



**Law
Commission**
Reforming the law



Scottish Law Commission
promoting law reform

BUILDING FAMILIES THROUGH SURROGACY: A NEW LAW

Summary of Consultation Paper

THIS CONSULTATION

Who are we?	The Law Commission of England and Wales and the Scottish Law Commission are independent bodies established by statute to make recommendations to government to reform the law in England and Wales, and in Scotland.
What are we doing?	Conducting a public consultation on our provisional proposals to reform the law governing surrogacy.
What is it about?	Surrogacy – where a woman becomes pregnant and gives birth to a child for another family.
Why are we consulting?	We are seeking views on our provisional proposals and asking questions. Your views will be carefully considered when we decide on our final recommendations.
Who do we want to hear from?	We are keen to receive comments from as many stakeholders as possible – including those who have been, are, or may be involved in surrogacy arrangements – whether they agree or disagree with our provisional proposals.
What is the deadline?	The consultation closes on 27 September 2019.
What happens next?	After reviewing all responses, we will decide on our final recommendations for law reform, which we will publish in a report, accompanied by a draft bill (legislation) in 2021.

THIS SUMMARY

This Summary does not summarise all of the provisional proposals and questions set out in our detailed Consultation Paper. Instead, it explains what the project is about, provides some context, and then highlights key issues discussed in the Consultation Paper. This Summary only provides an overview of those key issues.

Before responding, you are encouraged to read our full Consultation Paper, or the relevant parts of it. You do not have to respond to all the questions in our Consultation.

References in this Summary are to the chapters of the Consultation Paper.

RESPONDING TO OUR CONSULTATION



The Consultation Paper is available on our websites at <https://www.lawcom.gov.uk/project/surrogacy/> and <https://www.scotlawcom.gov.uk/law-reform/consultations/>

The deadline for responses is 27 September 2019.

Comments may be sent to us using the online response form, available on our websites. Where possible, it would be helpful if this form was used.

Alternatively, comments may be sent:

- (1) by email to surrogacy@lawcommission.gov.uk; or
- (2) by post to Surrogacy Team, Law Commission, 1st Floor, 52 Queen Anne's Gate, London, SW1H 9AG.

(If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically).

We ask consultees, when providing their responses, if they could avoid including personal identifying information in the text of their response, particularly where this may reveal the identities of other people involved in their surrogacy arrangement.

For further information about how the Law Commissions conduct their consultations, and our policy on the confidentiality of consultees' responses, please see page i of the Consultation Paper.

INTRODUCTION

What is surrogacy?

Surrogacy is the practice of a woman (whom we refer to as the “surrogate”) becoming pregnant with a child that may, or may not, be genetically related to her, carrying the child, and giving birth to the child for another family (whom we refer to as the “intended parents”).

Surrogacy has been around for a very long time. However, the development of surrogacy that does not use the surrogate’s own eggs, has only been possible following the development of in-vitro fertilisation (“IVF”). IVF allows eggs from an intended mother or an egg donor to be used instead of the eggs of the woman who will be the surrogate. As a result, there are now two different forms of surrogacy.

Different forms of surrogacy

Traditional surrogacy (also called “straight” or “partial” surrogacy):

a surrogacy arrangement where the surrogate is genetically related to the child born of the surrogacy arrangement because her own egg is used. Artificial insemination (not sexual intercourse) will be used to conceive the child.

Gestational surrogacy (also called “host” or “full” surrogacy):

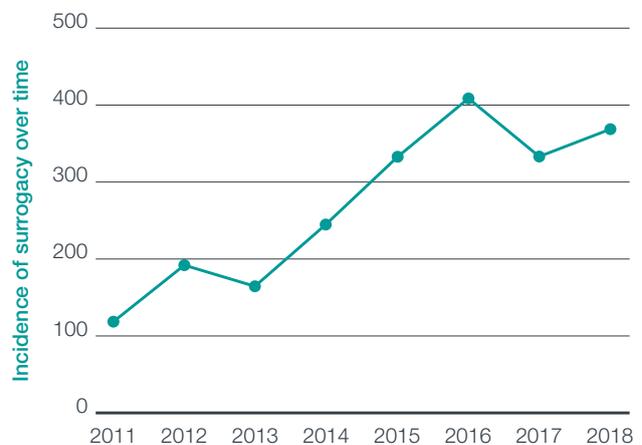
a surrogacy arrangement where the surrogate is not genetically related to the child born of the surrogacy arrangement because her eggs have not been used. IVF will be used to conceive the child.

Surrogacy is a way in which people who are unable to carry a baby themselves, can build a family. The intended parents who enter into surrogacy arrangements belong to one of two groups:

- opposite-sex couples, or single women, who experience infertility; or
- same-sex male couples or single men, who by reason of their gender, cannot become pregnant.

Whilst the exact numbers of surrogate births per year is uncertain, they certainly represent a tiny fraction of the total number of live births in the UK each year. Yet, the number of surrogate births continues to grow, and the impact that the law has on all those affected is substantial.

Number of children involved in parental order proceedings in England and Wales



Relatively few parental orders have been granted by the courts in Scotland. In 2018, for example, 15 parental orders were granted.

The surrogacy reform project is being undertaken jointly by the Law Commission of England and Wales, and the Scottish Law Commission. Work began in May 2018 and we expect to publish the report, containing recommendations for reform of the law, in 2021. We anticipate that this will be accompanied by draft legislation that will set out the new law governing surrogacy arrangements in the UK.

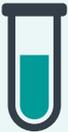
The swell of support from intended parents and surrogates for this project highlights its importance to real people creating families in this way. It is time for a root and branch reform of UK surrogacy law. Reform must protect the positive culture of UK surrogacy whilst bringing legislation into line with modern practice.

Surrogacy UK

Our project does not seek to examine whether or not surrogacy should be allowed. Instead, we take as our starting point that surrogacy is an accepted form of building a family, as recognised by the Department of Health and Social Care in the guidance it publishes on surrogacy arrangements:

The government supports surrogacy as part of the range of assisted conception options. Our view is that surrogacy is a pathway, starting with deciding which surrogacy organisation to work with, deciding which surrogate or intended parents to work with, reaching an agreement about how things will work, trying to get pregnant, supporting each other through pregnancy and then birth, applying for a parental order to transfer legal parenthood and then helping your child understand the circumstances of their birth. This guidance gives more information about each stage.

Our focus in the project is therefore on improving how surrogacy operates. We believe that while society and attitudes have evolved, the law has not done so sufficiently.

1985 	Modern day 2019 
 <p>First test tube baby only 7 years before</p>	 <p>Assisted reproduction, like IVF, increasingly common</p>
 <p>Baby Cotton “scandal”</p>	 <p>Increasingly positive social and media attitudes towards surrogacy</p>
 <p>Widespread homophobia and no legal recognition for same-sex couples</p>	 <p>Same-sex marriage from 2014 and equal rights</p>
 <p>One year after Warnock Report to government: recommends strong prohibitions against surrogacy</p>	 <p>DHSC guidance – government recognises surrogacy as a legitimate form of family-building</p>

AN OVERVIEW OF OUR REFORMS

We set out in this Summary a brief account of the current law of surrogacy and the problems with the law, before explaining the provisional proposals we make, and the questions we ask.

Before doing so we set out a list of our key provisional proposals for reform:

- The creation of a new pathway to legal parenthood in surrogacy, which will allow intended parents to be legal parents from birth.
- Requirements and safeguards for the new pathway.
- A regulator for surrogacy and the creation of regulated surrogacy organisations, who will oversee surrogacy agreements within the new pathway.
- Removal of the requirement of a genetic link between the intended parents and the child, where medically necessary (in the new pathway, and potentially for all domestic arrangements; genetic link still required for international arrangements).
- Creation of a register to allow those born of surrogacy arrangements to access information about their origins.
- For international surrogacy arrangements operational reforms, unified guidance on nationality and immigration issues, and provision for recognition of legal parenthood across borders, where appropriate, to help those who have had a surrogate child overseas to bring the baby into the UK.

In respect of payments for surrogacy, we ask questions intended to gather evidence from consultees on what payments intended parents should be able to make to the women who will be surrogates.

THE CURRENT LAW OF SURROGACY

In Chapters 4 and 5 of the Consultation Paper, we set out the current law. In summary, the current law on surrogacy is a combination of legislation and case law (that is, law as established by court decisions). The most important pieces of legislation relating to surrogacy are the Surrogacy Arrangements Act 1985 and the Human Fertilisation and Embryology Act 2008.

The Surrogacy Arrangements Act 1985 provides some limited regulation of surrogacy in the UK by making agreements to enter into a surrogacy arrangement unenforceable. So, for example, a surrogate could not be forced to hand over a child to intended parents simply because the agreement said that she should. This Act also creates criminal offences in relation to surrogacy.

The Human Fertilisation and Embryology Act 2008 and case law provide the rules to determine who the legal parents of a child born through a surrogacy arrangement are, at the time that the child is born. In law, the legal mother of the child will be the woman who acted as the surrogate, while the father or second parent will usually be either the surrogate's spouse or civil partner if she has one, or the intended father where his sperm was used. In Scotland, the man whose sperm fertilised the egg would be the legal parent only if he took steps to have himself named on the birth certificate, or a court order was made declaring that he was the child's parent. It is also possible for an intended parent – male or female – to use certain provisions of the Human Fertilisation and Embryology Act 2008 to become a second parent, again where the surrogate has no spouse or civil partner.

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

A parental order cannot be applied for until after the child has been born. The court also cannot make a parental order less than six weeks after the child's birth. That is because the parental order requires the consent of the surrogate, and the law says that her consent can only validly be given once that period of time has passed. In practice, intended parents are likely to have to wait at least six months before a parental order is made because of the time it takes for the proceedings to come before the court.

Since 1994, the scope of who can obtain a parental order has changed significantly, most recently with amendments to the law allowing single intended parents to obtain a parental order.



1 November 1994 -
31 September 2009

Married, opposite-sex couples (same-sex couples were not permitted to marry until 2014)



6 April 2010 -
present

Married, civil partners, in an enduring family relationship, same-sex or opposite-sex



3 January 2019

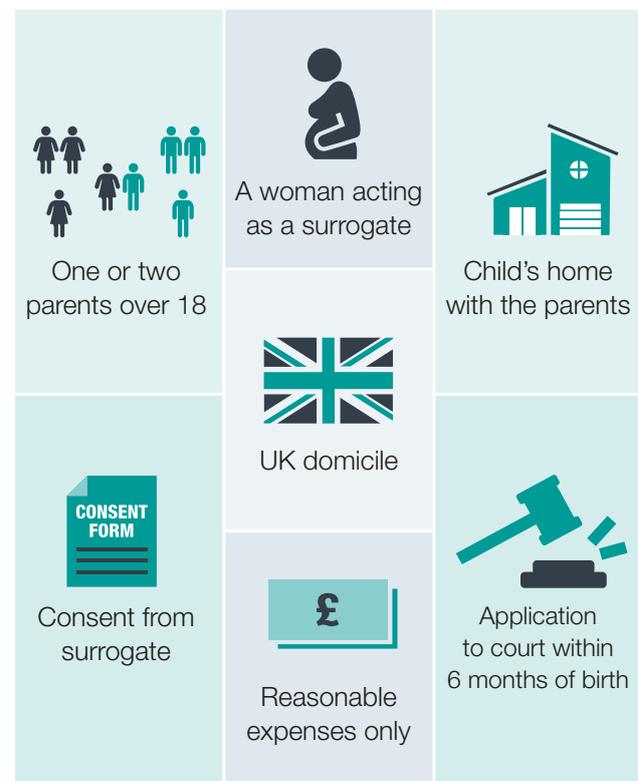
Married, civil partners, in an enduring family relationship, same-sex or opposite-sex and single people

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

This is a really important and long overdue piece of work. It is decades since the UK's laws on surrogacy were crafted and that is why this work by the Law Commissions is so important. It is vital that those with a view on this matter engage in this process and respond to this consultation.

Andrew Percy MP, Chair of the All Party Parliamentary Group on Surrogacy

Requirements for a parental order



If all the requirements are met, the court then has the ability to make a parental order. When considering whether to make the order the court's paramount consideration is the child's welfare throughout his or her life. In practice, where the requirements are met the court invariably makes a parental order.

THE PROBLEMS WITH THE CURRENT LAW

NGA Law and Brilliant Beginnings have campaigned for more than a decade for surrogacy law reform, and are delighted the Law Commissions have taken on this project. Having supported more than a thousand families through surrogacy, we see on a daily basis the difficulties arising from the current law, which is outdated, cumbersome and does not adequately protect the interests of surrogates, intended parents or children.

Natalie Gamble (NGA Law) and
Helen Prosser (Brilliant Beginnings)

The law governing surrogacy dates, in part, from the mid-1980s, when society and attitudes around surrogacy differed greatly from today. In short, the law relating to surrogacy is now outdated and needs to be changed to reflect current attitudes towards surrogacy, and understandings of how this way of building a family works.

We have been told by those involved in surrogacy arrangements that the law does not match their expectations; crucially, both surrogates and intended parents would like the child born of the surrogacy arrangement to be the child of the intended parents from birth, rather than waiting for parenthood to be transferred using the parental order.

This problem is partly a practical one: intended parents who are not legal parents will, as a result, lack parental responsibility for the child, which affects their ability to take decisions about the child in their care. It is also, however, a problem of identity; intended parents would like the child to be part of their family from birth, so that legal parenthood reflects social and psychological parenthood. Surrogates would like the law to reflect the fact that they do not consider themselves to be the mother of the child that they have carried for the intended parents.

The problems with the current law and our proposals for reform



In addition, case law has stretched the requirements of the law so that the law as applied no longer matches what the statute says. Most obviously, the law states that intended parents must apply for a parental order within six months of the birth of the child. But, since a case in 2014 where the court decided that it could interpret this requirement to allow applications beyond that time limit, the six month period no longer applies in practice, at least in England and Wales. Since that

time, the court has frequently made orders in respect of children who are older than six months. Additionally, the court has interpreted the requirement that a child must have its home with both parents to include a situation where a child moves between the homes of his or her separated parents.

It is widely recognised that the law is in need of substantial reform.

We all recognise that there are well-founded concerns about the struggle that surrogacy policy and legislation are facing to keep pace with 21st-century attitudes and lifestyles. This legislation is based largely on thinking and debate from the 1980s. We recognise that family structures are now much more diverse than when the policy and legislation were originally developed.

Baroness Chisholm of Owlpen

The scope of our law reform project is therefore wide.

Terms of reference

The law, regulation and practice of surrogacy, including:

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

A NEW PATHWAY TO LEGAL PARENTHOOD

In the diagram on the next page we set out a visual representation of our proposals to create a new pathway to legal parenthood in surrogacy cases. The aim of the new pathway is to create a route through which the intended parents become the legal parents of the child born of the surrogacy arrangement from the time that he or she is born. This proposal responds to the shared needs and intentions of those involved

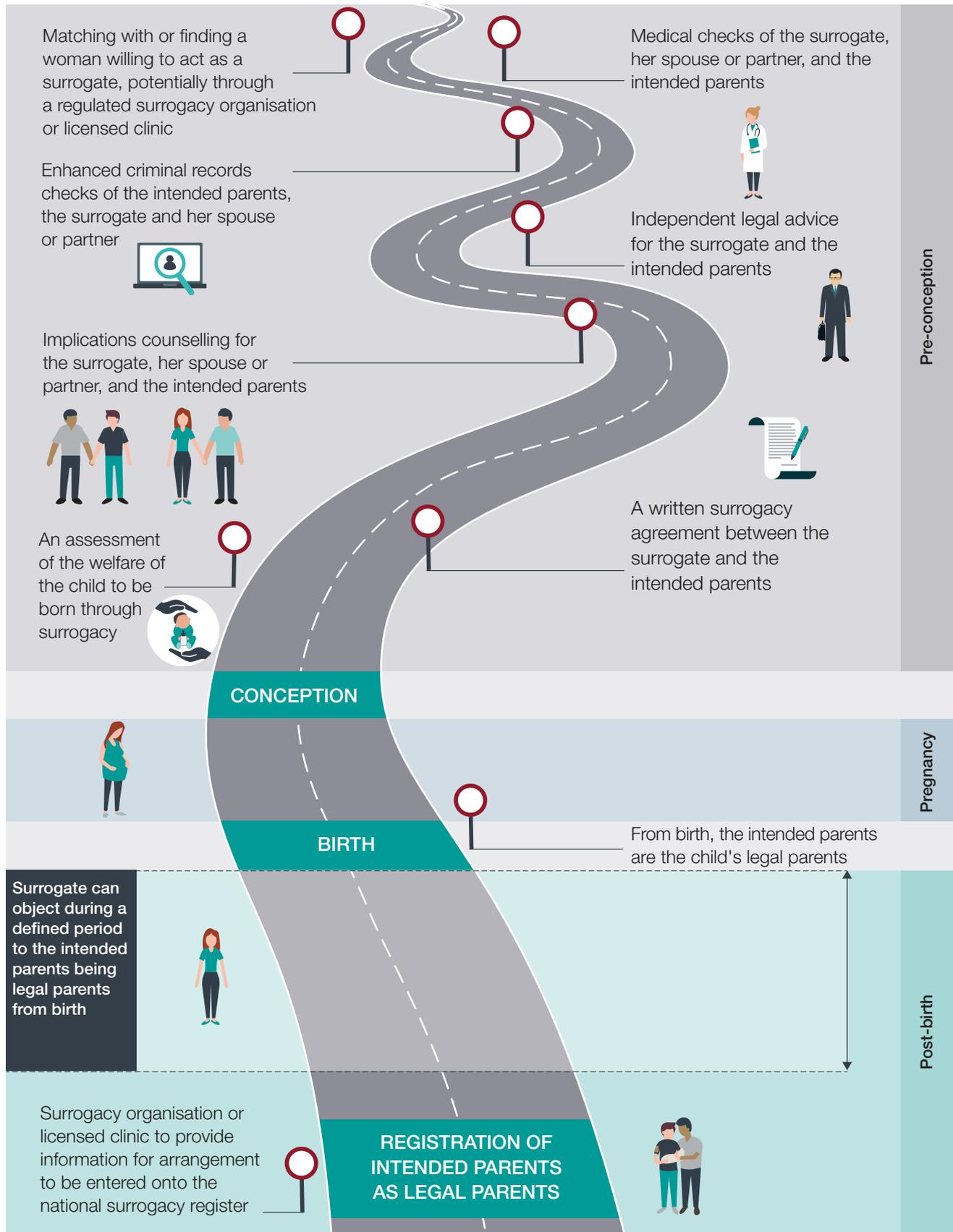
in surrogacy arrangements; in particular, the views of the women acting as surrogates whom we have spoken to have been clear that they do not wish to become the legal parent of the child that they are carrying.

We explain in Chapters 7 and 8 of the Consultation Paper the context for our suggested reforms, and then go on to set out our proposals. The new pathway to parenthood takes a different approach to the current route of obtaining a parental order. We provisionally propose that the pathway should not involve an application to court. Instead, we propose a rigorous administrative process incorporating safeguards which, if followed, will mean that the intended parents will become the legal parents of the child from birth. We propose a further, post-birth, safeguard; an opportunity, for a defined period after birth, for surrogates to object to the intended parents being the legal parents of the child. Should a surrogate object, the surrogacy arrangement will fall out of the new pathway, and the intended parents will have to apply for a parental order instead (we set out the requirements of the parental order route in the diagram on page 13). This right to object will ensure that the rights of the surrogate are fully respected and protected under the new pathway.

The new pathway does not replace the parental order route for intended parents to gain legal parenthood. We propose that the new pathway should only be suitable for surrogacy arrangements in which all the elements of the process take place in the United Kingdom (we refer to these as “domestic” arrangements). Where intended parents seek to become the legal parents of children born as a result of international surrogacy arrangements, we consider that they should have to seek a parental order after the child's birth. We also propose strict conditions that will have to be met for the surrogacy arrangement to qualify for the new pathway. Where these strict conditions are not met, intended parents will have to make an application for a parental order in order to become legal parents.

We believe that the new pathway better protects the child's welfare than the existing law. It ensures that those with whom the child lives post-birth are also his or her legal parents, as well as introducing more rigorous safeguards before he or she is conceived. We believe that, in the new pathway, the pre-conception assessment of the welfare of the child to be born removes the need for such an assessment after the birth. We propose that the acquisition of legal parenthood will also mean that the intended parents will have parental responsibility for the child from the time of his or her birth, provided that the child is living with them, or being cared for by them (the latter covering a situation where, say, a child is in hospital).

The new pathway to legal parenthood



As can be seen from the diagram, we think that the process leading to the acquisition of legal parenthood by the intended parents should begin before the child is conceived. Under the current parental order route, scrutiny only happens after the child is born, where, to some extent, the court's hands are tied by the "done deal" of the existence of a baby being cared for by the intended parents. We think that procedural requirements that operate before conception will allow a more meaningful opportunity to scrutinise the surrogacy arrangement.

A written surrogacy agreement

In Chapter 8 of the Consultation Paper we set out the need for the parties to a surrogacy arrangement to enter into a written surrogacy agreement before the child is conceived. This agreement would record:

- the parties' details
- details of any donor(s)
- compliance with the safeguards
- the assessment of the welfare of the child to be conceived
- the attribution of legal parenthood to the intended parents from birth
- the surrogate's right to object.

Safeguards for the new pathway

In Chapter 13 of the Consultation Paper we discuss in detail the requirements that we propose must be met for a surrogacy arrangement to enter into the new pathway and, therefore, for the intended parents to become legal parents at birth. These are:

- a written agreement between the woman who will be the surrogate and the intended parents
- an assessment of the welfare of the child to be born of the surrogacy arrangement
- the intended parents and the woman who will be the surrogate to take independent legal advice on the law and the effect of the agreement

- the intended parents, the woman who will be the surrogate and surrogate's spouse, civil partner or partner (if any) to attend implications counselling
- the intended parents, the woman who will be the surrogate and surrogate's spouse, civil partner or partner (if any) to be medically screened
- criminal record checks to be undertaken on the intended parents, the woman who will be the surrogate and surrogate's spouse, civil partner or partner (if any).

GENETIC LINK

At the moment, one of the requirements for a parental order to be made is that one of the intended parents must provide their eggs or sperm for the conception of the child. We discuss this requirement of a genetic link to one of the parents in Chapter 12 of the Consultation Paper. We think that, in cases falling within the new pathway there are strong arguments that a genetic link should not be required. Removing this requirement would reflect the view that in a surrogacy arrangement, the shared intention of the intended parents and the woman who will be the surrogate to bring the child into the world for the parents to raise, is more significant than the genetic parentage of the child. However, despite the greater importance of shared intentions, the requirement for a genetic link provides important safeguards, for example by providing evidence that the intended parents intended to bring about conception of the child.

Therefore, we provisionally propose that the requirement for genetic link should only be removed in cases of medical necessity, meaning that the intended parents are medically unable to contribute sperm or eggs. We ask whether the same should be true for an arrangement which uses the parental order route. We propose, however, that the requirement for a genetic link should be maintained for international surrogacy arrangements. We consider that its removal in international cases would bring an unacceptable risk of surrogacy being abused for the purposes of child-trafficking.

REGULATION OF SURROGACY ARRANGEMENTS

The creation of the new pathway means that, in our view, greater regulation of surrogacy arrangements is required, to ensure adherence to the new safeguards. We make proposals regarding the regulation of surrogacy in Chapter 9 of the Consultation Paper. We propose that it should be possible to create “regulated surrogacy organisations” that would be able to monitor compliance with the requirements of the new pathway.

We see regulated surrogacy organisations as having one core function that should be theirs alone to perform, at least in respect of the new pathway. This function is the provision of what we call “matching and facilitation services”. These services, which existing surrogacy organisations provide in different ways, include compiling information about women willing to act as surrogates and intended parents, assisting the parties to form surrogacy arrangements (sometimes by actively matching them) and advising and supporting the parties throughout the surrogacy process.

Where IVF is used, clinics will also be involved in the surrogacy process and could be responsible for monitoring compliance. However, clinics are very unlikely to be used in traditional arrangements. We would like as many domestic arrangements as possible to qualify for the new pathway, so, if traditional arrangements are brought within the new pathway (as we propose) then regulated surrogacy organisations could oversee their compliance with the requirements of the new pathway.

We propose that these organisations, like clinics, should be regulated by the Human Fertilisation and Embryology Authority. We think that regulation of regulated surrogacy organisations should be pitched appropriately, so as not to create an unduly heavy regulatory burden.

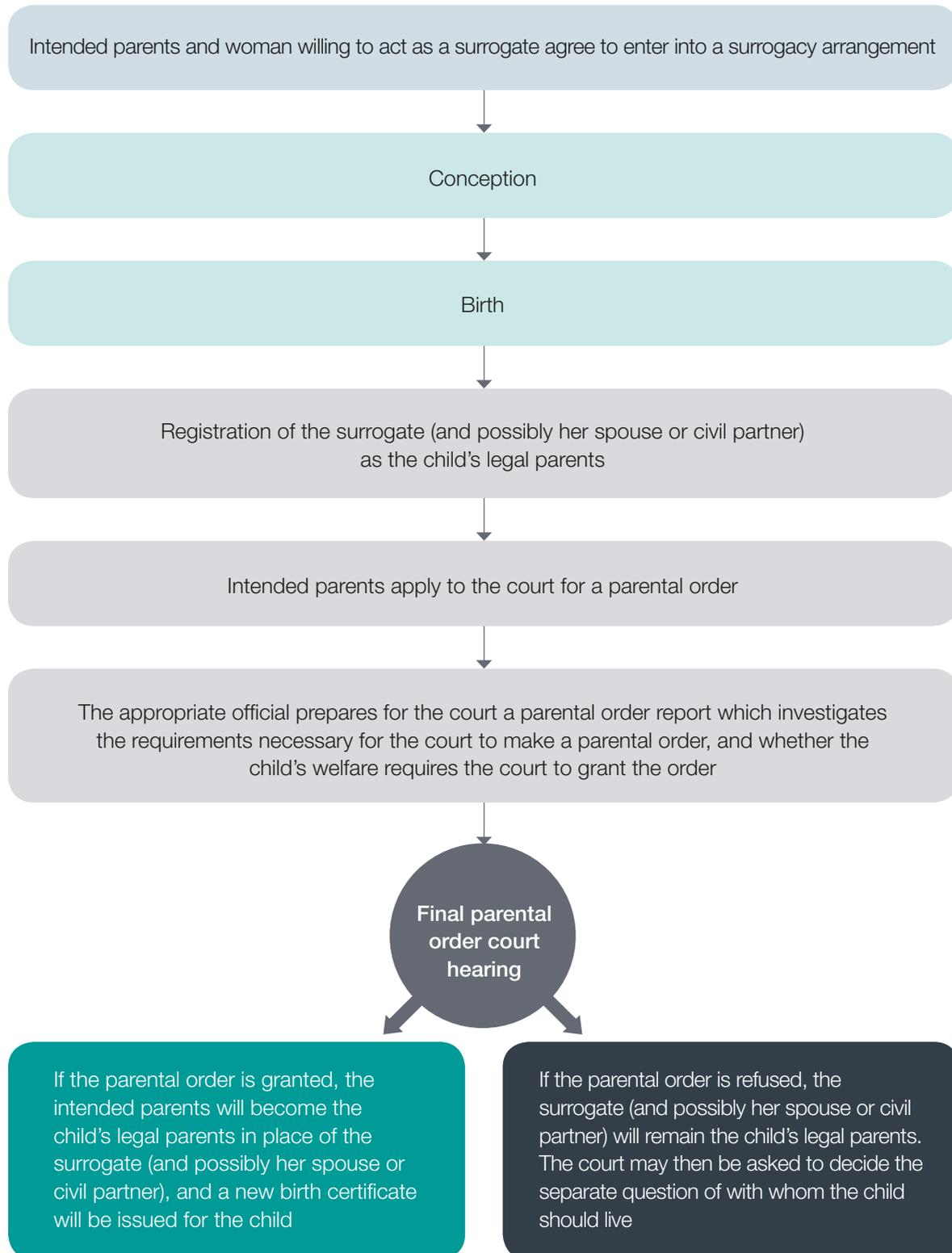
We believe that our proposals on legal parenthood are based on a consensus on what would work best amongst those most directly affected by surrogacy law; that is, those who enter into them and children born through surrogacy. We also believe that our proposals reflect the autonomy of women who have told us that the existing law does not reflect what they want to happen when they agree to become a surrogate. Nevertheless, we recognise that there are many perspectives on surrogacy and that not everyone will agree with our provisional conclusions. In Chapter 8 of the Consultation Paper we have included a section setting out an alternative view of our proposals, and we also ask questions about different models of acquiring legal parenthood in relation to surrogacy. We hope that our Consultation Paper inspires open debate and encourages consultees to make known their views, whether or not they agree with our proposals.

THE PARENTAL ORDER ROUTE TO LEGAL PARENTHOOD

As we have explained, we see a continuing need for parental orders to remain available alongside the new pathway we have proposed. Therefore, the Consultation Paper also suggests proposals to reform this route.

The parental order route

The diagram below provides an overview of the parental order route



Some of the reforms that we propose apply only to the parental order route, and we discuss these in Chapter 11. In that chapter we set out our proposal to remove the six month time limit for an application for a parental order which, as we have explained, is no longer applied in practice. We also consider the requirement for a surrogate (and any other legal parent – for example, the surrogate’s spouse) to consent to the making of the parental order. Currently, with very limited exceptions, such consent is an absolute prerequisite to a parental order. We take the view that, where it serves the welfare of a child who lives with the intended parents (or whom the court decides should live with the intended parents), the court should have the ability to dispense with this requirement for consent, and therefore retain the ability to make a parental order, where it is in the best interests of the child to do so.

We propose, in Chapter 8 of the Consultation Paper, that, in contrast to the current position, intended parents should automatically acquire parental responsibility where the child is living with them, or being cared for by them, and they intend to apply for a parental order.

In Chapter 6 of the Consultation Paper we make proposals for limited reform to the procedure for obtaining a parental order, and ask about changing how, in England and Wales, surrogacy cases are allocated to different levels of judge.

We summarise the differences between the new pathway and the parental order route (assuming that this route is reformed in the way that we provisionally propose) in the diagram below.

The new pathway versus the parental order route

	New pathway	Parental order route
Allows traditional and gestational surrogacy arrangements	✓	✓
Allows international surrogacy arrangements	✗	✓
Allows independent surrogacy arrangements which take place outside a regulated surrogacy organisation or licensed clinic	✓	✓
Includes compulsory safeguards, before entering a surrogacy arrangement, designed to protect all participants in an arrangement	✓	✗
In the absence of an objection from the surrogate during a defined period of time, the intended parents are the child’s legal parents from birth without the need to apply to the court for a parental order	✓	✗
A post-birth assessment by an appropriate official	✗	✓
A post-birth court hearing required to obtain a parental order	✗	✓
Access to a new national surrogacy register	✓	✓

REFORM APPLYING TO BOTH THE NEW PATHWAY AND THE PARENTAL ORDER ROUTE

Some of the reforms that we propose would apply equally to the new pathway and the parental order route. We have already explained our approach to the existing requirement for a genetic link, which we discuss in Chapter 12. Also in that Chapter, we set out our proposal that the basis for eligibility for intended parents to enter onto the new pathway, or to apply for a parental order, should be made broader. We conclude that the current requirement of domicile (a legal concept requiring that a person has made a country his or her permanent home) is an unnecessary barrier to some intended parents who live in the UK from obtaining a parental order. We therefore propose an additional, alternative, eligibility requirement of habitual residence (a concept, for these purposes, based on a person's physical presence in a country and his or her integration into a social and family environment).

In the remainder of Chapter 12 we discuss, and ask questions about, requirements that exist either in the current law, such as the requirements as to the relationship status of the applicants and that the child's home be with the intended parents, or that might be part of a reformed law. We provisionally propose that there should be a minimum age limit of 18 for a woman to become a surrogate, to match that currently in place for intended parents. We make no proposal for a maximum age limit for women to become surrogates, and nor do we propose one for intended parents in the parental order route. We do, however, ask whether there should be a maximum age limit for intended parents to access the new pathway.

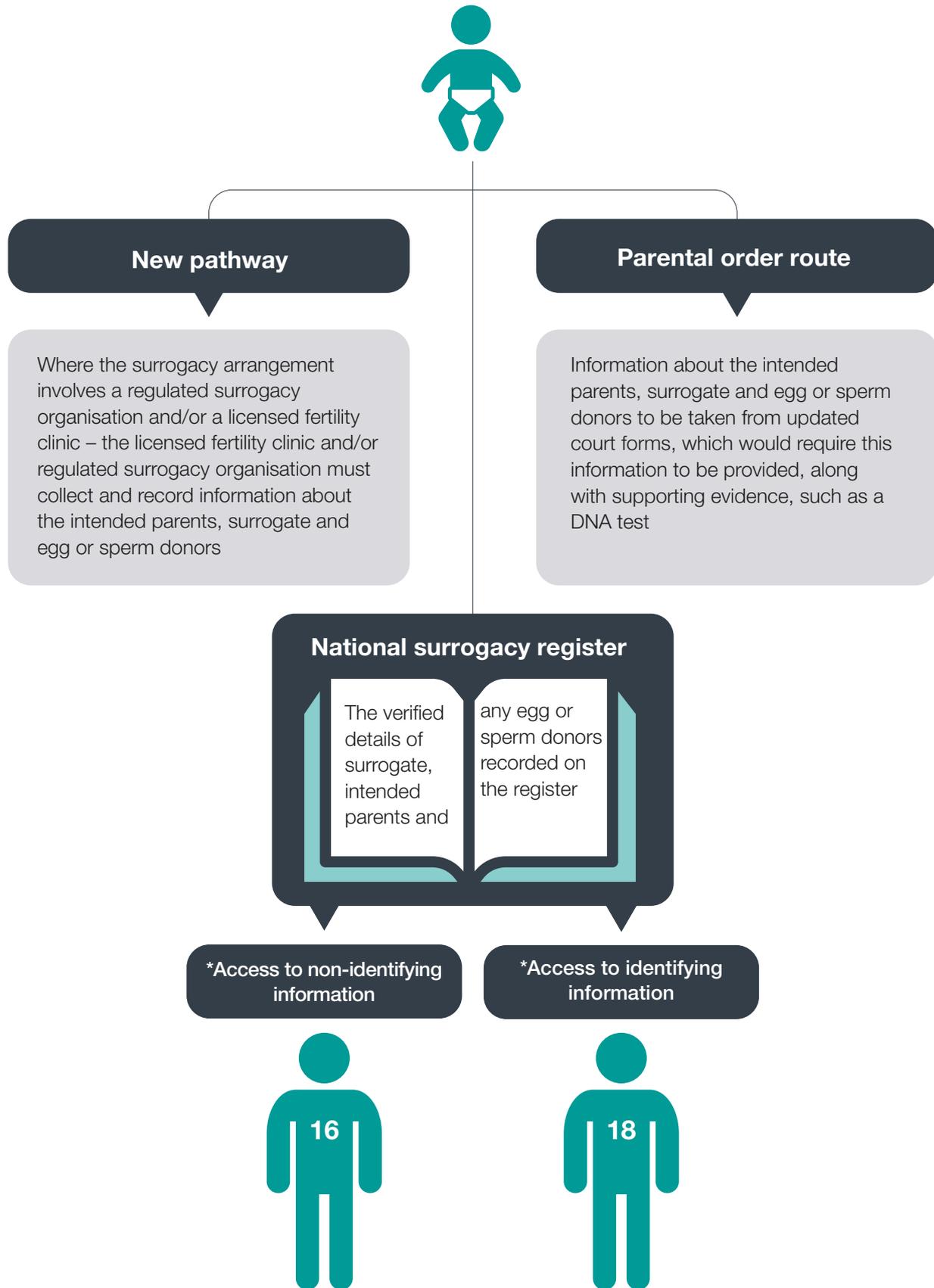
ACCESS TO INFORMATION ABOUT SURROGACY ARRANGEMENTS

In Chapter 10 we set out provisional proposals relating to the ability of a child born through surrogacy to access full information about how they were conceived and born.

Surrogacy law reform is needed to put the human rights and needs of surrogate-born people first and foremost – ensuring access to genetic and gestational heritage information; understanding that all involved in their conception and birth carry lifelong responsibilities; ensuring international standards outlawing child selling are met; preventing statelessness; and improving regulation.

Dr Marilyn Crawshaw, Chair of the Project Group on Assisted Reproduction (PROGAR)

Access to information



*A suitable opportunity must be given for the person born through surrogacy to receive counselling about the implications of the request.

A national register of surrogacy arrangements

We make a provisional proposal for the creation of a national register of surrogacy arrangements that would record, in relation to each child born following a surrogacy arrangement, the following information:

- the identity of the intended parents
- the identity of the woman acting as a surrogate
- information allowing the identity of whoever provided the sperm and egg to be accessed at the relevant time

We provisionally propose that the person born through surrogacy should be able to access identifying information about these people from the age of 18.

We ask whether non-identifying information – for example, height, weight, ethnic group, medical history, occupation, interest – should be recorded for the surrogate and intended parents (it is already recorded for those who donate eggs and sperm) and propose that, if this is the case, the young person be able to access this non-identifying information at the age of 16 as is already the case for donor-conceived children.

We provisionally propose that the new pathway should require that the information set out above is entered onto the national register before the child's birth is registered. For those following the parental order route we ask whether it should be a requirement that egg and sperm donors are entered onto the register, bearing in mind the negative effects on a child of blocking the making of a parental order where, say, sperm has been anonymously donated. We can see no reason, however, why the identity of the surrogate should not be entered in the register.

We also make proposals to fix a loophole in the law, in England and Wales, so that those born of a surrogacy arrangement outside the new pathway will be able to access their original birth certificate, and so that the full birth certificate of those born from arrangements in the new pathway will disclose the existence of the surrogacy arrangement (in line with the current situation).

In Chapter 10 we also ask further questions about whether provision should be made to allow those connected by a surrogacy arrangement, in different ways, to identify each other.

PAYMENTS TO THE SURROGATE BY THE INTENDED PARENTS

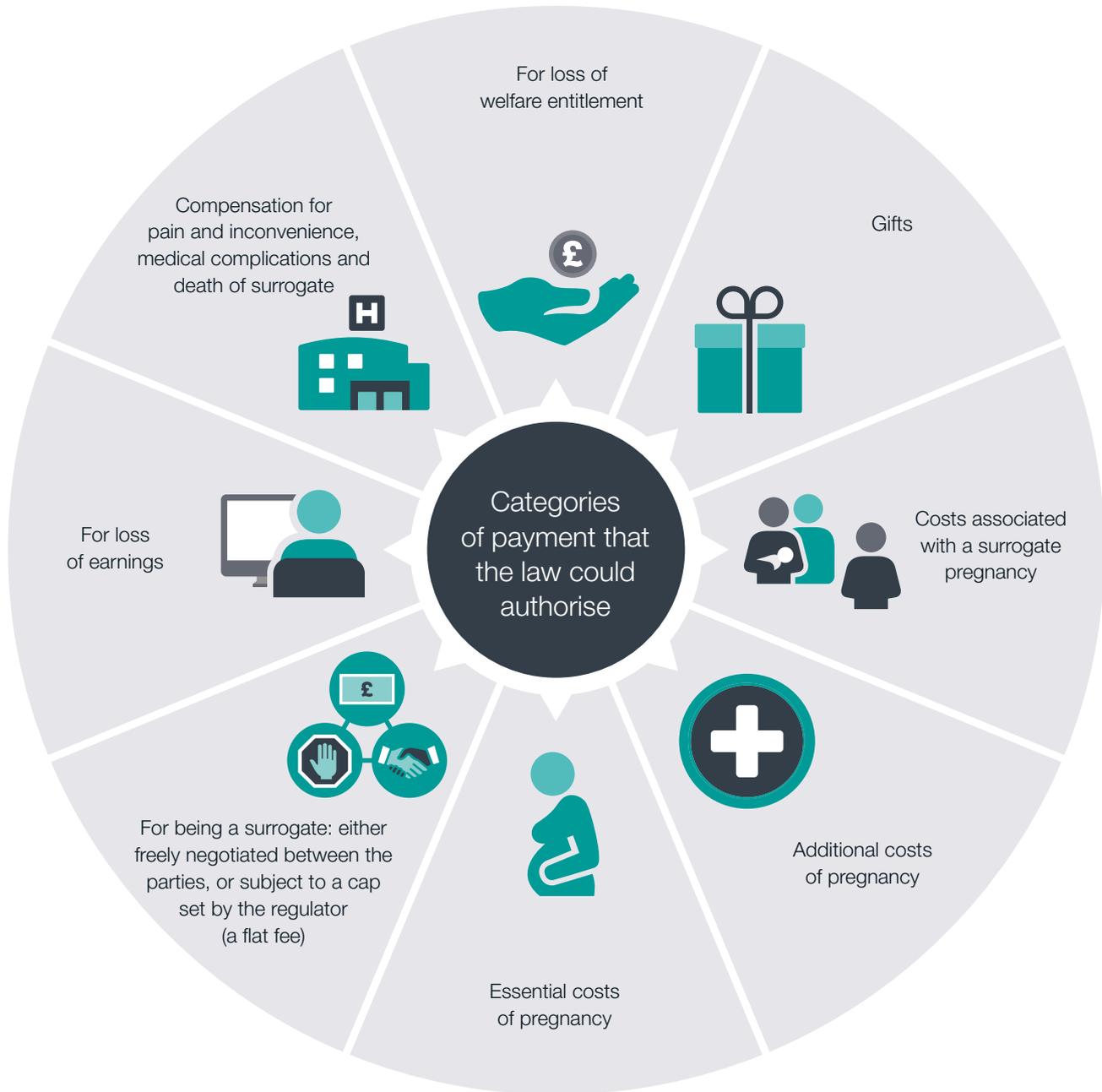


Chapters 14 and 15 of the Consultation Paper discuss payments made by the intended parents to the surrogate. In the first of these chapters we set out what payments are made under the current law that permits reasonable expenses, what women currently receive for being a surrogate under the law, criticisms of the current law, and the debate around whether it should be possible to pay a woman for the service of acting as a surrogate. We also look at the law in other countries on these points.

The question of what payments intended parents should be able to make to a woman who becomes their surrogate is one of the most important issues in surrogacy law. It is also an issue on which people have strongly held and opposing views. As a result, we have not reached any provisional proposals on what payments a woman should be able to receive for being a surrogate. Instead, in Chapter 15 of the Consultation Paper, we break down the possible payments that could be made into different categories and, for each category, we ask for consultees' views on whether such payments should be permitted. We also look at how limitations on payments can be enforced, and we provisionally propose that a surrogate should be able to enforce payments that are due to her under a surrogacy agreement (having provisionally proposed in Chapter 9 that, for all other purposes, it should remain that case that surrogacy agreements are unenforceable).

The diagram below sets out the different categories of payment to a surrogate by the intended parents about which we ask questions.

Categories of Payments



INTERNATIONAL SURROGACY ARRANGEMENTS



Chapter 16 of the Consultation Paper looks at international surrogacy arrangements; that is, arrangements both where UK-based intended parents go abroad to enter into a surrogacy arrangement, and where intended parents based in other countries come to the UK to enter into surrogacy arrangements. Although it is difficult to be sure, it appears that international surrogacy arrangements may account for up to half of surrogacy arrangements entered into by UK-based intended parents. We wish to consider these arrangements in our paper while acknowledging that there are limits to what the reform of national law can do to address an international issue.

Three key areas for international surrogacy arrangements:

Nationality

Nationality law decides who is a British citizen. Problems can arise for a child born of a surrogacy arrangement in a country which recognises him or her as the child of the UK intended parents, whereas UK law sees the child as the child of the surrogate. This can have the effect of the child not being entitled, at birth, to citizenship in any state. The making of a parental order, where at least one of the intended parents is a British citizen intended parent, has the effect of recognising the child as a British citizen.

Immigration

Immigration law decides who can enter the UK. There are two formal routes to allow a child born of an international surrogacy arrangement to do this: one is contained within the Immigration Rules and relies on having one intended parent who is recognised as a parent under the UK's law on nationality. The other route operates outside the rules, at the Secretary of State's discretion, and relies on an intention to apply for a parental order once the family is back in the UK. A child could also enter the UK where it has acquired on birth citizenship of another country, the citizens of which do not require a visa to enter the UK (for example, the USA).

Legal parenthood

Legal parenthood in the UK of a child born through surrogacy overseas is decided the same way as it is for a domestic surrogacy. That means that, in the UK, the woman acting as surrogate (and her spouse or civil partner) will be the legal parents, and the intended parents need to apply for a parental order. While the child born of an international surrogacy arrangement may be recognised as the legal child of the intended parents in the country of birth (for example, the USA), and potentially be able to obtain a British passport, there will be a conflict because the UK will not recognise the intended parents as legal parents until a parental order is granted.

For nationality law, we make a proposal that is aimed at streamlining and shortening the process to allow a child to obtain a passport, by proposing that the application process could begin before the child is born.

In respect of immigration, again, we provisionally propose that the application process for a visa could begin before the child's birth. We also propose that the route that exists outside the Immigration Rules be formalised by being brought within the Rules.

We provisionally propose that the law should provide the ability to recognise the status of legal parenthood acquired by intended parents in other countries automatically, without the need to apply for a parental order in the UK. However, recognition should be on an individual "country by country" basis when it has been established by the government that the laws and practices of the country in question provide protection for the welfare of the child, and against the exploitation of the surrogate.

We also provisionally propose that the government provide a comprehensive guide to intended parents about the nationality and immigration consequences of having a child through an international surrogacy arrangement, to replace the multiple government sources currently available, which are not always consistent.

The chapter also asks questions about the experience of those involved in international surrogacy arrangements, in order to gather evidence, and about arrangements where the UK is a surrogacy destination for intended parents from other countries. Intended parents may come to the UK to enter into a surrogacy arrangement here, with the intention of taking the child to their home country to become the legal parents there. We ask whether it is necessary, in these circumstances, to introduce a restriction on the removal of a child from the UK, and, if so, a process to allow this, with the approval of the court.

OTHER ISSUES



Chapter 17 of the Consultation Paper gathers together a discussion of other areas of the law and policy which interact with surrogacy and asks questions about whether there is a need for reform in these areas to better facilitate surrogacy arrangements. In particular, we ask questions about employment law, succession law (which covers the issue of inheritance by a child born of a surrogacy arrangement) and how the health services deal with surrogacy.

The penultimate chapter of the paper, 18, sets out questions intended to gather information about surrogacy generally, how it is funded, the impact of our proposals on surrogates and intended parents, and the specific impact in Northern Ireland.

Chapter 19 sets out a list of all the consultation questions.

CONCLUSION

We hope that you will read the full chapters in the Consultation Paper on the topics of interest to you, and respond to the questions in the paper.

The full Consultation Paper, and the online response form, can be found at <https://www.lawcom.gov.uk/project/surrogacy/> and <https://www.scotlawcom.gov.uk/law-reform/consultations/>

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