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BRIEFING PAPER

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Children: surrogacy – single people and parental orders (UK)

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Summary

This House of Commons Library briefing paper considers surrogacy and parental orders, in particular the current position for single people who are unable to obtain such an order and the draft remedial order that seeks to address this matter.

When a child is born to a surrogate mother, a parental order transfers both legal parenthood and "parental responsibility" from the surrogate mother (and her husband, if applicable) to the commissioning parents.

Section 54 of the *Human Fertilisation and Embryology Act 2008* allows for (prescribed) couples to apply for a parental order, but not a single person. The Government explained that, at the time, adoption was considered a more appropriate route for single people.

The following is a timeline of key developments:

- May 2016 – the High Court ruled that the inability of a single person to obtain a parental order was incompatible with the European Convention on Human Rights (ECHR);
- December 2016 – the Government confirmed that it would lay a remedial order before Parliament to allow single people to apply for a parental order;
- November 2017 – a draft remedial order was laid before Parliament to bring the 2008 Act into compliance with the ECHR;
- March 2018 – the Joint Committee on Human Rights' (JCHR) report on the draft remedial order stated that a "blanket ban on a [single] person who is in a couple getting a single parental order is clumsy and inflexible, as well as discriminatory" and the requirement for a single person still married or in a civil partnership to prove that a separation from a partner was permanent would "be difficult or impossible to prove to the Courts, and would seem to be unnecessary as a matter of policy";
- July 2018 – the Government published a revised draft remedial order;
- November 2018 – the JCHR said the revised draft order had addressed its concerns. Also, the Government published new parental order regulations as a consequence of the remedial order.

Both the revised draft remedial order and the draft parental order regulations are currently being considered by Parliament and are not yet in force.

This note applies to United Kingdom.

1. What is a parental order?

When a child is born to a surrogate mother, she is named on the birth certificate as the child's mother and automatically assumes "parental responsibility"[1] in law for the child.[2]

To pass responsibility for the child to the commissioning parents, a "parental order" can be obtained (in England and Wales) from the Family Court or the High Court.[3] The Government's Human Fertilisation and Embryology Authority states that:

> In the UK the surrogate is the legal mother of the child until you get a parental order from the court; even if the eggs and sperm used are yours or donated (ie she's not genetically related to the child). Once you have a parental order for the baby the surrogate will have no further rights or obligations to the child.[4]

The legal text *Children Law and Practice* adds:

> The effect of a parental order is to confer both legal parenthood and parental responsibility on the commissioning parents, with the consequence that the child is for all purposes treated in law as their child, and not the child of any other person. The child remains within the prohibited degrees with respect to his birth family in relation to incest and marriage.[5]

As the Human Fertilisation and Embryology Authority notes, "surrogacy involves a lot of complicated legal issues which is why you should seek independent legal advice, especially if you're having treatment overseas".[6]

2. Parental orders, and couples and single people

Section 54 of the *Human Fertilisation and Embryology Act 2008* (HFEA 2008) as amended sets out the current law in regard to who can apply for a parental order.

2.1 Couples

Under subsection 2 of section 54 of the HFEA 2008, an application for a parental order has to be "made by two people", specifically:

a. husband and wife;

b. civil partners of each other; or

c. two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other.

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1 For more information on parental responsibility (which is a devolved matter), see the Library briefing paper, Children: parental responsibility - what is it, and how is it gained and lost (England and Wales).

2 If the surrogate mother is married to a man at the time of the placing in her of the embryo or of the sperm and eggs or of her artificial insemination, then her husband also automatically acquires parental responsibility for the child unless it is shown that he did not consent to the surrogacy (Human Fertilisation and Embryology Act 2008, section 35 and Hershman and McFarlane, Children Law and Practice, paras A179 and A195–A196).

3 For more information, see the webpage Parenthood and parental orders (surrogacy law) published by Natalie Gamble Associates (a law firm specialising in family law), for example.

4 Human Fertilisation and Embryology Authority, Surrogacy – Are there any legal issues to consider?, webpage accessed on 14 May 2018 (content now deleted)

5 Hershman and McFarlane, Children Law and Practice, para A198

6 Human Fertilisation and Embryology Authority, Surrogacy – Are there any legal issues to consider?, webpage accessed on 10 December 2018

The Government noted that "the Marriage (Same Sex Couples) Act 2013, the Marriage and Civil partnership (Scotland) Act 2014 and Civil Partnership Act 2004 (Consequential Provisions and Modifications) Order 2014 (SI 2014/3229) later amended the 2008 Act to include same sex married couples".[7]

Additionally, certain other conditions set out in section 54 also have to be met.[8]

2.2 Single people

As the explanatory notes to section 54 of the HFEA 2008 state: "a single person remains unable to apply for a parental order"[9] – thereby maintaining the position from the previous legislation which section 54 replaced.[10]

Instead, a single person can gain parental responsibility for a surrogate child by:

- adopting the child – as a GOV.UK webpage on surrogacy notes, "if neither you or your partner are related to the child, or you're single, adoption is the only way you can become the child's legal parent", adding that "if you choose to adopt, a registered adoption agency must be involved in your surrogacy process".[11] Like a parental order, adoption similarly vests parental responsibility in the new parents, and extinguishes it from all previous holders of it including the birth parent(s) – the Government notes that a parental order "operates like a speeded up form of adoption";[12]
- a child arrangements order – this is a private law matter, and can allow residence to be granted to someone (even if they are not a birth parent of the child), with parental responsibility also granted alongside if they do not already have it. It does not extinguish parental responsibility from any existing holders of it;
- making the child a ward of court – if wardship is granted, "no important step can be taken in his life without the leave of the court" i.e. "ultimate responsibility for him rests with the court" (known as "parental jurisdiction").[13, 14]

2.3 Why doesn't the HFEA 2008 allow single people to apply for a parental order?

As the Government explained in November 2017 when it published the draft remedial order (see section 4), when the surrogacy legislation was originally passed:

> The intention was that an individual seeking to acquire legal parenthood of a child born under a surrogacy arrangement would have to adopt the child. The rationale at

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7 Department of Health, The Government's Response to an incompatibility in the Human Fertilisation & Embryology Act 2008: A remedial order to allow a single person to obtain a parental order following a surrogacy arrangement, Cm 9525, November 2017, p2, para 2.5

8 Including: the applicants must apply for the order during the period of 6 months beginning with the day on which the child is born; at the time of the application and the making of the order (a) the child's home must be with the applicants, and (b) either or both of the applicants must be domiciled in the United Kingdom or in the Channel Islands or the Isle of Man; at the time of the making of the order both the applicants must have attained the age of 18 (HFEA 2008, section 54).

9 Human Fertilisation and Embryology Act 2008–EN, p31, para 188

10 Namely, the Human Fertilisation and Embryology Act 1990, section 30 (now repealed)

11 GOV.UK, Become a child's legal parent, webpage accessed on 10 December 2018

12 Department of Health, The Government's Response to an incompatibility in the Human Fertilisation & Embryology Act 2008: A remedial order to allow a single person to obtain a parental order following a surrogacy arrangement, Cm 9525, November 2017, p1, para 2.1

13 Hershman and McFarlane, Children Law and Practice, paras B1056–B1057

14 For example, in the case of child "Z" who was born to a surrogate mother (see section 3.2), the child was made a ward of court, and the court placed him in the care and control of his commissioning father who at the time was seeking a parental order as a single parent (In the matter of Z (A Child) (No 2), [2016] EWHC 1191 (Fam), 20 May 2016, para 7).

> that time was that the fuller assessment carried out in adoption proceedings was more likely to ensure that a person on their own was able to cope with the demands of bringing up a child.[15]

3. Section 54 and the European Convention on Human Rights

3.1 Government declaration of compatibility

When a Bill is considered by Parliament, before Second Reading in both the Commons and Lords the Government has to declare whether the Bill, as it stands at that point, is compatible with human rights legislation, namely the *Human Rights Act 1998* which gives statutory force in the UK to the European Convention on Human Rights (ECHR): this is called the "statement of compatibility".

As the organisation Liberty explains, a "statement of compatibility":

> doesn't bind Parliament or the courts. It is intended to encourage ministers and the civil service to consider the human rights implications of proposed legislation before it is introduced.[16]

For the Commons and Lords Second Readings of the *Human Fertilisation and Embryology Bill*, which became the HFEA 2008, the Bill stated that:

> Secretary Alan Johnson [in the Commons, Lord Darzi of Denham when the Bill was presented in the Lords] has made the following statement under section 19(1)(a) of the Human Rights Act 1998:
>
> In my view the provisions of the Human Fertilisation and Embryology Bill [HL] are compatible with the Convention rights.[17]

The relevant clause concerning for whom a parental order could be made – clause 54 of the Bill – was not amended during its passage through Parliament, and became section 54 of the HFEA 2008.

3.2 Ruling in the case of Z (a child) and declaration of incompatibility of section 54 with the ECHR

A legal challenge was mounted by a man who, as a single parent, wished to have a parental order made in his favour for his surrogate child, "Z".[18] He was the biological father of Z, who was carried to birth by a surrogate mother.

The case was heard in the High Court by the then President of the Family Division, Sir James Munby. Sir James noted that:

> Faced with the difficulty that the language of section 54 contemplates that any such order can be made only on the application of "two people", he [the father] sought to persuade me that section 54 could be "read down" in accordance with section 3(1) of the Human Rights Act 1998 so as to enable a parental order to be made on the application of one person.[19]

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15 Department of Health, The Government's Response to an incompatibility in the Human Fertilisation & Embryology Act 2008: A remedial order to allow a single person to obtain a parental order following a surrogacy arrangement, Cm 9525, November 2017, p2, para 2.6

16 Liberty, How the Human Rights Act works – How does Parliament use the Human Rights Act?, webpage accessed on 10 December 2018

17 HL Bill 6 2007–08, p1 and Bill 70 2007–08, p1

18 "Z" was used in place of the child's name in the public court judgment in the interests of confidentiality.

19 In the matter of Z (A Child) (No 2), [2016] EWHC 1191 (Fam), 20 May 2016, para 2

Sir James ruled in September 2015 that it was not possible for section 54 to be "read down",[20] so the father then contested that section 54 was not compatible with the *Human Rights Act 1998*, seeking a "declaration of incompatibility" in accordance with section 4 of the 1998 Act.

In response to the arguments put forward to the court by the father in this regard, the then Department of Health (now the Department of Health and Social Care) responded by saying that "the Secretary of State concedes that the current provisions of section 54(1) and (2) of the Human Fertilisation and Embryology Act 2008 are incompatible with Article 14 [of the ECHR] taken in conjunction with Article 8", noting that "this is in reality, a discrimination case. That is the basis of the concession". The Department went on:

> The Secretary of State accepts that the facts fall within the ambit of Article 8 and that Article 14 is engaged. It is accepted that there is a difference in treatment between a single person entering into a lawful surrogacy arrangement and a couple entering the same arrangement. This difference in treatment, namely the inability to obtain a parental order, is on the sole ground of the status of the commissioning parent as a single person versus the same person were he part of a couple. The Secretary of State accepts that, in light of the evidence filed and the jurisprudential developments both domestic and in Strasbourg, including for example Mennesson v France (Application no. 65192/11) taken with Wagner v Luxembourg (Application no. 76240/01), this difference in treatment on the sole ground of the status of the commissioning parent as a single person versus being part of a couple, can no longer be justified within the meaning of Article 14.[21]

Box 1: Articles 8 and 14 of the European Convention on Human Rights

Article 8 – Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 14 – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[22]

The then President noted in his ruling of May 2016 that he had been invited by the parties to the case to make an order including a declaration of incompatibility, which he agreed to:

> "the Court noting that the [Secretary of State for Health] does not oppose a declaration being made in the terms:"
>
> "Sections 54(1) and (2) of the Human Fertilisation and Embryology Act 2008 are incompatible with the rights of the Applicant and the Second Respondent under Article 14 ECHR taken in conjunction with Article 8 insofar as they prevent the Applicant from obtaining a parental order on the sole ground of his status as a single person as opposed to being part of a couple".[23]

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20 In the matter of Z (A Child), [2015] EWFC 73, 7 September 2015
21 In the matter of Z (A Child) (No 2), [2016] EWHC 1191 (Fam), 20 May 2016, paras 11–13
22 European Court of Human Rights and the Council of Europe, European Convention on Human Rights, pp10 and 12
23 In the matter of Z (A Child) (No 2), [2016] EWHC 1191 (Fam), 20 May 2016, paras 17–21

4. Government response: draft remedial order (November 2017)

4.1 Announcement of the remedial order, delays in its laying and indications of what it would include

The Government told Parliament in June 2016 that it "accepted the judgment by Sir James Munby from the High Court. We will be looking to update the legislation on Parental Orders, and are now considering how best to do this".[24]

On 14 December 2016, the then Government whip, Baroness Chisholm of Owlpen, told the House of Lords that a remedial order would be made in respect of section 54 of the HFEA 2008. The Baroness said that work was being undertaken on:

> the Government's response to the recent High Court judgment that declared that a provision in the Human Fertilisation and Embryology Act 2008—which enables couples but not single people to obtain a parental order following surrogacy—is incompatible with the Human Rights Act. We will, therefore, update the legislation on parental orders to ensure that it is compatible with the court judgment. I can confirm that the Government will introduce a remedial order to achieve this, so that single people can apply for parental orders on the same basis as couples. The remedial order will be subject to consultation and will include transitional arrangements, which would put all single people on the same footing and allow a reasonable time period to apply. The House will recognise that there are complexities and a considerable number of consequential amendments to other pieces of legislation, so our current plan is that the remedial order will be introduced to Parliament in early 2017.[25]

Box 2: What is a remedial order?

Liberty provides the following explanation:

> If a court has found UK legislation incompatible with human rights, it is up to Parliament to decide whether to amend it.
>
> Section 10 and Schedule 2 of the Human Rights Act allow amendments to be made by a remedial order. If a minister thinks there are strong reasons to do so, they can make an order to amend legislation – to remove an incompatibility recognised by the courts.
>
> A draft of the order must be laid before Parliament for 60 days and then approved by both Houses before it can be made.
>
> The only exception is for urgent orders, which allow for an interim order to be made. This will have no effect if not approved by both Houses within 120 parliamentary days.
>
> This is intended to ensure that clear breaches of human rights can be dealt with swiftly, rather than waiting for a legislative slot which can often take months, if not years.[26]

The original "early 2017" date for the introduction of the draft remedial order was revised in March 2017 to "before the [2017 parliamentary] Summer recess".[27] This was revised again after the June General Election – the remedial order would be "laid when Parliament returns after the Summer recess period".[28] When the House returned from the summer recess in September 2017, the Government said that the remedial order would

24 PQ 39605 13 June 2016
25 HL Deb 14 December 2016 c1332
26 Liberty, How the Human Rights Act works – How does Parliament use the Human Rights Act?, webpage accessed on 10 December 2018
27 PQ 67333 14 March 2017
28 PQ 510 27 June 2017

be laid "in the autumn session of Parliament"[29] – the draft remedial order was duly laid on 29 November 2017.

In November 2017, the Government stated that the remedial order would be a non-urgent order (see Box 2 above),[30] having previously refrained from providing clarity on this matter.[31] It did not, at that stage, offer an explanation as to why the remedial order would be a non-urgent order.[32]

4.2 Laying of the November 2017 draft remedial order

Announcing the publication of the non-urgent draft remedial order, the then Minister for Health, Philip Dunne, told the House on 29 November 2017:

> Following consideration of possible legislative options, the Government considers that there are compelling reasons to amend the 2008 Act by order made under the power in section 10 of the Human Rights Act 1998 to take remedial action where there is an incompatibility with the Human Rights Act 1998. The Government also proposes to remake the parental order regulations in 2018 to reflect all technical amendments to secondary legislation arising from the remedial order.
>
> The Government welcomes the opportunity to lay this remedial order to allow a single person the same rights to gain legal parenthood as couples. The order will allow a six month period where an existing single parent through surrogacy can retrospectively apply for a parental order.[33]

The draft remedial order proposed its application across the UK. It should be noted that the proposed six month period for retrospective applications that the Minister referred to mirrors the existing provision for couples eligible for surrogacy.[34]

The Government noted that, whereas previously it considered that single people should not be able to apply for a parental order because "the fuller assessment carried out in adoption proceedings was more likely to ensure that a person on their own was able to cope with the demands of bringing up a child" (see section 2.3 above), its position had been "further considered as policy develops and the Government now consider that the court assessment of the parental order application, which is always made with the best interests of the child in mind, is the appropriate assessment in the circumstances".[35] The High Court's ruling of ECHR incompatibility in the case of *Z* (see section 3.2) had also, one might assume, influenced the Government's position.

The Government said that it would therefore "introduce legislation to reflect an equal approach for a single person and couples in obtaining legal parenthood after a surrogacy arrangement".

While it had considered introducing primary legislation to effect the change – either as a specific Bill on this matter or as part of another Bill – it said that there were "compelling reasons" to use a remedial order:

> The Department considers that the affirmative Parliamentary process to consider and approve a remedial order, would allow Parliament the opportunity to properly scrutinise the changes to legislation and remedial action taken, but would impose less

29 PQ 6229 5 September 2017
30 PQ 112662 21 November 2017
31 PQ 106127 12 October 2017
32 PQ 112662 21 November 2017
33 HCWS282 29 November 2017
34 Department of Health, The Government's Response to an incompatibility in the Human Fertilisation & Embryology Act 2008: A remedial order to allow a single person to obtain a parental order following a surrogacy arrangement, Cm 9525, November 2017, p6, section 4.3 (under "subsection (5))
35 As above, p2, para 2.6

> of a burden on Parliamentary time than a Bill. This would also enable the incompatibility to be addressed at the earliest opportunity and enable a narrow focus on the key issue.[36]

4.3 Analysis of the November 2017 draft remedial order

The draft remedial order laid in November 2017 proposed inserting a new section 54A into the *Human Fertilisation and Embryology Act 2008*: "the draft remedial order replicates the functions of Section 54, which covers an application made by two people, with a new Section 54A for `one applicant'".

It also proposed some amendments to section 54 following the insertion of section 54A (including preventing two applications from two single people in respect of the same child).[37] Full details of the proposed provisions of section 54A – many of which mirror those found in section 54 – can be found in section 4.3 of the Government's paper on the draft remedial order.

Schedule 1 to the draft remedial order laid in November 2017 set out proposed consequential amendments to other related primary legislation. The Government explained that "the purpose of the amendments is to ensure parity in the way applicants for and holders of section 54 parental orders and section 54A parental orders are treated under relevant primary legislation". This included, for example, amendments to primary legislation governing employment, benefits and child support, and amendments to legal aid provisions in primary legislation that relate to the existence of a family relationship.[38]

Similarly, Schedule 2 proposed consequential amendments to subordinate legislation (e.g. regulations) so that "equivalent provision in areas including access to benefits and employment rights is made for applicants for a parental order under section 54A as currently applies to applicants for an order under section 54".[39]

Looking ahead, the Government said that it "also proposes to bring forward a new set of parental order regulations alongside the remedial order (as provided for under the 2008 Act) to apply adoption legislation to parental orders, and extend these provisions to applications by a single person", adding:

> Other consequential amendments to secondary legislation are planned for re-made Human Fertilisation and Embryology Parental Order Regulations. It was regarded as too complex and unwieldy to include these in the remedial order. Our intention is that draft regulations will be laid before Parliament next year [i.e. 2018].[40]

4.4 The Joint Committee on Human Rights' report on the November 2017 draft remedial order

On 2 March 2018, the Joint Committee on Human Rights (JCHR) of both houses of Parliament published its report on the draft remedial order. The Committee's conclusions included that:

- "the power to amend statute by delegated legislation is unusual and carefully controlled. The Committee considers that the procedural requirements of the Human Rights Act 1998 ('HRA') have broadly been met in this case"; and

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36 Department of Health, The Government's Response to an incompatibility in the Human Fertilisation & Embryology Act 2008: A remedial order to allow a single person to obtain a parental order following a surrogacy arrangement, Cm 9525, November 2017, p4, paras 3.2–3.4
37 As above, p5, para 4.1 and section 4.3
38 As above, pp7–8, section 4.4 "Schedule 1 amendments"
39 As above, p11, section 4.4 "Schedule 2 amendments"
40 As above, p3, para 2.10 and p5, para 4.2

- "remedying the incompatibility by way of a non-urgent order, rather than an urgent order, strikes a reasonable balance between the competing considerations of the need to avoid undue delay before remedying the incompatibility and the need to afford a proper opportunity for parliamentary scrutiny".[41] However, the Committee said: "we regret that the Government did not set out its reasons for using the non-urgent procedure, and recommended that "in its response to the representations made, the Government clarifies its reasoning for proceeding by way of non-urgent procedure".[42]

Turning to the substance of the draft remedial order itself, the Committee said that there were "a number of issues arising".[43]

The Committee noted that the draft remedial order would allow one person to apply for a parental order "but only … if he or she is not in an enduring family relationship"; if they are in an "enduring family relationship" with a partner, "then they can only apply for a parental order as part of a couple with that partner". The Committee said:

> Therefore, in order for the biological parent and child to be legally recognised, the other partner is required (within a six month deadline) to agree to be legally recognised as an equal parent of that child (whether or not that partner has any biological relationship to that child), otherwise the child and its biological parent will not be able to have their de facto biological relationship legally recognised. We have concerns about this requirement.
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> […]
>
> Trying to put a blanket ban on a person who is in a couple [not covered by section 54, see section 2.1] getting a single parental order is clumsy and inflexible, as well as discriminatory. It is better for the courts to assess the child's interests according to the circumstances of each case.[44]

The Committee highlighted the lack of a Government explanation for this approach:

> The Government has not explained why it is necessary for a biological single parent to prove that they are not in an enduring family relationship in order to have their biological relationship with their child legally recognised under HFEA. Nor has the Government explained why it is necessary to require a single parent's partner with no biological relationship to the child (and no desire to be recognised as such a parent) to be recognised as that child's parent merely in order for the biological parent to be so recognised. This would not be the case for a biological child born without recourse to a surrogacy arrangement, where the State would not seek to create such barriers to the recognition of that parent-child legal relationship. It is surprising that a single applicant parent will need to prove to the Courts that they are not in an enduring family relationship with their partner, or that such a partner will be forced to either become an equal parent of that child (effectively requiring them to assert a non-existent quasi-biological relationship) or effectively veto the recognition of the biological parent-child relationship.[45]

The Committee was concerned that, while removing one area of discrimination, the draft remedial order "introduces a new distinction between those whose partners are willing to assume full parental responsibility for a child to which they may have no genetic bond, and those whose partners are not willing to take such a significant step".[46] The Committee recommended the redrafting of this part of the draft remedial order, else the Committee would draw it to the special attention of both Houses "on the grounds that it

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41 Joint Committee on Human Rights, Proposal for a Draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018, 2017–19 HC 645 and HL Paper 86, 2 March 2018, p3, para 3
42 As above, p10, paras 29 and 30
43 As above, p11, para 32
44 As above, pp11 and 12, paras 33 and 37
45 As above, p12, para 38
46 As above, p12, para 39

makes an unexpected use of the enabling power" and their doubt, therefore, that it was *intra vires*.[47]

In regard to the requirement for a single person still married or in a civil partnership to prove that a separation from a partner was permanent, the Committee contended that "this requirement of 'permanent separation' will be difficult or impossible to prove to the Courts, and would seem to be unnecessary as a matter of policy".[48]

The Committee recommended that "the Government reconsider the drafting … to remove the requirement for a person to prove to the Courts that their separation is likely to be permanent" else it would have to draw it to the special attention of both Houses "on the grounds that there is a doubt whether it is intra vires, because it goes beyond the minimum amendments necessary to remove the incompatibility".[49]

In chapter 4 of its report, the Committee also raised "a number of defective drafting concerns and concerns that require further elucidation by the Government" and recommended that the Government "make amendments to the draft, or clarify its position, as necessary".[50]

The procedure for remedial orders does not state how swiftly the Government has to reply to any concerns raised by the JCHR (see section 4.5) – the Committee, for its part, noted that "the declaration of incompatibility which is to be remedied by this order was made [by the High Court] on 20 May 2016. We urge the Government to lay a draft Order before Parliament as swiftly as it can".[51]

5. Revised draft remedial order (July 2018)

5.1 Revised draft remedial order and response to the JCHR report

Following the criticisms made by the JCHR, on 19 July 2018 the Government laid a revised draft remedial order,[52] and made a written ministerial statement to accompany it.

The Parliamentary Under-Secretary of State for Health, Jackie Doyle-Price, told the House that:

> The Government has carefully considered the issues raised in the report and has accepted the recommendations made by JCHR. We have taken additional action so that the revised order ensures that a biological parent in a surrogacy arrangement is not blocked by their relationship status from obtaining legal parenthood.
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> […]
>
> The revised remedial order reflects an equal approach for a sole applicant or a couple in obtaining legal parenthood after a surrogacy arrangement. The order will allow a six month period where an existing sole applicant can retrospectively apply for a parental order for a child born through surrogacy.[53]

As the Government explained the explanatory memorandum to the revised draft remedial order:

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47 Joint Committee on Human Rights, Proposal for a Draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018, 2017–19 HC 645 and HL Paper 86, 2 March 2018, p13, para 43
48 As above, p13, para 44
49 As above, p14, para 46
50 As above, p15, para 47 and p17, para 57
51 As above, p18, para 58
52 See: https://www.legislation.gov.uk/ukdsi/2018/9780111171660/contents
53 HCWS 893 19 July 2018

> An initial draft remedial order replicated the functions of Section 54, which covers an application made by two people, with a new Section 54A for 'one applicant'. The provisions were narrowly drawn so that only a person who was not in a relationship as defined in Section 54, the same as Child Z's father, would qualify to apply.

The Government noted that the JCHR was concerned that the "narrowly drawn" provisions of the original draft order would mean that there would be a "group of people not covered by the provisions of the initial draft order", adding "there are circumstances where a new partner, a recently reconciled partner or someone not involved in the original surrogacy arrangement, may not wish to be the child's parent". The Government added that "those in marriage or a civil partnership may also be affected in the same way".

To address these concerns, the revised draft remedial order would "propose to remove all requirements in Section 54A in respect of relationship status":

> The revised order therefore enables sole applications from individuals regardless of relationship status. This will ensure that a biological parent is not prevented from applying for a parental order, by the decision of a partner who is not biologically related to the child and who may not wish to be recognised as a legal parent.[54]

The Government also noted that this change meant that the JCHR's concerns regarding the requirement to prove a separation was permanent was no longer an issue.[55]

The revised draft remedial order also included a number of drafting amendments to address the concerns highlighted in chapter 4 of the JCHR's report.

In regard to the JCHR's particular concerns about section 54A(13) in the original draft remedial order, which concerned in which country elements of the surrogacy had occurred, the Government did not propose to amend the original wording:

> The Committee also identified drafting in S.54A (13), suggesting that there may be implicit requirements for other activities in subsection (1) to have occurred in the United Kingdom. On the presumption that by other activities, the Committee means activities involving the production of an embryo or sperms and eggs, these activities do not need to take place in the UK. The Committee suggests that the production might implicitly be required to be in the UK, but our view is that if the surrogate is outside the UK, then the production can't be so required – it is clearly not practical. The same wording has previously been used in S.54 (10) of the 2008 HFE Act and does not appear to have caused difficulties. We would be concerned about using a different wording in section 54A given that this might call into question the meaning of the existing sections and no misinterpretation has previously been made. No change to this drafting is therefore proposed. This paragraph now becomes S.54A (10).[56]

In its response to the JCHR report, the Department of Health and Social Care also explained why it had not used the urgent procedure for the remedial order. Noting that the JCHR itself has set out the factors to determine the appropriateness of an urgent remedial order – including the number of people affected, the seriousness of the impact and the significance of the rights affected – the Government observed that:

> The scrutiny of the draft remedial order under the non-urgent procedure, with the engagement and consultation of Parliamentarians and stakeholders is very important on a social policy issue like surrogacy, where people hold different and strong views. Under the urgent procedure stakeholders would not have the opportunity to make representations about the order before it came into effect. Additionally, the order

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54 Department of Health and Social Care, Explanatory Memorandum to the [draft revised] Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018, 19 July 2018, pp2–3, paras 7.2–7.6

55 Department of Health and Social Care, The Government's Response to the Joint Committee for Human Rights 2nd 2018 Report: Proposal for a Draft Human Fertilisation & Embryology Act 2008 (Remedial) Order 2018, July 2018, p5, para 3.10

56 As above, p6, para 3.13

> could fall if not approved and the procedure would have to restart from the beginning.
>
> It is also important to note that the Government must also replace the Human Fertilisation and Embryology (Parental Order) Regulations 2010 [see section 6] in order for the amended legislation to work, which means that an urgent order could not come into effect immediately in any case. […]
>
> The Government has also considered the mitigating factors in our approach for individuals affected: the family court in a recent case (M v F & SM (HFE Act 2008) [2017] EWHC 2176 (Fam)) has taken some pragmatic decisions to ensure the ongoing welfare of the child pending the change in the law; we understand that the Family Court support service has said that any applications from single people would be accepted and then adjourned to be revisited after the law changes, and the order itself will enable retroactive applications for eligible people, for six months after the law is enacted.[57]

In regard to the JCHR's concerns about the urgency of remedying declarations of incompatibility, the DHSC noted that under section 4 of the Human Rights Act 1998, "a declaration of incompatibility (DoI) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given", and that "there is no legal obligation on the Government to take remedial action following a declaration of incompatibility or on Parliament to accept any remedial measures the Government may propose". But it added:

> It has however, been the practice for the Government to consider and address such declarations either through primary legislation where possible or by way of a remedial order under section 10 of the HRA.
>
> When addressing incompatibilities with Convention rights it is important to make sure that the most appropriate remedial measures are taken in each case. This requires careful and thorough preparation including the commissioning of legal advice, research and consultation where necessary. Consideration needs to be given to the extent to which amendment of legislation may be required, and the appropriate vehicle to do so, with due regard to the current legislative timetable. The Government seeks to inform the Committee as soon as possible after final decisions have been made on how to address an incompatibility.[58]

The revised draft remedial order included Schedules 1 and 2 of the original order (see section 4.3); minor amendments as indicated by the JCHR were included in the schedules to the revised draft remedial order.[59]

5.2 JCHR report on the revised draft remedial order

In its report of 20 November 2018, the JCHR said that it was "pleased that the revised draft order now enables sole applications from biological parents regardless of relationship status", and added:

> We are content that the Government has revised its draft Order and has adequately taken into consideration the drafting points made in Chapter 4 of our first Report. The Government has also helpfully provided explanations and information in their response which respond to the other points made in our first Report.[60]

In conclusion, the JCHR said:

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57 Department of Health and Social Care, The Government's Response to the Joint Committee for Human Rights 2nd 2018 Report: Proposal for a Draft Human Fertilisation & Embryology Act 2008 (Remedial) Order 2018, July 2018, pp3–4, paras 3.3–3.5

58 As above, p6, paras 3.15–3.16

59 As above, p6, para 3.14

60 Joint Committee on Human Rights, Draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018 - Second Report, 2017–19 HC 1547 and HL Paper 227, 20 November 2018, pp3–4

> We consider that the procedural requirements of the Human Rights Act 1998 for the use of the remedial power have been met in this case and consider that the draft Order remedies the incompatibility identified by the Courts.
>
> The Committee concludes, after taking into account representations made, that the special attention of each House is not required to be drawn to the draft order on any of the relevant grounds, or on any other grounds.
>
> We consider that there are no reasons why this Order should not be agreed to by both Houses of Parliament. We therefore recommend that the draft order should be approved.[61]

6. Associated new parental order regulations

The draft Human Fertilisation and Embryology (Parental Orders) Regulations were laid on 15 November 2018. They are subject to the affirmative procedure.[62]

6.1 The reason for the new regulations

The parental order regulations take the existing adoption legislation applicable in the UK and apply it to parental orders for surrogacy.[63]

As the DHSC highlighted when publishing both the original and the revised remedial order, the new section 54A would require the existing parental order regulations to be revised.[64]

The existing Human Fertilisation and Embryology (Parental Orders) Regulations 2010 regulations,[65] the DHSC explained, "modify existing legislation (primary and secondary) to apply selected provisions in respect of adoption to children who are the subject of parental orders.[66] This existing legislation is not directly affected by the remedial order but re-made regulations are necessary in order to be read with the changes made to parental orders made by the remedial order".[67]

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61 Joint Committee on Human Rights, Draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018 - Second Report, 2017–19 HC 1547 and HL Paper 227, 20 November 2018, p8, paras 2–4

62 The draft regulations can be found at: http://www.legislation.gov.uk/ukdsi/2018/9780111174715 . There is also a "Procedural Activity" page which is being updated as the draft SI progresses through Parliament, see: https://beta.parliament.uk/work-packages/LyG8crcK

63 The suitability of this approach is currently subject to a review by the Law Commission, see section 7.

64 For example, see Department of Health, The Government's Response to an incompatibility in the Human Fertilisation & Embryology Act 2008: A remedial order to allow a single person to obtain a parental order following a surrogacy arrangement, Cm 9525, November 2017, p5, para 4.2 and Department of Health and Social Care, Explanatory Memorandum to the [draft revised] Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018, 19 July 2018, p3, para 7.6

65 SI 2010/985

66 The DHSC explained that "The Human Fertilisation and Embryology Act 1990 included a regulation making power that provided for specified adoption legislation to be applied, with modifications, to parental orders. This also provided for references in any enactment to adoption, an adopted child or an adoptive relationship to be read as including a reference to a parental order" [Department of Health and Social Care, Human Fertilisation and Embryology (Parental Order) Regulations 2018 – A consultation on revised regulations to reflect changes to the Human Fertilisation and Embryology Act 2008 that enable a single person to apply for a parental order, March 2018, p8, para 2.2].

67 Department of Health and Social Care, Human Fertilisation and Embryology (Parental Order) Regulations 2018 – A consultation on revised regulations to reflect changes to the Human Fertilisation and Embryology Act 2008 that enable a single person to apply for a parental order, March 2018, p5

6.2 Consultation on the regulations

In March 2018, the DHSC issued a consultation document on new regulations to replace the 2010 regulations, rather to amend them:

> The Department has proposed re-making the regulations rather than amending them. This is because they are complicated, consisting of modifications to legislation, and it is clearer to remake them, as well as ensuring that all the appropriate modifications are captured and that the legislation will work as intended.[68]

The Government subsequently noted that there had been 19 responses to the consultation, but that there was no need for "significant changes" to the regulations in the light of the consultation.[69]

6.3 The effect of the regulations

While the parental order regulations would be re-made, the DHSC said that the effect of this was limited to "largely reflect the same position as the original 2010 Regulations" – albeit with the changes being made by the remedial order – as well as to "tidy up the presentation and numbering of the clauses and remove a small number of out of date references … [and] revoke the 2010 regulations",[70] adding:

> It is not intended to make any change to how a parental order operates. The effect of a parental order as provided for by the modifications made in the 2010 regulations remain unchanged. The amendments made in the 2018 Regulations are purely in consequence of the amendment to the 2008 Act made by the remedial order.[71]

The Government noted that the "substantive provisions of the 2018 Regulations are to be found in its four Schedules". The changes apply to all four countries of the United Kingdom, with schedule 1 covering England and Wales (Adoption and Children Act 2002), schedule 2 Scotland (Adoption and Children (Scotland) Act 2007), and schedule 3 Northern Ireland (Adoption (Northern Ireland) Order 1987). In addition, schedule 4 "sets out the references in other legislation to adoption, adopted child or adoptive relationship that are to be read to include references to parental orders".[72]

Turning to the effect of schedules 1 to 3 in more detail:

- England and Wales:
  - "a child's welfare is the paramount consideration of the court when it makes decisions about a child's upbringing and to support this it sets out a welfare checklist in relation to the granting of parental orders". The regulations apply and modify this checklist in relation to the granting of parental orders;
  - the regulations set out "what form a parental order must take and what it means to be the subject of a parental order", namely that, equivalent to the effect an adoption order, a child subject to a parental order "will be deemed to be the legitimate child of the intending parent or parents, and to provide that no-one else will have parental responsibility for that child";

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68 As above, p5

69 Department of Health and Social Care, Draft revised explanatory Memorandum to the Human Fertilisation and Embryology (Parental Orders) Regulations 2018, 23 November 2018, p5, para 10.2

70 Department of Health and Social Care, Human Fertilisation and Embryology (Parental Order) Regulations 2018 – A consultation on revised regulations to reflect changes to the Human Fertilisation and Embryology Act 2008 that enable a single person to apply for a parental order, March 2018, p8, para 2.1

71 Department of Health and Social Care, Draft revised explanatory Memorandum to the Human Fertilisation and Embryology (Parental Orders) Regulations 2018, 23 November 2018, p3, para 7.3

72 As above, p3, para 7.4

  - "enact sections of the adoption legislation that give the court powers where a child is removed from the care of the intending parents once a parental order has been applied for";

- Scotland:
  - apply and modify provisions of the Adoption & Children (Scotland) Act 2007 to parental orders granted in Scotland. The 2002 Adoption and Children Act for England and Wales, and the 2007 Act are "broadly similar, which means that that the provisions applied and modified for parental orders are also similar and cover the same issues as set out above for the 2002 Act";
  - key differences are that "there is no welfare checklist and the status of illegitimacy has been abolished with the exception of provisions relating to any title, coat of arms, honour or dignity";
- Northern Ireland:
  - the 1987 order "makes similar provisions as the 2002 Act does to England and Wales and the 2007 Act does in Scotland. This means that that the provisions applied and modified for parental orders are also similar and cover the same issues as set out above for the 2002 Act".[73]

In addition, for the UK as a whole, Schedule 4 makes the following provisions which similarly mirror those in the 2010 regulations:

- the 2018 Regulations contain the requirement for the relevant Registrar General to hold and maintain a 'Parental Order Register': "when the child is born, the surrogate and her partner (if she has one) will record the child's birth on the live birth register. Once the parental order has been granted the court will send a copy of the order to the Registrar General and a new birth certificate will be issued. This will be a certified copy of the entry in the `Parental Order Register'. The Registrar General will mark the entry in the live birth register as `Re-registered' (in Scotland the birth entry is marked 'Parental Order')";
- "the relevant Registrar General must make traceable the connection between any entry in the register of births which has been marked 'Re-registered' or 'Parental Order' and any corresponding entry in the Parental Order Register. Information kept by the relevant Registrar General for this purpose is not open to public inspection or search, and this principle is maintained in the re-made regulations".[74]

6.4 Parliamentary consideration of the draft regulations

Sub-Committee A of the Secondary Legislation Scrutiny Committee of the House of Lords considered the draft regulations in its report of 28 November 2018, but did not draw them to the special attention of the House.[75]

The Joint Committee on Statutory Instruments found that the regulations did not need to be reported to the House in its report of 30 November 2018.[76]

The regulations, along with the remedial order, are scheduled to be considered in Grand Committee by the House of Lords on 12 December 2018.

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73 Department of Health and Social Care, Draft revised explanatory Memorandum to the Human Fertilisation and Embryology (Parental Orders) Regulations 2018, 23 November 2018, pp3–4, paras 7.6–7.13

74 As above, p4, paras 7.14–7.16

75 Secondary Legislation Scrutiny Committee (Sub-Committee A), Proposed Negative Statutory Instruments under the European Union (Withdrawal) Act 2018 – Includes 4 Information Paragraphs on 5 Instruments, 2017–19 HL 238, 28 November 2018, p4

76 Joint Committee on Statutory Instruments, Thirty-ninth Report of Session 2017–19, 2017–19 HL 240 HC 542-xxxix, 30 November 2018, p10

7. Law Commission review of surrogacy

As noted above, the current law on parental orders for surrogacy is based upon the law on adoption. The Government has said that it is:

> supporting a three year project by the Law Commission to undertake a comprehensive review of all surrogacy legislation and this will include consideration of the extent to which adoption legislation is appropriate as a framework for parental orders. The project started in May 2018.[77]

The Minister, Ms Doyle-Price, told the House in July 2018:

> There has been considerable growth in surrogacy arrangements in recent years, but I am unsure whether the law has kept pace with the changing practice. We have been revising the guidance to ensure that everyone can approach the matter with greater certainty but, more specifically, I have commissioned the Law Commission to have a good look at the law in the area so that we can ensure good practice in this country without driving people overseas.[78]

The Law Commission noted that the project "came out of the Law Commission's 13th Programme of Law Reform", after the open public consultation to determine which topics should be considered found that "surrogacy was the issue most cited that made it into the Programme, with over 340 people and groups saying the law was not fit for purpose". The Commission said that:

> The way in which parental orders are granted may create difficulties for new intended parents making medical decisions about the child. And the regulation of surrogacy requires improvement, so standards can be monitored and kept high. […]
>
> The project will consider the legal parentage of children born via surrogacy, and the regulation of surrogacy more widely. It will take account of the rights of all involved, including the question of a child's right to access information about their origin, and the prevention of exploitation of children and adults. […]
>
> Law Commissioner for England and Wales Professor Nick Hopkins:
>
> "Our society has moved on from when surrogacy laws were first introduced 30 years ago and, now, they are not fit for purpose.

Specifically, the Commissions said that they:

> have already identified three potential areas of concern:
>
> - difficulties with parental orders – a parental order transfers parentage from the surrogate mother to the intended parents. But that process can only happen after the baby is born and is subject to conditions which may require reform.
> - international surrogacy – the uncertainty in the current law may encourage use of international arrangements, where there are concerns about exploitation of surrogates.
> - how surrogacy is regulated – the rules governing how surrogacy is undertaken should be brought up to date and further improved.

The project will be jointly undertaken by the Law Commission of England and Wales and the Scottish Law Commission. In terms of next steps, the Law Commission said that the Commissions are "aiming to publish a consultation paper within a year" as part of "extensive public consultation" on the topic.[79]

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77 Department of Health and Social Care, Draft revised explanatory Memorandum to the Human Fertilisation and Embryology (Parental Orders) Regulations 2018, 23 November 2018, p3, para 7.3

78 HC Deb 24 July 2018 c862

79 Law Commission, Surrogacy laws set for reform as Law Commissions get Government backing, 4 May 2018, webpage

Version control (from version 3.0)

3.0	28/11/17	Sections 5.1 and 5.2 updated to show latest position, summary amended to reflect these changes, and minor typos corrected
4.0	05/02/18	Section 5.2 ("Continuing delays to the introduction of the remedial order") summarised and included in section 5.1, new sections 5.2 and 5.3 added and summary updated following publication of the draft remedial order, and minor editing changes made
5.0	14/5/18	Section number removed from summary. In section 4 (previously section 5), sub-section 4.4 added following publication of the JCHR's report, and section 4.5 updated, summary updated and note reviewed.
6.0	10/12/18	New sections 5 to 7 added and minor amendments made