced where a clinic closed and did not make adequate arrangements for records to be retained. The HFEA also placed importance on the need for the "Law Commissions [to] consider what format these records should be in".

7.99 There was support for records being retained centrally and passed to the regulator (the HFEA) after the birth had been registered and the surrogacy journey was at an end. In part, this was influenced by the belief that a centrally-held register would be more appropriate for surrogate-born children seeking to access information about their conception. Mills and Reeve LLP suggested that a central register would help to avoid problems such as those caused by recordkeeping practices in fertility clinics, as dealt with by the Family Court in the HFEA 2008 "alphabet cases".[32]

7.100 With respect to the length of time for which these records should be kept, consultees expressed a range of views.

7.101 For example, some consultees thought that 100 years, as proposed, was not long enough. Some suggested that individuals should be able to access their records throughout their lifetime, on which basis a duty to retain records for 120 or 150 years would future-proof the scheme. The Law Society of Scotland thought that records should be kept indefinitely, akin to birth and marriage certificates, because they are important historical documents which might have significance after the surrogate-born person has died.

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31 Consultation Question 8.

32 *A and Others v HFEA* [2015] EWHC 2602 (Fam), [2016] 1 WLR 1325 was the original case in a series nicknamed "the Alphabet cases". The only equivalent case reported in Scotland is *L v B* [2017] SC Edin 79. There have since been approximately 30 other parents who have applied for declarations from the court concerning parentage and it is thought that many other affected families still have not made court applications. In *Re HFEA 2008 (Cases AD, AE, AF, AG and AH)* (No 2) [2017] EWHC 1782 (Fam), [2018] 1 FLR 1120, the then President of the Family Division, Sir James Munby, gave guidance on the proper approach and procedure in cases where the statutory requirements have not been complied with prior to children being born via donor insemination.

7.102 On the other hand, those who supported the 100-year limit drew an analogy with the length of time for which adoption agencies keep adoption records.

7.103 Other responses posited a much shorter period: some consultees thought that a duty to keep records for 25 to 50 years would be sufficient, in light of our additional (separate) proposal for a Surrogacy Register. Parallels could be drawn with maternity and fertility clinic records which must be retained for 25 to 30 years.

Analysis

7.104 We note that the majority of consultees strongly supported the keeping of records regarding new pathway surrogacy agreements, but that a substantial number also raised concerns that clinics and RSOs would not be the right organisations to keep these records, particularly if this was to be for a long period of time.

7.105 Two preliminary points are worth reiterating. The first is that any proposal in the Consultation Paper regarding the recordkeeping obligations of clinics falls away in light of our conclusion that clinics should not be able to approve parties on the new pathway: only RSOs can do so. Thus, any provision concerning recordkeeping will apply only to RSOs, as part of their regulated status.

7.106 Secondly, some concerns raised by consultees focused on access to information by surrogate-born children. These concerns are partly met by the separate proposals to create a Surrogacy Register.[33] Thus, the primary purpose of the recordkeeping discussed here is not related to the separate, and important, need to ensure that data is recorded in the Surrogacy Register: it is part of the regulatory scrutiny which the HFEA, as regulator, will carry out in respect of RSOs. However, in Chapter 13 we set out plans for surrogate-born children who are the subject of a parental order to be able to access their full court file. In order to place children born from a surrogacy agreement on the new pathway in an equal position, they should be able to access the full Regulated Surrogacy Statement, which we address in Chapter 13, paragraph 13.248.

7.107 In light of consultee responses, and the many issues raised, we recommend that:

(1) RSOs should be under a duty to keep a copy of the Regulated Surrogacy Statement (discussed further in Chapter 9) completed by surrogacy teams, information on the birth of the child, and a record of any exercise by the surrogate of her right to withdraw her consent to the agreement.

(2) RSOs should be under a duty to submit these records to the HFEA by 12 weeks after the birth of the child, to tie in with the time period for the making of the statutory declaration by the intended parents regarding payments to the surrogate.[34]

(3) once RSOs have transferred these records to the HFEA, it will be up to the surrogacy organisation to decide for how long to retain a copy for its own purposes, in line with any directions made by the HFEA. We understand that

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33 See ch 13.

34 See ch 12, para 12.256.

some current surrogacy organisations retain records of surrogacy agreements after birth, in the interests of monitoring the relationship between the intended parents, the surrogate and the child thereafter. It would be up to individual RSOs to ensure that they were complying with data protection law.

(4) It will be a matter for the HFEA, as regulator, to decide for how long it should retain information on withdrawal of consent by the surrogate. These records will enable the HFEA, as regulator, to collect data on the number of agreements which exit the new pathway for each RSO, thus bringing to light any problems or patterns.

7.108 We consider that these recommendations appropriately respond to concerns that RSOs would not have the resources, expertise, or potentially the longevity to store records of written surrogacy agreements securely in the longer term.

Recommendation 27.

7.109 We recommend that:

(1) Regulated Surrogacy Organisations should be under a duty to keep a record of the data recorded in the Regulated Surrogacy Statement completed by surrogacy teams, and a record of any exercise by the surrogate of her right to withdraw her consent from the agreement;

(2) Regulated Surrogacy Organisations should be under a duty to submit these records to the HFEA by 12 weeks after the birth of the child, noting whether the surrogate withdrew her consent to the new pathway agreement;

(3) the HFEA can give directions to Regulated Surrogacy Organisations about how long they should keep records; and

(4) the HFEA should decide for how long it can retain records of surrogates withdrawing their consent to a surrogacy agreement.

7.110 Clause 53 of the draft Bill gives effect to this recommendation by giving the HFEA the power, in clause 53(3), to specify in directions the conditions of an RSO's licence. Clauses 53(1)(c) and (d) provide that the RSO must maintain proper records, to include copies of Regulated Surrogacy Statements and any notices of withdrawal of the surrogate's consent. Clause 53(1)(e) provides that the RSO must submit the records to the HFEA at specified intervals.

HFEA powers to ensure that RSOs comply with their licence conditions

7.111 A critical part of the new pathway is the role of RSOs and, in turn, the role of the HFEA in regulating them. This gives rise to questions of enforcement if RSOs fail to comply with their licence conditions. In addition to the general question of enforcement, a specific point was made by the HFEA in relation to the Surrogacy Register. The HFEA said that if it were to maintain the Surrogacy Register, it would need new enforcement powers to ensure that data submitted to it by RSOs is of a

suitable quality. This comment raised a broader question about the HFEA's regulation of RSOs, and its enforcement of RSOs' licence conditions.

7.112 Currently, data submission to the HFEA is mandatory for all licensed centres undertaking licensed treatments and, therefore, is enforceable.[35] The HFEA acknowledged[36] that it could issue guidance to ensure that data submitted is of an appropriate quality, and noted that the fertility sector at present is overwhelmingly compliant with its data quality rules. The HFEA, however, also noted that it is currently limited in the type of enforcement action it can take if a clinic does not submit data on time or submits data that does not meet the required quality standards. On that basis, and as a reflection of the importance of the register to surrogate-born people, the HFEA suggested that it would require new powers to take enforcement action against organisations that (i) do not submit data on time; or (ii) persistently submit data that does not meet its quality standards.

7.113 The HFEA outlined its existing powers to take action against fertility clinics which do not comply with licence conditions, including its data policies: namely, powers to revoke or to suspend a clinic's licence;[37] and to add additional conditions to a clinic's licence.[38] The HFEA explained that it is rarely appropriate to revoke or suspend a clinic's licence, in light of the impact on patients. For example, if the HFEA suspended a clinic's licence with immediate effect, this could lead to patients who were awaiting treatment from that clinic having their treatment delayed whilst they seek treatment elsewhere. This could potentially have a devastating impact on the patient in question. Thus, suspending a licence is a far-reaching step, which can have significant consequences for innocent parties. Further, the HFEA explained that if a clinic is already in breach of its licence conditions, adding new conditions seldom addresses the problem.

7.114 The HFEA made suggestions which informed the examples of new enforcement powers which we discuss below.[39]

7.115 We did not consult on the HFEA's enforcement powers with respect to RSOs. We note that the question of the adoption of new powers of enforcement by the HFEA against those that it regulates is not a question confined to the regulation of surrogacy agreements. It would be equally relevant to the clinics and research work already regulated by the HFEA. Therefore, we do not think that we can make specific recommendations about new enforcement powers in this Report. Instead, we are of the view that we can go no further than to (i) recommend the extension of the HFEA's existing powers to the surrogacy situation; and to (ii) encourage a holistic review of those powers. A decision could then be taken by the UK Government as to the

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35 HFEA, General Direction 0005 given under the 1990 Act (as amended), *Collecting and recording information for the Human Fertilisation and Embryology Authority, version 5* (1 April 2022). Available at: https://portal.hfea.gov.uk/media/urtn5qhy/2022-04-01-general-direction-0005-collecting-and-recording-information-for-the-hfea-v5.pdf (last visited 23 March 2023).

36 In correspondence with the project team.

37 HFEA 1990, s 18(2)(c).

38 HFEA 1990, s 18A(3).

39 See para 7.117.

appropriate scope of any review, in particular whether any new powers being adopted should apply across the whole spectrum of those the HFEA regulates.

7.116 In the interests of ensuring that all parties to surrogacy agreements are properly safeguarded by the regulator, we think that the HFEA's existing powers should be extended to apply to the regulation of RSOs. This would mean that they are subject to the same sanctions that currently apply to other bodies regulated by the HFEA, as set out above, in the event that they breach their licence conditions. Otherwise, if the HFEA does not have adequate enforcement powers, RSOs could effectively flout their licence conditions, which would put children, surrogates, and intended parents at risk and undermine our proposed regulatory scheme.

7.117 Beyond the extension of the HFEA's existing powers to RSOs, we suggest that the UK Government should review the HFEA's enforcement powers, to determine whether they are adequate to ensure the compliance of fertility clinics and RSOs with their licence conditions. New additional powers for the regulator could include, for example:

(1) financial penalties on an escalating scale;

(2) a power to disqualify persistent offenders from becoming the person responsible at other clinics or RSOs when they have been found not to have satisfied their statutory duties at one clinic or RSO; or

(3) powers to require revalidation on a regular basis.

Recommendation 28.

7.118 We recommend that Regulated Surrogacy Organisations should be subject to the same sanctions that currently apply to other bodies regulated by the HFEA, in the event that they breach their licence conditions.

7.119 Clauses 55, 56 and 57 of the draft Bill give effect to this recommendation, by giving the HFEA powers to revoke, vary or suspend an RSO's licence. Clause 56(5) in particular provides that the HFEA may remove, vary or add a licence condition without an application by the RSO.

Chapter 8: Screening and safeguarding

8.1 One of the most important functions of the new Regulated Surrogacy Organisations ("RSOs") will be to carry out the statutorily required screening and safeguarding in respect of the surrogate and the intended parents. These checks are fundamental in ensuring that surrogacy is the right choice for the surrogate and intended parents, and that the welfare of a child to be born through surrogacy is secured. The screening and safeguarding measures that we propose in this chapter cover health, counselling, criminal records, the requirement that the surrogate be insured, and the welfare of the child. We begin with health screening.

HEALTH SCREENING OF SURROGATES, THEIR PARTNERS AND INTENDED PARENTS

8.2 The law does not currently require any health checks or screening of a surrogate or intended parents prior to entering into a surrogacy agreement, although where clinically-managed fertility treatment is required, medical checks will typically be carried out for the surrogate and the intended parent who is providing gametes. As far as clinics are concerned, doing so is in line with the HFEA Code of Practice which requires clinics to be satisfied that surrogates are suitable to so act. In addition, intended parents who are providing gametes must be screened in line with requirements for gamete donors, which includes screening for sexually transmitted infections and autosomal genes.[1] Surrogacy organisations may also choose to carry out medical checks, by way of seeking letters from GPs.

8.3 The medical testing requirements currently required for parties to surrogacy agreements are as follows.

[1] HFEA Code of Practice, paras 114, 115 and 142.

Intended parents providing gametes in surrogacy agreements must be screened in line with requirements for gamete donors, which are set out in condition T52 of the HFEA's Standard Licence Conditions.[2] Prior to the use and/or storage of donor gametes and/or embryos created with donor gametes, the clinic must comply with the following requirements:

(1) Donors must be selected on the basis of their age, health and medical history, provided on a questionnaire and through a personal interview. The assessment must identify and screen out persons whose donations could present a health risk to others, such as the possibility of transmitting diseases (such as STIs), or health risks or psychological consequences to themselves.

(2) Donors must test negative for HIV 1, HIV 2, hepatitis B, hepatitis C and syphilis.

(3) Donors must be tested for the presence of active infection with Treponema pallidum, the bacterium that causes syphilis.

(4) Sperm donors must test negative for chlamydia on a urine sample tested by the nucleic acid amplification technique (NAT).

(5) Donors must be tested for human T-cell leukaemia virus type 1 antibodies if they live in or originate from high-prevalence areas; if they have sexual partners who originate from those areas; or if the donor's parents originate from those areas.

(6) Donors may be required to undergo additional testing depending on their medical history and the characteristics of the gametes donated, for example if they have previously contracted malaria.

(7) Donors must be genetically screened for autosomal recessive genes known to be prevalent, according to international scientific evidence, in the donor's ethnic background.

(8) An assessment of the risk of transmission of inherited conditions known to be present in the family of the donor must be carried out.

In relation to the surrogacy, Guidance Note 8, paragraph 8.11 of the Code of Practice provides as follows: The centre should use evidence it has gathered from the GP, surrogate and any other relevant sources to satisfy itself that the surrogate is suitable to act as a surrogate, taking into account all relevant factors (including, but not limited to, the surrogate's age, medical history, previous obstetric history, mental health, body mass index etc) and with reference to best practice guidance, including "The Surrogacy Pathway" and "Care in Surrogacy" published by the Department of Health and Social Care. Further information should be sought where required so that the treating clinician can make decisions having been fully informed of all relevant considerations.[3]

8.4 In all circumstances, the purpose of health screening is to protect the surrogate by ensuring that pregnancy and childbirth do not pose special risks to her health, and to protect the surrogate-born child from sexually transmitted infections and serious medical conditions.

8.5 In the Consultation Paper, we sought evidence from consultees as to the costs of medical screening.[4] Given the fundamental nature of this objective, we also made a provisional proposal that medical testing should be required for the surrogate, any partner she may have, and the intended parents providing gametes. We also invited consultees' views as to whether the types of testing set out in the Code of Practice are feasible for traditional surrogacy agreements which take place outside of a clinic, and if not what types of testing should be required for these agreements.[5]

Consultation

Evidence of costs of medical screening

8.6 Evidence from thirteen intended parents indicated that costs for medical screening (encompassing a range of tests, such as blood tests and gamete screening) ranged from £250 per person to £5,000 in total. NGA Law and Brilliant Beginnings said that they carry out health screening of surrogates prior to matching them with intended parents. A GP letter for basic medical screening costs between £30 and £120 depending on the GP, while psychological screening with a clinical psychologist costs around £600.

Mandatory health screening

8.7 There was broad support across a wide range of consultees for mandatory health screening. Consultees generally did not provide reasons for their views: where a comment was included, it focussed on testing to protect the health of the surrogate and the surrogate-born child. For example, Dr Alan Brown (legal academic) commented that "this appears to be a very sensible step for a regulated regime of surrogacy". COTS supported the requirement, suggesting that it "protects all the parties involved".

8.8 Dr Sharon Zahra queried the purpose of testing the surrogate's partner: if it is to prevent against STIs, should we also mandate the screening of any subsequent partners of the surrogate during the pregnancy? Dr Pauline Everett suggested that health screening the surrogate's partner "could ensure that a disease such as HIV is not passed onto the surrogate mother and is not passed on to the child."

8.9 Consultees who opposed mandatory health screening on the new pathway typically did so because they opposed the new pathway entirely. One concern raised was the privacy implications of requiring surrogates and intended parents to undergo mandatory health screening.

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4 Consultation Question 112.

5 Consultation Question 66.

Traditional surrogacy agreements outside licensed clinics

8.10 Most of the responses supported testing for traditional surrogacy agreements outside licensed clinics. There was very strong support for testing in order to protect the health of the surrogate and the child. Marie-Anne Lee, a surrogate, said that:

> Medical testing to include STDs, inherited disorders, any medical history that could affect a pregnancy. General health and wellbeing of all parties should be screened to prevent possible health complications. They should all be carried out in a clinic.

8.11 One intended parent, who supported medical testing for traditional surrogacy, thought that testing should be the responsibility of the RSO.

8.12 Some consultees supported the proposal but expressed concerns about its feasibility in practice. For example, the HFEA said:

> While in principle [we] would support the same health screening to be required for traditional surrogacy arrangement taking place outside of clinics… from a practical perspective this would need closer consideration as to its feasibility… We also would question what powers the surrogacy organisations (or other organisations/s responsible for the co-ordination of the testing) and the body regulating surrogacy would have at their disposal if testing was not carried out correctly, or at all.

8.13 SurrogacyUK, COTS, and NGA Law and Brilliant Beginnings all supported some form of medical screening in agreements outside a licensed clinic, while raising various points regarding the enforcement of this proposal. COTS suggested that monitoring compliance with medical screening requirements outside a surrogacy organisation would prove difficult in practice.

8.14 The main reason for those consultees who expressed doubts or concern about medical screening in agreements outside clinics was the practicality. For example, Elizabeth Purslow suggested that it was not possible to require medical screening in traditional surrogacy agreements, if the insemination happens at home and in an unregulated context.

8.15 A separate point related to the similarity between at-home artificial insemination and natural conception was raised. One consultee noted that “no parents conceiving in the usual way are required to undergo any testing. We all take a risk when conceiving a child.”

Analysis

8.16 Ensuring the health of any child born of surrogacy is clearly a critical factor in a surrogacy agreement. It is also imperative to protect the health of the surrogate, and ensure that no woman undertakes a surrogate pregnancy where she is not fit and healthy to do so. The responses from consultees were almost unanimous in their support for this measure. We therefore recommend that on the new pathway, the surrogate’s health and obstetric history are subject to a medical review as part of the pre-conception screening, to protect both the surrogate’s health and that of any child born from the agreement.

8.17 Some responses pointed to the fact that women who conceive naturally are not required to undergo extensive testing or medical checks. However, testing and medical checks are required from individuals seeking assisted reproduction treatment.[6] Furthermore, the fact that the intended parents need to involve a third person to have a child justifies a different regime, including measures to safeguard her health and that of the surrogate-born child.

8.18 We therefore recommend that, for surrogacy agreements on the new pathway, whether or not the conception is being managed in a clinical setting, the RSO must be satisfied that the following health checks and screening have been carried out pre-conception:

(1) the surrogate should be assessed by a qualified medical practitioner (such as her GP) to ensure she is fit for pregnancy, and any particular health risks are identified;[7]

(2) the surrogate and her partner should be tested for STIs;

(3) intended parents who are providing gametes through a licensed clinic should be subject to standard clinic procedures, such as in relation to screening and quarantining of gametes;

(4) intended parents who are providing gametes at home for artificial insemination must be screened for STIs but there is no need for the gametes to undergo further testing, for example, screening for genetic conditions; and

(5) any donor gametes/embryo used must be screened by the licensed clinic in line with standard procedures.[8]

8.19 Complying with these health checks and screening will be an essential prerequisite for admission to the new pathway.

8.20 In terms of enforcement, it will be up to the RSO to satisfy itself that these tests have been undertaken. Where the RSO certifies that these tests have been carried out and consequently admits a team to the new pathway but it later transpires that the tests were not carried out (or not carried out appropriately for some reason), then the team will remain on the new pathway but the RSO will be subject to regulatory sanctions. Ensuring that these medical checks and screening have been carried out appropriately is a key part of the RSO's responsibility.

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6 HFEA Standard Licence Conditions - GB – 1 July 2022 onwards: Treatment and Storage Licences, Licence Conditions T50 and 51. These Licence Conditions are also set out in full in the HFEA Code of Practice, in Guidance Note 15, together with an explanatory note, Interpretation of mandatory requirements 15D.

7 Any factors which point to an enhanced risk could be taken into account by the RSO and GP as part of the screening and safeguarding of the surrogate. Recent research has highlighted particular risk factors in pregnancy: see M Knight, K Bunch, R Patel, J Shakespeare, R Kotnis, S Kenyon, JJ Kurinczuk (Eds.) on behalf of MBRRACE-UK, "Saving Lives, Improving Mothers' Care Core Report - Lessons learned to inform maternity care from the UK and Ireland Confidential Enquiries into Maternal Deaths and Morbidity 2018-20" (2022) Oxford: National Perinatal Epidemiology Unit, University of Oxford.

8 These are currently set out in Guidance Note 9 of the HFEA Code of Practice and provision is made for testing under the 1990 Act, sch 2, para 1ZA.

8.21 We also note that, while genetic screening would not be required in cases of a traditional surrogacy using insemination at home, it is still open for the intended parents and surrogate to agree to genetic screening if they wished to.

8.22 Despite the significance of health screening, we do not propose to mandate any health screening where a parental order will be sought over and above that carried out by licensed clinics. Thus, any donor gametes used in a clinic will be screened, whether for use in surrogacy or not. However, where parties opt for traditional surrogacy using self-insemination at home, and intend to seek a parental order after the birth of the child, there will be no mandatory health screening, and it is not practical to mandate requirements in those circumstances.

Recommendation 29.

8.23 We recommend it should be a requirement to access the new pathway that the Regulated Surrogacy Organisation confirms that the following checks have been carried out:

(1) the surrogate has undergone a medical assessment to ensure she is fit for pregnancy;

(2) the surrogate and her partner have been tested for STIs; and

(3) intended parents who are providing sperm at home for artificial insemination have been screened for STIs, but there is no need for the semen to undergo further testing, eg screening for genetic conditions.

8.24 Where it transpires that these tests have not been carried out, in whole or in part, the surrogacy agreement would remain on the new pathway, but the Regulated Surrogacy Organisation would be subject to regulatory sanctions.

8.25 Screening and safeguarding checks on the new pathway are given effect in the draft Bill as follows. Clause 5(1)(a)(ii) requires that an RSO has signed the Regulated Surrogacy Statement in order for it to be valid, which is a requirement under clause 4(4) for the surrogacy agreement to proceed on the new pathway. Clause 5(3) provides that the statement which the RSO signs is a statement that it has carried out the pre-approval checks. Clause 6(1) sets out that the RSO has conducted the pre-approval checks if it has satisfied itself as to the matters in the rest of clause 6.

8.26 Clause 6(2) gives effect to the requirement for an appropriate medical assessment. What constitutes an “appropriate” assessment will be a matter for the HFEA’s new surrogacy code of practice, as set out in clause 67(2)(a). The regulatory sanctions to which an RSO may be subject are set out in Recommendation 28. By requiring that the RSO has signed the Regulated Surrogacy Statement, rather than requiring that the checks have been carried out, the draft Bill provides that the surrogacy agreement will remain on the new pathway even if the checks have not been carried out.

IMPLICATIONS COUNSELLING

8.27 Implications counselling is a process by which the surrogate (and currently her partner) and the intended parents have counselling sessions to explore the nature of surrogacy, and how they will deal with the emotional and practical consequences. For example, it can encourage the parties to explore how they will deal with difficult issues around pregnancy complications; how they will react when friends and family ask the intended parents where the new baby has come from or ask why the surrogate is pregnant but then does not have a newborn baby to look after; and consider the effect of the surrogacy on existing children. Typically, the surrogate and intended parents have sessions separately, and at least one session together.

8.28 Currently, while there is no legal requirement to undergo implications counselling, most licensed clinics offer it as part of their assisted reproduction treatment. Counselling on the implications of entering into a surrogacy agreement is important insofar as exploring these issues helps parties with informed decision-making, and can support the development of a relationship between the surrogate and the intended parents. In addition, it will help to ensure that all parties to the agreement have thought through what the surrogacy journey will mean, can help to identify areas where the parties share or do not share common values, and will raise specific issues associated with donor conception, such as how the resulting child should be made aware of their genetic and gestational origins.

8.29 Implications counselling is different from psychological testing. In the Consultation Paper we explained that we did not consider that such testing should be mandatory.[9] Nevertheless, several consultees raised psychological testing in their responses, and we consider it below.

8.30 Our first question asked for evidence as to the cost of implications counselling.[10]

8.31 Our second question provisionally proposed that, as a condition of being eligible for entry into the new pathway:

(1) the surrogate, her spouse, civil partner or partner (if any) and the intended parents intending to enter into a surrogacy agreement in the new pathway should be required to attend counselling with regard to the implications of entering into that agreement; and

(2) the implications counselling should be provided by a counsellor who meets the requirements set out in the Code of Practice at paragraphs 2.14 to 2.15.[11]

Consultation

Evidence as to the costs of implications counselling

8.32 Only eight consultees responded. Seven intended parents gave evidence about the costs incurred, ranging from £200 to £750, depending on the cost per hour and the

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9 Consultation Paper, para 13.47.

10 Consultation Question 112.

11 Consultation Question 67.

number of sessions. One intended parent reported that the implications counselling session they had via the clinic was free, but they paid £1,300 for the screening process. In-person sessions were approximately £100-£125 per hour (with some evidence of higher fees), whereas a telephone session was £60 per hour.

8.33 NGA Law and Brilliant Beginnings said they require implications counselling prior to matching a surrogate and intended parents, just before the birth and just after, at £60 per session.

8.34 In light of the small sample, any generalisations must be treated with some caution. However, from the responses, it appears that the cost of an implications counselling appointment can vary significantly, from £60 to around £165 per session. Likewise, the number of counselling appointments attended varies, ranging from three to six, which also affects the total cost of such counselling.

Requirement for implications counselling on the new pathway

8.35 There was broad support for this proposal from those involved in surrogacy, whether as surrogates, intended parents, or surrogacy organisations, to ensure the surrogate and intended parents were emotionally prepared and ready for surrogacy. NGA Law and Brilliant Beginnings agreed with it, saying it "broadly reflects what UK surrogacy organisations already recommend and what fertility clinics already provide where the surrogacy is gestational."

8.36 Those in favour also raised some specific points or suggestions. A number of consultees highlighted the need for the counselling to be meaningful, and provided by an appropriate and trained counsellor. COTS stated that they use a British Infertility Counselling Association (BICA) accredited counsellor. Concerns were expressed about the need to ensure the counselling was fit for purpose. One surrogate suggested it was necessary only for a first surrogacy journey, and that the counsellor should have experience as an intended parent or surrogate.

8.37 Zaina Mahmoud (legal academic) in her fieldwork recorded that there were mixed views among the surrogates that she had interviewed but agreed with the proposal, provided that the counsellors were trained and the counselling was rigorous. In particular, she emphasised that it should not be "just a box-ticking exercise".

8.38 SurrogacyUK, although agreeing with the proposal, suggested that there should be a more rigorous "suitability for surrogacy" assessment, to ensure that both parties are reasonably capable of delivering their surrogacy intentions and that there is not a significant risk of harm to either party or their existing children (although we note that what they propose is largely covered by the other safeguards built into our scheme).

8.39 Cost was raised by NGA Law and Brilliant Beginnings, who noted that mandatory counselling (which they supported) would have cost implications. They noted that it:

> …may add some cost for those going through traditional surrogacy arrangements who do not currently opt to access professional counselling. However, given our experience of disputed surrogacy cases in which parents and surrogates were not adequately prepared emotionally for the surrogacy, we think this is justified.

8.40 Dr Katherine Wade (legal academic) agreed and also recommended that counselling should be provided to the children of the surrogate and intended parents, if any, and to the child born as a result of the surrogacy agreement. In particular, counselling could also be available for children whose mothers act as surrogates, to provide them with information about the process and address any possible concerns the child may have.

8.41 PROGAR and Nagalro were critical of the Commission's understanding of implications counselling in the Consultation Paper, on the basis that it was not about the provision of information, which should come from preparation sessions instead. The HFEA made a similar point regarding the purpose of implications counselling, and drawing out the distinction between that and therapeutic counselling.

8.42 The difficulty of making such proposals mandatory was raised by the HFEA and the Law Society. The HFEA noted that this would place surrogacy in a different position from other forms of assisted conception, and that thought needed to be given to the practical effect of doing so on clinics; for example, impact on waiting times. The Law Society was concerned that too many pre-conception requirements might deter people from using the new pathway.

8.43 Some consultees disagreed with the mandatory nature of the proposal, saying that it should be a recommendation not a requirement, and pointing to the additional costs involved.

8.44 A number of consultees raised concerns about the appropriateness of mandatory counselling. Professor Kenneth Norrie (legal academic) rejected the proposal because he doubted that compulsory counselling could be made meaningful:

> The history of compulsory counselling, or counselling as an eligibility criterion, is not favourable to this proposal (see for example, for England and Wales, the Family Law Act 1996, Pt 1), and I do not support it… I would reject this proposal in whole. I much prefer the suggestion from the Brazier Report (mentioned at para 13.33) that the surrogate should be guaranteed access to voluntary counselling.

8.45 In a similar vein, Professor Emily Jackson (legal academic) thought that adults should not be forced to see a counsellor and that advice on implications did not necessarily need to be provided by a counsellor.

8.46 BPAS strongly disagreed with the proposal. They were of the view that the proposal was unduly restrictive. They were "deeply concerned" by any proposal that links access to reproductive health with counselling, and which might deny women's ability to make their own reproductive decisions – particularly those that may not fit within society's expectations of women's choices.

8.47 They also pointed to the fact that there is no other area where the law requires individuals to attend counselling prior to entering into medical treatment or a legal contract, and there is no circumstance in which a woman is required to attend

counselling prior to exercising her reproductive rights.[12] BPAS therefore concluded that "provision of counselling is included in regulation and not legislation, and that take-up of counselling is not required."

Analysis

8.48 The responses to this question were divided. There was support (especially from surrogates and intended parents) for mandatory counselling, to benefit all parties, provide further screening to pick up on the risk of exploitation or coercion, and to reflect the seriousness of a surrogacy agreement. If all parties are fully aware of the consequences of a surrogacy agreement, and have explored issues such as what they would do in the event of problems arising during the pregnancy, the outcome for the agreement – and thus for the surrogate child – will be considerably enhanced. We note that implications counselling is currently standard practice in clinics before going through any form of assisted conception. We have heard evidence that problems within the surrogacy team are most likely to arise where the surrogate and the intended parents have not spent time exploring the full implications of what they are doing and the longer-term consequences, leading to disagreements at a later stage as to matters related to the pregnancy or birth, and especially future contact with the child. These are heart-breaking situations for all involved, and reinforced to us the risks of rushing into surrogacy and without fully considering the implications.

8.49 On the other hand, there were significant concerns raised about the value of compulsory implications counselling; the suitability of the counsellors providing this service; and the inappropriateness and troubled history of mandating counselling before an individual can take a decision concerning their health.

8.50 In this vein, some responses queried the benefit of involving a counsellor, in preference to the support from surrogacy organisations. They pointed to, instead, the emotional and practical support offered by surrogacy organisations and networks, and the experience of those who have already been through a surrogacy journey.

8.51 Many of those who opposed compulsory implications counselling supported it being recommended to the surrogacy team as something that they should undertake, rather than as a mandatory requirement.

8.52 We considered these concerns in detail. We were particularly conscious of the need not to restrict unduly the choices of potential surrogates and intended parents. Nevertheless, the consequences of surrogacy and the significant involvement of a third party, the surrogate, together with the creation of a child, mean it is imperative that any surrogacy regime seeks to promote the best interests of the child and protect the parties involved. Ensuring that the surrogate and intended parents have explored the practical and emotional implications of surrogacy before they embark on surrogacy is fundamental. The success of surrogacy agreements is closely linked to the ability to consider these issues and be open about them. We were also influenced by accounts

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[12] Section 13 of the HFEA 1990 requires that patients be "given a suitable opportunity to receive proper counselling" in certain situations (specified in Sch 3ZA), but this is not the same as obliging the patient to take up the offer. This is reflected in the HFEA Code of Practice which requires 'counselling to be offered' (Interpretation of mandatory requirements 3A). In terms of abortion care, BPAS noted that, although the provision of counselling pre- and post-abortion is required under the Required Standard Operating Procedures published by the Department of Health and Social Care, no woman is required to take it up.

of surrogacy agreements which resulted in disputes (and distress), where the implications had not been explored in advance. We therefore conclude that, as we had provisionally proposed in the Consultation Paper, implications counselling should be mandatory for the surrogate and the intended parents, pre-conception, on the new pathway. We note that this recommendation is limited to implications counselling, and that any therapeutic counselling is a matter for the individual parties.

8.53 We recommend that this is a mandatory part of the new pathway even for those surrogates that are on a second or subsequent surrogate pregnancy. While some consultees made the case that surrogates who had already been through a surrogacy pregnancy did not require it, we think that there is a benefit in exploring the issues afresh on each occasion. This is particularly the case if the surrogate is working with different intended parents on the subsequent occasion, but even if the surrogacy team has been through a successful surrogacy before, it can be helpful to explore the issues again, and (if relevant) consider the implications of the previous surrogacy journey.

8.54 We found the responses from BPAS and Professor Kenneth Norrie highly persuasive, regarding the troubled history of requiring mandatory counselling and the possible impact on women's ability to make their own reproductive decisions. We considered these carefully in reaching our decision. Ultimately, the fact that surrogacy requires the involvement of the surrogate justifies implications counselling: the surrogate's choices through pregnancy have an impact on the intended parents, and the intended parents need to understand fully the surrogate's autonomy. Exploring the implications of proceeding with surrogacy is essential for all parties.

8.55 The value of the implications counselling lies not only in allowing the surrogate and intended parents to explore the implications and consequences of surrogacy, but also in giving an opportunity for any doubts or concerns to be picked up before the stage of conception. In order to ensure that the RSO is made aware of any concerns, we recommend that the counsellor should, at the beginning of the counselling session(s), seek the consent of the surrogate and intended parents to share relevant information with the RSO. If the party consents, the counsellor would be able to confirm to the RSO whether any specific concerns had arisen through the implications counselling which might suggest that the party is not ready to undertake the surrogacy. If the party does not consent, then the counselling would not be able to progress. The counsellor would need to report back to the RSO that the counselling session had not happened, and the RSO would then be able to explore the reasons for this with the relevant party. Ultimately, without the implications counselling taking place, the surrogacy would not be able to proceed on the new pathway.

8.56 However, it is important to emphasise that implications counselling is not the primary mechanism to ensure the surrogate is not being exploited, nor is this its primary function. Instead, a holistic approach is envisaged. All professionals involved should be aware of any risks to the surrogate.

8.57 Further, implications counselling is separate from the provision of information to the surrogate and intended parents. The RSO will be ideally placed to ensure that the surrogate and intended parents are aware of medical, legal, and social consequences, and have an opportunity to raise questions and explore issues. Moreover, specialist

advice would also come through other elements of the screening and safeguarding process, as explored later in this chapter.

8.58 Five further issues arose out of this question and responses:

(1) whether the surrogate's partner should be required to undertake implications counselling;

(2) whether any children should be required to undertake implications counselling;

(3) whether the counsellor should have any specific qualifications or training;

(4) whether there should be a minimum or maximum number of sessions; and

(5) whether psychological screening should also be required.

We address each in turn.

8.59 The proposal in the Consultation Paper also included the surrogate's partner in the implications counselling.[13] The case for the surrogate's partner attending implications counselling is complicated by the fact that they are not a party to the surrogacy agreement and there are no legal consequences attaching to the partner as a result of the surrogacy (that is, they will not be the legal parent under the new pathway). Nevertheless, the proposed surrogacy does have implications for the surrogate's partner, such as the consequences of supporting her through the pregnancy, potentially abstaining from sex at certain points, and the possible impact on any children of the household. As discussed elsewhere in this chapter, we are also proposing that certain other screening provisions are mandatory for the surrogate's partner, such as STI tests, to protect the health and wellbeing of the surrogate and the child.[14]

8.60 While we think there are strong reasons why the surrogate's partner may wish to undertake implications counselling, and there would certainly be benefits in them doing so, we do not think it is appropriate to require it for someone who is not a party to the surrogacy agreement. In particular, we were conscious that if we required such counselling, and the surrogate's partner refused to participate, that would prevent the surrogacy proceeding on the new pathway, potentially depriving the surrogate and intended parents of all the attendant benefits of the pathway. Accordingly, we recommend that the surrogate's partner should be offered implications counselling pre-conception as part of the new pathway, but that it is a matter for them as to whether to take up the offer.

8.61 Dr Katherine Wade suggested that implications counselling should be offered to the surrogate's and intended parents' other children. We agree that children may benefit from the chance to explore surrogacy-related issues as part of their parents going through a surrogacy journey, whether they are the children of the surrogate or of the intended parents. However, we are concerned that making such counselling mandatory, and removing any element of choice, would not sit easily with the best

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13 Consultation Question 67.

14 See para 8.29, Recommendation 29.

interests of the child. Instead, we would support counselling being made available to children if they wish it. The nature of that counselling should be dependent on the particular needs of the individual child.

8.62 Some consultees queried whether implications counselling required a trained counsellor, or whether someone with experience of surrogacy could help the parties explore implications. We recognise the essential help and support that comes from speaking to someone who has experienced surrogacy themselves, and we hope that RSOs will facilitate this. However, the value in undertaking counselling lies in speaking to an appropriately qualified counsellor. We recognise that there may also be value in a prospective surrogate or intended parent speaking to someone who is not intimately connected with surrogacy or the specific RSO. We therefore propose that the counsellor must be a member of BICA, the British Infertility Counselling Association (a professional infertility counselling body recognised by the HFEA[15] and the British Fertility Society), or an equivalent recognised body. Moreover, the person providing the counselling must meet the standards set out in the HFEA Code of Practice.

8.63 We do not think it is appropriate to prescribe a minimum number of sessions, or the format or permutations of the counselling sessions, as every surrogacy team will have different requirements. Those going through it for the first time will have different needs to those on a second or subsequent surrogacy journey. Thus, the number of sessions required and the format they take would be a matter for professional judgment: what is important is that the surrogate and the intended parents engage with the counsellor for implications counselling.

8.64 Of those who were opposed to making implications counselling mandatory, several raised concerns about costs, and the fact that this will increase the cost of surrogacy for the intended parents. One possible solution would be to cap the cost of this counselling. However, it would be difficult to set a meaningful cap as it is not possible to predict how many sessions might be required in each case. The evidence provided by consultees indicated that the average cost was around £500, which does not seem prohibitive, and any cap we set would be likely to be higher than that.[16]

8.65 The issue of psychological assessment was also raised. NGA Law and Brilliant Beginnings use this as part of their pre-conception screening of surrogates, and say it has “huge value” to them. There was some limited support for it being a requirement, particularly as a further way to ensure the surrogate is not being coerced or exploited. We did not consult directly on whether there should be a requirement for psychological counselling. However, engaging with a psychologist for an assessment of a person’s suitability to become a surrogate is very different from exploring the implications of surrogacy, and a person’s views and feelings about becoming a surrogate with a counsellor. Compelling a woman to undertake psychological assessment before becoming pregnant is a significant infringement of her autonomy and unduly interferes with her right to make decisions regarding her life. Given our view that psychological assessment and implications counselling are so different, and

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15 HFEA Code of Practice, Guidance Note 2, paragraph 2.14(b) states that a counsellor must be “accredited under the scheme of the British Infertility Counselling Association (or an equivalent body), or show evidence of working towards such accreditation”.

16 See paras 12.121 to 12.130 for discussion of the costs intended parents will be required to offer to pay.

the fact that we did not consult directly on the issue of psychological assessment, we have therefore concluded that psychological assessment should not be mandated for access to the new pathway.

8.66 While only implications counselling would be mandatory, this would not preclude the surrogate and/or intended parents opting-in to any psychological assessments, therapeutic counselling, or informal mentoring/support relationships with previous surrogates/intended parents should they choose to do so. The parties may wish to engage with counselling before, during, and after the pregnancy, in addition to the implications counselling pre-conception.

Recommendation 30.

8.67 We recommend it should be a requirement to access the new pathway that:

(1) the surrogate and the intended parents undertake implications counselling;

(2) the counselling should be provided by a counsellor who is a member of the British Infertility Counselling Association or an equivalent body recognised by the HFEA; and

(3) the counsellor should confirm to the Regulated Surrogacy Organisation that (i) the implications counselling has been completed and let the Regulated Surrogacy Organisation know if they have any concerns about the proposed surrogacy agreement as regards any of the parties involved; or (ii) they have been unable to conduct the implications counselling.

8.68 Clause 6(3) of the draft Bill gives effect to this recommendation. The detail of who should provide counselling and how information should be shared will be a matter for the HFEA's new surrogacy code of practice, as set out in clause 67(2)(a).

LEGAL ADVICE

8.69 Currently, it is an offence to charge for negotiating, facilitating and advising on surrogacy arrangements.[17] As such, legal advice cannot be provided on a commercial basis. While under our recommendations the surrogacy agreement will not be a legally enforceable contract (in contrast to the position in some states of the USA, for example), it will have significant legal effect by virtue of the statutory regime, not least in terms of the attribution of legal parental status. Therefore, we provisionally proposed in the Consultation Paper that, on the new pathway, surrogates and intended parents should be required to obtain independent legal advice on the effect of the law and of entering into the surrogacy agreement prior to the signing thereof.[18] We also asked two questions inviting consultees to give evidence about the practice

[17] Surrogacy Arrangements Act 1985, s 2.

[18] Consultation Question 68.

of seeking or providing legal advice, and the costs of legal advice, including whether their arrangement was domestic or international.[19]

Consultation

Evidence as to legal advice

8.70 Of the two surrogates who responded, one had taken legal advice prior to the making of the parental order but had not been legally represented by a lawyer in court, while the other wrote that she had obtained both legal advice and representation in her domestic surrogacy agreement.

8.71 Responses from intended parents differed in accordance with whether both legal advice and representation was sought and whether the arrangement was domestic or international.

8.72 For those intended parents who were party to a domestic surrogacy agreement, costs associated with legal advice and representation differed. In respect of intended parents who took both legal advice and sought representation by a lawyer, the reported costs ranged from £1,000 to £10,000. In respect of intended parents who took legal advice only, the reported costs ranged from £125 to £750 at the lower margin, while at the other end one consultee reported legal advice costing £6,000.

8.73 For those intended parents who were party to an international surrogacy arrangement, costs associated with legal advice and representation were on the whole higher when compared to domestic surrogacy agreements. In respect of intended parents who took both legal advice and sought representation by a lawyer, the reported costs ranged from £10,000 to £25,000 with the average cost being closer to the higher end of the range. In respect of intended parents who took legal advice only, the reported costs ranged from £5,000 to £10,000.

8.74 Consultees cited a range of potential fees for providing parties to a surrogacy agreement with independent legal advice, from £250 to £1,000. To an extent, the range reflects the different types of legal advice that consultees who are lawyers envisage providing. Other factors impacting on the costs include variations in the possible complexity of cases (where complex or novel cases would attract higher workloads and legal fees) and the difference between London legal rates and those in other areas of the country.

8.75 Based on consultation responses, we think the low estimate for independent legal advice is around £480, with the average cost being around £720. At the upper end of the spectrum, our highest estimate is £1,000.[20]

8.76 In relation to parental orders, the legal costs vary between jurisdiction and whether the surrogacy arrangement is domestic or international. Indicative costs range between £2,000 plus VAT to £20,000 plus VAT.

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[19] Consultation Question 110 asked this question of those who had experienced surrogacy, while Consultation Question 112 asked legal professionals what they would expect to charge.

[20] See the Impact Assessment published alongside this report.

8.77 At present, solicitors are not legally allowed to draft, advise on or negotiate the written surrogacy agreement. However, the responses to the question as to their likely fees for such work produced a range of fees, from £1,000 to £5,000 plus VAT, with most at the £1,000 to £2,000 mark. Several did, however, note that it would depend on the individual circumstances and the complexity of the situation. One firm of solicitors noted that in the comparable situation of known donors, they offer a template agreement at a fixed price, with no legal advice, which parties can choose to use.

8.78 While some consultees indicated they would expect to offer a fixed fee, others expressed concerns about doing do. SKO Family Law Specialists said:

> We would envisage charging for such work on the same basis as we charged for any work on negotiating or drafting any agreement, namely on a 'time and line' basis, where the fee reflected the time spent. Our experience of similar negotiations tells us that to attempt to fix a flat fee, while possible from a commercial perspective, would not best serve clients as it would lead to clients paying costs that did not fairly reflect the work undertaken on their behalf.

Requirement for independent legal advice in the new pathway

8.79 Consultees were supportive of the need for legal advice, but many raised a range of concerns, typically around the cost implications for the parties. For example, the Church of England supported the proposal but noted that the costs of taking independent legal advice might represent a barrier to some intended parents, making surrogacy available only to those who are relatively well-off. However, they said that on balance, this was outweighed by the fact that it was clearly in everyone's best interests that they are advised of the legal implications and limitations of surrogacy agreements. They suggested that the requirement ought to be made, but that costs are kept to a minimum by setting a cap on associated fees.

8.80 Consultees who were opposed to surrogacy nevertheless in general supported this proposal, but again raised concerns about costs. OBJECT said that based on the evidence of economic disparity between surrogates and intended parents, the surrogate should be legally aided to confirm informed consent. Another consultee emphasised that if the surrogate is required to have independent legal advice this should be paid for in full by the intended parents as the surrogate is more vulnerable in the surrogacy relationship.

8.81 One intended parent was sceptical about making legal advice an absolute requirement, on the basis that demand will push up the cost for intended parents.

8.82 One concern which was raised was whether a surrogate might find it difficult to consider independent legal advice funded by intended parents as truly independent. The Law Society suggested that, although intended parents should pay for the surrogate's legal advice, payments should be made through the surrogacy organisation or clinic in order to avoid (the perception of) a conflict of interest.

8.83 NGA Law and Brilliant Beginnings agreed with the proposal and their additional comments provided some useful details. They specifically noted the concerns regarding the cost of legal advice but said that the additional cost is justified by the benefits. They also noted that the cost of providing basic legal advice (they suggested

£300 plus VAT) is not excessive and will be offset from the saving of the parental order court fee. Moreover, it is already the policy of many fertility clinics and recommended by the HFEA Code of Practice to require legal advice for those having surrogacy treatment. NGA Law and Brilliant Beginnings also submitted that it reduces the risk of unethical arrangements and disputes which could have significant implications for the surrogate-born child.

8.84 There was strong support from across the legal profession. A number of specific points were raised, as follows.

8.85 The Bar Council emphasised how essential it would be for all parties to have independent legal advice to ensure a complete understanding of surrogacy and, critically, the right to object/withdraw agreement and how that can be exercised. If both parties have obtained separate independent legal advice prior to entering into a surrogacy agreement, then should the matter end up in court, a judge can be confident when considering the surrogacy agreement that it was entered into with full knowledge and understanding of the legal implications.

8.86 Resolution agreed with the proposal and suggested that the surrogate's partner should also be party to the legal advice provided. They emphasised that the choice of lawyer should be up to the surrogate.

8.87 SKO Family Law Specialists favoured a system whereby either the regulating authority maintains an approved register of lawyers who have demonstrated competence in this field, or at the very least that there is a requirement that the lawyer is an accredited specialist in family or child law. NGA Law and Brilliant Beginnings also raised this point: they had seen lawyers who were not experienced in surrogacy giving incorrect advice. They also emphasised that it was important that legal advice was provided by a qualified lawyer; they noted support groups and organisations sharing legal information via peer support, with which they have had regular and ongoing experience of incorrect advice being given, even by experienced organisations.

8.88 Mills & Reeve LLP agreed with the requirement of legal advice on the new pathway, noting that intended parents and surrogates who do not wish to take legal advice would still have the parental order process open to them.

8.89 Those consultees who disagreed with a requirement of mandatory legal advice did so primarily on the basis of concerns about cost and/or the belief that parties should be recommended but not required to obtain independent legal advice. Consultees also suggested that generic information could be made available online or provided by surrogacy organisations, and individuals could seek further legal advice if that was what they wanted. The surrogacy organisations tended to favour this approach: COTS said that legal advice has not been necessary up to now and that they had managed without it. They expressed concerns as to the cost to intended parents.

8.90 SurrogacyUK disagreed with the proposal for mandatory independent legal advice on the basis that it was not necessary as a safeguard when giving consent, and that the legal implications of surrogacy were not complicated enough to warrant legal advice in most surrogacy agreements. However, they thought that RSOs should have a duty to identify agreements that they think need legal input, and that surrogates and intended

parents should be able to seek legal advice whenever they see fit. They emphasised that providing consent is a continuous process that surrogacy organisations are best placed to monitor. Under the current law, most members do not seek legal advice and most simple queries are dealt with under the Department of Health and Social Care guidance. Instead, they suggested that supervising consent and checking legal eligibility should be a core competence of RSOs, who could advise parties to seek independent legal advice where this is needed.

8.91 One intended parent said that if the process continues to be as straightforward as the current system of parental orders, a requirement for legal advice was unnecessary and patronising. A further concern, closely tied up with the potential cost, was the risk of discouraging people from using the new pathway.

8.92 A further concern (also raised by some who supported the proposal) was that merely requiring parties to have independent legal advice does not guarantee the quality of the advice received. Professor Emily Jackson (legal academic) noted that surrogacy is not common and many high street solicitors may thus have had no experience with it. In her view, it might be preferable for the RSOs to obtain "first class" legal advice on surrogacy which they shared with their intended parents and surrogates. She noted this approach would provide economies of scale, so the total aggregate cost would be less but, more importantly, it would be possible for the regulator to check that the legal advice intended parents and surrogates were receiving was accurate and fit for purpose.

8.93 The issue of expertise was also raised by consultees who neither agreed nor disagreed with the proposal. PROGAR felt strongly about the need for an accreditation scheme for lawyers who wish to provide this service, and one that is proportionate to the task. They wrote that members were aware of instances where intended parents had been provided with factually incorrect legal advice and were not convinced that standards can be regulated adequately through existing mechanisms.

8.94 Linder Pott thought that the quality of legal advice across the UK should be improved should these sessions be deemed as mandatory. She also favoured a fixed fee or limit.

8.95 Professor Kenneth Norrie (legal academic) agreed with the motivation but saw difficulties in implementation/enforceability. In his view, the sanction for not taking independent legal advice was too great. He was particularly troubled by the additional costs that the proposal would inevitably impose on the intended parents and he was not wholly persuaded that this would be a reasonable addition to the intended parents' costs, given that they are paying large amounts in any case.

8.96 PET suggested that having separate legal representation could set an adversarial tone.

Analysis

8.97 While there was significant support for the proposal, there was nevertheless considerable concern expressed about whether it was appropriate to make legal advice a mandatory requirement, rather than something that is recommended. Many of these concerns stemmed from the cost involved, as part of an already expensive

process. Lower cost alternatives were put forward, including advice from a Government website, information from surrogacy organisations, and internet research. Some consultees also noted that the advice could be standardised, so that fact sheets could be produced.

8.98 Our conclusion is that there is a sound case for independent legal advice for both the surrogate and the intended parents to be a requirement for entry to the new pathway. This advice should be provided before the completion of the Regulated Surrogacy Statement. There should be no requirement for the surrogate's spouse or civil partner to take legal advice, as there are no legal implications for the spouse or civil partner.

8.99 The new pathway will introduce a significant change to the legal regime, and specifically to legal parenthood. It is critical that parties fully understand these changes. While RSOs can provide legal information, there is a qualitative difference between legal information and legal advice. The advantage of independent legal advice is that it is designed to put the interests of the client first and provide tailored advice on the client's specific needs in the general surrogacy framework. Thus, generic information on such a sensitive and important matter is not appropriate as the sole source of advice. Moreover, for questions regarding succession issues (which can be complex, and differ between England and Wales and Scotland), generic advice would not be possible.

8.100 Relying on internet research is also not an appropriate solution, for many reasons – two of the most obvious being the risk of the information being out of date, and the risk of it being from a different jurisdiction.

8.101 However, while we do not think that the provision of legal information can replace independent legal advice, we strongly support the provision of detailed and accurate legal information by the RSOs, throughout the process, to ensure that surrogates and intended parents have access to as much information as possible. Being aware of the general legal position before taking specific legal advice will mean that the parties have a chance to reflect on particular issues in advance of meeting their solicitor, and can raise those issues at the consultation.

8.102 Concerns were raised about the cost of legal advice, and the potential deterrent effect for the parties. We note that, where all goes to plan, the cost of independent legal advice on the new pathway will typically be lower than the costs of seeking a parental order. In general, failing to take legal advice at an early stage often leads to increased legal costs at a later stage.

8.103 We also do not envisage that there would be any need for the parties to use solicitors to negotiate or draft the surrogacy agreement. As happens at present, the agreement can be prepared using templates provided by surrogacy organisations. This agreement will not be legally binding: the legal consequences of the new pathway will arise entirely from the statutory regime. Thus, while they would be free to do so, there would be no need to use solicitors, and thus no additional costs incurred, at this stage: our proposal is limited to legal advice about the consequences of entering into the surrogacy agreement and the impact on legal parental status, including the right to withdraw agreement.

8.104 A number of consultation responses also raised the question of whether solicitors should be accredited specialists, to ensure the accuracy and value of the legal advice. We do not think this is feasible or desirable, although it is always open to parties to choose a solicitor who is an accredited specialist in child and family law. Existing regulatory requirements in both jurisdictions are sufficient to ensure that lawyers should not advise on issues beyond their expertise.

8.105 For the avoidance of doubt, despite some concerns raised in consultation responses, there should be no difficulty with the legal advice to the surrogate being truly independent, even if paid for by the intended parents. It is not unusual for one party to meet the legal expenses of the other party in a range of situations; for example, an employer paying for an employee to take independent legal advice as part of a settlement.

Recommendation 31.

8.106 We recommend it should be a requirement to access the new pathway that both the surrogate and the intended parents take independent legal advice about entering into the surrogacy agreement.

8.107 We recommend that there should not be a requirement for the surrogate's spouse or civil partner to take independent legal advice.

8.108 Clause 6(4) of the draft Bill gives effect to this recommendation. Clause 6(4)(a) specifies that the legal advice is to cover the effect of the new pathway on legal parental status under clause 4, and on parental responsibility/PRRs under clauses 31 or 34. Clause 6(4)(b) provides that the surrogate and intended parents receive advice from different legal professionals. Clause 6(8) specifies the legal professionals who may provide the advice.

CRIMINAL RECORD CHECKS

8.109 In order to safeguard all parties to the agreement and most particularly the child born of the agreement, we consulted on whether criminal record checks should be required on the new pathway. There is no statutory requirement for these under the current process, however they are sought by Cafcass as part of the parental order process in England and Wales. There is no requirement to submit criminal record checks to the court in Scotland as part of the parental order application.

8.110 Currently, background checks of intended parents and surrogates already form part of the processes of a number of surrogacy organisations, including SurrogacyUK and Brilliant Beginnings, and all parties to a surrogacy agreement are asked to declare criminal convictions by licensed clinics in the UK. Such checks are in line with the HFEA Code of Practice which guides clinics to "consider factors that are likely to cause risk of significant harm or neglect to any child who may be born or to any existing child of the family." These factors include "previous convictions relating to harming children". Similarly, when seeking a parental order, the parental order reporter in England and Wales will (with the consent of the parties) access information

from the local authority and police to assess whether the intended parents are likely to pose any risk to the safety of the child.

8.111 In the Consultation Paper, we provisionally proposed that the production of enhanced criminal record certificates for all parties to the surrogacy agreement and the spouse, civil partner or partner of the surrogate should be mandatory on the new pathway.[21] An individual would be unsuitable where they have been convicted of, or received a police caution for, any of the offences against children or sexual offences identified on a prescribed list. We also proposed that the body overseeing the surrogacy agreement may determine that a person is unsuitable based on the information provided by the check. Finally, we sought views on whether the list of offences that applies in the case of adoption is appropriate for surrogacy agreements in the new pathway.[22]

Consultation

8.112 This proposal drew support from a broad range of consultees. In the majority of cases, consultees did not provide further comments in support of their position.

8.113 The Law Society said the requirement emphasises "how the process should be child-focussed". Resolution said that "checks should also be undertaken on any people over the age of 18 living with the intended parents (as with adoption)."

8.114 Those who disagreed with the proposal again typically did not expand on their view. One intended parent indicated the need for a rationale:

> I think you need to be clear why this is needed and the sort of grounds where it could rule someone out.

8.115 Another ground for rejecting the proposal was the disparity it would create between surrogacy and other forms of assisted conception. The HFEA supported the Law Commissions' aim, "to prevent individuals convicted of child sex abuse from becoming parents through surrogacy". Nevertheless, the HFEA disagreed with the proposal, on the basis that an enhanced criminal record check is not required for other forms of assisted reproduction.

8.116 A number of consultees did not respond to the specific question but did offer relevant comments. Anest Mathias, a legal practitioner, thought that "there should also be a social services check of the intended parents, similar to the Cafcass safeguarding checks", while, similarly, one consultee who is a medical practitioner suggested that:

> … the intended parents and the surrogate should have a home visit. I think the fitness of intended parents should be assessed both for the child's sake and to

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21 In England and Wales, this would be an enhanced criminal record certificate under section 113B of the Police Act 1997. The check is conducted by the Disclosure and Barring Service. In Scotland, it would be a Level 2 disclosure within the meaning of section 8 of the Disclosure (Scotland) Act 2020 provided under section 11 of that Act. The check is conducted through Disclosure Scotland. In the Consultation Paper we referred to section 113B of the Police Act 1997 applying to England and Wales, and Scotland, as the Disclosure (Scotland) Act 2020 had not then been enacted.

22 Consultation Question 69.

ensure the surrogate can give informed consent about the sort of people she is acting as a surrogate for. This process is more like adoption than natural conception.

8.117 OBJECT said that all parties to the agreement "should be subject to rigorous investigation or part of a nationwide register that records and monitors the welfare of children born of a surrogate mother."

Whether the list of offences applied in adoption is appropriate to the new pathway

8.118 Adoption screening in England requires criminal record checks to be carried out in respect of a list of offences specified in regulations.[23] These are currently contained in Regulation 25 of the Adoption Agencies Regulations 2005,[24] as amended. Conviction for any of these offences is a complete disqualification for adoption. They include offences against children, offences involving pornography, sexual offences, and fraud and deception.

8.119 There was general support for the use of this list of offences in adoption screening to identify those offences which should preclude access to the new pathway. The only reason provided against using the list was general disagreement with the new surrogacy pathway.

8.120 However, the HFEA was sceptical about directly importing a list of offences from the adoption context, and about how that would work procedurally.

Analysis

8.121 There were pertinent arguments made on both sides of the question. Some of those who disagreed with requiring criminal records checks in fact did so because they disagreed with surrogacy. They argued that the need for checks to be made at all illustrated why surrogacy should not be permitted.

8.122 The main argument against criminal records checks by consultees who otherwise supported surrogacy was that such checks are not required for anyone seeking to become a parent through natural conception, assisted conception or donor conception. It therefore introduces a disparity between surrogate pregnancies and other pregnancies.

8.123 Nevertheless, surrogacy is qualitatively different from other forms of assisted conception, in that it involves the assistance of another party, the surrogate. To this extent, there are parallels with adoption, where criminal record checks are well established.

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[23] In Scotland, schedule 1 of the Adoption Agencies (Scotland) Regulations 2009 requires adoption agencies to obtain information about whether a prospective adopter has been convicted of certain specific offences listed in Schedule 1 to the Criminal Procedure (Scotland) Act 1995, Schedule 1 to the Children and Young Persons Act 1933, or section 11 of the Protection of Children (Scotland) Act 2003.

[24] The Adoption Agencies Regulations 2005, regulation 25(3)(b), as amended by the Adoption Agencies (Miscellaneous Amendments) Regulations 2013, apply in England only. There are specified offences for England and Wales and for Scotland in sch 3, part 1. The specific offences for England and Wales include offences which have been repealed but are still relevant and continue to operate for many purposes, including adoption.

8.124 We have concluded that, while not seeking to equate surrogacy with adoption, the parallels in this regard are sufficient to justify enhanced criminal record checks, pre-conception, for the intended parents, in order to safeguard the health and welfare of the child. Criminal record checks of the intended parents also operate to safeguard the surrogate, and ensure she is not exposed to the risk of violence or abuse. Further, in order to protect the health of the baby during the pregnancy, it is also necessary for the surrogate and her spouse, civil partner or partner to consent to an enhanced criminal record check. The agreement should not proceed if one of these individuals has been convicted of, or received a police caution for, any offence appearing on a prescribed list of offences.

8.125 Further, in order to safeguard the health and welfare of a child born of a surrogacy agreement, an enhanced criminal record check should also be obtained in respect of any person over the age of 18 who lives with the intended parents. This would cover a single intended parent's partner, any adult children of either intended parent, or any other family member, friend, or lodger staying in the same house.

8.126 RSOs should be responsible for overseeing this requirement.

8.127 The relevant offences which should prevent an agreement proceeding on the new pathway should mirror those which prohibit someone from adopting a child, contained in Regulation 25 of the 2005 Regulations.

8.128 We therefore recommend that Regulation 25 of the 2005 Regulations should apply to surrogacy cases, for the purposes of screening carried out before the completion of the Regulated Surrogacy Statement on the new pathway. As with adoption, the relevant offences would apply in England and Wales or in Scotland, as appropriate.

8.129 We also propose that RSOs should have the discretion to require enhanced criminal record checks for any other adult that could be involved in the life of the child, such as a single intended parent's partner, when that partner does not live with the intended parent. The RSO should then factor in any information revealed by this check to its overall assessment of the suitability of the parties to proceed on the new pathway.

8.130 We did not specifically consult on any change to the parental order process in this regard, and we do not make any recommendations in relation to it.

Recommendation 32.

8.131 We recommend it should be a requirement to access the new pathway that:

(1) the surrogate, her spouse, civil partner or partner, the intended parents, and any adult over the age of 18 who lives with the intended parents, be subject to an enhanced criminal record check (in England and Wales) and a Level 2 disclosure (in Scotland);

(2) where this enhanced criminal record check or Level 2 disclosure brings to light a relevant offence, the parties are precluded from proceeding on the new pathway;

(3) the relevant offences which would preclude the agreement from proceeding on the new pathway are those contained in Regulation 25 of the Adoption Agencies Regulations 2005, as amended;

(4) the Regulated Surrogacy Organisation should also have the discretion to seek an enhanced criminal record check in respect of any other adult who will be involved in the life of the surrogate-born child, and to factor any information revealed by this check into its assessment of the suitability of the parties to proceed on the new pathway; and

(5) the Regulated Surrogacy Organisation should be able to take into account offences disclosed by the enhanced criminal record check which are not set out in Regulation 25 of the Adoption Agencies Regulations 2005, in determining whether any person should proceed with a surrogacy agreement on the new pathway.

8.132 Clause 6(7) of the draft Bill gives effect to this recommendation, by specifying a requirement that a criminal record check has been obtained, and does not disclose any offence on the list, which may be specified in regulations, or any other offence which the RSO considers would make proceeding on the new pathway inappropriate. Criminal record checks must be obtained for any person "connected to the surrogacy agreement", as defined in clause 6(9) – clause 6(9)(a)(v) provides the RSO with the discretion set out in the recommendation.

INSURANCE FOR THE SURROGATE

8.133 We noted in the Consultation Paper that surrogacy organisations currently ask their members to make arrangements to offer protection in the event that the surrogate or intended parents die, and that it is common practice for intended parents to fund life insurance for the surrogate before she becomes pregnant.[25] We asked a series of questions relating to the payments which intended parents should be permitted to make to the surrogate, in particular inviting consultees' views as to whether intended parents should be able to pay compensation to the surrogate's family in the event of

[25] Consultation Paper, para 3.58.

the pregnancy resulting in the surrogate's death, including through payment of the cost of life insurance for the surrogate.[26]

8.134 We discuss consultees' responses to our questions regarding payments later in this Report, at Chapter 12. In respect of payments for life insurance, there was overwhelming support from consultees not opposed to surrogacy (and indeed support from some who were) for it to be possible for intended parents to pay for life insurance for the surrogate. Many consultees thought that it should be mandatory for them to do so. We are also aware from surrogacy organisations that some intended parents also pay for critical illness cover, to insure against the surrogate developing a long-term and very serious health condition.

8.135 We recommend that it should not only be permissible for the intended parents to pay for the surrogate to take out and maintain life insurance and critical illness cover, but that, on the new pathway, they should be required to do so (unless the surrogate wishes to meet these costs herself or they are paid for by a third party). We recommend that this insurance should cover the period beginning with the commencement of any fertility treatment and lasting from two years from the point of conception.[27]

8.136 This requirement that the intended parents pay for insurance is in keeping with our policy requiring the intended parents to meet the screening and safeguarding costs of the new pathway, with the exception of the cost of criminal record checks, which cannot be obtained by an individual, and the pre-conception child welfare assessment, which will be conducted by the RSO.[28] If the surrogate already has life insurance and critical illness cover then the intended parents can meet this requirement by covering the existing cost of the premiums for an agreed period.

8.137 Further details as to payment for life insurance and critical illness, together with other payments which are permitted to be made to the surrogate, are discussed in Chapter 12.

THE WELFARE OF THE CHILD

8.138 The most fundamental element of any surrogacy agreement is the need to protect and respect the welfare of the surrogate-born child. In considering whether to make a parental order, the court must have regard to the need to safeguard and promote the welfare of the child throughout the child's life as the paramount consideration.[29] Currently, during the course of the parental order application, a post-birth welfare assessment will be conducted by the Cafcass parental order reporter in England and Wales. In Scotland, this may be undertaken by the curator *ad litem* or reporting officer.

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26 Consultation Question 80.

27 Ch 12, para 12.167, Recommendation 55.

28 Ch 12, para 12.167, Recommendation 55.

29 We note that section 14(3) of the Adoption and Children (Scotland) Act 2007, which prescribes this test in the context of adoption in Scotland, applies to applications for a parental order by virtue of para 2 of sch 2 of the Human Fertilisation and Embryology (Parental Orders) Regulations 2018; similarly, for England and Wales, s 1(2) of the Adoption and Children Act 2002 applies by virtue of para 2 of sch 1 of the 2018 Regulations.

Unless the surrogacy agreement has broken down, surrogate-born children will live with their intended parents in the immediate post-birth period and consequently may reside with them for a number of months before their welfare is assessed.

8.139 In the Consultation Paper, we noted that the requirement of a post-birth welfare assessment is hard to reconcile with the intended parents being the legal parents at birth on the new pathway.[30] In addition, where the intended parents and surrogate have been screened and met the various procedural safeguards for the new pathway, and there is still agreement between the parties to the surrogacy agreement at the time of birth, we were not convinced that the introduction of a post-birth welfare assessment was required. As such, we provisionally proposed that a post-birth welfare of the child assessment should not be a requirement on the new pathway. Rather, we took the view that the welfare of the child is better protected by the proposed screening and procedural requirements before the completion of the Regulated Surrogacy Statement, the shared intention of all parties to the surrogacy agreement, and by automatically bestowing legal parental status upon the intended parents at birth. The proposal therefore sought to shift this assessment from its current application post-birth by a judge, to a pre-conception administrative scrutiny before accessing the new pathway.

8.140 In the Consultation Paper we provisionally proposed that the RSO or clinic should be responsible for ensuring a welfare of the child assessment is carried out, in accordance with Guidance Note 8 of the HFEA Code of Practice,[31] and that there should be no need for a post-birth assessment.[32]

Consultation

8.141 There was broad support for this proposal from those who supported surrogacy. A common theme amongst these responses was the desire for parity with natural conception, or with other forms of assisted conception, where no post-birth welfare of the child assessment takes place.

8.142 The Bar Council stated that it was important for any welfare assessment of the child after birth to be removed. They were of the view that surrogacy shared a high degree of similarity with natural conception and, as such, should be treated in the same way as those who become parents through natural conception. The Bar Council also took the view that the proposed new pathway checks to be undertaken prior to entering into the surrogacy were sufficient.

8.143 A separate point was made by NGA Law and Brilliant Beginnings, who questioned the efficacy of post-birth welfare assessments in any event:

> Of the 1000+ surrogacy cases we have been involved in, only one has raised a significant welfare question concerning the suitability of the parents. In that case, the judge made a parental order and said that he would have done so even if he thought the welfare issues were so significant that they should trigger public law proceedings

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30 Consultation Paper, paras 7.70 to 7.74.

31 The welfare of the child assessment in surrogacy cases is contained at paras 8.9 to 8.11 of Guidance Note 8; general factors to consider in the assessment process follow at paras 8.14 to 8.15.

32 Consultation Question 14.

since the parents (rather than the surrogate and her husband) should have the right to be involved in those proceedings. This demonstrates how little impact the full welfare assessments actually have on the outcome of parental order applications, given that welfare is assessed through the rear-view mirror.[33]

8.144 NGA Law and Brilliant Beginnings also raised the risk of discrimination in imposing a post-birth assessment. They noted that there is no evidence that people who need to use surrogacy pose a higher risk to children than any others.

8.145 Another common theme raised by a number of consultees was the fact that there is a level of screening applicable to all parents post-birth, in all circumstances, which is sufficient in surrogacy.

8.146 One intended parent spoke passionately from personal experience, in support of aligning surrogacy with natural conception, and emphasising the difference from adoption. Andrew Witcomb, intended parent, said this was the most stressful aspect of their entire surrogacy journey:

> To have the welfare assessment AFTER living with our children for several months seemed almost akin to cruelty. It felt like a threat to our recent happiness. If a welfare assessment has to happen, it should happen during or before preparation of a surrogacy agreement, under the auspices of a regulated surrogacy body, as proposed in the new pathway.

8.147 The competence of clinics or RSOs to carry out this assessment was raised by a number of consultees, some of whom also suggested that only social workers were capable of carrying out this assessment, or that special training was required. The HFEA suggested clear statutory guidance would be required:

> [a] prescribed process or procedure or some minimum criteria for this assessment is required for surrogacy agencies around the appropriate conduct of welfare of the child assessments.

8.148 Those who disagreed with the proposal were of the view that only a post-birth welfare assessment can adequately secure the best interests of the child and ensure compliance with international standards. Fife Campaign for Women's Rights pointed to international standards, as did Nordic Model Now!, and those who submitted their template response, citing the UN Special Rapporteur's recommendation that all decisions involving parenthood should be taken after the birth of the child.

8.149 Nordic Model Now! and those who submitted their template response also disputed the parity between surrogacy and natural conception:

> The justification that a welfare assessment after the birth of the child is not necessary because parents of children born through the normal process are not subject to such checks does not hold. Pregnancy, birth and the post-partum changes are intense physical and existential experiences that change you and prime you to love and be sensitive to the new-born child and rise to the challenge of the

[33] The reference to "public law proceedings" in this consultee's response refers to proceedings relating to taking the child into care.

enormous task of raising him or her to adulthood. For obvious reasons 'intended parents' do not have this advantage.

8.150 Other comments reflected concerns to ensure the welfare of the child, noting, for example, that much could change between any pre-conception assessment and birth.

8.151 Another reason posited in favour of a post-birth assessment was that the birth mother should be the legal parent at birth and that only a judicial decision after birth, based on the best interests of the child, should change that. In a similar vein, some consultees thought there should be a post-birth welfare assessment on the basis that surrogacy should be regulated on a similar basis to adoption.

8.152 One suggestion was that there was a risk of surrogacy-specific issues being overlooked if reliance was placed solely on the standard midwife/health visitor checks applicable to all new-born babies. Thorntons Law LLP favoured a post-birth assessment to be carried out by the court: "we believe that the Court is best placed to assess the welfare of the child and apply a consistent approach."

8.153 A further concern raised was whether it was appropriate for RSOs to be responsible for ensuring that pre-conception child welfare assessments are performed. Specific concerns were raised around expertise and independence, with the risk of a conflict of interest.

8.154 The Law Society neither agreed nor disagreed. They raised two further issues, both of which were also raised by PROGAR. The Law Society said:

> We question what would prevent intended parents going to an alternative clinic after one raises significant safeguarding and welfare concerns, preventing them from using their facilities. Furthermore, there is currently no requirement for intended parents to make a declaration that an adoption agency has rejected their application. This is all pertinent information that should be evaluated in any pre-conception welfare assessment and we recommend that the Law Commission consider this further.

8.155 PROGAR and Nagalro selected "other" and went on to say:

> With the proposed removal of the child welfare post birth assessment, our concern is that there will be no professionals or staff involved at any stage of the process whose core focus is the child.

Analysis

8.156 This consultation question posed three separate questions, and these will be dealt with in turn. It is helpful to set out some general observations at the outset.

8.157 The welfare of the child is critical in surrogacy, and must be at the heart of the new pathway. This reflects domestic law and the UNCRC. Anyone seeking to use assisted conception in a licensed clinic will be subject to the welfare of the child assessment in

Part 8 of the HFEA Code of Practice.[34] In contrast, individuals who become parents through natural conception are not subject to any pre-conception or pre-birth assessment of the welfare of the child. The question is whether there is any need for a welfare of the child assessment in surrogacy to go further than that in place under Part 8 of the HFEA Code of Practice. There is no evidence that medically or socially infertile couples who use surrogacy are necessarily less fit to parent than those who conceive naturally.[35]

8.158 Surrogacy is also different from adoption, where a thorough assessment of welfare and of parenting capacity is undertaken. This assessment is required because adoption will sever the child's ties to their birth parents,[36] in favour of the adoptive parent(s). It is incumbent on the state to ensure that any adoptive parent is able to meet the child's health and welfare needs. This justifies more stringent assessments.

8.159 In Consultation Question 14, the first element was the proposal that on the new pathway the welfare of the child should be assessed pre-conception in the way set out in Chapter 8 of the HFEA Code of Practice. This reflects the current practice for all adults who access assisted conception in a licensed clinic. There was no persuasive case made for removing this assessment or for differentiating surrogacy agreements from other assisted conception arrangements in this regard. Accordingly, our recommendation is that the RSO should carry out a pre-conception child welfare assessment, akin to that required under the HFEA Code of Practice, before the completion of the Regulated Surrogacy Statement.

8.160 As part of this pre-conception child welfare assessment, intended parents and surrogates would be required to submit a report from a medical practitioner to the RSO. This should be contained in guidance, rather than statute. The RSO should determine who, within the organisation, is best equipped to perform the pre-conception child welfare assessment, and we note that in some cases this will be a team effort.

8.161 Where concerns are raised about one or both intended parents as a result of the pre-conception child welfare assessment, such that the RSO concludes that the welfare of any surrogate-born child would not be adequately protected and promoted by the intended parents, this would prevent the intended parents from using the new pathway.

8.162 Similarly, where concerns are raised about the surrogate as a result of the pre-conception child welfare assessment, such that the RSO concludes that the welfare of

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34 Part 8 of the HFEA Code of Practice relates to the requirement that no treatment services regulated by the HFEA may be provided unless account has been taken of the welfare of any child who may be born as a result (including the need of that child for supportive parenting) and of any other child who may be affected by the birth. Accompanying guidance is also included as to how this requirement is to be fulfilled, with attention given to the welfare of the child assessment process for surrogacy, the factors which should be considered as part of that process and the steps that are to be taken when obtaining further information during the assessment process.

35 V Soderstrom-Anttila et al, "Surrogacy: outcomes for surrogate mothers, children and the resulting families—a systematic review" [2016] 22(2) *Human Reproduction Update*, 260–276; S Golombok, *We Are Family* (2022).

36 Unless within a step-parent adoption context, when ties to one birth parent will not be severed.

any child conceived as a result of the surrogacy agreement would not be adequately protected, then this would prevent the surrogate from proceeding with the agreement on the new pathway.

8.163 Accordingly, the pre-conception child welfare assessment would comprise:

(1) the completion by the intended parents and surrogate of a pre-conception child welfare form akin to that required in Part 8 of the HFEA Code of Practice, to be returned to the RSO;

(2) the provision of reports from medical practitioner(s) in respect of each of the intended parents and the surrogate to the RSO; and

(3) the assessment of the welfare of the child to be born of the surrogacy agreement by the RSO akin to that in terms of Part 8 of the HFEA Code of Practice.

8.164 Together with the other screening and safeguarding checks required before the completion of the Regulated Surrogacy Statement, such as the enhanced criminal records checks, this would allow the RSO to assess the welfare of any child to be born of the surrogacy agreement.

8.165 The second part of the question was the proposal that the RSO or regulated clinic should be responsible for ensuring that this procedure[37] is followed. While this proposal did receive support, there were suggestions that this should be carried out by social workers rather than a surrogacy organisation or clinic. Some consultees were concerned that only social workers had the professional experience to be able to conduct a meaningful assessment. Others pointed out that there might be a conflict of interest in allowing an organisation which may be perceived to have a vested interest in the treatment going ahead from carrying out the assessment.

8.166 To address the conflict of interest point, we have proposed as part of a separate recommendation that only the RSO can approve a surrogacy team on the new pathway (see Recommendation 25). RSOs (unlike licensed clinics) are non-profit-making and represent the interests of surrogates and of intended parents. They have nothing to gain from failing to carry out the screening and safeguarding measures appropriately and stringently. If they fail to do so, to the detriment of surrogate-born children, surrogates and/or intended parents, their reputation would rapidly suffer in the surrogacy community. There would also be regulatory consequences, through HFEA regulation.

8.167 However, we also recognise that, as part of their own licence conditions, clinics are required by the HFEA to carry out a welfare of the child assessment before carrying out fertility treatments, and that they currently do this for surrogates and intended parents (and for any parent seeking assisted conception). Although the RSO will have ultimate responsibility for ensuring that, on the new pathway, a pre-conception child welfare assessment has been carried out and that reports have been provided by medical practitioners, it will be possible for the RSO to adopt an assessment carried out by a licenced clinic. In order for the clinic to share that information with them, the

[37] That is, the procedure set out in Chapter 8 of the Code of Practice as modified by the proposals, above.

clinic will need the consent of the intended parents and the surrogate. Where that consent is not forthcoming, the consequence would be that the RSO needs to duplicate the assessment – but this is in the hands of the intended parents and surrogate. In the event of the RSO reaching a different conclusion on the pre-conception child welfare assessment from any conclusion reached by the clinic, the RSO's decision would be the one that mattered for determining whether the parties could enter the new pathway. They could still receive treatment if the clinic was willing to provide it, for example, but the surrogacy agreement would not be able to proceed on the new pathway.

8.168 The third part of the proposal concerned whether there should also be a post-birth assessment of the welfare of the child. It is important to emphasise that where parties seek a parental order, the courts will continue to be required to carry out a welfare of the child assessment. The proposal relates only to whether there should be a specific post-birth assessment on the new pathway. This scheme does not currently exist, and consequently post-birth welfare assessments do not exist in this context.

8.169 We recommend that, on the new pathway, where the pre-conception screening and safeguarding requirements have been met, there is no need for a separate post-birth welfare of the child assessment. Although consultees raised a range of concerns in support of introducing a post-birth assessment in this context, we believe these concerns can be met far more effectively by the recommended system on the new pathway for extensive and holistic pre-conception screening and safeguarding.

8.170 It is critical to emphasise that, whatever system we put in place for surrogacy, it would not, and should not, replace the standard safeguarding protections which apply to any child, born in any circumstances. Our proposals do not affect the measures available to midwives, health visitors, social workers, health professionals or others where there is any concern as to the safety, health, and wellbeing of the child at birth or at any point thereafter. The standard health visiting measures would continue to apply, as they do for all new-born children.

8.171 Many of the arguments put forward as to why there is a need for a post-birth assessment apply equally to all pregnancies, whether natural, assisted conception, or surrogate; for example, the fact that the parents might have separated during the pregnancy, or that the child might have specific health complications/needs at birth, which would impact on their care needs. These issues, if they impact on the welfare of the child, are caught by the universal health visitor support, together with GP and social worker input. The fact that the birth is a surrogate birth does not explain why intended parents should be treated differently in relation to these events, which can affect any parent.

8.172 Post-birth concerns regarding the health of the surrogate are also relevant, but again can be dealt with by the standard care system in place for all mothers post-birth. It is not clear that a post-birth welfare of the child assessment would help address any specific issues concerning the health of the surrogate.

8.173 Several consultees raised the UN Special Rapporteur's recommendation for a post-birth welfare of the child assessment. We have addressed these recommendations in detail in Chapter 3.

8.174 We are confident that our proposals for pre-conception screening and safeguarding fully safeguard the child, even absent a post-birth welfare of the child assessment. We are also aware that a post-birth welfare of the child assessment would still happen if the agreement exited the new pathway and a parental order was sought, where the surrogate withdraws her agreement.

8.175 Accordingly, where the intended parents and surrogate meet all the screening and safeguarding requirements on the new pathway, and no concerns are raised through the pre-conception child welfare assessment, then they are eligible to proceed on the new pathway. No separate post-birth assessment will be introduced, although the existing safeguarding and child protection measures will apply for surrogate born children as for all new-born children.

8.176 For the avoidance of doubt, post-birth welfare assessments will (continue to) be required when a party seeks a parental order.

Recommendation 33.

8.177 We recommend it should be a requirement to access the new pathway that:

(1) the welfare of the child is assessed pre-conception in a manner akin to that set out in Chapter 8 of the current HFEA Code of Practice;

(2) the Regulated Surrogacy Organisation is responsible for ensuring that this procedure is followed;

(3) the surrogate and intended parents should all be required to submit a report from a medical practitioner to the Regulated Surrogacy Organisation for the purpose of the pre-conception child welfare assessment;

(4) where a licenced clinic carries out a pre-conception child welfare assessment (together with a report from a medical practitioner where relevant), that can be shared with the Regulated Surrogacy Organisation, with the consent of the intended parents and surrogate, and adopted by the Regulated Surrogacy Organisation; and

(5) that where a surrogacy team does not satisfy the Regulated Surrogacy Organisation in respect of the pre-conception child welfare assessment, they cannot proceed on the new pathway.

8.178 Clause 5(3)(c) of the draft Bill gives effect to this recommendation, by requiring that before approving a surrogacy agreement to proceed on the new pathway, the RSO has taken into account the welfare of any child who may be born as a result of the agreement. The detail of the process for this assessment will be a matter for the HFEA's new surrogacy code of practice, as set out in clause 67(2)(a).

THE PROVISION OF INFORMATION AS AN ELIGIBILITY REQUIREMENT FOR THE NEW PATHWAY

8.179 In the Consultation Paper, we set out proposals in Chapter 10 on the creation of a national register of surrogacy agreements. This register would record details about the agreement, including the identity of the intended parents, the surrogate and any gamete donors, for agreements both in the new pathway and in relation to parental order applications. The creation of the Surrogacy Register ("SR") and the information to be contained on it is discussed in Chapter 13.

8.180 In the Consultation Paper we provisionally proposed that in order to use the new pathway, information that identified the surrogate and the sperm and egg donors, must be entered onto the SR prior to the registration of the child's birth.[38] This information would be provided to the SR by the RSO.[39]

8.181 The principal motivation for our proposals for this question is to protect the right of those children born of a surrogacy agreement to information about their genetic and gestational origins. While the HFEA already holds a register of information about donor gametes, which can be accessed by a child born using donor conception, it would not be possible for a child to identify the intended parents from the existing register, even where their gametes were used. The surrogate could be identified from the existing register, if her gametes were used.[40]

Consultation

8.182 Almost all consultees responding to the question supported the provisional proposal, with particularly strong support from individuals and professionals involved in surrogacy, and the legal and social work professions. Those consultees who opposed surrogacy nevertheless supported this proposal.

8.183 A small number of consultees raised privacy concerns for the family created through surrogacy, and in respect of surrogates.

8.184 The Law Society agreed, in theory, that this information should be entered onto a national register. However, they noted that it may not be possible to meet this condition if anonymous donations are permitted in any of the surrogacy pathways. They suggested that a record that an anonymous donor was used would be more appropriate in such cases.

8.185 The HFEA were concerned that the proposal might mean that they would have to ask regulated bodies to provide them with more, and different, information. They preferred that such evidence not be submitted to the register but was retained by RSOs and so would be available as part of any audit that they conduct over the sector.

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38 Consultation Question 63.

39 Consultation Question 63, part 1.

40 The HFEA have confirmed for the purposes of a donor-conceived person accessing information about a donor who is also the surrogate (in the case of traditional surrogacy), the surrogate will be treated as the donor.

Analysis

8.186 Consultees did not raise any significant counterargument against our provisional proposal and we therefore make a recommendation to the same effect. We note that elsewhere in this Report we recommend that agreements involving anonymously donated gametes should be excluded from the new pathway.[41] It is therefore consistent to make it a requirement of entry to the new pathway that the identity of the surrogate, the intended parents and the identity of the persons whose sperm and egg are being used (at least one of whom will be one of the intended parents),[42] should be recorded in the Regulated Surrogacy Statement, and transferred by the RSO to be placed on the SR.

8.187 We recommend that the details of donors – individuals other than the surrogate and intended parents who provide gametes used in a surrogacy agreement – continue to be recorded on the existing HFEA Register. The fact of the record on that register would be noted in the SR so that a person born of a surrogacy agreement seeking that information would know to check the HFEA Register. This is different to our provisional view in the Consultation Paper where we envisaged that all information would be recorded in the SR. We moved away from this position on the basis that there is no need to duplicate information that is already recorded in the HFEA Register.

8.188 Our consultation question may have suggested that all donors be positively identified at the time of entry onto the register. That was not our intention; we instead wish to provide, as is the case for identity-release donors[43] recorded on the existing HFEA Register of gamete donors, that those who contributed gametes are identifiable by the child born of the agreement once they reach the age at which information should be released to them via the existing provisions on gamete donors, should the child wish to access the information.

8.189 In relation to privacy concerns raised by consultees, we are satisfied that our proposals are proportionate and necessary. The right of the surrogate-born child to have access to information concerning their identity provides a compelling reason to make provision for this information to be included in the Regulated Surrogacy Statement and the Surrogacy Register ("SR"). We also wish to emphasise that the SR is not an open register, and the only people with access to the relevant entry will be the surrogate-born child, and potential siblings or sexual partners with the surrogate-born child's consent.[44]

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41 See para 8.236

42 See para 6.117 onwards.

43 Identity release donors are those whose identity is not known by the intended parents or the child, but whose identifying details will be released to the person who was born as result of the assisted conception process once they reach a certain age. For more information: https://www.dcnetwork.org/useful-info/types-of-donor (last visited 23 March 2023).

44 See ch 13, paras 13.151 to 13.155 and 13.159 to 13.211.

Recommendation 34.

8.190 We recommend that as a prerequisite of entering the new pathway, information identifying the intended parents, the surrogate and those who contributed gametes (or details of how to access such details, in the case of identity-release donors recorded on the existing HFEA Register on donor conception) must be recorded in the Regulated Surrogacy Statement for the agreement and provided after the child's birth by the Regulated Surrogacy Organisation for entry on the Surrogacy Register.

8.191 Clause 5(1)(c) of the draft Bill provides that a Regulated Surrogacy Statement must include "the required identity information". Clause 7 of the draft Bill provides for the Secretary of State to specify in regulations the information to be included about the surrogate, intended parents, and any gamete donor. Clause 92 provides that where information about a gamete donor is recorded in the existing HFEA Register on donor conception, the SR must or may contain a statement to that effect. Transfer of information from the RSO to the HFEA is effected by the licence conditions provided for in clause 53 of the draft Bill.

THE SCOPE OF THE NEW PATHWAY

8.192 In the Consultation Paper, we acknowledged that not all surrogacy teams should necessarily qualify for the new pathway. We proposed that traditional surrogacy agreements, in which the child is conceived using the surrogate's own egg, should be capable of following the new pathway.[45] We asked consultees for their views on whether independent surrogacy agreements, which have limited professional involvement,[46] and agreements involving anonymously donated gametes, should be able to enter the new pathway.[47] Finally, we proposed that international arrangements should be excluded from the new pathway in light of our policy aim to discourage UK intended parents from going overseas to enter into a surrogacy arrangement.[48]

Traditional surrogacy agreements

8.193 From the information available, it is believed that around one third of domestic surrogacy agreements involve the use of the surrogate's own egg.[49] The law at present does not distinguish between traditional and gestational surrogacy

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45 Consultation Question 30.

46 Consultation Question 32 (and Consultation Question 31 asked an open question about the experiences of those involved in independent surrogacy arrangements, in particular with regard to any screening for such arrangements). We do not discuss responses to these questions in detail; but there is nothing to prevent a surrogacy team forming independently but working with an RSO to meet the requirements for the new pathway.

47 Consultation Question 10.

48 Consultation Question 98.

49 Consultation Paper, paras 3.13 to 3.14.

agreements. As long as one of the intended parents is genetically related to the child, a parental order can be made.[50]

8.194 In the Consultation Paper, we set out arguments for and against including traditional agreements in the new pathway, and found the case in favour of doing so convincing.[51] We therefore proposed that traditional surrogacy agreements should be eligible for the new pathway.

Consultation

8.195 A wide range of consultees supported the proposal, including those directly involved in surrogacy, professionals and professional bodies, and academics.

8.196 Linder Pott said:

> From a surrogate's perspective I felt no difference having done both traditional surrogacy and gestational surrogacy.

8.197 Several consultees highlighted the value of traditional surrogacy agreements in arguing why they should be included on the new pathway.

8.198 For example, Dr Katherine Wade (legal academic) argued that traditional agreements might be beneficial to the psychological welfare and identity development of surrogate-born people, given they may have ongoing contact with their second genetic parent (the surrogate) throughout childhood. By contrast, donor-conceived surrogate-born people have to wait until they are 16 to discover any information about their egg donor. She also thought that we should respect the autonomy of women who wish to be traditional surrogates, and of intended parents who wish to pursue traditional surrogacy.

8.199 PROGAR pointed to research indicating gestational surrogate pregnancies are medically riskier than traditional surrogacy pregnancies for both the surrogate and the child.

8.200 A number of consultees involved in surrogacy research said there was no evidential basis for supposing that traditional surrogates are more likely to bond with the child and wish to raise them as their own, or that traditional agreements break down more frequently. NGA Law and Brilliant Beginnings said:

> It is important for policy to be based on evidence, and we have seen research from Cambridge University which has demonstrated good outcomes for traditional surrogacy. We also see no evidence from our legal experience that traditional surrogacy is more likely to result in a dispute, despite popular misconception about the greater risk of a change of heart if there is a biological connection.

8.201 Further, SurrogacyUK's Working Group on Law Reform said:

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50 HFEA 2008, s 54(1)(b).

51 Consultation Paper, paras 9.13 to 9.28.

> In our 2015 survey, 35.1% of the surrogate respondents were or had been in traditional surrogacy arrangements. In 2018, this figure was 28.1%. Given that around one third of the surrogates responding each time were traditional surrogates, and there is no overall sign of dissatisfaction with the process, we would conclude that traditional surrogacy is not more 'risky' than gestational surrogacy, nor women who do it more vulnerable.

8.202 A further argument advanced by a number of consultees was that surrogacy is founded on the surrogate and the intended parents' shared intention, which is equally present in traditional surrogacy agreements.

8.203 Moreover, as Dr Katarina Trimmings and Dr Michael Wells-Greco (legal academics) and others pointed out, traditional agreements would benefit from the professional involvement and screening requirements on the new pathway: it would be counter-intuitive to exclude traditional agreements from a safer, more regulated pathway that offers greater protection to all parties, including the surrogate-born child.

8.204 Few arguments were made against the proposal. PROGAR said some of its members:

> …felt deeply concerned at asking a traditional surrogate to supply even provisional consent pre-conception to allowing the intended parents to become legal parents at birth.

8.205 No empirical evidence was cited as to any additional risk of traditional surrogacy breaking down due to the genetic connection between surrogate and child, in contrast to the responses above that traditional surrogacy has much the same outcomes as gestational.

Analysis

8.206 We recommend that traditional surrogacy agreements should fall within the scope of the new pathway. We found the arguments in favour compelling and did not identify any evidence-based reasons for their exclusion. In particular, there is nothing to be gained from excluding traditional surrogacy from the support and safeguards on the new pathway, and compelling parties to seek a parental order instead.

Recommendation 35.

8.207 We recommend that traditional surrogacy agreements should fall within the scope of the new pathway.

8.208 No specific provision is made for this recommendation in the draft Bill, as it is not drafted to exclude traditional surrogacy agreements.

Surrogacy agreements involving anonymously donated gametes

8.209 In a domestic surrogacy agreement with which a HFEA-licensed fertility clinic is involved, the use of anonymously donated gametes is prohibited.[52] Therefore, intended parents who want to use a licensed clinic for a surrogacy agreement in the UK are unable to use anonymously donated gametes. Individual people are unable legally to import sperm, eggs or embryos into the UK without this being done through a licenced clinic, as the storage of sperm, eggs and embryos is a HFEA licensable activity.

8.210 We noted that in the Consultation Paper it was possible that intended parents might obtain anonymously donated sperm, for example by importing it from a country where treatment with anonymously donated gametes is permitted, and use it in a traditional surrogacy agreement through artificial insemination at home.

8.211 In the Consultation Paper we therefore asked consultees whether traditional surrogacy agreements involving anonymously donated gametes should be excluded from the new pathway.[53] We also provisionally proposed that the prohibition on the use of anonymously donated gametes should apply to traditional surrogacy agreements with which an RSO is involved.[54] Given that consultees raised similar arguments in response to both questions, we recount consultee responses and arguments in response to both questions before analysing them.

Consultation

The use of anonymous gametes on the new pathway

8.212 Consultee responses on this issue were mixed, but most supported excluding agreements involving anonymously donated gametes from the new pathway. A primary reason for this view was that excluding such agreements from the new pathway would discourage the use of anonymously donated gametes in the UK. This was considered desirable in light of the child's right to know about their origins.[55] For example, the Law Society wrote:

> We consider that the use of anonymous gametes hinders the statutory rights of the child to access their genetic origins. We therefore feel that the use of anonymous gametes should be discouraged and not permitting such arrangements to enter the new pathway could be a means of achieving this.

8.213 Dr Katherine Wade (legal academic) argued that children's autonomy is undermined when anonymous donor gametes are used in their conception. In her view, people who are born through assisted reproduction should be able to make informed choices themselves about information about their origins, including the significance they will

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52 This is the effect of the provisions giving donor-conceived people the right to identifying information about their donors, for example under HFEA 1990, s 31ZA. Licence Condition T54 in the Code of Practice (Guidance Note 20) also prevents the use of non-identifiable donors except in certain circumstances (for example where the gametes or embryo were supplied to the clinic before 1 April 2005).

53 Consultation Question 10.

54 Consultation Question 9.

55 UNCRC, Article 7.

attach to genetic or gestational links. Anonymous gamete donation does not allow this to happen.[56]

8.214 PROGAR also pointed out that the use of anonymous gametes is contrary to what Parliament intended in relation to access to information for donor-conceived people, and that "UK law and regulations [should be] consistent in their requirement for identity-release donation only".[57] Dr Rita D'Alton Harrison (legal academic) said that including these agreements on the new pathway would contradict our proposal for a SR, which would include information about any gamete donors used.

8.215 Other consultees suggested that there is a need for judicial oversight and/or a post-birth welfare assessment in surrogacy agreements involving anonymously donated gametes.

8.216 On the other hand, arguments were put forward by some consultees in support of including these agreements on the new pathway.

8.217 Ben Amies-Cull, an intended parent, thought that these agreements should be included on the new pathway, in light of its additional safeguards which would serve to protect the surrogate, saying:

> The lack of an option to have a safely regulated surrogacy with an anonymous gamete donor may lead to informal agreements and lack of safeguards for the surrogate… it is not possible to protect the surrogate while also enforcing this rule.

8.218 Parity of treatment with other forms of assisted conception was used to support excluding the use of anonymous gametes; but parity with sexual reproduction was advanced by the Bar Council as a justification for not excluding it:

> While the aim of allowing children born through surrogacy to have access to genetic and medical history information is an understandable and desirable one, there will be cases outside surrogacy arrangements in which children simply do not know their genetic origin because the mother does not know who the biological father is and takes no steps or is unable to take steps to find out who he is.

8.219 Other consultees suggested that excluding these agreements from the new pathway would punish the child. Georgina Roberts wrote:

> Once the child is conceived using anonymised sperm you are entered into that situation for life. For this to then mean that it is required that the old pathway is used brings yet more downsides to the child, which I don't think is fair.

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[56] See also Katherine Wade, "Reconceptualising the interest in knowing one's origins: a case for mandatory disclosure", (2020) 28(4) *Medical Law Review* 731.

[57] Identity release donors are those whose identity is not known by the intended parents or the child, but whose identifying details will be released to the person who was born as result of the assisted conception process once they reach a certain age. For more information: https://www.dcnetwork.org/useful-info/types-of-donor (last visited 23 March 2023).

The use of anonymous gametes and RSOs

8.220 Consultees responded to this issue in a similar fashion to the previous one. While responses were mixed, most consultees supported prohibiting the use of anonymously donated gametes in traditional surrogacy agreements with which RSOs are involved.

8.221 Some consultees who opposed surrogacy, including the Scottish Council on Human Bioethics and OBJECT, nevertheless supported this proposal.

8.222 Many consultees supported the proposal on the basis of the child's interest in having access to information about their genetic heritage. The Family Education Trust noted that the right of children to know who their parents are is protected by Articles 7 and 8 of the UNCRC and that the use of anonymously donated gametes risks this right being frustrated.

8.223 The HFEA was not persuaded that there ought to be parity of legal treatment between surrogacy and other forms of assisted reproduction:

> We do not consider the fact that patients outside of surrogacy arrangements are able to be the legal parents under UK law when using anonymously donated gametes … in countries which allow anonymous donation, to be inconsistent with the approach of denying access to the new pathway to those using anonymously donated gametes in a traditional surrogacy arrangement.
>
> We do not think that a direct comparison between legal parenthood within surrogacy arrangements and outside of them is useful… surrogacy is a very particular form of parenthood involving an additional party and provoking different ethical considerations, including the concepts of commodification and exploitation…

8.224 A further argument put forward was that medical information relating to the donor needs to be available to the surrogate-born person in case of an inherited medical issue.

8.225 On the other hand, a range of consultees disagreed with the proposal. Some people use anonymously donated gametes sourced from overseas because they cannot find donors with corresponding personal characteristics in the UK, such as ethnicity. Mills & Reeve LLP considered that these people should not be prohibited from working with RSOs:

> Individuals' reasons for using anonymously donated gametes are likely to vary but will, in our experience, often reflect the lack of availability of suitable donors with similar characteristics to the intended parents in the UK.

Analysis

8.226 We recommend that surrogacy teams who use anonymously donated gametes should be excluded from the new pathway.

8.227 The main argument in favour of excluding these agreements from the new pathway comes from respecting children's rights. Under the UNCRC, children have the right to

know their genetic origins,[58] that is, the identity of any donor whose gametes are used in their conception; and the right to an identity,[59] which requires them to have access to information about their genetic origins. Excluding the use of anonymous donors on the new pathway creates an incentive for intended parents to use donors whose identity is known, or whose identity can be released when the child turns 18, which protect the surrogate-born person's rights to know their genetic heritage.

8.228 We are also conscious that the UK has chosen to adopt a regime for donor gametes whereby identifying information must be available to children when they reach 18: any proposal to permit the use of anonymous gametes in domestic surrogacy agreements on the new pathway would seriously undermine that regime.

8.229 Relatedly, the Family Education Trust referred to academic studies showing that anonymous donor conception can negatively impact the emotional wellbeing of children and their families. One study cited by the Family Education Trust[60] found that the parent-child bond was weaker in families where anonymously donated gametes are used; another showed that 82% of donor-conceived people want to contact their donor, which is made far more difficult, if not impossible, if anonymously donated gametes have been used.

8.230 Excluding these agreements from the new pathway would also help to ensure that our new scheme for surrogacy is coherent. It does not make sense to introduce an SR and require that information relating to donors is recorded, while at the same time permitting agreements involving anonymously donated gametes to enter the new pathway.

8.231 We acknowledge that surrogacy teams who wish to use anonymously donated gametes might be less well supported if excluded from the new pathway. Furthermore, we acknowledge the argument that some donors might not wish to be contacted by a person born using their gametes. We note that this argument applies beyond the surrogacy context and runs counter to the statutory scheme for the release of donors' non-identifying and identifying information. We are, however, unequivocal in our conclusion that the use of anonymous gametes should not be facilitated on the new pathway.

8.232 We accept that some intended parents, especially those belonging to ethnic minorities, might find it considerably more difficult to locate donors with corresponding personal characteristics in the UK. Nevertheless, as data published by the HFEA shows, it is possible for intended parents to import gametes from overseas from donors who match their ethnicity *and* have disclosed their non-identifying and identifying information.[61]

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58 UNCRC, Article 7.

59 UNCRC, Article 8.

60 D Beeson et al., "Offspring searching for their sperm donors: how family type shapes the process." [2011] 26(9) *Human Reproduction*, 2415-2424.

61 HFEA, 'Ethnic diversity in fertility treatment 2018', https://www.hfea.gov.uk/about-us/publications/research-and-data/ethnic-diversity-in-fertility-treatment-2018/#Section3 (last visited 23 March 2023).

8.233 We also recommend that the prohibition on the use of anonymously donated gametes should apply to traditional surrogacy agreements with which an RSO is involved, for the reasons we set out above. This is in keeping with our aim of discouraging surrogacy teams from using anonymous gametes. Our recommendation will have the effect of preventing an RSO from working with a surrogate and intended parents who wish to enter into such an agreement, using anonymously donated gametes.

8.234 We do not think that an RSO, as a body regulated by HFEA, should be permitted to work with a surrogacy team if they have been involved in the importation of gametes, which can only lawfully be done through a HFEA-licensed clinic.[62] Enabling an RSO, as a state-regulated body, to support a surrogacy agreement in those circumstances could be seen as condoning the use of unlawfully imported gametes.

8.235 When we consulted on whether the prohibition on the use of anonymously donated gametes should apply to traditional surrogacy agreements with which an RSO is involved, we had not yet reached a conclusion about whether double donation should be permitted. We asked an open question as to whether double donation should be possible for domestic agreements where a parental order was sought.[63] We have now concluded that it should not,[64] and recommend that there should continue to be a requirement for a genetic link to the intended parents in parental order cases.[65] Use of the surrogate's own egg in a traditional surrogacy agreement, coupled with anonymously donated sperm, would mean that there was no such genetic link, and the intended parents would be ineligible for a parental order. Adoption would therefore be the only route by which the intended parents could become the legal parents of the child.

Recommendation 36.

8.236 We recommend that:

(1) the use of anonymously donated gametes should prevent a surrogacy agreement entering the new pathway; and

(2) the prohibition on the use of anonymously donated gametes should apply to traditional surrogacy agreements with which an RSO is involved, meaning that RSOs will be prohibited from working with surrogacy teams who use anonymously donated gametes in a traditional surrogacy agreement.

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62 Importation of gametes is a licensable activity under the HFEA 1990 and therefore cannot be undertaken other than by appropriately licensed clinics. Anonymous gametes could only possibly be imported legally were a special direction granted by the HFEA, HFEA, 'Special direction applications', https://portal.hfea.gov.uk/knowledge-base/other-guidance/special-direction-applications/ (last visited 23 March 2023), but as set out at para 4.210 these cannot be used in fertility treatment.

63 Consultation Question 59.

64 Although we are sympathetic to the arguments for allowing double donation in new pathway cases, see para 6.142 above, we did not consult on whether it should be permitted other than in cases of medical necessity.

65 See paras 6.117 onwards.

8.237 Clause 5(1)(b) of the draft Bill sets out the requirement for a regulated surrogacy statement to contain required identity information. Clauses 7(1)(c), 7(2) and 7(3) grant the Secretary of State power to make regulations specifying information required in relation to a donor who is to provide gametes for use or for the creation of an embryo to be used, which identify the donor or enable them to be identified. Together, these provisions give effect to the first part of our recommendation, as a surrogacy agreement cannot enter the new pathway without a completed Regulated Surrogacy Statement.

8.238 The draft Bill does not contain specific provision for the second part of our recommendation, as this will be given effect by the licence conditions imposed on RSOs by the HFEA.

Surrogacy arrangements with an international element

8.239 In some surrogacy arrangements, part of the arrangement happens outside the UK. This could comprise the fertility treatment, or the entire journey from conception through to the birth of the child. In the Consultation Paper, we provisionally proposed that such surrogacy arrangements should not be eligible for the new pathway.[66]

Consultation

8.240 Consultees suggested that the increased risk of exploitation of women and surrogate-born children in international surrogacy arrangements justified excluding them from the new pathway. Andrew Witcomb, an intended parent, wrote:

> Ideally, my wife and I would like to say no to this question. However, we recognise that safeguards against immigration fraud, child trafficking and exploitation of international surrogates who may be vulnerable must be maintained.

8.241 Another theme that came out of the consultation was that, in light of these risks, there should continue to be post-birth judicial scrutiny of international arrangements. The Law Society said:

> International surrogacies are more complex in nature and can involve countries that are at higher risk exploitation of vulnerable surrogates and child-trafficking. Additionally, it would be difficult to ensure all pre-birth requirements in the new pathway have been undertaken. Such cases should therefore be subject to judicial scrutiny in the High Court.

8.242 Dr Alan Brown (legal academic) thought that excluding international arrangements from the new pathway would help to discourage UK intended parents from going overseas:

> It seems clear that encouraging the use of domestic surrogacy arrangements is one of the core policy objectives of the Consultation Paper. Therefore, including international surrogacy arrangements within the 'new pathway' would seem to run counter to this aim.

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66 Consultation Question 98.

8.243 However, some consultees did support the inclusion of international agreements on the new pathway. The arguments put forward in support of this included acknowledging the limited number of UK surrogates, and that international surrogacy arrangements come with varying risks of exploitation, such that a blanket exclusion from the new pathway is unfair. Cafcass wrote:

> Our practitioners who work primarily in complex and international parental orders told us that some international arrangements, particularly in the US, already follow a similar pathway and are well regulated. It felt anomalous to them that these arrangements would still be required to go through the court process. But equally they acknowledged that for other less well-regulated international processes the court scrutiny would be required and is a vital safeguard for the child.

8.244 NGA Law and Brilliant Beginnings, who work with intended parents looking to enter into international surrogacy arrangements, thought that RSOs could be responsible for ensuring that the requirements of the new pathway have been complied with in individual cases in international arrangements. They said:

> This would have the massive advantage of introducing oversight of some international surrogacy arrangements upfront. It would incentivise parents to choose more ethical destinations (to avoid the need to apply for a parental order) and it would encourage them to take sensible steps which they might not otherwise do.

8.245 The Family Law Bar Association also pointed to the practical benefits in relation to immigration issues, through facilitating children receiving British passports and being able to travel back to the UK with their parents.

Analysis

8.246 We have concluded that international surrogacy arrangements should be excluded from the new pathway. We acknowledge the strength of the arguments put forward by Cafcass and NGA Law and Brilliant Beginnings, for example, that encouraging intended parents to follow the same safeguarding and screening standards for overseas arrangements would bring benefits. Nevertheless, we believe that these benefits are outweighed by the risks of exploitation of women in overseas jurisdictions. No matter what oversight is provided by a UK-based RSO, it remains the fact that international surrogacy is beyond the jurisdiction of surrogacy regulation in the UK.

8.247 By excluding international arrangements from the new pathway, we would hope to incentivise UK intended parents to enter into agreements in the UK where they can be the child's legal parents at birth, and to which the stricter regulatory requirements of the new pathway can apply.

8.248 This exclusion extends to a surrogacy arrangement where any element has taken place overseas, including fertility treatment leading to conception. Even if the intended parents and the surrogate are UK-based, and the pre-conception screening and the subsequent pregnancy and birth all take place in the UK, if treatment leading to conception happens overseas it weakens the regulation and oversight of the surrogacy arrangement as a whole. We are particularly concerned about any fertility treatment in a surrogacy context taking place in a clinic which is not subject to HFEA regulation. We therefore think that the new pathway, with all its attendant

consequences and benefits, should be limited to surrogacy agreements which are entirely within the jurisdiction of the UK surrogacy regime.

Recommendation 37.

8.249 We recommend that surrogacy arrangements with an international element should be excluded from the new pathway.

8.250 This recommendation is given effect in the draft Bill through two of the eligibility conditions for the new pathway, namely the requirement in clause 8(6) that the assisted reproduction procedure was carried out in the UK, and the requirement in clauses 8(8) and (9) that the intended parents and surrogate be domiciled or habitually resident in the UK, the Channel Islands or the Isle of Man when the Regulated Surrogacy Statement is signed and at the time of the birth.

Chapter 9: The form and content of Regulated Surrogacy Statements

9.1 As established in Chapters 2 and 4 of this Report, our reforms introduce a new pathway to parenthood, whereby the intended parents will be the legal parents of the child at birth. The ability of the intended parents to hold legal parental status from the birth of the child is a very significant feature of the new scheme, and is based on the agreement of the surrogate and the intended parents, with the oversight of the Regulated Surrogacy Organisation ("RSO"). There must therefore be a clear and unambiguous record of this agreement, and evidence that all the requirements of the new pathway have been met.

9.2 In the Consultation Paper we stated:

> The Human Fertilisation and Embryology Authority (the "Authority") already produces forms designed to record consent to the acquisition of legal parenthood, including in surrogacy cases where this is possible. We take the view that the regulator could do the same for surrogacy arrangements within the new pathway. However, we do not think that use of such a form should be mandatory, provided that the surrogacy agreement is clear and unambiguous in its statement on the effect of legal parenthood of entering into the agreement.[1]

9.3 We envisaged that the formal consent would be taken by the RSO but that there would be no mandated form, while recognising that the regulator may wish to provide an official form for recording consent.[2]

9.4 We provisionally proposed that the intended parents would be the legal parents at birth where they have "entered into an agreement including the prescribed information" with the surrogate.[3] In answering this question, some consultees provided information which was relevant to the form and content of such a consent statement or declaration.

Consultation

9.5 Several consultees raised the question of the form and content of the surrogacy agreement, and suggested that there should either be standardised forms or standard requirements. SurrogacyUK said:

> SurrogacyUK proposes official forms be introduced to record consent to statutory parenthood and payment requirements. SurrogacyUK thinks form and function go together regarding the recording of statutory consent in surrogacy arrangements. We think that where possible, standardised forms and associated guidance in plain English should be provided, following best practice that exists elsewhere today. This

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1 Consultation Question 7; Consultation Paper, para 8.11.

2 Consultation Paper, para 8.11.

3 Consultation Paper, para 8.13.

would allow parties to a surrogacy arrangement to record their consent without the need to incur costs and expend effort by instructing a lawyer to prepare documents for the same purpose. We think this should be sufficient for most straightforward surrogacy arrangements, but that it shouldn't stop parties from creating bespoke legal documents that have a similar effect if there is a wish or a need to do so.

Analysis

9.6 We were impressed by arguments that a standardised form would make the process easier for parties to navigate, would potentially reduce costs (by avoiding the need for a bespoke agreement in some cases), and would potentially be more acceptable as official proof of consent.

9.7 We therefore consider, contrary to the view in the Consultation Paper, that a standardised form should be required for entry into the new pathway. We recommend that this mandatory form should be called the Regulated Surrogacy Statement, and that it would be completed at the pre-conception stage by the surrogate, intended parents, and RSO. Once completed, this declaration would provide an unequivocal record of the surrogacy agreement on the new pathway. The format of the Regulated Surrogacy Statement will be prescribed in secondary legislation.

9.8 The Regulated Surrogacy Statement will fulfil three purposes: it will set out key information regarding the parties to the surrogacy agreement; it will confirm that the parties have complied with all the screening and safeguarding, and administrative, arrangements of the new pathway; and it will provide evidence of the parties' shared intention that the intended parents are to be the legal parents at birth.

9.9 The Regulated Surrogacy Statement will have no legal effect beyond that set out in statute. It will operate to provide evidence of the parties' intentions that the statutory provisions should apply, conferring legal parental status on the intended parents at birth, subject to the surrogate's right to withdraw consent. However, it will not be enforceable as a contract and no legal rights or obligations will arise from it beyond those specified in the statute. If there was any disagreement about the agreement at any stage before the surrogate was pregnant, the parties would be free not to proceed to conception and the agreement would lapse. If the surrogate wished to challenge the surrogacy agreement post-conception, she could exercise her right to withdraw her consent and the agreement would exit the new pathway.[4]

9.10 The Regulated Surrogacy Statement is different from any supplementary surrogacy agreement which surrogacy teams may choose to have, for example, relating to lifestyle choices. These agreements are frequently used at present, and set out a more detailed record of agreements reached between the intended parents and surrogate on a range of issues relating to lifestyle choices of the parties during pregnancy, arrangements as to the birth, and contact post-birth between the surrogate and the child, for example. Such supplementary agreements could continue to be

[4] See ch 4, para 4.106, Recommendation 2.

used but, as at present, they would not be legally binding or enforceable. However, the teams may choose to take legal advice or seek to have them drafted by lawyers.[5]

9.11 We will consider separately in Chapter 12 the information the parties will be required to provide to the RSO in relation to payments that the intended parents will make to the surrogate.

9.12 We therefore recommend that a Regulated Surrogacy Statement must be completed before the parties enter the new pathway.

Recommendation 38.

9.13 We recommend that the essential elements of the surrogacy agreement on the new pathway be set out on an official form, to be known as the Regulated Surrogacy Statement, to be signed by the surrogate, the intended parents and the Regulated Surrogacy Organisation.

9.14 Clause 5 of the draft Bill gives effect to this recommendation.

THE CONTENT OF THE REGULATED SURROGACY STATEMENT

9.15 In the Consultation Paper[6] we provisionally proposed that the Regulated Surrogacy Statement[7] should contain specified information, common to all surrogacy agreements in the new pathway:

(1) the details of those involved in the surrogacy agreement: the intended parents and the surrogate, and the RSO;

(2) whose genetic material is being used, including that of any donor (that is not the intended parents or surrogate);

(3) confirmation that genetic and gestational parenthood will be recorded in the national register of surrogacy;

(4) confirmation that a welfare of the child assessment has been completed and no significant concerns have been raised;

(5) confirmation that the parties have fulfilled the eligibility and screening requirements;

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5 See para 14.71 for our recommendations for reform to the law on charging for negotiation and drafting of surrogacy agreements.

6 Consultation Paper, para 8.8.

7 Note that this was referred to in the Consultation Paper as the “agreement” rather than the Regulated Surrogacy Statement.

(6) confirmation that the procedural safeguards have been met, including implications counselling;[8] and

(7) a statement that, on the child's birth, the intended parents will be the child's legal parents and that they intend that the child born of the agreement shall live with them and that the surrogate will not be the legal parent but will have, for a limited period, the right to withdraw from the agreement.[9]

9.16 We recommend that most of these details are incorporated into the Regulated Surrogacy Statement, subject to some specific comments. We deal first with the final point, regarding the proposed statement that the child's home will be with the legal parents. Thereafter we consider the remaining elements of the proposed contents, and the question of whether there should be a mandatory period of delay before the agreement comes into effect, and whether it should lapse with the passage of time.

Declaration that the child's home will be with the intended parents

9.17 Currently, one of the requirements for a parental order to be granted is that the child's home must be with the intended parent(s), both at the time of the application and the making of the order.[10] This requirement has not posed problems in practice: where the intended parents have separated or divorced, the courts have extended the meaning of "home" to mean the home of each intended parent.[11]

9.18 In the Consultation Paper, we took the view that this requirement was not in need of reform, but that it should be applied to the new pathway. We provisionally proposed that, on the new pathway, intended parents should be required to make a declaration in the surrogacy agreement that they intend for the child's home to be with them.[12] This requirement was also included in the list of factors which should be consented to in order to enter the new pathway. It featured as bullet point (7) on this list:

(7) a statement that, on the child's birth, the intended parents will be the child's legal parents and that they intend that the child born of the agreement shall live with them and that the surrogate will not be the legal parent but will have, for a limited period, the right to withdraw her agreement from the agreement.

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8 This was erroneously described in the Consultation Paper as the provision of information about the effect on the legal parenthood of the child. Having considered responses from consultees, we are aware that this misrepresented implications counselling in the sense that it is not the purpose of such counselling to provide information. Provision of information about legal parenthood is separate to implications counselling, which provides a forum for the discussion of the implications of entering into a surrogacy agreement, and of the information about this which has been provided.

9 This was framed in the Consultation Paper as the "right to object".

10 HFEA 2008, s 54(4)(a) and s 54A(3)(a).

11 *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] Fam 186 at [66]-[68]; *A and B (No 2 – Parental Order)* [2015] EWHC 2080 (Fam), [2015] Fam Law 1192; LB v SP [2016] EWFC 77, [2016] 9 WLUK 517.

12 Consultation Question 58.

Consultation

9.19 Most consultees who supported surrogacy, whether as those personally involved or professionals, supported the inclusion of a declaration from the intended parents that the child's home will be with them.

9.20 In terms of specific comments or suggestions made in response to the proposal, several consultees indicated that the proposed declaration served as a manifestation of intended parents' intent to raise the child. Consultees also suggested that it was in the surrogate-born child's best interests for the declaration to be made, while one consultee suggested the surrogate should make a similar declaration.

9.21 Several consultees, while in support of the declaration, raised issues regarding how "home" should be legislatively drafted, or judicially interpreted. For example, the Law Society raised the prospect of children living abroad, such as in an international surrogacy arrangement where the intended parents await their child's visa. They said that surrogacy law should clearly and explicitly respond to this situation and take account of UK immigration law.

9.22 Other consultees noted that in cases where the couple were not living together, due to pre-birth separation, parental orders have been made under the existing law, and the drafting of "home" should account for this possibility. Similarly, some consultees questioned what would happen legally and practically if the intended parents could not provide the child with a home post-birth, and asked whether the requirement of a declaration would thereby frustrate the agreement. Jason Brown, an intended parent, identified exceptional circumstances when a child requires long-term hospital care. In this case, their "home" is not with the intended parents, even though the child is under their care.

9.23 Concerns regarding the effect of such a declaration were also raised. For example, that such a pre-birth statement is nebulous and does not constitute a binding commitment, and that it therefore doesn't achieve anything meaningful. The opposite concern was also expressed; that such a statement pre-birth should not preclude the surrogate from claiming parental responsibility.

9.24 Consultation responses also emphasised that practical questions of child arrangements should be kept conceptually separate from questions as to who the legal parents are. There could be a risk that maintaining the "home" requirement may escalate levels of conflict in proceedings under section 8 of the Children Act 1989 (child contact and residence) between separated intended parents or between intended parents and surrogates. NGA Law and Brilliant Beginnings suggested that if a declaration of intention is made, it should instead be that the intended parents intend to be the child's legal parents.

Analysis

9.25 We think that there is merit in requiring the intended parents to make a declaration in the Regulated Surrogacy Statement that the child's home will be with them. We recognise that such a declaration would not be binding upon the court, nor would it in any way undermine the surrogate's right to withdraw consent and seek to be recognised as the legal parent, or seek contact and residence. Nevertheless, such a declaration would be a clear statement of the parties' intentions at the outset of the

agreement, pre-conception, and would reflect the reality of where the child will live in uncontested surrogacy agreements.

9.26 We do not agree that the declaration would escalate conflict within any post-birth contact or residence proceedings: the declaration would clearly not be binding upon the court, which will be solely concerned in such proceedings with the welfare of the child.

9.27 We have some sympathy with the arguments put forward for an expanded statutory definition of "home", in order to make clear that the child can have a home with separated parents living in different houses, or that the child's home could be abroad. We think it is clear in those cases that the child's home is with the intended parents. We also consider that the child's home would clearly be considered to be with the intended parents when they have not yet been able to take the child home from hospital because of ongoing medical treatment. However, we think there are risks that a statutory definition would fail to identify and provide for the variety of factual circumstances that may arise. We note that case law has dealt with these situations, and we expect this judicial interpretation to continue to apply.

9.28 We therefore recommend that the declaration in the new pathway that the child's home will be with the intended parents would be made in the Regulated Surrogacy Statement. We also think it appropriate for the surrogate to make this declaration in the Regulated Surrogacy Statement.

9.29 We also think that it is appropriate to include a reference to the effect of the new pathway on legal parental status, that is a statement that the intended parents will be legal parents at birth, and that the surrogate will not be the legal parent. This legal effect arises by operation of law, and entering into the written agreement is only one of the requirements necessary for the law to have that effect. While we wish to avoid any suggestion that it is the written agreement entered into by the parties that – by itself – effects the change in legal parental status, we nevertheless wish to emphasise this fundamental legal consequence in the Regulated Surrogacy Statement, which evidences the agreement between the parties.

9.30 Similarly, the surrogate's right to withdraw consent is not conditional on having been incorporated in the Regulated Surrogacy Statement: it is a fundamental right protected by the new pathway scheme, regardless of whether it is mentioned in the Regulated Surrogacy Statement or not. However, the existence of the right is a significant element of the surrogate's participation in the agreement and we likewise recommend that it is included in the Regulated Surrogacy Statement.

Further contents of the Regulated Surrogacy Statement

9.31 In the Consultation Paper we provisionally set out that the Regulated Surrogacy Statement would contain:

(1) the details of those involved in the surrogacy agreement: the intended parents and the surrogacy, and the RSO;

(2) whose genetic material is being used, including that of any donor (that is not the intended parents or surrogate); and

(3) confirmation that genetic and gestational parenthood will be recorded in the national register of surrogacy.

9.32 We continue to recommend that these are required, with the exception of the third point: while the information will be recorded in the Surrogacy Register that we make recommendations to create, the fact that this will happen does not need to be set out in the Regulated Surrogacy Statement.

9.33 Details regarding who provided the gametes for conception will consist of details as to identity in the case of known donors, intended parents and the surrogate. Where an identity release donor has been used (via a UK clinic), the form will provide details of how to access this information (via the HFEA Register of gamete donors).[13] Prescribed non-identifying information will also be provided for known donors, the surrogate and intended parents, mirroring that provided by gamete donors, and recorded on the HFEA Register of gamete donors.[14]

9.34 In the Consultation Paper we also proposed that the RSS include:

(5) confirmation that the parties have fulfilled the eligibility and screening requirements; and

(6) confirmation that the procedural safeguards have been met, including implications counselling.

9.35 On reflection, bullet point (6) is in fact encompassed by bullet point (5), as "screening" covers "procedural safeguards". It therefore does not need to be separately stated. We therefore omit bullet point (6) from our recommendation. However, the Regulated Surrogacy Statement must include a statement by the RSO that, in providing its approval, it took into account the welfare of both any child born of the surrogacy agreement, including any such child's need for supportive parenting, and of any other children who may be affected by such a birth. We take the view that, because of the paramount importance of the child's welfare, there should be a specific statement to this effect.

9.36 We also now take the view that the Regulated Surrogacy Statement does not need to record that eligibility requirements were met. These requirements are those as to the age and domicile, or habitual residence, of the surrogate and intended parents; the existence of a (defined) close relationship between the intended parents; and there having been no withdrawal from the surrogacy agreement. The assisted reproduction procedure for the surrogacy agreement must also be carried out in the UK. These requirements are conditions that must be met in order for the intended parents in a new pathway surrogacy agreement to be the legal parents from birth of the child born of the agreement. It would not be appropriate for these conditions to be satisfied by a

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[13] Identity release donors are those whose identity is not known by the intended parents or the child, but whose identifying details will be released to the person who was born as result of the assisted conception process once they reach a certain age. For more information: https://www.dcnetwork.org/useful-info/types-of-donor (last visited 23 March 2023).

[14] Further details of the information regarding the surrogate and gametes is discussed in Ch 10, at paras 10.144 to 10.163, and in Ch 13, at paras 1.33 to 1.35

statement in the Regulated Surrogacy Statement that the requirements have been met.

9.37 The Regulated Surrogacy Statement will also record the categories of permitted costs to be made by the intended parents to the surrogate, together with an agreed limit, if any, for each category. We discuss the parties' obligations in relation to payments, and the RSO's role in this respect, in Chapter [X].

9.38 The Regulated Surrogacy Statement would be signed by the surrogate, the intended parents and the RSO: this would be a critical element, to confirm not only that the stated information and safeguarding requirements had been fulfilled, but also to indicate the intention of the parties to proceed with this surrogacy agreement.

A fixed delay before entering into, and automatic expiry of, the surrogacy agreement

9.39 Some consultees raised the issue of whether an agreement on the new pathway should expire a certain amount of time after it was signed (a "longstop") if conception had not occurred. A "cooling off" period was also proposed. For example, SurrogacyUK suggested a mandatory period of delay between the signing of the agreement and an attempt at conception. We have concluded that neither is necessary.

9.40 The question of a longstop on the validity of an agreement seems finely balanced. The strongest argument for a longstop was to ensure that surrogates did not feel pressure to continue with an agreement after a relatively long period of time had elapsed without becoming pregnant. A longstop would give a surrogate a clear opportunity to withdraw from the agreement. On the other hand, a longstop could work arbitrarily to exclude intended parents from the new pathway (for example, where the parties had conceived a week after the longstop date, having not realised that the date had passed). It could also come to be regarded as a "deadline", which could increase pressure on all parties.

9.41 We are particularly keen to avoid any measures which place pressure on a surrogate: if she knew that the agreement was about to expire and it would cost the intended parents money to go through the procedural elements again, she may feel under pressure to go through another treatment cycle this month rather than next, for example. A further significant issue that emerged was the difficulty in trying to fix a meaningful longstop, whether measured in numbers of cycles of fertility treatment, or by a fixed period of time. Too long a period would render the longstop meaningless, while too short a time would risk parties having to repeat safeguarding requirements undertaken only a few months earlier.

9.42 With regard to any mandated delay between signing and conception, we take the view that the safeguards included in the new pathway prevent impulsive agreements and, in effect, already build a delay or cooling off period into the process. RSOs would be free to specify such a period if they wished.

Recommendation 39.

9.43 We recommend that the Regulated Surrogacy Statement should be signed by the intended parents, surrogate and Regulated Surrogacy Organisation, and include the following details:

(1) a statement that the intended parents will be the legal parents at birth, and that the surrogate will not be the legal parent of the child born, subject to her withdrawing her consent to the surrogacy agreement before the birth;

(2) confirmation that a welfare of the child assessment has been completed to the satisfaction of the Regulated Surrogacy Organisation;

(3) confirmation that the parties have fulfilled the screening requirements;

(4) a statement by the intended parents and the surrogate that the child born of the surrogacy agreement will have their home with the intended parents;

(5) a description of the permitted payments to be made by the intended parents to the surrogate (although not a breakdown of all agreed expenses).

(6) identifying details of those involved in the surrogacy agreement: the intended parents and the surrogate, and the Regulated Surrogacy Organisation;

(7) details of whose genetic material is being used in conception:

(a) identity in the case of the surrogate, intended parents, and known donors;

(b) details of how to access information regarding identity-release donors via the HFEA Register of gamete donors; and

(8) prescribed non-identifying information regarding the intended parents, surrogate and any known donors.

9.44 Clause 5 of the draft Bill gives effect to this recommendation. The clause operates by requiring that the Regulated Surrogacy Statement contain statements by the different parties (the intended parents, the surrogate and the RSO) on the various matters set out in the recommendation and include “required identity information”, which is the information referred to at points 6 to 8 in the recommendation. Clauses 6 and 7 provide further details about the pre-approval checks and required identity information respectively. The pre-approval checks are those screening and safeguarding measures which we discuss in Chapter 8. Clause 41 of the draft Bill also gives effect to this recommendation by providing that the payment of permitted costs by the intended parents is prohibited unless the costs are specified in the Regulated Surrogacy Statement, together with any agreed limit on those costs.

Chapter 10: Parental orders

10.1 In Chapters 2 and 4 we set out our recommendations for how a new pathway to legal parenthood for intended parents in surrogacy agreements should operate. In this chapter, we set out how the parental order process should operate for those surrogacy agreements that do not follow the new pathway.

10.2 We consider that the parental order process should be retained alongside the new pathway for four reasons.

(1) First, we have recommended that, where the surrogate exercises the right to withdraw her consent to a surrogacy agreement on the new pathway before the child is born, the surrogacy agreement should be removed from the new pathway. In those circumstances, legal parentage will be determined by the parental order process.

(2) Secondly we have recommended that, where the surrogate withdraws her consent after the child is born on the new pathway, legal parenthood will remain with the intended parents. If the surrogate wants to be the legal parent of the child, she will need to seek a parental order using that process.

(3) Thirdly we have recommended that the new pathway cannot be used in respect of international agreements. If intended parents enter an international surrogacy agreement, then they will continue to need to apply for a parental order to be recognised as the child's legal parents in the UK on their return.

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

10.3 We recommend that some aspects of the existing law on the parental order process remain the same and that others are reformed.

10.4 In this chapter, we first set out a brief overview of the current law of parental orders, before going on to consider what we recommend remains the same, and what we recommend changes.

THE CURRENT LAW

10.5 In this section, we set out a brief treatment of the current law on the following aspects of parental orders:

(1) the paramountcy of the child's welfare;

(2) application for, and grant of, a parental order;

(3) the six-month time limit for an application for a parental order;

(4) the child's home to be with the intended parents;

(5) the consent of the surrogate; and

(6) the provision of information about the surrogacy agreement.

The paramountcy of the child's welfare

10.6 The child's lifelong welfare is the court's paramount consideration when coming to a decision relating to the making of a parental order. The fact that this is the case is not stated explicitly in the sections of the HFEA 2008 dealing with the making of parental orders (54 and 54A) but is the result of the application of a provision of adoption law to the making of a parental order.[1]

10.7 In parental order cases in England and Wales, when considering the child's welfare, the court must have regard to the following checklist of matters (among others):

(1) the child's ascertainable wishes and feelings regarding the decision (considered in the light of the child's age and understanding);[2]

(2) the child's particular needs;

(3) the likely effect on the child (throughout his or her life) of having ceased to be a member of the original family and become the subject of a parental order;

(4) the child's age, sex, background and any of the child's characteristics which the court considers relevant;

(5) any harm (within the meaning of the Children Act 1989) which the child has suffered or is at risk of suffering; and

(6) the relationship which the child has with relatives and with any other person in relation to whom the court considers the relationship to be relevant.[3]

10.8 There is no checklist in Scotland. Instead, the court is directed to have regard to all the circumstances of the case,[4] and to regard the need to safeguard and promote the welfare of the child throughout the child's life as the paramount consideration.[5]

10.9 Furthermore, the court in Scotland must, so far as is practicable, have regard in particular to the following:[6]

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1 ACA 2002, s 1(2), as applied and modified by the 2018 Regulations, sch 1 para 2; AC(S)A 2007, s 14 (3) as applied and modified by the 2018 Regulations, reg 3 and sch 2 para 2.

2 Most parental order cases involve children who are too young to express a view on where they want to live. *Re TT (A Minor)* [2011] EWHC 33 (Fam), [2011] WL 1654 at [59]; *Re M (A Child)* [2015] EWFC 36, [2015] WL 2023213 at [117].

3 ACA 2002, s 1(4), as applied and modified by the 2018 Regulations, sch 1 para 2.

4 AC(S)A 2007, s 14(2) as applied and modified by the 2018 Regulations, reg 3 and sch 2 para 2.

5 AC(S)A 2007, s 14(3) as applied and modified by the 2018 Regulations, reg 3 and sch 2 para 2.

6 AS(C)A 2007, s14(4), as applied and modified by the 2018 Regulations.

(1) the value of a stable family unit in the child's development;

(2) the child's ascertainable views regarding the decision (taking account of the child's age and maturity);[7]

(3) the child's religious persuasion, racial origin and cultural and linguistic background; and

(4) the likely effect on the child, throughout the child's life, of the making of a parental order.[8]

Application for, and grant of, a parental order

10.10 Under the current law, there can be one or two applicants for a parental order: a sole applicant applies under section 54A of the HFEA 2008, while two applicants apply under section 54 of the Act. In both cases there must be a genetic link to the child born of the agreement, which means that a sole applicant will have to use their own gametes.

Six-month time limit for an application for a parental order

10.11 Under sections 54(3) and 54A(2) of the HFEA 2008, the intended parents must apply for a parental order within six months of the child's birth. The plain wording of section 54(3) of the HFEA 2008, that the application "must" be brought within six months, would appear to place an absolute bar on applicants applying for a parental order when the child is older than six months.

10.12 This is not, however, how the provision was interpreted by the High Court in the case of *Re X (A Child) (Surrogacy: Time Limit)*.[9] In this case, the court determined that it was not prevented from making a parental order when the intended parents brought the application two years after the birth of the child. As the then President of the Family Court explained:

> Can Parliament really have intended that the gate should be barred forever if the application for a parental order is lodged even one day late? I cannot think so. … I assume that Parliament intended a sensible result. Given the subject matter, given the consequences for the commissioning parents, never mind those for the child, to construe section 54(3) [of the HFEA 2008] as barring forever an application made just one day late is not, in my judgment, sensible. It is the very antithesis of sensible … .[10]

10.13 The court, consequently, held that it was able to "read-down" the wording of the law to permit exceptions; a conclusion justified by the rules of statutory interpretation under

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7 In relation to the ascertainable views of the child, it is provided that a child who is aged 12 or over is presumed to be of sufficient age and maturity to form a view regarding the decision in question: AC(S)A 2007, s 14(8) as applied and modified by the 2018 Regulations, reg 3 and sch 2 para 2. We note that, strictly speaking, in terms of the HFEA 2008, ss 54(3) and 54A(2), the intended parents or parent must apply for a parental order within six months of the child's birth.

8 AC(S)A 2007, s 14 (4) as applied and modified by the 2018 Regulations, reg 3 and sch 2 para 2.

9 *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] Fam 186.

10 *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] Fam 186, at [55].

domestic law[11] and/or by the case law of the European Court of Human Rights ("ECtHR").[12] As Mrs Justice Theis noted in a later judgment, the court decided to interpret section 54(3) of the HFEA 2008 in the way in which it did because:

> to not construe it in such a way could have detrimental long-term consequences for the children and the applicants, which is precisely what the section sets out to prevent.[13]

10.14 The decision to relax the time limit has meant that the courts now frequently make parental orders on applications made when the child was older than six months at the time of the application. To cite a few examples from the case law:

(1) in *A and B (No 2 – Parental Order)*,[14] a parental order was made in respect of twins who were aged 3 at the time of the application;

(2) in *D v ED (Parental Order: Time Limit)*,[15] a parental order was made in respect of a child aged 5 at the time of the application;

(3) in *A v C*,[16] a parental order was made in respect of children aged 12 and 13; and

(4) in *X v Z*,[17] a parental order was made in respect of an adult who had been born following a surrogacy arrangement in 1998.

10.15 Far fewer applications for parental orders in cases of surrogacy are made in Scotland, and there is no reported case in which a Scottish court has considered the issue.

The child's home to be with the intended parents

10.16 Sections 54(4)(a) and 54A(3)(a) of the HFEA 2008 require that the child's home must be with the applicants at the time of the parental order application and the making of the parental order, although they do not specify that the child's or the applicants' home must be in the UK.

10.17 This requirement posed problems prior to the introduction of the 2018 Regulations allowing single people to apply for a parental order. This was because if the child was not living in the home of both of the applicants (because, for example, the intended parents had separated before a parental order could be made), it was unclear whether or not a parental order could be made.

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11 Based on the case of *Howard v Bodington* (1877) 2 PD 203 on the impact of non-compliance with statutory rules.

12 Based upon Article 8, European Convention of Human Rights (a right to a private and family life).

13 [2015] EWHC 2080 (Fam), [2015] Fam Law 1192 at [72].

14 [2015] EWHC 2080 (Fam), [2015] Fam Law 1192.

15 [2015] EWHC 911 (Fam), [2016] 2 FLR 530.

16 [2016] EWFC 42, [2017] 2 FLR 101.

17 [2022] EWFC 26; [2022] 4 WLUK 120. Unlike the limitation imposed in the Adoption and Children Act 2002 (section 51), there is no limit in the 2008 Act on the making of a parental order in respect of an adult.

10.18 On the facts of *JP v LP*[18] in 2014, Mrs Justice King stated (in comments that were not material to the outcome of the case), that a parental order was unlikely to be made where the intended parents had separated. In that case, the intended mother had left the matrimonial home before an application for a parental order was made. The child was subject to a shared residence order, splitting his time between the home of the intended father and the intended mother.

10.19 The case law has, however, developed since Mrs Justice King's comments. The courts (relying upon the intended parents' right to a family life under Article 8 of the ECHR) have interpreted the legislation in such a way to mean that the physical presence of both applicants with the child in a single family home is not required for this eligibility requirement to be satisfied.[19]

10.20 In *Re X (A Child) (Surrogacy: Time Limit)*,[20] the intended parents were separated at the time the parental order application was issued (although had reconciled by the time the matter came before the court). At the time of the application, there was a shared residence arrangement in place, which meant that the child split his time between two separate homes. The court concluded that:

> [The child] plainly did not have his home with anyone else. His living arrangements were split between the commissioning father and the commissioning mother. It can fairly be said that he lived with them.[21]

10.21 As a result, the court held that the requirement that the child have his or her home with the applicants had been met.

10.22 This aspect of *Re X*[22] has been applied in numerous subsequent cases where the intended parents had separated, either before a parental order application was made, or before it was granted.[23]

The consent of the surrogate

10.23 Sections 54(6) and 54A(5) of the HFEA 2008 stipulate that an application can only be made if the surrogate (and potentially her spouse if he or she has also become a legal

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18 [2014] EWHC 595, [2015] 1 All ER 266.

19 See, for example, *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] Fam 186 at [68].

20 [2014] EWHC 3135 (Fam), [2015] Fam 186.

21 *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] Fam 186 at [67].

22 [2014] EWHC 3135 (Fam), [2015] Fam 186.

23 For recent example, see *Re Z (Parental Order: Child's Home)* [2021] EWHC 29 (Fam); [2021] 1 WLUK 516 where a child had her home with a couple in circumstances where, at the time of the application, the couple were in a relationship but not living together because of restrictions imposed during the Covid-19 pandemic and the child was in foster care; and *Re C (A Child) (Parental Order and Child Arrangements Order)* [2020] EWHC 2141 (Fam), [2020] WL 05507574 where the parents were separated at the time of the making of the order.

parent of the child),[24] have "freely, and with full understanding of what is involved, agreed unconditionally to the making of the order".[25]

10.24 There are, however, two exceptions in the statute to the requirement that the surrogate (and potentially her spouse) consent to the making of the order. These are when a person from whom consent is required:

(1) cannot be found; or

(2) is incapable of giving agreement.[26]

10.25 There is no provision in the statute allowing the court to dispense with the surrogate's (or her spouse's) consent, outside these two limited situations.[27]

10.26 Cases in which the court has dispensed with the requirement of consent where the surrogate and/or her spouse (if relevant) cannot be found have always involved international surrogacy arrangements. The court is only likely to dispense with consent where all reasonable steps have been taken to locate the surrogate, without success.[28]

10.27 There has not been a reported decision where the surrogate has been found unable to consent due to a lack of capacity. In England and Wales, the Mental Capacity Act 2005 sets out the conditions under which a person will be held to be lacking capacity for these purposes.[29] In Scotland, in terms of the rules of court, the reporting officer is required to ascertain whether the person suffers or appears to suffer from a mental disorder within the meaning of section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003.[30]

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24 As discussed in ch 4, if the surrogate is married, her spouse will currently become the legal parent of the child, unless they did not consent to the surrogate's treatment.

25 HFEA 2008, ss 54(6) and 54A(5).

26 HFEA 2008, ss 54(7) and 54A(6).

27 Strictly speaking, the court is not "dispensing" with the consent requirement in these two situations. Consent is simply not required. We think, however, that the term "dispense" is useful shorthand, and we will use it in the text. It is also often the language used by the courts in such situations.

28 *D v L (Surrogacy)* [2012] EWHC 2631 (Fam), [2013] 1 WLR 3135 at [28].

29 The Mental Capacity Act ("MCA") 2005 sets out the relevant test of incapacity in this context: a person is assumed to have capacity unless it is established that they do not (MCA 2005, s 1). A person will lack capacity if, at the material time, he or she is unable to make a decision for himself or herself in relation to the matter because of an impairment of, or a disturbance in the function of, the mind or brain (MCA 2005, s 2(1)).

30 Act of Sederunt (Rules of the Court of Session 1994) (SI 1994 No 1443), ch 97 as amended, r 97.9(1)(c) and the Act of Sederunt (Child Care and Maintenance Rules) 1997 (SI 1997 No291), ch 2, Pt VI as amended, r 2.51(1)(c). The Mental Health (Care and Treatment) (Scotland) Act 2003, s 328(1) defines "mental disorder", subject to s 328(2), as any mental illness, personality disorder or learning disability, however caused or manifested.

10.28 The surrogate cannot give her consent to the parental order less than six weeks after the child's birth.[31] This mirrors the requirement in domestic adoption law that a mother cannot consent to the adoption of her child less than six weeks after giving birth.[32]

The provision of information about the surrogacy agreement

10.29 We set out a summary of the current law in relation to access to information to those born of surrogacy arrangements in Chapter 13. This chapter includes information about the HFEA Register which holds information about donors and donor siblings which can be accessed by those born of donor conception, which will include some surrogacy arrangements.[33] In terms of the provision of information about origins specifically within surrogacy proceedings, we note that, where a parental order is applied for, the application form (C51) asks each applicant whether they are a genetic parent of the child.

PROVISIONS OF THE CURRENT LAW THAT SHOULD REMAIN THE SAME

10.30 In this section, we look at two areas where we recommend that the law remains broadly the same with regard to parental orders:

(1) the paramountcy of the child's welfare; and

(2) the child's home to be with the intended parents.

The paramountcy of the child's welfare

10.31 In the Consultation Paper, we did not ask whether the child's welfare should continue to be the court's paramount consideration when deciding whether to make a parental order; we do not consider that there are any arguments that would support displacing the child's lifelong welfare as the court's paramount consideration. However, we did ask for consultees' views on whether the checklist that is currently applied in cases in England and Wales should be further amended to provide for the court to have regard to additional specific factors in the situation where it is considering whether to make a parental order; and, if so, what those additional factors should be.[34]

Consultation

10.32 This question was not answered in detail by consultees.

10.33 Some consultees, legal professionals and those otherwise involved in legal practice, were opposed to introducing any new factors into the checklist. They thought that the inclusion of further factors would be unnecessary or over-complicated.

10.34 For example, the Association of Lawyers for Children argued that the courts have already had to determine a number of issues in which the welfare checklists as expressed have proved sufficient to guide the court's decision-making. They were concerned that there was a risk that including additional factors would over complicate

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31 HFEA 2008, ss 54(7) and 54A(6).

32 England and Wales: ACA 2002, s 52(3); Scotland: AC(S)A 2007, s 31(11).

33 The provisions cannot be used to identify the "donation" of gametes by the intended parents.

34 Consultation Question 24.

any welfare determination or prejudice one factor above others. The Association of Lawyers for Children in support of this view said:

> The court, and in particular the Court of Appeal, have emphasised how the current and well-tested approach to welfare is sufficient to enable the court to consider the individual circumstances of each case and attach appropriate weight to various factors, depending on the circumstances (e.g. *Re H (Surrogacy Breakdown)* [2017] EWCA Civ 1798; *Re M (A Child)* [2017] EWCA Civ 228).

10.35 Those opposed to surrogacy thought that no change was necessary, with this view being taken in the response from Nordic Model Now!. Their response said that the existing checklist provided a comprehensive summary of the issues to be considered, and that no other factors should be added.

10.36 The Law Society said that some of its members did suggest that certain factors should be added to the checklist, and this view was also taken by some other consultees from an academic or legal practitioner background. Factors that were suggested by such consultees for adding to the checklist included:

(1) genetic, gestational and social links;

(2) intention of the parties;

(3) existence of the agreement;

(4) circumstances surrounding the agreement (including the nature of the agreement and the assessment of parties' capacity);

(5) suitability of the parties;

(6) the child's health; and

(7) sibling relationships.

10.37 Comparatively few intended parents responded, none of whom proposed additional factors, while the one surrogate who responded raised the issue of contact between the surrogate and the child born of the agreement.

10.38 SurrogacyUK and NGA Law and Brilliant Beginnings thought that it would be appropriate for there to be a separate checklist for surrogacy, rather than referring to the existing adoption checklist and that there could be scope for making "identity" a separate factor (SurrogacyUK and the SurrogacyUK Working Group on Law Reform), or to remove what may be irrelevant factors, such as the effect on the child of ceasing to be a member of his or her original family (NGA Law and Brilliant Beginnings).

Analysis

10.39 There was no consensus amongst consultees about whether additional factors should be added to the checklist and, if so, what these should be. Taking the lack of consensus into account, the lack of certainty regarding whether additional factors would have any practical effect, and the risk identified by the Association of Lawyers for Children of over-complicating the welfare determination or elevating one factor

above another, we do not make any recommendation that additional factors be inserted into the checklist found in the legislation.

Recommendation 40.

10.40 We recommend that the child's welfare remains the paramount consideration when deciding whether to grant a parental order.

10.41 Clause 25 of the draft Bill provides for regulations to be made that will, as in the current law, apply certain provisions of the Adoption and Children Act 2002, and the Adoption and Children (Scotland) Act 2007, to the making of parental orders, including that the child's lifelong welfare will be the court's paramount consideration when deciding whether to grant a parental order.

The child's home to be with the intended parents

10.42 We took the view in the Consultation Paper that the requirement that the child's home be with the intended parents at both the time of the application for a parental order and the time of the making of the order had not caused problems in practice.

10.43 Where the intended parents have separated or divorced, or are living apart for another reason, the courts have extended the meaning of "home" to mean the home of each intended parent. As far as we are aware, this requirement has only been a barrier to the making of a parental order when the intended parents divorced, and one moved to another country so no longer saw the child.[35] Given that, since 2019, a single intended parent can apply for a parental order, in such a case the court could now make an order in favour of the remaining intended parent who was living with and parenting the child.[36]

10.44 We also took the view in the Consultation Paper that it would be odd for the court to make a parental order in favour of intended parents who were not living with (and so not parenting) the child. Accordingly, we did not think that reform was necessary in relation to this requirement for the making of a parental order and did not ask a question about it in the Consultation Paper. The requirement is therefore carried over to the requirements for the making of a parental order contained in clauses 16(4) and 18(5) of the draft Bill attached to this report. However, this requirement would not apply to an application for a parental order by a surrogate, covered later in this chapter.[37]

10.45 In Chapter 6 we noted consultees' suggestions for a definition of "home". We take the same view here as we explored there: the lack of a definition provides the court with necessary space to interpret the requirement. We think that there are risks that a statutory definition would fail to identify and provide for the variety of factual

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35 *AB v CD* [2018] EWHC 1590 (Fam), [2018] 4 WLUK 178.

36 Although note that, under our recommendations, that remaining intended parent would need to disclose to the court that there was a second intended parent. See para 10.75 below.

37 See para 10.87 onwards.

circumstances that may arise, whereas we note that the courts have been adept at accommodating different circumstances in their interpretation to date. While we envisage that the child's home would normally be with the intended parents, we would envisage that the requirement for the child's home to be with the intended parents would also be met if the intended parent is responsible for the child's care, even where the child does not physically share the same residence as the intended parent, for example where the child is in hospital, or being temporarily cared for by a relative.

Recommendation 41.

10.46 We recommend that there continue to be a requirement that, at the time of the application and of the making of the order, the child's home must be with the intended parents.

10.47 Clauses 16(4) and 18(5) of the draft Bill give effect to this recommendation, for surrogacy agreements where there are one or two intended parents under the agreement, respectively.

PROVISIONS OF THE CURRENT LAW THAT OUR RECOMMENDATIONS WOULD CHANGE

10.48 We now turn to those areas of the law governing parental orders where we recommend that the law is reformed:

(1) application for, and grant of, a parental order;

(2) the six-month time limit for an application for a parental order;

(3) the consent of the surrogate; and

(4) the provision of information about the surrogacy agreement.

Application for, and grant of, a parental order

10.49 In this section, we set out recommendations that expand the category of who can apply for a parental order.

Single and joint applicants

10.50 In the Consultation Paper, we made a provisional proposal to address the difficult situation where two intended parents enter into a surrogacy agreement outside the new pathway, but the intended parent with the genetic link to the child decides that he or she does not wish to go forward with an application for a parental order.

10.51 As we set out in Chapter 6, we recommend retaining the requirement that the gametes of at least one intended parent be used in the creation of the embryo for a surrogacy agreement. In most circumstances therefore, a single intended parent without a genetic link would not be able to meet the criteria to make an application for a parental order. We proposed that an exception should be made to allow a parental order to be granted to a single parent without a genetic link where the intended

parent's former partner provided gametes but the intended parents' relationship broke down before the grant of a parental order.[38]

10.52 We also deal below with two other situations:

(1) joining an 'absent' intended parent to an application for a parental order by a sole applicant, where appropriate; and

(2) on the new pathway, providing for an application by a surrogate to become the legal mother of the child born of the agreement, in defined circumstances.

Following on from this situation, we set out our view that the court should then have the power to decide whether to make a parental order in favour of either the original or joined applicant, or in favour of both applicants, but that it should not be able to make a parental order in favour of a person who was not a party to the surrogacy agreement.

Consultation

10.53 Surrogacy organisations and those personally involved with surrogacy tended to disagree with the premise of the question, and took the view that the former partner should still be the legal parent of the child. SurrogacyUK (disagreeing with the provisional proposal) thought that the former partner should be a legal parent:

> We don't think this requirement is necessary since we think the former partner should be a legal parent of the child and be the second applicant for the parental order.

10.54 Some consultees thought that the other parent with the genetic link should be recognised because they did not want the genetic parent to be able to evade their responsibilities. Joshua Harmston-Gething (intended parent) said:

> I do not agree with the assumption in the question: that the breakdown in the relationship of the intended parents would result in one not acquiring parental responsibility. Both of the intended parents were involved in commissioning the surrogacy arrangement and both should be responsible for the child's welfare. An intended parent who no longer wishes to be present should be treated in law as any parent who abandons their family - e.g. court orders for maintenance/ contact/ etc.

10.55 Other consultees generally agreed with the proposal.

10.56 While the Law Society agreed with the proposal, it also recorded some members' view that, post breakdown, the parties should be treated as a couple even where the genetic parent did not wish to be part of the child's life:

> some members question what provision will be made in respect of the child's relationship with a genetic relative who donated material but now no longer wishes to be part of the surrogacy process? A provision that tries to resolve this situation is

[38] Consultation Question 61

likely to cause problems as there are many possible situations that can arise from a separation of the intended parents.

10.57 Resolution asked whether there should be a presumption that both parents should apply for a parental order, with the court being able to permit a sole application, and whether it should be possible for one intended parent to apply to have the other intended parent recognised as the child's legal parent. They said:

> For us the central question was: If IPs separate during the course of the pregnancy, should their initial intention to be joint parents to their child born through surrogacy be recognised and presumed to exist in law, unless the court, in consideration of the child's welfare, authorises the rebuttal of that presumption?

10.58 Cafcass suggested that the consent of the other parent should be required if the parent without the genetic link applied as a sole applicant:

> If this were to be considered it would need to be subject to the other parent's consent as it would have an impact on the child to know that the parent did not consent to their birth.

10.59 Other consultees suggested that adoption was the appropriate response in these circumstances.

10.60 One consultee pointed out that permitting a parental order to be granted in the circumstances set out in the proposal may be open to abuse:

> For example, a woman ("M") wishes to parent a child on her own but cannot conceive and does not want to go through the more restrictive regulations of adoption orders. She asks a man to pretend to be in a relationship with her and provide his sperm in a surrogacy arrangement with another woman ("N"). After N becomes pregnant, M and the man split up. M will be eligible to apply for a parental order.

Applications for a parental order by single applicants

10.61 Before we proceed to analysis, we look first at responses to another question that we asked in the Consultation Paper which is closely linked to this one. We provisionally proposed that where an application is made for a parental order by a sole applicant, that applicant should have to make a declaration that it was always intended that there would only be a single applicant for a parental order in respect of the child concerned, or supply the name and contact details of the second intended parent. We also set out in the proposal brief details of a procedure to give notice to the second intended parent, if one were identified, and for their own application.[39]

Consultation

10.62 The majority of consultees agreed with the proposal. There was universal support from surrogates and family members of surrogates and/or intended parents, and from most intended parents themselves.

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[39] Consultation Question 20.

10.63 The SurrogacyUK response disagreed with the proposal, whereas the SurrogacyUK Working Group on Law Reform agreed with the proposal. SurrogacyUK, and NGA Law and Brilliant Beginnings, suggested alternative mechanisms for dealing with a second intended parent post-separation. SurrogacyUK suggested that the second intended parent should be joined to the parental order proceedings automatically. NGA Law and Brilliant Beginnings suggested a broad formulation whereby any person or persons who were intended to be the child's parents at the time of conception could have a parental order granted in their favour.

10.64 Resolution suggested using section 51 of the ACA 2002 as a model.[40]

10.65 The Law Society agreed with the proposal, and noted it is important that a second intended parent is not removed from the child's life by virtue of the separation, and that there is a means through which the second intended parent can make a sole parental order application.

10.66 Some of those opposed to surrogacy disagreed with the proposal, and some of them suggested that instead the second intended parent should apply to adopt the child. The Scottish Council on Human Bioethics disagreed with the proposal, noting their objection to surrogacy in principle and that sole parental orders do not work in the best interests of the child. A small minority of other individuals were also against sole parental orders. For example, one consultee considered that separation or divorce of the intended parents before birth should trigger a "full court hearing…to assess best interests of the child" at which the surrogate should be heard.

10.67 There were mixed responses to provisional proposals we made relating to the time limits for giving notice to the second intended parent and for their response. We have moved away from prescribing time limits in our recommendation below.

Analysis

Applications where only the intended parent without a genetic link applies

10.68 Our intention is to allow a single applicant without a genetic link to apply for a parental order where, at the time that the agreement was entered into, there was another intended parent with a genetic link. That is, we do not think that the refusal of the intended parent with a genetic link to apply for a parental order should prevent the intended parent without one from being granted a parental order. If this were not the case, the actions of the intended parent with the genetic link could prevent the outcome that is in the best interests of the child, if the child's welfare would best be served by the making of the parental order. We take the view that, in these circumstances, it would not be appropriate for an adoption order to be required where legal parental status is sought by an intended parent who has been involved from the beginning with the surrogacy agreement.[41]

10.69 It should be noted that, in some cases in which a parental order is being applied for, the genetic parent may already be a legal parent before the parental order has been

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[40] This section allows adoption by one person in the case where that person is the partner of a parent of the person to be adopted.

[41] If the intended parent could not apply for a parental order, adoption would be the only way in which they could obtain legal parental status.

granted. That could be either because the surrogate is unmarried or not in a civil partnership, or if her spouse or civil partner does not consent to fertility treatment, and the genetic parent is the intended father.[42] Alternatively, it could be because the surrogate and an intended mother with the genetic link have used the second parent provisions of the HFEA 2008, so that the genetic parent/intended mother is the second parent at the time of the child's birth.[43] The grant of a parental order on which they are not named would, however, extinguish their legal parental status.

10.70 Some consultees generally disagreed with parental orders being made in favour of single people because they were said to be disadvantageous to the child involved. However, single applicants can already apply for parental orders. This change was made in 2018 to ensure compliance with the right to respect for private and family life under Article 8 (taken together with Article 14 – protection from discrimination) of the European Convention on Human Rights.[44]

10.71 We carefully considered responses that suggest that the absent genetic parent should not be permitted to "walk away" from the child and should be held to their legal parental status in respect of the child born of the surrogacy agreement. However, we are also conscious of the need to preserve the primacy of the child's best interests when the court is faced with decisions concerning parental status. It is possible that making the absent genetic parent a legal parent against their will, on the basis of that genetic link, would not fit with the lifelong welfare of the child in question.

10.72 We consider that these concerns are addressed in part by our recommendation (discussed below at paragraphs 10.75 and 10.76) for a second intended parent to be joined to an application where one is identified. Our recommendation that an intended parent who is not a party to the application for a parental order should be recorded in the Surrogacy Register ("SR") is also significant.[45] Recording this information makes clear to the child born of the agreement the circumstances of their conception, rather than ignoring the existence of the other intended parent or suggesting that, if the intended parent was a gamete donor, this was their only role.

10.73 We note the concern raised by one consultee that granting a parental order to a single applicant in these circumstances may be subject to abuse by persons wishing to parent a child alone. We consider, however, that the court will be vigilant within the parental order process to ensure that such an abuse does not take place.

10.74 We are conscious that under our recommendations a single applicant whose former partner has a genetic link is able to apply for a parental order without having a genetic link to the child, but in other circumstances intended parents without a genetic link will

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42 At common law, in England and Wales; in Scotland, only where a further step had been taken of the genetic father being named on the child's birth certificate, or a court order being made declaring that he was the father.

43 HFEA 2008, s 43 (woman treated as second parent). It would not be possible for the genetic intended father to use the agreed fatherhood conditions as one of the conditions of a man doing so is that his gametes have not been used (s 36(d)).

44 *Re Z (A Child) (Surrogate Father: Parental Order)* (No.2) [2016] EWHC 1191 (Fam); [2016] 3 WLR 1369. This case led to The Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018 No 1413.

45 Ch 13, para 13.107, Recommendation 62.

remain unable to do so. This is because the surrogacy agreement must still include an intended parent with a genetic link, which enables many of the concerns about "double donation", discussed in Chapter 6, to be addressed. Enabling either party to a surrogacy agreement to apply for a parental order means that the law can be flexible to respond to a change in circumstances, and enable a decision in the best interests of the child. We therefore make a recommendation that the single person without a genetic link be permitted to apply for a parental order, in these (limited) circumstances.

Including an absent intended parent in the application

10.75 We think that it is necessary, in all parental order cases, for applicants to confirm, at the time that the application was made, who originally entered into the surrogacy agreement. Where, in a single applicant case, this discloses a second intended parent, the court must take steps to include the second intended parent in the application. In England and Wales, that will be done by joining that second intended parent to the proceedings, unless he or she cannot be found. In Scotland, there is no process of joinder, but we suggest that this procedural issue is dealt with by the making of appropriate rules of court to achieve inclusion of the second intended parent as an applicant.[46] This recommendation would apply in all cases, not just where a single applicant without a genetic link is seeking a parental order on the basis discussed above. Where, in a joint case, the application discloses that the parties to the application were not the parties to the original agreement, the application should not be permitted to proceed to the making of a parental order.

10.76 The court should be satisfied that the absent parent had been involved from the start as an intended parent. We suggest that the usual evidence on which the court would rely would be that the absent intended parent was party to a surrogacy agreement. For the avoidance of doubt, we note that if the court found that the person with a genetic link had not been involved from the start as an intended parent, the necessary consequence of that finding is that a parental order would not be available to the (non-genetically related) single applicant. In effect, the court would be finding that any surrogacy agreement that existed was between the surrogate and single parent through double donation, and the criteria for a parental order would not therefore be met.

Making a parental order where an applicant has been joined

10.77 Making provision for a second applicant to be joined into proceedings raises a further issue: whether the court, in this situation, should have the ability to decide whether to make a parental order in favour of both applicants or only one (either the original applicant or the one who has been joined). We recommend that the court should have this ability, in order to enable it to have the flexibility to prioritise the paramount consideration of the child's lifelong welfare.

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[46] The Courts Reform (Scotland) Act 2014 (Consequential Provisions and Modifications) Order 2015 (SI 2015/700), art 8, enables the Court of Session by Act of Sederunt to make provision specific to reserved matters such as surrogacy.

Prohibition on a parental order in favour of a person not party to the surrogacy agreement

10.78 The final issue that arises is what should happen when an intended parent forms a relationship with a new partner prior to the child's birth and wishes to apply for a parental order with the new partner, rather than the intended parent who was originally party to the surrogacy agreement. We note that there are two reported cases in which parental orders have been granted on such facts.[47]

10.79 We consider that where the court determines that one of the parties involved is in fact a new partner of one of the intended parents, rather than an original party to the surrogacy agreement, the court should not be able to make a parental order in favour of the two applicants, effectively "substituting" a new partner for an absent intended parent. Where that new partner seeks to become a parent, and there is a "space" for him or her to do so (given that a child can only have two legal parents),[48] we think that the appropriate course would be for him or her to seek an adoption order where that option is available. This is directly comparable to situations where step-parent adoption is sought. The new partner has not been involved in the decision to bring the child into the world, so lacks intention at the time of conception as a basis for recognising him or her as a legal parent. The new partner could alternatively seek parental responsibility/parental responsibilities and parental rights in respect of the child, which does not require legal parental status. Therefore, we recommend that the court should not be able to grant a parental order in favour of a person who did not enter into the surrogacy agreement originally.

Recommendation 42.

10.80 We recommend that the applicant(s) for a parental order should be asked by the court to confirm who originally entered into the surrogacy agreement and that, if details of another intended parent are supplied:

(1) in England and Wales, the court must join the second intended parent to the proceedings, unless he or she cannot be found, while in Scotland, this procedural issue should be dealt with by the making of appropriate rules of court to achieve inclusion of the second intended parent as an applicant;

(2) the court should have the power to decide, taking as its paramount consideration the child's lifelong welfare, whether to make a parental order in favour of either the original or joined applicant or in favour of both applicants; and

(3) the court should be able to make a parental order in favour of an intended parent without a genetic link to the child, in these circumstances.

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47 *Re F and M (Thai Surrogacy: Enduring Family Relationship)* [2016] EWHC 1594, [2016] 4 WLR 126; and *Re DM v SJ* [2016] EWHC 270 (Fam), [2016] 1 WLUK 103.

48 There might be "space" for another parent because the intended parent was a single applicant or because the court has, in a situation where it has joined an absent parent to the original application, decided to make a parental order in favour only of the original applicant.

Recommendation 43.

10.81 We recommend that it be possible for a single intended parent applicant without a genetic link to the child born of the surrogacy agreement to make an application for a parental order in respect of that child where, at the time that the agreement was entered into, there was a second intended parent with a genetic link to the child who was a party to the agreement but who no longer wishes to apply for a parental order.

Recommendation 44.

10.82 We recommend that the court should not be able to grant a parental order in favour of a person who did not enter into the surrogacy agreement originally.

10.83 It should be noted that the draft Bill, at clause 2, creates a requirement that there is a "surrogacy agreement", both in relation to the new pathway (separate from the requirement for a Regulated Surrogacy Statement) and as a pre-requisite for the granting of a parental order. This approach is different from how sections 54 and 54A of the HFEA 2008 currently work, as there is no explicit requirement for an agreement as a condition for the making of a parental order. In practice, however, there is invariably some form of agreement between the surrogate and the intended parents to undertake a surrogacy, even if this is not formally recorded, and the draft Bill does not impose any requirements on the form that an agreement must take.

10.84 The draft Bill always refers to a surrogacy agreement rather than a surrogacy arrangement. We consider that the language of "agreement" is clearer as to what is required, and more accurately reflects the fact that the existence of an agreement between the intended parents and the surrogate, both as to conception, and who the child's parents should be, is fundamental to the nature of surrogacy. We have given consideration as to whether use of the term 'agreement' might suggest a contractual relationship, particularly in a Scots law context. We are confident that clause 3 of the draft Bill ensures "surrogacy agreement" is not to be interpreted as creating an enforceable agreement.

10.85 The first part of Recommendation 6, with regard to joinder of a second intended parent in England and Wales, and rules of similar effect in Scotland, will be dealt with by changes to procedural rules of court, and is, therefore, not given effect by the draft Bill.

10.86 With regard to the second and third points in Recommendation 6 and Recommendations 7 and 8, these are implemented in the draft Bill by virtue of the combined effect of more than one clause. The requirement for a genetic link with the intended parents, or one of two intended parents, appears in the definition of 'surrogacy agreement' in clause 2 of the draft Bill, at 2(2). With regard to the making of a parental order, where there were two intended parents under the surrogacy

agreement, the court can make a parental order in favour of either or both of the intended parents, on an application by one of the intended parents, under clause 17 (see 17(2)).

Applications by the surrogate for a parental order

10.87 We are concerned here with two different scenarios which have emerged from consultation responses and our consideration of the position of the woman acting as surrogate. Both are matters on which we did not ask specific consultation questions:

(1) an application by the surrogate on behalf of the intended parents; and

(2) an application by the surrogate on her own behalf, if she withdraws her agreement under the new pathway.[49]

10.88 As we explain in this chapter, we are retaining the current requirement that the intended parents apply for a parental order within 6 months of the birth of the child.[50] The court will have discretion to allow applications beyond this period, but we consider that it is important that legal parental status is resolved in a timely manner. Given the importance of doing so, we recommend that provision should be made for the situation where the intended parents do not apply for a parental order within six months. While we did not consult on this particular issue, we note that we have received sufficient evidence regarding surrogates' wish not to be regarded as the legal mother of the child born of the agreement for us to address the point.[51]

10.89 If the surrogate is still the legal mother against her wishes, because of a failure by the intended parents to apply for a parental order, particularly where the surrogate does not have day-to-day care of the child, then we think it is important to provide a way for the surrogate to circumvent a refusal or failure by the intended parents to make the application. We therefore recommend that the surrogate be permitted, six months after the birth of the child, to make an application for a parental order to be made in the intended parents' favour, and to divest herself of legal parental status.

10.90 The other situation where we envisage a potential application by a surrogate is where the surrogate withdraws her consent to a new pathway surrogacy agreement in the six weeks following the birth of the child (she is not able to do so more than six weeks after birth). In these circumstances, withdrawal of consent will not make her the legal mother of the child in contrast to the position were she to withdraw consent before the child is born but it will allow her to apply for a parental order to be recognised as the legal parent of the child.

10.91 In both situations, the court would, as on an application for a parental order by the intended parents, decide whether to make the parental order based on the welfare of the child throughout his or her life.

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49 Ch 4, para 4.104, Recommendation 2.

50 See para 10.104.

51 See para 4.26.

10.92 Applications by the surrogate for a parental order in her favour will differ from those by the intended parents in several respects, in terms of the conditions necessary for the order to be made.

(1) Any application by the surrogate should be an application by her alone. That is, it should not be possible for an application (on her own behalf) to be jointly made by the surrogate and her spouse or partner, consistent with our policy of removing legal parental status from the latter person, across both the new pathway and in the parental order process.[52] The surrogate's spouse, civil partner or partner would have to adopt the child if they also wished to be recognised as the child's parent, in the same manner as step-parent adoption.

(2) There will be no requirement for the surrogate's gametes to have been used in the creation of the embryo.

(3) The intended parents will not have to agree to the making of the order.

(4) There will be no requirement that the child's home would be with the surrogate-applicant. We do not wish to limit the ability of a surrogate to apply for a parental order on her own behalf to such circumstances. To do so would obscure the difference between legal parental status on the one hand, and the exercise of parental responsibility/parental responsibilities and parental rights on the other, when we have generally sought to clearly distinguish between the two throughout our recommendations.[53]

Recommendation 45.

10.93 We recommend that the surrogate be able to make an application for a parental order:

(1) in favour of the intended parents if, after six months have elapsed from the time of the birth of the child, the intended parents have not made an application for a parental order; and

(2) on her own behalf, where, following a new pathway agreement, she has withdrawn consent to the agreement within the six weeks following the birth of the child; and

(3) without it being necessary for the surrogate to have a genetic link to the child, for the child's home to be with her or to have the consent of the intended parents.

10.94 Clauses 19 and 21 of the draft Bill give effect to this recommendation. In respect of the third part of the Recommendation it should be noted that the definition of

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52 Ch 4, para 4.157, Recommendation 4.

53 See para 4.6.

surrogacy agreement in clause 2 does not require a genetic link between the surrogate and the child born of the agreement.

The six-month time limit for an application for a parental order

10.95 In the Consultation Paper we provisionally proposed that the six-month time limit for applying for a parental order should be abolished. We noted that all those we had spoken to had agreed that this requirement needs to be changed. Some suggested that the time limit should be abolished, while others thought that it should be retained, with the court having the ability to dispense with the limit in certain circumstances.

10.96 We considered that maintaining any time limit, even one that could be dispensed with, adds unnecessary complexity to the law, given that it would be subject to the paramount consideration of the child's welfare. We therefore provisionally proposed to abolish the time limit.[54]

Consultation

10.97 All surrogates and nearly all intended parents agreed with the proposal. Surrogates generally pointed out that they did not want to be legally responsible for someone else's child any longer than is absolutely necessary. A few consultees pointed out that the time limit caused stress for those involved in parental order proceedings.

10.98 However, Linder Pott (surrogate) and one consultee who is an intended parent both pointed to the need to deal with a parental order quickly, citing, respectively, the best interests of the surrogate and the child.

10.99 Of the surrogacy organisations, COTS and NGA Law and Brilliant Beginnings agreed, and SurrogacyUK and the SurrogacyUK Working Group on Law Reform said that the wording should say "that the time limit is normally six months".

10.100 There was wide agreement that the time limit should be abolished amongst legal consultees. Consultees tended to mention the conflict between a time limit and the child's best interests.

10.101 However, some consultees who agreed struck a cautious note, saying they had reservations about there being no encouragement to apply for an order, or that it was in the child's best interests to encourage applications as quickly as possible.

10.102 Some consultees suggested that the time limit be retained but that the law be amended to allow leave to apply out of time or a statutory power to dispense with the time limit. These respondents thought that it was important to send a message that applications within the time limit should be encouraged.

10.103 Dr Katarina Trimmings and Dr Michael Wells-Greco were concerned about "limping parenthood" (where parenthood is established overseas but not regularised in the UK). Cambridge Family Law said that if the child is much older than 6 months, evidence will be more difficult to collect and present, but the social situation will also

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[54] Consultation Question 54.

be so entrenched that the court will be inhibited in its ability to refuse to recognise the intended parents' parenthood.

Analysis

10.104 We are concerned that to abolish the time limit would mean that there would be no encouragement for intended parents to apply promptly for a parental order. The risk is that where the new pathway is not followed, there will be more agreements where legal parental status is left with the surrogate. This outcome would not be in the best interests of the child, whose status (assuming that the intended parents are caring for him or her) will then not match his or her everyday family environment. It would also not be in the best interests of the surrogate, who could be left with unwanted legal parental status in respect of the child born of the agreement.

10.105 Instead, we think that a preferable approach is the suggestion made by several consultees of retaining a time limit, but providing the court with the power to dispense with the limit in cases where that was merited. The court's paramount consideration in deciding whether to permit an application later than six months will be the child's lifelong welfare. This will bring the paramount consideration for permitting a late application in line with that applied by the court in deciding whether to make a parental order.[55]

10.106 We recognise that this recommendation is more complex than simply removing the time limit for an application, but we think this strikes the right balance between encouraging timely applications, while recognising that the child's welfare is likely to require a late application to be allowed, as has already been recognised in case law.

Recommendation 46.

10.107 We recommend that:

(1) the current time limit for the making of an application for a parental order of six months from the birth of the child should be retained; but

(2) the court should have the power to allow applications to be made after this time; and

(3) in exercising that power, the court's paramount consideration should be the lifelong welfare of the child.

10.108 Clauses 16(3), 18(4) and 21(4) of the draft Bill give effect to the first two parts of this recommendation. In relation to the third part of the recommendation, the application of the lifelong welfare test will be the court's paramount consideration generally, when deciding whether to grant a parental order.

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55 See paras 10.31 to 10.40.

The consent of the surrogate

10.109 The potential difficulties of the requirement of consent are evident in the case of *Re AB (Surrogacy: Consent)*.[56] In this case, twins who had been born through surrogacy were being raised by the intended parents, but the surrogate and her husband refused to consent to the making of the parental order. As a result, they remain the legal parents of the twins, because the court held that the surrogate's consent could not be dispensed with. In its decision, the court did not feel that it was necessary to investigate or determine the reasons for the breakdown in relationship between the surrogate and the intended parents. It did state, however, that the "catalyst" for the breakdown appears to have been that the surrogate felt that the intended parents had not shown sufficient concern for her wellbeing after she had been told, at her 12-week scan, that the continuation of pregnancy could put her health at risk.[57]

10.110 The court stated that the surrogate's and her husband's decision regarding consent was said to be "due to their own feeling of injustice, rather than what is in the children's best interests".[58] As a result of their lack of consent, the court stated that:

> the application for a parental order comes to a juddering halt, to the very great distress of the applicants. The result is that these children are left in a legal limbo, where, contrary to what was agreed by the parties at the time of the arrangement, the respondents will remain their legal parents even though they are not biologically related to them and they expressly wish to play no part in the children's lives.[59]

10.111 The court, instead, made a child arrangements order under the Children Act 1989, providing for the children to live with the intended parents.[60] The surrogate and her husband stated that they would not object to the grant of an adoption order in favour of the intended parents. Mrs Justice Theis held, however, that such an order would not reflect the reality of the twins' situation.

10.112 There are other cases where, as well as refusing consent, the surrogate and her family have wished to care for the child.[61]

10.113 In contrast with the position for parental orders, the consent of a birth parent to the making of an adoption order may be dispensed with by the court. Currently, parental consent for an adoption order can be dispensed with if:

(1) the parent cannot be found;[62]

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56 [2016] EWHC 2643 (Fam), [2017] 2 FLR 217.

57 *Re AB (Surrogacy: Consent)* [2016] EWHC 2643 (Fam), [2017] 2 FLR 217 at [19]. Further specialist advice was sought, and the pregnancy continued.

58 *Re AB (Surrogacy: Consent)* [2016] EWHC 2643 (Fam), [2017] 2 FLR 217 at [8].

59 *Re AB (Surrogacy: Consent)* [2016] EWHC 2643 (Fam), [2017] 2 FLR 217 at [9].

60 *Re AB (Surrogacy: Consent)* [2016] EWHC 2643 (Fam), [2017] 2 FLR 217 at [7].

61 *Re P (Surrogacy: Residence)* [2007] EWCA Civ 1053, [2008] 1 FLR 198.

62 ACA 2002 s 52(1)(a).

(2) the parent lacks capacity to give consent;[63] or

(3) the welfare of the child requires that consent be dispensed with.[64]

10.114 Similar grounds are provided for dispensing with consent to the making of an adoption order in Scotland.[65] Scotland provides for the consent of the parents to be dispensed where required by the welfare of the child.[66] .

10.115 The welfare test for dispensing with parental consent to the adoption order has been criticised in England and Wales.[67] However, criticism has been alleviated by the judiciary effectively making it clear that adoption should be a last resort. In *Re P (Placement Orders: Parental Consent)*,[68] the court provided guidance on dispensing with parental consent when the welfare of the child so requires. In brief, the court recommended:

(1) it must be shown that the child's welfare requires adoption as opposed to something short of adoption;[69]

(2) "requires" should be equated with "necessary" in Article 8 of the European Convention on Human Rights, that is "the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable";[70]

(3) dispensing with parental consent must be proportionate to the aim to be achieved;[71] and

(4) the court should begin with a preference for the least interventionalist approach.[72]

10.116 The test in Scots law has also been approved as being compatible with the European Convention on Human Rights, and consistent with the principle that adoption ought

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63 ACA 2002 s 52(1)(a).

64 ACA 2002 s 52(1)(b).

65 AC(S)A 2007, s 31(3), referring to s 31(4) and (5). The reasons for dispensing with such consent in Scots law are similar to those set out in the statute for England and Wales, but not identical; in particular, s 31(4) of the 2007 Act specifically mentions the parent (or guardian's) inability to satisfactorily discharge parental responsibilities / exercise parental rights.

66 Where the other grounds do not apply.

67 See, for example, C Ball, The Adoption and Children Act 2002: A critical examination (2005) *Adoption & Fostering* 6, 12.

68 [2008] EWCA Civ 535, [2008] 2 FLR 625.

69 [2008] EWCA Civ 535, [2008] 2 FLR 625 at [128].

70 *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535, [2008] 2 FLR 625 at [120] and [125].

71 *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535, [2008] 2 FLR 625 at [119].

72 *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535, [2008] 2 FLR 625 at [123]. In a later case, the Court of Appeal emphasised that parental consent "can be dispensed with only if the welfare of the child 'requires' this". The case also reaffirmed that "require" has "the Strasbourg meaning of necessary … . This is a stringent and demanding test". See *Re B-S* [2013] EWCA Civ 1146, [2014] 1 FLR 1035 at [20].

only to be granted where nothing less than adoption will suffice for the child, in a case that addressed issues relating to the welfare-based test for dispensing with consent.[73]

10.117 In the Consultation Paper, we provisionally proposed that the current exemptions to the necessity of the surrogate's consent should continue to apply, but that it should also be possible for the court to dispense with such consent in the situation where the child was living with the intended parents, or following a determination by the court that the child should do so.

10.118 We also provisionally proposed that the court's power to dispense with consent should be subject to the paramount consideration of the child's lifelong welfare guided by the factors set out in section 1 of the ACA 2002 and, in Scotland, in line with section 14(3) of the AC(S)A Act 2007.[74]

Consultation

The existing powers to dispense with consent

10.119 Nearly all consultees who were not opposed to surrogacy agreed that the court should retain its existing powers to dispense with the consent of the surrogate and any other legal parent to the making the parental order, in circumstances where the surrogate/other legal parent could not be found, or lacked capacity.

10.120 Those who opposed surrogacy and disagreed with the existing provision generally did so on the basis of that the provision could be abused (for example, by falsely claiming the surrogate lacked capacity), leaving the surrogate vulnerable to exploitation by the intended parents, and that therefore the surrogate's consent should always be required as a condition of granting a parental order.

The extension of the power to dispense with consent

10.121 The majority of those consultees who were not opposed to surrogacy generally thought that the court should have the power to dispense with the surrogate's consent.

10.122 For example, an intended parent couple stated that the current law meant that in practice, the surrogate's consent prevailed over the welfare of children and was the only area of family law in which the interests of an adult can take priority over those of a child. They supported the provisional proposal as "fair and sensible" on the basis that the court was best placed to make the decision in the event of a dispute.

10.123 The Family Law Bar Association welcomed our provisional proposal as promoting consistency in the law and preventing the problem arising in the case of *Re AB*.[75]

10.124 However, a few consultees who had agreed with retaining the existing law on dispensing with consent disagreed with our proposed extension.

10.125 Some consultees said that the additional provisions for the court's power to dispense with consent did not adequately protect the legal position of the surrogate and unduly

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73 *S v L*, 2013 SC (UKSC) 20; [2012] UKSC 30.

74 Consultation Question 55.

75 [2016] EWHC 2643 (Fam), [2017] 2 FLR 217. Discussed at para 10.109.

shifted the balance of power away from her. Others felt it was a disproportionate interference with the surrogate's human right to private and family life to end her legal parenthood without a finding of significant harm to the child, or of fault on her part. They said that the comparison with adoption provisions was not appropriate in this respect.

The requirement for the child to be living with the intended parents

10.126 Several consultees disagreed with, or questioned, the requirement in the proposal that the power to dispense only be available where the child was living with the intended parents, or the court had made a determination to that effect.

10.127 Some were concerned that this requirement would encourage unnecessary litigation over the living arrangements of the child born of the surrogacy agreement, or that it conflated the surrogate's consent to the child living with intended parents with consent to her own parental status. The Association of Lawyers for Children said that the proposal wrongly proceeded on the basis that the outcome of the dispute between intended parents and the surrogate would be binary, that is, with the child living with one set of parents or the other, ignoring the possibility or likelihood that the court might order some form of shared care arrangement.

10.128 The Anscombe Bioethics Centre disagreed with the proposal as they were concerned about the situation where, because of an immediate health problem, the surrogate temporarily allows the child to live with the intended parents and, as a result, loses the right to raise the child.

The child's best interests

10.129 Several legal professional consultees and a small minority of intended parents indicated a preference in their response for the court's power to be available solely on the basis that it would be in the child's best interests, or that the child's welfare required the court, to dispense with the surrogate's consent and make the parental order. For example, The Law Society of England and Wales said:

> We agree with the principle of proposal (3), however we do also feel that it makes the ability to dispense with consent unnecessarily complicated. Section 31 of the Adoption and Children (Scotland) Act 2007 sets out the court's ability to dispense with consent where this is required to ensure the welfare of the child, which may be a simpler way of achieving this.

Retrospective application

10.130 The retrospective application of any new provision for the court to dispense with the surrogate's consent in specified circumstances was raised by a number of intended parents and surrogacy organisations. They raised the following points.

(1) They considered that the statutory framework allowing a surrogate to withhold her consent would not have formed "any operative part of a surrogate's thinking at the time she decides to enter into a surrogacy arrangement" and that to say otherwise was a "fiction", or overly legalistic. They therefore did not think that the right to withhold consent was part of the context in which the surrogate

entered the surrogacy agreement, and did not think it would be wrong to remove that right retrospectively.

(2) In their view, the only practical consequence of applying the provision retrospectively is that the court has power to make a parental order, rather than an adoption order.

(3) The restriction of the power to dispense with consent to cases where the child is living with the intended parents constitutes an inherent safeguard against "any injustice caused to the surrogate by retrospective application of the amendment".

(4) Any interference with the surrogate's rights is outweighed by the interests of the children involved: limiting the provision to only apply to births after a particular date would create two classes of children.

Analysis

The existing powers to dispense with consent

10.131 The parental order process will retain a requirement for the surrogate to consent to the making of the parental order, although we recommend below that the court should have the power to dispense with that requirement.

10.132 We have recommended elsewhere that the surrogate's spouse or civil partner should not be a legal parent of a child born through a surrogacy agreement.[76] Logically, this removes the need for consent to be obtained from anyone other than the surrogate; any intended parent who is a legal parent at birth (for example, a genetically related intended father where the surrogate is unmarried or not in a civil partnership) will either be applying for a parental order in any event, or be party to the application to do so by another intended parent. [77]

10.133 We think that there is a strong case to retain the current exemptions to consent contained in sections 54 and 54A. They attracted widespread support from those who support surrogacy and we think that they are practically necessary to deal with situations that may arise during the course of a surrogacy agreement. We also recommend below that the requirement for the surrogate to consent should not apply where she has died before being able to do so.

Extending the power to dispense with consent

10.134 Overall there was strong support from those consultees not opposed to surrogacy for the provisional proposal to extend the power to dispense with the surrogate's consent. We take the view that, in a surrogacy situation no less than adoption, the welfare of the child, which is paramount, requires that it should be possible for the court to make a parental order even where the surrogate's consent is not forthcoming.

10.135 However, we found compelling the comments from consultees regarding our proposed criterion that the child born of the surrogacy agreement be living with the

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[76] Ch 4, para 4.157, Recommendation 4.

[77] See para 10.75 and para 10.80, Recommendation 42.

intended parents (or that the court had determined that he or she should do so). We do not want an additional power for the court to dispense with the surrogate's consent inadvertently to fuel dispute and litigation over a child's living arrangements.

10.136 We recommend that the court have the power to dispense with the surrogate's consent where the lifelong welfare of the child requires it; that is, the same test that is found in the adoption legislation. That test has been interpreted in that context to mean that "nothing else will do";[78] that is, that only adoption will satisfy the child's lifelong welfare needs. In our context an equivalent interpretation would be to say that the surrogate's consent can be dispensed with where only the making of a parental order will satisfy the lifelong welfare of the child. In the Consultation Paper we stated that it should not be possible to dispense with the surrogate's consent where the child is living with her. On reflection, and taking into account the comments of consultees, we think that the recommendation better reflects our wish to keep separate the question of the child's living arrangements on the one hand, and the question of who the child's legal parents are on the other.

10.137 We also note that, in any event, the court would not have the power to make a parental order under section 54 or 54A of the HFEA 2008 where the child was not living with the intended parents (which we do not recommend changing).[79] The surrogate's consent would therefore not be a factor where the child is living with her.

10.138 We think that this is the correct outcome as we are confident that the paradigm circumstance that our proposal was intended to address – that where the child is permanently living with the intended parents and the only remaining link with the surrogate is her legal parental status – would likely satisfy the threshold necessary for the court to dispense with the surrogate's consent. Arguments that our proposed power would interfere with the surrogate's Article 8 ECHR right to respect for private and to family life can be countered by the argument that the child's own Article 8 rights in these circumstances justify any such interference. As currently drafted, it is arguable that section 54(6) does not strike a fair balance between the Article 8 rights of the child and those of the surrogate, since there is no provision for the best interests of the child to be taken into account.[80] We therefore take the view that our recommendation appropriately balances the rights of the surrogate and the child born of the agreement.

10.139 Therefore, while our recommendation goes further in its terms than the provisional proposal in the Consultation Paper, in practice it is likely to operate in the same way.

10.140 We were not convinced by arguments that the court should be able to apply its power to dispense with the surrogate's consent to surrogacy agreements retrospectively, by which we mean to those agreements entered into before any change in the law. We think that there is a very strong policy reason not to permit this: that is that at the time

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

79 See para 10.46, Recommendation 41.

80 See for example, *H v UK* (No 32185/20, 31 May 2022); R Marsh, "Surrogacy breakdown, birth registration and Article 8: a missed opportunity in Strasbourg" (2022) *Journal of Social Welfare and Family Law*, 44:4, 529.

the surrogate made the decision to enter into a surrogacy agreement, it was not possible for the court to dispense with her consent. We do not agree with the assertion that this fact would not have formed part of the surrogate's thinking when she decided to enter into the agreement. It is impossible to say that is the case with certainty. The surrogate entered into the surrogacy agreement against a specific legal background, in which her consent was an inalienable veto to the making of a parental order: there is no basis for unilaterally removing that veto after the event. The fact that an adoption order could dispense with the surrogate's consent does not change that situation. The courts in England and Wales have indicated that they are not willing to make adoption orders in such surrogacy cases,[81] so it is not likely that a surrogate would have taken into account the availability of an adoption order when she decided to become a surrogate.

10.141 In the Consultation Paper, we alluded to the possibility that, where the surrogate had died, her consent might not be required under the current law.[82] While we did not consult specifically on this point, we think that it would be helpful if the reformed law explicitly provides that the requirement for the surrogate to consent should not apply where she has died before being able to do so. Accordingly, this forms part of our recommendation below. We discuss elsewhere in the report our detailed recommendations for how the death of a party to the surrogacy agreement, or the death of the child born of the agreement, should be dealt with in the context of both the new pathway and the parental order process. These recommendations make provision for people to stand in the shoes of a deceased surrogate as respondent to an application by the intended parents for a parental order where the surrogate has died before the conclusion of the parental order proceedings.[83]

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81 *Re AB (Surrogacy: Consent)* [2016] EWHC 2643 (Fam), [2017] 2 FLR 217 at [31]; an exception was made in *B v C (Surrogacy: Adoption)* [2015] EWFC 17; [2015] 2 WLUK 501 but this in the case of a single applicant, at a time when they were not able to apply for a parental order.

82 Consultation Paper, para 8.69.

83 See paras 4.179 to 4.211.

Recommendation 47.

10.142 We recommend that, with respect to the making of a parental order:

(1) the current circumstances in which the consent of the surrogate is not required, namely where she cannot be found or is incapable of giving agreement, should be retained;

(2) the requirement for the surrogate to consent should not apply where she has died before being able to do so;

(3) the court should have the power to dispense with the consent of the surrogate where the welfare of the child requires the consent to be dispensed with; and

(4) that the power to dispense with consent should not be available retrospectively, that is, for surrogacy agreements entered into before the new law comes into force.

10.143 Clauses 16(6), 16(7), 18(7), and 18(8) of the draft Bill give effect to this recommendation.

The provision of information in parental order proceedings

10.144 In Chapter 13 we discuss access to information for those born of surrogacy agreements and those related through a surrogacy agreement. In order for that information to be available, it needs to be collected. We consider how we recommend that this be done for an agreement in the new pathway in Chapter 8.

10.145 In the Consultation Paper, we made a provisional proposal and asked open questions about whether the provision of information about the gestational and genetic circumstances of the surrogacy agreement should be compulsory for a parental order to be granted.[84]

10.146 In that question, we provisionally proposed that it should be a condition of an application for a parental order that the identity of the surrogate is entered into the Surrogacy Register, while asking an open question about whether the same should be true for those who contribute gametes. In making this distinction, we were mindful that it might not be possible, for some agreements on the parental order route, to supply the information requested about donor gametes. This is because assisted conception may have taken place overseas in countries which allow anonymous gametes donation. Thus, any requirement that information about those who contribute gametes must be provided might result in it not being possible for many children born of an overseas surrogacy arrangement to be the subject of a parental order.

10.147 We are not suggesting that all donors be positively identified at the time of the application for the parental order. Known donors will be identified on the application for a parental order. Where anyone other than a known donor provides gametes which

[84] Consultation Question 63.

are used to conceive with a clinic licensed by the HFEA, the donor's identity will be disclosable to any resulting child at the age of 18, and that will continue to be the case. By "donor" we mean individuals other than the surrogate and intended parents who provide gametes used in a surrogacy arrangement. We recommend that such donors continue to be recorded on the existing HFEA Register of gamete donors, as happens now.

Evidence of a genetic link

10.148 In the Consultation Paper we also asked an open question on whether, where a genetic link is still required, it should be necessary for the link to be demonstrated to the court by medical or DNA evidence.[85] Currently, evidence of the genetic link may be lacking in up to a quarter of cases.[86] We have recommended that a genetic link should be a requirement of surrogacy in both the new pathway and for the parental order process, and so this question is of concern to all surrogacy cases.

Consultation

10.149 A majority of consultees considered that information on gamete donors and evidence of the genetic link should be required in parental order applications. The reason for agreement was generally that the requirement promoted openness and enabled people born through surrogacy to access information about their origins.

Identity of gamete donors

10.150 The most significant opposition to the requirement came from those who were concerned about the position of international surrogacy arrangements taking place in jurisdictions in which anonymous gamete donation was either mandatory or the norm. NGA Law and Brilliant Beginnings said:

> The difficulty arises if a donor has been used overseas. Some jurisdictions (such as the US) have a choice over anonymous and known donors; while in most other surrogacy destinations the donors are anonymous. We would suggest that the best available information is collected in all cases, but that it should not be required to give the donor's details.

10.151 A number of consultees, including some intended parents, suggested instead that anonymous gamete donation be permitted, and that the gamete donor information should only be required to be provided if it is known. Some intended parents thought that mandatory provision of information was unfair when this would not be required in "normal" pregnancies.

10.152 Dr Katherine Wade and the SurrogacyUK Working Group on Law Reform thought that making an application for a parental order conditional upon the provision of information about genetic heritage went too far. Both supported the policy of inclusion of all genetic/gestational information on the register, but said that it would be difficult to make this a condition of an order being granted if the child's best interests are to be

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85 Consultation Question 63.

86 Cafcass, Cafcass Study of Parental Order Applications made in 2013/14 (July 2015), accessible at: https://www.Cafcass.gov.uk/about-Cafcass/research-and-data/Cafcass-research/ (last visited 23 March 2023) p 14.

paramount, given that, even in the absence of such information, it may be in the child's best interests for a parental order to be made.

10.153 The SurrogacyUK Working Group on Law Reform were particularly concerned that making the provision of information a condition for an application for a parental order would either be something a court would "read down" to ensure compliance with the child's human rights, or that the requirement would interfere with the rights of the child under Article 8 of the ECHR (right to private and family life). They suggested that the provision of this information could be something the court is asked to consider when determining if an order is in the best interests of a child.

Evidence of a genetic link

10.154 In respect of the requirement for medical or DNA evidence, several consultees questioned whether this was desirable. They felt this would "exceptionalise" surrogacy, or pointed out that there are a number of ways in which the court can be satisfied of a genetic link and that it should not necessarily require DNA evidence (for example, a declaration from the doctor who performed an IVF procedure might be a suitable alternative). The HFEA was concerned that such a requirement would involve asking clinics to provide them with more, or different, information and preferred that such information be retained by clinics rather than be submitted to a register.

The surrogate's identity

10.155 The provisional proposal to require the recording of the surrogate's identity on the national register of surrogacy agreements was supported by almost all consultees who responded to the question. Those who disagreed typically did so on the basis that the surrogate should be permitted to decide whether her identity is recorded in the register.

10.156 The SurrogacyUK Working Group for Law Reform reiterated the same concern they held regarding information on gamete donors: would a court refuse to make a parental order, where it would be in the best interests of the child to do so, if this condition were not complied with?

Analysis

10.157 There was overwhelming support for it to be a condition of the application for a parental order that information on the surrogate is provided for entry onto the SR. We can see no barrier to this; it should be simple to identify the surrogate, even in international arrangements. PROGAR and Nagalro were of the view that there were occasional difficulties in identifying the surrogate. If this is the case (and we think that this would be extremely rare) then, as we recommend for gamete donors, we think that there should be a judicial discretion to dispense with identification.

10.158 In respect of whether to make the provision of information about gamete donors for identification on the register a requirement for the making of a parental order, we think that the concerns outlined by consultees including Dr Katherine Wade and the Surrogacy UK Working Group on Law Reform are justified. We have not recommended that overseas surrogacy be prohibited, or that intended parents who pursue this option are only able to obtain legal parental status through an adoption order. Given this is the case, and that overseas arrangements frequently involve

anonymous gamete donors, it is consistent for us not to prevent an application for a parental order in circumstances where this information is not available.

10.159 However, we think that it is also vitally important, and consistent with upholding the human rights of those born through surrogacy to information about their origins, that the law strongly encourages the collection of information about origins. We therefore recommend that it be a requirement for an application for a parental order that information be provided enabling identification of those who contributed gametes, with the judge ordering that the necessary information is recorded in the appropriate register.

10.160 Where those providing gametes are the intended parents and the surrogate this information would be recorded in the SR; where gametes are being provided by other donors, on an identity release basis, that information would continue to be recorded in the HFEA Register, and the court would provide the information to the HFEA for entry onto the SR.

10.161 However, we also recommend that a judge be given the power to dispense with this requirement, allowing instead for an application for a parental order to be made where it is recorded in the SR – if that is the case – that anonymously donated gametes were used.

10.162 With regard to requiring medical or other DNA evidence, we note the concerns that such a requirement would "exceptionalise" surrogacy, and that the existence of a genetic link may be evidenced otherwise than through a DNA test. We wish to strike a balance between making sure that the court does have some evidence of the genetic link between (one of) the intended parent(s) and the child, while not being too prescriptive as to what that evidence should be. We would not wish to exclude, for example, a letter from a clinic confirming that one of the intended parents has provided his or her gametes. We therefore recommend that it be a condition of an application for a parental order that the intended parents provide sufficient evidence in the proceedings to satisfy the court that there is a genetic link between one of them and the child.

10.163 Information for entry onto the SR would be provided by the intended parents at the time of the application, rather than at the time that the parental order is made. This would ensure that information is entered onto the register even in the unlikely event that a parental order is not made.

Recommendation 48.

10.164 We recommend that, as a prerequisite for the making of a parental order there must be provided to the court by the intended parents, at the time of the application for the order, prescribed information, including information identifying:

(1) the surrogate;

(2) those who contributed gametes, where those are known (intended parents, surrogate, gamete donor, as appropriate); and

(3) how to access such details (identity-release donor via the HFEA register, or other source of information);

but that the court will have the ability to dispense with the identification of the surrogate and those who contributed gametes and allow instead the fact that the surrogate could not be identified, or that anonymously donated gametes were used, to be recorded in the Surrogacy Register.

10.165 We also recommend that, on the conclusion of parental order proceedings, the court must provide the prescribed information to the HFEA for recording in the Surrogacy Register.

10.166 Clauses 16(9), 18(10), 19(7), 21(9), read with the definition of "required identity information" in clause 23 give effect to the first part of this recommendation. Clause 24 gives effect to the second part.

Chapter 11: Parental order procedure

11.1 In this chapter, we deal with some discrete aspects of the procedure applying to applications for a parental order. The first three sections deal with the procedure in England and Wales, including allocation of cases and the release of the parental order report, and the final section addresses reform of procedure in Scotland.

11.2 We have also covered some aspects of procedure in other chapters, where those aspects are closely connected to the substantive law, in particular with regard to the court checking that the applicant(s) for a parental order match those intended parents who originally entered into the surrogacy agreement.[1]

11.3 We set out in some detail the procedure applying to parental orders in England and Wales and Scotland in Chapter 6 of the Consultation Paper.[2] Rather than set out a general explanation of procedure in this chapter, we will only provide an explanation here of the current law for the aspects of procedure that we discuss, dealing with that in relation to each topic.

ALLOCATION OF PARENTAL ORDER PROCEEDINGS IN THE COURT SYSTEM IN ENGLAND AND WALES

11.4 Surrogacy cases are allocated to either lay justices, judges of circuit judge level, or judges of High Court judge level, sitting in the Family Court, depending on whether all the respondents agree to the making of a parental order, and whether the case concerns a domestic or an international surrogacy arrangement:

(1) where the child's place of birth was in England and Wales and where all respondents agree to the making of the parental order, the case will be allocated to lay justices;[3]

(2) where the child's place of birth was in England and Wales, but not all respondents agree to the making of the parental order, the case will be allocated to a judge of circuit judge level;[4] and

(3) where the child's place of birth was outside of England and Wales, the case will be allocated to a judge of High Court judge level.[5]

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1 See ch 10, para 10.75.

2 For procedure in England and Wales see Consultation Paper, paras 6.7 to 6.20, and 6.54 to 6.79. For procedure in Scotland see Consultation Paper, paras 6.80 to 6.106.

3 Family Court (Composition and Distribution of Business) Rules 2014 (SI 2014 No 840), sch 1(1)(o). Lay justices are also known as "magistrates". We have preferred the term "lay justices" throughout the text.

4 Family Court (Composition and Distribution of Business) Rules 2014 (SI 2014 No 840), sch 1(1)(o)., sch 1(3)(c).

5 Family Court (Composition and Distribution of Business) Rules 2014 (SI 2014 No 840), sch 1(1)(o)., sch 1(4)(f).

Allocation of international surrogacy cases

11.5 In *Re Z (Foreign Surrogacy: Allocation of Work: Guidance on Parental Order Reports)*,[6] the court endorsed earmarking all cases allocated to the High Court to a group of specialist judges who are experienced in parental order applications.

11.6 In the Consultation Paper, we asked whether international surrogacy cases (for these purposes, where the child is born outside of England and Wales) should continue to be allocated to High Court judges.[7]

11.7 On the one hand, we explained that we have some sympathy with the view expressed by Professor Emily Jackson that it is disproportionate to allocate all international cases to High Court judges, without first assessing their complexity.[8] While some international cases are more complex than domestic cases, we are not sure that this is necessarily the case. An international surrogacy arrangement through a reputable and well-established Californian surrogacy agency may, for example, be relatively simple as far as the grant of the parental order is concerned.

11.8 We also note that our recommendation to introduce habitual residence as an alternative to domicile,[9] would reduce the legal complexity in international surrogacy cases on the question of whether the court has jurisdiction to make a parental order.

11.9 Further, although we hope that our recommendations would make domestic surrogacy more attractive, there are still likely to be a number of international cases, which, without reallocation, would continue to claim the time of the High Court.

11.10 We were, however, conscious of the views expressed to us by High Court judges who currently hear surrogacy cases, that all international surrogacy cases should continue to be heard in the Family Court by High Court judges. They felt that the current system of allocation to a small number of High Court judges allowed these judges to build up a considerable level of expertise in this area. They expressed concern at the prospect of these cases being heard by other courts. Further, the High Court, through its reported judgments, can also develop case law in a way that lower courts are unable to do.

11.11 In light of divergent views on this issue, and particularly those of the High Court judges, we asked consultees for their views on whether all international surrogacy cases should continue to be automatically allocated to judges of High Court level. In the same question, we also asked consultees whether some international surrogacy

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6 *Re Z (Foreign Surrogacy: Allocation of Work: Guidance on Parental Order Reports)* [2015] EWFC 90, [2017] 4 WLR 5. The Guidance was expressly approved by the then President of the Family Division.

7 Consultation Paper, para 6.42, Consultation Question 1.

8 E Jackson, "UK Law and International Commercial Surrogacy: 'the very antithesis of sensible'", (2016) 4 *Journal of Medical Law and Ethics* 197.

9 Ch 6, para 6.188, Recommendation 23

cases could be allocated to a circuit judge.[10] We suggested that a ticketing[11] process could be put in place, to ensure that certain circuit judges build up expertise in this area. A circuit judge could still refer the case upwards to judges of High Court level where they felt it was necessary to do so.

11.12 To help inform decisions on these issues we also asked consultees to provide any evidence that would support either the retention or reform of the current allocation rules.[12] We do not separately consider responses to this question, as the responses did not introduce issues different to those expressed in response to the question about changing the allocation rules.

Consultation

11.13 Regarding the first part of the question, whether High Court judges should continue to hear all international surrogacy cases, most consultees thought that they should.

11.14 The Law Society suggested that, if the new pathway is introduced, straightforward surrogacy cases will be diverted away from the courts and it is appropriate for the more complex cases, including international cases, to be heard by High Court judges. Further, the Law Society argued that the current allocation rules have led to the High Court developing specialist expertise in international surrogacy, in addition to providing precedent, which has been beneficial to parties involved in proceedings, and to others who benefit from High Court judges' development of the law. The Law Society also noted two further points.

11.15 First international arrangements often originate in countries where surrogacy is entirely unregulated. Such markets can give rise to heightened concerns about the exploitation of surrogates. International arrangements from other jurisdictions may be more straightforward; however, it would be difficult to devise a system which could effectively demarcate countries considered more likely to be exploitative from those that have adequate protections in place. Even where such a system was implemented, the High Court may have to spend considerable time deciding the appropriate category, at an initial stage.

11.16 Secondly, if a complicating factor arises which was not apparent at the initial stage, these cases would need to be allocated back to the High Court. This would increase costs and delays as the High Court judge would have to pick up a case that was potentially in its later stages.

11.17 Other consultees thought that senior judges of the High Court are best placed to identify the exploitation of women and children, such that the current allocation rules act as a safeguard against such exploitation.

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10 Consultation Paper, para 6.42, Consultation Question 1. We envisaged that court staff would assess the complexity of the international case upon a review of the file, before deciding whether to assign initially to a circuit court judge or a High Court judge.

11 Judicial office-holders can be required to be "authorised" to deal with different types of cases. This is often referred to as "ticketing". It may be necessary for the ticketed judge to undertake specialist training. In the context of surrogacy, a small number of circuit judges could be ticketed to hear parental order applications.

12 Consultation Paper, para 6.53, Consultation Question 3.

11.18 Dr Rita D'Alton Harrison highlighted the broader jurisdiction of the High Court to make orders, which she suggested is especially useful in international surrogacy cases. Dr D'Alton Harrison also noted that requiring parties to apply to the High Court is the only means by which the numbers of international surrogacy arrangements are currently tracked.

11.19 On the other hand, some consultees did not think High Court judges should continue to hear *all* international surrogacy cases.

11.20 Several intended parent consultees cited difficulties in accessing the High Court, in terms of the costs of legal representation and the logistical difficulties of attending a hearing in London, as well as noting that it increased the stress of the proceedings.

11.21 Some consultees made the argument that certain international surrogacy cases, including those that take place in the USA, are more straightforward than others, and thus can be heard by a judge of a lower level.

11.22 With regard to the second part of the question asking whether circuit judges should be ticketed to hear international surrogacy cases, in the event that such cases are not automatically heard in the High Court, there was a mix of views.

11.23 These included that ticketing circuit judges would still ensure that international cases are heard by a judge with expertise in the area, and the observation that circuit judges would have to be trained on international surrogacy arrangements before they could hear these cases. One consultee, an intended parent, noted that ticketing circuit judges to hear these cases would reduce the workload of High Court judges and the costs for intended parents. Another consultee suggested that any circuit judge who is ticketed to hear international surrogacy cases should have a High Court mentor.

11.24 The Law Society acknowledged the attraction of a ticketing system for circuit judges for more straightforward cases:

> Our members do, however, understand the draw of a ticketing system, particularly considering the high number of cases coming to the family courts… Where international surrogacy arrangements are not automatically allocated to a judge of the High Court, they should be heard by judges no lower than circuit level who have experience [and thorough training] in international surrogacy arrangements.

11.25 Resolution thought that international cases could be referred to the Designated Family Judge ("DFJ")[13] in the local family court for gatekeeping, with the application specifying which level of judge was believed to be appropriate. Mills & Reeve LLP made a very similar suggestion. They also commented that district judges already hear private law cases containing international elements.

11.26 Some consultees disagreed with circuit judges being ticketed to hear international cases, whether because they thought that international cases should be heard in the

[13] DFJs are circuit judges responsible for leading the family judiciary at the courts for which they are responsible.

lower courts or because, from the opposite perspective, they thought that these cases are better suited to being heard by High Court judges.

11.27 As an example of the first perspective, Ben Aimes-Cull, an intended parent, suggested that international cases should be heard in courts local to the intended parents, to make the court process more accessible to the parties, and to make surrogacy arrangements "feel and appear [less] abnormal".

11.28 NGA Law and Brilliant Beginnings wrote:

> We have seen a few (3 or 4) international surrogacy cases mistakenly allocated to circuit judges and our experience has been consistently very poor. In one involving an Indian surrogacy, the court made the wrong order (a parental responsibility order instead of a parental order) and this was not identified by self-representing applicants until they sought legal advice several years later. In a more recent US surrogacy case involving a single father (which had been properly issued within six months of s54A coming into effect) the applicant was wrongly told he was out of time and a hearing before a circuit judge was listed to consider whether his application could proceed at all.
>
> Many applicants for parental orders are unrepresented and mistakes of this kind cause unnecessary delay and may even have lifelong implications for the child.
>
> Significant training will be needed if the current allocation is changed. Given the relatively small number of international surrogacy cases, this does not seem justified.

11.29 The view that circuit judges are inadequately qualified and insufficiently experienced to protect the parties to international surrogacy arrangements from exploitation was shared by several other consultees.

Analysis

11.30 We recommend that, in England and Wales, all international surrogacy cases should continue to be automatically allocated to judges of High Court judge level.

11.31 The introduction of the new pathway would take straightforward surrogacy agreements, which have benefited from oversight by Regulated Surrogacy Organisations ("RSOs"), out of the court system, leaving behind typically more complex cases, including international surrogacy arrangements (which we have recommended should not be eligible for the new pathway).[14] We are persuaded by the responses of consultees which suggest that judges of High Court judge level are best placed to hear international surrogacy cases given the specialist knowledge and experience those judges, and their role in developing precedent. Further, as noted above, High Court judges themselves are in favour of continuing to hear international surrogacy cases.

11.32 We acknowledge that international cases vary in their complexity, such that it might be appropriate for district or circuit judges to hear some international cases.

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[14] Ch 8, para 8.249, Recommendation 37.

Nevertheless, we do not think it would necessarily be feasible to identify at the outset which cases were likely to be straightforward. We also note that, contrary to the position taken in the Consultation Paper,[15] we no longer recommend granting the Secretary of State a power to automatically recognise (in England and Wales) legal parental status acquired following a surrogacy arrangement that took place in a specified overseas destination.[16] Therefore, we are now of the view that all international arrangements should be governed by the same procedure.

Recommendation 49.

11.33 We recommend that, in England and Wales, all parental order proceedings following international surrogacy arrangements should continue to be automatically allocated to judges of High Court judge level.

11.34 This recommendation will be given effect by procedural rules and therefore is not covered by the draft Bill.

Allocation of domestic surrogacy cases

11.35 If our recommendations for the new pathway are implemented, the remaining domestic parental order cases are likely to fall into one of two categories.

(1) Cases where the surrogate has exercised her right to withdraw her consent on the new pathway. Assuming that a contested parental order application results from that withdrawal of consent this would mean that, under the current law, the case is heard by a circuit judge rather than lay justices (because it would be a case where one of the respondents objects to the grant of a parental order).[17] We do not recommend altering this position, and we envisage that cases in which the surrogate exercises her right to withdraw from the new pathway would be heard by a circuit judge.[18]

(2) Surrogacy agreements which do not follow the new pathway. These are most likely to be traditional agreements where the parties do not use an RSO to access the new pathway, although it is possible that the parties to a gestational agreement might also follow the parental order process. These cases are not necessarily more complicated, and where a clinic is used there will have been some oversight of the agreement prior to conception.

11.36 In the latter category of cases, it may be thought appropriate for a degree of oversight to be provided by a district or circuit judge rather than a panel of lay justices, who

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15 Consultation Paper, para 16.94, Consultation Question 99.

16 See paras 16.174 to 16.193.

17 Family Court (Composition and Distribution of Business) Rules 2014 (SI 2014 No 840), sch 1(3)(c).

18 If, following the exercise of her right to withdraw her consent, the surrogate consents to the parental order, then the case could be heard by the appropriate lower level of the judiciary.

would hear such cases under the current allocation rules, where the grant of the parental order is not contested.

11.37 At the time of publishing the Consultation Paper, some judges and lawyers had also expressed concern regarding the lack of scrutiny by lay justices in parental order cases of issues such as expenses and consent. In addition, there is currently no way for individual lay justices to build up experience in surrogacy in the same way as it is possible for judges through the ticketing system.

11.38 On the other hand, we are aware of the current pressures on the court system. Another relevant consideration is the practical advantages of the courts in which lay justices sit, such as their greater geographical spread around the country, and often more informal setting. Lay justices also already hear difficult proceedings under the ACA 2002. For example, they have jurisdiction to decide upon applications for placement orders by local authorities. Placement orders are the first step towards a final adoption order and give permission to a local authority to remove a child from his or her legal parents and place him or her for adoption.[19]

11.39 In light of divergent views on this issue, rather than making a provisional proposal, we invited consultees' views as to whether domestic parental order proceedings should continue to be heard by lay justices, or whether they should be allocated to another level of the judiciary and, if so, to which level.[20]

Consultation

11.40 A minority of consultees were in favour of lay justices continuing to hear domestic surrogacy cases, including most of the intended parents and surrogates who answered the question.

11.41 Some consultees thought that training could be provided to lay justices, to ensure they are capable of hearing surrogacy cases, while others thought that continuing to allocate surrogacy cases to lay justices would help to reduce delay between the birth of the child and the parental order hearing. Consultees also highlighted the benefits to intended parents if their case can be heard by lay justices in a local, geographically proximate court.

11.42 Dr Rita D'Alton Harrison and the Family Justice Council thought that domestic surrogacy cases should generally be heard by lay justices, and only moved up to the higher courts if they raise complex issues, such as where social media had been used to find the surrogate, or the intended parents have separated.

11.43 On the other hand, most consultees opposed lay justices continuing to hear surrogacy cases. A significant number of consultees thought that, following the introduction of the new pathway, arrangements where intended parents need to seek a parental order are likely to be more complex, and so unsuitable for lay justices to hear.

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19 The Family Court (Composition and Distribution of Business) Rules 2014 (SI 2014 No 840), sch 1 para 5.

20 Consultation Paper, para 6.51, Consultation Question 2.

11.44 Some consultees did not think that there was adequate scrutiny by lay justices in surrogacy cases. NGA Law and Brilliant Beginnings wrote:

> The Central Family Court in London has good experience and manages cases efficiently (with a single final hearing after directions are issued automatically in writing) and this typically takes 4-6 months with legal representation or 6-9 months without. Elsewhere there are usually two court hearings in the magistrates' court, and experience is variable, but applications often take longer (6-15 months). The advantage of magistrate allocation is that the process is largely administrative. However, the disadvantage is that the process is lengthy and there is very little legal scrutiny.

11.45 A few consultees said that the issues arising in surrogacy cases are not comparable to those that lay justices handle in adoption cases: the procedure is different, and there is no children's guardian, only a parental order reporter who becomes involved after birth. The Law Society wrote:

> the parental order reporter…generally has much less contact with the child and the intended parents, making their representations limited in their scope. They are also likely to enter the proceedings at quite a late stage. As such, they are less likely to raise important issues, such as the intended parents disclosing the surrogacy origins of their child.

11.46 Nordic Model Now! and all the responses based on its template thought that all surrogacy agreements posed risks of the sale and trafficking of children and the exploitation of birth mothers, and said that they should therefore be heard by judges of circuit judge level or higher.

11.47 Some consultees thought that district judges, rather than lay justices, should hear straightforward surrogacy cases, while some thought that circuit judges should do so. Others said that judges should be specifically ticketed to hear surrogacy cases.

11.48 NGA Law and Brilliant Beginnings said that in practice, all disputed domestic surrogacy cases of which they are aware have been heard by judges of High Court level and they thought that this practice should continue. They also thought that, currently, only High Court judges are sufficiently qualified to hear undisputed domestic surrogacy cases.

Analysis

11.49 We recommend that domestic surrogacy cases requiring a parental order should not continue to be heard by lay justices. Instead, we recommend that domestic surrogacy cases should, by default, be heard by district judges and, as at present, cases in which one of the parties opposes the parental order application should be referred to a circuit judge.

11.50 In coming to this view, we were persuaded by the argument that, following the introduction of the new pathway, arrangements where intended parents need to seek a parental order are likely to be more complex than the typical domestic surrogacy cases that lay justices currently hear. Straightforward domestic surrogacy agreements, benefiting from professional involvement and the oversight of an RSO,

would progress along the new pathway, outside the court system; only domestic agreements that do not follow the new pathway would remain for consideration by the courts. These cases are, we think, more likely to be independent agreements that have not involved an RSO and in which the parties have met informally; for example, through social media. District judges are better placed than lay justices to manage the more complex issues that these types of cases are likely to raise.

11.51 We acknowledge that, as a result, some straightforward domestic surrogacy cases would be allocated to district judges which could have been handled by lay justices. Nevertheless, we think this disadvantage is outweighed by the greater expertise that district judges would provide in more complex surrogacy cases. We also do not think it is feasible to establish criteria to distinguish simpler surrogacy cases from more difficult ones, other than the fact that one of the parties opposes the application, in which circumstances the case would be automatically referred to a circuit judge under the current rules.

11.52 We have spoken to the Magistrates' Association, which represents magistrates/lay justices in England and Wales, and to the Chief Magistrate, who leads district judges (magistrates' courts) in England and Wales, who agreed with our recommendation. The Magistrates' Association took the view that there may still be simple cases which lay justices could deal with, so that it would be helpful if district judges would be able to transfer "down" cases to lay justices. It appears that the power to do so already exists under Rule 29.19 of the Family Procedure Rules 2010, which allows for the allocation of proceedings to another level of judge.

11.53 We note NGA Law and Brilliant Beginning's view that all disputed surrogacy cases are (and should be) heard by High Court judges, rather than circuit judges as provided for in the allocation rules. However, we do not think that we have received sufficient evidence to recommend a change to the allocation rules to this effect. It would still be possible for a circuit judge to allocate such proceedings to a High Court judge, should he or she wish to do so, under Rule 29.19 referred to above. Equally, in choosing to recommend that undisputed domestic surrogacy cases be allocated to district judges rather than circuit judges, we are mindful of not seeking to recommend a reallocation of business that moves proceedings to an unnecessarily high level of the judiciary.

Recommendation 50.

11.54 We recommend that in England and Wales, undisputed domestic surrogacy cases should, by default, be heard by a district judge, rather than by lay justices, with disputed domestic cases continuing to be heard by a circuit judge.

11.55 This recommendation will be given effect by procedural rules and therefore is not covered by the draft Bill.

RELEASE OF THE PARENTAL ORDER REPORT IN ENGLAND AND WALES

11.56 In England and Wales, the court must appoint a parental order reporter as soon as is reasonably practicable after parental order proceedings have been raised.[21]

11.57 The duties of the parental order reporter are set out in Part 16 of the FPR 2010. The parental order reporter acts on behalf of the child with the duty of safeguarding the child's interests.[22]

11.58 Amongst the parental order reporter's duties, the two primary ones are to:

(1) investigate the matters set out in sections 54 and 54A of the HFEA 2008;[23] and

(2) advise the court on whether the child's welfare requires the court to grant, or refuse, a parental order.[24]

11.59 The advice of the parental order reporter may be given orally or in writing, although the default rule is that a written report is required.[25]

11.60 At present, the report is confidential and may only be disclosed to the parties on the direction of the court.[26] In practice, it is disclosed in the majority of cases. Nonetheless, at the time of writing the Consultation Paper, it was apparent that the court did not always direct the release of the report to the intended parents until the final hearing. As such, we expressed concern that the intended parents may not, before the final hearing, have seen, let alone offered their views on, the report that was used by the court in reaching its decision on whether to grant a parental order.

11.61 Therefore, in the Consultation Paper, we took the view that reversing the position in Part 16 to create a default rule whereby the report is automatically released would improve transparency. We therefore made a provisional proposal in those terms.[27] Given that the default rule in Scotland is that the report should be available to the parties,[28] reform would also align the law in England and Wales with the law in Scotland.

11.62 We note that the court's operational processes will need to ensure that a judge or legal adviser reviews the parental order report before it is sent to the parties. This will ensure that the judge or legal adviser is happy for the default rule to apply, and to

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21 Family Procedure Rules 2010, r 13.5(1)(a)(iii).

22 Family Procedure Rules 2010, r 16.35.

23 See para 10.5 onwards.

24 Family Procedure Rules 2010, r 16.35(2).

25 Family Procedure Rules 2010, PD 16A, para 10.5(a).

26 Family Procedure Rules 2010, r 13.5(1)(a)(iii).

27 Consultation Paper, para 6.72, Consultation Question 5.

28 Act of Sederunt (Rules of the Court of Session 1994) (SI 1994 No 1443), ch 97 as amended, r 97.4; Act of Sederunt (Child Care and Maintenance Rules) 1997 (SI 1997 No 291), ch 2, Pt VI as amended, r 2.47.

consider whether to exercise the court's power to delete information from the report before it is released.[29]

Consultation

11.63 Nearly all consultees agreed with our provisional proposal.

11.64 Central to consultees' arguments in support of the proposal was transparency. They perceived the automatic release of the report as promoting transparency, openness and honesty.

11.65 Several consultees noted that disclosure of the report at an early stage offers an opportunity to challenge any errors. The parental order report contains important information relevant to the court's decision on whether to grant a parental order. The accuracy of its contents is therefore essential to promote good decision-making.

11.66 One intended parent, Gill Price, stated:

> The report is about you so we should get to see it. The court released our report at the second hearing and there were significant errors in it, including who was biologically related.

11.67 Consultees also noted that, in the majority of cases, the parental order report is disclosed to the parties as a matter of convention.

11.68 Mills & Reeve LLP commented:

> If there are concerns about release of the report to the intended parents, then the parental order reporter may apply to the court for directions.

11.69 Kingsley Napley LLP expressed concern that, under the new rule, the court would be burdened to examine the report before deciding on its release, which may cause delays. Nonetheless, they thought that the new rule would still be preferable to the current regime.

11.70 A few consultees differed over which parties should receive the report automatically. One consultee suggested that the report should only be released if the surrogate has care of the child, legal representation and all relevant documentation. Another felt that "there could be extreme circumstances where a Court may decide that all or part of the parental order report should remain confidential".

11.71 Some consultees argued against the proposed default rule. Resolution, who disagreed with changing the default rule, considered that whilst the report should be automatically released to the intended parents, it should not be shared with the surrogate unless the court so directs. They stated:

> The report can contain some very sensitive and personal information which may not be shared or need to be shared with the surrogate. Reversing rule 16.35(5) may carry with it a much more 'watered down' report which will not assist the court.

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[29] The court already has this power under Family Procedure Rules 2010, r 13.12(2).

If wider disclosure is sought, considered necessary and/or directed, the court can at that point also consider redactions, weighing [Article] 6 and [Article] 8 rights of all involved.

11.72 One consultee, who also disagreed with changing the default rule, was concerned that a regime based on automatic disclosure would not adequately protect the fundamental rights of the parties involved, particularly the surrogate and the surrogate-born child.

11.73 Professor Jens Scherpe reported on discussions he has had with practitioners on other aspects of procedure around the parental order. In these discussions, he told us that some had suggested that a parental order report should only be required where issues have been identified at an early stage, thereby justifying the involvement of a parental order reporter. It was also noted that practitioners suggested that it should be possible to streamline the parental order procedure to one hearing for a parental order, with the parental order reporter beginning their investigations ahead of said hearing.

11.74 NGA Law and Brilliant Beginnings made suggestions to redesign the parental order process as a whole, but supported the automatic disclosure of the report in the absence of wider changes.

Analysis

11.75 Taking into account the high level of support from consultees, we recommend that the rule in 16.35(5) of the Family Procedure Rules 2010 should be reversed, and the report should automatically be disclosed to all parties at the outset of proceedings. Reform of the law in England and Wales will increase transparency, reflect current practice, and align with the law in Scotland.

11.76 We note that a few consultees only wished the report to be disclosed to the intended parents, or that its release should be subject to conditions as regards the position of the surrogate. We consider that such an approach would be problematic. At the time of the report, the surrogate is a party to proceedings, and remains the legal parent of the child born of the agreement. We cannot see a valid reason why she should be excluded from disclosure. We note Resolution's concern that the report contains sensitive and personal information, but we would point to the very close relationship that often exists between the intended parents and the surrogate. If the report is to be released, it should be released to all parties.

11.77 Nor do we consider that the release of the report should be subject to conditions relating to the surrogate's position, or that greater transparency will undermine the rights of the parties. We think that transparency will in relation to the report will better protect the parties, including by ensuring that any factual inaccuracies are corrected before the parental order hearing.

11.78 We consider suggestions that the report should not be required in all cases to be impractical. Cases where parental orders are required will be domestic agreements which were either on the new pathway but have exited it due to the surrogate withdrawing consent before the birth, or which were never on the new pathway, or they will be international surrogacy cases. These are all cases in which judicial

oversight is considered to be necessary and, as such, the requirement for a parental report should remain.

11.79 In response to the comment provided by Professor Jens Scherpe regarding the possibility of the parental order reporter beginning work before the first directions hearing, we note that the court may issue written directions which require Cafcass to appoint a parental order reporter on the issue of proceedings.[30] We also note that NGA Law and Brilliant Beginnings told us that under the existing procedure the Central Family Court in London already lists parental order cases with a single final hearing following the automatic issuing of written directions as to the conduct of the proceedings. They said that the proceedings then typically take four to six months if there is legal representation, and six to nine months if there is not.[31]

11.80 We therefore consider that there is not sufficient evidence to recommend other changes to the procedure for parental order proceedings in England and Wales.

Recommendation 51.

11.81 We recommend that a parental order report should be released to all the parties in the parental order proceedings by default, unless the court directs otherwise.

11.82 This recommendation will be given effect by procedural rules and therefore is not covered by the draft Bill.

PROCEDURE IN SCOTLAND

11.83 The Consultation Paper asked for views as to three different issues relating to the parental order procedure in Scotland.[32] Two of those issues will be considered in this chapter:

(1) the expenses of curators *ad litem* and reporting officers; and

(2) whether any procedural reform is needed.

11.84 The remaining issue, which relates to the making of orders regarding parental responsibilities and rights at any hearing for a parental order is covered in Chapter 5 of this Report.[33]

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30 Family Procedure Rules 2010, r 13.5(2).

31 NGA Law and Brilliant Beginnings' response to Consultation Question 2.

32 Consultation Paper, para 6.110, Consultation Question 6.

33 See para 5.70 onwards.

The requirement to appoint a curator *ad litem* and a reporting officer

11.85 Under the current law, on the presentation of a petition for a parental order, the court must appoint a curator *ad litem* and a reporting officer.[34] It is possible to seek the appointment of a reporting officer, on cause shown, before presentation of the petition. The same person usually acts in both roles; in the sheriff court the role is generally assumed by a solicitor and, in the Court of Session, by counsel.[35]

11.86 A curator *ad litem* has the duty of safeguarding the interests of the child in such manner as may be prescribed by rules of court.[36] The purpose of a reporting officer is to witness agreements to the parental order and to perform such other duties as may be prescribed by rules of court.[37]

11.87 As to the expense of such officers, the court may make an order as to expenses as it thinks fit.[38] Certain panels are established from which curators *ad litem* and reporting officers may be appointed.[39] Whereas in the Court of Session, if there is an established panel, the officers must be selected from that panel unless the court considers that it would be appropriate to appoint a person who is not on the panel,[40] the emphasis is different in the sheriff court. In the sheriff court, the rules of court provide that the sheriff may appoint a person who is not a member of a panel.[41] As detailed below, it appears that in some areas the expenses of such officers are met from the public purse but in others the expenses fall on the applicants.[42]

11.88 As highlighted in the Consultation Paper, there is a lack of consistency and transparency regarding the expenses and liability for the expenses of curators *ad litem* and reporting officers.[43] Accordingly, the Consultation Paper asked whether greater consistency and clarity was needed and, if so, how this should be secured.[44]

Consultation

11.89 One intended parent spoke of her own experience of the process, highlighting the apparent unfairness regarding costs:

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34 Act of Sederunt (Rules of the Court of Session 1994) (SI 1994 No 1443) ("the 1994 Rules"), ch 97 as amended, r 97.8(1); Act of Sederunt (Child Care and Maintenance Rules) 1997 (SI 1997 No 291) ("the 1997 Rules"), ch 2, Pt VI as amended, r 2.50(1).

35 The 1994 Rules, ch 97 as amended, rr 97.8(4), (5), (7) and (8);The 1997 Rules, ch 2, Pt VI as amended, rr 2.50(4), (5) and (6).

36 Adoption and Children (Scotland) Act 2007 ("AC(S)A 2007"), s 108(1)(a) as applied and modified by reg 3 and sch 2 para 20 of the the 2018 Regulations.

37 AC(S)A 2007, s 108(1)(b) as applied and modified in by reg 3 and sch 2 para 20 of the 2018 Regulations.

38 The 1994 Rules, ch 97 as amended, r 97.6; The 1997 Rules, ch 2, Pt VI as amended, r 2.2.

39 The Curators ad litem and Reporting Officers (Panels) (Scotland) Regulations 2001 (SSI 2001 No 477).

40 The 1994 Rules, ch 97 as amended, r 97.8(3).

41 Act of Sederunt (Child Care and Maintenance Rules) 1997 (SI 1997 No 291), ch 2, Pt VI as amended, r 50(3).

42 Consultation Paper, para 6.102.

43 Consultation Paper, para 6.101.

44 Consultation Paper, para 6.110, Consultation Question 6.

> I think it very unfair that it is a postcode lottery to decide whether the cost of the expenses of curators *ad litem* and reporting officers is covered by the sheriffdom or the intended parents. Looking at the costs for intended parents in England and Wales I feel strong that the expenses of curators *ad litem* and reporting officers should be at least partially if not fully covered by the sheriffdom.

11.90 This view was shared by other consultees with experience of the Scottish system. SKO Family Law pointed to a need for much greater clarity and consistency as regards the appointment and remuneration of curators *ad litem* across Scotland. In contrast, Thorntons Law LLP said that the provisions relating to the expenses of curator *ad litem* and reporting officers were satisfactory at present.[45]

11.91 On a separate matter, a handful of consultees said that curators *ad litem* should be qualified social workers, and that such professional expertise was necessary.

Analysis

11.92 There was clear consensus that there is a great deal of uncertainty for intended parents in relation to who is responsible for covering the cost of a report by a curator *ad litem*, and the range of fees incurred.

11.93 However, since the Consultation Paper was published in 2019, there have been other developments in Scotland. The regulation of curators *ad litem* was considered by the Scottish Government as part of the implementation of the Children (Scotland) Act 2020 ("the 2020 Act"). The 2020 Act provides Scottish Ministers with the power to make provision for the remuneration of curators *ad litem*, including expenses and outlays.[46] Section 17 of the 2020 Act, once fully in force, will introduce a register for curators *ad litem*. In particular, "all curator *ad litem* fees and expenses would be paid by the body appointed to operate and manage the register".[47] Once these reforms are implemented, they will address the concerns raised by consultees, as intended parents will no longer be required to meet the cost of a curator *ad litem* report.

11.94 If the cost of the curator *ad litem* report is met by the relevant body that manages the register instead of intended parents, it will provide certainty and consistency in respect of the associated costs of applying for a parental order in Scotland.

11.95 In respect of whether curators *ad litem* should be qualified social workers, the qualification of curators *ad litem* is already under consideration by the Scottish Government. A consultation conducted in the summer of 2021 in relation to the 2020

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45 This range of views is reflected in recent empirical research: see K Trimmings, "UK Surrogacy Law Reform: Exploring attitudes amongst Judges and Legal Practitioners in Scotland", (2020) University of Aberdeen, pp 14 to 15.

46 Section 17(3) of the 2020 Act will insert a new section 101B into the Children (Scotland) Act 1995, permitting Scottish Ministers to make provision for training, selection, and remuneration of curators, as well as the criteria by which they may be appointed to the register of curators.

47 Scottish Government, "Children (Scotland) Act 2020 – registers of child welfare reporters, curators *ad litem* and solicitors" (2021), para 3.29. Available at: https://www.gov.scot/publications/children-scotland-act-2020-consultation-registers-child-welfare-reporters-curators-ad-litem-solicitors-appointed-represent-person-prohibited-conducting-case/pages/4/ (last visited 23 March 2023).

Act sought views on the requirements, including training requirements, for a curator *ad litem* to be registered when the 2020 Act comes into force.[48]

11.96 It is anticipated that the implementation of the 2020 Act will precede the introduction of the recommendations set out in this Report. Accordingly, we have concluded that this is not an issue for which we need to make provision in this project.

Further procedural reform

11.97 The final part of the consultation on Scottish procedure asked an open question as to whether any further procedural reform was required.[49]

Consultation

11.98 A handful of responses sought harmonisation across the United Kingdom. Linder Pott, a surrogate, said:

> Wherever possible the Law Commission should seek to remove inconsistencies between Scotland and the rest of the UK. It is very common that surrogacy 'teams' have members in both countries, it seems strange that two babies born through surrogacy in the same hospital will have different officials involved in confirming their parenthood due to where they live. The paper gives the example of a Scottish couple who achieved the parental order without legal representation. Documentation should be clear to ensure that parents through surrogacy in Scotland are able to access the parental order process in the same manner as those in England.

11.99 Other responses also raised the issue of jurisdiction "surfing" or "shopping"; that is, intended parents seeking to apply to a court of their choosing, so that intended parents from Scotland might apply to court in England and Wales for a parental order, and vice versa. Anecdotally, we have been told that Scottish intended parents who enter into overseas surrogacy arrangements will usually seek a parental order in the High Court in England and Wales, rather than in a Scottish court. SKO Family Law Specialists addressed the issue of intra-UK jurisdiction, saying:

> We also consider that provision should be made to ensure that any application for a parental order should be made within the constituent jurisdiction of the UK in which domicile or habitual residence is established.[50]

11.100 SKO Family Law Specialists raised a separate issue in response to a different consultation question, concerning whether, in England and Wales, (1) all international surrogacy arrangements should continue to be automatically allocated to a judge of

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48 Section 17 of the Children (Scotland) Act 2020 amends the Children (Scotland) Act 1995, to the effect that a court may only appoint as a curator *ad litem* a person who is included on the Register of Curators *ad litem*. This provision is not in force, and the register does not exist as yet. Further information on this provision and its implementation is available at: https://www.gov.scot/publications/children-scotland-act-2020-consultation-registers-child-welfare-reporters-curators-ad-litem-solicitors-appointed-represent-person-prohibited-conducting-case/pages/1/.

49 Consultation Paper, para 6.110, Consultation Question 6.

50 This point was made by them in response to Consultation Question 56. Two out of 15 participants referred to this as a "loophole" in research undertaken by Dr Katarina Trimmings. See K Trimmings, "UK Surrogacy Law Reform: Exploring attitudes amongst Judges and Legal Practitioners in Scotland", (2020) University of Aberdeen, p 6.

the High Court; and (2) if international surrogacy arrangements are not automatically allocated to a judge of the High Court, circuit judges should be ticketed to hear such cases.[51] SKO suggested that greater consistency was desirable between England and Wales and Scotland:

> Some consideration should be given to ensuring, so far as possible, uniformity of practice between England and Wales and Scotland. While the court structures are not directly analogous, many of the arguments put forward for retaining the exclusive allocation of foreign cases to the High Court (a small number of judges building up a considerable expertise in this area of law) could equally be applied in Scotland to justify the conclusion that such cases should be allocated [t]o the Court of Session (or perhaps to a 'specialist' Sheriff Court akin to the all Scotland personal injury sheriff court). At present the relatively low number of parental order applications in Scotland means that it is not possible for judicial expertise to be built up. If this is considered to be an essential element of the structure retained in England & Wales, Scotland should have a similar approach.

Analysis

11.101 A range of procedural points were raised.

11.102 We first consider those suggestions that there should be harmonisation of the parental order procedure across Scotland and England and Wales, including that the allocation of parental order proceedings in the Scottish court system should more closely follow the model in England and Wales. We acknowledge that one aim of the project is to harmonise legislation and policy across the United Kingdom; however, the Scottish legal system, within which that legislation will apply, is distinct from the English legal system. Therefore, we are not convinced that there is a need to reform Scottish procedure to mirror the procedure in England.

11.103 In respect of those suggestions that there should be no jurisdiction "shopping", so that intended parents from England and Wales should not be able to apply to Scottish courts or vice versa, we have concluded that it is not appropriate to place restrictions upon parties in choosing whether to petition English or Scottish courts. There could be a range of variations as to where intended parents and surrogates are domiciled, including those intended parents who have sought overseas surrogacy, and we are content to leave questions of jurisdiction to the courts' discretion.[52]

11.104 Accordingly, we recommend no further reforms in relation to procedural issues in Scotland.

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[51] Consultation Paper, para 6.42, Consultation Question 1. See para 11.5 onwards for discussion of this proposal.

[52] We note that, in Scotland: ""the court" means the Court of Session or the sheriff court of the sheriffdom within which the child is", HFEA 2008 ss 54(9)(b) and 54A(9). Therefore, in Scotland, if the petition for the parental order is made to the Sheriff Court, it must be to the child's local court.

Chapter 12: Payments

12.1 In this chapter, we consider the issue of payments for surrogacy, in particular the payments that it should be possible for the intended parents to make to the woman acting as surrogate in the agreement. We also consider how the limitations that we recommend on payments might be enforced, how the surrogate should be able to recover payments that the intended parents have agreed that they will make to her as part of the surrogacy agreement, and how the intended parents could recover any payments made to the surrogate that she has not used. Therefore, in this Report (and in contrast to the discussion in the Consultation Paper) we use a different term – "recovery" – to describe the enforcement of payments between individuals, as distinct from the State enforcement against individuals of the limitations that we recommend on payments.

12.2 We have used the language of "payments" in part to reflect a change of terminology from "expenses" under the current law, to highlight that we are not simply trying to capture (and then permit) payments that have been accepted as "expenses" under the current law. We have also used the term "costs" which more accurately reflects the idea that the money paid should not leave the surrogate financially better off.

12.3 Previous reviews of the law that have considered surrogacy have also looked at the question of payments. The 1984 Warnock Report was concerned to prevent commercial surrogacy agreements and recommended the criminalisation of those involved in surrogacy to achieve this aim. However, it also recommended that intended parents and surrogates should not be criminalised as it was "anxious to avoid children being born to mothers subject to the taint of criminality".[1] The report's conclusions influenced the content of the SAA 1985.

12.4 On the question of payments, the Brazier Report of 1998 rejected any move to allow the surrogate to benefit financially from the surrogacy agreement.[2] Instead, the report recommended that payments to the surrogate should only cover genuine expenses associated with pregnancy.[3] The Brazier Report again rejected the idea of using criminal sanctions against surrogates and intended parents to try to secure compliance with the law, citing the argument about the taint of criminality.[4]

12.5 Our approach in the Consultation Paper when considering the payments that intended parents should be permitted to make to the surrogate was not to focus on whether such payments were in accordance with the agreement being "commercial" or

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1 Report of the Committee of Inquiry into Human Fertilisation and Embryology (1984) Cmnd 9314 paras 8.18 and 8.19.

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

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

4 Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (October 1998) Cm 4068 paras 4.38 and 7.13.

"altruistic" in nature. While the types of payments that can be made to surrogates are one aspect of whether a surrogacy agreement is commercial or altruistic in nature, we do not think that they are the sole or defining feature. Further, asking whether surrogacy in the UK should be able to operate commercially, or altruistically, does not answer the question of what payments the intended parents should be permitted to make to the surrogate. While some payments – such as those for gestational services – are inherently linked to commercial surrogacy, describing surrogacy as altruistic does not, itself, preclude the payment of some expenses, nor does it identify the types of payments that should be permitted.

12.6 Our approach to reform of payments in the Consultation Paper was therefore to consider directly the question of what payments the intended parents should be permitted to make to the surrogate. We did not make any provisional proposals as to what payments should be permitted, but instead asked consultees a series of open questions, seeking their views on this topic.

12.7 One of the key questions in this area is whether intended parents should be permitted to pay a woman for acting as a surrogate for them. We covered the arguments for and against allowing such payments in detail in the Consultation Paper,[5] and note the concerns of the UN Special Rapporteur on the Sale and Sexual Exploitation of Children that payments to surrogates are linked to the risk of surrogacy operating as the sale of children.[6]

12.8 Our overall approach has been to seek to provide greater detail on what payments it should be permissible to make to the surrogate rather than relying on the formula of "expenses reasonably incurred", found in section 54 of the HFEA 2008.

12.9 Our analysis has been guided by four overarching principles:

(1) First, that surrogacy law should protect against the risks of women being exploited. That exploitation may occur through a woman being induced to become a surrogate for financial reward. We acknowledge, however, that it is not a universally held view that financial reward is always equated with exploitation, as some surrogates in commercial agreements, particularly in developing countries, may view surrogacy as a means by which to lift themselves and their families out of poverty.[7] Exploitation may also occur in other ways, for example where women are induced to become surrogates for

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5 At paras 14.49 to 14.69.

6 M de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* (January 2018), A/HRC/37/60 paras 41 to 51. Her later report, while upholding this analysis, focuses on the role of private intermediaries with for-profit motives and states that criminalisation of surrogates should be avoided, and that the criminalisation of intended parents will not usually be in the best interests of the child. See: M de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* (July 2019), A/74/162 paras 76 and 79.

7 For example, see L Goswami and K Rotabi, "Force, Fraud and Coercion – Bridging from Knowledge of Intercountry Adoption" (2014) *Institute of Social Studies Working Paper* No. 600, pp 17-18, and K Rotabi, and L Goswami, "Perspectives of Indian Women Who Have Completed A Global Surrogacy Contract" in K Rotabi, and N Bromfield (Eds), *From Intercountry Adoption to Commercial Global Surrogacy: A Human Rights History and New Fertility Frontiers* (2016) pp 143-144.

non-financial reasons, such as family pressure to help a relative. Nevertheless, this factor reflects the importance of rules relating to payments in guarding against exploitation. The Brazier Report noted that "payment increases the risk of exploitation if it constitutes an inducement to participate in an activity whose degree of risk the surrogate cannot, in the nature of things, fully understand or predict".[8]

(2) Secondly, a woman who becomes a surrogate should not be left financially worse off as a result; that is, she should not have to pay to be a surrogate. This factor reflects the manner in which courts have interpreted the current provision for expenses[9] and was also the view taken of expenses in the Brazier Report.[10]

(3) Thirdly, that the costs in question are those which are typically incurred during pregnancy and would have been incurred directly by the intended parents themselves in a personal pregnancy, or which arise as a result of the pregnancy being a surrogate pregnancy.

(4) Fourthly, that the birth of the child as a result of the surrogacy agreement should not be tainted with criminality.

12.10 We note that the rules on payments are only one aspect of our recommendations that seek to minimise the risks of exploitation. Our other recommendations have an important role to play to minimise the risk that a woman is induced to become a surrogate when she does not freely decide to be one. These recommendations include statutory provision for non-profit-making Regulated Surrogacy Organisations ("RSOs"); the eligibility criteria that apply both on the new pathway and the parental order process, and the screening and safeguarding checks that must be undertaken before a surrogacy agreement is admitted onto the new pathway.[11]

12.11 We also acknowledge that the need to prevent exploitation cannot generally answer the question as to whether particular categories of payment should be permitted. There are, however, some categories of payment that would present a greater risk of exploitation than others. For example, the ability to pay a surrogate for her gestational services inherently increases the risk of exploitation. We noted in the Consultation Paper that the UK has high, and rising, levels of income inequality, and that there are women for whom the availability of payment for gestational services could become the key factor in a decision to become a surrogate.[12] That inequality has not diminished in the years since the Consultation Paper, and the high cost of living is a very real crisis facing the UK in 2023. The availability of payments for gestational services also increases the risk of women being coerced into surrogacy by others who might gain financially from an agreement, such as family members. Conversely, the risks of exploitation appear minimal if provision is made to enable the surrogate to recover

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8 Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation (October 1998) Cm 4068 para 3.1.1.

9 Consultation Paper para 14.09.

10 Consultation Paper para 14.10.

11 Ch 6, 7 and 8.

12 Consultation Paper para 14.61.

costs incurred by the pregnancy so that she is not left financially worse off, because this would not mean that she could make a profit.

12.12 It is important to note that the law cannot guarantee either that the surrogate will not be left financially worse off or that exploitation will never arise. It is difficult – perhaps impossible – fully to shield women from the long-term financial consequences of having been a surrogate where the pregnancy and/or surrogacy impacts on career development, pay, or contributions to a pension. In relation to exploitation, it is impossible to say that a woman will never be induced into becoming a surrogate on the basis of even the limited payments that we recommend that the law should permit the intended parents to make. Indeed, the very fact of not being left financially worse off may be said to "induce" women into becoming surrogates, as few women would be willing or able to fund a pregnancy for the benefit of the intended parents. However, a law that enabled surrogacy only where the surrogate bore the costs could itself be seen as exploitative of the surrogate.

12.13 It is also important to acknowledge that the relationship between the intended parents and the woman who acts as a surrogate for them will not begin when the surrogacy agreement is entered into and will not usually end with the birth of the child. Entering into a surrogacy agreement will often bring the parties together, though in some cases where a friend or family member acts as a surrogate, there is a pre-existing relationship. Even in the majority of cases where the parties did not know each other beforehand, entering into the surrogacy agreement will be the culmination of a period in which they have discussed their interest in surrogacy, got to know each other, and decided to form a surrogacy team.

12.14 In UK surrogacy, there is generally (even if not invariably) an expectation that the parties will continue to have contact with each other following the child's birth, and that the child will be fully aware of the role that the surrogate has played. This context is significant because there is a limit to how far the law can or should regulate the parties' relationship, particularly in the months and years after the birth of the child. We discuss this point below when we consider the period of time during which the payments intended parents make to the surrogate should be scrutinised.[13]

12.15 Our recommendations seek to ensure that, as under the current law, women who become surrogates are neither left financially worse off nor do they financially benefit. Our recommendations go further than the current law in clarifying the types of payments that are permitted and in ensuring that payments made by the intended parents correlate to the sum spent by the surrogate, or the sum by which the surrogate would otherwise be left financially worse off. We also recommend a more effective means of ensuring that limitations on payments are enforced.

12.16 We think that our recommendations on permitted payments will provide a degree of clarity that does not exist in the current law. This clarity will enable parties to a surrogacy agreement to understand the types of payments that are and are not permitted.

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[13] Para 12.180 onwards.

12.17 Our recommendations as regards the types of payments that are permitted apply equally to surrogacy agreements on the new pathway and where the intended parents seek a parental order. There are, however, inevitably some differences in how they will operate and be enforced. In particular, the effect of our recommendations is that an RSO will always be involved where a surrogacy agreement is on the new pathway, and so the RSO can provide oversight. That will not be possible in cases where a parental order application is required.

12.18 By payments being made to the surrogate, we mean money paid either directly to the surrogate or on her behalf to the provider of the goods and services; for example, where the intended parents were paying for childcare for the surrogate, they would be able to pay the childminder directly, if this were agreed.

12.19 By way of summary, we recommend that intended parents should be able to pay to the surrogate:

(1) costs related to the decision to enter into a surrogacy agreement;[14]

(2) medical, wellbeing and related costs;

(3) pregnancy-related items;

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

(5) costs for specified forms of domestic support;

(6) travel and occasional overnight accommodation for a purpose linked to the surrogacy agreement;

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

(8) the surrogate's lost earnings;

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

(10) a modest recuperative holiday for the surrogate and her family.

12.20 We also recommend that intended parents should be permitted to make gifts of a modest nature to the surrogate.

12.21 Further, we recommend that the intended parents should, on the new pathway, be required to pay the cost of an agreed level of life insurance and critical illness cover for the surrogate, and that they should meet the costs of the screening and safeguarding requirements of the new pathway.

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[14] Paras 12.119 to 12.167.

12.22 No other payments will be permitted to be made. In particular, that means that the intended parents will not be able to pay the surrogate for the following:

(1) her gestational services in carrying the child;

(2) compensatory payments for any pain and inconvenience;

(3) the "handing over of the child", to use the language of the HFEA 2008; and/or

(4) general costs of living that the surrogate would need to incur regardless of the pregnancy, including the costs of housing (such as rent or mortgage), mobile phone costs, and payments for essential services and groceries (other than the surrogate's additional dietary requirements during the pregnancy).

12.23 In this chapter, we first explain the current law and its problems, before turning to consider consultees' responses to the questions that we asked in the Consultation Paper, and to provide our analysis of the issues, leading to our recommendations for a scheme of payments. We set out our discussions in four further sections:

(1) the scope of the payments scheme;

(2) the method of payment;

(3) the categories of permitted, mandatory and prohibited payments; and

(4) the enforcement of payments.

CURRENT LAW

12.24 Currently, the SAA 1985 makes it a criminal offence for a person to negotiate surrogacy arrangements on a commercial basis.[15] However, the SAA 1985 is careful to avoid criminalising the conduct of intended parents and surrogates, who are excluded from the scope of the offences.[16] Beyond the issue of criminalisation, however, the SAA 1985 does not address payments to surrogates.

12.25 Instead, the position of payments is currently addressed in the context of making a parental order. For a court to make a parental order, it must be satisfied that "no money or other benefit (other than for expenses reasonably incurred)" has been paid by the intended parents to the surrogate.[17] However, the same provision that imposes this limitation enables the court to grant a parental order where payments have been made beyond expenses reasonably incurred, where the court (retrospectively) authorises those payments. Furthermore, the meaning of "expenses reasonably incurred" is not defined by the HFEA 2008.

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15 SAA 1985, s 2(1).

16 SAA 1985, s 2(2).

17 HFEA 2008, ss 54 and 54A.

12.26 Under sections 54(8) and 54A(7) of the HFEA 2008, in order to make a parental order, the court must be satisfied that the intended parents gave no money or benefit other than "expenses reasonably incurred" for or in consideration of:

(1) the making of the order;

(2) any agreement of the surrogate (and her spouse if applicable) to the making of the order;

(3) the handing over of the child to the applicants; or

(4) the making of arrangements with a view to the making of the order

unless retrospectively authorised by the court.

Payments currently made to surrogates

12.27 There is no comprehensive record of payments made to surrogates in the UK. In the Consultation Paper, we considered data from the following:

(1) two surveys undertaken by SurrogacyUK in 2015 and 2018;

(2) data from court files; and

(3) other sources, including guidelines provided by surrogacy organisations.

12.28 It has sometimes been suggested to us that there is, in effect, a "going rate" paid to surrogates of "£8,000 to £15,000".[18] This claim has, equally forcefully, been contested. The data from SurrogacyUK's surveys, suggests that payments of £10,000 to £15,000 are typical, while there was an increase in the percentage of surrogates reporting payments of £15,000 to £20,000.[19]

12.29 In March 2019, we were granted permission by the Ministry of Justice to review a number of court files of parental order applications in domestic surrogacy arrangements held by the Central Family Court in London for the years 2015 to 2019.[20] We reviewed 52 files, which the court provided to us after searching their database. We took steps to record the data in a way that would not allow data to be linked to individual cases, or individuals to be identified.

12.30 Our research revealed that, in the files reviewed, the median payment made by the intended parents to surrogates in domestic surrogacy arrangements was £14,795.54. The mean payment was £13,535.18. The range of payments varied considerably. In one familial arrangement the applicants declared paying the surrogate £470. By contrast, five of the files reviewed (9.61%) involved expenses being paid of more than £20,000.

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18 Notably Russell J used this language in *Re A, B and C (UK surrogacy expenses)* [2016] EWFC 33 at [3].

19 SurrogacyUK Working Group on Surrogacy Law Reform, *Surrogacy in the UK: Myth busting and reform* (November 2015) p 34.

20 In view of the small number of applications for parental orders in Scotland, a similar review was not conducted there.

12.31 It was notable from the review of the files that very few parental order applications included a detailed, itemised breakdown of the expenses paid to the surrogate, along with the accompanying receipts.

12.32 In a number of cases, the intended parents did not attempt to categorise what the payment to the surrogate was for, simply saying that the amount was "for expenses incurred as a result of the pregnancy", with no further detail provided.

12.33 Moreover, we frequently came across cases where a round figure was pre-agreed to by the parties (for example £15,000). A proportion of this amount was then paid in monthly instalments to the surrogate, followed by the balance after pregnancy.

12.34 This research should be seen in conjunction with the earlier court file research completed by the Children and Family Court Advisory and Support Service ("Cafcass") in July 2015 (in relation to 73 parental order applications made in the years 2013/2014).[21] In contrast to the Law Commission of England and Wales' research, the files examined by Cafcass included both domestic and international surrogacy agreements. For domestic agreements, the research found a mean payment of £10,694.13. In contrast, surrogacy agreements from the USA had a mean payment of £39,875.69.

Authorisation of payments in excess of reasonable expenses

12.35 The court has the ability, under section 54 or 54A of the HFEA 2008, to authorise payments that would not otherwise be permitted because they have been given for or in consideration of the making of the parental order; the consent required for the court to make the order; the handing over of the child born of the arrangement to the intended parents; or the making of arrangements with a view to the making of the parental order.

12.36 The issue of authorisation of payments by the court where these are in excess of reasonable expenses is a particular issue in international surrogacy arrangements from jurisdictions which permit commercial surrogacy. In such circumstances, the payments that the intended parents have made to the surrogate are, by their very nature, in excess of reasonable expenses, and may run – in some countries (for example, the USA) – to many thousands of pounds.

12.37 In the case of *Re X and Y (Foreign Surrogacy)*,[22] Mr Justice Hedley outlined three questions that the court should ask when deciding whether to authorise payments beyond reasonable expenses.

(1) Was the sum paid disproportionate to reasonable expenses?

(2) Were the applicants acting in good faith and without "moral taint" in their dealings with the surrogate mother?

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21 Cafcass, *Cafcass Study of Parental Order Applications made in 2013/*14 (July 2015) accessible at: https://www.cafcass.gov.uk/about-cafcass/research-and-data/cafcass-research/ (last visited 23 March 2023).

22 [2008] EWHC 3030 (Fam), [2009] Fam 71.

(3) Were the applicants party to any attempt to defraud the authorities?[23]

12.38 It is also clear that the child's welfare is the court's paramount consideration when deciding whether to grant a parental order.[24] The effect of this on the court's discretion to authorise payments in excess of reasonable expenses was discussed in the case of *Re L*.[25] Mr Justice Hedley wrote that:

> The effect of [the child's welfare being the paramount consideration] must be to weight the balance between public policy considerations and welfare... decisively in favour of welfare. It must follow that it will only be in the clearest case of the abuse of public policy that the court will be able to withhold an order if otherwise welfare considerations support its making.

12.39 We note that the court takes account of the usual practice in the foreign jurisdiction when considering whether a payment was reasonable or not: for example, in *X v W*,[26] the court held that any element of the payments other than for expenses reasonably incurred were authorised, on the basis of evidence from an Advocate of the High Court of Uganda about the payments it was usual for surrogates to receive in Uganda.

12.40 We are not aware of a case where a parental order has been refused on the basis of payments exceeding what is reasonable, under section 54(8) of the HFEA 2008.

Criticisms of the current law

12.41 In the Consultation Paper we identified three key criticisms of the current law on payments in relation to surrogacy.

(1) There is a lack of certainty as to what payments are permitted as "expenses reasonably incurred" resulting in concerns as 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.

(2) 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. As we have seen, there is no reported case in which a court has refused a parental order as a result of payments that have been made, given that the best interests of the child have required parental orders to be made.

(3) There is a disparity, in practice, between payments that are made for domestic surrogacy and those authorised in respect of international arrangements. Payments that would be a criminal offence under the SAA 1985, if made in a

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23 *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] Fam 71 at [21].

24 ACA 2002, s 1, as applied and modified by the 2018 Regulations, sch 1 para 2 (previously contained in the 2010 Regulations, sch 1); AC(S)A 2007, s 14(3), as applied and modified by the 2018 Regulations, reg 3 and sch 2 para 2.

25 [2010] EWHC 3146 (Fam), [2011] Fam 106.

26 [2022] EWFC 34.

domestic agreement, are made and retrospectively authorised by courts as regards international arrangements.[27]

12.42 We further noted that the question of payments is one on which interested parties have strongly held, and sometimes opposing, views. This is because the nature of payments the law permits is seen as a key determinant of whether surrogacy operates on an altruistic or commercial model.

THE SCOPE OF THE SCHEME

12.43 In the Consultation Paper we provisionally proposed that the types of payment that are permitted to be made to surrogates should be the same, whether the surrogacy follows the new pathway or the intended parents need to apply for a parental order.[28]

Consultation

12.44 Generally, consultees were in favour of the proposal as a method of promoting equality between the new pathway and the parental order process.

12.45 In agreeing, SurrogacyUK said that the costs associated with a surrogacy arrangement should be recorded in an official form that is signed by all parties to the arrangement and countersigned by a representative of an RSO.

12.46 A number of consultees specifically referenced payments in relation to international surrogacy agreements. Resolution thought that, in international surrogacy arrangements, consideration could be given to sanctioning payments made which fall outside those permitted under domestic legislation, as long as they are permitted by the laws of the country in which the surrogacy took place. Similarly, one intended parent, Lara Hill, agreed with our proposal but noted that if payments are to be restricted, wider categories of payments should be allowed outside the new pathway in cases involving international surrogacy agreements.

Analysis

12.47 We continue to take the view that we took in the Consultation Paper that there is no reason why the payments that can be made should differ depending on how intended parents become legal parents. Very few arguments were made to suggest that there should not be parity between the new pathway and the parental order process. We therefore recommend that payments are treated the same across both the new pathway and the parental order process.

12.48 This approach achieves uniformity and simplicity in regulation, whilst providing safeguards for all those involved in surrogacy agreements.

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[27] The SAA 1985 makes it a criminal offence for a person to negotiate surrogacy arrangements on a commercial basis but intended parents and surrogates themselves are excluded from the scope of the offences. The Act does not otherwise address the issue of payments to surrogates. In parental order cases where there is an international surrogacy arrangement and a commercial agency has managed the process, the payment of the agency's fee is routinely authorised by the court in the making of a parental order. For example, see *Re P-M* [2013] EWHC 2328 (Fam), [2014] 1 FLR 725.

[28] Consultation Question 84.

12.49 In addition, if we did not treat payments in the same way in both the parental order process and the new pathway, then this could act as a disincentive to use the new pathway. This is because any disparity in the payments allowed would have to be resolved in favour of more generous rules in the parental order process, because of the need to allow the court to authorise payments.

12.50 As will be evident in the discussion below, we have taken on board SurrogacyUK's suggestion, with regard to the recording of costs/payments, as part of our recommendation as to how our payments scheme should be enforced.[29]

12.51 We intend to retain, in the case of parental orders, the ability of the court to authorise payments that go beyond what is otherwise permitted by law or which are excessive, while falling within permitted categories.[30] This will be necessary in order to allow parental orders to continue to be made in cases where, for example, the surrogate has been paid for gestation, that is, following international commercial surrogacy arrangements. It will also be necessary where payments outside the statutory scheme are made in a domestic case, so that the making of unauthorised payments does not block the court from making a parental order that would be dictated by the child's best interests. Given the paramount importance of the welfare of the child, we see no other realistic option.

12.52 However, authorisation by the court, allowing it to make a parental order, should not be equated with tacit approval of such payments in domestic cases, because we recommend (as one of the options for enforcement) that the court would have the ability to refer the intended parents to the enforcing authority for the imposition of a civil (financial) penalty. This would not apply to international arrangements, where the preponderance of commercial surrogacy agreements would mean that referral for the possible application of penalties would be routine (and potentially just become another cost of the agreement to be factored in). In those cases, we recognise that those payments are legal in those jurisdictions, meaning that the intended parents have not done anything unlawful.

Recommendation 52.

12.53 We recommend that:

(1) The law should specify which payments intended parents are permitted make to a surrogate; and

(2) the types of payment that are permitted to be made to surrogates should be the same, whether the surrogacy agreement follows the new pathway to parenthood or a post-birth application for a parental order is required.

12.54 This recommendation is given effect by clauses 39, 40 and 42 of the draft Bill which, respectively, set out the general prohibition on the making of payments by the

[29] Para 12.255.

[30] Para 12.187.

intended parents to the surrogate within the protected period, provide for regulations to be made setting out permitted costs and the categories of permitted costs for which provision should be made, and provide for permitted discretionary payments, such as modest gifts and a recuperative holiday. Clause 6(6) provides the definition of mandatory costs. Clause 39(1) provides that the clause applies where a surrogacy agreement has been entered into, which means that the payment rules generally apply both to the new pathway and to surrogacy agreements where a parental order is required.

PAYMENT IN ADVANCE

12.55 In some existing surrogacy agreements, payments to the surrogate are made by way of an allowance, perhaps on a monthly basis, rather than by way of reimbursement by the intended parents to the surrogate of precise sums spent.

12.56 In the Consultation Paper, we therefore noted that, as regards payments that are permitted in respect of costs incurred by the surrogate, a further question arose as to the basis on which those payments are made. We invited views as to whether the payments should be permitted on the basis of an allowance agreed at the start of the surrogacy, based on the surrogate's anticipated costs, or on the basis of costs actually incurred. As regards payments on the basis of costs actually incurred, we also asked whether the surrogate should be required to produce receipts for these costs.[31]

12.57 We noted that the approaches differed both in terms of the sums of money that may actually be paid and the level of evidence required. In particular, an allowance may mean that the sums paid are not actually used for their intended purpose and may therefore result, in effect, in the surrogate making a financial gain (although any such gain may be modest in practice).

Consultation

12.58 The majority of consultees supported a scheme based on payment for costs incurred rather than an allowance, although consultees were divided as to whether receipts should be required. Consultees also emphasised the need for transparency, for greater scrutiny around payments and the potential impact on the child if surrogacy is undertaken for financial gain.

12.59 Surrogates who preferred actual costs but without receipts explained that receipts were not always available, though noted that they should be able to provide a breakdown if required (for example, on a spreadsheet). Some surrogates and intended parents emphasised that their relationship is based on trust.

12.60 SurrogacyUK supported a model that enables a surrogate to recover her actual costs and explained that "she should not be out of pocket, nor left with unspent sums at the end". They were concerned by the administrative burden of requiring receipts, a view that was echoed by SurrogacyUK's Working Group on Law Reform. Other consultees also thought that requiring receipts was unrealistic, given that it is increasingly the case that a receipt will not be given for transactions.

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[31] Consultation Question 72.

12.61 Those who supported a requirement of receipts did so, in particular, as a means of ensuring that women did not financially gain from being a surrogate and, relatedly, to avoid the risks of women being exploited through paid surrogacy. Some consultees qualified their answer by suggesting that there could be a limit up to which receipts would not be required.

12.62 An allowance-based model was supported by some consultees for a variety of reasons. Natalie Orton-Rose emphasised the need to set out the sum before conception so that the intended parents can budget, whilst allowing flexibility for unexpected circumstances. A number of intended parents suggested that the parties should be able to choose their own financial arrangements. Some consultees noted that the making of payments above expenses happens in practice.

12.63 The Family Law Bar Association suggested that an allowance model:

> allows for greater fluidity than itemised payments and a sense of certainty for the surrogate so she can prospectively plan expenditure rather than have to recoup monies spent.

12.64 Professor Emily Jackson said that, as courts will authorise overpayments, it would be sensible for payments to be allowed up front to avoid any confusion and anxiety.

Analysis

12.65 We agree with the views of consultees that a scheme based on reimbursement provides greater protection against a woman profiting from being a surrogate, and therefore against women being financially induced to become a surrogate. We note that some consultees who supported an allowance model did so precisely because it facilitated payments above costs actually incurred. While, as Professor Emily Jackson acknowledged, overpayments will ultimately be sanctioned by the court, we do not consider this a reason not to impose limitations. We note that the mechanisms we recommend will seek to ensure that limitations are adhered to.[32]

12.66 We also acknowledge, however, that a requirement of receipts would not be practical or desirable. Receipts may not always be available, leaving the surrogate financially worse off. Further, receipts are simply one way of providing evidence that money has been spent for a particular purpose, and consultation responses illustrated that there are other ways in which surrogates may keep track of spending. Where payments are made on a debit or credit card, for example, a record of the payments will be available in a statement or through online banking, should a question arise in relation to the payments made.

12.67 We also acknowledge, however, that a scheme in which surrogates are required to cover their own costs and claim reimbursement would impose financial pressure on a surrogate, as it would mean that she is left financially worse off until the reimbursement is made.

12.68 We consider that the concerns of consultees around an allowance model do not mean that intended parents should not be able to make payments to the surrogate in

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[32] Para 12.225.

advance of her incurring expenditure. It should be possible for the intended parents to make payments to the surrogate in anticipation of costs being incurred. We view these payments as a "float" rather than an allowance; that is to say, a sum of money paid in advance out of which the surrogate can meet costs, coupled with a reconciliation so that any sums that were not in fact required to meet costs are repaid to the intended parents. As a safeguard against prohibited payments being made, we think that the float should be paid in close proximity to the time of anticipated costs being incurred.

12.69 For the avoidance of doubt, it would be entirely acceptable in the scheme for intended parents to meet costs incurred by the surrogate directly (by paying the person or company providing goods or services to the surrogate) rather than reimbursing a payment made by the surrogate. The intended parents would be responsible for keeping a record of such payments.

Recommendation 53.

12.70 We recommend that:

(1) the payments that the intended parents are permitted to make to, or on behalf of, the surrogate should be based on a reimbursement of costs actually incurred, rather than an allowance; and

(2) the intended parents should be able to make payments to the surrogate in advance (as a float) to cover anticipated costs. These advance payments should be made in close proximity to the expected costs being incurred by the surrogate, with sums that were not used being repaid to the intended parents by the surrogate.

12.71 The use of the language of payments being made "in respect of" mandatory or permitted costs in clause 39(2)(a) and 39(2)(b) of the draft Bill is intended to indicate that payments must be linked to particular costs rather than consist of an allowance, while permitting such payments to be made in advance.

CATEGORIES OF PAYMENT

12.72 In the Consultation Paper, we asked a series of open questions that covered all the types of payment or cost, and the impact associated with such payments, that we envisaged as being relevant to the surrogacy. These were:

(1) essential costs relating to the pregnancy;

(2) additional costs relating to the pregnancy;

(3) costs arising from entering into a surrogacy agreement and those unique to a surrogate pregnancy;

(4) surrogate's actual lost earnings;

(5) surrogate's potential lost earnings;

(6) surrogate's entitlement to means-tested social welfare benefits;

(7) payment of compensation to the surrogate for pain and inconvenience; medical treatments relating to the surrogacy; and specified complications of the pregnancy;

(8) compensation for the death of the surrogate, including payment of the cost of life insurance;

(9) gifts to the surrogate from the intended parents;

(10) payment to the surrogate for undertaking the surrogacy/carrying the child; and

(11) the effect on payments of termination or miscarriage of the surrogate pregnancy.[33]

Consultation

12.73 Rather than discussing the responses on payments question by question, we outline the general trends from consultation responses in this section. We then refer as necessary to specific points from consultation responses in the discussion of our recommendations below.

12.74 Some consultees questioned whether there should be any legal limit on permitted payments at all, although this was not the view of most consultees who responded.

12.75 A recurring theme amongst consultation responses was that women should not be financially induced into becoming a surrogate as this amounted to the exploitation of vulnerable women and the commodification of women and children. As part of this concern, the majority of consultees were strongly against making payments to the surrogate for gestational services, compensation, or to meet her general living expenses. The primary concern of consultees who opposed payment for gestational services was that it would exacerbate the risk of exploitation and the commercialisation of surrogacy. A minority of consultees disagreed and supported permitting payments for gestational services. They cited the importance of respecting the autonomous decision of women who become surrogates. There was some support for payment of compensation to the surrogate (for example, for pain and suffering resulting from the pregnancy), but consultees questioned the distinction between such payments and payments for gestational services.

12.76 While consultees generally agreed that women should not be financially induced into becoming a surrogate, there was also a common consensus that a surrogate should not be left financially worse-off as a result of her pregnancy. Only a minority of those consultees who would prefer surrogacy to be prohibited felt that the surrogate should bear all costs of the pregnancy, and thus rejected the notion of payments being made to the surrogate to ensure that she is not left financially worse off. There was,

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[33] These categories were covered by Consultation Questions 73 to 86 inclusive (with the exception of Question 84), with questions also asking whether there were any additional categories of payment that we should consider, and for any further views on the topic. Question 84 asked about the scope of the payments scheme, covered above.

however, a wide divergence in views as to which payments should be permitted, and the extent to which payments beyond unavoidable costs should be made.

12.77 Many consultees suggested that permissible costs should only be those that were directly related to the surrogate pregnancy; that is, but for the surrogate pregnancy occurring, the surrogate would not have incurred the cost. However, consultees also took a broad view of the costs they saw as being directly related to the pregnancy. For example, most consultees who mentioned the recuperative holiday supported allowing payment for it on the basis that the surrogate pregnancy and birth were the direct cause of incurring the costs of the holiday.

12.78 Another theme which emerged from responses was the emphasis by a number of consultees on the importance that any payments made must be reasonable or modest. This concern with the level of payments appeared to be on the basis that this limitation would maintain the altruistic nature of surrogacy. For example, many consultees (aside from those who were opposed to surrogacy in general) supported permitting the intended parents to make gifts to the surrogate, but only on the basis that the gift was proportionate to the parties' personal and financial situation. Proportionality will of course differ, depending on the individual circumstances of the parties: what is extravagant for one set of intended parents or surrogate will not be so for another. This theme also encompassed a desire on the part of consultees that it be possible in some way to quantify the costs being met, such that they have a base in reality.

12.79 At the granular level, consultees suggested a range of costs that the intended parents should be able to pay to the surrogate, including:

(1) all costs involved in medical treatment related to the surrogacy, including costs involved in fertility treatment, private fees where (for example) additional scans were had, physiotherapy and mental health support including counselling;

(2) maternity care, including massages and fitness classes, breast pump and pads, and stretch mark cream;

(3) maternity clothes;

(4) additional food, takeaway meals, and food to support a healthier diet;

(5) childcare (for example, when attending appointments) and additional help around the home; and

(6) travel costs (for example, to appointments).

Analysis

12.80 In our analysis and recommendations, we set out first the payments which we recommend are prohibited, followed by those that we recommend be permitted. Specifying payments that are permitted is a new departure for the law insofar as it applies to intended parents and surrogates. The current restrictions in the SAA 1985

do not apply to payments to or for surrogates,[34] while sections 54 and 54A of the HFEA 2008 do not specify types of payments beyond "expenses reasonably incurred." In the language of our draft Bill, all payments that are not explicitly permitted are prohibited. Those that we discuss here are not, therefore, an exhaustive list of prohibited payments, but are categories of payment that have given rise to particular policy considerations during our project.

Payments that should not be permitted

Gestational services

12.81 Permitting payments for gestational services, by which we mean the act of carrying the child, would be a very significant change to the current law. We consider that such a change would be appropriate only if it was widely supported, and the consultation responses demonstrated that that is not the case. Both those who were opposed to surrogacy and those who are personally involved in surrogacy were generally opposed to introducing payments for gestational services.

12.82 We share concerns regarding the link between payments for gestational services and exploitation; both increase the risk of women being induced to turn to surrogacy to alleviate financial difficulties or being coerced into surrogacy by others for financial gain.

12.83 We have concluded that the risk of exploitation that arises in connection with payments for gestational services outweighs the arguments in favour of such payments, based on autonomy and choice.

12.84 We note that simply permitting any payments could be seen as "solving" problems with enforcing limitations on payments (by effectively removing any such limitations) or as reflecting the nature of payments that are currently made. We consider, however, that the law should tackle those difficulties, rather than avoid them.

12.85 For agreements in the new pathway, RSOs will play an important role in ensuring that respecting these limitations on payments is part of the culture and ethos of surrogacy, and that intended parents and surrogates abide by them. We set out below how our recommended limitations on payments would be enforced.[35]

12.86 We acknowledge that, as we set out above, the ability for the court retrospectively to authorise payments that are prohibited needs to be retained to support the welfare of the child.[36]

12.87 We do not, however, consider that the ability of the court to do so should determine what the law permits as a matter of course. First, there is an important normalising role in taking as a starting point that payment for gestational services is prohibited. This starting point emphasises that such payments are not usual, or condoned. They are accepted only at the discretion of the court, and only in order to protect the welfare of the child. Secondly, the ability to authorise payments lies at the discretion of the

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34 SAA 1985, s 2(3).

35 Para 12.225 onwards.

36 Para 12.187.

court. While, as we have acknowledged, a parental order has not been refused for overpayment, a court could be expected to refuse to exercise its discretion in the clearest cases of abuse, where the payments made raised concerns as to the welfare of the child.

12.88 International surrogacy cases, which are usually commercial agreements, do offer a challenge to a law that does not permit payment to the surrogate for carrying the child. As we have seen, the court will routinely authorise the making of a parental order following an international arrangement in which such payments have been made.

12.89 In a further development, in the case *of XX v Whittington Hospital NHS Trust*,[37] the UK Supreme Court held that permitting payment for commercial surrogacy overseas, as part of a personal injury damages award, is not contrary to public policy in this jurisdiction, so that it is open to a court to award damages to pay for such a surrogacy arrangement. The *Whittington* case therefore goes further than condoning payments that have been made after the fact – dictated by the paramount nature of the welfare of the child – to accepting in advance the legitimacy of entering into commercial surrogacy arrangements overseas.

12.90 The law in the UK therefore condones and permits a commercial surrogacy arrangement entered into overseas while, at the same time, seeking to prohibit, by way of the SAA 1985, commercial surrogacy in this jurisdiction.

12.91 We do not think that condoning commercial payments being made to surrogates overseas, in jurisdictions which permit commercial surrogacy, means that commercial payments should be permitted in domestic cases. It is not inconsistent to recognise the outcome of a commercial surrogacy arrangement overseas (by recognising the child as the legal child of the intended parents), whilst limiting the nature and extent of payments that are permitted under domestic law. This is because the law currently condones commercial surrogacy arrangements in two ways – by granting parental orders (which requires the court to authorise the payments that have been made) and making damages available to fund the cost of commercial surrogacy overseas. In the first of these instances, the courts are prioritising the welfare of the child; in the second (the *Whittington* case) the court is accepting that it is not against public policy to make the award (that is, its reasoning is, to a degree "negative"). We think both of these reasons fall short of meaning that the law "positively" accepts commercial surrogacy – or to put it another way, neither means that commercial payments should logically be permitted as a matter of domestic law.

12.92 This dichotomy is similar to the situation in countries which prohibit surrogacy altogether, but where they nevertheless have an obligation to recognise the legal status of any child born through surrogacy overseas where the intended parents are nationals of that country, as can be seen in the *Mennesson* case.[38]

12.93 In addition, the question of whether commercial payments should be permitted within the UK was not one that the Supreme Court was asked to answer in the *Whittington*

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[37] [2020] UKSC 14, [2020] 2 WLR 972.

[38] *Mennesson v France* (App No 65192/11). See also *D B and others v Switzerland* (2022) (App Nos 58817/15 and 58252/15).

case. It would be inappropriate to extrapolate policy on domestic commercial payments from a decision which did not relate to them.

12.94 We acknowledge that there is, nevertheless, a tension in this situation. The policy considerations that led to limitations being put in place are undermined if surrogacy agreements are simply "exported" to countries and jurisdictions where commercial payments are permitted. These concerns appear particularly pertinent where the surrogacy takes place in a developing country, where women are more vulnerable to exploitation than in the UK because of the potentially life-changing impact of the payments received.

12.95 Our response to these concerns has been to maintain a non-commercial stance in relation to domestic surrogacy and design a system – the new pathway – which will offer an incentive to intended parents to enter into a surrogacy agreement in the UK rather than going overseas.

Compensatory payments

12.96 In the Consultation Paper, we invited views as to whether the intended parents should be permitted to pay compensation to the surrogate for the pain and inconvenience of pregnancy and childbirth, for medical treatments relating to the surrogacy, and for specified complications. If such payments were permitted, we invited views as to whether the level of compensation paid should be left to the parties to determine or be a fixed fee set by a regulator.

12.97 Compensatory payments for a range of events are paid under the current law. In the Consultation Paper, we noted that we have come across flat fee payments in surrogacy agreements for matters including an insemination or embryo transfer taking place, for multiple births and caesarean sections, as well as where the surrogate must have her ovaries and/or fallopian tubes removed or requires a hysterectomy.[39]

12.98 Not permitting such payments, therefore, will mean that payments that currently appear to have been judicially accepted as constituting "expenses reasonably incurred" would be prohibited in any future surrogacy law. We are aware (from the work conducted for the Consultation Paper) that flat fee compensatory payments of the type referred to in the paragraph above are commonly made and that parental orders are granted in these cases. It is not always apparent, however, from court judgments, whether the court has accepted a payment as an expense reasonably incurred or is authorising the (over) payment. And in most instances of domestic surrogacy the parental order application will have been heard by lay justices, and hence not appear in the law reports.

12.99 Nevertheless, we do not recommend that compensatory payments should be permitted. We are persuaded by the views of consultees that provision for compensation is difficult to separate from paying the surrogate for her gestational services. We accept that a woman who becomes a surrogate is necessarily accepting that pregnancy involves a degree of pain, inconvenience, and loss of amenity. We also note that a surrogate accepts, to an extent, medical risks associated with surrogacy, and will have made the decision to become a surrogate with those risks in

[39] Consultation Paper, para 14.22.

mind.[40] We do not think it is desirable to persuade a woman to accept these risks because she will be financially compensated for them. We do not, however, consider that the risk should lie solely with the surrogate. As we discuss elsewhere in the report, we recommend that intended parents should be required to pay for life and critical illness insurance for a surrogate, to provide financial protection to her and her family.[41]

12.100 We further accept that the surrogate should generally be protected from the financial consequences of complications that arise during the pregnancy. We are persuaded by consultees who suggested that a distinction should be drawn between general compensatory payments for complications on the one hand (which will not be permitted), and reimbursement for costs arising from those complications on the other. Specific costs arising from such complications will be permitted under the other categories of payment, for example medical costs or additional childcare while the surrogate recovers from the birth. As we discuss below, it would also be permissible for the intended parents to fund private medical treatment for the surrogate, perhaps by way of an insurance policy to cover medical and related costs arising from the pregnancy.[42]

12.101 In view of our recommendation that compensatory payments should not be permitted, the secondary issue of whether compensatory payments should be determined by the parties or based on a fixed fee falls away.

12.102 Our recommendation means, for example, that it will not be possible for the intended parents to pay the surrogate a flat fee for undergoing an embryo transfer. Payment of such a fee would be tantamount to paying the surrogate for her gestational services. However, if the surrogate is financially worse off for undergoing the procedure, then the intended parents will be permitted to reimburse her. That may include paying the surrogate for lost earnings if the time during which she is unable to work is not otherwise paid, and for travel costs incurred. Similarly, if the surrogate is unwell during the pregnancy, then the intended parents will be able to pay for childcare and other domestic costs to support the surrogate; however, they will not be able to pay her a fee or allowance to compensate her for her ill health.

General living expenses

12.103 We did not ask in the Consultation Paper whether the intended parents should be able to pay the surrogate's general living expenses. We are not aware that such costs are usually met by the intended parents. We have, however, seen mobile phone bills, gas and electricity bills and rent listed as expenses in some surrogacy agreements.[43]

12.104 We take the view that some of the concerns directed at permitting payments for gestational services apply equally to permitting payments to cover the surrogate's general living expenses. In particular, we are concerned that there is a risk that

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40 We have addressed this in our screening and safeguarding recommendations in Chapter 8, whereby medical advice and information should be provided before the surrogate enters into the agreement.

41 Para 8.133.

42 Para 12.131.

43 Consultation Paper para 14.22.

women who are struggling financially could look to surrogacy to provide them with a period of financial security if their general living expenses could be funded in this way. Similarly, there is a risk of women being coerced into surrogacy by a spouse or partner or other family member, if surrogacy could provide a means of meeting the family's costs of living.

12.105 We think it is essential that a woman who is considering becoming a surrogate is not doing so as a means of supporting herself or her family. Prohibiting payments that cover general living expenses would help to ensure that women who become surrogates do so from a position of financial security, rather than financial vulnerability.

12.106 We acknowledge that financial circumstances can change during the course of a surrogacy agreement. Financial security can be lost through unexpected illness or redundancy, for example (whether of the surrogate or of her spouse or partner). Where this happens prior to conception, the appropriate course of action may be to delay conception or end the agreement. Where loss of financial security happens during pregnancy, it may be natural for the intended parents to want to help the surrogate, and we recommend that short-term assistance should be acceptable – not least as this may well be in the best interests of the child to be born, for example to reduce the stress of the surrogate.

12.107 We consider that the following types of payments are examples of those that constitute general living expenses, and should therefore not be permitted (this list is not intended to be exhaustive):

(1) payments towards a mortgage or rent;

(2) payments to cover the cost of groceries, other than additional costs to meet dietary requirements of the surrogate during the pregnancy;

(3) payments for utilities, including council tax, gas, electricity, water, mobile and fixed line telephony and for internet service; or

(4) payments for subscription services such as television or entertainment services.

12.108 We consider that these categories of payment should be precluded, not just in relation to the surrogate, but also in relation to the surrogate's family members. For example, if the law did not permit the intended parents to pay the surrogate's own costs of living but enabled them to pay the costs of living of the surrogate's children, risks of exploitation would not be alleviated. The prohibition should also cover provision in cash or in kind; for example, the intended parents would generally not be able to provide the surrogate with accommodation, just as they cannot pay for her mortgage or rent.

12.109 For the avoidance of doubt, we think that payments that do not clearly relate to a specified cost, and, for example, are simply payable in instalments on a monthly basis during the pregnancy (sometimes with a larger payment post-birth) are unacceptable.

Recommendation 54.

12.110 We recommend that intended parents should be prohibited from making payments to the surrogate that fall into the following categories:

(1) payment for gestational services/payment for carrying the child born of the agreement;

(2) compensatory payments;

(3) payment for general living expenses; and

(4) payments for unspecified costs, whether payable in a lump sum or instalments.

12.111 Payments set out in this recommendation are not included in those payments which the intended parents can make to the surrogate under clauses 39, 40 and 42 of the draft Bill, and are therefore prohibited.

Permitted and mandatory payments

12.112 We set out below the categories of payments to the surrogate that we recommend should be permitted, whether in the new pathway or in the parental order process. In the draft Bill these are called “permitted payments” and “mandatory payments”, with the latter being those payments that the intended parents must offer to make to the surrogate, rather than simply being permitted to pay. We then turn to the level of payments permissible, and the length of time for which costs agreed by the parties will be treated as recoverable by the surrogate from the intended parents under the new law.

12.113 The detail of permitted payments will be contained in secondary legislation, with further guidance for RSOs to be contained in the surrogacy Code of Practice. The draft Bill provides that the regulations setting out the detail of categories of payment will have to be approved via the affirmative resolution procedure (whereby the regulations must be approved by Parliament, rather than Parliament having the opportunity to initiate a procedure to reject the regulations). Leaving the detail of the permitted payments to secondary legislation allows for further consideration and consultation as to precisely what payments within each category should be allowed. Furthermore, leaving detail to secondary legislation rather than having it on the face of the draft Bill means that amendments can be more easily made to what is permitted; for example, if experience of the scheme in practice shows that changes are required.

12.114 While no single view united all consultees, responses suggest a consensus around the idea that the surrogate should not be left financially worse off as a result of the pregnancy. Of those consultees who would prefer surrogacy to be prohibited, only a minority felt that the surrogate should bear all costs of the pregnancy and rejected the notion of any payments being made to the surrogate to ensure that she is not left financially worse off. Of consultees who supported some degree of permitted payments there was, however, a wide divergence in views as to what payments

should be permitted, and the extent to which payments beyond unavoidable costs should be made.

12.115 We do not agree with the view expressed by some consultees that the payments made to surrogates are indicative of surrogacy operating as a "business" in which poor women are exploited. The payments that are in issue here are those made directly to the surrogate, not to an agency, and are not designed to enable her to profit from being a surrogate. We accept that currently there can be a lack of transparency around the payments that are made, which understandably gives rise to questions as to the nature of those payments. We also acknowledge that some intended parents and surrogates openly accept that payments that are currently made may not all be spent for their intended purpose. Some consultees suggested that the sums currently paid are too high to represent expenses and are therefore indicative of "commercial" payments. We note, however, that the total sums paid at present do not only reflect reimbursement for goods or services but may include (for example) the surrogate's lost income, which could be a considerable amount.

12.116 We have approached our assessment with four guiding principles in mind, set out above at paragraph 12.9. With regard to the third principle, that the costs in question are those which are typically incurred during pregnancy and would have been incurred directly by the intended parents themselves in a personal pregnancy, our proposals therefore seek to ensure that they are the ones who bear them in a surrogate pregnancy. Related to this is the fact that a surrogate pregnancy is different to a pregnancy that a woman undertakes to have her own children. A woman acting as a surrogate may quite reasonably wish to ensure that her pregnancy does not impact on her spouse, partner or family in the same way that a pregnancy to have her own child would do so. We therefore consider it acceptable, for example, that the additional domestic support a woman may obtain when she is pregnant with her own child – from her spouse, partner or family – is obtained from the intended parents, typically on a paid basis, in a surrogate pregnancy. As a result of our recommendation that payments for gestational services should not be permitted, we are keen to ensure that such payments are not made indirectly by way of payment for other costs.

12.117 In light of these factors, we have found it useful to take a granular approach to the types of costs that intended parents should be able to pay to the surrogate. We have considered directly whether particular types or categories of payment should be permitted, and what kinds of payments may fall within each category. Our intention is to ensure that the surrogate is neither financially advantaged nor disadvantaged by the surrogacy but is shielded by the intended parents from the costs of the pregnancy – in the same way that they would bear the costs if one of them was pregnant. This approach is reinforced by our discussion above, regarding the basis upon which these costs should be payable.[44] As we explain above, we reject an allowance-based system and recommend that the money paid to a surrogate is a reimbursement of actual costs incurred (while permitting a pre-payment 'float' system).

12.118 In a subsequent section below we set out our approach to the recoverability of permitted payments. We recommend that the surrogate will be able to recover from the intended parents permitted payments that were promised within a fixed period

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[44] Para 12.9.

from the point of the surrogacy agreement, until (generally) six weeks after the birth (but not paid to her). This would include payments which were promised, but not due to be paid until after the regulated period. For the avoidance of doubt, that does not mean that any action to recover such payments by the surrogate needs to be brought within this period. The sums payable to the surrogate would, under the draft Bill, constitute a debt, and an action to recover the debt would be subject to the general law of limitation of actions. On the new pathway the surrogate can recover payments agreed in an annex to the Regulated Surrogacy Statement, or later approved by the RSO. In relation to a parental order, the court will be able to determine the amount recoverable by the surrogate as reflecting her permitted and mandatory costs. In the new pathway there will be a system of regulatory sanctions on RSOs in relation to payments. We outline a system of civil penalties for prohibited payments but leave to the UK Government the question of whether to adopt it.

12.119 We recommend that the following categories of cost should be permitted and recoverable by the surrogate. These payments will be permitted, and there is no expectation that in all cases intended parents will make payments in each category. The second and third categories set out below will, however, be mandatory payments that the intended parents must offer to pay. We recommend separately further costs which should be permitted but be non-enforceable by the surrogate against the intended parents and we discuss these separately at para 12.152 to 12.162 below. In summary, the permitted and recoverable costs fall within the following categories:

(1) costs related to the decision to enter into a surrogacy agreement;

(2) costs of new pathway screening and safeguarding;

(3) insurance for the surrogate;

(4) medical, wellbeing and related costs;

(5) pregnancy-related items;

(6) additional food costs;

(7) costs of domestic support that the surrogate ordinarily undertakes;

(8) travel and occasional accommodation costs;

(9) costs of maintaining contact between the surrogate, the intended parents and the child born of the agreement; and

(10) lost earnings.

Costs related to the decision to enter into a surrogacy agreement

12.120 We consider it uncontentious that the intended parents should be able to pay all costs related to the decision to enter into a surrogacy agreement. This will include the costs incurred while the intended parents and surrogate get to know each other and decide whether to enter into a surrogacy agreement with each other; for example, the costs of meeting up for social occasions to facilitate doing so. We do not consider that there are particular risks of exploitation regarding money that the intended parents

spend prior to a decision to enter into a surrogacy agreement. Some of this money may be paid directly to the surrogate – for instance, to cover travel expenses to meet the intended parents. However, much of this money will not be paid directly to the surrogate – for instance, where the intended parents take the surrogate out for dinner and pay for the meal. Accordingly, the draft Bill does not prohibit such payments being made before the surrogacy agreement is entered into.

Costs of new pathway screening and safeguarding requirements

12.121 We now turn to two categories of payment which we recommend that the intended parents be obligated to fund.

12.122 In Chapter 8, we recommend that, as part of the new pathway, the surrogate and intended parents will need to comply with certain screening and safeguarding requirements for entry to the new pathway: criminal record checks; medical checks; implications counselling; independent legal advice; and the pre-conception child welfare assessment in relation to the child born of a surrogacy arrangement.

12.123 While we did not ask specifically about payment of these costs in the Consultation Paper, we take the view that not only should it be permissible for the intended parents to pay these costs, but they should be required to do so, unless the surrogate specifically wishes to pay these costs (or a proportion of them) herself.

12.124 The strongest argument in favour of making payment by the intended parents mandatory is that the screening itself is, in the new pathway, mandatory, so the costs will inevitably be incurred. If the surrogate were to pay for the screening, that would mean that the surrogate would be left financially worse off as a result of the surrogate pregnancy; it might also be considered to be exploitative for the surrogate to pay for these protective provisions. Therefore, making payment by the intended parents merely permissible rather than mandatory could be said to offend against the general principles which have guided our thinking about payment.

12.125 It is also possible that, were the payment only to be permissive, the surrogate may not receive the level of protection that she was seeking, even where the basic screening requirement had been met and paid for by the intended parents. For example, the surrogate may want an additional implications counselling session but feel unable to attend one where the intended parents refuse to pay, and will only agree to pay for the basic level of screening.

12.126 On the other hand, requiring the intended parents to pay does take away the autonomy of the parties to decide what works best for them; a surrogate may wish to share or meet her screening costs. We think that our recommendation strikes a balance between requiring the intended parents to pay these costs but allowing some flexibility.

12.127 We exclude the enhanced criminal records checks and the pre-conception child welfare assessment from these mandatory costs as these costs will be met by the RSO, rather than the intended parents. The former cannot be obtained by individuals, while it will be for the RSO to carry out the pre-conception child welfare assessment. The RSO will be able to recover these costs from its clients or members as part of any fee that they charge.

Insurance for the surrogate

12.128 We note the overwhelming support from consultees not opposed to surrogacy (and indeed support from some who were) for it to be possible for intended parents to pay for life insurance for the surrogate. Indeed, many consultees thought that it should be mandatory for them to do so. We consider life insurance to have an important protective benefit for the surrogate and her family or dependents. Therefore, we agree with those consultees who considered that it should not only be permissible for the intended parents to pay for life insurance for the surrogate but that they should be required to do so. We are also aware from surrogacy organisations that critical illness cover – to insure against the surrogate developing a long-term and very serious health condition – is also paid for by some intended parents. We also think that it should be mandatory for such cover to also be provided. Practically, however, we can only mandate these payments in the new pathway.

12.129 We recognise that the payment of premiums for life and critical illness cover might be understood as being compensatory in nature, when we have generally rejected such payments. The question then arises as to why we consider that the surrogate's family should be compensated in the event of her death, or the surrogate compensated in the event of her developing a long-term and very serious health condition. Ultimately, we see the provision of critical illness and life insurance as an exception that is justified by the outcomes against which these provisions insure, being the worst possible outcomes for the surrogate and her family. We recognise that there are risks inherent in every pregnancy, whether surrogate or not, and we think it is appropriate to seek to protect the surrogate and her family from the financial impact of these risks, while acknowledging that they will bear the emotional and physical impact. In these circumstances, an insurance solution is sensible because few intended parents would be able to meet the costs arising from the surrogate's death or critical illness from their own resources. We are also mindful that the provision of life insurance is customary for surrogacy agreements currently happening under the auspices of surrogacy organisations. The cost of the insurance should be modest, where – as should be the case – the woman acting as surrogate is healthy.[45]

12.130 If the surrogate already has such cover then the intended parents would be able to meet the requirement by covering the existing cost of the premiums for an agreed period. Such insurance may also be already provided by a third party, such as the surrogate's employer. In that instance, we think that either the policy would continue to be paid by the employer, in which case the surrogate is not out of pocket, or the employer would stop providing the benefit and the intended parents would pay for alternative cover. If payments for insurance are made by another third party (for example, a family member) then it seems likely to be the case that the surrogate is in fact responsible for the payment, and the intended parents could make the payments on her behalf (in place of the family member) for the agreed period.

[45] We have been told, for example, by a surrogacy organisation that the usual cost for cover of £250,000 for this period is around £200.

Medical, wellbeing and related costs

12.131 We recommend that the intended parents should be permitted to pay for a range of medical and related costs arising from the pregnancy, including but not limited to:

(1) medication and vitamins which the surrogate needs, or which will be beneficial to her, for the pregnancy;

(2) private medical care related to the pregnancy (which could be funded by insurance). The intended parents would not be able to pay for private medical treatment for any pre-existing conditions, as such payment could operate as a financial incentive for a woman to become a surrogate. It is also not anticipated that the intended parents would pay for treatment for unrelated medical conditions during the pregnancy. It is acknowledged, however, that the relationship between a medical condition and the pregnancy may not be known, and that the appropriateness of the intended parents paying for medical treatment will be a matter of judgement in each situation and should be discussed with the RSO where there is one. Further, it would be appropriate for intended parents to pay for private treatment for a medical condition which may be unrelated to the pregnancy, but which impacts upon the pregnancy because of its effect on the health of the surrogate or foetus. Should NHS treatment and care during the pregnancy result in a financial cost being incurred by the surrogate, it will also be appropriate for the intended parents to pay such costs;

(3) counselling and other mental health support services (this would include counselling for the surrogate's partner/spouse, and her immediate family); and

(4) physiotherapy, massages, antenatal classes and other classes or services (including fitness) intended to support pregnancy, including a doula.

Pregnancy-related items

12.132 This category includes maternity clothing, comfort aids, and sanitary items.

Additional food costs

12.133 This category is to support the surrogate's dietary needs during pregnancy, but to the exclusion of basic subsistence costs for food which she would need in any event.

Costs of domestic support for tasks that the surrogate ordinarily undertakes and that it is not reasonable for her to undertake for reasons related to the pregnancy

12.134 This category includes:

(1) childcare costs beyond those that the surrogate would generally pay herself. The expectation is that the intended parents could pay for these costs where the surrogate is unable to provide the care for her children that she would usually provide herself—for example, because she is attending medical appointments relating to the pregnancy, or as a result of general tiredness as the pregnancy develops, or specific ill health or complications during the pregnancy. We do not, however, consider that it is necessary or feasible to impose strict limitations, as the level of childcare required may vary significantly between agreements;

(2) household services, such as cleaning or gardening; and

(3) occasional takeaway or restaurant meals for the surrogate and her family.

12.135 Payment should only be permitted for tasks that fall within the above definition that need to be done at the time and cannot be deferred until after the pregnancy: so it would not be appropriate, for example, for the intended parents to pay for longer term costs such as redecoration or maintenance of the surrogate's house. The potential impact of surrogacy on such longer-term plans is a matter that a woman can be expected to take into account when deciding whether to become a surrogate.

Travel and occasional accommodation costs for a purpose linked to the surrogacy

12.136 This category covers, for example, travel costs to and from clinics for artificial insemination, egg-recovery or IVF, and for medical appointments, as well as travel to meet the intended parents. Overnight accommodation would also be permitted to allow for instances where a return journey cannot practicably be made in the same day.

Costs of maintaining contact between the surrogate, the intended parents and the child born of the agreement

12.137 This would include travel costs so that the surrogate can maintain contact with the intended parents and the child after the child's birth. It is common practice for the surrogate to maintain contact with the child born of the agreement, and the intended parents, and this ongoing relationship also encourages and facilitates openness with the child as to his or her origins. These costs will be recoverable, if they relate to costs incurred during the pregnancy and for up to six weeks after the birth (in line with our general position on the length of time for which costs should be recoverable by the surrogate).[46] Any agreement as to payment in respect of contact costs beyond the six weeks can be set out in any wider (unenforceable) agreement, separate from the financial arrangements included in the Regulated Surrogacy Statement.

Actual lost earnings

12.138 We asked consultees open questions about what intended parents should be able to pay surrogates under the reformed law with regard to lost earnings, both actual and potential. The questions raised issues regarding what amounted to payment for gestational services and other important points, including:

(1) how to calculate lost earnings where the surrogate is self-employed;

(2) which factors should be included within "actual lost earnings";

(3) whether the surrogate's spouse/partner's lost earnings can be paid for by the intended parents;

(4) intended parents' liability for lost earnings post-birth and whether there should be a time limit on this;

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[46] Para 12.180.

(5) whether the surrogate should be required to provide a medical note for any time taken off; and

(6) whether the surrogate's lost potential earnings can be paid for by the intended parents.

12.139 One consultee expressed concern that allowing intended parents to "top up" the surrogate's earnings could incentivise intended parents to choose lower-paid surrogates, to reduce their costs. While we agree that this would be undesirable, we do not have evidence that it happens in the domestic context, given that it is generally surrogates who choose whether to form an agreement with intended parents (since there are more intended parents than women who wish to act as surrogates). It is likely that all surrogates – whatever they earn – would, if they choose, be able to form an agreement with intended parents who are comfortable with the costs involved for that particular agreement. In addition, we consider that the arguments in support of intended parents paying the surrogate for her loss of actual earnings outweigh this concern.

12.140 Furthermore, on a practical note, prohibiting this category of payment would potentially require surrogates to accept that they will be left significantly financially worse off in order to participate in a surrogacy agreement. We think this restriction would be a disincentive to surrogates in domestic agreements to use the new pathway, run contrary to our overall aim to promote transparency and clarity on payments, and instead drive the practice of surrogacy outside the scope of regulation.

12.141 We are also not persuaded by the argument made by some consultees that permitting such reimbursement would amount, in effect, to payment for a gestational service. On this same line of reasoning, the existence of statutory maternity pay could be seen to be a state payment for a gestational service. Moreover, it only applies where the surrogate is earning: if it were truly a payment for gestational services then it could be claimed by all surrogates, regardless of their employment status. Instead, we agree with the argument that actual lost earnings form part of the costs incurred by the surrogate. Effectively, this means that the intended parents are incurring the lost earnings, in the way that they would for their own pregnancy. We consider that if the surrogate needs to take time off work due to illness during the pregnancy, intended parents should be able make up any shortfall in her earnings that results. We also consider that intended parents should be able to make up any shortfalls if she is unable to return to work post-birth due to illness associated with pregnancy or birth complications.

12.142 We recommend that the payment of actual lost earnings should be permitted. Actual lost earnings would be the difference between the actual maternity pay received by the surrogate and what she would otherwise have earned. This approach takes into account the fact that some employers will pay more than the statutory minimum for maternity pay, under contractual arrangements.

12.143 We considered for how long after the child's birth the intended parents' liability should continue. With respect to a limit for the intended parents' potential liability, we take the view that while six weeks post-birth (in line with the general position), is a reasonable length of time, it may be necessary for intended parents to make up any shortfall between the surrogate's sick pay and the level of her earnings for more than six

weeks post-birth, on medical grounds. For example, if a difficult caesarean birth means that the surrogate is unable to return to work within six weeks, and requires, say, a further four weeks of recovery, then the intended parents should be permitted to make up any shortfall between the surrogate's maternity pay and her usual earnings during this additional period.

12.144 We considered whether the surrogate should be required to provide medical evidence of her time off work. We decided that medical evidence should be required unless it is in the period where self-declaration is possible, as this is in line with the requirements for claiming statutory sick pay.[47]

12.145 We do not recommend that statutory paternity leave and pay be extended to a surrogate's spouse or partner.[48] However, we do take the view that it should be permissible for intended parents to cover the cost of any lost pay for a person who takes up to two weeks off work to provide general support and help to the surrogate in this immediate post-birth period.[49]

12.146 We take the view that the intended parents should be able to pay for the surrogate's lost pension or National Insurance contributions if there is a shortfall.

Potential lost earnings

12.147 In the Consultation Paper, we distinguished between payment for actual lost earnings and payment for "potential" lost earnings. We divided the latter category into two: we termed lost overtime, bonuses and sales/commission, calculable with some degree of certainty, as "lost employment-related potential earnings"; while we termed potential earnings lost by not taking new job opportunities, or forgoing seeking alternative employment, as "other lost potential earnings."[50]

12.148 The weight of opinion amongst consultees was that the surrogate's lost employment-related potential earnings should be payable, but not other lost potential earnings. We make a recommendation in line with these views.

12.149 In practice, we think that this means that the intended parents should be able to make payments to the surrogate covering the following situations:

(1) surrogates who habitually work overtime and are paid accordingly (including any additional payments for working unsociable hours);

(2) surrogates paid a basic salary with a "commission" or performance-related element (including tips);

(3) surrogates who work on zero-hours contracts, under which the surrogate has no entitlement to a certain number of hours' work, and can accept or refuse to do work as and when it is offered; and

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47 Statutory Sick Pay (Medical Evidence) Regulations 1985 (SSI 1985 No 1604) para 2.

48 Para 15.40.

49 Paras 15.82 to 15.84.

50 Paras 15.34 to 15.36 of the Consultation Paper.

(4) surrogates entitled to non-discretionary bonus schemes.

12.150 We think these payments are readily ascertainable; for example, by reference to what the surrogate has actually earned in a period prior to entering into the surrogacy. Further, a surrogate working through one of the arrangements above is very likely to be left worse off if only actual lost earnings can be paid; for example, a surrogate on a zero-hours contract will not be able to show that she was entitled to any payment at all during the period she is unable to work due to the surrogate pregnancy. Therefore, we recommend that surrogates should be able to receive such employment-related lost potential earnings.

12.151 However, we do not think that intended parents should be able to pay surrogates for what we have called other lost potential earnings. Such payments are both too speculative and therefore not readily ascertainable and, more importantly, too likely to act as a financial inducement for a woman to agree to act as a surrogate.

Recuperative holiday

12.152 We noted in the Consultation Paper that a recuperative holiday for the surrogate and her family after the birth of the child was a cost commonly provided for in agreements prepared by some surrogacy organisations, and that a payment for this purpose has been accepted in case law as being within the statutory formulation of an expense reasonably incurred.[51] We did not ask a specific question in the Consultation Paper about whether it should be permissible for the intended parents to pay for a holiday, but we did mention this as an example of a cost associated with a surrogacy agreement and pregnancy.[52] However, this specific payment was raised by many consultees.

12.153 The question of whether a recuperative holiday should be permitted is not straightforward; on the one hand, it is intellectually difficult to justify permitting payment for something that is not intrinsically connected to the pregnancy. On the other hand, this is a well-established practice, which has been accepted in case law, and has a clear purpose in allowing the surrogate and her family time to recuperate and re-connect as a family. Payment for such a holiday was also supported by the majority of consultees who are not opposed to surrogacy. We also do not have any evidence that the provision of a recuperative holiday is likely to act as a sufficient financial inducement for a woman to enter into a surrogacy agreement. The holidays we have heard about have typically been modest.

12.154 We therefore recommend that payment for a recuperative holiday of modest cost for the surrogate, and her partner and family, if any, be permitted if included in the financial annex to the Regulated Surrogacy Statement. However, inclusion of the cost of the holiday in the annex will not, exceptionally, allow it to be recoverable by the surrogate against the intended parents. This is because we think that the holiday has some of the characteristics of a gift – which means that it should be capable of being enforced – but it would be useful for payment for it to be recorded in the financial annex, as this will allow more accurate monitoring of the payments made to the surrogates for such holidays. Lack of recoverability also means that any concerns

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51 *Re A, B and C* (UK surrogacy expenses) [2016] EWFC 33.

52 Consultation Question 75.

about the holiday acting as a financial inducement should be mitigated, as the surrogate cannot legally rely on the undertaking to provide it.

Gifts

12.155 In the Consultation Paper, we acknowledged that the exchange of gifts between the intended parents and surrogate was both natural, and, in practice, a feature of the surrogacy agreements that we had heard about. Such gifts were typically modest and sentimental in nature, such as an item of jewellery.[53] We are aware that gifts can be made from the intended parents to the surrogate but also from the surrogate to the intended parents or indeed the child born as a result of the agreement.[54]

12.156 We are alive to the possibility that expensive gifts to the surrogate would circumvent not allowing payments or compensation to the surrogate for carrying the child. Such gifts would reintroduce the possibility of financial inducement for entering into a surrogacy agreement. Accordingly, in the Consultation Paper, we asked whether intended parents should be able to buy gifts for the surrogate and, if so, whether these gifts should be required to be modest or reasonable in nature.

12.157 Those consultees who supported surrogacy regulation were not opposed to the giving of gifts. Many saw this as a valuable part of the ongoing relationship and friendship between the intended parents and the surrogate and were opposed to interference in this area.

12.158 We acknowledge those views and agree that it would not be desirable to prevent the making of all gifts. It would also not be practical in the sense that we are not seeking, in our scheme, to regulate forever all payments, or transfers (of goods or services) that have a monetary value, between the intended parents and the surrogate. The relationship between the intended parents and surrogate is likely to continue for many years after the surrogacy. It would neither be practicable nor desirable for the law to seek to regulate their relationship forever, on the basis that it at some point in the past involved surrogacy. Nonetheless, there is a risk that the giving of expensive gifts by the intended parents to the surrogate does constitute a risk of financial inducement to the surrogate to enter the surrogacy agreement or not to withdraw her consent. To some extent, that risk can be alleviated by a law that stipulates that, in accordance with their voluntary nature, any undertakings to make a gift will not be recoverable by the surrogate. Importantly, the screening and safeguards that we recommend, especially on the new pathway, will also reduce any such risk.

12.159 We therefore recommend that – consistent with their nature as a voluntary act – any gifts should not be included in the payments the intended parents agree to make to the surrogate as part of the surrogacy agreement. They will not therefore be recoverable by the surrogate against the intended parents. However, we would wish for there to be consequences if the intended parents do make gifts in excess of the statutory regime. We therefore recommend that gifts to the surrogate should be reported to the RSO by intended parents so that the organisations can monitor the

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53 See paras 15.57 to 15.59 of the Consultation Paper.

54 The draft Bill provides a power, at clause 42, to prescribe what it calls “permitted discretionary payments”, including gifts and payments for a recuperative holiday, with scope for other payments of this type to be prescribed.

level of gift-giving and ensure that it is within appropriate limits. Intended parents should also be able to check beforehand with RSOs for guidance on whether a specific gift would fall within such limits. In the parental order process, gifts would be reported to the court. If gifts are made that fall outside these limits then the approach to enforcement discussed below would apply.[55]

12.160 In line with the regulation that we recommend for nearly all other payments we are of the view that any regulation of gifts in the context of a surrogacy agreement should cease six weeks after the birth of the child.[56] That is to say, only gifts made or promised up to the end of that time should be subject to regulation, with consequences for any gift made or promised in excess of the statutory regime.[57] Gifts made or promised after the expiry of that time would not be subject to regulation.

12.161 As we have said, we also recommend that gifts should be constrained within appropriate limits. One option would be to impose a cumulative financial limit on gifts, over the course of the pregnancy up to the end of the six-week period after birth. The advantage of such a limit is the clarity and certainty it provides for all concerned. However, the disadvantage of this option is the possibility that this sets a somewhat arbitrary figure and risks "normalising" a gift of this amount, with the consequence that the gift becomes perceived as an expected payment rather than a gift. Moreover, although a hard limit may be easier to implement, it does not reflect consultees' views.

12.162 Instead, we recommend that the RSO, or the court, should determine what a modest gift is in the circumstances. This approach has the benefit of recognising that what is important is not so much the absolute financial value of the gift, but whether it operates as a financial inducement sufficient to persuade the surrogate to undertake surrogacy, not to withdraw her consent, or to provide consent for a parental order, when she was otherwise minded to make a different decision.

National insurance, pension contributions, and means-tested social welfare benefits

12.163 Finally, we mention the issue of the relationship between payments received by the surrogate and means-tested social welfare benefits, such as Universal Credit. We agree with the view of the majority of consultees that a surrogate who claims means-tested social welfare benefits should not be left financially worse off as a result of surrogacy. We note, however, that any reform of the welfare benefit system is both outside the scope of this project, and the role of the Law Commissions.

12.164 The underlying difficulty is that the payments received by surrogates from the intended parents under the current law and under our recommendations are wider in scope than the types of payments classed as expenses for the purposes of social security. So, payments that would be understood as expenses for the purposes of the current surrogacy law would not qualify as expenses for the purpose of social security law and would thus be counted as income received bv the surrogate. As the same concept of expenses is used across the social welfare system it is difficult to envisage a different (and more generous) approach being taken for surrogacy. We also

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55 Para 12.225.

56 Exceptions are set out below at para 12.182.

57 We discuss below our reason for this time period at para 12.180.

acknowledge the point raised by consultees that any additional payment made to the surrogate to make up for a deduction in her entitlement to social welfare benefits would itself be counted as income and so impact on her entitlement.

12.165 We also consider it likely that there may well be a negative impact on the pension and National Insurance contributions of a woman acting as a surrogate, which it may be very difficult for intended parents to compensate accurately or comprehensively. RSOs should make sure that surrogates are aware of the financial risks of undertaking a surrogate pregnancy.

12.166 In conclusion, we feel that any reform in these areas, or the provision of guidance, is a matter for the Department for Work and Pensions in the case of welfare benefits payable to the surrogate. For these reasons we are not minded to make any recommendations in this area, including with regard to recommending favourable tax or benefits treatment of surrogacy agreements in the new pathway.

Recommendation 55.

12.167 We recommend that the law should:

(1) permit intended parents to pay to the surrogate costs which fall in the following categories:

(a) those costs related to the decision to enter into a surrogacy agreement;

(b) medical, wellbeing and related costs;

(c) pregnancy-related items;

(d) costs of additional dietary requirements related to the pregnancy for the surrogate;

(e) costs for specified forms of domestic support;

(f) travel and occasional overnight accommodation for a purpose linked to the surrogacy agreement;

(g) the costs of the surrogate maintaining contact with the intended parents and the child after the birth;

(h) the surrogate's actual lost earnings (whether the surrogate is employed or self-employed) to include pension and national insurance contributions;

(i) the surrogate's lost employment-related potential earnings;

(j) actual lost earnings and lost employment-related potential earnings for up to two weeks for a person who takes time off work to support the surrogate post-birth; and

(k) a modest recuperative holiday for the surrogate and her family;

(2) permit intended parents to make modest gifts to the surrogate;

(3) on the new pathway, unless the surrogate wishes to pay all or a proportion of them herself, require intended parents to meet the costs of:

(a) the surrogate taking out or maintaining an agreed level of life insurance and critical illness cover for herself beginning with the commencement of any fertility treatment and lasting from two years from the point of conception; and

(b) the screening and safeguarding requirements (with the exception of the criminal records checks and welfare of the child assessment).

12.168 This recommendation is given effect by clauses 39, 40 and 42 of the draft Bill, with the requirement for the intended parents to meet the costs set out in paragraph (3) of the recommendation being given effect by clause 6(6), as part of the pre-approval checks for the Regulated Surrogacy Statement.

Level of payments

12.169 Where a type of payment is permitted, it is not intended that any statutory cap will be placed on the amount of money that the intended parents can pay the surrogate. For example, as long as money is being paid for maternity clothing, there will not be a cap on the amount of money that is paid. We do not consider that such a cap is necessary or appropriate for three reasons.

12.170 First, in relation to a number of items for which intended parents will be able to pay, the needs of surrogates will vary. Imposing a cap risks that surrogates will be left financially worse off. That concern could be alleviated by imposing a cap at the upper end of the likely cost, but the disadvantage of doing so is that it could normalise payments at that level and create an expectation that the cap is what the intended parents should be paying, and the surrogate should be spending.

12.171 Secondly, as long as the money is being used for the type of payment in question, there is no need to impose a cap as the surrogate is not being left with money in her pocket. We think it is more important to ensure that money is being used for permitted purposes than it is to place financial limits on the amount of money that is spent for those purposes.

12.172 Thirdly, as we explain below, we recommend (in respect of the new pathway) that information regarding the types of payments that will be made, and an estimate of the costs, will be shared with the RSO before the surrogacy agreement is authorised for the new pathway.[58] The need for authorisation mitigates any risk of payments being inflated as a means (indirectly) of providing a financial inducement to the surrogate. Where a parental order application is made, the courts will have regard to the level of payments made.

12.173 For the new pathway, the categories of costs envisaged for the particular agreement, and an agreed "ceiling" for costs in each category must be included in a financial annex accompanying the Regulated Surrogacy Statement. Inclusion in the annex will mean that the costs are recoverable by the surrogate against the intended parents, subject to certain exceptions, which we discuss below. Where either an additional (previously unanticipated) category of costs needs to be added to the annex, or the agreed ceiling for a category upwardly revised, the parties would need to take the new category or revised estimate to the RSO for approval. For example, a surrogate may anticipate requiring no or minimal payments for childcare costs or domestic assistance, but may ultimately require both following complications in the pregnancy or a change of circumstances (for example, a surrogate's parents may agree to provide childcare for her children, but then become unwell and unable to do so).

12.174 The draft Bill does not specify the reasons why an RSO could refuse to approve a cost for inclusion in the Regulated Surrogacy Statement (or subsequently) but the

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58 Para 12.255.

RSO could refuse approval where it was concerned about the payment. For example, the RSO might be concerned that the payment could offer a financial inducement to the woman to act as a surrogate. A surrogate's costs should be commensurate with her usual standard of living and that standard will, for example, inform the costs of the goods and services for which the intended parents are reimbursing her.

12.175 In the parental order process, it will be up to the court to check the payments that have been made at the time of the application for the parental order, going back to one year before the time at which the surrogacy agreement was entered into. As we have set out above, we recommend that, for the purpose of making a parental order, the court should continue to be able to approve payments. Provision for the court to do so replicates the effect of the current judicial discretion to approve payments which go beyond expenses reasonably incurred. In deciding whether to authorise such payments the court must have regard to the principle that the surrogate should be neither better nor worse off financially as a result of the surrogacy agreement. As explained below, approval by the court for the purposes of granting a parental order would not prevent action being taken against the intended parents for making a prohibited payment. Enabling the court to approve the payment for the purpose of granting the parental order would, however, separate the issue of making payments that are prohibited from the determination of legal parental status.

12.176 In the case both of the new pathway and the parental order process, the RSO, or the court, respectively, would, under one of the options that we suggest for enforcement, refer any prohibited payments made during the regulated period to a state enforcing authority which would have the power to issue financial civil penalties to the intended parents. This option would also involve a regulatory route to enforcement, with the Human Fertilisation and Embryology Authority ("HFEA") being able to take regulatory action against RSOs responsible for surrogacy agreements. RSOs will have to provide guidance to intended parents and surrogates with respect to permitted costs in surrogacy agreements. We provide more detail below on what RSOs must do, in the section of this chapter dealing with enforcement.[59]

[59] Para 12.225 onwards.

Recommendation 56.

12.177 We recommend that:

(1) in the new pathway:

(a) there should be no financial cap on payments made by the intended parents to the surrogate or on her behalf;

(b) such payments are to be approved by the RSO, which will consider whether to approve a payment in the light of this potential surrogate's standard of living; and

(c) the RSO must refuse to approve payments where it considers such payment might offer a financial inducement to the woman to become a surrogate.

(2) in the parental order process, the court will continue to have the power, for the purpose of making a parental order, to authorise payments made by the intended parents that are prohibited. In deciding whether to authorise a payment, the court should have regard to the principle that the surrogate should be neither better nor worse off financially as a result of the surrogacy agreement.

12.178 The first part of this recommendation, in respect of the new pathway, is given effect by clause 5(3)(b) of the draft Bill, which requires an RSO to make a statement in the Regulated Surrogacy Statement that it gives its approval to the surrogacy agreement being one to which section 4(1) applies, that is a new pathway surrogacy agreement. RSOs will have regard to the Code of Practice for surrogacy agreements, which will include the proper conduct of licensable surrogacy-related activity (clause 67(1)(a)), which definition includes advising in relation to, or monitoring payments in connection with, a new pathway surrogacy agreement (clause 51(1)(d)).

12.179 The second part of this recommendation, in respect of the parental order process, is given effect by the clauses dealing with the making of parental orders at clauses 16(10), 18(11), 19(8), which provide that, for an order to be granted, the court must authorise all payments made by the intended parents to the surrogate, except for payments in respect of mandatory costs. Further provision is made in clause 20 with regard to the meaning of payment and that the court must have regard to the principle that the surrogate should be neither better nor worse off financially as a result of the surrogacy agreement.

The time period during which payments are regulated and recoverable

12.180 Our recommended scheme prescribes all the payments that may be made by the intended parents to the surrogate, or costs which are paid on her behalf, during a certain period of time (called "the protected period" in the draft Bill). These are the payments which it will be permissible for the intended parents to make under the reformed law, during that time. Other payments will be prohibited. By "payment" we

include payment in money or money's worth (that is, something equivalent to money such as, for example, goods). Our scheme also covers payments made without prior obligation.

12.181 Most of these payments will also be recoverable by the surrogate provided that the costs are incurred or promised within this time frame, and only to the extent that they relate to that time frame. Of course, the costs must also fall within the permitted categories and have been either authorised by the RSO (in the case of new pathway agreements)[60] or found to be actually incurred, and approved, by the court (in the case of agreements on the parental order process). The issue of the costs being recoverable is separate, in the parental order process, from the authorisation of payments by the court for the purpose of making the parental order, discussed above.

12.182 After this time period, limits will cease to apply and payments made or promised outside this time period will neither be regulated nor recoverable. This general approach is subject to two exceptions:

(1) some payments, while permitted, will not be enforceable: the recuperative holiday; and gifts; and

(2) some payments, which we set out below, will be recoverable when incurred or promised during a longer period.

12.183 We have set the general time limit as running from the time the surrogacy agreement is entered into until six weeks after the birth. This approach matches the recommendation in the new pathway that the surrogate should have the right to withdraw her consent for six weeks after the birth (which would then allow her to seek a parental order, should she wish to do so).[61] Any payments made before or after that period will not be regulated or recoverable (subject to the exceptions set out below).

12.184 We take the view that the law should not seek to regulate or enforce payments from the intended parents to the surrogate made after six weeks post-birth. This is for several reasons.

(1) The six-week period represents the period during which the surrogate could withdraw her consent post-birth in the new pathway; any payments made after this date would not be an inducement to the surrogate not to do so.

(2) If, as is usual (at least in domestic surrogacy agreements),[62] the surrogate and the intended parents have become friends, it would be intrusive for the law to seek to regulate the giving of gifts between them for longer than is absolutely necessary. For example, a legal regime which prescribes what Christmas

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60 Being authorised by inclusion in the financial annex to the Regulated Surrogacy Statement or subsequently authorised by the RSO.

61 If she withdraws her consent on the new pathway before the child is born then she will be the legal mother at birth and it would be for the intended parents to seek a parental order (see para 4.108 onwards).

62 And we have recommended that international surrogacy arrangements cannot enter onto the new pathway (Recommendation 37).

presents given by the intended parents to the surrogate can be bought several years later is at odds with the voluntary nature of the relationship.

(3) Practically, it would be very difficult for the RSO or court to regulate or check gift-giving or other transfers between the intended parents and the surrogate for a long period post-birth.

12.185 In relation to parental orders, one option for the definition of the period during which payments made or promised are to be enforceable, or capable of recovery, would be the time that the parental order is made. However, adopting that as the end of the enforcement period could lead to a very long period of enforceability, given that a parental order may be made many months after the child is born. A further alternative would be for payments to be recoverable by the surrogate if made up until the time when the surrogate provides her consent to the parental order, but that would risk creating an incentive for the surrogate to consent later than she otherwise would.

12.186 However, we are also conscious that not providing any regulation of payments in the parental order process between six weeks after the birth of the child and the time that the parental order is made would not be acceptable, given that it would provide an opportunity for payments to be made by the intended parents to the surrogate that could induce her to give her consent to the making of the order when she otherwise might not do so.

12.187 Accordingly, we therefore recommend that the six-week period also be adopted in relation to parental orders in terms of the surrogate being able to recover any mandatory payments and permitted payments against the intended parents made or promised during that time.[63] However, the period during which payments will be regulated in the parental order process will extend from one year before the time at which the surrogacy agreement was entered into until the making of the parental order. The court will have to consider and authorise all payments made to the surrogate during this time, with the exception of mandatory payments, as one of the conditions of making a parental order under the reformed law. In deciding whether to authorise a payment, the court should have regard to the principle that the surrogate should be neither better nor worse off financially as a result of entering into the surrogacy agreement. The court will therefore continue to have full oversight in the parental order process.

12.188 We recommend, therefore, that limits on the payments that the intended parents can make to the surrogate should apply from the time that the surrogacy agreement is entered into, until six weeks after the birth.

12.189 We do, however, think that there should be some exceptions to this general rule, so that some payments should continue to be both regulated and recoverable when made beyond the six-week period. We set out these different time periods below.

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[63] Mandatory payments may occur in a surrogacy agreement that leads to a parental order application, even though these relate to payment for screening and safeguarding purposes on the new pathway, because an agreement may move from the new pathway to the parental order process, where there has been a withdrawal from the new pathway agreement.

(1) Life insurance and critical illness cover: bearing in mind existing practice in surrogacy organisations, and in order to provide a suitable protective benefit, intended parents should be required to keep in place (and pay the premiums for) both kinds of insurance cover from the commencement of any fertility treatment. We take the view that insurance should continue for two years after this time, but in the draft Bill this is left to specification in regulations, in order to provide for the necessary detail in respect of insurance cover in cases where conception does not occur, or where there are prolonged gaps between fertility procedures.

(2) Payment of the surrogate's lost earnings: as above, we recommend that these generally be limited to the six-week period but that, where justified (and evidenced) on medical grounds, recoverable payment can be continued for longer. We recommend, however, that there be a long-stop of two years from birth for such payments by the intended parents. This time period balances the provision of financial protection from the intended parents to the surrogate but, recognising that the surrogate's employment would likely cease within that time, if the surrogate were unable to work, prevents the intended parents agreeing to an open-ended liability. This detail will be left to regulations rather than appearing in the draft Bill.

(3) Counselling or therapy for the surrogate after the child is born: if the intended parents and surrogate wish to include payment for any necessary counselling or therapy (of whatever form), we take the view that intended parents should be permitted to pay these costs on the basis that they will be recoverable for up to two years from birth, given that any problems that may benefit from therapeutic intervention (such as postnatal depression) may only emerge or be diagnosed after the six-week period has ended. Again, this detail will be left to regulations.

Recommendation 57.

12.190 We recommend that:

(1) restrictions on the payments that the intended parents can make or undertake to make to the surrogate should last from the time that the parties enter into the surrogacy agreement (whether in the new pathway or in the parental order process) until six weeks after the birth of the child;

(2) only payments made, promised or incurred within this period, and which relate to that period, will be recoverable by the surrogate against the intended parents, or, where there has been an overpayment, by the intended parents against the surrogate;

(3) by exception, the period will be different in relation to the following types of payments:

(a) in the case of the mandatory life insurance and critical illness cover, the period will run from the commencement of any fertility treatment and for such period as specified in regulations; and

(b) in the case of payment of any lost earnings of the surrogate, and with respect to the costs of therapy or counselling for the surrogate, the period will run from the time that the parties enter into the surrogacy agreement and for such period as specified in regulations; and

(4) in the parental order process, one of the conditions for the court to be able to make a parental order will be that it has authorised any payment made by the intended parents to the surrogate during the period beginning one year before the surrogacy agreement was entered into and ending on the making of the order.

12.191 This recommendation is given effect in the draft Bill by clause 39, which sets out the definition of the protected period at clause 39(3), clause 40(5), which allows for a different period to be specified in regulations, clauses 44 to 47, insofar as they define which costs are recoverable, and in respect of the parental order process, by the definition of regulated payment period in clause 20(2).

RECOVERY OF PAYMENTS

Recovery by the surrogate

12.192 Under the current law, surrogacy arrangements are unenforceable.[64] As a result, a surrogate is currently unable to take action against the intended parents where they have failed to make a payment which they previously agreed to make to her. Whilst in

[64] SAA 1985, s 1A, and see para 1.60.

the majority of cases this bar on recovery of payments does not create difficulties, we do not consider this position to be satisfactory.

12.193 As explained above, in the Consultation Paper we referred to "enforcement" of payments both in relation to the enforcement of limitations on permitted payments, and the recovery of payments by the surrogate.[65] In this Report, we confine "enforcement" to the enforcement of limitations on permitted payments. We use "recovery" to refer to the surrogate claiming payments against the intended parents. We have, however, retained references to "enforcement" in connection to the recovery of payments by the surrogate in the following discussion, when referring to the Consultation Paper or to views of consultees, reflecting the language that was used.

12.194 In the Consultation Paper, we set out how the new pathway presented an opportunity to put the issue of payments on a clear legal footing.[66] We stressed that we were consulting only on the enforcement of terms relating to payments and not enforceability of the agreement itself or any matter in connection to the pregnancy or birth of the child. The enforcement of terms relating to payment would not constitute the sale of the child born of the agreement, as the payments would be enforceable regardless of whether or not the surrogate gave the child into the care of the intended parents.

12.195 Moreover, we highlighted that under the current law the sole course of action available to a surrogate, if a dispute arises in relation to payments that she felt were due to her, would be to withhold her consent to the making of the parental order. This creates an unhelpful connection between payment and legal parent status in relation to the child. Our intention is to break any such connection. We also set out our view that the surrogate's ability to recover payments should be absolute and not dependent on her lifestyle choices during the surrogacy. We therefore provisionally proposed that the financial terms of a surrogacy agreement entered into under the new pathway should be enforceable by the surrogate, and that the ability of the surrogate to enforce such terms should not be dependent on the surrogate complying with any terms of the agreement relating to her lifestyle.[67]

Consultation

12.196 The first part of the question – that the surrogate should be able to enforce the financial terms of a new pathway surrogacy agreement – received significant support from a range of consultees including surrogates, intended parents, surrogacy organisations, legal professionals and other professional bodies. Several organisations opposed to surrogacy felt that if surrogacy were to continue to be legal, then enforcement of payments by the surrogate would be appropriate.

12.197 A number of consultees who disagreed or only partially agreed with our proposal felt that trust between the surrogacy team was imperative in the agreement, and therefore enforcement was unnecessary. Vicky Sutton, a surrogate, stated:

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65 Para 12.1.

66 Consultation Paper, paras 15.90 to 15.98.

67 Consultation Question 88.

> I personally have felt no need for the financial aspect to be enforceable because I trust my friends. For those without such a solid relationship, a guarantee could be helpful.

12.198 Some consultees, including some intended parents, believed that enforcement should occur both ways and were uncomfortable with what they saw as the balance of power being weighted significantly in favour of the surrogate.

12.199 SurrogacyUK said that both the intended parents and the surrogate should be able to enforce financial terms. For the intended parents, this would mean that they would be able to recover payments made to the surrogate where there has been no associated cost (for example, if the surrogate were given money for, say, physiotherapy but never attended any sessions).

12.200 Similarly, Zaina Mahmoud thought that the terms should be enforceable by both parties, with the intended parents being able to recover surrogacy costs where the surrogate had changed her mind.

12.201 A number of consultees believed that the surrogate should only be able to enforce certain types of payment. For example, the Anscombe Bioethics Centre thought that only payments relating to essential post-conception medical expenses[68] should be enforceable. SurrogacyUK suggested that only payments recorded in the "official" surrogacy arrangement (and therefore only payments in the new pathway) should be enforceable. They said:

> We think that only costs and payments that are recorded in the official form should be enforceable by the parties. Any payments made beyond the amounts agreed in the official forms would not be enforceable by them, nor would any payments associated with surrogacy arrangements outside the New Pathway since these would not be recorded in the official form.

12.202 Other consultees gave situations in which the surrogate's power to enforce payments should be restricted. Professor Emily Jackson felt that payments should be limited where the surrogate has terminated or miscarried the pregnancy. The Law Society of Scotland, whilst agreeing with the provisional proposal, asked whether payments should be enforceable in full where the surrogate objects to the application of the parental order and where the outcome of the objection is that a parental order is subsequently refused.

12.203 NGA Law and Brilliant Beginnings, in agreeing with our proposal, went further and suggested that there may be a need for financial sanctions against the surrogate in certain cases, such as where the surrogate ignores medical and legal advice by travelling overseas and having the surrogate-born child in a different jurisdiction, resulting in significant medical and legal costs for the intended parents.

12.204 The Low Incomes Tax Reform Group, Chartered Institute of Taxation, pointed out that making the financial terms of a surrogacy agreement enforceable might change the tax and benefit treatment of surrogacy arrangements. They said:

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[68] Such as the continuation of pregnancy, birth or miscarriage, or compensation for injury or death.

> Enforceability on the part of the surrogate suggests to us that it would be more likely that receipts would be taxable, for example, as it would rule out arguments that amounts might be considered voluntary payments or gifts and therefore potentially not taxable… .[69]

12.205 Katie Bezant, a surrogate, disagreed with the proposal but said that, at present, there is no legal requirement for checks to be carried out to ensure that intended parents are financially able to cover the surrogate's costs.[70] A few consultees suggested that money to pay the surrogate should be held in some form of escrow account (as required under Californian legislation), or by the surrogacy organisation.

12.206 In relation to the second part of the question, the majority of consultees agreed with our provisional proposal that the ability for the surrogate to enforce financial terms of the agreement should not be dependent on the surrogate complying with any terms of the agreement relating to her lifestyle.

12.207 Other consultees commented that if the surrogate's ability to enforce was dependent on compliance with lifestyle terms, then the agreement would be very much akin to commercial surrogacy: the more a commercial agreement was adopted the more reasonable penalising a surrogate for not adhering to lifestyle terms might seem. This argument was then used as a reason for not facilitating commercial surrogacy.

12.208 Generally, consultees in favour of the proposal considered that trying to enforce compliance with lifestyle terms would constitute an unwarranted intrusion into the surrogate's privacy.

12.209 Zaina Mahmoud pointed out the difficulties in ensuring the surrogate's compliance with lifestyle terms, and the challenges of monitoring the surrogate's behaviour.

12.210 Those who disagreed with the provisional proposal primarily felt that lifestyle terms should be enforceable against a surrogate as she has a responsibility to protect and maintain the health of the foetus. A number of intended parents were of this view.

12.211 The Glasgow Bar Association was also of the view that non-compliance with such terms should impact on the ability to enforce. A few other consultees said that they would limit such non-compliance from preventing the surrogate from enforcing financial terms only to a situation where non-compliance had resulted in harm to the foetus.

Analysis

Recovery by the surrogate

12.212 The majority of consultees were of the view that within the new pathway the surrogate should be able to recover from the intended parents the payments that have been agreed between the parties. A majority also agreed that the ability to enforce

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69 We take the view that we cannot make recommendations for reform in this area, para 12.163.

70 However, we were told by Brilliant Beginnings that they do discuss the intended parents' financial circumstances with them insofar as they ask about how the intended parents will fund the surrogacy arrangement.

should not be dependent on the surrogate complying with any lifestyle terms in the agreement.

12.213 We agree with this majority view. We think that the surrogate should be able to recover from the intended parents those payments which are included in the financial annex to a Regulated Surrogacy Statement (or subsequently approved by an RSO).[71]

12.214 In an evolution of the views expressed in the Consultation Paper, we also believe that the surrogate should be able to recover from the intended parents payments in the permitted categories which are due to her from them, where these have been reviewed by the court on the making of a parental order and have been approved (and where those payments relate to the period during which such payments can be recoverable).[72] In deciding what amount to declare recoverable the court will be directed to take the surrogate's usual standard of living into account. Any payments not approved by the court would not be recoverable by the surrogate.[73]

12.215 For the avoidance of doubt, the recoverability of these payments will derive not from any contractual status of the surrogacy agreement, but rather from specific provision to this effect in statute. Surrogacy agreements themselves remain unenforceable.[74]

12.216 We considered concerns raised by consultees regarding the effect of recoverability of payments on trust within a surrogacy team. We think that the surrogate being able to recover payments is of paramount importance. As a priority, the surrogate should not be left in a position in which the only recourse available to her is to use her right to withdraw her consent as a means of pressurising the intended parents to pay. Furthermore, doing so may not in fact, ultimately, have any effect: in parental order proceedings that followed, the court might dispense with her consent,[75] where appropriate, and there would be no mechanism through which the court could order the intended parents to pay the surrogate. Enforcement therefore offers a clear means of resolving financial disputes and keeps these separate from legal parental status.

12.217 With regard to the venue for enforcement of the surrogate's claim for recovery of payments, we recommend that, in England and Wales, the civil court would be the most appropriate forum for a surrogate to bring an enforcement claim. We take the view that the discretionary and inquisitorial nature of the family court is not required for what should be a relatively straightforward matter of enforcing a debt. In Scotland, we recommend that a surrogate could raise an action in the Sheriff Court.[76]

12.218 We note consultees' suggestions regarding use of an escrow arrangement; while we can see that such an arrangement might be sensible, we do not think that it should be mandated in legislation. It may not suit, or may be over-complicated for some

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71 By exception, payment for a recuperative holiday would be included in the annex but not be enforceable.

72 Para 12.180.

73 And such payments could also be the subject of civil penalties under the second option presented in our enforcement scheme, see para 12.263.

74 Para 1.60.

75 Under our recommendation that the court have this power (Recommendation 47).

76 Or in the Court of Session if the claim is over £100,000 (the latter scenario being extremely unlikely).

agreements, and we would prefer to leave the choice to the parties to the surrogacy agreement.

Recovery against the surrogate

12.219 For surrogacy agreements on the new pathway we consider that it is appropriate to make provision for the intended parents to be able to recover as a debt from the surrogate, in civil proceedings, payments that were made to her in accordance with the terms of the Regulated Surrogacy Statement, but which she did not spend on corresponding costs, therefore retaining these sums. Specific provision is appropriate to allow these payments to be recoverable, given that surrogacy agreements generally will remain unenforceable.[77] We have also made such provision on the parental order process, in respect of overpayments. In both cases, overpayment is defined to mean the difference between payments made by the intended parents to the surrogate in respect of mandatory and permitted costs, and payments made by the surrogate in respect of such costs that have been incurred by her (in the case of an agreement on the new pathway, taking into account agreed limits to such payments set in the Regulated Surrogacy Statement).

12.220 We would hope that disputes over small sums retained by the surrogate could be better resolved by agreement between the parties themselves rather than through litigation (with a surrogacy organisation where relevant).

Lifestyle terms

12.221 We are confirmed in the view we expressed in the Consultation Paper that the ability of the surrogate to recover payments should not be dependent on her complying with any terms as to lifestyle contained in the surrogacy agreement.[78] We maintain our view that permitting these terms to be enforced would be an unprecedented and unacceptable intrusion into the surrogate's bodily autonomy.

12.222 We reiterate that the surrogate's ability to recover payments will not be tied to any stage of the pregnancy being reached, or to the surrogate handing the child to the intended parents. Critically, as the permitted costs arise from the pregnancy and birth, the surrogate will still be able to recover payments against the intended parents even if she withdraws her consent on the new pathway, or does not provide her consent to the making of a parental order, or if the pregnancy does not progress. Any other approach would, we think, mean that payments would constitute payments for the sale of the child. Instead, the payments are for costs arising from the fact of being pregnant, regardless of whether the purposes of the surrogacy agreement are fulfilled.

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77 Para 1.60.

78 Consultation Question 88.

Recommendation 58.

12.223 We recommend that:

(1) the surrogate in a surrogacy agreement entered into under the new pathway or in the parental order process should be able to recover from the intended parents costs in the surrogacy agreement, as a debt in the County Court and High Court in England and Wales, or in the Sheriff Court or Court of Session in Scotland;

(2) the surrogate's ability to recover costs from the intended parents should not be dependent on the surrogate complying with any terms of the agreement; and

(3) the intended parents should be able to recover from the surrogate as a debt, payments that were made to her in accordance with the law but for which she has not incurred a corresponding cost, in the County Court and High Court in England and Wales, or in the Sheriff Court or Court of Session in Scotland.

12.224 Clauses 44 to 47 of the draft Bill give effect to this recommendation. Clauses 44 and 45 deal with the recovery of costs by the surrogate following, respectively, a new pathway surrogacy agreement, and a surrogacy agreement not on the new pathway. Clauses 46 and 47 deal with recovery of overpayments by the intended parents from the surrogate following respectively, a new pathway agreement, and a surrogacy agreement not on the new pathway.

ENFORCEMENT OF THE PAYMENTS SCHEME

12.225 It is essential that there is an effective mechanism to ensure enforcement of the payments scheme that we recommend. Those limitations exist to ensure that the aims outlined above are achieved,[79] and would be undermined in the absence of effective enforcement.

12.226 In the Consultation Paper we asked consultees if there were specific methods of enforcing limitations placed on payments to surrogates that we should consider, both on the new pathway and in the parental order process.[80] We suggested – without making a provisional proposal – a method of enforcement whereby surrogacy agreements could be removed from the new pathway in the event that prohibited payments were made. We said that the consequent failure to shift legal parental status from the surrogate to the intended parents, triggering a requirement for a parental order to be obtained, would provide an incentive to the parties to comply with restrictions on payments. We also focused on the enforcement effect of RSOs being

[79] Para 12.9.

[80] Consultation Question 87.

subject to regulatory sanctions should they fail to ensure that payments made by intended parents are within the law.[81]

12.227 As we discussed at the beginning of this chapter, the Warnock and Brazier Reports both concluded that criminal sanctions should not be imposed on the intended parents and surrogate in respect of a payment not permitted by law, to ensure that the birth of the child is not tainted with criminality.[82] In the Consultation Paper we agreed with this assessment and we maintain that position here.[83] However, we discuss below how our views on enforcement have evolved in light of our consultation.

Consultation

The approach to enforcement

12.228 PROGAR and Nagalro identified the key tension in any attempt to enforce limitations on payments. They said that, while they understand the view that surrogate-born children should not carry the taint of criminality, and neither should the surrogate/intended parents be subject to criminal action, they were conflicted about what sanctions might be sufficient to deter any intentional wrongdoing. Like the UN Special Rapporteur, they had grave concerns about the role of brokers (such as surrogacy agencies) and believed sanctions should be primarily directed at them.

12.229 The HFEA supported more effective means of ensuring compliance with limitations on payments that are permitted, and in principle welcomed these being incorporated into the new pathway. From a practical perspective, they thought that ensuring compliance with limitations on payments both in and out the new pathway required careful consideration.

12.230 PET said that enforcing the expenses-only model is problematic but having a clear law and a regulator would send a strong public policy message. They thought that it was important that the threat of refusal to transfer legal parenthood should not be a tool by which compliance is enforced, as the child's welfare must take priority.

12.231 Some consultees favoured a less regulated approach, or felt that enforceability was less important than the message the law sent or the underlying public policy it reflected. Some questioned whether enforcement could ever be effective.

12.232 NGA Law and Brilliant Beginnings did not think there were any methods of enforcement that would successfully limit payments to surrogates. They noted that in international cases it is not possible to regulate what surrogates can be paid. In any parental order case, the idea that the family court could regulate payments was, in their view, a fiction given the amount of case law retrospectively authorising payments. They thought that we should not knowingly retain legislation which serves no purpose and has been demonstrated and declared to be unworkable.

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81 Consultation Paper, paras 15.86 and 15.88.

82 Para 12.4. *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (1984) Cmnd 9314 (Warnock) and *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation* (October 1998) Cm 4068 (Brazier).

83 Consultation Paper, paras 14.40 and 15.80.

12.233 Some consultees considered that the difficulty in effectively enforcing limitations on payments was a reason for not imposing any limitations.

New pathway and parental order process

12.234 NGA Law and Brilliant Beginnings commented on whether the new pathway and the parental order application should be subject to different enforcement processes. They questioned whether there is any logical justification for the law being enforced only in those cases where safeguarding steps have been followed (that is, in the new pathway) and not in relation to international surrogacy arrangements and UK arrangements outside the pathway, where there are no such protections. The SurrogacyUK Working Group on Law Reform did not think that there should be any difference in the position regarding payment or reimbursement limits in the new pathway or outside of it.

12.235 PET suggested that, outside the new pathway, receipts should have to be provided at a lower threshold than in the new pathway, to improve accountability, but also so the reduced administration would add to the attractiveness of the new pathway.

The method of enforcement

12.236 Mills & Reeve LLP supported the approach of arrangements being removed from the new pathway where non-permitted payments had been made and noted that the court would then still retain the ability to make a parental order, with discretion as to whether or not to approve the payments made. While the circumstances in which a court would be likely to refuse to approve the payments (and so a parental order) would be limited, they considered that this would be better than other hard-line rules, which could punish the child or lead to criminalisation. Resolution agreed with this approach.

12.237 However, NGA Law and Brilliant Beginnings said that it was difficult to see how removal from the new pathway would be triggered unless the parties were so honest in their agreement that they effectively volunteered themselves out. They were also concerned about certainty in respect of a child's parental status – if someone, for example, later raised a breach of payment rules, parenthood would not then be conferred on the intended parents in the absence of a parental order.

12.238 Dr Herjeet Marway said that, although the threat of the arrangement moving out of the new pathway was helpful, as we noted in the Consultation Paper, a parental order has never not been granted due to the nature of the payments made.

12.239 Dr Marway thought that an option discussed at a consultation event could be useful. This approach would involve a self-declaration being made by the intended parents that overpayment has not occurred. If this were found to be untrue, then it would be regarded as contempt of court leaving the intended parents open to prosecution on those grounds. However, she worried that, in practice, there is still a taint on the parents and, by association, the child.

12.240 A similar suggestion was made by Natalie Smith, who said parties should sign an affidavit and be held in contempt of court if they break it. A court should also be able to force the return of monies to either party.

12.241 However, NGA Law and Brilliant Beginnings said that they would view this method as:

> still effectively criminalisation, which we reject as draconian and unjustified, and something which may taint the birth of the child.

12.242 The SurrogacyUK Working Group on Law Reform said that the creation of a regulator, in the name of the state, would give surrogacy credence and increase public acceptance and confidence.

12.243 A number of consultees made suggestions as to how a system of monitoring and enforcing payments could work. These included payments being made in advance into a client account, and spot-checks by HFEA of surrogacy organisations. COTS suggested bank statements being made available to show payments made to a surrogate from the intended parents' account, and one for the surrogate showing payments into her account. One consultee also said access to bank accounts for auditing purposes needed to be ensured.

Who should enforce?

12.244 Resolution suggested it should be for the clinic to oversee payments as is done in other jurisdictions. The Glasgow Bar Association considered provision should be made for the surrogacy agreement to be overseen by a regulated surrogacy agency, clinic, or possibly by a professional such as a solicitor. Other consultees also suggested that the RSO should play a pivotal role. This was a view shared by the HFEA.

12.245 The HFEA also noted that the regulator of the RSOs would be responsible for imposing regulatory sanctions. The HFEA said that they would need clarity on what sanctions could be applied. They considered that responsibility for ensuring that RSOs correctly manage the process of payments to surrogates to be beyond their current remit and expertise.

12.246 PET agreed that, within the new pathway, there could be penalties for RSOs who oversee arrangements where limitations are breached.

12.247 The SurrogacyUK Working Group on Law Reform thought that there should be criminal, civil and regulatory sanctions against organisations that operate outside of the law.

12.248 NGA Law and Brilliant Beginnings were less enthusiastic about the regulatory sanction route, saying that while the RSO will have some involvement in surrogacy (though, they surmised, not as much as the HFEA do with gamete donation), this would only be up to the point where the arrangement is signed off. They said that the parties will have a direct relationship and will be responsible for making payments privately between themselves and therefore not be subject to regulatory control as individuals. They were concerned about creating a system which they considered would incentivise written agreements which do not reflect everything the parties have in fact agreed.

12.249 In cases where a parental order is made after the birth of the child, the HFEA said that there were no specific measures that should be introduced to assist with the enforcement of limitations on permitted payments.

Analysis

12.250 Our views on enforcement have changed as a result of the consultation exercise. We have concluded that regulatory sanctions remain a necessary element of any system of enforcement, but we also think that there may be a place for the imposition of a civil penalties scheme, in addition to the use of regulatory sanctions. We see advantages and disadvantages to both options, which we set out below.[84]

12.251 On reflection, we do not think that is viable or appropriate for the making of prohibited payments to have the effect of removing a surrogacy agreement from the new pathway. In terms of such payments that are discovered after the birth of the child, our recommendations with regard to the operation of the new pathway mean that legal parental status at that stage could only be changed by an order of the court (as is the current position). We think that this approach promotes certainty and avoids any suggestion that a change in status can be achieved by private agreement between the parties. Where prohibited payments are discovered prior to the birth, removing the case from the new pathway would address the payment in a way that directly impacts on legal parental status, because the intended parents would not be legal parents on the birth of the child. This situation would be contrary to our policy of separating issues of payment from legal parental status.

12.252 We do, however, note the lack of support amongst consultees for criminalisation of the surrogate and intended parents for making payments outside the rules. This confirms us in our view that we should not recommend making such prohibited payments a criminal offence committed by surrogates and/or intended parents. We maintain the approach in the Warnock and Brazier Reports that such a step taints the birth of the child, and we do not believe this is in the best interests of the child. We note that, elsewhere in this Report, we do recommend criminal offences aimed at agencies and organisations operating in an unlawful or unregulated manner, with respect to the provision of matching and facilitation services for surrogacy; the provision of legal advice; and advertising.[85] We do not believe that these offences taint the birth of the child with criminality.

12.253 We therefore recommend that the intended parents should make a statutory declaration as to the payments that they have made as part of an agreement on the new pathway. Lying on such a declaration would mean that the intended parents had committed a criminal offence under the existing law. Of course, there are other possibilities other than telling the truth or lying; the intended parents might, for example, have omitted a payment that they had forgotten about making. We do not intend to expand on the scope of the existing offence, which requires that a false statement is made "knowingly and wilfully". We see the commission of such a criminal offence as sufficiently removed from the surrogacy agreement to avoid tainting the child's birth with criminality.

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84 Para 12.285.

85 Ch 14.

12.254 We do not think that surrogates should have to make such a declaration in respect of receipt of payments; we are concerned that to do so would put pressure on surrogates not to declare payments in the knowledge that doing so might render the intended parents vulnerable to criminalisation or other penalties. It is fair to ask the intended parents to make such a declaration as what they pay a surrogate is within their control.

12.255 We set out below what we see as the context, and route, for the enforcement of the payments scheme, to apply in the new pathway. Regardless of which of the enforcement options that we discuss below is chosen:

(1) there will be a financial schedule annexed to the Regulated Surrogacy Statement agreed by the parties and approved by the RSO. The financial schedule will set out agreed categories of payment for the individual surrogacy agreement, selected from the permitted categories of payment, with maximum figures stated for each selected category;

(2) any payments made by the intended parents to the surrogate in the year prior to the signing of the written agreement must be reported to the RSO before entry to the new pathway;

(3) the regulation of payments will begin at the time that the surrogacy agreement is entered into and end six weeks after the child is born (with exceptions). However, payments agreed prior to this point can be enforced by the surrogate more than six weeks after the birth, where they relate to that period;

(4) no earlier than six weeks, and no later than twelve weeks after the child is born, the intended parents will make a statutory declaration as to whether they have made payments in excess of those recorded in the financial schedule. A false statement will be a criminal offence under the existing law as the making of a false statutory declaration[86] and, as we explain below, there will be a new criminal offence of not making the statutory declaration. As long as the intended parents make a truthful statutory declaration, there will be no criminal penalties in connection with the payments regime;

(5) the intended parents will be able to seek retrospective authorisation from the RSO, up to the time of making the statutory declaration, for (i) payments that can be authorised but which did not appear in the financial schedule; or (ii) payments which exceed the maximum figures provided in the financial schedule; and

(6) if, in their statutory declaration, the intended parents disclose payments that would not have been permitted, or were not authorised, either in the financial schedule or retrospectively by the RSO, the RSO will report the fact of this prohibited payment to the HFEA.

12.256 We believe that a new criminal offence of failing to make the statutory declaration is justified. We need to ensure that we deter intended parents from making payments

[86] In England and Wales, under section 5 of the Perjury Act 1911, and in Scotland under section 44(2)(a) of the Criminal Law (Consolidation) (Scotland) Act 1995.

that are prohibited, to minimise risks of coercion and exploitation. If payments were made to a woman acting as a surrogate that could constitute a financial inducement to surrogacy, this may mean that she did not freely consent to act as a surrogate. The making of the statutory declaration is a key element in making the scheme work and we do not think that a civil penalty for failing to make the statutory declaration would provide a sufficient deterrent. An intended parent could simply 'price in' a (civil) financial penalty where they wished to avoid making the declaration and to conceal that they had made prohibited payments.

12.257 An intended parent on the new pathway who fails to make, before the end of 12 weeks after the child's birth, the statutory declaration stating whether or not they have made payments to the surrogate that are prohibited will therefore be guilty of a criminal offence. However, no offence will be committed where the intended parents have a reasonable excuse for not making the declaration. For example, an intended parent may be seriously ill and unable to make the declaration within the 12-week deadline. The offence would be tried summarily (that is, in the magistrates' court) and, if found guilty of the offence, the intended parent would face a criminal fine, recorded on their criminal record. We are satisfied that the fact this would be a criminal conviction would be a sufficiently strong deterrent, without requiring the possibility of a custodial sentence.

12.258 In the parental order process, these steps will not be present, but the intended parents would still be liable to sanctions because they will have to report the payments that they made to the surrogate to the court as part of the application for a parental order. Lying in the application form (or witness statement), verified by a statement of truth, would be contempt of court.[87]

12.259 Beyond this general framework for enforcement, we see two possible options for the enforcement of the payments scheme:

(1) regulatory only; and

(2) regulatory plus civil penalties.

Regulatory sanctions

12.260 We recommend that RSOs should ensure that intended parents only make payments to surrogates that are permitted, by providing advice and guidance about the rules and promoting transparency on payments. So, if there are repeated or serious breaches of these rules which come to the attention of the enforcing body, then the RSO may face regulatory sanctions. The rationale for holding the RSO responsible is that the RSO carries out the initial screening, works with the surrogacy team, and authorises the schedule of payments. In doing so, the RSO should be aiming to create a positive culture of surrogacy, which complies with the financial regime. As part of this, the RSO should make it clear to the intended parents that they must only make payments permitted by the law.

[87] Family Procedure Rules, r 17.6 (England and Wales); Criminal Law (Consolidation) (Scotland) Act 1995, s 44.

12.261 RSOs should also provide such guidance or advice to intended parents and surrogates following the parental order process, but what they should do will vary depending on the circumstances. The RSO may have to do less in the case of a surrogacy agreement on the parental order process with which it is involved, because the RSO will not have such a close involvement with the agreement and will have far less oversight than of an agreement in the new pathway.

12.262 There is a limit as to how far RSOs can reasonably be held accountable for the actions of intended parents; they will not have failed in their responsibilities where the intended parents made payments that were prohibited or were not authorised, but where the RSO had provided effective advice and guidance.

Civil penalties

12.263 The second option is, in addition to the regulatory sanctions created above, to also create a scheme of civil penalties. This scheme would be administered by an enforcing body.

12.264 We have deliberately left the identity of the enforcing body to be decided by Government. We initially took the view that there were two main candidates for acting as the enforcing body: either the HFEA or RSOs. Following discussions, however, neither the HFEA nor the surrogacy organisations believed that they should take on this role. The surrogacy organisations strongly preferred that the HFEA undertake the role and the HFEA strongly preferred that RSOs do so. Two of the surrogacy organisations said that they would either be forced to close down, or would choose to do so in relation to domestic agreements, should they have to take on the role. The others were not enthusiastic, citing concerns such as the impact that acting as the enforcing body would have on their relationship with intended parents and surrogates.

12.265 The Chief Executive of the HFEA told us:

> This proposal is unworkable. The element that causes us real concern is the idea that the HFEA should be given powers to issue financial penalties to IPs who have made overpayments to surrogates, and to then take IPs to court who refused to pay the financial penalty. We have two problems with this element of the proposal.
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> The first, and the most obvious, is that this is far outside of the HFEA's current regulatory activities: we regulate fertility clinics and research centres to ensure compliance with the law and the guidance and standards we set for high quality care and research, we do not regulate patient activities nor serve any penalties on them. Moreover, we are currently not set up to investigate and prosecute criminal offences.
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> Second, even if the question of expertise and resources were resolved, we do not think this proposal makes sense from a regulatory perspective. As the regulated entity it is surely for the RSO to ensure that any payments made by the IPs are within the terms of surrogacy agreement. Your proposal risks letting the RSO 'off the hook' for the actions of the IPs.

12.266 We have come to the conclusion that if Government decides to proceed with the civil penalties scheme, then the enforcing body must be a state body.

12.267 We note that existing regimes of civil penalties involve enforcement by the state, rather than by private bodies, the latter being the form which RSOs will take. We are also persuaded by responses from surrogacy organisations that it would not be right, as a matter of policy, for them to take on the role because it would constitute too much of an intrusion into their relationship with the intended parents and surrogate, and that they would not have the necessary resources or expertise to oversee a civil penalties regime.

12.268 The HFEA's remit at present is licensing, monitoring, and inspecting fertility clinics. Our recommendations extend its functions to become the regulator of RSOs. However, the main concerns for the HFEA, as to its own involvement, appear to be that they are not equipped to investigate and implement civil penalties which take the form of financial sanctions, and that they do not have experience dealing with or taking action against individuals, as opposed to corporate bodies such as fertility clinics. We understand those concerns; however, there is a logic in having the regulator and the enforcer as one and the same body. The alternative would be to have another, existing, state body carry out this function, or to create a bespoke body to do so. The option of a bespoke enforcement body seems to us unnecessary and costly. It is for the same reasons that we have recommended elsewhere in this report that the HFEA take on the regulation of surrogacy, rather than a bespoke regulator be created.[88]

12.269 Given the HFEA's opposition to taking on the role of the enforcing body in a civil penalties scheme, we do not think we can recommend that it becomes the enforcing body. Instead, we confine our recommendation in respect of this option to a state body taking on this role and ask Government to consider which such body would be best placed to do this work.

12.270 We take the view that, if the option of including civil penalties is adopted, the civil penalty should be a financial one. Where an unauthorised payment is revealed by the statutory declaration made by the intended parents, this fact would be brought to the attention of the enforcing body by the RSO. If the enforcing body were the HFEA, it would necessarily come to their attention when the statutory declaration is passed from the RSO to the HFEA.

12.271 There would be no *de minimis* rule in respect of unauthorised payments, that is, any prohibited or excess payments, of any amount, could be open to enforcement against the intended parents by the enforcing body.

Application of the civil penalties scheme

12.272 If it is adopted by Government, the civil penalties regime should apply to domestic agreements where the intended parents seek a parental order, as well as to those on the new pathway. This approach is consistent with our recommendation that the limitations on permitted payments apply to parental order applications.[89] The fact of prohibited payments would come to light when the intended parents make the application for a parental order because, at that point, they will need to declare to the court what payments have been made. If payments were made that are prohibited, or

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88 Recommendation 24.

89 Recommendation 52.

fall within a permitted category but are excessive, then the court should refer the matter to the enforcing body, who would then decide whether to impose a penalty on the intended parents.

12.273 As we recommend above, the court would have to authorise payments that have been made in order to grant the parental order.[90] The authorisation of the payments by the court would, however, specifically be confined to their authorisation for the purpose of the grant of the parental order. The enforcing body would still be able to issue a civil penalty in respect of those payments.

12.274 We do not think that the civil penalties regime could or should be applied to international arrangements, given that payments will, in most international cases, fall outside the permitted categories but nevertheless be lawfully made in that jurisdiction (for example, "for profit" payments to surrogates in USA jurisdictions).

Details of the scheme – nature of the penalty

12.275 The enforcing body would have the power to require the intended parents to pay it the amount of the penalty. There would be no requirement for the surrogate to return any payments made that are not within the rules.

12.276 We take the view that the amount of the penalty should be linked to the amount of the prohibited payment. If the unauthorised payment is a payment in kind, we think that the legislation should provide for the enforcing body to assign a value to such a payment and use that to set the penalty figure.

12.277 In addition to being an amount equivalent to the amount of the unauthorised payment, we think that it should be possible for the enforcing authority to add to that amount a further amount that is either a fraction or multiple of the first amount. The size of the fraction or multiple would be specified in regulations made under powers in the Bill.

12.278 We do not think it should be a matter for the Law Commissions to decide what the multiple or fraction should be, given that we have not consulted on this issue and do not have the necessary expertise to make such a decision. The power to make regulations in respect of the multiple or fraction to be applied would include the ability for that multiple or fraction to be set at different levels, so that, for example, it might vary depending on the amount of the payment.

12.279 We wish to guard against a situation where wealthy intended parents see the civil penalty as another cost that is incurred as part of the surrogacy journey. With this in mind, the legislation should provide for a set minimum (very low) penalty and a (high) maximum penalty, that will provide a "floor" and a "ceiling" to the amount that would otherwise be levied by reference to the amount paid.[91] We think that this solution will offer some reassurance to intended parents concerned about being faced with a large financial penalty, while a high maximum will ensure that in the vast majority of cases a sum equivalent to the prohibited payment and any fraction or multiple is still within the

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90 Recommendation 57.

91 This approach, with respect to minimum and maximum amounts, is taken in section 9(2) of the Leasehold Reform (Ground Rent) Act 2022.

ceiling for the penalty. To ensure that minimum and maximum figures remain appropriate over time, there should be a power to alter them by regulations.[92]

12.280 If the intended parents refuse to pay what is owed, or contest that they have made any unauthorised payment at all, then the enforcing body may initiate court proceedings against the intended parents for payment of the amount levied.

12.281 The amount recovered from the intended parents (by the enforcing body or by the court) would be paid into the Consolidated Fund.[93]

Details of the scheme - procedure

12.282 We set out below the key procedural aspects of the scheme.

(1) The enforcing body must give the intended parents a "notice of intent" that it is imposing a financial penalty, no later than six months after the enforcing body has sufficient evidence of the conduct to which the penalty relates. The notice of intent must set out:

(a) the amount of the proposed financial penalty;

(b) the reasons for proposing to impose the penalty; and

(c) information about the right to make representations (any representations to be made within 28 days from the date the notice was given).

(2) If the enforcing body decides to impose a financial penalty, it must give the intended parents a final notice requiring that the penalty is paid within 28 days.

(3) On receipt of a final notice imposing a financial penalty, the intended parents can appeal to the First-tier Tribunal against the decision to impose a penalty and/or the amount of the penalty within 28 days. The final notice is suspended until the appeal is determined or withdrawn.

(4) The venue for appeal by the intended parents will be the General Regulatory Chamber of the First-Tier Tribunal. The General Regulatory Chamber applies across the UK to reserved matters,[94] so surrogacy appeals arising in Scotland, as well as England and Wales, would also go to that Tribunal.

(5) The First-tier Tribunal will be able to confirm, vary or cancel the civil penalty imposed by the enforcing body. The First-tier Tribunal can dismiss an appeal if it is satisfied that the appeal is frivolous, vexatious or an abuse of process, or has no reasonable prospect of success.

(6) Where the intended parents fail to pay a civil penalty, the enforcing body should refer the case to the county court in England and Wales, and the Sheriff Court in Scotland, for an order of that court for enforcement of that debt. If necessary,

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92 As is the case, for example, in the Housing Act 2004, s 249A(8).

93 The Consolidated Fund is the Government's general bank account at the Bank of England.

94 For example, approved driving instructor appeals, see Road Traffic Act 1988 (as amended), s 131.

the enforcing body should use county court bailiffs, or Sheriff officers, to enforce the order and recover the debt.

The standard of proof

12.283 We are of the view that the criminal standard of proof ("beyond reasonable doubt") is the appropriate standard of proof for the civil penalties scheme because:

(1) the monetary penalty could be a significant amount of money, particularly where a fraction or multiple of the unauthorised payment is added to that payment; and

(2) there will not be an initial procedure whereby the intended parent is notified by the enforcement authority that they are doing something wrong and given a chance to remedy the problem before the penalty is imposed. The notice of intent does not perform this role because its purpose is to provide the intended parents with the opportunity to make representations, rather than with a time period to "put right" the wrong (the prohibited payment), which the intended parents are not able to do.

12.284 Use of the criminal standard of proof will not make the penalty criminal. We also do not think that use of the higher standard will make application of the penalty too difficult to achieve: if it is apparent on the face of the statutory declaration made by the intended parents that they have made an unauthorised payment, then that would meet the criminal standard of proof in any case (unless it could be proved that they had been coerced or were under duress when they made the declaration).[95]

The advantages and disadvantages of the two options

12.285 The "regulatory control only option" may produce a surrogacy culture in which intended parents and surrogates develop strongly negative feelings towards payments that are prohibited by the scheme, which could mean that intended parents voluntarily adhere to the limits on payments. While opinions will vary as to how much reliance can be placed on such voluntary compliance, a strong advantage of the regulatory control only option is that is likely to sit better with the altruistic character of UK domestic surrogacy. This is compared to the more draconian option which includes the use of civil penalties.

12.286 A further advantage of the regulatory control only option is that it may avoid people being deterred from using surrogacy in England and Wales, and Scotland, by the prospect of facing civil penalties should they make payments that are prohibited. This may particularly apply to new pathway agreements where scrutiny will be greater at an earlier stage than in the parental order process, where the court only becomes involved after the child is born. This would have the particularly undesirable effect of reducing the attraction of the new pathway, compared to the parental order process, contrary to our overall policy of promoting the more regulated environment of the new pathway.

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[95] We note that the criminal standard of proof is used in other civil penalty schemes, for example in the scheme in the Housing Act 2004.

12.287 However, a disadvantage of an enforcement system that relies purely on regulatory control is that it would do nothing to prevent the parties, who would not be subject to such control, from making direct payments between them, bypassing the RSO. This could create a system which allows parties to enter into written agreements that do not include additional payments that they have, in fact, privately agreed to make between themselves, without fear of personal consequences should those payments come to light.

12.288 Some surrogacy organisations were also concerned that having only a system of regulatory control could unfairly penalise RSOs by holding them responsible for unlawful payments made between the parties, when they had done all they could to prevent such payments being made. A disadvantage of the regulatory control only option is that it could lead to surrogacy organisations choosing not to become RSOs or to use the new pathway if they feared facing sanction for the intended parents' non-compliance. However, we think any unfairness would be mitigated by the careful delineation of what was expected of RSOs, so that they were not held responsible for behaviour of the intended parents and surrogates which, reasonably, they could not influence.

12.289 A further disadvantage of the regulatory control only option is that it will not assist with enforcing the payments rules where the surrogacy agreement is using the parental order process and there is no RSO involved.

12.290 The advantage of the second option that we have identified - adding a civil penalties scheme to the regulatory element - is that it provides for personal consequences for intended parents who do not adhere to the rules on payments. By doing so, it would give extra teeth to the enforcement regime, and provide an effective measure against payments that have a greater risk of inducing a woman to become a surrogate, whether such payments are explicitly described as payment for gestational services or simply have the same effect (for example, a lavish payment made within a permitted category, but which is in fact far above what the surrogate actually needs). A further advantage of the use of civil penalties is that they would apply across all domestic surrogacy agreements, including those leading to a parental order, even where an RSO is not involved.

12.291 On the other hand, the prospect of being subject to civil penalties might discourage intended parents and surrogates from entering into surrogacy agreements here, potentially forcing them abroad, which is, again, contrary to our overall policy intention. Or, more narrowly, given that not every intended parent or couple can afford to go abroad for surrogacy, a civil penalties scheme might be said to discriminate against less wealthy intended parents who, in reality, would only be able to enter into a domestic agreement.

12.292 That said, it would make no sense to permit civil penalties against those intended parents who have "overpaid" because they have participated in an overseas commercial surrogacy arrangement lawful in the foreign jurisdiction. Such arrangements are very likely to involve payments that would not be sanctioned in the payments scheme set out above (principally, payments to the surrogate for carrying the child). However, the potential for a civil penalties scheme to act as a factor pushing people abroad for surrogacy is unavoidable; only likely to apply to the

wealthiest would-be intended parents; and may well be countered by the attraction of remaining at home to enter into a new pathway agreement which avoids the later need for a parental order. We therefore do not view this risk as a significant disadvantage of introducing civil penalties.

12.293 A further disadvantage of the civil penalties scheme is that it would be more costly to set up and administer than a scheme relying solely on regulatory controls. Additionally, the HFEA, which (bar the Department of Health and Social Care taking on the role itself) may in practice be the only realistic candidate to take on the role of enforcing authority, raised objections to the scheme, as we set out above.[96]

12.294 In conclusion, the strength of consultees' views (including those who support surrogacy, as well as those opposed to it) with regard to the need for effective enforcement provides a strong case against the regulatory control only option. This was clearly a matter which generated considerable concern, and a desire to ensure that a payments regime could be adequately enforced. On the other hand, we acknowledge the potential risks and disadvantages of a civil penalties scheme and, additionally, note that it introduces a level of complexity into the law which might be seen as disproportionate if regulation instils the appropriate culture. A further reason for not going ahead with a recommendation for the second option including civil penalties is the challenge in identifying an enforcement body. We note the HFEA's opposition to taking on the enforcement role and the need for it to be done by a state body, given the concerns expressed by surrogacy organisations that playing a part in enforcement would significantly undermine their relationship with intended parents and surrogates, and may deter them from becoming RSOs.

12.295 We suggest that the UK Government, bearing in mind our discussion above as to their relative merits, choose between the two options for the enforcement of the reformed rules on payments by intended parents in surrogacy, in domestic surrogacy cases:

(1) the regulatory control only option; or

(2) regulatory control plus a scheme of civil penalties against intended parents who make payments that are prohibited under the reformed rules on payments.

12.296 Given that we leave this decision to the UK Government, the accompanying draft Bill contains regulation-making powers enabling the establishment of method(s) of enforcement for the payments scheme.

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96 Para 12.265.

Recommendation 59.

12.297 We recommend that, in the new pathway:

(1) there will be a financial schedule annexed to the Regulated Surrogacy Statement, to be agreed by the surrogate and intended parents and approved by the RSO. The financial schedule will set out agreed categories of payment for the individual surrogacy agreement, selected from the permitted categories of payment, with a maximum figure stated for each selected category agreement;

(2) any payments made by the intended parents to the surrogate in the year prior to the signing of the written agreement must be reported to the RSO before entry to the new pathway;

(3) the intended parents should be able to seek retrospective authorisation from the RSO, up to the time of making the statutory declaration, for payments that can be authorised, but which did not appear in the financial schedule, or which exceed the maximum figures provided in the financial schedule;

(4) the intended parents must make a statutory declaration no later than twelve weeks after the child is born as to whether they have made payments in excess of those recorded in the financial schedule, with there being no discretion as to the extension of this deadline;

(5) it will be a criminal offence for an intended parent to make a false declaration knowingly and wilfully, applying the existing law to this use of a statutory declaration;

(6) there should be a new criminal offence of not making this statutory declaration, which would be triable summarily and, on conviction, punishable by a fine; and

(7) this offence would not be committed if the intended parents had a reasonable excuse for not making the statutory declaration.

12.298 Clause 41 of the draft Bill gives effect to the first part of this recommendation, and clause 43 gives effect to the third part of this recommendation. The second part is not given effect by the draft Bill but instead will be information requested by the RSO when deciding whether to authorise a surrogacy agreement for the new pathway. The fourth, sixth and seventh parts are given effect by clause 48 of the draft Bill.

Recommendation 60.

12.299 We recommend that:

(1) there should be a system of regulatory control for the enforcement of the reformed rules on payments that can be made by intended parents to surrogates, in domestic surrogacy cases; and

(2) the UK Government should decide whether there should, in addition to the regulatory system, be a scheme of civil penalties against intended parents who make payments that are prohibited under the reformed rules on payments.

12.300 The first part of this recommendation, in respect of regulatory control, is given effect by the draft Bill by means of advising in relation to, or monitoring, payments in connection with a new pathway surrogacy agreement forming part of the definition of licensable surrogacy-related activity in the Bill (clause 51(1(d)). Under the draft Bill the Code of Practice for surrogacy must also deal with the proper conduct of licensable surrogacy-related activity, and therefore such advice and monitoring in respect of payments (clause 67(1)(a) of the Bill). The draft Bill provides that the HFEA may, when considering whether to vary or revoke an RSO's licence, take into account any failure to observe the provisions of the Code (clause 67(5)(b)).

12.301 The second part of this recommendation, in respect of civil penalties, is given effect by clause 49 of the draft Bill, which provides the Secretary of State with the power to make regulations for the scheme of civil penalties, and which sets out the aspects of the scheme which those regulations might address.

Chapter 13: Surrogacy Register

13.1 In this chapter, we deal with the provision of, and access to, information for persons born through surrogacy about their genetic and gestational origins.

13.2 In previous chapters, we set out our recommendations for a new pathway for surrogacy agreements. It is essential that the introduction of the new pathway does not reduce the current availability of information for surrogate-born persons but, instead, operates to increase access to information. Reforms to the law on parental orders should also promote and enhance access to information for surrogate-born persons. Our recommendations in this chapter are made on this basis.

13.3 In the Consultation Paper, we took the provisional view that the child born of a surrogacy arrangement should have access to full information on both their genetic and gestational origins. We noted that our terms of reference for our project specifically included the law, regulation and practice on "information about a child's genetic and gestational origins within the surrogacy context". Importantly, there did not seem to us to be any reason to treat the child's gestational origin differently from his or her genetic origins, by potentially concealing one, while recording the other.

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

(1) First, it respects the rights of a surrogate-born child. Under Article 7 of the UNCRC, the child has a right to "know… his or her parents"[1], which might be interpreted to include the identities of the surrogate, the intended parents and any gamete donors. The child also has a right to "preserve his or her identity… including family relations" under Article 8 of the UNCRC, which can be interpreted to include understanding who was involved in their conception.[2] At first sight it may seem odd to rely on a convention on the rights of children where we state that the right to access certain information should be obtained on reaching adulthood. We do not however think it is wrong to do so. Access at majority depends on steps being taken to obtain and store that information while the person is a child. Furthermore, we recommend access at earlier ages throughout this chapter, where the child has capacity.

(2) Secondly, and more generally, it is in the interests of surrogate-born people to have access to this information. A surrogate-born person might want to contact their gamete donor, in order to better understand their genetic heritage, or might wish to learn more about the surrogate and her motivations. The information may also be important for health reasons. Child Identity Protection ("CHIP") and

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1 The UNCRC does not define the term "parent", so "parent" could be interpreted as covering any of those involved in surrogacy: the surrogate, gamete donors and intended parents.

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

UNICEF have published a briefing note on children's rights and surrogacy, emphasising the importance of knowing one's own identity:

> Knowing one's origins is fundamental to the child's physical, psychological, cultural and spiritual development. Having one's own identity is also a gateway to the enjoyment of the child's other fundamental rights, such as those related to protection, health, education, and the maintenance of family ties.[3]

(3) Thirdly, research shows that having access to information about the circumstances of one's conception and gestation can contribute positively to the quality of relationships and psychological wellbeing within the family,[4] and that surrogate-born children value openness when it comes to information about surrogacy arrangements.[5]

(4) Fourthly, research also shows that the gestational period impacts development,[6] and therefore, knowledge of one's gestational origins is important for the process of identity-formation.

13.5 To ensure surrogate-born people have access to information about their genetic and gestational origins, we recommend wholesale reform in this area. None of the current methods for accessing information about one's origins were originally designed for use by people born as a result of surrogacy. As a result, there are gaps in the framework for surrogate-born people, and no clear route specifically for this group to access information. There are also inconsistencies in relation to access to information between adopted and donor-conceived people on the one hand, and people born via surrogacy on the other.

13.6 To resolve this problem, we recommend creating a bespoke Surrogacy Register ("SR"). The provision of information on the SR will mirror the scheme for disclosure applicable to the existing HFEA Register[7] as far as possible.

13.7 We also make recommendations in relation to access to information for those surrogacy agreements that follow the parental order process, so that there is improved access for all surrogate-born people (not solely those born on the new pathway). We intend some recommendations to apply to enable people already born through

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3 Child Information Protection and UNICEF, *Key Considerations: Children's Rights and Surrogacy* (February 2022) p 2. Available at: https://www.unicef.org/media/115331/file.

4 For a summary of these findings and list of empirical studies relating to donor-conceived and surrogate families, see S Golombok, We Are Family, (Scribe 2022), pp260-264; 274-280.

5 K Wade, K Horsey, and Z Mahmoud, "Children's Voices in Surrogacy Law: Preliminary Report", shared prior to publication with the Law Commissions.

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

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

surrogacy, or born before the legislation comes into force, to be able to benefit from the provisions which will increase access to information.[8]

13.8 Our overall aim is to create a clear route for people born via surrogacy to access information.[9]

CURRENT LAW

13.9 There are currently three ways in which a child born as a result of a surrogacy arrangement can seek to access information about their origins:

(1) through their birth certificate;

(2) through access to court records; and

(3) by requesting information from the HFEA Register under the current information provisions in the HFEA 1990.[10]

13.10 Below we give a brief overview of the current law in relation to each of these. A more detailed account is provided in the Consultation Paper.[11]

Birth certificates

13.11 All births in the UK must be registered.[12]

13.12 When a birth is registered, certain other details must also be registered, including:

(1) date and time of birth;

(2) name and surname;

(3) father's name, surname, place of birth and occupation (if available);

(4) mother's name, surname and occupation; and

(5) informant's address.[13]

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8 See Recommendation 61(5) and Recommendation 70.

9 UNCRC Articles 7, 8 and 24. See Consultation Paper, paras 10.71 to 10.76.

10 Inserted by HFEA 2008, ss 24 and 25.

11 Chapter 15, paras 10.14 to 10.65

12 Births and Deaths Registration Act 1953, s 1(1); Registration of Births, Deaths and Marriages (Scotland) Act 1965, s 13(1).

13 Registration of Births and Deaths Regulations 1987 (SI 1987 No 2088), regs 7 and 9; Registration of Births, Still-births, Deaths and Marriages (Prescription of Forms) (Scotland) Regulations 1997 (SI 1997 No 2348), reg 3 and sch 1. In England and Wales, where a name is given to a child, or altered, within 12 months of the registration of the birth, it can be added to the birth certificate at any time: Births and Deaths Registration Act 1953, ss 10A and 13. In Scotland, where a name is given to a child, or altered, within 12 months of the date of birth, it can be registered if an application is made within two years from the date of birth of the child, s 43(3) Registration of Births, Deaths and Marriages (Scotland) Act 1965.

13.13 As the register of births is public, any person can request a copy or extract of a certificate of birth (of any person) from the Registrar General.[14]

13.14 A child can access his or her birth certificate from the age of 18 in England and Wales or the age of 16 in Scotland, but this will show only those who are registered as his or her parents – who may not be his or her genetic parents.[15] The birth certificate may show no registered father. There is a common-law presumption that the mother's husband is the legal father of her child, but that may not reflect the genetic reality of the child.[16] To know their true genetic origins, children therefore have to rely on the honesty of their parents regarding such information.

13.15 When a child is born through a surrogacy arrangement, the surrogate is his or her legal mother.[17] As the legal mother, the surrogate will be named on the birth certificate and recorded as the mother in the register of live-births (in England and Wales) or the register of births (Scotland).[18]

13.16 If the surrogate is married or in a civil partnership with a man, her spouse/civil partner is the legal father and may also be named on the birth certificate (unless it can be shown that he did not consent to the surrogacy).[19] If the surrogate is in a civil partnership or married to a woman, her spouse/civil partner is the legal second parent and may also be named on the birth certificate (unless it can be shown that she did not consent to the surrogacy).[20] If the surrogate is unmarried, the second parent named on the birth certificate may be:

(1) the intended father, if he is genetically related to the child and therefore the child's legal father at common law.[21] As he is not married to the surrogate, he could be registered on the birth certificate in the same way as any unmarried father.[22] In Scotland, the intended father who is genetically related to the child would be the legal father only if a court order was made declaring that he was the child's parent or, similar to the position in England and Wales, he took steps

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14 Births and Deaths Registration Act 1953, s 30; Births, Deaths and Marriages (Scotland) Act 1965 s 37(1).

15 Following a birth, the mother will have been given a card by the hospital which she should produce to the registrar. Hospitals also send weekly lists of births to the local registrars. It is therefore unlikely that a woman other than the gestational mother of the child would be named on the birth certificate. Disputes regarding paternity are however more likely as there is no equivalent to gestation or birth from which a conclusion of paternity can be drawn (See A Wilkinson and K Norrie, The Law Relating to Parent and Child in Scotland (3rd ed 2013) paras 3.05 and 3.06).

16 See A Bainham, "Arguments about parentage" (2008) 67 Cambridge Law Journal 322. In Scots law, this common law presumption is enshrined in statute by the Law Reform (Parent and Child) (Scotland) Act 1986, s 5(1)(a): A man shall be presumed to be the father of a child if he was married to the mother of the child at any time in the period beginning with the conception and ending with the birth of the child.

17 HFEA 2008, s 33.

18 Registration of Births, Deaths and Marriages (Scotland) Act 1965 ss 16B(4) and 32(1)

19 HFEA 2008, s 35.

20 HFEA 2008, s 42.

21 Para 4.9 and see Consultation Paper, ch 4.

22 Consultation Paper, para 10.15.

to have himself named on the birth certificate with the consent of the surrogate.[23]

(2) A person without a genetic connection nominated as a parent under the agreed fatherhood conditions or second female parent provisions of the HFEA 2008.[24]

13.17 If donor gametes have been used in the context of treatment at a clinic licensed by the HFEA, the sperm or egg donor will not be recorded on the birth certificate as the father or mother of the child.[25]

Problems with accessing information by using a birth certificate

13.18 Following a parental order, where the child is entered into the Parental Order Register, a certificate produced from that register will say "Certified to be a true copy of an entry in the Parental Order Register ...". In contrast, in Scotland, at the top of the certificate, the following words appear, namely, "This is an extract of an entry from a register held by the Registrar General for Scotland." The General Register Office for England and Wales told us that, before 2010, it was *not* evident from the face of the full certificate issued after a parental order had been made, that it was a copy of the Parental Order Register. This was changed after consultation with those in the field of surrogacy. At the same time, references on the certificate to "parent" were inserted instead of references to "mother" and "father" in recognition that the category of applicants able to access parental orders was broader than opposite-sex married couples. However, all full certificates issued following a parental order before 2010, will not indicate that a parental order has been made, potentially meaning that the person will not know that they were born by surrogacy.

13.19 Further, contrary to the position on adoption, in England and Wales, it is not possible for the General Register Office to provide the linking information that would allow a child born of surrogacy to obtain their original birth certificate. The General Register Office have told us that, before the coming into force of the Human Fertilisation and Embryology (Parental Order) Regulations 2010, it was possible for a person subject to a parental order to access a certified copy of his or her birth certificate. It appears to be a mistake or oversight that this is no longer possible.

Court records

13.20 In England and Wales, when a surrogate-born child attains 18 years, they may apply to the court for information about the parental order application using form A64A.[26] They have the right to receive:

(1) the application form for a parental order (but not the documents attached to that form);

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23 Registration of Births, Deaths and Marriages (Scotland) Act 1965, ss 18(1)(a), (b)(i), (c) and (2)(b).

24 HFEA 2008, ss 35 to 47.

25 HFEA 2008, ss 41(1) and 33.

26 ACA 2002, ss 60(1) and (4), as applied and modified by the 2018 Regulations, reg 2 and sch 1 para 9 and the Family Procedure Rules 2010 (SI 2010 No 2955), r 13.16(3).

(2) the parental order and any other orders relating to the parental order proceedings;

(3) a transcript of the court's decision; and

(4) a report made to the court by the parental order reporter."[27]

13.21 The court will provide this information only if the person has completed a certificate relating to counselling in form A64A.[28] Since 6 April 2010, the courts have been able to disclose information containing identifying information.[29]

13.22 In Scotland, a person who is the subject of a parental order may, after he or she has reached the age of 16, apply to the court for access to the relevant court file (or "process", to use the technical term).[30] Before the Registrar General discloses information about the parental order, the person aged 16 or over and to whom the information relates, must be informed about the availability of any services providing counselling in relation to the implications of compliance with the request; and be given a suitable opportunity to receive counselling.[31]

Problems with accessing information by using court records

13.23 In England and Wales, the documents that the surrogate-born child can obtain on reaching 18 years of age contain much information, including the full names and address of the surrogate and any other person who is a legal parent on birth. However, it appears that it is not possible to obtain statements filed in the proceedings. Typically, these statements would include one made by the intended parents.[32] We have been told by lawyers and judges that such statements, if drafted well, set out a full narrative of the surrogacy journey, which the person who is the subject of the parental order might find useful.

13.24 In Scotland, on the other hand, a person who is the subject of a parental order may, after he or she has reached the age of 16, obtain access to the complete court process relating to the grant of the parental order.[33] The court process is likely to contain information of a sensitive nature.

13.25 There is therefore inconsistency here between the two jurisdictions with regard to access to court records.

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27 Family Procedure Rules 2010 (SI 2010 No 2955), r 13.16 (1) and PD 5A.

28 Family Procedure Rules 2010 (SI 2010 No 2955), r 13.16 (2).

29 ACA 2002, s 60(4) ACA 2002 as applied and modified by the 2018 Regulations, sch 1 para 2 and sch 1 para 9.

30 Act of Sederunt (Rules of the Court of Session 1994) (SI 1994 No 1443) as amended, r 97.17; and Act of Sederunt (Child Care and Maintenance Rules) 1997) (SI 1997 No 291) as amended, r 2.59.

31 Adoption and Children (Scotland) Act 2007, s 55(1) to (5), as applied and modified by the 2018 Regulations, sch 2 para 15.

32 The parties in the proceedings can make statements; the intended parents will make a statement, but it is unusual for the surrogate to do so.

33 Act of Sederunt (Rules of the Court of Session 1994) (SI 1994 No 1443) as amended, r 97.17; and Act of Sederunt (Child Care and Maintenance Rules) 1997) (SI 1997 No 291) as amended, r 2.59.

Register of information maintained by the Authority

13.26 The HFEA 1990 contains provisions dealing with access to information for donor-conceived people. The provisions allow the HFEA to provide information about any person who "would or might, but for the relevant statutory provisions, be the parent of the applicant."[34] The relevant statutory provisions are the sections of the HFEA 1990 and HFEA 2008 that set out who will be a parent in case of assisted reproduction.[35] The HFEA must comply with the request where the individual is or may have been donor-conceived, and has been given the opportunity to receive proper counselling about the implications of compliance with their request.[36] Therefore, these provisions can only be used where gametes have been donated.

13.27 Regulations set out the information that donor-conceived children can access from the age of 16. This information includes: the height, weight, ethnic group and eye colour of the donor; the screening tests carried out on him or her; his or her personal and family medical history and whether the donor has children; and the donor's religion, occupation, interest and skills and why he or she donated.[37] The information does not identify the donor. However, the regulations also permit donor-conceived people over the age of 18 years to access identifying information about their donor, if the donor provided identifying information after 31 March 2005.

13.28 Consequently, for donations from 1 April 2005 onwards, children born of donor gametes have access to significantly more information, including:

(1) the donor's name;

(2) the last known postal address of the donor;

(3) the donor's date of birth and town of birth;

(4) the appearance of the donor; and

(5) any identifying information from the categories covered above for non-identifying information.[38]

13.29 Donors can also access limited information through the HFEA Register, including how many people, if any, were born using their gametes, and the sex and year of birth of these people.[39]

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34 HFEA 1990, s 31ZA(2). The use of "parent" here must mean a genetic parent.

35 HFEA 1990, s 31ZA(7).

36 HFEA 1990, s 31ZA(3).

37 Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations (SI 2004 No 1511), regs 2(1), (2) and (3)(a).

38 Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004 (SI 2004 No 1511), regs 2(1), 2(2), 2(3) and 3(a).

39 HFEA Code of Practice (9th edn) para 11.39.

Problems with applying the provisions to those born as a result of a surrogacy arrangement

13.30 The disclosure provisions in the HFEA 1990 will only be relevant where a UK licensed clinic is involved; that is, where the surrogacy involves IVF or medically supervised artificial insemination. Where self-insemination at home is used, there is no clinic involvement and so the donor cannot be noted on the HFEA Register. Foreign clinics may be involved in a surrogacy arrangement, but these are, obviously, not regulated by the HFEA.

13.31 The disclosure provisions focus on a child being donor-conceived; they permit those born of donor conception to access information about their sperm or egg donor. A surrogacy arrangement may or may not include the use of donor gametes and it appears from what we have been told that if donor gametes are used in surrogacy arrangements, these are more likely to be eggs than sperm.

13.32 The HFEA does not regard intended parents who provide gametes as donors in the way that they would a 'true' sperm or egg donor; that is, someone who simply donates gametes with no expectation that he or she will have an ongoing role in the life of a child conceived with those gametes.[40] Where the intended parents provide gametes their information will be recorded on the HFEA Register of information as a donor, although, since 2013, with the prefix "IP" added to the entry to show that they are the intended parent, rather than a true donor. They will also be screened (in the same way as a donor) for infectious diseases. Because the intended parents were not treated as donors, information about them will not be disclosable via the disclosure provisions.[41] The identity of an intended parent who does not provide gametes will not be recorded on the HFEA Register.

13.33 A surrogate will be registered by the clinic as a patient; where a surrogate's eggs are not used it will not be possible to identify her using the disclosure provisions. The HFEA told us where the surrogate's eggs were used, she would meet the definition of a donor in the Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004 and therefore it would be possible to identify a traditional surrogate using the provisions.

13.34 It is unsurprising that the disclosure provisions cannot be used to identify a surrogate who did not use her own eggs. The regulations that deal with disclosure of information refer to a donor, and the donor is defined as "the person who has provided the sperm, eggs or embryos that have been used for treatment services in consequence of which the applicant was, or may have been, born".[42] This definition clearly does not extend to a gestational surrogate.

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40 That is, intended parents (and surrogates) are not seen to fall within HFEA 1990, sch 3 para 5(1) which provides that "a person's gametes must not be used for the purposes of treatment services or non-medical fertility services unless there is an effective consent by that person to their being so used and they are used in accordance with the terms of the consent". Instead, they are seen to fall within HFEA 1990, sch 3 para 5(3): "This paragraph does not apply to the use of a person's gametes for the purpose of that person, or that person and another together, receiving treatment services".

41 This situation exists because intended parents will not have given the necessary consent to be treated as a donor for the purposes of the HFEA Register; HFEA 1990, s31ZD(1).

42 Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004 (SI 2004 No 1511), reg 1(2).

13.35 The law is not sufficiently clear about access to information relating to origins in the context of a surrogacy arrangement. Several consultees, including the HFEA, thought that there was not a good fit between the provisions of the HFEA 1990 dealing with disclosure of information, and surrogacy arrangements.

13.36 Of course, a scenario where a child born of a surrogacy arrangement does not know who the intended parents are may be very unlikely. However, such a situation could arise where, for example, the child was not raised by the intended parents, but was taken into care before the making of the parental order, or where the intended parents' relationship has broken down and the intended parent who cares for the child does not inform the child that there was ever another intended parent involved in the arrangement. The scenario where the child does not know that she or he was born as a result of a surrogacy arrangement is more likely under the current law (at least for the child of an opposite-sex couple), if he or she has only ever seen his or her short birth certificate. It is not possible to tell from the short birth certificate that it is a copy of the Parental Order Register entry.

INTRODUCTION OF THE SURROGACY REGISTER

13.37 As has been seen above, the existing means of obtaining access to information are not sufficient to ensure that those born through surrogacy can access information about their genetic and gestational origins.

13.38 In the Consultation Paper, we provisionally proposed that a Surrogacy Register (the "SR") should be created to record the identity of the intended parents, the surrogate and any other gamete donors, making it clear who contributed gametes.[43] We proposed that the SR would be maintained by the HFEA and contain both identifying and non-identifying information about the gamete donors involved in each surrogacy agreement.[44] We wanted to put all this information in one place to make it easier for a surrogate-born person to learn about their origins. We saw the SR as operating in a way similar to the existing HFEA Register, which would continue to operate alongside the SR.

13.39 In the Consultation Paper, we were particularly interested in consultees' views on the following points:

(1) Who should maintain the SR.[45]

(2) For which agreements information should be recorded.[46]

(3) The content of the information (identifying and/or non-identifying information).[47]

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43 Consultation Question 47.

44 Consultation Question 47.

45 Consultation Question 47(1).

46 Consultation Question 47(2).

47 Consultation Question 47(2).

(4) Whether the information should be medically verified to be included on the SR.[48]

(5) Whether the application form/petition for a parental order should record full information about a child's genetic heritage where available and established by DNA or medical evidence, recording the use of an anonymous gamete donor if that applies.

13.40 We proceed by dealing with each of the above aspects in turn.

13.41 It is important to note that our recommendations in this chapter reflect the current position on anonymity of gamete donors. The HFEA is currently considering whether to recommend to the DHSC changes they would like to see made to the Human Fertilisation and Embryology Act 1990 (as amended), in relation to consent and information-sharing around the anonymity of gamete and embryo donors. We understand that these recommendations are likely to be informed by a consultative survey and other engagement with interested parties. If the position changes in the future, then those changes would need to be reflected in relation to surrogacy.

Introduction of the Surrogacy Register

13.42 Firstly, we provisionally proposed in the Consultation Paper the introduction of an SR which would record the identities of the surrogate, the intended parents and any gamete donors.[49]

Consultation

13.43 Almost all consultees agreed with the provisional proposal, including those who object to surrogacy in principle. Nordic Model Now!, and all the responses based on its template, considered that if surrogacy does take place then it is important that children have access to information about their origins.

13.44 Some consultees thought that creating an SR was in the interests of transparency. One intended parent said that introducing an SR would serve to protect the surrogate (presumably because it would mean that the surrogate would be less likely to be left with the child).

13.45 The Board of Deputies of British Jews and the Scottish Council of Jewish Communities highlighted that genetic and gestational origins were particularly important to identity for the Jewish Community.

13.46 A small number of consultees disagreed with the proposal. Some thought that the surrogate should be able to decide whether her information is recorded on the SR or not. The Law Society of Scotland were concerned about the privacy implications of introducing an SR and that individuals other than the surrogate-born person and the parties to the arrangement would be able to access the SR.

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[48] Consultation Question 47(2). We suggested that in traditional surrogacy arrangements (which do not involve a fertility clinic), the parties should take a DNA test or submit other evidence to establish who the child's genetic parents are, see Consultation Paper, para 10.98.

[49] Consultation Question 47.

13.47 Some consultees argued that children conceived through sexual intercourse or IVF are not entered into a register, and therefore our proposal treats surrogate-born people differently, without justification.

13.48 Other consultees commented on the relationship between our proposal and the rights of trans people. The Birth Registration Campaign were concerned that it would not be possible to identify a gamete donor or surrogate where they have transitioned gender after providing gametes, and so proposed that pre-conception surrogacy agreements should require the surrogate, and any gamete donor, to agree to inform the Register of any changes to their identity, including a recognition of their different gender identity.

Analysis

13.49 In light of widespread support from consultees, we recommend the introduction of an SR that would include the identities of the surrogate, the intended parents and any gamete donors.

13.50 This recommendation is central to the protection of the child's rights to know their gestational and genetic origins and his or her identity, since the creation of an SR would enable a surrogate-born person to access all the key information about their origins.

13.51 In response to consultees' privacy concerns, we confirm that access to the SR would be permitted only to specified individuals in specified circumstances; the public would not have access.

13.52 We note consultee arguments that children conceived through sexual intercourse or IVF are not entered into a register. However, if donor gametes are involved in the IVF process, then their details would already be included in the HFEA Register, whereas we do not consider it appropriate or practical for the law to become involved in the private relations between individuals in natural conception.

13.53 We understand that it could be difficult for a surrogate-born person to identify their surrogate or genetic parent if that person has transitioned after being involved in the arrangement, because trans people do not have to make their gender identity documents publicly available. We consider that this point raises social policy issues which fall outside the remit of the surrogacy project, given that there will be other situations where analogous issues may arise because a person has transitioned.

Content and maintenance of the Surrogacy Register

13.54 In the Consultation Paper, we provisionally proposed that the HFEA would maintain the SR, which would record the surrogate's and the intended parents' identifying information, as well as the identifying and non-identifying information of any gamete donors.[50]

13.55 In the Consultation Paper, we provisionally proposed that the SR should record identifying and non-identifying information about donors, but only identifying

[50] Consultation Question 47.

information about surrogates and intended parents.[51] We asked whether *non-identifying* information about surrogates and intended parents should be recorded.[52] This could include (among other things) a physical description of the parties, their marital status and ethnic group.[53]

13.56 We also provisionally proposed that the SR would record information for all surrogacy agreements, irrespective of whether they are on the new pathway, as long as the gamete contributors have been medically verified. We suggested that in traditional surrogacy arrangements (which do not involve a fertility clinic), the parties should take a DNA test or submit other evidence to establish who the child's genetic parents are.[54] In order to facilitate the collection of information relating to agreements where a parental order is sought, the parental order application form should require parties to detail the child's genetic heritage, or confirm that anonymously donated gametes were used. We have recommended elsewhere that, to be granted a parental order, the intended parents should disclose the identities of the surrogate and any known gamete donors for entry into the SR.[55]

Consultation

13.57 The majority of consultees responded "Other" to this question, but in the text of their answers, most consultees, in fact, agreed with this proposal relating to the content and maintenance of an SR. We consider that the reason there were so many "Other" responses was because the format of the consultation question. The question was formulated as a bullet point list of provisional proposals, and a number of consultees agreed to some of the bullet points, but not to others. It seems that this led to those consultees who did not agree to all of the bullet points responding "Other", rather than "Yes", as they considered the latter category would be interpreted as indicating complete agreement to all proposals. Furthermore, a significant minority of consultees were under the erroneous impression that the SR would not include identifying information relating to gamete donors (this may have been due to the wording of part 2(b) of the proposal).

13.58 Relatively few consultees articulated reasons for their support. Some emphasised the importance of compiling accurate information relating to the child's origins, to ensure that the child could learn about their heritage and have access to medical information about their genetic origins, whereas others endorsed the HFEA's role as record-keeper. The Bar Council agreed that as many arrangements as possible should be included in the SR to ensure that surrogate-born people can understand their origin story.

13.59 The Birth Registration Campaign, and PROGAR and Nagalro, suggested that the Register operate retrospectively, to include surrogacy arrangements that came into being before the passage of new legislation. Dr Katherine Wade similarly suggested

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51 Consultation Question 47.

52 Consultation Question 48.

53 We considered the provision of non-identifying information to donor-conceived people under the current law at para 10.52 of the Consultation Paper.

54 Consultation Paper, para 10.98.

55 Recommendation 48.

that the SR should link with information from the courts and the Register of Births, citing Irish proposals[56] as an example.

13.60 Some consultees raised concerns with at least the aspect of the proposal relating to identifying information. Some did not think it should be mandatory to provide identifying information for entry into the SR, while others were concerned that requiring identifying information might discourage people from donating gametes.

13.61 Some consultees thought that gestational surrogacy arrangements should be exempt. They drew a parallel with other couples who have children through IVF using their own gametes, who do not have to disclose their details for entry into an SR.

13.62 COTS disagreed with the requirement for all details to be medically verified, on the basis that the DNA testing involved would be too expensive, while another consultee had concerns about unnecessary medicalisation of traditional surrogacy. There was also concern that the requirement would reduce the amount of information that is recorded on the SR, and this would not be in the surrogate-born person's interests.

13.63 PROGAR and Nagalro raised two issues. The first was whether the SR would be open to those who have used international arrangements. The second was their belief that the Register should hold pen portraits of surrogates and donors along the lines of current HFEA donor requirements except that the pen portraits should be required, not optional.

13.64 Some consultees suggested that the General Register Office would be better suited to the role of maintaining the Register, in light of its experience of managing the birth and death registers. Some consultees did not have confidence in the HFEA, partly due to its links with the fertility industry. The HFEA itself was concerned that extending its remit to cover surrogacy arrangements would be operationally complex; would require new powers of disclosure of information and new powers to ensure that any data submitted is of a suitable quality; and it was concerned how it would follow up with individuals who submitted inaccurate or incomplete information.

13.65 On considering consultees' responses in respect of our question regarding the record of non-identifying details about the intended parents and the surrogate, we realised that our question may have suggested that we meant that *only* non-identifying information about surrogates and intended parents should be recorded. That was not our intention.

13.66 Of consultees who understood the intention behind the question, most supported recording non-identifying information. Some consultees thought that non-identifying information about surrogates and intended parents could be of significance to

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[56] In October 2017, the Irish government approved the drafting of a Bill on assisted human reproduction ("AHR") and associated areas of research, based on the published General Scheme of the Assisted Human Reproduction Bill. The Bill aims to: regulate the area of AHR in order to assist people to have children safely; clarify the legal position of children born from these practices; and ensure research and new reproductive technologies are carried out within a prescribed ethical framework. This Bill also provides for the establishment of the Assisted Human Reproduction Regulatory Authority (AHRRA), which will be the body responsible for ensuring compliance with the new regulatory framework in respect of a wide range of practices undertaken within this jurisdiction. At the time of writing, the Health (Assisted Human Reproduction) Bill 2022 is before Dáil Éireean, Third Stage.

surrogate-born people, whilst others thought that consistency with the information available through the HFEA Register is desirable. One consultee said that non-identifying information should be included if the risk of a health condition is apparent.

13.67 A small number of consultees disagreed with recording non-identifying information.

13.68 Resolution did not think that surrogate-born people would find it useful to have access to non-identifying information about surrogates and intended parents. They argued that many surrogate-born people are in contact with these individuals and, in any case, they would have access to their identifying information through the SR which would allow them to ask questions if they wished.

Analysis

Maintenance of the Surrogacy Register

13.69 We recommend that the SR is maintained by the HFEA. The HFEA is best placed to manage the SR due to its directly relevant experience of managing the HFEA Register, and its disclosure scheme. While we are placing a new responsibility on the HFEA, with operational implications, it would be administratively complicated for any state body to be given responsibility for setting up and maintaining the SR. We believe that, with adequate resources, the HFEA is best placed to discharge this responsibility efficiently and effectively.

Content of the Surrogacy Register

13.70 We recommend that the SR should record information for all surrogacy agreements, whether on the new pathway or following the parental order process, domestic or international, gestational or traditional. This wide scope would maximise the number of surrogate-born people who can access information about their origins through the SR.

13.71 Information about gamete donors, other than the intended parents, and the surrogate in a traditional surrogacy arrangement, should however continue to be recorded on the HFEA Register, in line with current practice.

13.72 Some consultees objected to surrogacy agreements being recorded in the SR where the gametes of both intended parents were used in conception. It is true that if the intended parents had only used assisted reproduction services, their details would not be entered into a register akin to the SR. However, the fact that they are involving a surrogate is a significant part of the child's origins and justifies treating surrogacy differently in this respect.

13.73 Where treatment in an overseas fertility clinic takes place using donor gametes, they will not come within the scope of the existing HFEA Register. There is a risk that information provided about donors in such situations is inaccurate as they fall outside the regime in the UK. We take the view that, notwithstanding the potentially greater risk of inaccuracy, any information available relating to overseas gamete donors, including contact details for the overseas clinic, should be recorded in the SR. In so doing, we hope to maximise the amount of information available to the surrogate-born person, thus helping them understand their origins.

13.74 We recommend that non-identifying information about surrogates and intended parents should be recorded in the SR.

13.75 We consider that non-identifying information serves a distinct, useful purpose in providing the surrogate-born person with information about the surrogate and the intended parents which might be of importance to them. One of the parties might have died since entering into the agreement, or the surrogate-born person might have lost contact with them, in which case providing that information would make it easier for the surrogate-born person to access the information which may be of great personal value to them. As outlined at paragraph 13.4 above, children's rights to know their origins can be linked to Articles 7, 8 and 24 of the UNCRC. In accordance with these rights, we seek to ensure surrogate-born persons have as much access to information about the surrogate and the intended parents as possible via the SR.

Medical verification

13.76 Contrary to our provisional proposal, and in light of consultee responses, we do not recommend that information must be medically verified before it can be recorded in the SR. Instead, we recommend that, in the case of new pathway agreements, the RSO must be satisfied (on the balance of probabilities) that the information provided is accurate. For agreements which are the subject of a parental order application, the court must be satisfied to the same standard. We have recommended elsewhere that rather than requiring the court to obtain DNA tests or another form of evidence, it should be able to decide what evidence it requires to discharge the civil standard of proof.[57] The court could, for instance, rely on clinic records, DNA tests, and written or oral testimony. On reflection, and in light of consultees' responses, we are concerned that the provisional proposal in the Consultation Paper unnecessarily infringes privacy rights, as DNA tests can reveal far more information than the identity of the parent. To compel parties to seek that level of information about themselves may be unnecessary when it is possible to obtain the information in another way.

Provision of information to the HFEA

13.77 For surrogacy agreements outside the new pathway, we recommend that the application form for a parental order in England and Wales, or the petition made to the court in Scotland, should record the child's genetic heritage, including the use of any anonymous gamete donor. The court should be required to send the parties' details to the HFEA for inclusion in the SR, on the conclusion of the application, whether or not an order is made. If the surrogacy team used anonymously donated gametes (for example, overseas), that should also be recorded explicitly on the SR. Recommendation 48 in Chapter 10 sets out this approach. For surrogacy arrangements on the new pathway, the required identity information would be included in the Regulated Surrogacy Statement, as set out in Recommendation 34 in Chapter 8.

13.78 We recommend that if a surrogacy team use the services of a fertility clinic, based in the UK or overseas, its contact details should be recorded in the SR. This information could enable the surrogate-born person to learn more about their origins if other information is incomplete or is subsequently disproven. It is appropriate to record this information in the SR, given that the parties are already required to list the contact

[57] Recommendation 61.

details of any fertility clinic they have used on the parental order application form during the parental order process.

Information not included on the Surrogacy Register

13.79 At present, gamete donors are permitted but are not obliged to provide a pen portrait for inclusion in the HFEA Register. A pen portrait is a short description of the donor, which might include personality traits and interests. We do not recommend that all parties to a surrogacy agreement must provide a pen portrait for inclusion in the SR. To do so would be to introduce inconsistency with the HFEA Register. Modern understandings of children's rights suggest that children should be granted as much access to information about their origins as possible, and therefore, the HFEA and DHSC may wish to consider whether the current policy on pen portraits should be revised, across both donor-conception and surrogacy agreements, to require that donors always provide a pen portrait.

13.80 We recommend that the SR should not include cross-references to the surrogate-born person's parental order court records. The purpose of the SR is to record non-identifying and identifying information relating to those involved in the child's conception and birth. It is not designed to provide linking information to court records, which might also be operationally difficult for the HFEA to administer. Further, it is unnecessary for the SR to include cross-references to court records. If the surrogate-born person was the subject of a parental order, a parental order certificate would be issued in their name which should alert them to the existence of court records relating to their parents' parental order application.

13.81 We recommend that the SR should only include, for the new pathway, surrogacy agreements where the Regulated Surrogacy Statement was signed into after a reformed law comes into force. For surrogacy agreements which are the subject of a parental order, only those where the application was made after the reformed law comes into force would be recorded on the SR. Parties to surrogacy agreements which predate the new legislation should be able voluntarily to submit their details to a separate "voluntary contact register", as is currently the case for donor conception. This approach would increase the number of surrogate-born people who can access information about their origins, without prejudicing those whose involvement in a surrogacy agreement pre-dates the creation of the SR.

Inaccurate information on the Surrogacy Register

13.82 We recommend that on the new pathway, if it emerges that the intended parents provided inaccurate information about the child's genetic heritage, the HFEA should be able to rectify the SR, but the identity of the child's legal parents should be unaffected. We want to ensure, as far as possible, that the information contained in the SR is accurate. Nevertheless, we do not think it is appropriate for the surrogacy agreement to exit the new pathway and to require the intended parents to bring a parental order application in circumstances where incorrect information has been provided. This approach would be to the detriment of everyone involved in the agreement, creating great uncertainty for the surrogate, child and the intended parents.

13.83 The surrogacy agreement would not continue to be on the new pathway where the provision of the inaccurate information concealed the fact that the child had not been

born as a result of a surrogacy arrangement; for example, where a DNA test shows that the child is the genetic child of both the surrogate and her husband or male partner.

HFEA powers

13.84 The HFEA said that if it were to maintain the SR, it would need new powers: (i) to disclose information; and (ii) to ensure that data is of a suitable quality.

13.85 As regards disclosure, we are of the view that our recommendations make clear the circumstances in which the HFEA should disclose information contained in the SR, such as the age of access and counselling requirements, and to whom.[58]

13.86 As regards the quality of the data, we make a recommendation elsewhere in this Report regarding the HFEA's powers to enforce compliance with its licence conditions,[59] including its data quality policies. In short, we have recommended that the HFEA should have the same powers against RSOs as it currently has against other bodies that it regulates to enforce compliance with its licence conditions. Further, we suggest that DHSC should conduct a review to determine whether the HFEA's existing enforcement powers are adequate and have given examples of some additional enforcement powers that the HFEA could be given. Any such new enforcement powers could apply to instances of RSOs supplying information for entry to the SR that does not comply with the HFEA's data quality standards. We note that in addition to clinics and RSOs, information for the SR would be received from the court where a parental order is made. We consider that the fact that the information has been accepted by the court should provide sufficient assurance of its quality.

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58 Recommendations 63 to 66.

59 Recommendation 28.

Recommendation 61.

13.87 We recommend the creation of the Surrogacy Register ("the SR").

13.88 We further recommend that:

(1) the SR should be maintained by the HFEA;

(2) the SR should record identifying *and* non-identifying information about surrogates, intended parents, and gamete donors involved in surrogacy agreements, with the exception of information about gamete donors other than the intended parents, which should continue to be recorded in the HFEA Register;

(3) the SR should record information for all surrogacy agreements, whether in or outside the new pathway, domestic or international, gestational or traditional, provided that the parties have satisfied either a Regulated Surrogacy Organisation ("RSO") or the court on the balance of probabilities that the information is accurate;

(4) if a surrogacy team used the services of a fertility clinic, its contact details should be included in the SR, irrespective of whether it is based in the UK or overseas; and

(5) parental order agreements should only be included in the SR where the Regulated Surrogacy Statement was signed, or the parental order application was made, after the commencement of the SR provisions. However, surrogate-born people and parties to surrogacy agreements which came into being before the passage of new legislation should be able to submit their details for inclusion on a separate voluntary contact register.

13.89 We recommend that, on the new pathway, if the intended parents provided incorrect information about the child's genetic heritage, the SR should be rectified on application to the HFEA, but that the identity of the child's legal parents should be unaffected, unless it emerges that the child was not born of a surrogacy arrangement.

13.90 Clauses 90 and 91 of the draft Bill give effect to the recommendation that the SR is established, giving the UK Government powers to make regulations specifying the information to be kept on the register. In particular, clause 91(3)(b) enables regulations to make provision for the test as to the accuracy of information which is or is to be recorded on the SR. Clause 92 provides for regulations to be made addressing the case where information on gamete donors is stored on the existing HFEA Register on donor conception.

13.91 The recommendation that the details of any fertility clinic used are recorded in the SR is also given effect through a licence condition for RSOs which requires that information to be recorded, in clause 53(1)(v) of the draft Bill.

13.92 Clause 100 of the draft Bill gives effect to the recommendation that the HFEA may keep a voluntary contact register, and clause 101 enables the HFEA to make arrangements for another person to keep that register, and to provide financial assistance to such a person on such terms and conditions as it considers appropriate.

13.93 Other clauses of the draft Bill set out how the HFEA will operate the SR. Clauses 102 to 105 provide for restrictions on the disclosure of information on the SR (and the Register of Regulated Surrogacy Statements, and the voluntary contact register) and related offences, which mirror similar provisions in the HFEA 1990 in relation to the HFEA Register on donor conception. Clause 97 enables the HFEA to charge a fee in relation to a request for information on the SR.

Including information about an intended parent who is not a party to the parental order on the Surrogacy Register

13.94 It is possible that a couple (the intended parents) could enter into a surrogacy agreement, but then separate after the child is conceived, before or around the time of the child's birth.

13.95 If this happened on the new pathway, then unless the surrogate exercised her right to withdraw her consent, both intended parents would be the child's legal parents automatically at birth. This outcome arises because, on the new pathway, the intended parents do not have to do anything after conception to become the child's legal parents, and so their legal status would be unchanged by their separation.

13.96 Where the intended parents need to seek a parental order, the result of a separation might be different. A parental order may still be granted in their joint names, or a parental order may be granted in the sole name of one of the intended parents, in which case the other will never be the child's legal parent.[60] In these circumstances, we asked consultees whether the former intended parent's information should be recorded on the SR. On the one hand, at the time of conception the former intended parent wanted to bring the child into the world and to be a parent. On the other, they may have played no subsequent role in the child's life.

13.97 We note that, if the former intended parent was genetically related to the child, they would be recorded on the SR as a gamete contributor, in light of Recommendation 61. Nevertheless, they would not be recorded on the SR as an intended parent. And if the former intended parent was not genetically related to the child, then they would not be recorded on any register at all, unless this proposal is taken forward.

13.98 In the Consultation Paper, we asked for consultees' views as to whether details of an intended parent who is not a party to the application for a parental order should be recorded in the SR.[61]

Consultation

13.99 Most consultees said that the details of the former intended parent should be recorded. Most commonly, consultees argued that the information might be important

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60 Para 10.68 onwards.

61 Consultation Question 53.

to the surrogate-born person. It was felt that the surrogate-born person might want to contact the former intended parent, to help them understand their origins, and this information might be concealed unless it is recorded on the SR.

13.100 One consultee argued for the importance of intention in surrogacy arrangements; whilst SurrogacyUK's Working Group on Law Reform argued for the potential parallel with natural conception, in which circumstances a man would still be regarded, in law, as the child's father even if the couple separated before birth.

13.101 A small minority of consultees responded that the details of the former intended parent should not be recorded in the SR. There were three main arguments amongst this group:

(1) First, the relationship ended prior to the birth and therefore, it would not be beneficial for the child to have access to this information.

(2) Secondly, in practical terms, it would be difficult to ensure compliance with the proposal.

(3) Thirdly, the former intended parent was entitled to privacy thus their details should not be automatically entered into the SR.

13.102 Some consultees also thought this person should only be recorded in the SR if they are genetically related to the child.

Analysis

13.103 We recommend that for surrogacy agreements outside the new pathway, information relating to a former intended parent who is not a party to the parental order should be included in the SR.

13.104 In the event that a parental order is not granted in this person's favour, we still think it is in the best interests of the surrogate-born child that the information should be recorded in the SR, to ensure that they can fully understand their origins. The former intended parent played a role in the formation of the agreement which led to the surrogacy agreement, which the surrogate-born person might be interested in. We do not think this person should be written out of the narrative of the surrogacy agreement altogether in these circumstances.

13.105 This recommendation operates in conjunction with Recommendation 42,[62] where we have recommended that on applying for a parental order, the surrogate and the intended parents must confirm that no one else was involved in the agreement at an earlier stage. If the surrogate or intended parents make a false statement or declaration to the court in this respect, they would be guilty of contempt of court in England and Wales,[63] or commit a criminal offence in Scotland.[64]

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62 Para 10.80

63 Part 17.6 Family Procedure Rules 2010.

64 Under Section 44 Criminal Law (Consolidation) (Scotland) Act 1995.

13.106 We consider it suitable for there to be a requirement that, during parental order proceedings, the court must be satisfied, on the balance of probabilities, that the person was a party to the surrogacy agreement at its inception. Only if the court is satisfied (to this standard) should the former intended parent be recorded on the SR. This is necessary to preserve its accuracy. The court could rely on whatever evidence it wishes, for example an original written document evidencing the arrangement, or evidence of relevant correspondence between the former intended parent, the surrogate and the current intended parent.

Recommendation 62.

13.107 We recommend that for surrogacy agreements outside the new pathway, information relating to a former intended parent who is not a party to the parental order should be recorded in the Surrogacy Register. Before the court can submit the former intended parent's details to the HFEA for inclusion in the Surrogacy Register, it must be satisfied, on the balance of probabilities, that the person was a party to the surrogacy agreement at its inception.

13.108 Clause 23 of the draft Bill provides for regulations to specify the required identity information that must be submitted to meet the conditions of a parental order application, including the conditions for an application made by two parents in clause 18(10). Clause 24 requires the court to transfer that information to the HFEA.

13.109 The recommendation that this information should include information on a former intended parent who is not party to the parental order is enabled by clause 17(2) which allows for an application to be made by only one of two intended parents who had entered into a surrogacy agreement.

AGE OF ACCESS TO THE SURROGACY REGISTER

13.110 In the Consultation Paper, we considered at what point surrogate-born people should be able to access information about their origins. We proposed that a surrogate-born person should be able to access non-identifying information on the SR from age 16, and identifying information from age 18, in line with the HFEA Register, provided that they have been given an opportunity to receive implications counselling.[65]

13.111 We noted that this proposal was inconsistent with Scots law. The age of legal capacity in Scotland is 16,[66] and, correspondingly, Scots law permits a surrogate-born person to access their original birth certificate and the court records relating to their parental order application at this age.[67] Both sets of documents could contain

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65 Consultation Question 49(1).

66 Age of Legal Capacity (Scotland) Act 1991, s 1(1)(b).

67 In relation to the original birth certificate: Adoption and Children (Scotland) Act 2007, s 55(4)(b), as applied and modified by the 2018 Regulations, reg 3 and sch 2, para 15. In relation to the court records: where the application was lodged in the Court of Session then the relevant provision is Act of Sederunt (Rules of the Court of Session 1994) (SI 1994 No 1443) as amended, r 97.17; and where the application was lodged in

identifying information. In this sense, our proposal would, in fact, raise the age at which a surrogate-born person in Scotland could access identifying information (although it would not interfere with their existing ability to access their birth certificate and court records at 16).

13.112 We noted, however, that the HFEA Register extends across Scotland, along with the rest of the UK so, to that extent, those in Scotland are not able to access identifying information from the HFEA Register at an earlier age than their English and Welsh counterparts. Therefore, the age at which people can access identifying information in Scotland is already dependent on the source of the information. We asked consultees whether surrogate-born people under the ages of 16 and 18, respectively, should be able to access non-identifying and identifying information contained in the SR.[68] Some Australian statutes allow a person under 18 access to identifying information, where approval has been given by a parent, or where a counsellor has advised that the person is mature enough to understand the consequences of disclosure.[69] In light of this, we also asked consultees whether a child under the age of 18 or 16 (depending on whether the information is identifying or non-identifying respectively) should be able to access the information in the Register and, if so, in which circumstances:

(1) where his or her legal parents have consented;

(2) if he or she has received counselling and the counsellor judges that he or she is sufficiently mature to receive this information; and/or

(3) in any other circumstances.

Consultation

13.113 We divided the consultation question into two parts. In part 1 we provisionally proposed the age of 18 for accessing identifying information and 16 for non-identifying information (if such information were to be included on the SR, which we have recommended should be the case).[70] In part 2 we asked an open question as to consultees' views on the circumstances in which information could be accessed before the respective statutory ages.

Part 1

13.114 Regarding the default ages of access to the SR, most consultees agreed with the proposal. For example, the Family Education Trust argued in favour of the proposal on the basis that surrogate-born people have a right to know about their origins.

Sheriff Court then the relevant provision is Act of Sederunt (Child Care and Maintenance Rules) 1997) (SI 1997 No 291) as amended, r 2.59.

68 Consultation Question 49(2).

69 Both the Assisted Reproductive Treatment Act 2008 (Victoria) and the Parentage Act 2004 (Australian Capital Territories) allow disclosure with parental consent. The Australian state of Victoria additionally allows disclosure on the advice of a counsellor.

70 Recommendation 61.

13.115 Some consultees supported the proposal on the basis of its consistency with the HFEA Register disclosure scheme. They argued that donor-conceived and surrogate-born people have, in principle, the same right to access information about their origins.

13.116 Some consultees disagreed with the proposal. One group of consultees thought surrogate-born people should not be able to access the SR at all before age 18.

13.117 Another group of consultees thought the ages of access to the SR should be lower than proposed, and advocated for access to identifying information at age 16. This view was held by Georgina Roberts (person born of a surrogacy arrangement), who thought that it would not be in the child's best interests to withhold the information until age 18.

13.118 Regarding our proposal that surrogate-born children should be given a suitable opportunity to receive implications counselling before accessing the SR, the Law Society said that they thought counselling should be a requirement. By contrast, some consultees thought that the child should not have to go through counselling to access information about their origins. Furthermore, the Birth Registration Campaign suggested the term "counselling" be replaced by "consultation" in the Report:

> We have learned from the adoption community that adopted people do not welcome the idea that they need counselling in order to receive information relating to their adoption records. The word is associated with trauma and therapy and suggests that their wish to know about their personal history is in some sense abnormal. However, they can for the most part see the value of a preparatory consultation with a professional who has an understanding of the issues that they may encounter.

13.119 Finally, some consultees said that we had neglected rights of access to the SR for donors and surrogates and suggested that they should be able to access information about children whose birth they had been involved in.

Part 2

13.120 In response to the second part of the question, most consultees favoured allowing access to the SR to surrogate-born people under the ages of 16 and 18.

13.121 Nevertheless, consultees rarely articulated *why* they supported earlier access to the SR. Consultees sometimes spoke of the child's right to access the information, or the benefits of being told at an early age. Dr Katherine Wade and Cambridge Family Law argued that information about origins can be important for identity formation as children grow up.

13.122 On the other hand, some consultees disagreed with permitting surrogate-born people to access the SR early.

13.123 Some consultees thought the ages of access should mirror those applicable to the HFEA Register. For this reason, they did not support earlier access to the SR, unless the scheme underpinning the HFEA Register was also reformed.

13.124 Some intended parents thought it should be up to the child's parents to decide whether to share information informally with the child before age 16, whilst others

thought it was unlikely that a child under 16 would be mature enough to understand the information they were receiving.

13.125 On a different note, the HFEA said:

> Operationally we also do not believe that it is desirable to have any other barriers to the request by the relevant parties to have access to register information, apart from a suitable opportunity to receive proper counselling. In practical terms we question how the regulator would know whether the legal parents had in fact consented to such an information access request or not, and what would happen in scenarios where an individual had lost contact with their legal parents etc, and then wished to make an information access request.
>
> We would also be concerned about the additional resource burden this would place on the future regulator, as this would mean having the counselling provision available to service the potential counselling requirement of a greater cohort of people than is now the case.

Consultees' views on circumstances in which early access to the Surrogacy Register should be permitted

13.126 Of those who supported earlier access to the SR, consultees had a range of views on the circumstances in which surrogate-born people should be permitted to access the SR early, although reasons for these views were rarely provided. It was most common for consultees to endorse earlier access following a counsellor's assessment of the person's maturity.

13.127 Cafcass agreed with earlier access following a counsellor's assessment of maturity, but rejected parental consent. Some consultees thought that counsellor assessment and parental consent could coexist as alternative routes to earlier access to the SR. Others, in contrast, thought that both parental consent and counsellor approval should be required to enable earlier access to the SR.

13.128 Some consultees thought that only parents should be able to grant early access to the SR. A small number of consultees did not support any restrictions at all on a surrogate-born person's ability to access the SR.

13.129 Consultees also made other suggestions relating to our proposal. PROGAR and Nagalro doubted whether counsellors are well placed to assess maturity. Several consultees advocated *Gillick* competence as the legal test for maturity, whilst some thought children should have access to the SR for urgent medical reasons, without parental consent. Others said that surrogate-born people should be able to access the SR early if the surrogate and/or the donor agree.

13.130 The Family Justice Council suggested that surrogate-born people could make an application to the court before the respective ages of 16 and 18, to determine whether they are sufficiently mature to access the SR.

Analysis

13.131 Our approach in making recommendations on the age of access to the SR has been guided by the different approaches to the wider question of capacity in the two

jurisdictions, rather than on alignment across both jurisdictions with the rules for accessing the existing HFEA Register on donor conception, as we had originally set out in our Consultation Paper proposals. We have decided that it is necessary to have different policies for England and Wales, and Scotland. This is because, in Scotland, legislation provides that the age of legal capacity is 16,[71] whereas in England and Wales, the legal situation is more complex, particularly for 16- and 17-year-olds.

England and Wales

13.132 In England and Wales, we recommend that a surrogate-born person should be able to access non-identifying information contained in the SR at age 16, and identifying information at age 18. Our starting point was that surrogate-born people should have at least the same entitlement as donor-conceived persons to access information about their origins. We consider the HFEA 1990 provisions to be sensible and do not see any reason for diverging from those statutory ages of 16 and 18 as a starting point.

13.133 We considered recommending the age of 16 for access to *identifying* information but decided against it on the basis of the rights of surrogate-born children. In isolation, the child's rights to an identity under Article 7 and to preserve their identity under Article 8 of the UNCRC, point towards a lower age of access, which would enhance the child's autonomy by allowing them to identify their surrogate and any gamete donors, and contact them, without needing to wait until age 18. Articles 7 and 8 of the UNCRC must, however, be read through the lens of its four general principles, including the best interests of the child (Article 3). Gaining access to identifying information about one's genetic origins or surrogate is a significant decision, with the potential to cause psychological and emotional distress. We learned in a meeting with representatives of the Donor Conceived Register,[72] for example, that donor-conceived people may be disappointed after meeting their donor, and risk feeling rejected if their donor does not wish to develop a relationship with them.[73] Therefore, in weighing the surrogate-born person's right to know about their origins against what is likely to be in their best interests, we take the view that 18 is a more suitable age to access identifying information because it is the age of majority. As set out above, we take a different approach in Scotland given the different approach to capacity in that jurisdiction.

13.134 Some children, however, will be sufficiently mature to access the SR below the respective ages of 16 and 18. We do not think we should prevent younger children from accessing information if a professional concludes they have legal capacity or competence with respect to the decision. As a result, our recommendation in relation to access to information *before* the ages of 16 or 18 respectively, for England and Wales, has developed significantly following consultation.

13.135 Most consultees agreed that there ought to be some way to access information before the respective statutory ages. In light of this, we recommend that surrogate-born children should be able to access information in the SR before the ages of 16

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71 Age of Legal Capacity (Scotland) Act 1991 s 1(1)(b)

72 Which is the Voluntary Contact Register established to provide a (voluntary) means of contact between gamete donors and offspring for assisted conception that took place before the recording of gamete donors' identities (this register is distinct from that maintained by the HFEA).

73 Meeting between the Law Commission of England and Wales and the Donor Conceived Register, 7 July 2021.

and 18 respectively, regardless of the type of surrogacy agreement, if they demonstrate legal capacity or competence with respect to the decision.

13.136 We did consider taking a different approach and providing access to information about the surrogacy at 16, and information about any donor(s) at age 18. However, we have not chosen to pursue this option as we think that the two regimes (for the provision of gestational and genetic information) should be aligned in England and Wales where statutory provision on capacity does not take a different approach, and that any reform to the system as a whole should be considered in the future.

13.137 We have taken account of the effect of section 8(1) of the Family Law Reform Act 1969 ("the FLRA") which first introduced to England and Wales the significance of the age of 16 in the context of medical treatment. The position of 16- and 17-year-olds in England and Wales is also affected by sections 1(2) and 2(5) of the Mental Capacity Act 2005 ("the MCA"). As summarised by Sir James Munby in *Re X (A Child) (No. 2)* [2021] EWHC 65 (Fam):[74]

(1) Until the child reaches the age of 16 the relevant inquiry is as to whether the child is *Gillick* competent.

(2) Once the child reaches the age of 16: (i) the issue of *Gillick* competence falls away, and (ii) the child is assumed to have legal capacity in accordance with section 8 [of the Family Law Reform Act 1969], unless (iii) the child is shown to lack mental capacity as defined in sections 2(1) and 3(1) of the Mental Capacity Act 2005.

13.138 We are drawing an analogy with consent to medical treatment because it is the closest comparable scenario and well established in law.

13.139 "*Gillick* competence" is a test for the legal capacity of children in England and Wales that originated in a House of Lords decision.[75] In the majority speeches in that case, it was held that when the child achieves sufficient maturity and understanding, their parents' right to determine their medical treatment terminates, and is replaced by the child's right to make their own decisions. An assessment of whether a child is *Gillick* competent will factor in whether they can truly understand what is in their best interests,[76] but it is also possible for a competent child to seek to make a decision that is against their best interests.[77] In cases where this would have severe impacts, the

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74 *Re X (A Child) (No. 2)* [2021] EWHC 65 (Fam) at [55].

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

76 *Re R (A Minor) (Wardship: Consent to Treatment)* [1991] 3 WLR 592; Re E (a minor) (wardship: medical treatment) [1993] 1 FLR 386, 391; D Archard and M Skivenes, 'Balancing a Child's Best Interests and a Child's Views' [2009] 17 *International Journal of Children's Rights* 1

77 *Re S (A Child) (Child as Parent: Adoption: Consent)* [2018] 2 WLR 1029, 62

court can override their decision by exercising its inherent jurisdiction,[78] although a child's preferences will be treated as important when determining their best interests.[79]

13.140 While the interaction between the approaches in the Mental Capacity Act 2005 and *Gillick* is the subject of considerable debate,[80] we view it as important to ensure consistency with respect to the existing law on children's capacity.

13.141 We recommend that in England and Wales, a surrogate-born person below the age of 16, should be able to access identifying or non-identifying information in the SR, if the surrogate-born person meets the requirements of *Gillick*[81] competence with respect to the decision.

13.142 We are confident that the *Gillick* test is appropriate to assess competence in this context because *Gillick* is an established legal test and professionals working with children are already familiar with it. For example, *Gillick* competence is referred to in the HFEA Code of Practice as the test to decide whether a child under 16 can consent to the storage or use of their gametes.[82]

13.143 Our draft Bill simply refers to the child's competence being the relevant factor when making a decision about their access to information on the SR, with competence to then be dealt with under the common law. Reference to *Gillick* competence could be made in the Surrogacy Code of Practice to be issued by the HFEA.[83]

13.144 For those aged 16 or 17 in England and Wales, we recommend provision for them in the draft Bill to make an access request to the HFEA, if they have capacity under the Mental Capacity Act 2005. Under this Act there is a presumption of capacity, unless proved otherwise, which would apply with respect to the decision to access identifying information contained in the SR, in line with the approach taken in sections 1(2) of that Act.

Scotland

13.145 The Mental Capacity Act 2005 has no application in Scotland, where those aged 16 or over are deemed to have capacity, by virtue of the Age of Legal Capacity (Scotland) Act 1991. For this reason, in Scotland, we recommend a different approach. A surrogate-born person aged 16 or over will be able to access this information as they will have capacity. Before the age of 16, they should be able to access this information where it is established that they have a general understanding of what it means to do so. In order to achieve this, we recommend disapplying the Age

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78 *Re X (A Child) (No.2)* [2021] 4 WLR 11; *E v Northern Care Alliance NHS Foundation Trust* [2021] EWCA Civ 1888

79 *A Teaching Hospitals NHS Trust v DV (A Child*) [2021] EWHC 1037 (Fam); D Archard and M Skivenes, 'Balancing a Child's Best Interests and a Child's Views' [2009] *17 International Journal of Children's Rights* 1

80 See, for example, Emma Cave, "Goodbye Gillick: Identifying and resolving problems with the concept of child competence" [2014] 34 Legal Studies 103; Andrew McFarlane, "Mental capacity: one standard for all ages" [2011] 41 Fam Law 479

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

82 HFEA Code of Practice (9th edn) para 5.11.

83 Recommendation 24(2).

of Legal Capacity (Scotland) Act 1991 in this specific context, to enable children under 16 to access this information where they can demonstrate that they have such capacity, and adapting the test of legal capacity to instruct medical treatment, which requires the child to be capable of understanding the nature and possible consequences of treatment, from section 2(4ZA) of that Act.

13.146 We acknowledge that this creates a disparity between Scotland, and England and Wales, and that the recommendation will also create a disparity in Scotland between donor conceived people and surrogate-born people (the former only being able to access information about their origins at age 18). However, we think that this is justified given the different law on capacity in the two jurisdictions. Furthermore, despite the different legal tests for the different jurisdictions, we envision that the outcome will materially be the same because, in general, 16- and 17-year-olds will have access to identifying information in both jurisdictions: as of right in Scotland and where they have capacity under the Mental Capacity Act 2005 in England and Wales.

Counselling

13.147 We accept that counsellors might not have the training or experience to assess the capacity or competence of a surrogate-born child, and we recognise that several professions currently conduct these assessments, including clinicians and lawyers. Therefore, our recommendation sets out the tests for early access to the SR, without identifying a specific group of professionals who would conduct the assessment or how this will be done, but we foresee it being a professional with the appropriate qualifications and experience.

13.148 We recommend that the surrogate-born person be given a suitable opportunity to receive counselling about the implications of accessing the SR in all circumstances before being granted access. Some consultees suggested that offering a surrogate-born person implications counselling prior to accessing the SR was unnecessary. We take a different view in light of the potential psychological and emotional implications of the decision.

13.149 Other consultees suggested that implications counselling should be a mandatory requirement for children under 16 who want to access the SR. We disagree that it should be mandatory, on the basis that surrogate-born people would have different levels of maturity and preparedness to access the SR. We do not want to impose counselling on a child under 16, who is fully aware of and prepared for the consequences of the decision.

13.150 We note the Birth Registration Campaign's concern that counselling has negative connotations and that "consultation" with a professional should instead be offered. However, we have decided to use the term 'counselling' because it is the term used throughout the HFEA statutes and we wish to ensure consistency with the HFEA disclosure scheme as far as possible.

Parties other than the surrogate-born person

13.151 We recommend surrogates and donors are made aware by the fertility clinic, at the time of donation, or of entering into the agreement, that a surrogate-born person might be able to access the SR below the ages of 16 or 18. This would be set out in the

Surrogacy Code of Practice, similarly to the way donors are currently made aware of the ways in which their information will be available, by the HFEA Code of Practice.[84]

13.152 According to the HFEA's website, parents can already access *non-identifying* information about the donor on their child's behalf before the child turns 16.[85] We acknowledge, however, that by permitting children to access *identifying* information contained in the SR below age 18, our recommendations go beyond the HFEA Register disclosure scheme. While we cannot make recommendations outside the scope of surrogacy law, we consider that the scope of disclosure under the HFEA Register could be usefully evaluated by DHSC and the HFEA, in light of modern understandings of children's rights. Finally, PROGAR, Nagalro and Dr Sharon Pettle proposed that intended parents should have access to the SR until their child is 18, and that donors and surrogates should also have access to the SR, in line with the information that donors can access through the HFEA Register. We did not find either argument persuasive.

13.153 As regards intended parents' access to information, if their child was conceived using donor gametes, after their child's birth they could access non-identifying information about the donor through the HFEA Register,[86] in addition to the information they could access prior to treatment.[87] We do not see any reason to duplicate the availability of this information by also making it available to intended parents through the SR. Further, we do not see any reason to allow intended parents to access non-identifying information about their surrogate through the SR. Presumably, all the information they (personally) would need to know would have been disclosed at the time of entering into the agreement.

13.154 As regards donors and surrogates, donors have access through the HFEA Register to the following information about any children born as a result of their donated gametes or embryos: (a) the number of children born; (b) their sex; and (c) year of birth.[88] We suggest that there is no reason also to give donors access to this information through the SR. And with respect to surrogates, they would already be familiar with this information, having given birth to the child.

13.155 The rules regarding ages of access outlined in Recommendation 63 below also apply to all subsequent recommendations on access to the SR for a specific purpose, except for Recommendation 64. Recommendation 64 concerns access to the SR to allow a surrogate-born person to determine whether their proposed future spouse, civil partner or sexual partner was carried by the same surrogate. We do not consider it appropriate for a surrogate-born person to access information in the SR before the ages of 16 for this purpose, given the age of consent in the UK.

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84 HFEA Code of Practice, paras 20.12 to 20.16.

85 HFEA, 'Finding out about your donor and genetic siblings', online only, available at: https://www.hfea.gov.uk/donation/donor-conceived-people-and-their-parents/finding-out-about-your-donor-and-genetic-siblings/. Access is permitted by Human Fertilisation and Embryology Act 1990, s 33A(2)(g).

86 HFEA Code of Practice (9th edn) para 20.14.

87 HFEA Code of Practice (9th edn) para 20.1.

88 HFEA Code of Practice (9th edn) para 20.11.

Recommendation 63.

13.156 We recommend that a surrogate-born person should be able to access information contained in the Surrogacy Register:

(1) at age 16:

(a) in Scotland, both identifying and non-identifying information;

(b) in England and Wales, non-identifying information;

(2) at age 18, in England and Wales, identifying information;

(3) under the age of 16, in Scotland, both identifying and non-identifying information where the surrogate-born person meets a statutory test of legal capacity to access the information;

(4) under the age of 16, in England and Wales, both identifying and non-identifying information where the surrogate-born person meets the test of *Gillick* competence; and

(5) at the ages of 16 and 17, in England and Wales, identifying information unless the surrogate-born person is shown to lack mental capacity as defined in sections 2(1) and 3(1) of the Mental Capacity Act 2005 with respect to the decision to access the identifying information contained in the Surrogacy Register

where, in any circumstances, they have been given a suitable opportunity to receive counselling about the implications of accessing the information contained in the Surrogacy Register.

13.157 Clause 85 of the draft Bill gives effect to the age criteria for access to the SR, by creating a definition of "children without capacity or competence" which varies based on the age of the child and the jurisdiction in which they are habitually resident. Clause 84(1) of the draft Bill introduces the concept of a "Part 1 surrogate-born individual" to describe a person who was born as a result of a surrogacy agreement on the new pathway, or for which a parental order was sought, or where the intended parents have died, and to whom information may be disclosed.

13.158 Clause 94 of the draft Bill enables the HFEA to respond to requests for information from the SR: in particular, clause 94(1)(b) uses the definition of a child without capacity to determine whether information must be provided to an applicant, and clause 94(1)(c) requires the applicant to have been given a suitable opportunity to receive appropriate counselling.

ACCESS TO INFORMATION IN THE SURROGACY REGISTER IN OTHER CIRCUMSTANCES

13.159 In the Consultation Paper, we also asked consultees if surrogate-born people should be able to access the SR for other reasons, for example to discover if their partner was carried by the same surrogate, or to learn the identity of the surrogate's own children (with the consent of all involved). We noted that some of these proposals went beyond the scheme applicable to the current HFEA Register.

Access to the Surrogacy Register to allow a surrogate-born person to determine whether their partner was carried by the same surrogate

13.160 From age 16, a donor-conceived person can learn if the HFEA Register contains any information showing that they are, or might be, genetically related to a person whom they intend to marry, enter into a civil partnership, or have a sexual relationship with.[89]

13.161 In the Consultation Paper, we asked consultees whether provision should be made for a surrogate-born person to learn, through the SR, if they are intending to marry, enter into a civil partnership, or have a sexual relationship with someone who was carried by the same surrogate (but to whom they are not genetically related).[90]

13.162 As set out in the Consultation Paper, we do not think a gestational relationship of this sort would fall within the prohibited degrees of relationship.[91] Nevertheless, it is possible that a surrogate-born person might not wish to be partnered with someone with whom they share a gestational (but not genetic) link.

Consultation

13.163 Most consultees were in favour of a surrogate-born person learning, through the SR, whether their partner or prospective partner was carried by the same surrogate.

13.164 A number of consultees suggested this information may be of importance to the surrogate-born person. Professor Emily Jackson thought it made sense to mirror the HFEA Register provision.

13.165 NGA Law and Brilliant Beginnings thought such a provision would be of limited practical significance, due to the low risk that one's partner was carried by the same surrogate. They also said that in their experience, surrogate-born people are far more likely to know their surrogates than donor-conceived people are likely to know their donors, so they did not think that it was necessary to mirror the HFEA Register provision. Additionally, they noted that this provision would only really matter to those entering into relationships between the age of 16 and 18.

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89 HFEA 1990, s 31ZB.

90 Consultation Question 50.

91 Consultation Paper, para 10.113.

13.166 A significant minority of consultees only supported granting access to the SR where there is a potential genetic link between the parties, "so as to avoid a relationship within prohibited degrees."[92]

Analysis

13.167 We recommend that a surrogate-born person should be able to make a request from age 16, through the SR, to learn whether a person they are intending to marry, enter into a civil partnership, or have a sexual relationship with, was carried by the same surrogate.[93] Both parties should be given an opportunity to receive implications counselling before being able to access the SR for this purpose.

13.168 In cases where there is no genetic link between the two people born to the same surrogate, we take the view that it should be up to the individual to decide whether it is significant that their would-be partner was carried by the same surrogate. While the information may not have the same medical and legal significance as the fact of a *genetic* relationship, it is still significant personal information. If the two people in question were born from traditional surrogacy arrangements and would therefore be genetic half-siblings through the surrogate, the surrogate would be recorded as having provided the gametes for the pregnancy in the required identity information provided on the Regulated Surrogacy Statement, or to the court for a parental order, and this information would be shared following a successful request to access the SR.[94]

13.169 We agree that the privacy of the surrogate-born person's partner should nevertheless be respected. Therefore, we propose to mirror the HFEA Register disclosure provisions in this regard: the surrogate-born person's partner must consent to the request before the information is disclosed, and that consent must not have been withdrawn.[95]

13.170 We also note, in the interests of clarity, that a surrogate-born person would already also be able to discover if their would-be partner is genetically related to them, if the surrogacy arrangement used a licensed fertility clinic and therefore came within the scope of the existing HFEA Register. From age 16, a donor-conceived person can access the HFEA Register, to discover if their partner is also listed on the HFEA Register and is genetically related to them.[96] If a person was born through a gestational surrogacy arrangement using an egg donor, they would appear on the

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92 SurrogacyUK's Working Group on Law Reform.

93 We are aware that the Marriage and Civil Partnership (Minimum Age) Act 2022 is due to come into force on 27 February 2023 which will raise the minimum age of marriage or civil partnership in England and Wales to 18. We do not consider this to change our position here, because the person can learn this information about someone who they are intending to marry or enter into a civil partnership with, prior to the age at which they are legally able to get married or enter into a civil partnership. Moreover, this Act does not affect the minimum age in Scotland, which remains 16. The HFEA have confirmed to us that they have no plans to change their position regarding such a request in light of the Marriage and Civil Partnership (Minimum Age) Act 2022.

94 See Recommendation 65. This would apply in a case of self-insemination at home. As set out below, if a surrogacy team used a licensed fertility clinic for a traditional surrogacy the surrogate would be recorded as the egg donor.

95 HFEA 1990, s 31ZB(3).

96 HFEA 1990, s 31ZB.

HFEA Register, and so this existing power would flag a genetic link between this person and another donor-conceived person. If a person was born through a traditional surrogacy arrangement that used a licensed fertility clinic, the "donation" of the surrogate's egg would be similarly recorded on the HFEA Register on donor conception.

Recommendation 64.

13.171 We recommend that a surrogate-born person should be able to make a request from age 16, through the Surrogacy Register, to learn if a person they are intending to marry, enter into a civil partnership, or have a sexual relationship with, was carried by the same surrogate.

13.172 Clause 84(3) of the draft Bill introduces the concept of "Part 1 surrogate siblings" to describe the relationship between individuals where the same woman gave birth to them, and at least one of them is a Part 1 surrogate-born individual. Clause 93 enables the contact details of a Part 1 surrogate sibling who is not a Part 1 surrogate-born individual to be stored on the SR.

13.173 Clause 95 gives effect to this recommendation by requiring the HFEA to give an applicant information as to whether a person whom they propose to marry, enter a civil partnership with, or have or continue to have a sexual relationship with, is a person who is or may be their Part 1 surrogate sibling, if that person consents, and both have been given a suitable opportunity to receive appropriate counselling.

Access to the Surrogacy Register to allow two surrogate-born people who were carried by the same surrogate, and who may or may not be genetically related, to identify each other

13.174 The current law allows a donor-conceived person at age 18, through the HFEA Register, to access identifying information about other donor-conceived people to whom they are genetically related. Both donor-conceived persons must have provided identifying information to the HFEA Register and have requested that it be disclosed to genetic siblings. Both parties must also have been given the opportunity to receive counselling.[97]

13.175 In the Consultation Paper, we provisionally proposed that where two people are born to and genetically related through the same (traditional) surrogate, it should be possible for them to be identified to each other through the SR, if they both should wish (which we refer to below as part 1 of the consultation question).[98] Currently, because a traditional surrogate would not be recorded as a donor on the HFEA Register, these people could not find each other through the HFEA Register.

13.176 It would be possible to make similar provision to allow those who were carried by the same surrogate, but who are not genetically related, to learn each other's identity,

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97 HFEA 1990, s 31ZE.

98 Consultation Question 51(1).

where both wish to do so. In part 2 of the consultation question, we asked consultees whether this should be possible.[99]

Consultation

Part 1

13.177 Regarding the first part of the question, concerning two surrogate-born people who are gestationally *and* genetically related to each other, almost all consultees supported the proposal.

13.178 Some consultees agreed on the basis that the proposal would bring about parity with the HFEA Register disclosure scheme, whilst others said that surrogate-born people have a right to know their genetic siblings or that it would be beneficial for surrogate-born people to learn of their genetic siblings. The Law Society of Scotland emphasised the need to ensure that all parties wish to be identified before information is disclosed.

13.179 A small number of consultees disagreed with the proposal.

13.180 Professor Kenneth Norrie suggested that sharing a gestational connection with someone is an inadequate reason to create a right of access to the SR. BPAS were concerned the proposal would have a negative impact on women by "enshrining gestation as a separate concept in law".

Part 2

13.181 Regarding the second part of the question, concerning two surrogate-born people who are gestationally but *not* genetically related, most consultees thought they should be able to identify each other through the SR, where both wish to do so.

13.182 Many of these consultees did not give reasons for their views. The most common arguments referred to the potential importance of the information to the parties, and how having access to the information could help a surrogate-born person to understand their identity and family history. PET thought the proposal logically followed if the principles underpinning the HFEA Register are applied to the SR.

13.183 Making provision for access to information where there is only a gestational link was not supported to the same extent as the proposal in part 1 of the question, where the link is genetic and gestational. A significant minority disagreed with enabling access to the SR where the parties are not genetically related.

13.184 Some consultees did not think a gestational link is sufficiently important to warrant access to the SR in these circumstances and some did not think that a surrogate-born person has a moral right to access information relating to individuals with whom they share a gestational link. One consultee thought that if we are trying to bring about parity with the HFEA Register, only genetically related individuals should be able to identify each other through the SR.

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[99] Consultation Question 51(2).

13.185 A consultee who is an intended parent did not think it was in a surrogate-born person's interests to access to this information. She said the information "could create mass confusion and identity issues", and that "this is a very private matter that should be discussed via intended parents and their surrogate and have no part in a new law".

Analysis

13.186 We recommend that where two people are born to the same surrogate, it should be possible for them to identify each other through the SR, irrespective of whether they are genetically related. Both parties should be given an opportunity to receive implications counselling before being able to access the SR for this purpose.

13.187 We take the view that, while some surrogate-born people may have no interest in learning of other surrogate-born children born to the same surrogate, others might. And while some consultees suppose that surrogate-born people would only be interested in learning about their *genetic* siblings, some surrogate-born people might be curious to get in touch with those with whom they share a purely gestational link. Throughout the project, we have tried not to overemphasise the significance of genetics, and we think that surrogate-born people should be able to decide for themselves how important it is that they are gestationally and perhaps genetically related to someone else. In order to ensure that the rights to privacy and confidentiality of surrogate-born people are respected, before a request about gestational siblings can be made to the SR, both parties must have notified the HFEA that they would like their information to be made available to gestational siblings.

13.188 We do not agree with BPAS's argument regarding the proposal's impact on women, given that gestation is already enshrined in law as a separate concept.[100]

[100] HFEA 2008, s33.

Recommendation 65.

13.189 We recommend that:

(1) where two surrogate-born people are born to the same surrogate, it should be possible for them to identify each other through the Surrogacy Register, irrespective of whether they are genetically related;

(2) before a request for information about those born to the same surrogate can be complied with, both parties must have notified the HFEA that they would like their information to be made available to others born of the same surrogate; and

(3) surrogate-born people should be able to identify those born to the same surrogate:

(a) in England and Wales at 18, or at age 16 or 17 unless they are shown to lack mental capacity with respect to the decision as defined in sections 2(1) and 3(1) of the Mental Capacity Act 2005, or below the age of 16 if they meet the test of *Gillick* competence with respect to the decision; and

(b) in Scotland, at the age of 16, or below the age of 16 if they meet a statutory test of legal capacity with respect to the decision.

13.190 Clause 84(3) of the draft Bill introduces the concept of "Part 1 surrogate siblings" to describe the relationship between individuals where the same woman gave birth to them, and at least one of them is a Part 1 surrogate-born individual. This definition would include two surrogate-born people who were born to the same surrogate.

13.191 Clause 96 of the draft Bill gives effect to this recommendation. Clause 96(1) enables any person who might have Part 1 surrogate siblings to consent to their information being disclosed, provided they meet the age and capacity or competence criteria and have been offered counselling. Clause 96(2) requires the HFEA to provide their Part 1 surrogate siblings with that information following a request, again provided they meet the age and capacity or competence criteria and have been offered counselling.

Access to the Surrogacy Register to allow a surrogate-born person and the surrogate's own children to identify each other

13.192 Thirdly, in the Consultation Paper we asked consultees for their views on whether a surrogate-born child and the surrogate's own child/children should be able to use the SR to identify each other, should they both wish to do so (referred to below as part 1 of the question).[101] In part 2 of the question we asked consultees if their views differed

[101] Consultation Question 52(1).

depending on whether the surrogate-born child and the surrogate's own child/children are genetically related.[102]

13.193 We did not think it would be feasible or appropriate for information about the surrogate's own children to be recorded on the SR as a matter of course. While a surrogate could be required to provide details of her own children at the time when she acts as a surrogate, such information would fall out of date if she subsequently had more children of her own. In addition, the surrogate's decision on this matter would impact on her own children's lives; we thought that it was better for that decision to rest with the surrogate's children.

13.194 In the Consultation Paper we therefore took the provisional view that it should be possible for the surrogate's own child to lodge their details with the SR (on proof that the surrogate was their mother), once adult. They could request that these details be released to a surrogate-born child carried by their mother, where the surrogate-born child had also indicated that they would be open to contact of this kind. Admittedly, in consequence the surrogate-born child would only be able to identify the surrogate's own children where the surrogate's children have decided to lodge their own details on the SR. In the situation where the surrogate's own children do not learn of the existence of any children born of the surrogacy arrangement (or vice versa) through being told by their parents or others, the decision to seek contact with any such 'surrogate siblings' will rest with the children at the relevant age.

13.195 We noted that a provision of this sort could create conflict where the surrogate has several children of her own, some of whom wish to lodge their details on the SR and some who do not. Some might be concerned that, if their sibling contacts a surrogate-born person, their own identity might be revealed. Nevertheless, we took the view that such objections should not outweigh a joint desire of the surrogate-born child and the surrogate's own child to identify each other. We also note that the same outcome can result in respect of donor-conceived siblings, if one chooses to access identifying information from the HFEA Register and the other does not.

Consultation

Part 1

13.196 Regarding two people who are *genetically related*, most consultees agreed that it should be possible for them to identify each other.

13.197 Some consultees thought that access to this information would promote transparency and openness with surrogate-born people and some highlighted the genetic and gestational connection that these two people would have. Dr Alan Brown (academic) noted the "identity implications for the individuals involved". It was also highlighted that access to the SR for genetically related siblings, in order for relevant medical information to be shared.

13.198 A small number of consultees disagreed that it should be possible for a surrogate-born child and the surrogate's own child/children to use the SR to identify each other.

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[102] Consultation Question 52(2).

13.199 Some consultees argued that the two individuals are likely to know each other already, given that surrogate-born children tend to stay in contact with their surrogate, so such a provision would be redundant. Others thought that it would not adequately respect the surrogate's right to privacy, nor accurately reflect the nature of a surrogacy arrangement. Callum Watson-Ross, an intended parent, was concerned that allowing the surrogate-born child and the surrogate's own child/children to identify each other would "blur the very clear lines set up in the surrogacy agreement and the intent behind the agreement."

Part 2

13.200 Regarding two people who are not genetically related, most consultees agreed that it should be possible for them to identify each other as well. Consultees emphasised the significance of the gestational link between the parties.

13.201 Some consultees drew parallels with the HFEA Register. NGA Law and Brilliant Beginnings wrote:

> We know there is an existing gap in the law for donor-conceived people, who are not able to contact genetic siblings who are the donor's own children via the register (which we have been told is because those children are not recorded on the HFEA Donor-Conceived Register). We would therefore welcome that, if surrogate-born children and surrogates' children are given such a right, the rules in relation to donation should be tidied up to match.

13.202 A minority of consultees were not in favour of the surrogate-born child and the surrogate's own child/children being able to identify each other where they are not genetically related. As in the previous consultation question, fewer consultees supported the provision of access to information in respect of those whose only connection is gestational.

13.203 Some intended parents thought that the suggestion contradicted the nature of surrogacy and some said that gestational surrogates see their own children not as siblings of a surrogate-born child, but as a completely different family. Other consultees were concerned that the suggestion did not adequately respect the right to privacy of a surrogate-born person.

13.204 BPAS wrote:

> The decision to act as a gestational surrogate belongs to the woman involved, and not to other people in her life who have no genetic link to her surrogate pregnancy.

Analysis

13.205 We recommend that a surrogate-born person and the surrogate's own child should be able to access the SR to identify each other, if they *both* wish to do so, irrespective of whether they are genetically related. Both parties should be given an opportunity to receive implications counselling before being able to access the SR for this purpose.

13.206 Two people with this link might want to contact one another in light of their gestational connection, and we see no reason not to facilitate them doing so. By

allowing them to identify one another through the SR, they can initiate contact irrespective of whether the surrogate wishes to facilitate their relationship.

13.207 Before a request can be made to the SR, both people must have notified the HFEA that they would like their information to be made available to one another.

13.208 Whilst donor-conceived people's access to information is outside the scope of the project, we suggest that Government considers whether donor-conceived people and the donor's own children should also be able to identify each other through the HFEA Register, taking into account the right to identity under Article 8 of the UNCRC. We do not make a recommendation to that effect but raise it as a potential future inconsistency in the law.

Recommendation 66.

13.209 We recommend that:

(1) A surrogate-born person and the surrogate's own child should be able to access the Surrogacy Register to identify each other, irrespective of whether they are genetically related.

(2) Before a request for information can be complied with, both parties must have notified the HFEA that they would like their information to be made available for this purpose; and

(3) Individuals should be able to access the Surrogacy Register for this purpose:

(a) In England and Wales at 18, or at age 16 or 17 unless they are shown to lack mental capacity with respect to the decision as defined in sections 2(1) and 3(1) of the Mental Capacity Act 2005, or below the age of 16 if they meet the test of *Gillick* competence with respect to the decision.

(b) In Scotland, at the age of 16, or below the age of 16 if they meet a statutory test of legal capacity with respect to the decision.

13.210 Clause 84(3) of the draft Bill introduces the concept of "Part 1 surrogate siblings" to describe the relationship between individuals where the same woman gave birth to them, and at least one of them is a Part 1 surrogate-born individual. This definition would include the described in this recommendation. Clause 93 enables the contact details of a Part 1 surrogate sibling who is not a Part 1 surrogate-born individual to be stored on the SR.

13.211 Clause 96 of the draft Bill gives effect to this recommendation. Clause 96(1) enables any person who might have Part 1 surrogate siblings to consent to their information being disclosed, provided they meet the age and capacity or competence criteria and have been offered counselling. Clause 96(2) requires the HFEA to provide their Part 1 surrogate siblings with that information following a request, again provided they meet the age and capacity or competence criteria and have been offered counselling.

OTHER WAYS TO ACCESS INFORMATION ON THE NEW PATHWAY

13.212 At present, those born of surrogacy arrangements can access the relevant entries from the Parental Order Register to learn more about their origins.[103] When a parental order is granted to the intended parents, the parental order is entered on the Parental Order Register, and is linked to the register of births.

13.213 When a parental order is made in England and Wales, the court sends a copy of the order to the General Register Office.[104] The order contains a direction for the Registrar General to update the register of births,[105] and the original entry in the register of births is marked as "re-registered"[106] in England and Wales, and with the words "Parental Order"[107] in Scotland. In Scotland, but not in England and Wales, an entry in the Parental Order Register records the date of the order and the details of the relevant court.[108] The Parental Order certificate effectively replaces the child's original birth certificate.

13.214 There are, essentially, two types of birth certificate: a 'full' birth certificate or 'full extract' in Scotland, which shows information about the parents, and a 'short' birth certificate or 'abbreviated extract' in Scotland, containing information about the child only.[109] The format of the short certificate or abbreviated extract cannot include any information relating to parentage or adoption.[110] This means that in both England and Wales and in Scotland, short certificates or abbreviated extracts do not make reference to the fact that a child was the subject of a parental order.[111]

13.215 Therefore, currently, the only way (other than being told by their intended parents) that a person can become aware that they were born via a surrogacy arrangement is through the words on the parental order certificate showing that a parental order has been made. If our new pathway were implemented, however, it will not be necessary for the intended parents to obtain a parental order if they fulfil the conditions for entry to the new pathway. These changes will have an impact on the availability of information regarding their conception for the children born of surrogacy arrangements

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103 ACA 2002, s 78(2), as applied and modified by the 2018 Regulations, reg 2 and sch 1 para 21; AC(S)A 2007, s 55(4)(b), as applied and modified by the 2018 Regulations, reg 3 and sch 2 para 15.

104 Family Procedure Rules 2010 (SI 2010 No 2955), r 13.21; Act of Sederunt (Rules of the Court of Session 1994) (SI 1994 No 1443) as amended, r 97.15; and Act of Sederunt (Child Care and Maintenance Rules) 1997 (SI 1997 No 291) as amended, r 2.57.

105 ACA 2002, sch 1 para 1(2), as applied and modified by the 2018 Regulations, reg 2 and sch 1 para 34; AC(S)A 2007 sch 1 para 2(2), as applied and modified by the 2018 Regulations, reg 3 and sch 2 para 28.

106 ACA 2002, sch 1 para 1(2), as applied and modified by the 2018 Regulations, reg 2 and sch 1 para 34.

107 AC(S)A 2007, sch 1 para 2(2), as applied and modified by the 2018 Regulations, reg 3 and sch 2 para 28.

108 Registration Services (Prescription of Forms) (Scotland) Regulations 2009 (SSI 2009 No 314), schs 1 and 2.

109 Gov.uk, Register a birth: https://www.gov.uk/register-birth/birth-certificates (last visited 23 March 2023); National Records of Scotland, Registering a birth: accessible at: https://www.nrscotland.gov.uk/registration/registering-a-birth (last visited 23 March 2023).

110 Births and Deaths Registration Act 1953, s 33; Registration of Births, Deaths and Marriages (Scotland) Act 1965, s 39E and the Registration of Births, Still-births, Deaths and Marriages (Prescription of Forms and Errors) (Scotland) Regulations 2006 (SSI 2006 No 598), reg 4.

111 Births and Deaths Registration Act 1953, s 33(2); Registration of Births, Deaths and Marriages (Scotland) Act 1965, s 39E(5)(a) as applied and modified by the 2018 Regulations, reg 5 and sch 4 para 3.

on the new pathway. If the intended parents are named on the birth certificate, the surrogate-born person may have no idea that they were born via a surrogate if their parents do not inform them.

13.216 In order to ensure that our proposals do not remove the child's ability to access information about their origins, in the Consultation Paper we provisionally proposed that the child's full (not short/abbreviated) birth certificate should note that they were born as a result of a surrogacy arrangement.[112] This proposal would ensure parity of information with those children born of surrogacy arrangements falling outside the new pathway, as the certificate produced from the Parental Order Register makes clear on its face that it is a parental order certificate.

Consultation

13.217 Most consultees supported the proposal for the full birth certificate to indicate that a child was born through a surrogacy arrangement.

13.218 All surrogates who responded to this question agreed with the proposal, as did the majority of intended parents. Some intended parents disagreed, on the basis that making it clear on the birth certificate that a person was born through a surrogacy arrangement would risk causing stigma and discrimination.

13.219 Nordic Model Now! expressed general disagreement with the new pathway but agreed with this proposal if the new pathway went ahead.

13.220 Some consultees who disagreed with the proposal did so because it would introduce an inconsistency with the treatment of donor-conceived people, as birth certificates do not show when someone was conceived using donor conception.

13.221 Some consultees were concerned about the privacy of surrogate-born people and thought the question should be considered as part of a wider review of birth registration. NGA Law and Brilliant Beginnings were concerned about interference with human rights as the birth certificate is a public document.

13.222 An intended parent suggested that the proposal would make surrogate-born children feel different and have a negative emotional impact if they had to disclose their full birth certificate.

13.223 Some consultees thought that this proposal would force parents to disclose the surrogacy arrangement to their child, rather than allowing them to do so in their own time. One intended parent said:

> I believe that intended parents should discuss the origins with surrogate born children but done at the appropriate time. And while making it explicit on the birth certificate is one way to ensure that this eventually happens, it may force the issue at a much younger age.

13.224 Some consultees suggested different ideas for providing information to the surrogate-born person, such as an indication on the full birth certificate that there was simply

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[112] Consultation Question 44.

additional information available or recording the information on a separate sheet. The Law Society of Scotland and Dr Katherine Wade also suggested that a surrogate-born child should receive a letter notifying them of the existence of the surrogacy arrangement when they reach the age of 16 or 18.[113]

Analysis

13.225 We have concluded that we should recommend that a child's full (not short/abbreviated) birth certificate should note that they were born as a result of a surrogacy arrangement. However, it is important to note that this recommendation would only be relevant if our preferred approach to birth registration were to be adopted. If the alternative approach were adopted, there would still be an original birth certificate and current practice would apply.[114]

13.226 In the event that our preferred approach to birth registration is adopted, where a child is born of a surrogacy arrangement, and the intended parents are recorded as parent on the birth certificate, the full form of that certificate should make clear that the birth was the result of a surrogacy arrangement. The intended parents will be required to notify the person registering the birth that it is a surrogacy arrangement. Existing law will be amended or applied to this situation such that failing to notify the registrar that a birth is a surrogacy birth will incur the same penalty as if the person had provided false information on the statutory declaration, as explained in Chapter 12.

13.227 We consider that the precise wording to appear on the birth certificate should be developed with social work expertise, and should therefore not be specified in the legislation.

13.228 Because we feel it is important to protect the surrogate-born child's right to know about his or her origins, we do not consider that we can make a recommendation which is less protective of a child's right to know than the current law, under which it is evident from the Parental Order Certificate that the child was born via surrogacy. For the same reason we are not persuaded by the concerns of those who consider that the intended parents should be left to decide whether to tell their child of the surrogacy; this is a matter that the child has a right to know.

13.229 In light of concerns from a significant number of consultees that our proposal would interfere with the child's right to privacy, we have considered alternatives which would go some way towards protecting the child's right to know about their origins. However, we have concluded that none of them are suitable.

13.230 We considered marking on the birth certificate simply that there is additional information available about the person's origin. However, its meaning would be obvious, given that only a surrogacy arrangement (at present) would attract this mark. We also considered putting information about the surrogacy arrangement on a separate document but concluded that intended parents who wished to conceal the truth could easily separate the document from the birth certificate and conceal it from their child. We also dismissed the idea of a letter being sent to the child at the age of

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113 See also Katherine Wade, "Reconceptualising the interest in knowing one's origins: a case for mandatory disclosure", (2020) 28(4) *Medical Law Review* 731.

114 See discussion of birth registration at 4.244 onwards.

16 or 18 informing them of the surrogacy arrangement, on the basis that such mandatory disclosure does not apply to any other information relating to a person's origins. Introducing such an approach would require wider reform to birth registration which is outside the scope of the surrogacy project. In addition, seeking to contact such a large number of people would be likely to prove impractical.

13.231 We did not think any of the alternatives offered were feasible, however, we think that the surrogate-born person's privacy can be suitably protected by only marking the full form of the birth certificate, not the short form certificate (in England and Wales) or abbreviated extract (in Scotland). Short/abbreviated certificates may be used as a means of providing identification to Government bodies and other organisations. We do not think that people should (in effect) be forced to disclose personal information about their origins whenever identification is required.

Recommendation 67.

13.232 We recommend that, where children are born of surrogacy arrangements that result in the intended parents being recorded as parents on the birth certificate, the full form of that certificate should make clear that the birth was the result of a surrogacy arrangement.

13.233 Clause 106 and Part 1 of Schedule 5 (for England and Wales) and clause 107 and Part 1 of Schedule 6 (for Scotland) to the draft Bill give effect to our recommendations for our preferred approach to birth registration. For England and Wales, new subsection 10ZB(4) inserted into the Births and Deaths Registration Act 1953 by paragraph 4 of Schedule 5 to the draft Bill sets out the power for the Registrar General to prescribe in regulations how the register is to be marked. For Scotland, new subsection 18C(4) inserted into the Registration of Births, Deaths and Marriages (Scotland) Act 1965 by paragraph 4 of Schedule 6 to the draft Bill sets out the equivalent regulation-making power.

ACCESS TO INFORMATION WHERE A PARENTAL ORDER IS GRANTED

Access to the parental order court file by a surrogate-born person

13.234 To address the disparity between Scotland and England and Wales regarding access to the parental order court file ("court process", in Scotland) by a surrogate-born person – which is outlined above[115] – we provisionally proposed in the Consultation Paper that in England and Wales, from the age of 18, a child who has been the subject of a parental order should be able to access all the documents contained in the court's file for those parental order proceedings.[116]

[115] Para 13.20.

[116] Consultation Question 46.

Consultation

13.235 Nearly all consultees agreed with the proposal that there should be access to the complete parental order court file at age 18.

13.236 Most consultees who gave a reason for supporting the proposal highlighted the potential importance to the child of being able to understand the circumstances of their conception and birth. Some consultees referred to a child's right to access the information or emphasised the importance of being open and honest with surrogate-born people about their origins.

13.237 A number of consultees thought that it was inappropriate for a surrogate-born person to access some of the information contained in the court file, including the parties' health or other status; a breakdown of the expenses paid to the surrogate; statements referring to third parties which should remain confidential; and instances of incapacity.

13.238 Resolution suggested the following process to overcome this hurdle:

> If there is information on the court file that the child should not have access to, the court can consider, on the making of a parental order, whether such information should not be disclosed. This should only apply for exceptional circumstances. A child seeking to access that 'barred' information post 18, would need to make a further application to the court, to lift any non-disclosure order. Alternatively, the court could direct, on the making of a parental order, which documents are to be accessed by the child post 18, if so requested.

13.239 In contrast, other consultees thought that a surrogate-born person should have access to the court file before age 18. Lucy Cowlin said:

> If anything, 18 is too late. The child should have access to full information as early as they are competent to understand it and definitely full access to documentation which details how their birth was planned once they are 18. Counselling should be provided as well.

Analysis

13.240 Following analysis of consultee responses our approach to accessing the parental order court file is now in line with our approach to accessing identifying information contained in the SR. We do not think it would be justifiable for there to be a difference in terms of age of access to information between the new pathway and the parental order process, as we want all surrogate-born people to have the same opportunities to access information about their origins.

13.241 In order to ensure this parity, we recommend that, in England and Wales, a child who has been the subject of a parental order should be able to access their complete parental order file at age 18; before age 18 if deemed to have capacity under the Mental Capacity Act 2005;[117] or before age 16 if *Gillick* competent. We intend the same approach to apply in this context.

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[117] Mental Capacity Act 2005, ss 2(1) and 3(1).

13.242 We do not propose any change to the legal position in Scotland, where a surrogate-born person can access their complete parental order court process at age 16. This divergence between the law in England and Wales and in Scotland is justified by the fact that legal capacity is generally afforded to children of age 16 in Scotland.[118] However, we do recommend that under 16s in Scotland should be able to access their complete parental order court process before the age of 16 if they have capacity under a statutory test, so that we do not create a disparity between under 16s in Scotland compared to those in England and Wales.

13.243 We also take the view that no parts of the parental order court file should be withheld from the surrogate-born person, either before or after age 18. If we made specific provision for the court to restrict the information available, we would be restricting the surrogate-born person's access to information about their origins, contrary to the spirit of all our other recommendations. Further:

(1) If the court file contains references to third parties whose identities should not be disclosed, we can rely on general court redaction policies to ensure that confidentiality is respected.

(2) We were not persuaded that information relating to expenses paid to the surrogate, or instances of incapacity should be concealed from the surrogate-born person. If the surrogate-born person was made aware that information was being withheld, without knowing what it was, this could be as psychologically and emotionally damaging to them as the information itself. We think openness and honesty should underpin our approach to surrogacy and to access to information. Furthermore, preliminary findings from a recent study on *Children's Voices in Surrogacy Law* show that children born through surrogacy do not feel that payments being made to a surrogate would negatively affect any child born of that surrogacy arrangement.[119]

(3) We also came to the view that information contained in the court file which might distress the surrogate-born person, for example evidence that their surrogacy arrangement broke down, should not be withheld, for two reasons. First, even if receiving this information would be distressing (which, we assume, would be rare given that very few surrogacy arrangements break down), we feel that this consideration is outweighed by the need to ensure that the surrogate-born person has a route to access information, which might otherwise be concealed from them. Secondly, by providing this information pathway, the child's parents might be incentivised to tell their child about any distressing information, in a sensitive and timely way.

(4) We further note that, currently, counselling is offered before access is granted to any information contained in the court file, which would help prepare someone to receive any distressing information.[120]

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118 Age of Legal Capacity (Scotland) Act 1991, s 1(1).

119 K Wade, K Horsey and Z Mahmoud, "Children's Voices in Surrogacy Law: Briefing Paper on Preliminary Findings", (2022) p 17. Only one out of five voiced concern.

120 Family Procedure Rules 2010, r13.16(2).

13.244 The current rules on access to the parental order court file in England and Wales are set out in the Family Procedure Rules 2010,[121] which are made by the Family Procedure Rule Committee. The rules on access to the parental order process in Scotland are in the Act of Sederunt (Rules of the Court of Session 1994),[122] which are made through the Scottish Civil Justice Council. Our recommendations for change are therefore directed to them.

Recommendation 68.

13.245 We recommend that, in England and Wales, the Family Procedure Rules Committee provide that a surrogate-born person should:

(1) Have access to their complete parental order court file at age 18;

(2) Have access to their complete parental order court file if aged 16 or 17, unless shown to lack mental capacity as defined in sections 2(1) and 3(1) of the Mental Capacity Act 2005 with respect to the decision to access their complete parental order file; and

(3) Have access to their complete parental order court file below the age 16, if they are *Gillick* competent with respect to the decision.

13.246 In Scotland, we recommend that the Scottish Civil Justice Council should provide rules to facilitate a surrogate-born person accessing their complete parental order court process below the age 16 if they meet a test of capacity with respect to the decision.

13.247 Clause 25 of the draft Bill enables regulations to provide for the adoption enactments, the ACA 2002 and the AC(S)A 2007, to have effect with modifications in relation to parental orders. The rules we recommend on access to the parental order court file and process could be prescribed by the Family Procedure Rule Committee and the Scottish Civil Justice Council under powers set out in such regulations.

Register of Regulated Surrogacy Statements

13.248 Our recommendations mean that a surrogate-born person who was the subject of a parental order will have access to information contained in the SR, as well as the full court file or process in relation to that parental order. Taken together, that information will provide them with a breadth of information so that they can understand their origins.

13.249 We consider that it is right for a person who was born from a surrogacy agreement on the new pathway to have access to a comparable degree of information. They will

[121] Family Procedure Rules 2010 r 13.16.

[122] Act of Sederunt (Rules of the Court of Session 1994) as amended, r 97.17.

have access to the information on the SR, but the Regulated Surrogacy Statement will contain further information which they may consider relevant.

13.250 We apply the same reasoning to this information as we do to the full court file or process: that withholding the information could be as damaging as the information; that providing information in a timely way would be beneficial to family dynamics; and we recommend that counselling should be offered before access. In the case of the Regulated Surrogacy Statement, as opposed to the court file or process, information on third parties would not be present.

13.251 We therefore recommend that the HFEA maintain a register of Regulated Surrogacy Statements, and that a surrogate-born person should be able to access the full Regulated Surrogacy Statement that relates to their birth, after being offered appropriate counselling.

13.252 We recommend that the same rules on age of access that apply to the SR should also apply to the Register of Regulated Surrogacy Statements.

Recommendation 69.

13.253 We recommend that, in England and Wales, a surrogate-born person should:

(1) have access to the Regulated Surrogacy Statement that relates to their birth at age 18;

(2) have access to the Regulated Surrogacy Statement that relates to their birth if aged 16 or 17, unless shown to lack mental capacity as defined in sections 2(1) and 3(1) of the Mental Capacity Act 2005 with respect to the decision to access the Regulated Surrogacy Statement; and

(3) have access to the Regulated Surrogacy Statement that relates to their birth below the age 16, if they are *Gillick* competent with respect to the decision.

13.254 In Scotland, we recommend that a surrogate-born person should be able to access the Regulated Surrogacy Statement that relates to their birth at age 16, or below the age of 16 if they meet a test of capacity with respect to the decision.

13.255 In each jurisdiction, a surrogate-born person should be given a suitable opportunity to receive appropriate counselling about the implications of the disclosure of the Regulated Surrogacy Statement.

13.256 Clauses 87 to 89 of the draft Bill would give effect to these recommendations, utilising the age and capacity or competence criteria set out in clause 85.

Access to original birth certificate following the parental order process

13.257 In the Consultation Paper, we provisionally proposed that, in England and Wales, where the making of a parental order in respect of a child born of a surrogacy

arrangement has been recorded in the Parental Order Register, the child should be able to access his or her original birth certificate at the age of 18.[123]

Consultation

13.258 The proposal for children who are the subject of a parental order to have access to their original birth certificate attracted almost universal support.

13.259 Most consultees who supported the proposal emphasised the importance of knowing the truth about one's origins. Some consultees highlighted the compatibility of the proposals with Articles 7 and 8 of the UNCRC.[124]

13.260 There was some disagreement among consultees around the age at which surrogate-born children should have access to their original birth certificate, with many proposing lowering the age to 16, in line with the approach in Scotland.

13.261 Some consultees suggested that free counselling should be offered to a surrogate-born child when (on reaching adulthood or before then) they request their own original birth certificate, in addition to practical support in contacting one's genetic parents, surrogate and other family members. Such counselling is provided for free in Scotland by the local authority.[125] It is not currently possible for a person born through surrogacy to obtain their original birth certificate in England and Wales.[126] In relation to accessing information about one's origins in the adoption context, however, counselling is provided for free by the local authority, GRO or the adoption agency in England and Wales.[127]

Analysis

13.262 We recommend that people who are the subject of an entry in the Parental Order Register should have access to their original birth certificate across England and Wales, and Scotland, in the interests of improving access to information about one's origins.

13.263 We think that there should be consistency across the board for surrogate-born persons so that whether the agreement proceeded on the new pathway or followed the parental order process, it does not affect the age at which a surrogate-born person can access information about their origins. Therefore, we think that, in England and Wales, surrogate-born persons should be able to access their original birth certificate following the parental order process at age 18; at ages 16 or 17, unless shown to lack mental capacity as defined in sections 2(1) and 3(1) of the Mental Capacity Act 2005 with respect to the decision; and before age 16, following a professional assessment that they are competent according to *Gillick* competence. This is in line with the

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123 Consultation question 43.

124 Articles 7 and 8 refer respectively to the right of a child to be registered after birth, to a name and nationality and to be cared for by his or her parents; and to preserve his or her identity.

125 Adoption and Children (Scotland) Act 2007, s 55, Explanatory Notes.

126 ACA 2002, ss 60 and 79 as applied and modified by the 2018 Regulations, reg 2 and sch 1 paras 9 and 22. This is because the 2018 Regulations, like the previous regulations, do not apply ACA 2002, s 79(5) or ACA 2002, ss 60(2) and (3): see the 2018 Regulations, paras 9 and 22.

127 Adoption and Children Act 2022, s 63, Explanatory Notes.

approach to age at which a surrogate-born person can access information contained in the SR.[128]

13.264 In Scotland, we think that specific statutory provision ought to be made for a surrogate-born person to access their original birth certificate following the parental order process under the age of 16, where they can demonstrate that they have capacity. We think this should be done by way of addition to section 2 of the Age of Legal Capacity (Scotland) Act 1991.

13.265 We want anyone who is the subject of a parental order to be able to access their original birth certificate at the relevant ages, regardless of whether the parental order was granted before or after new legislation comes into force. We believe there is justification for applying this provision retrospectively given that the current state of the law in England and Wales is apparently an oversight or mistake.

13.266 PROGAR, Nagalro and Dr Sharon Pettle raised the point that trans people do not have to make their gender identity documents publicly available, such that, if a surrogate transitioned after giving birth, the child might not be able to trace them. We consider that this point raises social policy issues which fall outside the remit of the surrogacy project, given that there will be other situations where this problem may arise because a person has transitioned.

13.267 Lastly, we recommend that an offer of counselling should be made to the surrogate-born person seeking disclosure of their original birth certificate, in line with the position in Scotland. This would also mirror the position to disclosure in adoption.[129]

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[128] Para 13.240.

[129] Adoption and Children Act 2002, s 63, Explanatory Notes; Adoption and Children (Scotland) Act 2007, s 55, Explanatory Notes.

Recommendation 70.

13.268 We recommend that people who are the subject of an entry in the Parental Order Register:

(1) should have access to their original birth certificate in England and Wales:

(a) at age 18;

(b) at age 16 or 17, unless shown to lack capacity as defined in sections 2(1) and 3(1) of the Mental Capacity Act 2005 with respect to the decision to access their original birth certificate; and

(c) below the age 16, if they meet the test of *Gillick* competence.

(2) in Scotland should continue to have access to their original birth certificate at age 16, but specific statutory provision ought to be made for a surrogate-born person to access their original birth certificate following the parental order process under the age of 16, where they have capacity with respect to the decision.

13.269 We recommend that this provision should apply retrospectively so that anyone who is the subject of a parental order is able to access their original birth certificate, regardless of whether the parental order was granted before or after new legislation comes into force.

13.270 We recommend that an offer of counselling should be made to the surrogate-born person seeking disclosure of their original birth certificate.

13.271 Clause 25 of the draft Bill empowers the Secretary of State to make provide in regulations for the adoption enactments, the ACA 2002 and the AC(S)A 2007, to have effect with modifications in relation to parental orders. This power could be used to make regulations giving effect to this recommendation.

Chapter 14: Surrogacy matching services, legal advice, and advertising

14.1 In Chapter 7 we discuss our recommended reforms to create a regulatory framework for surrogacy. The key aspects are that the Human Fertilisation and Embryology Authority ("HFEA") will be the regulator for surrogacy, regulating non-profit-making Regulated Surrogacy Organisations ("RSOs"), which will be licensed under statute and play a central role in the administration of the new pathway.

14.2 In this chapter, we discuss activities in relation to forming surrogacy arrangements which will be undertaken by RSOs and by others; we recommend that these activities are prohibited and subject to criminal sanction unless they are provided by certain people and within certain limits. These activities are:

(1) matching and facilitation;

(2) charging for negotiating and advising on surrogacy agreements; and

(3) advertising of surrogacy arrangements.

14.3 These areas are to some extent already regulated in the SAA 1985. Our recommendations would replace the current law to reflect the role of RSOs under our recommendations, ensure consistency with other reforms, and provide greater clarity.

CURRENT LAW

14.4 The current law regulating surrogacy arrangements is set out in the SAA 1985. We summarise below the provisions of the Act. The Act has come to be seen as adopting a "tolerant" approach, in which altruistic surrogacy is permitted within certain confines.[1]

14.5 The SAA 1985 states:

> an arrangement is a surrogacy arrangement if, were a woman to whom the arrangement relates to carry a child in pursuance of it, she would be a surrogate mother.[2]

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

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

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

2 SAA 1985, s 1(3).

(b) made with a view to any child carried in pursuance of it being handed over to, and parental responsibility being met (so far as practicable) by, another person or other persons.[3]

Negotiating surrogacy arrangements on a commercial basis

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

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

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

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

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

(5) knowingly cause another to do any of these acts on a commercial basis.[4]

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

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

(b) he does it with a view to any payment being received by himself or another in respect of making, or negotiating or facilitating the making of, any surrogacy arrangement.[5]

14.9 Crucially, however, surrogates and intended parents are excluded from this prohibition.[6]

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

14.11 Finally, as the Court of Appeal noted, it is not an offence for any person to negotiate a commercial surrogacy arrangement overseas: the section does not apply extraterritorially to the actions of UK citizens abroad.[7]

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3 SAA 1985, s 1(2).

4 SAA 1985, s 2(1).

5 SAA 1985, s 2(3).

6 SAA 1985, s 2(2).

7 *XX v Whittington Hospital NHS Trust* [2020] UKSC 14, [2021] AC 275 at [55].

Advertising

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

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

(2) a person is looking for a surrogate.[8]

14.13 This provision extends to all methods of advertising, including newspaper, television, radio and the internet.[9]

Criminal offences

14.14 Section 4 of the SAA 1985 sets out the criminal sanctions for breach of the provisions highlighted above. A breach of the provisions on negotiating a surrogacy arrangement on a commercial basis can result in a custodial sentence of up to three months.[10] No proceedings for an offence under the Act, however, can be started in England and Wales without the non-personal consent of the Director of Public Prosecutions.[11]

14.15 At the time of the Consultation Paper, we attempted to confirm with the Ministry of Justice and Crown Prosecution Service whether any of these offences under the SAA 1985 have been prosecuted (successfully or otherwise) since they were enacted. Unfortunately, due to the way in which these offences would be recorded, it was not possible for either to do so. We are not, however, aware of any prosecutions that have taken place.

The position of non-profit agencies

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

14.17 A non-profit-making body[12] (such as a non-profit-making surrogacy organisation) is permitted to initiate negotiations and compile information in respect of surrogacy without the risk of criminal sanction.[13] It is, further, permitted to receive reasonable payments for carrying out these two activities.[14]

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

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

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

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

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

13 SAA 1985, s 2(2A).

14 SAA 1985, s 2(2A).

14.18 A non-profit-making body is also permitted to advertise the services which it can legally provide – in other words it can advertise that it can initiate negotiations and compile information.[15]

MATCHING AND FACILITATION

14.19 We see the core work, and unique role, of RSOs under our recommendations as facilitating surrogacy arrangements between surrogates and intended parents, sometimes in the form of actively "matching" the parties.[16] This work covers, to some extent, the behaviour criminalised by section 2 of the SAA 1985 described above, and the ability of non-profit-making surrogacy organisations to initiate negotiations and compile information.

14.20 We do not, however, think that this work, if permitted, should be conducted on a profit-making basis. To take any other view would allow organisations other than not-for-profit RSOs (such as clinics) to operate effectively as for-profit surrogacy organisations, circumventing our recommended prohibition against such bodies.[17]

14.21 In the Consultation Paper, we took the view that matching and facilitation services would include:

(1) compiling information about surrogates and intended parents;

(2) facilitating the formation of surrogacy teams both by actively matching surrogates and intended parents, and in other ways such as the provision of profiles, social events and online spaces for this purpose;

(3) providing advice and support to surrogates and intended parents on the surrogacy process from the time that they join the organisation to after the birth of the child, including helping to manage the relationship between the parties; and

(4) the administration necessary for, and ancillary to, the above services.

14.22 We sought consultees' views on this definition of matching and facilitation services.[18]

14.23 In respect of arrangements in the new pathway we provisionally proposed that only RSOs should be able to provide matching and facilitation services, which would be a regulated activity.[19]

14.24 In the Consultation Paper, we identified that the position in respect of providing such services for surrogacy arrangements outside the new pathway is less obvious. We said that we would not seek to prevent intended parents and surrogates, as private individuals, from matching with each other. However, we noted that there may be

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15 SAA 1985, s 3(1A).

16 SAA 1985, s 3(1A).

17 Recommendation 25.

18 Consultation Paper, para 9.94, Consultation Question 36.

19 Consultation Paper, para 9.95, Consultation Question 37.

some organisations (to use the term broadly), for example, a social media group administered by independent surrogates, which may find it hard to meet the requirements of being an RSO, but which would wish to provide matching and facilitation services. Where such groups are helping to facilitate surrogacy arrangements that are outside the new pathway, the presence of judicial scrutiny in the form of the parental order process may alleviate concerns about these organisations providing these services, and lessen the need for these organisations to be regulated.

14.25 On the other hand, we suggested that it would be clear and consistent for all matching and facilitation services to be provided only by surrogacy organisations that are regulated. There is also the possibility that allowing surrogacy organisations other than those that are regulated to continue to provide matching and facilitation services would undermine efforts to steer those seeking to enter into surrogacy agreements into the new pathway.

14.26 If all surrogacy organisations offering matching and facilitation services had to be regulated, we felt that consideration would need to be given to the sanctions available against organisations that offered matching and facilitation services without being regulated to do so. Clearly, it would not be appropriate to prevent a parental order being made in respect of a child simply because matching and facilitation services had been provided by an unregulated organisation. Imposing a bar on the availability of a parental order in this way would not be in the best interests of the child.

14.27 By way of comparison, we noted that the law often provides for criminal sanctions against individuals who carry out regulated activities when they do not hold the required licence or qualification. For example, the HFEA 1990 provides for various criminal offences for persons who carry out licensed activities (such as the creation of an embryo, which occurs in in-vitro fertilisation ("IVF") treatment) without being in possession of the required licence.[20]

14.28 In the Consultation Paper, we invited consultees' views as to what should be included in the definition of matching and facilitation services;[21] provisionally proposed that only RSOs should be able to offer matching and facilitation services in respect of surrogacy arrangements in the new pathway; asked an open question as to whether this should be the case for arrangements outside the new pathway;[22] and invited consultees' views about the sanctions that should be available against organisations that offer matching and facilitation services without being regulated.[23]

Consultation

14.29 We consider consultees' responses in relation to all three areas, before providing our analysis and recommendations.

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20 HFEA 1990, s 41.

21 Consultation Paper, para 9.94, Consultation Question 36.

22 Consultation Paper, paras 9.95 to 9.96, Consultation Question 37.

23 Consultation Paper, para 9.97, Consultation Question 38.

Scope of matching and facilitation

14.30 Surrogacy organisations said that the definition should include activities to establish the relationship between a surrogate and intended parents, including actively pairing them up, and hosting social events that allow people to meet. Some surrogates and intended parents said that the definition of matching services should encompass different methods of meeting people, such as online platforms, to ensure different preferences are catered for.

14.31 Surrogacy organisations also said that activities to support or mediate the relationship, such as facilitating, negotiating or advising on written surrogacy agreements, or ensuring they have met the requirements of the new pathway, could come under this definition. NGA Law and Brilliant Beginnings preferred the term "introduction services" to "matching services", as they thought it better captured the range of services offered.

14.32 Some consultees disagreed with the third limb of the definition above, namely providing advice and support to surrogates and intended parents and helping to manage the parties' relationship. NGA Law and Brilliant Beginnings said:

> These are activities which may (desirably) also be offered by professionals who make a profit. For example, private fertility clinics provide advice and support on the surrogacy process; lawyers give legal advice on the surrogacy process and help to manage the relationship by drafting the agreement; other professionals give support including counsellors, therapists, mediators etc. We do not think the intention is to prevent professional support being offered or to restrict this kind of wider support.

14.33 Consultees' other suggestions as to the scope of matching and facilitation services included:

(1) creating a supportive community in which would-be surrogates and intended parents can meet and discuss their preferences for a surrogacy journey;

(2) educating surrogates and intended parents on best practice for a safe surrogacy journey;

(3) advertising for surrogates;

(4) oversight of the initial stages of the arrangement;

(5) health and emotional screening and counselling to ensure that all parties are holistically prepared to enter into a surrogacy arrangement;

(6) a course highlighting the importance of all individuals involved in the arrangement being open with the child about their origins ("life story work");

(7) providing a list of specialist professionals that parties could use. For example, Resolution and the Family Law Bar Association suggested that Resolution could provide quality assurance through surrogacy accreditation for solicitors; and

(8) reassure intended parents that the surrogate wishes to proceed with the arrangement, and all the necessary paperwork has been completed.

14.34 Some consultees suggested that RSOs should obtain specified information from intended parents and surrogates and carry out preliminary screening before providing matching and facilitation services. Information that they suggested RSOs collect included: their age; relationship status; location in the UK; health history; interests; a DBS check; work status; educational background; and previous experience of assisted reproductive treatment and of surrogacy organisations.

RSOs and matching and facilitation

14.35 In respect of surrogacy arrangements on the new pathway, most consultees agreed that only RSOs should be able to offer matching and facilitation services.

14.36 Some consultees argued that allowing only RSOs to provide matching and facilitation services on the new pathway would incentivise its use. For example, Dr Alan Brown noted that only allowing RSOs to provide matching and facilitation services would incentivise organisations to seek to become regulated and also provides a reason why intended parents would use such organisations.

14.37 Other consultees thought that individuals and organisations other than RSOs should be able to provide matching and facilitation services in respect of surrogacy arrangements on the new pathway. Some felt that to do otherwise would increase intended parents' costs. A number of consultees thought that surrogacy teams should be eligible for the new pathway irrespective of how they meet.

14.38 The SurrogacyUK Working Group on Law Reform said:

> However IPs and surrogates 'match' with each other, we believe it would then be preferable for them to then be facilitated through the surrogacy journey with the help of an RSO, which would have responsibility under statute and/or a Code of Practice to ensure that certain procedures or checks take place in order that the new pathway to parenthood can be followed.

14.39 In respect of surrogacy arrangements outside the new pathway, a greater proportion of consultees thought that individuals and organisations other than RSOs should be able to provide matching and facilitation services. Several consultees suggested that individuals' freedom of choice would be restricted if they could only access matching and facilitation services through RSOs. One consultee suggested that the judicial scrutiny of the parental order process would provide a safeguard.

14.40 Some consultees said that prohibiting unregulated matching and facilitation service-providers could discourage individuals who use them from applying for a parental order. Mills & Reeve LLP suggested that to encourage those who do use an unregulated surrogacy organisation to apply for a parental order, the use of such an organisation should not be taken into account by the court in considering whether or not to make a parental order.

14.41 Nevertheless, most consultees were still against this. A number suggested that limiting the provision of matching and facilitation services to RSOs would introduce a degree of regulation to arrangements outside the new pathway, which would be beneficial for everyone involved.

Sanctions against unregulated matching and facilitation

14.42 Most consultees who gave a substantive response argued in favour of criminal sanctions. Some consultees emphasised the vulnerability of people who are interested in entering into a surrogacy arrangement, arguing that criminal sanctions are necessary to protect them against potentially exploitative providers of matching and facilitation services.

14.43 Other consultees argued that criminal sanctions were the most likely to deter individuals and organisations from unlawfully providing matching and facilitation services. The Law Society wrote:

> Although we are cautious about criminalising aspects of surrogacy, such sanctions could apply to regulation. This is the case in adoption legislation. Our members consider it important that unregulated persons should not provide M&F [matching and facilitation] services, and therefore agree with criminal sanctions where this does occur. This is a necessary deterrent and safeguard as the consequences of improper matching can be significant to those involved.

14.44 Some consultees argued that only organisations which unlawfully provide matching and facilitation services, and not surrogates and intended parents, should be criminalised. Some thought that different kinds of sanction should be available, depending on the seriousness of the conduct.

14.45 Others thought there should be parity between the present context and the sanctions that apply when medical services are provided by an individual or organisation without a licence. Dr Rita D'Alton Harrison wrote:

> Those sanctions are criminal in nature under s.41 HFEA 1990 with a maximum penalty of 10 years and/or fine.

14.46 Some consultees suggested that regulatory sanctions, as opposed to criminal ones, would be ineffective in holding unlawful providers of matching and facilitation services to account, because these would be outside the regulatory environment.

14.47 The HFEA encouraged the Law Commissions to learn from the HFEA's experience of holding unlicensed service-providers to account:

> although it is a criminal offence to undertake certain (but not all) licensable activities without a licence, in practice people are able to escape punishment while undertaking licensable activities without a licence. This is because the HFEA cannot regulate what it does not license. The growing world of internet activity, which is difficult to monitor, means that it is all the more important to learn from the current model when developing any new system of regulation, to ensure that the legislation and regulation fulfil their purpose.

14.48 One intended parent argued against introducing criminal sanctions, on the basis that it would send the wrong message to the public about surrogacy and perpetuate the stigma associated with it.

Analysis

Scope of matching and facilitation

14.49 We recommend keeping the second limb of our provisional definition of matching and facilitation services, namely actively matching surrogacy teams and the provision of spaces and information for that purpose. This element of our definition was supported by consultees, and is central to the work of matching and facilitation.

14.50 We recommend that the unlawful provision of matching and facilitation services should be criminalised. Because we recommend a criminal offence, we do not think that the compiling of information about surrogates and intended parents (the first limb of the provisional definition) should form part of the definition of matching and facilitation services. The activity of compiling of information, taken on its own, is unlikely to create a risk of harm to surrogates and intended parents sufficient to justify a criminal offence, in the way that matching might.

14.51 The third limb of our provisional definition referred to providing advice and support to surrogates and intended parents throughout their surrogacy journey until after the child's birth. Consultees highlighted that these matters referred to activities which would benefit from external professional support from the likes of lawyers and counsellors who operate for profit, and whose work would not sensibly come into a definition of matching and facilitation. We agree with consultees on this point. We recommend that only non-profit RSOs should be able to charge for matching and facilitation services. Consequently, we do not recommend including providing advice and support to surrogates and intended parents within our definition of matching and facilitation services.

14.52 We were not persuaded that the range of other services suggested by consultees form part of matching and facilitation. Some of them reflect forms of support that existing surrogacy organisations and RSOs may provide during the course of a surrogacy arrangement (such as creating a supportive community and encouraging best practice). Others refer to different aspects of surrogacy law that we address elsewhere, such as advertising, or need to be undertaken by a suitably qualified professional (health screening and counselling). It would not be appropriate to say that the RSO is there to "reassure the intended parents" when it is essential that they act in the interest of all parties involved in surrogacy.

14.53 Accordingly, we recommend a narrower definition of matching and facilitation than that which appears in the Consultation Paper. In addition, we now think that the "facilitation" element of the name is unnecessary, given the narrower definition. We expect social events and online spaces, to give two non-exhaustive examples, to be included within this definition. We recommend that the definition of "surrogacy matching services" is:

> services provided with a view to assisting an individual who wants to enter into a surrogacy agreement to find another individual or individuals with whom to enter into the agreement.

RSOs and surrogacy matching services

14.54 We are persuaded that it is desirable for the regulation of matching services to be consistent both across the new pathway and outside it.

14.55 We were concerned that if any entity, regulated or unregulated, could charge on a profit-making basis to provide matching services, this would amount to commercial surrogacy. Individuals and organisations might be incentivised by profit to match would-be intended parents and surrogates irrespective of whether they are a good fit for each other, or for surrogacy at all, which would clearly be to the detriment of everyone involved in the arrangement, including any child who was born.

14.56 In light of the value that consultees attached to social media groups, where would-be intended parents and surrogates can meet virtually, we have decided to recommend that such unregulated forums should only be unlawful if they charge for their services. We are also aware of at least one mobile application (or app) which some would-be intended parents and surrogates use. Again, we do not wish to make such apps unlawful, but instead recommend that they cannot charge for their services and must operate on a non-profit basis.

14.57 We therefore recommend that, irrespective of whether a surrogacy arrangement is on the new pathway or outside it:

(1) only non-profit RSOs can charge for matching services;

(2) individuals and organisations other than RSOs can provide matching services, if they operate on a non-profit basis and provide those services free of charge. An organisation providing such services must operate as a non-profit body; and

(3) if an individual or an organisation seeks to provide a service free of charge but will receive, say, revenue from advertisements from which it will make a profit, that will mean that they will not be permitted to provide matching services.

14.58 The question then arises as to how the law should apply to intended parents and a surrogate who meet through matching services that are provided in breach of these limitations. For example, what would the position be if intended parents and a surrogate meet using matching services that have been provided by an organisation on a profit-making basis? The mischief that is being targeted by the limitations on the provision of matching services is the behaviour of profit-seeking organisations who target vulnerable people. We do not think that intended parents or surrogates who use such services should be penalised for the wrong-doing of others.

14.59 A resulting surrogacy agreement would still therefore be able to proceed under the new pathway. The screening requirements on the new pathway, set out in Chapter 8, should ensure, including in these agreements, that people are entering into an agreement on a free and voluntary basis, well-informed of the legal, medical and emotional consequences. Equally, a parental order should be available in respect of those surrogacy agreements where the new pathway is not followed. On an application for a parental order the paramount consideration is the welfare of the child. It would be in conflict with that welfare principle to seek to bar the grant of a parental

order, or deny the attribution of legal parental status to the intended parents, simply because of the circumstances in which the surrogacy team came together.

Sanctions against unregulated matching services

14.60 We recommend that individuals and organisations who provide matching services unlawfully, either because they charge for their services or operate for profit, should be subject to criminal sanctions.

14.61 We are of the view that criminal liability, and not civil liability, is proportionate in the circumstances for several reasons. These reasons reflect factors for consideration suggested in Ministry of Justice advice on introducing or amending criminal offences,[24] namely whether criminal sanctions are proportionate, whether civil or regulatory sanctions would be more appropriate, and whether the sanction seeks to have a deterrent effect.[25]

14.62 First, individuals and organisations which charge for their matching services, or which operate for profit, could exploit vulnerable would-be surrogates and intended parents and match up surrogacy teams irrespective of whether they are a good fit, incentivised by making money. If these individuals took forward a surrogacy agreement, the relationship between them might be more likely to break down as a result of the poor match, to the serious detriment of any child born, as well as the parties themselves. Profit-driven service-providers could also encourage would-be intended parents and surrogates to enter into a surrogacy agreement when they are not ready to do so or are unsuited to surrogacy. In particular, it would cause the surrogate emotional and psychological harm if she entered into a surrogacy agreement without being prepared for the emotional and legal consequences. Consequently, we take the view that the potential to cause serious harm justifies imposing a criminal sanction on unlawful matching services.

14.63 Secondly, individuals and organisations other than RSOs cannot be the subject of regulatory sanctions, as they would not be regulated by the HFEA. Therefore, regulatory sanctions would not be effective.

14.64 Thirdly, civil sanctions would be inappropriate for two reasons:

(1) civil sanctions received limited support from consultees; and

(2) unlicensed providers of fertility treatment are subject to criminal sanctions, under section 41 of the HFEA 1990, and not civil sanctions. Our recommendations would therefore be consistent with the approach taken elsewhere in the assisted reproductive treatment sphere.

14.65 Fourthly, criminal sanctions, by their nature, are the most likely to deter individuals and organisations from unlawfully providing matching services.

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[24] Introduced following proposals in Criminal Liability in Regulatory Contexts (2010) Law Commission Consultation Paper No 195.

[25] Ministry of Justice and Cabinet Office, *Advice on introducing or amending criminal offences and estimating and agreeing implications for the criminal justice system* (2015).

14.66 Fifthly, the nature of the wrong we are proposing to criminalise is narrowly defined and is not disproportionate to the harm we are trying to tackle. We are not recommending that anyone who provides matching services should be criminalised; we understand that would be impractical and would potentially capture a wide range of individuals and organisations. Instead, we only recommend criminalising those who charge for their matching services, or who operate for profit, because of our concern that the financial motive will result in unsuitable and potentially harmful agreements being made.

14.67 We do not think that it should be a requirement of committing the offence that someone knowingly provided matching services on a for-profit basis or while charging for such services. The offence will be committed simply when that behaviour is undertaken. But a person accused of the offence would have a defence to the offence if they could prove that, at the time of providing the services, they did not know that a requirement to pay for the services was being imposed.

Recommendation 71.

14.68 We recommend that matching services are defined as services provided with a view to assisting an individual who wants to enter into a surrogacy agreement to find another individual or individuals with whom to enter into the agreement.

14.69 We recommend that, irrespective of whether a surrogacy agreement is on the new pathway or outside it:

(1) only non-profit RSOs can charge for matching services;

(2) individuals and organisations other than RSOs can provide matching services, if they provide them free of charge, and operate on a non-profit basis;

(3) individuals and organisations who provide matching services unlawfully, either because they charge for their services or operate for profit, will commit a criminal offence;

(4) a defence should be available if a person can prove that, at the time of providing the services, they did not know that a requirement to pay was being imposed; and

(5) if a surrogacy team receives unlawful matching services, either because they are charged for the services other than by an RSO, or because the service-provider operated for profit, the surrogacy team should not be penalised and should still be eligible for the new pathway or for a parental order.

14.70 Clause 75 of the draft Bill gives effect to this recommendation. Subsection (8) sets out the definition of surrogacy matching services. Subsection (1) and (2) provide that it is an offence for anyone other than non-profit-making bodies or individuals acting otherwise than in the course of business to provide surrogacy matching services, and

subsections (3) and (4) provide that it is an offence for anyone other than an RSO to provide surrogacy matching services for a fee. Subsections (5) and (6) set out the defence. Subsection (7) provides that a person does not commit an offence by using prohibited services, meaning that intended parents or a surrogate who use unlawful matching services will not be penalised.

CHARGING FOR NEGOTIATING AND ADVISING ON SURROGACY AGREEMENTS

14.71 As we have seen above, it is currently a criminal offence to make, negotiate or facilitate the making of a surrogacy agreement in the UK on a commercial basis.

14.72 As we noted in the Consultation Paper, when the SAA 1985 was enacted, one commentator wrote:

> Perhaps the most serious danger posed by this piecemeal legislation is its encouragement of amateurish agreements… The couple and the surrogate are left to stumble through the process without the advice of experts. It is most unfortunate that a law that does not condemn the agreement itself does not permit the parties to pursue it in a professional manner.[26]

14.73 Lawyers to whom we spoke at the time of writing the Consultation Paper saw the current prohibition in the SAA 1985 as a prohibition on providing advice on, negotiating, or drafting in respect of surrogacy agreements into which their clients had entered.

14.74 In the context of the provisional proposals in our Consultation Paper, this prohibition was a particular concern. Our provisional proposals (and the recommendations that we make in this Report) provided that in order to enter the new pathway, a written agreement should be in place and the parties should have received independent legal advice.[27] If surrogacy is to be properly regulated and facilitated, we said that advice and support should be available throughout the surrogacy journey.

14.75 We have seen that there are exceptions in the current law allowing a non-profit organisation to initiate negotiations with a view to the making of a surrogacy arrangement (and to compile information). Even such organisations cannot, however, take part in any negotiations with the same aim or offer or agree to negotiate the making of a surrogacy arrangement. It seemed to us difficult to distinguish between these activities in practice.

14.76 We also took the view in the Consultation Paper that, when providing legal advice, lawyers should be able to advise on the drafting of a surrogacy agreement. We felt that it was not viable to ask commercial organisations to undertake work on a non-profit basis similar to that which they currently provide for profit (that is, law firms are currently able to provide, and charge for, advice about surrogacy agreements in the sense of advising about the law on parental status, and applying for a parental order).

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[26] T A Eaton, "The British Response to Surrogate Motherhood: An American Critique" (1985) 19 *Law Teacher* 163, 172.

[27] Recommendations 1 and 31.

14.77 In the Consultation Paper we therefore provisionally proposed that there should be no prohibition against charging for negotiating, facilitating and advising on surrogacy agreements.[28]

Consultation

14.78 Most consultees who supported surrogacy supported the proposal to remove the prohibition.

14.79 Some said the proposal would help to ensure that intended parents and surrogates can access good quality, professional support. The Law Society wrote:

> It is long overdue that legal professionals should be able to charge for negotiating, facilitating and advising on both the surrogacy arrangement and agreement. Solicitors fulfil an essential role in surrogacy arrangements, being perfectly situated to explain to the intended parents and the surrogate the importance of using regulated bodies, the benefits of meeting the criteria of the new pathway and to ensure that all parties understand, and can protect, their rights. We consider the role of solicitors in surrogacy arrangements an invaluable protection for all parties… .

14.80 NGA Law and Brilliant Beginnings expressed concern about the current approach to drafting agreements in the UK, which they said usually relies on a template with a tick box:

> We have experience of many cases in which resulted ambiguity has caused difficulties between the parties at a later stage, particularly in respect of financial terms… .

14.81 NGA Law and Brilliant Beginnings also pointed out that the need for proper drafting would be of even greater significance under the proposed new pathway, which would give rise to legal consequences, including legal parental status for the intended parents, and financial terms being enforceable against them.

14.82 Consultees identified various benefits of permitting legal advice, including clarity and fairness. Some support for the proposal was predicated on the condition that only regulated professionals provide these services.

14.83 Some consultees, while supporting the proposal, thought there should be a cap on how much professionals can charge, or that services should be provided on a non-profit basis.

14.84 Concerns about the proposal were also expressed. Some consultees thought that charging on a commercial basis for negotiating or advising on a written surrogacy agreement was contrary to the altruistic nature of surrogacy, or would contribute to the commodification of women and children. Cambridge Family Law and the Centre for Family Research thought that unregulated individuals could still perform these services but only on a non-profit basis:

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[28] Consultation Paper, para 9.135, Consultation Question 41.

While it is important to allow lawyers and other professionals to be involved in the process, ensuring compliance with the legislation and regulations, it is equally vital that surrogacy does not become an industry, where unregulated middle-men are making significant amounts of money.

14.85 The Nordic Model Now! response disagreed with the proposal, on the basis that allowing people to charge to draft written surrogacy agreements is "abhorrent" and violates the spirit of Article 6 of the Convention Against the Elimination of Discrimination Against Women.[29]

Analysis

14.86 We consider that the prohibition against charging should be removed, but only in respect of certain professionals.

14.87 There are benefits of allowing all parties to seek and receive independent professional advice, to protect their interests, and ensure that any agreement meets their needs. We also want to enable advice to be provided on a surrogacy agreement, for example, by drafting, reviewing and advising on the terms of a written agreement, without there being any expectation that parties should feel that they have to seek professional legal advice on the terms of agreements. Surrogacy teams might choose to seek advice on the terms of the regulated surrogacy statement required for the new pathway.[30] They might also seek advice on or drafting of any other (unenforceable) agreement concerning all aspects of a surrogacy arrangement, which we expect might continue to be used in the context of the new pathway, as well as in agreements outside the new pathway.[31] As consultees noted, the intended parents and surrogate might also want advice on payments provided for in an agreement, as these will be enforceable by the surrogate under our recommendations.

14.88 Allowing assistance by advising on or negotiating written surrogacy agreements will help to ensure that surrogacy teams are clear about the consequences of entering into the agreement. This should reduce the potential for disagreement and might also reduce the likelihood of surrogacy arrangements breaking down.

14.89 However, we emphasise that there will be no requirement or expectation that parties to surrogacy agreements must take such advice, in contrast to the requirement for independent legal advice for entry to the new pathway.[32] Currently, surrogacy teams may be supported in devising their agreements by surrogacy organisations, and they may continue to look primarily to an RSO to help them with this stage of the process.

14.90 We want to enable professional advisors to be able to charge on a for-profit basis to offer such advice and representation, whether in respect of agreements on the new pathway or in the parental order process. We do not wish to prevent others, including RSOs, from providing such advice on a non-profit basis. RSOs may also wish to

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29 CEDAW, Article 6: "States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation or prostitution of women".

30 Recommendation 38.

31 Para 9.6 onwards.

32 Recommendation 31.

provide general information to members as to, for example, the legal effect of the new pathway on legal parental status. However, that information would not be tailored to the individual entering into the agreement.

14.91 While we acknowledge that allowing professionals to provide these services on a profit-making basis might increase the costs to intended parents (who would be expected to offer to pay legal costs incurred by the surrogate as well as their own costs), these costs are likely to be small relative to others incurred, such as fertility clinic fees. Further, we do not think it is feasible to introduce caps on the fees that regulated professionals charge. Moreover, RSOs may well have template agreements that the parties can use. Our recommendation is not intended to create an expectation that parties will use a professional advisor to prepare their agreement, but only to enable them to act where the parties do wish to do so.

14.92 We primarily intend that regulated legal professionals will be able to provide these services on a profit-making basis. However, we note that other regulated professionals may also be well-placed to negotiate and advise on surrogacy agreements. Our consultation question was not confined to legal professionals and consultees variously referred to lawyers or more generally to regulated professionals. To ensure flexibility in the legislation for the future, we think it would be useful to include a power for the Secretary of State to identify other regulated professionals who should be able to negotiate and advise on surrogacy agreements for payment.

14.93 We also want to make clear that our recommendation does not make it unlawful for other professionals, such as clinicians and counsellors, to discuss the surrogacy arrangement with the surrogate or the intended parents. These individuals are not involved in negotiating or advising on written surrogacy agreements and should not be hampered from advising their client or patient (although we do propose limits on their ability to advertise).[33]

14.94 We therefore recommend that regulated legal professionals should be able to charge for negotiating and advising on surrogacy agreements for payment and that there should be a power for the Secretary of State to identify other regulated professionals who should be permitted to do so.

14.95 In defining legal professionals, we have simply specified the professions of solicitor, barrister (advocate in Scotland) and (in England and Wales) legal executive, also making it a requirement that these professionals have a current practising certificate (or in the case of an advocate, that they are a member of the Faculty of Advocates and practising as such). We also rely on these professionals not advising outside their competence, being prevented from doing so by professional conduct rules and the limits of their professional liability insurance.

14.96 There will continue to be a prohibition, by way of a criminal offence, against the provision of such advice or representation in return for a fee, by those other than regulated legal professionals, RSOs, or other non-profit-making bodies or individuals acting otherwise than in the course of business. Like the offence in relation to matching services, the offence will be committed simply where anyone other than one

[33] Para 14.99.

of the individuals or bodies mentioned above charges to negotiate and advise on surrogacy agreements. A person accused of the offence will have a defence to the offence if they can prove that, at the time of providing the services, they did not know that services had been provided in return for payment.

Recommendation 72.

14.97 We recommend that:

(1) regulated legal professionals (solicitors, barristers, advocates and legal executives) should be able to charge to negotiate or advise on surrogacy agreements;

(2) the Secretary of State should have a power to identify other regulated professionals who should be permitted to charge to advise on surrogacy agreements;

(3) RSOs and other non-profit-making bodies, and individuals acting other than in the course of a business, should be able to charge to negotiate and advise on surrogacy agreements; and

(4) it should continue to be a criminal offence for anyone else to charge to negotiate or advise on surrogacy agreements, with a defence available if they can prove that, at the time of providing the services, they did not know that they had been provided on that basis.

14.98 Clause 76 of the draft Bill gives effect to this recommendation. Subsection (2) sets out the services which are the subject of the offence. Subsections (1) and (3) provide that it is an offence for anyone other than non-profit bodies, individuals acting other than in the course of a business, a legal professional, or a person specified in regulations to provide those services for payment. Subsections (4) and (5) set out the defence. Subsection (7) provides that a person does not commit an offence by using prohibited services, meaning that intended parents or a surrogate who use unlawful negotiation or advice services will not be penalised.

ADVERTISING IN RELATION TO SURROGACY

14.99 It appears that the original rationale for the ban on advertising in relation to surrogacy was to "ensure that to all intents and purposes surrogacy will be kept 'within the family'".[34] The Brazier Report recommended maintaining the prohibition on advertising with respect to surrogacy, although it provided no reasons for doing so.[35]

14.100 At the time of writing the Consultation Paper, surrogacy organisations told us that they were reluctant to advertise their services in light of how unclearly the statutory

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34 D Morgan, "Who to Be or Not to Be: the Surrogacy Story" (1986) 49 *Modern Law Review* 358, 365.

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

exception that applies to them is drafted. Those with whom we engaged expressed near-universal dissatisfaction with the current ban on advertising. COTS called the ban on advertising "the worst constraint" in the SAA 1985 and noted that advertising for egg and sperm donors was legal.[36] SurrogacyUK said that the prohibition prevents agencies from providing useful information to people who may be thinking of entering into a surrogacy agreement.

14.101 In the Consultation Paper we noted that the prohibition is routinely breached on the internet, where it is easy to find people asking for surrogates, or offering to be surrogates, particularly on social media. It is also easy to access advertising by agencies and clinics offering surrogacy overseas, on the internet, often on a commercial basis.[37]

14.102 In the Consultation Paper, we provisionally proposed to remove the ban on advertising surrogacy with the effect that anything that can be lawfully done with respect to surrogacy can be advertised.[38]

Consultation

Regulation of advertising

14.103 Most consultees who were not opposed to surrogacy were in favour of reducing restrictions on advertising. However, many of these consultees did favour the regulation of advertising, due to concerns that vulnerable and young women might otherwise be targeted as potential surrogates. A concern to ensure that vulnerable and young women were not targeted in this way was shared by a number of those who supported and rejected the provisional proposal.

14.104 Some consultees argued that regulation should ensure that advertising in respect of surrogacy cannot target vulnerable women as potential surrogates. Zaina Mahmoud noted that online advertisements can become avenues through which vulnerable individuals may be taken advantage of on online platforms.

14.105 Others suggested that only surrogacy organisations should be able to advertise in respect of surrogacy, or that they should screen surrogates before they would be able to advertise their services.

14.106 PROGAR and Nagalro argued that advertising in respect of surrogacy should follow the approach taken with respect to adoption:

> There should be restrictions as to which organisations [can] advertise in the UK. [The Consultation Paper at 9.142 pointed out that] only UK people caught advertising in the UK… can be prosecuted not those operating overseas

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36 While such advertising is legal, the HFEA Code of Practice para 11.1 states that "advertising and publicity materials should be designed and written with regard to the sensitive issues involved in recruiting donors".

37 Such advertising would not be effectively caught by the prohibition in the SAA 1985, s 3, as while the prohibition applies to an advertisement "conveyed by means an electronic communications network so as to be seen or heard (or both) in the United Kingdom", only a "person who in the United Kingdom causes it to be so conveyed" is guilty of an offence under the legislation (SAA 1985, s 3(3)).

38 Consultation Paper, para 9.145, Consultation Question 42.

commercially and advertising here. We believe this is a loophole that needs to be shut down if we are serious about maintaining a ban on commercial surrogacy.

14.107 The HFEA did not wish to express a view on removing the prohibition on advertising with respect to surrogacy, but said:

> We note the need for careful consideration to be given to which powers the Advertising Standards Agency (ASA) and/or surrogacy regulator would have in the event that unregulated entities are found to be advertising unlawfully and whether current ASA powers would suffice or not. Any surrogacy provider would also have to ensure they are compliant with other legislation including consumer law.
>
> We also note that the removal of the ban on advertising in respect of surrogacy might constitute a significant cultural change for the UK, which could attract considerable public interest and perhaps criticism, of which a regulator would naturally be the focus. This could be a resource consideration for a future regulator.

Encouraging the new pathway or surrogacy

14.108 NGA Law and Brilliant Beginnings pointed out that the ban on advertising with respect to surrogacy was introduced in a different social context:

> The policy behind the ban on advertising was the desire to prevent surrogacy from occurring, which is inconsistent with modern attitudes on surrogacy. We do not see that the current ban serves any real purpose.

14.109 Some consultees made the point that the current prohibition on advertising with respect to surrogacy is widely breached, and the law is not enforced. Some suggested that removing the ban could help to steer individuals towards the new pathway, and others framed this in terms of encouraging intended parents away from international and towards domestic surrogacy.

14.110 Others said that removing the ban might help to reduce the stigma surrounding surrogacy, raise awareness of the practice, and increase the number of UK surrogates, which they considered important in light of the rising number of intended parents.

Commercialisation of surrogacy

14.111 Some consultees disagreed with the proposal. Some surrogates and intended parents raised concerns that removing the ban on advertising would lead to the commercialisation of surrogacy in the UK, or to an increase in the number of informal surrogacy arrangements in the UK.

14.112 Nordic Model Now! and all the responses based on its template disagreed with removing the prohibition on the basis that this could lead to the exploitation of vulnerable women, by promoting to impoverished young women the idea of surrogacy as a solution to their financial problems.

Analysis

Regulation of advertising

14.113 As part of the wider context, we briefly set out the legal frameworks governing the advertising of adoption and gamete donation, and the regulation of advertising more generally by the Advertising Standards Authority ("ASA").

14.114 With respect to adoption, the law distinguishes between adoption agencies, who are permitted to advertise or distribute information to the effect that a child is being put up for adoption, and all other persons, who are prohibited from so doing.[39] An adoption agency is defined as a local authority or registered adoption society, which is by its nature regulated. If surrogacy were to follow the example of adoption, only RSOs would be permitted to advertise.

14.115 By contrast, there are no restrictions on who can advertise for an egg or sperm donor or present themselves in that capacity. Advertising with respect to the recruitment of gamete donors is subject to a HFEA Code of Practice requirement that "advertising and publicity materials should be designed and written with regard to the sensitive issues involved in recruiting donors".[40] The Code also says that adverts for gamete donors should not refer to the possibility of financial gain.[41] The HFEA, however, does not have regulatory powers to implement this guidance or sanction those who do not follow it. Were surrogacy to follow this example, the ban on advertising with respect to surrogacy would be lifted, subject only to broadly framed HFEA guidance.

14.116 The ASA is the independent regulator of advertising in the UK. The ASA enforces the Broadcast Code and a Non-broadcast Code set out by its sister organisation, the Committee of Advertising Practice ("CAP"), which set out standards relating to the content of UK advertisements. In addition to setting out general standards, including that adverts should not be misleading or harmful, the Codes set out tailored rules for specific industries such as "Medicines, medical devices, treatments and health", specific audiences such as children, and subject matters, such as faith and religion. They also provide guidance to help advertisers comply with these rules.

14.117 The ASA has powers to investigate a complaint that an advertisement breaks one of its Codes, in which circumstances meritorious claims would be ruled on by the ASA Council (the ASA's independent jury) whose decisions are publicly available online. If the ASA Council rules that an advert breached one of its Codes, the advert must be changed or withdrawn. If an advertiser refuses to comply the ASA can refer them to other bodies such as Trading Standards or Ofcom.[42]

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39 Adoption and Children Act 2002, s 123; Adoption and Children (Scotland) Act 2007, ss 60 and 75.

40 HFEA Code of Practice (9th edn) para 11.1.

41 HFEA Code of Practice (9th edn) para 13.1

42 For more information, see https://www.asa.org.uk/about-asa-and-cap/the-work-we-do/how-we-handle-complaints.html (last visited 23 March 2023). We note that, in July 2021, the ASA, in conjunction with the Competition and Markets Authority and the HFEA, published guidance for advertisers of fertility treatments to make sure that fertility clinics are treating patients fairly. The guidance does not address the sensitive nature of fertility treatment (unlike HFEA guidance with respect to gamete donor recruitment) but seeks to ensure that advertising of fertility treatment is not misleading and gives patients a realistic impression of the

Advertising by regulated organisations and professionals

14.118 We note that that there was not a clear consensus amongst consultees in support of removing restrictions on advertising. Therefore, in light of these responses, and our analysis below, we have departed from the provisional proposal in the Consultation Paper, and we now recommend that the blanket ban on advertising relating to surrogacy should be modified but not entirely removed.

14.119 There are five categories of person who might want to advertise in respect of surrogacy: (1) RSOs; (2) professionals, including fertility clinics, lawyers and counsellors; (3) unregulated organisations which provide matching or other services; (4) individual would-be surrogates and intended parents; and (5) overseas surrogacy organisations.

14.120 We consider it essential that RSOs can advertise their services, in light of our policy aim of enabling people to access the new pathway where it is appropriate for them. RSOs would be regulated by the HFEA, which could hold them to account if they breach advertising regulations. RSOs would have unparalleled expertise in matching up and supporting surrogacy teams throughout their surrogacy journey and, crucially, they would be the gatekeepers of the new pathway. Therefore, RSOs should be able to promote their services and the benefits of the new pathway through advertising, to enable surrogates and intended parents to make informed choices.

14.121 Under our recommendations, RSOs will be able to advertise that they are looking for intended parents, and for women to act as surrogates, and that they can provide matching services for which a charge is made (as discussed above, they are the only organisations that can lawfully charge for such services, operating on a non-profit basis).

Advertisements by professionals

14.122 We also think that regulated professionals who are involved in surrogacy arrangements, including lawyers, clinicians and counsellors, should be able to advertise their services. This would make it easier for would-be surrogates and intended parents to locate relevant legal, medical and support services, which are fundamental to supporting them through surrogacy and which are a condition of entry to the new pathway.

14.123 Further, these professionals are regulated by bodies such as the Law Society, the Law Society of Scotland, the General Medical Council and the British Infertility Counselling Association. We believe that this means that it would be possible to hold such professionals to account if they published surrogacy adverts that breached the standards expected by their professional bodies, rather than solely relying on the ASA to take action.

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likelihood of success of such treatment. Accessible at: https://www.asa.org.uk/uploads/assets/cb6c3d82-5bfc-463a-9a9fac5cbfe6d831/f00db49e-0bde-4ccf-940807410ace35d9/Fertility-Treatments-Enforcement-Notice-FINALPDF.pdf (last visited 23 March 2023).

14.124 We recommend that the professionals that should be able to advertise their services should include lawyers; regulated health professionals (for example, midwives and dietitians); counsellors and therapists.

14.125 We acknowledge that some services provided to parties to a surrogacy arrangement involve professions that are not regulated. We heard, in particular, of the valuable support that some surrogates have received from doulas. We recommend that these professionals should also be able to advertise their services.

Advertising by unregulated organisations providing matching services

14.126 With regard to unregulated organisations which provide matching services, we do not recommend that they should be permitted to advertise.

14.127 On the one hand, we have recommended that such organisations should not operate for profit, or charge for matching services.[43] Therefore, they would not be driven by the profit incentive to advertise as a means of recruiting new would-be surrogates and intended parents. Further, while they could potentially spread inaccurate or misleading information about surrogacy, given that they are not regulated organisations and may not have the same expertise as RSOs, inaccurate or misleading adverts would still be caught by the ASA's Codes.

14.128 Nevertheless, we were persuaded that we should not open the door to advertising of matching services by unregulated organisations, because it would be difficult in practice to regulate the content of their adverts. Regulation through the CAP Codes could prevent any references to financial gain in adverts, in line with our policy against commercial surrogacy arrangements. However, advertising may employ more subtle means of promising financial gain, or other ways of inducing a woman to become a surrogate, such as linking being a surrogate to accessing a better lifestyle. It would be difficult to regulate these kinds of less obvious messages, and women could be induced to enter into a surrogacy agreement as a result of them.

Advertising by individual surrogates and intended parents

14.129 We also recommend that it continue to be the case that individual surrogates and intended parents should not be permitted to advertise. We were persuaded by the responses from consultees, as we were in relation to unregulated organisations, that it would be difficult in practice to regulate the content of adverts by would-be surrogates and intended parents. We do not in principle have an issue with would-be intended parents stating in a newspaper or online forum that, for example: "we are interested in entering into a surrogacy agreement". However, in our view it would be difficult to regulate other, more subtle messages that can be conveyed through advertising, which could induce a woman to become a surrogate; for example, a suggestion that the surrogate would be "well looked after".

Advertising by overseas surrogacy organisations and clinics

14.130 With respect to overseas surrogacy organisations and clinics, particularly where advertising is online, we are of the view that it would be difficult to enforce any advertising restrictions. We also suggest it would be difficult to say that overseas

[43] Recommendations 25 and 71.

clinics or surrogacy organisations are doing anything unlawful by advertising legal opportunities for commercial surrogacy overseas. Courts in England and Wales, and Scotland, are prepared to make parental orders following such arrangements, and the Supreme Court has decided that payment for the costs of commercial surrogacy overseas, as part of a personal injury damages award, is not contrary to public policy.[44] For this reason, we cannot see that it would be justified to criminalise such organisations for advertising overseas services in the UK.

Criminal offences related to advertising

14.131 We recommend that the restrictions on advertising be implemented by a revised criminal offence, replacing that currently contained in section 3 of the SAA 1985. It will be framed to prevent individuals or organisations (with exceptions) from making arrangements for an advertisement that:

(1) a woman is a surrogate and is seeking intended parents to have a child with, or is seeking to enter into a surrogacy agreement;

(2) a person is an intended parent and is seeking a surrogate to have a child with, or is seeking to enter into a surrogacy agreement;

(3) they offer or will provide matching services;

(4) they will, on a commercial basis, negotiate and advise on surrogacy agreements; or

(5) they will provide services which are advertised as being for surrogates or intended parents.

14.132 Publishing such an advertisement will also be an offence. There will be a defence to the publishing offence where the defendant can show sufficient evidence to raise as an issue that they did not know that the advertisement was a prohibited advertisement, and had taken reasonable steps to establish whether it was.

14.133 We acknowledge that the current criminal prohibition of advertising with respect to surrogacy is not enforced. To our knowledge no one has ever been prosecuted for the offence, despite widespread advertising by individuals on social media. However, we are not creating a new offence, but replacing an existing one. Removing any offence would send a message that the law has ceased to discourage individuals from advertising their interest in entering into a surrogacy agreement.

14.134 Finally, in terms of regulating advertising we think there is value in the HFEA, our proposed regulator of surrogacy, working with the ASA and the Committee of Advertising Practice to consider whether to introduce new rules relating to surrogacy, into the Broadcast and Non-Broadcast Codes, that the ASA would then monitor compliance with.

14.135 Any rules should seek to ensure that advertising:

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[44] *XX v Whittington Hospital NHS Trust* [2020] UKSC 14, [2021] AC 275.

(1) respects the sensitive nature of surrogacy arrangements;

(2) addresses concerns that vulnerable women could be targeted by advertising relating to surrogacy;

(3) addresses concerns that women and children could be objectified and commodified by advertising relating to surrogacy;

(4) does not include references to financial gain nor attempt to emotionally manipulate women into becoming surrogates; and

(5) does not target a particular demographic of women, for example students or women under 30.

Recommendation 73.

14.136 We recommend that:

(1) RSOs should be permitted to advertise that they are looking for intended parents, and for women to act as surrogates, and that they can provide matching services;

(2) certain professionals (such as lawyers and counsellors), those providing services to support the health or wellbeing of an individual, and RSOs and non-profit bodies should be able to advertise the services that they can provide that are relevant to surrogacy; and

(3) it should be an offence for anyone else, including individual would-be surrogates and intended parents and unregulated (matching) organisations, to advertise with respect to surrogacy that:

(a) a woman is a surrogate and is seeking intended parents to have a child with or is seeking to enter into a surrogacy agreement;

(b) a person is an intended parent and is seeking a surrogate to have a child with, or is seeking to enter into a surrogacy agreement;

(c) they offer or will provide matching services;

(d) they will, on a commercial basis, negotiate and advise on surrogacy agreements; or

(e) they will provide services which are advertised as being for surrogates or intended parents; and

(4) it should be an offence to publish such a prohibited advertisement, with a defence available if a person did not know the advertisement was prohibited and had taken reasonable steps to establish whether it was prohibited.

14.137 Clauses 77 and 78 of the draft Bill give effect to this recommendation.

14.138 Clauses 77(1) and (2) provide that making arrangements for an advertisement which relates to individuals seeking to enter into a surrogacy agreement, or to surrogacy matching services, are prohibited unless made under and in accordance with a licence, that is, by an RSO acting in accordance with the terms of its licence. Clauses 77(3) and (4) provide that arrangements for an advertisement offering to negotiate, draft or advise on a surrogacy agreement are prohibited unless made by a non-profit-making body, individual acting otherwise than in the course of a business, or a legal professional. Clauses 77(5) and (6) provide that arrangements for an advertisement for services for an intended parent or surrogate are prohibited unless they are by an RSO, a legal professional, or in support of the physical or mental health or wellbeing of an individual. Clause 78(1) provides that it is an offence to publish prohibited advertisements.

14.139 Clauses 77(9) and (10) and 78(1) provide that publishing a prohibited advertisement is an offence. Clauses 77(3) and (4) provide the defence to the publication offence.

COMMON FEATURES OF OFFENCES

14.140 There are some features of the offences in relation to matching services, charging on a for-profit basis for negotiating and advising on a surrogacy agreement, and advertising in relation to surrogacy which are the same across the different offences. This section sets out our reasoning for those common features, and notes any differences between the offences.

14.141 In line with the common approach to criminal liability, we consider that the offences should apply to non-human or legal persons so that the deterrent effect we seek can apply to the body responsible for any contravention. We recommend that the actions or words of those who manage or control the body can be admitted as evidence of the activities of the body. To ensure that those who manage or control such bodies can be held responsible for the offences where appropriate, we recommend that where an offence has been committed by such a body, and that offence was committed with the consent or connivance of a person who managed or controlled the body, that person is also guilty of an offence. This mirrors the approach taken in the SAA 1985.[45]

14.142 We do not wish to taint the birth of a surrogate-born child with criminality, in line with the principles set out in the Warnock Report.[46] We think there is a risk that intended parents or surrogates could be said to commit an inchoate offence, such as the offence of aiding and abetting, or encouraging or assisting in the commission of one of the offences we recommend if they used unlawful matching services or received advice on a surrogacy agreement from a person who provided it unlawfully. That would not meet our aim of criminalising the action that has the potential to cause harm, so we recommend that these acts will not constitute a criminal offence.

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45 SAA 1985, s 4(3) to (5).

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

14.143 Offences under the SAA 1985 have a time limit for proceedings to be brought of two years, rather than the six months which is usual for summary offences.[47] Because criminal offences relating to surrogacy agreements may not become apparent to the relevant authorities until after a child is born, we think this extended time limit remains necessary.

14.144 For the advertising offences and the offences of negotiating and advising on surrogacy agreements for profit, we recommend that the penalty currently applied to advertising offences under the SAA 1985, of a fine not exceeding level 5 on the standard scale, is applied.[48] We consider that providing matching services for payment outside of the regulatory environment we recommend, or on a for-profit basis, presents a greater risk of exploitation, so we recommend that a penalty of imprisonment for up to three months is also available for that offence.

14.145 We take the view that, in order to mitigate the risk of private prosecutions being brought by groups opposed to surrogacy, it is necessary for the consent of the Director of Public Prosecutions ("DPP") to be required in England and Wales for a prosecution to be brought for any of these offences.[49] We also note that such consent is required to bring proceedings for offences under the HFEA 1990 and SAA 1985.[50] Such consent would be non-personal, that is, it could be exercised on behalf of the DPP.

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47 SAA 1985, s 4(6).

48 SAA 1985, s 4(1). In England and Wales, an unlimited fine replaces level 5 on the standard scale under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 85(1).

49 All criminal proceedings in Scotland are brought by the Crown Office in the name of the Lord Advocate so equivalent provision is not necessary for Scotland.

50 HFEA 1990, s 42; SAA 1985, s 4(2).

Recommendation 74.

14.146 We recommend that in relation to the offences relating to matching services, to negotiating or advising on a surrogacy agreement on a for-profit basis, or to advertisements about surrogacy:

(1) the offences should apply to corporate bodies, unincorporated associations and partnerships, as well as individuals;

(2) where an offence has been committed by such a body, and that offence was committed with the consent or connivance of a person who managed or controlled the body, that person is also guilty of the offence;

(3) in England and Wales, evidence of the things done or words spoken, written or published by a person taking part in the management or control of a body of persons, or by a person acting on behalf of the body, is admissible as evidence of the activities of that body;

(4) a person will not commit an offence because they made use of unlawful matching services, or received legal advice on a surrogacy agreement from a person who was unlawfully providing that advice;

(5) proceedings must be commenced within two years from the time that the offence is committed;

(6) offences will be tried summarily with a penalty of a fine not exceeding level 5 on the standard scale (an unlimited fine, in England and Wales), with the additional possibility of imprisonment for three months for the offence in respect of matching services; and

(7) proceedings can only be instigated in England and Wales with the non-personal consent of the Director of Public Prosecutions.

14.147 Offences in clauses 75, 76 and 78 of the draft Bill can be committed by a person, which includes corporate and unincorporated bodies.[51] Clause 81 of the draft Bill provides for individual culpability for offending by an organisation. Clause 82 of the draft Bill provides that evidence of things done by a person in management or control of a body is admissible as evidence of the activities of that body. Clauses 75(7) and 76(6) of the draft Bill provide for the exemptions from liability for inchoate offences. Clause 79 provides for the requirement for the DPP's consent. Clause 80 of the draft Bill provides for a two-year time limit for prosecution. Penalties for the criminal offences are set in clauses 75(9), 76(8), and 78(2) of the draft Bill.

[51] Interpretation Act 1978, sch 1.

Chapter 15: Surrogacy and other substantive rights

15.1 This chapter considers the consequential impact of surrogacy on other areas of law.[1] For each of these areas, we set out a brief overview of the current law, before going on to consider the changes we recommend to the law.

15.2 First, we discuss issues of surrogacy that arise in respect of employment law, in particular considering the operation of statutory maternity and paternity leave and pay, as well as the current entitlement of the intended parents to statutory adoption leave and time off work prior to the birth of the child. We make a series of recommendations intended to ensure that a surrogate is treated in the same way as a pregnant woman who is not a surrogate, and that the intended parents are treated in the same way as any other person with a new child.

15.3 Next, we consider the operation of the law in relation to inheritance or succession in respect of a surrogate-born child. We recommend that in respect of the new pathway, and in both jurisdictions, the law should be reformed such that the child who was in utero at the time of the death of one or both of the intended parents can inherit from them, and not from the surrogate and/or her spouse or civil partner.

15.4 Finally, we consider surrogacy in a healthcare context, and whether any reforms are required in this area. We identify themes in the responses provided by consultees, often based on their personal experiences. We note that these themes are already addressed in the current surrogacy guidance for England and Wales.[2]

SURROGACY AND EMPLOYMENT LAW

15.5 In the Consultation Paper, we stated our view that, as a general matter of policy, employment law should offer the same rights to those involved in a surrogate pregnancy as those involved in any other pregnancy.[3]

15.6 Having set out that general policy position, we asked consultees to give their views on how areas of current law might require reform. As explained in the discussion that follows, we asked open questions on some issues, and made a provisional proposal concerning Maternity Allowance.

15.7 At present, intended parents may be entitled to statutory adoption leave and pay. Whilst this reference to adoption in a surrogacy context may be confusing, we do not think it is practical for us to change the existing terminology, or to introduce a surrogacy-specific regime to the current system of benefits. As such, where we make

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1 Our Terms of Reference include consideration of these issues (see para 1.81).

2 The current guidance is Department of Health and Social Care, *The Surrogacy Pathway: Surrogacy and the legal process for intended parents and surrogates in England and Wales* (February 2018, updated July 2021), and Department of Health, *Care in Surrogacy in Northern Ireland – Guidance for intended parents and surrogates* (2019); Department of Health, *Care in Surrogacy in Northern Ireland – Guidance for Healthcare Professionals caring for Surrogates and Intended Parents in Surrogate Births* (2019).

3 Consultation Paper, para 17.3.

recommendations, in addition to considering Maternity Allowance, we refer to rights available to adoptive parents.

Current law

15.8 The following areas of employment law impact upon those involved in surrogacy agreements:

(1) statutory maternity leave;

(2) Statutory Maternity Pay;

(3) statutory paternity leave;

(4) Statutory Paternity Pay;

(5) rights of the intended parents;

(6) Maternity Allowance;

(7) leave for intended parents prior to the birth of the child; and

(8) a rest space for breastfeeding.

15.9 We deal first with statutory maternity and paternity leave and pay, and the rights of the intended parents. As we explain below,[4] intended parents may be entitled to statutory adoption leave. Table 1 summarises the current entitlement to employment rights for those involved in a surrogacy agreement, provided the relevant statutory conditions for each of them have been met:

Table 1: Summary of the current entitlement to employment rights for those involved in a surrogacy agreement

Employment right	The surrogate	The surrogate's spouse, civil partner or partner	Intended Parent A[5]	Intended Parent B
Statutory maternity leave and pay	Yes	No	No	No

4 Para 15.22.

5 The terms "Parent A" and "Parent B" are used in the Paternity and Adoption Leave Regulations 2002 (SI 2002 No 2788) as varied by the Paternity, Adoption and Shared Parental Leave (Parental Order Cases) Regulations 2014 (SI 2014 No 3096), which govern adoption leave for intended parents. The intended parents can decide which of them (if more than one) is to be Parent A, who can claim up to 52 weeks of adoption leave and may be eligible for statutory adoption pay. Parent B must be married to, the civil partner of or the partner of Parent A, and may qualify for a modified form of statutory paternity leave and pay.

Employment right	The surrogate	The surrogate's spouse, civil partner or partner	Intended Parent A[5]	Intended Parent B
Statutory paternity leave and pay	No	Very unlikely	No	Yes (a modified form of)
Statutory adoption leave and pay	No	No	Yes	No

Statutory maternity leave

15.10 A woman acting as a surrogate is entitled to 52 weeks of statutory maternity leave in the same way as any woman giving birth, as the entitlement depends on a person being pregnant and giving birth.[6] As maternity leave is based on being pregnant and giving birth it is not available for intended parents under the current law.

15.11 Statutory maternity leave is not dependent on satisfying any conditions, such as a minimum period of employment. Furthermore, the surrogate is entitled to maternity leave, even if she is not actually caring for the child during her maternity leave. A surrogate is not, however, required to take her full entitlement of 52 weeks of statutory maternity leave. A woman must take two weeks of compulsory leave immediately after giving birth.[7] After this two-week period, however, she is free to return to work as soon after birth as she would like, subject to her medical fitness.

15.12 The surrogate's entitlement to leave would be unaffected by her not being the legal mother of the child at birth. As such, the fact that under our new pathway[8] the surrogate is not the legal mother of the child on birth (unless she has withdrawn her consent to the new pathway agreement before then), would not affect the surrogate's existing entitlement to statutory maternity leave.

Statutory Maternity Pay

15.13 Unlike statutory maternity leave, entitlement to Statutory Maternity Pay does not arise from the first day of employment. The surrogate will be entitled to 39 weeks of

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6 The Maternity and Parental Leave etc. Regulations 1999 (SI 1999 No 3312), reg 4. Statutory maternity leave is currently composed of 26 weeks of ordinary maternity leave, and a further 26 weeks of additional maternity leave.

7 Employment Rights Act 1996, s 72 and the Maternity and Parental Leave etc. Regulations 1999 (SI 1999 No 3312), reg 8.

8 See Ch 8.

Statutory Maternity Pay, but only if the relevant statutory conditions have been met.[9] If the surrogate does not meet these conditions, she will be entitled to Maternity Allowance (again subject to certain conditions – see below).[10]

15.14 Statutory Maternity Pay is not available to intended parents under the current law.

Statutory paternity leave

15.15 As previously discussed,[11] under the current law if the surrogate is married, or in a civil partnership, the surrogate's spouse or civil partner will become the child's legal parent.

15.16 The law on statutory paternity leave (which can, despite its name, be taken by a man or woman), states that, to qualify, a person must be:

(1) the child's legal father; or

(2) married to, the civil partner of, or the partner of the child's mother, but not the child's father.[12]

15.17 This provision, on the face of it, provides that the spouse, civil partner or unmarried partner of the surrogate can qualify for statutory paternity leave.

15.18 However, to qualify for statutory paternity leave the person must satisfy an additional condition; they must also have, or expect to have:

(1) if he is the child's father, responsibility for the upbringing of the child; or

(2) if he or she is the mother's husband, civil partner, or partner, but is not the child's father, the main responsibility (apart from any responsibility of the mother) for the upbringing of the child.[13]

15.19 As we noted in the Consultation Paper, commentators have therefore considered that statutory paternity leave "will not ordinarily be available to the spouse or partner of the surrogate mother".[14]

Statutory Paternity Pay

15.20 Statutory Paternity Pay is only available for those who are entitled to take statutory paternity leave, meaning that to qualify a person must have the necessary relationship

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9 Social Security Contributions and Benefits Act 1992, s 164. A woman will be entitled to 39 weeks of Statutory Maternity Pay on condition of: (1) 26 weeks continuous employment up to and including the 15th week before the expected week of childbirth; and (2) average earnings of at least the lower earnings limit for national insurance contributions during the eight-week period ending on the 15th week before the expected week of childbirth. There are also notification and other requirements which we have not covered.

10 Para 15.29.

11 Para 4.9.

12 Paternity and Adoption Leave Regulations 2002 (SI 2002 No 2788), reg 4(2)(b).

13 Paternity and Adoption Leave Regulations 2002 (SI 2002 No 2788), reg 4(2)(c).

14 R Cabeza, V Flowers, E Pierrot, A Rao, B O'Leary and L Odze, *Surrogacy: Law, Practice and Policy in England and Wales* (1st ed 2018) para 6.61.

with the child, set out above.[15] There are also further requirements, which mirror the eligibility requirements for Statutory Maternity Pay.[16]

15.21 Consequently, if the spouse, civil partner or partner of the surrogate is not entitled to statutory paternity leave (as will very likely be the case), they will not be entitled to Statutory Paternity Pay.

Rights of the intended parents

15.22 As noted above, neither of the intended parents are entitled to statutory maternity leave, as this benefit is reserved for women who are pregnant.[17]

15.23 Since 5 April 2015, however, intended parents may be entitled to statutory adoption leave and pay.

"Parent A"

15.24 Provided that all the eligibility criteria in the regulations have been met, one of the intended parents (referred to in the regulations as intended "Parent A") may qualify to take up to 52 weeks of statutory adoption leave.[18] Only one of the intended parents is entitled to take statutory adoption leave and, if there are two intended parents, they are free to decide which of them will exercise this right.

15.25 The intended parent taking statutory adoption leave may also be eligible to receive statutory adoption pay.[19]

"Parent B"

15.26 The second intended parent who does not take statutory adoption leave (referred to in the regulations as intended "Parent B"), may be entitled to statutory paternity leave and Statutory Paternity Pay, the conditions of which have been modified for the surrogacy context. Intended Parent B will qualify for this form of statutory paternity leave if:

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15 See The Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations 2002 (SI 2000 No 2822), reg 4.

16 Social Security Contributions and Benefits Act 1992, s 171ZA. A person will be entitled to Statutory Paternity Pay on condition of: (1) 26 weeks continuous employment up to and including the 15th week before the expected week of childbirth; and (2) average earnings of at least the lower earnings limit for national insurance contributions during the eight-week period ending on the 15th week before the expected week of childbirth. There are also notification and other requirements which we have not covered.

17 Maternity and Parental Leave etc. Regulations 1999 (SI 1999 No 3312), reg 4. The Court of Justice of the European Union has confirmed that this means that EU law contains no right to maternity leave for intended parents in surrogacy arrangements: Case C-167/12 *CD v ST* [2014] 3 CMLR 15; and C-363/12 *Z v A Government Department and the Board of Management of a Community School* [2014] 3 CMLR 20.

18 Paternity and Adoption Leave Regulations 2002 (SI 2002 No 2788) as varied by the Paternity, Adoption and Shared Parental Leave (Parental Order Cases) Regulations 2014 (SI 2014 No 3096).

19 The Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations 2002 (SI 2002 No 2822), as applied and modified by The Statutory Paternity Pay and Statutory Adoption Pay (Parental Orders and Prospective Adopters) Regulations 2014 (SI 2014 No 2934). Parent A must have (1) 26 weeks continuous employment up to the time that they wish to take their leave; and (2) must have normal weekly earnings for an eight-week period (the "relevant period") which are not less than the lower earnings limit for national insurance contributions. There are also notification and other requirements which we have not covered.

(1) he or she is either married to, the civil partner of, or the partner of Parent A; and

(2) he or she has, or expects to have, the main responsibility (apart from the responsibility of Parent A) for the upbringing of the child.[20]

15.27 Provided the other conditions in the regulations are met,[21] Parent B will also be entitled to a modified form of Statutory Paternity Pay.

15.28 As we noted in the Consultation Paper, under our proposed new pathway, both intended parents would be legal parents of the child at birth. As a result, one of the intended parents would potentially qualify for the "standard" statutory paternity leave, provided the other conditions in the regulations have been met. This is because they will be the child's father and/or will have responsibility for the upbringing of the child, as required by the existing paternity leave regulations.[22] This may render redundant the provisions outlined above in respect of Parent B, whilst the other intended parent can (subject to fulfilling the eligibility criteria) claim adoption leave and pay as Parent A.

Maternity Allowance

15.29 Maternity Allowance is a weekly payment that a woman may be eligible to receive if she has been employed or self-employed for some of the time during and before her pregnancy. She must also have met the Maternity Allowance earnings threshold during this period.[23]

15.30 Maternity Allowance is primarily aimed at those mothers who are self-employed, and therefore not eligible for Statutory Maternity Pay, which is restricted to employees. It also benefits those mothers who are employed but cannot fulfil the stricter conditions for Statutory Maternity Pay.

15.31 Section 35(1) of the Social Security Contributions and Benefits Act 1992 ("the 1992 Act") only provides the allowance to a woman if:

(a) she has become pregnant and has reached, or been confined before reaching, the commencement of the 11th week before the expected week of confinement; and

(b) she has been engaged in employment as an employed or self-employed earner for any part of the week in the case of at least 26 of the 66 weeks immediately preceding the expected week of confinement;

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20 The Paternity, Adoption and Shared Parental Leave (Parental Order Cases) Regulations 2014 (SI 2014 No 3096), reg 3 (applying the Paternity and Adoption Leave Regulations 2002 (SI 2002 No 2822), reg 4).

21 The Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations 2002 (SI 2002 No 2822), as applied and modified by The Statutory Paternity Pay and Statutory Adoption Pay (Parental Orders and Prospective Adopters) Regulations 2014 (SI 2014 No 2934) require that Parent B must have (1) 26 weeks continuous employment up to the time that they wish to take their leave; and (2) must have normal weekly earnings for an eight-week period (the relevant period) which are not less than the lower earnings limit for national insurance contributions. There are also notification and other requirements which we have not covered.

22 Paternity and Adoption Leave Regulations 2002 (SI 2002 No 2822), reg 4(2)(c).

23 Social Security Contributions and Benefits Act 1992, ss 35 and 35A.

15.32 Under the above section, a woman will be entitled to Maternity Allowance if "she has become pregnant". It would therefore not be available for an intended parent.

15.33 Unlike Statutory Maternity Pay, which is also only available to women who are pregnant, but where there is an equivalent that intended parents can be eligible for (statutory adoption pay), no such equivalent exists for intended parents in respect of Maternity Allowance.

15.34 As noted in the Consultation Paper, this situation creates a potential anomaly, which is inconsistent with our general policy that employment law should offer the same rights to those involved in a surrogate pregnancy as those involved in any other pregnancy. This anomaly arises where the intended mother is self-employed or does not meet the conditions for statutory adoption pay, as she will:

(1) not qualify for Statutory Maternity Pay (as this requires a person to be pregnant);[24]

(2) not qualify for Maternity Allowance (as this requires a person to be pregnant);[25] and

(3) not qualify for statutory adoption pay (as this requires a person to be an employee or to meet the necessary conditions).[26]

Leave for intended parents prior to the birth of the child

15.35 The intended parent who is taking statutory adoption leave, in relation to surrogacy, has no choice as to when their leave will commence: it must commence on the day that the child is born or, if the relevant intended parent is at work on that day, the next day.[27]

15.36 Equally, the intended parents only have a right to time off work to accompany the surrogate to ante-natal appointments on two occasions.[28] This time off is unpaid. The

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24 Social Security Contributions and Benefits Act 1992, s 164.

25 Social Security Contributions and Benefits Act 1992, s 35.

26 The Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations 2002 (SI 2002 No 2822), as applied and modified by The Statutory Paternity Pay and Statutory Adoption Pay (Parental Orders and Prospective Adopters) Regulations 2014 (SI 2014 No 2934).

27 The Paternity, Adoption and Shared Parental Leave (Parental Order Cases) Regulations 2014 (SI 2014 No 3096), reg 14.

This situation is in contrast to statutory maternity leave, and statutory adoption leave in the adoption context, where there is more flexibility:

(1) A mother who qualifies for statutory maternity leave can decide when she starts her statutory maternity leave, provided that it does not begin more than 11 weeks before the expected week of childbirth: The Maternity and Parental Leave etc. Regulations 1999 (SI 1999 No 3312), reg 4(2)(b); and

(2) The primary adoptive parent who qualifies for statutory adoption leave in the adoption context can decide when he or she starts his or her statutory adoption leave, provided that it does not begin more than 14 days before the date on which the child is expected to be placed with them: The Paternity and Adoption Leave Regulations 2002 (SI 2002 No 2788), reg 16(1)(b).

28 Employment Rights Act 1996, s 57ZE(7)(e). On each of these occasions, the maximum time off during working hours to which the employee is entitled is six and a half hours.

intended parents are not entitled to time off work for appointments without the surrogate, or for any other reason.

15.37 The situation for intended parents differs both from that for adoptive parents and for those parents raising children whom they have carried. Table 2 summarises the position.

Table 2 showing a summary of current entitlement to ante-natal time off

	Number of ante-natal/other appointments	Maximum time off for ante-natal appointments	When leave can commence
Current law for intended parents[29]	2 (unpaid)	6.5 hours	On day of birth (or if parent is at work on the day of birth, the day after birth)
Adoptive parents	5/2[30]	6.5 hours	Up to 14 days before expected day of placement
Pregnant women	Unlimited (unless employer can reasonably refuse leave in all the circumstances)	Reasonable time	Up to 11 weeks before expected week of childbirth

A rest space for breastfeeding

15.38 Under the Workplace (Health, Safety and Welfare) Regulations 1992:

> suitable facilities shall be provided for any person at work who is a pregnant woman or nursing mother to rest.[31]

15.39 The terms “pregnant woman” and “nursing mother” are not defined. It is therefore unclear whether this regulation would apply to intended mothers who, through induced

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29 Intended parents are exercising the right to accompany a pregnant woman to an ante-natal appointment under section 57ZE of the Employment Rights Act 1996. This right applies to those in a qualifying relationship with a pregnant woman or her expected child. Under subsection 7, this includes the father or second female parent of the child, the woman’s spouse, civil partner or partner in an enduring family relationship, and a person who is a potential applicant for a parental order.

30 One adoptive parent can elect for five occasions of paid time off work to attend ante-natal appointments, under section 57ZJ(5) of the Employment Rights Act 1996. The other adoptive parent, if there is one, can elect for two occasions of unpaid time off work to attend ante-natal appointments, under section 57ZL(4) of the Employment Rights Act 1996. It is not open to the adoptive parents to mix and match these occasions.

31 Workplace (Health, Safety and Welfare) Regulations 1992 (SI 1992 No 3004), reg 25.

lactation, wish to express milk at work. The intended mother would not qualify as a "pregnant woman", but it is uncertain whether she might be within the term "nursing mother".

Statutory paternity leave and pay for the surrogate's spouse or civil partner

15.40 In the Consultation Paper, we posited that the unavailability of statutory paternity leave for the surrogate's spouse or civil partner was potentially inconsistent with the express statutory purpose of statutory paternity leave—namely, "caring for the child *or supporting the mother*".[32]

15.41 We invited consultees' views as to whether the current application of the law on statutory paternity leave, and Statutory Paternity Pay, to the situation of the surrogate's spouse, civil partner or partner requires reform.[33]

Consultation

15.42 The majority of responses to this question were template responses by those generally opposed to surrogacy, who indicated that the law did not need changing. Responses amongst consultees not opposed to surrogacy in principle were mixed.

15.43 Several consultees who supported reform did so on the basis that the surrogate would be supported by her partner following the birth. NGA Law and Brilliant Beginnings said that the partner of the surrogate is often relied upon to care for the surrogate and their family after the birth of the child born of surrogacy. They considered that paternity leave should be extended to include the surrogate's partner "on the basis that the wider family plays a pivotal role in the surrogacy".

15.44 SurrogacyUK supported reform, noting the support of surrogates for paternity leave for their partners, and added that the majority of surrogates found that their partners had been allowed unpaid leave following the birth. They noted that there was a division in their surrogate members as to whether leave should be paid or unpaid, with the majority favouring the latter, along with the ability to claim "lost" wages in expenses from the intended parents. This difference in opinion about paid or unpaid leave was evident in the responses of other consultees.

15.45 SurrogacyUK observed that the new pathway required more of a surrogate's spouse or civil partner in terms of participation in the safeguards, and suggested that leave entitlement be provided to cover these appointments. The SurrogacyUK Working Group on Law Reform thought that any entitlement to paternity leave should also attract paternity pay, failing which it should be covered by expenses, which could also extend to other people such as parents and friends who support the surrogate.

15.46 Consultees opposed to reform argued that the purpose of paternity leave is to support the child, as well as the mother, and is therefore not appropriate in a surrogacy context. The Bar Council said:

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32 Employment Rights Act 1996, s 80A(1) (emphasis added).

33 Consultation Paper, para 17.18, Consultation Question 101.

> It should be noted that the purpose of statutory paternity leave is not purely to support the mother who has just given birth; it is to bond with the child and therefore it is arguable that it is not really appropriate for this to be a form of leave available to the spouse or partner of the surrogate.
>
> Statutory paternity pay is to enable a new parent to take statutory paternity leave for those dual purposes and to receive some income during that time; again, it is not clear to us that this is really a form of payment which the spouse or partner of a surrogate should be receiving.

15.47 Dr Michelle Weldon-Johns, an academic specialising in work-family employment rights, made similar points, stating that the intention of the legislation for paternity leave and pay was to enable the person taking it to care for the child or support the child's mother in caring for the child. It was not to provide care and support to the mother after the pregnancy. On that basis, she advocated for a separate and distinct right to time off and pay for the spouses, civil partners and partners "of women who have given birth but are not personally caring for the child for whatever reason".

15.48 Several consultees observed that under our proposed new pathway the surrogate's partner would not be a party to the surrogacy agreement and suggested that on this basis, the surrogate's partner should not be eligible for paternity leave.

15.49 Other consultees considered reform unnecessary, with one suggesting that any time taken off work by the surrogate's partner should be considered as an expense of the agreement.

Maternity Allowance for intended parents

15.50 In the Consultation Paper, we provisionally proposed that provision for Maternity Allowance should be made in respect of intended parents, and that any such provision should be limited so that only one intended parent qualifies.[34]

Consultation

15.51 The majority of consultees did not agree with our provisional proposal. These responses in the main came from those who were opposed to surrogacy and who provided a template response which simply disagreed with the proposal.

15.52 Amongst consultees who agreed, COTS agreed with our provisional proposal, but additionally said that they wanted leave and pay to be available to both parents (as we note below, other consultees disagreed with our proposal on this basis). SurrogacyUK noted that their survey showed a higher percentage of intended parents who were self-employed, compared to the UK average (28% vs 15%, respectively), saying:

> Anecdotal evidence indicates that some intended parents have actively chosen self-employment over employment following unsupportive practices and inflexibility during their own IVF treatment or surrogacy journey.

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[34] Consultation Paper, para 17.32, Consultation Question 102. Extending Maternity Allowance to both parents would mean that the law was *more* generous to intended parents in surrogate pregnancies than to parents who do not use surrogacy.

15.53 Resolution said that they were not in a position to comment but observed that it would be in the child's interests to protect their position and for them to spend time with their parents, regardless of the circumstances of their birth.

15.54 The charity Maternity Action provided a detailed response which advocated for reforms to Maternity Allowance, Statutory Maternity Pay, Statutory Paternity Pay, Statutory Adoption Pay and how these interact with the wider benefits system.

15.55 In summary, Maternity Action agreed with the proposal. It noted that any extension of Maternity Allowance to a self-employed intended parent might result in both the surrogate and an intended parent becoming eligible for Maternity Allowance in respect of the same child. Maternity Action also expressed its support for proposals to make Statutory Adoption Pay and Statutory Paternity Pay more widely available, and to provide an equivalent to Maternity Allowance to self-employed parents and employed parents who did not qualify for statutory pay.

15.56 Of the consultees who disagreed with the proposal, some did so on the basis that they thought that both parents should qualify for the allowance.

15.57 Other consultees appeared to disagree because they had misunderstood the provisional proposal. Some mistakenly thought that we were proposing to remove the Maternity Allowance from the surrogate if it were extended to one of the intended parents. A few consultees who disagreed then indicated that the situation for intended parents should be analogous to that for parents who have not had children through a surrogacy agreement, which is the aim of our proposal.

15.58 Some consultees disagreed with the form in which we made the proposal – that is, the extension of Maternity Allowance to the intended parents – and instead proposed that a separate system of pay be set up for intended parents.

Time off work before and for the birth of the child

15.59 In the Consultation Paper, we noted that concerns had been raised with us as to whether the law supports intended mothers who are inducing lactation so that they can breastfeed the baby. We therefore invited consultees' views as to:

(1) whether there is a need for reform in respect of the right of intended parents to take time off work before the birth of the child, whether for the purpose of induced lactation, ante-natal appointments or any other reason; and

(2) if reform is needed, suggestions on reform.[35]

Consultation

15.60 In responding to this question, consultees raised more widely current leave entitlements for intended parents prior to the birth of the child.

[35] Consultation Paper, para 17.36, Consultation Question 103.

15.61 The majority of consultees who were not opposed to surrogacy supported reform in this area, considering that reform should provide intended parents with the same leave as all other parents.

15.62 The Bar Council noted the need for reform to address the legitimate needs and desires of intended parents to be involved in the process of the surrogate pregnancy, including attending scans and ante-natal appointments, and for purposes such as induced lactation or parenting classes. The Bar Council also said:

> The intended parents in a surrogacy arrangement who intend to apply for a Parental Order are entitled to unpaid time off to accompany the surrogate mother to up to two antenatal appointments. Each appointment is capped at a maximum of 6.5 hours. This seems an arbitrary cutting off point in terms of the number of appointments in circumstances in which the parties to the arrangement want to be more involved in the antenatal part of the child's life […]
>
> It does seem anomalous that the surrogate is entitled to 52 weeks' maternity leave irrespective of the fact that she will not have a child to care for after giving birth at the point that the intended parents assume responsibility, and yet the role that the intended parents can play at the antenatal stage is poorly recognised in law.

15.63 In terms of what the reform should entail, consultees tended to focus on aligning the law for intended parents with that applying to adoptive parents, or parents raising children that they had carried.

15.64 Consultees with personal experience of surrogacy mentioned the need for intended parents to be able to take time off to attend the surrogate's ante-natal appointments, or for induced lactation, but also to be able to travel to the surrogate (who may not live nearby, or may live abroad), particularly around the expected time of birth.

15.65 SurrogacyUK and the SurrogacyUK Working Group on Law Reform also focused on aligning leave for intended parents with the leave available for adoptive parents and those able to carry a child themselves. In respect of time off before the birth, SurrogacyUK said that the provision of two appointments of 6.5 hours was unlikely to cover what was necessary, for the reasons set out above; they also pointed out that additional scans were often necessary in gestational surrogacy agreements, due to the use of in-vitro fertilisation ("IVF") and the surrogate being under consultant-led care. They were of the view that:

> Treating both intended parents in the same way that legislation treats a pregnant person's partner creates an inequality in comparison with a situation where one of the parents were able to carry themselves. Decisions may need to be made and information provided regarding the development of the intended parents' future child.

15.66 Maternity Action, by contrast, who otherwise supported limited reform, considered that the right should remain at two ante-natal appointments (which should be paid time off), because the purpose of the appointments is to protect the health of the pregnant woman and baby. They also raised the importance of preserving confidentiality between a pregnant woman and her medical advisers. In their view, if intended parents could accompany a surrogate mother to more than two appointments, more

consideration would need to be given to protect those surrogates who were more vulnerable.

15.67 There was agreement among those who favoured reform that it should be possible for intended parents to start their adoption leave earlier than the day on which the child is born. NGA Law and Brilliant Beginnings, and Maternity Action, noted the particular difficulties that arise for intended parents who are travelling overseas for the birth of the child.

15.68 SurrogacyUK thought that it should be possible for leave to begin two weeks prior to birth, noting the significance of being at the birth for bonding with the baby.

15.69 Reform was not supported by those opposed to surrogacy in principle.

15.70 Some consultees who were not generally opposed to surrogacy also disagreed with the need for reform. Dr Rita D'Alton-Harrison (legal academic) considered that the current law struck the right balance, with the focus being on the surrogate. She thought that anything further would favour intended parents as a group within employment law, although she did say that:

> there should be some guidance for employers on allowing intended parents to work flexi-time to enable them to attend ante-natal appointments with the surrogate or for induced lactation.

A rest space for breastfeeding

15.71 In the Consultation Paper, we asked consultees to give their views on whether the duty of employers to provide suitable facilities for any person at work who is a pregnant woman or nursing mother to rest under Regulation 25 of the Workplace (Health, Safety and Welfare) Regulations 1992 is sufficient to include intended parents in a surrogacy agreement.[36]

Consultation

15.72 Most consultees who responded focused on whether the law should include intended mothers in this situation, rather than giving their view on whether the current law does so.

15.73 Maternity Action, however, considered that the current law would apply to intended parents. They said:

> The Management of Health and Safety at Work Regulations 1999, reg. 16, requires an employer to carry out a risk assessment that takes account of the risks to 'pregnant workers and workers who have recently given birth or are breastfeeding'. In our view, this includes an intended parent who is breastfeeding as well as the obligation to provide somewhere for a nursing mother to rest under regulation 25 above so the regulations as they currently stand are sufficient.

15.74 The Bar Council agreed that the existing provision would cover a nursing intended parent. It further suggested that an employer imposing a blanket ban on a person who

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[36] Consultation Paper, para 17.40, Consultation Question 104.

has not given birth to the child from nursing at work would give rise to a substantial group disadvantage for women and to the woman in question, and that this would more than likely amount to unlawful direct sex discrimination.

15.75 Amongst other consultees, there was disagreement as to whether the current regulations are sufficient to encompass an intended mother. Most consultees who did not oppose surrogacy in principle, and did not consider the current regulations already to be sufficient, were supportive of reform to include intended parents

15.76 Other consultees wanted wider reforms. SurrogacyUK said:

> The terminology [in the existing legislation] should be changed to include the scenario of a woman inducing lactation, who is not a pregnant woman, and a surrogate expressing milk, who is not a nursing mother, following their return to work.

15.77 Maternity Action wanted reform to give employees time off to breastfeed (or express), and suitable facilities for doing so, rather than these being a matter of good practice.

15.78 The majority of consultees who opposed surrogacy in principle did not support reform, because they considered it would normalise surrogacy.

Further issues in relation to employment rights and surrogacy agreements

15.79 In the Consultation Paper, we invited consultees' views as to whether there are further issues in relation to employment rights and surrogacy agreements and, if so, any suggestions for reform.[37]

Consultation

15.80 Issues raised by consultees were:

(1) parental leave for surrogacy to be equivalent to that provided for other pregnancies;

(2) potential burden on employers if full leave entitlements were available to all parties in surrogacy agreements, and consequent risk of negative perception of surrogacy;

(3) the need for guidance for employers;

(4) protection against redundancy for intended parents;

(5) wider protection against disability, pregnancy or sexual discrimination arising from participation in a surrogacy agreement, potentially including an expansion of the definition of disability to include infertility, or an expansion of the concept

[37] Consultation Paper, para 17.43, Consultation Question 105.

of associative discrimination[38] to include intended parents in relation to the pregnancy of a woman acting as a surrogate for them;[39]

(6) better protections against dismissal as a result of (sick leave or time off for) fertility treatment; and

(7) leave for IVF appointments.

Analysis

15.81 It was clear from the responses received that some consultees advocated for wide-ranging reform of employment law, potentially including discrimination law. We have focused our thinking on addressing specific concerns with the current system, to ensure that our recommendations stay within the scope of the project to reform surrogacy law. We do not think that it would be feasible to recommend broad and profound changes to how involvement in a surrogacy agreement is treated for the purposes of employment and discrimination law.

Statutory paternity leave and pay for the surrogate's spouse or civil partner

15.82 The responses to our question inviting consultees' views on whether the current application of the law in this area to the situation of the surrogate's spouse or civil partner requires reform were mixed.[40] We did not consider that we could justify an extension of statutory paternity leave or pay to enable the surrogate to be supported by her spouse or civil partner, as consultees highlighted that the benefit is primarily intended to help support the child.

15.83 On that basis, we do not recommend that paternity leave and pay be extended to the surrogate's spouse or civil partner, or that an equivalent right or benefit be provided to them.

15.84 Instead, we take the view that it should be permissible for the intended parents to pay the surrogate for the actual lost earnings and potential lost earnings, for a person who takes time off work to support the surrogate post-birth, for up to two weeks. We deal with that recommendation in Chapter 12, concerning payments.[41] We consider the expenses permitted by our recommendation would not be limited to the surrogate's spouse or civil partner, but could extend to another person such as a parent or friend who supports the surrogate, as suggested by the SurrogacyUK Working Group on Law Reform.

Maternity Allowance

15.85 With regard to the extension of Maternity Allowance to intended parents, we recommend that an equivalent to this allowance should be available to one of the intended parents. This recommendation will fill the gap where an intended parent is

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38 Associative discrimination occurs when a person is treated unfairly because either someone they know or someone with whom they are associated has a certain protected characteristic under the Equality Act 2010.

39 See Michelle Last, "Fertility Treatment: an issue ripe for legal challenges" *Employment Law Journal* (February 2020), 17-19.

40 Consultation Paper, para 17.18, Consultation Question 101.

41 Ch 12, paras 12.167, Recommendation 55.

not entitled to statutory adoption pay because they do not meet the criteria. We do not think that it is fair that those who are not entitled to adoption pay in the context of a surrogacy agreement – including the self-employed – have no other entitlement, contrary to the position of those pregnant women who are not entitled to Statutory Maternity Pay.

15.86 We are also mindful of the widespread support from those engaged with or supportive of surrogacy of a policy for provision of a benefit in circumstances where the intended parents do not qualify for adoption pay. We note that the position is the same for adoptive parents; however, the operation of the law in relation to adoptive parents falls outside the scope of this project.

15.87 There are different ways in which our recommendation could be implemented, and provision of an equivalent benefit for one of the intended parents could be achieved—for example, through an extension of Maternity Allowance to intended parents, or by the creation of a new equivalent benefit to apply in surrogacy agreements. Because the provision does not exist for an adoptive parent, it will not be possible to achieve our aim simply by applying existing adoption provision to the surrogacy situation.

15.88 We set out below what we consider should be the key features of any equivalent allowance.

15.89 We consider that eligibility for the equivalent of Maternity Allowance in a surrogacy situation should follow the current eligibility criteria for Maternity Allowance. On this basis the equivalent allowance should be payable where the intended parent seeking to claim the benefit has been engaged in employment as an employed or self-employed earner for any part of the week in the case of at least 26 of the 66 weeks immediately preceding the relevant week.

15.90 Any definition of intended parent would need to include both a parent by virtue of the new pathway and parent by way of the parental order process.

15.91 We suggest that the same definition in respect of the relevant week is met as for statutory adoption pay, which is available to an intended parent where they have 26 weeks' continuous employment ending with the relevant week. Under the 1992 Act the relevant week for statutory adoption pay in a surrogacy situation is defined as the week immediately preceding the 14th week before the expected week of the child's birth.[42]

15.92 We suggest that the period for payment of the benefit should also begin on the same terms as statutory adoption pay. Currently, in a surrogacy situation, statutory adoption pay must begin the day on which the child is born or, where the person is at work on that day, the following day.[43]

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[42] Schedule 2 to the Social Security Contributions and Benefits Act 1992 (Application of Parts 12ZA, 12ZB and 12ZC to Parental Order Cases) Regulations 2014, (SI 2014 No 2866).

[43] The Statutory Paternity Pay and Statutory Adoption Pay (Parental Orders and Prospective Adopters) Regulations 2014, (SI 2014 No 2934), reg 17.

15.93 However, we also recommend that it should be possible for intended parents to begin statutory adoption leave and pay at the same time as adoptive parents can, that is, up to 14 days before the expected date of birth of the child.

15.94 We consider that the new equivalent benefit should be paid at the same rate as currently exists for a pregnant woman, for Maternity Allowance.[44]

15.95 Section 35B of the 1992 Act provides for an entitlement to Maternity Allowance for a pregnant woman who is the wife and civil partner of a self-employed earner and who works with her spouse or civil partner. "Works with" is defined in this way:

> A reference to W working with S is a reference to W participating in the activities engaged in by S as a self-employed earner, performing the same tasks or ancillary tasks, without being employed by S or being in partnership with S.[45]

15.96 It is our view that the possibility of claiming a benefit equivalent to Maternity Allowance should be extended to an intended parent who is in the same position of working with a self-employed spouse or civil partner, and who meets the other necessary eligibility criteria. The benefit could only be claimed by one of the intended parents.

Leave to attend ante-natal or other appointments

15.97 In the Consultation Paper, our question about leave for intended parents prior to the birth of the child focused on the specific issue of leave for the purposes of induced lactation.[46] However, consultation responses have led us to consider more widely the leave entitlements of intended parents pre-birth.

15.98 As noted above,[47] intended parents have the right to unpaid time off to accompany the surrogate to an ante-natal appointment, comprising six and a half hours off, on each of two occasions.[48] By contrast, adoptive parents have rights to both paid and unpaid time off. A sole adoptive parent or one of two joint adoptive parents can take paid leave on five occasions,[49] while the other joint parent, who does not elect to take paid leave, can take unpaid time off on two occasions.[50] The maximum time off during working hours for each occasion is 6.5 hours.

15.99 There was good support from consultees for the leave and timing options available for intended parents to be aligned with the options available for those building a family either by adoption or natural conception.

15.100 We take the view that the surrogacy situation should be aligned to the position in adoption prior to the child's placement with the adoptive parents. Therefore, we recommend that the leave prior to birth available to intended parents should be the

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44 Social Security Contributions and Benefits Act 1992, s 35A.

45 Social Security Contributions and Benefits Act 1992, s 35B(2)(a).

46 Consultation Paper, para 17.36, Consultation Question 103.

47 Para 15.35.

48 Employment Rights Act 1996, s 57ZE(7)(e).

49 Employment Rights Act 1996, s 57ZJ.

50 Employment Rights Act 1996, s 57ZL.

same as that available for adoptive parents; that is, one of the intended parents should have the right to paid time off to attend up to five ante-natal or other appointments, while the other intended parent can take unpaid time off on two occasions.

15.101 We note that at present the purpose of the time off provisions in respect of adoptive parents is defined as being to allow them to attend adoption appointments.[51] A similar approach is taken with regard to time off to accompany to ante-natal appointments, where the appointment has to have been made on the advice of a registered medical practitioner, registered midwife or registered nurse.[52]

15.102 We consider the purpose of the leave provisions (both paid and unpaid) for intended parents should be framed as being to accompany the surrogate to ante-natal appointments. We considered enabling intended parents to take ante-natal leave for wider purposes connected to the surrogacy. However, adoption appointments are specified as those which have been arranged by the adoption agency, and we considered that there would not be a comparable definition in relation to surrogacy.

15.103 We note the concerns raised over the intended parents having the right to take time off to attend more than two ante-natal appointments; the concerns noted the risk of intended parents pressurising the surrogate into letting them attend appointments, or the risk of coercion. It is important to ensure that the surrogate can attend ante-natal appointments and speak freely with the midwife, without the intended parents present, if she wishes to do so. Our view is that safeguarding the surrogate from any pressure or coercion by the intended parents should be dealt with by the midwife and other medical staff, or indeed by the regulated surrogacy organisation ("RSO"); safeguarding should not be achieved through restricting the number of appointments that intended parents can take time off work to attend. We also note that the right in question is a right *to leave work* to attend an ante-natal appointment; it is not a right *to attend the appointment*, which would only be possible where the surrogate consents to the intended parents being present.

Timing of when intended parents can begin adoption leave

15.104 As noted above, the consultation responses we received have led us to consider more widely the leave entitlements of intended parents pre-birth, including the timing of when the intended parents can begin taking adoption leave.

15.105 We also take the view that there should be greater flexibility on when adoption leave for intended parents can begin. In line with leave for adoptive parents, we recommend it should begin up to 14 days before the expected date of birth,[53] rather than (as at present) on the day that the child is born, or on the following day if the intended parent is at work that day.[54]

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51 Employment Rights Act 1996, ss 57ZJ(7) and 57ZL(6).

52 Employment Rights Act 1996, s 57ZE(4).

53 The adoption equivalent is up to 14 days before the expected date of placement.

54 Paternity, Adoption and Shared Parental Leave (Parental Order Cases) Regulations 2014 (SI 2014 No 3096), reg 14, modifying reg 16 of the Paternity and Adoption Leave Regulations 2002 (SI 2002 No 2788).

15.106 This recommendation would not give the intended parents any entitlement to additional leave—merely the right to begin their current allocation of leave earlier, up to two weeks before the birth.

A rest space for breastfeeding

15.107 On the question of whether the right to suitable facilities for rest under Regulation 25 of the Workplace (Health, Safety and Welfare) Regulations 1992 encompasses intended parents,[55] we prefer the view of Maternity Action and the Bar Council — namely, that the regulation is already broad enough to do so. Accordingly, we make no recommendations in this regard.

15.108 We note the suggestions of SurrogacyUK, Maternity Action and other consultees that wider reform or extension of the existing provisions is desirable, but for the reasons stated above we do not consider it within the scope of our project to recommend broader reform in this area.[56]

Further issues in relation to employment rights

15.109 We note the points that were raised in response to the open question that was asked regarding other issues in employment law.[57] We consider it would go beyond the scope of the project, or raise questions of law and practice on which we have not consulted, to seek to make recommendations based on what consultees have told us. Consequently, we do not make recommendations on any of these issues.

15.110 However, we do recommend that, where legislation provides employment rights to intended parents based on their intention to apply for a parental order – for example, with regard to entitlement for statutory adoption leave – then equivalent provision will need to be made, such that the same rights will be provided for those who become parents through a surrogacy agreement in the new pathway.

Recommendation 75.

15.111 We recommend that one of the intended parents should have the right to receive a benefit equivalent to Maternity Allowance where they fulfil the criteria for that benefit.

15.112 Clause 112 and paragraph 18 of Schedule 7 to the draft Bill, inserting a new section 35C into the Social Security Contributions and Benefits Act 1992, empowers the Secretary of State to make regulations to give effect to this recommendation.

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55 Consultation Paper, para 17.40, Consultation Question 104.

56 Para 15.81.

57 Consultation Paper, para 17.43, Consultation Question 105.

Recommendation 76.

15.113 We recommend 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 – that is:

(1) the right for a sole intended parent or one of two joint intended parents to paid time off work on five occasions, of up to 6.5 hours on each occasion, and

(2) the right for the other joint intended parent to unpaid time off work on two occasions for up to 6.5 hours on each occasion,

with the purpose of the time off work being to accompany the surrogate to ante-natal appointments; and

15.114 the right to begin statutory leave up to 14 days before the expected date of birth of the child born as a result of the surrogacy arrangement.

15.115 Clause 112 and paragraphs 1 to 14 of Schedule 7 to the draft Bill, inserting new provisions into and amending the Employment Rights Act 1996, give effect to parts (1) and (2) of this recommendation.

15.116 Clause 112 and paragraphs 8 to 14 of Schedule 7 to the draft Bill, inserting new provisions into and amending the Employment Rights Act 1996, give effect to part (3) of this recommendation.

Recommendation 77.

15.117 We recommend that references to intended parents in employment rights and other relevant legislation should be amended, in order to include intended parents who will gain legal parental status via the new pathway, rather than by way of a parental order.

15.118 Clause 112 and paragraphs 16 to 19 of Schedule 7 to the draft Bill, inserting new subsections into and amending sections 171ZK, 171ZT and 171ZZ5 of the Social Security Contributions and Benefits Act 1992, and paragraphs 20 to 23 of Schedule 7 to the draft Bill, amending paragraphs 5A, 5B and 5C of Schedule 5 to the Social Security Act 1989, give effect to this recommendation.

SURROGACY AND SUCCESSION

15.119 For the purposes of succession to property, a child's parent is his or her legal parent. As the surrogate is regarded as the legal mother of the child until a parental order is granted, questions of succession arise if the surrogate dies between the birth of the child and the grant of a parental order to the intended parents. Equally, the issue of

rights on succession can also arise if an individual who is the legal father, or other legal parent, of the child dies prior to the grant of the parental order.[58]

15.120 In the new pathway to legal parenthood which we recommend, the intended parents will be the legal parents of a surrogate-born child from birth;[59] this will avoid any "gap" in which the child could inherit from the surrogate following the child's birth.

Current law

15.121 There are substantial differences in the law of succession between England and Wales, and Scotland. However, under the current regime in both jurisdictions, inheritance by the child born of the surrogacy agreement from the intended parents in the period before they become the child's legal parents is only possible where the intended parents have explicitly made provision by making valid wills under which the child benefits.

England and Wales

15.122 Under the law of England and Wales, if the surrogate dies testate (that is having made a valid will) and she decides in that will not to leave any of her estate to the surrogate-born child, that child will have no entitlement to any of her estate.[60]

15.123 If, on the other hand, the surrogate dies intestate (that is without having made a valid will, or where a will does not dispose completely of her property), the law, by way of the intestacy rules, sets out who will inherit the deceased person's estate.[61]

15.124 In such circumstances, the surrogate-born child's entitlement to a part of the deceased's estate will depend on whether there is a surviving spouse or civil partner. The child's entitlement will be shared collectively with all other children of the deceased.

(1) Where there is a surviving spouse or civil partner, he or she will be entitled to the personal chattels of the deceased, a statutory legacy of £250,000 and half of anything that remains. The child or children will then be entitled to the other half of anything that remains (with the property being held on the statutory trusts).[62]

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58 Consultation Paper, para 4.25 and subsequent for the current law of parenthood.

59 Subject to the surrogate's right to withdraw from the new pathway arrangement, see para 4.48 onwards.

60 Subject to the child making a claim under the Inheritance (Provision for Family and Dependants) Act 1975 which would be possible if made before the grant of a parental order. The surrogate-born child would also qualify (pre-parental order) to make a claim against the estate of the surrogate under that Act under s 1(1)(c) ("a child of the deceased").

61 The intestacy rules appear in the Administration of Estates Act 1925, s 46. The Law Commission of England and Wales produced a Report with recommendations on reform to this area of the law: Intestacy and Family Provision Claims on Death (2011) Law Com No 331. This led to reform of the law in this area, by the Inheritance and Trustees' Powers Act 2014.

62 A statutory trust is a trust created automatically, by operation of law.

(2) Where there is not a surviving spouse or civil partner, then the child or children will be entitled to take the whole estate, with the property being held on the statutory trusts.[63]

15.125 As noted above, a surrogate-born child may also have rights of succession if an individual who is the legal father, or other legal parent, of the child dies prior to the grant of the parental order. The same principles detailed above in respect of the child's inheritance from the surrogate, their legal mother, will apply to inheritance from a legal father or other legal parent where a parental order has not yet been granted.

15.126 The surrogate-born child's entitlements to inherit are unaffected if they were not yet born at the time of the death. In England and Wales this entitlement is by operation of the *en ventre sa mère* ("in the womb of the mother")[64] principle, which applies at common law where the child would inherit under a will[65] and under the Administration of Estates Act 1925 in the case of intestacy. Section 55(2) provides that:

> References to a child or issue living at the death of any person include a child or issue *en ventre sa mère* [that is, a child in his or her mother's womb] at the death.

Scotland

15.127 The position is different under Scots law.[66] In this section, we set out the law that applies to testate and intestate succession in Scotland, and how this applies in surrogacy situations.

15.128 Where a person dies testate, their estate will be distributed in accordance with the terms of their will. However, before that distribution, surviving children are always entitled to "legal rights" from the deceased's net moveable estate.[67] Legal rights are an entitlement to money based on a fixed fraction of the net moveable estate (that is

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63 Administration of Estates Act 1925, s 46(1).

64 This French phrase continues to be used both in textbooks and in statute, instead of any English equivalent: Administration of Estates Act 1925, s 55(2).

65 The basis of the principle is fully discussed by the House of Lords in *Elliot v Joicey* [1935] AC 209.

66 The Scottish Law Commission has published two reports recommending major changes to succession law, the first in 1990 (Succession (1990) Scot Law Com No 124), and the second in 2009 (Succession (2009) Scot Law Com No 215). Some recommendations were implemented by the Scottish Parliament in the Succession (Scotland) Act 2016. In addition, the Trusts and Succession (Scotland) Bill, introduced into the Scottish Parliament on 22 November 2022, would implement a further recommendation from the 2009 report.

The Scottish Government recently reviewed the law of succession. A consultation was launched on 17 February 2019 seeking views on a new approach to reform of intestate succession and on cohabitants' rights in intestacy, as well as on a number of discrete succession issues. The consultation closed on 10 May 2019, and the Scottish Government's response was published on 19 May 2022, noting that it would seek to look at ways to conduct further research or analysis, to better understand the views of the general public on intestate succession, to inform future law reform.

For more information see: https://www.gov.scot/publications/consultation-law-succession/ and https://www.gov.scot/publications/scottish-government-response-consultation-law-succession/documents/ (last visited 23 March 2023).

67 These rights of children are sometimes referred to as "legitim". A surviving spouse or civil partner also has a claim for legal rights, but this Report is concerned with the succession rights of children, and in particular surrogate-born children, rather than other family members.

the estate apart from heritable property, such as land or buildings).[68] This entitlement to legal rights cannot be defeated by making a will. In surrogacy, this means that until a parental order is made a surrogate-born child will always be entitled to legal rights in respect of the surrogate's estate (or that of her spouse or civil partner[69]). Where a surrogate dies before the court has made a parental order, and is therefore the legal parent of the child at the time of her death, then the surrogate-born child will always have a claim for legal rights, thereby diminishing the amount of her estate remaining for distribution to her other children or family members.

15.129 Where the surrogate dies testate, the surrogate-born child could inherit under a legacy in the will addressed to the surrogate's children generally. However, the child cannot claim both the legacy and legal rights, but must choose between them. As the child will be under the age of 16 years, the choice must be made on their behalf by the person or persons who have PRRs in relation to the administration of a child's property.[70]

15.130 Where the surrogate dies intestate, it is possible that the prior rights to inherit[71] of her spouse or civil partner will exhaust her whole estate, leaving no inheritance for any children. However if there is any net moveable estate left after prior rights have been settled, the children will be entitled to the legal rights already described.[72] In addition to their entitlement to legal rights, the surviving children will be entitled to all of the remaining "free estate" (whether or not moveable).[73]

15.131 Where the surrogate dies intestate prior to the grant of a parental order, the child born through surrogacy is her legal child at the time of death, and is therefore entitled, along with her other surviving children (if any), to part of her estate through legal rights and thereafter to a share of the free estate. Again, this claim on her estate will diminish the share of the estate passing to the surrogate's other children and family members.

15.132 It makes no difference if the child was not born at the time of the death; in Scotland, where it would be to the child's benefit to do so, an unborn child is treated as if he or

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68 The rules of quantifying legal rights in testate cases are the same as for intestate cases except that there are no prior rights to be deducted before determining the net moveable estate.

69 Although the current law applies to a surrogate's spouse or civil partner, under our recommended reforms they would not be a legal parent of the child, and so we exclude them from this discussion on succession.

70 Children (Scotland) Act 1995, ss 10(1) and 15(5). In making the choice the person must act as a reasonable and prudent person would act on their own behalf. In practice this will usually mean selection of whichever of legal rights or any legacy has the greatest value.

71 Succession (Scotland) Act 1964, ss 8 and 9. Prior rights include the dwellinghouse lived in by the spouse or partner up to a value of £473,000, its furniture and plenishings up to a value of £29,000, and £50,000 from the remaining estate.

72 Again, her surviving spouse or civil partner will have a claim for legal rights and, on intestacy, prior rights, but these claims are separate from those of the surviving children.

73 Succession (Scotland) Act 1964, s 2(1)(a), although the free estate may be reduced if there is an award made in respect of a claim by a surviving cohabitant: Family Law (Scotland) Act 2006, s 29.

she were already born for the purposes of succession, assuming the child is subsequently born alive.[74]

15.133 Succession law in Scotland is therefore problematic in the context of current surrogacy agreements. If the surrogate dies before the intended parents have obtained a parental order, then the surrogate-born child has an indefeasible claim on her estate by way of legal rights and possibly free estate, or (in preference to legal rights) a share in a legacy. This can then diminish the amount that her other surviving children and family members receive from her estate, even though the surrogate will typically intend that the surrogate-born child should be treated as the child of the intended parents. Conversely if an intended parent dies before the order the child will not inherit from their estate at all unless the intended parent dies testate with a legacy to the child.

Consultation

15.134 In the Consultation Paper, we invited consultees to give their views on whether they believe any reforms in relation to surrogacy and succession law are required.[75]

15.135 There was a mixed response to this question from consultees who were not opposed to surrogacy in principle. Some consultees considered that a child born of a surrogacy arrangement should be able to inherit from the deceased intended parents in all circumstances. For example, one consultee stated that children born of surrogacy should be treated in the same manner as children conceived other than through surrogacy.

15.136 NGA Law and Brilliant Beginnings welcomed the reforms which would confer legal parental status on the intended parents from birth (our proposed new pathway), noting that an important implication of legal parental status was the succession rights it confers. In relation to England and Wales, they suggested two reforms for instances where legal parental status was not granted at birth or shortly thereafter (that is, where the intended parents need to seek a parental order):

> To the extent that there will remain cases in which surrogate-born people may not have a secure legal connection with their parents for the purposes of inheritance (either temporarily or long term) … there should be a right to bring claims under the Inheritance (Provision for Family and Dependants) Act 1975 to enable a disenfranchised surrogate child to claim what he or she should be entitled to [from the intended parents]. Similarly we wonder if there should be provision for a surrogate's natural children to be able to contest a share going to a surrogate-born child and thereby reducing their share.

15.137 Mills & Reeve LLP suggested that the gap before a parental order is granted should be addressed by the intended parents making a will in respect of the period before they become the legal parents of a child born of surrogacy. They also commented:

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74 *Elliot v Joicey* [1935] AC 209, 1935 SC (HL) 57; for discussion see Roderick R M Paisley, "The succession rights of the unborn child" (2006) 10(1) *Edinburgh Law Review* 28.

75 Consultation Paper, para 17.56, Consultation Question 106.

> We believe that consideration should be given to excluding, in respect of a person acting as a surrogate, any child born to them who they were a surrogate for from the definition of a child of the deceased in s1(1)(c) Inheritance (Provision for Family and Dependants) Act 1975.

15.138 JMW Solicitors went one step further and recommended that making a will should be compulsory for entering the new pathway.

15.139 Some consultees felt that there was no need to reform the law, because succession law as it currently stands would provide an incentive to adhere to the qualifying conditions for the new pathway.

15.140 SurrogacyUK considered that the new pathway would address the succession and inheritance issues and suggested that guidance make clear that this is one of the benefits of entering the pathway.

15.141 The Church of England commented that, when proceeding with (or going onto) the parental order process, surrogate mothers should be encouraged to make or update their wills. However, it did not consider that any reform to the law of England and Wales was necessary (and considered Scots law to be outside their remit).

15.142 Consultees opposed to surrogacy in principle were also opposed to reform, and either expressed views that broadly opposed surrogacy and therefore any reform, or, submitted a template response rejecting reform on the basis that it would normalise surrogacy.

15.143 Only one consultee, the Law Society of Scotland, considered the issue of succession in Scotland. It noted that:

> There must be review in Scotland to better reflect the intended legal position should the surrogate or intended parents die before a parental order can be granted.

Analysis

General recommendation on succession under the new pathway

15.144 We recommend that in respect of the new pathway, and in both jurisdictions, the law should be reformed such that the child who was *in utero* at the time of the death of one or both of the intended parents can inherit from them, and not from the surrogate. This reform will allow the same rule to apply to births following surrogacy agreements in the new pathway as apply to non-surrogate births. Succession law will therefore be applied consistently, so that the child will inherit from his or her legal parent. We do not recommend altering the position where a parental order is required. We acknowledge that not doing so is undesirable for surrogates, although in England and Wales they will be able to minimise any risk of a surrogate-born child claiming on their estate by making a will or in Scotland, paradoxically, by making no will at all.[76] However, the likelihood of the child inheriting from the surrogate in these circumstances, while not impossible, is very low, because the child would have to

[76] If a Scottish surrogate dies without a will there is a possibility that her spouse or civil partner will inherit the whole estate under their prior rights or, if she had no other children, that her cohabitant could successfully make a claim for the whole of her free estate.

survive, while *in utero*, the death of the surrogate. The child will not inherit on the death of the surrogate's spouse or civil partner, under our recommendation that legal parental status be removed from the surrogate's spouse or civil partner, irrespective of whether the agreement is on the new pathway or a parental order is sought.[77]

15.145 As regards England and Wales, we recommend that this policy is achieved through the extension of the *en ventre sa mère* principle, as contained in the Administration of Estates Act 1925 and explained above.[78] That extension of the *en ventre sa mère* principle will determine that, where the intended parents die intestate, their "issue" would include children who are being carried by a surrogate at the time of death.[79]

15.146 However, the extension of the *en ventre sa mère* principle should only include surrogacy agreements which, under the new pathway, successfully result in the child born of the agreement being the legal child of the intended parents. If the agreement were to exit the new pathway – by the surrogate withdrawing consent pre-birth, with the effect that she becomes the legal mother – or where the agreement was never on the new pathway, the child should not be considered to be the child of the intended parents for the purposes of succession. Figure 1 illustrates how the extension of the *en ventre sa mère* principle will operate in practice.

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77 Recommendation 4. A parental order will have the effect of ensuring that the surrogate's spouse or civil partner is never recognised as the child's father.

78 Para 15.126.

79 Administration of Estates Act 1925, s 55(2).

Figure 1

The following hypothetical scenarios below illustrate how an extension of the *en ventre sa mère* principle will operate in surrogacy agreements on the new pathway:

Withdrawal of consent post-birth

The surrogacy agreement commences in January; the surrogate does not withdraw consent pre-birth. The intended parents die in August. The child is born in September. The surrogate then withdraws consent after the birth of the child.

In this scenario, the child will be the legal child of the intended parents from birth. Therefore, the extension of the *en ventre sa mère* principle, as suggested above, will allow the child to inherit from the intended parents' estate, as the child will be deemed to have been one of their "issue" at the time of the intended parents' deaths. This position would not change if the surrogate withdrew consent post-birth and was subsequently successful in obtaining a parental order to transfer legal parental status to herself. In such a case, the child will be the legal child of the intended parents at birth (and able to inherit from them by extension of the principle), but will then subsequently become the legal child of the surrogate, from the date of the parental order granted in her favour.

Withdrawal of consent pre-birth

The surrogacy agreement commences in January; the surrogate withdraws consent in July, at which point the agreement therefore exits the new pathway. The intended parents die in August. The child is born in September.

In this scenario, if our recommendations for a new pathway are accepted, the child will be the legal child of the surrogate from birth. In order to ensure that succession law reflects the legal parental status of the child in this scenario, where the child is not legally the child of the intended parents at the time of their deaths, there should be no extension of the *en ventre sa mère* principle to this category of case. This will mean the child is not treated as the child of the intended parents for succession purposes.

15.147 In Scotland, we think that explicit statutory provision is expedient to clarify the position for a child born on the new pathway. Such a child will not be the legal child of the surrogate at birth and so will not inherit from her or from her spouse or civil partner. A child who is born on the new pathway should be treated as the child of the intended parents for all purposes, including succession. Where an intended parent dies prior to the live birth of a child on the new pathway, the child should be treated, for the purposes of succession, as having been the child of the intended parent at the time of the intended parent's death. (As is the case in respect of children born other than through surrogacy, the rule should apply only where it operates to the benefit of the child in question and not where the only direct benefit is to a third party.[80])

[80] *Elliot v Joicey* [1935] AC 209, [1935] SC (HL) 57. For a comprehensive survey of the existing law, see Roderick R M Paisley, "The succession rights of the unborn child" (2006) 10(1) *Edinburgh Law Review* 28.

15.148 Where the agreement is not on the new pathway, the existing position will remain unchanged as regards the surrogate.[81] In the event of the death of the surrogate prior to the parental order being granted, the surrogate-born child will have a claim on her estate. In the event of the death of an intended parent prior to any parental order, the surrogate-born child will have no claim on the estate of that intended parent (although the intended parent may choose to make provision for the child in their will). The same is true of a case such as that in the second example in Figure 1 above. In that scenario, where the agreement exits the new pathway by virtue of the surrogate's withdrawal of consent prior to the birth of the child, the intended parents will not be the legal parents at birth.

15.149 Scots law will also need to consider the operation of the *conditio si testator sine liberis decesserit* doctrine. Under this doctrine, the law presumes that a testator who fails to make provision for a child in a will made before the child's birth has done so by oversight and accordingly, the child has an option to revoke the will.[82] The operation of this doctrine could potentially be problematic in surrogacy agreements.

15.150 A child born on the new pathway will not be the legal child of the surrogate and so the presumption will not apply in relation to any will made by the surrogate. Since the child will be the legal child of the intended parents, the presumption will apply in respect of any existing will of theirs which fails to provide for that child. The intended parents will, however, have received legal advice as a condition of their participation in the new pathway which should include, for intended parents in Scotland, advice as to the potential impact of the *conditio si testator sine liberis decesserit* doctrine.

15.151 Where a surrogacy agreement is not on the new pathway and the surrogate dies before a parental order is granted, the surrogate is the legal parent. The question then arises as to whether the presumption of oversight of the child in her will has been rebutted. In assessing this, the court is concerned with the intention of the testator (that is the surrogate) as evidenced by, among other things, written evidence not in the form of a testamentary deed. A written surrogacy agreement, in addition to the general fact of the existence of a surrogacy agreement, would therefore be of great significance to the court. Such evidence plainly speaks to the intention of the surrogate not to retain legal parental status in respect of the surrogate-born child, and might arguably indicate[83] a conscious intent to exclude the child's inheritance. In that way, we consider that evidence of a surrogacy agreement could rebut the presumption and protect her will.

15.152 The presumption that a will is revoked is likely to be more difficult to rebut where the agreement exited the new pathway by reason of the surrogate's withdrawal of

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81 There will of course be a change as regards her spouse or civil partner, since they will no longer be recognised as a legal parent of the surrogate-born child, and therefore that child would have no claim against their estate.

82 The *conditio si testator sine liberis decesserit* doctrine is discussed, with a recommendation for its abolition, in paras 6.18 to 6.21 of the Scottish Law Commission's Report on Succession (2009) Scot Law Com No 215. See too Roderick R M Paisley, "The *conditio si testator sine liberis decesserit*" (2014) 40 *Scots Law Times* 191.

83 If the surrogacy agreement had a term expressly confirming the validity of any will of the surrogate, that would be strong evidence of the conscious intent to exclude the child from inheritance and rebuttal of the presumed oversight.

consent, to the extent that this may speak to her intention to assume legal parental status in respect of the child. In this case, the operation of the presumption may accurately reflect the surrogate's intention. Additionally, in such cases, we must assume that the surrogate has withdrawn consent in the knowledge of all the consequences that flow therefrom. In light of this assessment, we do not recommend any change to the existing position.

15.153 The effect of our recommendations is that in relation to intestate deaths of the surrogate or the intended parents,[84] the surrogate-born child can inherit as follows.

(1) In an agreement on the new pathway, where the surrogate does not withdraw consent pre-birth, the child will be able to inherit from the intended parents but not from the surrogate. This will be the case whether or not the child was born at the time of the deceased's death. A child unborn at the time of the death of either of the intended parents (and subsequently born alive) could still inherit from them because of the reform we recommend above.

(2) In an agreement on the new pathway, where the surrogate withdraws consent pre-birth, the child can inherit from the surrogate. This will be the case whether or not the child was born at the time of the deceased's death. The child will also be able to inherit from one of the intended parents, if they are the second legal parent of the child. This could include a genetically related intended father or, by using the agreed parenthood provisions of the HFEA 2008, the intended mother or the (genetically unrelated) intended father.[85] The child will be able to inherit whether or not the child was born at the time of the deceased's death.[86]

(3) In an agreement where a parental order is required, prior to the making of the parental order, the child will be able to inherit from the surrogate. The child will also be able to inherit from one of the intended parents, if they are the second legal parent of the child. This could include a genetically related intended father or, by using the agreed parenthood provisions of the HFEA 2008, the intended mother or the (genetically unrelated) intended father. The child will be able to inherit whether or not the child was born at the time of the deceased's death. After the making of a parental order in favour of the intended parents, the child will be their legal child and will thereafter be able to inherit from them, but not from the surrogate.

15.154 In all the above situations, the extent of the surrogate-born child's entitlement under the intestacy rules (if any) to a part of the deceased's estate will be determined by operation of the rules of intestacy (including, in Scotland, the rules on legal rights).

15.155 Our recommendations do not alter the position as regards the provision where either the surrogate or the intended parents die testate, that is, having made a valid will. However, the position will remain different between the jurisdictions, as is currently the

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84 Recommendation 4 provides that the surrogate's spouse or civil partner, if any, should not be a legal parent of the child. As they will not be a legal parent, the child will not be entitled to claim from them under intestacy provisions – see Para 15.163.

85 Recommendation 3.

86 It is highly unlikely, but not impossible, for the child to be born after the surrogate's death.

case. In England and Wales the deceased's will dictates how their estate will be distributed. In Scotland the entitlement of children of the deceased to legal rights cannot be defeated by a will – and indeed, the will may be revoked (on behalf of the child) by virtue of the *conditio si testator sine liberis decesserit* doctrine.

15.156 For completeness, it is important to emphasise that our recommendations only apply to surrogacy agreements in terms of the Surrogacy Bill: where the agreement does not meet the eligibility criteria such that the Surrogacy Bill does not apply to it, then the normal rules of succession will continue to apply.

Recommendation 78.

15.157 We recommend that, in England and Wales:

(1) There should be an extension of the *en ventre sa mère* principle under section 55 of the Administration of Estates Act 1925, so that it applies where the child is being carried by a surrogate.

(2) The principle should only be extended to surrogacy cases under the new pathway in which the child, at the time of birth, is the legal child of the intended parents. (For the avoidance of doubt, it will therefore not apply to agreements in the new pathway where the surrogate has withdrawn her consent before the child's birth, or to agreements where the intended parents are required to seek a parental order to become the child's legal parents.)

15.158 We recommend that, in Scotland, for the purposes of succession (whether testate or intestate) any child born of a surrogacy agreement which is on the new pathway at the date of birth is treated as having been while *in utero* the unborn child of the intended parents.

15.159 Clause 113 of the draft Bill, inserting new subsections into section 55 of the Administration of Estates Act 1925 gives effect to this recommendation in relation to England and Wales. Clause 114 of the draft Bill, inserting a new Part IVA into the Succession (Scotland) Act 1964, gives effect to this recommendation in relation to Scotland.

The making of a will as a requirement of the new pathway

15.160 As noted above, several consultees emphasised the importance of the surrogate and/or the intended parents making a will. One consultee went so far as to recommend that making a will should be compulsory for the new pathway.

15.161 We do not agree with that proposal, and do not recommend that making a will should be a *requirement* for the new pathway. The requirements of entering the new pathway are focused on screening and safeguarding.[87] Whilst the making of a will is important, and we agree that surrogates and intended parents should be encouraged to do so, it is not an issue concerned with screening or safeguarding. We do not therefore think it

[87] The requirements to enter the new pathway are discussed in Chapter 6.

would be right, as a matter of policy, for us to require the making of a will as a condition of entering the new pathway.

15.162 However, we do recommend that independent legal advice should be a requirement for entry to the new pathway,[88] and anticipate that legal advice would include recommending to the parties to the agreement that they each make a will in respect of any child born of the surrogacy agreement. We further suggest that the making of wills by intended parents and surrogates be strongly encouraged by surrogacy organisations (existing organisations and RSOs) to intended parents and surrogates with whom they are working. We also support for the provision of detailed and accurate legal information by RSOs, throughout the process, to ensure that surrogates and intended parents have access to as much information as possible.

15.163 Furthermore, the effect of our recommendations is that for surrogacy agreements on the new pathway, the rules that apply on intestacy will achieve what we think surrogates and intended parents would want them to achieve. Should the surrogate or the intended parents die intestate, the child born of surrogacy will be entitled to inherit from the intended parents, but not from the surrogate (unless the surrogate withdraws consent pre-birth). These changes to the rules mean that the unwanted consequences that arise on intestacy under the current law will be removed, and so the failure of any of the parties to make a will, will not have the same consequences as under the current law. That does not alter the fact that parties entering a surrogacy agreement should be advised to make a will, to ensure that full effect is given to their own testamentary wishes.

Succession law and parental orders

15.164 The majority of consultees who considered the effect of succession where a parental order was required thought that the continuation of an intestacy gap under this process was an incentive for parties instead to proceed under the new pathway. They therefore considered that no reform was necessary.

15.165 We agree with that position. We consider that a surrogate could avoid her estate passing to the child under the intestacy provisions by making a will (although as noted in Scotland a will would not fully defeat the child's entitlement to inherit). Additionally, as we discuss below, we consider that it is not desirable in England and Wales to seek to exclude the child's potential ability to claim under the Inheritance (Provision for Family and Dependants) Act 1975. We conclude that there should be no reform to succession law as it relates to the surrogate and intended parents where a parental order is sought.

15.166 This means that, prior to the making of the parental order, a child born of the surrogacy agreement will continue to have a claim on the surrogate's estate, even where she has died intestate. This claim will either be by way of legal rights in Scotland (see the section on current law above), or (potentially) by way of a claim under the Inheritance (Provision for Family and Dependants) Act 1975, in England and Wales. In both jurisdictions, should the surrogate die intestate, the child born of

[88] Recommendation 31.

the agreement could benefit under the law on intestacy (to the detriment of the surrogate's other family members).

Suggested reform of the Inheritance (Provision for Family and Dependants) Act 1975 in England and Wales

15.167 We have decided that no reform is necessary in relation to the suggestion from NGA Law and Brilliant Beginnings, regarding reform of the Inheritance (Provision for Family and Dependants) Act 1975 ("the 1975 Act"),[89] to explicitly include a child born of a surrogacy agreement. We consider that a child born of a surrogacy agreement could already fall within the categories of claimant within subsections 1(1)(d) or 1(1)(e) of the 1975 Act under the existing law; however, this is for the court to decide, following a factual inquiry.

15.168 In addition, we were not convinced by the suggestion from Mills & Reeve LLP noted above[90] – namely, to exclude the child born of surrogacy from the meaning of a "child of the deceased", in respect of a claim under the 1975 Act by the child against the surrogate (in scenarios where the surrogate is still the child's legal mother).

15.169 We consider that this issue will be automatically resolved under the new pathway, because the surrogate will not be the child's legal mother upon birth and, therefore, the child will have no grounds to inherit from the surrogate. In the parental order process, the surrogate-born child will continue to be able to make a claim to inherit in the period before the parental order is granted. The exclusion suggested by Mills & Reeve LLP would unfairly disenfranchise the surrogate-born child in the event that the surrogate dies prior to the granting of the parental order, but has not made sufficient provision for that child in her will. Keeping the law as it stands will also mean the child's claims under the 1975 Act remain if the surrogate decides to care for the child or oppose the parental order.

15.170 NGA Law and Brilliant Beginnings also raised the possibility of allowing the surrogate's other family members to contest the share of her estate going to the child born through surrogacy. However, the circumstances under which a surrogate-born child might make a claim from the surrogate's estate are limited under our recommendations because of the operation of legal parental status under the new pathway. We do not consider that any particular provision should be made to deal with the remaining circumstances when a claim can be made. Financial provision under the 1975 Act is discretionary; even if a child born of a surrogacy agreement were to make a claim against his or her surrogate mother, the court would have the ability to refuse the claim, taking into account the circumstances of the surrogacy agreement.

15.171 We were also conscious that the Law Commission of England and Wales has already undertaken relatively recent work on reforming aspects of the 1975 Act – reporting in 2011[91] – and, therefore, we do not think that it would be attractive to re-open reform of the statute.

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89 This Act does not apply in Scotland.

90 Para 15.137.

91 Intestacy and Family Provision Claims on Death (2011) Law Com No 331.

15.172 Overall, we have decided that there is no need for additional reform of the 1975 Act.

Inheritance from the surrogate's spouse or civil partner

15.173 The effect of our recommendations in this Report is that the surrogate's spouse or civil partner will not be a legal parent of a child born through surrogacy, either in the new pathway or surrogacy agreements that follow the parental order process.[92] These recommendations will also ensure that the child will not be able to inherit from the surrogate's spouse or civil partner without the need for further recommendations in that respect.

15.174 There is one potential exception that requires consideration in respect of the1975 Act. In England and Wales, it is possible that the child born of a surrogacy agreement could apply for provision from the surrogate's deceased spouse's or civil partner's estate under the 1975 Act. However, case law suggests that, determining who is a "child of the family" for the purposes of the 1975 Act requires a factual inquiry by the court, which considers, amongst other things, the behaviour of the members of the family towards the potential claimant.[93] Given these circumstances, and in light of the change in the law, it is unlikely that the court would consider the surrogate-born child to be a child of the surrogate's deceased spouse or civil partner.

15.175 Accordingly, we do not make any further recommendations for legal reform in respect of the surrogate-born child's inheritance from the surrogate's spouse or civil partner.

SURROGACY AND HEALTHCARE

15.176 This section addresses surrogacy in a healthcare context, and considers whether any reforms are required in this area.

15.177 In the Consultation Paper, we noted the importance of all people involved in a surrogacy agreement feeling supported and well looked after in the care that they receive in hospital.

15.178 We observed that the guidance provided by the Department of Health and Social Care in relation to England and Wales shared this view:

> Whilst the healthcare professional's duty of care is to the surrogate, [intended parents] should also receive sensitive and supportive care. If the hospital is talking about something that could have implications for the baby and its care and welfare, this should usually also be directed to the [intended parents].[94]

Current guidance

15.179 The current guidance on this subject was published by the Department of Health and Social Care in 2018. It consists of two documents:

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92 Recommendation 4.

93 See *Re Leach* [1986] Ch 226.

94 Department of Health and Social Care, *The Surrogacy Pathway: Surrogacy and the legal process for intended parents and surrogates in England and Wales* (February 2018, updated July 2021) p 17.

(1) The Surrogacy Pathway, which sets out the legal process for intended parents and surrogates; and

(2) Care in Surrogacy, which offers guidance on the care of surrogates and intended parents in surrogate births.

15.180 Both documents apply solely to England and Wales. Similar guidance for Northern Ireland was published in 2019.[95] Currently, there is no guidance covering Scotland.[96] As the Care in Surrogacy document concerns healthcare, we consider at some length below the guidance it provides.

Care in Surrogacy

15.181 The Department of Health and Social Care's current Care in Surrogacy guidance document[97] is based upon the key principles quoted in Figure 2 below.

[95] Department of Health, *Care in Surrogacy in Northern Ireland – Guidance for intended parents and surrogates* (2019); Department of Health, *Care in Surrogacy in Northern Ireland – Guidance for Healthcare Professionals caring for Surrogates and Intended Parents in Surrogate Births* (2019).

[96] Although the Scottish Government has not issued specific guidance on surrogacy at this time, it provides brief general information on the Scottish Government website: https://www.mygov.scot/surrogacy (last visited 23 March 2023).

[97] Department of Health and Social Care, *Care in Surrogacy: Guidance for the care of surrogates and intended parents in surrogate births in England and Wales* (July 2021).

Figure 2

Altruistic surrogacy is a positive option for those seeking to start a family through assisted reproduction in the UK.

The safety and health of the surrogate and child will always be of paramount importance.

The vast majority of surrogacy cases are straightforward, positive and rewarding experiences; disputes between parties are very rare.

The actions and attitudes of healthcare staff can have a significant impact on the experiences of surrogates and IP(s). Surrogates can be stigmatised and IP(s) have often been through distressing experiences before turning to surrogacy, so compassion, dignity and sensitivity are important. Perceived negative attitudes can cause particular stress or distress.

Surrogates and IP(s) should be treated in the same way as any other patients accessing healthcare during pregnancy and birth while recognising that there may be particular characteristics, such as LGBT+ status, that may require a more tailored approach.

A co-ordinated, consistent but flexible approach is important, where all staff are aware:

- that the pregnancy is being carried by a surrogate
- of best practice in how to ensure their approach facilitates a safe, positive and rewarding experience for all

It is important to ensure the involvement of all parties in information-giving and decision-making wherever safe and practicable to do so, if this is something the parties have agreed to.

Surrogacy should have comprehensive, trust-based agreements between the surrogate and IP(s) (known as surrogacy agreements), which cover most eventualities and desired outcomes; these should be reflected in birth plans and engagement with healthcare staff.

It would be usual practice for the IP(s) to be treated as the parent(s) of the child, subject to the agreement of the surrogate (and her partner, if she has one), and that the surrogate does not see herself as the mother.

15.182 *Care in Surrogacy* goes on to make clear that during the pregnancy and birth, the surrogate's wishes are paramount. Healthcare professionals should be led by her, irrespective of what she has agreed with the intended parents beforehand.

> Healthcare staff have a duty of care, as when supporting any other pregnant woman, to the surrogate and they should ensure that she has given her consent to any agreement regarding her care. …
>
> During care provision, best practice should be observed with the surrogate having an opportunity to be seen alone by a healthcare professional. This affords opportunity for routine and confidential discussion regarding social concerns (that is,

domestic abuse), physical or emotional well-being or any issues that may not otherwise be disclosed if accompanied.[98]

15.183 The guidance emphases that disputes in surrogacy are rare, but in the event of an unresolvable dispute, the surrogate's autonomy prevails:

> … the surrogate's wishes must be respected regardless of what is set out in any surrogacy agreement or consents that may previously have been provided.
>
> If the surrogate changes her mind and wishes to keep the child herself or no longer wishes to transfer the child to the IP(s), then staff must respect this and should ensure accurate notes of the circumstances are kept. If the IP(s) want to challenge this situation, then it will be a matter for the family courts to decide.[99]

15.184 Surrogacy teams are encouraged to enter into a "comprehensive surrogacy agreement [which] would cover all eventualities and decision-making events, for example how the termination of a pregnancy should be handled".[100] The guidance makes clear that such a written agreement would not be legally binding.

15.185 The principle stated above notes that it is usual practice for the intended parents to be treated as the parents of the child, subject to the surrogate's agreement. This treatment takes different forms, including those set out below.

(1) Accommodating the intended parents at scans, at the birth and in the hospital after birth if that has been agreed with the surrogate, and is in line with her present wishes.

(2) Informing the intended parents of developments in the pregnancy and birth, while still respecting the surrogate's privacy and the confidentiality of her medical information:

> However, since the surrogate has a right to confidentiality, great care should be taken to understand what information she has agreed may be shared with the IP(s). … Staff should make sure that any consents to share information are recorded, and they should take care to confirm any point where confidentiality may be an issue.[101]

(3) Allowing the intended parents to share in decision-making, provided always that the surrogate has consented to this. In particular, where the surrogate has given her consent, intended parents should be included in counselling, decision-making and information sharing:

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98 Department of Health and Social Care, *Care in Surrogacy: Guidance for the care of surrogates and intended parents in surrogate births in England and Wales* (July 2021), para 1.3.

99 Department of Health and Social Care, *Care in Surrogacy: Guidance for the care of surrogates and intended parents in surrogate births in England and Wales* (July 2021), para 1.5.

100 Department of Health and Social Care, *Care in Surrogacy: Guidance for the care of surrogates and intended parents in surrogate births in England and Wales* (July 2021), para 1.3.

101 Department of Health and Social Care, *Care in Surrogacy: Guidance for the care of surrogates and intended parents in surrogate births in England and Wales* (July 2021), para 1.4.

(a) if antenatal screening reveals foetal abnormalities; and

(b) where the surrogate is considering termination of pregnancy, although the guidance makes clear that "the surrogate makes any final decision about a termination".[102]

(4) Allowing the intended parents to make medical decisions with respect to the child immediately after birth, where the surrogate agrees:

> Usually the child will be fully cared for by the IP(s) from birth and so parenting support, advice and decision making should be directed to them until they are discharged with the child.[103]
>
> …
>
> Where the surrogate has given her consent … it is usual practice for the IP(s)' wishes to be considered by staff regarding the treatment of a sick child and for them to be included in any important decisions regarding the health of that child while recognising that the surrogate has the overall responsibility until a parental order has been issued.[104]

(5) Allowing the intended parents to leave the hospital with the child, and the surrogate to leave the hospital without the child:

> While it is often the case for a surrogate child to be transferred to the IP(s) at birth, the written consent of the surrogate should be provided if the child is to be discharged with the IP(s) and independently of her. If the child and surrogate are discharged at different times and the child is not already being cared for by the IP(s), transfer of the child to the IP(s) should happen in an appropriate place on the hospital premises. ... Under no circumstances should the child be discharged with the IP(s) without the surrogate's consent.[105]

(6) Allowing the child to stay in hospital with the intended parents and be cared for by them rather that the surrogate after the birth, if this is requested:

> Every effort should be made to fulfil all reasonable requests regarding post-natal care, which may include a desire for the surrogate and IP(s) (with child) to be accommodated separately, but with access to each other after the birth.[106]

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[102] Department of Health and Social Care, *Care in Surrogacy: Guidance for the care of surrogates and intended parents in surrogate births in England and Wales* (July 2021), para 2.4.

[103] Department of Health and Social Care, *Care in Surrogacy: Guidance for the care of surrogates and intended parents in surrogate births in England and Wales* (July 2021), para 4.1.

[104] Department of Health and Social Care, *Care in Surrogacy: Guidance for the care of surrogates and intended parents in surrogate births in England and Wales* (July 2021), para 4.2.

[105] Department of Health and Social Care, *Care in Surrogacy: Guidance for the care of surrogates and intended parents in surrogate births in England and Wales* (July 2021), para 4.1.

[106] Department of Health and Social Care, *Care in Surrogacy: Guidance for the care of surrogates and intended parents in surrogate births in England and Wales* (July 2021), para 4.1.

15.186 The guidance also notes that social services should not be called automatically because of the surrogacy agreement:

> However, there is no need to inform a social worker or lead for safeguarding unless staff determine that either party may be experiencing difficulty or there is some other reason that staff consider a social worker should be contacted.[107]

How health services deal with surrogacy

15.187 In the Consultation Paper we asked consultees to share their views about healthcare in surrogacy agreements.[108] Our question was divided into three parts. The first part of the question asked consultees to give their views on whether there are any issues in how surrogacy agreements are dealt with by the health services, and whether there are reforms to law or practice that consultees would like to see in this area.

Consultation

15.188 We received a large number of responses to this question, many of which dealt specifically with the consultee's personal experience and offered recommendations on this basis. Common themes were evident in these answers.

15.189 The majority of surrogates with personal experience of surrogacy cited the importance of treating the intended parents as the child's parents throughout the pregnancy, birth and afterwards. The response of one surrogate, Natalie Orton-Rose, accurately reflected the feelings of this group:

> All health professionals should recognise the intended parents as the parents and allow them at all appointments and scans and at the birth and post birth as though they are carrying the baby themselves.

15.190 Some consultees also reported that social services were often alerted simply because there was a surrogacy agreement. They argued that social services should not be involved on this basis, but only if there were genuine safeguarding concerns.

15.191 Martha Hankins, a surrogate, described her experience:

> Some hospitals automatically allocate surrogates to a 'safeguarding' midwife which implies there are additional concerns about the welfare of the surrogate or the unborn child in these circumstances - this feels horrible.

15.192 Similarly, one consultee, an intended parent, recorded in his answer to the second part of our question that in his case, social services had been called because the case involved a surrogacy agreement. He stated:

> For the intended parents, this puts them in an awkward position. In many cases there is the fear that if they complain, it will trigger a 'what do they have to hide' mentality and only increase scrutiny.

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[107] Department of Health and Social Care, *Care in Surrogacy: Guidance for the care of surrogates and intended parents in surrogate births in England and Wales* (July 2021), para 4.1.

[108] Consultation Paper, paras 17.76 to 17.78, Consultation Question 107.

15.193 Several consultees reported that the Department of Health and Social Care guidance on surrogacy was not implemented in full. One noted that health services were not always aware of the guidelines, and did not always follow them; the consultee recommended an education programme to ensure that health authorities were made aware of the guidance.

15.194 Several consultees suggested tailoring healthcare services specifically for surrogacy. Paul Morgan-Bentley, an intended parent, stated:

> There could be a requirement for a surrogacy coordination meeting during which senior hospital staff are presented with the agreement that has been previously overseen by an RSO so they can be sure about the wishes of the surrogate and intended parents.

15.195 Consultees who used the Nordic Model Now! template response stated that healthcare professionals should treat the surrogate's wishes as paramount and be wary of coercion from the intended parents and other parties.

Suggestions for reform of Department of Health and Social Care guidance

15.196 The second part of the question we asked in the Consultation Paper invited consultees to provide their views as to any additions or revisions that they would like to see made to the guidance published by the Department of Health and Social Care for England and Wales.[109]

Consultation

15.197 PROGAR and Nagalro noted that healthcare professionals should reinforce the importance of openness with surrogate-born people about their origins.

15.198 One consultee, a surrogate, said that the surrogate should be treated as any other pregnant woman, and that she should be at the centre of decision-making. She further wrote of the need to respect the privacy of the surrogate, and that medical questions should be directed to the surrogate as opposed to the intended parents.

15.199 The majority of consultees gave the template response referred to above, emphasising the need to respect the wishes of the surrogate and that healthcare professionals should be wary of coercion by the intended parents.

Midwifery practice and surrogacy

15.200 The third part of the question we asked in the Consultation Paper invited consultees to give their views on how midwifery practice might better accommodate surrogacy agreements, in particular with regard to safeguarding issues.[110]

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109 Consultation Paper, para 17.77, Consultation Question 107.

110 Consultation Paper, para 17.78, Consultation Question 107.

Consultation

15.201 The majority of consultees responding to this question submitted the Nordic Model Now! template response, which stated that midwifery practice should always prioritise "the wishes of the birth mother and the wellbeing of herself and the child".

15.202 The importance of the surrogate's wishes was also cited by Woman's Place UK who said that the surrogate should always be at the centre of decision-making and protected from coercion:

> As much as intended parents may wish to be involved in antenatal appointments, scans, and the actual birth (indeed, in some cases the surrogate may want this too), the midwife's relationship and primary concern must be with her patient, the surrogate mother. This is an important opportunity for midwives to identify risk factors or safeguarding issues, including the possibility of coercion or undue pressure being placed on the surrogate mother by the intended parents.

15.203 Several consultees drew upon their experiences with midwives in their response. Some noted a positive experience with midwives. One surrogate stated that her experience with midwives had been very positive, and that they were sensitive to the issues presented by the surrogacy agreement. Another consultee, an intended parent, also recounted her positive experience, reporting that the midwife at the birth of her son gave excellent care and support to all parties.

15.204 However, another consultee who had been a surrogate described a difficult experience of giving birth, during which she was not given good care, and subsequently developed post-traumatic stress disorder.

15.205 Resolution, and another consultee who is a medical practitioner, stated that midwives needed more training on surrogacy agreements. Each gave their own list of specific training which should be included, such as the law, ethics and the importance of following the pre-agreed birth plan. Both felt that, by providing further training, midwives would be better equipped to understand potential risks and safeguarding issues.

15.206 The Nursing and Midwifery Council told us that new standards of education and training are under consideration. However, these standards of proficiency, which have now been published, only briefly mention surrogacy, stating that midwives should

> provide additional postnatal care for the woman including referral to services and resources as needed; this must include … support for women and families undergoing surrogacy or adoption.[111]

15.207 Some consultees commented on the need for midwives to treat the intended parents as the parents of the child and not the surrogate.

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[111] Nursing and Midwifery Council, *Standards of proficiency for midwives* (November 2019) p 49, para 6.75.

15.208 Several consultees again noted that midwives should not automatically refer surrogacy cases to social services, and some suggested that surrogacy agreements should not be subject to any further checks or scrutiny.

Analysis

Proposed reforms and the Department of Health and Social Care guidance

15.209 In response to each of the three questions on which we sought consultees' views, consultees gave a variety of answers and suggestions for reform, often based on their own personal experiences. This made identifying areas for reform more difficult. Despite this, certain themes were evident, such as improving the treatment of intended parents, avoiding the automatic involvement of social services, and ensuring that the surrogate's wishes are respected, along with the surrogate's involvement in decision-making and her protection from coercion.

15.210 These themes are already included in the Department of Health and Social Care's current Care in Surrogacy guidance document, detailed above.[112] The consultation comments suggest that consultees were either unaware of current guidance, or that it is not being followed by practitioners and healthcare services.

15.211 As these points are covered by the current Department of Health and Social Care guidance, we emphasise the importance of adherence to this guidance. Similarly, we consider that tailoring healthcare services specifically for surrogacy, as proposed by some consultees, is not necessary if the existing guidance is followed in full.

15.212 Accordingly, we do not consider that this is an area in which it is necessary for us to make recommendations for reform

Scottish guidance

15.213 With regard to the absence of specific Scottish guidance, we would strongly support the development of such guidance.

Bodily autonomy of the surrogate

15.214 The majority of consultees responding to this question submitted a template response emphasising the need to ensure that the surrogate's wishes are respected, and that she is involved in decision-making and protected from coercion.

15.215 It is central to our recommendations that the surrogate retains bodily autonomy in respect of her pregnancy and childbirth.[113] Under our recommended reforms, surrogacy agreements remain not binding upon the surrogate, and the surrogate has the right to withdraw from a new pathway agreement, with withdrawal having legal consequences.[114] The surrogate and intended parents may discuss and agree on a wide range of matters prior to the child being conceived, but the surrogate may decide

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112 Para 15.181.

113 Paras 1.13 and 1.53.

114 Para 1.60 and para 4.48 onwards (and Recommendation 2).

not to follow what the parties had agreed regarding her pregnancy and childbirth, and could follow this course without withdrawing from the new pathway agreement.

Disclosure of the child's origins

15.216 We note the suggestion by PROGAR and Nagalro that healthcare services should encourage intended parents to be open with their surrogate-born children about their origins. We suggest that the UK, Scottish and Welsh governments give consideration to this suggestion, when next reviewing the guidance.

Midwife training

15.217 With regards to concerns raised by consultees over the training of midwives, we consider that this is an internal issue to be dealt with by the healthcare services themselves, and therefore not an area in which we could make recommendations. However, we would expect the very minimal guidance given in the proficiency document to be expanded upon in training.

15.218 We note that, if the recommendations in our report are accepted by Government and implemented by legislation, then the guidance will necessarily need to be reviewed and updated to reflect those changes.

Chapter 16: International surrogacy arrangements

16.1 Some surrogacy arrangements involve an international element, where part of the arrangement happens outside the UK. This could comprise the fertility treatment, or the entire journey from conception through to the birth of the child. We have concluded that international surrogacy arrangements should be excluded from the new pathway,[1] as we are concerned by the risks of exploitation since international surrogacy is beyond the jurisdiction of surrogacy regulation in the UK.

16.2 In this chapter, we are mostly concerned with those international surrogacy arrangements where intended parents from the UK enter into an arrangement to have a baby with a surrogate from outside the UK, with the baby being born outside the UK. Such international surrogacy arrangements are almost invariably commercial in nature. We also consider reform around international surrogacy arrangements that involve intended parents from overseas coming to the UK. Such arrangements are much less common.[2] We do not deal in this chapter with surrogacy arrangements where the international element relates solely to fertility treatment being obtained overseas.

16.3 We noted in the Consultation Paper[3] that increasingly intended parents from the UK are going overseas to enter into international surrogacy arrangements. Data from Cafcass shows that there has been a significant increase in the proportion of parental order applications where the surrogacy arrangement was an international one. It appears to be the case that international surrogacy arrangements may now account for up to half of parental order applications.[4] As the most recent available figures show, 436 parental order applications were made in England and Wales in 2021,[5] and

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1 Recommendation 37.

2 Consultation Paper, para 16.96.

3 Consultation Paper, paras 3.100 to 3.102

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

5 Ministry of Justice, *Family Court Statistics Quarterly - Family Court Tables January to March 2022* (June 2022) Table 3: Number of orders applied for 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.

a further 15 parental orders made in Scotland in 2021.[6] International surrogacy arrangements may therefore now exceed 200 a year.[7]

16.4 While intended parents may decide to enter an international surrogacy arrangement for a wide range of reasons, we observed that there are two main reasons given by intended parents.

(1) First, the certainty as to legal parenthood offered by those foreign jurisdictions where (in contrast to the position in the UK) the intended parents are recognised in that jurisdiction as the legal parents from birth. 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 still needed when the baby is brought to the UK.

(2) Secondly, it is easier to find a woman willing to act as a surrogate overseas.

16.5 These views are supported by research 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".[8]

International surrogacy destinations

16.6 We noted in the Consultation Paper that at the time of its publication, the countries most frequently mentioned to us as destinations for intended parents from the UK seeking an international surrogacy arrangement were the USA, Ukraine and Georgia, and that Canada was also growing in popularity. We observed that newly emerging surrogacy destinations included Kenya, Nigeria, Ghana and Greece.

16.7 India was previously a very popular destination for international surrogacy arrangements, but in 2016 closed its borders to overseas couples seeking a surrogacy arrangement.[9] Other previously possible destinations, now closed, include Thailand and Cambodia.

16.8 Recent research using data on parental order applications provided by Cafcass, suggests that in 2020-2021 the most popular international surrogacy destination was

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6 National Records Scotland, *Vital Events Statistics 1999-2020*, Table 2.03: Adoptions by type of adoption and by type of adopter(s), 1999-2021. 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#section2 (last visited 23 March 2023). However, the 2021 figures also include the last 4-5 months of 2020, due to a delay in registering parental orders during 2020 because of the Covid-19 pandemic. During the first 7-8 months of 2020, 9 parental orders were made; pre-pandemic, in 2019, the figure was 8.

7 Although, there may well be children born as a result of international surrogacy arrangements in respect of whom no application for a parental order is made. This may occur where the intended parents are already registered as the parents on the foreign birth certificate, are able to enter the UK with the child using the child's foreign passport, and do not realise the need, or do not wish to, obtain a parental order in the UK.

8 V Jadva, H Prosser and N Gamble, "Cross-border and domestic surrogacy in the UK context: an exploration of practical and legal decision-making" (2018) *Human Fertility*, 1464, Table 4.

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

the USA, followed by Ukraine and then Canada.[10] Other destinations included Nigeria, or were described only as "non-UK".[11]

Risks of international surrogacy

16.9 One of the main aims of the law reforms we recommend in this Report is to encourage intended parents in the UK who wish to enter into surrogacy agreements to do so in the UK, rather than overseas. This aim to encourage domestic agreements is closely linked to our other primary aim, which is to ensure that surrogate-born children, surrogates and intended parents in the UK benefit from appropriate protection, through screening and safeguarding and support. In contrast, international surrogacy is beyond jurisdiction in the UK, and we cannot address the risks of exploitation in international surrogacy arrangements.

16.10 We acknowledged in the Consultation Paper that the extent to which international surrogacy arrangements give rise to cause for concern is dependent, to an extent, on the level of regulation provided in each country, as well as the general legal and socio-economic context. The risks of exploitation will depend, for example, on the effectiveness of regulation provided by national laws in different countries, and the impact that the payment available to women to be a surrogate can have on the lives of the surrogate and her family. Concerns may be greatest where regulation is inadequate, the sums of money payable to women who act as surrogates are life-changing, and where women do not have equal access to employment, education or other opportunities. While we do not consider that all international arrangements will necessarily be exploitative, we consider that the risk of exploitation is considerably higher than in domestic agreements and that those risks cannot be controlled by the domestic laws of England and Wales, or Scotland.

16.11 We detailed concerns about exploitation raised by international surrogacy arrangements in the Consultation Paper.[12] We noted concerns that women in certain international destinations which permit commercial surrogacy are being underpaid, and therefore exploited, compared with their equivalents in countries such as the USA. In the Consultation Paper we observed that surrogates in the USA can expect to receive a higher level of compensation (in absolute terms) of around £30,000 than a surrogate in Georgia or Ukraine, who may receive around £10,000.[13]

16.12 In addition to the issue of pay, we noted that serious concerns had been expressed as to the treatment and conditions of surrogates in some overseas countries. Before it changed its law to prohibit non-citizens from accessing surrogacy, India became a

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10 M Johnson-Ellis and K Horsey, *Surrogacy trends for UK nationals; our exclusive findings*, https://www.mysurrogacyjourney.com/blog/surrogacy-trends-for-uk-nationals-our-exclusive-findings (last visited 23 March 2023). The findings were based on data obtained from Cafcass in response to two Freedom of Information requests, granted on 26 March 2021 and 6 May 2021, which included the address of the female respondent to a parental order application (usually the surrogate).

11 See above - the authors of the research suggested that this could include Greece, Cyprus, the Czech Republic, Georgia and Kenya.

12 Consultation Paper, para 2.48 onwards.

13 Consultation Paper, para 2.49. Looking at such payments in absolute terms does not, of course, take account of the relative cost of living in the United States compared to Georgia or Ukraine.

focal point for such criticism.[14] From the literature in this area, it is clear that some degrading and inhumane conditions existed for surrogates. As one academic reported:

> Live-in surrogacy hostels have emerged to monitor intensely women's behaviour during their pregnancies. At some clinics, women are required to live at these hostels, apart from their families, for the length of their pregnancies under controlled eating, health care, and rest regimens. As well, there can be restrictions about when the surrogates' own families can visit them and the type of physical interactions the women are allowed to have with their children when visiting.[15]

16.13 Concerns about exploitation have resulted in the closing down of previously popular international surrogacy destinations. In addition to concerns in relation to the treatment of surrogates in India, we noted in the Consultation Paper reports of Vietnamese women trafficked to Thailand for the purpose of surrogacy.[16] Both destinations now prohibit international surrogacy.[17]

16.14 We highlighted that reports of exploitation persisted in several overseas surrogacy destinations which were at that time open to UK citizens, including Ukraine and Georgia.[18] Members of the Law Commission of England and Wales visited Ukraine in February 2019, on the initiation of the consul for the region and heard first-hand of a number of cases which raised concerns as to the treatment of surrogates. For example, we heard of vulnerable women displaced from occupied territories in Ukraine acting as surrogates; young women from Georgia who had acted as surrogates being cast out from their communities because they were no longer considered marriageable; and surrogates not being aware of the genetic parentage of embryos transferred to them for the purpose of surrogacy.[19] We also noted a news

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[14] For a comprehensive study on this issue see A Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (2014). For further detail on Indian surrogates see also "Indian surrogate mothers talk of pain of giving up baby" *BBC News* (15 August 2016), accessible at: https://www.bbc.co.uk/news/world-asia-india-37050249) (last visited 23 March 2023) and "Why Some of India's Surrogate Moms are Full of Regret" *National Public Radio*, accessible at: https://text.npr.org/s.php?sId=494451674 (last visited 23 March 2023).

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

[16] "Thailand's crackdown on 'wombs for rent'" *BBC News* (20 February 2015), accessible at: https://www.bbc.co.uk/news/world-asia-31556597 (last visited 23 March 2023).

[17] As noted above, Indian nationals resident in the UK can still access India for surrogacy arrangements.

[18] On Ukraine see, for example, S N Kirshner, "Selling a Miracle? Surrogacy through International Borders: Exploration of Ukrainian Surrogacy" (2015) 14 *The Journal of International Business & Law* 77 and "In search of surrogates, foreign couples descend on Ukraine" *BBC News* (13 February 2018), accessible at: https://www.bbc.co.uk/news/world-europe-42845602 (last visited 23 March 2023). In mid-2018 criminal proceedings were brought against the owner of the largest provider of assisted conception and surrogacy services in Ukraine by the Ukrainian prosecutor general pursuant to laws on trafficking in persons and evasion of taxes (cited by S Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008 (Report: Part 2)* (2019) p 168.

On Georgia, see "The new Caucasian chalk circle: Georgia's surrogate motherhood business" *168 Ora* (27 November 2017), accessible at: https://168ora.hu/kriziszona/the-new-caucasian-chalk-circle-georgias-surrogate-motherhood-business-12709 (last visited 23 March 2023).

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

report of a woman in Ukraine who acted as a surrogate not receiving adequate medical care, and others not being paid by surrogacy agencies if they miscarried or did not adhere to strict requirements.[20] In addition to this visit (and whilst recognising the limitations of the consultation process because of issues of distribution of the paper, language and other barriers) we asked that overseas surrogates and overseas surrogate representative or advocacy organisations share their experiences of international surrogacy arrangements with us.[21] Although we did not hear from overseas surrogates or bodies representing them, a number of consultees expressed their opposition to international surrogacy arrangements, raising concerns about exploitation in those countries in which such arrangements occurred.

16.15 We were also aware of our limited ability to engage with organisations focused on the welfare of children in the international context, including those with expertise on child trafficking, and therefore asked such organisations to share with us their views on our proposed reforms.[22] We received only one response from an organisation focused on children's welfare. PROGAR and Nagalro set out in their response the views of Children and Families Across Borders (CFaB), the UK member of the International Social Service:

> Our colleagues in CFaB support our responses as set out in our response. In particular they support the need to strengthen the screening and preparation of IPs to protect the interests of the child as well as the surrogate and the need to see surrogacy as closer to adoption than to assisted conception. They share our concerns about the lack of scrutiny of any IPs who have been turned down for adoption, for example. They also support the view that it is important that ties are maintained with the surrogate (and donor where one was used), not only for understanding origins but also in the case that there are siblings or there is a need to access medical history.

16.16 We observed in Chapter 2 of this Report that it is not possible for UK bodies to ensure that the surrogate in overseas arrangements is not exploited, or that her welfare and that of the child are protected. The court process in England and Wales, and Scotland, provides only limited protection for the surrogate and the surrogate-born child because it only operates at a very late stage in the process, when the child will have been living with the intended parents for several months, and it will almost always be in the best interests of a child who is living with the intended parents for a parental order to be made.

16.17 The risks of international surrogacy arrangements are not limited to their potential for exploitation. Since publication of the Consultation Paper, both the Covid-19 pandemic and the Russian invasion of Ukraine in February 2022 have impacted upon international surrogacy arrangements.

16.18 The Covid-19 pandemic meant that for a period of time international travel was not possible or was highly restricted. Intended parents were unable to travel overseas for

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20 "In search of surrogates, foreign couples descend on Ukraine" *BBC News* (13 February 2018), accessible at: https://www.bbc.co.uk/news/world-europe-42845602 (last visited 23 March 2023).

21 Consultation Question 89.

22 Consultation Question 90.

the birth of their child and children were left stranded in their country of birth.[23] When travel was permitted, passport applications were delayed, and quarantine requirements added to the time spent before surrogate-born children could leave with the intended parents.[24]

16.19 The Russian invasion of Ukraine resulted in surrogates and children being placed at risk.[25] Media reports suggest that some pregnant surrogates were placed under pressure to travel to safer parts of the country or leave Ukraine, and their families, to prioritise the welfare of the unborn child,[26] whilst other surrogate-born babies remained in areas at risk of attack.[27] Intended parents were unable to travel to Ukraine to collect their child or undertook lengthy dangerous journeys to do so. In the UK, visas were made available to allow pregnant surrogates and their immediate families to come from Ukraine to the UK.[28]

16.20 Coverage of both these events has focused on their immediate impact on surrogates and intended parents, and the plight of surrogate-born children, who in many cases have been left in the care of the surrogacy organisation which facilitated the surrogacy arrangement, the surrogate herself, or hospital staff.[29] The longer term impact on the welfare of these children is not yet known, but it has been suggested the combination of the separation of the child from the surrogate and the inability of the intended

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23 See "Coronavirus: Surrogate babies stranded in Ukraine" *BBC News* (15 May 2020), accessible at https://www.bbc.co.uk/news/av/world-europe-52673225 (last visited 23 March 2023); and A Roth "Up to 1,000 babies born to surrogate mothers stranded in Russia", *The Guardian* (29 July 2020), accessible at https://www.theguardian.com/lifeandstyle/2020/jul/29/up-to-1000-babies-born-to-surrogate-mothers-stranded-in-russia (last visited 23 March 2023)

24 S Williams, "The challenges of international surrogacy arrangements in the climate of COVID-19", *BioNews*, 1054, 6 July 2020. Available at https://www.progress.org.uk/the-challenges-of-international-surrogacy-arrangements-in-the-climate-of-covid-19/ (last visited 23 March 2023)

25 For an overview, see for example Z Mahmoud and K Horsey, "Ukrainian surrogates: a surprising silence", *BioNews*, 1135. Available at https://www.progress.org.uk/ukrainian-surrogates-a-surprising-silence/ (last visited 23 March 2023); S Hegarty and E Layhe, "Ukraine: Impossible choices for surrogate mothers and parents" *BBC News*, 22 March 2022. Available at https://www.bbc.co.uk/news/world-europe-60824936 (last visited 23 March 2023).

26 L Callaghan, "Surrogate mothers fear pressure to flee Ukraine", *The Times*, 20 February 2022. Available at: https://www.thetimes.co.uk/article/surrogate-mothers-fear-pressure-to-flee-ukraine-gsntx9z7f (last visited 23 March 2023).

27 A E Kramer and M Varenikova, "In a Kyiv Basement, 19 Surrogate Babies Are Trapped by War but Kept Alive by Nannies", *The New York Times*, 12 March 2022. Available at: https://www.nytimes.com/2022/03/12/world/europe/ukraine-surrogate-mothers-babies.html (last visited 23 March 2023)

28 This was confirmed in a letter from the then Home Secretary Priti Patel MP to Natalie Gamble of NGA Law and Barry O'Leary in March 2022. Available at https://www.ngalaw.co.uk/wp-content/uploads/2022/10/Home-Secretary-letter-to-NGA-law.pdf (last visited 23 March 2023).

29 For example, O Grytsenko "The stranded babies of Kyiv and the women who give birth for money", *The Guardian*, 15 June 2020, Available at https://www.theguardian.com/world/2020/jun/15/the-stranded-babies-of-kyiv-and-the-women-who-give-birth-for-money (last visited 23 March 2023); L Widdicombe, "The stranded babies of the coronavirus disaster", *The New Yorker*, 20 July 2020. Available at https://www.newyorker.com/news/news-desk/the-stranded-babies-of-the-coronavirus-disaster (last visited 23 March 2023).

parents to be with him or her from birth may have adverse effects on the children's psychological health.[30]

16.21 The closure of overseas surrogacy destinations does not appear to have led to a drop in demand for international surrogacy arrangements. Rather, intended parents seek out new destinations. The Cafcass data indicates that prior to the Russian invasion of Ukraine in 2022, parental order applications linked to Ukraine had shown a sharp increase between 2017 and 2021, following the ban on overseas couples seeking surrogacy in India.[31] Since the invasion, the country has ceased to be a destination for international surrogacy arrangements for intended parents from the UK. NGA Law and Brilliant Beginnings have suggested to us that the current situation in Ukraine will result in intended parents seeking surrogacy in other overseas destinations such as Georgia, Mexico, and Colombia. That said, we have also been told that, despite the continuing conflict in Ukraine, foreign nationals may have recommenced entering into surrogacy arrangements there.

Costs of international surrogacy arrangements

16.22 International surrogacy arrangements are almost invariably commercial arrangements.[32] The cost varies considerably depending on where the arrangement takes place.

16.23 In the Consultation Paper, we noted that:

> As they are commercial in nature, international surrogacy arrangements are more costly than domestic arrangements. We were told that the total cost of surrogacy in the USA was around £140,000 to £150,000 for one child and £200,000 for twins.[33] A law firm shared with us recent figures for sums received by surrogates in the USA, Ukraine, and Georgia, using cases from the last three years. In Ukraine and Georgia, surrogates received the equivalent of around £10,000 to £14,500, whereas in the USA, surrogates were receiving approximately £1,650 to £2,650 for allowances (round sums paid for expenses),[34] £300 to £4,000 for identified, "out of pocket", expenses, and between £24,000 and £32,000 by way of compensation.

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30 L Goswami, SA Larmar, and J Boddy, "The impacts of the Covid-19 pandemic on surrogacy in India: The role of social work", *Qualitative Social Work* 2021 Mar; 20(1-2): 472–478 .

31 M Johnson-Ellis and K Horsey, *Surrogacy trends for UK nationals; our exclusive findings*, https://www.mysurrogacyjourney.com/blog/surrogacy-trends-for-uk-nationals-our-exclusive-findings (last visited 23 March 2023). The findings were based on data obtained from Cafcass in response to two Freedom of Information requests, granted on 26 March 2021 and 6 May 2021, which included the address of the female respondent to a parental order application (usually the surrogate).

32 Canada being a notable exception.

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

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

Payments are made to the surrogate throughout the pregnancy, with some payments being paid after birth.[35]

16.24 We posed a Consultation 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.[36] In respect of international arrangements, nine consultees responded, giving costs between £38,000[37] and £167,000; the average reported cost of entering an international surrogacy arrangement was £92,500.

16.25 The SurrogacyUK Working Group on Law Reform, when responding to our question seeking evidence from international surrogates of their experience of such arrangements, noted that in addition to ethical concerns, surrogacy in destinations where commercial surrogacy is the norm can be extremely expensive. The SurrogacyUK Working Group referred to their previous reports; its 2015 report stated that 74% of respondents[38] who used overseas surrogates paid over £60,000 in total.[39] Its 2018 report noted that the average cost for overseas arrangements was £27,375 (or £35,000 for the USA) and observed that "arrangements in the USA typically cost more than £80,000 in total, with many in excess of £105,000 and even up to £160,000+".[40]

Areas of reform

16.26 As we explained in the Consultation Paper, while we do not wish to encourage international surrogacy, we are concerned with the welfare of children who are born in such arrangements. In particular, it is a concern that intended parents, as parents of a new baby, are sometimes unable to travel back to the UK with the child for several months, without there necessarily being ready access to medical advice or to their personal support networks. We identified three key areas of potential law reform that could promote the welfare of surrogate-born children:

(1) nationality;

(2) immigration; and

(3) legal parenthood.

16.27 Nationality and immigration law are separate but related areas as they both concern the ability of the intended parents to bring their child into the UK: either as a British citizen with a British passport (nationality law); or as the holder of a passport from the

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35 Consultation Paper, para 3.107.

36 Consultation Question 116(2).

37 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.

38 14 out of a total 19 respondents.

39 Surrogacy UK Working Group on Surrogacy Law Reform, *Surrogacy in the UK: Myth busting and reform – Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (2015) pp 23 to 24.

40 Surrogacy UK Working Group on Surrogacy Law Reform, Surrogacy in the UK: *Further evidence for reform. Second Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (2018) pp 40 to 41.

child's country of birth with entry clearance to enter the UK (immigration law). We made a number of proposals for changes to the practice of government agencies in relation to the acquisition of nationality and entry to the UK, with regard to children born of surrogacy arrangements.

16.28 Additionally, we provisionally proposed that the Secretary of State should have the power to recognise legal parenthood granted in other jurisdictions which provided sufficient protection against exploitation. The purpose of this proposal was to encourage intended parents considering international surrogacy to go to countries that provide an equivalent level of protection to women who become surrogates and surrogate-born children as is provided in the law of England and Wales, and Scotland.

16.29 We also identified two other areas where reform could be beneficial. First, we proposed that guidance should be prepared by Government in relation to international surrogacy, to help address the difficulties encountered by intended parents who are unaware of the processes they will need to follow to bring a surrogate-born child to the UK. Secondly, we considered the situation of foreign intended parents who enter into a surrogacy agreement in the UK, who will not generally be able to obtain a parental order, and may seek to leave the UK with the child to become the child's legal parents in their home jurisdiction, while not being recognised here as the legal parents of the child. We considered that there may be a need to protect the child's welfare in such circumstances, by ensuring they are not removed from the UK for the purpose of a parental order (or equivalent) being made overseas without the approval of the court in this jurisdiction.

16.30 In this chapter we look at each of the areas of reform we have identified, providing a summary of the current law where relevant, before considering consultee responses and making our recommendations.

16.31 We recommend that:

(1) there be provision for the child born of a domestic surrogacy agreement under the new pathway to be able to acquire British nationality automatically from their British intended parents, in line with the position we recommend for family law;[41]

(2) the definition in section 50(9A) of the British Nationality Act 1981 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 agreement.[42] This amendment to the definition will allow surrogate-born children to obtain British nationality through their biological father in cases where the surrogate is married;

(3) HM Passport Office and UK Visa and Immigration Service change their operating practice to allow the opening of a file and beginning of an application for a surrogate-born child prior to their birth, whether in relation to an application

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41 Recommendation 80 below.

42 Recommendation 80 below.

for the registration of a child as a British citizen, or an application for a passport, visa, or Form for Affixing a Visa;[43]

(4) the current provision 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;[44]

(5) it should be made 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 the conditions for the grant of the visa prevent the child having contact, and an on-going relationship, with the surrogate;[45]

(6) 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, and existing guidance should be updated to include an explanation of the new pathway;[46] and

(7) with regard to foreign intended parents coming to the UK, a system of restrictions (similar to those for international adoption) should be imposed to regulate the removal of a child born as a result of a UK surrogacy arrangement, for the purposes of obtaining a parental order (or equivalent) overseas.[47]

16.32 However, we have decided not to proceed with the proposal in the Consultation Paper changing the requirement for the grant of a visa that intended parents must apply for a parental order within six months of the child's birth.[48] This is in keeping with our decision not to recommend that the six-month time limit for application for a parental order be removed.[49]

16.33 We have also decided not to recommend that it be possible for legal parenthood obtained in a foreign jurisdiction following a surrogacy arrangement there to be automatically recognised in the UK, without it being necessary for the intended parents to apply for a parental order. Having considered the consultee responses, we retain concerns about the risks of exploitation and do not consider that the proposed reform is compatible with the rest of our recommendations.

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43 A one-way travel document onto which a visa can be placed, used where the child is stateless.

44 Recommendation 82 below.

45 Recommendation 82 below.

46 Recommendation 83 below.

47 Recommendation 84 below.

48 Consultation Question 94 (fourth paragraph).

49 Recommendation 46 (we recommend that the time limit is retained but that the court should have the power to allow parental order applications after this time).

NATIONALITY

Current law

16.34 As set out in the Consultation Paper,[50] a child born through international surrogacy can obtain British citizenship in two ways, either:

(1) at birth (by virtue of one of their parents being British citizens); or

(2) if (1) does not apply, through registration as a British citizen.

Obtaining British citizenship through a parent at birth

16.35 For the purposes of nationality law, a child's mother is the woman who gives birth to the child,[51] meaning that the surrogate is always the child's mother. This will be the case regardless of whether the surrogate is the child's genetic mother. As a result, a surrogate-born child cannot acquire British citizenship by virtue of the intended mother being British, even in a gestational surrogacy arrangement in which the intended mother's gametes have been used to create the embryo.[52] It is important to note that this is the outcome regardless of who is recognised as the legal mother in the jurisdiction of birth. Thus, even if the jurisdiction where the child is born recognises the intended parent as the legal parent, and not the surrogate, that has no effect as regards nationality law in the UK.

16.36 If the surrogate is married (or in a civil partnership), then her spouse (or civil partner) will be the child's father or other parent.[53] Again, this principle applies regardless of the identity of the child's genetic father. Therefore, if the surrogate is married, or in a civil partnership, the child cannot acquire British citizenship by virtue of the intended father being British, even if the intended father's gametes have been used to create the embryo.[54] Again, the rules governing nationality in the UK will override the legal position in the jurisdiction where the surrogacy takes place.

16.37 Where the surrogate is unmarried, and the intended father is the genetic father of the child, the intended father is the child's father for the purposes of nationality law.[55] The

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50 Consultation Paper, paras 16.22 to 16.41.

51 British Nationality Act 1981, s 50(9).

52 It is possible – but exceptionally unlikely – that the surrogate in an international surrogacy arrangement is herself a British citizen. If that is the case, then the child will obtain British citizenship through the surrogate: R Cabeza, V Flowers, E Pierrot, A Rao, B O'Leary and L Odze, *Surrogacy: Law, Practice and Policy in England and Wales* (1st ed 2018) para 7.15.

53 British Nationality Act 1981, s 50(9A).

54 As is the case with the surrogate, in the unlikely event that the surrogate's spouse or civil partner is a British citizen, then the child will obtain British citizenship through the surrogate's spouse or civil partner.

55 British Nationality Act 1981, s 50(9A)(c). The intended father must satisfy the prescribed requirements as to proof of paternity. These requirements state that "the person must satisfy the Secretary of State that he is the natural father of the child": British Nationality (Proof of Paternity) Regulations 2006 (SI 2006 No 1496), as amended by the British Nationality (Proof of Paternity) (Amendment) Regulations 2015 (SI 2015 No 1615). These Regulations state that the Secretary of State may have regard to any evidence to determine the paternity of the child, including, but not limited to DNA test reports and court orders: British Nationality (Proof of Paternity) Regulations 2006 (SI 2006 No 1496), as amended by the British Nationality (Proof of Paternity) (Amendment) Regulations 2015 (SI 2015 No 1615), reg 3.

child will then obtain British citizenship through their intended father, as long as the intended father is a British citizen "otherwise than by descent".[56] Acquisition of British citizenship "by descent" is where the citizenship is acquired through being born outside the UK to a British parent (who was a British citizen otherwise than by descent).[57] Therefore in general terms if the intended father obtained British citizenship by birth, adoption, registration or naturalisation in the UK, the child will then obtain British citizenship.[58] However if the intended father is a British citizen only "by descent" then the child will not obtain British nationality at birth through the intended father.[59]

16.38 In summary, a child born through an international surrogacy arrangement will be a British citizen at birth if (i) the surrogate is unmarried; (ii) the intended father is the genetic father of the child; and (iii) the intended father is a British citizen otherwise than by descent. The child will then be born a British citizen and, therefore, be entitled to a British passport. In all other cases the child will not obtain British citizenship through their parents from birth, and so is not entitled to a British passport at birth.

16.39 In practical terms, where a child is born a British citizen, an application for a passport must be made to HM Passport Office.[60]

Citizenship through a parent by the grant of a parental order

16.40 If a child is not a British citizen at the time of their birth, then they can obtain British citizenship through the grant of a parental order. The effect of a parental order is that the child is recognised as a British citizen from the time the parental order is granted, as long as the intended parent, or one of the intended parents, is a British citizen.[61]

16.41 In practice, this is not useful from the point of view of the child entering the UK because, generally speaking, the child already needs to be in the UK to be the subject of the parental order application and the process can also take several months. The child therefore cannot acquire a British passport to allow them to travel into the UK, as there is no parental order – but the child needs to be in the UK to allow the intended parents to apply for the parental order.

Obtaining British citizenship through registration, where an intended parent is a British citizen otherwise than by descent

16.42 Where a child is not a British citizen at birth (for example, where the surrogate is married), then rather than waiting for the grant of a parental order, an intended parent can apply for the child to be registered as a British citizen. Once registered as a British

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56 British Nationality Act 1981, s 2.

57 British Nationality Act 1981, s 14.

58 R Cabeza, V Flowers, E Pierrot, A Rao, B O'Leary and L Odze, *Surrogacy: Law, Practice and Policy in England and Wales* (1st ed 2018) para 7.26. Exceptions are noted in para 7.28.

59 "British citizens by descent suffer a real disadvantage, namely the inability to secure entitlement to British citizenship for their children if they are born outside the United Kingdom": *R (Ullah) v Secretary of State for the Home Department* [2001] EWCA Civ 659, [2002] QB 525 at [4].

60 See Consultation Paper, para 16.49.

61 British Nationality Act 1981, s 1(5), which is extended to apply in respect of the grant of a parental order by 2018 Regulations, sch 4 para 10.

citizen, a Certificate of Registration is issued, and the child can obtain a British passport. An application to obtain British citizenship through registration is made to the UK Visa and Immigration Service. An application for a British passport must then be made to HM Passport Office.[62]

16.43 Registration as a British citizen is at the discretion of the Secretary of State for the Home Office;[63] guidelines provide that the discretion will be exercised so as to grant British citizenship to the child in circumstances where a court order has been obtained in the child's country of birth recognising the intended parents as the legal parent, although a court order will not be necessary in the case of an intended father who is the genetic father of the child and is a British citizen otherwise than by descent.[64]

16.44 In all cases, the consent of those with parental responsibility, including the surrogate, must be obtained, and where a court order is necessary it appears that the order must be obtained after the birth of the child.

Obtaining British citizenship through registration, where the intended parent or parents are British citizens by descent

16.45 Where the intended parents are British citizens by descent, additional requirements around the parents' status must be met in order for the child to be registered.[65]

Applications for registration of a child as a British citizen, and for a passport

16.46 We invited consultees to provide us with evidence of their experience of applying to register a child born through an international surrogacy arrangement as a British citizen and obtaining a passport for the child. We noted that we would be particularly interested to hear how long the application took after the birth of the child, and any information consultees could provide about causes of delays in the process.[66]

Consultation

16.47 Consultees indicated that the length of time it takes to obtain British citizenship and a British passport for a child born through surrogacy varies depending on the country in which the child is born.

16.48 Consultees including NGA Law and Brilliant Beginnings indicated that in the USA and Canada, applications for British citizenship and a British passport were said to be

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62 See Consultation Paper, para 16.50.

63 British Nationality Act 1981, s 3(1), which confers a discretion on the Secretary of State for the Home Department to register a child as a British citizen where an application is made while the child is a minor and the Secretary of State "thinks fit" to do so.

64 Home Office, *Registration as a British citizen: children* (Version 9, July 2022), pages 26 to 27, accessible at: https://www.gov.uk/government/publications/children-nationality-policy-guidance (last visited 23 March 2023). We noted in the Consultation Paper at 16.47 that there are anomalies in the guidelines for establishment of British citizenship by registration, in that a court order is required where the application for registration is made by a genetically related intended mother, but not when the application is made by a genetically related intended father. Having observed that this distinction is a consequence of the general rule that the woman who gives birth is the child's mother under nationality law, we concluded it would not be rational for the guidelines to change, whilst that rule remains in place.

65 These are described in detail in the Consultation Paper, paras 16.39 to 16.41.

66 Consultation Question 91.

approved much quicker in relation to children born through surrogacy in comparison with other countries. NGA Law and Brilliant Beginnings described how as the surrogate-born child was a USA or Canadian citizen by birth, intended parents "almost invariably" apply for a USA/Canadian passport and use this to travel home between one to four weeks after the birth of the child. UK border officials permit the surrogate-born child to enter the UK, notwithstanding the lack of a British passport or a visa. According to NGA Law and Brilliant Beginnings, this is common practice, and none of the intended parents with whom they have worked have been denied entry. The intended parents then apply for a parental order to grant the child British nationality, after which the child can obtain a British passport.

16.49 In cases where parents return to the UK and choose to apply for British nationality registration and/or a passport separately rather than applying for a parental order, NGA Law and Brilliant Beginnings noted that the timescale for doing so was quicker in the USA and Canada than other jurisdictions, taking approximately three to six weeks for each application.

16.50 It is possible that applications made in the UK are processed quicker than applications made overseas; one consultee stated that applications for British citizenship and a British passport can take as little as six weeks to be processed when made within the UK in relation to children born through surrogacy in the USA. By contrast, another consultee who applied for their child's UK passport from the USA waited 20 weeks before receiving it.

16.51 In Ukraine and Georgia, according to NGA Law and Brilliant Beginnings:

> The child is not entitled to nationality of the country of birth. Therefore, there is no local passport and no easy route home which circumvents the need to first make a British passport application (unless, as is sometimes the case, the parents have other EU nationalities).

16.52 Consultees indicated that it takes between nine weeks and five months to obtain a British passport for a child born through surrogacy in Ukraine or Georgia.

16.53 Other than the child's country of birth, consultees noted various other factors which contributed to delays in the application processes for British citizenship and a British passport.

16.54 Most consultees reported that it was difficult to ascertain or to predict which documents would be requested as part of the application process for both British citizenship and a British passport.

16.55 Several consultees noted that UK Visa and Immigration Service and HM Passport Office treated applications for British citizenship and British passports for children born through international surrogacy arrangements very differently. Consultees reported that UK Visa and Immigration Service's specialist team provided a good service, whilst experiences of HM Passport Office were generally less positive. Delays were reported, together with requests for documents sought by HM Passport Office for issuing a passport to the child which often duplicated those that had already been

provided to establish the child's claim to British citizenship. Duplication of requests for documentation also occurred following the making of a parental order.[67]

16.56 To address these issues, the Law Society recommended the establishment of a specialist team within HM Passport Office to treat surrogacy applications for a passport as a priority. It also suggested that HM Passport Office provide a list of documents that will be required in surrogacy cases from each country, to avoid requests for documents which are not relevant or were not initially requested.

16.57 The Law Society also argued that where a certificate of registration has been granted in respect of the child, registering them as a British citizen, there should be no need for HM Passport Office to "second guess" that decision and it should be acknowledged that the application for a passport can be dealt with swiftly. The Immigration Law Practitioners' Association recommended that children who have already been registered as British citizens should be issued with Emergency Travel Documents.

16.58 Consultees also suggested that surrogacy cases could be identified and prioritised through the online system used to make applications for registration as a British citizen, by asking a question at the start of the application to determine if it relates to a surrogacy arrangement.

16.59 Delays can also be caused by the need to supply certain biometric information as an added security measure when applying for citizenship. If a child is applying to be registered as a British citizen, they must attend a biometric appointment at their local United Kingdom Visa and Citizenship Application Services service point to provide this information (usually just a photograph) which will be reviewed before the application can be granted.[68] The Immigration Law Practitioners' Association recommended removing the biometrics process for children in international surrogacy arrangements, considering that it caused significant delays, particularly in arranging a biometrics appointment with the local service partner, resulting in additional stress and cost for the intended parents.

Opening a file prior to birth of the child

16.60 In the Consultation Paper, we provisionally proposed that it should be possible for a file to be opened, and the application process for obtaining registration of a child born from an international surrogacy arrangement and obtaining a passport to begin, prior to the birth of the child.[69]

Consultation

16.61 Amongst consultees who were not opposed to surrogacy, there was widespread support for this proposal.

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67 The making of a parental order makes a child a British citizen provided that one of the intended parents is British, by operation of the British Nationality Act 1981, s 1(5), which is extended to apply in respect of the grant of a parental order by 2018 Regulations, sch 4 para 10.

68 Immigration Law Practitioners' Association provided this information in their response to Consultation Question 91.

69 Consultation Question 92.

16.62 Consultees who had entered into international surrogacy arrangements as intended parents welcomed the potential for the proposal to reduce the amount of time spent abroad. Some argued that delays and an extended stay abroad are not in the interests of the child, being away from family and support networks. One drew attention to the financial costs incurred by intended parents living abroad.

16.63 The Law Society pointed out the administrative efficiency of the proposal, on the basis that it would allow requirements for documents needed for applications for both registration and passports to be fulfilled pre-birth; it also recommended that any interviews with intended parents requested by HM Passport Office should be able to be conducted prior to the birth.

16.64 The Immigration Law Practitioners' Association supported the proposal, on the basis that the application process should be designed to ensure that intended parents are aware at an early stage of what will be required to register the child and obtain a passport after birth, rather than finding out about these requirements only after the child has been born and when they are abroad. The need for training of staff dealing with applications for registration and passports was highlighted by one consultee, who agreed with the proposal but thought that that there might be no need to open a file prior to the birth of the child if such training was provided.

16.65 Other consultees who agreed with the proposal highlighted the complications that could arise if the surrogate were to withdraw her agreement after a file had been opened, with one suggesting that there could be an issue with obtaining a passport for a child prior to birth if the surrogate then objected after the child was born. However, we consider this concern misplaced; our proposal would only allow a file to be opened but a passport could not be obtained prior to birth. We also note that the extent to which a surrogate can withdraw her consent in an international surrogacy arrangement will depend on the domestic law of the country in which the surrogacy takes place; our proposal would not alter the operation of any such law.

16.66 Similarly, Resolution, which agreed with the proposal, noted that family law does not currently provide for any actions being taken pre-birth. It commented that if this was made possible it would be a welcome change.

16.67 Those consultees who were opposed to surrogacy in principle disagreed with the proposal. Most focused on what was said to be a contradiction between the recommendations of the UN Special Rapporteur and our proposal.[70] Others took the view that international surrogacy arrangements amounted to child trafficking, with one such consultee considering that the proposed reform might incentivise intended parents to enter into "surrogate tourism".

16.68 The Anscombe Bioethics Centre objected to international surrogacy being "streamlined" and suggested that if the child was removed from their country of birth, it would be harder for them to seek their birth mother or have contact with the place and culture of their "natal land".

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[70] This argument was made in the template response submitted by Nordic Model Now! which other consultees adopted.

16.69 The Scottish Council on Human Bioethics argued that preparation of any new UK guidelines should be delayed until the completion of the work of the Hague Conference on Private International Law.

Acquisition of British nationality on the new pathway

16.70 In the Consultation Paper we considered whether we could propose allowing the genetically related intended mother to be recognised as the mother of the child for the purposes of nationality law, putting her in the same position as the genetically related intended father. However, we did not make provisional proposals for such reform.

16.71 We took the view that it is not practical within the confines of this project to propose changes to nationality law. The general rule that the woman who gives birth to the child is the legal mother for nationality law is not confined to surrogacy; it is a general principle applying in all cases. We did not feel that piecemeal reform to deal with specific difficulties that arise in surrogacy cases was merited. We considered that there could be practical difficulties in obtaining amendments to the British Nationality Act 1981, as the subject of who qualifies for British citizenship is politically sensitive.

16.72 However, in their response to our proposal that it be possible to open a file prior to the birth of the child,[71] NGA Law and Brilliant Beginnings raised with us particular points of nationality law that they considered required reform as a consequence of changes to the law around legal parental status we recommended in the Consultation Paper.[72] They suggested that section 50(9) and (9A) British Nationality Act 1981 would need to be amended to include those intended parents who become legal parents via the new pathway in the definitions of 'mother' and 'father' so that parents through surrogacy are able to transmit British nationality to their child in the same way they would if their child was not born through surrogacy. They noted that as no parental order would be made on the new pathway, a new burden to apply instead for British nationality registration, and the expense of doing so, could in some cases be inadvertently imposed on families who would not otherwise have had to do so.

Amendment to definition of parent to exclude a surrogate's spouse or civil partner

16.73 Similarly, in the Consultation Paper we considered removing the rule of nationality law that the surrogate's spouse or civil partner is the father or other parent of the child, enabling a genetically related intended father to be recognised as the legal father, regardless of the marital status of the surrogate.[73] We did not make provisional proposals to remove this rule.

16.74 We did, however, make provisional proposals regarding the parental status of the surrogate's spouse or civil partner in family law. In the Consultation Paper we proposed that under the new pathway, the intended parents (not the surrogate or her spouse or civil partner) would be the parents at birth, provided the surrogate did not withdraw her consent. Where the surrogate withdrew her consent with the result that she became the legal mother of the child, we proposed that her spouse or civil partner should still not be a legal parent. We have amended the provisional policy in the

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71 Consultation Question 92.

72 Consultation Question 7. This provisional proposal is now Recommendation 1.

73 Consultation Paper, paras 16.45 to 16.36.

recommendations that we make in this Report, with the effect that the surrogate will be the legal mother of the child on their birth only if she withdraws her consent prior to birth.[74] We also asked consultees for their views on whether the surrogate's spouse or civil partner should be a legal parent of the child born as a result of the surrogacy arrangement, for arrangements outside the new pathway.[75]

16.75 NGA Law and Brilliant Beginnings raised the issue of whether British nationality law should be amended if the surrogate's spouse was no longer a legal parent at birth, noting that:[76]

> If a policy decision is made to provide that a surrogate's spouse is not a legal parent at birth, this should be reflected in the section 50(9A) BNA 1981 definition of 'father' as well as in the HFEA 2008. In non-pathway and non-recognition cases, this would enable the biological father to pass on British nationality irrespective of whether the surrogate is married, ending the arbitrary distinction related to marital status and the related evidential burden for parents.

Analysis

Operational practice - pre-birth opening of files/applications

16.76 There was a high level of support among consultees not opposed to surrogacy for the provisional proposals dealing with allowing the opening of a file for a surrogate-born child prior to their birth, whether in relation to application for registration of a child as a British citizen, or an application for a passport.

16.77 Given that a number of consultees made similar points, we would emphasise that our proposal is not for any legal proceedings to be started before the child's birth. We do not believe that this would be appropriate, although we note that NGA Law and Brilliant Beginnings have stated to us that they are aware of an unreported case where a declaration of parentage was granted prior to the birth of the child.

16.78 We are not suggesting that it become possible to make a formal application for registration or for a passport in respect of an unborn child, nor that it should be possible for a child to be registered or issued with a passport before birth. We are not seeking to suggest any change to the legal status of an unborn child. However, we do think that a file could be opened, and the process of evidence-gathering begun; for example, informing the relevant HM Passport Office / UK Visa and Immigration Service teams of the existence of the surrogacy arrangement, and providing evidence of it to them.

16.79 In considering whether it should be possible for a file to be opened in respect of a passport for a child prior to their birth, two factors seem to be particularly relevant:

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74 Recommendation 3.

75 Consultation Question 15, which was in two parts.

76 This comment was made in NGA Law and Brilliant Beginnings' response to Consultation Question 92, which proposed that it be possible for a file to be opened, and the application process for obtaining registration of a child born from an international surrogacy arrangement and obtaining a passport to begin, prior to the birth of the child.

(1) First, as noted above, there are concerns in relation to the welfare of the child where the intended parents have to spend extended periods of time in a country with which they are probably not familiar and may not speak the language. The intended parents are cut off from their wider family, friends and support networks, at a pivotal time as they adjust to caring for a new-born child, and in which they are incurring significant additional expenses, primarily for accommodation. The waiting time before applications are granted is also likely to be stressful in and of itself.

(2) Secondly, the current position does not adequately protect the child's rights to a nationality. Some countries, including Georgia and Ukraine, do not recognise the nationality of a child born to overseas intended parents through a surrogacy arrangement in their jurisdictions. As a result, the child is stateless until British citizenship is obtained for the child, which is contrary to Article 7(1) of the UNCRC, and the ethos of the Verona Principles.[77]

16.80 We discuss further the relevance of the UNCRC and the Verona Principles[78] below.

16.81 Article 7(1) of the UNCRC provides that:

> The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

16.82 The Verona Principles make the following recommendations as to the nationality of children born through surrogacy arrangements:

> The policy of States regarding the nationality of a child born through surrogacy should be guided by the overriding importance of avoiding a situation in which a child is stateless.
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> …
>
> States should grant their nationality at birth to a child born on its territory in cases where the parents are unknown or do not have that State's nationality, and the child would otherwise be stateless; failing which,
>
> States of which the surrogate mother is a national should grant their nationality if the child would otherwise be stateless; failing which,
>
> Other States connected to the surrogacy arrangement should consider the discretionary grant of nationality if the child would otherwise be stateless.[79]

16.83 If a file for an application for British citizenship or passport could be opened by the intended parents prior to birth, this could help to reduce the length of time that a child

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

78 The impact of international law, including the UNCRC and the Verona Principles, on the new pathway is considered in Chapter 3. However, the new pathway will not apply to international surrogacy arrangements.

79 Verona Principles, paras 13.2, 13.4.

born in other countries is stateless, and therefore also protect the child's right to a nationality under Article 7(1) of the UNCRC. The same would be true for an application for a visa or other entry clearance, as we note below.

16.84 The Verona Principles also state, at paragraph 13.3, that "States shall act in an expeditious manner when determining nationality". By allowing a file for an application for nationality to be opened before the child's birth, delays are likely to be reduced.

16.85 Our proposals for pre-birth opening of a file for the relevant applications bring the law more in line with the approach to international surrogacy suggested by the Verona Principles. Paragraph 13.8 of the Verona Principles state that:

> States should take measures, where necessary and appropriate, to grant *without delay* a visa and/or discretionary status to the child to remain in and/or travel from the State of birth pending any determination of legal parentage and/or nationality, in the best interests of the child [our emphasis].

16.86 While Nordic Model Now! suggested in its template response that provision for opening a file prior to the birth of the child contradicted the UN Special Rapporteur's recommendations, we are satisfied that this is not the case. The Rapporteur's 2018 and 2019 reports make no reference to files for applications for visas, citizenship or passports being opened before the child's birth. The Rapporteur does, however, stress the importance of children born through surrogacy not being left stateless, which points in favour of reducing delays to conferring nationality on the child, or in allowing the child to lawfully enter the country where the intended parents are resident.

16.87 In response to consultees' concerns that the proposal may impact on the surrogate's right to withdraw from the agreement, we disagree that the provision for a file to be opened would have this effect. In any event, as we explain above,[80] whether the surrogate has a right to do so is dependent on the law in the country in which the child is born. In part for that reason, it is rare in international arrangements for surrogates to seek to withdraw from the arrangement.

16.88 Further, intended parents who have brought the child back into the UK will have to obtain a parental order to be recognised as the child's legal parents in the UK. There would therefore need to be a post-birth assessment of the best interests of the child and, if the surrogate does not consent to the grant of the parental order, the court would have to consider whether her consent should be dispensed with in the best interests of the child.

16.89 A further argument made against the opening of a file before the child is born is that it is unfair to 'prioritise' births resulting from surrogacy arrangements overseas, compared to other overseas births. This point was made expressly in our proposals for opening a file for a visa application prior to birth,[81] but we think is helpful to discuss it here, as the Law Society in particular considered this issue when providing its

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80 Para 16.65.

81 Para 16.131.

experience of making applications for passport or registration in the surrogacy context.[82]

16.90 We consider that a different approach can be justified because surrogate births are more complex, and raise issues that will not be present in other cases. In addition, intended parents who go overseas specifically as part of a surrogacy arrangement may have no connection to the country concerned and are present there only temporarily. We consider that these intended parents' situation can be distinguished from that of those UK residents or citizens who live overseas, have a child there and are making the relevant application from a country that is their home. The former situation is likely to be much more stressful. This view was supported by the Law Society. We note, in any event, that where changes in the law are not required, practical measures that we suggest would be helpful in the surrogacy context could also be rolled out for other overseas births if considered desirable. It is not, however, within the scope of this project to suggest that they are.

16.91 The Scottish Council on Human Bioethics suggested that any reform should await the completion of the work of The Hague Conference on Private International Law. We do not consider that it is practical or necessary to wait for developments from The Hague Conference before making changes to domestic law and practice. The Conference on parentage and surrogacy has been ongoing for around 10 years and as we note in Chapter 3, the final report of the Experts' Group on parentage / surrogacy has recently been submitted.[83] The Experts' Group distinguished between a surrogacy arrangement and an international surrogacy arrangement; the latter being defined as one where the surrogate is habitually resident in a different state from the intended parents, and it is intended that the child will move from their state of birth to the state of residence of the intended parents.[84] In respect of international surrogacy arrangements, the Experts' Group concluded that:

> The most feasible way forward would be to exclude legal parentage resulting from ISAs from the scope of an instrument on legal parentage generally (a Convention) and address such legal parentage in a separate instrument (a Protocol).[85]

16.92 The Council on General Affairs and Policy (CGAP), which is due to meet in March 2023, has been invited to make a decision on possible further work on the subject, taking into account the Final Report of the Experts' Group. There is at present no indication of the timescale for that further work, should the CGAP decide to proceed with it. In any event, given the recommendations in the Final Report, any proposals in respect of international surrogacy agreements would be likely to form part of an optional protocol rather than a convention.

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82 Response to Consultation Question 91.

83 Hague Conference on Private International Law Experts Group on the Parentage / Surrogacy project, *Final Report: The feasibility of one or more private international law instruments on legal parentage*, 1 November 2022. Available at https://assets.hcch.net/docs/6d8eeb81-ef67-4b21-be42-f7261d0cfa52.pdf (last visited 23 March 2023).

84 Above, para 77.

85 Above, para 81.

16.93 We recommend that it be possible for a file to be opened, and the application process for obtaining registration of a child born from an international surrogacy arrangement and obtaining a passport to begin, prior to the birth of the child.[86] We do not think that implementation of the provisional proposals in this regard would require a change in the law and, for the avoidance of doubt, we are not suggesting that it should be possible for any order to be made, or final decision to be taken, before the birth of the child.

Operational practice - documentation

16.94 Permitting a file to be opened before a child is born could also help intended parents and government agencies work together on assembling the documents required by the latter. Some consultees, in particular an intended parent, said that it is unclear which documents the various government agencies will require. Starting the application overseas will, therefore, likely lead to numerous telephone calls with officials and lawyers, and frustration for the intended parents if it is not apparent which documents they need to obtain and submit. As the Law Society suggests, such a process would be logistically more straightforward if the intended parents met officials in person before the child was born.

16.95 We therefore also recommend that the Home Office (the department of which HM Passport Office and UK Visa and Immigration Service are part) should provide clear guidance on what documentation is required for applications for these documents, and passports in particular.[87] We note in our discussion of pre-birth opening of files for visa applications below that the current Home Office policy document for immigration is in need of revision.[88] This information should also be easily accessible to the public.

Operational practice - requirement for a post-birth order for registration route

16.96 As we outlined above, for registration as a British citizen, an order confirming the parental status of the child from the overseas jurisdiction will be required where the claim for citizenship is through the intended father who is not genetically related, or through the intended mother.[89] The Home Office have stated that they require a post-birth order; this is a problem in those jurisdictions where pre-birth orders are made, such as California. We recommend that the Home Office consider its approach to always requiring a post-birth order.

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86 Recommendation 79.

87 Recommendation 79.

88 Para 16.157.

89 Para 16.43.

Recommendation 79.

16.97 We recommend that, in relation to applications for obtaining registration of a child born from an international surrogacy arrangement as a British citizen, and obtaining a passport for the child:

(1) HM Passport Office and UK Visa and Immigration Service consider changing their operational practice to make it possible for a file to be opened, and the application process to begin, prior to the birth of the child; and

(2) the Home Office:

(a) provide clear guidance, in a form easily accessible to the public, on what documentation is required for such applications; and

16.98 consider whether a post-birth order should always be required for applications for registration as a British citizen.

Operational practice - biometrics

16.99 The Immigration Law Practitioners' Association was concerned that the biometrics requirement in relation to the application for a passport – essentially the taking of a photograph of the child born of the arrangement, in this context, via an official partner – was the cause of significant delays. They stated that this was due to the time taken to get an appointment in the country concerned, and the lack of communication with the official partner. The ILPA therefore recommended that the biometrics requirement be removed. We take the view, however, that it would not be appropriate for us to recommend the removal of this requirement, which we understand is an anti-trafficking measure, and which also applies in other contexts.

Acquisition of British nationality on the new pathway

16.100 The concern raised by NGA Law and Brilliant Beginnings regarding amendment of the definitions of "mother" and "father" in section 50(9) and (9A) British Nationality Act 1981 in respect of legal parents on the new pathway relates solely to domestic surrogacy arrangements, as international surrogacy arrangements are excluded from the new pathway. Nonetheless, as the issue relates to nationality law it is appropriate to consider it in this part of our Report. Currently, in domestic agreements, there is little concern over the child born of the agreement acquiring British nationality. The child will either have this at birth, from the British surrogate (assuming that she is of British nationality) or, at the time the parental order is granted, from one or both of the intended parents.[90]

16.101 Specific provision would need to be made for the child born of a new pathway surrogacy agreement to acquire automatically British nationality from his or her intended parents; in the absence of specific provision the child would not automatically

[90] British Nationality Act 1981, s 1(5) which is extended to apply in respect of the grant of a parental order by 2018 Regulations, sch 4 para 10.

do so. If the surrogate were not British but, say, a European citizen, then the child would – absent a change in the law – not acquire British nationality, despite being recognised as the legal child of the (British citizen) intended parents for the purposes of family law.[91]

16.102 It is therefore possible that removing the need to apply for a parental order on the new pathway could lead to more children being stateless. This could occur if, say, the intended parents were not British citizens and instead came from a jurisdiction that did not recognise legal parenthood through surrogacy (with our recommended change meaning that the child would not acquire nationality from the British citizen surrogate). It is very difficult to know, absent data on the likeliest combinations of intended parent/surrogate nationalities, to what extent this could occur.

16.103 However, we consider that two factors tip the balance toward making provision for a child born via the new pathway to acquire any British nationality from their intended parents.

(1) The change would promote consistency between family law and nationality law by recognising, in nationality law, the reforms that we suggest which enable intended parents to become the legal parents at birth of a child born through a surrogacy agreement in the new pathway.

(2) There is already the precedent of specific provision being made for a child to acquire nationality from their British intended parents on the making of a parental order.

16.104 We therefore recommend that there be provision for the child born of a new pathway surrogacy agreement to be able to acquire British nationality automatically from their British intended parents.[92]

Amendment to definition of parent to exclude a surrogate's spouse or civil partner.

16.105 In Chapter 4, we set out our recommendation that, whether on the new pathway or where a parental order is sought, the law should be changed so that the surrogate's spouse or civil partner is no longer the legal parent of the child at birth.[93] The effect of these recommendations is that a British surrogate's spouse or civil partner is not the child's parent.

16.106 We have therefore considered the issue raised by NGA Law and Brilliant Beginnings, as to whether British nationality law should be amended to reflect the position which we have recommended in family law.

16.107 Such a reform would promote consistency between family law and nationality law; it would also remove – in terms of acquisition of nationality – the distinction between a surrogate being married or unmarried. For those children born of surrogacy

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91 This would be the case if the European citizen did not have "settled status". Children born in the UK to European citizens who are settled in the UK are British citizens – British Nationality Act 1981, s 1(1)(b).

92 Recommendation 80.

93 Recommendation 4.

arrangements in which the surrogate is married, this reform would make it easier for them to acquire British nationality.

16.108 The current favouring of unmarried surrogates in international arrangements, where the acquisition of nationality is dependent on that status, would end. It could be argued that this would better serve the interests of women who act as surrogates. In some countries, becoming a surrogate gives rise to specific concerns of exploitation for single women who may subsequently be shunned by their family and community for being pregnant outside of marriage. Conversely, a married surrogate will have more support (from her spouse) throughout the pregnancy.

16.109 On the other hand, this reform could encourage intended parents to consider married women as surrogates, as well as increasing the number of women who might consider being a surrogate, especially in countries where there is a heightened risk of exploitation.

16.110 There could also be an issue of how to prove that there was, in fact, a surrogacy arrangement such that the surrogate's spouse or civil partner, for the purposes of nationality law, should be excluded from legal parental status. However, it would be a matter for the Home Office to decide what evidence it would require for proof of the arrangement.

16.111 On balance, we are persuaded that there is a strong argument for consistency, and that nationality law should be amended to reflect the position which we have recommended in family law.

Recommendation 80.

16.112 We recommend that:

(1) there be provision for the child born of a new pathway surrogacy agreement to be able to acquire British nationality automatically from their British intended parents; and

(2) the definition in section 50(9A) of the British Nationality Act 1981 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.

16.113 Clause 115 of the draft Bill, inserting new provisions into sections 4E, 17B and subsections 50(9) and 50(9A) of the British Nationality Act 1981, gives effect to this recommendation.

IMMIGRATION

Current law

16.114 The nationality rules described above determine the ability of a child born through an international surrogacy arrangement to enter the UK as a British citizen with a British passport. The rules on immigration govern the ability of a child, instead, to enter the

UK on a passport issued by the country of the child's birth; entry clearance may be required in order for the child to do so.

Entry as a visitor

16.115 As we noted in the Consultation Paper,[94] it is also possible for a child who holds a non-British passport to enter the UK as a visitor, if they are travelling on a passport from a country whose nationals do not require a visa to visit the UK. The child will not therefore need a visa. Bringing the child into the UK in this way occurs as a matter of practice. It is not strictly sanctioned by the law, but we have been told that this route is commonly used, in particular, in respect of children born through surrogacy arrangements in the USA and Canada.

16.116 Where a visa is required for the child's entry into the UK, the visa may be applied for within the Immigration Rules, or, alternatively, entry clearance may be granted outside the Rules.[95] If the child is granted indefinite leave to enter the UK, then the child would be able to enter the UK and remain in the UK permanently.[96]

Applying for a visa within the Immigration Rules

16.117 A child born through surrogacy will be entitled to a visa within the Immigration Rules only where one of the intended parents is recognised as the legal parent under nationality law. As a result, the route of obtaining a visa within the Rules does not offer a practical advantage over the route of recognition of the child as a British citizen (where the parent is a British citizen). We understand from consultee responses that this is not a popular route with intended parents, who tend instead to register the child as a British citizen and then apply for a British passport.

Applying for entry clearance outside the Immigration Rules

16.118 It is also possible to obtain entry clearance for a child to be available outside the Immigration Rules. This is possible where the intended parents wish to bring the child into the UK and will make an application for a parental order within six months of the child's birth. Entry clearance outside the Rules is granted at the discretion of the Secretary of State,[97] and is likely to be granted for 12 months.[98]

16.119 To obtain entry clearance outside the Rules, it is sufficient that one of the intended parents is the genetic parent of the child (even though they are not the legal parent). In addition, the intended parents must show that they are capable of meeting the other criteria necessary to obtain a parental order for the child, and that they intend to apply for a parental order within six months of the child's birth.[99]

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94 Consultation Paper, para 16.16.

95 At the discretion of the Secretary of State, see para 16.132.

96 UK Border Agency, *Inter-country surrogacy and the Immigration Rules* (June 2009), para 62.

97 UK Border Agency: *Inter-country surrogacy and the Immigration Rules* (June 2009) paras 30 and 41.

98 UK Border Agency: *Inter-country surrogacy and the Immigration Rules* (June 2009) para 62.

99 UK Border Agency: *Inter-country surrogacy and the Immigration Rules* (June 2009) para 59(g). Note, the requirement that one of the intended parents is the child's genetic parent is also a requirement for obtaining a parental order.

Conditions for applying for entry clearance

16.120 Whether entry clearance for a child is applied for within or outside of the Immigration Rules, intended parents must show that the surrogate has renounced her parental rights at least six weeks after the birth. This reflects the requirement that a surrogate must give her consent to the intended parents obtaining a parental order at least six weeks after the birth. Other conditions must also be met,[100] but these will not be relevant, or will not generally present difficulties, in the case of bringing a surrogate-born child into the UK shortly after their birth.

Surrogate-born children who are not entitled to a passport

16.121 We noted in the Consultation Paper that there will be instances where a child is not entitled to a passport from the country in which they are born.[101] If that child is also not entitled to a British passport, because they are not a British citizen, then the child will be stateless.[102] This situation arises because of a mismatch between the national law in the country in which the child was born, and the laws governing entitlement to British citizenship.[103] We gave the example of a country, such as Ukraine, recognising the intended parents as legal parents so the child is not eligible for citizenship of that country; if that child cannot obtain British citizenship – either at birth or by registration – the child is stateless until British citizenship is obtained through the grant of a parental order.

16.122 In such cases, in addition to obtaining entry clearance for the child, the intended parents will need to obtain a one-way travel document, onto which the visa or other document can be placed. This was at the time of the Consultation Paper known as an EU Uniform Format Form ("EU UFF") but has now been replaced by the Form for Affixing a Visa ("FAV").

Experiences of applying for a visa

16.123 We invited consultees to provide us with evidence of their experiences of applying for a visa for a child born through an international surrogacy arrangement. In particular, we expressed interest in hearing from consultees how long the application took after the birth of the child, and any information they had about the causes of delays in the process.[104]

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100 These conditions are: At least one of the intended parents must be present and settled in the UK; the intended parents are able to maintain and accommodate the child adequately and without recourse to public funds; the child is under 18 years old; the child is not leading an independent life, is unmarried, and has not formed an independent family unit.

101 Consultation Paper, paras 16.73 to 16.75.

102 A situation faced, for example, by Hedley J in *Re: X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] Fam 71.

103 There are several international instruments that might be used to advance the case of children born stateless in the situation of an international surrogacy arrangement, including the UN Convention on the Rights of the Child, the European Convention on Human Rights and the UN Convention on the Reduction of Statelessness. Article 1(1) of the last convention, ratified by the UK in 1966, provides that "a Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless. See: B Ní Ghráinne and A McMahon, "A Public International Law approach to safeguard nationality for surrogate-born children" (2017) 37 *Legal Studies* 324.

104 Consultation Question 93.

Consultation

16.124 Consultees informed us that, on average, it takes between six weeks and three months to obtain a visa for a child born through an international surrogacy arrangement from the time of application. As we note above, this is not a very popular route among intended parents, who tend instead to apply for registration of the child as a British citizen and then a British passport.

16.125 In respect of an entry clearance outside the Immigration Rules, NGA Law and Brilliant Beginnings said that it had only been used in four of their cases and took six to 12 weeks to process.

16.126 The Law Society and the Immigration Law Practitioners Association both recommended rewriting the policy on inter-country surrogacy and immigration, both within and outside the Immigration Rules), noting that these are confusing and out of date.

Opening a file prior to birth of the child

16.127 In the same way that we proposed that it should be possible to begin an application for a child born through surrogacy to be registered as a British citizen, or for a British passport, we suggested similar reform for visa applications. We provisionally proposed 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. We noted that the application would need to be completed after the birth of the child, and the issuing of a passport in the child's country of birth. We asked consultees for their views on this proposal.[105]

Consultation

16.128 Nearly all consultees who were not opposed to surrogacy in principle agreed with the provisional proposal. Consultees considered that this would speed up the return to the UK for intended parents and children and reduce stress for those involved.

16.129 NGA Law and Brilliant Beginnings noted that the proposal reflected one that they had previously made to a government working group. In their consultation response, they noted that the proposal should encourage intended parents to apply for parental orders.

16.130 Opposition to the proposal primarily came from those objecting to surrogacy in principle, many of whom submitted a template response claiming that our proposal contradicts the recommendations of the UN Special Rapporteur.[106] Another consultee also raised concerns of exploitation, arguing the proposal would streamline the process of international surrogacy.

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[105] Consultation Question 94, part one, para 16.69 of the Consultation Paper. This question was a multi-part question, of which this part was the first.

[106] We consider this argument at 16.154.

16.131 A further consultee who disagreed with the proposal argued that it would grant an advantage to intended parents in surrogacy situations (whom they described as economically advantaged).

Bringing within the Immigration Rules the entry clearance route for intended parents who are not legal parents under nationality law

16.132 We provisionally proposed that the current provision made for the grant of 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 Rules.[107] At present, such applications are determined at the discretion of the Secretary of State although it appears this system is used infrequently.

Consultation

16.133 Consultee responses were essentially the same as for the first part of the question (opening a file pre-birth for visa applications), with nearly all those not opposed to surrogacy agreeing.

16.134 The Law Society and the Immigration Law Practitioners' Association agreed with the proposal but considered that a more pressing issue was updating the Immigration Rules to reviewing the policy both inside and outside of the rules, which was outdated.

16.135 Some consultees who disagreed with the proposal considered that the rules of international adoption should apply.

Relationship between the child and the surrogate

16.136 We had provisionally proposed in the Consultation Paper that a condition for the grant of a visa should not be dependent on preventing an ongoing relationship between the surrogate and the child. In particular:

(1) the grant of a visa should not be dependent on the child breaking links with the surrogate; or

(2) that this condition should be clarified to ensure that it does not prevent the child having contact, and an on-going relationship, with the surrogate.[108]

16.137 Our provisional proposal was based on 2009 UK Border Agency guidance, which suggests that the availability of a visa within the Immigration Rules (and, by extension, when entry clearance is applied for outside of the Rules) is dependent on the child breaking any ties with the surrogate.[109] We made a provisional proposal that the requirement should be removed, or at least that its scope should be clarified so that it does not deter contact with the surrogate.[110] Subsequently, we have been told that the

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107 Consultation Question 94, part two, para 16.70 of the Consultation Paper. This question was a multi-part question, of which this part was the second.

108 Consultation Question 94, part three, para 16.71 of the Consultation Paper. This question was a multi-part question, of which this part was the third.

109 UK Border Agency: *Inter-country surrogacy and the Immigration Rules* (June 2009) para 56.

110 Consultation Question 94, part three, para 16.71 of the Consultation Paper. This question was a multi-part question, of which this part was the third.

2009 guidance is out of date and no longer applied in practice, and that there is therefore no requirement in law that the child break ties with the surrogate.

Consultation

16.138 There was broad agreement for both limbs of the proposal amongst almost all consultees, including those opposed to surrogacy.

16.139 One consultee, although agreeing with the proposal, noted that in practice a relationship between the child and surrogate may be unlikely, not least as they may not even share a common language.

16.140 Some consultees went further in seeking to preserve links between the surrogate and the child, by suggesting information on the child's origins and on the intended parents should be required to be held by the country of birth and forwarded to the country to which the intended parents bring the child after birth, an approach that would involve international co-operation.

Time limit for applying for a parental order

16.141 We invited consultees' views as to whether the current requirement for the grant of entry clearance[111] outside the Immigration Rules, that the intended parents must apply for a parental order within six months of the child's birth, should be removed (regardless of whether the availability of entry clearance is brought within the Rules), if our provisional proposal to remove the time limit on applications for parental orders were accepted.[112]

16.142 We had provisionally proposed in the Consultation Paper[113] that this six-month time limit for applications for parental orders be removed, but, as we explain in Chapter 10, we have reconsidered our position.[114]

Consultation

16.143 Relatively few consultees responded to this part of the question; of those who did, the majority supported the removal of the six-month requirement.

16.144 The desirability of intended parents applying for a parental order was emphasised by consultees who agreed to the proposal.

16.145 Arguments against the proposal and in favour of retention of the time limit were made by consultees opposed to surrogacy, some of whom suggested in a template response that if the limit is exceeded, an adoption order should be considered. Other consultees opposed to surrogacy proposed retention of the time limit but suggested

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111 Consultation Question 94 referred to the grant of a visa outside of the Immigration Rules, but we now understand that we should have referred to entry clearance outside the Rules.

112 Consultation Question 94, part three, para 16.72 of the Consultation Paper. This question was a multi-part question, of which this part was the fourth.

113 Consultation Question 54.

114 See para 10.104.

that the court have the power to dispense with it when this is in the best interests of the child.

16.146 Other consultees opposed to the proposal argued that making the application for a parental order a condition for entry to the UK encouraged those who might not otherwise apply for a parental order to do so. PROGAR and Nagalro went further, and recommended introducing a statutory duty to ensure that intended parents make a parental order application, suggesting that where a parental order is not applied for and the parents subsequently separate, one parent may find themselves without a legal relationship to the child.

The EU Uniform Format Form

16.147 We invited consultees' views on proposals concerning the EU UFF, which as detailed in the summary of immigration law at paragraph 16.112, was a one-way travel document onto which a visa can be placed, used where a child is stateless. The EU UFF has now been replaced by the FAV (Form for Affixing a Visa). In the Consultation Paper we considered that some of the practical problems experienced by intended parents could be alleviated by enabling the application process for the form to be commenced prior to the birth of the child.

16.148 We therefore proposed that it should be possible to open a file and begin the process for applying for an EU UFF, in respect of a child born through an international surrogacy arrangement, before the child is born. The application would need to be completed after the birth of the child.[115]

Consultation

16.149 The responses to this question followed the same lines as those to the other provisional proposals dealing with early application; that is, those consultees not opposed to surrogacy supported the provisional proposal, whereas those who took a negative view of surrogacy did not. Very few consultees gave substantive responses and those that did provided little new information.

16.150 As with the other provisional proposals dealing with early application, the main argument raised in favour of the proposal was to speed up the resolution of the family's return to the UK. Similarly, the main arguments raised against the proposal were the concern that the surrogate would not feel able to withdraw her consent, once she has contributed to the paperwork, and that the proposal would contradict the UN Special Rapporteur's recommendations.

Consultee experiences with applications for an EU UFF

16.151 We also invited consultees to provide us with evidence of the experience they had had of applying for an EU UFF for a child born through an international surrogacy arrangement. In particular, we expressed interest in hearing how long the application took after the birth of the child, and any information consultees had of causes of delays in the process.[116]

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115 Consultation Question 95.

116 Consultation Question 96.

Consultation

16.152 We received very few responses to this question. One consultee recommended the use of specialist advice when making an EU UFF application. The Law Society noted that whilst in the absence of a passport it was possible to endorse entry clearance (it used the term visa) on an EU UFF:

> At present, it can be difficult to obtain agreement to this. If a policy was produced that allows visas to be issued on such a form in cases following international surrogacy arrangements, then parents would have more certainty that the visa route could be used. The Home Office should issue a policy on how they will assist parents with this and, in doing so, consult with lawyers (such as the Law Society's Immigration Law Committee) who have experience in this area.

Analysis

Operational practice - pre-birth opening of files/applications

16.153 There is a high level of support among consultees not opposed to surrogacy for our provisional proposals to allow the opening of a file for a surrogate-born child prior to their birth, in relation to applications for a visa or for a FAV (formerly EU UFF). This is in keeping with the high level of support for our provisional proposals to allow the opening of a file, pre-birth, for a surrogate-born child's application for registration as a British citizen or for a passport.

16.154 The points discussed above in respect of the proposals for pre-birth applications for registration as a British citizen or a passport apply equally here. In particular, we emphasise that it should not become possible to make a formal application for a visa or a FAV in respect of an unborn child. Nor should it be possible for a child to be issued with entry clearance before birth. In respect of the objections made by those opposed to surrogacy and the claim by those submitting a template response claiming that our proposal contradicts the recommendations of the UN Special Rapporteur, we refer to our analysis of the relevance of these recommendations, and the UNCRC and the Verona Principles, above.[117] Similarly, we refer to the analysis above in relation to the suggestion made by one consultee that allowing a file to be opened prior to the birth of the child in a surrogacy situation would grant an unfair advantage to intended parents.

16.155 We therefore recommend that it be possible for a file to be opened, and the application process for obtaining a visa or a FAV for a child born from an international surrogacy arrangement to begin, prior to the birth of the child.[118] As with our recommendations in respect of applications for registration as a British citizen or for a passport, we do not think any change in the law would be required for a file for a visa or FAV application to be opened pre-birth.

Operational practice - documentation

16.156 Guidance on the documentation required for applications made under immigration law is just as necessary as for those made under nationality law. We recommend that

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117 Para 16.80.

118 Recommendation 81.

the Home Office provide clear guidance, in a form easily accessible to the public, on what documentation is required for such applications.

16.157 Clarity about the documentation required should also be addressed if the Home Office revisits its policy on inter-country surrogacy and immigration. We note the criticisms from professional consultees like the Law Society and the Immigration Law Practitioners' Association that the policy has not been revised to take account of changes in immigration law and procedure in 2009. We recommend that the Home Office consider producing up-to-date and clear policy guidance. This might form part of a project more generally to provide public guidance in this area, which we discuss below, although the 2009 guidance is not only aimed at the public. Any such review could dovetail with a consideration of the online application system and address consultees' suggestions that the form is amended so that the fact the application is being made in relation to surrogacy is made clear at the outset.

16.158 As we note above, no change in law is required for a file to be opened pre-birth, or for the gathering of documentation prior to the birth.

Recommendation 81.

16.159 We recommend that, in relation to applications for obtaining a visa or a Form for Affixing a Visa (FAV) for a child born from an international surrogacy arrangement:

(1) UK Visas and Immigration consider changing their operational practice to make it possible for a file to be opened, and the application process to begin, prior to the birth of the child; and

(2) the Home Office provide clear guidance, in a form easily accessible to the public, on what documentation is required for such applications.

16.160 We recommend that the Home Office produce up-to-date and clear policy guidance on inter-country surrogacy and immigration.

Bringing within the Immigration Rules the entry clearance route for intended parents who are not legal parents under nationality law

16.161 Given the high level of support among those consultees not generally opposed to surrogacy and the benefit of regularising a route and providing greater certainty to those who wish to use this route, we recommend that the route be explicitly set out within the Immigration Rules.[119]

16.162 Provision for the Immigration Rules is made by section 3(2) of the Immigration Act 1971:

> The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the

[119] Recommendation 82.

entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances… .

16.163 We consider that there is ample scope within this power for the Secretary of State to make provision to change the Immigration Rules so they provide a route for entry to the UK in line with our recommendation. As such, no further statutory provision would be required to implement our recommendation.

Relationship between the child and the surrogate

16.164 There was overwhelming support from all consultees for this proposal.

16.165 We note above[120] that we have been advised that the 2009 guidance[121] is no longer applied in practice. Notwithstanding we recommend that the Immigration Rules make clear that no breaking of ties between the child born of the arrangement and the surrogate is required for the grant of a visa.

16.166 The removal of this requirement will help give legal acknowledgement to the fact that, to varying degrees, there may be an ongoing relationship between the intended parents and the child, on one hand, and the surrogate in the foreign jurisdiction on the other. Maintaining such a relationship is likely to be in the best interests of the child in understanding their origins.

16.167 We also note the suggestions made by consultees for information on the origins of children born through surrogacy to be held by the state, and those which suggest that information should be collected and shared by foreign jurisdictions. We consider that, in part, these suggestions are answered by our creation of the Surrogacy Register in the UK, which would include international arrangements where a parental order was sought.[122] However, insofar as the suggestions go beyond what we can recommend (namely actions to be taken by other jurisdictions), this is an issue that Government could raise with foreign jurisdictions, particularly those to which UK residents and citizens are most likely to go for surrogacy arrangements.

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120 Para 16.137.

121 UK Border Agency: *Inter-country surrogacy and the Immigration Rules* (June 2009) para 56.

122 See para 13.70 and Recommendation 61.

Recommendation 82.

16.168 We recommend that:

(1) 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

(2) it should be clear within the Immigration Rules that the grant of visa or entry clearance to the child born of a surrogacy arrangement should not be dependent on the child breaking links with the surrogate nor should the grant prevent the child having contact, and an on-going relationship, with the surrogate.

Time limit for applying for a parental order

16.169 There was majority support for the proposal that we should remove the condition for the grant of entry clearance that intended parents must apply for a parental order within six months of the child's birth. However, this proposal was made on the basis that we recommended removing the time limit on an application for a parental order generally.[123]

16.170 We do not, in fact, recommend that the time limit for application for a parental order be removed[124] and, accordingly, we do not recommend that this condition for the grant of entry clearance is changed. We also note that there was opposition to the proposed reform from PROGAR, and that the Immigration Law Practitioners' Association, while supporting reform, was still concerned that removing the time limit could discourage intended parents from applying for a parental order upon their return to the UK.

16.171 Some consultees suggested that the immigration authorities in the UK should trace whether a parental order application is in fact made by the intended parents on their return to the UK. We think that the resources and administrative apparatus which would be required for this render it impractical. Moreover, it is not clear what the immigration authorities would do if they discovered that intended parents had not so applied; the only obvious remedy would be to withhold immigration status from the child, placing them in a worse position than their parents as a result. Instead, we consider that better guidance from the Government, as we suggest below,[125] together with support from UK surrogacy organisations, would be more effective in ensuring intended parents make such an application, and supporting them in doing so.

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123 Consultation Question 54.

124 Recommendation 46.

125 See para 16.206.

LEGAL PARENTHOOD

Current law

16.172 As we have explained above[126] in the UK, the legal parents of a child born through an international surrogacy arrangement are the surrogate, and (if she is married or in a civil partnership) her spouse or civil partner. This is the case regardless of whether the intended parents are recognised as the legal parents in the country of the child's birth and are named on the child's birth certificate.

16.173 As a result, where the intended parents bring the child into the UK to raise them here, it is necessary to apply for a parental order. It is only on the grant of a parental order that the intended parents become the legal parents under UK law,[127] and the parenthood of the surrogate (and of her spouse or civil partner) is extinguished.[128]

Automatic recognition of parental status following an overseas surrogacy arrangement

16.174 In the Consultation Paper we provisionally proposed that the new pathway to parenthood, under which the intended parents can be recognised as the legal parents of a child from birth, should not be available in the case of international surrogacy arrangements.[129] We have concluded that international surrogacy arrangements should be excluded from the new pathway.[130]

16.175 As we do not recommend that the new pathway be available in international surrogacy arrangements, the intended parents of children born through such arrangements will continue to need to apply for a parental order.

16.176 We noted in the Consultation Paper that there is wide disparity in surrogacy laws that exist worldwide, and wide variations in risks of exploitation between different countries. We considered that, given these wide variations, UK law should not as a matter of course recognise intended parents as the legal parents of a child born through an international surrogacy arrangement.

16.177 However, we considered that some other countries might have equivalent levels of protection against exploitation to the UK. We therefore made a provisional proposal[131] that:

(1) the Secretary of State should have the power[132] to provide that the intended parents of children born through international surrogacy arrangements, who are

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126 Paras 16.35 and 16.36.

127 Although the intended father whose sperm is used where the surrogate does not have a spouse will be the legal father under the law of England and Wales and can take steps to be under Scots law (see para 4.9).

128 We recommend elsewhere that the spouse or civil partner of the surrogate should no longer be recognised as the legal parent of the child born through surrogacy (Recommendation 4).

129 Consultation Question 98.

130 Para 8.240 onwards.

131 Consultation Question 99.

132 The power would be contained in primary legislation, and would be exercisable through secondary legislation.

recognised as the legal parents of the child in the country of the child's birth, should also be recognised as the child's legal parents in the UK, without it being necessary for the intended parents to apply for a parental order, but

(2) before exercising the power, the Secretary of State should be required to be satisfied that domestic law and practice[133] in the country in question provides protection against the exploitation of women acting as surrogates, and for the welfare of the child, at least equivalent to that provided in UK law.

16.178 We noted that it would not be practical to require that the law in other countries was the same as that in the UK: such a test would be too specific. The assessment required would be that the protections available are equivalent, despite differences in the law, to those in the UK.

Consultation

16.179 Most consultees who were not opposed to surrogacy agreed with the provisional proposal. Opposition to this provisional proposal generally came from those who were opposed to surrogacy in principle.

16.180 Several consultees who agreed with our provisional proposal highlighted that it could reduce the emotional and financial cost of applying for a parental order. Laura Wade-Gery and Simon Roberts, who had undertaken an international surrogacy arrangement as intended parents, observed that they had incurred considerable costs and stress in going through court proceedings in the UK, and said:

> We used the US precisely because it had in place many of the safeguards that the new pathway is now proposing (eg counselling, independent legal advice, a legal agreement) so at the time it felt particularly unkind and unnecessary and ultimately rather hollow (since it was hard to believe that the UK courts would recommend going into care as the alternative to our loving home where we had gone to such extraordinary lengths to have our daughter) to ask us to go through the whole procedure a second time. But those same safeguards that attracted us should be able to give the UK legal establishment comfort and allow it to recognise specific approved countries, and allow a US procedure to be automatically recognised in the UK.

16.181 The suggestion that UK court proceedings are unnecessary was also expressed by Dr Wendy Norton, who noted that participants in her research who had entered into international surrogacy arrangements had been able to establish their parental rights within the child's country of birth, and completed the paperwork necessary to allow the child to enter the UK. On that basis, they considered the extent of UK court involvement was not needed and that there should be a simpler means of establishing their legal parental status in the UK.

16.182 Other consultees drew parallels with practice in international adoptions. Resolution, which agreed with the proposal, suggested that a designated list, as in international

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[133] We noted in the Consultation Paper that by "practice" we have in mind the situation where the law of a particular jurisdiction may not explicitly require, say, a specific screening requirement but, in practice, organisations, clinics or agencies in that country always undertake that particular screening.

adoption matters, could be used to identify countries where parental status would automatically be recognised

16.183 Thorntons Law LLP, which agreed with the proposal, considered it would help direct intended parents towards particular countries in a way that could reduce exploitation:

> This would help to reduce implications arising from international surrogacy arrangements, as intended parents may look to certain recognised countries who hold equivalent protection against the exploitation of surrogates and for the welfare of the child to the UK.

16.184 In contrast, consultees who opposed the proposal, or neither agreed nor disagreed, expressed concerns about exploitation. Cafcass queried how the proposal would guard against the exploitation of international surrogates and observed that a substantial monitoring role would be required, particularly for less established or well-known arrangements. Other consultees also highlighted the importance of monitoring and noted, for example, that the laws in other countries may change after the Secretary of State's power had been exercised.

16.185 One consultee made the point that even where a jurisdiction had put in place protective legal measures, the Secretary of State might not be well placed to ascertain how surrogacy practice operated there.

16.186 The majority of those opposing the proposal submitted a template response produced by Nordic Model Now!, which argued that the proposal would not align with the UN Special Rapporteur's recommendations and the Hague Convention on the Protection of Children and Cooperation in respect of Intercountry Adoption of 1993. In particular, the template response stated that the proposal would not comply with the foregoing legal framework because legal parenthood would be transferred at birth without judicial oversight.

16.187 Dr Alan Brown considered that the proposal was contrary to the project's objective of encouraging domestic surrogacy and, as such, discouraging intended parents from entering surrogacy arrangements overseas.

16.188 Several consultees noted the difficulties of assessing what would make law and practice in a jurisdiction equivalent to the UK in terms of protection and the criteria for doing so. One consultee noted that requiring equivalence could make the provisions unusable and could prevent recognition in US states which permitted commercial surrogacy; they took the view that provided the Secretary of State was satisfied that a jurisdiction prevented exploitation and protected child welfare, automatic recognition should be allowed.

16.189 Other consultees, whether agreeing, disagreeing, or taking no view on the issue, highlighted the importance of judicial oversight in international surrogacy arrangements. One consultee suggested that the issue of whether parentage should be recognised was one that could be overseen by the courts, as a separate process to applications for a parental order.

Analysis

16.190 We have concluded that we should not recommend such a power for the Secretary of State. As Dr Alan Brown identified, the proposal can be seen to be fundamentally at odds with one of the underlying policy objectives of our reforms: to encourage intended parents seeking surrogacy to undertake domestic surrogacy in the new pathway, rather than international surrogacy.

16.191 While the other proposals already made with regard to international arrangements correct inconsistencies or failings in nationality and immigration law as they apply to surrogacy arrangements, this proposal entirely sidesteps the need for a domestic process to recognise parenthood. At the time of the Consultation Paper, we felt that there was some force in the argument for enabling intended parents to do so where an equivalent level of protection was provided in the domestic law of the country in which the surrogacy takes place. We no longer hold that view.

16.192 We have reached this conclusion primarily because nearly all international surrogacy destinations operate commercial surrogacy. We accept that those destinations vary widely in the risk of exploitation of women acting as surrogates, and their protection (or lack thereof) of the welfare of the children born of surrogacy. However, we do not think that automatic recognition of legal parental status after a commercial surrogacy arrangement is consistent with our recommendations on domestic payments to surrogates. In Chapter 12 of this Report we have explained that one of the key objectives in our recommendations in relation to payments has been to ensure that women are not financially induced to become surrogates. As a result, our recommendations do not permit payments to the surrogate in respect of the gestational services that she provides in carrying the child for the intended parents.[134]

16.193 Our provisional proposal would require the Secretary of State to be satisfied that there is the same level of protection against the exploitation of women in the overseas jurisdiction as there is in the UK. We consider that it would be inconsistent to say that there is an equivalent protection against exploitation in jurisdictions which permit commercial surrogacy, when such payments are not permitted in domestic arrangements in order to guard against exploitation. It would therefore, in our view, be inappropriate for the Secretary of State to exercise any such power in relation to jurisdictions permitting commercial surrogacy. Given the prevalence of commercial surrogacy international arrangements, we do not consider that the power would have practical significance when it could not be exercised in relation to those jurisdictions.

GUIDANCE ON INTERNATIONAL SURROGACY ARRANGEMENTS

16.194 We noted in the Consultation Paper that one of the reasons intended parents encounter difficulties bringing a child into the UK, and a key cause of delay, is because they are unaware of the process that they will need to follow. It was suggested to us that intended parents often do not think about the issue until the surrogacy arrangement is under way, the surrogate is pregnant, or the child has been born. We observed that this situation is not helped by the fact that UK Government guidance on international surrogacy is spread across a number of different sources;

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134 Recommendation 54.

is, in some places, out of date; and that each piece of guidance reflects the different responsibilities of each department or agency that produced it.

16.195 We further noted that, in another context, the Department of Health and Social Care had already produced guidance (at the time of the Consultation Paper, applicable in England and Wales, but since updated and also provided for Northern Ireland) for those entering into a surrogacy agreement, and for healthcare professionals involved in caring for surrogates and intended parents.[135]

16.196 We therefore proposed 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, and invited consultees to indicate whether or not they agreed.[136]

Consultation

16.197 Nearly all consultees who responded agreed with the proposal, except for consultees who are opposed to surrogacy. Of those consultees who were generally opposed to surrogacy, many neither agreed nor disagreed, but made a comment.

16.198 Consultees expressed their views that the existing guidance was inadequate, suggesting it was out of date, complicated, and contained in different places. It was noted that guidance needed to be maintained and updated regularly.

16.199 One consultee who agreed with the proposal also raised the question of whether the UK Government also had a duty to provide guidance and information to international surrogates.

16.200 OBJECT disagreed with the proposal, considering the provision of guidance on international surrogacy arrangements by Government to be "validation of the practice of surrogacy as a commercial exchange, opposed by many international organisations".

Content of guidance

16.201 NGA Law and Brilliant Beginnings made recommendations for the content of any guidance.

> We think any guidance should be clear about the steps which should be taken to enter the UK with a child born through surrogacy in the UK, and the different routes to British nationality. It should reflect family law accurately, both to the extent that family law provisions and processes affect nationality, but also in order to highlight wider issues which parents should be aware of in a joined-up way. Finally, the

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135 Department of Health and Social Care, *The surrogacy pathway: surrogacy and the legal process for intended parents and surrogates in England and Wales*, and *Care in surrogacy: guidance for the care of surrogates and intended parents in surrogate births in England and Wales* (February 2018, updated July 2021). Department of Health, *Care in Surrogacy in Northern Ireland – Guidance for intended parents and surrogates* (2019); Department of Health, *Care in Surrogacy in Northern Ireland – Guidance for Healthcare Professionals caring for Surrogates and Intended Parents in Surrogate Births* (2019). Although the Scottish Government has not issued specific guidance on surrogacy at this time, it provides brief general information on the Scottish Government website: https://www.mygov.scot/surrogacy (last visited 23 March 2023).

136 Consultation Question 97.

guidance on the documentation which needs to be provided in support of each application should be set out clearly in one place.

16.202 Other consultees considered that the guidance should include information for intended parents on the importance of children knowing their origins. Dr Katherine Wade (legal academic) suggested that guidance could also be used to inform intended parents of the negative effects on children's rights of using anonymous gametes or anonymous surrogates on children's rights. Similarly, PROGAR and Nagalro noted that guidance should stress the importance of openness with the surrogate-born child, but also with the children of surrogates, the existing children of intended parents and any other children affected.

16.203 Some consultees also thought that the guidance would be helpful for professionals and help them to provide better services. One legal practitioner considered that there should be a guide for employees of the immigration services.

16.204 Nordic Model Now! and those submitting their template response agreed with the provision of guidance, but wanted it to contain specific content, explaining why surrogacy is a violation of the human rights of women and children.

16.205 SurrogacyUK, which agreed to the proposal, did so on the condition that the guidance covered domestic surrogacy arrangements, and included an explanation of the different processes involved in the two types of arrangement.

Analysis

16.206 Given the responses from consultees we recommend that the 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.

16.207 As noted by Mills & Reeve LLP, it would be important for any such guide to be maintained and updated regularly. PET also commented that there needed to be a plan for disseminating the guidance as well, and we agree that thought should be given as to how to make it easy to access the guidance (for example, the use of electronic channels and social media).

16.208 We note the number of suggestions raised by consultees as to what the guidance should provide. We make no recommendations in this respect as we consider that it is for the UK Government agencies producing the guidance to determine its scope and content.

16.209 In response to SurrogacyUK, however, we think that the guidance should be confined to international surrogacy arrangements, rather than covering domestic arrangements. There are two reasons why we do not think it is practical or desirable to do so.

(1) First, different Government departments will be responsible for the two sets of guidance and will want to maintain control over their respective areas, which may need to be updated at different times.

(2) Secondly, we think that presenting information about international agreements to intended parents searching for guidance on domestic agreements will give

equal visibility and credence to both forms of surrogacy. We think it would run contrary to the intention of encouraging domestic arrangements over international ones if intended parents could not access information about domestic surrogacy arrangements without also being given information on an international "route".

16.210 Rather than the proposed new guidance also covering domestic agreements, we think the existing guidance for those entering into a surrogacy agreement should be updated to include an explanation of the new pathway. We did not specifically consult on this point, but it is both necessary and uncontroversial – if our recommendations for the new pathway are enacted, all involved will need to be made aware of that change to the law.

Recommendation 83.

16.211 We recommend that:

(1) 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; and

(2) the existing guidance on surrogacy, produced by the Department of Health and Social Care, for those entering into an agreement be updated to include an explanation of the new pathway.

SURROGACY ARANGEMENTS IN THE UK WITH FOREIGN INTENDED PARENTS

16.212 Foreign intended parents who enter a surrogacy agreement in the UK will not generally meet the criteria for the grant of a parental order. This general position will not be affected by our recommendation that intended parents' habitual residence in the UK (as an alternative to domicile) would qualify them to make an application.[137] That recommendation is not directed at intended parents whose only connection to the UK is entering into a surrogacy agreement.

16.213 We expressed concern in the Consultation Paper that foreign intended parents could establish habitual residence in order to enter into a surrogacy agreement, and that there is a risk that allowing parental order applications to be based on habitual residence could result in surrogacy tourism to the UK.[138] However, as we note in Chapter 6,[139] we were particularly persuaded by the responses from law firms and legal representative bodies on this point. We did not see evidence that introducing habitual residence as an alternative to domicile would give rise to surrogacy tourism. Under our recommendations, intended parents seeking a parental order via habitual

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137 Recommendation 23. Under the current law, foreign intended parents will not be able to obtain a parental order unless they are domiciled in the UK, because domicile is a requirement of the grant of a parental order; Human Fertilisation and Embryology Act 2008, s 54 and 54A.

138 Consultation Paper, para 12.13.

139 Paras 6.181.

residence would need to show that they were habitually resident both at the time of applying for and at the time of the making of the parental order.[140] We do not consider that foreign intended parents coming to the UK for surrogacy will have sufficient links to the UK to establish habitual residence.

16.214 The only option for such foreign intended parents who cannot establish habitual residence or domicile would therefore be to remove the child from the UK and apply for an adoption order or the equivalent of a parental order in their home country (which, of course, may be their intention). At the point of removing the child from the UK, those intended parents would not both be the legal parents of the child, although one of them could be.[141]

16.215 We noted in the Consultation Paper that restrictions might be necessary to prevent intended parents leaving the UK with the child for this purpose without judicial oversight. We were concerned to protect the child's welfare and avoid the risks of exploitation and trafficking associated with international surrogacy arrangements, which we considered; for these reasons we did not wish to encourage people to come to the UK simply for the purpose of surrogacy.

Current law

16.216 At present, if it is possible for the foreign intended parents to obtain an order equivalent to a parental order in their home country, the (UK) surrogate (as legal mother) could travel with the child to facilitate such an application, or provide written authority for the intended parents to do so in her absence, assuming that the child also had a passport or way of entering the country of destination. There are no other restrictions to the intended parents removing the child from the UK to make this application.

16.217 By contrast, as we observed in the Consultation Paper, in adoption cases overseas adoptive parents require the court's permission to remove the child from the UK for this purpose, in order to protect against child slavery and trafficking, and to promote children's welfare.[142]

Comparison with current law on adoption by overseas adoptive parents

16.218 Section 85 of the Adoption and Children Act 2002 ("the ACA 2002") for England and Wales, and section 60 of the Adoption and Children (Scotland) Act 2007 ("the AC(S)A 2007") for Scotland, impose restrictions on taking children who are Commonwealth citizens, or habitually resident in the UK, out of the UK for the purpose of adoption. These sections make it a criminal offence to remove a child from the UK, unless the

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140 Recommendation 23(2).

141 One of the intended parents could be the child's genetic parent, or a legal parent by operation of the agreed parenthood provisions of the HFE Act, ss 36 and 43.

142 R Cabeza, "Family: Adoption without borders?" (2009) 159 *New Law Journal* 1310

proposed adopters have obtained an order under section 84 of the ACA 2002 or section 59 of the AC(S)A 2007.[143]

16.219 An order under section 84 of the ACA 2002 or section 59 of the AC(S)A 2007 acts like an adoption order, in that it confers on the applicant parental responsibility for the child, and extinguishes the parental responsibility of any other person.[144]

16.220 When the court is deciding whether to make an order under section 84 of the ACA 2002, the child's lifelong welfare is the court's paramount consideration (along with the checklist contained in section 1 of that Act).[145] The need to safeguard and promote the child's lifelong welfare is also the court's paramount consideration when deciding whether or not to make an order under section 59 of the AC(S)A 2007.[146] The court would also, so far as is reasonably practicable, have regard in particular to the factors in section 14(4) of the AC(S) A 2007.[147]

16.221 Before the court can make an order under section 84, it must be satisfied that the relevant requirements prescribed by the Adoptions with a Foreign Element Regulations 2005[148] have been met. Similarly, in Scotland, before the court can make an order under section 59, it must be satisfied that the relevant requirements prescribed by the Adoptions with a Foreign Element (Scotland) Regulations 2009[149] have been met.[150] These regulations place requirements on both the UK adoption agency and the relevant foreign authority[151] and aim to prevent adoptive parents circumventing the requirements of UK adoption law.

16.222 The requirements of the regulations are detailed in the Consultation Paper.[152] Broadly, the regulations cover – in respect of the domestic agencies – the making of reports about the child to be adopted (and their health), the suitability of the intended parents, a record of visits and review by the agency and the recommendations of its

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143 The offence also extends to people who negotiate or initiate arrangements which have the purpose of facilitating the removal of a child from the UK, unless the proposed adopters have obtained an order under ACA 2002, s 84: ACA 2002, ss 60(2) and 85(2).

144 ACA 2002, s 84(5); AC(S)A 2007, s 59(5).

145 The Adoptions with a Foreign Element Regulations 2005 (SI 2005 No 392), reg 11(1)(a).

146 AC(S)A 2007, s 14(3) as applied by the Adoptions with a Foreign Element (Scotland) Regulations 2009 (SSI 2009 No 182), reg 9(1).

147 AC(S)A 2007, s 14(4) as applied by the Adoptions with a Foreign Element (Scotland) Regulations 2009 (SSI 2009 No 182), reg 9(1).

148 The Adoptions with a Foreign Element Regulations 2005 (SI 2005 No 392).

149 The Adoptions with a Foreign Element (Scotland) Regulations 2009 (SSI 2009 No 182).

150 AC(S)A 2007, s 59(3).

151 This term meaning "a person, outside the British Islands performing functions in the country in which the child is, or in which the prospective adopter is, habitually resident which correspond to the functions of an adoption agency or to the functions of the Secretary of State in respect of adoptions with a foreign element" (the Adoptions with a Foreign Element Regulations 2005, (SI 2005 No 392), reg 2) or a "person or body outwith the British Islands performing functions in the country in which the child, or the prospective adopter, is habitually resident which correspond to the functions of an adoption agency or to the functions of the Scottish Ministers in respect of adoptions with a foreign element" (The Adoptions with a Foreign Element (Scotland) Regulations 2009 (SSI 2009 No 182), reg 2).

152 Consultation Paper, paras 16.105 to 16.109.

adoption panel. The foreign agency must also prepare a report on the suitability of the adopter(s), including their eligibility to adopt, confirm that counselling and an explanation of legal implications has been provided to the adopters, and that the child will be authorised to enter and reside in the foreign territory. There are also requirements as to how long the child should have been living with the adoptive parents.

Application of adoption requirements to international surrogacy arrangements

16.223 The potential application of sections 84 and 85 of the ACA 2002 in a surrogacy case has already been recognised in the case of *Re G (Surrogacy: Foreign Domicile)*.[153] The case concerned a surrogacy agreement entered into by Turkish nationals who came to the UK for the surrogacy agreement. They were unable to obtain a parental order, as they were not domiciled in the UK. The court held that the way forward was for the couple to adopt the child in Turkey. In order for this to happen, and to prevent a breach of section 85 of the ACA 2002, the High Court made an order under section 84 of that Act.

16.224 The sections of the ACA 2002 and AC(S)A 2007 discussed above are therefore only currently relevant where the only way for intended parents to acquire legal parenthood in their home country is for them to adopt the child born following a surrogacy agreement. If an order equivalent to a parental order is available, then there is no equivalent to the protection offered by these sections for the child born of a surrogacy agreement in the UK to foreign intended parents.

Areas of reform

16.225 In the Consultation Paper we considered whether, in cases where the foreign intended parents wish to apply for the equivalent of a parental order (and not an adoption order) in their home country, there should be restrictions on them removing their child from the UK for this purpose. For example, should the court be required to make an order that removal would be in the child's best interests, in a similar (but not identical) fashion to the process in international adoption described above?

16.226 We noted that it would not be possible to establish an exact equivalent procedure given that the infrastructure relied upon in adoption cases does not exist for surrogacy agreements. As we set out above, an order under section 84 of the ACA 2002 or section 59 of the AC(S)A 2007, requires the involvement of both the domestic adoption agency and the foreign authority. There are no equivalent organisations in place for surrogacy.

16.227 However, we suggested that it might be possible for RSOs to fulfil a role in this process. We suggested that such organisations could fulfil a role in providing information needed by the court to make a decision on the removal of the child from the jurisdiction for the purposes of a parental order being made overseas. We noted,

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153 [2007] EWHC 2814 (Fam), [2008] 1 FLR 1047. *Re G (Surrogacy: Foreign Domicile)* was considered in *Re Q (A child) (Parental Order: Domicile)* [2014] EWHC 1307 (Fam), also *AB v CT (Parental Order: Consent of Surrogate Mother)* [2015] EWFC 12 and applied (without discussion) in *Re JB (A child) (Surrogacy: Immigration)* [2016] EWHC 760 (Fam). However, none of those cases involved the couple having to undertake international adoption proceedings.

however, that some UK surrogacy organisations might not wish to be involved in surrogacy agreements involving foreign intended parents.

Experience of surrogacy agreements in the UK involving foreign intended parents

16.228 We sought consultees' views on the issue of surrogacy agreements in the UK involving foreign parents.[154] First, we invited consultees to tell us of their experience of such surrogacy agreements.

Consultation

16.229 NGA Law and Brilliant Beginnings said that they had been involved in a small number of cases involving UK surrogates and parents from outside the UK. Most of these cases were uncompensated agreements between friends or family, as well as two cases involving overseas couples matching with UK surrogates through Facebook groups. They commented that they were "regularly approached by intended parents from outside the UK who hope to access UK surrogacy because it is prohibited or too expensive in their own country", but usually encouraged these individuals to look elsewhere. NGA Law and Brilliant Beginnings noted that they had not yet been involved in a case where they had made an application to the court under section 84 of the ACA 2002.

16.230 Another legal practitioner said that in her experience, after receiving advice foreign intended parents chose not to use the UK as a destination for surrogacy, on the basis that the surrogate would not be happy to remain the legal mother.

16.231 The Law Society said that it had not heard from any of its members who had experience of surrogacy agreements in the UK involving foreign intended parents, but acknowledged that the situation in *Re G (Surrogacy: Foreign Domicile)*[155] could be replicated. Similarly, the Law Society of Scotland noted that from its experience there was little evidence of such situations happening in practice.

Restrictions on removing children from the UK who are born to foreign parents through a UK surrogacy agreement

16.232 We also invited consultees to provide their views as to whether:

(1) any restriction is necessary on the removal of a child from the UK for the purpose of the child becoming the subject of a parental order, or its equivalent, in another jurisdiction; and

(2) if such a restriction is necessary, there should be a process allowing foreign intended parents to remove the child from the jurisdiction of the UK for this purpose and with the approval of the court and, if so, what form that process should take.[156]

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154 Consultation Question 100. This question was in two parts, of which the request for consultees' experiences of surrogacy arrangements in the UK involving foreign intended parents was the first part.

155 [2007] EWHC 2814 (Fam), [2008] 1 FLR 1047.

156 Consultation Question 100, part two.

Consultation

16.233 Nearly all consultees agreed that restrictions on removing children from the UK who are born to foreign parents through a UK surrogacy agreement should be put in place. Consultees noted the importance of such provision to protect the child and surrogate from trafficking and exploitation and as a means of discouraging intended parents from seeing the UK as a surrogacy destination.

16.234 There were two notable exceptions to the general consensus in favour of restrictions. One consultee argued that foreign intended parents should have the same rights as domestic intended parents. Another consultee considered that such restrictions were unnecessary if the requirements of the new pathway have been complied with, even though legal parentage could not be conferred because the intended parents were not domiciled or habitually resident in the UK.

16.235 Consultees discussed different methods of how restrictions might operate, with the most popular option being obtaining a court order permitting removal from the jurisdiction.

16.236 Some consultees, mostly legal practitioners and organisations, suggested either that restrictions should mirror those in the parental order process, or that the parental order process should be amended to allow foreign parents to obtain a parental order. One consultee noted that designing the process could be difficult because of the different legal requirements that the intended parents will need to follow once they have returned to their home country.

16.237 Mills & Reeve LLP took the view that the court should consider the best interests of the child when deciding whether removal from the jurisdiction was appropriate. This deliberation could include consideration of whether a parental order would have been made, had the parents not been living overseas, and whether an equivalent order to a parental order would be made in the foreign jurisdiction. Another consultee commented that the court should conduct a welfare assessment, similar to that which would be carried out in a parental order application

16.238 Other consultees suggested changes to the existing law governing applications for a parental order, or interpretation of that law. Resolution suggested that the court could stretch the meaning of ‘habitual residence’ for 12 months to include foreign intended parents who came to the UK to enter a surrogacy arrangement, allowing them to obtain a parental order, which could be required before removal of the child from the jurisdiction. It argued that the court could consider that the close link intended parents would have to the UK for the duration of the pregnancy, as well as pre-pregnancy and post-birth connections might allow a court to decide that the intended parents had acquired habitual residence (or an additional habitual residence) in the UK by virtue of the surrogacy arrangements.

16.239 The Law Society referred to its suggestion that the requirements for a parental order application be altered to be brought into line with those for adoption law. This would allow an application for a parental order to be made if both intended parents had been domiciled or habitually resident in the UK for at least 12 months. The Law Society suggested that this change would discourage intended parents from using the UK as a surrogacy destination. It noted that if intended parents could not meet this

requirement, they could still make an application under section 84 of the ACA 2002, although the complexity of the process might be a deterrent.

16.240 Several consultees were in favour of restrictions similar to the international adoption process being imposed. The Family Justice Council suggested that if foreign intended parents could not establish habitual residence, then they could make an application to the court for leave to remove the child from the jurisdiction, and/or possible foreign adoption. The court could then make a determination as to whether removal was in the child's best interests, with the surrogacy organisations providing information to the court for this purpose.

16.241 This approach was also favoured by those submitting the template response produced by Nordic Model Now!, which suggested that the process following a surrogacy arrangement here should include the same checks as would be used in an international adoption.

16.242 In contrast to those consultees suggesting that a court order should be required to remove the child, Dr Rita D'Alton Harrison suggested that the restrictions should be administrative in nature and applied by the UK Border Agency[157] and embassies, rather than through the courts.

Analysis

16.243 At present, there is very limited oversight when children are removed from the UK for the purpose of the intended parents applying for a parental order; as we have seen, that contrasts with the position where the child is being removed from the UK for the purpose of adoption.

16.244 Given the responses of consultees, and the good arguments for doing so – principally to protect the welfare of the child and to discourage any attempt to turn the UK into a surrogacy destination – we think that there is a strong case for introducing restrictions. We set out below our recommendations for those restrictions and, where appropriate, our suggestions for how those recommendations might best be implemented.

Requirement for an order authorising removal of the child from the jurisdiction

16.245 Our view is that the only practical way for the restriction to operate would be to place a requirement for foreign intended parents to apply to the courts for authorisation to remove the child from the UK for the purpose of obtaining a parental order or its equivalent overseas.

16.246 The requirement to apply for a court order would therefore be the equivalent, for surrogacy arrangements, to the existing provision in legislation that regulates the situation where a child is being removed from the UK for the purpose of being the subject of an adoption order overseas.

16.247 We recommend that the paramount consideration for the court, as for the making of a parental order, or for an order under section 84 of the ACA 2002 or section 59 of the AC(S)A 2007, would be the child's welfare throughout his or her life. The court would

[157] No longer in existence.

assess whether the child's welfare would be best served by the child's removal from the UK by the intended parents.

16.248 We remain of the view expressed in the Consultation Paper that it is not possible, or appropriate, for the process fully to mirror that described above for adoption cases. There is simply not the infrastructure to support that process.

16.249 We suggest, therefore, that the process for surrogacy could require the court to appoint a parental order reporter (in England and Wales) or curator *ad litem*/reporting officer (in Scotland). The parental order reporter/curator *ad litem* would produce a post-birth report, similar to that required for a parental order, but with the exception of the requirement that the intended parents demonstrate the link to the jurisdiction of the UK.

16.250 We suggest that this duty to appoint a parental order reporter/curator *ad litem* may most appropriately be imposed by way of court procedural rules, which would be in line with the current approach. This could be done by amendment of, for England and Wales, the Family Procedure Rules 2010 and for Scotland amendment of the Rules of the Court of Session 1994[158] and in the Sheriff Court, the Child Care and Maintenance Rules 1997.[159]

16.251 Given the potential lack of infrastructure to support such arrangements in foreign jurisdictions, we do not think that there should be strict requirements as to the involvement of specified foreign agencies or government bodies. It should be up to the UK courts to indicate what evidence, in excess of that required for a parental order, they would require from the country to which the child would be taken. The court might, for example, require a criminal records check from the foreign jurisdiction on the intended parents. If a RSO had been involved in the UK, then the parental order reporter or curator *ad litem* might also seek evidence from that organisation as to its involvement and on any aspect of the surrogacy arrangement. Any new Code of Practice for RSOs could provide that they should cooperate with such requests for information from the court.

16.252 We consider that, for an order to be made permitting removal of the child from the jurisdiction, the intended parents should meet the following parental order requirements:

(1) that there is a surrogacy arrangement, using the gametes of one of the applicants;

(2) that they are in a qualifying relationship (where there are joint applicants);

(3) that the intended parent applicants and surrogate meet the minimum age requirements;

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158 Act of Sederunt (Rules of the Court of Session 1994) 1994, SI 1994/1443 (s.69)

159 Act of Sederunt (Child Care and Maintenance Rules) 1997, SI 1997.291 (s.19)

(4) that the applicants have applied for the order within six months of the birth of the child, subject to the court having the ability to allow applications outside that period, in line with our recommendation for the reform of parental orders;

(5) that the child's home is with the applicants;

(6) the surrogate's consent should be obtained but, if it is not, this will not preclude the making of the order (given that the child's welfare will be the court's paramount consideration); and

(7) that no money – except for payments under the reformed law on payments – had been given or received in consideration of the making of the order, the surrogate's agreement, the handing over of the child to the applicants or the making of arrangements with a view to the making of the order (or that the court has authorised any such overpayments).[160]

16.253 We propose that the surrogate should not be able to provide consent to the application for an order until six weeks after the birth of the child. This would mean that the court could not make an order permitting removal of a child until that time has elapsed. This provision is intended to provide an equivalent to the international adoption regime,[161] which provides that application for an order may not be made unless the child has lived with the prospective adopters for the period of 10 weeks preceding the application. It also provides consistency with the parental order process, in which the surrogate cannot provide consent to an application for a parental order until six weeks after the birth of the child.

Parental responsibilities

16.254 With regard to adoption, the impact of being granted an order under section 84 of the ACA 2002 or section 59 of the AC(S)A 2007 is to confer parental responsibility/PRRs on the prospective adoptive parent, creating an established legal relationship between parent and child prior to removal. We consider this would also be beneficial when foreign intended parents propose removing the child from the UK for the purpose of applying for the equivalent of a parental order in their home jurisdiction. This would remove the need for the surrogate to travel with the intended parents back to their home country, or for her to provide her explicit permission for them to do so (at least, from the point of view of the law in this jurisdiction). It would also ensure that the intended parents could make important decisions for the child, for example relating to medical treatment, without requiring the surrogate's consent.

16.255 A related question is whether the surrogate's parental responsibility/PRRs should be extinguished upon the granting of the court order permitting removal from the UK. If the order were to have the same effect as a section 59 or section 84 order, that would be the result. We note that the surrogate's spouse or civil partner will not be a legal

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[160] Any civil penalty regime that applies to parental order applications should also be available in these applications). See para 12.263 onwards.

[161] ACA 2002, ss 84(4), and AC(S)A 2007, s 59(4).

parent and thus not have parental responsibility/PRRs via this route, if our recommendation on that issue is accepted.[162]

16.256 If the court has decided that removal, with the intent to apply for the equivalent of a parental order overseas, is in the child's best interests, it is difficult to see why the surrogate practically needs to continue holding parental responsibility/PRRs for the child after the order is made. It might also be the case that it would present problems for the granting of the foreign parental order or its equivalent if the surrogate retained parental responsibility/PRRs under UK law.

16.257 On the other hand, extinguishing the surrogate's parental responsibility/PRRs could encourage surrogacy tourism to the UK. While the foreign intended parents still could not apply for a parental order in the UK, unless domiciled or habitually resident in the UK, they could potentially obtain exclusive parental responsibility/PRRs for the child prior to leaving the UK, which may be very attractive. Although this is a concern, we note that consultees, including NGA Law and Brilliant Beginnings, reported that foreign intended parents tend to be dissuaded from pursuing UK surrogacy when they learn that the surrogate's legal parental status cannot be extinguished in UK law, due to the unavailability of a parental order. As this would continue to be the case, the level of surrogacy tourism to the UK might be unaffected if the effect of the order permitting removal of the child were to extinguish the surrogate's parental responsibility/PRRs.

16.258 Finally, we note that the issue of parental responsibility/PRRs may be affected by whether the surrogate has provided her consent to the order being made. Whilst we consider an order permitting removal of the child would usually be made with the surrogate's consent, the exception would be if she had changed her mind about the surrogacy arrangement. In such a case the court would take her refusal of consent into account when deciding whether to grant the order.

16.259 Bearing in mind these considerations, we consider that the best, and most cautious, approach would be for the making of the order permitting removal to extinguish the surrogate's parental responsibility/PRRs, where she has provided her consent to removal. Where the surrogate has not provided such consent, the court should have the discretion to decide whether the making of the order permitting removal should extinguish the surrogate's parental responsibility/PRRs. If the surrogate's parental responsibility/PRRs are not extinguished at the time that the order is made, then they should be extinguished automatically on the later making of a parental order (or equivalent) in the foreign jurisdiction.

The surrogate's parental status

16.260 The surrogate's parental responsibility/PRRs are separate from her legal parental status. We have considered whether the surrogate's legal parental status under the law in this jurisdiction should be terminated by or at the same time as an order being made permitting removal of the child from the jurisdiction, but have concluded that it should not.

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[162] Recommendation 4.

16.261 If the surrogate's legal parental status remains unchanged, then the surrogate remains the legal parent (under UK law) following the making of the foreign parental order.

16.262 Retaining parental status may be detrimental for the surrogate in that she remains, in this jurisdiction, the mother of a child who is not part of her family (but could, for example, inherit from her under UK law). More importantly, it may be detrimental for the child in the sense that it could create conflict around their identity and understanding of their family.

16.263 On the other hand, given that the child will be growing up in a different jurisdiction, under the law of which the surrogate will not be the legal mother (assuming that the parental order or its equivalent is made) practical conflict, if any, is likely to be very limited. We are very concerned that, were we to recommend that the court should terminate the legal parental status of the surrogate, the UK would become an attractive destination for surrogacy arrangements. This has been the case in the USA and Ukraine, where the surrogate is not the legal mother of the child born to international intended parents. We do not wish to take steps that would promote the UK as a surrogacy destination.

16.264 Terminating the surrogate's parental status would also run contrary to the best interests of the child, as no-one would then have legal parental status in respect of the child unless and until the intended parents become the child's legal parents through the grant of a parental order (or equivalent) in their country of residence.

16.265 We therefore do not recommend any change to the surrogate's legal parental status as a result of the making of an order permitting the foreign intended parents to leave this jurisdiction with the child born of the surrogacy arrangement.

16.266 We also consider that providing the court with the power to remove legal parental status from the surrogate, in a situation where the child will not be living in this jurisdiction, would overstep necessary limits to the jurisdiction of the courts of England and Wales, and Scotland. The intended parents would not, of course, be prevented from becoming the child's legal parents under the law of their home jurisdiction, as they intend (subject to meeting any requirements under that law). While the disparity in legal parental status between jurisdictions may be regrettable, we consider that it can only be solved by international agreement, along the lines of a new Hague Convention, and falls outside the scope of this project.

Criminal offences

16.267 In keeping with our intent to create equivalent provision for surrogacy arrangements to that regulating removal of a child from the UK for the purposes of international adoption, we consider criminal offences are required to mirror those in section 85 of the ACA 2002 and section 60 of the AC(S)A 2007. We therefore recommend that the removal of a child from the UK for the purpose of becoming the subject of an order equivalent in that jurisdiction to a parental order, where that child is not the legal child of the intended parents, be a criminal offence, unless an order is obtained from the court.

16.268 We note that the offences under section 85 of the ACA 2002 and section 60 of the AC(S)A 2007 set different punishments. The penalties for the offences are six to 12 months' imprisonment in England and Wales, depending whether on summary conviction, or conviction on indictment, or, in Scotland, three months. We recommend that the new offence which will be the same across both jurisdictions, should carry a penalty in each jurisdiction which mirrors that for the offences in section 85 of the ACA 2002 and section 60 of the AC(S)A 2007, respectively, to enable consistency with the approach taken for adoption.

Recommendation 84.

16.269 We recommend that:

(1) a child should not be removed from the UK for the purpose of the child becoming the subject of a parental order, or its equivalent, in another jurisdiction, without obtaining an order of the court and it should be an offence to remove a child from the UK for that purpose;

(2) the new offence be the same across both jurisdictions, be summarily triable, and carry a penalty in each jurisdiction which mirrors that for the offences in section 85 of the Adoption and Children Act 2002 and section 60 of the Adoption and Children (Scotland) Act 2007, namely:

(a) in England and Wales, imprisonment for a term not exceeding the maximum term for summary offences or a fine, or both; or

(b) in Scotland, imprisonment for a term not exceeding 3 months or a fine not exceeding level 5 on the standard scale, or both.

(3) in deciding whether to grant an order permitting removal of the child from the jurisdiction, the court's paramount consideration shall be the welfare of the child throughout their life;

(4) for an order to be made permitting removal of the child from the jurisdiction, the following requirements must be met:

(a) that there is a surrogacy arrangement, using the gametes of one of the applicants;

(b) that they are in a qualifying relationship (where there are joint applicants);

(c) that the intended parent applicants and surrogate meet the minimum age requirements;

(d) that the applicants have applied for the order within six months of the birth of the child, subject to the court having the ability to allow applications outside that period;

(e) that the child's home is with the applicants;

(f) that the surrogate's consent should be obtained but, if it is not, this will not preclude the making of the order; and

(g) that no money – except for permitted payments under the reformed law on payments – has been given or received in consideration of the making of the order, the surrogate's agreement, the handing over of the child to the applicants or the making of arrangements with a view to the

making of the order (or that the court has authorised any such overpayments).

(5) on such an application being made, the court must appoint a parental order reporter (in England and Wales) or curator *ad litem* (in Scotland);

(6) the making of the order:

(a) 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;

(b) with respect to its effect on the parental responsibility/PRRs of the surrogate at the time that the order is made:

(i) if the surrogate consents to the order, will extinguish the surrogate's parental responsibility/PRRs;

(ii) if the surrogate does not consent to the order, may, at the court's discretion, extinguish the parental responsibility/PRRs of the surrogate; and

(7) if not extinguished at the time that the order is made, the parental responsibility/PRRs of the surrogate will be extinguished by the later making of a foreign parental order, or its equivalent; and

(8) the making of the order will not extinguish the surrogate's legal parental status.

16.270 Clause 120 of the draft Bill governs restrictions on taking children out of the UK and creates the offence of removing the child from the jurisdiction, unless the intended parents are the legal parents of the child under clause 4(1) of the draft Bill, or have parental responsibility/PRRs (whether under clauses 32 or 35, or 116 or 118 of the draft Bill). Clause 116 of the draft Bill applies to England and Wales and clause 118 to Scotland, providing the ability for the court to grant the intended parents parental responsibility / PRRs, and setting out the requirements to be met for such an order to be made. Together, these clauses give effect to parts 1 to 5 of this recommendation.

16.271 Clauses 117 (England and Wales) and 119 (Scotland), setting out the consequential effect of orders for parental responsibility/PRRs under clauses 116 and 118, give effect to parts 6 and 7 of the recommendation. These clauses do not make provision for extinguishing the surrogate's legal parental status, giving effect to part 8 of the recommendation.

Chapter 17: Recommendations

Recommendation 1.

17.1 In respect of a domestic surrogacy agreement, we recommend that, where:

(1) before the child is conceived, the intended parents, surrogate, and Regulated Surrogacy Organisation (RSO) have made a regulated surrogacy statement, which will include a statement agreeing to the intended parents having legal parenthood on birth, and that they have complied with the screening and safeguarding requirements; and

(2) the intended parents and surrogate have met eligibility requirements;

then on the live birth of the child the intended parents should be the legal parents of the child.

Paragraph 4.46

Recommendation 2.

17.2 We recommend that:

(1) the surrogate should have the right to withdraw her consent to the surrogacy agreement in the period from the treatment which leads to pregnancy until six weeks after the birth of the child;

(2) this withdrawal should operate by the surrogate notifying her withdrawal of consent in any recorded format to the intended parents and to the RSO involved in the agreement;

(3) the requirement to notify the intended parents of her withdrawal of consent should not apply where they have both died, or where they cannot be traced despite the surrogate taking reasonable steps to do so;

(4) the requirement to notify the RSO should not apply where it has ceased to exist as an organisation; and

(5) the RSO involved in the agreement should notify the HFEA of the surrogate's withdrawal of consent.

Paragraph 4.106

Recommendation 3.

17.3 We recommend that, if the surrogate withdraws her consent to the surrogacy agreement, the party without legal parental status can apply to the court for a parental order to determine, finally, who should be the child's legal parent(s): the surrogate, or the intended parents. Until the parental order is made, issues regarding care of the child and parental responsibility/parental responsibilities and rights would be determined in accordance with the proposals in Chapter 5.

17.4 Where the surrogate withdraws her consent before the birth of the child, she would be the legal mother at birth, and it would be a matter for the intended parents to apply for a parental order.

17.5 Where the surrogate withdraws her consent after the birth of the child, within the six-week period for doing so, the intended parents (who would already be the legal parents) should remain the legal parents, and the surrogate would be entitled to apply for a parental order.

17.6 We recommend that guidance in the HFEA Surrogacy Code of Practice should provide that where a surrogate withdraws her consent after the birth of the child and seeks a parental order, the RSO should provide social, emotional and financial support to the surrogate.

Paragraph 4.124

Recommendation 4.

17.7 We recommend that, for a child born as a result of a surrogacy agreement, whether on or outside the new pathway, and where at the time of entering into the surrogacy agreement the surrogate was aged 21 or over and the intended parents were aged 18 or over, the surrogate's spouse or civil partner, if any, should not be a legal parent of the child.

Paragraph 4.157

Recommendation 5.

17.8 We recommend that, where there is a stillbirth following a surrogacy agreement:

(1) in all cases, the surrogate would be the legal parent;

(2) the surrogate may consent to the intended parents being the legal parents of the child, which would enable them to register the stillbirth; and

(3) in all circumstances, only the surrogate should be able to consent to any post mortem examination of the stillborn child.

Paragraph 4.176

Recommendation 6.

17.9 We recommend that:

(1) where the child dies at any point before the court makes a parental order following an agreement governed by the parental order process, including where the surrogate has withdrawn her consent before the birth, then the intended parents may apply for a post-mortem parental order. The court will not have the power to dispense with the surrogate's consent to the making of a post-mortem parental order; and

(2) where the surrogacy agreement is on the new pathway, the child dies, and the surrogate withdraws her consent within six weeks of birth (whether before or after the death of the child), then she may apply for a post-mortem parental order. The court can only make the order with the intended parents' consent.

17.10 We also recommend that whichever of the surrogate and the intended parents is not the legal parent be added to the list of those in the Births and Deaths Registration Act 1953 in England and Wales, and the Registration of Births, Deaths and Marriages (Scotland) Act 1965 who can act as informants in the case of death, if they intend to apply for a parental order or have such an application pending.

Paragraph 4.194

Recommendation 7.

17.11 We recommend that:

(1) for a surrogacy agreement in the new pathway, where the surrogate dies within six weeks of the child's birth, the intended parents will automatically gain legal parental status in respect of the child unless the surrogate has previously exercised her right to withdraw her consent;

(a) if the surrogate does so before the birth of the child, she will be the legal mother and the intended parents will be able to apply for a parental order;

(b) if the surrogate does so in the six weeks following the child's birth, the intended parents will be the child's legal parents but the surrogate's representatives will be able to make, or continue, an application for a parental order in the surrogate's favour.

(2) the following people (in priority order) will be able to make or continue with the application on the surrogate's behalf:

(a) a person named by the surrogate as the guardian of the child;

(b) a person in a close relationship with the surrogate; or

(c) the relatives or a longstanding friend of the surrogate; and

(3) for a surrogacy agreement outside the new pathway, the law should specifically provide that the consent of the surrogate will not be required for a parental order where she has died before being able to provide such consent.

Paragraph 4.210

Recommendation 8.

17.12 We recommend in the event of the death of both intended parents, or a sole intended parent, that:

(1) for a surrogacy agreement in the new pathway, where the deaths occur less than six weeks after the birth of the child, the intended parents will be the legal parents of the child, subject to the surrogate having the right to withdraw her consent;

(2) for a surrogacy agreement outside the new pathway, the following people, in priority order, will have the standing to apply for a parental order in favour of the deceased intended parents:

(a) a person named as the guardian of the child by the intended parents;

(b) the surrogate;

(c) a person who was in a close relationship with the intended parent at the time of their death; or

(d) another relative or friend of longstanding of the intended parents; and

(3) for a surrogacy agreement outside the new pathway, where none of the above persons wishes to apply for a parental order in favour of the deceased intended parents, that it be possible for the surrogate to provide information about the intended parents (and gamete donors) to the HFEA for inclusion on the Surrogacy Register.

17.13 We also recommend that, where there are two intended parents and one dies:

(1) for a surrogacy agreement in the new pathway:

(a) where an intended parent dies less than six weeks after the birth of the child, both intended parents will be the legal parents of the child (where the surrogate has not withdrawn her consent pre-birth); and

(b) where an intended parent dies before the assisted reproduction procedure, the surviving intended parent can be the child's legal parent from birth, and can, if the deceased intended parent is genetically linked to the child, apply for an order so that the deceased intended parent is named on the child's birth certificate; and

(2) for a surrogacy agreement outside the new pathway, where an intended parent dies before the application for the parental order, it shall be possible, on an application by the surviving intended parent, for a parental order to be made in favour of both parents.

Paragraph 4.241

Recommendation 9.

17.14 We recommend that, for surrogacy agreements on the new pathway where the surrogate has not withdrawn her consent before the birth of the child:

(1) the intended parents will be named as the child's parents on the birth certificate;

(2) in order for the intended parents to be named as the child's parents on the birth certificate:

(a) any informant registering the birth will be required to provide the registrar with the Regulated Surrogacy Statement; and

(b) any informant other than the surrogate will be required to provide the registrar with a declaration made by the intended parents that the surrogate had not withdrawn her consent before the child was born;

(3) the intended parents or the surrogate will be named as informants who can register the birth;

(4) the full birth certificate in England and Wales, or full extract in Scotland, will be marked to reflect that the birth was a result of a surrogacy agreement;

(5) the short certificate in England and Wales, or abbreviated extract in Scotland, will not include information about whether the birth was a result of a surrogacy agreement.

Paragraph 4.266

Recommendation 10.

17.15 We recommend that where a child is born as a result of a surrogacy agreement in the new pathway:

(1) the intended parents should acquire parental responsibility/PRRs on the birth of the child, unless the surrogate withdraws her consent before the child is born;

(2) where the surrogate withdraws her consent before the child is born, the position will be the same as that for agreements outside the new pathway; and

(3) if the surrogate withdraws her consent in the six weeks after birth, the intended parents should continue to have parental responsibility/PRRs for the child where the child is living with, or being cared for by, them.

Paragraph 5.31

Recommendation 11.

17.16 We recommend that, for surrogacy agreements on the new pathway, the surrogate should have parental responsibility/PRRs from the time the child is born:

(1) until six weeks after the birth of the child, should the surrogate not withdraw her consent during that period (the end of that period being when the surrogate's right to withdraw consent ceases); or

(2) should she withdraw her consent in that six-week period after birth, until such time as the question of the child's legal parental status is decided by a court following an application for a parental order, or until six months after the birth of the child, when her right to make an application for a parental order in her favour lapses.

Paragraph 5.32

Recommendation 12.

17.17 We recommend that:

(1) where a child is born as a result of a surrogacy agreement outside the new pathway, the intended parents should acquire parental responsibility/PRRs automatically where the child is living with them or being cared for by them; and

(2) the making of a parental order should continue to provide parental responsibility/PRRs to those in whose favour it is made, and to extinguish the parental responsibility/PRRs of any other individuals.

Paragraph 5.55

Recommendation 13.

17.18 We recommend that the court in England and Wales considers whether to make an order awarding parental responsibility to the intended parents at the first directions hearing or any other interim hearing.

Paragraph 5.68

Recommendation 14.

17.19 We recommend that, as regards parental order petitions in Scotland:

(1) when an application for a parental order is made by or for the intended parents, they should be able, in the context of those proceedings, to obtain an interim order conferring parental responsibilities and parental rights pending the full hearing on the parental order; and

(2) the court should have the discretion to make an interim order regulating parental responsibilities and parental rights at an initial or subsequent parental order hearing either on application by or for the intended parents or at its own instance.

Paragraph 5.82

Recommendation 15.

17.20 We recommend that, in relation to the period between the making of a parental order application and the determination of that application:

(1) in England and Wales intended parents are added to the list of persons in section 10 of the Children Act 1989 who are able to apply for a section 8 order without leave of the court;

(2) in Scotland, intended parents should be able to apply to court for an order granting PRRs, regardless of whether they have had and no longer have PRRs; and

(3) in Scotland, intended parents who are the legal parents under a new pathway arrangement should be entitled to apply for an order under section 11 of the Children (Scotland) Act 1995.

17.21 We recommend that, in England and Wales, whichever party to a surrogacy agreement is not the legal parent after either the conclusion of the new pathway or the determination of a parental order application, may make an application for any order under section 8 of the Children Act 1989 only with leave of the court.

17.22 We recommend that, in Scotland, whichever party to a surrogacy agreement is not the legal parent after either the conclusion of the new pathway or the determination of a parental order application may apply, with leave of the court, for an order regarding contact only.

Paragraph 5.117

Recommendation 16.

17.23 We recommend that surrogates should be at least 21 years old at the time of entering into the surrogacy agreement.

Paragraph 6.17

Recommendation 17.

17.24 We recommend that the surrogate should not be required to have previously given birth to be eligible for the new pathway, or where a parental order is sought.

Paragraph 6.39

Recommendation 18.

17.25 We recommend that there should be no statutorily imposed maximum on the number of surrogate pregnancies that a surrogate can undertake.

Paragraph 6.58

Recommendation 19.

17.26 We recommend that:

(1) there should be no maximum age imposed for intended parents for the granting of a parental order;

(2) there should be no maximum age imposed for intended parents on the new pathway; and

(3) there should be a minimum age of 18 for intended parents on the new pathway, and 18 should continue to be the minimum age for intended parents seeking a parental order. These requirements relate to the age of the intended parents at the time of entering into the surrogacy agreement.

Paragraph 6.90

Recommendation 20.

17.27 We recommend that there should be no requirement that a surrogacy agreement has been used because of medical necessity.

Paragraph 6.115

Recommendation 21.

17.28 We recommend that:

(1) a genetic link between the child and the intended parents continues to be required for surrogacy agreements where a parental order is sought; and

(2) a genetic link between the child and the intended parents is a requirement for surrogacy agreements proceeding on the new pathway.

Paragraph 6.145

Recommendation 22.

17.29 We recommend that the qualifying categories of relationship set out in section 54(2) of the Human Fertilisation and Embryology Act 2008 should continue to apply to agreements where a parental order is sought, without reform, and should also apply to agreements on the new pathway.

Paragraph 6.164

Recommendation 23.

17.30 We recommend that:

(1) for an agreement in the new pathway, both the surrogate and one of the intended parents must be domiciled in or be habitually resident in the UK, Channel Islands or Isle of Man at the time of signing the Regulated Surrogacy Statement and at time the child is born; and

(2) for an agreement outside the new pathway, one of the intended parents must be domiciled in or be habitually resident in the UK, Channel Islands or Isle of Man at the time of applying for, and the time of the making of, the parental order.

Paragraph 6.188

Recommendation 24.

17.31 We recommend that:

(1) The remit of the HFEA be expanded to include the regulation of Regulated Surrogacy Organisations, and oversight of compliance with the proposed legal requirements for the new surrogacy pathway; and

(2) A separate Code of Practice should be issued by the HFEA for surrogacy agreements that would address the legal requirements for the new surrogacy pathway and parental orders, together with any other guidance the HFEA deems appropriate to include.

Paragraph 7.21

Recommendation 25.

17.32 We recommend that:

(1) there should be Regulated Surrogacy Organisations;

(2) an individual should not be capable of being a Regulated Surrogacy Organisation but there should be no requirement for a Regulated Surrogacy Organisation to take a particular organisational form;

(3) Regulated Surrogacy Organisations should be non-profit-making bodies; and

(4) only Regulated Surrogacy Organisations should be able to approve surrogacy teams on the new pathway.

Paragraph 7.65

Recommendation 26.

17.33 We recommend that Regulated Surrogacy Organisations should be required to appoint an individual responsible for ensuring that their organisation complies with the HFEA's regulatory requirements.

17.34 We recommend that the designated "person responsible" within a Regulated Surrogacy Organisation must be responsible for:

(1) representing the organisation to, and liaising with, the HFEA;

(2) managing the Regulated Surrogacy Organisation with sufficient care, competence and skill;

(3) ensuring the compliance of the organisation with relevant law and regulation, including the creation, maintenance and operation of necessary policies and procedures;

(4) training and development, including:

(a) ensuring that appropriate arrangements are in place for training staff; and

(b) undertaking professional training and development as appropriate to facilitate the discharge of their responsibilities; and

(5) providing data to the regulator and to such other person as required by law.

Paragraph 7.91

Recommendation 27.

17.35 We recommend that:

(1) Regulated Surrogacy Organisations should be under a duty to keep a record of the data recorded in the Regulated Surrogacy Statement completed by surrogacy teams, and a record of any exercise by the surrogate of her right to withdraw her consent from the agreement;

(2) Regulated Surrogacy Organisations should be under a duty to submit these records to the HFEA by 12 weeks after the birth of the child, noting whether the surrogate withdrew her consent to the new pathway agreement;

(3) the HFEA can give directions to Regulated Surrogacy Organisations about how long they should keep records; and

(4) the HFEA should decide for how long it can retain records of surrogates withdrawing their consent to a surrogacy agreement.

Paragraph 7.109

Recommendation 28.

17.36 We recommend that Regulated Surrogacy Organisations should be subject to the same sanctions that currently apply to other bodies regulated by the HFEA, in the event that they breach their licence conditions.

Paragraph 7.118

Recommendation 29.

17.37 We recommend it should be a requirement to access the new pathway that the Regulated Surrogacy Organisation confirms that the following checks have been carried out:

(1) the surrogate has undergone a medical assessment to ensure she is fit for pregnancy;

(2) the surrogate and her partner have been tested for STIs; and

(3) intended parents who are providing sperm at home for artificial insemination have been screened for STIs, but there is no need for the semen to undergo further testing, eg screening for genetic conditions.

17.38 Where it transpires that these tests have not been carried out, in whole or in part, the surrogacy agreement would remain on the new pathway, but the Regulated Surrogacy Organisation would be subject to regulatory sanctions.

Paragraph 8.23

Recommendation 30.

17.39 We recommend it should be a requirement to access the new pathway that:

(1) the surrogate and the intended parents undertake implications counselling;

(2) the counselling should be provided by a counsellor who is a member of the British Infertility Counselling Association or an equivalent body recognised by the HFEA; and

(3) the counsellor should confirm to the Regulated Surrogacy Organisation that (i) the implications counselling has been completed and let the Regulated Surrogacy Organisation know if they have any concerns about the proposed surrogacy agreement as regards any of the parties involved; or (ii) they have been unable to conduct the implications counselling.

Paragraph 8.67

Recommendation 31.

17.40 We recommend it should be a requirement to access the new pathway that both the surrogate and the intended parents take independent legal advice about entering into the surrogacy agreement.

17.41 We recommend that there should not be a requirement for the surrogate's spouse or civil partner to take independent legal advice.

Paragraph 8.106

Recommendation 32.

17.42 We recommend it should be a requirement to access the new pathway that:

(1) the surrogate, her spouse, civil partner or partner, the intended parents, and any adult over the age of 18 who lives with the intended parents, be subject to an enhanced criminal record check (in England and Wales) and a Level 2 disclosure (in Scotland);

(2) where this enhanced criminal record check or Level 2 disclosure brings to light a relevant offence, the parties are precluded from proceeding on the new pathway;

(3) the relevant offences which would preclude the agreement from proceeding on the new pathway are those contained in Regulation 25 of the Adoption Agencies Regulations 2005, as amended;

(4) the Regulated Surrogacy Organisation should also have the discretion to seek an enhanced criminal record check in respect of any other adult who will be involved in the life of the surrogate-born child, and to factor any information revealed by this check into its assessment of the suitability of the parties to proceed on the new pathway; and

(5) the Regulated Surrogacy Organisation should be able to take into account offences disclosed by the enhanced criminal record check which are not set out in Regulation 25 of the Adoption Agencies Regulations 2005, in determining whether any person should proceed with a surrogacy agreement on the new pathway.

Paragraph 8.131

Recommendation 33.

17.43 We recommend it should be a requirement to access the new pathway that:

(1) the welfare of the child is assessed pre-conception in a manner akin to that set out in Chapter 8 of the current HFEA Code of Practice;

(2) the Regulated Surrogacy Organisation is responsible for ensuring that this procedure is followed;

(3) the surrogate and intended parents should all be required to submit a report from a medical practitioner to the Regulated Surrogacy Organisation for the purpose of the pre-conception child welfare assessment;

(4) where a licenced clinic carries out a pre-conception child welfare assessment (together with a report from a medical practitioner where relevant), that can be shared with the Regulated Surrogacy Organisation, with the consent of the intended parents and surrogate, and adopted by the Regulated Surrogacy Organisation; and

(5) that where a surrogacy team does not satisfy the Regulated Surrogacy Organisation in respect of the pre-conception child welfare assessment, they cannot proceed on the new pathway.

Paragraph 8.177

Recommendation 34.

17.44 We recommend that as a prerequisite of entering the new pathway, information identifying the intended parents, the surrogate and those who contributed gametes (or details of how to access such details, in the case of identity-release donors recorded on the existing HFEA Register on donor conception) must be recorded in the Regulated Surrogacy Statement for the agreement and provided after the child's birth by the Regulated Surrogacy Organisation for entry on the Surrogacy Register.

Paragraph 8.190

Recommendation 35.

17.45 We recommend that traditional surrogacy agreements should fall within the scope of the new pathway.

Paragraph 8.207

Recommendation 36.

17.46 We recommend that:

(1) the use of anonymously donated gametes should prevent a surrogacy agreement entering the new pathway; and

(2) the prohibition on the use of anonymously donated gametes should apply to traditional surrogacy agreements with which an RSO is involved, meaning that RSOs will be prohibited from working with surrogacy teams who use anonymously donated gametes in a traditional surrogacy agreement.

Paragraph 8.236

Recommendation 37.

17.47 We recommend that surrogacy arrangements with an international element should be excluded from the new pathway.

Paragraph 8.249

Recommendation 38.

17.48 We recommend that the essential elements of the surrogacy agreement on the new pathway be set out on an official form, to be known as the Regulated Surrogacy Statement, to be signed by the surrogate, the intended parents and the Regulated Surrogacy Organisation.

Paragraph 9.13

Recommendation 39.

17.49 We recommend that the Regulated Surrogacy Statement should be signed by the intended parents, surrogate and Regulated Surrogacy Organisation, and include the following details:

(1) a statement that the intended parents will be the legal parents at birth, and that the surrogate will not be the legal parent of the child born, subject to her withdrawing her consent to the surrogacy agreement before the birth;

(2) confirmation that a welfare of the child assessment has been completed to the satisfaction of the Regulated Surrogacy Organisation;

(3) confirmation that the parties have fulfilled the screening requirements;

(4) a statement by the intended parents and the surrogate that the child born of the surrogacy agreement will have their home with the intended parents;

(5) a description of the permitted payments to be made by the intended parents to the surrogate (although not a breakdown of all agreed expenses).

(6) identifying details of those involved in the surrogacy agreement: the intended parents and the surrogate, and the Regulated Surrogacy Organisation;

(7) details of whose genetic material is being used in conception:

(a) identity in the case of the surrogate, intended parents, and known donors;

(b) details of how to access information regarding identity-release donors via the HFEA Register of gamete donors; and

(8) prescribed non-identifying information regarding the intended parents, surrogate and any known donors.

Paragraph 9.43

Recommendation 40.

17.50 We recommend that the child's welfare remains the paramount consideration when deciding whether to grant a parental order.

Paragraph 10.40

Recommendation 41.

17.51 We recommend that there continue to be a requirement that, at the time of the application and of the making of the order, the child's home must be with the intended parents.

Paragraph 10.46

Recommendation 42.

17.52 We recommend that the applicant(s) for a parental order should be asked by the court to confirm who originally entered into the surrogacy agreement and that, if details of another intended parent are supplied:

(1) in England and Wales, the court must join the second intended parent to the proceedings, unless he or she cannot be found, while in Scotland, this procedural issue should be dealt with by the making of appropriate rules of court to achieve inclusion of the second intended parent as an applicant;

(2) the court should have the power to decide, taking as its paramount consideration the child's lifelong welfare, whether to make a parental order in favour of either the original or joined applicant or in favour of both applicants; and

(3) the court should be able to make a parental order in favour of an intended parent without a genetic link to the child, in these circumstances.

Paragraph 10.80

Recommendation 43.

17.53 We recommend that it be possible for a single intended parent applicant without a genetic link to the child born of the surrogacy agreement to make an application for a parental order in respect of that child where, at the time that the agreement was entered into, there was a second intended parent with a genetic link to the child who was a party to the agreement but who no longer wishes to apply for a parental order.

Paragraph 10.81

Recommendation 44.

17.54 We recommend that the court should not be able to grant a parental order in favour of a person who did not enter into the surrogacy agreement originally.

Paragraph 10.82

Recommendation 45.

17.55 We recommend that the surrogate be able to make an application for a parental order:

(1) in favour of the intended parents if, after six months have elapsed from the time of the birth of the child, the intended parents have not made an application for a parental order; and

(2) on her own behalf, where, following a new pathway agreement, she has withdrawn consent to the agreement within the six weeks following the birth of the child; and

(3) without it being necessary for the surrogate to have a genetic link to the child, for the child's home to be with her or to have the consent of the intended parents.

Paragraph 10.93

Recommendation 46.

17.56 We recommend that:

(1) the current time limit for the making of an application for a parental order of six months from the birth of the child should be retained; but

(2) the court should have the power to allow applications to be made after this time; and

(3) in exercising that power, the court's paramount consideration should be the lifelong welfare of the child.

Paragraph 10.107

Recommendation 47.

17.57 We recommend that, with respect to the making of a parental order:

(1) the current circumstances in which the consent of the surrogate is not required, namely where she cannot be found or is incapable of giving agreement, should be retained;

(2) the requirement for the surrogate to consent should not apply where she has died before being able to do so;

(3) the court should have the power to dispense with the consent of the surrogate where the welfare of the child requires the consent to be dispensed with; and

(4) that the power to dispense with consent should not be available retrospectively, that is, for surrogacy agreements entered into before the new law comes into force.

Paragraph 10.142

Recommendation 48.

17.58 We recommend that, as a prerequisite for the making of a parental order there must be provided to the court by the intended parents, at the time of the application for the order, prescribed information, including information identifying:

(1) the surrogate;

(2) those who contributed gametes, where those are known (intended parents, surrogate, gamete donor, as appropriate); and

(3) how to access such details (identity-release donor via the HFEA register, or other source of information);

but that the court will have the ability to dispense with the identification of the surrogate and those who contributed gametes and allow instead the fact that the surrogate could not be identified, or that anonymously donated gametes were used, to be recorded in the Surrogacy Register.

17.59 We also recommend that, on the conclusion of parental order proceedings, the court must provide the prescribed information to the HFEA for recording in the Surrogacy Register.

Paragraph 10.164

Recommendation 49.

17.60 We recommend that, in England and Wales, all parental order proceedings following international surrogacy arrangements should continue to be automatically allocated to judges of High Court judge level.

Paragraph 11.33

Recommendation 50.

17.61 We recommend that in England and Wales, undisputed domestic surrogacy cases should, by default, be heard by a district judge, rather than by lay justices, with disputed domestic cases continuing to be heard by a circuit judge.

Paragraph 11.54

Recommendation 51.

17.62 We recommend that a parental order report should be released to all the parties in the parental order proceedings by default, unless the court directs otherwise.

Paragraph 11.81

Recommendation 52.

17.63 We recommend that:

(1) The law should specify which payments intended parents are permitted make to a surrogate; and

(2) the types of payment that are permitted to be made to surrogates should be the same, whether the surrogacy agreement follows the new pathway to parenthood or a post-birth application for a parental order is required.

Paragraph 12.53

Recommendation 53.

17.64 We recommend that:

(1) the payments that the intended parents are permitted to make to, or on behalf of, the surrogate should be based on a reimbursement of costs actually incurred, rather than an allowance; and

(2) the intended parents should be able to make payments to the surrogate in advance (as a float) to cover anticipated costs. These advance payments should be made in close proximity to the expected costs being incurred by the surrogate, with sums that were not used being repaid to the intended parents by the surrogate.

Paragraph 12.70

Recommendation 54.

17.65 We recommend that intended parents should be prohibited from making payments to the surrogate that fall into the following categories:

(1) payment for gestational services/payment for carrying the child born of the agreement;

(2) compensatory payments;

(3) payment for general living expenses; and

(4) payments for unspecified costs, whether payable in a lump sum or instalments.

Paragraph 12.110

Recommendation 55.

17.66 We recommend that the law should:

(1) permit intended parents to pay to the surrogate costs which fall in the following categories:

(a) those costs related to the decision to enter into a surrogacy agreement;

(b) medical, wellbeing and related costs;

(c) pregnancy-related items;

(d) costs of additional dietary requirements related to the pregnancy for the surrogate;

(e) costs for specified forms of domestic support;

(f) travel and occasional overnight accommodation for a purpose linked to the surrogacy agreement;

(g) the costs of the surrogate maintaining contact with the intended parents and the child after the birth;

(h) the surrogate's actual lost earnings (whether the surrogate is employed or self-employed) to include pension and national insurance contributions;

(i) the surrogate's lost employment-related potential earnings;

(j) actual lost earnings and lost employment-related potential earnings for up to two weeks for a person who takes time off work to support the surrogate post-birth; and

(k) a modest recuperative holiday for the surrogate and her family;

(2) permit intended parents to make modest gifts to the surrogate;

(3) on the new pathway, unless the surrogate wishes to pay all or a proportion of them herself, require intended parents to meet the costs of:

(a) the surrogate taking out or maintaining an agreed level of life insurance and critical illness cover for herself beginning with the commencement of any fertility treatment and lasting from two years from the point of conception; and

(b) the screening and safeguarding requirements (with the exception of the criminal records checks and welfare of the child assessment).

Paragraph 12.167

Recommendation 56.

17.67 We recommend that:

(1) in the new pathway:

(a) there should be no financial cap on payments made by the intended parents to the surrogate or on her behalf;

(b) such payments are to be approved by the RSO, which will consider whether to approve a payment in the light of this potential surrogate's standard of living; and

(c) the RSO must refuse to approve payments where it considers such payment might offer a financial inducement to the woman to become a surrogate.

(2) in the parental order process, the court will continue to have the power, for the purpose of making a parental order, to authorise payments made by the intended parents that are prohibited. In deciding whether to authorise a payment, the court should have regard to the principle that the surrogate should be neither better nor worse off financially as a result of the surrogacy agreement.

Paragraph 12.177

Recommendation 57.

17.68 We recommend that:

(1) restrictions on the payments that the intended parents can make or undertake to make to the surrogate should last from the time that the parties enter into the surrogacy agreement (whether in the new pathway or in the parental order process) until six weeks after the birth of the child;

(2) only payments made, promised or incurred within this period, and which relate to that period, will be recoverable by the surrogate against the intended parents, or, where there has been an overpayment, by the intended parents against the surrogate;

(3) by exception, the period will be different in relation to the following types of payments:

  (a) in the case of the mandatory life insurance and critical illness cover, the period will run from the commencement of any fertility treatment and for such period as specified in regulations; and

  (b) in the case of payment of any lost earnings of the surrogate, and with respect to the costs of therapy or counselling for the surrogate, the period will run from the time that the parties enter into the surrogacy agreement and for such period as specified in regulations; and

(4) in the parental order process, one of the conditions for the court to be able to make a parental order will be that it has authorised any payment made by the intended parents to the surrogate during the period beginning one year before the surrogacy agreement was entered into and ending on the making of the order.

Paragraph 12.190

Recommendation 58.

17.69 We recommend that:

(1) the surrogate in a surrogacy agreement entered into under the new pathway or in the parental order process should be able to recover from the intended parents costs in the surrogacy agreement, as a debt in the County Court and High Court in England and Wales, or in the Sheriff Court or Court of Session in Scotland;

(2) the surrogate's ability to recover costs from the intended parents should not be dependent on the surrogate complying with any terms of the agreement; and

(3) the intended parents should be able to recover from the surrogate as a debt, payments that were made to her in accordance with the law but for which she has not incurred a corresponding cost, in the County Court and High Court in England and Wales, or in the Sheriff Court or Court of Session in Scotland.

Paragraph 12.223

Recommendation 59.

17.70 We recommend that, in the new pathway:

(1) there will be a financial schedule annexed to the Regulated Surrogacy Statement, to be agreed by the surrogate and intended parents and approved by the RSO. The financial schedule will set out agreed categories of payment for the individual surrogacy agreement, selected from the permitted categories of payment, with a maximum figure stated for each selected category agreement;

(2) any payments made by the intended parents to the surrogate in the year prior to the signing of the written agreement must be reported to the RSO before entry to the new pathway;

(3) the intended parents should be able to seek retrospective authorisation from the RSO, up to the time of making the statutory declaration, for payments that can be authorised, but which did not appear in the financial schedule, or which exceed the maximum figures provided in the financial schedule;

(4) the intended parents must make a statutory declaration no later than twelve weeks after the child is born as to whether they have made payments in excess of those recorded in the financial schedule, with there being no discretion as to the extension of this deadline;

(5) it will be a criminal offence for an intended parent to make a false declaration knowingly and wilfully, applying the existing law to this use of a statutory declaration;

(6) there should be a new criminal offence of not making this statutory declaration, which would be triable summarily and, on conviction, punishable by a fine; and

(7) this offence would not be committed if the intended parents had a reasonable excuse for not making the statutory declaration.

Paragraph 12.297

Recommendation 60.

17.71 We recommend that:

(1) there should be a system of regulatory control for the enforcement of the reformed rules on payments that can be made by intended parents to surrogates, in domestic surrogacy cases; and

(2) the UK Government should decide whether there should, in addition to the regulatory system, be a scheme of civil penalties against intended parents who make payments that are prohibited under the reformed rules on payments.

Paragraph 12.299

Recommendation 61.

17.72 We recommend the creation of the Surrogacy Register ("the SR").

17.73 We further recommend that:

(1) the SR should be maintained by the HFEA;

(2) the SR should record identifying and non-identifying information about surrogates, intended parents, and gamete donors involved in surrogacy agreements, with the exception of information about gamete donors other than the intended parents, which should continue to be recorded in the HFEA Register;

(3) the SR should record information for all surrogacy agreements, whether in or outside the new pathway, domestic or international, gestational or traditional, provided that the parties have satisfied either a Regulated Surrogacy Organisation ("RSO") or the court on the balance of probabilities that the information is accurate;

(4) if a surrogacy team used the services of a fertility clinic, its contact details should be included in the SR, irrespective of whether it is based in the UK or overseas; and

(5) parental order agreements should only be included in the SR where the Regulated Surrogacy Statement was signed, or the parental order application was made, after the commencement of the SR provisions. However, surrogate-born people and parties to surrogacy agreements which came into being before the passage of new legislation should be able to submit their details for inclusion on a separate voluntary contact register.

17.74 We recommend that, on the new pathway, if the intended parents provided incorrect information about the child's genetic heritage, the SR should be rectified on application to the HFEA, but that the identity of the child's legal parents should be unaffected, unless it emerges that the child was not born of a surrogacy arrangement.

Paragraph 13.87

Recommendation 62.

17.75 We recommend that for surrogacy agreements outside the new pathway, information relating to a former intended parent who is not a party to the parental order should be recorded in the Surrogacy Register. Before the court can submit the former intended parent's details to the HFEA for inclusion in the Surrogacy Register, it must be satisfied, on the balance of probabilities, that the person was a party to the surrogacy agreement at its inception.

Paragraph 13.107

Recommendation 63.

17.76 We recommend that a surrogate-born person should be able to access information contained in the Surrogacy Register:

(1) at age 16:

(a) in Scotland, both identifying and non-identifying information;

(b) in England and Wales, non-identifying information;

(2) at age 18, in England and Wales, identifying information;

(3) under the age of 16, in Scotland, both identifying and non-identifying information where the surrogate-born person meets a statutory test of legal capacity to access the information;

(4) under the age of 16, in England and Wales, both identifying and non-identifying information where the surrogate-born person meets the test of *Gillick* competence; and

(5) at the ages of 16 and 17, in England and Wales, identifying information unless the surrogate-born person is shown to lack mental capacity as defined in sections 2(1) and 3(1) of the Mental Capacity Act 2005 with respect to the decision to access the identifying information contained in the Surrogacy Register

where, in any circumstances, they have been given a suitable opportunity to receive counselling about the implications of accessing the information contained in the Surrogacy Register.

Paragraph 13.156

Recommendation 64.

17.77 We recommend that a surrogate-born person should be able to make a request from age 16, through the Surrogacy Register, to learn if a person they are intending to marry, enter into a civil partnership, or have a sexual relationship with, was carried by the same surrogate.

Paragraph 13.171

Recommendation 65.

17.78 We recommend that:

(1) where two surrogate-born people are born to the same surrogate, it should be possible for them to identify each other through the Surrogacy Register, irrespective of whether they are genetically related;

(2) before a request for information about those born to the same surrogate can be complied with, both parties must have notified the HFEA that they would like their information to be made available to others born of the same surrogate; and

(3) surrogate-born people should be able to identify those born to the same surrogate:

(a) in England and Wales at 18, or at age 16 or 17 unless they are shown to lack mental capacity with respect to the decision as defined in sections 2(1) and 3(1) of the Mental Capacity Act 2005, or below the age of 16 if they meet the test of *Gillick* competence with respect to the decision; and

(b) in Scotland, at the age of 16, or below the age of 16 if they meet a statutory test of legal capacity with respect to the decision.

Paragraph 13.189

Recommendation 66.

17.79 We recommend that:

(1) A surrogate-born person and the surrogate's own child should be able to access the Surrogacy Register to identify each other, irrespective of whether they are genetically related.

(2) Before a request for information can be complied with, both parties must have notified the HFEA that they would like their information to be made available for this purpose; and

(3) Individuals should be able to access the Surrogacy Register for this purpose:

(a) In England and Wales at 18, or at age 16 or 17 unless they are shown to lack mental capacity with respect to the decision as defined in sections 2(1) and 3(1) of the Mental Capacity Act 2005, or below the age of 16 if they meet the test of *Gillick* competence with respect to the decision.

(b) In Scotland, at the age of 16, or below the age of 16 if they meet a statutory test of legal capacity with respect to the decision.

Paragraph 13.209

Recommendation 67.

17.80 We recommend that, where children are born of surrogacy arrangements that result in the intended parents being recorded as parents on the birth certificate, the full form of that certificate should make clear that the birth was the result of a surrogacy arrangement.

Paragraph 13.232

Recommendation 68.

17.81 We recommend that, in England and Wales, the Family Procedure Rules Committee provide that a surrogate-born person should:

(1) Have access to their complete parental order court file at age 18;

(2) Have access to their complete parental order court file if aged 16 or 17, unless shown to lack mental capacity as defined in sections 2(1) and 3(1) of the Mental Capacity Act 2005 with respect to the decision to access their complete parental order file; and

(3) Have access to their complete parental order court file below the age 16, if they are *Gillick* competent with respect to the decision.

17.82 In Scotland, we recommend that the Scottish Civil Justice Council should provide rules to facilitate a surrogate-born person accessing their complete parental order court process below the age 16 if they meet a test of capacity with respect to the decision.

Paragraph 13.245

Recommendation 69.

17.83 We recommend that, in England and Wales, a surrogate-born person should:

(1) have access to the Regulated Surrogacy Statement that relates to their birth at age 18;

(2) have access to the Regulated Surrogacy Statement that relates to their birth if aged 16 or 17, unless shown to lack mental capacity as defined in sections 2(1) and 3(1) of the Mental Capacity Act 2005 with respect to the decision to access the Regulated Surrogacy Statement; and

(3) have access to the Regulated Surrogacy Statement that relates to their birth below the age 16, if they are *Gillick* competent with respect to the decision.

17.84 In Scotland, we recommend that a surrogate-born person should be able to access the Regulated Surrogacy Statement that relates to their birth at age 16, or below the age of 16 if they meet a test of capacity with respect to the decision.

17.85 In each jurisdiction, a surrogate-born person should be given a suitable opportunity to receive appropriate counselling about the implications of the disclosure of the Regulated Surrogacy Statement.

Paragraph 13.253

Recommendation 70.

17.86 We recommend that people who are the subject of an entry in the Parental Order Register:

(1) should have access to their original birth certificate in England and Wales:

(a) at age 18;

(b) at age 16 or 17, unless shown to lack capacity as defined in sections 2(1) and 3(1) of the Mental Capacity Act 2005 with respect to the decision to access their original birth certificate; and

(c) below the age 16, if they meet the test of *Gillick* competence.

(2) in Scotland should continue to have access to their original birth certificate at age 16, but specific statutory provision ought to be made for a surrogate-born person to access their original birth certificate following the parental order process under the age of 16, where they have capacity with respect to the decision.

17.87 We recommend that this provision should apply retrospectively so that anyone who is the subject of a parental order is able to access their original birth certificate, regardless of whether the parental order was granted before or after new legislation comes into force.

17.88 We recommend that an offer of counselling should be made to the surrogate-born person seeking disclosure of their original birth certificate.

Paragraph 13.268

Recommendation 71.

17.89 We recommend that matching services are defined as services provided with a view to assisting an individual who wants to enter into a surrogacy agreement to find another individual or individuals with whom to enter into the agreement.

17.90 We recommend that, irrespective of whether a surrogacy agreement is on the new pathway or outside it:

(1) only non-profit RSOs can charge for matching services;

(2) individuals and organisations other than RSOs can provide matching services, if they provide them free of charge, and operate on a non-profit basis;

(3) individuals and organisations who provide matching services unlawfully, either because they charge for their services or operate for profit, will commit a criminal offence;

(4) a defence should be available if a person can prove that, at the time of providing the services, they did not know that a requirement to pay was being imposed; and

(5) if a surrogacy team receives unlawful matching services, either because they are charged for the services other than by an RSO, or because the service-provider operated for profit, the surrogacy team should not be penalised and should still be eligible for the new pathway or for a parental order.

Paragraph 14.68

Recommendation 72.

17.91 We recommend that:

(1) regulated legal professionals (solicitors, barristers, advocates and legal executives) should be able to charge to negotiate or advise on surrogacy agreements;

(2) the Secretary of State should have a power to identify other regulated professionals who should be permitted to charge to advise on surrogacy agreements;

(3) RSOs and other non-profit-making bodies, and individuals acting other than in the course of a business, should be able to charge to negotiate and advise on surrogacy agreements; and

(4) it should continue to be a criminal offence for anyone else to charge to negotiate or advise on surrogacy agreements, with a defence available if they can prove that, at the time of providing the services, they did not know that they had been provided on that basis.

Paragraph 14.97

Recommendation 73.

17.92 We recommend that:

(1) RSOs should be permitted to advertise that they are looking for intended parents, and for women to act as surrogates, and that they can provide matching services;

(2) certain professionals (such as lawyers and counsellors), those providing services to support the health or wellbeing of an individual, and RSOs and non-profit bodies should be able to advertise the services that they can provide that are relevant to surrogacy; and

(3) it should be an offence for anyone else, including individual would-be surrogates and intended parents and unregulated (matching) organisations, to advertise with respect to surrogacy that:

  (a) a woman is a surrogate and is seeking intended parents to have a child with or is seeking to enter into a surrogacy agreement;

  (b) a person is an intended parent and is seeking a surrogate to have a child with, or is seeking to enter into a surrogacy agreement;

  (c) they offer or will provide matching services;

  (d) they will, on a commercial basis, negotiate and advise on surrogacy agreements; or

  (e) they will provide services which are advertised as being for surrogates or intended parents; and

(4) it should be an offence to publish such a prohibited advertisement, with a defence available if a person did not know the advertisement was prohibited and had taken reasonable steps to establish whether it was prohibited.

Paragraph 14.136

Recommendation 74.

17.93 We recommend that in relation to the offences relating to matching services, to negotiating or advising on a surrogacy agreement on a for-profit basis, or to advertisements about surrogacy:

(1) the offences should apply to corporate bodies, unincorporated associations and partnerships, as well as individuals;

(2) where an offence has been committed by such a body, and that offence was committed with the consent or connivance of a person who managed or controlled the body, that person is also guilty of the offence;

(3) in England and Wales, evidence of the things done or words spoken, written or published by a person taking part in the management or control of a body of persons, or by a person acting on behalf of the body, is admissible as evidence of the activities of that body;

(4) a person will not commit an offence because they made use of unlawful matching services, or received legal advice on a surrogacy agreement from a person who was unlawfully providing that advice;

(5) proceedings must be commenced within two years from the time that the offence is committed;

(6) offences will be tried summarily with a penalty of a fine not exceeding level 5 on the standard scale (an unlimited fine, in England and Wales), with the additional possibility of imprisonment for three months for the offence in respect of matching services; and

(7) proceedings can only be instigated in England and Wales with the non-personal consent of the Director of Public Prosecutions.

Paragraph 14.146

Recommendation 75.

17.94 We recommend that one of the intended parents should have the right to receive a benefit equivalent to Maternity Allowance where they fulfil the criteria for that benefit.

Paragraph 15.111

Recommendation 76.

17.95 We recommend 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 – that is:

(1) the right for a sole intended parent or one of two joint intended parents to paid time off work on five occasions, of up to 6.5 hours on each occasion, and

(2) the right for the other joint intended parent to unpaid time off work on two occasions for up to 6.5 hours on each occasion,

with the purpose of the time off work being to accompany the surrogate to ante-natal appointments; and

(3) the right to begin statutory leave up to 14 days before the expected date of birth of the child born as a result of the surrogacy arrangement.

Paragraph 15.113

Recommendation 77.

17.96 We recommend that references to intended parents in employment rights and other relevant legislation should be amended, in order to include intended parents who will gain legal parental status via the new pathway, rather than by way of a parental order.

Paragraph 15.117

Recommendation 78.

17.97 We recommend that, in England and Wales:

(1) There should be an extension of the *en ventre sa mère* principle under section 55 of the Administration of Estates Act 1925, so that it applies where the child is being carried by a surrogate.

(2) The principle should only be extended to surrogacy cases under the new pathway in which the child, at the time of birth, is the legal child of the intended parents. (For the avoidance of doubt, it will therefore not apply to agreements in the new pathway where the surrogate has withdrawn her consent before the child's birth, or to agreements where the intended parents are required to seek a parental order to become the child's legal parents.)

17.98 We recommend that, in Scotland, for the purposes of succession (whether testate or intestate) any child born of a surrogacy agreement which is on the new pathway at the date of birth is treated as having been while in utero the unborn child of the intended parents.

Paragraph 15.157

Recommendation 79.

17.99 We recommend that, in relation to applications for obtaining registration of a child born from an international surrogacy arrangement as a British citizen, and obtaining a passport for the child:

(1) HM Passport Office and UK Visa and Immigration Service consider changing their operational practice to make it possible for a file to be opened, and the application process to begin, prior to the birth of the child; and

(2) the Home Office:

(a) provide clear guidance, in a form easily accessible to the public, on what documentation is required for such applications; and

(b) consider whether a post-birth order should always be required for applications for registration as a British citizen.

Paragraph 16.97

Recommendation 80.

17.100 We recommend that:

(1) there be provision for the child born of a new pathway surrogacy agreement to be able to acquire British nationality automatically from their British intended parents; and

(2) the definition in section 50(9A) of the British Nationality Act 1981 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.

Paragraph 16.112

Recommendation 81.

17.101 We recommend that, in relation to applications for obtaining a visa or a Form for Affixing a Visa (FAV) for a child born from an international surrogacy arrangement:

(1) UK Visas and Immigration consider changing their operational practice to make it possible for a file to be opened, and the application process to begin, prior to the birth of the child; and

(2) the Home Office provide clear guidance, in a form easily accessible to the public, on what documentation is required for such applications.

17.102 We recommend that the Home Office produce up-to-date and clear policy guidance on inter-country surrogacy and immigration.

Paragraph 16.159

Recommendation 82.

17.103 We recommend that:

(1) 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

(2) it should be clear within the Immigration Rules that the grant of visa or entry clearance to the child born of a surrogacy arrangement should not be dependent on the child breaking links with the surrogate nor should the grant prevent the child having contact, and an on-going relationship, with the surrogate.

Paragraph 16.168

Recommendation 83.

17.104 We recommend that:

(1) 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; and

(2) the existing guidance on surrogacy, produced by the Department of Health and Social Care, for those entering into an agreement be updated to include an explanation of the new pathway.

Paragraph 16.211

Recommendation 84.

17.105 We recommend that:

(1) a child should not be removed from the UK for the purpose of the child becoming the subject of a parental order, or its equivalent, in another jurisdiction, without obtaining an order of the court and it should be an offence to remove a child from the UK for that purpose;

(2) the new offence be the same across both jurisdictions, be summarily triable, and carry a penalty in each jurisdiction which mirrors that for the offences in section 85 of the Adoption and Children Act 2002 and section 60 of the Adoption and Children (Scotland) Act 2007, namely:

  (a) in England and Wales, imprisonment for a term not exceeding the maximum term for summary offences or a fine, or both; or

  (b) in Scotland, imprisonment for a term not exceeding 3 months or a fine not exceeding level 5 on the standard scale, or both.

(3) in deciding whether to grant an order permitting removal of the child from the jurisdiction, the court's paramount consideration shall be the welfare of the child throughout their life;

(4) for an order to be made permitting removal of the child from the jurisdiction, the following requirements must be met:

  (a) that there is a surrogacy arrangement, using the gametes of one of the applicants;

  (b) that they are in a qualifying relationship (where there are joint applicants);

  (c) that the intended parent applicants and surrogate meet the minimum age requirements;

  (d) that the applicants have applied for the order within six months of the birth of the child, subject to the court having the ability to allow applications outside that period;

  (e) that the child's home is with the applicants;

  (f) that the surrogate's consent should be obtained but, if it is not, this will not preclude the making of the order; and

  (g) that no money – except for permitted payments under the reformed law on payments – has been given or received in consideration of the making of the order, the surrogate's agreement, the handing over of the child to the applicants or the making of arrangements with a view

to the making of the order (or that the court has authorised any such overpayments).

(5) on such an application being made, the court must appoint a parental order reporter (in England and Wales) or curator ad litem (in Scotland);

(6) the making of the order:

(a) 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;

(b) with respect to its effect on the parental responsibility/PRRs of the surrogate at the time that the order is made:

(i) if the surrogate consents to the order, will extinguish the surrogate's parental responsibility/PRRs;

(ii) if the surrogate does not consent to the order, may, at the court's discretion, extinguish the parental responsibility/PRRs of the surrogate; and

(7) if not extinguished at the time that the order is made, the parental responsibility/PRRs of the surrogate will be extinguished by the later making of a foreign parental order, or its equivalent; and

(8) the making of the order will not extinguish the surrogate's legal parental status.

Paragraph 16.269