



The Bar Council

## **Bar Council response to the Law Commission consultation paper on Building Families Through Surrogacy: A New Law**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Law Commission consultation paper on Building Families Through Surrogacy: A New Law.<sup>1</sup>
2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).
4. The Law Reform Committee have focused on answering the questions that primarily raise legal issues rather than policy issues. In addition, the Law Reform Committee has aimed to offer an opinion in response to particular areas of proposed reform that were highlighted and discussed during the Law Commission's Surrogacy Consultation event earlier this year - in particular, payment of surrogates and the implications of the same, and legal parentage.

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<sup>1</sup> [Law Commission's consultation on surrogacy](#)

**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?**

5. Yes, we agree that provided that the necessary steps set out at (1) to (3) have been met there should be no further steps required for the intended parents to become the legal parents of the child, subject only to the surrogate's right to object. This will increase legal certainty for all concerned and contains sufficient safeguards for all parties concerned i.e. the intended parents, the surrogate (and the surrogate's partner if there is one) and the child. We consider that it would be beneficial for the surrogate to know from the outset in this arrangement that she is not going to be the legal parent of the child to whom she gives birth. By following this pathway, the law will in fact honour the intentions of all concerned and respect the right of the child to his or her personal identity on birth.
6. 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.
7. In order to ensure that all parties are in complete understanding regarding each of their stated intentions, it is right that the parties should enter into an agreement which includes a statement as to the legal parenthood of the child at birth. It is noted that there is no indication within the question, or the consultation paper as to whether or not it is proposed that the agreement be legally binding. However, it is not considered that such an agreement should be legally binding. The agreement

should simply be used to formalise the agreements and the intentions of the parties, and also provide clarity for the court (if necessary at a later stage), as to what the intentions of the parties were at the time the surrogacy journey was embarked upon.

**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.**

8. Yes, we agree that there ought to be a legal duty to keep and maintain records of surrogacy arrangements for a minimum period of time. It is appropriate that such records can be accessed by the proposed regulator (i.e. the HFEA) and also the person registering the birth of the child.
9. As to the period of retention, the consultation suggests that the proposed 100 years is linked to a person's lifetime. However, it is unclear why, if the new pathway is to be implemented, with legal parenthood being acquired at birth subject to a limited time when the surrogate can object, and in domestic rather than international cases, such an extensive period of retention would be required.
10. In any event, we do not consider that 100 years is appropriate insofar as this is said to be reflective of a person's lifetime. Whilst there are isolated cases of individuals living for beyond the age of 100, this can happen, and it is impossible to predict with certainty what the effect of medical advances might be on longevity. As records tend to be stored electronically, and easily can be converted to such format even if initially made and stored in paper form, we do not see that it would be overly onerous to extend the period to 120 years if a lengthy period is already in contemplation.

**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?**

11. We agree that this a finely balanced issue, but we consider that there should be no prohibition given that this would create a legally anomalous position and that the number of cases in which this is an issue is likely to be very small as identified in paragraph 8.18.

**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.**

12. We do not think that the use of anonymously donated sperm in a traditional, domestic surrogacy arrangement should take that arrangement outside the scope of the new pathway. There is no strong policy basis for doing so and in fact it is desirable to achieve as much legal parity as possible. While the aim of allowing children born through a surrogacy arrangement 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.

**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?**

13. Under this proposal, the intended parents would automatically become the legal parents of the child unless there existed a right of the surrogate to object and that right was exercised within such period as it could be. This immediately creates an

imbalance insofar as the intended parents cannot 'back out' (which we agree is the correct position for the protection of the surrogate and the child), but the surrogate can take action to prevent this from happening by actively objecting in writing.

14. Given that within the new pathway there will have been extensive safeguarding of the surrogate's position and understanding of the process, its implications and the effect of automatic legal parenthood for the legal parents on birth, to retain a right to object seems to deviate from the legal certainty which the new model seeks to provide. It also seems to be at odds with the philosophy of parenthood underpinning the new pathway because it does not in truth afford the intended parents certain legal parenthood at birth and is therefore not so different to the parental order route as a matter of principle.
15. We consider that it is no answer to say that in practice very few surrogacy arrangements would break down in this manner and given that, where the relationship of the intended parents broke down or the child was born with a disability, the intended parents would, we consider rightly, be in the same position as 'natural' parents insofar as their responsibilities to the child, then 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.
16. In those circumstances, we would agree that the objection should be made in writing to the body responsible for regulation and the intended parents as soon as possible and in any event no later than a week before the latest date when the birth can be registered. The surrogate should be allowed to appoint a proxy to make the objection in writing if necessary in circumstances in which her physical or mental health is compromised and prevents her from making the objection in writing herself.
17. If it decided that legally, the surrogate should have the right to object post birth then it is agreed that any such objection should be made in writing within a defined period. However, it is not agreed that the defined period should be the applicable period for birth registration less one week – therefore totalling 5 weeks.

18. Prior to the pregnancy and subsequent birth, under the current proposal, (particularly for the new pathway), the surrogate would have completed a series of checks and balances to ensure that she understood the implications of the agreement that she was entering into. This is further cemented by the proposed implications counselling which the writer supports. A considerable amount of time would therefore have already been devoted to ensuring that there is a thorough understanding of the arrangement and consent to the same by all parties. Therefore, it is proposed in the alternative that a period of 3 weeks will suffice for the surrogate to make these views known.
19. When considered further from the position of the rights of the child for a private and family life, alongside the principle within family law of the need to provide certainty and stability for children without undue delay when the court becomes involved, it becomes even more essential that the potential delay to establishing the child's permanent home and legal parents be minimised. If the surrogate voices an objection, then the matter will have to proceed down the parental order route which potentially adds further delay for the child, thus this also needs to be borne in mind.

**Question 12:**

**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?**

20. The proposed consequences of the surrogate objecting in writing to the intended parents acquiring legal parenthood after the birth of the child place into stark relief how severely legal certainty may be undermined by a general, seemingly unfettered right to object notwithstanding the steps that must be taken within the pathway prior to the birth of the child. Under this proposal, the mere fact of the objection takes the

arrangement wholly outside the pathway. We consider that this fundamentally undermines the proposal for a new pathway.

21. If the effect of an objection is to take the arrangement outside the pathway then we agree that a sensible procedure is as set out with the surrogate becoming the legal parent, the intended parent who would otherwise become a legal parent retaining those rights and the intended parents having to apply to the Court for a parental order.
  
22. We consider, therefore, that the scope of any right to object must be limited and considered with great care as it may undermine the new pathway altogether. We note that the position in Ontario differs insofar as up to four intended parents can be recognised in law and that the surrogate must confirm that she is “relinquishing” legal parenthood i.e. that she is a legal parent and she relinquishes it rather than that, as we understand this proposal, she is never a legal parent at all so long as the necessary steps in the pathway are met prior to the birth.

### **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?**

23. Our concerns about the right to object and its effect on the pathway as a whole can be echoed here. We agree, however, that insofar as the right to object is to be retained then the onus should be on the intended parents who are registering the birth of the child to provide a declaration of belief or alternatively the positive consent of the surrogate failing which the arrangement will, at the very end of the process, fall off the pathway and go back onto the parental order route.

#### **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?**

24. Agreed. Removing the requirement for any welfare assessment of the child after birth is particularly important.

25. Surrogacy should be seen as an acceptable and alternative way for consenting adults to create their family and indeed, it has greater similarities to natural conception and childbirth than it does differences. In light of this, those who become parents through surrogacy, should, as far as is possible, be treated in the same way as those who become parents through natural conception. To subject a family to a welfare assessment of the child post-birth when one would not be conducted had the intended parents become parents of the child naturally, arguably discriminates against Intended Parents for no justifiable reason, and implies that a surrogate pregnancy must be treated in a different, and somewhat more unfavourable way to a natural conception.

26. The proposed new pathway accounts for checks to be undertaken prior to entering into the surrogacy arrangement and it is argued that this should suffice. With a natural conception, a check and state interference would only occur if concerns are raised by treating clinicians/ nurses/ medical staff, otherwise parents are left to enjoy



their new addition to the family without interference. The same should apply with surrogate births.

**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.**

27. Again, further to our general observations and concerns about the objection model and its undermining of the purpose of the new pathway itself, we do not agree that where an arrangement is taken out of the pathway because of a surrogate's objection, the surrogate's spouse or civil partner should not be a legal parent of the child where otherwise he or she would be. This cherry picking creates legal uncertainty and there is no proper basis for the full consequences of the surrogate being the legal parent not applying where she objects whereas those consequences apply fully to the intended parents. This creates a legal imbalance which we have not seen any proper rationale for.
28. We agree that in any arrangement outside the new pathway the surrogate's spouse or civil partner should continue to be a legal parent of a child born as a result of the arrangement. This should encourage the surrogate to consult carefully with her spouse or civil partner which is likely to be in the best interests of the surrogate, her family unit, and the child.

**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?**

29. We fully agree that where the new pathway applies and, sadly, a child is stillborn the intended parents should be the legal parents of the child.
30. We repeat our position as to the proposed right of the surrogate to object and consider that there is no basis for distinguishing our views by reason of the child being stillborn.
31. We agree that where the new pathway does not apply, and a child is stillborn then the surrogate should be able to consent to the intended parents being registered as the parents where they declare that the relevant criteria for the making of a parental order are satisfied.
32. The law should recognise parents of a child who dies whether he or she is stillborn or dies prior to formalities being concluded which would otherwise have resulted in that legal recognition.

**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?**

33. We also agree that where the new pathway does not apply and, sadly, a child dies before the making of a parental order the surrogate should be able to consent to the intended parents being registered as the parents where they declare that the relevant criteria for the making of a parental order are satisfied.
34. The law should recognise parents of a child who dies whether he or she is stillborn or dies prior to formalities being concluded which would otherwise have resulted in that legal recognition.

**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.**

35. We repeat our position as to the proposed right of the surrogate to object and consider that there is no basis for distinguishing our views by reason of the surrogate sadly dying in childbirth or after giving birth.

**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.**

36. We repeat our position as to the proposed right of the surrogate to object and consider that there is no basis for distinguishing our views by reason of the intended parents sadly dying before the child is born.

37. Where the new pathway does not apply, then, as is observed in the consultation, where both intended parents die, there is no one eligible to apply for a parental order. We agree that a person who fulfils the definition set out in (1) should be able to make an application for an order for appointment as a guardian and for a parental order in the name of the intended parents i.e. there should be a means by which a parental order may be applied for and the surrogate should have the opportunity to make representations as would be the case had the parents lived and made the application themselves.

38. We consider that this respects the distinction between new pathway and non-pathway cases whilst dealing with the obvious lacuna that arises where both intended parents die before a parental order is granted.

**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?**

39. We agree with the proposal.

40. It is right that the second Intended Parent be given notice of any application made by the first Intended Parent. Not requiring the same (as the law currently states) has the effect of essentially making an ex parte order without the other party having any opportunity to respond either at the time of the order or subsequently.

41. It is proposed that when the first Intended Parent gives the requisite notice of the application to the second Intended Parent, then the second Intended Parent's period to provide a notice of opposition should be 7 days, rather than the 14 or 21 days which have been suggested.

42. It is noted that in divorce proceedings, a Respondent upon receiving a notice of application for divorce, has 7 days to return the acknowledgement of service detailing whether or not the Applicant's divorce application is opposed. The Respondent then has a further 21 days to file and serve an answer. (21 days beginning when the acknowledgement of service was due to the filed and served. See FPR 7.12(1) and FPR 7.12(8)). It would therefore follow that when considering timescales for a similar process within surrogacy law, for parity, a similar timeline should be implemented.

**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.**

43. We do not support the three-parent model of legal parenthood and consider it offers no real benefit over the parental order route save in one very particular instance, which is where the effect of the new pathway is to leave a child born to a surrogate

with no legal mother. This poses a question which may be said to be as philosophical and ethical in nature as it is legal; we do not seek to trespass beyond the final of those three. However, it is inescapable that having regard to the welfare of the child must include his or her psychological welfare and having no mother on a birth certificate or in law, where the intended parents are both male, may be seen by many to be a deeply uncomfortable situation to have to confront. The recent case concerning Mr Freddy McConnell, a transgender male, who gave birth and wished to be registered as the father rather than the mother of his child lost his case at the High Court but is said to be contemplating an appeal.

44. As reported by the BBC:

*Sir Andrew McFarlane, president of the Family Division of the High Court, said: "There is a material difference between a person's gender and their status as a parent.*

*"Being a 'mother', whilst hitherto always associated with being female, is the status afforded to a person who undergoes the physical and biological process of carrying a pregnancy and giving birth.*

*"It is now medically and legally possible for an individual, whose gender is recognised in law as male, to become pregnant and give birth to their child.*

*"Whilst that person's gender is 'male', their parental status, which derives from their biological role in giving birth, is that of 'mother.'"*

*Sir Andrew added: "There would seem to be a pressing need for Government and Parliament to address square-on the question of the status of a trans-male who has become pregnant and given birth to a child."*

45. One can see that the implications of having no "mother" on a birth certificate may be profound and that the court did not consider that Mr McConnell's autonomy and right to change his legal status from female to male could override his status as the child's mother because he had given birth to the child. The argument could extend to the role of a surrogate and providing a register in which the surrogate's details appear may not be a complete answer to this profound issue.

#### **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.**

46. The new pathway is proposed to and indeed should have robust systems and protections in place to ensure that the intended parents and surrogates have all the necessary information in order to make informed decisions which are legally binding prior to the birth of the child. The pathway will need to be regulated and we agree that HFEA is well placed to do this. We consider that there should be no need for judicial oversight of the pathway process and that this would be inimical to what the new pathway seeks to achieve. Other than regulatory oversight we do not think there is any need for further administrative oversight. A dispute around legal parenthood would ultimately be resolved by the courts where it arose and was not otherwise resolved consensually.

**Question 23:**

**In respect of England and Wales, we invite consultees' views as to:**

- (1) **whether the welfare checklist, contained in section 1(3) of the Children Act 1989, should be amended to provide for the court to have regard to additional specific factors in the situation where it is considering the arrangements for a child in the context of a dispute about a surrogacy arrangement; and**
- (2) **if so, as to what those additional factors should be.**

47. When considering the welfare checklist in section 1(3) of the Children Act 1989, we take the view that the court should have regard to further specific factors when considering arrangements for a child in a dispute about a surrogacy arrangement. Thus, it is agreed that the welfare checklist should be amended to include these factors.

48. It is of note, that the welfare checklist is used to determine a number of different matters in relation to a child – not just who the child is to live with, but also who the child spends time with, specific issues regarding whether the child has a change of name, is permitted to relocate with a parent either internationally or internally - to name only a few examples. Precedents such as *Re N (A child)* [2007] EWCA Civ 1053 and *Re Z (surrogacy agreements) (Child arrangement orders)* [2016] EWFC 34 have demonstrated that where there is a dispute arising from a surrogacy agreement, the court has considered matters such as the intention of the parties, the genetic make-

up of the child and the contents of any agreements, when considering not just with whom the child should live, but also whether there should then be contact with the other party and if so, how much.

49. It would therefore appear to us upon consideration of those precedents, that those 3 factors in particular have been at the forefront of judge's minds when giving those judgments. However, these factors were considered, largely because they were issues which formed part of the key facts before the Judge, and not because the matters are within any affirmed checklist.
50. It is therefore suggested that the welfare checklist be amended to include the following factors:
- i. Any surrogacy agreement and the contents therein
  - ii. The intention of the parties (if not contained within a surrogacy agreement as proposed under the new pathway)
  - iii. Genetic make-up of the child.

These factors are likely to have the most weight in many decisions before the court regarding surrogacy arrangements. Further, although the courts thus far have exercised their discretion and so considered those aforementioned matters when they have arisen, codifying them in an amended welfare checklist, will ensure uniformity of thought and application of law by all judges across all future proceedings. It will also provide clarity for those practitioners and parties within proceedings as to what the court will and will not consider as part of their decision making.

**Question 24:**

**In respect of England and Wales, we invite consultees' views:**

- (1) as to whether the checklist, contained in section 1(4) of the ACA 2002 (as applied and modified by regulation 2 and paragraph 1 of Schedule 1 of the 2018 Regulations) 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**
- (2) what those additional factors should be**

51. Agreed, for the reasons outlined in paragraph 8.118. To date, the court has had no difficulty granting parental orders where one has been applied for. Therefore the



inclusion of further factors in an effort to assist decision making which already appears to occur without difficulty, would be superfluous.

**Question 25:**

**We invite consultees' view 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 without leave.**

52. Agreed.

53. 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'. These persons therefore range from special guardians (who would have parental responsibility), to those who the child is living with or has lived with for a significant period of time, or a party to a marriage or civil partnership where the child is a child of that family.

54. 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.

**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?**

55. Agreed, for three reasons.

56. Firstly, the current law confers parental responsibility upon any person, or state body who has the care of a child and who will therefore have to make decisions on behalf of the child. For example, if a family member becomes the Guardian of a child, parental responsibility is automatically conferred upon the Guardian in respect of the child. In care proceedings, if an Interim Care order is made in favour of a Local

Authority, the Authority will then share parental responsibility with the child's parents, as the child is now placed in the care of the Local Authority. It therefore follows that if the child is in the care of the Intended Parents, then they should have the legal capacity and authority to make decisions regarding that child in order to care for the child completely.

57. Secondly, if there is an intention to apply for a parental order then this demonstrates the parties' intention to be considered the legal parents of the child. Therefore granting parental responsibility at this interim stage further gives way to that.

58. Thirdly, at paragraph 8.97 of the consultation paper, it is noted that surrogates do not want to be considered the legal parent of a child that they never considered to be theirs, or make decisions in respect of that child. If the surrogate has consented to the child living with Intended Parents whilst a parental order is awaited, this is further demonstration of that sentiment expressed by the surrogates. Therefore it follows that the law should pave the way to the parties' intentions and grant the Intended Parents parental responsibility in these circumstances – irrespective of whether the arrangement is within the new pathway.

**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?**

59. Agreed, for the first two reasons outlined in response to question 26.

60. It is assumed however, that the converse would therefore be true. Thus, if the surrogate raises her right to object and the child is not living with the Intended Parents, there should be no parental responsibility held by the Intended Parents – even in circumstances where they intend to apply for a parental order

**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?**

61. This is not agreed. The surrogate should only have parental responsibility if the surrogate has exercised her right to object.

62. In reference to the first paragraph in response to question 26 above, parental responsibility is ordinarily conferred upon a person who has care of the child or is the legal parent of the child. Therefore if:

- i. the surrogacy arrangement has followed the new pathway, thus,
- ii. the Intended Parents have obtained legal parentage upon birth of the child,  
and
- iii. the child is living with the Intended Parents,

then it is the Intended Parents alone, who should have parental responsibility for the child – particularly in circumstances where the surrogate has not raised an objection or desire/intention to object. In this scenario, without an objection raised by the surrogate, she will have neither physical care of the child nor legal parentage, thus parental responsibility is not required. Moreover, this outcome would accord with the responses given by surrogates that they do not want to be responsible for a child they have never considered to be theirs.

If, on the other hand,

- i. the surrogacy arrangement follows the new pathway, however,
- ii. the surrogate does exercise her right to object,

then parental responsibility should then be conferred upon the surrogate, as she would now be the legal parent under the current proposals under the new pathway.

**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

63. Agreed, for the first reason outlined in response to question 26. Parental responsibility, if shared by the surrogate and Intended Parents, should only be exercised by the person(s) with whom the child is living/ party caring for the child.
64. Going further, if the outcomes of questions 27 and 28 above are considered, then the only circumstance in which parental responsibility would be shared, would be in the situation where the surrogate has raised her right to object but the child is living with the Intended Parents and they intend to apply for a parental order. It would therefore follow that it would be for the Intended Parents alone to exercise the shared parental responsibility as they would have care of the child.

**Question 30:**

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

**Do consultees agree?**

65. Agreed, for 2 key reasons.
66. Firstly, there is currently no distinction made in the law or by a court between traditional surrogacy and gestational surrogacy when Intended Parents obtain Parental Orders. It would therefore serve no purpose to create a distinction in law now, particularly as the matters of principal concern - namely intention and consent regarding legal parentage, remain the same.
67. Secondly, the new pathway provides a further benefit to both surrogates and Intended Parents, as all parties engage in a transparent regulatory process which will serve to bring clarity and certainty to surrogacy agreements. It would therefore stand to reason that all types of surrogacy arrangements should benefit from this regulatory process as far as is practicable. Therefore traditional surrogacy arrangements should indeed fall within the scope of the new pathway.

**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.**

68. We agree that the HFEA should be tasked with regulating regulated surrogacy organisations and have oversight of compliance with the proposed legal requirements for the new pathway to legal parenthood. Putting resourcing matters to one side, it is well placed to be able to regulate in this complex sphere. We agree that it is the only realistic candidate.

**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:**  
**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.**

69. We agree with the proposal and note the many reasons why a child born within a surrogacy arrangement may wish to know about their genetic identity including for reasons for health. We agree that the register should be for all surrogacy arrangements and not just those on the new pathway.

#### **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?**

70. Agreed. As detailed, such a time limit will add an unnecessary layer of complexity to the law.

71. However, it will be important to ensure that awareness is raised about the need for Intended Parents to regularise their legal parenthood. A time limit will not encourage Intended Parents to take this step if relevant awareness is not already in place that such a step is necessary.

#### **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?**

72. Agreed.

73. In addition, the proposal at paragraph 11.55 of the Consultation paper is of particular importance here and should be made clear in any future drafting. Namely, that when the court is considering dispensing with consent, there should be no preference given to a genetic or gestational link between the Surrogate and the child, in the same way there has been no preference shown or additional weight granted to the Intended Parents thus far when there has been a genetic link between an intended parent and a child.

**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.**

74. It is agreed that the Intended Parents or one of the Intended Parents must be domiciled or habitually resident in the UK, Channel Islands or Isle of Man. It is not agreed however, that there be any additional qualification imposed on the test of habitual residence.

75. 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. For example, one consideration of the test, (certainly in respect to the habitual residence of a child) makes clear that the more established a person is in their former state, the longer it will take, and the more that will have to be done in the UK as the new state, to transfer their habitual residence. (See Mr Justice Baker in *EE and ME (Children) (Habitual Residence)* [2016] EWHC 3363 (Fam)). That one consideration in itself (amongst the others stated in leading precedents), decreases the ease of establishing surrogacy tourism.

76. 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.

#### **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.**

77. The right to procreate for those who can or choose to do so is not one that is subject to being married or in a civil partnership or living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other. The right to family life is one which is a fundamental human right.

78. Conversely, those who seek to adopt may find themselves subjected to a whole catalogue of queries, examinations, inspections and standards which would not apply to someone wishing to become pregnant or impregnate another with a view to having a child.

79. So, where does surrogacy sit within this spectrum? It is certainly arguable that the law places too many conditions on those who seek a parental order; an order simply recognising them as the legal parents of a child with all the legal responsibilities that come with the territory.

80. The law at present creates an anomaly as between sole applicants and joint applicants. The legal requirements upon joint applicants to show that they fall within the qualifying categories of relationship in section 54(2) HFEA 2008 appear to be more onerous, which, of itself, creates a discriminatory regime. If having a child is not the preserve of the married or coupled then what place does section 54(2) have now? There is no requirement for a woman or man seeking to have a child through 'ordinary' biological means or a man or woman seeking a parental order by themselves to prove any relationship, let alone a permanent or sexual relationship, with another person in order to do so.



81. We consider that the time has come to remove the qualifying categories of relationship save that the barrier to those within the prohibited degrees of relationship applying should remain in place. While this prohibition is directed at unlawful incest and its consequences on the health of a child, it 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. While two siblings seeking a parental order in respect of a child who does not have a genetic connection with one or both can be distinguished in terms of the consequences of incest, the societal bedrock of family life has not changed to the extent that one could reasonably describe the law as being out of kilter in this regard.

**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?**

82. This is strongly agreed. It is essential that both parties enter into the agreement in complete understanding of the legal implications which flow from making a surrogacy arrangement and stating an intention regarding legal parentage. Further, the surrogate must also understand her right to object and the means by which she is to do so, and the Intended Parents must be made aware of the passage the new pathway will take (if applicable), the Surrogate's right to object, and the options then available to the Intended Parents in the wake of an objection.

83. Finally, if both parties have obtained separate and independent legal advice prior to entering into a surrogacy agreement, then should the matter traverse into the court arena, a Judge can be confident when considering the surrogacy agreement that it was entered into with full knowledge and understanding of the legal implications therein, due to the provision of independent legal advice.

**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:**

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

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

84. The surrogate goes through pregnancy and all its associated pain and inconvenience, and childbirth, and may suffer complications to her health which give could also rise to financial losses. Plainly, medical treatments may be involved along the way. Pregnancy and childbirth do not always chart the same course or go to plan.

85. We see no reason why intended parents should not be able to pay a surrogate compensation for:

- i. Pain and inconvenience arising from pregnancy and childbirth;
- ii. Medical treatments relating to the surrogacy and / or
- iii. For any and not just a specified medical complication arising from the pregnancy or childbirth.

86. The law has sought to guard against exploitative practices, but also to respect the autonomy of the parties to a surrogacy arrangement and to allow for genuine compensation for the matters referred to above, by and large.

87. We consider that it should be open to intended parents to pay a surrogate for any expenses or losses reasonably incurred or sustained wholly or substantially by

reason of the pregnancy or childbirth or post-partum period subject to a cap set by the regulator.

88. The cap should be sufficient to deter parties from exploitative practices but should account for the different earning potential of individual i.e. there is no reason why a high earner who becomes a surrogate should be disproportionately impacted by a cap which assumes she is a low or average earner.

**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.**

89. It should be open to intended parents to compensate a surrogate for career interruption, disruption to career progression and loss of earnings or bonus or other remuneration by reason of the pregnancy, childbirth or the post-partum recovery. It is a matter for the parties as to how they agree this and how sensibly they structure any contract in this regard, but the law should as a matter of principle allow such payments as they do not offend public policy.

**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.**

90. If, as a matter of policy, it is thought right that the spouse or partner of a surrogate should be entitled to statutory paternity leave then the law will need to be reformed in this respect as he or she is not entitled to it as matters stand. However, this would likely give rise to the situation of two or more individuals taking statutory paternity leave in respect of the birth of the same child i.e. one to support the intended other parent and one to support the surrogate. This may be seen to be undesirable in circumstances in which it should be open to the intended parents to pay the surrogate a sum to compensate her for the cost of obtaining any post-partum support she requires (which could be within a wide spectrum depending on her delivery, health, whether there is to be any period of breastfeeding and any complications).
91. 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.

92. 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.

**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?**

93. We disagree that maternity allowance should be made available to one intended parent for the following reasons:
- i. Maternity allowance is based on the same purposes as maternity pay i.e. to allow the self-employed woman who is pregnant and gives birth to take time off work and receive an income, which includes ante-natal and post-natal periods. The ante-natal time is usually due to pregnancy and preparing for birth whereas the post-natal time is for recovering (compulsory two week period after birth) and caring for the child;
  - ii. This is reflected by the CJEU which sees the “commissioning mother” as having a different position to one who has given birth and is protected by the Pregnant Workers’ Directive (see for example CD v ST);
  - iii. The needs of the intended parent are plainly different insofar as they are not pregnant or giving birth;
  - iv. There is a different scheme of leave and pay for adoptive parents and for those who wish to share parental leave which is available to intended parents going down the Adoption Order route;
  - v. There could and should be a separate system of pay for intended parents who become parents through surrogacy under the Parental Order or new pathway routes, after the child is born, to avoid duplication of pay for two individuals in respect of the birth of the same child i.e. two lots of maternity pay or allowance;

vi. Having a separate form of parental pay is administratively much less complex for the state and employers to manage particularly given the shared leave regulations;

vii. Intended parents should be placed in an analogous position to adoptive parents in terms of pay or allowances. It should be noted that adoptive leave and pay is already available where the intended parents have no genetic link to the child and are going down the Adoption Order route. There could be a 'Surrogacy Leave' and 'Surrogacy Pay' regime albeit perhaps not with that working title.

**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.**

94. We consider that there should be holistic 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 etc.

95. 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.

96. It is outside the scope of this response to analyse the impact this would have on employers, including small or medium sized ones.

97. 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.

98. Other areas of law that ought to be considered for reform include a prohibition on discrimination against the intended parents in a surrogacy arrangement by extension of the Equality Act 2010.

**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.**

99. We consider that the existing provision covers a pregnant surrogate and a nursing mother (intended parent who becomes legal parent of the child on or after its birth). We would be surprised if any employer would risk preventing or failing to facilitate a nursing (intended) parent from doing so. This would more than likely amount to unlawful indirect sex discrimination i.e. a blanket ban on anyone who 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 which is unlikely to be objectively justifiable.

**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.**

100. Areas of reform are covered elsewhere.

**Bar Council<sup>2</sup>**

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<sup>2</sup> Prepared for the Bar Council by the Law Reform Committee