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**Date: 27 September 2019 – Scottish Law Commission**

**Consultation: *Building families through surrogacy: A joint consultation paper***

**Consultation response on behalf of the Scottish Council on Human Bioethics:**

The **Scottish Council on Human Bioethics** (SCHB) is an independent registered Scottish charity composed of doctors, lawyers, biomedical scientists, ethicists and other professionals from disciplines associated with medical ethics.

The principles to which the Scottish Council on Human Bioethics subscribes are set out in the **United Nations Universal Declaration of Human Rights** which was adopted and proclaimed by the UN General Assembly resolution 217A (III) on the 10<sup>th</sup> of December 1948.

The SCHB is very grateful to the Scottish Law Commission for this opportunity to respond to the consultation on **Surrogacy**. It welcomes its intention to promote public consultation, understanding and discussion on this topic.

## **About you**

**1. What is your name?**

*Scottish Council on Human Bioethics*

**2. If you are a member of an organisation (for example, a surrogacy organisation or a university), what is the name of your organisation?**

*Scottish Council on Human Bioethics*

**3. Are you responding to this consultation in a personal capacity or on behalf of your organisation?**

*This is a response on behalf of an organisation.*

**4. What is your email address?**

*Email: mail@schb.org.uk*

**6. What is your telephone number?**

*Tel: 07 83 83 84 904*

**7. If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.**

## **Scottish Council on Human Bioethics Response (SCHB)**

The Scottish Council on Human Bioethics (SCHB) will only respond to the questions of the enquiry which relate to its remit.

### **Executive Summary:**

The new Law Commission's consultation paper entitled '*Building families through surrogacy: a new law*' is extensive, informative and useful in recognising that the legislation in the area needs reforming in the UK.<sup>1</sup> However, from an ethical perspective, it is unfortunately rather short (only 8 specific pages out of 475) and incomplete. In addition, and more seriously, it seeks to resist any new ethical discussions about surrogacy, as such. This is regrettable, and actually quite concerning, since as with any consent process with patients, a society as a whole, is similarly entitled to reconsider its consent to a procedure through its parliament, at any time, especially if it is contentious. This is a very serious and unprofessional omission on behalf of the Law Commission as well as the Scottish Law Commission. A responsible ethical examination of a procedure always requires an honest re-evaluation of both the advantages and risks arising.

Moreover, it is not sufficient for the consultation to just take as its starting point that "*surrogacy is an accepted form of building a family, as recognised by the [government]*".<sup>2</sup> Indeed on such a basis, a procedure, such as slavery, would never have been abolished in the UK. But it is also democratically unacceptable since it is an unprofessional dogmatic statement which cannot be the basis of any responsible legislation. Indeed, this present consultation becomes meaningless if the very basis of accepting surrogacy is so precarious. How is it possible to adequately respond to a consultation which is built on such doctrinaire and unsubstantiated assumptions relating to the very acceptability of surrogacy?

In addition, the consultation seems to overlook the reasons why most European countries have completely prohibited surrogacy in all its forms. This means that the majority of parliamentarians in these states agree that the possible advantages of the procedure are disproportionate to the risks for all involved, including to the surrogate women who are generally motivated by selfless compassion towards childless individuals. Consequently, it is completely inappropriate for the UK to just ignore the arguments against surrogacy of its neighbours while simply stating that it is 'correct' in its own position.

The consultation also seems to limit most of the discussion on ethics to the possible exploitation and commodification of the woman<sup>3</sup> who may accept to become a surrogate while presenting some form of commercialisation of the procedure as an appropriate way forward. In this regard, it indicates that "*the ethical debate around surrogacy reflects a tension between autonomy and paternalism.*"<sup>4</sup> But, again, this is difficult to accept since a number of other important ethical challenges exist with respect to the procedure. For example, many would argue that limiting surrogacy is not, in fact, based on paternalism, which represents some kind of interference on persons against their will, with the intention of protecting them from harm.<sup>5</sup> Indeed, an important philosophical difference exists between persons selling (or renting) their bodies or parts of their bodies, as such, which is seen as unacceptable in a civilised society, and these individuals being paid for the work of their bodies, such as in employment. For instance, it is not paternalistic to limit a person's autonomy to sell themselves into slavery to pay for a very large expense which they cannot, otherwise,

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<sup>1</sup> Law Commission & Scottish Law Commission, *Building families through surrogacy: a new law*, 2019

<sup>2</sup> Law Commission & Scottish Law Commission, *Building families through surrogacy: a new law*, Summary of Consultation Paper 2019.

<sup>3</sup> Law Commission & Scottish Law Commission, *Building families through surrogacy: a new law*, 2019, p. 33.

<sup>4</sup> Law Commission & Scottish Law Commission, *Building families through surrogacy: a new law*, 2019, p. 40.

<sup>5</sup> Stanford Encyclopedia of Philosophy, 'Paternalism'. Accessed on 2 October 2019 from <https://plato.stanford.edu/entries/paternalism/>

address. This is because the commercialisation of the body, as such, would undermine the very fabric of civilised society.

Furthermore, the consultation document indicates that: “*The law governing surrogacy dates, in part, from the mid-1980s, when society and attitudes around surrogacy differed greatly from today. In short, the law relating to surrogacy is now outdated and needs to be changed to reflect current attitudes towards surrogacy, and understandings of how this way of building a family works.*”<sup>6</sup>

But again, because this statement is not substantiated by any appropriate references, it is impossible to know whether this account is true and reliable. Such a presumption and lack of rigour cannot be acceptable as an appropriate basis for reforming legislation.

Interestingly, the consultation does recognise that no real and extensive discussion and attitudinal research amongst members of society in the UK relating to surrogacy has taken place.<sup>7</sup> This is surprising since any investigation should normally be carried out before any legislation is proposed or amended. Moreover, an enquiry would be very useful since, even for the most informed of commentators, many of the questions relating to surrogacy are complex, such as:

- Should a woman ever be encouraged to detach herself, psychologically, from her gestating child?
- What do the intended parents mean when they say that they want a child ‘of their own’?
- Can the ethical and relational identity challenges arising from the use of donor eggs and/or sperm ever be resolved for the donor, the intended parents, and the resulting child?
- Can persons ever own (or rent) their bodies, as such, in a civilised society?
- Is there a risk of commodification of children born from commercial surrogacy both in the UK and abroad? How will the children resulting from commercial surrogacy understand, or consider, the manner in which they were brought into existence, when they become more mature?
- Should procedures, which are prohibited in the UK, be legalised just because some individuals are going abroad to bypass the law?
- What kinds of psychological risks would exist for the surrogate or the child if the latter is immediately taken away after birth?
- Why is there no requirement for discussion and agreement concerning the detection of disability and its management (such as a termination of the pregnancy)? What would the rights and interests be of a disabled fetus or those of the surrogate if she disagrees with the intended couple on the definition of acceptable risks of disability?

Until such questions are seriously considered (and answered) it is difficult to accept this consultation as being adequate or reliable since it does not really address, or give any information about, the core ethical challenges. Again, if the principle of providing appropriate information in the consent procedure is seen as important for patients, then it is also important for democratic societies and parliaments before they make decisions, such as in considering different forms of surrogacy.

As it stands, the consultation seems to have been put together by a small number of well-meaning organisations and stakeholders. But it is not just the views of those involved in surrogacy arrangements that matter in determining whether legislation should be amended but those of the whole of society. And such a societal consultation has certainly not been undertaken.

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<sup>6</sup> The Law Commission and the Scottish Law Commission, *Building Families Through Surrogacy: A New Law (Summary of Consultation Paper)*, 2019, p. 7.

<sup>7</sup> Law Commission & Scottish Law Commission, *Building families through surrogacy: a new law*, 2019, p. 3.

Moreover, a number of the proposals being present to the surrogacy problems are unproven, disturbing and even scandal-prone solutions. Proposals which may undermine the very basis of civilised society. In addition, there is no real evidence that the alarming solutions being suggested are what the general public really wants. This is because the consultation seems to limit the possible ways forward in a manner which, to be honest, may be considered as a form of undue constraining and even coercion of the responder.

The SCHB notes that many statements in the present consultation relate to the wishes of the intended parents or the surrogate, but the possible views of the children being brought into existence through surrogacy seem to be overlooked. The 'Right to have a child' by intended parents seem to have priority over any rights of children born through surrogacy. In other words, the proposals seem to have been driven by, and largely serve the interests of, those who wish to benefit from surrogacy, but with little concern for surrogate women or the children who are born. This differential would be further widened if surrogacy became a commercial relationship.

The purpose of any law is not merely to licence activities that some autonomous individuals within society seek to access. Rather the law must protect those who may be harmed by others. In this regard, the SCHB would like to consider the following serious ethical concerns:

## **1. Concerns relating to the surrogate woman**

The use of a surrogate woman to gestate the child for someone else is one of the main concerns relating to the whole procedure. These include the reality that she is expected to psychologically detach herself from her gestating child and give it up at birth. Risks also exist that the surrogate mother may just be seen as the means to an end with the resulting possibility of exploitation. Indeed, there is an instrumental logic that persists in surrogacy, among other reproductive technologies, which needs to be developed.

### **1.1. The psychological risk of detachment towards the gestating child**

Generally, a woman who knows that a child is growing inside her feels very strong bonds of mutual belonging with it. This is because she enters into a kind of relationship with the child she is gestating at a time when it is growing from its most vulnerable and smallest size into a fully-grown baby. It is also one of the most important times in the life of this child - one where he or she is entirely dependent on others and most in need of protection and unconditional acceptance. In this regard, one of the central objections to surrogacy is that it involves an expectation of deliberate detachment between the surrogate mother and the child she is carrying.<sup>8</sup>

Furthermore, it may be suggested that the relationship between mother and child is itself undermined by surrogacy since, in the procedure, a woman deliberately becomes pregnant with the aim of giving up the child after birth which is a very detrimental way of considering pregnancy.<sup>9</sup> Questions can be asked relating to the kinds of relationships surrogates are expected to have with the gestating child. This is because, with the procedure, a woman's detachment from her child in the womb is accepted and even encouraged - a situation which would very much be discouraged in any traditional pregnancy.<sup>10</sup>

In this respect, the New Zealand neuroscientist and bioethicist, D. Gareth Jones, explains: "*Relationships are critical to what we are as human persons.*"<sup>11</sup> Because of this, he is very concerned that: "*Surrogacy ... places the development of a crucial relationship in jeopardy, and it does this intentionally ... This is a very high price to pay for providing an infertile couple with a child.*"<sup>12</sup>

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<sup>8</sup> D. Gareth Jones, *Manufacturing Humans*, Leicester: Inter-Varsity Press, 1987, p. 204-205.

<sup>9</sup> Department of Health & Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, 1984, London: Her Majesty's Stationery Office, p.44-45.

<sup>10</sup> Scott B. Rae and D. Joy Riley, *Outside the Womb: Moral Guidance for Assisted Reproduction*, Chicago: Moody Publishers, 2011, p. 183.

<sup>11</sup> D. Gareth Jones, *Manufacturing Humans*, Leicester: Inter-Varsity Press, 1987, p. 204-205.

Jones further comments:

*“However numerous our objections to surrogacy, a central one is the deliberate breaking of that intimate relationship between the biological or carrying mother and the child. Relationships are critical to what we are as human persons. Surrogacy therefore places the development of a crucial relationship in jeopardy, and it does this intentionally.”<sup>13</sup>*

Thus, a pregnancy cannot be seen as being unimportant for both the mother and the child. Instead, it represents a very significant natural relationship of dependency on the mother by the prenatal child for his or her survival and protection.<sup>14</sup>

## **1.2. The psychological risk of relinquishing the child at birth**

Concerns also exist as to what is actually happening when the surrogate mother relinquishes the child at birth. This is because she may feel a very strong bond of mutual belonging with the child arising from the gestational experience. But even if it was possible for a surrogate to relinquish the child to whom she has given birth, it is not a psychological feature that society should ever encourage even on the basis of altruism. As Jones explains:

*“The welfare of the surrogate mother also needs to be considered from another angle, and this is her own reaction to the loss of ‘her’ baby. Far too little attention has been paid to this, or to the guilt and despair she may experience in later years. While the reactions of surrogates will undoubtedly vary, the loss of the child is as real for her as for the woman whose child has been adopted or the woman who has had a still-birth.”<sup>15</sup>*

Of course, it may be suggested that surrogacy is similar to adoption in that the surrogate mother relinquishes the child at birth to the commissioning parents. But this may not, in fact, be true since in adoption the adoptive legal parents are not deliberately bringing into existence a child to be relinquished. In this regard, the American bioethicists, Gilbert Meilaender, explains that when a child is relinquished for adoption, the woman who rears that child is rightly described as his or her mother, adding:

*“But this, again, only indicates that adoption is not analogous to surrogacy. The child adopted is not conceived in order to be given up. The child is already on the scene presenting in his person a need for care. Adoption is a procedure designed to answer that need already present. By contrast, perhaps the greatest moral difficulty with surrogacy is that the surrogate is being invited to conceive a human being as a means to satisfying someone else’s desire to have a child.”<sup>16</sup>*

Some courts, in the USA, have already compared gestational surrogacy to a form of baby-sitting lasting nine months. But this very much underplays and overlooks the deep psychological relationship a surrogate may develop with her gestating child. Indeed, very deep emotional bonds may develop between the surrogate and her child which the woman would have to break when giving over the child to the intended parents. Moreover, the genetic element cannot be seen as having priority over all other aspects. The moral philosopher, Norman Ford, indicates:

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<sup>12</sup> D. Gareth Jones, *Manufacturing Humans*, Leicester: Inter-Varsity Press, 1987, p. 204-205.

<sup>13</sup> D. Gareth Jones, *Manufacturing Humans*, Leicester: Inter-Varsity Press, 1987, p. 204.

<sup>14</sup> Norman M. Ford, *The Prenatal Person: Ethics from Conception to Birth*, Blackwell, Oxford, 2002, p. 115.

<sup>15</sup> D. Gareth Jones, *Manufacturing Humans*, Leicester: Inter-Varsity Press, 1987, p. 206.

<sup>16</sup> Gilbert Meilaender, *Bioethics: A Primer for Christians (Third Edition)*, Grand Rapids: Eedermans Publishing Co. 2013. p. 23.

*“Where donor gametes are legally permitted in [artificial reproductive technology] ... with the consent of one’s partner, common law has usually, and rightly, been changed by statute law to determine that the birth mother is the legal mother of the child rather than the genetic mother. Even the legal sanctioning of altruistic surrogacy would weaken the importance of motherhood.”<sup>17</sup>*

This means that a woman should never legally be forced to relinquish a child after birth against her will.<sup>18</sup> For example, in the UK at present, legislation always recognises the birth mother as the legal parent including for surrogates. It is only in follow-up legal proceedings that the child may be relinquished to the commissioning parents (but this is not automatic).

Even when surrogacy is undertaken for altruistic aims in a spirit of compassion, the dangers of psychological harm are substantial. For instance, when surrogacy takes place within an extended family setting between sisters, surrogate arrangements are fraught with unforeseen complications for all involved and should never be encouraged.<sup>19</sup>

### **1.3. Risks of dispute between the surrogate and commissioning parents**

When a number of participants are involved in a surrogacy procedure, a risk exists that real difficulties may arise after the initial arrangements. For example, when the child is born disabled and the intended parents then refuse to accept the child which they had ‘commissioned’.

In 2010, it was reported that a couple in Canada had engaged a surrogate to carry their child but then discovered, during an ultrasound examination in the first trimester of the pregnancy, that the foetus was likely to have Down’s syndrome.<sup>20</sup> The couple then asked the surrogate to have an abortion for which she expressed some concerns. But the couple had entered into a contract with the surrogate before the gestation began stating that if she refused the eventual request for an abortion, then the couple would be absolved of all further responsibility towards the child. In the end, the surrogate agreed to the abortion but this case demonstrates the potential complications and significant ethical difficulties that may arise from surrogate arrangements.<sup>21</sup>

One of the most famous surrogacy disputes, which exemplifies the risks of bringing a child into existence outside the exclusive embodied loving relationship of a married couple, took place in 1997 in California. This arose when an infertile couple, Luanne and John Buzzanca, contracted three separate adults, a sperm donor, an egg donor and a surrogate woman, to bring ‘their’ child into existence through *in vitro* fertilisation. A baby girl was subsequently born in 1995 called Jaycee. But before the birth took place and after the Buzzancas signed a contract with the surrogate, John decided to leave his wife and filed for divorce. At the divorce hearing, it was ruled that John should pay child support which he later appealed since he considered that the baby was not a child of the marriage. In the meantime, the surrogate filed for custody of the child which she later dropped, and Luanne took responsibility of the baby girl while continuing to sue her estranged husband for child support.

In 1997, a superior court ruled that the child had no legal parents responsible for her care and that John Buzzanca was not obliged to pay child support. This was because the baby girl had two gametal, two commissioning non-biological parents and a surrogate mother who had relinquished her parental rights through the surrogacy agreement.

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<sup>17</sup> Normam M. Ford, *The Prenatal Person: Ethics from Conception to Birth*, Blackwell, Oxford, 2002, p. 115.

<sup>18</sup> Department of Health & Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, 1984, London: Her Majesty’s Stationery Office, p.44-45.

<sup>19</sup> D. Gareth Jones, *Manufacturing Humans*, Leicester: Inter-Varsity Press, 1987, pp. 205-206.

<sup>20</sup> Hyder, N. (2010). ‘Couple request surrogate mum to abort over disability’. *BioNews*, 579.

<sup>21</sup> Andrea Braverman, Polly Casey and Vasanti Jadva, *Reproduction through surrogacy: the UK and US experience*, in *Reproductive Donation*, Martin Richards, Guido Pennings and John B. Appleby (eds.) Cambridge: Cambridge University Press, 2012, p. 294.

The case, as a result, went to an appeal court in 1998<sup>22</sup> whereby a panel of three-judges ruled unanimously that both John and Luanne were to be considered the legal parents of the baby girl because she would never have been born had not Luanne and John both agreed to have a fertilised egg implanted into a surrogate mother. Thus, the judges found that the child's conception was every bit as much the responsibility of the Buzzancas as if things had been done the old-fashioned way.

#### 1.4. The risk of Commodification and Objectification of the Surrogate

A number of other ethical questions relating to surrogacy exist. One of these is that surrogate women are allowing themselves to be used as a kind of human incubator for someone else's child. Indeed, it may still be very difficult, in practice, to ensure that such a relationship does not reflect some exploitative connotations.<sup>23</sup> Thus a real risk of commodification of the women's body exists which describes the treatment of a human being as an interchangeable marketable commodity which can give rise to commerce. A commodity has a price and only an instrumental value. But with surrogacy there is also a risk of 'objectification' which describes the treatment of a human being as a thing or an object, disregarding his or her personality and inherent dignity.

It is because of such risks that Article 3 of the **EU Charter of Fundamental Rights** indicates that: "*In the fields of medicine and biology, the following must be respected in particular ... the prohibition on making the human body and its parts as such a source of financial gain*".

Similarly, the **Council of Europe Convention on Human Rights and Biomedicine** indicates in Article 21 that: "*The human body and its parts shall not, as such, give rise to financial gain.*"

Risks of commodification and objectification are very real when it is the women most needing money who become surrogates. Society could then be faced with the unacceptable situation where the use of human bodies, as such, could have a price with the possibility of contracts being written up. Gilbert Meilaender explains: "*Clearly, the child then becomes an object, and, if money is paid [to] the surrogate, a commodity. She makes of the child's person and of her body and its procreative powers instruments in service of others' purposes.*"<sup>24</sup>

Christina Weis also argues with respect to the biological stratifications and the commodification of reproductive capital in Russia that:

*"... surrogacy workers and client parents are socially stratified. Client parents possess more economic, social and cultural capital than their surrogacy workers, and have access to resources that the latter do not. Further, I have shown that surrogacy in Russia is framed as an economic transaction and that consequently, surrogacy workers perceive carrying a contracted and commissioned pregnancy as a form of work/temporary employment."*<sup>25</sup>

Moreover, it is argued that the inherent human dignity of a woman is assaulted when she uses her uterus for financial profit and that she is just being considered as an incubator for someone else's child. But, since real risks exist in gestating a child, no woman should ever be asked to undertake a pregnancy for another woman in exchange of money.<sup>26</sup>

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<sup>22</sup> Buzzanca v. Buzzanca (1998 Cal. App. Lexis 180), 10 March 1998.

<sup>23</sup> D. Gareth Jones, *Manufacturing Humans*, Leicester: Inter-Varsity Press, 1987, p. 203.

<sup>24</sup> Gilbert Meilaender, *Bioethics: A Primer for Christians* (Third Edition), Grand Rapids: Eedermans Publishing Co. 2013. p. 23.

<sup>25</sup> Christina Weis, 'Reproductive Migrations Surrogacy workers and stratified reproduction in St Petersburg', PhD thesis De Montfort University September 2017 Section 6.2. (p. 187).  
See also <https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/workers-or-mothers-business-of-surrogacy-in-russia/>

<sup>26</sup> Department of Health & Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, 1984, London: Her Majesty's Stationery Office, p.44-45.

In addition, even when there is no commercial transaction in the surrogacy arrangement, there is still a risk that the woman may just be considered as a kind of 'container' or 'incubator' divorced of any natural maternal relationships with her child.<sup>27</sup>

### 1.5. Risk of Exploitation

Because most European countries have prohibited all forms of surrogacy for ethical reasons, an international market has developed in which wealthy commissioning parents pay poor surrogate women to gestate their child for them in countries where surrogacy regulations are weak or not really enforced. Because of this, a real risk of exploitation exists. The Swedish journalist, Kajsa Ekman, asks "*how can we justify a situation in which wealthy people use poor people as breeders, inject them full of hormones, take children away from them and leave pocket money in exchange?*"<sup>28</sup>

This is a very real question and cannot be ignored in the countries in which the relatively wealthy commissioning parents originate.

In this respect, India has sought to end its reputation as being a centre for fertility tourism and enacted its Surrogacy (Regulation) Bill 2016 banning all international applications. It did this to protect vulnerable women from unscrupulous agents representing wealthy clients.<sup>29</sup>

## 2. Concerns for the resulting child

Questions may also exist relating to the way the resulting child may consider his or her commissioning, surrogate or other parents. For example, the child may want to know and even have a relationship with the surrogate mother when he or she grows up since he or she knows that without her, he or she would not even have existed.

But this also means that the resulting children may struggle, psychologically, when finding out about the manner in which they were brought into existence and that this seems to have come about by prioritising the intended parent's personal autonomy over all other factors. Norman Ford indicates:

*"An individualistic notion of personal autonomy opens the way to overlook the personal identity and dignity of the child who may be treated as an object. As a result, the notion of harm can be so narrowed as to exclude the psychological damage to the child's sense of personal identity. It is not a question of it being better to be than not to be. Accepting this line of argument could lead to justifying the conception of children from adulterous affairs. Adultery is immoral and ought not to be committed even if it gives rise to children who may live happy lives."*<sup>30</sup>

In addition, because of all the different kinds of parents a child born from surrogacy may have, new regulations may be required to determine who the legal parents of a child really are while ensuring that other possible parents cannot legally challenge this decision. Indeed, such challenges may have detrimental consequences for the child. If a dispute does arise because of legal ambiguity between the gametal, gestational and commissioning parents, the child may eventually become parentless which may also mean that he or she does not have a nationality. The American bioethicist, Ben Mitchell explains: "*For the sake of*

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<sup>27</sup> Normam M. Ford, *The Prenatal Person: Ethics from Conception to Birth*, Blackwell, Oxford, 2002, p. 115.

<sup>28</sup> Ekman, K. E. 2014. *Being and being bought: Prostitution, surrogacy and the split self*. Victoria: Spinifex Press. p. 150. Mentioned in: Clara Watson, *Womb Rentals and Baby-Selling: Does Surrogacy Undermine the Human Dignity and Rights of the Surrogate Mother and Child?* *Journal, The New Bioethics*, Volume 22, 2016 - Issue 3, pp. 212-228 (p. 220).

<sup>29</sup> <https://www.telegraph.co.uk/news/2018/12/20/india-bans-commercial-surrogacy-stop-rent-womb-exploitation/>

<sup>30</sup> Normam M. Ford, *The Prenatal Person: Ethics from Conception to Birth*, Blackwell, Oxford, 2002, p. 115-116.



*the children we should resist the temptation to create the conditions that cause a child to ask, 'who are my parents?'"<sup>31</sup>*

Thus, surrogacy may also be damaging to the child, whose relational bonds with the surrogate are considered to be significant and whose wellbeing should be seen as having paramount importance. Moreover, it may be suggested that a surrogacy agreement may be degrading to the resulting child since, for all practical purposes, he or she would have been brought into the world through a legal and/or monetary transaction.<sup>32</sup> This means that, in the case of commercial surrogacy, children may be asking themselves if they only actually exist because a certain amount of money was exchanged to the surrogate and that their very existence has a price.<sup>33</sup>

In this regard, and in agreement with a number of other countries in Europe, the SCHB is of the opinion that surrogacy should be prohibited because of the grave psychological and social risks that may be created by such a procedure. These include psychological and social risks for (1) the commissioning parents, (2) the surrogate mother, her possible partner and existing children in addition to (3) the child created.

## **Chapter 6: The parental order procedure**

### **Consultation Question 1:**

**We invite consultees' views as to whether, in England and Wales:**

**(1) all international surrogacy arrangements should continue to be automatically allocated to a judge of the High Court;**

**Yes**  
**No**  
**Other**

*Response from the Scottish Council on Human Bioethics*

*Not applicable to Scotland.*

**We invite consultees' views as to whether, in England and Wales:**

**(2) if international surrogacy arrangements are not automatically allocated to a judge of the High Court, circuit judges should be ticketed to hear such cases.**

*Response from the Scottish Council on Human Bioethics*

*Not applicable to Scotland.*

### **Consultation Question 2:**

**We invite consultees' views as to whether, in respect of England and Wales:**

**(1) domestic surrogacy cases which continue to require a post-birth parental order should continue to be heard by lay justices, or whether they should be allocated to another level of the judiciary; and**

<sup>31</sup> Ben Mitchell, Shouldn't Children Want Parents of Their Own?, *Ethics & Medicine*, Vol. 30:2 Summer 2014, p. 69.

<sup>32</sup> Department of Health & Social Security, Report of the Committee of Inquiry into Human Fertilisation and Embryology, 1984, London: Her Majesty's Stationery Office, p.44-45.

<sup>33</sup> Clara Watson, Womb Rentals and Baby-Selling: Does Surrogacy Undermine the Human Dignity and Rights of the Surrogate Mother and Child? *Journal, The New Bioethics*, Volume 22, 2016 - Issue 3, pp. 212-228.

**(2) If consultees consider that such cases should be allocated to another level of the judiciary, which level of the judiciary would be appropriate.**

*Response from the Scottish Council on Human Bioethics*

*Not applicable to Scotland.*

**Consultation Question 3:**

**We invite consultees to provide any evidence that would support either the retention of the current allocation rules, or their reform along the lines that we discuss in Consultation Questions 1 and 2.**

*Response from the Scottish Council on Human Bioethics*

*Not applicable to Scotland.*

**Consultation Question 4:**

**We provisionally propose that, in England and Wales, the court should be placed under a duty to consider whether to make an order awarding the intended parents parental responsibility at the first directions hearing in the proceedings.**

**Do consultees agree?**

**(Note that this provisional proposal would be necessary only if our provisional proposal in Chapter 8 that all intended parents (whether in the new pathway or not) automatically acquire parental responsibility if the child is living with or being cared for by them is not supported by consultees).**

- Yes**
- No**
- Other**

*Response from the Scottish Council on Human Bioethics*

*Not applicable to Scotland.*

**Consultation Question 5:**

**We provisionally propose that the rule currently contained in rule 16.35(5) of the Family Procedure Rules 2010 should be reversed, so that a parental order report is released to the parties in the proceedings by default, unless the court directs otherwise. Do consultees agree?**

- Yes**
- No**
- Other**

*Response from the Scottish Council on Human Bioethics*

*Not applicable to Scotland.*

**Consultation Question 6:**

**We invite consultees' views as to whether they are of the view that, in Scotland:**

(1) there is a need for greater consistency and clarity in provisions relating to the expenses of curators ad litem and reporting officers and, if so, how this should be addressed;

(2) it should be provided by statute that, at the initial hearing or any subsequent hearing for a parental order, the court may make any such interim order or orders for parental responsibilities and parental rights as it sees fit; and/or

(3) further procedural reform is needed and, if so, what that reform should be.

Response from the Scottish Council on Human Bioethics

*The SCHB is opposed to surrogacy in principle. But if it does take place it should continue to retain the current allocation rules. This is because every situation is very different while giving rise to very sensitive challenges which can only be considered by a judge.*

## **Chapter 8: Legal Parenthood: Proposals for Reform - A New Pathway**

### **Consultation Question 7:**

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

(1) entered into an agreement including the prescribed information, which will include a statement as to legal parenthood on birth,

(2) complied with procedural safeguards for the agreement, and

(3) met eligibility requirements,

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

Do consultees agree?

— **Yes**  
— **No**  
— **Other**

Response from the Scottish Council on Human Bioethics

*The SCHB is opposed to surrogacy in principle. But if it does take place it should continue to retain the current allocation rules. It would be completely unethical and even inhumane for the intended parents to be seen as the legal parents at birth. Instead, though other biological relationships are important, the default position should always be that it is the surrogate who is the legal parent of the child at birth.*

*Even with a right to object by the surrogate to the intended parents being the legal parents of the child, the surrogate is already in a weakened legal position with respect to the commissioning parents.*

*This means that even with a right to object by the surrogate this will not always ensure that she is fully respected and protected under the new pathway.*

*In other words, the new pathway does not give the same rights, as previously, for the surrogate to change her mind especially if the child has already been taken away by the commissioning parents.*

*Thus, concern exists that the intention of the new proposals is to increase the power and rights of the intended parents at the expense of the power and the rights of the surrogate and the child.*

**Consultation Question 8:**

**We provisionally propose that regulated surrogacy organisations and licensed clinics should be under a duty to keep a record of surrogacy arrangements under the new pathway to which they are a party, with such records being retained for a specified minimum period.**

**Do consultees agree?**

- Yes**
- No**
- Other**

*Response from the Scottish Council on Human Bioethics*

*Though the SCHB is opposed to surrogacy in principle, if the procedure does take place, regulated surrogacy organisations and licensed clinics should be under a duty to keep a record of surrogacy arrangements.*

**We invite consultees' views as to what the length of that specified period should be: whether 100 years or another period.**

- 100 years; or**
- Another period**

*Response from the Scottish Council on Human Bioethics*

*The SCHB is of the opinion that a longer time than 100 years should be required which takes into account any relatives such a great grand-children and great nephews.*

**Consultation Question 9:**

**We provisionally propose that the prohibition on the use of anonymously donated gametes should apply to traditional surrogacy arrangements with which a regulated surrogacy organisation is involved. Do consultees agree?**

- Yes**
- No**
- Other**

*Response from the Scottish Council on Human Bioethics*

*The SCHB is opposed to the use of anonymously donated gametes in principle. These should not be used in any kind of surrogacy.*

**Consultation Question 10:**

**We invite consultees' views as to whether the use of anonymously donated sperm in a traditional, domestic surrogacy arrangement should prevent that arrangement from entering into the new pathway.**

*Response from the Scottish Council on Human Bioethics*

*The SCHB is opposed to the use of anonymously donated gametes in principle. These should not be used in any kind of surrogacy.*

**Consultation Question 11:**

**We provisionally propose that:**

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

**Do consultees agree?**

**Yes**

**No**

**~~Other~~**

*Response from the Scottish Council on Human Bioethics*

*The SCHB is opposed to surrogacy in principle. Moreover, it believes that the present situation (where the surrogate is considered to be the legal mother at the birth of the child) should not be changed.*

**Consultation Question 12:**

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

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

**Do consultees agree?**

**Yes**

**No**

**Other**

*Response from the Scottish Council on Human Bioethics*

*The SCHB is opposed to surrogacy in principle. Moreover, it believes that the present situation (where the surrogate is considered to be the legal mother at the birth of the child) should not be changed.*

**Consultation Question 13:**

**We provisionally propose that, in the new pathway:**

- (1) the intended parents should be required to make a declaration on registering the birth of the child that they have no reason to believe that the surrogate has lacked capacity at any time during the period in which she had the right to object to the intended parents acquiring legal parenthood;**

**(2) if the intended parents cannot provide this declaration then, during the period in which she has the right to object to the intended parents acquiring legal parenthood, the surrogate should be able to provide a positive consent to such acquisition; and**

**(3) if the intended parents are unable to make this declaration and the surrogate is unable to provide the positive consent within the relevant period, the surrogacy arrangement should exit the new pathway and the intended parents should be able to make an application for a parental order.**

**Do consultees agree?**

**Yes**  
**Ne**  
**Other**

Response from the Scottish Council on Human Bioethics

*The SCHB is opposed to surrogacy in principle. Moreover, it believes that the present situation (where the surrogate is considered to be the legal mother at the birth of the child) should not be changed. It further questions how the intended parents can declare 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. Indeed, the intended parents are not trained to recognise capacity. It should further be clarified whether social workers should be involved in surrogacy arrangements. If capacity needs to be evaluated, more detail about the process should be presented and more professionals involved.*

**Consultation Question 14:**

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

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

**Do consultees agree?**

**Yes**  
**—Ne**  
**Other**

Response from the Scottish Council on Human Bioethics

*The SCHB is opposed to surrogacy in principle. Moreover, it believes that the present situation (where the surrogate is considered to be the legal mother at the birth of the child) should not be changed.*

**Consultation Question 15:**

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

**Do consultees agree?**

~~Yes~~  
~~No~~  
~~Other~~

Response from the Scottish Council on Human Bioethics

*This is a difficult issue and emphasises one of the reasons why the SCHB is opposed to all forms of surrogacy arrangements.*

**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.**

~~Yes~~  
~~No~~  
~~Other~~

Response from the Scottish Council on Human Bioethics

*Yes, surrogate's spouse or civil partner should continue to be a legal parent of the child born.*

**Consultation Question 16:**

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

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

**Do consultees agree?**

~~Yes~~  
~~No~~  
~~Other~~

**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?**

~~Yes~~  
~~No~~  
~~Other~~

**Consultation Question 17:**

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

Yes  
No  
Other

**Consultation Question 18:**

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

*Response from the Scottish Council on Human Bioethics*

*The SCHB is of the view that, 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.*

**Consultation Question 19:**

We provisionally propose that, for surrogacy arrangements in the new pathway, where both intended parents die during the surrogate's pregnancy, the intended parents should be registered as the child's parents on birth, subject to the surrogate not exercising her right to object within the defined period.

Do consultees agree?

Yes  
No  
Other

*Response from the Scottish Council on Human Bioethics*

*The SCHB is opposed to surrogacy in principle. Moreover, it believes that the present situation (where the surrogate is considered to be the legal mother at the birth of the child) should not be changed.*

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

(1) it should be competent for an application to be made, by a person who claims an interest under section 11(3)(a) of the Children (Scotland) Act 1995, or who would be permitted to apply for an order under section 8 of the Children Act 1989:

(a) for an order for appointment as guardian of the child, and

(b) for a parental order in the name of the intended parents, subject to the surrogate's consent; or

(2) the surrogate should be registered as the child's mother and it should not be possible for the intended parents to be registered as the child's parents, but that there should be a procedure for the



surrogate to provide details of the intended parents, and, if relevant, gamete donors, for entry onto the register of surrogacy arrangements.

Response from the Scottish Council on Human Bioethics

*The SCHB is opposed to surrogacy in principle. Moreover, it believes that the present situation (where the surrogate is considered to be the legal mother at the birth of the child) should not be changed.*

**Consultation Question 20:**

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

- (1) the applicant should have to make a declaration that it was always intended that there would only be a single applicant for a parental order in respect of the child concerned or to supply the name and contact details of the other intended parent;**
- (2) if details of another intended parent are supplied, a provision should be made for notice to be given to the potential second intended parent of the application and an opportunity given to that party to provide notice of opposition within a brief period (of, say, 14 to 21 days); and**
- (3) if the second intended parent gives notice of his or her intention to oppose, he or she should be required to make his or her own application within a brief period (say 14 days), otherwise the application of the first intended parent will be determined by the court.**

**Do consultees agree?**

- Yes**
- No**
- Other**

Response from the Scottish Council on Human Bioethics

*The SCHB is opposed to surrogacy in principle. Moreover, it believes that sole applicants to parental orders do not represent the best outcome for the child.*

**Consultation Question 21:**

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

Response from the Scottish Council on Human Bioethics

*The SCHB is opposed to surrogacy in principle. The possibility for a three-parent model of legal parenthood in surrogacy cases is not the right outcome for a child. Such situations just serve to confirm the SCHB's opposition to surrogacy.*

**Consultation Question 22:**

**We invite consultees' views:**

- (1) as to whether there should be any additional oversight in the new pathway that we have proposed, leading to the acquisition of legal parenthood by the intended parents at birth; and**
- (2) if so, as to whether should this oversight be:**

**(a) administrative, or**

**(b) judicial.**

Response from the Scottish Council on Human Bioethics

*The SCHB is opposed to surrogacy in principle. Moreover, it believes that the present situation (where the surrogate is considered to be the legal mother at the birth of the child) should not be changed.*

**Consultation Question 23:**

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

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

**(2) if so, as to what those additional factors should be.**

Response from the Scottish Council on Human Bioethics

*Not applicable to Scotland.*

**Consultation Question 24:**

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

**(1) as to whether the checklist, contained in section 1(4) of the 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**

**(2) what those additional factors should be.**

Response from the Scottish Council on Human Bioethics

*Not applicable to Scotland.*

**Consultation Question 25:**

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

Response from the Scottish Council on Human Bioethics

*Not applicable to Scotland.*

**Consultation Question 26:**

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

**(1) the child is living with them or being cared for by them; and**

(2) they intend to apply for a parental order.

Do consultees agree?

Yes  
No  
Other

Response from the Scottish Council on Human Bioethics

*The SCHB is opposed to surrogacy in principle. Moreover, it believes that the present situation (where the surrogate is considered to be the legal mother at the birth of the child) should not be changed.*

**Consultation Question 27:**

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

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

Do consultees agree?

Yes  
No  
Other

Response from the Scottish Council on Human Bioethics

*The SCHB is opposed to surrogacy in principle. Moreover, it believes that the present situation (where the surrogate is considered to be the legal mother at the birth of the child) should not be changed.*

**Consultation Question 28:**

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

Yes  
No  
Other

Response from the Scottish Council on Human Bioethics

*The SCHB is opposed to surrogacy in principle. Moreover, it believes that the present situation (where the surrogate is considered to be the legal mother at the birth of the child until a court order is provided) should not be changed.*

**Consultation Question 29:**

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

**(1) whether there is a need for any restriction to be placed on the exercise of parental responsibility by either the surrogate (or other legal parent), or the intended parents, during the period in which parental responsibility is shared; and**

**(2) whether it should operate to restrict the exercise of parental responsibility by the party not caring for the child or with whom the child is not living.**

*Response from the Scottish Council on Human Bioethics*

*Restrictions should only be placed on the exercise of parental responsibility where these are already provided for by law such as when the child is at risk.*

## **Chapter 9: The Regulation of Surrogacy Arrangements**

### **Consultation Question 30:**

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

**Yes**  
**No**  
**Other**

*Response from the Scottish Council on Human Bioethics*

*The SCHB is opposed to surrogacy in principle. Moreover, it believes that the present situation (where the surrogate is considered to be the legal mother at the birth of the child) should not be changed.*

### **Consultation Question 32:**

**(1) We invite consultees' views as to whether independent surrogacy arrangements should be brought within the scope of the new pathway.**

*Response from the Scottish Council on Human Bioethics*

*The SCHB is opposed to surrogacy in principle. Moreover, it believes that the present situation (where the surrogate is considered to be the legal mother at the birth of the child) should not be changed.*

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

*Response from the Scottish Council on Human Bioethics*

*The SCHB is opposed to surrogacy in principle. Moreover, it believes that the present situation (where the surrogate is considered to be the legal mother at the birth of the child) should not be changed.*

### **Consultation Question 33:**

**We provisionally propose that:**

**(1) there should be regulated surrogacy organisations;**

**Do consultees agree?**

**Yes**  
**No**  
**Other**

Response from the Scottish Council on Human Bioethics

*The SCHB is opposed to surrogacy in principle.*

**(2) there should be no requirement for a regulated surrogacy organisation to take a particular form; and**

**Do consultees agree?**

**Yes**  
**No**  
**Other**

Response from the Scottish Council on Human Bioethics

*The SCHB is opposed to surrogacy in principle.*

**(3) each surrogacy organisation should be required to appoint an individual responsible for ensuring that the organisation complies with regulation.**

**Do consultees agree?**

**Yes**  
**No**  
**Other**

Response from the Scottish Council on Human Bioethics

*The SCHB is opposed to surrogacy in principle.*

**Consultation Question 34:**

**We provisionally propose that the person responsible must be responsible for (please tick as many as you agree with):**

- representing the organisation to, and liaising with, the regulator;
- managing the regulated surrogacy organisation with sufficient care, competence and skill;
- ensuring the compliance of the organisation with relevant law and regulation, including the creation, maintenance and operation of necessary policies and procedures;
- training any staff, including that of the person responsible; and
- providing data to the regulator and to such other person as required by law.

Response from the Scottish Council on Human Bioethics

*Though the SCHB is opposed to surrogacy in principle it agrees with all the above.*

**Consultation Question 35:**

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

**Yes**

**No**  
**Other**

Response from the Scottish Council on Human Bioethics

*Though the SCHB is opposed to surrogacy in principle it agrees that regulated surrogacy organisations should be non-profit making bodies.*

**Consultation Question 38:**

**We invite consultees' views as to the sanctions that should be available against organisations that offer matching and facilitation services without being regulated to do so, and whether these should be criminal, civil or regulatory.**

Response from the Scottish Council on Human Bioethics

*The sanctions should be criminal.*

**Consultation Question 39:**

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

**Yes**  
**No**  
**Other**

Response from the Scottish Council on Human Bioethics

*The SCHB has no confidence in the HFEA which is only a quasi-autonomous non-governmental organisation. It cannot represent the people in the UK and often just reflects dogmatic unsubstantiated positions.*

**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.**

Response from the Scottish Council on Human Bioethics

*The SCHB has no confidence in the HFEA and does not believe it should be involved in surrogacy.*

**Consultation Question 40:**

**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**  
**No**  
**Other**

Response from the Scottish Council on Human Bioethics

*The SCHB is opposed to surrogacy in principle. Moreover, it believes that the present situation (where the surrogate is considered to be the legal mother at the birth of the child) should not be changed.*

**Consultation Question 41:**

**We provisionally propose that there should be no prohibition against charging for negotiating, facilitating and advising on surrogacy arrangements. Do consultees agree?**

- Yes**
- No**
- Other**

*Response from the Scottish Council on Human Bioethics*

*The SCHB is opposed to surrogacy in principle.*

**Consultation Question 42:**

**We provisionally propose that the current ban on advertising in respect of surrogacy should be removed, with the effect that there will be no restrictions on advertising anything that can lawfully be done in relation to surrogacy arrangements. Do consultees agree?**

- Yes**
- No**
- Other**

*Response from the Scottish Council on Human Bioethics*

*The SCHB is opposed to surrogacy in principle. Any encouragement through advertising of the exploitation of vulnerable women through surrogacy is unethical and even inhumane.*

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

**Consultation Question 43:**

**We provisionally propose that, in England and Wales, where the making of a parental order in respect of a child born of a surrogacy arrangement has been recorded in the Parental Order Register, the child should be able to access his or her original birth certificate at the age of 18. Do consultees agree?**

- Yes**
- No**
- Other**

*Response from the Scottish Council on Human Bioethics*

*Not applicable to Scotland.*

**Consultation Question 44:**

**We provisionally propose that where children are born of surrogacy arrangements that result in the intended parents being recorded as parents on the birth certificate, the full form of that certificate should make clear that the birth was the result of a surrogacy arrangement. Do consultees agree?**

Yes  
No  
Other

**Consultation Question 45:**

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.

*Response from the Scottish Council on Human Bioethics*

*Not applicable to Scotland.*

**Consultation Question 46:**

We provisionally propose that, in England and Wales, from the age of 18, a child who has been the subject of a parental order should be able to access all the documents contained in the court's file for those parental order proceedings. Do consultees agree?

Yes  
No  
Other

*Response from the Scottish Council on Human Bioethics*

*Not applicable to Scotland.*

**Consultation Question 47:**

We provisionally propose that a national register of surrogacy arrangements should be created to record the identity of the intended parents, the surrogate and the gamete donors. Do consultees agree?

Yes  
No  
Other

*Response from the Scottish Council on Human Bioethics*

*Though the SCHB is opposed to surrogacy in principle, it would support the creation of a national register of surrogacy arrangements.*

**We provisionally propose that:**

**(1) the register should be maintained by the Authority;**

**(2) the register should record information for all surrogacy arrangements, whether in or outside the new pathway, provided that the information about who has contributed gametes for the conception of the child has been medically verified, and that the information should include:**

**(a) identifying information about all the parties to the surrogacy arrangement, and**

**(b) non-identifying information about those who have contributed gametes to the conception of the child; and**



**(3) to facilitate the record of this information, the application form/petition for a parental order should record full information about a child's genetic heritage where available and established by DNA or medical evidence, recording the use of an anonymous gamete donor if that applies.**

**Do consultees agree?**

**Yes**  
**No**  
**Other**

*Response from the Scottish Council on Human Bioethics*

*The SCHB has no confidence in the HFEA which is only a quasi-autonomous non-governmental organisation. It cannot represent the people in the UK and often just reflects dogmatic unsubstantiated and irresponsible positions.*

**Consultation Question 48:**

**We invite consultees' views as to whether non-identifying information about the surrogate and the intended parents should be recorded in the national register of surrogacy arrangements and available for disclosure to a child born of a surrogacy arrangement.**

*Response from the Scottish Council on Human Bioethics*

*The SCHB believes that non-identifying information about the surrogate and the intended parents should be recorded in the national register of surrogacy arrangements and available for disclosure to a child born of a surrogacy arrangement.*

**Consultation Question 49:**

**We provisionally propose that a child born of a surrogacy arrangement should be able to access the information recorded in the register from the age of 18 for identifying information, and 16 for non-identifying information (if such information is included on the register), provided that he or she has been given a suitable opportunity to receive counselling about the implications of compliance with this request. Do consultees agree?**

**Yes**  
**No**  
**Other**

**We invite consultees' views as to whether a child under the age of 18 or 16 (depending on whether the information is identifying or non-identifying respectively) should be able to access the information in the register and, if so, in which circumstances:**

- (1) where his or her legal parents have consented;**
- (2) if he or she has received counselling and the counsellor judges that he or she is sufficiently mature to receive this information; and/or**
- (3) in any other circumstances.**

*Response from the Scottish Council on Human Bioethics*

*A child under the age of 18 or 16 (depending on whether the information is identifying or non-identifying respectively) should be able to access the information in the register if he or she has received counselling and the counsellor judges that he or she is sufficiently mature to receive this information.*

**Consultation Question 50:**

**We invite consultees' views as to whether there should be any provision for those born of a surrogacy arrangement to make a request for information to disclose whether a person whom he or she is intending to marry, or with whom he or she intends to enter into a civil partnership or intimate physical relationship, was carried by the same surrogate.**

*Response from the Scottish Council on Human Bioethics*

*There should be a provision for those born of a surrogacy arrangement to make a request for information to disclose whether a person whom he or she is intending to marry, or with whom he or she intends to enter into a civil partnership or intimate physical relationship, was carried by the same surrogate.*

**Consultation Question 51:**

**We provisionally propose that where two people are born to, and genetically related through, the same surrogate, they should be able to access the register to identify each other, if they both wish to do so.**

**Do consultees agree?**

**Yes**  
**Ne**  
**Other**

**We invite consultees' views as to whether there should be provision to allow people born to the same surrogate – but who are not genetically related – to access the register to identify each other, if they both wish to do so.**

*Response from the Scottish Council on Human Bioethics*

*There should be provision to allow people born to the same surrogate – but who are not genetically related – to access the register to identify each other, if they both wish to do so.*

**Consultation Question 52:**

**We invite consultees' views as to whether provision should be made to allow a person carried by a surrogate, and the surrogate's own child, to access the register to identify each other, if they both wish to do so:**

**(1) if they are genetically related through the surrogate; and/or**

*Response from the Scottish Council on Human Bioethics*

*Provision should be made to allow a person carried by a surrogate, and the surrogate's own child, to access the register to identify each other, if they both wish to do so*

**(2) if they are not genetically related through the surrogate.**

*Response from the Scottish Council on Human Bioethics*

*Provision should be made to allow a person carried by a surrogate, and the surrogate's own child, to access the register to identify each other, if they both wish to do so*

## Chapter 11: Eligibility Criteria for a Parental Order

### Consultation Question 54:

We provisionally propose that the six month time limits in sections 54 and 54A of the HFEA 2008 for making a parental order application should be abolished. Do consultees agree?

*Response from the Scottish Council on Human Bioethics*

*The SCHB is opposed to surrogacy in principle. Moreover, it believes that the present situation (where the surrogate is considered to be the legal mother at the birth of the child) should not be changed.*

### Consultation Question 55:

We provisionally propose that:

(1) the current circumstances in which the consent of the surrogate (and any other legal parent) is not required, namely where a person cannot be found or is incapable of giving agreement, should continue to be available;

Do consultees agree?

Yes  
No  
Other

(2) the court should have the power to dispense with the consent of the surrogate, and any other legal parent of the child, in the following circumstances:

(a) where the child is living with the intended parents, with the consent of the surrogate and any other legal parent, or

(b) following a determination by the court that the child should live with the intended parents; and

(3) the court's power to dispense with consent should be subject to the paramount consideration of the child's welfare throughout his or her life guided by the factors set out in section 1 of the Adoption and Children Act 2002 and, in Scotland, in line with the section 14(3) of the Adoption and Children (Scotland) Act 2007.

Do consultees agree?

Yes  
No  
Other

*Response from the Scottish Council on Human Bioethics*

*The SCHB is opposed to surrogacy in principle. Moreover, it believes that the present situation (where the surrogate is considered to be the legal mother at the birth of the child) should not be changed.*

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

### Consultation Question 56:

**We provisionally propose that, both for a parental order and in the new pathway, the intended parents or one of the intended parents must be domiciled or habitually resident in the UK, Channel Islands or Isle of Man. Do consultees agree**

**Yes**  
**No**  
**Other**

*Response from the Scottish Council on Human Bioethics*

*The SCHB is opposed to surrogacy in principle and any international surrogacy arrangements should be prohibited through national and extra-territorial legal provisions.*

**We invite consultees' views as to whether there should be any additional conditions imposed on the test of habitual residence, for example, a qualifying period of habitual residence required to satisfy the test.**

*Response from the Scottish Council on Human Bioethics*

*The SCHB is opposed to surrogacy in principle and any international surrogacy arrangements should be prohibited through extraterritorial legal provisions.*

**Consultation Question 57:**

**We invite consultees' views on whether:**

**(1) the qualifying categories of relationship in section 54(2) of the HFEA 2008 should be reformed and, if so, how; or**

**(2) the requirement should be removed, subject to two persons who are within the prohibited degrees of relationship being prevented from applying.**

*Response from the Scottish Council on Human Bioethics*

*The qualifying categories of relationship in section 54(2) of the HFEA 2008 should be NOT be reformed.*

**Consultation Question 58:**

**We provisionally propose that to use the new pathway, intended parents should be required to make a declaration in the surrogacy agreement that they intend for the child's home to be with them. Do consultees agree?**

**Yes**  
**No**  
**Other**

*Response from the Scottish Council on Human Bioethics*

*The SCHB is opposed to surrogacy in principle. Moreover, it believes that the present situation (where the surrogate is considered to be the legal mother at the birth of the child) should not be changed.*

**Consultation Question 59:**

**We provisionally propose that the new pathway:**

**(1) should not impose a requirement that the intended parent, or one of the intended parents, provide gametes for the conception of the child, so that double donation of gametes is permitted, but**

**(2) that double donation should only be permitted in cases of medical necessity, meaning that there is not an intended parent who is able to provide a gamete due to infertility.**

**Do consultees agree?**

**Yes**  
**No**  
**Other**

*Response from the Scottish Council on Human Bioethics*

*The SCHB is opposed to surrogacy in principle. Moreover, it believes that the present situation with respect to the biological relationship with the child should not be changed.*

**We invite consultees' views as to whether double donation should be permitted under the parental order pathway (to the same extent that it may be permitted in the new pathway) in domestic surrogacy arrangements.**

*Response from the Scottish Council on Human Bioethics*

*Double donation to bring into existence a child should be prohibited.*

**We provisionally propose that the requirement that the intended parent or one of the intended parents contribute gametes to the conception of the child in the parental order pathway should be retained in international surrogacy arrangements.**

**Do consultees agree?**

**Yes**  
**No**  
**Other**

*Response from the Scottish Council on Human Bioethics*

*The SCHB is opposed to surrogacy in principle and any international surrogacy arrangements should be prohibited through extraterritorial legal provisions.*

*The SCHB also notes the inconsistency in requiring that one of the intended parents contribute gametes to the conception of the child in international but not in domestic surrogacy arrangements.*

**Consultation Question 60:**

**We provisionally propose that if the requirement for a genetic link is retained for domestic cases outside the new pathway, the requirement should not apply, subject to medical necessity, if the court determines that the intended parents in good faith began the surrogacy arrangement in the new pathway but were required to apply for a parental order. Do consultees agree?**

**Yes**  
**No**  
**Other**

*Response from the Scottish Council on Human Bioethics*

*The summary of the consultation report indicated in a very dogmatic manner that:*

*“We think that, in cases falling within the new pathway there are strong arguments that a genetic link should not be required. Removing this requirement would reflect the view that in a surrogacy arrangement, the shared intention of the intended parents and the woman who will be the surrogate to bring the child into the world for the parents to raise, is more significant than the genetic parentage of the child.”<sup>34</sup>*

*But again, there is no evidence for this in refereed academic journals and thus cannot be taken seriously or accepted. The situation may be far more complex.*

*The SCHB does not understand what is meant, precisely, by ‘genetic link’ nor why this should be important. Indeed, such a link is not defined nor developed in the report, meaning that the SCHB cannot respond to the question.*

*The SCHB would like to note, again, the superficial, incomplete and unprofessional nature of this consultation.*

### **Consultation Question 61:**

**We provisionally propose that if double donation is permitted only in cases of medical necessity, an exception should be made to allow a parental order to be granted to a single parent without a genetic link where the intended parent’s former partner provides gametes but the intended parents’ relationship breaks down before the grant of a parental order. Do consultees agree?**

**Yes**  
**No**  
**Other**

*Response from the Scottish Council on Human Bioethics*

*The SCHB is opposed to surrogacy and the use of donated gametes in principle.*

### **Consultation Question 62:**

**We invite consultees’ views as to whether there should be a requirement that a surrogacy arrangement has been used because of medical necessity:**

**(1) for cases under the new pathway to parenthood; and/or**

**(2) for cases where a post-birth parental order application is made.**

**We invite consultees’ views as to how a test of medical necessity for surrogacy, if it is introduced, should be defined and assessed.**

*Response from the Scottish Council on Human Bioethics*

*The SCHB is opposed to surrogacy in principle.*

### **Consultation Question 63:**

**We provisionally propose that in order to use the new pathway to parenthood, information identifying the child’s genetic parents and the surrogate must be provided for entry on the national register of surrogacy agreements prior to registration of the child’s birth. Do consultees agree?**

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<sup>34</sup> The Law Commission and the Scottish Law Commission, Building Families Through Surrogacy: A New Law (Summary of Consultation Paper), 2019, p. 11.

**Yes**  
**No**  
**Other**

Response from the Scottish Council on Human Bioethics

*Information identifying the child's genetic parents and the surrogate must be provided for entry on the national register of surrogacy agreements prior to registration of the child's birth.*

**We invite consultees' views as to whether it should be a condition for an application for a parental order that:**

**(1) those who contributed gametes are entered on the national register of surrogacy agreements; and/or**

**(2) if it remains a requirement that one of the intended parents provided gametes in the conception of the child, that the genetic link is demonstrated to the court with medical or DNA evidence.**

**We provisionally propose that it should be a condition for the application of a parental order that the identity of the surrogate is entered on the national register of surrogacy agreements.**

**Do consultees agree?**

**Yes**  
 **No**  
 **Other**

Response from the Scottish Council on Human Bioethics

*The identity of the surrogate should be entered on the national register of surrogacy agreements*

**Consultation Question 64:**

**We provisionally propose that there should be no maximum age limit for the grant of a parental order. The age of the intended parents should continue to be taken into account in the assessment of the welfare of the child in applications to grant a parental order.**

**Do consultees agree?**

**Yes**  
 **No**  
**Other**

**We invite consultees' views as to whether under the new pathway there should be a maximum age limit for intended parents, and if so, what it should be.**

Response from the Scottish Council on Human Bioethics

*The SCHB is opposed to surrogacy in principle.*

**We provisionally propose that intended parents should be required to be at least 18 years old at the time that they enter into a surrogacy agreement under the new pathway.**

**Do consultees agree?**

**Yes**

~~No~~  
~~Other~~

Response from the Scottish Council on Human Bioethics

*The SCHB is opposed to surrogacy in principle.*

**Consultation Question 65:**

**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?**

~~Yes~~  
~~No~~  
~~Other~~

Response from the Scottish Council on Human Bioethics

*The SCHB is opposed to surrogacy in principle.*

*In addition, consideration is also necessary relating to the general health and welfare of the surrogate. Section 8.8 (p157) of the consultation discusses the arrangements made pre-conception but why is there no requirements for the surrogate to give informed consent?*

*In this regard it should be noted that a minimum age of 18 may be a first pregnancy. There is no requirement to have had already one pregnancy.*

**We provisionally propose that surrogates should be required to be at least 18 years old at the time of entering into the surrogacy agreement within the new pathway.**

**Do consultees agree?**

~~Yes~~  
~~No~~  
~~Other~~

Response from the Scottish Council on Human Bioethics

*The SCHB is opposed to surrogacy in principle.*

*In addition, consideration is also necessary relating to the general health and welfare of the surrogate. Section 8.8 (p157) of the consultation discusses the arrangements made pre-conception but why is there no requirements for the surrogate to give informed consent?*

*In this regard it should be noted that a minimum age of 18 may be a first pregnancy. There is no requirement to have had already one pregnancy. There is no requirement or discussion about the level of detail required of risks of pregnancy, especially prior to conception, such as bleeding, infection, infertility, incontinence, postnatal depression, gestational diabetes, and death.*

## **Chapter 13: Eligibility Criteria for the New Pathway**



**Consultation Question 66:**

**We provisionally propose that medical testing of the surrogate, any partner of the surrogate, and any intended parent providing gametes should be required for the new pathway.**

**Do consultees agree?**

**Yes**  
**No**  
**Other**

**Response from the Scottish Council on Human Bioethics**

*The SCHB would like to question whether this would represent new eugenic developments?*

**We invite consultees' views as to whether the types of testing set out in the Code of Practice are feasible for traditional surrogacy arrangements outside a licensed clinic, and if not, which types of testing should be required for such arrangements.**

**Consultation Question 67:**

**We provisionally propose that, as a condition of being eligible for entry into the new pathway:**

**(1) the surrogate, her spouse, civil partner or partner (if any) and the intended parents intending to enter into a surrogacy arrangement in the new pathway should be required to attend counselling with regard to the implications of entering into that arrangement; and**

**(2) the implications counselling should be provided by a counsellor who meets the requirements set out in the Code of Practice at paragraphs 2.14 to 2.15.**

**Do consultees agree?**

**Yes**  
**No**  
**Other**

**Response from the Scottish Council on Human Bioethics**

*Counselling with regard to the very grave implications of entering into a surrogacy arrangement should be given.*

*There should be a requirement to discuss the risks of pregnancy, especially prior to conception, such as bleeding, infection, infertility, incontinence, postnatal depression, gestational diabetes, and death.*

**Consultation Question 68:**

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

**Yes**  
**No**  
**Other**

**Response from the Scottish Council on Human Bioethics**

*There should be a requirement that the surrogate and the intended parents should take independent legal advice on the effect of the law relating to surrogacy arrangements.*

**Consultation Question 69:**

**We provisionally propose that, as an eligibility requirement of the new pathway:**

**(1) an enhanced criminal record certificate should be obtained for intended parents, surrogates and any spouses, civil partners or partners of surrogates;**

**(2) the body overseeing the surrogate arrangement should not enable a surrogate arrangement to be proceed under the new pathway where a person screened is unsuitable for having being convicted of, or received a police caution for, any offence appearing on a prescribed list of offences; and**

**(3) the body overseeing the surrogacy arrangement may also determine that a person is unsuitable based on the information provided in the enhanced record certificate.**

**Do consultees agree?**

**Yes**

**No**

**Other**

**We invite consultees' views as to whether the list of offences that applies in the case of adoption is appropriate in the case of surrogacy arrangements in the new pathway.**

*Response from the Scottish Council on Human Bioethics*

*The list of offences that applies in the case of adoption is appropriate in the case of surrogacy arrangements.*

**Consultation Question 70:**

**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.**

*Response from the Scottish Council on Human Bioethics*

*There should be a requirement that the surrogate has previously given birth as an eligibility requirement of the new pathway.*

**Consultation Question 71:**

**We provisionally propose that there should not be a maximum number of surrogate pregnancies that a woman can undertake as an eligibility requirement of the new pathway. Do consultees agree?**

**Yes**

**No**

**Other**

*Response from the Scottish Council on Human Bioethics*

*The SCHB is opposed to surrogacy in principle.*

## **Chapter 15: Payments to the Surrogate: Options for Reform**

### **Consultation Question 72:**

**We invite consultees' views as to whether payment of costs by the intended parents to the surrogate should be able to be:**

- **based on an allowance;**
- **based on costs actually incurred by the surrogate, but without the need for production of receipts; or**
- **based on costs actually incurred by the surrogate, and only on production of receipts.**

#### *Response from the Scottish Council on Human Bioethics*

*The SCHB is opposed to surrogacy in principle and believed that any payment to the surrogate would be completely unethical. It would represent the unacceptable exploitation as well as rental of a woman's body, as such, and would be contrary to international law. Moreover, no child should ever be brought into existence for a price.*

### **Consultation Question 73:**

**We invite consultees' views as to:**

**(1) whether intended parents should be able to pay the surrogate essential costs relating to the pregnancy; and**

**(2) the types of expenditure which should be considered "essential".**

#### *Response from the Scottish Council on Human Bioethics*

*When surrogacy arrangements involve a financial incentive, they become commercial surrogacies. Such practices, however, are extremely controversial. Indeed, asking a mother to give up the child she has gestated is not something anyone would see as normal or desirable. Moreover, making this meaningful for the woman through payment does not make it any more ethical. Instead, it represents one of the most unacceptable forms of exploitation being done against women. In addition, it is not because the arguments use language making surrogacy seem nuanced and careful that the procedure is any less controversial. Calling a woman a 'carrier' or 'gestator' is unacceptable in relation to any human being since it reduces her to a biological process. Erasing any reference to the woman's humanity and her status as a mother cannot ever be seen as responsible or ethically appropriate.*

*Such a manipulation and misuse of the language encourages the surrogate and society to disconnect and deny what the woman is really experiencing in order for her to be able to separate herself from the child. This is because it is necessary for her to believe that this child is not really her child, to repress her emotions, to convince herself that this abandonment is done for the good of others. Furthermore, such 'linguistic cleansing' may be aimed at making invisible the market aspect of contractual transactions which amounts to the sale of babies.*

*The industrialisation of births has already begun, and biomedical reproductive capitalism introduces an exploitation aspect that is more pernicious and more effective than any other. Indeed, a woman's agreement appears to be the green light to justify any practice based on her life or her body. But to say that women are agreeing to become commercial surrogates is to forget the conditions under which they are led to agree and to neglect the reasons for which they have accepted to be exploited. An agreement is not a desire, it is not a will, it is not freedom.*

*In France, the National Consultative Ethics Committee has already clearly stated, in 2018, its extreme concern relating to the expansion of the international market for commercial surrogacy. This has been*

*encouraged by commercial agencies and lobby groups presenting and showcasing positive images of the surrogacy market in the media.*

*The reasons why this French committee has reiterated its opposition is that it remains determined to retain the principles that justify the prohibition of commercial surrogacy in France on the basis, amongst other things, of respect for the human person who cannot be exploited.*

*On this account, presenting commercial surrogacy in a positive manner should be seen as being as shameful as presenting slavery in a positive manner. This is because a woman would be selling her body for reproduction which is completely unethical.*

*Of course, a lot of compassion should be shown to the very real suffering of persons who cannot gestate their own children, but compassion also demands protecting women from unacceptable exploitation. Accordingly, the UK Parliament should never countenance the legalisation of commercial surrogacy.*

#### **Consultation Question 74:**

**We invite consultees' views as to:**

**(1) whether they consider that intended parents should be able to pay the surrogate additional costs relating to the pregnancy; and**

**(2) the types of expenditure which should be considered additional, rather than essential.**

#### **Response from the Scottish Council on Human Bioethics**

*The SCHB is opposed to surrogacy in principle and believed that any payment to the surrogate would be completely unethical. It would represent the unacceptable exploitation and rental sale of a woman's body, as such, for reproduction and would be contrary to international law. Moreover, no child should ever be brought into existence through a payment.*

#### **Consultation Question 75:**

**We invite consultees' views as to:**

**(1) whether intended parents should be permitted to pay all costs that arise from entering into a surrogacy arrangement, and those unique to a surrogate pregnancy; and**

**(2) the types of cost which should be included within this category.**

#### **Response from the Scottish Council on Human Bioethics**

*The SCHB is opposed to surrogacy in principle and believed that any payment to the surrogate would be completely unethical. It would represent the unacceptable exploitation and rental of a woman's body, as such, for reproduction and would be contrary to international law. Moreover, no child should ever be brought into existence through a payment.*

#### **Consultation Question 76:**

**We invite consultees' views as to whether they consider that intended parents should be able to pay their surrogate her actual lost earnings (whether the surrogate is employed or self-employed).**

#### **Response from the Scottish Council on Human Bioethics**

*The SCHB is opposed to surrogacy in principle and believed that any payment to the surrogate would be completely unethical. It would represent the unacceptable exploitation and rental of a woman's body, as such, and would be contrary to international law. Moreover, no child should ever be brought into existence through a payment.*

**Consultation Question 77:**

**We invite consultees' views as to whether they consider that intended parents should be able to pay their surrogate either or both of the following lost potential earnings:**

**(1) her lost employment-related potential earnings (as defined in paragraph 15.35 in the text of the Consultation Paper); and/or**

**(2) other lost potential earnings (as defined in paragraph 15.36 in the text of the Consultation Paper).**

**Response from the Scottish Council on Human Bioethics**

*The SCHB is opposed to surrogacy in principle and believed that any payment to the surrogate would be completely unethical. It would represent the unacceptable exploitation and rental of a woman's body, as such, and would be contrary to international law. Moreover, no child should ever be brought into existence through a payment.*

**Consultation Question 79:**

**We invite consultees' views as to whether intended parents should be able to pay compensation to the surrogate for the following:**

- **pain and inconvenience arising from the pregnancy and childbirth;**
- **medical treatments relating to the surrogacy, including payments for each insemination or embryo transfer; and/or**
- **specified complications, including hyperemesis gravidarum, pre-eclampsia, an ectopic pregnancy, miscarriage, termination, caesarean birth, excessive haemorrhaging, perineal tearing, removal of fallopian tubes or ovaries or a hysterectomy.**

**Response from the Scottish Council on Human Bioethics**

*The SCHB is opposed to surrogacy in principle and believed that any payment to the surrogate would be completely unethical. It would represent the unacceptable exploitation and rental of a woman's body, as such, and would be contrary to international law. Moreover, no child should ever be brought into existence through a payment.*

**We invite consultees' views as to whether there are any other matters in respect of which intended parents should be able to pay the surrogate compensation.**

**Response from the Scottish Council on Human Bioethics**

*The SCHB is opposed to surrogacy in principle and believed that any payment to the surrogate would be completely unethical. It would represent the unacceptable exploitation and rental of a woman's body, as such, and would be contrary to international law. Moreover, no child should ever be brought into existence through a payment.*

**Consultation Question 80:**

**We invite consultees' views as to whether intended parents should be able to pay compensation to the surrogate's family in the event of the pregnancy resulting in the surrogate's death, including through payment of the cost of life assurance for the surrogate.**

**Response from the Scottish Council on Human Bioethics**

*The SCHB is opposed to surrogacy in principle and believed that any payment to the surrogate would be completely unethical. It would represent the unacceptable exploitation and rental of a woman's body, as such, and would be contrary to international law.*

**Consultation Question 81:**

**We invite consultees' views as to whether:**

- (1) intended parents should be able to buy gifts for the surrogate; and**
- (2) if so, specific provision should be made for these gifts to be modest or reasonable in nature.**

*Response from the Scottish Council on Human Bioethics*

*The SCHB is opposed to surrogacy in principle.*

**Consultation Question 82:**

**We invite consultees' views as to whether it should be possible for the intended parents to agree to pay a woman for the service of undertaking a surrogacy.**

~~**It should be possible for the intended parents to agree to pay a woman for the service of undertaking a surrogacy.**~~

**It should not be possible for the intended parents to agree to pay a woman for the service of undertaking a surrogacy.**

**We invite consultees' views as to whether, if provision is made for intended parents to pay a woman for the service of undertaking surrogacy, whether that the fee should be:**

- ~~**— any sum agreed between the parties to the surrogacy; or**~~
- ~~**— a fixed fee set by the regulator.**~~

*Response from the Scottish Council on Human Bioethics*

*It would be completely unethical and even exploitative for any woman to receive a payment for surrogacy.*

**We invite consultees' views as to whether, if provision is made for intended parents to pay a woman a fixed fee for the service of undertaking surrogacy, what, if any, other payments the law should permit, in addition to that fixed fee (please tick as many as you agree with):**

- no other payments;**
- ~~**— essential costs relating to the pregnancy;**~~
- ~~**— additional costs relating to the pregnancy;**~~
- ~~**— lost earnings;**~~
- ~~**— compensation for pain and inconvenience, medical treatment and complications, and the death of the surrogate; and/or**~~
- ~~**— gifts.**~~

*Response from the Scottish Council on Human Bioethics*

*It would be completely unethical and even exploitative for any woman to receive any kind of payment for surrogacy.*

**Consultation Question 83:**

**We invite consultees' views as to whether it should be possible for any payment the law permits the intended parents to pay the surrogate for her services to be reduced in the event of a miscarriage or termination of the pregnancy.**

Response from the Scottish Council on Human Bioethics

*The SCHB is opposed to surrogacy in principle and believed that any payment to the surrogate would be completely unethical. It would represent the unacceptable exploitation and rental of a woman's body, as such, and would be contrary to international law.*

**We invite consultees' views as to whether, if the law permits a fee payable to the surrogate to be able to be reduced in the event of a miscarriage or termination, whether such provision should apply:**

- **in the first trimester of pregnancy only;**
- **to any miscarriage or termination; or**
- **some other period of time (please specify in the box below).**

Response from the Scottish Council on Human Bioethics

*The SCHB would like to question these options and the implication that human life has a price. Such a notion is completely unacceptable and deeply offensive.*

**Consultation Question 84:**

**We provisionally propose that the types of payment that are permitted to be made to surrogates should be the same, whether the surrogacy follows our new pathway to parenthood or involves a post-birth application for a parental order. Do consultees agree?**

- Yes**
- No**
- Other**

Response from the Scottish Council on Human Bioethics

*It would be completely unethical and even exploitative for any woman to receive any kind of payment for surrogacy.*

**Consultation Question 88:**

**We provisionally propose that financial terms of a surrogacy agreement entered into under the new pathway to parenthood should be enforceable by the surrogate. Do consultees agree?**

- Yes**
- No**
- Other**

**We provisionally propose that if the financial terms of a surrogacy agreement entered into under the new pathway become enforceable, the ability to do so should not be dependent on the surrogate complying with any terms of the agreement relating to her lifestyle.**

**Do consultees agree?**

- Yes**
- No**
- Other**

## Chapter 16: International Surrogacy Arrangements

### Consultation Question 92:

We provisionally propose that it should be possible for a file to be opened, and the application process for obtaining registration of a child born from an international surrogacy arrangement and obtaining a passport to begin, prior to the birth of the child. Do consultees agree?

Yes  
No  
Other

### Response from the Scottish Council on Human Bioethics

The SCHB believes that the results from the Hague Conference on Private International Law on a new global convention on international surrogacy should be awaited before any guidelines are prepared in this area for the UK.

### Consultation Question 94:

We provisionally propose that it should be possible to open a file, and begin the process for applying for a visa in respect of a child born through an international surrogacy arrangement, before the child is born. The application will need to be completed after the birth of the child, and the issue of a passport in the child's country of birth. Do consultees agree?

Yes  
No  
Other

### Response from the Scottish Council on Human Bioethics

The SCHB believes that the results from the Hague Conference on Private International Law on a new global convention on international surrogacy should be awaited before any guidelines are prepared in this area for the UK.

We provisionally propose that the current provision made for the grant of a visa outside of the Immigration Rules where the intended parents are not the legal parents of the child under nationality law should be brought within the Rules.

Do consultees agree?

Yes  
No  
Other

### Consultation Question 95:

We provisionally propose that it should be possible to open a file, and begin the process for applying for a EU Uniform Format Form in respect of a child born through an international surrogacy arrangement, before the child is born. The application will need to be completed after the birth of the child. Do consultees agree?

Yes  
No



**Other**

Response from the Scottish Council on Human Bioethics

The SCHB believes that the results from the Hague Conference on Private International Law on a new global convention on international surrogacy should be awaited before any guidelines are prepared in this area for the UK.

**Consultation Question 97:**

**We provisionally propose that the UK Government should provide a single, comprehensive guide for intended parents explaining the nationality and immigration consequences of having a child through an international surrogacy arrangement. Do consultees agree?**

**Yes**

**No**

**Other**

Response from the Scottish Council on Human Bioethics

The SCHB is opposed to surrogacy in principle.

**Consultation Question 98:**

**We provisionally propose that international surrogacy arrangements should not be eligible for the new pathway to parenthood. Do consultees agree?**

**Yes**

**No**

**Other**

**Consultation Question 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?**

**Yes**

**No**

**Other**

Response from the Scottish Council on Human Bioethics

The SCHB is opposed to surrogacy in principle.

## Chapter 18: Impact

### Consultation Question 113:

We invite consultees to tell us of the impact of:

#### (1) the current requirement of a genetic link

##### Response from the Scottish Council on Human Bioethics

The summary of the consultation report indicated in a very dogmatic manner that:

*“We think that, in cases falling within the new pathway there are strong arguments that a genetic link should not be required. Removing this requirement would reflect the view that in a surrogacy arrangement, the shared intention of the intended parents and the woman who will be the surrogate to bring the child into the world for the parents to raise, is more significant than the genetic parentage of the child.”<sup>35</sup>*

*But again, there is no evidence for this in refereed academic journals and thus cannot be taken seriously or accepted. The situation may be far more complex.*

*The SCHB does not understand what is meant, precisely, by ‘genetic link’ nor why this should be important. Indeed, such a link is not defined nor developed in the report, meaning that the SCHB cannot respond to the question.*

*The SCHB would like to note, again, the superficial, incomplete and unprofessional nature of this consultation.*

### Consultation Question 118:

We invite consultees’ views as to any other impact that we have not specifically addressed in this chapter, or the preceding chapters, of this Consultation Paper.

##### Response from the Scottish Council on Human Bioethics

*The SCHB would like to question the legal weight of the proposed new written surrogacy agreement. And even if it has no legal weight how will it be considered by all the parties if they change their minds?*

*The SCHB noted that the consultation report states: “We also believe that our proposals reflect the autonomy of women who have told us that the existing law does not reflect what they want to happen when they agree to become a surrogate.”<sup>36</sup>*

*However, the SCHB is of the opinion that new legislation is prepared with the informed consent of society and not just that of the relevant woman. Moreover, civilised society is based on the inherent human dignity of all, including the resulting child, and not just on the wishes of the relevant commissioning parents or surrogates.*

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<sup>35</sup> The Law Commission and the Scottish Law Commission, Building Families Through Surrogacy: A New Law (Summary of Consultation Paper), 2019, p. 11.

<sup>36</sup> The Law Commission and the Scottish Law Commission, Building Families Through Surrogacy: A New Law (Summary of Consultation Paper), 2019, p. 12.