

Equality Impact Assessment Initial Screening – Relevance to Equality Duties

Before you complete an Equality Impact Assessment you must read the Guidance Notes and unless you have a comprehensive knowledge of the equality legislation and duties, it is strongly recommended that you attend an EIA training course.

The EIA should be used to identify likely impacts on:

- Disability
- Race
- Gender
- Age
- Religion or belief
- Sexual orientation
- Pregnancy and maternity
- Caring responsibilities (usually only for HR policies and change management processes such as back offices)

1. Name of the proposed new or changed legislation, policy, strategy, project or service being assessed.

The current law

The project aims to reform surrogacy laws, which are currently contained primarily in the Surrogacy Arrangements Act 1985 and the Human Fertilisation and Embryology Acts 1990 and 2008.

There are three significant problems with the current surrogacy laws in the UK. First, intended parents currently have to wait until the child has been born and then apply to court to become the child's parents. The process often takes from six months to a year to complete, does not reflect the reality of the child's family life, and affects the intended parents' ability to take decisions about the child in their care. Until the intended parents are recognised as the parents, the surrogate remains the legal parent of a child that she has not intended to raise, and may be required to make decisions in respect of the child, despite the child not being (and never having intended to be) in her care. Numbers of surrogacy arrangements are small: only 436 parental orders (the only existing measure for the number of surrogacy arrangements taking place in the UK) were made in 2021, however, the impact on those affected is significant.

Second, there is insufficient regulation, making it difficult to monitor the surrogacy process and those involved in it and ensure that standards throughout the process are maintained to a high standard. This raises concerns about the child's welfare and the exploitation of women.

Third, a lack of clarity around surrogacy payments makes the laws difficult to apply in practice.

The current law is complicated, out-dated and results in inequality. As surrogates, women face an unequal impact in cases where the lack of proper regulation of surrogacy arrangements places them in a situation where they are vulnerable to exploitation, particularly if they are induced into becoming a surrogate, whether the inducement is

emotional or financial. They are also vulnerable to being left legally responsible for the child unless and until the intended parents are recognised as parents. (see note 1).

The delay between the child being born and a parental order being granted is a feature of the current law that impacts couples or individuals who are unable to bear children. The available data shows that this impacts male same-sex couples in particular, as one of the groups who are proportionately more likely to use surrogacy (see note 2).

We recommend comprehensive reform of the existing legislation to resolve these issues, proposing an entirely new scheme to govern surrogacy law.

Notes

(1) We use “women” and the female pronoun when referring to surrogates. We note that trans men who have a uterus can carry a child and that some do. However, we think that it is important to acknowledge that carrying and giving birth to children is almost invariably undertaken by women. Accordingly, we also think it is important to acknowledge that the issue of surrogacy, and the specific concerns about exploitation of surrogates, directly involves women’s rights.

(2) Information provided by Cafcass dated 13 October 2022 in response to a Freedom of Information request, available in Appendix 1, shows that 26% of parental order applications were made by same-sex couples in 2021, a much higher proportion than the proportion of same-sex couples in the population as a whole.

2. Individual Officer(s) & unit responsible for completing the Equality Impact Assessment.

Spencer Clarke

3. What is the main aim or purpose of the proposed new or changed legislation, policy, strategy, project or service and what are the main aims and intended outcomes?

Aims / objectives	Outcomes
To provide recommendations for a reformed law of surrogacy that works to protect the welfare of all the participants to the arrangement, including the surrogate, the intended parents and, most importantly, the child.	The intended effect is to make surrogacy laws fairer and up to date with Government’s support of surrogacy as part of the range of assisted conception options. In doing so, we want to encourage people to stay in this country rather than go abroad for surrogacy arrangements, where we can ensure that there is an appropriate legal regime in place to regulate surrogacy arrangements, and thereby reduce the likelihood of exploitation of surrogates overseas, where we have no way of requiring or overseeing safeguarding and protection measures.
Provide a new pathway to allow intended parents to be legal parents on birth if they	Reduces problems related to having to apply for a parental order after birth; puts

<p>fulfil certain screening and safeguarding requirements and are signed off onto our new pathway by what we call a “regulated surrogacy organisation”.</p>	<p>safeguards in place to ensure the welfare of the child is protected prior to conception; increases stability for the child from birth; removes the risk of surrogate being left with legal responsibility for the child; decreases stress and cost for all parties; better reflects the intentions of the parties; and greater certainty for all involved.</p>
<p>Introduce a new regulatory framework for surrogacy organisations and screening and safeguarding requirements pre-birth on the new pathway, such as independent legal advice, implications counselling, health screening, and enhanced criminal record checks.</p>	<p>Ensures better protection for surrogates, intended parents and children on the new pathway and should make it easier to monitor what is going on in the surrogacy process to ensure that standards are kept high; consequences for organisations who do not comply with standards.</p>
<p>Provide clarity on what payments to surrogates are permitted and create an enforcement system to ensure intended parents are not able to make overpayments to surrogates.</p>	<p>Our recommendations will set up a system of permissible categories of payments. This should make the law on payments clearer to understand for all parties; reduce concerns about inadvertent infringement of the law; makes it less likely that commercial surrogacy arrangements are able to slip through the net and therefore, reduces the risk of exploitation; may incentivise domestic surrogacy arrangements rather than overseas arrangements. Making the financial terms of a surrogacy agreement on the new pathway enforceable by the surrogate against the intended parents will also ensure greater protection for surrogates and ensures they are not left “out-of-pocket”.</p>
<p>Ensure access to information about one’s origins for all surrogacy-born people.</p>	<p>We recommend the creation of a bespoke Surrogacy Register which all arrangements, whether on the new pathway or using the parental order process, will be required to submit information to. This should provide greater access to information for children born of surrogacy arrangements, which has psychological and wellbeing benefits for both them and their families.</p>
<p>Removal of legal parental status from surrogate’s spouse or civil partner</p>	<p>Reflects the intentions of the parties and the position of the surrogate’s spouse or civil partner; and better reflects the realities of the child’s birth.</p>
<p>Reform of parental order process so that in any dispute, the court may dispense with the requirement for the surrogate’s consent where the child’s welfare requires it</p>	<p>This prioritises the best interests of the child and reduces the likelihood of a stalemate situation where the surrogate has refused to give consent to a parental order after breakdown of the surrogacy relationship, but the child is living with the intended parents (such as in the case of <i>Re AB</i></p>

4. What existing sources of information will you use to help you identify the likely equality impacts on different groups of people?

(for example statistics, survey results, complaints analysis, consultation documents, customer feedback, existing briefings, submissions or business reports, comparative policies from external sources and other Government Departments)

The Law Commissions are consultative bodies and consult widely to support their proposals. The evidence we considered included existing data and reports, as well as evidence provided by consultees during consultation.

1. Data

Family Courts Statistics Quarterly

Given the unregulated nature of surrogacy arrangements, it is difficult to accurately measure the extent of surrogacy at any one time. The only way in which we can collect data about surrogacy is to look at the number of parental order applications made to the court. Data on the number of parental orders is available from the Family Courts Statistics Quarterly (FCSQ) and National Records Scotland. The most recent figures show that in 2021, there were 436 parental orders made by the courts in England and Wales and 15 such orders made in Scotland. Given the very small proportion of parental orders granted in Scotland, the data set here is too small to provide meaningful evidence of any particular trend. We have therefore focused the following analysis on the data from England and Wales.

Cafcass data on parental orders

We used information obtained from Cafcass, showing obtain breakdowns of data on parental orders by age, sexual orientation and country (see note 3).

The number of parental order applications made by same-sex applicants has been gradually increasing over the last few years to around 33% of all applications in 2020 and 26% in 2021. The typical age group of applicants for a parental order is between 30 and 50, with nearly 85% of all applications being made by at least one applicant in that age group.

Data from Cafcass shows that there has been a significant increase in the proportion of parental order applications where the surrogacy arrangement was an international one, with the percentage of international arrangements now consistently being around the 50% mark. Given that domestic law is limited in the extent to which it can guard against exploitation in another jurisdiction, there is greater potential for exploitation of women as surrogates in overseas arrangements, where we cannot control what legal protections are in place for them. There are particular concerns where the surrogacy takes place in a developing country, where women are more vulnerable to exploitation than in the UK because of the potentially life-changing impact of the payments received and, if relevant, the existence of commercial surrogacy arrangements with only light regulation and no judicial oversight. International arrangements may result in laws that aim to protect the welfare of children and surrogates being circumvented, and can raise concerns about

trafficking of children or the exploitation of women in specific parts of the world. However, concerns of exploitation vary considerably between different countries (see note 4).

Our understanding of some of the difficulties and challenges presented by international surrogacy arrangements was greatly assisted by a visit by members of the Law Commission of England and Wales team to the British Embassy in Kyiv, Ukraine, and by discussions and meetings held during that visit. We heard first-hand of a number of cases which raised concerns as to the treatment of surrogates. For example, we heard of vulnerable women displaced from occupied territories in Ukraine acting as surrogates; young women from Georgia who had acted as surrogates being cast out from their communities because they were no longer considered marriageable; and surrogates not being aware of the genetic parentage of embryos transferred to them for the purpose of surrogacy. This last point is of course also evidence of mistreatment of intended parents, as well as fundamentally undermining the surrogate's ability to give informed consent. The current situation in Ukraine has, of course, meant that its popularity as a surrogacy destination has greatly decreased.

K Horsey, "Surrogacy in the UK: Myth busting and reform", Report of the SurrogacyUK Working Group on Surrogacy Law Reform (Surrogacy UK, November 2015) and K Horsey, "Further evidence for reform", Second Report of the Surrogacy UK Working Group on Surrogacy Law Reform (Surrogacy UK, December 2018).

We also benefited greatly from the information collected in two reports of the SurrogacyUK Working Group on Law Reform. We used the Working Group's reports for insight into surrogates and intended parents' experiences (both reports contained the results of online surveys, with respondents to each including just over 100 surrogates and 200 intended parents). Although now dated, these reports also provided us with useful information on the extent of international surrogacy arrangements at the time: "information provided by HMPO relating to the number of entries in the Parental Order Register in the period 2003-2013 showed that a small but increasing proportion of the total number of parental orders recorded annually (1098 over 11 years) relate to births taking place overseas, with the primary locations in that period being India (11.38%) and the USA (9.74%)" (p 15 2015 Report). However, the Working Group noted that it is important to bear in mind that data from HM Passport Office does not tell us the true number of children born to overseas surrogates before being brought into the UK, as this will only be a percentage of the total number of overseas passport applications that are made per annum (p14, 2015 Report).

J Scherpe, C Fenton-Glynn, and S Kaan (eds) Eastern and Western Perspectives on Surrogacy (2019) and 'Eastern and Western Perspectives on Surrogacy': Conference organised by C Fenton-Glynn, J Scherpe and T Kaan at the University of Hong Kong, October 2016.

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

S Golombok, We Are Family (2020); S Golombok, E Illioi, L Blake, G Roman and V Jadva, "A Longitudinal Study of Families Formed Through Reproductive Donation: Parent-Adolescent Relationships and Adolescent Adjustment at Age 14" (2017) Developmental Psychology 1966, 1975

The University of Cambridge's Centre for Family Research was founded in 1966 and its Director is Professor Pasco Fearon. Professor Susan Golombok was in post as Director during the work on this project and led many of the studies we cite. The Centre has undertaken numerous research studies into outcomes for surrogate families, including their longitudinal study of 42 families created by surrogacy. Their research has given us insight into the experiences of surrogates, intended parents, and importantly into outcomes for children born from surrogacy arrangements, finding that those children do not suffer negative psychological health or family functioning.

Children's Voices in Surrogacy Law: Briefing Paper on Preliminary Findings (14 September 2022, provided to us for citation purposes but not yet available for circulation).

We have used preliminary evidence from research carried out by Dr Katherine Wade, Dr Kirsty Horsey and Zaina Mahmoud into children's perspectives on surrogacy law to identify the likely impact of our recommendations on children connected to surrogacy. Preliminary conclusions show that children in the focus groups studied were positive about and supportive of surrogacy, whether from their experience as a surrogate-born child or as the child or relative of a surrogate.

We further noted research that showed that surrogacy is generally experienced positively by UK surrogates, and when surveyed one year after the birth, that surrogates were happy with their decision to act as a surrogate (see note 5). This was also the case for the parents of children born via surrogacy, and the children themselves (see note 6).

2. Primary research

The possibility of undertaking a law reform project on surrogacy was canvassed in the Law Commission of England and Wales's consultation for its 13th Programme of Law Reform. In that open public consultation, surrogacy received the most support of those projects which now form part of the Programme, with over 340 people and groups saying the law was not fit for purpose. The project commenced in 2018. The project is a joint project of the Law Commission of England and Wales and the Scottish Law Commission.

Prior to the commencement of the consultation period, the Law Commission of England and Wales undertook some independent research into what intended parents declared by way of payments to the surrogate in domestic surrogacy arrangements. This was completed by conducting a review of the relevant court files for the preceding few years held by the Central Family Court, in London.

3. Evidence from interested parties

In June 2019, we published our Consultation Paper on surrogacy reform – *Building families through surrogacy: a new law*. In the paper, we made provisional proposals to improve surrogacy laws so they better support the child, surrogates and intended parents.

We engaged with a wide range of individuals and organisations before and during the consultation process. We engaged with four main categories of respondent: those with a personal interest in surrogacy (intended parents, surrogates, surrogacy organisations); those with a professional interest in and engagement with surrogacy (lawyers, representative legal organisations such as Resolution, the Family Law Bar Association, the Law Society; CAF/CASS, social workers and their representative organisations such as PROGAR; counsellors; British Pregnancy Advisory Service); those opposed to surrogacy;

and others with an interest in the topic, but who are not writing from these perspectives or from personal experience.

With regard to women's rights groups, we did contact, prior to the consultation period, the leading women's rights charities, the Fawcett Society, Engender (based in Scotland), and the Scottish Women's Convention, who told us they would await the publication of the Consultation Paper, as well as professional organisations concerned with women's health.

During the consultation period, we also contacted a significant number of other organisations concerned with women's rights, health and poverty, so that they were aware of the consultation and could respond if they wished. These were:

- Rights of Women (Women's Legal Charity)
- Filia (Women's rights organisation)
- Rosa (Women's poverty charity)
- Wellbeing of Women (Women's health charity)
- Daisy Network (Charity for women with ovarian conditions)
- National Maternity Support Foundation
- Muslim Women's Network
- Baby Lifeline
- Kicks Count (Foetal Movement organisation)
- Miscarriage Association
- Action on Pre-Eclampsia
- Maternity Action

With regard to the rights and interests of LGBTQ+ people we met Stonewall and received consultation responses from them, and also from Here NI and the Rainbow Project in Northern Ireland.

We made use of a wide range of media to promote the Consultation Paper. We expected national coverage and so developed the press release with that in mind. We secured a number of significant pieces of coverage. On the BBC, we secured a prime slot on the Today programme which helps sets the news agenda for the day ahead, on the Emma Barnett show on Five Live, on a BBC Scotland TV news bulletin (The Nine) and in an online story. The Daily Mail, Guardian, Telegraph, Independent, Times, Metro and HuffPost all covered the announcement of the launch of the consultation.

We supported the media work with a number of tweets, including one which received more than 50,000 impressions. During the consultation period we tweeted regularly to encourage people to attend our consultation events, and to announce that we had extended the consultation period. Several consultees including academics, journalists and campaigners also published their own social media content.

From the wide range of coverage we secured to the number of social media posts to encourage engagement, we are of the view that, taking into account our size and capacity, our communications strategy was successful. We would hope and expect that the coverage of the Consultation Paper in mainstream, widely read media, coupled with the use of news alerts, would mean that the opportunity had been provided to all those members of the public, or organisations with an interest in reading and responding to our consultation to have been aware of the consultation within a short time of the publication of the Consultation Paper on 6 June 2019.

Our consultation period ran from 6 June to 11 October 2019, and in total, we received 681 formal responses.

Analysis of the responses shows that 20% of responses were from those with a personal interest, 15% submitted by those with a professional interest, 55% of consultees classified themselves as 'other individuals' and 10% did not answer this self-categorisation question. Many, although not all, of the responses in the 'other individuals' category were from those who oppose surrogacy in principle.

Around half of the consultation responses received were based either entirely or in part on a template produced by a feminist campaigning organisation, Nordic Model Now!. Nordic Model Now! is an organisation that campaigns for a particular model for dealing with sex work in which those who buy sex rather than sex workers are criminalised (called the Nordic model). Nordic Model Now! opposes all forms of surrogacy on the basis that it is incompatible with the rights and dignity of women. It sees surrogacy as a form of abuse and exploitation of women. Essentially, their response, and their template response, sought something outside the terms of reference of the project: the absolute prohibition of surrogacy.

Nevertheless, these responses have been valuable in putting forward measures to protect and safeguard surrogates and children in any reformed law, while acknowledging and advocating for their preferred position of prohibition.

During the consultation period, we held a series of consultation events in a seminar (presentation followed by Q&A) format to inform people about our provisional proposals and to hear their views on these, which were open to all (eg professionals, surrogates, intended parents and interested members of the public). In addition to these open events, we also hosted a London event for lawyers and other professionals, and a London symposium for invited attendees, where we discussed our provisional proposals in detail and asked for consultees' comments.

In particular, we asked surrogacy organisations for information on the composition of their members during the consultation period and in further meetings since the close of consultation. My Surrogacy Journey told us that, as of July 2022, 47% of their intended parent couples were LGBTQ+. Less recently, SurrogacyUK told us that, as of July 2018, 20% of intended parent couples who had joined since 2009 were same-sex male couples. The mixed-sex couples who made up the remaining 80% had joined SurrogacyUK because of infertility caused by a medical reason. At the same time, COTS told us that 50% of their intended parents were same-sex couples, while Brilliant Beginnings reported the same proportion. Most organisations reported a significant increase in the proportion of male same-sex couples over the last few years, which was also the experience of Cafcass.

In the Consultation Paper itself, we asked consultees who were intended parents, lived in the UK, and had entered into a surrogacy arrangement that led to the birth of a child, to tell us whether they were a mixed-sex couple, male same-sex couple, female same-sex

couple, single woman or single man. Of the 25 arrangements mentioned in response to this question, 16 involved an mixed-sex couple and nine involved a same-sex male couple. None involved a single intended parent or a female couple.

Since the end of the consultation period, we have continued to have detailed discussions, generally by way of meetings, with relevant government departments, surrogates, intended parents, surrogacy organisations and women's rights groups. For example, we have had meetings with Nordic Model Now!, OBJECT UK and Stop Surrogacy Now, women's rights groups that are opposed to surrogacy. We also met the AIRE Centre and Maternity Action in the post-consultation period. We have followed up on various references given to us by consultees and explored issues further as our policy has progressed, via email correspondence. We have always been open to meeting or speaking to those who have contacted us, from a diversity of perspectives on surrogacy. The level of engagement we had during the consultation period, and the consultation responses received, enable us to be confident that our consultation reached as many, and as diverse a range of, consultees, as possible.

Notes

(3) Information provided by Cafcass dated 13 October 2022 in response to a Freedom of Information request, available at Appendix 1. See also the information provided by CAF/CASS dated 7 October 2015 in response to a Freedom of Information Request, accessible at: <https://www.cafcass.gov.uk/about-cafcass/transparency-information/freedom-of-information/2015-disclosure-log/> (under the title: "Number of parental order applications and information relating to international surrogacy arrangements and gender of applicants") and V Jadva, H Prosser and N Gamble, "Cross-border and domestic surrogacy in the UK context: an exploration of practical and legal decision-making" (2018) *Human Fertility*, 1464, 1466.

(4) Significant examples of the exploitation of surrogates in countries that permit international surrogacy to take place have been reported by the media. For example, see "Indian surrogate mothers talk of pain of giving up baby" BBC News (15 August 2016), accessible at: <https://www.bbc.co.uk/news/world-asia-india-37050249> (last visited 29 September 2022) and "Thailand's crackdown on 'wombs for rent'" BBC News (20 February 2015), accessible at: <https://www.bbc.co.uk/news/world-asia-31556597> (last visited 29 September 2022). As a result, some destinations that have enjoyed popularity for surrogacy at different points in time have been closed down by national laws confining access to surrogacy to a country's own nationals. That is the case, for example, in India, Cambodia and Thailand.

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

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

5. Are there gaps in information that make it difficult or impossible to form an opinion on how your proposals might affect different groups of people. If so what are the gaps in the information and how and when do you plan to collect additional information?

Note this information will help you to identify potential equality stakeholders and specific issues that affect them – essential information if you are planning to consult as you can raise specific issues with particular groups as part of the consultation process. EIAs often pause at this stage while additional information is obtained.

We received 681 formal submissions and consulted extensively. Nonetheless, there are some inevitable gaps in information as a result of the lack of any official measurement of surrogacy arrangements which have not passed through the courts.

We have used the proxy of the number of parental orders to estimate how many surrogacy arrangements there are, but there is not a direct measure of surrogacy births. As there is no requirement to apply for a parental order, there could be a substantial number of surrogacy arrangements taking place which are not documented (including international arrangements where the intended parents are named on the birth certificate and may be unaware of the need for a parental order). Notwithstanding its limitations, however, parental orders are an appropriate proxy given that under the current law, a parental order is the only way to transfer legal parental status from the surrogate to the intended parents in the UK.

There is also an absence of official data on the different groups of persons applying for parental orders, however we have addressed this gap as far as possible by seeking the relevant information from surrogacy organisations regarding the constitution of their members, and thus, the type of people becoming intended parents. We sought this information in our public consultation and then further collected information throughout the project at presentation events by surrogacy organisations.

We also obtained data from Cafcass via a Freedom of Information request, on the number of parental order applications with same-sex applicants (see note 7). There were a high proportion of mixed-sex couples who responded to our Consultation Paper, compared to statistics provided by surrogacy organisations and Cafcass data. It is possible that mixed-sex couples are overrepresented in the sample of consultees who responded to our Consultation Paper.

Beyond sex and sexual orientation, we do not have data on surrogacy that reflects other protected characteristics.

Note (7) Information provided by Cafcass dated 13 October 2022 in response to a Freedom of Information request, available at Appendix 1, shows that 26% of parental order applications were made by same-sex couples in 2021, a much higher proportion than the proportion of same-sex couples in the population as a whole.

6. Having analysed the initial and additional sources of information including feedback from consultation, is there any evidence that the proposed changes will have a **positive impact** on any of these different groups of people and/or promote equality of opportunity?

Please provide details of who benefits from the positive impacts and the evidence and analysis used to identify them.

A more consistent, regulated scheme

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

Better protection for vulnerable women

We think that the introduction of the new pathway with its screening and safeguarding measures – which must be signed off by regulated surrogacy organisations – will have a positive impact on women as there will be a reduced likelihood of exploitation of vulnerable women, and surrogacy arrangements will be properly regulated, compared to the current system of post-birth parental orders.

The screening measures which we have recommended on the new pathway are requirements for the woman acting as surrogate and the intended parents to obtain independent legal advice (Recommendation 31), implications counselling (Recommendation 30), criminal record checks (Recommendation 32), medical checks/health screening (Recommendation 29); and engage in a pre-conception child welfare assessment (Recommendation 33). Compliance with these measures must be certified by a Regulated Surrogacy Organisation (“RSO”) (which will be licenced under a new statutory regime) to confirm compliance. Some of the concerns that have been expressed by consultees around exploitation relate to increased commercialisation. Our proposals will not shift the UK surrogacy framework to a commercial model, but rather continue an altruistic model of surrogacy which will also bring greater clarity on the role of payments within the framework.

Greater respect for women’s autonomy

Our recommended reform that, on the new pathway, the intended parents should become legal parents upon the child’s birth, will have a positive impact on women who act as surrogates by respecting their intention when entering into the surrogacy arrangement to act as a surrogate and not to be the legal mother of the child to whom they give birth. Should a surrogate wish to withdraw consent to the new pathway arrangement, there will be a mechanism for her to do so. If she withdraws consent pre-birth she will be the child’s legal mother on the child’s birth; if she withdraws in the six weeks post-birth she will have the opportunity to seek a parental order to transfer legal parental status from the intended parents to her.

Interaction with international surrogacy arrangements

As our report describes, we have concerns about the potential for exploitation that exists in international surrogacy arrangements in relation to some jurisdictions. The new pathway aims to shift the balance so that for people based in the UK who want to access

surrogacy, doing so in the UK is more attractive and international arrangements less attractive. This should reduce the risk of exploitation of women living in those countries.

Equality of opportunity for same-sex couples

Surrogacy is a particularly significant route to parenthood for male same-sex couples, who are unable to carry a child themselves. Improving the legal framework in the UK would promote equality of opportunity in relation to becoming a parent. Our recommendations for the new pathway could resolve one of the reasons why intended parents use international surrogacy, namely that they can obtain legal parenthood from birth. This could result in those who would go abroad instead having better regulated arrangements in the UK. It may also mean that some same-sex couples who would not otherwise use surrogacy may do so because it meets their needs, increasing their opportunity to build a family in this way.

Employment rights for intended parents

Our recommendations will extend employment rights to intended parents (see Recommendations 75, 76, and 77, which will have the greatest impact on women and same-sex couples. Based on existing inequalities in gendered divisions of caring labour, women who are intended parents in a mixed-sex couple are more likely to take on the bulk of care work. At present there are gaps in the support that is available, which is likely to disproportionately impact on women. Because same-sex couples are more represented among the couples who use surrogacy, compared to their representation in the population as a whole, resolving the gaps in the support available is likely to disproportionately benefit same-sex male couples.

We recommend that one of the intended parents should have the right to receive a benefit equivalent to maternity allowance where they fulfil the criteria for that benefit, and that the right of intended parents to take time off work to attend ante-natal appointments and to begin their statutory leave should be aligned with that for adoptive parents. In addition, women who are carrying a baby for someone else will be better understood in the workplace given the general normalisation of surrogacy provided by our recommendations.

7. Is there any feedback or evidence that additional work could be done to promote equality of opportunity?

If the answer is yes, please provide details of whether or not you plan to undertake this work. If not, please say why.

No.

8. Is there any evidence that proposed changes will have an **adverse equality impact** on any of these different groups of people?

Please provide details of who the proposals affect, what the adverse impacts are, and the evidence and analysis used to identify them.

No. We do not consider that the proposed changes will have any adverse equality impacts.

Legal motherhood

If the new pathway is implemented, our recommended reforms will automatically remove legal motherhood from women who are acting as surrogates on the new pathway, unless they withdraw consent to the arrangement before birth. In the situation where the surrogate withdraws consent in the six weeks following birth, the surrogate would be able to apply for a parental order to transfer legal parental status to her.

Some groups may consider this to adversely impact women by denying women legal motherhood of a child that they have given birth to. However, we believe the converse to be true. We think that the current law has an adverse impact on women because it forces them to be the legal mother of a child to whom they never intended to be legal mother, which diminishes respect for women's capacity to make autonomous decisions. There is strong evidence that women who act as surrogates want, and intend, the intended parents to be the legal parents at birth. Almost all surrogates who responded to the consultation question on this topic (see Chapter 4, paragraph 4.26 of the Report) agreed with the proposal and therefore, we consider the recommended reform to, in fact, have a positive impact on women. Furthermore, the automatic removal of legal motherhood would only happen in the highly regulated environment of the new pathway and would only result from the operation of law, rather than by private agreement between parties.

Our proposal also includes a significant safeguard for those cases where a surrogate's intentions change, in that she can withdraw her consent and a judicial decision can then be made about legal parental status that balances her intentions with the requirements of the child's welfare. This is not possible under the current surrogacy laws.

Dispensing with the surrogate's consent to a parental order

Under the current law, a surrogate must consent to the granting of a parental order to the intended parents (note 8). Whilst the recommended reforms will make it possible for the court to dispense with the surrogate's consent to a parental order, the basis of this decision is already a well-established concept in family law. For example, in the adoption context, the welfare of the child is the paramount consideration so a court can dispense with the consent of the parent(s) or guardian and make the adoption order where the welfare of the child *throughout the child's life* requires the consent to be dispensed with (note 9). This is a more stringent test than the standard welfare test which applies in other areas of family law, and which does not require consideration of the lifelong welfare of the child (note 10).

This recommendation may be criticised by some groups for prioritising the welfare of the child born through surrogacy over that of the woman acting as a surrogate. However, the child's welfare being of paramount importance is a consistent feature of family law – the surrogate's current veto in relation to a parental order is an outlier in this respect. The UNCRC requires that the child's best interests are the primary consideration in all actions concerning children.

Increased use of surrogacy

In consultation, some consultees who state that surrogacy is necessarily exploitative expressed the view that reforms could increase the overall use of surrogacy by making it more attractive, and thereby risk increasing the number of exploitative arrangements that occur, negatively impacting women. It is not our intention to increase the use of surrogacy,

as opposed to providing a more appropriate legal framework for the situations where it does take place. We also reject the contention that surrogacy is necessarily exploitative.

However, if our reforms result in surrogacy becoming more attractive, that is likely to occur under the new pathway because it allows intended parents to be legal parents from birth. That model involves significant safeguards against exploitation of women acting as surrogates, which are not part of the current system, so any increase in overall numbers is not likely to lead to an increase in exploitative arrangements.

We want our recommendations to encourage the use of domestic surrogacy rather than international arrangements. That does not reflect an aim to generate an overall increase, but rather a desire to ensure that surrogacy takes place in this jurisdiction to benefit from the safeguards included in the new pathway.

Driving surrogacy abroad

There are also risks involved as there is always the possibility that greater regulation of payments to surrogates may inadvertently encourage more intended parents to seek overseas arrangements, thus reducing the protection for both surrogate and child. However, this risk is negated by the significant benefits of the new pathway for all parties to the arrangement (for example, increased legal certainty, reduction in court costs, reduced stress and waiting periods) which will incentivise use of the new regulated pathway in the majority of cases.

Notes

(8) Human Fertilisation and Embryology Act 2008, s56(6).

(9) Adoption and Children Act, s52(1). It can also make the adoption order in circumstances where either the parent or guardian cannot be found or lacks capacity to give consent.

(10) For example, see the Children Act 1989, s 47.

9. Is there any evidence that the proposed changes have no equality impacts?

Please provide details of the evidence and analysis used to reach the conclusion that the proposed changes have no impact on any of these different groups of people.

No.

10. Is a full Equality Impact Assessment required? No

If you answered "No", please explain below why not?

NOTE – you will need to complete a full EIA if:

- The proposals are likely to have equality impacts and you will need to provide details about how the impacts will be mitigated or justified.
- There are likely to be equality impacts plus negative public opinion or media coverage about the proposed changes.
- You have missed an opportunity to promote equality of opportunity and need to provide further details of action that can be taken to remedy this.

If your proposed new or changed legislation, policy, strategy, project or service involves an Information and Communication Technology (ICT) system and you have identified equality impacts of that system, a focused full EIA for ICT specific impacts should be completed. The ICT Specific Impacts template is available from MoJ ICT or can be downloaded from the Intranet at: <http://intranet.justice.gsi.gov/justice/equdiv/equal-impact.htm>, and should be referenced here.

No, our recommendations are not likely to have an adverse equality impact.

11. Even if a full EIA is not required, you are legally required to monitor and review the proposed changes after implementation to check they work as planned and to screen for unexpected equality impacts. Please provide details of how you will monitor evaluate or review your proposals and when the review will take place.

We are a recommendation body, and do not have direct responsibility for administering surrogacy law. It will be for the relevant government body to monitor and review changes after implementation.

12. Name of Senior Manager and date approved. You should now complete a short summary (if possible, in fewer than 50 words) **setting out which policy, legislation or service the EIA refers to, how you assessed it, a summary of the results of consultation, a summary of the impacts (positive and negative) and, any decisions made, actions taken or improvements implemented as a result of the EIA.** The summary will be published on the external MOJ website.

You should now complete a short summary (if possible, in fewer than 50 words) **setting out which policy, legislation or service the EIA refers to, how you assessed it, a summary of the results of consultation, a summary of the impacts (positive and negative) and, any decisions made, actions taken or improvements implemented as a result of the EIA.** The summary will be published on the external MOJ website.

The Surrogacy project aims to reform the law governing surrogacy, currently contained in the Surrogacy Arrangements Act 1985 and the Human Fertilisation and Embryology Act 2008. Our Consultation Paper was published in June 2019. Our Report recommends a comprehensive range of reforms to make the law of surrogacy work better for children, surrogates and intended parents.

Name (must be grade 5 or above): Stephanie Hack

Department: Law Commission

Date: 28 March 2023

Note: the EIA should be sent **by email to anthony.shepherd@justice.gsi.gov.uk of the Corporate Equality Division (CED), for publication.**

Full Equality Impact Assessment

13. Which group(s) of people have been identified as being disadvantaged by our proposals. What are the equality impacts?

14. What changes are you planning to make to your original proposals to minimise or eliminate the adverse equality impacts? Please provide details of the proposed actions, timetable for making the changes and the person(s) responsible for making the changes.

15. Please provide details of whether or not you will consult on the proposed changes, particularly with disabled people and if you do not plan to consult, please provide the rationale behind that decision.

16. Can the adverse impacts you identified during the initial screening be justified and the original proposals implemented without making any adjustments to them? Please set out the basis on which you justify implementing the proposals without adjustments.

17. Do your proposals miss an opportunity to promote equality of opportunity? If so, do you plan to take action to remedy this and if so, when? Please provide details.

18. You are legally required to monitor and review the proposed changes after implementation to check they work as planned and to screen for unexpected equity impacts.

Please provide details of how you will monitor/evaluate or review your proposals and when the review will take place.

19. Summary details, sign off by Senior Manager and date approved.

You should now complete a short summary (if possible, in fewer than 50 words) **setting out which policy, legislation or service the EIA refers to, how you assessed it, a**

summary of the results of consultation, a summary of the impacts (positive and negative) and, any decisions made, actions taken or improvements implemented as a result of the EIA. The summary will be published on the external MOJ website.

Name (must be grade 5 or above):

Department:

Date:

Note: the EIA should be sent **by email to anthony.shepherd@justice.gsi.gov.uk of the Corporate Equality Division (CED), for publication.**

Appendix 1: Cafcass FOL request response

Parental Orders Received

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

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

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

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

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

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

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

Parental Orders Received by Service Area

Service Area	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21
A1	<6	<6	6	<6	<6	<6	<6
A2	6	8	6	12	6	15	9
A3	7	9	7	6	<6	6	8
A4	<6	<6	8	7	9	6	6
A5	<6	8	<6	<6	<6	<6	9
A6	<6	10	18	12	6	18	11
A7	16	18	17	15	11	18	22
A8	<6	6	<6	<6	8	10	8
A9	<6	<6	<6	<6	<6	6	12
A10	11	7	8	<6	<6	10	11
A11	<6	7	<6	<6	7	7	11
A12	10	20	14	9	11	14	11
A13	8	<6	<6	<6	<6	15	<6
A14	9	6	15	16	14	11	9
A15A	30	29	11		8	12	<6
A15B	99	112	144	151	156	187	158
A16	13	14	15	10	13	21	23
A17	<6	12	6	<6	8	10	8
A18	9	14	15	15	14	15	14
NBC		<6	<6	<6			
Grand Total	242	295	314	280	298	389	335

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

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

Country	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21
Australia	<6		<6				
Canada	<6	<6	<6	13	10	17	7
England	89	115	142	119	126	145	145
India	47	53	57	7	6	<6	<6
Ireland		<6	<6				<6
New Zealand			<6				
Nigeria	<6	<6	<6	<6	<6	7	<6
Non UK Other	6	9	10	26	23	34	32
Russia	<6						<6
Scotland	<6	<6	<6	<6	<6	9	<6
South Africa	<6			<6		<6	
Spain			<6		<6		
Thailand	12	8	<6	<6	<6	<6	<6
Ukraine	<6	<6	<6	20	31	44	44
USA	48	72	71	77	83	110	76
Wales		<6	6	6	<6	<6	<6
Unknown address	14	11	7	<6	<6	6	<6

Respondent information not held	14	16	<6	<6	1	7	6
Total	242	295	314	280	298	389	335

Follow-up request

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

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

Follow-up response from Cafcass

Parental Orders Received

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

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

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

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

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

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

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

Below shows the country of surrogacy for same sex applicants.

Country	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21
Australia							
Canada	<6	<6	<6	9	7	13	<6
England	19	21	30	32	35	53	57
India	<6	<6					
Ireland							
New Zealand							
Nigeria						<6	
Non UK Other	<6	<6	<6	<6	<6	6	<6
Russia							

Scotland	<6		<6			<6	<6
South Africa	<6			<6		<6	
Spain			<6				
Thailand	6	7		<6	<6	<6	
Ukraine						6	<6
USA	26	28	40	46	49	52	41
Wales			<6	<6	<6	<6	<6
Unknown address	10	<6		<6		<6	<6
Respondent information not held							<6
Total	69	66	79	93	96	139	115

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

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