



STOWE  
FAMILY LAW

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**COTS**

*Childlessness Overcome  
Through Surrogacy*

# BUILDING FAMILIES THROUGH SURROGACY

## A NEW LAW

A COTS and Stowe  
Family Law guide  
on responding to the  
consultation paper

As you may be aware, the Law Commission has recently published their consultation paper on surrogacy law reform. The whole document can be found [here](#), but we understand that analysing the 475 page document, and answering the 118 questions being asked, could be an intimidating task for COTS members and others who may wish to respond and give their view. There is a summary document found [here](#) which is an easier read, however we wanted to put together our own helpful summary which we hope will assist when composing your reply. It is important to know before you start that you don't need to answer all the questions, and only need to answer the ones you wish.

In the first instance, there are a number of consultation events that you can attend to give your view personally to the Law Commission. These are spread around the UK and details can be found below:

Birmingham	Tuesday 3 September
Edinburgh	Monday 9 September
Aberdeen	Tuesday 10 September
Belfast	Tuesday 17 September
London	Thursday 19 September



We would encourage as many COTS members as possible to attend to provide their view in person, and to understand more about the Law Commission's thoughts. Let us know on the Facebook community pages which event you are hoping to attend and I am sure there will be others going along too.

If you can't attend, but still wish to give your view then the consultation is open until 11 October 2019, you can respond using the online form [here](#), or by emailing [surrogacy@lawcommission.gov.uk](mailto:surrogacy@lawcommission.gov.uk).

Once the consultation closes, the Law Commission will then review all the responses they have received, so your voice will be heard. They will then decide on their final recommendations for law reform, and a final report will be published in 2021.

We will then need to wait to understand whether the government will follow their recommendations and make them law.

The Law Commission's paper is incredibly thorough, but can be split into three headings:

1. **Legal Parenthood** – the Law Commission propose three different ways for intended parents to be recognised as the legal parents of their child born through surrogacy, including a new pathway for UK surrogacy arrangements
2. **Payments** – what the position should be in relation to making payments for surrogacy in the UK
3. **Regulation** – how surrogacy should be regulated in the UK moving forward.



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# I LEGAL PARENTHOOD

## 1. THE NEW PATHWAY

The Law Commission proposes that there will be a new pathway to legal parenthood in UK surrogacy cases, and the aim of this is to create a clear route by which the intended parent/s will be recognised as the legal parent/s of their child from birth.

It sets out that a court application will not be required provided the pathway is followed. This will be a rigorous administrative process which includes the following stages once a surrogate has been identified:

1. Medical checks
2. Enhanced criminal record checks
3. Independent legal advice
4. Implications counselling
5. A written surrogacy agreement
6. An assessment of the welfare of the child to be born through surrogacy

If this is followed, then the intended parent/s will be recognised as the child's legal parent/s from birth.

The Law Commission have however, proposed that there will be a post-birth safeguard; i.e. a defined period after the birth for the surrogate to object. If this happens, then the arrangement will fall out of the pathway, and a parental order would need to be applied for.

## 2. THE PARENTAL ORDER

For cases which fall outside the pathway, the current parental order system will remain (with some key changes). The surrogate will continue to be recognised as the legal mother at birth, with the parental order acting as the legal solution once applied for by the intended parent/s and granted by the Court.

The Law Commission have proposed that the six month time limit is removed (as this is ultimately not applied in practice any more), that the current criteria relating to domicile is expanded so that parents can apply on the basis they are habitually resident in the UK as well and there will be the ability in some circumstances for the Court to waive the need for the surrogate to consent.

## 3. INTERNATIONAL SURROGACY

The Law Commission also comments on international surrogacy, although notes that these are ultimately international issues and so possibly outside their jurisdiction.

They propose that from a UK perspective there should be a list of permitted countries (which the government will assess to understand the law and practices of the country in question in relation to surrogacy) which if surrogacy is carried out there, then UK law will recognise the legal parenthood of the intended parents established there, rather than requiring them to apply for a parental order in the UK also.



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If a child is born in a country which is not on that recognised list, then a parental order will still be able to be applied for. However, improvements are again recommended to the process and criteria, and there are also recommendations relating to nationality and immigration to assist parents bringing children home. This will hopefully avoid the situation where they may be stuck in a foreign country for up to 16 weeks (and sometimes longer) after the birth while waiting for a UK passport.

## | PAYMENTS

Payments, as we know, is one of the most important issues in surrogacy law, and perhaps also one of the most strongly debated. There are differing views amongst those in the community and a variety of ways that payments are dealt with in practice.

The Law Commission has therefore chosen to tread carefully in relation to payments, and have reserved their views on this for the time being. They have instead asked a number of questions and sought the public's view before making a determination on this.

They have set out 8 categories of payments which the law could authorise, and these are as follows:

1. Loss of earnings
2. Compensation for pain/inconvenience, medical complications and in a worst-case scenario, death of the surrogate
3. For loss of welfare entitlement
4. Gifts
5. Costs associated with a surrogate pregnancy
6. Additional costs of pregnancy
7. Essential costs of pregnancy
8. A payment for being a surrogate

This is a key area which we need your input on. You might have seen the poll which appeared on the members only Facebook group a few weeks ago, and if so, you will have seen the different views amongst members and surrogates. These views need to be conveyed to the Law Commission so they can review the feedback and consider what the best way forward might be.

## | REGULATION

Finally, the Law Commission goes on to look at how surrogacy is regulated in the UK. They do not propose a commercial system, and they comment that only not for profit surrogacy organisations (such as COTS) will be able to assist intended parents and surrogates. There will however, be a requirement for surrogacy organisations to be regulated by the HFEA as they will then oversee surrogacy arrangements which fall within the new pathway.

The proposals to remove any kind of restriction for intended parents/surrogates and organisations advertising will hopefully be well received, and fingers crossed will help with increasing awareness about surrogacy and mean that more surrogates may come forward.



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The Law Commission also proposes that lawyers will be able to help with surrogacy arrangements (it is currently illegal for a lawyer to draft/prepare a surrogacy arrangement) and this can form part of their service to intended parents/surrogates.

## OTHER POINTS OF INTEREST

The Law Commission have also proposed the following changes:

- Removal of the need for there to be a genetic link between the child and the intended parents – this will only be in cases which fall into the new pathway, and potentially other domestic arrangements. This will not be possible in international surrogacy cases.
- National surrogacy register – the Law Commission have also proposed that a register be created so that surrogate born children can access information about their surrogate, the intended parent/s and any sperm/egg donors involved in conception.

## NEXT STEPS

This is just an overview of their proposals, if you are able to, we would recommend that you read the full consultation paper (or perhaps just review the bits of the paper which relate to the questions you are hoping to respond to).

To help you decide what questions you might want to address, we have prepared the table below:

Category	Question numbers
The New Pathway	7, 11–14, 16–21, 27–32, 56, 58, 64–71, 112, 114
Parental Orders	1–5, 15, 19, 20, 24, 26, 54, 56, 57, 64, 65
UK Surrogacy Agreements	24, 25, 40, 55, 88
International Surrogacy Arrangements	89–94, 96–100
Payments to UK Surrogates	72–87
Regulation of Surrogacy	33–39, 41, 42, 107
Genetic Link	59–62, 113
National Surrogacy Register	8–10, 43, 44, 46–53, 63
Employment Law (Maternity/Paternity/Surrogacy Leave)	101–105
Personal Experiences	109–111, 115, 116
Scotland/Northern Island Issues	6, 106, 117
Anything Else	45, 108, 118

We hope this has been helpful, but if you do have any specific questions please do not hesitate to get in touch. Email Kim at [kim@surrogacy.org.uk](mailto:kim@surrogacy.org.uk) and Bethan Carr (the writer of this document) who is a surrogacy lawyer at Stowe Family Law and a COTS buddy [bethan.carr@stowefamilylaw.co.uk](mailto:bethan.carr@stowefamilylaw.co.uk).



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