



glasgow bar association
established 1959

The Executive Committee
Glasgow Bar Association
Room 1.29
Glasgow Sheriff Court
1 Carlton Place,
Glasgow
G5 9DA

10th October 2019

INTRODUCTION

RESPONSE BY THE GLASGOW BAR ASSOCIATION

TO THE LC and SLC CONSULTATION -

SURROGACY REFORM – BUILDING FAMILIES THROUGH

SURROGACY: A NEW LAW

The Executive Committee of the Glasgow Bar Association (GBA) welcomes this opportunity to respond to this consultation on behalf of its members. The GBA is the largest association of Solicitors in Scotland, representing Solicitors in the West of Scotland and acting on behalf of our clients throughout Scotland. Glasgow Sheriff Court is the busiest Court in Scotland. It has also been billed as the busiest Court in Europe.

The Aims and Objectives of the Glasgow Bar Association are: -

1. To promote, represent and protect the rights and interests of its Members in the practice of law; and by extension those of its members' clients and therefore the wider public including the most vulnerable members of society.

2. To promote access to legal services and to justice.
3. To consider and, if necessary, formulate proposals and initiate action for law reform.
4. To consider and monitor proposals made by other bodies for law reform and draft legislation and to make comments, recommendations and representations thereanent to the appropriate quarters.
5. To arrange conferences and lectures and otherwise to provide opportunities for its Members and others to study and keep up to date with current and proposed law practice and procedures.

We have responded to the questions applicable to matters of Scots Law, in our capacity as representatives of our members. Where applicable, we have noted that as an Association, we are unable to answer a question designed for an individual.

Finally, we would welcome any expression of interest from the Commissions' representatives or by any MSP or MP to visit us at Glasgow Sheriff Court to illustrate the commendable work done by our members in representing our clients.

THE CONSULTATION RESPONSES

Consultation Question 6.

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

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

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

The view of the Glasgow Bar Association is that there is disparity with regards the expenses which are paid to Curators Ad Litem and Reporting Officers throughout the country. The means by which same could be addressed is by having a national framework for the payment of same with a set scale of fees and a mechanism for the regular review of same.

With regards interim orders, it is our view that same is not necessary, unless a specific issue arose, i.e. travelling for a period of holiday, rather than a blanket order for parental responsibilities and parental orders. The reason for same being that the granting of same would create a status quo. However, in practical terms, it is difficult to envisage a situation which would require at such a stage, an interim order where the same end cannot be achieved by other means or forums.

Consultation Question 7.

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

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

complied with procedural safeguards for the agreement, and

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?

The Glasgow Bar Association agrees with this proposal. This would provide certainty to all.

Consultation Question 8.

19.8 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?

The Glasgow Bar Association agrees with this proposal. This would allow parties or children born as a result of said arrangement to have the potential to gain access to records in the future. However, this would raise issues of privacy for the surrogate.

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

A period of 100 years would be appropriate.

Consultation Question 9.

19.10 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?

The Glasgow Bar Association does not have a difficulty with this proposal.

Consultation Question 10.

19.11 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.

The Glasgow Bar Association does not consider that it should.

Consultation Question 11.

19.12 We provisionally propose that:

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;

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

the defined period should be the applicable period for birth registration less one week.

Do consultees agree?

The Glasgow Bar Association considers that this proposal is very wide in scope. There are also parallels with the earlier question in relation to the registration of an agreement (at Question 7). We consider that the circumstances of any such right to object would require to be strict in nature (particularly if an agreement had been entered into) and there must be a means for any issues arising to be dealt with in an expeditious manner.

Consultation Question 12.

19.13 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:

the surrogate will be the legal parent of the child;

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

the intended parents would be able to make an application for a parental order to obtain legal parenthood.

Do consultees agree?

The Glasgow Bar Association considers that such a proposal would be open to abuse and would lead to matters becoming protracted, which appears to be contrary to the intentions.

Consultation Question 13.

19.14 We provisionally propose that, in the new pathway:

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;

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

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?

The Glasgow Bar Association considers that this would require clear definition as to what would be expected within the ‘no reason to believe’ and what level of investigation / knowledge would be required on the part of the intended parents. We wonder whether another option would be the transferring of such an onus to the licensed clinics who would be better placed to make such a declaration.

Consultation Question 14.

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

should be assessed in the way set out in Chapter 8 of the current Code of Practice;

either the regulated surrogacy organisation or regulated clinic, as appropriate, should be responsible for ensuring that this procedure is followed; and

there should be no requirement for any welfare assessment of the child after his or her birth.

Do consultees agree?

The Glasgow Bar Association agrees with this proposal. This would appear to seek to expedite matters.

Consultation Question 15.

19.16 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?

The Glasgow Bar Association agrees with this proposal.

19.17 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.

We do not consider that the surrogate's spouse or civil partner should continue to be a legal parent.

Consultation Question 16.

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

the intended parents should be the legal parents of the child unless the surrogate exercises her right to object; and

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?

The Glasgow Bar Association does agree with part one of this proposal and considers that there should be a process to allow the surrogate to consent to same. However, there should also be a means by which the intended parents can seek registration, in the event of opposition from the surrogate.

19.19 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?

The Glasgow Bar Association agrees with this proposal.

Consultation Question 17.

19.20 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?

The Glasgow Bar Association agrees with this proposal.

Consultation Question 18.

19.21 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.

The Glasgow Bar Association considers that the new pathway could and should still be available to the intended parents as this would assist in the streamlining.

Consultation Question 19.

19.22 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?

The Glasgow Bar Association agrees with this proposal.

19.23 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:

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:

for an order for appointment as guardian of the child, and

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

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.

The Glasgow Bar Association agrees with this proposal.

Consultation Question 20.

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

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;

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

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?

The Glasgow Bar Association agrees with this proposal.

Consultation Question 21.

19.25 We invite consultees' views as to:

a temporary three-parent model of legal parenthood in surrogacy cases; and

how the legal parenthood of the surrogate should be extinguished in this model.

The Glasgow Bar Association does not consider that there should be a temporary model of same, except for in limited cases where the registration of the intended parents is contested. Same could be extinguished on the granting of an order by the court.

Consultation Question 22.

19.26 We invite consultees' views:

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

if so, as to whether should this oversight be:

administrative, or

judicial.

The Glasgow Bar Association does not have any further view in relation to this.

Consultation Question 26.

19.30 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:

the child is living with them or being cared for by them; and

they intend to apply for a parental order.

Do consultees agree?

The Glasgow Bar Association agrees with this proposal.

Consultation Question 27.

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

the intended parents should acquire parental responsibility on the birth of the child; and

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?

The Glasgow Bar Association agrees with this proposal.

Consultation Question 28.

19.32 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?

The Glasgow Bar Association agrees with this proposal.

Consultation Question 29.

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

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

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.

The Glasgow Bar Association would be opposed to restrictions. If a person has parental responsibility then if a dispute arises, there are legal remedies which can be pursued.

Consultation Question 30.

19.34 We provisionally propose that traditional surrogacy arrangements should fall within the scope of the new pathway.

Do consultees agree?

The Glasgow Bar Association agrees with this proposal.

Consultation Question 33.

19.38 We provisionally propose that:

there should be regulated surrogacy organisations;

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

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

Do consultees agree?

The Glasgow Bar Association agrees with this proposal. Regulation will promote standards and consistency.

Consultation Question 34.

19.39 We provisionally propose that the person responsible must be responsible for:

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. Do

consultees agree?

The Glasgow Bar Association agrees with this proposal.

19.40 We invite consultees to identify any other responsibilities which a responsible individual should have.

The Glasgow Bar Association has no additional suggestions to make.

19.41 We invite consultees' views as to what experience, skills and qualifications a person responsible for a surrogacy organisation should have.

The Glasgow Bar Association considers that an expert panel / regulator is best placed to consider this.

Consultation Question 35.

19.42 We provisionally propose that regulated surrogacy organisations should be non-profit making bodies.

Do consultees agree?

The Glasgow Bar Association is neutral about this proposal. We obviously appreciate the motivation behind the proposal but if a commercial organisation meets the relevant criteria then we would not wish to suppress commercial enterprise in our free market economy nor a person's ability to make informed choices concerning the availability of options relevant to them.

Consultation Question 36.

19.43 We invite consultees' views as to what should be included in the definition of matching and facilitation services.

The Glasgow Bar Association considers that an expert panel / regulator is best placed to consider this.

Consultation Question 37.

19.44 We provisionally propose that only regulated surrogacy organisations should be able to offer matching and facilitation services in respect of surrogacy arrangements in the new pathway.

Do consultees agree?

The Glasgow Bar Association agrees with this proposal.

19.45 We invite consultees' views as to whether only regulated surrogacy organisations should be able to offer matching and facilitation services in respect of surrogacy arrangements outside the new pathway.

In principle the Glasgow Bar Association agrees with this proposal. However, this will be tempered by the reality that individuals will make private arrangements.

Consultation Question 38.

19.46 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.

The Glasgow Bar Association considers that regulatory and civil sanctions will be sufficient.

Consultation Question 39.

19.47 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?

The Glasgow Bar Association agrees with this proposal.

19.48 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.

The Glasgow Bar Association considers that an expert panel / regulator is best placed to consider this.

Consultation Question 40.

19.49 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?

The Glasgow Bar Association agrees with this proposal.

Consultation Question 41.

19.50 We provisionally propose that there should be no prohibition against charging for negotiating, facilitating and advising on surrogacy arrangements.

Do consultees agree?

The Glasgow Bar Association agrees with this proposal.

Consultation Question 42.

19.51 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?

The Glasgow Bar Association agrees with this proposal.

Consultation Question 44.

19.53 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?

The Glasgow Bar Association agrees with this proposal.

Consultation Question 47.

19.56 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?

The Glasgow Bar Association agrees with this proposal.

19.57 We provisionally propose that:

the register should be maintained by the Authority;

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:

identifying information about all the parties to the surrogacy arrangement,
and

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

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?

The Glasgow Bar Association agrees with this proposal.

Consultation Question 48.

19.58 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.

The Glasgow Bar Association would support non identifying information about the surrogate and the intended parents being recorded in the national register of surrogacy arrangements. This would allow a child born of a surrogacy arrangement to obtain more detailed information about their conception and the people involved in that.

Consultation Question 49.

19.59 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?

The Glasgow Bar Association agrees with this proposal.

19.60 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:

where his or her legal parents have consented;

if he or she has received counselling and the counsellor judges that he or she is sufficiently mature to receive this information; and/or

in any other circumstances.

The Glasgow Bar Association agrees with the proposal that a child born of a surrogacy arrangement should be able to access information from the register from 18 or 16 depending on the nature of the information and subject to him or her having been given the opportunity to receive counselling.

In relation to a child under the age of 16 or 18 accessing the register, consideration would require to be given to the maturity of the individual child involved and the consent of the legal parents should be required. It may be that rather than an opportunity for counselling being given, any child under 16 or 18 would require to

undergo counselling before gaining access to identifying or non-identifying information.

Consultation Question 50.

19.61 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.

This proposal is supported by the Glasgow Bar Association. Even though there may be no genetic link between the person born of the surrogacy arrangement and the person they intend to marry or enter a civil partnership with, if that person was carried by the same surrogate, that may change the person's view as to whether they wish to enter into that relationship. It seems correct that a person born of a surrogacy arrangement should have access to that information when making such an important life choice.

Consultation Question 51.

19.62 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?

The Glasgow Bar Association agrees with this proposal.

19.63 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.

The Glasgow Bar Association would support the proposal that two people born to, and genetically related through the same surrogate should be able to access the register to identify each other, if they both wish to do so.

There would appear to be no reason not to extend this right to people born to the same surrogate but who are not genetically linked on the basis that they both wish to do so.

Consultation Question 52.

19.64 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:

if they are genetically related through the surrogate; and/or

if they are not genetically related through the surrogate.

This proposal could create a number of difficulties within the surrogate's family. We would support a proposal that would allow a surrogate's own child who is genetically related to a child born of a surrogacy arrangement to register their details once over the age of 18 allowing both parties to access the register to identify each other if they wish. It does not seem necessary to extend this to non-genetically related children.

Consultation Question 53.

19.65 For surrogacy arrangements outside the new pathway, we invite consultees' views as to whether details of an intended parent who is not a party to the application for a parental order should be recorded in the register.

It would be preferable for details of an intended parent who ultimately does not become a party to the application for a parental order to be recorded in the register. This may cause some practical difficulties but would be consistent with the argument that the child should have the right to access as much information as possible. We would support the proposal that where there is a single applicant for a parental order he or she should be required to confirm whether there was ever an intention for the application to be made jointly and if so details of the previous intended joint applicant should be notified.

Consultation Question 54.

19.66 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?

The Glasgow Bar Association agrees with the abolition of the six month time limits.

Consultation Question 55.

19.67 We provisionally propose that:

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;

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:

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

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

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

Do consultees agree?

The Glasgow Bar Association agrees with this proposal.

Consultation Question 56.

19.68 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?

19.69 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.

The Glasgow Bar Association agrees with part one of the question and would support an additional condition being imposed on the test for habitual residence, namely a qualifying period to avoid the risk of 'surrogacy tourism'. It would be undesirable if intended parents simply used the UK as a destination to enter into a surrogacy arrangement and would undermine the principle of trying to implement more regulated arrangements for surrogacy.

Consultation Question 57.

19.70 We invite consultees' views on whether:

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

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

Currently the three qualifying categories set out in s54(2) of the HFEA 2008 are:

- (1) Husband and wife**
- (2) Civil partners of each other; or**
- (3) Two partners who are living as partners in an enduring family relationship and are not within prohibited degrees of a relationship in relation to each other.**

There is also now provision to allow single people to apply for a parental order. We note that there is a suggestion that two people, not in a relationship and who are not within the prohibited degrees of relationship, could apply for a parental order. This would mean two friends living together could apply but not two sisters living together. At this stage we would not support reforming s54(2) of the HFEA 2008.

The current regime provides a basis for parental orders being made in a manner which makes clear who is to become a parent of the child born. There is a degree of certainty with the current restrictions in place about the family the child will be brought up by, whether that be a couple or a single person. To extend this to two people not in a relationship would not in our view, be in the child's best interests and may cause uncertainty in the long term.

Consultation Question 58.

19.71 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?

The Glasgow Bar Association agrees with this proposal.

Consultation Question 59.

19.72 We provisionally propose that the new pathway –

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

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?

19.73 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.

19.74 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?

The Glasgow Bar Association agrees that under the new pathway double donation be allowed but only in cases of medical necessity.

We do not think that double donation should be allowed under the parental order pathway in domestic surrogacy arrangements. The new pathway will provide a very clear history of the intended parents' involvement in the child's conception and this will be documented and easily accessed by the child in later life if they wish. This would not necessarily be the case under the parental orders pathway and it would be preferable to retain the genetic link here in order to ensure that the child has access to that information later on and the intended parent's involvement is clear from the outset due to the genetic link.

We agree with the proposal in relation to international surrogacy arrangements.

Consultation Question 60.

19.75 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?

The Glasgow Bar Association agrees with this proposal.

Consultation Question 61.

19.76 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?

The Glasgow Bar Association agrees with this proposal.

Consultation Question 62.

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

for cases under the new pathway to parenthood; and/or

for cases where a post-birth parental order application is made.

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

The Glasgow Bar Association agrees with this proposal.

Consultation Question 63.

19.79 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?

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

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

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.

19.81 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?

The Glasgow Bar Association agrees with part 1 of question 63.

If the parental order pathway is to act as a safety net for cases which fall outwith the new pathway, it would seem to be too stringent a requirement that those who contributed gametes are entered on the national register of surrogacy agreements. This may cause difficulties in certain cases, particularly those where donation has taken place overseas. If registration is required, some cases may find themselves caught between the two pathways. This is undesirable for all parties involved, in particular the child.

Alternatively, we would support the position that where a parental order is sought, and where a genetic link with one intended parent remains a requirement, as we support, the link should be evidenced to the court by way of a DNA test or equivalent conclusive medical evidence. This is not an onerous requirement but provides certainty for the court before a parental order is granted.

Consultation Question 64.

19.82 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?

19.83 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.

19.84 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?

The Glasgow Bar Association agrees with the proposal in part 1 of the question.

We do not think it is necessary to fix a maximum age for intended parents under the new pathway but it would be desirable for the intended parents' ages to be taken into account as part of the welfare assessment carried out prior to the child's conception. It would be of benefit to include their age as a specific consideration in the Code of Practice and would allow this to be considered in the round rather than an arbitrary maximum age being fixed.

We support the proposal that a minimum age of 18 be set for intended parents wishing to use the new pathway.

Consultation Question 68.

19.90 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?

The Glasgow Bar Association agrees with this proposal.

Consultation Question 69.

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

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

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

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?

The Glasgow Bar Association agrees with this proposal.

19.92 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.

The Glasgow Bar Association agrees that the list of offences that applies in the case of adoption is appropriate.

Consultation Question 79.

19.102 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;

The Glasgow Bar Association agrees with this proposal – but in accordance with a fixed rate level of compensation.

medical treatments relating to the surrogacy, including payments for each insemination or embryo transfer; and/or

The Glasgow Bar Association agrees with this proposal – but in accordance with fixed rates.

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.

The Glasgow Bar Association agrees with this proposal – but this will require to be case specific.

19.103 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.

The Glasgow Bar Association has no additional comments to add.

19.104 We invite consultees' views as to whether the level of compensation payable should be:

a fixed fee set by the regulator (operating as a cap on the maximum payable),

or

left to the parties to negotiate.

The Glasgow Bar Association considers a fixed fee should be set by the regulator.

Consultation Question 80.

19.105 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.

The Glasgow Bar Association agrees with this proposal.

Consultation Question 81.

19.106 We invite consultees' views as to whether:

intended parents should be able to buy gifts for the surrogate; and

if so, specific provision should be made for these gifts to be modest or reasonable in nature.

The Glasgow Bar Association considers gifts should not be excluded however there should be a limit imposed regarding the extent of the gifts.

Consultation Question 82.

19.107 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.

19.108 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.

The Glasgow Bar Association considers provision should be agreed for a fixed fee set by the regulator. The fee will be for gestational services, and not in relation to the transfer of the child.

19.109 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:

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.

The Glasgow Bar Association considers provision should be made for all of the above to be included in addition to any fixed fee payable to the surrogate.

Consultation Question 83.

19.110 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.

The Glasgow Bar Association considers provision should not be reduced in the event of a miscarriage. Much would need to depend on the circumstances of the termination of the pregnancy such as the health of the unborn baby and /or surrogate.

We take the view that for payment to be linked to the child being born alive would be incompatible with the UN Convention on the Rights of the Child ("UNCRC").

19.111 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).

The Glasgow Bar Association considers provision should not be made for the fee to be reduced and apportioned depending on the trimester of the pregnancy.

Consultation Question 84.

19.112 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?

The Glasgow Bar Association agrees with this proposal.

Consultation Question 85.

19.113 We invite consultees' views as to whether there are any categories of payment we have not discussed which they think intended parents should be able to agree to pay to the surrogate.

The Glasgow Bar Association considers there are no other categories of payment.

Consultation Question 86.

19.114 We invite consultees to express any further views they have about the payments that intended parents should be able to agree to pay to the surrogate.

The Glasgow Bar Association considers the payments and intended payments envisaged are covered by question 82.

Consultation Question 87.

19.115 We invite consultees' views as to whether there are specific methods of enforcing limitations that are placed on payments to surrogates that we should consider as part of our review:

for cases within the new pathway to parenthood; and

for cases where a parental order is made after the birth of the baby.

The Glasgow Bar Association considers provision should be made for the surrogacy agreement to be overseen by a regulated surrogacy agency, clinic or, possibly, by a professional such as a solicitor. In addition, we believe it is mandatory that the parties should receive legal advice prior to entering into the agreement.

Consultation Question 88.

19.116 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?

The Glasgow Bar Association agrees with this proposal.

19.117 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?

The Glasgow Bar Association does not agree with this proposal.

The lifestyle / health of the surrogate is paramount in any pregnancy and it is expected that any surrogate would comply with agreed terms relating to their lifestyle and if the surrogate does not comply with the terms this may have an impact on the surrogate's ability to enforce the agreement.

Consultation Question 92.

19.121 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?

The Glasgow Bar Association considers this could be useful to assist in smoothing the logistical path of international surrogacy but could become complicated given the potential for the surrogate to change her mind after the child's birth.

Consultation Question 93.

We invite consultees to provide us with evidence of the experience they have had of applying for a visa for a child born through an international surrogacy arrangement. In particular, we would be interested to hear how long the application took after the birth of the child, and any information consultees have of causes of delays in the process.

This question is not applicable to the Glasgow Bar Association.

Consultation Question 94.

19.123 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?

The Glasgow Bar association considers this could be useful to assist in smoothing the logistical path of international surrogacy and is a more moderate step than authorising a passport application per question 92.

19.124 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?

The Glasgow Bar Association agrees with this proposal.

19.125 We provisionally propose that:

(1) the grant of a visa should not be dependent on the child breaking links with the surrogate; or

(2) that this condition should be clarified to ensure that it does not prevent the child having contact, and an on-going relationship, with the surrogate.

Do consultees agree?

The Glasgow Bar Association agrees with both points. Clarification would be of use.

19.126 We invite consultees' views as to whether the current requirement for the grant of a visa outside the Rules that the intended parents must apply for a parental order within six months of the child's birth should be removed (regardless of whether the availability of the visa is brought within the Rules), if our provisional proposal to remove the time limit on applications for parental orders is accepted.

The Glasgow Bar Association considers if the time limit on applications is removed, this would make sense.

Consultation Question 95.

19.127 We provisionally propose that it should be possible to open a file and begin to 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?

The Glasgow Bar Association agrees with this proposal.

Consultation Question 96.

19.128 We invite consultees to provide us with evidence of the experience they have had of applying for a EU Uniform Format Form for a child born through an international surrogacy arrangement. In particular we would be interested to hear how long the application took after the birth of the child, and any information consultees have of causes of delays in the process.

This question is not applicable to the Glasgow Bar Association.

Consultation Question 97.

19.129 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?

The Glasgow Bar Association agrees with this proposal. This comprehensive guide will be of assistance to many intended parents.

Consultation Question 98.

19.130 We provisionally propose that international surrogacy arrangements should not be eligible for the new pathway to parenthood.

Do consultees agree?

The Glasgow Bar Association agrees with this proposal.

Consultation Question 99.

We provisionally propose that:

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

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?

The Glasgow Bar Association agrees with this proposal. It is important that the Secretary of State is satisfied.

Consultation Question 100.

19.134 We invite consultees to tell us of their experience of surrogacy arrangements in the UK involving foreign intended parents.

19.135 We invite consultees' views as to whether:

any restriction is necessary on the removal of a child from the UK for the purpose of the child becoming the subject of a parental order, or its equivalent, in another jurisdiction; and

if such a restriction is necessary, there should be a process allowing foreign intended parents to remove the child from the jurisdiction of the UK for this purpose and with the approval of the court and, if so, what form should that process take.

This question is not applicable to the Glasgow Bar Association.

Consultation Question 101.

19.136 We invite consultees' views as to whether the current application of the law on statutory paternity leave, and statutory paternity pay, to the situation of the surrogate's spouse, civil partner or partner requires reform.

The Glasgow Bar Association considers more detailed consultation is required on this and our response will depend on the outcome of this consultation.

Consultation Question 102.

19.137 We provisionally propose that provision for maternity allowance should be made in respect of intended parents, and that any such provision should be limited so that only one intended parent qualifies.

Do consultees agree?

The Glasgow Bar Association agrees with this proposal.

Consultation Question 103.

19.138 We invite consultees' views as to:

whether there is a need for reform in respect of the right of intended parents to take time off work before the birth of the child, whether for the purpose of induced lactation, ante-natal appointments or any other reason; and

if reform is needed, suggestions on reform.

The Glasgow Bar Association considers more detailed consultation is required on this and our response will depend on the outcome of this consultation.

Consultation Question 104.

19.139 We invite consultees' views as to whether the duty of employers to provide suitable facilities for any person at work who is a pregnant woman or nursing mother to rest under Regulation 25 of the Workplace (Health, Safety and Welfare) Regulations 1992 is sufficient to include intended parents in a surrogacy arrangement.

The Glasgow Bar Association is unable to answer this question which is more properly directed to those with employment law expertise.

Consultation Question 105.

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

Please see the above response (Question 104.)

Consultation Question 106.

19.141 We invite consultees' views as to whether they believe any reforms in relation to surrogacy and succession law are required.

The Glasgow Bar Association is unable to answer this question which is more properly directed to those with succession law expertise.

Consultation Question 108.

19.145 We invite consultees' views as to whether there are any other legal issues in relation to surrogacy, not covered in this Consultation Paper, that merit examination.

The Glasgow Bar Association considers that the "Ten year" rule in relation to egg freezing requires to be carefully considered.

Consultation Question 111.

18.6 We invite consultees' views as to the impact (social, emotional, financial or otherwise) of the current law where the intended parents are not the legal parents from birth of the child born of the surrogacy arrangement.

The Glasgow Bar Association considers there is a balance to be struck given the current law regarding application for a parental order and the impact both upon the intended parent and the child of the current law. If the current law were changed, careful thought is needed.

Consultation Question 114.

18.13 We invite consultees who consider that they might be able to fulfil the roll of the independent professional discussed in Chapter 9 to tell us their profession; and what they would charge to provide such a service.

This question is not applicable to the Glasgow Bar Association. It should more appropriately be answered by any individual member who considers this question applicable to them.

Consultation Question 118.

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

We consider it important that the "Ten year" rule which applies to egg freezing is reconsidered immediately. It is arbitrary and causes significant distress to women who are impacted by it. We also consider that the rules around the use of frozen embryos should be reconsidered.

**THIS NOW CONCLUDES THE CONSULTATION RESPONSE BY THE
GLASGOW BAR ASSOCIATION**



glasgow bar association
established 1959