

E: surrogacy@lawcommission.gov.uk

13 March 2020

Dear Surrogacy Team,

Please find enclosed the [Centre for Sexuality, Race and Gender Justice](#) (SeRGJ) response to your public consultation on surrogacy law. This response has been prepared by Dr Julie McCandless, with input from SeRGJ members. SeRGJ is based at [Kent Law School](#) and a briefing of the work of SeRGJ is provided at the start of our response.

We appreciate you accepting our response after the deadline for formal submissions. We understand that you are unable to treat our submission as a formal response to the consultation, but hope that it will be useful for the Surrogacy Team as you enter the policy development stage of the project.

How best to reform surrogacy law is a challenging question. SeRGJ members have different political and personal views on surrogacy. However, as a collective, we are interested in the societal and political context in which surrogacy operates, to include the legal framework, and the repercussions thereof. This means that while we are at once concerned with the rights and lives of individuals and of particular families, we are also concerned with the wider impact on society – however hard to predict, evaluate and measure – that law and legal change may have. The reform of surrogacy law has the potential to influence how significant life events, relationships and legal connections are understood, and possibly even (re)constituted. It is with these concerns in mind, particularly as they relate to societal inequality and injustice that our response is submitted.

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We wish the Surrogacy Team all the best with the remainder of the project.

If we can be of any further assistance, we are happy to be contacted via Dr Julie McCandless (j.c.mccandless@kent.ac.uk).

Yours sincerely,
Centre for Sexuality, Race and Gender Justice, Kent Law School



BUILDING FAMILIES THROUGH SURROGACY: A NEW LAW

RESPONSE TO THE LAW COMMISSION AND THE SCOTTISH LAW COMMISSION JOINT PUBLIC CONSULTATION ON SURROGACY LAW

Prepared by Dr Julie McCandless on behalf of the Centre for Sexuality, Race and Gender Justice (Kent Law School) with input from Centre members.¹ Submitted March 2020.

The [Centre for Sexuality, Race and Gender Justice](https://research.kent.ac.uk/sergi/) (SeRGJ) is based in Kent Law School at the University of Kent. Its members are academics and doctoral students with research expertise in the complex relationships between sexuality, race and gender with law and governance, particularly in relation to inequality and injustice in society. Members of SeRGJ study these relationships in multiple ways in their individual and collaborative research projects.

SeRGJ aims to support current research in this field through a range of activities such as academic seminars and workshops, discussion forums, the publication of books and articles, a visiting scholar programme, the supervision of postgraduate research students and engagement in policy and law reform. Recent projects include exploring the disproportionate impact of austerity on BME women in the UK; equal access to (higher) education; reproductive rights; child abuse and sexual violence; and the legal recognition of gender. SeRGJ is also home to the [#DecoloniseUKC](https://twitter.com/DecoloniseUKC) project.

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¹ Please note that one Centre member, Dr Kirsty Horsey, while agreeing with the thrust of many of the recommendations and answers to the various questions, does not agree with the position taken in this response on legal parenthood. Dr Kirsty has already submitted her own response to the consultation.

Part A: General Recommendations

1. Consider the wider context of surrogacy in the UK and re-orientate the 'starting point' for the law reform proposals to better consider surrogacy agreements that 'go wrong'.
2. Acknowledge the potentially wider impact of the proposals in 'normalising' certain expectations, particularly around parenthood.
3. Consider and learn from developments in the rest of the world.
4. Explore new solutions beyond a) the two-parent model and b) existing legal measures such as Parental Orders.

Each of these points is developed below:-

1. Consider the wider context of surrogacy in the UK and re-orientate the 'starting point' for the law reform proposals to better consider surrogacy agreements that 'go wrong'.

- 1.1 The Consultation Paper (CP) draws on the views of many people and practitioners with experience of surrogacy, as well as academic research and other studies. This information paints a picture of surrogacy operating well in the UK, with well-adjusted families and children. We do not dispute these findings. We agree that there is considerable good practice in the UK and the generation of significant joy and happiness through surrogacy.
- 1.2 However, we do have concerns about the representativeness of those you have spoken with, especially surrogates, as well as the extent to which the wider context of surrogacy in the UK can be accurately depicted given available empirical research.
- 1.3 It is perhaps not surprising that persons who have had a positive experience of surrogacy are easier to reach in consultation exercises.² The same could be said for recruitment for experiential research studies.³
- 1.4 Those for whom surrogacy was not a positive experience – surrogates and intended parents, as well as potentially other family members – are unlikely to be part of the infrastructure of the surrogacy communities or organisations, which have understandably played a prominent role in campaigning for law reform. Disappointing, difficult or failed experiences of surrogacy have not been investigated to the same extent, nor have they resulted in calls for law reform in the UK. Yet they are an important part of the context with which law reform in this area should be concerned.
- 1.5 We also know very little about the demographics of those who engage with surrogacy and how differently situated persons, in terms of class, race and ethnicity, sexual orientation, gender identity, age, disability and so forth may practice and/or experience surrogacy.
- 1.6 We are not suggesting that the Law Commission could or should fill these research gaps.
- 1.7 *However, we are of the view that a reorientation of the basis on which the Law Commission's proposals proceed is necessary.* The current proposals focus on (the

² Of course, we do not know who has responded to the consultation; the pool may be much wider. To be clear, we are not only thinking of those who 'oppose' surrogacy – who are likely to be vocal – but also those who are in general supportive or accepting of surrogacy, but who have had a bad or disappointing experience.

³ This is certainly not a criticism of the studies or the quality of the research – many of them are excellent. Our concern is that we must acknowledge that existing studies do not necessarily capture the breadth of surrogacy experiences.

majority of) unproblematic cases, where all parties to the arrangement agree. We are of the view that there needs to be greater consideration of (the minority of) problematic cases, where there is disagreement or breakdown of the arrangement, or some other challenging issue.

- 1.8 To be clear, by this we do not mean that surrogacy law should continue to be devised around the premise that most surrogates change their mind about giving the baby to the intended parent(s); or that surrogates are necessarily the most susceptible to exploitation in arrangements. Rather, that law reform relating to surrogacy must take account that some arrangements will go wrong. We are of the view that the current proposals do not adequately reflect this and that surrogates in particular, but also intended mothers are inadequately protected. We discuss this further in responses to Qs 7, 11, 21, 26 and 27.

2. Acknowledge the potentially wider impact of the proposals in ‘normalising’ certain expectations, particularly around parenthood.

- 2.1 As recognised in the CP, it will not be possible to capture all surrogacy arrangements in a formal regulatory framework. However, for those that fall outside any new official ‘pathway’, the norms signalled by the legal and regulatory framework will be influential and often decisive. For example, there is some evidence in Greece of midwives registering intended parents as legal parents in surrogacy arrangements that have not received formal pre-approval from a judge; despite this pre-approval being a clear pre-requisite for the attribution of legal parenthood to intended parents instead of the woman who has given birth.⁴
- 2.2 Such a process of normalisation may also help to explain why there are few, if any, legal challenges by surrogates in jurisdictions that introduce an explicit legal framework that attributes parenthood at birth to intended parent(s), to the exclusion of the surrogate. While robust screening and pre-approval practices may reduce the likelihood of these challenges, attributing legal parenthood at birth to **only** intended parents signals a *fait accompli*, even when formal legal challenges are in theory possible.
- 2.3 We are therefore of the view that further consideration must be given to the possibility of recognising the surrogate **and** the intended parents **simultaneously** as legal parents, in order to afford better legal protection to all those with a significant connection to the child at birth. We discuss this further in responses to Qs 7, 11, 21, 26 and 27.
- 2.4 Finally, we also agree with the Law Commissions that there is a lack of attitudinal research on surrogacy in the UK. Such research has been useful in other family related contexts. For example, for better understanding instinctive reactions on the acceptability and fairness of pre-nuptial agreements.⁵ While it seems clear that surrogacy is regarded as considerably more culturally and ethically acceptable than it was just a few decades ago, it is difficult to gauge the parameters of what may be deemed fair and acceptable – and why – for particularly controversial issues such as legal parenthood, without further empirical research.
- 2.5 We are therefore of the view that greater caution should be exercised before recommending the removal of the long-standing legal rule that women who give birth

⁴ Aikaterini Neofytou (2018) *A Comparative Socio-Legal Analysis of Responses to Surrogacy in Greece and the UK*. A thesis submitted to the University of Kent for the degree of Doctor of Philosophy in Law.

⁵ Anne Barlow and Janet Smithson (2012) Is Modern Marriage a Bargain? Exploring Perceptions of Prenuptial Agreements in England and Wales 24(3) *Child and Family Law Quarterly* 304-319.

have legal status in relation to the children that they bear. We discuss this further in responses to Qs 7, 11, 21, 26 and 27.

3. Consider and learn from developments in the rest of the world.

- 3.1 While the CP usefully refers to the legal position and rules relating to surrogacy in several jurisdictions across the world, as well as some new legal developments, we were struck by the absence of any research studies on the context and operation of surrogacy in other jurisdictions. We are of the view that such research could and should help inform the Law Commissions' recommendations, particularly in relation to proposals around legal parenthood and payments.
- 3.2 In particular, we think it would be useful to examine research from jurisdictions where intended parents are attributed legal status at birth, to the exclusion of surrogates. In almost all of these jurisdictions, commercial gestational surrogacy is the norm. The thrust of the Law Commissions' recommendations are to resist commercial surrogacy (in the sense of a market, 3rd party profit-driven model), as well as homogenising surrogacy by only capturing gestational surrogacy in the regulatory regime. We are in agreement with both, but are concerned that the proposed changes in legal parenthood will push surrogacy towards the commercial/gestational-only model.
- 3.1 This is what appears to have happened in Israel, which is the country with the longest-standing explicit legal and regulatory framework for surrogacy. Regulated surrogacy agreements – which involve extensive screening procedures and formal pre-approval by a specially devised surrogacy committee – result in intended parents being attributed with legal status at birth, to the exclusion of the surrogate. Initially, only 'altruistic'⁶ arrangements were permitted, but this soon came under demand-driven pressure and commercial agreements are now the norm. In these agreements, 3rd parties, rather than surrogates, tend to make increasing profits.
- 3.2 This example is certainly not enough evidence to establish a causative link between the legal parenthood model adopted and the normalisation of commercial surrogacy. Other factors such as cultural understandings of reproduction and infertility, as well as the wider regulation and provision of fertility treatment will also be highly significant.⁷
- 3.3 However, it seems clear that the two are closely related, in the sense that reforming legal parenthood in this way more squarely casts surrogacy as a **transaction**, rather than a **collaboration**. We discuss this further in response to Q 7.
- 3.4 We are of the view that if legal parenthood is reformed as currently suggested by the Law Commissions, any newly established regulatory framework for will soon come under pressure to permit commercial agreements as surrogacy will become increasingly understood and practiced as a **transaction** rather than as a **collaboration**.

⁶ We accept that this is a problematic term, particularly when it is placed in a dichotomised relationship with 'commercial'. In most agreements that would be described as 'altruistic', payment is given to the surrogate by the intended parents. This includes in Israel, where there is considerable state provision for expensive fertility procedures such as IVF. In other words, private individuals, rather than state infrastructure provide the payments for surrogacy, to include in 'altruistic' arrangements, with very few surrogacy arrangements happening without the exchange of some sort of payment. .

⁷ So for example, the same does not yet appear to have happened in Greece, where a similar legal and regulatory framework was adopted in 2002. For further detail, as well as a discussion of the cultural role of shame around infertility in Greece as an influential factor, see: Aikaterini Neofytou (2018) *A Comparative Socio-Legal Analysis of Responses to Surrogacy in Greece and the UK*. A thesis submitted to the University of Kent for the degree of Doctor of Philosophy in Law.

- 3.5 We do not think that this pressure will necessarily come from women who want to be surrogates.⁸ Rather, as demand for surrogacy increases, new surrogacy ‘providers’ will form and seek to operate under a profit-based system. The UK may be particularly susceptible to this development given that most fertility treatment takes place in private, for-profit clinics, rather than the NHS. We discuss this further in responses to Qs 35 and 39.
- 3.6 More closely examining developments elsewhere in the world would offer contextual understanding of what factors lead to surrogacy operating on a more commercial/for-profit basis – or not – as well as the relationship between different aspects of the legal and regulatory framework.
- 3.7 From the empirical research that we have reviewed – mainly from India and Israel – there are striking similarities in the precariousness experienced by surrogates when intended parents are attributed with legal status, to her exclusion. This is true even when surrogacy operates in a highly regulated context with in-built legal protections (e.g. Israel), as opposed to a free-market context (e.g. India). *In other words, we are of the view that the exploitative impulses of surrogacy may be difficult to curb through regulation alone, particularly when surrogates are disassociated with legal status at birth.*

4. Explore new solutions beyond a) the two-parent model and b) existing legal measures such as Parental Orders.

- 4.1 Feminist legal scholarship has demonstrated the ongoing ideological role of the nuclear family model in underpinning family law and policy.⁹ This remains true despite significant demographic shifts and reproductive contexts where familiar fault-lines of marriage and/or bio-genetic relationships cannot straightforwardly determine familial legal connections.¹⁰ Yet it is the ideological vision of the two-parent family that continues to inform the parameters of law and law reform, even in contexts such as surrogacy. *We recommend that greater consideration should be given to exploring new solutions and models for surrogacy law, so that proposals around parental status move away from simply relying on the two-parent paradigm in different iterations.*
- 4.2 In particular, we are concerned that the existing Parental Order route – which is underpinned by the two-parent family model and its exclusive and gendered notions of parenthood – is presented in the Law Commissions’ recommendations as the solution for arrangements that breakdown or somehow go wrong. Not only does this maintain legal status as the focal point and decider for disputes (see further, responses to Qs 11, 12 and 13 and 27), but it will often result in two women being ‘pitted’ against each other in legal terms, at least in the context of heterosexual couples (See further, response to Q

⁸ Indeed, many women involved in surrogacy in the UK actively resist commercial surrogacy. Globally, there seems to be very little evidence of surrogates making considerable profit from surrogacy. Instead, fertility clinics and surrogacy agencies make increasingly large sums of money.

⁹ Martha Fineman (1995) *The Sexual Family* (Routledge); Alison Diduck (2003) *Law’s Families* (Butterworths).

¹⁰ Julie McCandless and Sally Sheldon (2010) ‘The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form’ 73(2) *Modern Law Review* 175-207. In addition to the use of reproductive technologies, we could also consider the context of step-families, blended families, adoption, fostering, co-parenting etc.

- 11). This is because there is considerably more legal scope for an intended father to be a legal parent at birth alongside the surrogate than an intended mother.¹¹
- 4.3 The Parental Order application is then often about securing the intended mother's legal status. We are of the view that this is a very undesirable consequence of the two-parent model for surrogacy in terms of locating differently situated women in precarious legal situations. Indeed, the inevitable outcome of the Parental Order application will be that one will have her legal subjectivity denied. This is unacceptable in a societal context whereby women continue to undertake the majority of socially reproductive labour and childcare. We are of the view that any proposals for reform should seek to strengthen the legal position of ALL women involved in surrogacy arrangements, and that maintaining the rule of legal status for women who give birth, alongside recognising intended parents as legal parents would be one possible way of doing that.
- 4.4 We note that in the CP, there are proposals that would see a more creative use of parental responsibility as a legal concept. We recommend that legal status could likewise be developed in a more creative and/or flexible way for surrogacy. We discuss this further our responses to Qs 7, 11, 21, 26 and 27.
- 4.5 Surrogacy is a unique and collaborative reproductive method, which requires a unique – and fresh – legal response that does not perpetuate the traditionally dichotomous assumptions and ideology of the nuclear family model. While many persons seeking to reproduce through surrogacy certainly want to establish their 'own' family unit (nuclear or otherwise) that is rightly afforded legal recognition in society, we are concerned that the current proposals permit this at the expense of devaluing and 'invisibilising' the role and contribution of women and women's bodies in reproduction and surrogacy.
- 4.6 We are of the view that this may lead to two undesirable consequences:-
- 4.7 First, that surrogacy will be understood more as another 'reproductive technology' – similar to IVF, which has undergone a remarkable process of normalisation despite statistically low success rates – rather than a collaborative family formation method that intimately relies on the body and commitment of a woman, as well as the formation of relationships.
- 4.8 We are not suggesting that persons engaged in surrogacy will actively seek to devalue the important role played by women who act as surrogates, but rather that this may happen at a wider and much more nebulous socio-cultural level, given the already low value accorded to reproductive labour and social reproduction in our patriarchal society.
- 4.9 Second, feminist anthropological research in IVF clinics has documented how gendered pressures and expectations encourage women in particular to try 'everything possible' to conceive when they experience infertility, often at great emotional and financial cost. Therefore, a legal framework that potentially constructs surrogacy as another 'reproductive option', akin to trying IVF, may generate undue pressure to pursue surrogacy.
- 4.10 As many of your stakeholders will have conveyed, surrogacy is not an easy or straightforward option. It is expensive, emotionally and physically demanding, as well as stressful. While we do not think that law should prevent persons from engaging in surrogacy, or make it unnecessarily difficult, we are concerned that the current

¹¹ Same sex female couples may present a challenge to this, as one of the women could potentially be considered as the legal parent alongside the surrogate. However, there are not that many female same sex couples who seek to have a child through surrogacy as usually one of the women will want to and be able to carry a pregnancy. In same sex male couples, who are more likely to be part of surrogacy arrangements, the intended father without the genetic link is more likely to be in the position of the intended mother in a heterosexual couple. We do not address this directly here, but do discuss it in some detail in response to Q 11.

proposals may normalise surrogacy as a 'reproductive option' at the expense of underplaying the gendered work that makes surrogacy possible; work undertaken both by (potential) surrogates and (potential) intended mothers.

Part B: Responses to Questions

Chapter 8: Legal Parenthood: Proposals for Reform – a New Pathway

Q7. In respect of a domestic surrogacy arrangement, we provisionally propose that, before the child is conceived, where the intended parents and surrogate have:

- (1) entered into an agreement including the prescribed information, which will include a statement as to legal parenthood on birth,**
- (2) complied with procedural safeguards for the agreement, and**
- (3) met eligibility requirements,**

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

Do consultees agree? 8.13

We do not entirely agree with the Law Commissions' proposals here. While we do agree that the intended parent(s) should be legal parents from birth, we strongly disagree with removing the legal status of maternity and recommend that it is maintained. We recommend that further consideration should be given to recognising the parental status of the intended parent(s) *alongside* the surrogate (see further response to Q 21) and that the proposed 'right to object' is not a strong enough legal protection against this proposed removal of the legal status of maternity (see further response to Q 11).

With respect to the proposed removal of the legal status of maternity *per se*, we have several concerns about the potentially far-reaching consequences of this, for surrogacy specifically but also pregnancy and reproduction more generally.

- **First, removing this long-standing rule risks that surrogates – and potentially other pregnant women and people – will no longer be regarded as the main decision-makers during a pregnancy.**

Parties to a surrogacy agreement clearly have to discuss and negotiate pregnancy potentialities and attempt to reach consensus about what should hypothetically happen in different circumstances. However, a surrogate must have final decision-making power for what happens to her body. We are very concerned that the proposals to remove the legal rule of maternity will lead to an erosion of this decision-making power as surrogates come under pressure to accede to the wishes of the intended parent(s) and/or 3rd parties, such as surrogacy providers.

Some will argue that this risk can be minimised or removed by the provision of clear legal protections regarding a surrogate's decision-making power, or that of pregnant women and persons more generally. However, we are highly sceptical of this argument. Feminist research has extensively documented the ever-increasing tendency to construct pregnant women and fetuses in a dichotomised relationship with opposing interests, rather than being in a uniquely connected and embodied state. The law itself has always struggled with recognising the unique state of pregnancy, and pregnant women continue to face ongoing challenges in having their wishes and decisions respected during both pregnancy and child-birth.

Parental legal status may not necessarily be the best or only way for law and society to recognise the unique state of pregnancy.¹² However, the legal rule of maternity is currently a very significant cultural demarcation, as represented by the widespread applicability of the rule across many jurisdictions and cultures. The rule captures both what may come (future relationship with the child) as well as what has been (conception, pregnancy and birth). While a birth giver is not the only person to have a significant connection with a child at birth, they do have a particular one that society needs to somehow accord value, irrespective of the individual circumstances of the pregnancy and birth.

We are therefore of the view that there is a strong argument to be made that all women and persons who undertake a pregnancy and give birth should have legal status at birth in order to send a clear message to society that they have a unique and significant connection to any child that they bear,¹³ irrespective of whether or not they also raise that child .

- **Second, that if the legal rule is removed, surrogacy risks becoming significantly more transactional and women’s gendered labour devalued.**

We are of the view that if only the intended parents have legal status at birth, a surrogate pregnancy will take place in a much more transactional paradigm than has hitherto been the case in the UK. Indeed, in almost all jurisdictions where this legal position on parenthood has been adopted, commercial (and usually also gestational) surrogacy has become the norm (see further section 3 in our General Concerns section).

Whether fully commercialised surrogacy would develop in the UK remains speculation. However, full commercialisation is not needed for a paradigmatic shift in how surrogacy is practiced and understood. If intended parents are attributed with legal status at birth, while the surrogate is not, it seems fairly obvious that they – and potentially 3rd parties – will be in a position to exert greater control over the pregnancy given their (perceived) exclusive relationship to the future child.

The risks of a more transactional paradigm for surrogacy are that women’s reproductive labour becomes devalued, with their role in surrogacy conceptualised as akin to other reproductive technologies, and their bargaining power eroded by the removal of a culturally significant legal status.

- **Third, that if this legal status can be removed in the context of surrogacy, there is the risk that it can be more easily removed in other contexts, such as where a woman is regarded as an undesirable mother or potential risk to the child.**

The current legal rule of maternity is applied without prejudice and there is a strong argument that this blanket application should remain in order to minimise at a wider

¹² However, we note that the Law Commissions’ project is not tasked with examining this wider question, nor the related issue of the role and formulation of birth registration in society.

¹³ Note that we do not extend these arguments to gamete donors/providers as we regard their contribution as qualitatively different to that of a woman/person who has carried a pregnancy and given birth, as well as perhaps undergoing several rounds of fertility treatment in order to conceive, and indeed possible miscarriages.

societal level legal (or other) discretion over which pregnant women and people should and shouldn't have legal parental status. This responds to feminist concern about women and people who are regarded as unsuitable, risky or undesirable mothers or parents, with feminist research exposing the particular and intersecting role of race, sexuality, class, disability, mental health, migrant status and so forth in (unequally) mediating the societal ideals by which women in particular are judged.

The obvious objection to the blanket application of the rule is that many surrogates do not want to be – or be seen as – mothers to their surrogate-born children, or have legal status in relation to them. Indeed, many have campaigned for the law to be reformed in precisely this way, alongside many intended parents, who are currently in the precarious situation of raising their surrogate-born children without legal status and recognition; or at least until such time as status is transferred to them through a Parental Order or Adoption Order. If this predicament is all we see law reform in this context as having to deal with, what is being proposed seems sensible.

However, we are of the view that the current proposals do not adequately recognise their potentially much wider impact than the context of surrogacy. In addition, we are also concerned that removing the legal status of maternity, and replacing it with a surrogate's 'right to object', is not a strong enough legal protection for surrogates, both with respect to control over the pregnancy and in the context of agreements that break down and/or where a surrogate changes her mind (see further, response to Q11).

To conclude, we want to make clear that in arguing to maintain the legal rule that those who give birth be attributed with parental legal status, we are not arguing that this status need be exclusive and/or to the exclusion of others with a significant connection to the child, namely the intended parents. The law already allows for multiple bases on which to ground parental legal status, as well as parental responsibility under the Children Act 1989. The CP makes several interesting proposals in relation to creative and flexible uses of parental responsibility in the context of surrogacy and we suggest that something similar could be done with parental legal status. We elaborate further on this in our response to Q 21, on the possibility of the three-parent (plus) legal model (temporary or otherwise).

Q11. We provisionally propose that:

- (4) the surrogate should have the right to object to the acquisition of legal parenthood by the intended parents, for a fixed period after the birth of the child;**
- (5) this right to object should operate by the surrogate making her objection in writing within a defined period, with the objection being sent to both the intended parents and the body responsible for the regulation of surrogacy; and**
- (6) the defined period should be the applicable period for birth registration less one week.**

Do consultees agree? 8.35

No, we strongly disagree with this proposal. Following on from our response to Q 7 on the proposal to remove legal status at birth for surrogates, we have several further significant concerns here.

Time Period Too Short

First, the defined period proposed is 35 days in England and Wales and 14 days in Scotland. This is an incredibly short space of 'maximum' legal time, in which to be permitted to make a decision like this. Several factors may make this even more so, whether a difficult birth, the onset of difficulties after birth, a difficult relationship with the intended parents – or even a good relationship and the wish not to disappoint them – as well as other care and/or familial commitments of the surrogate. If the proposal is maintained, the time period *must* be extended, if necessary by extending the time limit for birth registration, or allowing subsequent amendment of registration, in such cases. However, we are ultimately of the view that even with such an extension/possibility of subsequent amendment of registration, surrogates will not be sufficiently protected in law, for the reasons given in our response to Q7.

Clarity of the Proposal

Second, the current presentation of the proposal does not make it clear whether the surrogate can exercise her right to object during the pregnancy, or only afterwards. In our discussions, one member was of the view from other discussions on the CP that the right to object could be exercised at any point prior to birth; however, all other members understood the proposal as being about a right that could only be exercised post-birth. Clarity is needed on this point. We are of the view that a surrogate should be able to exercise this right at any point during the pregnancy. However, even if the recommendations are clarified in this way, the defined period remains too short.

Purpose of the Proposal

Third, the goal of this proposal appears to be to bring legal certainty as soon as possible to the intended parent(s) as to their (exclusive) parental legal status, rather than to provide any substantive legal protection or recognition for the surrogate. We are of the view that it fails on both counts.

Impact on Surrogates

In relation to surrogates, not only is the permitted time-frame too brief, but we are concerned that the proposed 'right to object' will simply translate into a delayed transfer of legal parenthood to the intended parent(s) following a Parental Order application; which will be the effective result of a surrogate exercising this right. While judges currently don't usually approve a Parental Order application without a surrogate's consent, that is in the context of a legal framework whereby a blanket rule of maternity operates. If that default legal rule is no longer in place in the context of surrogacy, it will become a much easier leap for judges to ignore the wishes of surrogates and to discard their consent for a transfer of parenthood in Parental Order applications, under the auspices of the welfare principle. This will be particularly the case if intended parents have automatic parental responsibility, even when the surrogate exercises her 'right to object', as is proposed in the CP. In other words, the proposals seem to significantly strengthen the position of intended parents – which we don't necessarily object to – while greatly reducing the position of surrogates.

There is no detail in the proposals as to what type of circumstances or reasons for exercising her right to object will be considered sufficient for determining that the surrogate should retain her legal status. Can she simply change her mind, or does she have to have material concerns about the intended parent(s) and their ability to care for the child? Would these have to reach some sort of threshold akin to child protection proceedings, or will something less serious suffice? Do they have to be proven? Does she have to want to bring up the child in order to exercise her right to object, or can it be for other reasons? What if she simply decides that retaining legal recognition is important to her, and an important acknowledgment for what she has done? What if she thinks it is in the child's interests?

In addition, there is no detail in the proposals as to what happens to the child when the surrogate exercises her right to object. Does the surrogate have an automatic right to take the child into her care or refuse to let the intended parents take the child home? Is it that social services automatically become involved? Who decides these things?

While it is always difficult to predict how a new legal provision will come to be used, we are of the view that this will come to be a fairly empty legal right for surrogates, who may, for a wide variety of reasons, find themselves in challenging situations as arrangements proceed. We are of the view that unless future legislation or regulations explicitly indicate otherwise, the threshold for surrogates retaining their status in law through this proposed 'right to object' will come to be very high indeed, and require very significant concerns about the intended parents.¹⁴ Likewise, it will be difficult for surrogates who object to assert any control over who cares for the child or where the child lives. It will therefore be very difficult for a surrogate who changes her mind about the agreement to do anything, and we will in practice have enforced surrogacy contracts; no matter what the law formally states about enforceability and specific performance.

In addition, the proposal divests surrogates of a legal status that they may, for good reason(s), want to maintain, unless they want to formally object to the intended parents being regarded as the child's legal parents. We are of the view that the two things do not necessarily have to go hand-in-hand. We note that while most surrogates that you have spoken to, and those who responded to the Surrogacy UK surveys, say that they do not want parental legal status, a small number thought they should, sometimes alongside an intended parent and/or parents. We are of the view that their reasoning and concerns should be further investigated and used as a springboard for further consideration about how the law could be reformed. In addition, there may be ways to achieve better legal provision for intended parents that does not involve such stark removal of legal status for surrogates.

Impact on Intended Parents

In relation to the intended parents, the 'right to object' proposal simply brings back the problems of the existing law, at least for some. As we have already indicated, the consequence of a surrogate exercising her right to object will be that the intended parents then apply for a Parental Order. As there is more legal scope for a genetically related intended father to be a legal parent at birth alongside the surrogate, Parental Order applications are often about securing an intended mother's legal status, or that of a non-genetically related intended father in the context of male same sex couples. While our

¹⁴ Indeed, even with explicit guidelines, the threshold will likely be high.

instinct is that Parental Order applications will typically end up still being approved when a surrogate exercises her right to object, the burden of legal uncertainty here will mainly fall to intended mothers and genetically unrelated intended fathers. This uneven ability of intended parents to assert legal status is unfair and indeed will intensify should a surrogate's husband or partner no longer be regarded as a legal parent (see further our responses to Qs 15 and 15a). This is because there will then be more scenarios where genetically related fathers are the default second parent. We see, therefore, the ongoing restrictions of trying to maintain the two-parent family model in the context of surrogacy.

If, as we suspect, Parental Order applications are mainly approved, this unfairness may well not manifest in any great dissatisfaction with the law. However, unfairness and discrimination are clearly present, particularly in scenarios where intended mothers have a genetic connection to the child, as their 'equivalent'¹⁵ contribution to that of the intended father is not afforded the same legal recognition.¹⁶ It would be an unfortunate consequence of this project if future law reform in this area came under legal challenge on the basis of discrimination, given the reasons for pursuing the project on surrogacy law reform in the first place.

The risk of such a legal challenge is clearly greater if the 'right to object' develops in the opposite way to what we foresee i.e. that parental order applications are refused rather than approved. This would mean that intended mothers – with or without a genetic connection – and intended fathers without a genetic connection – will remain permanently 'left out' of the legal status equation, while intended fathers with a genetic connection are potentially increasingly 'brought in'. It is possible to foresee a future legal challenge on the basis of discrimination in this context, as intended parents in a couple who have jointly entered into a surrogacy arrangement will end up with completely disparate legal (non)recognition. Having parental responsibility, but not legal parental status is unlikely to assuage dissatisfaction with the law, if your partner has legal status but you don't.

Conclusion

In short, what we see in these proposals is a firm adherence to the two-parent family model, at least in the context of legal status. We are of the view that maintaining the Parental Order route, as underpinned by the two-parent family model, is not an adequate way of either protecting surrogates or (some) intended parents. Nor do we think it is an effective way of dealing with arrangements that break down, whether the arrangements begin in the proposed new pathway or not. Maintaining the Parental Order route as the way of resolving disputes means that legal status will act as both the focal point and decider for matters that would be better considered on their own terms through existing child law mechanisms e.g. proceedings under the Children Act 1989.

¹⁵ Male and female gametes are clearly not 'the same', as the female egg also has MitDNA. However, current prevalent understandings of reproduction emphasise the coming together of male and female nuclear DNA, with each contributing 50/50 to the subsequent embryo. Whether the development of epigenetics shifts this understanding significantly remains to be seen.

¹⁶ We are not trying to say here that non-genetic intended fathers are somehow less worse off, but rather that we cannot think of how a discrimination claim would be framed in this context given the need for it to hinge on a special characteristic like sex/gender or sexual orientation.

Q12. We provisionally propose that, where the surrogate objects to the intended parents acquiring legal parenthood within the period fixed after birth, the surrogacy arrangement should no longer be able to proceed in the new pathway, with the result that:

- (7) the surrogate will be the legal parent of the child;**
- (8) if one of the intended parents would, under the current law, be a legal parent of the child, then he or she will continue to be a legal parent in these circumstances; and**
- (9) the intended parents would be able to make an application for a parental order to obtain legal parenthood.**

Do consultees agree? 8.36

No. As explained in response to the previous question, we are of the view that this proposal is inadequate for both protecting surrogates and intended parents and that it effectively casts the Parental Order route and legal status as the focal point and decider for disputes and/or agreements that break down. In many ways, this proposal does very little to improve current dissatisfaction with the law and opens up new possibilities for discriminatory treatment.

Q13. We provisionally propose that, in the new pathway:

- (10) the intended parents should be required to make a declaration on registering the birth of the child that they have no reason to believe that the surrogate has lacked capacity at any time during the period in which she had the right to object to the intended parents acquiring legal parenthood;**
- (11) if the intended parents cannot provide this declaration then, during the period in which she has the right to object to the intended parents acquiring legal parenthood, the surrogate should be able to provide a positive consent to such acquisition; and**
- (12) if the intended parents are unable to make this declaration and the surrogate is unable to provide the positive consent within the relevant period, the surrogacy arrangement should exit the new pathway and the intended parents should be able to make an application for a parental order.**

Do consultees agree? Share your views. 8.37

No. See further response to Qs 7 and 11 above. We are of the view that surrogates should continue to have some sort of legal status at birth and that this need not be to the exclusion of the intended parents. We are further of the view that it is inadequate that the Parental Order route be cast as the main way of dealing with disputes, disagreements, or other challenges presented by surrogacy agreements.

Reading the CP and the consequent consultation questions around parenthood has been a challenging endeavour; and we are academic lawyers, used to working with long and complex texts. Having to think through all the various iterations and pathways of different scenarios, and what must happen in each, is far from straightforward. It also makes clear the difficulties of maintaining such close adherence to the two-parent family model for legal status in the context of surrogacy.

We are of the view that the insistence on under-girding the proposals with the two-parent family model diverts attention and resources to disputes over legal status, which in many ways will become ever more complex under the new proposals given the reliance on written declarations and other documents in order to operate 'with certainty' (if that is ever possible!). It is here worth noting that the shift from fact-based tests for legal status to a more contractual paradigm in the 2008 reforms of the parenthood provisions in the Human Fertilisation and Embryology legislation has already resulted in a significant number of legal cases. In other words, introducing contract-like requirements has not necessarily led to greater certainty with respect to parental status in contexts where the two-parent family norm does not straightforwardly apply. It may be that fact-based tests are more appropriate in the context of determining parental status, and that a better approach would be to enlarge the scope of these tests and the parameters of the two-parent family model. As aforementioned, if this were the case, it may be possible for subsequent disputes and/or disagreements to better focus on other issues pertaining to the child's upbringing.

Q14. We provisionally propose that, in the new pathway, the welfare of the child to be born as a result of the surrogacy arrangement:

- (13) should be assessed in the way set out in Chapter 8 of the current Code of Practice;**
- (14) either the regulated surrogacy organisation or regulated clinic, as appropriate, should be responsible for ensuring that this procedure is followed; and**
- (15) there should be no requirement for any welfare assessment of the child after his or her birth.**

Do consultees agree? Share your views. 8.51

Yes. We do not think that surrogacy arrangements necessitate a different or additional approach to how the welfare of the child is assessed in other reproductive contexts that involve regulated clinics or organisations.

Q15. We provisionally propose that, for a child born as a result of a surrogacy arrangement under the new pathway, where the surrogate has exercised her right to object to the intended parents' acquisition of legal parenthood at birth, the surrogate's spouse or civil partner, if any, should not be a legal parent of the child. Do consultees agree?

Q15a. We invite consultees' views as to whether, in the case of a surrogacy arrangement outside the new pathway, the surrogate's spouse or civil partner should continue to be a legal parent of the child born as a result of the arrangement. 8.57

We have sympathy with this proposal. A surrogate's spouse or civil partner – or indeed partner – does not have the same reproductive connections to a surrogate-born child as do surrogates and intended parents. It is therefore very odd that they could potentially have parental legal status, while intended parents do not.

What gives us pause for concern here are arrangements which do not work out, and where the child becomes a member of the surrogate/birth mother's¹⁷ family. In these situations – which may be few in number, but are still important to consider – a surrogate/birth mother's partner will almost certainly be involved in the care of the child. This may be alongside, or sometimes without involvement from the intended parents (who may possibly be legal parents).

S 4A of the Children Act 1989 provides for the acquisition of parental responsibility by a step-parent. In our reading of s 4A, a surrogate-birth should not prevent a surrogate/birth mother's spouse or civil partner from being covered by his provision. However, clarity may be needed on this.

The straightforward application of s 4A may also be difficult in situations whereby the surrogate/birth mother is not a legal parent. So for example, she exercises her right to object, but a Parental Order is granted to the intended parents, and a parental responsibility order to the surrogate/birth mother as she will have some ongoing involvement in the child's life (or she acquires parental responsibility through a child arrangements order under Children Act 1989). In this situation, she would not be considered a legal parent, and this means that s 4A would not be applicable. In this situation, it would be important to include her spouse/civil partner in the parental responsibility and/or child arrangements order. It should likewise be possible to include partners who are not in a formally recognised relationship with the surrogate/birth mother in parental responsibility and child arrangements orders. This is important as s 4A does not extend to partners who are not in a formal relationship. This distinction between spouses and civil partners on the one hand, and partners not in a formal union on the other, is of course an issue beyond the parameters of the Law Commissions' current project. However, we are of the view that within the parameters of this project proposals could be made to ensure that partners who find themselves caring for a surrogate-born child can formally acquire parental responsibility and/or apply for other orders under the Children Act 1989.

For example, under the current law, a child must have lived with a (legal) non-relative for at least three years before they have standing under the Children Act 1989 (s 10 (5) (b)) to apply for any s 8 orders with respect to the child. In contrast, the time requirement for a (legal) relative is one year (s 10 (5B)). Provision could be made in the legislation that similarly 'speeds things up' for children born of a surrogacy arrangement. Or alternatively, new surrogacy legislation could better provide for agreements that don't go 'according to plan' and offer detail on who can apply for parental responsibility and/or child arrangements orders.

Q16. We provisionally propose that, in the new pathway, where a child born of a surrogacy arrangement is stillborn:

- (16) the intended parents should be the legal parents of the child unless the surrogate exercises her right to object; and**
- (17) the surrogate should be able to consent to the intended parents being registered as the parents before the expiry of the period of the right to object.**

¹⁷ We are using the terminology of surrogate/birth mother here for clarity's sake, accepting that the term surrogate will no longer be suitable for the scenario that we are envisaging here.

Do consultees agree?

No. We think that these proposals are overly complex for such a traumatic situation and that having different surrogacy scenarios going down different routes potentially adds to perceptions of unfairness and hurt at a very difficult time. They completely fail to acknowledge or validate the grief and loss of the woman who has carried the child.

We are of the view that reforming parental legal status in a way that does not adhere to the two-parent family model would open up less complex legal provisions, which potentially offer persons involved in a surrogacy arrangement the legal and societal recognition that is often desired when a child is stillborn, or dies soon after birth.

Q16a. We provisionally propose that, outside the new pathway, where a child born of a surrogacy arrangement is stillborn, the surrogate should be able to consent to the intended parents being registered as the parents before the expiry of the period allowed for the registration of the birth, provided that the intended parents have made a declaration to the effect that the relevant criteria for the making of a parental order are satisfied, on registration of the stillbirth. Do consultees agree? 8.77

No. See response to Q 16 above.

Q17. We provisionally propose that, for surrogacy arrangements outside the new pathway, where the child dies before the making of the parental order, the surrogate should be able to consent to the intended parents being registered as the parents before the expiry of the period allowed for the registration of the birth, provided that the intended parents have made a declaration to the effect that the relevant criteria for the making of a parental order are satisfied, on registration of the birth. Do consultees agree? 8.79

No. See response to Q 16 above.

Q18. For surrogacy arrangements in the new pathway, we invite consultees' views as to whether, where the surrogate dies in childbirth or before the end of the period during which she can exercise her right to object, the arrangement should not proceed in the new pathway and the intended parents should be required to make an application for a parental order. 8.80

No. This proposal appears to be punishing the intended parents for something that is beyond their control. We are of the view, that a different model for legal parenthood, that does not rely on the exclusivity of the two-parent model could be better for difficult and traumatic scenarios like this and avoid the need for unnecessary legal applications and processes.

Q19. We provisionally propose that, for surrogacy arrangements in the new pathway, where both intended parents die during the surrogate's pregnancy, the intended parents

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

No. This is a further example of a difficult scenario that is made more complex with the insistence on the two-parent family model for surrogacy law. Like the scenarios above, we are of the view that the law should be as simple as possible so that those involved do not have to make burdensome legal applications. It is certainly possible that in a situation where both the intended parents die, a surrogate may want to keep and bring up the child. She should not have to go through a legal process to be able to do so.

The flip-side is that if she has parental status, she has to go through a process in order to 'give up' legal rights and entitlements. We are of the view that this is preferable than women having to apply to 'acquire' parental legal status for children that they give birth to, given that we live in a patriarchal society in which women are punished and deemed unsuitable mothers when they do not approach a pregnancy in the paradigmatic way. In other words, we are of the view that it will be easier, at a societal level, for surrogates to 'give up' legal status, than it will be for them to 'acquire' legal status, whether this is in the context of intended parents dying, or indeed any other context (see further response to Q 21 below, on the three-parent model of legal parenthood).

Q19a. We invite consultees' views as to whether, for surrogacy arrangements outside the new pathway, where both intended parents die during the surrogate's pregnancy or before a parental order is made:

- a. it should be competent for an application to be made, by a person who claims an interest under section 11(3)(a) of the Children (Scotland) Act 1995, or who would be permitted to apply for an order under section 8 of the Children Act 1989:**
 - i. for an order for appointment as guardian of the child, and**
 - ii. for a parental order in the name of the intended parents, subject to the surrogate's consent; or**
- b. the surrogate should be registered as the child's mother and it should not be possible for the intended parents to be registered as the child's parents, but that there should be a procedure for the surrogate to provide details of the intended parents, and, if relevant, gamete donors, for entry onto the register of surrogacy arrangements. 8.81**

Again, we are of the view that strict adherence to the two-parent family norm is creating a need for overly complex legal provisions, that will ultimately fail to consider all the possible iterations of what may happen in a surrogacy arrangement. If all surrogates and intended parents have legal status at birth, this would provide a better platform for other legal provisions to 'kick in', such as s 8 and guardianship orders.

Q20. We provisionally propose that, where an application is made for a parental order by a sole applicant under section 54A:

- (18) the applicant should have to make a declaration that it was always intended that there would only be a single applicant for a parental order in**

respect of the child concerned or to supply the name and contact details of the other intended parent;

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

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

Do consultees agree? 8.86

No. We are sceptical of the ability of written declarations and other text-based tests to ‘arbitrate’ these types of situations. We would prefer a fact-based test in future legislation, for example, by inserting a ‘treatment alone’ requirement into the legislation, similar to the ‘treatment together’ provision that preceded the agreed parenthood provisions in the Human Fertilisation and Embryology legislation. This would give the courts better scope to focus on the substance of claims being made in any dispute, rather than whether the correct paperwork was completed.

Q21. We invite consultees’ views as to: (1) a temporary three-parent model of legal parenthood in surrogacy cases; and (2) how the legal parenthood of the surrogate should be extinguished in this model. 8.91

We are of the view that further consideration should be given to this possibility in the context of surrogacy arrangements involving a couple.¹⁸ Surrogacy is a collaborative reproductive technique that relies on the intimate labour of women’s bodies to help other persons create families. Part of the dissatisfaction with the current law is that the two-parent family model is insisted upon when it comes to the ascription of legal status, creating unsatisfactory results. Considering a three-parent (or more) model might offer a workable alternative that responds to surrogacy as a reproductive practice on its own terms, as opposed to trying to ‘shoe-horn’ surrogacy into a paradigm that it doesn’t entirely fit.

¹⁸ Some surrogacy arrangements will involve a surrogate and one intended parent. In these arrangements, we think it appropriate that status be restricted to the surrogate and the intended parent, rather than the law ‘imposing’ a third parent (e.g. a gamete donor or the surrogate’s partner).

Conversely – although we are not aware of this being a very prevalent social phenomena – some arrangements may involve a surrogate and more than two intended parents, who plan to co-parent together. Our instinct is that in these circumstances, consideration should be given to affording the same parental status to all of the intended parents, on the basis of their shared role in bringing about the arrangement and their intent to bring up the child. While some will argue that this unnecessarily ‘fractures’ parenthood and is against the best interests of children, limiting parental status does not by itself prevent future disputes, and in many cases, exacerbates it and/or produces unfair results. We are of the view that disputes would be better focussed on practical issues relating to the child’s upbringing, rather than who should ‘count’ as a parent. Moreover, if the recommendations propose to remove the need for a genetic connection in cases of e.g. double donation, the law is more firmly grounding intent as a basis for parental status. Clearly not the only basis, but an increasingly recognised one. To not ‘roll this out’ to other family formations would need to be further justified.

Surrogates and intended parents ALL have important connections to a child at birth. As we have discussed above, parental legal status is an important cultural demarcation for signalling the significance of these connections. While we have discussed in our response to Q 7 how parental status is both backward and forward looking with respect to women who give birth, it can of course be seen as backward and forward looking for intended parents; acknowledging their contribution in 'bringing about' the child and their future intent to raise and care for them. Having to go through a legal procedure in order to 'obtain' legal status is an emotionally taxing endeavour, as the impetus for this Law Commission project has made clear.

What the law has hitherto done in the context of surrogacy is 'hierarchise' the various relations, connections and contributions that surrogacy entails, requiring some to be legally invalidated in order for others to be constituted; particularly in the transfer of status from surrogates to intended mothers. Yet this does not reflect the relations at play in surrogacy, which all operate simultaneously and only through each other.¹⁹ While the three parent model for legal parenthood may not perfectly reflect what a surrogacy arrangement is either, it may at least offer an alternative that does not operate to constitute and recognise some bodies, connections and relations at the expense of others.

There will be objections to considering the three-parent (or more) model, and we attempt to briefly respond to these.

Objections from Surrogates

First, that surrogates themselves do not want parental legal status at birth. This position has been articulated by many of the surrogates that you have spoken with, as well as the majority of surrogates who responded to the SUK surveys. These surrogates are understandably concerned about two primary issues with the legal status of the birth mother in law: 1) that they do not regard the child as 'theirs', but rather the intended parent(s)' and 2) they do not want to be legally responsible for surrogate-born children.

It is easy to see how the current model of legal parenthood, which operates on an exclusive either/or basis, generates such concerns. However, a differently configured model of legal parenthood, that does not rest on exclusivity, may also sufficiently assuage such concerns, while not divesting surrogates completely of legal status at birth. Having the intended parents *simultaneously* acknowledged as legal parents along with the surrogate would help to allay fears that surrogates will be left responsible for their surrogate-born children when this is not what they want, while also ensuring that surrogates are not 'invisibilised' by the law.

As discussed above, we regard the automatic legal status of surrogates as an important safeguard in the law, both for women's decision-making power during pregnancy and birth (response to Q 7), as well as in arrangements that 'go wrong' (response to Q 11), which of course are the agreements where the impact of the law will be most keenly felt (even if they are fewer in number). While removing the surrogate's legal status for the (majority) of arrangements that proceed as planned may seem like a fair and expedient legal reform, we are concerned about the possibilities for unfairness that it might generate, and think that a

¹⁹ For analysis of the significance of relations to human existence, see the pathbreaking work of social anthropologist Marilyn Strathern, most recently in *Relations: An Anthropological Account* (2020, Duke University Press).

reform where legal parents were attributed with status *alongside* surrogates would be preferable than a) the current legal position and b) proposals that involve surrogates having no parental legal status at birth.

In terms of the ongoing dimension of legal status, we can appreciate why surrogates would be concerned about what this means in relation to expected responsibilities towards the child, whether financial, decision-making, or care more widely. Where a surrogate wants to relinquish their legal status, we think they should be permitted to do so. While we have not given this full consideration, we think a special procedure would need to be devised, as current mechanisms for relinquishing parental legal status involve transferring it (e.g. Parental Order applications or adoption proceedings), which is not what is contemplated here. Or alternatively, legal status, or a version of it could be maintained, and parental responsibility under the Children Act 1989 relinquished.

What we envisage here is that, for the majority of cases where there is agreement that the intended parents raise the child, the surrogate will, in time,²⁰ relinquish her legal status. This would replace the current need for intended parents to apply for a Parental Order to have legal parenthood ‘transferred’ to them. This may seem to counter-intuitively shift the ‘have to do something’ burden to surrogates. However, we are of the view that this is preferable to generally ‘removing’ the long-standing legal rule of maternity in the context of surrogacy and requiring those in the more challenging and difficult circumstances to initiate a ‘right to object’. Yes, the three-parent (or more) legal model does not stop disputes from materialising or ending up in legal forums, but it would mean that all parties are on the same legal footing in the framing of disputes, rather than the *prima facie* dispute being about legal status.

A risk of what we suggest above is that ‘relinquishing’ simply becomes an expected and normalised part of the surrogacy exchange. Indeed, we anticipate that it will. However, we see the three-parent model as offering a better starting point for those arrangements that go wrong, or where the family created does not necessarily want to define itself within the two-parent family parameters.

Objections from Intended Parents

The second objection is that intended parents who are raising the child deserve to have the boundaries of their family ‘secure’ from future interference by the surrogate, particularly where they are raising the child. This is another valid and important concern, which mirrors concerns about law’s recognition of families headed by lesbian couples or single women who have had children with the involvement of known sperm donors. However, we think the concerns here have to be differently analysed, given a) the patriarchal nature of wider society and the devaluing of women, women’s bodies and maternal and social labour; and b) the significance in society and law of the male genetic link and the historical and contemporary patriarchal impulses of law to prioritise that link.²¹

Clearly, surrogacy families should not be excluded from the rights and protections afforded to other families in society, nor should they be unnecessarily stigmatised by having to

²⁰ We think it would be sensible for the law to set a (generous) minimum but not a maximum time limit.

²¹ We see this clearly in the operation of surrogacy law, and laws that intersect with surrogacy, such as immigration i.e. that genetically related intended fathers are the most likely cohort of intended parents to be considered as a legal parent from birth.

undergo time-consuming, stressful and expensive legal procedures. This is why we are supportive of intended parents being attributed with legal status from birth. However, we think this should be *alongside* surrogates. We are of the view that this does not undermine the social or legal validity of surrogacy families, but rather tries to accommodate them, and the relationships that produce them, on their own terms. Moreover, because these relationships operate in a patriarchal society and legal system, we are of the view that for surrogates to maintain legal status at birth does not represent the same ‘threat’ as affording status recognition to a male known sperm donor. And indeed, the contribution of a woman during conception, pregnancy and birth is very different to the provision of genetic material and is a relationship that warrants status recognition on its own terms, irrespective of the wider reproductive context.

Uncertainty, Disputes and Child Welfare

A third objection is that extending parenthood to three or more people, particularly where there is not an original intention for those people to parent together, leads to greater uncertainty around parental status, expands the space for disputes (legal or otherwise), and is generally bad for the interests of children. We take these concerns seriously. However, in response, we would argue that strictly adhering to the two-parent family model with respect to legal status has likewise led to uncertainty around legal status as people cannot ‘fit’ within the framework and engage in efforts to change the ‘at birth’ attribution. It does not seem satisfactory that we ‘close down’ disputes over surrogacy agreements by effectively rendering surrogates without any meaningful legal standing to avail of current child law mechanisms and procedures. Instead, we should perhaps accept that some disputes, even if the majority of arrangements go well, will inevitably happen, and that no party to a surrogacy agreement should be in weaker position than others in determining how the dispute is negotiated. In other words, we take an important opportunity in this law reform process to place the significant persons involved in surrogacy arrangements on an initial platform whereby certain interests are not given higher priority compared to others.

In addition, disputes involving two parents can be highly fractious. Yet rather than suggesting that, for example, male parents don’t have legal status so that separated parents don’t fight over their children, we provide measures for these families through the family justice system. It is impossible for law to stop disputes happening and it is highly unethical for law to stop them from happening only by removing the rights and legal status that a person would otherwise have by virtue of giving birth.

Societal Readiness for Three Legal Parents

A fourth objection is that society is not yet ready to countenance a child as having more than two legal parents. Such a legal reform is likely to be controversial. But then so too is the removal of legal status from women who give birth. We have two very strong socio-cultural and legal mores here – the legal status of the birth mother, and the two-parent family – pulling in different directions. As noted in the CP, some jurisdictions have recently introduced the three parent (or more) family model in the context of surrogacy and other reproductive practices such as known donation. While it is still too early to fully assess the impact of these legal changes on those most closely affected by them, as well as wider society, they do not seem to have been met with especially wide or intense social opposition, perhaps because their reach is regarded as being fairly limited. Yet the removal of the legal status attached to maternity, even in the particular context of regulated surrogacy agreements, may be seen as having much wider, and controversial implications in

terms of the acceptability of the proposal. Indeed, it could be argued that if society is ready to accept surrogacy as a regulated reproductive practice, it should also be ready and willing to accept new and more appropriate legal arrangements for surrogacy.

Q22. We invite consultees' views:

- (21) as to whether there should be any additional oversight in the new pathway that we have proposed, leading to the acquisition of legal parenthood by the intended parents at birth; and**
- (22) if so, as to whether should this oversight be:**
 - i. administrative, or**
 - ii. judicial. 8.93**

No. We are not clear what purpose this additional oversight would serve, particularly in the context of a regulated new pathway. There is a strong risk that it would operate to 'cast suspicion' over intended parents, when the direction and impetus for surrogacy law reform is in part to make things easier for intended parents.

Q23. In respect of England and Wales, we invite consultees' views as to:

- (23) whether the welfare checklist, contained in section 1(3) of the Children Act 1989, should be amended to provide for the court to have regard to additional specific factors in the situation where it is considering the arrangements for a child in the context of a dispute about a surrogacy arrangement; and**
- (24) if so, as to what those additional factors should be. 8.120**

We do not think that there is any need for change here. Or alternatively, that any changes should only be child-focussed, rather than designed to promote the interests of adult parties.

Q24. In respect of England and Wales, we invite consultees' views:

- (25) as to whether the checklist, contained in section 1(4) of the Adoption and Children Act 2002 (as applied and modified by regulation 2 and paragraph 1 of Schedule 1 of the 2018 Regulations) should be further amended to provide for the court to have regard to additional specific factors in the situation where it is considering whether to make a parental order; and**
- (26) what those additional factors should be. 8.121**

We do not think that there is any need for change here. Or alternatively, that any changes should only be child-focussed, rather than designed to promote the interests of adult parties.

Q25. We invite consultees' view as to whether section 10 of the Children Act 1989 should be amended to add the intended parents to the category of those who can apply for a section 8 order without leave. 8.123

Whether this is required depends on how legal parenthood is reformed, if at all. We are not against the inclusion of such a provision, but it would be unnecessary if intended parents are regarded as parents in law from birth.

If such a provision is deemed necessary for intended parents, we are of the view that it should be extended to surrogates, as well as potentially the partners of surrogates when a surrogate-born child becomes a member of the surrogate's family (see further, response to Qs 15 and 15a), given that they may not necessarily in law be considered as a parent and/or relative to the child.

Q26. We provisionally propose that, where a child is born as a result of a surrogacy arrangement outside the new pathway, the intended parents should acquire parental responsibility automatically where:

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

Do consultees agree? 8.132

See response to Q 27 below.

Q27. We provisionally propose that, where a child is born as a result of a surrogacy arrangement in the new pathway:

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

Do consultees agree? 8.134

Qs 26 and 27 aptly demonstrate the difficulty of adhering to the two-parent family model for parental legal status in the context of surrogacy, as well as our concerns that the proposed 'right to object' will be a fairly toothless legal right for surrogates. While we agree that intended parents should have legal status and parental responsibility for their surrogate-born children, this should not be to the exclusion of the surrogate. What the proposed law is setting up here, are Parental Order applications whereby a judge must decide on issues pertaining to status, as well as arrangements for the child's upbringing; when it would be better for these to remain as separate issues in the context of disputes and disagreements over a surrogacy arrangement. Otherwise, judges will find it very hard to refuse Parental Order applications to intended parents who already have parental responsibility, and with whom the child is more than likely living. Yet, a surrogate may have a very good reason to exercise her 'right to object'. Parental responsibility would then become the only legal tool to respond to her concerns, when actually, legal status may be more apt, or some combination thereof.

We are of the view that an alternative model of legal parenthood would permit more scope for judges – and mediators – to focus their attention and determinations on the practical

arrangements for a child's upbringing in the case of a disagreement, with legal status remaining determined upon birth, as opposed to being a status that is attributed by legal decision-makers at some point post-birth.

Q28. We provisionally propose that, for surrogacy arrangements within the new pathway, the surrogate should retain parental responsibility for the child born as a result of the arrangement until the expiry of the period during which she can exercise her right to object, assuming that she does not exercise her right to object. Do consultees agree?
8.139

No. We are concerned that this sends the message that surrogates remain responsible for surrogate-born children, yet are afforded no status recognition in relation to them.

We are of the view that surrogates should retain parental legal status *and* parental responsibility, until such time as the surrogate wishes to relinquish one or the other, or both. See further response to Q 21 on the possibility of a three-parent model for legal status.

Q29. For all surrogacy arrangements, we invite consultees' views as to:

- (31) whether there is a need for any restriction to be placed on the exercise of parental responsibility by either the surrogate (or other legal parent), or the intended parents, during the period in which parental responsibility is shared; and**
- (32) whether it should operate to restrict the exercise of parental responsibility by the party not caring for the child or with whom the child is not living. 8.140**

This proposal is interesting and could potentially be developed in a way that responds to some of the particularised concerns of how and why parenting situations may be challenging in the context of surrogacy. However, careful consideration would need to be given to precisely what activities the law should restrict, why, and for how long. We are of the view that this may potentially be a better route for law reform in the context of surrogacy, than parental legal status being the primary focus and arbiter for disputes and disagreements. This is because it could potentially focus legal attention and resources on practical questions, rather than the competing claims for recognition between parties who all have important connections to the child in question.

However we also note that under the current law, when parental responsibility is shared between two parents but the child is living with only one of those parents, the resident parent may unilaterally exercise parental responsibility in relation all practical, day-to-day issues, and the non-resident parent has little practical opportunity to exercise parental responsibility, except in circumstances specified by law when the consent of all parental responsibility holders is required. So the need for any formal restrictions on the exercise of parental responsibility by any party not caring for the child would need to be carefully considered in this light.

Q30. We provisionally propose that traditional surrogacy arrangements should fall within the scope of the new pathway. Do consultees agree?

Yes. We do not think that surrogacy law reform should apply to only gestational/IVF surrogacy arrangements. We are of the view that it is important that future surrogacy law reform does not signal gestational/IVF surrogacy as the only or preferred surrogacy arrangement, as has been the trend in other jurisdictions enacting new surrogacy legislation. Traditional surrogacy arrangements involve less intervention on the surrogate's body than gestational/IVF surrogacy. On that basis alone, they should not be disincentivised through law reform.

Chapter 9: The Regulation of Surrogacy Arrangements

Q32 a. We invite consultees' views as to whether independent surrogacy arrangements should be brought within the scope of the new pathway.

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

We think that while it may be possible for some independent surrogacy arrangements to 'affiliate' with regulated surrogacy organisations, it will be impossible to bring all surrogacy arrangements within the scope of regulation and the newly proposed pathway. In light of this, we are of the view that the legal framework must maintain the legal status of surrogates at birth (although this need not be to the exclusion of intended parents), even if a surrogate wishes to later waive this legal status. As discussed above, to 'waive' is less burdensome than to 'acquire', and it also moves surrogacy out of the two-parent family model for status recognition.

Q33 We provisionally propose that:

(1) There should be regulated surrogacy organisations – do consultees agree?

Yes. However, we do not think the involvement of a regulated surrogacy organisation justifies the removal of legal status from surrogates. The involvement of a regulated organisation may well reduce the risk of disputes and disagreements, as seems to have happened with the involvement of the current voluntary surrogacy organisations which operate with considerable good practice. However, we are of the view that legal status remains a crucial socio-cultural demarcation for women who give birth in terms of control of their pregnancy, as well as in terms of not excluding them from a future role in the child's life (which need not be parental, but may well be significant).

(2) There should be no requirement for a regulated surrogacy organisation to take a particular form – do consultees agree?

Yes. We are of the view that the law should not be prescriptive of form and allow differently focussed organisations to develop.

- (3) **Each surrogacy organisation should be required to appoint an individual responsible for ensuring that the organisation complies with regulation – do consultees agree? Yes.**

Q35 We provisionally propose that regulated surrogacy organisations should be non-profit making bodies. Do consultees agree?

Yes. We are of the view that organisations and other 3rd parties should not make a profit from surrogacy. In fact, we are fundamentally opposed to this.

Q39 We provisionally propose that the remit of the Human Fertilisation and Embryology Authority be expanded to include the regulation of regulated surrogacy organisations, and oversight of compliance with the proposed legal requirements for the new pathway to legal parenthood. Do consultees agree?

We are not opposed to this proposal. However, we have some concern about the HFEA simultaneously regulating ‘for profit’ fertility clinics,²² alongside ‘not for profit’ surrogacy organisations. If both are to have the same regulator, it is highly likely that ‘for profit’ fertility clinics will seek to expand their provision to surrogacy. It is not clear to us that there is anything in the Law Commissions’ proposals that would attend to this inevitability, such as further regulatory powers in terms of e.g. pricing, that the HFEA may need to be afforded if commercial surrogacy is not to be unintentionally marshalled in through newly proposed law and regulation.

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

See above – new powers to regulate pricing.

Q40 We provisionally propose that surrogacy agreements should remain unenforceable (subject to the exception we provisionally propose in Consultation Question 88 in relation to financial terms). Do consultees agree?

Yes. We are of the view that surrogacy contracts should remain unenforceable. However, we are of the view that the proposals in relation to legal parenthood will operate to effectively ‘enforce’ surrogacy contracts.

²² Clearly some assisted reproduction clinics operate within the NHS and are not ‘for profit’ enterprises. However, we don’t envisage surrogacy becoming an NHS service.

Chapter 10: Children's Access to Information About Surrogacy Arrangements

Q45 We invite consultees' views as to whether the birth registration system in England and Wales requires reform and, if so, which reforms they would like to see.

We are offering only a response to this Q in this section. This is because we are of the view that many of the Qs in this section only appear necessary because of the recent difficulty that surrogate-born persons are having in accessing their original birth certificate, as helpfully outlined in the CP. We are of the view that this could be easily changed, removing the need for a specific surrogacy register to operate alongside existing gamete donor registers.

Furthermore, as we are opposed to the removal of legal status at birth from surrogates, we think that they should be named on the original birth certificate, possibly alongside the intended parents (see response to Q 21 above). Future proceedings may mean that the configuration of names on a birth certificate changes, but the surrogate would remain in the 'paper trail' on the original registration. This would remove the need for a national surrogacy register, in addition to the general register.

We are also concerned that registers are being proposed in order to further regulate and 'manage' surrogacy in a way that casts aspersions on the reproductive practice and those who engage in it. There is considerable evidence that surrogate-born children are told of the circumstances of their birth, with many families having an ongoing relationship with the surrogate. This makes surrogacy very different to the context of donor-conception, particularly where there is no *prima facie* relationship between the gamete donor(s) and the parent(s). This begs the question then of why similar types of registers are thought to be necessary.

Finally, we agree in principle that the birth registration system requires reform. It is a compulsory procedure, that has received very little substantive reform since it was introduced in the early Victorian era. In recent years, variously situated individuals have contested the information that is recorded,²³ and there is growing and often impassioned disagreement as to the purpose of birth registration and the birth certificate.

We are of the view that empirical research is needed on the operation of the birth registration system, as well as its role, and perceived role, in wider society. This is a fairly significant endeavour, given the interaction of birth registration with other legal regimes, from family, to social security, to immigration and administrative law, as well as the interplay of very different national systems of registration. In other words, there are significant issues pertaining to fairness and equality and what work birth registration does, or doesn't do, for our society and what reform may be needed.

²³ Particular examples include donor-conceived persons, transgender and intersex persons, as well as transgender parents.

Chapter 11: Eligibility Criteria for a Parental Order

Q55 We provisionally propose that:

- (1) the current circumstances in which the consent of the surrogate (and any other legal parent) is not required, namely where a person cannot be found or is incapable of giving agreement, should continue to be available - do consultees agree?**
- (2) the court should have the power to dispense with the consent of the surrogate, and any other legal parent of the child, in the following circumstances:**
 - i. where the child is living with the intended parents, with the consent of the surrogate and any other legal parent, or**
 - ii. following a determination by the court that the child should live with the intended parents; and**
 - iii. the court's power to dispense with consent should be subject to the paramount consideration of the child's welfare throughout his or her life guided by the factors set out in section 1 of the Adoption and Children Act 2002 and, in Scotland, in line with the section 14(3) of the Adoption and Children (Scotland) Act 2007.**

Do consultees agree?

The proposal in subsection (2) above appears to have been included to deal with scenarios whereby surrogates (and potentially their partners) refuse to give consent for the Parental Order application by the intended parents, despite the child being raised by the intended parents. This is what happened in a recent case in the UK, whereby the surrogate and her husband refused their consent for the Parental Order application because they were unhappy with how the surrogate had been treated by the intended parents during the arrangement. The judge in the case refused to consider the possibility of an adoption order, which the surrogate and her husband said they would give consent to.²⁴

We are of the view that this case aptly demonstrates how the two-parent family model for surrogacy focuses disputes and disagreements on status, as opposed to the more practical issues about a child's upbringing, which is arguably where our courts and legal resources should be focussed. It is also a case that demonstrates the significance of legal status for a surrogate when an agreement has been challenging, and how the legal framework can be mobilised to make her appear unreasonable and selfish when her desire for legal status is necessarily pitted against that of the intended parents.

We are of the view that a different approach to legal status *per se* is needed, as opposed to reforms to the Parental Order criteria. If our view is not accepted, we would be opposed to any reforms to enable the court to dispense with the consent of the surrogate to the making of a Parental Order. The analogy with adoption is not apt. There will rarely if ever be a situation in which the surrogate has been found to have caused or to create risk of significant harm to the child, and dispensing with her consent in the absence of such a finding is a draconian measure which must infringe her human rights.

²⁴ Re AB (Surrogacy: Consent) [2016] EWHC 2643 (Fam).

Chapter 12: Eligibility Criteria for Both a Parental Order and for the New Pathway

Q65 We provisionally propose that surrogates should be required to be at least 18 years of age (at the time of conception), in order for the court to have the power to make a parental order. Do consultees agree?

We agree that a minimum age is sensible for surrogacy and that it could be introduced in the newly proposed pathway. As minimum age is a less nebulous category than e.g. reasonable expenses, it does appear reasonably straightforward to introduce it into the Parental Order criteria. However, as various other 'straightforward' Parental Order criteria have come under challenge in this context, we are of the view that it would be preferable for the law to further make clear that the parental legal status of a person under 18 cannot be removed other than through adoption or child protection proceedings. In other words, that the context of a surrogacy agreement cannot marshal through less scrutinised transfer of parenthood proceedings in the form of Parental Order applications.

Chapter 13: Eligibility Criteria for the New Pathway

Q68 We provisionally propose that, for the new pathway, there should be a requirement that the surrogate and the intended parents should take independent legal advice on the effect of the law and of entering into the agreement before the agreement is signed. Do consultees agree?

We are of the view that while independent legal advice can be helpful, it cannot by itself provide sufficient protection for those seeking to enter surrogacy agreements. While we are not aware of any research on legal advice in the context of surrogacy agreements, other research on legal advice in the context of familial agreements where people potentially negotiate away future legal rights and entitlements (e.g. pre-nuptial agreements), demonstrates that it does not prevent individuals from agreeing to disadvantageous arrangements.²⁵ We are of the view therefore that any proposals around independent legal advice must proceed from the basis that the legal framework must provide additional protection for those involved in surrogacy, particularly when it comes to parental legal status at birth.

In addition, given the fairly prescriptive thrust of the CP proposals, legal advice would seem to be mainly for information purposes, as opposed to e.g. assisting the parties in negotiations. This information could, potentially, come just as effectively from other sources, such as regulated surrogacy organisations or the regulator.

²⁵ Sharon Thompson (2011) Levelling the prenuptial playing field: Is independent legal advice the answer? 4 *International Family Law* 327-331

We are of the view, therefore, that there needs to be more clarity as to the purpose of the independent legal advice, given that the need for it will likely increase the cost of agreements. An increase in cost may be justified if independent legal advice is providing something 'additional' to what is already available.

Q70 We invite consultees' views as to whether there should be a requirement that the surrogate has previously given birth as an eligibility requirement of the new pathway.

Some of us agree with this proposal on the basis that like legal status, it operates as a protective mechanism that can be inbuilt into a legal regulatory framework. However, others did not express a view, and we are aware that feminist opinion is divided on this. Some feminists would be opposed to such a provision on the basis that women have the capacity to make these decisions themselves. Given that we have relatively little empirical information about surrogacy arrangements that 'go wrong', we would suggest a cautious approach whereby having previously given birth is included as an eligibility requirement of the new pathway.

Chapter 15: Payments to the Surrogate: Options for Reform

For this section, we offer 5 key points:

1. The law should be generous on what surrogates can be paid and payments should not be for a product but for the reproductive and social labour that the surrogate undertakes (to include e.g. fertility treatment, getting pregnant, miscarriages, ante and post-natal care, giving birth etc).
2. Any payment to a surrogate should not impact means tested social security benefits.
3. In terms of fixed fees, it may be more important to consider setting a minimum rather than a maximum fee.
4. That it is important to focus not only on what payments may be made to surrogates, but also organisations and other individuals who may seek to profit from surrogacy at the expense of surrogates and intended parents.
5. The trend in commercial surrogacy is typically that payments to surrogates go down, usually while the fees for other services, people or aspects of the contract go up. We are of the view that every effort should be made to avoid the creep of commercial surrogacy, possibly by explicit provisions in legislation which prohibit certain actors from profiting from surrogacy (e.g. private fertility clinics that generally operate on a for-profit basis).
6. Any financial clauses in a surrogacy agreement should not be made contingent or conditional.

Chapter 16: International Surrogacy Arrangements

Q 99 We provisionally propose that:

- (1) the Secretary of State should have the power to provide that the intended parents of children born through international surrogacy arrangements, who are recognised as the legal parents of the child in the country of the child's birth, should also be recognised as the child's legal parents in the UK, without it being necessary for the intended parents to apply for a parental order, but**
- (2) before exercising the power, the Secretary of State should be required to be satisfied that the domestic law and practice in the country in question provides protection against the exploitation of surrogates, and for the welfare of the child, that is at least equivalent to that provided in UK law.**

Do consultees agree?

We have reservations here, given that we do not want the automatic attribution of legal status to surrogates who give birth to be removed in the UK, seeing it as an essential 'protective' mechanism in the legal framework. It would therefore be hard to justify a change in law which did not require this status to be afforded to women in other countries.

However, if, for example, the three-parent (or more) model for legal parenthood was implemented in such a way as to include international surrogacy agreements (similar to how the current rule of maternity operates), intended parents would have the legal status that this provision is trying to facilitate, while at the same time recognising the status of women elsewhere in the world who give birth, as well as their agency to relinquish that legal status.

If our argument is not accepted, we would oppose this proposal, on the basis that it would create an incentive for UK intended parents to pursue surrogacy arrangements in countries that will give them legal status, without subjecting them to the regulation proposed in the UK. The regulatory framework being proposed by the LC is likely to increase the cost of surrogacy, and thus the incentive to engage in international surrogacy arrangements in parts of the world where regulation and cost is less will continue. We need to care about the implications of this, and make provision for those cases in a way that protects overseas surrogates as much as those giving birth in the UK. The Secretary of State's scrutiny of domestic law and practice in such cases is likely to be fairly superficial. We think such a provision would have very undesirable consequences.

Chapter 17: Miscellaneous Issues

Q105 We invite consultees' views as to whether there are further issues in relation to employment rights and surrogacy arrangements and, if so, any suggestions for reform.

Yes. Most of the questions in this section relate to the extension of employment rights and protections to the intended parents. However, attention must also be given to the possible implications of any new proposals on existing rights for women who give birth, particularly if under some surrogacy agreements they no longer have legal status at birth. What would this mean for their current employment rights and protections, or indeed any other legal right or protection? This concern gives further force to the need for the legal rule of maternity to stay in place.

In terms of further issues in relation to employment rights and surrogacy agreements, the issue of dismissal from employment should also be looked at, both in the context of surrogates and intended parents.

Chapter 18: Impact

Q117 We invite consultees' views as to the specific impact of our proposals in Northern Ireland.

We do not have particular expertise on this, but we wondered whether Brexit, and the uncertain status of the Irish border may have some impact on the reach and application of certain proposals. This may be of particular relevance to international agreements, but also agreements involving parties from Northern Ireland and Great Britain, and/or Northern Ireland and Ireland/EU countries.

[END OF QUESTION RESPONSES]