

# Consultation Response

Building families through surrogacy: a new law

A joint consultation paper

14 October 2019



## Introduction

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The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

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Our Child and Family Law committee welcomes the opportunity to consider and respond to the joint consultation by the Scottish Law Commission and the Law Commission consultation, *Building Families through Surrogacy: a New Law*.

## General comments

The laws regarding surrogacy in Scotland and, indeed, across the United Kingdom do merit consideration. Though the number of people involved in surrogacy arrangements may be small, the issues that are engaged are fundamental and it is crucial that the law is clear, comprehensible and accessible in this area.

We are, overall, supportive of the proposals, subject to some details. The new route proposed should cover the majority of cases, while preserving the parental order route for those that would have required a higher level of intervention in any case. We note that there is a lot of concern around the current legal framework from those affected, and that challenges getting legal advice at the planning stage are counterproductive. There are some areas of potential concern, including expenses, how to assess the regimes in other countries and the onus on the surrogate to object and we believe that these merit further consideration.

## Questions

### Consultation Question 6

**We invite consultees' views as to whether they are of the view that, in Scotland:**

**(1) there is a need for greater consistency and clarity in provisions relating to the expenses of curators ad litem and reporting officers and, if so, how this should be addressed;**

**(2) it should be provided by statute that, at the initial hearing or any subsequent hearing for a parental order, the court may make any such interim order or orders for parental responsibilities and parental rights as it sees fit; and/or**

**(3) further procedural reform is needed and, if so, what that reform should be.**

In relation to question 6(1), consideration should be given to how this would interact with the proposals in the Children (Scotland) Bill. Support standardising the approach across Scotland. Clarity around outlays is helpful.

In relation to question 6(2), we are unaware of any suggestion that the court cannot already make interim orders. If this is an issue, we support clarification through statute.

In relation to question 6(3), proposals would be a significant simplification for straightforward cases. Keeping the current system seems appropriate for other, more complex cases. The roles of reporting officer and curator should be carried out by the same person (and, in practice, they generally are).

## **Consultation Question 7.**

**In respect of a domestic surrogacy arrangement, we provisionally propose that, before the child is conceived, where the intended parents and surrogate have:**

**(1) entered into an agreement including the prescribed information, which will include a statement as to legal parenthood on birth,**

**(2) complied with procedural safeguards for the agreement, and**

**(3) met eligibility requirements,**

**on the birth of the child the intended parents should be the legal parents of the child, subject to the surrogate's right to object.**

### **Do consultees agree?**

In general, we agree, but subject to some detail, discussed later in the response.

The question seems to be whether surrogacy is more like adoption (highly regulated in terms of assessing intended parents and transfer of PRRs) or more like assisted reproduction (much lower regulation with regards to the intended parents and acquiring PRRs). The proposals indicate a desire to shift towards a model more like assisted reproduction, but there may be cause to retain a higher degree of regulation and safeguarding for the welfare of the child and the rights of the surrogate.

### **Consultation Question 8.**

**We provisionally propose that regulated surrogacy organisations and licensed clinics should be under a duty to keep a record of surrogacy arrangements under the new pathway to which they are a party, with such records being retained for a specified minimum period.**

### **Do consultees agree?**

**We invite consultees' views as to what the length of that period should be: whether 100 years or another period.**

It is essential for such agencies to be well organised and keep proper records. There is an argument for keeping records forever, treating them in the same manner as birth certificates.

There would need to be a penalty for failing to keep records. This could be a condition of being registered, or potentially a fine.

Records should be kept in a central register to reduce the burden on agencies (which may be not-for-profit) and ensure continuity in case of an agency dissolving.

### **Consultation Question 9.**

**We provisionally propose that the prohibition on the use of anonymously donated gametes should apply to traditional surrogacy arrangements with which a regulated surrogacy organisation is involved.**

**Do consultees agree?**

We agree.

### **Consultation Question 10.**

**We invite consultees' views as to whether the use of anonymously donated sperm in a traditional, domestic surrogacy arrangement should prevent that arrangement from entering into the new pathway.**

We agree. This creates an incentive to comply

but retains a means of dealing with situations that arise outwith the intended framework.

### **Consultation Question 11.**

**We provisionally propose that:**

**(1) the surrogate should have the right to object to the acquisition of legal parenthood by the intended parents, for a fixed period after the birth of the child;**

**(2) this right to object should operate by the surrogate making her objection in writing within a defined period, with the objection being sent to both the intended parents and the body responsible for the regulation of surrogacy; and**

**(3) the defined period should be the applicable period for birth registration less one week.**

### **Do consultees agree?**

No. There are concerns around the timescales. In Scotland, this would amount to a two-week period. This is a very short period considering that the surrogate will be recovering from having given birth.

In addition, it would be preferable to require consent, rather than have to lodge an objection. This takes the immediate action off of the surrogate, and frames the situation in a more positive way. In general, where there are likely to be problems with the agreement to transfer PRRs, it is likely that this will be known in the lead up to the birth or immediately after.

There may be options to relax the procedural requirements or to increase the safeguards. Increasing the timescales would likely require either changing the rules around registration of births, or having the surrogate register as the mother initially, defeating the purpose of the proposed reforms. Similar issues and concerns arise in relation to question 12.

### **Consultation Question 12.**

**19.13 We provisionally propose that, where the surrogate objects to the intended parents acquiring legal parenthood within the period fixed after birth, the surrogacy arrangement should no longer be able to proceed in the new pathway, with the result that:**

**(1) the surrogate will be the legal parent of the child;**

**(2) if one of the intended parents would, under the current law, be a legal parent of the child, then he or she will continue to be a legal parent in these circumstances; and**

**(3) the intended parents would be able to make an application for a parental order to obtain legal parenthood.**

## **Do consultees agree?**

We are unsure. Particularly regarding question 12(2), in Scotland, this would occur in a situation where the donor is the intended father, and the surrogate is not married.

Is this the right outcome where the full new pathway process has been followed, and the only difference is that the surrogate has changed her mind? The process has built in a number of checks and safeguards, and the intended parents have acted in good faith. However, the surrogate should be recognised as vulnerable most situations, and it is recognised that this is different to other forms of assisted reproduction.

It might be possible to default to the intended parents being granted PRRs unless/until the court determines otherwise. The ability for the court to quickly make interim orders will be important. These cases are likely to be very rare, but high conflict. What would be the outcome where it is the intended parents who change their minds?

## **Consultation Question 13.**

**We provisionally propose that, in the new pathway:**

**(1) the intended parents should be required to make a declaration on registering the birth of the child that they have no reason to believe that the surrogate has lacked capacity at any time during the period in which she had the right to object to the intended parents acquiring legal parenthood;**

**(2) if the intended parents cannot provide this declaration then, during the period in which she has the right to object to the intended parents acquiring legal parenthood, the surrogate should be able to provide a positive consent to such acquisition; and**

**(3) if the intended parents are unable to make this declaration and the surrogate is unable to provide the positive consent within the relevant period, the surrogacy arrangement should exit the new pathway and the intended parents should be able to make an application for a parental order.**

### **Do consultees agree?**

Yes. This will appropriately deal with any loss of capacity for whatever reason, subject to some leeway being acceptable for administrative errors/illness etc.

### **Consultation Question 14.**

**We provisionally propose that, in the new pathway, the welfare of the child to be born as a result of the surrogacy arrangement:**

**(1) should be assessed in the way set out in Chapter 8 of the current Code of Practice;**

**(2) either the regulated surrogacy organisation or regulated clinic, as appropriate, should be responsible for ensuring that this procedure is followed; and**

**(3) there should be no requirement for any welfare assessment of the child after his or her birth.**

### **Do consultees agree?**

Yes. It is appropriate that a welfare check is completed prior to conception and we consider that Chapter 8 of the Code of Conduct appropriately covers this for the purposes of surrogacy.

### **Consultation Question 15.**

**We provisionally propose that, for a child born as a result of a surrogacy arrangement under the new pathway, where the surrogate has exercised her right to object to the intended parents' acquisition of legal parenthood at birth, the surrogate's spouse or civil partner, if any, should not be a legal parent of the child.**

## **Do consultees agree?**

**We invite consultees' views as to whether, in the case of a surrogacy arrangement outside the new pathway, the surrogate's spouse or civil partner should continue to be a legal parent of the child born as a result of the arrangement.**

Yes. We consider that it would be inappropriate for the surrogate's spouse or civil partner to be the legal parent of the child born via the new pathway. We also consider it inappropriate under the old pathway where the child's second legal parent can be ascertained.

## **Consultation Question 16.**

**We provisionally propose that, in the new pathway, where a child born of a surrogacy arrangement is stillborn:**

**(1) the intended parents should be the legal parents of the child unless the surrogate exercises her right to object; and**

**(2) the surrogate should be able to consent to the intended parents being registered as the parents before the expiry of the period of the right to object.**

## **Do consultees agree?**

**We provisionally propose that, outside the new pathway, where a child born of a surrogacy arrangement is stillborn, the surrogate should be able to consent to the intended parents being registered as the parents before the expiry of the period allowed for the registration of the birth, provided that the intended parents have made a declaration to the effect that the relevant criteria for the making of a parental order are satisfied, on registration of the stillbirth.**

### **Do consultees agree?**

Yes, we agree that both proposals are entirely appropriate.

### **Consultation Question 17.**

**We provisionally propose that, for surrogacy arrangements outside the new pathway, where the child dies before the making of the parental order, the surrogate should be able to consent to the intended parents being registered as the parents before the expiry of the period allowed for the registration of the birth, provided that the intended parents have made a declaration to the effect that the relevant criteria for the making of a parental order are satisfied, on registration of the birth.**

### **Do consultees agree?**

Yes.

### **Consultation Question 18.**

**For surrogacy arrangements in the new pathway, we invite consultees' views as to whether, where the surrogate dies in childbirth or before the end of the period during which she can exercise her right to object, the arrangement should not proceed in the new pathway and the intended parents should be required to make an application for a parental order.**

No. Where the arrangement follows the new pathway and the criteria has been met, we would consider it appropriate that the intended parents are the legal parents from birth.

### **Consultation Question 19.**

**We provisionally propose that, for surrogacy arrangements in the new pathway, where both intended parents die during the surrogate's pregnancy, the intended**

**parents should be registered as the child's parents on birth, subject to the surrogate not exercising her right to object within the defined period.**

**Do consultees agree?**

**We invite consultees' views as to whether, for surrogacy arrangements outside the new pathway, where both intended parents die during the surrogate's pregnancy or before a parental order is made:**

**(1) it should be competent for an application to be made, by a person who claims an interest under section 11(3)(a) of the Children (Scotland) Act 1995, or who would be permitted to apply for an order under section 8 of the Children Act 1989:**

**(a) for an order for appointment as guardian of the child, and**

**(b) for a parental order in the name of the intended parents, subject to the surrogate's consent; or**

**(2) the surrogate should be registered as the child's mother and it should not be possible for the intended parents to be registered as the child's parents, but that there should be a procedure for the surrogate to provide details of the intended parents, and, if relevant, gamete donors, for entry onto the register of surrogacy arrangements.**

Regarding 19(1), we agree, subject to there being suitable safeguards to allow for a guardian to be appointed to the child. Regarding 19(2), we would consider option 1 to be the most appropriate under those circumstances.

**Consultation Question 20.**

**We provisionally propose that, where an application is made for a parental order by a sole applicant under section 54A:**

**(1) the applicant should have to make a declaration that it was always intended that there would only be a single applicant for a parental order in respect of the child concerned or to supply the name and contact details of the other intended parent;**

**(2) if details of another intended parent are supplied, a provision should be made for notice to be given to the potential second intended parent of the application and an opportunity given to that party to provide notice of opposition within a brief period (of, say, 14 to 21 days); and**

**(3) if the second intended parent gives notice of his or her intention to oppose, he or she should be required to make his or her own application within a brief period (say 14 days), otherwise the application of the first intended parent will be determined by the court.**

### **Do consultees agree?**

Regarding 20(1), we agree. Regarding 20(2), we agree, with a brief period of 21 days' notice. Regarding 20(3), we agree. We consider that both intended parents should be able to apply to be the intended parents of the child, on the condition that they were both intending to be the parents of the child at the time of conception.

### **Consultation Question 21.**

**We invite consultees' views as to:**

**(1) a temporary three-parent model of legal parenthood in surrogacy cases; and**

## **(2) how the legal parenthood of the surrogate should be extinguished in this model.**

We do not consider that a temporary three-parent legal parenthood model would be appropriate for surrogacy cases. This would confuse the role of the surrogate and provide a conflict between parties in contentious cases and adds an additional layer of stress, expense and uncertainty via a further legal procedure. We fully support the intended new model proposed by way of the new pathway as minimising the stress and expense to all involved.

## **Consultation Question 22.**

### **We invite consultees' views:**

**(1) as to whether there should be any additional oversight in the new pathway that we have proposed, leading to the acquisition of legal parenthood by the intended parents at birth; and**

**(2) if so, as to whether should this oversight be:**

**(a) administrative, or**

**(b) judicial.**

We consider that if there were to be any additional oversight, then it should be judicial rather than by way of an adoption panel. The welfare checks (discussed above) are sufficient when done by a regulated clinic, and any additional checks should be procedurally administrative through the courts in order to ensure that the correct criteria have been met. This could be done by a straightforward application to the court showing that all of the relevant criteria have been met and not necessarily requiring the agreement itself to be approved.

A suggested solution could be that the solicitor(s) providing the independent legal advice to both parties jointly submit to the court that they have considered that all criteria have been met to allow the parents to follow the new pathway and therefore for the intended parents to be registered as the child's legal parents at birth.

### **Consultation Question 26.**

**We provisionally propose that, where a child is born as a result of a surrogacy arrangement outside the new pathway, the intended parents should acquire parental responsibility automatically where:**

- (1) the child is living with them or being cared for by them; and**
- (2) they intend to apply for a parental order.**

### **Do consultees agree?**

Yes, although in Scotland this would be that the intended parents should have parental rights and responsibilities automatically where the child is living with them or being cared for by them and they intend to apply for a parental order.

### **Consultation Question 27.**

**We provisionally propose that, where a child is born as a result of a surrogacy arrangement in the new pathway:**

- (1) the intended parents should acquire parental responsibility on the birth of the child; and**
- (2) if the surrogate exercises her right to object, the intended parents should continue to have parental responsibility for the child where the child is living with, or being cared for by, them, and they intend to apply for a parental order.**

## **Do consultees agree?**

We agree.

## **Consultation Question 28.**

**We provisionally propose that, for surrogacy arrangements within the new pathway, the surrogate should retain parental responsibility for the child born as a result of the arrangement until the expiry of the period during which she can exercise her right to object, assuming that she does not exercise her right to object.**

## **Do consultees agree?**

No. This seems at a conflict with the intended purpose of the change. The position should be that she only obtains PRRs at such time as the objection is made, at which point they could be automatically granted (subject to any restrictions as set out below).

## **Consultation Question 29.**

**For all surrogacy arrangements, we invite consultees' views as to:**

**(1) whether there is a need for any restriction to be placed on the exercise of parental responsibility by either the surrogate (or other legal parent), or the intended parents, during the period in which parental responsibility is shared; and**

**(2) whether it should operate to restrict the exercise of parental responsibility by the party not caring for the child or with whom the child is not living.**

Yes. During any such time when PRRs are shared (i.e. after an objection has been raised) there must be some kind of restriction or regulation placed on competing decision making. We would suggest the most sensible solution is that either the person(s) with day-to-day care of the child make the overarching decision or an application requires to be made to the court.

### **Consultation Question 30.**

**We provisionally propose that traditional surrogacy arrangements should fall within the scope of the new pathway.**

#### **Do consultees agree?**

Yes. The current law does not make a distinction and therefore it would be entirely reasonable to include this in the new pathway, again with all of the other conditions being met.

### **Consultation Question 32.**

**We invite consultees' views as to whether independent surrogacy arrangements should be brought within the scope of the new pathway.**

**We invite consultees' views as to how independent surrogacy arrangements might be brought within the scope of the new pathway.**

We agree that they should be brought into the new pathway, and agree that it would be appropriate for the independent surrogate and intended parents to provide evidence of compliance with the regulatory requirements to an independent professional, such as a lawyer, who would then make a return on their behalf to the Authority, certifying that the surrogacy arrangement had complied with the requirements for entry to the new pathway.

### **Consultation Question 33.**

**We provisionally propose that:**

**(1) there should be regulated surrogacy organisations;**

**(2) there should be no requirement for a regulated surrogacy organisation to take a particular form; and**

**(3) each surrogacy organisation should be required to appoint an individual responsible for ensuring that the organisation complies with regulation.**

**Do consultees agree?**

Yes. 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.

**Consultation Question 34.**

**We provisionally propose that the person responsible must be responsible for:**

**(1) representing the organisation to, and liaising with, the regulator;**

**(2) managing the regulated surrogacy organisation with sufficient care, competence and skill;**

**(3) ensuring the compliance of the organisation with relevant law and regulation, including the creation, maintenance and operation of necessary policies and procedures;**

**(4) training any staff, including that of the person responsible; and (5) providing data to the regulator and to such other person as required by law.**

**Do consultees agree?**

**We invite consultees to identify any other responsibilities which a responsible individual should have.**

**We invite consultees' views as to what experience, skills and qualifications a person responsible for a surrogacy organisation should have.**

Regarding 34(1), we agree and would consider that it would be sensible for lawyers to be authorised to give advice to such persons responsible where instructed to do so by them, and to be permitted to do so on a commercial basis.

Regarding 34(2), we believe that data protection compliance and record keeping will be important elements.

Regarding 34(3), we would defer to the opinions of the current surrogacy organisations on this question but would note that it would seem responsible for that person to have the necessary understanding of the legislation underpinning their role.

### **Consultation Question 35.**

**We provisionally propose that regulated surrogacy organisations should be nonprofit making bodies.**

#### **Do consultees agree?**

Yes. We agree that having for-profit agencies would price people out of using the organisations and the safe and ethical environment they help to facilitate.

### **Consultation Question 36.**

**We invite consultees' views as to what should be included in the definition of matching and facilitation services.**

We agree with the definition as provided in that matching and facilitation services should be limited to the matching of the surrogate with the intended parent(s) and include points 1-4 in 9.86 as regulated services.

We do consider that it should be appropriate and allowable for solicitors who operate on a commercial basis to be involved in the drafting of any surrogacy agreement reached, without that falling into the definition of matching and facilitation services.

### **Consultation Question 37.**

**We provisionally propose that only regulated surrogacy organisations should be able to offer matching and facilitation services in respect of surrogacy arrangements in the new pathway.**

**Do consultees agree?**

**We invite consultees' views as to whether only regulated surrogacy organisations should be able to offer matching and facilitation services in respect of surrogacy arrangements outside the new pathway.**

We agree to both propositions. This will allow consistency across the sector, minimise risk and steer those into using the new pathway for the additional safety elements.

### **Consultation Question 38.**

**We invite consultees' views as to the sanctions that should be available against organisations that offer matching and facilitation services without being regulated to do so, and whether these should be criminal, civil or regulatory.**

We would suggest criminal or regulatory sanctions. Criminal sanctions may be the most compelling option.

### **Consultation Question 39.**

**We provisionally propose that the remit of the Human Fertilisation and Embryology Authority be expanded to include the regulation of regulated surrogacy organisations, and oversight of compliance with the proposed legal requirements for the new pathway to legal parenthood.**

**Do consultees agree?**

**If consultees agree, we invite their views as to how the Authority's Code of Practice should apply to regulated surrogacy organisations, including which additional or new areas of regulation should be applied.**

Yes. We consider that HFEA is the only suitable option for regulatory oversight. We agree that the remit should be expanded to include:

- The regulation of surrogacy organisations
- Provide guidance to organisations on how they should carry out their duties
- To provide and oversee licences to regulated organisations
- Auditing the accounts of regulated organisations

We would suggest that an entirely separate Code of Conduct may be the most straightforward and clear option but would defer to views of the Authority.

**Consultation Question 40.**

**We provisionally propose that surrogacy agreements should remain unenforceable (subject to the exception we provisionally propose in Consultation Question 88 in relation to financial terms).**

**Do consultees agree?**

Yes. We would agree subject to comments regarding enforceability of payments to the surrogate discussed further in response to question 88.

**Consultation Question 41.**

**We provisionally propose that there should be no prohibition against charging for negotiating, facilitating and advising on surrogacy arrangements.**

**Do consultees agree?**

Yes. As identified in the consultation document, the current law is an extremely grey area and leaves clients stumbling around in the dark, without being able to obtain legal advice on the terms of any agreement. We would very much welcome the removal of the prohibition against charging for negotiating, facilitating and advising on surrogacy arrangements.

**Consultation Question 42.**

**We provisionally propose that the current ban on advertising in respect of surrogacy should be removed, with the effect that there will be no restrictions on advertising anything that can lawfully be done in relation to surrogacy arrangements.**

**Do consultees agree?**

Yes. We believe this is a sensible solution and removes unnecessary restrictions where the advertising relates to something that can be lawfully done in relation to surrogacy arrangements.

**Consultation Question 43.**

**We provisionally propose that, in England and Wales, where the making of a parental order in respect of a child born of a surrogacy arrangement has been recorded in the Parental Order Register, the child should be able to access his or her original birth certificate at the age of 18.**

**Do consultees agree?**

We are pleased to note that, while the Commissions provisionally propose that such access in England and Wales should be available from the age of 18, it is not proposing any change to such access being available in Scotland from the age of 16 (para.10.79). Care should be taken in drafting any legislation to ensure that Scots law is not altered inadvertently.

On that basis, we would suggest that this could be earlier than 18. If a child has capacity, they are able to make a subject access request to receive information about themselves, for example social work files. Provided that appropriate support is provided to the child in receiving the information, they should not be required to wait until age 18.

## **Consultation Question 44.**

**We provisionally propose that where children are born of surrogacy arrangements that result in the intended parents being recorded as parents on the birth certificate, the full form of that certificate should make clear that the birth was the result of a surrogacy arrangement.**

### **Do consultees agree?**

We agree wholeheartedly with the Commissions' provisional view that the child born of a surrogacy arrangement should have access to full information about his or her genetic and gestational origins (para. 10.78). As the Commissions rightly point out, the CRC supports making the information available to the child (paras 10.71-10.76). The lack of consensus amongst Council of Europe members means that position under the ECHR is not yet as clear, but the ECtHR is certainly moving in the direction of supporting access to information (paras 10.66-10.70).<sup>1</sup> The child's right, in this respect, must be balanced against the right to privacy of the child, the surrogate, the intended parents and any gamete donors.

The Consultation Paper explores the various ways in which the child may access information about his or her genetic or gestational origins. However, it does not explore the fact that, in order for the child's right to information to be respected fully, the child must be aware that there is something further to be known: i.e. that he or she is the product of donated gametes or surrogacy. Until the "right to know" is secured for every donor and surrogate-born child, the legal system will fail in its obligation to ensure a meaningful right of access to information for these children.

<sup>1</sup> See also, *Jäggi v Switzerland*, Application No.58757/00 and *Mifsud v Malta*, Application No.62257/15.

At present, Scots law goes part of the way towards ensuring this “right to know”. The abbreviated extract birth certificate does not disclose the fact that the child is adopted<sup>2</sup> or that a parental order has been granted.<sup>3</sup> This means that parents may conceal the truth about genetic or gestation origins from the child (save, of course, those cases where the reality of third party involvement is obvious) for as long as all they need, for practical purposes, is an abbreviated birth certificate. The full extract birth certificate will be marked “Adopted”<sup>4</sup> or “Parental order”,<sup>5</sup> as appropriate. Since the child may obtain the full certificate at some stage – and will have to do so in order to obtain a first passport and for other purposes – the child will become aware of the fact that he or she is adopted or surrogacy-born and can seek access to his or her original birth certificate<sup>6</sup> and the court process.<sup>7</sup> Finding out the truth in this way is less than desirable, but it does provide an incentive for parents to be honest with children from an early stage. Donor children have no parallel opportunity to find out the truth – there is no “marking” of their birth certificates – and, thus, their parents have less incentive to be honest.<sup>8</sup>

The marking of full extract birth certificates may encourage parental honesty, with children being made aware of their genetic and gestational origins in a supportive environment, but that comes at a price. Birth records are public documents and anyone may obtain a copy of another person’s full extract birth certificate on paying the requisite fee.<sup>9</sup> This necessarily risks compromising the privacy of adopted and surrogate-born children and the various adults involved, albeit the third party applicant cannot access the linked information in the Adopted Children or Parental Orders Registers<sup>10</sup> or the court process.<sup>11</sup>

The Commissions’ proposal that the full extract birth certificate should be “marked” to indicate the fact of surrogacy would place the surrogacy-born child in the same position as adopted children. Their parents would have an incentive to be honest and, where they were not, the child would discover the truth eventually. Thus, we extend a qualified welcome to the proposal and would urge the Commissions to recommend a parallel system in respect of donor children.

<sup>2</sup> Registration of Births, Deaths and Marriages (Scotland) Act 1965, s.39E.

<sup>3</sup> Human Fertilisation and Embryology (Parental Orders) Regulations, SI 2018/142, Sch. 4, para. 3.

<sup>4</sup> Adoption and Children (Scotland) Act 2007, s.53(4) and Sch. 1, para. 1(2).

<sup>5</sup> Human Fertilisation and Embryology (Parental Orders) Regulations, SI 2018/142, Sch. 2, para. 13.

<sup>6</sup> Adoption and Children (Scotland) Act 2007, s.55(2)(b); Human Fertilisation and Embryology (Parental Orders) Regulations, SI 2018/142, Sch. 2, para.15.

<sup>7</sup> Act of Sederunt (Rules of the Court of Session 1994), SI 1994/1443, as amended, r. 97.17; and Act of Sederunt (Child Care and Maintenance Rules) 1997, SI 1997/291, as amended, r. 2.59.

<sup>8</sup> This applies particularly to donor children raised by different sex couples. Donor children raised by single parents or same sex couples will realise there is something more to be known so, again, there is an incentive for parental honesty.

<sup>9</sup> Registration of Births, Deaths and Marriages (Scotland) Act 1965, s.37.

<sup>10</sup> Adoption and Children (Scotland) Act 2007, s.55(2); Human Fertilisation and Embryology (Parental Orders) Regulations, SI 2018/142, Sch. 2, para.15.

<sup>11</sup> Act of Sederunt (Rules of the Court of Session 1994), SI 1994/1443, as amended, r. 97.17; and Act of Sederunt (Child Care and Maintenance Rules) 1997, SI 1997/291, as amended, r. 2.59.

However, it would be preferable to find another way of securing the child's right to know about his or her genetic and gestational origins for all adopted, donor and surrogacy-born children at the same time as protecting the privacy of the various parties. One method of doing so would be by creating a system of sensitive, personal, official notification to the child when he or she reaches the age of 16 (or possibly 18). The Commissions may take the view that recommending such a system is beyond the scope of the current project.

### **Consultation Question 47.**

**We provisionally propose that a national register of surrogacy arrangements should be created to record the identity of the intended parents, the surrogate and the gamete donors.**

**Do consultees agree?**

**We provisionally propose that:**

**(1) the register should be maintained by the Authority;**

**(2) the register should record information for all surrogacy arrangements, whether in or outside the new pathway, provided that the information about who has contributed gametes for the conception of the child has been medically verified, and that the information should include:**

**(a) identifying information about all the parties to the surrogacy arrangement,  
and**

**(b) non-identifying information about those who have contributed gametes to**

**the conception of the child; and**

**(3) to facilitate the record of this information, the application form/petition for a parental order should record full information about a child's genetic heritage where available and established by DNA or medical evidence, recording the use of an anonymous gamete donor if that applies.**

### **Do consultees agree?**

Regarding 47(1), we agree. We consider however that access to this should be private and open to the parties' involved only. Regarding 47(2), we agree.

### **Consultation Question 48.**

**We invite consultees' views as to whether non-identifying information about the surrogate and the intended parents should be recorded in the national register of surrogacy arrangements and available for disclosure to a child born of a surrogacy arrangement.**

We believe such information should be included. It is consistent with our view that information about genetic and gestational origins should be available to all donor and surrogacy-born children. Please see our response to Question 44.

### **Consultation Question 49.**

**We provisionally propose that a child born of a surrogacy arrangement should be able to access the information recorded in the register from the age of 18 for identifying information, and 16 for non-identifying information (if such information is included on the register), provided that he or she has been given a suitable opportunity to receive counselling about the implications of compliance with this request.**

## **Do consultees agree?**

**We invite consultees' views as to whether a child under the age of 18 or 16 (depending on whether the information is identifying or non-identifying respectively) should be able to access the information in the register and, if so, in which circumstances:**

**(1) where his or her legal parents have consented;**

**(2) if he or she has received counselling and the counsellor judges that he or she is sufficiently mature to receive this information; and/or**

**(3) in any other circumstances.**

We agree that the child should be able to access both identifying and non-identifying information and be given the opportunity to receive counselling.

We understand that the Commissions' provisional proposal is premised on ensuring consistency with the current law donor children's access to identifying and non-identifying information. However, as the Commission has noted (para.10.107), it is inconsistent with current Scots law that permits adopted children and those in respect of whom there is a parental order to access their original birth certificates at 16. We believe there is a value in having internal consistency in Scots law where that is possible and suggest 16 as the age when children should have access to both identifying and non-identifying information – and that this be applied to donor children as well. We appreciate that this may result in the law in Scotland being different to that in England and Wales, but that is already the case in other respects. Please see our response to Question 43.

Access to information about genetic and gestational origins is, in our view, the child's right. Thus, it should not be conditional on parental consent. It is fundamental to Scots law that young people acquire considerable capacity at the age of 16 and, as a rule, parental consent plays no part in that. For example the right to marry or register a civil partnership at the age of 16 is not conditional on parental consent.<sup>12</sup>

<sup>12</sup> Marriage (Scotland) Act 1977, s. 1; Civil Partnership Act 2004, s.85(1)(b).

Not do we support access to information being conditional on the views of a counsellor. We support counselling being made available to the child – and, indeed, the child being encouraged to participate in it – but we oppose mandatory counselling.

### **Consultation Question 50.**

**We invite consultees' views as to whether there should be any provision for those born of a surrogacy arrangement to make a request for information to disclose whether a person whom he or she is intending to marry, or with whom he or she intends to enter into a civil partnership or intimate physical relationship, was carried by the same surrogate.**

We agree that a child born to the same surrogate, but not genetically related, would not fall within the forbidden degrees under Scots law. However, there is arguably a “connection” of some kind between persons to whom the same woman gave birth. If individuals seek this information it suggests that this connection may be important to them. Thus, allowing access to this information makes sense.

### **Consultation Question 51.**

**We provisionally propose that where two people are born to, and genetically related through, the same surrogate, they should be able to access the register to identify each other, if they both wish to do so.**

**Do consultees agree?**

**We invite consultees' views as to whether there should be provision to allow people born to the same surrogate – but who are not genetically related – to access the register to identify each other, if they both wish to do so.**

We agree, if both parties wished to do so. The crucial factor here is that both of the people whose information would be disclosed agree to disclosure.

## **Consultation Question 52.**

**We invite consultees' views as to whether provision should be made to allow a person carried by a surrogate, and the surrogate's own child, to access the register to identify each other, if they both wish to do so:**

**(1) if they are genetically related through the surrogate; and/or**

**(2) if they are not genetically related through the surrogate.**

We agree, if both parties wished to do so.

## **Consultation Question 53.**

**For surrogacy arrangements outside the new pathway, we invite consultees' views as to whether details of an intended parent who is not a party to the application for a parental order should be recorded in the register.**

We agree.

## **Consultation Question 54.**

**We provisionally propose that the six month time limits in sections 54 and 54A of the HFEA 2008 for making a parental order application should be abolished.**

### **Do consultees agree?**

Whilst we agree in principle with the conclusion of the abolishment of the time limit in the old pathway, we would have reservations about there being no encouragement for apply for a parental order, particularly for those in private arrangements, as having no parental order will not be in the best interests of the child but

some may choose to forego the process to save costs. Having said that, we appreciate that any time limit be arbitrary, and therefore would suggest that there should be some other incentive/disincentive mechanism to ensure people apply and do not avoid doing to in an attempt to forego paying court costs.

## **Consultation Question 55.**

**We provisionally propose that:**

**(1) the current circumstances in which the consent of the surrogate (and any other legal parent) is not required, namely where a person cannot be found or is incapable of giving agreement, should continue to be available;**

**(2) the court should have the power to dispense with the consent of the surrogate, and any other legal parent of the child, in the following circumstances:**

**(a) where the child is living with the intended parents, with the consent of the surrogate and any other legal parent, or**

**(b) following a determination by the court that the child should live with the intended parents; and**

**(3) the court's power to dispense with consent should be subject to the paramount consideration of the child's welfare throughout his or her life guided by the factors set out in section 1 of the Adoption and Children Act 2002 and, in Scotland, in line with the section 14(3) of the Adoption and Children (Scotland) Act 2007.**

**Do consultees agree?**

Yes, but with the caveat that those such considerations should be reflected in surrogacy-specific legislation and not cross-reference with the Adoption and Children (Scotland) Act 2007.

## Consultation Question 56.

**We provisionally propose that, both for a parental order and in the new pathway, the intended parents or one of the intended parents must be domiciled or habitually resident in the UK, Channel Islands or Isle of Man.**

**Do consultees agree?**

**We invite consultees' views as to whether there should be any additional conditions imposed on the test of habitual residence, for example, a qualifying period of habitual residence required to satisfy the test.**

Yes. This would bring the law in line with similar areas of Child Law. An alternative could be to consider or use the habitual residence of the intended parent(s) at the time the surrogacy arrangement is entered into.

## Consultation Question 57.

**We invite consultees' views on whether:**

**(1) the qualifying categories of relationship in section 54(2) of the HFEA 2008 should be reformed and, if so, how; or**

**(2) the requirement should be removed, subject to two persons who are within the prohibited degrees of relationship being prevented from applying.**

We do not consider that the categories of relationship in section 54(2) require to be changed. If they were removed then we would support the prohibited degrees of relationship being maintained as a condition.

## Consultation Question 58.

**We provisionally propose that to use the new pathway, intended parents should be required to make a declaration in the surrogacy agreement that they intend for the child's home to be with them.**

**Do consultees agree?**

Yes, we agree.

**Consultation Question 59.**

**We provisionally propose that the new pathway**

**(1) should not impose a requirement that the intended parent, or one of the intended parents, provide gametes for the conception of the child, so that double donation of gametes is permitted, but**

**(2) that double donation should only be permitted in cases of medical necessity, meaning that there is not an intended parent who is able to provide a gamete due to infertility.**

**Do consultees agree?**

**We invite consultees' views as to whether double donation should be permitted under the parental order pathway (to the same extent that it may be permitted in the new pathway) in domestic surrogacy arrangements. 19.74 We provisionally propose that the requirement that the intended parent or one of the intended parents contribute gametes to the conception of the child in the parental order pathway should be retained in international surrogacy arrangements.**

**Do consultees agree?**



We agree with these proposals. Regarding 59(3), we agree, subject to comment that it may be reasonable to allow double donation in international surrogacy arrangements if that jurisdiction has similar safeguards to the UK and the donation can be robustly verified by way of contact with the surrogate. There may not be jurisdictions which meet that criteria, but if there are then it would seem contradictory to not allow double donation from those jurisdictions.

### **Consultation Question 60.**

**We provisionally propose that if the requirement for a genetic link is retained for domestic cases outside the new pathway, the requirement should not apply, subject to medical necessity, if the court determines that the intended parents in good faith began the surrogacy arrangement in the new pathway but were required to apply for a parental order.**

**Do consultees agree?**

Yes.

### **Consultation Question 61.**

**We provisionally propose that if double donation is permitted only in cases of medical necessity, an exception should be made to allow a parental order to be granted to a single parent without a genetic link where the intended parent's former partner provides gametes but the intended parents' relationship breaks down before the grant of a parental order.**

**Do consultees agree?**

Yes.

### **Consultation Question 62.**

**We invite consultees' views as to whether there should be a requirement that a surrogacy arrangement has been used because of medical necessity:**

**(1) for cases under the new pathway to parenthood; and/or**

**(2) for cases where a post-birth parental order application is made.**

**We invite consultees' views as to how a test of medical necessity for surrogacy, if it is introduced, should be defined and assessed.**

If it is deemed necessary to include medical necessity into the requirements for a surrogacy arrangement, then we are in agreement regarding the suggested phrasing of that.

We do however question, most specifically regarding the old pathway, whether that will cause unnecessary restrictions or a requirement for intended parents to 'justify' their chosen method of surrogacy. The lack of oversight pre-birth in the old pathway will cause a legal limbo position for children born without 'medical necessity', which as detailed in the consultation paper is suspected to be rare if at all present in the UK. This could cause a problem whereby the child is with the intended parents but they are unable to obtain a parental order for them, which is not in the best interests of the child.

### **Consultation Question 63.**

**We provisionally propose that in order to use the new pathway to parenthood, information identifying the child's genetic parents and the surrogate must be provided for entry on the national register of surrogacy agreements prior to registration of the child's birth.**

**Do consultees agree?**

**We invite consultees' views as to whether it should be a condition for an application for a parental order that:**

**(1) those who contributed gametes are entered on the national register of surrogacy agreements; and/or**

**(2) if it remains a requirement that one of the intended parents provided gametes in the conception of the child, that the genetic link is demonstrated to the court with medical or DNA evidence.**

**We provisionally propose that it should be a condition for the application of a parental order that the identity of the surrogate is entered on the national register of surrogacy agreements.**

**Do consultees agree?**

Yes. We generally agree with what is proposed to enable the child's right to know their genetic origins, though see comments above regarding double donation.

**Consultation Question 64.**

**We provisionally propose that there should be no maximum age limit for the grant of a parental order. The age of the intended parents should continue to be taken into account in the assessment of the welfare of the child in applications to grant a parental order.**

**Do consultees agree?**

**We invite consultees' views as to whether under the new pathway there should be a maximum age limit for intended parents, and if so, what it should be.**

**We provisionally propose that intended parents should be required to be at least 18 years old at the time that they enter into a surrogacy agreement under the new**

pathway.

### **Do consultees agree?**

We agree with the first proposal, and the third. Regarding 64(2), we do not agree. We believe that the upper age of the intended parents should be added to the Code of Conduct as part of the welfare consideration under the new pathway.

### **Consultation Question 65.**

**We provisionally propose that surrogates should be required to be at least 18 years of age (at the time of conception), in order for the court to have the power to make a parental order.**

### **Do consultees agree?**

**We provisionally propose that surrogates should be required to be at least 18 years old at the time of entering into the surrogacy agreement within the new pathway. Do consultees agree?**

Whilst we do agree with a minimum age of 18 for surrogates at time of conception (or time of entering into a Surrogacy Agreement under the new pathway), we wonder what the consequences would be for the parental order pathway if this was not the case? Would this prevent the court from making a parental order at all, and therefore forcing the surrogate who was not 18 into being the child's legal parent, even where that was not in the best interests of the child? Further clarification of the proposed consequences would be welcomed.

### **Consultation Question 66.**

**We provisionally propose that medical testing of the surrogate, any partner of the surrogate, and any intended parent providing gametes should be required for the new pathway.**



## **Do consultees agree?**

**We invite consultees' views as to whether the types of testing set out in the Code of Practice are feasible for traditional surrogacy arrangements outside a licensed clinic, and if not, which types of testing should be required for such arrangements.**

Yes. We defer to the fertility clinics response on tests required.

## **Consultation Question 67.**

**We provisionally propose that, as a condition of being eligible for entry into the new pathway:**

**(1) the surrogate, her spouse, civil partner or partner (if any) and the intended parents intending to enter into a surrogacy arrangement in the new pathway should be required to attend counselling with regard to the implications of entering into that arrangement; and**

**(2) the implications counselling should be provided by a counsellor who meets the requirements set out in the Code of Practice at paragraphs 2.14 to 2.15.**

## **Do consultees agree?**

Yes.

## **Consultation Question 68.**

**We provisionally propose that, for the new pathway, there should be a requirement that the surrogate and the intended parents should take independent legal advice on the effect of the law and of entering into the agreement before the agreement is**

signed.

### **Do consultees agree?**

Yes.

In our experience it is extremely important for all parties to obtain independent legal advice, and we welcome the proposal to allow solicitors to be involved in drafting the surrogacy agreement which will help to ensure safeguarding for both parties.

We agree in that, whilst that may bring an additional cost initially, it will be significantly less than the costs of applying for a parental order which currently average around £4,000 - £6,000 in Scotland depending on the circumstances, including court costs.

### **Consultation Question 69.**

**We provisionally propose that, as an eligibility requirement of the new pathway:**

**(1) an enhanced criminal record certificate should be obtained for intended parents, surrogates and any spouses, civil partners or partners of surrogates;**

**(2) the body overseeing the surrogate arrangement should not enable a surrogate arrangement to be proceed under the new pathway where a person screened is unsuitable for having being convicted of, or received a police caution for, any offence appearing on a prescribed list of offences; and**

**(3) the body overseeing the surrogacy arrangement may also determine that a person is unsuitable based on the information provided in the enhanced record certificate.**

## **Do consultees agree?**

**We invite consultees' views as to whether the list of offences that applies in the case of adoption is appropriate in the case of surrogacy arrangements in the new pathway.**

Yes, and we would consider the prescribed list used for adoption purposes is also suitable in this scenario. We note that the Scottish Parliament is currently considering reform of the disclosure system through the Disclosure (Scotland) Bill.

## **Consultation Question 70.**

**We invite consultees' views as to whether there should be a requirement that the surrogate has previously given birth as an eligibility requirement of the new pathway.**

No. As is stated in the consultation paper, this would unnecessarily prevent women who do not wish to be mothers from being surrogates which would be unnecessary. We recognise that in practice this is considered and would support some kind of formal consideration of whether the surrogate has completed/started her own family as part of the initial matching process.

## **Consultation Question 71.**

**We provisionally propose that there should not be a maximum number of surrogate pregnancies that a woman can undertake as an eligibility requirement of the new pathway.**

## **Do consultees agree?**

Yes. With the proposed new pathway in place this would be considered as part of the overall screening process on each occasion.

## **Consultation Question 72.**

**We invite consultees' views as to whether payment of costs by the intended parents to the surrogate should be able to be:**

**(1) based on an allowance;**

**(2) based on costs actually incurred by the surrogate, but without the need for production of receipts; or**

**(3) based on costs actually incurred by the surrogate, and only on production of receipts.**

We would support either options 1 or 2. It could be open for those in the arrangement to choose which is most suitable for their individual circumstances. It does not seem like requiring receipts would encourage people to use the new pathway where that is not required under the old pathway, and in any event there would be little consequence for failing to keep receipts compared with the onerous administrative requirements to do so, which may then fall onto the surrogate.

## **Consultation Question 73.**

**We invite consultees' views as to:**

**(1) whether intended parents should be able to pay the surrogate essential costs relating to the pregnancy; and**

**(2) the types of expenditure which should be considered "essential".**

For questions around costs and expenses, we do not comment on which exact costs should be allowed, as that may be more appropriate for others to suggest but do have comments around the definition of the broad

categories that we would consider helpful in any legislation. On that basis, we believe that intended parents should be able to pay for essential costs and we prefer the definition used in the consultation of “any essential and unavailable costs relating to pregnancy”.

#### **Consultation Question 74.**

**We invite consultees’ views as to:**

**(1) whether they consider that intended parents should be able to pay the surrogate additional costs relating to the pregnancy; and**

**(2) the types of expenditure which should be considered additional, rather than essential.**

Yes. We prefer the definition of “any costs which provide additional assistance to the surrogate relating to the pregnancy”

#### **Consultation Question 75.**

**We invite consultees’ views as to:**

**(1) whether intended parents should be permitted to pay all costs that arise from entering into a surrogacy arrangement, and those unique to a surrogate pregnancy; and**

**(2) the types of cost which should be included within this category.**

Yes. We prefer the definition used in the consultation of “all costs arising from the entering into of a surrogacy arrangement, and those unique to a surrogate pregnancy”

### **Consultation Question 76.**

**We invite consultees' views as to whether they consider that intended parents should be able to pay their surrogate her actual lost earnings (whether the surrogate is employed or self-employed).**

Yes. We prefer the definition of "reimbursement of any actual lost earnings incurred by the surrogate".

### **Consultation Question 77.**

**We invite consultees' views as to whether they consider that intended parents should be able to pay their surrogate either or both of the following lost potential earnings:**

**(1) her lost employment-related potential earnings (as defined in paragraph 15.35 above); and/or**

**(2) other lost potential earnings (as defined in paragraph 15.36 above).**

Regarding 77(1), we agree, if this could be reasonably calculated we would consider this fair to be reimbursed. Regarding 77(2), we do not agree as we consider that this is too speculative to enable realistic recovery.

### **Consultation Question 79.**

**We invite consultees' views as to whether intended parents should be able to pay compensation to the surrogate for the following:**

**(1) pain and inconvenience arising from the pregnancy and childbirth;**

**(2) medical treatments relating to the surrogacy, including payments for each insemination or embryo transfer; and/or**

**(3) specified complications, including hyperemesis gravidarum, pre-eclampsia, an ectopic pregnancy, miscarriage, termination, caesarean birth, excessive haemorrhaging, perineal tearing, removal of fallopian tubes or ovaries or a hysterectomy.**

**We invite consultees' views as to whether there are any other matters in respect of which intended parents should be able to pay the surrogate compensation.**

**We invite consultees' views as to whether the level of compensation payable should be:**

**(1) a fixed fee set by the regulator (operating as a cap on the maximum payable), or**

**(2) left to the parties to negotiate.**

Regarding 79(1), we agree. Regarding 79(2), we consider this has all been covered in the consultation appropriately. Regarding 79(3), we would agree with a fixed fee set by the regulator, operating as a cap on the maximum payable, which will help give transparency to all involved.

## **Consultation Question 80.**

**We invite consultees views' as to whether intended parents should be able to pay compensation to the surrogate's family in the event of the pregnancy resulting in the surrogate's death, including through payment of the cost of life assurance for the surrogate.**

Yes, however we consider that it should be compulsory to have life assurance under such circumstances.

## **Consultation Question 81.**

**We invite consultees' views as to whether:**

**(1) intended parents should be able to buy gifts for the surrogate; and**

**(2) if so, specific provision should be made for these gifts to be modest or reasonable in nature.**

Yes, and we would agree that it should be specified that any gifts require to be modest or reasonable in nature.

## **Consultation Question 82.**

**We invite consultees' views as to whether it should be possible for the intended parents to agree to pay a woman for the service of undertaking a surrogacy.**

**We invite consultees' views as to whether, if provision is made for intended parents to pay a woman for the service of undertaking surrogacy, whether that the fee should be:**

**(1) any sum agreed between the parties to the surrogacy; or**

**(2) a fixed fee set by the regulator.**

**We invite consultees' views as to whether, if provision is made for intended parents to pay a woman a fixed fee for the service of undertaking surrogacy, what, if any, other payments the law should permit, in addition to that fixed fee:**

**(1) no other payments;**

**(2) essential costs relating to the pregnancy;**

**(3) additional costs relating to the pregnancy;**

**(4) lost earnings;**

**(5) compensation for pain and inconvenience, medical treatment and complications, and the death of the surrogate; and/or**

**(6) gifts.**

We would in principle agree with the idea of payments for the service of undertaking a surrogacy be allowable. How that would operate in practice would be better decided by those operating on the front line of such arrangements. From a legal perspective it would be more easily monitored by allowing a fixed fee, operating as a cap, which is set by the regulator.

Under those circumstances we would suggest that the cap should either operate as a ceiling for the surrogacy arrangement as a whole (which would also require to incorporate *all* other types of expenses), or if operating as a separate head of expenses, should be much lower figure and work alongside the other classifications of payments.

### **Consultation Question 83.**

**We invite consultees' views as to whether it should be possible for any payment the law permits the intended parents to pay the surrogate for her services to be reduced in the event of a miscarriage or termination of the pregnancy.**

**We invite consultees' views as to whether, if the law permits a fee payable to the**



**surrogate to be able to be reduced in the event of a miscarriage or termination, whether such provision should apply:**

**(1) in the first trimester of pregnancy only;**

**(2) to any miscarriage or termination; or**

**(3) some other period of time (please specify).**

Yes, if the miscarriage or termination is in the first trimester of pregnancy only.

#### **Consultation Question 84.**

**We provisionally propose that the types of payment that are permitted to be made to surrogates should be the same, whether the surrogacy follows our new pathway to parenthood or involves a post-birth application for a parental order.**

**Do consultees agree?**

Yes.

#### **Consultation Question 85.**

**We invite consultees' views as to whether there are any categories of payment we have not discussed which they think intended parents should be able to agree to pay to the surrogate.**

No.

### **Consultation Question 86.**

**We invite consultees to express any further views they have about the payments that intended parents should be able to agree to pay to the surrogate.**

None.

### **Consultation Question 87.**

**We invite consultees' views as to whether there are specific methods of enforcing limitations that are placed on payments to surrogates that we should consider as part of our review:**

**(1) for cases within the new pathway to parenthood; and**

**(2) for cases where a parental order is made after the birth of the baby**

This is the issue which faces the courts at the moment and leaves children in a position of legal limbo. We consider that the introduction of a cap will stop people going over that, and in particular will allow both sides to be clear about the levels of payments involved *before* they embark on the process. This will allow people to know quite clearly when they are going outwith the lines (which we consider would be rare where the law makes clear what the maximum payments should be). Under the new pathway this will practically always happen due to the licences from the regulator via surrogacy organisations, and the requirement for legal advice making it clear to both parties the maximum payments permissible which will then be included in any draft agreement. For those on the old pathway, this should hopefully incentivise them into following the new scheme, but there may still be problems with international arrangements where payments may have been (but will not always be) above the cap. Under those circumstances, judges will continue to have a difficult decision of how much weight that should give towards the parental order application, although the hope would be that such instances would become much rarer with an update to the UK law.

### **Consultation Question 88.**

**We provisionally propose that financial terms of a surrogacy agreement entered into under the new pathway to parenthood should be enforceable by the surrogate.**

**Do consultees agree?**

**We provisionally propose that if the financial terms of a surrogacy agreement entered into under the new pathway become enforceable, the ability to do so should not be dependent on the surrogate complying with any terms of the agreement relating to her lifestyle.**

**Do consultees agree?**

Yes. However, we would welcome further consideration and input from the surrogacy organisations on whether the payments in full should be enforceable where the surrogate objects to the application of the parental order (and where the outcome of her objection is that a parental order is subsequently refused). Whilst we do consider that it is essential to avoid the agreement being considered to constitute the sale of the baby that the two are not liked, we can however see this causing major concern to Intended Parents, who may choose instead to go abroad where that is not a condition. It may be possible to distinguish this if different categories of payments are detailed in the legislation and under those circumstances it should make clear which categories of payments would be enforceable.

**Consultation Question 92.**

**We provisionally propose that it should be possible for a file to be opened, and the application process for obtaining registration of a child born from an international surrogacy arrangement and obtaining a passport to begin, prior to the birth of the child.**

**Do consultees agree?**

Yes.

## **Consultation Question 94.**

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

**Do consultees agree?**

**We provisionally propose that the current provision made for the grant of a visa outside of the Immigration Rules where the intended parents are not the legal parents of the child under nationality law should be brought within the Rules.**

**Do consultees agree?**

**We provisionally propose that:**

**(1) the grant of a visa should not be dependent on the child breaking links with the surrogate; or**

**(2) that this condition should be clarified to ensure that it does not prevent the child having contact, and an on-going relationship, with the surrogate.**

**Do consultees agree?**

**We invite consultees' views as to whether the current requirement for the grant of a visa outside the Rules that the intended parents must apply for a parental order**



**within six months of the child's birth should be removed (regardless of whether the availability of the visa is brought within the Rules), if our provisional proposal to remove the time limit on applications for parental orders is accepted.**

- (1) Yes.
- (2) Yes.
- (3) Yes, if that is what is agreed between the parties.
- (4) Yes, subject to our previous comments regarding the removal of the time limit.

### **Consultation Question 95.**

**We provisionally propose that it should be possible to open a file, and begin the process for applying for a EU Uniform Format Form in respect of a child born through an international surrogacy arrangement, before the child is born. The application will need to be completed after the birth of the child.**

**Do consultees agree?**

Yes.

### **Consultation Question 97.**

**We provisionally propose that the UK Government should provide a single, comprehensive guide for intended parents explaining the nationality and immigration consequences of having a child through an international surrogacy arrangement.**

**Do consultees agree?**

Yes. We consider this will also be better explained and understood once the law itself is updated and no doubt other organisations will therefore better understand the immigration and nationality implications to be able to explain them to intended parents.

**Consultation Question 98.**

**We provisionally propose that international surrogacy arrangements should not be eligible for the new pathway to parenthood.**

**Do consultees agree?**

Yes.

**Consultation Question 99.**

**We provisionally propose that –**

**The Secretary of State should have the power to provide that the intended parents of children born through international surrogacy arrangements, who are recognised as the legal parents of the child in the country of the child's birth, should also be recognised as the child's legal parents in the UK, without it being necessary for the intended parents to apply for a parental order, but –**

**before exercising the power, the Secretary of State should be required to be satisfied that the domestic law and practice in the country in question provides protection against the exploitation of surrogates, and for the welfare of the child, that is at least equivalent to that provided in UK law.**

**Do consultees agree?**

Yes.

## **Consultation Question 100.**

**We invite consultees to tell us of their experience of surrogacy arrangements in the UK involving foreign intended parents.**

**We invite consultees' views as to whether:**

**(1) any restriction is necessary on the removal of a child from the UK for the purpose of the child becoming the subject of a parental order, or its equivalent, in another jurisdiction; and**

**(2) if such a restriction is necessary, there should be a process allowing foreign intended parents to remove the child from the jurisdiction of the UK for this purpose and with the approval of the court and, if so, what form should that process take.**

From our experience there is little evidence of this happening in practice. We would defer to the surrogacy organisations for a view on whether they consider this to be required, but in principle have no objection to a restriction being applied to the removal of children from the UK for the purposes of a parental order and, under such circumstances, would support the court being permitted to approve that subject to a curator ad litem/reporting officer supporting that after review.

## **Consultation Question 101.**

**We invite consultees' views as to whether the current application of the law on statutory paternity leave, and statutory paternity pay, to the situation of the surrogate's spouse, civil partner or partner requires reform**

We consider that the current application of the law to the situation of the surrogate's spouse or civil partner is sufficient.

## **Consultation Question 102.**

**We provisionally propose that provision for maternity allowance should be made in respect of intended parents, and that any such provision should be limited so that only one intended parent qualifies.**

### **Do consultees agree?**

We would support a reform in the law to allow intended parents a specialist and surrogacy-specific form of maternity/paternity leave and allowance to enable them sufficient and reasonable leave/pay to care for the child. We would suggest that this could be split between both parents in a way which suits them.

### **Consultation Question 103.**

**We invite consultees' views as to:**

**(1) whether there is a need for reform in respect of the right of intended parents to take time off work before the birth of the child, whether for the purpose of induced lactation, ante-natal appointments or any other reason; and**

**(2) if reform is needed, suggestions on reform.**

Yes. This must be reformed to be consistent with the purpose of treating the pregnancy like any other.

### **Consultation Question 104.**

**We invite consultees' views as to whether the duty of employers to provide suitable facilities for any person at work who is a pregnant woman or nursing mother to rest under Regulation 25 of the Workplace (Health, Safety and Welfare) Regulations 1992 is sufficient to include intended parents in a surrogacy arrangement.**

Yes.

### **Consultation Question 105.**

**We invite consultees' views as to whether there are further issues in relation to employment rights and surrogacy arrangements and, if so, any suggestions for reform.**

We refer to our comments above.

### **Consultation Question 106.**

**We invite consultees' views as to whether they believe any reforms in relation to surrogacy and succession law are required.**

Yes. 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. We would defer to our Succession Law Committee on this point and have included a number of queries from this committee in our response to question 118.

### **Consultation Question 108.**

**We invite consultees' views as to whether there are any other legal issues in relation to surrogacy, not covered in this Consultation Paper, that merit examination.**

Aside from our response to question 118, we do not have further comments.

### **Consultation Question 110.**

**We invite consultees who have experience of applying for a parental order in the UK to tell us:**

**(1) whether the surrogacy arrangement was domestic or international;**

**(2) whether they had legal advice before the making of the parental order;**

**(3) whether they were represented by a lawyer in court; and**

**(4) the cost of any legal advice or representation.**

Whilst we are not intended parents, our understanding from practitioners in this area that they estimate the court outlays in Scotland of applying for a parental order to be approximately £2,500 - £3,000 + VAT and the legal fees of taking a parental order application from first meeting to overall conclusion (with the solicitor doing all of the work involved) to be a further approximately £3,000 + VAT assuming no complications or international arrangements which can be significantly more and depend on the jurisdiction etc.

#### **Consultation Question 111.**

**We invite consultees' views as to the impact (social, emotional, financial or otherwise) of the current law where the intended parents are not the legal parents from birth of the child born of the surrogacy arrangement.**

We would defer to the opinion of Intended Parents on this question.

#### **Consultation Question 112.**

**We invite consultees to tell us what they have paid for, or to provide evidence about the cost of:**

**(1) medical screening; and**

**(2) implications counselling (where possible separating out the cost of such screening, tests or implications counselling from any other costs involved with fertility treatment).**

**We invite legal consultees, who advise on surrogacy and parental order proceedings, to provide evidence of what they would charge:**

**(1) to provide advice sufficient to meet the proposed requirement for independent legal advice discussed in Chapter 13; and**

**(2) to draft, advise on and negotiate the written surrogacy agreement required for the new pathway**

We understand from practitioners that this varies from firm-to-firm and the level of experience of the solicitor involved. The basis of these estimations assumes the use of a mid to large city-based firm using a Fertility Specialist Solicitor: Providing advice sufficient to meet the proposed requirement for independent legal advice discussed in Chapter 13 would cost in the region of £250 - 500 depending on the complexity of the case. The cost of drafting, advising on and negotiating the written surrogacy agreement required for the new pathway would likely cost between £1000 and £1500 depending on the level of complexity involved. We understand that some firms may choose to offer fixed fee packages.

Consultation Question 114.

We invite consultees who consider that they might be able to fulfil the role of the independent professional discussed in Chapter 9 to tell us:

(1) their profession; and

(2) what they would charge to provide such a service

Having consulted with solicitors who specialise in fertility law, we consider it would be appropriate for such solicitors to be able to fulfil the role of the independent professional discussed in Chapter 9 of the consultation paper. Again, this varies from firm-to-firm and the level of experience of the solicitor involved. We understand that the average cost would likely be £500, depending on the requirements in any legislation and work levels involved. This assumes the use of a mid to large city-based firm using a Fertility Specialist Solicitor.

## Consultation Question 118.

### **We invite consultees' views as to any other impact that we have not specifically addressed in this chapter, or the preceding chapters, of this paper.**

We had considered some of the trusts and succession issues around surrogacy, and had the following questions that could be considered as part of the wider reforms:

- In the circumstances where there is a gap between birth of a child by surrogacy and the 'transfer' of parental rights/responsibilities to the new parents, could a new parent be obliged to pay into the estate of the surrogate to indemnify their estate against death?
- Where there is a valid contract under the new proposals and rights of succession to the surrogate's estate are lost at the birth of the child, what happens if the surrogacy does not go ahead? If there is a let-out, the child's inheritance rights should remain until a let-out is fulfilled so that a child is never a child of no parent.
- Under current arrangements, what happens if the surrogate or their husband/partner dies within the 6-week period after birth during which the surrogate is deemed to be unable to consent? Could the law provide that they are deemed to have consented to the surrogacy for inheritance purposes?
- Could succession rights be dealt with by way of standard clauses in the surrogacy agreement? That way, agreement could be reached by all parties who have been properly advised.
- What is the time of death of a mother and birth of a baby in circumstances where a mother dies during childbirth? How does this affect the *conditio*?

We hope that this response helps to inform the Law Commission's work in this important area, and would be happy to provide any additional information that may be helpful in considering these reforms.



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