

# PROJECT REPORT

UK Surrogacy Law Reform: Exploring the Application of Surrogacy Laws, Attitudes towards Surrogacy, and Attitudes towards the Reform of the Law Governing Surrogacy amongst Judges and Legal Practitioners in Scotland



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**UNIVERSITY OF ABERDEEN, SCHOOL OF LAW,  
CENTRE FOR PRIVATE INTERNATIONAL LAW**

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# INTRODUCTION

This Report was prepared under the auspices of a small-scale research project titled ‘UK Surrogacy Law Reform: Exploring the Application of Surrogacy Laws, Attitudes towards Surrogacy, and Attitudes towards the Reform of the Law Governing Surrogacy amongst Judges and Legal Practitioners in Scotland’, which was conducted by Dr Katarina Trimmings (the Principal Investigator) and Dr Jennifer Speirs (the Research Assistant) between September 2019 and February 2020. The project was generously funded by the Clark Foundation for Legal Education. The key objectives of the research were to explore the practical application in Scotland of the UK laws governing surrogate motherhood<sup>1</sup> and attitudes towards surrogacy and possible law reform in this area amongst judges and legal practitioners in Scotland. Ultimately, the project sought to provide a Scottish perspective on the proposed reform of the UK laws governing surrogacy.<sup>2</sup>

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<sup>1</sup> In particular, s 54 of the Human Fertilisation and Embryology Act 2008 (‘HFEA’).

<sup>2</sup> See Law Commission: Reforming the Law, ‘Surrogacy’, available at <https://www.lawcom.gov.uk/project/surrogacy/>. See also Law Commission & Scottish Law Commission, ‘Building families through surrogacy: a new law / A joint consultation paper’, available at <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2019/06/Surrogacy-consultation-paper.pdf> (‘Consultation paper’).

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## 1. Background

In the United Kingdom, assisted reproduction, including surrogate motherhood, is a reserved matter. This means that surrogacy is regulated by the Westminster Parliament, and the law on surrogacy is the same in all three territorial jurisdictions of the UK - England & Wales, Scotland and Northern Ireland. Surrogacy is legal in the UK and the intending parents are responsible for reimbursing any reasonable pregnancy-related expenses that the surrogate incurs. The surrogate mother cannot be paid for carrying the child and a surrogacy arrangement is not enforceable by the law. The surrogate mother is the legal mother of the child at birth even if she is not genetically related to the child, and if she is married or in a civil partnership, her spouse or civil partner will be the child's second parent at birth, unless they did not consent to the treatment. Legal parenthood can be transferred by parental order after the child is born, however, various conditions must be met for a parental order to be granted, including for example that the application is made within six months of the birth; that at least one of the intending parents is domiciled in a part of the UK; that no more than reasonable expenses has been paid to the surrogate mother (unless the payment is retrospectively authorised by the court); that the child is in the care of the intending parents both at the time of the application and the time of the making of the order, and, perhaps most importantly, that the surrogate mother (and her husband/partner) agree.<sup>3</sup>

It has been suggested that the laws governing surrogacy are outdated and no longer fit for purpose. In particular, it is felt that there are difficulties with the process of the post-birth transfer of legal parentage through parental orders, and also that the uncertainty experienced by intending parents in the UK drives them abroad to more liberal jurisdictions where commercial surrogacy is permitted and surrogacy arrangements are legally enforceable but where there are concerns about exploitation of surrogates.

Against this background, the Law Commission of England and Wales and the Scottish Law Commission have commenced a joint project to develop law reform recommendations in this sensitive area of law.<sup>4</sup> The Law Commissions' project seeks to 'consider the legal parentage of children born via surrogacy, and the regulation of surrogacy more widely', whilst taking 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.'<sup>5</sup> It is the intention of the Law Commissions that their work be informed by high-quality academic research; in particular research centered on understanding public attitudes towards the practice of surrogacy and the reform of the law governing surrogacy.<sup>6</sup> This Report, albeit limited in scope,<sup>7</sup> seeks to assist the Law Commissions in attaining this objective by helping to develop well-informed recommendations for the reform of the UK laws governing surrogacy, from a Scottish perspective.

The terminology used throughout the Report follows the Law Commissions' Consultation paper,<sup>8</sup> however, when referring to the gestational mother, terms 'surrogate' and 'surrogate mother' are used interchangeably.

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## 2. Methodology

It was planned that approximately 20 interviews would be carried out with selected judges and legal practitioners based in Edinburgh, Glasgow and Aberdeen. Several potential research participants were recommended by the Scottish Law Commission (based on their prior interactions with these specialists), and a number of additional contacts were identified through online search, based on the potential participants' expertise in the area of fertility and/or family law. Whilst it was not necessary for the research participants to have had direct involvement in a surrogacy case, knowledge and experience of family law was essential.<sup>9</sup>

### Participant recruitment

The participant recruitment stage of the project was divided into two parts. During the first part, 30 invitation letters were sent out.<sup>10</sup> Of the specialists approached through these letters, 13 responded positively; although one of them was eventually unable to take part in the project. Consequently, only 12 interviews<sup>11</sup> were conducted as a result of this part of participant recruitment, making it apparent that the pool of specialists who would be suitable and willing to participate in the project was much narrower than originally thought.

In the meantime, a second part of the recruitment phase was carried out, during which a 'judicial access request letter' was sent to the Lord President of the Court of Session to request permission to approach Sheriffs with experience in family law matters based at Sheriff Courts across Scotland and invite them to participate in the project either by way of a face-to-face or phone interview, or a questionnaire, as preferable to the individual participant. The Lord President kindly approved the judicial access request on condition that permission be obtained also from the Sheriffs Principal. A judicial access request letter was then sent to all six Sheriffs Principal in Scotland. This was accompanied by a polite request to circulate a brief 'invitation to participate in research' letter amongst their Sheriffs. This resulted in

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<sup>3</sup> HFEA, s 54.

<sup>4</sup> See Law Commission, 'Surrogacy laws set for reform as Law Commissions get Government backing' 4 May 2018, available at <https://www.lawcom.gov.uk/surrogacy-laws-set-for-reform-as-law-commissions-get-government-backing/>.

<sup>5</sup> Ibid.

<sup>6</sup> Law Commission Surrogacy Project, Meeting re Possible Public Attitudinal Research, 18 January 2019.

<sup>7</sup> The material scope is limited to judges and legal practitioners and the geographical scope is limited to Scotland.

<sup>8</sup> See n 2 above.

<sup>9</sup> Unlike in England & Wales, it does not appear to be common for legal practitioners in Scotland to specialise exclusively in the area of fertility law. This seems to be due to a combination of the relatively narrow scope of fertility law as a sub-field of family law and the apparently much lower number of surrogacy cases in Scotland than in England & Wales. For more details on the profile of the research participants see below.

<sup>10</sup> Of the specialists approached, 4 were based in Aberdeen, 18 in Edinburgh and 6 in Glasgow. Additionally, 2 potential participants based in Dundee were approached.

<sup>11</sup> These consisted of face-to-face interviews with 11 legal practitioners based in Edinburgh and Glasgow, and one Court of Session judge.

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three Sheriffs kindly agreeing to participate in the project; all three by way of a questionnaire. The questionnaire reflected the content of the interview questions, albeit obviously the format differed.

### **Interview procedure**

The interviews were conducted face-to-face at a place agreed on by the individual participant and the researcher. Informed consent was given in writing, and participants were made aware that they were free to withdraw from the research at any time, without giving reason. Also, participants were guaranteed that all data would be anonymised in the collection, storage and publication of research materials.

The interviews were conducted in the period between October 2019 and February 2020 and followed a combination of structured and semi-structured interview questions. The latter type of questions allowed the interviewees to elaborate on relevant issues or to raise new issues if needed. The interviews took approximately 45 minutes each and were divided into three parts: general issues, substantive issues and procedural issues.<sup>12</sup>

Research ethics approval for the project was granted by the Committee for Research Ethics & Governance in Arts, Social Sciences & Business of the University of Aberdeen.

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<sup>12</sup> For more details see the analysis of the research findings below, which follows the structure of the interviews.



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# PROJECT FINDINGS

## 1. General part

The interviews and the questionnaire were divided into three parts. The first part focused on selected introductory points, in particular the research participant's professional experience of surrogacy.

12 participants (80%) had a professional experience of surrogacy in that they had advised (potential) surrogate mothers and/or intending parents or acted as a *curator ad litem* for a parental order case.<sup>13</sup> Occasionally, the participants encountered a situation where they were asked for legal advice in a surrogacy case but the parental order proceedings for some reason did not go ahead. This meant that several participants (40%), although having provided legal advice in a surrogacy case, have not dealt with a parental order application.<sup>14</sup>

Several participants noted that the numbers of enquiries related to surrogacy and parental order applications in Scotland were on the increase. This trend was evidenced, even though only anecdotally, by the numbers of surrogacy-related queries/parental order applications dealt with the participants. Unfortunately, this information was not provided by all participants, and where it was provided, the format differed, so it was not feasible to compare the data in any meaningful way. Nevertheless, the following figures can be mentioned by way of an example: '3 cases leading to a parental order all in one year'; 'about 10 cases in the last few years'; and '12 cases since August 2015 (2 in 2020 so far, 4 in 2019, 1 in 2018, 3 in 2017, 1 in 2016, 1 in 2015)'.<sup>15</sup>

In more general terms, one participant explained that their first case was in 2001 or 2002 and that it was very unusual then. In contrast, currently there are '3-4 cases on [their] desk'. Another participant noted that the number of surrogacy-related enquiries had risen to the point that they now needed 'a spreadsheet for managing them', and another participant remarked that they 'may now have 6-9 consultations ongoing, at various stages'.

Despite the increasing numbers of surrogacy arrangements in Scotland, several participants highlighted the fact that the numbers were lower in Scotland, relative to the size of Scotland's population, than in England and Wales. It was suggested that there could be cultural differences that would explain the relatively lower numbers, i.e. that Scotland may be more conservative than England and Wales. Alternatively, it was questioned whether the difference could be due to the expertise of English fertility lawyers and the possibility that they advertise their legal services in Scotland. Several participants believed that there was anecdotal evidence of intended parents normally resident in Scotland seeking parental orders in England and Wales. In this context, 2 participants referred to a 'loophole' in the current legislation whereby s 54(4)(b) of the Human Fertilisation and Embryology Act 2008 refers to a UK domicile as opposed to a Scottish or English domicile.<sup>16</sup>

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## 2. Substantive part

### Legal parenthood in surrogacy arrangements

In the UK, the legal mother of a child born through a surrogacy arrangement is the surrogate mother, while the father or second parent is usually either the surrogate's spouse or civil partner if she has one, or the intended father where his sperm was used.<sup>17</sup> A full transfer of legal parenthood from the surrogate mother (and her husband/partner) to the intended parent(s) is facilitated through a parental order.<sup>18</sup> The participants were asked whether they considered this approach to be appropriate or whether they believed that legal parenthood at birth should be vested in the intended parents instead. Overall, the participants were split on the question of legal parenthood whilst two of them noted that the underlying issue here was of an ethical rather than a legal nature.

Under a half of the participants (47%) believed that it was desirable that the intended parents were recognised as the legal parents from birth.<sup>19</sup> Nevertheless, two of these participants were of the view that this approach to legal parenthood was not unqualified; rather it was dependent on the fulfilment of certain requirements. In particular, one participant emphasised that 'put[ting] the child in the same position as if it had not been born through surrogacy' was acceptable only if the following three requirements were met: first, the surrogate mother did not wish to be the legal parent; second, the intended parents wished to be the legal parents; and third, it was in the child's best interest. Importantly, the last requirement implies that the allocation of legal parenthood to the intended parents at birth should

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<sup>13</sup> On the receipt of an application for a parental order, the Scottish court must appoint a *curator ad litem* and a reporting officer (Act of Sederunt (Rules of the Court of Session 1994) (SI 1994 No 1443), ch 97 as amended, r 97.8(1); Act of Sederunt (Child Care and Maintenance Rules) 1997 (SI 1997 No 291), ch 2, Pt VI as amended, r 2.50(1)). The role of the *curator ad litem* is to safeguard the interests of the child (The Adoption and Children (Scotland) Act 2007, s 108(1)(a)). The participant concerned felt that acting as a *curator ad litem* for a parental order case was challenging as there was 'little guidance in Scotland' in this area. This point was indirectly supported by another participant who believed that more training should be provided for *curators ad litem* generally (i.e. not only in the surrogacy context).

<sup>14</sup> The reasons cited ranged from obstacles on the part of the parties (i.e. there were arguments between the parties; the intended parents moved to England and went through surrogacy there; in a cross-border surrogacy case, the intended parents had a birth certificate from the country of birth and did not appreciate the importance of obtaining a parental order in Scotland; and the surrogate mother was already pregnant and the intended parents thought that they could 'deal with it themselves'), to obstacles on the part of the participant (i.e. in an early 1990s case, the participant who was unexperienced in the area was uncertain what legal advice to provide), and obstacles of a general character (i.e. the embryo transfer had been unsuccessful).

<sup>15</sup> This participant noted that some fertility clinics in Scotland provided would-be surrogate mothers and intended parents with a list of lawyers. This participant's name was on such a list of lawyers compiled by the Glasgow Centre For Reproductive Medicine (GCRM) (where most surrogacy pregnancies in Scotland are carried out).

<sup>16</sup> S 54(4): 'At the time of the application and the making of the order— (a) [...], 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.'

<sup>17</sup> HFEA 2008, ss 33(1) and 35. In Scotland, the man whose sperm fertilised the egg would be the legal parent only if he took steps to have himself named on the birth certificate, or a court order was made declaring that he was the child's parent.

<sup>18</sup> HFEA 2008, s 54.

<sup>19</sup> Four reasons were cited in support of this approach: first, it prevents a situation where the new-born child is in a temporary 'limbo', 'with its future mother in terms of the law uncertain'; second, it puts in place, as soon as possible, a 'secure family structure [...], both physically and emotionally' for the benefit of the child; third, it gives effect to the surrogacy agreement; and fourth, it is 'better suited to the reality of most surrogacy arrangements'.

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not be automatic but should be preceded by a welfare assessment carried out by the court or other relevant authority. The necessity of the surrogate’s consent as a prerequisite to the intended parents being vested with legal parenthood at birth was emphasised also by another participant. This participant additionally believed that the intended parents should be given legal parenthood at birth only if the child was genetically linked to both of them.

In contrast, 33% of the participants believed that the surrogate mother should be treated as the legal mother at birth.<sup>20</sup> In support of this view, one participant cited concerns over women’s bodily autonomy and the protection of the surrogate. Another participant felt that automatic allocation of legal parenthood to the intended parents could be damaging for the child as there would be no investigation of the suitability of the intended parents and the welfare needs of the child. This participant criticised ‘the rush to get legal parenthood’ and recommended the use of ‘delegated authority’ as an alternative way of dealing with the ‘uncertainty period’ between the birth and the transfer of legal parenthood from the surrogate mother to the intended parents. Yet another participant expressed the view that the present system, although not perfect, worked for the protection of the child’s safety that is paramount.

Finally, 20% of the participants felt that each of the two approaches to legal parenthood had its merits and shortcomings and were unable to express preference for either of them.

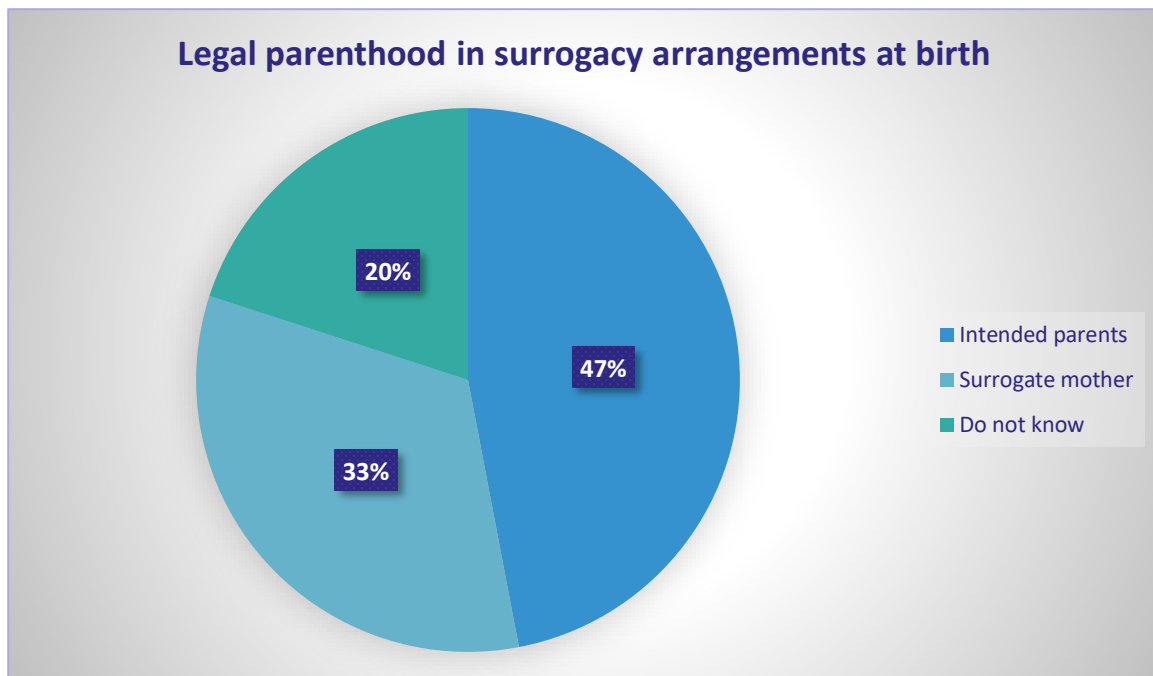


Table 1

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<sup>20</sup> Albeit for at least one of these participants this was not a straightforward conclusion to reach as (s)he stated: ‘With some hesitation, I suggest that it is probably right that the person giving birth should be the legal p



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## Consent of the surrogate mother

In parental order proceedings, currently, the consent of the surrogate is not required where the surrogate cannot be found or is incapable of giving agreement.<sup>21</sup> The participants were asked whether, in their view, this should be widened so as to allow the court to dispense with the consent of the surrogate where the court is satisfied that the child's welfare throughout his/her life as the court's paramount consideration<sup>22</sup> requires so, and one of the below following circumstances is present:

- a.) The child is living with the intended parents, with the consent of the surrogate, or
- b.) following a determination by the court that the child should live with the intended parents.<sup>23</sup>

73% of the participants held the view that the court should be allowed to dispense with the consent of the surrogate mother on the basis of the child's welfare in each of the two circumstances set out above. Two participants (13%) believed that dispensation with the surrogate mother's consent by the court on the child's welfare ground should be possible, however, this court's power should not be unlimited. Rather, it should be restricted as follows:

First, dispensation with the surrogate's consent by the court on the ground of the child's welfare should be possible where the court has determined that the child should live with the intended parents (point b.) above). The relevant participant, however felt 'less comfortable' about this in respect of the first scenario (point a.) above) – i.e. a situation where the child is living with the intended parents, with the consent of the surrogate but no determination to that effect has been made by the court.

Second, the court should have the power to dispense with the consent of the surrogate mother in both circumstances set out above, however, this authority should only be available in cases of gestational surrogacy. Where there is a genetic link between the surrogate mother and the child, dispensation with the surrogate's consent on the basis of the child's welfare should not be possible. More generally, this participant expressed concerns over a possible 'low threshold' whereby the surrogate's rights may not be sufficiently protected.

One participant (7%) felt uncomfortable with any attempts to allow the court to dispense with the surrogate's consent on the ground of the child's welfare. This participant believed that this would amount to linking surrogacy and adoption together as dispensation with parental consent based on the welfare of the child is possible in adoption proceedings in Scotland under s 14(3) of the Adoption and Children (Scotland) Act 2007. In the view of this participant, surrogacy should be kept distinct from adoption and therefore 'consent has to be there at every stage'.

Finally, one participant (7%) believed that no consent at all should be sought from the surrogate mother as surrogacy is 'a private contractual arrangement and the state is only there to rubber-stamp the consequences post-birth'. This participant found 'invoking the welfare principle into a contractual

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<sup>21</sup> HFEA 2008, ss 54(6) and 54(7).

<sup>22</sup> Cf S 14(3) of the Adoption and Children (Scotland) Act 2007.

<sup>23</sup> Cf Consultation paper (n 2), para 11.58.

arrangement about surrogacy [...] hugely concerning’ and concluded that ‘the court can in any event always intervene in the life of the child if there is a welfare consideration’.

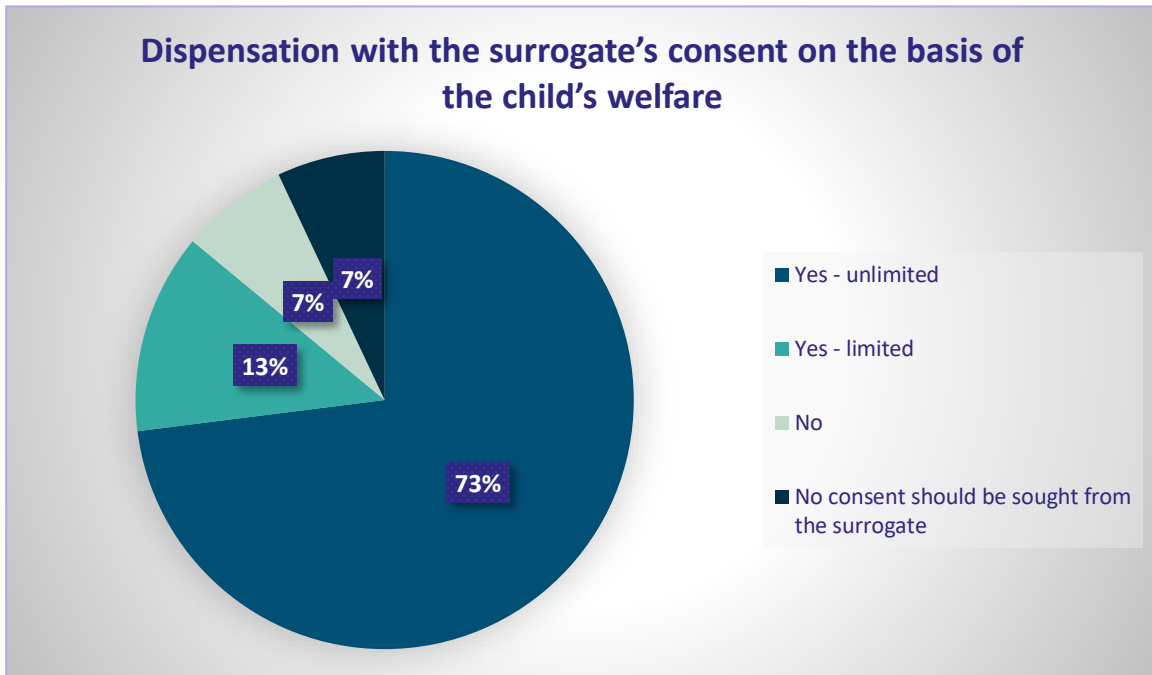


Table 2

### Payments in surrogacy arrangements

The question of payments was approached differently in the interviews than in the questionnaire. In particular, the interviewees were asked an open-ended question (i.e. ‘What is your view on the issue of payments in surrogacy arrangements?’) whereas the participants who chose to complete the questionnaire were presented with a closed question, which listed the individual categories of payments set out in the Consultation Paper (where relevant, with examples), and were asked to indicate for each category of payments whether the law should authorise it. Given this difference in approach, the interview and the questionnaire findings have been analysed separately.

#### *Interview findings*

Generally, the interviewees expressed strong support for maintaining the altruistic nature of surrogacy arrangements in Scotland. Accordingly, 75% of the interviewees believed that surrogacy arrangements should be regulated in a way that legalises only not-for-profit arrangements. The interviewees were concerned in particular about ‘exploitation’; ‘people making money out of baby-farming’; the need ‘to prevent abuse’; and the ‘protection of vulnerable surrogates’. Nevertheless, overall, the interviewees thought that surrogate mothers should be allowed to receive not only reasonable payments for their pregnancy-related expenses but also a limited amount of compensation. In this context, one participant suggested that, given the difficulty of ‘policing and enforcing effectively’ the regulation of payments, the legislator must avoid being over-restrictive.

With respect to reasonable pregnancy-related expenses, it was proposed that a list of what is ‘reasonable’ should be drawn up. As for payments beyond reasonable pregnancy-related expenses (i.e. compensation for lost earnings (actual/potential), lost entitlement to social welfare benefits, and pain/inconvenience), it was suggested that such payments should be capped by the legislator.<sup>24</sup> None but one participant expressly mentioned gifts to the surrogate mother as a separate category of payments. This participant found the possibility of legalising gifts in the context of surrogacy arrangements inappropriate and noted that ‘it becomes quite uncomfortable’. The remaining 25% of the interviewees did not hold any particular views on the question of payments in surrogacy arrangements.

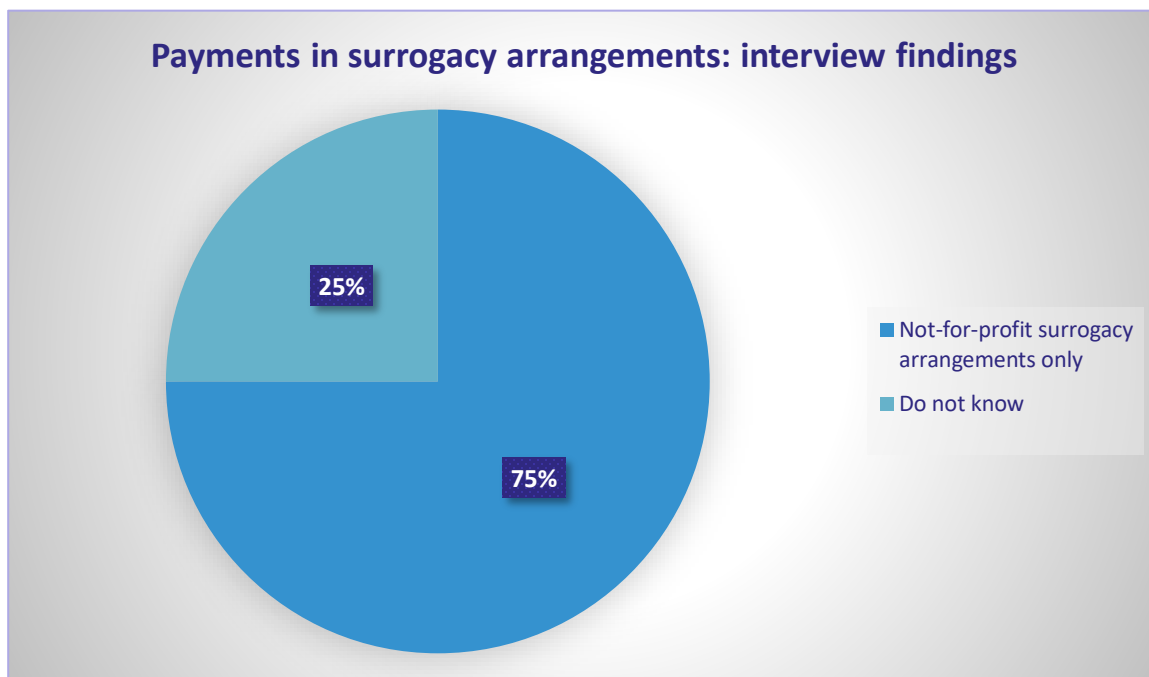


Table 3

### *Questionnaire findings*

The three participants who were recruited during the second phase of the project participant recruitment (and chose to complete the project questionnaire instead of taking part in an interview)<sup>25</sup> expressed the following views on the issue of payments in surrogacy arrangements.

All 3 participants (100%) believed that the law should authorise these categories of payments to the surrogate mother: 1.) Essential costs relating to the pregnancy;<sup>26</sup> ('EC') 2.) Additional costs relating to

<sup>24</sup> Nevertheless, one participant suggested that putting a cap on such compensatory payments would be difficult 'because each situation is different'.

<sup>25</sup> See section 'Methodology' above.

<sup>26</sup> E.g. maternity clothes; additional expenditure the surrogate incurs on food as a result of the pregnancy; costs associated with fertility treatment where a clinic is used for the surrogacy; costs incurred while the surrogate recovers from the birth (e.g. physiotherapy), and costs associated with attending any postnatal medical appointments.

the pregnancy;<sup>27</sup> ('AC') 3.) Costs associated with a surrogacy arrangement and pregnancy;<sup>28</sup> ('CA with SA') and 4.) Actual lost earnings (whether the surrogate is employed or self-employed) ('ALE').

2 participants (67%) were of the view that 'Potential lost earnings' ('PLE'); 'Lost entitlement to social welfare benefits' ('LESWB'); and 'Compensation for pain and inconvenience, medical treatment and complications' ('Compensation'), and the death of the surrogate mother' should also be included by the legislator in the list of sanctioned categories of payments.

Finally, only 1 of the 3 participants (33%) believed that surrogate mothers should be legally entitled to receive gifts from the intended parents.

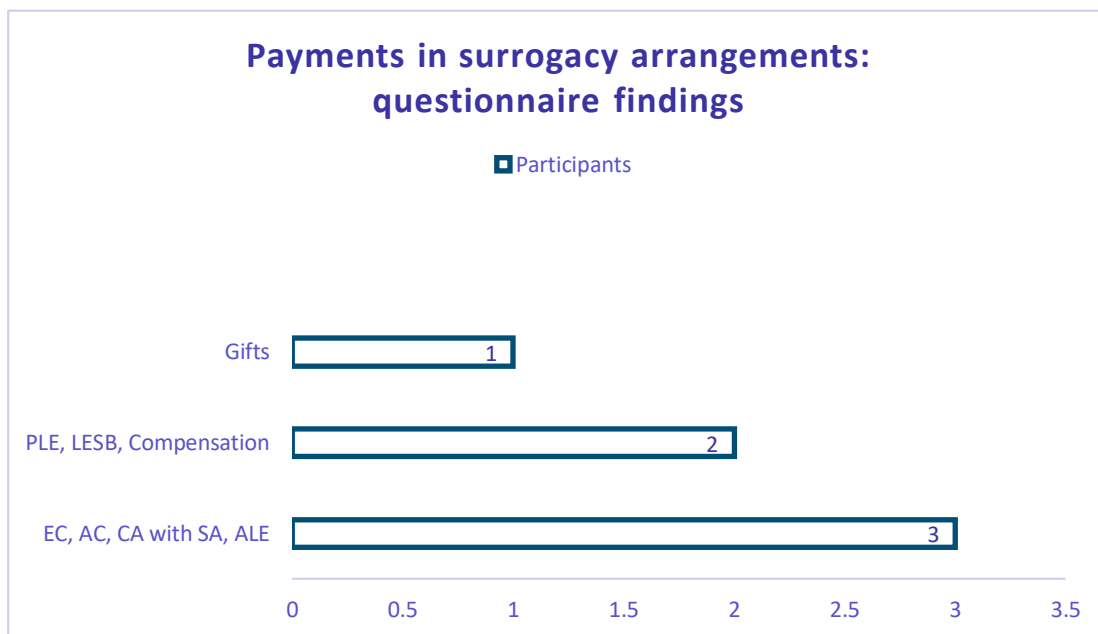


Table 4

## Regulation of international surrogacy arrangements

All participants (100%) were of the view that international surrogacy arrangements should be treated differently from domestic arrangements. Several participants drew parallel with intercountry adoption, expressing concerns over potential exploitation of birth mothers and trafficking in children in international surrogacy arrangements. One participant noted that it took years to negotiate an international Convention on inter-country adoption<sup>29</sup> and that the UK legislator should therefore not

<sup>27</sup> E.g. cost of providing childcare or domestic support to help the surrogate mother during her pregnancy; the cost of taxis the surrogate uses to attend medical appointments, or to travel to and from work, rather than using other public transport; payments for fitness; and other classes designed to support pregnant women.

<sup>28</sup> I.e. costs specific to the surrogacy (e.g. costs incurred in the parties meeting up to get to know each other, costs of counselling and legal advice; additional payments made to the surrogate mother for support for her to recuperate after the birth, such as a holiday or additional counselling).

<sup>29</sup> 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. One participant suggested that this Convention could be helpful in developing a Convention on international surrogacy.

rely on an international Convention to regulate international surrogacy to be drafted any time soon but should instead tackle the problem through domestic regulation. Accordingly, there was a strong emphasis on the need to adopt legislation that will not ‘turn a blind eye to or encourage people to go abroad to regulatory frameworks that are inappropriate and would concern us as a reasonable society.’ Otherwise, our attitudes would be characterised by NIMBYism as we would be ‘exporting the moral dilemmas around surrogacy to overseas countries, where the situation is messy, perhaps exploitative, the surrogate has no genetic link to the baby and is in a need of money.’

One participant highlighted the fact that international surrogacy arrangements are ‘almost impossible to monitor’ and therefore should be assessed by the Scottish court before legal parenthood can be obtained by the intended parents. Six participants (40%) made an explicit or implicit reference to the Law Commissions’ proposal for the regulation of international surrogacy arrangements. All these participants supported the Law Commissions’ intention to exclude international surrogacy arrangements from the new pathway to legal parenthood that has been proposed for certain domestic surrogacy arrangements. More specifically, the participants commented that the need to protect the welfare of the child meant that ‘the new pathway is not appropriate for international arrangements’; that it was appropriate that intended parents in international surrogacy arrangements should ‘go through the extra hoop’ (i.e. parental order proceedings); that ‘the Law Commissions’ proposals are sensible as we do not know what procedures and processes were followed overseas’; and that ‘a parental order should still be required in cases involving international arrangements, to ensure that the UK courts [...] are happy with the arrangements, given that different requirements may apply in different countries depending on where the surrogate lives.’

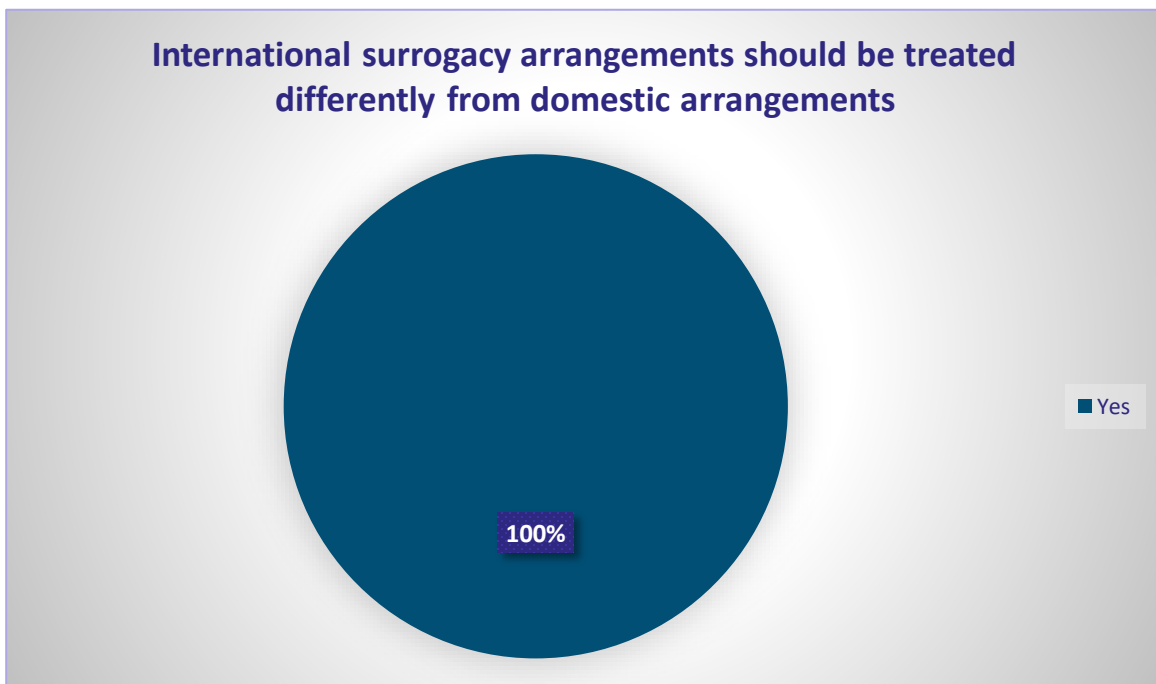


Table 5

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### 3. Procedural part

#### Expenses of *curators ad litem* and reporting officers<sup>30</sup>

There is evidence of an inconsistency between sheriffdoms/local authority areas as to charging for reports prepared by *curators ad litem* for the purposes of parental order applications. In some areas, the applicants are asked to bear the cost; in other areas, they are not; moreover, the cost varies from case to case.<sup>31</sup> Against this background, the participants were asked whether, in their view, there was a need for greater consistency and clarity in provisions relating to the expenses of *curators ad litem* and reporting officers. The participants largely limited their answers to *curators ad litem*.

27% of the participants were unaware of any inconsistencies related to expenses of *curators ad litem* in the context of parental order proceedings.

In contrast, 53% of the participants agreed that there was a lack of consistency,<sup>32</sup> making the present system unsatisfactory and in need of a reform. As an example, one participant explained that the Glasgow Social Work Department covered the *curator ad litem* fees whereas in Edinburgh, the clients paid privately.<sup>33</sup> Another participant described the present situation as follows: ‘The *curators ad litem* can charge whatever they want, without any justification. It is a “postcode lottery” as the applicants can’t “shop around”’. Related to this, another participant noted that the lack of consistency ‘makes it difficult to for the lawyer advising the intended parents.’ Nevertheless, yet another participant explained that although there is a great variety in terms of what the *curators ad litem* charge, the length and depth of their reports also varies.<sup>34</sup> Importantly, this point was touched on by further two participants, one of whom posed a rhetorical question whether the cost difference was due to a difference in quality between different *curator ad litem* reports. Another participant’s answer confirmed that this was indeed the case and clarified that ‘high fees (£130 per hour) usually mean good quality reports and avoid people “cutting corners”’. These participants believed that if the fees were to be lowered/capped, there was a danger of ‘getting a poorer service’.<sup>35</sup> In this context, one participant explained that (s)he ‘tends to charge an hourly rate’. These participants (20%) believed that there was no need for a legal reform in this area.

The participants who held the view that a legal reform of the expenses of *curators ad litem* and reporting officers was necessary made several suggestions for such a reform. The participants addressed 2 points in particular: 1.) the underlying ‘policy issue’ of who should pay for the *curator ad litem* fees, and 2.) the most appropriate way of regulating the fees of *curators ad litem*. With respect to the first point, it

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<sup>30</sup> One participant proposed that ‘the reporting officer and the *curator ad litem* should be the same person’.

<sup>31</sup> See Consultation Paper, para 6.101.

<sup>32</sup> One participant commented that this was ‘odd’ because ‘there is a standard for other work’ (e.g. permanency orders).

<sup>33</sup> Nevertheless, another participant noted that, even though there may be inconsistencies between sheriffdoms, there is consistency within Edinburgh.

<sup>34</sup> This participant mentioned a case where the Sheriff, who had no previous experience in the area of surrogacy, requested a very detailed *curator ad litem* report as (s)he wanted to ensure that (s)he has the right information for making the correct decision.

<sup>35</sup> This could have a negative impact on the judge’s ability to adjudicate the case as, it was suggested, Sheriffs tend to rely heavily on *curator ad litem* reports in parental order proceedings.



was noted that this was ‘an issue about what the public purse should pay for’ and, against this background, it was proposed that the fees should be covered by the applicants. With regards to the second point, the following alternative suggestions were made: a.) a table of fees should be drawn up in the secondary legislation, in the same way as it is for other legal duties; b.) a base line of fees with an added fee scale to cope with particularly challenging cases should be set by the legislator; and c.) the fees should be determined on the basis of the intended parents’ household income.

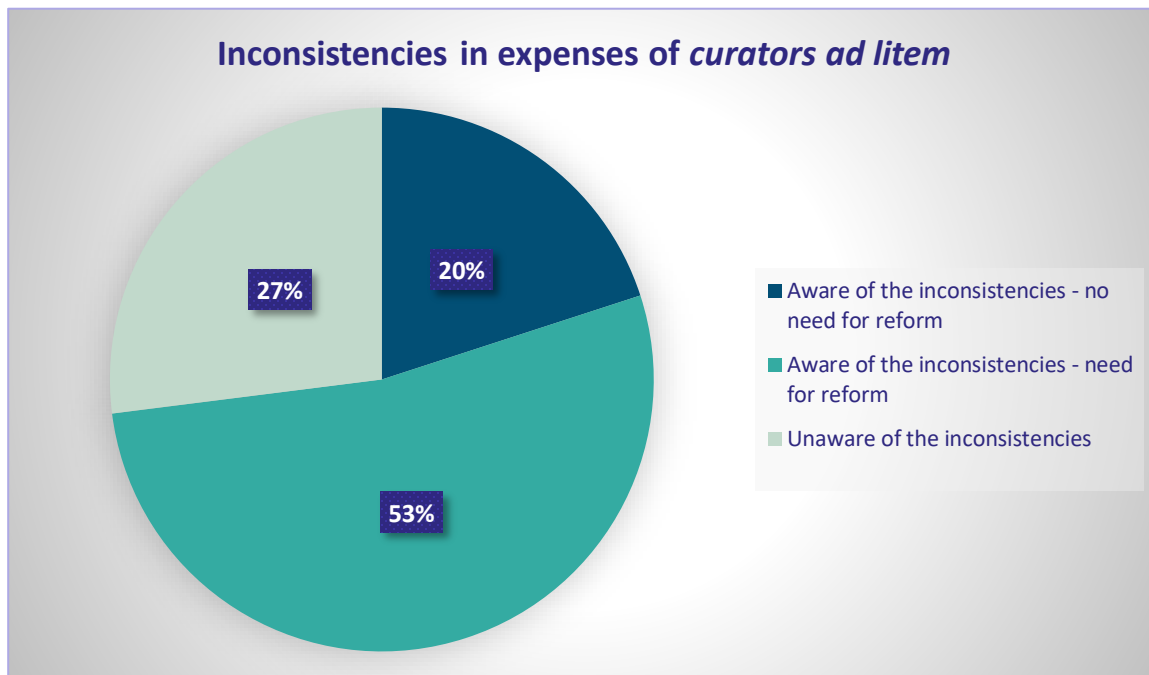


Table 6

### Availability of interim orders/orders for parental responsibilities and parental rights during parental order proceedings

The participants were asked whether, in their view, it should be provided by statute that, at the initial hearing or any subsequent hearing for a parental order, the court may make an interim order or an order for parental responsibilities and parental rights as it sees fit.

67% of the participants believed that this would be sensible and should therefore be permitted by statute. One participant commented that this would help some ‘in limbo’ situations, or when the parental order is being opposed. Another participant observed that this would be in the best interests of the child and would avoid a separate court getting involved.

Two participants (13%) were of the view that such reform would be useful, however, the court’s power to make an interim order or an order for parental responsibilities and parental rights in parental order proceedings should not be automatic. Instead, there should be a test, for example, medical necessity, or, in international cases, the lack of prior procedures in the country of birth.

One participant (7%) believed that, although granting the court the power to make interim orders in parental order proceedings would be useful, the power to make orders for parental responsibilities and rights was not necessary as ‘the caring parents would have such rights and responsibilities as were

necessary in terms of section 5 of the 1995 Children (Scotland) Act, because they've got care and control.' In contrast, another participant (7%) believed that it was 'already possible' to make an interim order, through Section 11(1) of the Children (Scotland) Act 1995.

Finally, one participant (7%) implicitly rejected such a reform. This participant had no experience of an interim hearing in the context of parental order proceedings; all the cases this participant dealt with had been one hearing.

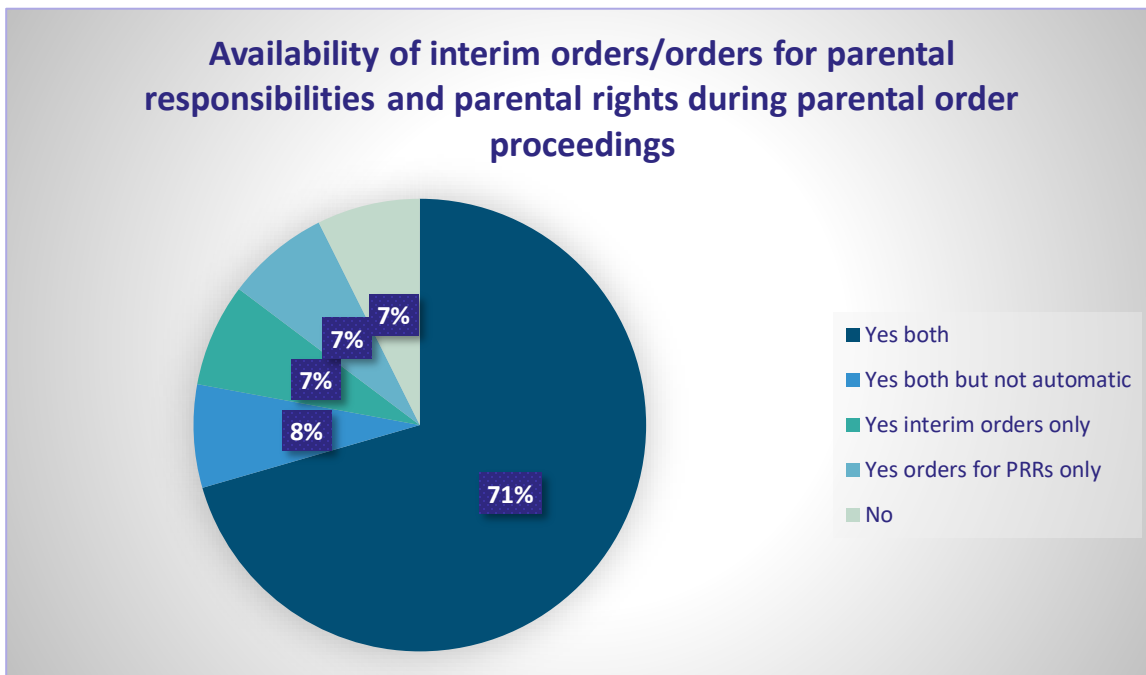


Table 7

### Need for a further procedural reform to accommodate the regulation of surrogacy arrangements in Scotland

Another question the participants asked was whether they thought that, more generally, further procedural reform was needed to accommodate the regulation of surrogacy arrangements in Scotland. 47% of the participants believed that a further procedural reform was needed, and the following general areas were identified as needing a reform: 1.) 'how consent is to be obtained', 2.) 'matters such as payments to *curators ad litem* and time limits', 3.) 'surrogacy agencies', and 4.) 'international surrogacy arrangements'. Additionally, one of these participants, although having noted that the procedure in Scotland worked well,<sup>36</sup> suggested that there should be 'a specialist court or at least specialist sheriffs for parental order applications.' This participant noted that, as 'the numbers are small', it should be easily achievable, without being 'resource-intensive'. Related to this, the participant highlighted the

<sup>36</sup> In particular, the participant noted: 'The cases that I have dealt with, they have been dealt with quickly and efficiently by Scottish courts. The intended parents can even do without a lawyer, and that should remain the case.'

fact that currently, ‘there is no way to build up expertise because there are so few cases’.<sup>37</sup> Consequently, intended parents (especially those involved in international surrogacy cases) tend to seek legal advice in England as ‘[m]ost expertise is in London’ and ‘[o]verseas agencies are likely to refer intended parents to London lawyers’.<sup>38</sup>

A similar theme was raised by further two participants who emphasised the need for ‘greater consistency in the courts across Scotland’,<sup>39</sup> and training of sheriffs and sheriff court clerks. These participants, however, did not believe that there was a need for a procedural reform as such. One of these participants considered that the impending reform of the surrogacy laws presented a suitable opportunity to introduce judicial training in the area of surrogacy. In addition to these two participants, there were further two participants (27% in total) who did not think that a further procedural reform to accommodate the regulation of surrogacy arrangements in Scotland was necessary. One of these participants remarked that ‘the proposals in the report [i.e. the Consultation paper] are comprehensive’. The remaining 27% of the participants were uncertain whether or not there was a need for a further procedural reform to accommodate the regulation of surrogacy arrangements in Scotland.

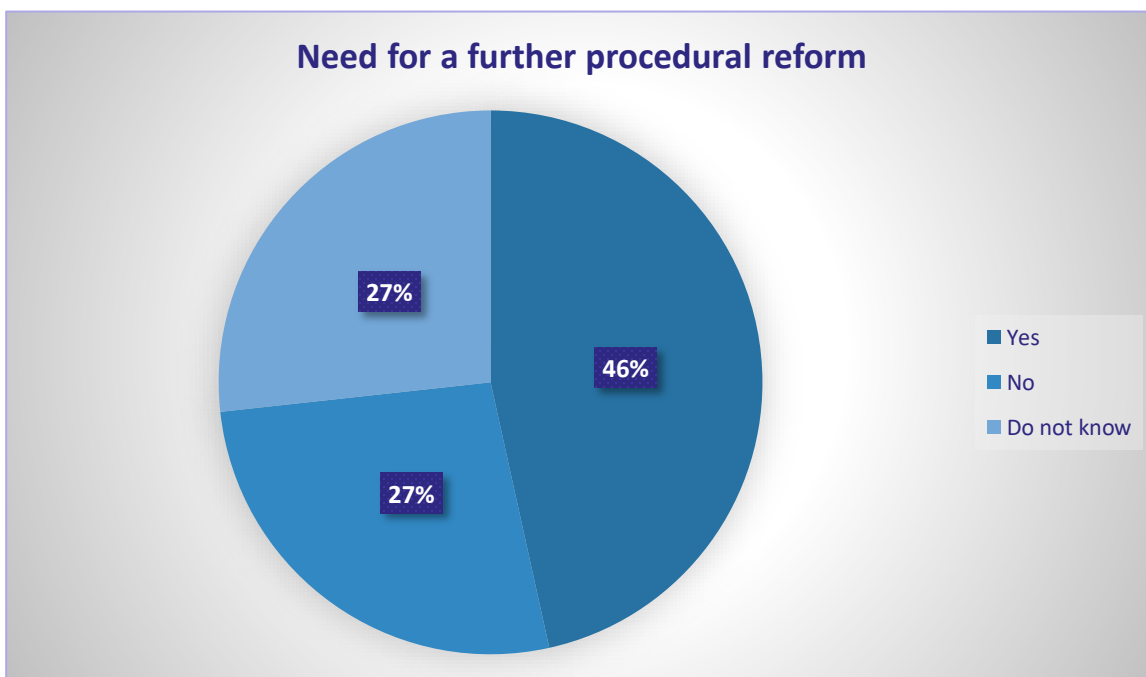


Table 8

<sup>37</sup> The participant noted that, from their experience, ‘some sheriff court clerks struggle with what to do’. For example, in one case, a couple who had been involved in an international surrogacy arrangement and already had a birth certificate for the child from the country of birth, were advised by a sheriff clerk that a parental order was not necessary.

<sup>38</sup> According to the participant, this could be verified by conducting research into ‘the Parental Order Register for England & Wales to see if there are any Scottish addresses.’

<sup>39</sup> One of these participants noted that the fact that ‘sheriffs and court clerks are treating surrogacy cases in different ways’ was most likely due to the ‘lack of experience in some courts’ with issues such as the ‘requirement for affidavits’ and the ‘issuing of interlocutor’.

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## **The length of the proposed period within which the surrogate has the right to object to the acquisition of legal parenthood by the intended parents**

It is proposed in the Law Commissions' Consultation paper that, under the 'new pathway' to legal parenthood, the intended parents will become the legal parents at birth, and that the surrogate should have the right to object to the acquisition of legal parenthood by the intended parents, for a fixed period after the birth of the child. The defined period should be the applicable period for birth registration less one week, meaning that in Scotland the period would be 14 days.<sup>40</sup> The participants were asked whether they considered this period sufficiently long.

The vast majority of participants (73%) believed that the proposed period of 14 days was 'too short a period for a post-partum mum'.<sup>41</sup> Indeed, several participants raised the point that women can be seriously affected in their judgment post-partum.<sup>42</sup> In this context, one participant suggested that the surrogate mother 'might be very unwell during that time', and another participant rightly noted that '[t]here could be medical problems'.

One participant observed that the link to the birth registration process was 'rational', however, the period needed to be extended. It was suggested that the Registration of Births Marriages and Deaths (Scotland) Act 1965 needed to include an exception for surrogacy cases.<sup>43</sup> Related to this, one participant posed a question whether there could 'be a delay allowed before registration of the birth'.

The time periods proposed by the participants ranged from 4 to 12 weeks. In particular, the following proposals were put forward: a.) 4 weeks; b.) 35 days (to align with the proposed period for England & Wales); c.) 6 weeks (to align with adoption legislation)<sup>44</sup>; d.) 6-8 weeks; and e.) 'at least 28 days but not more than 3 months'.

20% of the participants were of the view that the proposed period of 14 days after the birth of the child within which the surrogate has the right to object to the acquisition of legal parenthood by the intended parents was sufficiently long. Nevertheless, one of these participants believed that 'some relieving provision was needed' (e.g. 'except in exceptional circumstances') [...] 'to cover a situation that is unusual'. Such 'unusual' situation would include, for example, circumstances 'where the surrogate is undergoing surgery and recovery or is medically incapable for a time after birth.'

Another one of these participants expressed the view that 'adoption and surrogacy differ here' as, unlike in adoption, in surrogacy 'issues of consent and contract' come into play. Nevertheless, it is the principle of the best interests of the child that is even more important than the contractual considerations. As such, the best interests principle dictates that the 'no-man's land' (i.e. the temporary period within which

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<sup>40</sup> Consultation paper (n 2), para 8.27.

<sup>41</sup> One participant rightly noted that '[y]ou get a longer period to change your mind over a dress that you have purchased!'

<sup>42</sup> One participant made only an implied reference to the post-partum period by suggesting that '[t]he surrogate's emotions will not have settled'.

<sup>43</sup> Although it was acknowledged that 'the Scottish Parliament would not want to do that, because the Act is meant to be universally applied', it was felt that 'the nettle has to be grasped'.

<sup>44</sup> One participant suggested that the period of 6 weeks would be consistent also with 'criminal law legislation under which a mother who has murdered her new-born child within 6 weeks of giving birth can only be convicted of a culpable homicide as opposed to a murder.'

the question of legal parenthood is not fully settled) is kept to the minimum. Having said that, however, the participant acknowledged that she was speaking ‘as a lawyer’ rather than ‘as a mother’, which significantly affected her conclusion on the matter. In particular, she said: ‘Legally, speaking as a lawyer, you must know that you want to consent. But as a mother, I know that 14 days may be much too short a time period.’

Finally, one participant (7%) believed that the length of the period should be dependent on the presence or absence of a genetic link between the child and the intended parents and/or the surrogate mother. In particular, 14 days is a long enough period if the intended parents are both genetically related to the child, however, it is not long enough in cases of traditional surrogacy (i.e. where the surrogate is also the egg provider).

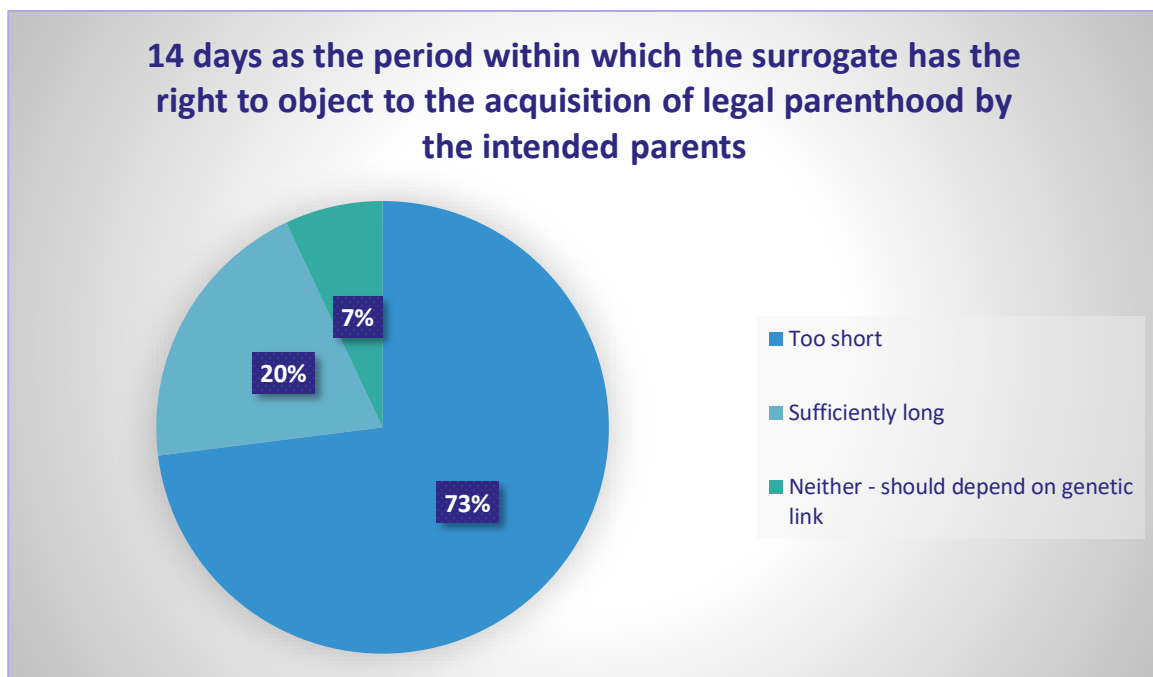


Table 9

### **Surrogacy arrangements outside the new pathway: death of the intended parents during the surrogate’s pregnancy or before a parental order is made**

The final question the participants were asked concerned a scenario involving a potential death of the intended parents during the surrogate’s pregnancy or before a parental order is made. The question was as follows:

‘Do you think that for surrogacy arrangements outside the new pathway, where both intended parents die during the surrogate’s pregnancy or before a parental order is made, it should be competent for an application to be made, by a person who claims an interest under section 11(3)(a) of the Children (Scotland) Act 1995:

- a. for an order for appointment as guardian of the child, and

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- b. for a parental order in the name of the intended parents, subject to the surrogate's consent? Alternatively, should the surrogate be registered as the child's mother?<sup>45</sup>

Several participants found this question difficult to answer. One participant observed that the situation 'is more likely because of the increasing age of intended parents nowadays'.

Two participants noted that a death of the intended parents during the surrogate's pregnancy would have succession implications,<sup>46</sup> and that the intended parents should therefore be advised to make a will. Nevertheless, one participant considered that 'only a person with parental rights and responsibilities can appoint a [testamentary] guardian', which under current law means that the intended parents are ineligible to do so. Another participant questioned whether it was possible to 'make someone a guardian of a baby that is not yet born'. Yet another participant believed that it was competent to include in one's will provision for intended children, however, they considered that following the death of the intended parents a declarator that the subsequently born child was a legal child of the intended parents would need to be issued. In the view of this participant, such declarator would be more appropriate than a parental order which would, in the given circumstances, amount to 'a declarator in the name of the intended but dead parent'.

Most participants answered the two parts of the question separately. With respect to the first part (a.), 73% of the participants believed that it should be possible for a person that claims an interest under section 11(3)(a) of the Children (Scotland) Act 1995 to apply for an order for appointment as guardian of the child. One participant noted that, 'in practice, guardianship is not common in Scotland'. Another participant believed that it was 'already competent for a person with an interest' to make such an application, and that the expression 'person with an interest' was wide as the term is not defined. Three participants emphasised the potential role that intended parents' parents and siblings may play here.

In contrast, only 33% of the participants answered 'yes' to the second part of the question (b.). One of these participants believed that to cover the temporary period before the parental order is made 'someone would still have to be appointed as the guardian'.

40% of the participants believed that it should not be possible for a parental order to be made in the name of the intended parents after they have died. One participant wondered 'why do this; what benefit and for whom?', noting that '[w]hat we don't want is a baby with no identity'. Several participants questioned whether it would 'be competent to raise an action on behalf of a deceased person' and argued that 1.) there would be 'no tests of the person for a parental order', 2.) 'the parental order and the birth certificate are different', and 3.) it would 'not be in the interests of the child's welfare' for a parental order to be made in such circumstances. Nevertheless, several participants emphasised the role of the welfare test in parental order proceedings and concluded that the issuing of a parental order in the name of the intended parents would be dependent on the welfare assessment by the court.<sup>47</sup> One participant expressed the view that it would be 'legally flawed' for a parental order to be made in the name of the

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<sup>45</sup> In this case, there would be a procedure for the surrogate to provide details of the intended parents, and, if relevant, gamete donors, for entry onto the register of surrogacy arrangements. Consultation paper, paras 8.76 and 8.82.

<sup>46</sup> One of these participants added that the situation would raise also identity issues.

<sup>47</sup> One of these participants stressed that the situation needed to be approached 'from the child's perspective, not the dead person's perspective'.



intended parents and that, instead, it would be more sensible for the court to issue a parental order in the name of a relative of the intended parents.

Finally, 20% of the participants had no clear view on the problem. They speculated, positing various points, including that: 1.) the answer would be dependent on the rest of the legislation; 2.) different areas of law would need to be considered as ‘parentage has so many different consequences in different areas’; and 3.) in the end, ‘the answer really is, what is best for the child’, and this will be contingent *inter alia* ‘on the age of the baby/the fetus’.

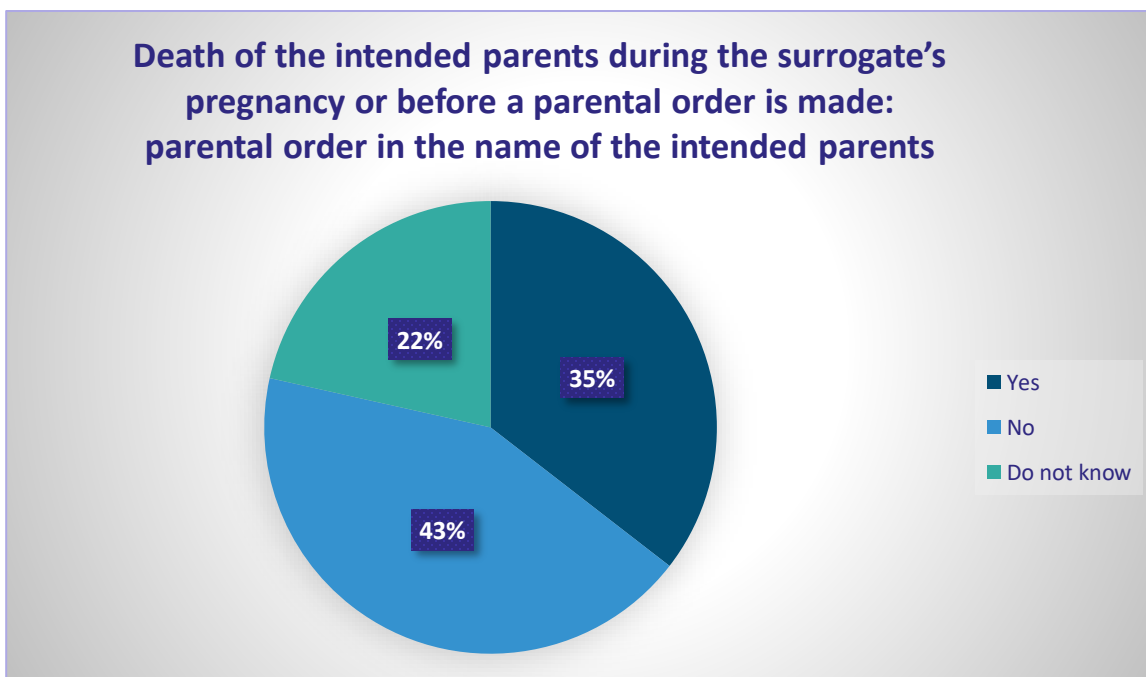


Table 10

As part of the second part of the question (b.), the participants were asked whether, in their view, the surrogate should be registered as the child’s legal mother in place of the intended parents, provided that there would be a procedure for the surrogate to provide details of the intended parents, and, if relevant, gamete donors, for entry onto the register of surrogacy arrangements. Not all participants answered this part of the question. Nevertheless, of those who did address this question<sup>48</sup>, only 22% believed that the surrogate mother should be registered as the legal mother in case both intended parents died during the pregnancy or before a parental order was made. 67% of the participants who answered the question disagreed with the surrogate being registered as the legal mother in such circumstances. The participants were concerned that it would put ‘too much pressure on her’ as she may not wish to be registered as the child’s legal mother, in particular where there is no genetic connection between her and the child. One participant suggested that it may be more sensible to register the surrogate not as the child’s *legal* mother but as the *surrogate* mother, noting that this would require ‘a change in the registration of the birth act

<sup>48</sup> Nine participants.

for that purpose’. Finally, one participant (11%) felt that ‘this needs to be thought more about’, conjecturing that ‘[t]he surrogate might not want the child although might be the best carer in the short term, and the grandparents might have died.’

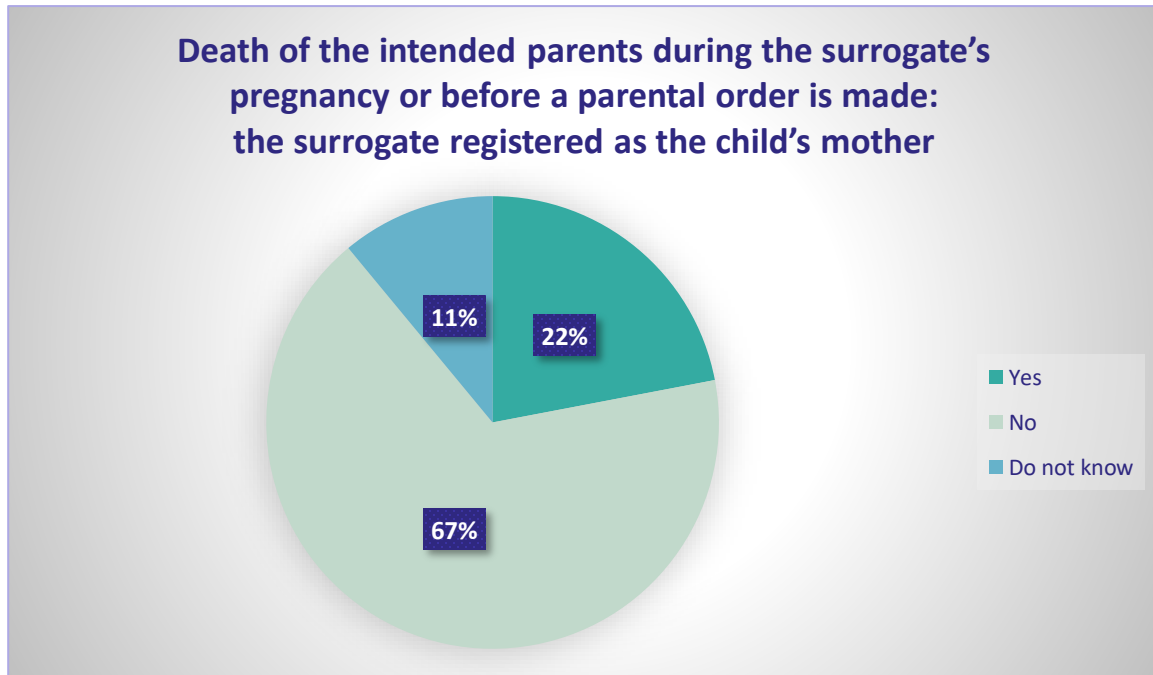


Table 11

## CONCLUSION

This Report sought to provide the Scottish perspective on the intended reform of the UK surrogacy laws by presenting the views of judges and legal practitioners on the topic. Although the participant sample size was relatively limited, it does not diminish the validity of the findings, which can be summarised as follows:

- Overall, the participants expressed preference for the intended parents (as opposed to the surrogate) being recognised as the legal parents at birth.
- Most participants were of the view that the court should be allowed to dispense with the consent of the surrogate mother where it is satisfied that the child’s welfare throughout his/her life requires so, and either: a.) the child is living with the intended parents, with the consent of the surrogate, or b.) following a determination by the court that the child should live with the intended parents.
- The participants expressed overwhelming support for maintaining the altruistic nature of surrogacy arrangements in the UK.
- Based on the questionnaire results, there was a full support for permitting the following categories of payments to the surrogate mother: a.) essential costs relating to the pregnancy; b.) additional costs relating to the pregnancy; c.) costs associated with a surrogacy arrangement and pregnancy; and d.) actual lost earnings (whether the surrogate is employed or self-employed).

- 
- All participants believed that international surrogacy arrangements should be treated differently from domestic surrogacy arrangements.
  - A slight majority of the participants were aware of inconsistencies related to expenses of *curators ad litem* in the context of parental order proceedings, and believed that this area was in need of a reform.
  - Most participants believed that the statute should provide that, at the initial hearing or any subsequent hearing for a parental order, the court may make an interim order or an order for parental responsibilities and parental rights as it sees fit.
  - Just below half of the participants were of the view that further procedural reform was needed to accommodate the regulation of surrogacy arrangements in Scotland.
  - Most participants held the view that, in the context of the new pathway, the proposed period within which the surrogate has the right to object to the acquisition of legal parenthood by the intended parents (i.e. 14 days) was too short.
  - Most participants believed that for surrogacy arrangements outside the new pathway, where both intended parents die during the surrogate's pregnancy or before a parental order is made, it should be possible for a person that claims an interest under section 11(3)(a) of the Children (Scotland) Act 1995 to apply for an order for appointment as guardian of the child. In contrast, less than half of the participants were comfortable with the idea of a parental order being made in the name of the intended parents after they have died, and only a small minority of the participants believed that the surrogate mother should be registered as the legal mother in case both intended parents died during the pregnancy or before a parental order was made.

