

Title: Surrogacy Legislation Remedial Order IA No: 16001 RPC Reference No: Lead department or agency: Health Other departments or agencies:	Impact Assessment (IA)			
	Date: 01/11/2017			
	Stage: Enactment			
	Source of intervention: Domestic			
	Type of measure: Primary legislation			
	Contact for enquiries: steve.pugh@dh.gsi.gov.uk			
Summary: Intervention and Options				RPC Opinion: Not Applicable

Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANDCB in 2014 prices)	One-In, Three-Out	Business Impact Target Status
£-1.01m	£m	£m	Not in scope	Non qualifying provision

What is the problem under consideration? Why is government intervention necessary?
 Surrogacy arrangements are legal in the UK and are subject to primary legislation. Parental orders allow for the transfer of legal parenthood after a surrogacy arrangement. The current legislation restricts single people from being granted parental orders, reflecting societal attitudes at the time they were drawn up. Following a challenge to this restriction, the High Court ruled that the legislative requirement that parental orders could only be granted to couples was discriminatory and incompatible with Article 14 (Prohibition on Discrimination) of the European Convention on Human Rights, (enshrined in the UK law by the Human Rights Act 1998 (HRA 1998)). Only government can rectify this restriction, by amending the legislation.

What are the policy objectives and the intended effects?
 The proposed change within the Remedial Order will mean that, subject to the other criteria being met, single people can apply for a parental order rather an adoption order to acquire legal parenthood for a child born from a surrogacy arrangement. Currently an adoption order is the only route to legal parenthood for a single person following a surrogacy arrangement.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)
 HM Government considered a range of legislative options to rectify the incompatibility before choosing a Remedial Order. A Remedial Order is a form of secondary legislation designed for the specific purpose of remedying an incompatibility with the ECHR. It is simpler than amending primary legislation.

Will the policy be reviewed? It will not be reviewed. If applicable, set review date: Month/Year					
Does implementation go beyond minimum EU requirements?			No		
Are any of these organisations in scope?		Micro Yes/No	Small Yes/No	Medium Yes/No	Large Yes/No
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded: N/A	Non-traded: N/A	

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible Minister: _____ Date: Philip Dunne
 _____ e: 15/11/17

Summary: Analysis & Evidence

Policy Option 1

Description: Remedial order (RO) to allow single people to apply for parental orders to acquire legal parenthood of a child born from a surrogacy arrangement

FULL ECONOMIC ASSESSMENT

Price Base Year 2017	PV Base Year 2017	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate: -1.01

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	0	0.5	4.0

Description and scale of key monetised costs by 'main affected groups'

Business: indirect cost of more people taking parental leave, includes small portion of statutory adoption pay, cost of absence consisting of the work of the person on leave, a loss of productivity, and an additional person's non-wage costs. PV cost is estimated to be £2.27m over 10 years, average annual cost of £0.29m. Exchequer: cost of more people claiming statutory adoption pay, PV cost is estimated to be £1.75m over 10 years, with an average annual cost of £0.22m.

Other key non-monetised costs by 'main affected groups'

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	0	0.4	3.0

Description and scale of key monetised benefits by 'main affected groups'

Intended parent: benefit of being entitled to take adoption leave, this is valued at least as much as the net income they could have had (wage minus any childcare costs), otherwise they would return to work. PV benefit is estimated to be £3.01m over 10 years, with an average annual benefit of £0.38m.

Other key non-monetised benefits by 'main affected groups'

Benefits to the child, intended parents and birth parents of legal clarity over the parental responsibility of the child; and the benefit to the child and parent of the legal recognition of their genetic relationship and of better outcomes for the child if the intended parent takes adoption leave they otherwise wouldn't have taken. Small resource savings if parental orders are chosen over adoptions orders as there is a simpler process for the authority and intended parent.

Key assumptions/sensitivities/risks	Discount rate (%)	3.5
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The RO does not impose any requirements. Costs and benefits above depend on single people applying for a parental order instead of doing nothing or adopting, see evidence base. Estimate of the number of single parents with a surrogate child is based on recent legal enquiries, passport applications and parental order application growth rates over recent years. If this number is lower/higher then the benefits and costs will be lower/higher, an estimate of the impact of one case is included.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m:
Costs: 0	Benefits: 0	Net: 0	
			Not in scope (indirect costs)

Evidence Base (for summary sheets)

Problem under consideration

- 1) Legislation on surrogacy arrangements in the UK has been found in court to be discriminatory against single people and incompatible with the Human Rights Act 1998.

Surrogacy arrangements - legislation

- 2) Surrogacy arrangements are legal in the UK and are subject to two pieces of primary legislation:
 - the **Surrogacy Arrangements Act 1985**, which defines the terms, including "surrogate mother" and "surrogacy arrangement" and lays down the key principles for the conduct of surrogacy arrangements, notably prohibiting commercial surrogacy arrangements and advertising for women to become surrogates (to prevent exploitation of women),
 - the **Human Fertilisation & Embryology Act 2008 (2008 Act)**, Section 54 sets the criteria that must be satisfied for a court to grant a Parental Order, which is the mechanism that transfers legal parentage from the surrogate (and her spouse/partner if she has one) to the persons commissioning the surrogacy (the "intended parents").
- 3) The criteria set out in the 2008 Act that must be satisfied for a Parental Order to be granted were:
 - the applicants for a parental order must be a couple (married couple, civil partners or two persons living as partners in an enduring family relationship),
 - the gametes of at least one of the applicants must have been used to create the child,
 - the application must be made within 6 months of the child being born,
 - the child must be living with the applicants,
 - the applicants must be domiciled within the United Kingdom, Channel Islands or Isle of Man,
 - both applicants must have attained age 18,
 - the surrogate mother and any other person recognised as a parent of the child (the Surrogate's spouse or partner) must have consented, unconditionally, to a Parental Order being granted,
 - the court must be satisfied that no money or other benefit, other than reasonable expenses, has been paid in respect of any part of the surrogacy/Parental Order arrangement, unless it has been authorised by the court.

Challenge to legislation

- 4) In September 2015 a single man, who had a child ("Child Z") via a surrogacy arrangement in the USA, challenged the restriction in the 2008 Act on single people being granted parental orders. This provision, which was also included in the surrogacy/parental order provisions contained in the Human Fertilisation & Embryology Act 1990 (which the 2008 Act updated), reflected societal attitudes at that time, that it was beneficial for children to have two parents.
- 5) The basis of the Judicial Review was that the legislative requirement that parental orders could only be granted to couples was discriminatory and incompatible with Article 14 (Prohibition on Discrimination) of the European Convention on Human Rights, (enshrined in the UK law by the Human Rights Act 1998 (HRA 1998)).
- 6) The facts of the case and the legal advice were carefully considered by the Department. After extensive deliberation, the consensus was that the Department should concede the case and accept the incompatibility claim. In his judgement, in May 2016, the President of the Family Division (Sir James Mumby), taking account of the Department's concession, ruled the exclusion of single people in the 2008 Act parental order provisions was

incompatible with the HRA 1998. The President firmly rejected requests to comment on the need for reform of existing legislation.

- 7) Although he won a ruling of incompatibility, the applicant will not be able to apply for a Parental Order in respect of his son until the 2008 Act is revised.

Further background information

- 8) In 2016, General Registry Office figures reported 368 parental orders were granted to couples in respect of surrogacy arrangements in England & Wales. This is an increase from 281 in 2015.
- 9) At present it is understood that some single people do have children through surrogacy arrangements but do not apply for adoption and therefore may not have parental responsibility for their child. It is not known how many of these cases there are.

Rationale for intervention

- 10) Only Government can change the legal position.

Policy objective

- 11) The proposed change within the Remedial Order will mean that subject to the other criteria being met, single people can apply for a parental order rather than an adoption order to acquire legal parenthood for a child born from a surrogacy arrangement. Currently an adoption order is the only route to legal parenthood for a single person.
- 12) This means that single people will have access to an additional option for legal parenthood that is currently only available to couples, the parental order. The parental order option is more straightforward than legal adoption.

Options for rectifying the problem

- 13) HMG considered a range of legislative options to rectify the incompatibility before choosing a Remedial Order. A Remedial order is a form of secondary legislation designed for the specific purpose of remedying an incompatibility with the ECHR. They are rarely used and have been used only around 20 times since their general introduction in 1998.
- 14) Any other method of rectifying the incompatibility would be more complex, onerous and take more parliamentary time. Options considered include: Clause in the NHS Cost Recovery Bill; Using a Handout Bill/ Private Members Bill; A short bespoke Human Fertilisation & Embryology Bill; The DfE Children & Families Bill; Including this provision in a fast-track review as part of the proposed Law Commission review.
- 15) The benefits and costs are presented below for the option of bringing forward a remedial order against a counterfactual of the status quo. Doing nothing is not a viable option as this will not resolve the discrimination against single people and would leave the legislation incompatible with the HRA 1998.

Benefits

- 16) The Remedial Order gives single people who have a child following a surrogacy arrangement, two options, whereas currently they only have one – i.e. a parental order is now an option in addition to legal adoption.
- 17) The applicant can choose to pursue either of these routes, or neither. The Remedial Order does not require anyone to pursue any particular route.
- 18) If a single parent of a surrogate child chooses to pursue a parental order instead of legal adoption, then this will be a somewhat simpler process.

Adoption process:

19) There is a six month assessment process through a local authority or independent adoption agency. This includes: preparation classes; several social worker visits to check suitability; police check; statements from 3 referees; housing and employment checks; medical assessment. There is a review of the complete assessment report by an independent panel. Single people would then be placed on register as suitable to adopt. There would be a 10 week wait to apply for an adoption order through the family court. Generally there would also be a need for the birth parents' consent but the court has the power to overrule this in specific circumstances.

Parental order process:

20) An application must be completed within 6 months of child's birth. Assessment by Parental Order reporter from the family court based on a review of application and supporting papers, with a fact check, including LA and police checks. There will be a meeting with the family and child in home. The surrogate mother must give consent. The reporter makes a recommendation to family court in a written report. The process can be completed without the applicant having legal representation, although many still choose to do so.

Likely demand for parental orders by single parents following surrogacy

- 21) No recorded information is available on the number of single people who might wish to apply for a Parental Order but it is believed that the number would be low, although it may increase in future.
- 22) A leading surrogacy law firm have told DH that it has advised 43 single fathers and 18 single mothers about surrogacy since 2009. So far 10 of these (plus the father in Re Z) have said they are intending to apply for a parental order when the law changes (9 fathers and 2 mothers). Of the rest it is uncertain how many will apply, but at least 9 more have definitely had children.
- 23) In terms of other applications made, only one of their clients has ever applied for adoption and one has obtained a child arrangements order. All the others have done nothing to secure their status or parental responsibility.
- 24) As stated above, the number of single people that would apply for a parental order for their surrogate child is unknown. It is necessary to make an estimate for the number of single people to enable us to assess the costs and benefits of this remedial order and therefore, a number of assumptions have been made. The estimate of the number of single people who may apply for parental orders has been made from the information from a leading law firm mentioned above, and to be conservative in the cost estimate we have assumed that if parental orders had been available every person who sought advice would have gone ahead with the process. This results in an estimate of 8 people per year. Adding to this an estimate of single people who are pursuing surrogacy arrangements abroad, arrived at by combining estimated figures from HM Passport Office and Children and family court advisory support service (Cafcass)¹ figures this increases the estimate to 10 people per year in 2016.
- 25) It is assumed that this remedial order will not result in more single people deciding to have a child through surrogacy, and therefore the general growth of parental orders has been applied to those of single people. Applying the growth rate seen over the last 5 years results in estimates of 14 people in 2018 which is the first year this remedial order will come into effect, up to 26 in 2022 and 58 in 2028.

¹ Cafcass Freedom of Information request: Gov/CAF 15-147 Country of surrogates involved in parental order applications
https://www.cafcass.gov.uk/media/264110/caf_15-147_countries_of_surrogates_in_parental_order_applications.pdf

Quantification of benefits

- 26) As the parental order process is somewhat simpler than the adoption process, there may be some small saving of resources, for example to Local Authorities and a simpler process for the single parent. Whether these arise will depend on the decisions of single parents with a surrogate child. The research needed to quantify these small savings would be disproportionate to the scale of the sums involved.
- 27) In addition, some of the single people who have had, or will have a child through surrogacy who would not have applied for an adoption order, may now apply for a parental order. This could be because the process is simpler, or because it better reflects the genetic relationship between the single person and the child. This is a benefit to the child, the intended parent and society as a whole as the legal parental responsibility is clear, leaving no uncertainty of responsibility between the birth mother and her partner and the intended parent. There are also broader societal benefits from legal equality. These benefits are not quantified.
- 28) There is also the benefit to the intended parent and the child of the parent being entitled to adoption leave, which they previously would not have if they did not apply for an adoption order. The value of this benefit to the intended parent would be at least the value of the forgone wages minus any childcare costs, as if they valued the leave less than this they would choose to return to work. It is assumed here that the intended parent takes the maximum 39 weeks paid leave, on statutory adoption pay, and then returns to work. These benefits have been estimated using average weekly wage², £512 in March 2017 and average weekly childcare costs³, £202 in 2016, which result in £12,000 per person, equating to an annual benefit of £0.38m and a PV benefit of £3.01m over 10 years.
- 29) If the intended parent does take the adoption leave when they previously would not have this has benefits to the child, parent and the rest of society as the more time the child has with their primary carer in their first year may lead to better outcomes for the child⁴.
- 30) The birth mother is still entitled to maternity leave and statutory maternity pay when the surrogate parent takes adoption leave and statutory adoption pay and so this is unchanged.⁵

Costs

- 31) The Remedial Order does not compel any citizen or business to do anything. It provides an additional option to single people, that is currently only available to couples.
- 32) As the Remedial Order does not require any action by anyone, any changes are due to a behaviour change as a result of the option being open to the single people and therefore do not impose any direct costs. However, there may be some indirect costs due to single people having a child through surrogacy applying for a parental order, when they would previously not have applied for an adoption order. If they are granted a parental order they would be entitled to adoption pay and leave in the same way one of the surrogate parents in a couple would be. This results in indirect costs to business and the exchequer from more people taking adoption leave and receiving adoption pay.
- 33) The scale of the **costs to business** from the potential increase is small. Business can reclaim most of the statutory adoption pay costs from the government⁶ and therefore the main costs are those involved in covering the person's absence. This consists of the cost of

² ONS, UK average weekly wage, March 2017, EARN01 Average Weekly Earnings - total pay, Great Britain (seasonally adjusted) Whole Economy KAB9
<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/datasets/averageweeklyearningsearn01/current>

³ Family and Childcare Trust, 2016 Childcare survey: Average weekly cost of full-time child-minder for a child under 2, for Britain average of regions and nations, <https://www.familyandchildcaretrust.org/childcare-survey-2016-0>

⁴ Tanaka, S. (2005). "Parental Leave and Child Health Across OECD Countries", *The Economic Journal*, 115, 7-28.

⁵ Gov.uk guidance <https://www.gov.uk/legal-rights-when-using-surrogates-and-donors/maternity-leave>

⁶ Gov.uk guidance, <https://www.gov.uk/recover-statutory-payments>

covering the persons' job whilst on leave and productivity losses because of this, and an extra person's non-wage costs (as these still need to be covered for the person taking adoption leave, as well as the person covering their post). This has been estimated using average weekly wage⁷ and methodology from the BIS Shared Parental Leave IA⁸. The cost of absence is the productivity loss is estimated to be 11% of labour costs (mid-point of the range 7-14% used in the above IA) and non-wage costs of 30% of wages in line with government guidance. The costs to business are estimated to be £9,000 per person taking leave, equating to an average annual cost of £0.29m and a PV cost of £2.27m over 10 years.

- 34) There are **costs to the exchequer** from extra people claiming statutory adoption pay of £7,000 per person taking leave, equating to an annual average cost of £0.22m and a PV cost of £1.75m over 10 years.

Uncertainties

- 35) The costs and benefits presented here will only arise if the single people having a child through surrogacy decide to apply for a parental order, when they would not have applied for an adoption order (other than the small resource savings and the benefit of the legal recognition of the genetic relationship between the intended parent and the child which are benefits of the parental order over an adoption order).
- 36) The number of single people who have had a child through surrogacy is unknown, as is the numbers who are likely to in future. Estimates presented in paragraphs 24 and 25 above have been made using the best information available at the time, but there is a lot of uncertainty around these. The 'per person' figures have been presented in the benefits and cost section so the reader can see the impact of any different outturn in numbers.

Preferred option

- 37) The Government must end the incompatibility with the Human Rights Act 1998. A Remedial Order is a relatively straightforward way of doing this, and is the preferred option. If the intended parents decide to apply for a parental order now they are an option, and would not have applied for an adoption order then there is a net present cost of the Remedial Order of £1.01m over 10 years. However, there are substantial unquantifiable benefits in terms of the benefits to the child of better outcomes; to the child, intended parents and birth parents of legal clarity over the parental responsibility of the child; and the benefit of the legal recognition of the genetic relationship between the intended parent and the child. Therefore it is reasonable to conclude the benefits outweigh the costs of this policy.

⁷ ONS, UK average weekly wage, March 2017, EARN01 Average Weekly Earnings - total pay, Great Britain (seasonally adjusted) Whole Economy KAB9
<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/datasets/averageweeklyearningsearn01/current>

⁸ Modern workplaces: shared parental leave and pay administration consultation - impact assessment,
<https://www.gov.uk/government/consultations/consultation-on-the-administration-of-shared-parental-leave-and-pay>