



Department
of Health &
Social Care

Parental Orders for a Single Person: Equality Assessment

An assessment of the equality impact of the [Human Fertilisation and Embryology Act 2008 \(Remedial\) Order 2017](#) to allow a single person to obtain a parental order following a surrogacy arrangement

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Prepared by the Health Ethics Team, Department of Health & Social Care

Contents

Contents.....	4
Executive summary.....	5
Chapter 1: Background.....	6
Chapter 2: Equality analysis.....	8
Chapter 3: Summary of Analysis.....	14

Executive summary

This assessment considers the impact of the Human Fertilisation and Embryology Act 2008 (Remedial order) 2017 which will allow a single person to obtain a parental order in a surrogacy arrangement.

Parental orders are the means by which legal parenthood is transferred, following a surrogacy arrangement, from the birth mother (and any other parent of the child), to the intended parents. The effect of a parental order is that the child born to the surrogate is treated in law as the child of the applicants, and that any parental rights of the surrogate and her partner are extinguished.

Parental orders were first introduced by the Human Fertilisation & Embryology Act 1990 (“the 1990 Act”), and are now provided for under the Human Fertilisation and Embryology Act 2008 (“the 2008 Act”). Under the 2008 Act parental orders are available for couples who are married, or in a civil partnership or an enduring family relationship. Parental orders are available to both heterosexual and same sex couples.

In the case of *Re Z* [2016] EWHC 1191 (Fam) the provisions in the 2008 Act relating to parental orders were found to be incompatible with the rights of an applicant for a parental order, and his child, under Article 14 of the European Convention on Human Rights (taken with Article 8) on the basis that they prevented the applicant from applying for, and obtaining, a parental order **as a single person**.

The Government is bringing forward a remedial order to remedy this incompatibility, which will enable a single person to obtain a parental order following a surrogacy arrangement in the same way that couples can currently under the 2008 Act.

The assessment is that there are no differential or negative impacts on people on the basis of sex, religion and race (see categories below). There may be positive differential impacts on the basis of same sex and trans-gender groups based on the limited evidence available, but to the extent that there are, we consider that this is justified by the legitimate aim of the policy in removing unlawful discrimination contrary to Article 14 of the ECHR. Positive differential effects do not adversely affect other protected groups.

Chapter 1: Background

What are parental orders?

Parental orders are the means by which legal parenthood is transferred, following a surrogacy arrangement, from the birth mother (and any other parent of the child), to the intended parents. The effect of a parental order is that the child born to the surrogate is treated in law as the child of the applicants, and that any parental rights of the surrogate and her partner are extinguished.

It is lawful to enter into a surrogacy arrangement in the UK, but surrogacy contracts themselves are not enforceable. The Surrogacy Arrangements Act 1985 prohibits commercial surrogacy in the form of third parties receiving payment for negotiating a surrogacy arrangement. There is an exemption to this rule for non-profit making organisations. It is also a criminal offence under the 1985 Act to advertise that you are willing to act as a surrogate, are looking for a surrogate, or are a third party willing to negotiate a surrogacy arrangement (unless you are a not for profit organisation).

The 1990 Act allowed the transfer of legal parenthood from the birth mother to the intended parents, following a surrogacy arrangement, by means of a parental order. The order operates like a speeded up form of adoption and must be applied for through the Family Court. Parental orders were only available under the 1990 Act to married heterosexual couples.

The 2008 Act introduced new provisions to extend eligibility for parental orders following a surrogacy arrangement to reflect broader changes in social policy. The 2008 Act therefore allows civil partners and any couples in long-term relationship the same rights to apply for a parental order as married couples. Later, the Marriage (Same Sex Couples) Act 2013 amended the 2008 Act to enable same sex married couples to also apply.

Single people were not included in the provisions of the 2008 Act. The intention was that individuals would have to adopt any child born as a result of surrogacy arrangement if they wished to acquire legal parenthood. The rationale at that time was that the fuller assessment carried out in adoption proceedings was more likely to ensure that a person on their own was able to cope with the demands of bringing up a child.

Why is the change necessary now?

In 2015 a UK resident single father, who had a child through a surrogacy arrangement in the USA, applied for a parental order for 'Child Z' through the Family Court. In September 2015, the Judge rejected the application as it did not meet the requirements of the 2008 Act, because the man was not applying as part of a couple, and he did not consider it possible to "read" down the provisions of the 2008 Act to enable this outcome. The only available route to the applicant to obtain a parental order was therefore to challenge the provisions of the 2008 Act as being contrary to the Human Rights Act 1998.

An application was subsequently lodged on behalf of Child Z for a declaration that the provisions of the 2008 Act, in not allowing parental orders for a single person, were in breach of Articles 8 and 14 of the ECHR. The Secretary of State for Health was a party to the challenge and conceded that there was a breach of Article 14 (but not Article 8). This recognises the evolving domestic and ECtHR case law in this area. In May 2016, the Family Court therefore made a declaration that the provision in the Human Fertilisation & Embryology Act 2008 which enable couples, but not a single person, to obtain a parental order following surrogacy is incompatible with Article 14 of the European Convention on Human Rights. Article 14 prohibits discrimination on the grounds of a protected status, and it was accepted that this could include a single person in this context.

The Government now wishes to introduce amending legislation to address this incompatibility. Following consideration of possible legislative options, the Government decided to use a Remedial Order, which is provided for under section 10 of the Human Rights Act 1998 to enable incompatible legislation to be amended. The government also proposes to bring forward a new set of parental order regulations alongside the remedial order (as provided for under the 2008 Act) to apply adoption legislation to parental orders, and extend this to applications by a single person.

Impact on specific groups/communities

Surrogacy arrangements can be entered into in the UK by anyone who can give legal consent. These include couples and a single person. In order to obtain a parental order you need to be at least 18 years of age. This proposed change in the law may therefore affect anyone who might enter into a surrogacy arrangement or who may give support to people who are making a surrogacy arrangement.

The equality assessment undertaken for the legislation to enable parental orders to be available to single people following a surrogacy arrangement is set out in Chapter 2.

Chapter 2: Equality analysis

Relevant line in DH Strategic Development Plan 2017-2018

Not applicable.

What are the intended outcomes of this work?

This assessment sits alongside the Human Fertilisation and Embryology Act 2008 (Remedial) Order 2017, which amends Section 54 of the Human Fertilisation and Embryology Act 2008, to enable single people to apply for a parental order following a surrogacy arrangement. The analysis will also extend to new regulations which will replace the Human Fertilisation and Embryology (Parental Order) Regulations 2010 to apply adoption legislation, with modifications, to parental orders.

Who may be affected?

Surrogacy community:

- Prospective single intended parents
- Surrogacy Organisations
- Solicitors specialising in surrogacy
- Prospective surrogates
- Resulting child
- CAFCASS (Children And Families Court Advisory Support Service)

Staff in assisted reproduction clinics:

- Clinicians
- Nurses/Midwives
- Counsellors

Initial assessment of the impact of the Remedial Order

Disability

We are not aware of any evidence that the package of legislation proposed will impact negatively on people with a disability. Disabled single people who wish to apply for a parental order following a surrogacy arrangement will be able to do so in the same way as a person who does not have a disability. More people (both disabled and non-disabled people) will be able to apply for parental orders if the legislation is passed. In the absence of official collected data about surrogacy arrangements, an analysis of 2015 fertility treatment data from HFEA records shows that 274 people who are disabled sought fertility treatment from the 52,288 women and their partners overall. This represents 0.5% of the total. This compares with 18% of people in the UK population in the 2011 census that self-identified as having a disability. This would suggest that disabled people are less likely to enter into surrogacy arrangements. This would suggest a neutral effect for disabled people.

Any differential impact would be justified as the legitimate aims of the policy (to remove unlawful discrimination contrary to the ECHR) would justify any potential differential effect.

Sex

The package of legislation will enable single people to apply for a parental order, and this will include both men and women.

One of the criteria for obtaining a parental order is that the person applying must use their own gametes. In practice this means that a man may use his sperm for conception in a licensed clinic or through an artificial insemination process which takes place outside a licensed clinic. Should a woman wish to use her own eggs with a surrogate (known as a gestational surrogacy arrangement), this would need to take place at a licensed clinic, because of the clinical fertility techniques required.

It is also the case that a single man would need to use a surrogate to have his own genetic child, whereas a single woman may have other options available to her (such as using donor sperm - if she is able to carry her own child).

It may therefore be that more men than women seek to enter into surrogacy arrangements and that there may therefore be more men than women who pursue a parental order to transfer parenthood as a single person. As the only way that a single man not within a relationship can conceive his own genetic child is through the use of a surrogate, the availability of a legal mechanism to transfer parenthood to him, may have a positive impact on men in this position and promote equality of opportunity with single women, many of whom are able to have their own genetic child using other means.

The new provisions in this order preclude single women who cannot use their own eggs and are therefore not genetically related to the resultant child from applying for a parental order. This is in line with existing policy that one parent applying for a parental order must be genetically related. Any change in this policy position is outside the scope of the remedial order. In such cases, legal parenthood can be obtained through an adoption order, as it can in other cases when the child is not genetically related.

No statistics are collected about single people undertaking surrogacy, so there is no reliable evidence about the balance of men or women who either have undertaken or who might intend to undertake surrogacy arrangements as single people. The anecdotal feedback from surrogacy organisations suggest the overall numbers are small. However, even if the number of single men outnumbered the number of single women undertaking a surrogacy arrangement, in our view, the legitimate aim of the policy (in removing unlawful discrimination) outweighs any differential impact.

The surrogate mother will always be female, and therefore extending the scope of situations where a parental order can be obtained, transferring parental responsibility from the surrogate mother, is likely to have a greater overall impact on women than on men (albeit that some male partners of the surrogate may also have parenthood transferred). An order can only be made where there is informed and written consent from the surrogate mother (and any other parent), and where other safeguards are in place. The surrogate mother can also only receive reasonable expenses in compensation. Currently, single people can apply to adopt a child following a surrogacy arrangement,

and an adoption order will extinguish the parental rights of a surrogate mother. We consider that any differential impact on women of extending the applicants for parental orders can be justified by the policy aim of removing unlawful discrimination under Art 14 of the ECHR.

Race

We are not aware of any evidence that the package of legislation proposed would impact negatively on people on the grounds of race. A single person of any race would be able to apply for a parental order following a surrogacy arrangement. We are not aware of any published evidence that surrogacy arrangements are more prevalent or socially acceptable in any particular community [Individuals may make their own decisions about who they enter into a surrogacy arrangement with, and what ethnic background that person may have, and whether or not donor gametes are used. Gestational surrogacy would allow any race of intended parent to match with a potential surrogate and this would not have an influence on the race of any resulting child.

In the absence of any officially collected data about surrogacy arrangements, an analysis of ethnicity data from the HFEA's register of fertility treatment shows that in 2015 from the total of 67,708 cycles of IVF, 8.6% were ascribed to those describing themselves as being from Asian background, compared with 8% of that background in the 2011 UK census. While 2.3% were ascribed to those describing themselves as black/afro-caribbean, compared with 3% of that background in the 2011 UK census. This would suggest that trends in fertility are a fairly accurate reflective of the ethnic make-up of the UK and that there is no differential impact in the terms of race for the new policy.

Age

Under the 2008 Act a parental order can only be obtained by a person who is 18 years of age, or older. Although a person could become a parent of a child at a younger age than this, it was felt that this age limit struck the appropriate balance between the interests of the commissioning parents and the child who would be subject to the order. This is also consistent with the age limit for a parent to adopt their own genetic child under the adoption legislation.

The proposed new legislation will continue with this approach, meaning that only a single person who is 18 years or older will be able to apply for a parental order following a surrogacy arrangement. There is nothing to restrict a person entering into a surrogacy arrangement if they are younger than this, but the government continues to take the view that legal parenthood should only be transferred where the intended parent is at least 18 years of age.

The proposed approach continues the existing rules, and any differential impact on people of different ages is justified for the reasons described above.

Gender reassignment (including transgender)

We are not aware of any evidence that the package of legislation proposed would impact negatively on people on the grounds of gender reassignment.

Gender reassigned people will be able to access assisted conception services, or enter into their own informal arrangements for conception, in the same way as anyone else. It will also be open to gender reassigned people to enter into a surrogacy arrangement, and the proposed change in the law would enable a single person in that position to apply for a parental order.

While there is no published evidence on this issue, anecdotal evidence from recent workshops at the HFEA Annual Conference indicated a rise in the number of young trans-gender people having their gametes frozen and stored for use post-transition. While some might be used in 'donor conception' situations, it was envisaged by clinic staff that surrogacy arrangements would also be a route of choice to achieving parenthood. The change to access of parental orders might therefore be more likely to have a positive differential impact for the transgender community.

Sexual orientation

A male same sex couple will only be able to conceive a child with a genetic link to one of them through the use of a surrogate. However the policy changes proposed relates to applicants from people who are single, and therefore we are not aware of any evidence that the package of legislation proposed would impact negatively on people on the grounds of their sexual orientation.

Any person, regardless of their sexual orientation, will be able to access assisted conception services, or enter into their own informal arrangements for conception. It will also be open to any person to enter into a surrogacy arrangement, and the proposed change in the law would enable a single person in that position to apply for a parental order regardless of their sexual orientation.

Recent evidence published in a paper called '*Gay fathers' motivations for and feelings about surrogacy as a path to parenthood*' sets out evidence from the USA that '*Most fathers chose surrogacy because they considered adoption to be a less desirable and/or accessible path to parenthood*'. This would suggest that changes to parental order access may have a positive influence on equality for gay prospective fathers.

Religion or belief

People may hold religious or other beliefs which mean that they would not want to use assisted conception services and/ or enter into surrogacy arrangements. For example, while there are different streams of Islamic teaching which support or do not support the use of IVF using your own gametes, the use of other people's genetic material is forbidden, which would exclude the use of donor conception or surrogacy. It is also known that the Roman Catholic faith has issues with assisted conception generally and with surrogacy specifically. Individuals from these faith groups are therefore much less likely to use these services, and thus less likely to benefit.

A parental order is only available following a surrogacy arrangement, and some surrogacy will involve medical treatment. Therefore, if someone objects to these practices they would not seek to conceive

a child this way, and so will not be able to apply for a parental order, whether as part of a couple or as a single person (if this package of legislation is passed).

There is no obligation to conceive a child in this way, the provision for parental orders simply enables people who do enter into surrogacy arrangements to regularise their parental status in relation to any child that is born.

The proposed approach continues the existing rules, and extends them to single people, and it is our view that any differential impact on people of different religions or beliefs is justified by the policy aim of removing unlawful discrimination under Article 14 ECHR.

Pregnancy and maternity

The package of legislation will enable a single person to obtain parental orders following a surrogacy arrangement. Not all people who enter into surrogacy arrangements seek parental orders, and there is no bar to a single person entering into such an arrangement at the moment. We therefore do not know whether the proposed change in the law will lead to more people entering into surrogacy arrangements (because they are now able to obtain legal parenthood without needing to adopt).

If more people did seek to enter into surrogacy arrangements then it would depend on whether more women came forward to act as surrogates whether or not this caused an increase or not. If there was an increase, then this would have an impact on pregnant women in the sense that there would be more pregnant women acting as surrogate mothers.

However, we do not have any evidence that this will be the result of the proposed legislation. It seems unlikely to be a direct result given that more women would need to choose to become surrogates. If there is an increased impact on women becoming pregnant as a result of the policy then we consider that this is justified by the legitimate policy aim of removing unlawful discrimination under Article 14 ECHR.

Carers

We are not aware of any evidence that the package of legislation proposed would impact negatively on people who are carers.

The legislation will enable more people to apply for a parental order to obtain parental rights and responsibilities in relation to a child born following a surrogacy arrangement. This may mean that that person becomes a parent carer for that child, and that the surrogate mother ceases to be a parent carer.

If there is any impact on parent carers as a result of the policy then we consider that this is justified by the legitimate policy aim of removing unlawful discrimination under Article 14 ECHR.

What evidence has been considered?

- Evidence presented to the High Court in respect of Child Z application for declaration of incompatibility.
- Surrogacy UK Report: *Surrogacy in the UK: Myth Busting & Reform*. November 2015.
- 'Gay fathers' motivations for and feelings about surrogacy as a path to parenthood' by Blake et al Published Feb 2017 in *Human Reproduction*, Vol.32, No.4
- Human Fertilisation & Embryology Authority: fertility treatment data 2015.

Engagement and involvement?

Work subject to the requirements of the cross-government code of practice on consultation?

Not applicable

Engagement with stakeholders in gathering and/or testing evidence?

The Department has not held a public consultation exercise about the proposed package of legislation. The Court has made a declaration of incompatibility and the Government is obliged to address this in a reasonable period of time. It is the Department's view that the remedial order, alongside a set of affirmative regulations, is the most expedient and effective way to address the court declaration.

The court declaration does reflect the view of surrogacy stakeholder groups that parental orders should be available to a single person. A national surrogacy organisation, Surrogacy UK, undertook a large scale open consultation of its own members, families and the wider public during 2015. A total of 434 people completed an online survey to contribute to this report, which represented the biggest survey undertaken in the UK about surrogacy to date. The report makes a clear recommendation about this issue:

'Parental orders should be available to single people who use surrogacy.'

The underlying principle of the court declaration was that the existing legal provisions were inequitable. The proposed change in the law will remove any unlawful discrimination and ensure that single people can apply for parental orders in the same way that couples can.

Chapter 3: Summary of Analysis

Introduction

Scope to eliminate discrimination, harassment and victimisation

For the reasons set out in more detail above, the Department of Health has concluded that the proposed policy would not lead to any unlawful discrimination, harassment or victimisation of any particular group on the basis of disability, sex, race or sexuality.

Scope to advance equality of opportunity

For the reasons discussed above, the proposed policy may help in advancing equality of opportunity between men and women by enabling single men to acquire legal parenthood of their genetic child born following surrogacy. As surrogacy is the only way that a single man can have his own genetic child, whereas a single woman who can carry her own child has other options, expanding the circumstances when legal parenthood can be transferred may advance equality of opportunity. There may also be more positive opportunities for gay men and trans-gender people, who may be more inclined to use surrogacy as a means to have their own genetically related children.

Scope to promote good relationships between groups

The proposed policy may have the positive effects on protected groups described above. We have not identified any other scope for the policy to promote relationships between those groups.

Assessment of overall impact

There is only limited evidence that there will be any differential impact on any of the protected groups. There may be positive impacts for gay men and trans-gender people. Where there is a differential impact our view is that it can be justified by the legitimate aim of the policy in removing unlawful discrimination contrary to Article 14 of the ECHR. The policy may promote equality of opportunity in relation to legal parenthood for single men with single women.

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Date assessment completed: July 2017

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