FACULTY OF ADVOCATES

**Response from the Faculty of Advocates**

**to**

**the Consultation on**

**Building families through surrogacy: a new law**

## Introduction

The Faculty of Advocates appreciates the substantial efforts of the Law Commission and Scottish Law Commission in reviewing the law relating to surrogacy and making proposals for change. The resulting report is lengthy. Completing a response to the consultation has been challenging. We have confined our response to matters of law where we are in a position to comment. There are matters falling within the consultation that relate to questions of policy, where we have refrained from comment, or commented subject to a decision on how the issue of policy is decided. We have not answered those questions relating solely to England and Wales, or calling for experience from participants in surrogacy arrangements. With those caveats our responses are as follows:

## Chapter 6. The court procedure

### Question 6

(1) The issue over curators' and reporting officers' expenses reflects the position in applications for adoption and permanence orders. The local authority is bound to maintain a panel of persons to be appointed as curators *ad litem* and reporting officers, and to pay their fees (Curators Ad Litem and Reporting Officers (Panels) (Scotland) Regulations 2001 (SSI 2001/447) (as amended)). The court also retains the

power to make an award of judicial expenses payable by a party to an action, both in terms of the court rules and at common law. This position was confirmed by the Second Division in *Clackmannanshire Council, Petitioners* 2016 SLT 1071 and *City of Edinburgh Council, Petitioners* 2016 SLT 1075. The Inner House expressly endorsed the "dual system of remuneration", commenting that any award by the court "should be under deduction of any payment received from the local authority". This leaves an applicant for an adoption order or a parental order exposed to what may be a substantial fee, charged on a "time and line" basis, to the extent this exceeds the fee payable by the local authority. The Court has however expressly approved the position, as necessary to provide appropriate remuneration to persons carrying out the responsible work of a curator and reporting officer.

In the circumstances it may be difficult to address expenses of curators and reporting officers in parental orders without addressing their expenses in adoption orders as the work is equivalent. Any provision for expenses is likely to have to be on a realistic "time and line" basis. Local authorities will not welcome being made to pay "time and line" fees for parental orders, and it will be difficult to see why they should be asked to do so. Petitioners for parental orders may have to be prepared to pay a significant cost for the necessary report to allow the court to make a decision about the factors set out in section 14 of the Adoption and Children (Scotland) Act 2007, as they apply to parental orders.

(2) It is not necessary to make further provision for interim orders in relation to parental responsibilities and parental rights in parental order applications. This power already exists under s 11 of Children (Scotland) Act 1995. Section 11(1) and (3)(b) gives the court the power to make orders relating to parental responsibilities and parental rights in any proceedings where it considers it should make such an order. The power has been used in adoption proceedings. It was recently commented on by the Inner House in the context of adoption proceedings in *LO v N and C* 2017 Fam LR 44 at para 21.

(3) There should be clarity over jurisdiction. For petitioners habitually resident in Scotland, applications should be made to Scottish courts, not English courts. The

relevant entry in the Register of Births should be made in Scotland, in accordance with Scottish legislation (cf the position mentioned at para 3.112).

**Chapter 8. Legal Parenthood – a new pathway**

**Question 7**

This is a radical proposal. It substitutes legal status for gestational and genetic status. It must however be accepted that surrogacy is now a fact of life. The use of surrogacy is expanding. Provision must be made, and the welfare of the child must be the paramount consideration. The proposal has the benefit of avoiding a period when the child is living with persons who regard themselves as parents, but have no legal status as such. The second consideration is that surrogates must be protected from exploitation. We recognise that well-considered domestic arrangements will satisfy these objectives better than restrictive provisions that drive would-be parents overseas. Whether the new pathway will satisfy these objectives will depend on robust procedural safeguards.

It must, of course, be recognised that parentage acquired through the new pathway may not be recognised in other States, but that problem may exist in any event, where a child is born as a result of a surrogacy arrangement. There are numerous possible consequences in terms of international private law, including issues in relation to succession. A concomitant of proceeding with these proposals should be to support the work of (*inter alia*) the Hague Conference in trying to find common ground on the basis of which surrogacy may be accepted.

**Question 8**

We agree that records of surrogacy arrangements should be retained and agree that retention for at least 100 years is appropriate. This is consistent with the period of retention of adoption records by an adoption agency under regulation 28 of the Adoption Agencies (Scotland) Regulations 2009 (SSI 2009/154).

We are aware of circumstances in which vital forms of consent have been "lost" by IVF clinics (see *Re Human Fertilisation and Embryology Act 2008 (Cases A, B, C, D, E, F, G and H)* [2015] EWHC 2602 (Fam)). In Scotland it is possible to register documents for preservation in the Books of Council and Session. While this precise form of registration would give insufficient protection of privacy, consideration should be given to a scheme operating on similar, but confidential lines, with recovery of the surrogacy agreement available only to its signatories, the child on attaining an appropriate age or persons able to demonstrate an interest. We note the proposal for a national register and refer to our answer to Question 47.

**Question 9**

If a regulated surrogacy organisation is involved then that organisation should adhere to the highest standards, including those relating to knowledge of identity for the child.

**Question 10**

The new pathway should not be available in a case involving anonymously donated gametes in traditional surrogacy arrangements. The integrity of the new pathway should be protected by robust safeguards, and available only in circumstances where there is open information about origins. If anonymously donated sperm are used then any acquisition of legal parenthood should be subjected to the scrutiny of a court, by an application for a parental order.

**Question 11**

We agree that the surrogate should have a short period after the birth of the child to withdraw the case from the new pathway. While 6 weeks may be too long, we consider 2 weeks (21 days to register the birth less a week) is too short. There should be one period applicable to all parts of the UK, to avoid confusion. We consider a period of 4 weeks about right. This may mean adjusting the period for registration of the birth in Scotland.

**Question 12**

We agree that where the surrogate no longer agrees, then legal parenthood should revert to the position that would have prevailed but for application of the pathway and the intended parents should be able to apply for a parental order.

**Question 13**

If all the conditions of the new pathway are not met, then the default should be a requirement to apply for a parental order. The procedure proposed looks a little complex, but as we understand the proposal, when registering the birth the intended parents will either have to produce (a) their own declaration that to the best of their knowledge the surrogate has had capacity (and has not objected) or (b) a positive consent from the surrogate.

This may be open to abuse. Might it be better to ask the regulated surrogacy organisation involved to provide a statement to the effect that they have visited the surrogate on a date falling within a specified period after the birth and found that she has capacity and has no intention of objecting to registration of the birth? We would be keen to see safeguards to ensure that there is no exploitation of surrogates. We are aware of disquiet over coercion of surrogates in some overseas situations.

We agree that if the surrogate lacks capacity at the relevant time then the pathway should not apply but it should be possible to apply for a parental order.

**Question 14**

We agree that in cases that follow the new pathway the welfare of the child should be assessed before the surrogacy arrangement is entered into.

A welfare assessment before the arrangement is embarked on is in any event preferable to an assessment after the birth, when the child has arrived and provision must be made. In those circumstances non-ideal arrangements may be accepted as the best that can be done. It would be better to carry out the assessment and not to embark at all in situations where the welfare of the resulting child would not be well-served.

On the other hand there is no welfare check before conception in ordinary non-surrogacy situations, so a balance must be struck. We do not consider that surrogacy organisations or regulated clinics should provide surrogacy services to persons where difficulties can be anticipated. The Code of Practice may require to be more detailed and clear regulatory arrangements made to ensure observation of the Code.

We would also support a provision for the surrogacy organisation or regulated clinic to give notice which would have the effect of removing the child from the pathway in circumstances where there is a clear difficulty over welfare (eg it comes to light that one of the intended parents has committed a serious criminal offence that would affect capacity to care for the child. In Scotland this could be an offence mentioned in Schedule 1 to the Criminal Procedure (Scotland) Act 1995). The case could still potentially proceed by way of parental order.

**Question 15**

We agree that the surrogate's spouse or civil partner should not be a legal parent in a pathway case, where the surrogate objects to the intended parents having legal parenthood at birth.

Logically, in the case of a surrogacy arrangement of any kind, the surrogate's spouse or civil partner should not be a legal parent.

**Question 16**

This is largely a social/emotional issue, but we see no particular objection to the proposals that would allow intended parents to be registered as parents, and in the case of the new pathway for the surrogate to provide consent to registration before the period for objection has expired. A surrogate should also be able to consent to registration in cases falling outside the new pathway.

**Question 17**

While we agree that, in principle, the intended parents should be registered as parents if the child dies before the making of a parental order, we note that no consideration is given to inheritance or property rights that might have accrued to the child, depending on the child’s status as the child of the surrogate or of the intended parents. Inheritance is a more acute problem in the case of parental death, but it does require to be considered in the case of a child who dies.

**Question 18**

If the surrogate dies in childbirth or before the end of the period when she can object, then we cannot see the point of making the intended parents apply for a parental order. There is no longer any necessity for protection of the surrogate’s right. There is little point in compelling the intended parents to make an application. That said we refer to our answer to paragraph 14, where we suggest that the surrogacy organisation or regulated clinic should be able to give notice which would have the effect of removing the child from the pathway in circumstances where there is a clear difficulty over welfare. This could be sufficient to afford any protection the child might require in the event of death of the surrogate.

**Question 19**

We are inclined to agree that if both intended parents die then the child should be treated as their child, unless the surrogate objects. This does mean that it lies in the hands of the surrogate to deprive the child of inheritance rights. There are permutations of this situation to consider. What if the surrogate did not object, but sought to resume care of the child, with the benefit of any inheritance?

Outside the pathway the issue is more difficult. The surrogate did not intend to be the legal parent. It therefore makes sense for it to be possible to make an application that would allow the child to be as full a member of the intended family as circumstances permit. On the other hand, if the surrogate is prepared to be the legal parent then there are good arguments to permit her to do so, subject to appropriate acknowledgement of the intended parents in the register of surrogacy arrangements.

**Question 20**

We agree that the position of a second intended parent requires some protection, where the couple concerned have separated, and that the proposals in this respect are sensible.

**Question 21**

If the "three-parent model" resulted in three persons holding PRR it would result in the necessity for continuing consultation between the intended parents and the surrogate in respect of all major decisions relating to the child (Children (Scotland) Act 1995, section 6). This would be inconsistent with the intentions of the persons concerned. It has potential to overshadow and destabilise the early weeks of the child's life. It lacks the simplicity and clarity of the new pathway. On the other hand, we are aware of cases where a three-parent solution has worked satisfactorily, but on the basis of prior agreement rather than as a default model.

If there is to be requirement to apply to the court to remove parental status from the surrogate, what would the test be for granting the application? If the application is refused, or never made, the child would have a lifelong position of three parents. How would that be represented on a birth certificate or other identity document? What would be the implications for the law of succession?

The requirement of positive consent may bring the situation to a close at the earliest possible stage, but if there is no consent could perpetuate it. Lapsing might be the least fraught way of ending the position.

**Question 22**

We refer to our answer to question 14. We would support robust oversight of the new pathway. We would therefore support the proposal for a "panel" convened by the surrogacy agency. We do not anticipate that this would require the level of scrutiny involved in the adoption process, as surrogacy, unlike adoption, does not involve the placement of unrelated children who may already have difficulties, but it would provide a check on cases where

there may be cause for concern. For example it should show up cases where there is exploitation of a surrogate, or clear inability on the part of the intended parents to provide a suitable home for a child. There should be some external scrutiny on the work of the agency, and this could be provided through specification of the composition of the panel.

**Question 26**

In Scotland the starting point is that a person who has care and control of a child, but no parental responsibilities or parental rights, has the responsibility to do what is reasonable in the circumstances to safeguard the child's health, development and welfare, although giving consent to any surgical, medical or dental treatment or procedure is contingent on having no knowledge that a parent would refuse consent (Children (Scotland) Act 1995, section 5). The position of intended parents is therefore already largely covered, without requiring them to intend to apply for a parental order. There may be some scope for reinforcing their position by express acquisition of full PRR, as that would put them in the same position as any other parent of a very young child.

**Question 27**

We agree that where the new pathway applies then intended parents should be in the same position as any other parents as regards PRR and should have full parental responsibilities and parental rights on birth. We also agree that this should continue if the surrogate objects, although the situation in Scotland would then in any event be covered by the Children (Scotland) Act, section 5 (see above).

**Question 28**

The Children (Scotland) Act 1995 already provides that parental rights can be exercised by parents independently of one another (section 2(2)), but as explained above there is still a duty to consult in relation to major decisions (section 6). It is inconsistent with the new pathway for the surrogate to hold parental responsibilities and parental rights after the birth of the child. It would be more logical to provide for the surrogate's parental responsibilities and rights to be suspended after birth, extinguished if there is no objection but revived in the case of objection.

**Question 29**

We see a clear case for restrictions on any parental responsibilities or parental rights for a person who would have these purely because married to or a partner of the surrogate.

We also see a case for avoiding conflict between the exercise of parental responsibilities and parental rights by both surrogate and intended parents.

## Chapter 9. The regulation of surrogacy arrangements

**Question 30.**

We agree that traditional surrogacy arrangements should fall within the scope of the new pathway.

**Question 31.**

The Faculty is not suitably qualified to comment on this issue.

**Question 32.**

The Faculty has no comment on these questions.

**Question 33.**

(1) We agree that there should be regulated surrogacy organisations.

(2) We agree that there should be no requirement for a regulated surrogacy organisation to take a particular form, provided the body is legally accountable.

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

**Question 34.**

We further agree with the proposals that the person responsible must be responsible for:

(1) representing the organisation to, and liaising with, the regulator;

(2) managing the regulated surrogacy organisation with sufficient care, competence and skill;

(3) ensuring the compliance of the organisation with relevant law and regulation, including the creation, maintenance and operation of necessary policies and procedures;

(4) training any staff, including that of the person responsible; and

(5) providing data to the regulator and to such other person as required by law.

We consider that there must be checks to ensure that a woman has not been compelled in any way to enter into an agreement for her to be a surrogate mother. A declaration to that effect should be a minimum requirement.

**Question 35.**

Regulated surrogacy organisations should be non-profit making bodies. It is important that there is no exploitation of surrogate mothers. There must be robust protections in place and no dividends or bonuses should be paid.

**Question 36.**

Provided there is no exploitation of surrogate mothers, we have no view as to the definition of matching and facilitation services.

**Question 37.**

We agree that no organisation other than those regulated by law should be able to offer matching and facilitation services in respect of surrogacy.

Surrogacy must be highly regulated. Only regulated surrogacy organisations should be able to offer services. Any organisation that is not regulated and that offers surrogacy services must be considered illegal.

**Question 38.**

Criminal, civil and regulatory sanctions should potentially be available. Much depends on the nature of the "breach". An unregulated organisation maintaining a database of individuals and recruiting women as surrogate mothers may amount to a regulatory offence but an unregulated organisation carrying out medical procedures and prescribing hormones for the use of IVF may amount to a criminal offence. We are concerned that there should be no exploitation and trafficking of women. The Care Inspectorate maintains a model of what can happen to institutions that are not properly regulated. That model should inform the model for regulation of surrogacy.

**Question 39.**

We agree provisionally 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.

We consider the application of the Authority's Code of Practice to be a matter of policy, to be left to the Authority.

**Question 40.**

We agree that surrogacy agreements should remain unenforceable (subject to the proposed exception in relation to financial terms).

**Question 41.**

There should be no prohibition against charging for negotiating, facilitating and advising on surrogacy arrangements. It is anticipated that solicitors will be instructed to frame such arrangements and it should be possible to pay a fee for such services.

**Question 42.**

If advertising is unrestricted then we can expect e.g. Google and Facebook to direct advertising towards young women who may view entering into a surrogacy arrangement as a means to generate income by way of "reasonable expenses". The model of advertising must be robust and treated akin to advertising for private healthcare and adoption and fostering agencies. The regulations used for those organisations may inform advertising for surrogacy.

## Chapter 10. Children's access to information about surrogacy arrangements

### Question 44

The proposed approach of intended parents automatically being registered as parents on birth certificates should not, in our view, limit the child of a surrogacy arrangement having access to important information about their genetic heritage. The intention to include, on the full form of the birth certificate only, the information that the birth is the result of a surrogacy arrangement would address that, and open up opportunities for the child to undertake further enquiries if desired.

### Question 46

This is a question relating to England and Wales, but we agree a child in those jurisdictions should be able to access documents in the court file relating to a parental order as this brings some parity to the situation in Scotland where a child can access the whole of the court process, albeit in Scotland this can occur at the age of 16.

### Question 47

We agree that a national register of surrogacy arrangements should be created to record the identity of the intended parents, the surrogate and the gamete donors. The only concern would be ensuring suitable safeguards and limitations are in place regarding who can access that information.

It makes sense that the proposed register should be maintained by the Authority, given the relatively small numbers involved, but we also consider that approach possibly provides better protection from access to the material by the wider public. We would also agree with

the suggestion that this should apply to all surrogacy arrangements. The nature of the information for the register is in accord with that provided in terms of a petition for parental orders, so we do not see any issues with what is proposed.

The suggested means of recovering the relevant information through the application form/petition for a parental order, appears to be a simple way of achieving this, as long as there remain strong safeguards in place over who can access the court process, and register.

**Question 48**

We view the answer to this question as a matter of social policy and so make no comment.

**Question 49**

We note the difficulties posed by the fact the position in Scotland is different due to the age of legal capacity being 16, however agree that uniformity is preferable across the United Kingdom in terms of regulating access to identifying and non-identifying information. Maintaining that uniformity with donor-conceived children is also appropriate. We also agree that an opportunity to receive suitable counselling, about the implications of the request being answered, is an important part of this regulation.

We wonder whether consideration might be given to creating an exception, such that in Scotland, where someone of age 16 is able to marry and contemplating marriage, they should be able to access identifying information, subject to establishing a real intention to marry, and safeguards re the provision of counselling.

We consider that there may be exceptional circumstances where a child under 18 (regarding identifying information), or a child under 16 (regarding non-identifying information), should have the opportunity to access information. The need could, for example, arise in connection with treating a child for mental health issues or psychological problems. In exceptional circumstances therefore, we consider that such access should be possible, but would not wish that to be aligned with the legal parents having consented. A child’s need to access that

information at a younger age may relate to disputes with parents over disclosure, when consent is highly unlikely to be forthcoming. Our preference would be to allow younger children access, only in limited circumstances, and where they have received counselling and the counsellor judges that he or she is sufficiently mature to receive this information.

**Question 50**

As suggested in answer 49, we think that a person intending to marry, or indeed more widely, intending to enter into an intimate physical relationship, should be able 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. We suspect that the frequency of such requests might be low, but where made the matter would clearly be of some importance to the individual concerned. Given the sensitivity of the issue, again counselling provision might be appropriate, and there might be a need for the other party to provide their consent, the assumption being that it is already known between the two individuals they were born through a surrogate.

**Question 51**

We agree 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. The genetic link is important in this consideration.

Whether 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, is really a matter of social policy. We can see no particular need for this to be provided for in a legal context.

**Question 52**

In a situation where the surrogate's own child and the person carried by the surrogate are genetically related, due to the surrogate having provided the egg, we think there should be scope for them to access the register to identify each other, if they both wish to do so. There

may be medical reasons for that, and indeed issues in the event of marriage or intimate relationships. Again, the genetic connection is the important aspect of this.

If they are not genetically related through the surrogate, then this is really a matter of social policy, and we have no particular view.

**Question 53**

Similar situations can arise in families where there is no surrogacy background, in that a father of a child may either not be aware that they are the father of a child, due to the circumstances of conception, or be aware they are but choose to take no further part in the child's life. In those circumstances we would not prevent a child from knowing or indeed finding out who their father was. The right of the child to know their identity is an aspect of private life in terms of article 8 of ECHR and is also protected by article 8 of UNCRC, which would cover the preceding scenario. There is of course in that situation a genetic link. We doubt whether, in a situation where the intended parent has played no part in the child's life, and has no legal status in relation to the child, there is in fact any need for their identity to be known, or recorded. Recording that information, with the right of a child to access it in due course, as identifying information, serves little useful purpose. However, if it were felt necessary to record the details of the intended parent who is not a party to the application for a parental order, on the basis that this is part of a child's history that might not otherwise be known, access to that information should perhaps be on the basis of the intended parent's consent.

**Chapter 11. Eligibility criteria for a parental order**

**Question 54**

We agree that the 6 month time limit should be abolished. It is arbitrary. Although it allows the issue of parentage to be determined at an early stage, it is otherwise unrelated to the child's best interests.

The authorities show cases where the need for a parental order is not known to applicants who have made informal arrangements until an event later in the child's life reveals the need for a parental order.

**Question 55**

We agree the provision, that consent is not required if the surrogate cannot be found, should remain, as to do otherwise would leave a child in such a position without a legal parent.

We also agree that there should be provision to dispense with consent. The optimum legal outcome for a child is one which provides predictability and permanence. The private law orders which are available where the surrogate does not consent do not provide this. The making of a parental order without consent would necessarily be subject to tests of necessity and proportionality.

The factors to be considered by a court which are set out in the legislation have operated well in the context of adoption.

**Chapter 12. Eligibility criteria for both a parental order and for the new pathway**

**Question 56**

We agree in part. Habitual residence is recognised in international law as a qualification for jurisdiction and should remain.

The model of pan UK jurisdiction for parental orders is at odds with other children's legislation (for example private law orders). It is justified in adoption legislation because adoption agencies place children outwith the jurisdiction in which they are based. No such issue arises in the case of surrogacy. The proposed legislation should set out a habitual residence requirement which recognises that the United Kingdom consists of three separate jurisdictions. Orders should be dealt with in the part of the UK in which the applicants habitually reside.

**Question 57**

The requirement of legal partnership or an enduring relationship in relation to joint applicants ensures that joint orders are only available to couples who present as offering a continuing and stable family home. The quality of adult relationships is not a feature for single applicants who obviously cannot split. This is not an inconsistency as suggested by one of the correspondents.

**Question 58**

We agree that intended parents should declare that they intend the child's home to be with them. The proposed declaration would be significant evidence of joint intention which would be relevant to dispensing with consent. It avoids disputes about original intention which beset so-called "known donor" cases.

**Question 59**

Whilst this is primarily an issue of policy, we express reservations about double donation being permitted at all. The existence of a genetic link is a characteristic of a surrogacy arrangement. The arrangement provisionally proposed involves the creation of a foetus without a genetic link. It is difficult to understand the social purpose of such an arrangement particularly where there is a known shortage of adopters who also care for children with whom there is no genetic link. Double donation would be a matter of concern as it presents a risk of exploitation and even eugenics.

**Question 60**

For the reasons given above we have reservations about double donation even in cases of medical necessity.

**Question 61**

We do not answer this question, nor question 62, in the light of our answer to question 59.

**Question 63**

We agree that in all cases (whether pathway or parental order) information as to the child's genetic make up should be recorded and proved, if disputed, by medical or DNA evidence.

**Question 64 (age of applicants)**

We agree that the age of the applicants is a welfare consideration in applications for parental orders.

We also agree that there should be a maximum age for cases which are not subject to a Court welfare test in which its relevance can be evaluated. It should be at or about 50 which makes it likely, (or average life expectancy) that the applicants will survive throughout the child's early life and into adulthood.

Eighteen is a suitable minimum age for the pathway.

**Question 65**

We agree 18 is a suitable minimum age for surrogates.

**Chapter 13. Eligibility criteria for the new pathway**

**Question 66**

There is no medical testing of a parent before birth in ordinary course. On one view it is a matter for the surrogate, any partner of the surrogate, and any intended parent to agree whether there should be medical testing before entering on the new pathway. This applies particularly in relation to genetic conditions where testing is not the norm. While we see the argument for medical testing before providing gametes when embarking on the new pathway we have reservations about this.

If there is to be testing, the Faculty is not best placed to comment on the appropriateness or feasibility of specific types of medical testing.

**Question 67**

We agree with the proposal for counselling as this will ensure that those participating in the process of surrogacy are aware of the consequences. We consider that it would be important that the requirement for counselling might be set out in statute as one of the eligibility requirements for entry into the new pathway.

**Question 68**

We agree that entering into a surrogacy arrangement in the new pathway has a very significant legal effect and that 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.

**Question 69**

We agree with the checks and screening proposed. It is our view that the assessment must focus on criminal offences for behaviour that amounts to risk of harm to a child as opposed to any criminal offences. We would see this as part of the robust safeguarding we see as essential in implementation of the new pathway.

We consider that, in relation to Scotland, the list of offences that applies in the case of adoption (as set out in appendix 3 of the consultation paper, ie the list in Schedule 1 of the Criminal Procedure (Scotland) Act 1995) would be appropriate in the case of surrogacy arrangements in the new pathway.

**Question 70**

We are of the view that it should not be an eligibility requirement of the new pathway that the surrogate has previously given birth. While some women may use their prior experience of

pregnancy and childbirth to help them to assess whether they are good candidates to act as a surrogate, other women may be able to recognise that they will manage the experience of surrogacy well without having been pregnant before. Women who do not wish to be mothers should not be excluded from being surrogates.

**Question 71**

We agree that there should not be a maximum number of surrogate pregnancies that a woman can undertake as an eligibility requirement of the new pathway and that informed consent of the surrogate is key. The protections provided by the proposed screening requirements ought to ensure protection of physical health, and the proposed counselling process ought to reduce risks to psychological health.

**Chapter 14. Payments to the surrogate by the intended parents**

**Question 72**

A response on the issue of costs is difficult as it is difficult to find satisfactory limits. The current law is not applied. While some surrogacy is entirely altruistic, other surrogacy services are provided on a commercial basis (in relation to which see our answer to Question 82 below). We wholly oppose any exploitative arrangements but these should not be confused with commercial arrangements, which may be acceptable if properly regulated.

If there is to be some limitation on payments then we observe that there is a good argument for payment of costs by the intended parents to the surrogate to be based on an allowance, i.e. an amount agreed at the start of the surrogacy arrangement which is broadly related to the surrogate's anticipated costs, but which does not need to be an exact amount. We appreciate this may mean that the sums paid are not actually used for their intended purpose and may therefore result, in effect, in the surrogate making a financial gain (although any such gain may in practice be modest). Requiring receipts, in our view, could lead to practical challenges, and place an unnecessary burden on the surrogate in independent arrangements. Payment by allowance would also allow payments to be made regularly and at agreed time periods, so the surrogate would not require to be out of pocket in advance of expenses being refunded.

**Question 73**

We are of the view that intended parents should be able to pay the surrogate essential costs relating to the pregnancy. We would consider that essential costs should include all necessary and unavoidable costs before, during and after the pregnancy. We would suggest including as examples of that: costs associated with relevant medical procedures including attending pre- and post-natal appointments, additional clothing that the surrogate needs as a result of the pregnancy, additional food that the surrogate needs as a result of the pregnancy, travel costs the surrogate will require to incur as a result of the pregnancy, time off work to recover from childbirth, costs incurred while the surrogate recovers from the birth.

**Question 74**

We are of the view that intended parents should be able to pay the surrogate additional costs relating to the pregnancy i.e. those costs that arise because of the pregnancy, but are not necessarily essential. We would suggest including as examples of that: domestic costs to help the surrogate during her pregnancy, child care costs to help the surrogate during her pregnancy, costs of taxis to and from relevant medical appointments rather than using other public transport, costs of taxis to and from work rather than using other public transport, payments for fitness and other classes and supports designed to support pregnant or post-natal women.

**Question 75**

We are of the view that intended parents should be able to pay all costs that arise from entering into a surrogacy arrangement, and those unique to a surrogate pregnancy. We would suggest including as examples of these costs: costs incurred in the parties meeting to get to know each other before the pregnancy, costs of implications counselling for the surrogate, costs of legal advice for the surrogate, costs of support with the surrogate's recuperation.

**Question 76**

We are of the view that intended parents should be able to pay their surrogate her actual lost earnings (whether the surrogate is employed or self-employed) to the extent of any shortfall between the surrogate's lost earnings and her maternity payments.

**Question 77**

Agreement by intended parents to pay a surrogate's lost potential earnings (whether employment related or not) may lead to undertaking an uncertain form of liability. In providing informed consent a surrogate should appreciate that potential earnings may be lost. We do not consider that it would be necessary for lost potential earnings (employment related or otherwise) to be a heading of potential payments.

**Question 78**

We see the case for the surrogate to receive compensation for any financial consequences of agreeing to undertake the pregnancy, so she is not worse off in the future. We would include consideration of lost pension contributions.

**Question 79**

Whilst we do not consider that intended parents should be liable in any way to pay compensation to the surrogate for the listed events, we do not consider it necessary to prohibit intended parents from being able to pay a form of compensation for the listed events should the intended parents wish to do so. There may need to be consideration of who should pay an insurance premium in respect of any such event. There may also require to be consideration of whether there may be another source of compensation, for example in the event of medical negligence.

**Question 80**

We do not consider there should be payment of compensation in the event of the surrogate's death, although agreement on a life insurance policy may be a reasonable part of an agreement.

**Question 81**

We are of the view that intended parents should be able to buy reasonable gifts for the surrogate. We agree that a potential limit based on a "modest" or "reasonable" gift would be preferable to one based on the financial value. The relevant point is to exclude "remuneration" under the guise of "gift".

**Question 82**

Whether to permit commercial surrogacy is a policy issue on which we have no comment.

If the policy issue is decided in favour of permitting commercial surrogacy then we consider that the fee should be any sum agreed between the parties to the surrogacy subject to a cap fixed by the regulator. The payment should be linked to the surrogate's gestational services, and not to the transfer of the child, or to the acquisition of legal parenthood. We agree that any fee payable to the surrogate could not be dependent on the pregnancy resulting in a live birth. The agreement between the parties should set out what is to happen in relation to the fee following a miscarriage or termination.

If provision is made for intended parents to pay a woman a fixed fee for the service of undertaking surrogacy, the law should permit payment by the intended parents of the following other costs - essential costs relating to the pregnancy, additional costs relating to the pregnancy, lost actual earnings and gifts.

**Question 83**

Any answer to this question must be viewed as contingent on a decision in relation to whether, as a matter of policy, commercial arrangements for surrogacy should be permitted. If so, then payments should be agreed between the parties in advance. If the payment is linked to the surrogate's gestational services, parties could agree to reduce the payment in the event of early termination or miscarriage.

**Question 84**

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

**Question 87**

We do not consider that there are specific measures that should be introduced to assist in the enforcement of limitations on permitted payments where a parental order application is made after the birth of the child. We are of the view that the pathway to parenthood provides a more effective means of ensuring compliance with limitations on payments that are permitted. The new pathway has the advantage that the legitimacy of the payments made is established prior to conception. We agree that the loss for the intended parents of being recognised as legal parents at birth, and the surrogate becoming the legal parent when she does not wish to do so, will be an incentive for the parties to ensure that only permitted payments are made.

**Question 88**

We are of the view that financial terms of a surrogacy agreement entered into under the new pathway to parenthood should be enforceable by the surrogate.

**Chapter 16. International surrogacy arrangements**

**Question 92**

We agree that it would be helpful for it to be possible to commence the application process for obtaining registration of a child born from an international surrogacy arrangement and obtaining a passport, prior to birth of the child. Lengthy delays, while the child remains overseas, are likely to have an adverse effect on welfare. The welfare of the child should in these circumstances be a primary consideration, in terms of article 3 of the United Nations Convention on the Rights of the Child.

**Question 94**

We agree that the process of applying for a visa should begin before the birth of the child, for the reason given in answer to Question 92. We also agree that the grant of a visa should, in the interests of clarity and certainty, be brought within the Immigration Rules. We see no reason to require that links with the surrogate should be broken, as a condition of grant of a visa and we agree that it should be possible for the child to have future contact with the surrogate.

If the time limit for applying to the court for a parental order is removed, then it is difficult to maintain the time limit for the purposes of a visa.

**Question 95**

We agree that as with other matters relating to immigration an application for an EU UFF should commence before the birth of the child.

**Question 97**

We agree that there should be a single, comprehensive guide for intended parents explaining the nationality and immigration consequences of having a child through an international surrogacy arrangement.

We note at this point that there is a complex relationship between adoption legislation relating to bringing a child into the UK for the purposes of adoption, and the same legislation, as applied to parental orders by the Human Fertilisation and Embryology (Parental Orders) Regulations 2010 (SI 2010/985). Adopters, including cases where one is a natural parent, require to comply with regulations. In Scotland these are the Adoptions with a Foreign Element (Scotland) Regulations 2009 (SSI 2009/182). In England the Adoptions with a Foreign Element Regulations 2005 (SI 2005/392) apply. It would be helpful to clarify whether or not the 2009 and 2005 Regulations apply in the case of intended parents bringing a child to the UK with the intent of seeking a parental order. A failure to comply could, in theory, result in prosecution.

**Question 98**

We agree that the new pathway should not be available in the case of international surrogacy arrangements. We refer to our view expressed above, that the new pathway should only be available subject to robust safeguards. These cannot be ensured in the case of international arrangements.

**Question 99**

We agree that by analogy with overseas adoptions that may be recognised in the UK (see the Adoption (Recognition of Overseas Adoptions) (Scotland) Regulations 2013 (SSI 2013/310), international surrogacy arrangements may be recognised, where the Secretary of State in satisfied that protection for the surrogate and regard for welfare of the child is at least equivalent to that provided in the UK.

**Question 100**

In principle we agree that there should be a restriction on removal of a child from the UK for the purpose of becoming the subject of a parental order, or equivalent, in another jurisdiction, and that there should be a process for such removal that is similar to that which applies when a person wishes to take a child abroad for the purposes of adoption.

**Chapter 17. Miscellaneous Issues**

**Question 101**

We see the argument for reform of the law on statutory paternity leave and statutory paternity pay for a surrogate's spouse, civil partner or partner.

**Question 102**

We agree that one of the intended parents should qualify for maternity allowance.

**Question 103**

An intended parent should be able to take time off work to prepare for the birth and subsequent care of the child. We have no detailed suggestions on this proposal.

**Question 106**

If the situation is arrived at whereby the intended parents will be the legal parents of a child from birth, then there does not appear to be a need to reform the law of succession with reference to surrogacy, as no child born as part of a surrogacy arrangement would be entitled to inherit from the surrogate's estate as a matter of law.

**Question 110**

The experience of Faculty consultees is that in applying for parental orders.

(i) The surrogacy arrangements have been international;

(ii) The parties had all had legal advice before applying for the making of a parental order, and often had had legal advice from very early on in the surrogacy process;

(iii) All were represented by lawyers in court; and

(iv) The costs of legal representation and advice are not known.

**Chapter 18. Impact of proposals**

We have no comments in relation to the matters discussed in this chapter.