

FAQs | Building families through surrogacy: a new law

Q. What is surrogacy?

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

Q. Why might a couple or individual choose surrogacy?

- Surrogacy is a possible way for people to form a family if they are unable to conceive or carry a foetus, or deliver a baby. As a result, the intended parents who enter into surrogacy arrangements usually belong to one of two groups: opposite-sex couples, same-sex female couples, or single women who experience infertility, meaning that they are unable to carry a foetus to term; or same-sex male couples or single men.

Q. Why has the use of surrogacy grown?

- Significant changes to medicine and society have likely played a role. The rise in the use of surrogacy stems from the development of in-vitro fertilisation (“IVF”) from the late 1970s, which enabled gestational surrogacy agreements (where the surrogate’s own egg is not used).
- In recent decades, society’s understanding of family and parenthood has also changed. The Court of Appeal has noted that changes in recent decades have included the “current acceptance of an infinite variety of forms of family life of which single sex, single person and so called ‘blended families’ are but examples” (XX v Whittington Hospital NHS Trust judgment, 2018)

Q. How did this review come about, and what has it involved?

- Every few years, the Law Commission of England and Wales and the Scottish Law Commission each put together a Programme of Law Reform for agreement with, respectively, the UK Government and the Scottish Government. A review of surrogacy law was supported by consultees who responded to the Law Commission of England and Wales’s consultation on its 13th Programme of Law Reform, and the Scottish Law Commission’s consultation on its 10th Programme of Law Reform. Our review was then

agreed with Government, commissioned by the Department of Health and Social Care and supported by the Scottish Government as a joint project.

- Work on the surrogacy project began in May 2018 and in June 2019 we published a Consultation Paper, inviting responses to our provisional proposals for law reform. Our consultation period ran from 6 June to 11 October 2019. We received over 680 responses, including from many individuals and organisations who endorse and support the use of surrogacy, along with individuals and groups who oppose surrogacy.
- Since then, we have worked on a final report and draft Bill, setting out our final recommendations to Government for reform.

Q. Why are reforms to surrogacy law needed?

- Surrogacy laws were largely formed in the 1980s and are now outdated.
- Intended parents have to wait until the child has been born and then apply to court to become the child's parents. This can take many months and makes it difficult for the intended parents to take decisions about the child in their care.
- The current law does not reflect the intentions of surrogates or intended parents.
- There is a lack of transparency, safeguarding and support for all parties. The law creates a degree of uncertainty and stress which is not in the best interests of the child.
- Better regulation is needed to protect the interests of all those involved; the surrogate, the intended parents and, particularly, the child, whose best interests should be at the heart of the law.

Q. What reforms are you recommending?

- One of our central recommendations is the introduction of a "new pathway" for surrogacy arrangements, under which intended parents would become parents of the child from birth, rather than wait for months to obtain a parental order. This would be subject to the surrogate having the right to withdraw consent.
- The new pathway will involve important screening and safeguarding checks before conception, to provide greater support and protection for the surrogate and intended parents and to protect the welfare of any child who may be born pursuant to the surrogacy. These checks will be carried out by an independent state-regulated body. This also allows meaningful scrutiny of the proposed surrogacy agreement at an early stage, rather than the current law which only involves scrutiny by the court several months after the child is born.

Q. Who will oversee the surrogacy arrangements under these reforms?

- Under this new regulatory route, individual surrogacy agreements under the new pathway will be overseen and supported by non-profit Regulated Surrogacy Organisations (RSOs). RSOs themselves will be regulated by the Human Fertilisation and Embryology Authority (HFEA).

Q What additional support will the surrogate and intended parents receive under these reforms?

- Currently, there is no legal regulation of how surrogacy agreements are entered into. There may be no scrutiny of the agreement until the child has been born and the parental order application is heard.
- Our new pathway incorporates screening and safeguards from the very beginning of the process, including medical checks, enhanced criminal records checks, independent legal advice and implications counselling. Surrogates and intended parents on the new pathway will be supported by the RSO throughout the process, from before the surrogacy agreement is entered into, throughout conception and pregnancy, and then through to (and beyond) the birth of the child.
- A surrogacy agreement that breaks down is clearly not in the interests of the surrogate, intended parents, or the child. The evidence suggests that safeguards and support prior to and during the surrogacy agreement reduce the risk of this occurring.

Q. What if the surrogate withdraws her consent midway through an agreement, what options do they have?

- Respecting the autonomy of the surrogate is central to our recommendations. Under our new pathway, the surrogate has the right to withdraw her consent to a surrogacy agreement during the pregnancy and up to six weeks after birth.
- If the surrogate chooses to withdraw consent during pregnancy, then the surrogate would be the legal mother at birth: the intended parents would not become legal parents at birth and they would need to apply for a parental order through the courts, who will make the final decision on parental status.
- If the surrogate chooses to withdraw consent in the six-week window after birth, the intended parents would already have been recognised as the legal parents at birth, and they would remain the legal parents: the surrogate would then be able to apply for a parental order, leaving the decision on legal parental status to the courts.
- Our recommendations therefore ensure that once the child has been born, the child's legal parents can be changed only by a court hearing, in which the child's welfare throughout his or her life will be the paramount consideration.

Q. In what cases will a parental order for surrogacy arrangements still be required? What reforms have you made to parental orders?

- Despite the introduction of the new pathway to legal parenthood, some intended parents will still need to obtain a parental order through the courts in order to become legal parents, such as those where an RSO has not been involved, agreements where the surrogate withdraws consent; or international agreements, which will not be eligible for the new pathway.
- We recommend reforms to parental orders, include allowing the court to make a parental order where the surrogate does not consent, provided that the child's welfare throughout their life requires this. This would bring surrogacy law into line with other family law.

Q. Some people oppose surrogacy on ethical grounds – what is your position?

- Surrogacy has never been prohibited under domestic law. The question of whether the law should permit or prohibit surrogacy is not one the Law Commissions were asked to consider in the review. The starting point for the review was that the Government supports surrogacy as a legitimate way to build a family – we were then asked by Government to make recommendations to improve existing laws for the benefit of the child, surrogate and intended parents.

Q. Does surrogacy have public support?

- Around two-thirds (65%) of those living in Britain in 2022 support a gay/bi/lesbian couple having a child through surrogacy, according to YouGov (2022).
- 51% of the British public think that the intended parents should be legal parents when a child is born through surrogacy, while 17% say the surrogate should be, according to YouGov (2021).
- A YouGov survey from 2014 showed that 59% of the British public approve of gestational surrogacy (where the surrogate carries a pregnancy from a donor egg rather than her own), while 21% disapprove (2014).

Q. What's the Government's current position on surrogacy?

- The Government supports surrogacy as a legitimate way to build a family. Current guidelines published by the Department of Health and Social Care (DHSC) which are in effect in England and Wales state clearly that “the Government supports surrogacy as part of the range of assisted conception options”. The DHSC asked the Law Commissions to carry out a review of the current law.

Q. Will these reforms permit “for profit” commercial surrogacy?

- No. Under our reforms, commercial surrogacy, as seen in some countries, would continue to be strictly prohibited under the law. Our recommendations, including rules on payments, ensure that surrogacy continues to operate on an altruistic, rather than a commercial basis.
- Surrogacy arrangements will also remain unenforceable: the surrogate could not be forced to give the child to the intended parents because of an enforceable surrogacy contract, as seen under some “for profit” systems abroad.
- Regulated Surrogacy Organisations will be required to operate on a non-profit-making basis.
- Our recommendations seek to retain and reinforce the current culture within the UK whereby surrogacy operates on an altruistic basis.

Q. How will payment rules be enforced?

- Payments rules will be overseen by Regulated Surrogacy Organisations (RSOs), who will play an important role in ensuring that intended parents and surrogates understand what is permitted.
- Intended parents will be required to make a statutory declaration between six and 12 weeks after the birth of the child as to whether they have made any form of payment that is prohibited. Intended parents may commit an offence under the current law if they make a false statutory declaration. They may also commit an offence if they fail to make the statutory declaration.
- We also recommend that the UK Government consider introducing a scheme of civil penalties on intended parents who make payments which are not permitted.

Q. You have recommended a Surrogacy Register – why is this needed and what will it involve?

- Under our reforms, a new Surrogacy Register, maintained by the Human Fertilisation and Embryology Authority (HFEA), would record information for all surrogacy agreements in the new pathway and where a parental order is obtained.
- The Surrogacy Register is designed so that surrogate-born people can access information about their origins.
- The Surrogacy Register will record both identifying and non-identifying information about surrogates and intended parents, signpost the details of gamete donors held on the existing HFEA register, as well as details for any fertility clinic used in the UK or overseas.

Q. Why don't your reforms cover Northern Ireland?

- The existing laws from the 1980s and 1990s which govern surrogacy apply across the UK.
- As the Law Commissions for England and Wales and Scotland, we can only make recommendations for those jurisdictions
- Northern Ireland has its own Law Commission, but it has not been operational since April 2015 due to budgetary pressures. Without their involvement we have not been able to include a review of surrogacy law in Northern Ireland within the remit of this project.
- We have, however, engaged with interested parties in Northern Ireland and we hope that, if the UK Government accepts our recommendations and takes forward the Bill to Parliament, that the Bill can, at that time, be extended to Northern Ireland, to achieve the same reforms to surrogacy in that jurisdiction as we recommend for England and Wales, and for Scotland

Q. Why do people opt for international surrogacy arrangements? Is it due to problems with domestic laws?

- We understand that people choose international surrogacy arrangements for two main reasons. Firstly, because they believe that other countries currently offer a more secure legal framework for surrogacy than the UK, for example, by allowing intended parents to be the legal parents of the child from birth.
- Secondly, because they believe that it is easier to find a surrogate abroad.
- However, many of these perceived benefits are not always realised – for example, while intended parents may achieve legal parenthood in the child’s country of birth, they will not receive this same recognition when returning to the UK without obtaining a parental order.
- Our reforms are designed to dissuade intended parents from seeking agreements abroad, by making domestic surrogacy arrangements a more attractive option.

Q. How many people are using international surrogacy compared to domestic surrogacy?

- We don’t know for certain, but data from the Children and Family Court Advisory and Support Service suggests that up to half of surrogacy arrangements which lead to a parental order in England and Wales may be international surrogacy arrangements.

Q. How will you stop exploitative international surrogacy arrangements?

- International surrogacy arrangements can vary significantly, in respect of their safeguarding and screening arrangements. Some international arrangements can also result in complications for the child entering into the UK, due to nationality and immigration issues.
- There is nothing that that we can do to alter surrogacy laws abroad. We can, however, ensure that the domestic regime is well regulated and operates in the best interests of the child, surrogate and intended parents. By doing so, we can encourage intended parents in the UK who are considering surrogacy to have a domestic arrangement, as they know that they, the surrogate and the child will be properly supported and protected.

Q. Will intended parents from the UK who use international surrogacy arrangements still be allowed to raise the child in the UK?

- It will still be possible for intended parents who have a child through an international surrogacy arrangement to raise the child in the UK. Their surrogacy arrangement will not be eligible for the new pathway, and so they will continue to need to obtain a parental order through the courts to become the child’s legal parents. We have not recommended a ban on international surrogacy agreements, as doing so may not be in the best interests of the child.
- Because immigration issues can arise, we have recommended legal and practical measures to safeguard the welfare of children of surrogacy arrangements who are born abroad, for example through assisting them in acquiring UK nationality, and recording relevant information in a Surrogacy Register.

Q. Now that these reforms have been published, what happens next?

- Following the publication of our report and Draft Bill, it will then be for the Government to decide whether it intends to implement our recommendations.