

JERSEY LAW COMMISSION



TOPIC REPORT

**THE LAW RELATING TO PARENTAGE, DONOR
CONCEPTION AND SURROGACY**

Considerations for Reform

The Jersey Law Commission is an independent body appointed by the States Assembly to identify and examine aspects of Jersey law with a view to their development and reform. This includes in particular: the elimination of anomalies; the repeal of obsolete and unnecessary enactments; the reductions of the number of separate enactments; and generally, the simplification and modernisation of the law. Members of the Law Commission serve on a part-time basis and are unremunerated.

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SUMMARY OF REPORT

The law relating to parentage in Jersey, while updated to an extent in 2005 with the coming into force of the Children (Jersey) Law 2002, does not reflect modern family life in the island. Since the changes in the law to enable civil partnerships in 2012 and same sex marriage in 2018 there has been a need to reform the law to ensure that same sex parents are able to have parental responsibility for their children. The States of Jersey: Children's Legislation Transformation Programme Schedule in December 2018 recognised the need for the law to make such provision but this has not yet been done. The law in relation to adoption was changed, enabling same sex parents who adopt children (either their own or others) to both have parental responsibility but not otherwise.

Advances in assisted reproduction have meant that many more people are able to have children where previously biology denied them that option. Those same advances have enabled children to be born through surrogacy. It is important that the law keeps up with modern technology. Jersey now has discrimination legislation but the law itself discriminates against many parents.

Only one female mother and one male father may be registered as a child's parents. Customary law dictates that the person who gives birth to a child is its mother, regardless of where or how the child was conceived and whose gametes she has.

Marisa Allman, a barrister in chambers at 36 Family in London, was commissioned by the Law Commission in 2019 to prepare this report to consider law reform to modernise Jersey law, to address anomalies and to remove the discrimination in the current law. Her report was completed in September last year but the Jersey Law Commission delayed publication whilst discussing with the Jersey Government the possibility of wider consultation on the topic generally, which now seems unlikely in the foreseeable future.

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Considerations for Reform

Marisa Allman, Barrister, England and Wales

September 2019

Introduction:

Advances in reproductive technology in conjunction with greater variation in the constitution of families globally in the last 40 years has given rise to a pressing need to consider the welfare and legal status of children born through all forms of reproductive technology and family creation, including those conceived with donor gametes.

Jersey, in common with many States around the world, has not yet enacted specific laws to address surrogacy or parentage following assisted reproduction, but is actively considering whether to do so, and, if so, what those laws should provide. This comes at a critical time on the world stage, when a number of countries globally are taking steps to address the issues raised by surrogacy arrangements; the Law Commission of England and Wales and the Scottish Law Commission have recently published a detailed joint consultation document reviewing the existing law on surrogacy in the UK; Portugal has recently enacted a legal framework scheme around surrogacy¹; Iceland has a pending Bill to introduce altruistic surrogacy; India's proposed Surrogacy (Regulation) Bill 2018 would aim to close down all but altruistic family surrogacy, and these countries are not alone in seeking to tackle the issues.

For each individual country, the legal status of children born following assisted reproduction in that country is important to the child's identity, but also for legal consequences such as nationality, citizenship, inheritance, obligations to financially maintain, ability to make applications in relation to the child, and parental responsibility.

The need to have recourse to assisted reproduction affects non-traditional family structures disproportionately, same-sex couples, single parents, or persons with gender identity issues being more likely to have to need fertility treatment, and male same-sex couples being one of the family structures commonly embarking upon a surrogacy arrangement². Any consideration of legal parentage and surrogacy must, therefore, include the whole range of individuals and family structures likely to need to have regard to assisted reproduction. In its 2005 Review of the Human Fertilisation and Embryology Act, the UK government recognised this;

"In undertaking this review of the HFE Act, the Government intends to consider the extent to which changes may be needed to better recognise the wider range of people who seek and receive assisted reproduction in the 21st Century."

In addition, as families become more internationally mobile in the way that they live and work, the issue of legal status across international borders attains even greater significance. The last 10 years has seen an explosion in reproductive tourism and surrogacy internationally. Parentage following assisted reproduction is a now global issue to the extent that even for a relatively small territory such as Jersey, any laws which are in place (or the absence of them) has the potential to have a wider international impact. Both a lack of regulation and an abundance of regulation can lead to increased reproductive tourism – as has been the case in countries such as India and Canada respectively.

¹ The Medically Assisted Reproduction Law was amended by Law No 25/2016 to create a legal framework for surrogacy in Portugal in 2016.

² A CAFCASS response to a Freedom of Information request showed of 229 Parental Order applications in 2014, 56 were made by same sex couples: §3.19 of the joint Law Commission report.

The absence of specific provision in Jersey currently provides an opportunity to implement a legal framework which is bespoke, which is fit for the 21st century family, which is global in context, and which is not encumbered by historical legislation or common law.

The interlinked nature of parentage following assisted reproduction and international surrogacy is highlighted by the long-running project of the Permanent Bureau to the Hague Conference. In 2010 the Council on General Affairs and the Policy of the Hague Conference (HCCH) invited the Permanent Bureau to report on the private international law issues surrounding the status of children, and in particular on the issue of recognition of parent child relationships, including around international surrogacy³.

The Permanent Bureau in their 2011 preliminary document considered that it would be *“artificial to address ... the challenges of private international law regarding the status of children generally separately from those which face the international community in relation to international surrogacy cases”*. The work of the Permanent Bureau continues and will be referenced where appropriate.

The objective of this report is to inform the debate around the introduction of specific laws addressing parentage following assisted reproduction and surrogacy in Jersey, drawing on the experience of other jurisdictions, making recommendations and raising questions which require further consideration.

Albeit the report is divided into two main sections, namely ‘Parentage and Donor Conception’ and ‘Surrogacy’, the issue of parentage and assisted reproduction is also considered holistically, and in an international context, in a way which recognises the artificiality of trying to separate the issues arising from donor conception and those arising from surrogacy.

Any consideration of the implementation of a legal framework around surrogacy would be assisted by careful reading of the joint consultation report of the Law Commission of England and Wales and the Scottish Law Commission, which contains an in-depth analysis of the many factors which ought to be taken into consideration, particularly given the particular connection between Jersey and the UK. The Law Commission report has been drawn upon in the present report and referenced where appropriate, but bears a separate reading.

In considering the legal framework for surrogacy in other jurisdictions this report has also been assisted by the work of Jens M. Scherpe, Claire Fenton-Glynn⁴ and Terry Kaan, as well as contributing authors, in their book ‘Eastern and Western Perspectives on Surrogacy’ published in February 2019. The Scottish Law Commission and Law Commission of England and Wales also had regard to this work and highlighted its importance as a comprehensive comparative overview of surrogacy⁵.

³ Preliminary document of the Permanent Bureau of March 2011

⁴ Both of the University of Cambridge. 5.

⁵ §7.91

A key feature which becomes apparent from a detailed reading of international resources is the wide divergence of attitudes to family creation through assisted reproduction generally and surrogacy especially. In each jurisdiction it is important that the legal framework developed is one which is right for that jurisdiction and which is consistent with social attitude and available resources.

In this regard it is important to note that Jersey is a small jurisdiction, with one fertility clinic currently, and the numbers of its own permanently resident population needing to resort to surrogacy are likely to be fairly small. This is in contrast to 119 licensed fertility clinics in the UK⁶, where there were 387 Parental Orders granted in 2018⁷.

Jersey, whilst not having a legal framework in place at present, is not hostile to surrogacy in the way that its near neighbours France and Spain are. This may mean that Jersey has the potential to become a significant destination for reproductive tourism.

The present report does not aim to consider whether surrogacy is ethically sound or desirable in principle, but approaches the issue of family creation through assisted reproduction, including surrogacy, as a fact of modern life which countries can choose to regulate or not, and to different extents.

⁶ HFEA report 'State of the Fertility Sector 2016- 2017'

⁷ Law Commission and Scottish Law Commission joint consultation paper §1.2

Contents;

Part I: Parentage and Donor Conception; _____ 8

Legal parentage.

Part A: substantive provision. _____ 14

Primary considerations;

Family structure _____ 15

Excluding legal parentage _____ 19

Gender identity _____ 24

Method of conception _____ 25

Clinic conception _____ 26

Extraterritoriality _____ 29

Part B: Mechanism and registration; _____ 32

Mechanism _____ 32

Birth registration _____ 37

Part II: Surrogacy: _____ 40

A. Objectives _____ 50

B. Considerations for a legal framework _____ 52

Timing and process _____ 52

Eligibility requirements and safeguards _____ 57

Consent and enforceability _____ 60

Payments _____ 68

Registration and identity information _____ 70

International surrogacy arrangements _____ 72

C. Comparative Analysis _____ 76

Part I: Parentage and Donor Conception;

1. **Legal parentage.** There are many ways in which a person can be a parent to a child. The issue under consideration in this report is that of the creation of a legal status between a child and an adult outside a genetic or biological relationship, including outside a gestational relationship. In real terms, this means the creation or exclusion of a legal parental status for a child where they have been conceived using donor gametes and / or through surrogacy, or in scenarios where it is intended that there should be more than two parents. It is outside the scope of this report to either explore adoption as a means of creation of parental status (other than to refer to it as one of a potential range of means of creating parental status where appropriate), or consider the range of rights and responsibilities that might flow from the creation of parental status. Where the creation of parental status is discussed, it is assumed that the parent concerned will be treated as a parent for all purposes, and not hold a legal status different to any other parent following natural conception.
2. At present, under Jersey customary law, a child's mother at birth is the woman who gave birth, and if she is married to a man, her husband will be the child's other legal parent. If she is not married, the man whose gametes are involved in the conception will be the legal father. This would appear to include any donor of male gametes. Pursuant to the Adoption Jersey Law 1961, an adoption order may be used to enable a mother or father to adopt together with their spouse or civil partner. In this way legal parentage may be afforded to the spouse or civil partner of a woman who has conceived a child with donor gametes. In addition, where a parental order has been made by the courts of England and Wales in respect of a person domiciled in Jersey, parental status will be recognised by Jersey law⁸.
3. There are, therefore, a wide range of family scenarios in which legal parentage is only achievable via adoption in Jersey or where it cannot be obtained at all, and circumstances in which it might be in the interests of a child to exclude a person's legal parentage, such as a donor, but where this is not currently possible.
4. To some degree, the narrow range of circumstances in which legal parentage can be acquired in Jersey is inconsistent with the implementation of civil partnership and same sex marriage in Jersey, which self-evidently supports the formation of non-traditional family structures.
5. There are a range of reasons why adoption might not be an appropriate solution to the question of legal parentage. In the joint UK and Scottish Law Commission report on surrogacy it is noted that;

“One salient difference is that adoption only begins after a child already exists, whilst in surrogacy the intended parents and the surrogate begin the process of reproduction together. Surrogacy can, therefore, be seen as a medical solution to infertility as well as a method of reproduction in a way that adoption

⁸ Albeit the formal mechanism for this is unclear.

cannot.”

The same might be said of other forms of family creation through assisted reproduction.

6. In the English courts, in those cases where clinic error led to doubt being cast on the parental status of the mother’s partner where donor gametes had been used, the then President of the Family Division of the High Court of England and Wales, Munby P, described adoption on a number of occasions as an utterly inappropriate remedy⁹. He noted the feelings of abhorrence of the parents who had been through assisted reproduction together at the possibility of having to adopt their own child.
7. In addition, the process of adoption means that the child would not be legally the child of one of its intended parents from the moment of his or her birth, and the family would be required to undergo a welfare assessment, which might be both lengthy and intrusive in order to regularise the parental status of the child. It is not inconceivable that the other parent might die in the meantime, thereby leaving the child with potentially unresolved issues as to inheritance, succession, citizenship or nationality. Equally, the intended parents might separate during this process, thereby complicating the process further.
8. Implementing a legal framework for parentage following assisted reproduction provides an opportunity to ensure legal parentage from birth of each of the parents who it is intended will parent the child without requiring them to fulfil additional hurdles or embark upon proceedings, and to enable the legal parentage of a greater range of family structures. It would also enable families to ensure that donors who are not expected to have any involvement in the life of the child are excluded from parentage and parental responsibility. At the present time, where a mother is unmarried or in a same sex relationship and the parentage of a donor who may be anonymous is not excluded, he may nonetheless be that child’s legal parent with all that entails. In the study of legal parentage carried out by the Permanent Bureau in 2014, they reported to the HCCH that;

“In most States with ART legislation, third party gamete donors who donate in accordance with the rules of the State (e.g., formally, through medical institutions) are specifically provided for in legislation and will not be the legal parents of a child born following use of their gametes.”

9. Implementing a coherent legal framework for parentage of donor conceived children would also ensure greater consistency with the requirements of the United Nations Convention on the Rights of the Child (UNCRC). The UNCRC signifies the importance of establishing a child’s legal identity in Articles 7 and 8;
Article 7
1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

⁹ See Re A and Ors [2016] 1 WLR 1325, Case O [2016] 4 WLR 148, Case I [2017] 1 FLR 998.

2. *States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.*

Article 8

1. *States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.*

2. *Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.*

10. The Permanent Bureau's 2011 report to HCCH on Private International Law Issues surrounding the status of children noted in the context of international surrogacy arrangements, having regard to Articles 7 and 8 UNCRC;

14. "Non-recognition of the parent child relationship may have a number of serious consequences for the rights and welfare of the child, in particular regarding the child's right to acquire a nationality, the child's right to an identity and States' obligations to ensure that children do not end up stateless. In a number of States ad hoc, ex post facto remedies have been found with a view to reducing the harmful impact of this legal limbo for children."

11. The United Kingdom's ratification of the UNCRC was extended to Jersey on 29.04.14. In July 2017 a proposition was put before the States Greffe to decide whether there should be legislative changes to ensure that a Minister who lodges a draft law considers whether it will impact on children's rights as specified in the UNCRC and / or to consider incorporating the UNCRC into Jersey legislation. The provisions of the UNCRC are therefore an important consideration.

12. The absence of a legal framework to confer parentage on an intended parent, or to exclude the parentage of a donor who is not intended to parent the child, risks giving rise to considerable issues regarding a child's parentage, and concomitantly their nationality, the obligation to maintain them, parental responsibility, and of depriving them of parts of their identity.

13. On a pragmatic, domestic level, children growing up in families where a legal relationship with one or more of their psychological parents is absent has the potential to cause significant and lasting effects throughout their lives. If the parents separate, this factor may be of significance to whether the child is financially maintained and the relationship which they have with each of their parents. If the birth mother is not a citizen of the country in question, the citizenship of the child is likely to be affected. It may affect whether a removal of the child from the jurisdiction is unlawful if parental responsibility has not been granted. The child's inheritance may be affected on the death of their psychological parent.

14. Since 1990, the UK has provided for the legal parentage from birth of children

born via assisted conception with donor gametes for opposite sex couples and single women in the form of the Human Fertilisation and Embryology Act 1990. One of the objectives of the 1990 Act was to ensure that legal parentage was consistent with the assumption of all rights and duties with regard to the child¹⁰. When the 1990 Act was reviewed, one of the objectives of the HFE Act 2008 was to move “*further towards a concept of parenthood as a legal responsibility rather than a biological relationship*”¹¹. In the 2008 Act the range of legal parents was extended to include same sex couples. Crucially, pursuant to s.41 of the 2008 Act, and Schedule 3 of the 1990 Act, where the sperm of a man was used in treatment, and he had given consent to that sperm being used other than for the treatment of himself and another person (i.e. donation) “*he is not to be treated as the father of the child*”. Insofar as the 2008 Act does not apply to Jersey, if sperm is used which has been donated to a UK licensed clinic, the paternity of that individual is unlikely to be excluded in Jersey by him having given consent in England consistent with Schedule 3 of the 1990 Act. He would not, however, be a legal parent in the UK.

15. In the joint report of the Law Commission of the UK and the Scottish Law Commission in respect of surrogacy, a further shift can be detected in the thinking about parentage, with a focus on intent;

“The overwhelming view of intended parents and surrogates is that recognising the intended parents from birth reflects the wishes and intentions of all the parties to a surrogacy arrangement. We take the view that the law should reflect what the parties intend in terms of legal parenthood and that it can do so because.... we think that this will best promote the welfare of the child.”

16. The first question for the States of Jersey to consider in deciding whether to create a legal framework for the attribution of parentage from birth, beyond the presumption arising from marriage, is what the overriding objectives might be said to be, as this is likely to inform the specific provisions and mechanism. It is suggested that important considerations might be;

- a) clarity of parental status for children born via assisted reproduction, and factors arising from legal parentage;
- b) ensuring consistency between a child’s de facto parental relationships from birth and their legal parental relationships;
- c) ensuring parity of parental relationship where there is more than 1 parent;
- d) ensuring that where a child is conceived in circumstances where persons wish to conceive that child together and intend to parent the child together, their legal relationship to the child reflects their intent;
- e) parental status which it might be in the child’s best interests to exclude.

This is a non-exhaustive list.

17. One option might be to mirror the provisions of the HFE Act 2008 in respect of parentage. However, the 2008 Act is not without its own problems. Some of these are elaborated upon below where referred to specifically, but points of note are;

- i) In enacting the provisions of the HFE Act 2008 in respect of parentage,

¹⁰ Warnock Report of the Committee of Enquiry into Human Fertilisation and Embryology.

¹¹ HL 169/HC 630-II, Ev07

there was no debate concerning the impact of the Gender Recognition Act 2004. Section 12 of the Gender Recognition act contains a similar provision that that of s.10 of the Gender Recognition (Jersey) Law 2010, which provides that:

“The fact that a person acquires a gender does not affect the status of the person as the father or mother of a child.”

There is currently a case pending in the English court concerning whether the equivalent English provision is only retrospective in effect (i.e. status pre-dating gender change) or also prospective. [This matter has now been adjudicated on in 2020 and a man who gave birth was adjudged to be the mother and not a father to the child.]

- ii) The provisions for unmarried persons to acquire parentage from birth in conjunction with the woman giving birth are dependent upon notice being given to the Person Responsible at the clinic of both parties' consent to being named as the legal parent, e.g. section 37 HFE Act 2008;
 - 1) *The agreed fatherhood conditions referred to in section 36(b) are met in relation to a man (“M”) in relation to treatment provided to W under a licence if, but only if,—*
 - 2) *M has given the person responsible a notice stating that he consents to being treated as the father of any child resulting from treatment provided to W under the licence,*
 - 3) *W has given the person responsible a notice stating that she consents to M being so treated,*
 - 4) *neither M nor W has, since giving notice under paragraph (a) or (b), given the person responsible notice of the withdrawal of M's or W's consent to M being so treated.*

This provision has left clinics responsible for the creation of parental status and resulted in numerous cases reaching the court for a declaration of parentage arising from clinic error - See Re A and Ors [2016] 1 WLR 1325.

- iii) The provisions of the HFE Act imply that a woman's spouse's consent is required to her receiving fertility treatment, e.g. s.35 HFE Act 2008;

35 Woman married [to a man] at time of treatment

(1) If—

(a) *at the time of the placing in her of the embryo or of the sperm and eggs or of her artificial insemination, W was a party to a marriage [with a man], and*

(b) *the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage,*

then, subject to section 38(2) to (4), the other party to the marriage is to be treated as the father of the child unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her artificial insemination (as the case may be).

Not only does this raise questions regarding the appropriateness of a woman ever requiring the consent of her husband to undergo fertility treatment in the 21st century, but has also caused difficulties in cases where the woman has

been undergoing treatment with someone other than her spouse – e.g. Re G [2016] EWHC 729.

18. In addition, the particular position of Jersey requires specific consideration. The 2008 Act was implemented with a much larger population and many more fertility clinics in mind, and assisted conception in the UK is regulated by the HFEA. It is not necessarily an optimal or appropriate structure on the much smaller scale of Jersey.

Part A: substantive provision.

19. **Primary considerations;** The range of potential circumstances in which donor gametes might be used are wide, as are the circumstances of conception. Aside from surrogacy situations (discussed further in Part II of this report), in all jurisdictions the person who gives birth is legally a parent of the child, even if donor gametes are used. As regards the parentage of a person who is not a gestational or genetic parent following assisted reproduction, there is a very wide range in how these circumstances are treated globally. The Parentage Study of the Permanent Bureau in 2014 found that;

“20...in many of these States if “assisted reproduction” is undertaken in an informal fashion – i.e., without third party medical intervention, by individuals following an agreement often with friends or arranged via the internet – the rules on legal parentage following ART may not apply. In some States, the distinction is drawn upon whether the conception resulted from sexual intercourse or not, whilst in others the important factor is whether the ART treatment was carried out by health professionals or not, or, whether it took place in a clinic licensed under the particular ART legislation or not. Whichever route is adopted, if the persons involved have not complied with the relevant legislative requirements, legal parentage will be established in accordance with the basic legal principles described in paragraphs 11 to 14 above and this may result in those who have informally “donated” gametes acquiring the status of legal parent. In a 2007 Canadian (Ontario) case in which a same-sex female couple undertook such an informal arrangement with a male friend and the genetic parents were registered on the birth certificate, the birth mother’s female partner won a subsequent challenge to be declared a legal parent of the child, resulting in the child having three legal parents.”

20. A number of questions arise for consideration;

21. **A. For which family structures is it intended to provide?** The range of family structures might include (references to marriage include civil partnership unless otherwise stated);

- A. What is the range of family structures for which it is intended to provide?**

- B. In what circumstances should legal parentage be excluded and what are the implications of that?**

- C. How should gender identity be taken into account, specifically when providing for the parental status of a person who has changed gender?**

- D. Should a distinction be made between natural conception and assisted reproduction?**

- E. Should a distinction be made between conception in a clinic, or a UK licensed clinic, or elsewhere?**

- F. Should a distinction be made between conception which occurs in Jersey and conception extra-territorially?**

- 21.1 A married couple, same or opposite-sex, requiring donor eggs or sperm or embryos to conceive using assisted reproductive techniques which involve one of the couple carrying the child.
 - a) where the identity of the donor is known;
 - b) where the identity of the donor is unknown.
- 21.2 An unmarried same or opposite sex couple per 21.1,
 - a) where both are unmarried;
 - b) where one or both of them may still be married to a 3rd party.
- 21.3 A same sex couple, per 21.1 or 21.2 where the eggs of the woman not carrying the child are intended to be used to conceive with donor sperm.
- 21.4 A couple, married or unmarried, using donor eggs or sperm or embryos to conceive using assisted reproductive techniques, where one or both of the couple have changed gender.
- 21.5 A woman using donor sperm or embryos to conceive using assisted reproductive techniques where she intends to parent alone and the gametes are from;
 - a) a donor whose identity is known;
 - b) a donor whose identity is unknown.

- 21.6 A trans man who seeks to carry a child using assisted reproductive techniques, and using donor sperm, and who intends to parent alone
- a) From a donor whose identity is known;
 - b) From a donor whose identity is unknown.
- 21.7 A single woman or a couple (female or opposite sex) seeking to conceive utilising assisted reproduction techniques and the sperm of another man with whom they intend to co-parent
- 21.8 A man and a woman who are not in a relationship but who intend to co-parent and who are seeking to utilise assisted reproductive techniques and donor gametes.
22. In addition, there is the question of legal parentage following a surrogacy arrangement which is explored in detail in the second part of this report. It is noted at this stage in general terms however, and in connection with the question of the family scenarios which may arise, that the intended parent(s) in a surrogacy relationship may be single, married or an unmarried couple of either sex, or intend to co-parent without being in a relationship. Depending on whether, and if so what, legal framework is put in place in respect of domestic or international surrogacy arrangements, it will be important to consider the interrelationship with the domestic law generally as to parentage. For example, if a framework were to be implemented to enable the intended parents to become a child's legal parents from birth or shortly thereafter, and if the requirements of that framework were not met, what would be the position in respect of the parentage of that child having regard to the remainder of the domestic laws in respect of children born following assisted conception? Is there a justification for having different laws in place to address the legal parentage of a child born following assisted reproduction where this formed part of a surrogacy arrangement than otherwise? This is explored further below in Part II of this report dealing with surrogacy.
23. In reaching a conclusion about the above scenarios, an important consideration might be achieving consistency with the family structures which are provided for in existing Jersey legislation. In particular the Civil Partnership (Jersey) Law 2012, Marriage and Civil Status (Amendment No. 4) (Jersey) Law 2018, and the Adoption (Jersey) Law 1961, all envisage families being formed by two persons of the same sex. In addition, the implementation of a framework enables express consideration to be given to persons forming families following gender change.
24. The formalisation of family structures in non-traditional family scenarios would also achieve greater consistency with the Article 8 Rights to Private and Family Life enshrined by the European Convention on Human Rights and Fundamental Freedoms (ECHR) which is given effect to by the Human Rights (Jersey) Law 2000. The European Court of Human Rights (ECtHR) has not yet gone so far as to require legal status be afforded to a de facto relationship of family life between a child and a person in the position of psychological parent who has no genetic relationship with the child. However, there are a number of decisions pertaining to Article 8 rights, in conjunction with Article 14 (prohibition of discrimination) which suggest that it is only a matter of time before a case reaches the court in circumstances where, for example, domestic legislation will recognise the

parental status of a man not genetically related to the child if he is married to the child's mother, but would not recognise the same parental status if a woman is married to the child's mother, but permits same sex marriage. In particular, the following passages are taken from the ECtHR and Council of Europe Guide to Article 8 of the ECHR¹²;

202. Where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be established that render possible as from the moment of birth, or as soon as practicable thereafter, the child's integration in his family (Kroon and Others v. the Netherlands, § 32).

203. In spite of the absence of a biological tie and of a parental relationship legally recognised by the respondent State, the Court found that there existed family life between the foster parents who had cared for a child on a temporary basis and the child in question, on account of the close personal ties between them, the role played by the adults vis-à-vis the child, and the time spent together (Moretti and Benedetti v. Italy, § 48; Kopf and Liberda v. Austria, § 37). In addition, in the case of Wagner and J.M.W.L. v. Luxembourg – which concerned the inability to obtain legal recognition in Luxembourg of a Peruvian judicial decision pronouncing the second applicant's full adoption by the first applicant – the Court recognised the existence of family life in the absence of legal recognition of the adoption.

212. A same-sex couple living in a stable relationship fall within the notion of family life, as well as private life, in the same way as a heterosexual couple (Vallianatos and Others v. Greece [GC], § 73-74; X and Others v. Austria [GC], § 95; P.B. and J.S. v. Austria, § 30; Schalk and Kopf v. Austria, §§ 92- 94).

217. In another case concerning the regulation of residence permits for family reunification, however, the Court considered same-sex and different sex couples as being in a similar position (Pajić v. Croatia, § 73). The Court stated that by tacitly excluding same-sex couples from its scope, the domestic legislation introduced a difference in treatment based on sexual orientation and thus violated Article 8 of the Convention (ibid., §§ 79-84).

In addition, the ECtHR emphasised in the case of Mennesson v France¹³ the significance of parental status for an individual's Article 8 rights to Private Life; "96. As the Court has observed, respect for private life requires that everyone should be able to establish details of their identity as individual human beings, which includes the legal parent-child relationship ...; an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned."

25. That is not to say that the Article 8 rights of a child could not be achieved by adoption, as opposed to recognition from birth, but some caution is required before legislating in a way which enables a parental status to be acquired by operation of law in a family founded by an opposite sex couple, but require adoption in the same circumstances for a family founded by a same sex couple, as

¹² Dated 31.12.17

¹³ Application 65192/11

this risks breaching the prohibition on discrimination.

26. In 2018 the Parliamentary Assembly to the Council of Europe published a Resolution entitled “Private and family life: achieving equality regardless of sexual orientation”¹⁴ which called upon Council of Europe Member States to;

4.5 Protect the rights of parents and children in rainbow families, without discrimination based on sexual orientation or gender identity, and accordingly:

4.5.1 in line with the case law of the European Court of Human Rights, ensure that all rights regarding parental authority, adoption by single parents and simple or second-parent adoption are granted

4.5.2 without discrimination on the grounds of sexual orientation or gender identity;

4.5.3 provide for joint adoption by same-sex couples, without discrimination on the grounds of sexual orientation;

4.5.4 extend automatic co-parent recognition to the same-sex partner of the parent who has given birth in all cases where this would be extended to a mother’s male spouse;

4.5.5 where single women are granted access to medically assisted procreation, ensure that such access is granted without discrimination on the grounds of sexual orientation or gender identity;

4.5.6 where unmarried heterosexual couples are granted access to medically assisted procreation, ensure that such access is granted to same-sex couples;

27. To the extent that the view of the Parliamentary Assembly can be taken as an indicator of the direction in which the law of the ECtHR is heading, the implementation of any legal framework to provide for parentage in cases of assisted reproduction ought to carefully consider whether such framework would be consistent with the child’s Article 8 rights taken in conjunction with Article 14 having regard to it.

28. Some of the scenarios in paragraph 21 give rise to the possibility of families where there are more than two active, psychological parents, and the question arises as to whether three or more legal parents should be provided for in legislation. The joint consultation document of the Scottish Law Commission and the Law Commission of England and Wales raises this as an area for potential future reform in the UK (but not in surrogacy situations)¹⁵;

“We think that there could be much merit outside surrogacy arrangements in further exploring the possibility of permitting a child to have more than 2 legal parents. That would enable the position to reflect reality where there is genuine co-parenting of a child by three or four people.”

29. This was foreshadowed by a number of cases in the English court where disputes arose between a lesbian couple co-parenting a child and their known

¹⁴ Resolution 223

¹⁵ At §7.90

male donor. Notably, the case of A v B and C (lesbian co-parents: role of father)¹⁶ in which Lord Justice Thorpe was considering the role to be played by a known and involved genetic father, albeit not specifically considering legal parenthood;

“A’s involvement in the creation of M and his commitment to M from birth suggest that he may be seeking to offer a relationship of considerable value. It is generally accepted that a child gains by having two parents. It does not follow from that that the addition of a third is necessarily disadvantageous.”

30. There are a number of states in the US and Canada whose laws make families where there are 3 legal parents possible under legislative law, namely California, Maine, Washington (state) and Louisiana, Ontario and Brazil¹⁷. In addition, there are a number of states such as New Jersey where tri-partite legal parentage has been facilitated by court decision¹⁸.

31. If new legislation is to be enacted to provide for parentage in scenarios where two or more persons are going to be sharing the parenting of a child and this is envisaged from pre-conception, the possibility of providing for a child to have more than two legal parents where this is consented to by the intended parents ought to be given consideration as potentially being more consistent with the child’s welfare. In particular this may;

- reduce disputes regarding the primacy of one parent or another;
- more accurately reflect the child’s day to day reality;
- share financial responsibility for the child in a manner which is consistent with parental responsibility.

32. **B. In what circumstances should legal parentage be excluded and what are the implications of that?** There are three particular scenarios in which this is a consideration;

- a) excluding the parentage of an anonymous or unknown donor;
- b) excluding the parentage of a known donor;
- c) the circumstances, if any, in which the parentage of the spouse of the person giving birth should be excluded.

In addition, there are the circumstances of a surrogacy arrangement, which are addressed separately in Part II of this report, save that some of the discussion in this part is relevant to (c), the parentage of the spouse of a person giving birth.

33. **Anonymous and unknown donors;** In this context anonymous and unknown donors are considered together. An anonymous donor is the donor whose identity is kept entirely secret and is undiscoverable by either parent or child even upon the child reaching 18. An unknown donor is a donor who is not known to the family conceiving the child, but whose identity will be made available to the child upon reaching 18 if requested by the child. In the UK donors are no longer permitted to donate gametes to clinics anonymously¹⁹.

¹⁶ [2012] 1 WRL 3456 at [24]

¹⁷ “Technologies and the evolving recognition of Tri-parenting” Colleen. M Quinn, Esq of the Adoption and Surrogacy Law Centre at Locke and Quinn, Richmond VA.

¹⁸ In re Adoption of two children by H.N.R., 285 N.J. Super. 1, 666 A.2d 535 (App. Div. 1996).

¹⁹ Pursuant to the Human Fertilisation and Embryology Authority (disclosure of information) Regulations 2004 (SI 2004/1511)

However, for individuals or couples conceiving via home insemination they may use anonymous donor sperm purchased from other countries. In either scenario, the identity of the donor is not discoverable at least until the child reaches the age of 18, and it is not intended that the donor will play any part in the child's upbringing. For this reason, therefore, the same issues arise regarding excluding parentage.

34. In the HFE Act 2008, parentage of a person who has donated gametes to a clinic other than for their own treatment alone or with a partner is excluded by Sch 3 to the 1990 Act together with §§.41, 45 and 47 of the HFE Act 2008 which specify that a donor of eggs is not to be the mother merely by reason of egg donation, and the circumstances in which the donor of sperm is not to be the father. These provisions protect both the unknown donor and the individual or couple receiving assisted conception and work well. The alternative of leaving an unknown or anonymous donor in the position of legal parent is unlikely to be in the child's best interests where they are not known to the family and not playing any part in the child's upbringing.
35. In most states with assisted reproductive legislation who responded to the HCCH survey, third party donors who donate formally, e.g. through medical institutions, are specifically excluded from legal parenthood²⁰.
36. **Known donors;** Many couples seeking fertility treatment, particularly lesbian couples, do not want a completely unknown donor of sperm for their child. Often there is a tension between a couple wanting their child to know their origins and to have an identifiable genetic parent who is part of their lives, and the desire to ensure that the couple doing the day to day parenting are able to exercise parental responsibility without interference. In other cases, the couple intend to co-parent with the genetic father. This latter situation can give rise to 3 parent families and the question of whether to recognise these in law.
37. Since the 1990 HFE Act²¹ it has been possible for a single woman to have a child with no legal father. In practice, this was sometimes the route taken by lesbian couples who were treated together but who could not both be legal parents. However, many lesbian parents preferred to have a known donor for their child. This led to a number of disputed cases before the courts when there was conflict regarding the role to be played by the genetic parent; for example in the case of T v T in 2010²² where the court made a shared residence order encompassing both women and the genetic father in circumstances where the genetic father was also the legal father.
38. The HFE Act 2008 provided that in two particular circumstances a child could have two female parents from birth, and no legal father – firstly where the women were married or in a civil partnership at the time of conception²³, and secondly where the women underwent treatment at a UK licensed clinic and each gave notice to the Person Responsible of their agreement to the other

²⁰ HCCH Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements, Preliminary Document No 3 of March 2014 at § [20]

²¹ Pursuant to s.28(6)

²² [2010] EWCA Civ 1366

²³ ss.42 and 45 HFE Act 2008

woman being the second female parent²⁴. Neither of these scenarios require the donor to be unknown. As a result, a number of cases have arisen where there has been a later dispute regarding the role to be played by the biological father in the child's life, even though he is not a legal parent. In the case of Re Z (Children: Sperm Donors: Leave to Apply for Children Act Orders)²⁵ as the genetic fathers of the children were not legal fathers they did not have an automatic right to apply for Children Act 1989 orders for contact with the children. The mothers opposed the fathers being permitted leave to apply for such orders. The court granted leave and held;

"[113]...; The effect of ss. 42(1), 45(1) and 48(2) of the 2008 Act is that S and T are not to be treated in law as the parents of, respectively, G and Z for any purpose. I endorse the submissions that the policy underpinning these reforms is an acknowledgement that alternative family forms without fathers are sufficient to meet a child's need.

[114] To my mind, the policy underpinning ss. 42(1), 45(1) and 48(2) of the 2008 Act is simply to put lesbian couples and their children in exactly the same legal position as other types of parent and children. This is, in my judgment, the clear intention of Parliament.

[115] Any person who seeks a s 8 order in respect of that child against the wishes of such parents must obtain the leave of the court which will consider all relevant matters including the factors identified in s 10(9) as explained by Black LJ in Re B (Paternal Grandmother: Joinder as Party). As part of that analysis, the court will consider the rights of legal parents to family life including the right to make decisions about their children. Those rights are widely recognised both as a longstanding principle of English law and under Art 8. In this regard, the position of a lesbian couple who have been granted the status of legal parents by the 2008 Act is exactly the same as any other legal parent. Having taken those rights into account, however, it is still open to the court, after considering all relevant factors, to grant leave to other persons to apply for s 8 orders. In this regard, the position of biological fathers who have been deprived of the status of legal parent by the 2008 Act is the same as any other person.

[118] By choosing friends, S and T, to provide sperm to enable them to conceive children, and by allowing them to have regular and frequent contact and to place some role (albeit disputed) in the lives of their families, D and E in one case, and X and Y in the other, were exercising their parental responsibility to facilitate some sort of relationship between their children and their biological fathers. This illustrates the true effect of the reforms implemented in ss. 42(1), 45(1) and 48(2) of the 2008 Act. D and E, and X and Y, have been granted full and inclusive parental responsibility for G and Z, to the exclusion of the biological fathers. They consciously exercised that responsibility by allowing S and T regular contact with the children. The 2008 Act empowered them to take this course. It did not deny them the right to do so. No doubt there will be some lesbian couples who, after having children by artificial insemination, not only allowed the biological fathers to have contact with the children but also encouraged them to play a full

²⁴ ss43 and 44 HFEAct 2008

²⁵ [2013] 1 FLR 1334

parental role and be recognised as fathers. The 2008 Act denies the biological father the status of legal parent, but it does not prevent the lesbian couple, in whom legal parenthood is vested, from encouraging or enabling the biological father to become a psychological parent. On the contrary, it empowers the lesbian couple to take that course as the persons in whom parental responsibility is vested.”

39. Therefore, albeit that the genetic fathers were not legal fathers, the court was expressly considering the potential for the children to have more than two psychological parents, capable of being supported by shared parental responsibility. As set out in **Section A** above, some consideration could be given to reducing these tensions by permitting a child to have more than two legal parents in some scenarios.
40. Where there are to be two legal parents and a known genetic father, a decision needs to be made regarding who those legal parents should be, whether it should be the couple bringing up the child, or whether it should be the genetic parents, and what the implications for the child in each scenario are. If the legal parentage structure provides for married couples to be the sole legal parents of a child, even where the genetic father is known to them, it is suggested that some justification would be required for excluding unmarried couples from being the sole legal parents of a child, whether opposite sex or same sex, in similar circumstances.
41. **Egg donors;** Most of cases in the courts of England and Wales have focussed on known genetic fathers as the situation most commonly arising. However, it is sometimes the case that there is a known egg donor. If the person who gives birth is always a parent, the egg donor's parentage is automatically excluded. In England her parentage is excluded by virtue of s.47 HFE Act 2008. However, if that egg donor is also the partner of the person giving birth, it may not be in the child's best interests for her to have no legal relationship with the child. The case of Re G (Children)²⁶ concerned an application for a shared residence order by the biological and psychological mother of a child who was not a gestational parent and therefore not a legal parent. She was in fact the only known genetic parent of the child concerned, but had no legal status and no parental responsibility.
42. If a legal framework is enacted in which it is possible for two women to be the legal parents of a child from birth, and if the second female parent donates her eggs to the treatment of the gestational parent with whom she intends to co-parent, it is suggested that one of the criteria for ensuring the that the second female parent is a legal parent may be the genetic relationship with the child.
43. **Spouse of the gestational parent;** A question arises as to whether it is always appropriate for the gestational parent's spouse to be the second legal parent of the child where that person is not receiving assisted reproduction with the gestational parent. The gestational parent may be receiving assisted reproduction alone, or may be in a relationship with someone else and not yet

²⁶ [2014] EWCA Civ 336

formally divorced from the spouse. The spouse may not even be aware of the treatment being received by the gestational parent. It is suggested that there may be a number of ways of addressing this, such as;

- (i) There could be a catch all provision which excludes the spouse from a legal relationship where it is evidenced that they did not agree to being the second parent or did not know about the assisted conception.
- (ii) There could be provision requiring written agreement setting out who the parents are in all cases of assisted reproduction (see below the section on mechanism).
- (iii) The parentage of the spouse could be excluded where the gestational parent has entered into a written agreement with another person to be the second parent (see below the section on mechanism).

44. At present, in the UK, pursuant to ss.35 and 42 of the HFE Act 2008, the gestational parent's spouse is the second legal parent "*unless it is shown that (s)he did not consent to the placing in her of the embryo or the sperm and eggs or to her artificial insemination (as the case may be).*" As noted above, there are ethical issues regarding whether a spouse can consent to someone else's treatment. It is suggested that what this section is really aimed at is the question of whether the spouse was aware of the assisted reproductive treatment and agreed to be the parent of any resultant child. One of the issues that has arisen from these sections is an evidential one – how does the gestational parent provide evidence that their spouse does not consent, when they may not be aware, and where the gestational parent is seeking treatment with someone else? The HFEA have developed 'Form LC' to deal with this scenario, which is signed by the gestational parent to attest to their spouse's lack of consent, but it is a cumbersome procedure and open to challenge. It hasn't in practice provided the requisite degree of certainty for the children concerned, particularly where the spouse hasn't been aware of the treatment.

45. In the case of Re G²⁷, which concerned this scenario, the then President of the Family Division, Munby P held @ [26];

- i) *The intention of the 2008 Act and its predecessor the 1990 Act is to provide certainty, which is why there is a presumption.*
- ii) *Section 42 of the 2008 Act creates a rebuttable presumption that consent exists in cases of marriage or civil partnership. The presumption can be rebutted by evidence which shows that consent has not been given.*
- iii) *Once evidence to counter the presumption has been led, the presumption cannot be used as a 'makeweight'. So even weak evidence against consent having been given must prevail if there is no other evidence to counterbalance it.*
- iv) *A general 'awareness' that treatment is taking place, or acquiescence in that fact, is not sufficient. What is needed is "consent", and this involves a deliberate exercise of choice.*

46. It is suggested that this formulation is not entirely clear from sections 35 and 42

²⁷ [2016] EWHC 729

of the HFE Act 2008 as drafted, and that if what is desirable is a ‘deliberate exercise of choice’ that could be provided for, either by requiring written evidence of that exercise of choice in every case in which there is assisted reproduction, or in every case where the gestational parent is married and not being treated with the spouse. It is recognised, however, that this may give rise to some evidential issues in international cases in particular, and the merits of requiring evidence of deliberate agreement as against the de-merits of the parentage of a spouse not being recognised if the implemented procedures have not been complied with, or in the case of an international family require careful consideration and debate.

47. **C. How should gender identity be taken into account, specifically when providing for the parental status of a person who has changed gender?** As noted above, the UK Government did not expressly debate the implications of the Gender Recognition Act 2004 when implementing the provisions concerning parentage in the HFE Act 2008, and this has led to litigation.

48. Furthermore, the law relating to gender recognition continues to develop internationally, and there are cases currently pending before the ECtHR concerning gender change and parental status – for example *Y.P. v Russia* Application No 8650/12²⁸ which concerns a trans man who wishes to be named as father on his son’s birth certificate. In the Parliamentary Assembly Resolution 2239 referred to above, the Council of Europe Member States were also called upon to;

“provide for transgender parents’ gender identity to be correctly recorded on their children’s birth certificates, and ensure that persons who use legal gender markers other than male or female are able to have their partnerships and their relationships with their children recognised without discrimination.”

Some jurisdictions, such as Malta, already provide for this by adopting gender neutral terms on birth certificates.

49. In the 2017 ECtHR case of *Case of A.P., GARÇON AND NICOT v. FRANCE*²⁹ found a violation of Article 8 occurred in the requirement for a person changing gender to undergo an irreversible change of appearance – namely gender reassignment surgery. Europe-wide, therefore, this decision increases the likelihood of trans men giving birth following gender reassignment. Nor is it necessarily the case that that person will require assisted reproduction in order to become pregnant if, for example, they were in a same sex relationship with a cis-gender man.

50. Furthermore, it is not only the position of trans men who are capable of giving birth which requires consideration. Clarity is required regarding the parental status of the spouse or partner of gestational parent if the second parent has been afforded gender recognition in their altered gender. The Registrar General in the case currently pending before the courts of England and Wales on this issue has given evidence regarding the confusion which has existed for a number of years among local registrars registering births, and a number of

²⁸ Communicated on 23 February 2017

²⁹ Applications nos. 79885/12, 52471/13 and 52596/13

cases where a birth has been registered naming a mother's partner as the child's father when it has subsequently emerged that he was a trans man at the time of birth registration and the birth of the child was achieved through assisted reproduction. It is suggested that the implications of gender change for the parental status of any child born following the gender change of any of its intended parents is given careful consideration when enacting a legal framework addressing parentage and assisted reproduction.

51. **D. Should a distinction be made between natural conception and assisted reproduction?** All of the scenarios in §21 above assume the use of assisted reproductive techniques. However, it is by no means axiomatic that donor conception involves assisted reproductive techniques. The English case of SAB (A Child) [2014] EWHC 384 concerned a same-sex female couple in circumstances where the child intended to be brought up by them had been conceived naturally. In the English case of M v F and H [2014] 1 FLR 352 an opposite couple had used the services of a man who advertised himself as offering unpaid sperm donation, naturally or via artificial insemination, and the court found that conception had taken place naturally, which resulted in him being the legal father.
52. The parentage provisions in the HFE Act 2008 in s.33 onwards relating to parentage expressly only apply where there is assisted reproduction. There is a common law presumption where a woman is married to a man that he is the legal father of the child, but this can be displaced by DNA evidence showing some other person to be the father of the child³⁰. There is no such common law presumption in English law in respect of two women who are married, but there is a statutory presumption where there is assisted reproduction.
53. The HCCH Study of Legal Parentage of 2014 the survey conducted showed the following;

20. In most States with ART legislation, third party gamete donors who donate in accordance with the rules of the State (e.g., formally, through medical institutions) are specifically provided for in legislation and will not be the legal parents of a child born following use of their gametes. However, in many of these States if "assisted reproduction" is undertaken in an informal fashion – i.e., without third party medical intervention, by individuals following an agreement often with friends or arranged via the internet - the rules on legal parentage following ART may not apply. In some States, the distinction is drawn upon whether the conception resulted from sexual intercourse or not, whilst in others the important factor is whether the ART treatment was carried out by health professionals or not, or, whether it took place in a clinic licensed under the particular ART legislation or not. Whichever route is adopted, if the persons involved have not complied with the relevant legislative requirements, legal parentage will be established in accordance with the basic legal principles described in paragraphs 11 to 14 above and this may result in those who have informally "donated" gametes acquiring the status of legal parent.

³⁰ Leeds Teaching Hospitals NHS Trust v A and B [2003] 1 FLR 1091 @ [24].

54. It is suggested that this issue interrelates with the question of mechanism, and the view taken about whether it should be permissible for a child to have more than two legal parents. For example, if natural conception occurs in a situation where it is intended the child will have 3 legal parents, the ability to provide for this may mean that it is not in a child's interests to exclude the parentage of one of the women co-parenting simply because of the method of conception. If, however, the mechanism adopted for recognising parentage of a non-genetic parent relies upon treatment being undertaken in clinic, this would not be possible.
55. It is suggested that what is important in this situation is clarity of the legal position and certainty for the child. If it becomes possible for non-genetic parents to acquire legal parentage in respect of children conceived outside a clinic setting, or outside the UK, then the concomitant rules would need to be in place to ensure that this can only happen where all parties are fully cognisant of the legal situation they are entering and fully intend such, and to ensure that a court can reach a determination in the event of a dispute.
56. **E. Should a distinction be made between conception in a clinic, or a UK licensed clinic, or elsewhere?** As set out above, the HCCH Study of Legal Parentage found that a number of states made distinctions in relation to the attribution of legal parentage depending upon whether the child is conceived in a clinic setting or informally. The position in the law of England and Wales is somewhat of a hybrid.
57. Pursuant to ss.35 and 42 HFE Act 2008, where a woman is married, to a woman or a man, or civilly partnered, at the time of conception, her spouse will be the second legal parent irrespective of where the conception took place, formal or informal, inside or outside the UK;

35 Woman married [to a man] at time of treatment

(1) If—

(a) at the time of the placing in her of the embryo or of the sperm and eggs or of her artificial insemination, W was a party to a marriage [with a man], and,

(b) the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage,

then, subject to section 38(2) to (4), the other party to the marriage is to be treated as the father of the child unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her artificial insemination (as the case may be).

(2) This section applies whether W was in the United Kingdom or elsewhere at the time mentioned in subsection (1)(a).

42 Woman in civil partnership [or marriage to a woman] at time of treatment

(1) If at the time of the placing in her of the embryo or the sperm and eggs or of her artificial insemination, W was a party to a civil partnership [or a marriage with another woman], then subject to section 45(2) to (4), the other party to the civil partnership [or marriage] is to be treated as a parent of the child unless it is shown that she did not consent to the placing in W of the embryo or the sperm and eggs or to her artificial insemination (as the case may be).

(2) *This section applies whether W was in the United Kingdom or elsewhere at the time mentioned in subsection (1).*

45 Further provision relating to sections 42 and 43

(1) *Where a woman is treated by virtue of section 42 or 43 as a parent of the child, no man is to be treated as the father of the child.*

(2) *In England and Wales and Northern Ireland, sections 42 and 43 do not affect any presumption, applying by virtue of the rules of common law, that a child is the legitimate child of the parties to a marriage.*

58. This means, for example, that two women who are married and buy donor sperm for home insemination over the internet and become pregnant will be the sole legal parents of the child. In contrast, where the couple are not married or civilly partnered, it is only possible for the mother's partner to become the second legal parent where treatment takes place at a UK licensed clinic in accordance with sections 36 and 37 or 43 and 44 of the HFEAct 2008 which requires that written notice be given to the Person Responsible at the clinic.

59. The provision for this dates back to the 1990 HFEAct. In the House of Lords debates, the then Lord Chancellor set out the rationale for requiring in that donor conceived children born to unmarried couples would only become the legal child of the unmarried father in circumstances of treatment in a (UK) licensed clinic, as follows;

These amendments will create a new subsection, the effect of which is limited to those treated together by a person to whom a licence applies. The effect of that limitation is that all persons who seek fatherhood in this way will be subject to the regulatory framework provided by the Bill. In particular, as I have already said, the clinic providing the treatment will have to take account of the welfare of the child. And both parties will be given an opportunity for counselling so that they will be fully aware of the legal and other implications of their actions.

However, the unsupervised use of artificial insemination techniques outside the statutory scheme, including treatment outside the jurisdiction of the United Kingdom, will not be covered by the new provisions. Without the regulation provided by the Bill, it would be extremely difficult to be certain about who is the mother's partner and who is to be treated, for the purposes of this amendment, as the father.

60. The importance of certainty was echoed by the House of Lords in the case of Re R (Child: IVF Paternity of child) [2005] 2 AC 621 per Lord Hope of Craighead:

*[17] The language of the subsection does not provide a clear answer to this question [of how parentage is to be determined many years later]. But there are good reasons for thinking it ought to be read and applied in a way that creates as much certainty as possible. Section 28(2) uses the fact that the woman was a party to the marriage at the relevant time as the test. This is consistent with the common law presumption *pate rest quem nuptiae demonstrant*. Where there is no marriage some other test is needed that will stand the test of time and reduce to a minimum the opportunities for uncertainty.”*

61. A number of points arise for consideration;
- (i) This issue was being considered in 1990, long before it was legally possible for two female parents to be parents, and was not debated again in relation to the 2008 Act.
 - (ii) The provision was being considered in the context of the provisions of the HFEAct 1990 which required that couples were being ‘treated together’ by the clinic in order for parentage of the non-genetic parent to arise following donor conception. It was therefore reliant upon the fact of clinic involvement in the process, and there was no other scheme for creating legal parentage following donor conception.
 - (iii) There are three important elements highlighted, namely consent, certainty and the child’s welfare, but it may be entirely possible for these three factors to be provided for even outside a clinic setting – this is discussed further below in the section on mechanism.
 - (iv) A question arises as to whether the welfare of a child to be born via donor conception requires greater scrutiny where the parents are unmarried than when they are married, provided there is proper informed consent in place. This risks discrimination both on grounds of infertility (or sexuality where the infertility arises from the sex of the parents) and on grounds of marital status.
 - (v) For Jersey, in particular, there is only one fertility clinic, and it is not a UK licensed clinic, albeit the clinical embryologists abide by the provisions of the HFEActs and the HFEA Code of Practice. In Jersey at least there would be a good argument for recognising parentage of unmarried second parents where the child was conceived in a UK licensed clinic and the criteria of the 2008 HFEAct met. It may be possible to enter into a third-party agreement with the HFEA under the provisions of the HFEAct 1990 which would facilitate this additionally.
 - (vi) If provision for legal parentage to occur outside a clinic were to be implemented, this would require careful consideration of how and in what circumstances consent could be withdrawn. This is discussed further below in relation to mechanism.
62. A suggestion is made below that the mechanism for recognition of legal parentage of donor conceived children might be made the responsibility of the Parish Registrar rather than the fertility clinic in Jersey. Arguably this would address the concerns regarding informed consent and certainty of parentage, such that the rationale for requiring conception to occur in a clinic setting would diminish. More difficult is the issue of children born outside Jersey or the UK and this is considered in more detail in section F below.

- 63. F. Should a distinction be made between conception which occurs in Jersey and conception extra-territorially?** There are a number of factual scenarios in which extraterritoriality might become relevant;
- (i) Jersey nationals seeking fertility treatment abroad, including the UK, whilst living in Jersey;
 - (ii) Jersey nationals living or working abroad for a period of time, during which period a child is conceived via assisted conception, and then returning to Jersey to live;
 - (iii) foreign nationals living in Jersey, but otherwise per (i) and (ii);
 - (iv) foreign nationals who had their children abroad via assisted conception prior to moving to Jersey;
 - (v) visiting foreign nationals;
 - (vi) families where one parent resides in Jersey and another in a different jurisdiction.

Specific considerations arise in respect of international surrogacy arrangements which are addressed in Part II of this report. However, it is suggested that there needs to be congruence between the provisions in respect of recognition of parentage generally, and recognition of parentage following international surrogacy arrangements.

64. The issue of cross border recognition of parentage is a vexed one, and the basis of the ongoing HCCH Parentage / surrogacy project³¹. The issue is one of 'limping parentage', namely circumstances in which parentage is recognised in one country but not another, with particular implications for immigration and citizenship. The policy objectives of the Parentage Surrogacy project work are to;
- 1) *Ensure legal certainty and security of legal status for children and families in international situations; and*
 - 2) *Protect the rights and welfare of children, parents and other parties involved with the conception of children in international situations, in line with established global human rights standards.*

As at 2019 the group are still considering possible methods to ensure cross-border continuity of legal parentage among signatory states. What is clear is that the issue of cross border parentage is not one that can be resolved by one jurisdiction alone, and requires international consensus. In the context of the present report, however, it is suggested that focus is required on the best interests of resident Jersey families who, for whatever reason, have had their children via assisted conception in a different jurisdiction, and how their best interests can best be protected.

65. As set out above, in the UK the HFE Act 2008 provides that where the parents are married (same or opposite sex), if their child has been conceived via assisted conception, parentage will be automatically recognised whether the child has been conceived in the UK or elsewhere. This is in common with most

³¹ HCCH Study on the Desirability and Feasibility of Further Work on the Parentage / Surrogacy Project, Preliminary Document of March 2015 @ [68]

jurisdictions insofar as it applies to opposite sex couples³². The same recognition is not afforded to unmarried couples in the UK, irrespective of whether they are named on the child's birth certificate, and irrespective of what procedure applied in order for them to have obtained parentage in the other jurisdiction. For example, in a number of countries there is provision for the female partner of the gestational parent to acquire legal parentage by obtaining an order after the birth³³. With proper judicial procedure, it is difficult to see why recognising such a judicial decision would produce less certainty and security for a child than recognising a child's birth certificate where the parents are married.

66. Within Private International Law, there is precedent for the recognition of status arising from procedures undertaken abroad, and, in certain circumstances for the recognition of foreign orders, where appropriate safeguards are in place. Marriages conducted in one jurisdiction are commonly recognised in many. International adoption is capable of being recognised in many jurisdictions, for example by virtue of the Convention on Protection of Children and Co-operation of Intercountry Adoption 1993, which appears at Schedule 2 of the Adoption (Jersey) Law 1961. Article 23 provides that;

“(1) An adoption certified by the competent authority of the State of adoption as having been made in accordance with the convention shall be recognised by operation of law in the other Contracting States.”

67. The law of England and Wales recognises some overseas adoptions which fall outside the international instruments, but where there are sufficient safeguards, and where the adoption has been made by court order, pursuant to common law; A County Council v M. and others (No 4)³⁴

“Recognition under common law;

[61] The case-law establishes that an application for the recognition at common law of a foreign adoption must satisfy a number of specific criteria:

- (1) The order must have been lawfully obtained in the foreign jurisdiction.*
- (2) The concept of adoption in that jurisdiction must substantially conform to that in England.*
- (3) The adoption process that was undertaken must have been substantially the same as would have applied in England at the time.*
- (4) There must be no public policy consideration militating against recognition.*
- (5) Recognition must be in the best interests of the child.*

68. The HCCH 2014 Study of Legal Parentage found that most states who participated in the survey provided for a form of 'recognition' of foreign judicial decisions concerning legal parentage in some circumstances. Common grounds for recognition or refusal of recognition were;
- a) Whether the foreign decision was rendered in compliance with or

³² HCCH Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements, Preliminary Document No 3 of March 2014

³³ HCCH Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements, Preliminary Document No 3 of March 2014 at [21]

³⁴ [2014] 1 FLR 881

- contravention of fundamental due process principles.
- b) Whether the foreign decision is a final decision.
- c) Whether the foreign decision is in contradiction with the decision of another State.
- d) Whether the foreign decision is contrary to public policy.

69. Within the context of considering international surrogacy arrangements, the joint report of the Scottish Law Commission and the Law Commission of England and Wales at §16.91 suggests a mechanism by which the legal parenthood of intended parents who have entered into surrogacy arrangements abroad might be recognised;

“We think...that the Secretary of State should have the power to provide that the legal parenthood of parents of children born through international surrogacy arrangements established under the law of a particular country will be recognised in the UK, without the need for the intended parents to make a parental order application in this jurisdiction.”

70. In order to afford children who are born abroad following assisted reproduction the security of maintaining parental status, certainty of parentage, and whilst respecting the need for appropriate and informed consent it is suggested that there are a number of mechanisms by which the parentage of children conceived or born out of the jurisdiction might be recognised;

- (i) by operation of law in some circumstances, such as marriage;
- (ii) by providing a judicial mechanism whereby an application can be made for recognition of the parentage of children born or conceived abroad, subject to the fulfilment of certain requirements or safeguards. This could apply to any child, irrespective of whether the parents seeking recognition are married and taking into account the circumstances in which the child was conceived, and the basis for parentage in the country or conception or birth;
- (iii) by providing a streamlined mechanism, judicial or by operation of law, where the child was conceived or born in certain countries to be defined by a schedule to legislation or secondary legislation;
- (iv) in combination of some or all of the above, so that in some circumstances recognition is automatic without the need for an application, and in others a potential remedy lies in the ability to make an application for recognition of parentage. Distinctions might be made between cases concerning Jersey nationals and foreign nationals in some circumstances.

71. Such provisions might be capable of dovetailing with provisions in relation to international surrogacy, discussed in more detail in Part II of this report, such that there is a similar judicial process or operation of law which is capable of providing recognition of parentage following an international surrogacy arrangement where certain safeguards are complied with, or where the surrogacy arrangements have been entered into in certain jurisdictions.

72. **Part B: Mechanism and registration;** If legislation is to be enacted to clarify the law relating to parental status in respect of children born following assisted reproduction and / or gender change, a number of subsidiary questions arise regarding the appropriate legal mechanism to provide for the substantive provisions, and the implications of such provisions for issues such as birth registration and donor anonymity. It is suggested that the following are the key areas for consideration;

- A. What is the appropriate mechanism for affording legal parentage to a person who is not genetically related to the child?
- B. What evidence is to be provided to the Registrar in connection with the registration of birth?
- C. How is any dispute as to parentage to be determined?
- D. Should the child's birth certificate evidence the fact of them being donor conceived?
- E. Should a donor of gametes be permitted to retain anonymity?

73. **Mechanism:** As set out above, the HFE Act 1990 permitted for the first time in the UK the conferring of legal parentage on a person not genetically related to a child, other than by adoption. This statute gave rise to a number of cases in which parentage was disputed, particularly in the context of unmarried couples. The particular issue lay with s.28(3) which provided that in relation to unmarried couples;

"If no man is treated, by virtue of subsection (2) above, as the father of the child but—
*(a) the embryo or the sperm and eggs were placed in the woman, or she was artificially inseminated, in the course of **treatment services provided for her and a man together** by a person to whom a licence applies, and*
(b) the creation of the embryo carried by her was not brought about with the sperm of that man, then, subject to subsection (5) below, that man shall be treated as the father of the child." (emphasis added).

74. A number of cases arose thereafter in which consideration was given to the meaning of "treatment services provided for her together". One such case was that of Re R (IVF) Paternity of Child³⁵ which reached the House of Lords, and where the particular issue arose because the mother's relationship with her partner had come to an end by the time of implantation, and the treating clinic had not been made aware of that fact. The Court of Appeal determined on appeal that the mother's former partner was not the legal parent of the child, Baroness Hale holding;

"[20]...We start from the proposition, advanced by Mr Jackson for the child's

³⁵ [2005] 2 FLR 843

guardian, that s 28(3) is an unusual provision, conferring the relationship of parent and child on people who are related neither by blood nor by marriage. Conferring such relationships is a serious matter, involving as it does not only the relationship between father and child but also between the whole of the father's family and the child. The rule should only apply to those cases which clearly fall within the footprint of the statutory language.”

75. The decision was upheld in the House of Lords where the importance of certainty in such situations was again emphasised. Lord Hope of Craighead identified the essential problem of the uncertainty of the statutory language;

[16] ...It seems to me, however, that the simple approach still leaves unanswered the question how it is to be determined, in the event of a dispute which may perhaps not emerge until many years after the event, whether the services were being provided for the woman and the man together at the time when the embryo or the sperm and eggs were placed in the mother or she was artificially inseminated.

*[17] The language of the subsection does not provide a clear answer to this question. But there are good reasons for thinking that it ought to be read and applied in a way that creates as much certainty as possible. Section 28(2) uses the fact that the woman was a party to a marriage at the relevant time as the test. This is consistent with the common law presumption *pater est quem nuptiae demonstrant*. Where there is no marriage some other test is needed that will stand the test of time and reduce to a minimum the opportunities for uncertainty. The recording by the provider of the information referred to in s 13(2) is likely to have that effect. The subsection refers to a 'course of treatment services provided ... by a person to whom a licence applies'. This assumes that the provider will have decided to provide a course of treatment services for the woman and the man together which will have a beginning and an end, that at the relevant time that course of treatment was still in progress and that the provider of the services will have kept records which will demonstrate that this is so. The records are likely to provide all that is needed as evidence to show that, so far as the provider was concerned, the woman and the man were being treated together at the relevant time.*

[18] On the other hand this approach places a high premium on regular and accurate record-keeping – on what, as Hedley J put it, is spelled out in the consent form of the mother, which the man joins in by acknowledging the legal consequences to him of the treatment which she is to receive – and on keeping the records up to date throughout the course of the treatment which, as this case shows, may extend over several years. It places the onus on the man to inform the provider if and as soon as he wishes to withdraw from the arrangement. Yet, as he will not be participating in the treatment in any way, he may be quite unaware of the steps that the provider is taking as the course proceeds. He need not be present during any part of it. So the date that has been fixed for any stage in the treatment of the woman may be unknown to him, especially if the relationship is an unstable one. In the present case the man wishes to be the father of the child and is willing to accept the responsibilities

that will flow from this. But it is easy to envisage cases where the man was no longer willing to be associated with the treatment but had not realised, because he was not being kept fully informed, that it was still continuing.

76. This case highlighted some of the difficulties which arise from having a statutory scheme which is not sufficiently clear. When the 2008 Act was implemented, a new statutory scheme was created for the conferring of legal parentage on a person who was not a genetic or gestational parent, and not married to the gestational parent. The new scheme depended on written notice being given to the Person Responsible (usually the lead clinical embryologist) of the intent of the gestational parent and another man or woman that the man or woman would be the second parent³⁶. This was intended to eliminate the difficulty of evidencing a clear agreement as to who the intended parent would be. It was supported by the HFEA Code of Practice and licence conditions, which require that appropriate information and counselling is given to the intended parents before treatment can be given;

T60 A woman must not be provided with treatment services using embryos or donated gametes unless she and any man or woman who is to be treated together with her have been given a suitable opportunity to receive proper counselling about the implications of her being provided with treatment services of that kind, and have been provided with such relevant information as is proper.

T61 A woman must not be provided with treatment services where there is an intended second parent unless, either before or after both have consented to the man or woman being the intended second parent, she and the intended second parent have been given a suitable opportunity to receive proper counselling about the implications of the woman being provided with treatment services and have been provided with such relevant information as is proper.

77. However, these amendments to the legislation have not resolved the issues, primarily for the reason that in practice it is fertility nurses who are responsible for completing the forms with patients which the HFEA developed to evidence the relevant notice to the Person Responsible, and there have been numerous errors arising from the forms not being completed, or being completed wrongly. The leading case was Re A and Ors³⁷ heard in 2015, but the problems continue to arise. Significant factors in this are;
- (a) fertility Nurses not fully understanding the differences between medical and legal consent, or fully appreciating the effect of the forms being signed;
 - (b) patients and clinics being reluctant for reasons of time or cost to make separate appointments focussed on the issue of agreement to legal parentage and the signing of the requisite documents, resulting in the forms being signed on the same day as many other forms;
 - (c) the length of time in some cases between receiving the relevant information and counselling, and signing the written notice;
 - (d) in some instances, the forms being sent home for patients to complete;
 - (e) the absence of legal advice to either the clinic or the patients.

³⁶ Ss. 36, 37 and 43, 44

³⁷ [2016] 1 WLR 1325

78. Having been involved in a number of these cases, and having spent a considerable amount of time with clinicians from the Association of Clinical Embryologists and the HFEA discussing the issues arising, I question whether it is appropriate at all for fertility nurses or clinical embryologists to be the persons who are given the responsibility of ensuring the documentation necessary to confer legal parentage on a non-genetic parent is correctly completed. The implementation of an entirely new framework gives Jersey the opportunity to consider a statutory scheme which is not dependent on clinical specialists being given responsibility for the creation of legal status. If they are to be given such responsibility, then there is also the opportunity to create a Code of Practice in relation to this which addresses some of the ongoing issues in the UK.
79. In other jurisdictions, there are a variety of ways in which parentage is conferred following assisted reproduction.
- (a) Operation of law: the HCCH found that in most states where there is provision for parentage following ART, the husband of a woman who gave birth to a child following ART is usually the other legal parent of the child irrespective of genetics, provided that he consented to the treatment³⁸. In some states the operation of law is extended to unmarried couples, provided qualifying requirements such as 'living together as though married' are met.
 - (b) Voluntary acknowledgment; In some states this takes place prior to the birth of the child, and in other states afterwards.
 - (c) By judicial or administrative decision; Some states provide for the possibility of an unchallenged application being made to the relevant state authorities confirming the legal parentage of a child, often the birth registration authorities.
 - (d) By step parent adoption.
80. In circumstances where parentage is conferred by operation of law, the question of evidence assumes greater importance. A marriage can be readily evidenced, but as set out above, the lack of consent of a spouse is not always so easily evidenced. A requirement for a cohabiting relationship is difficult to evidence, and again gives rise to the issue of a cohabiting partner not necessarily wanting to have legal parentage conferred. Even the requirement of a couple having treatment together in a medical institution was problematic when applicable in the UK. It is suggested that a system of written agreement provides all concerned with greater certainty.
81. In all states which responded to the HCCH survey on legal parentage, legal parentage could be established by the court where there is a dispute as to parentage. In English law this takes the form of an application for a declaration of parentage pursuant to s.55A of the Family Law Act 1986. However, this is not a means of conferring legal parentage, but of determining, by way of application of the law as to parentage, what the legal parentage of a child is.

³⁸ HCCH 2014 Study of Legal Parentage 2014 @ [18]

82. If a legal framework is to be implemented which moves closer to a model of parental intent and agreement to parentage, then the question of how that intent and agreement is to be evidenced arises. It is suggested that as a minimum the agreement to confer parentage should be given in writing. It is also suggested that such agreement should be given before treatment commences. Furthermore, that it should be an agreement to parentage being conferred following donor conception, rather than consent to treatment of the gestational parent; a system of 'consent to treatment' continues the confusion of medical and legal consent, and confuses the issue of consent to treatment with agreement to confer parentage. Additional criteria for consideration might include;
- a) to whom the agreement is given;
 - b) what information and / or advice should be given to the persons agreeing before agreement is given;
 - c) whether the same process should apply to formal and informal assisted reproduction;
 - d) whether the same process should apply in circumstances of known donors and unknown or anonymous donors;
 - e) whether the process should include married couples as well as unmarried couples;
 - f) what the process would be for withdrawal of consent.
83. A potential framework might be one where couples intending to confer parentage on a non-genetic non-gestational parent are required to attend the Parish Registrar before embarking upon treatment to receive the appropriate advice and information concerning the effect of conferring parentage, and to sign the relevant documentation for achieving this. Where treatment is to take place in a clinic, the clinic could be provided with the signed documentation by the Parish Registrar. Where conception is to take place informally, the documentation would assist with registering the birth if conception is successful.
84. This system might also enable couples intending to conceive their child abroad to register the agreement in Jersey before doing so, in order to be assured of their parentage of the child on their return or later residence in Jersey.
85. Disadvantages of this system might be the degree of intrusion felt by couples in having to disclose to the Parish Registrar the fact of use of donor gametes, and the likelihood that not all couples conceiving with donor gametes would know of the requirement. A statutory presumption in certain circumstances would avoid this. It would also potentially increase the number of children for whom parentage following donor conception is secure in circumstances where parents may not take the necessary steps to attend the Parish Registrar or complete the written documentation if conceiving outside a clinic setting or abroad. However, as set out above, a statutory presumption still has the potential to give rise to uncertainty, for example where a woman is married and has treatment with someone other than her spouse.
86. Careful attention would also need to be paid to the possibility of couples separating after entering into the agreement but prior to treatment. The question

would arise as to the onus placed on an intended parent who no longer agreed to parentage being conferred on themselves or the other parent to withdraw consent. A scenario could arise in which an intended parent has not taken steps to withdraw consent, and their former partner becomes pregnant through assisted conception, perhaps many years later. Consideration should perhaps be given to whether there should be provision for automatic review of the agreement at intervals initiated by the Registrar.

87. **Posthumous parentage;** In some circumstances, a gestational parent may wish to be treated with the gametes of a deceased partner which have been stored with the partner's consent, or treated with embryos created at a time when the couple were being treated together, and created with donor gametes. It is outside the scope of this report to consider the regulations in relation to storage of gametes, save to say that the time limits for storage are regarded by the HFEA as a particular issue at the present time. However, in implementing a comprehensive scheme for conferring parentage following assisted reproduction, provision for the use of gametes and embryos posthumously needs to be addressed in any statutory scheme, whether included or excluded.

88. **Birth registration;** Closely related to donor conception are the issues of donor anonymity and birth registration. Modern technology makes the access of donor conceived children to information about their genetic origin an even more pressing issue than when assisted reproductive techniques were first developed because of the availability of information on the internet. In particular, companies which provide home genetic testing services such as '23andMe' and 'AncestryDNA' mean that individuals may inadvertently discover that they are donor conceived or have genetic siblings, or indeed discover the identity of their donor's genetic family. Conversely, without proper information regarding genetic history, an individual may inadvertently enter a relationship with a genetic sibling or other relative.

89. The joint Scottish Law Commission and Law Commission of England and Wales consultation document notes that there is no European consensus on donor anonymity, and in fact in some jurisdictions it is still mandatory³⁹. The Law Commission report also noted that no case in the ECtHR has considered the specific question of donor conceived people's rights to information about their donor, but observes at §10.67;

"There is increasing weight placed on the child's rights to know his or her genetic origins under Article 8 of the European Convention on Human Rights ("ECHR") (right to respect for private and family life)."

And in relation to Article 7 of the UNCRC, the Law Commission report notes at §10.72 that *"this provision has been interpreted as providing a clear basis for donor conceived children to know their origins"*⁴⁰.

90. The ability to trace one's genetic origins, however, depends upon the

³⁹ At §10.66

⁴⁰ Referencing the professional handbook published by the Child Rights information Network "A children's rights approach to assisted reproduction"

knowledge that one is donor conceived. Many families choose not to tell their children that they are donor conceived, particularly due to perceived stigma around infertility. In England and Wales there is a hybrid system in operation; section 31Z of the HFE Act 1990 provides for persons over the age of 16 to be able to make a request to the Registrar for some identifying information. Where the person is over 18 this can be information which identifies the donor⁴¹;

31ZA Request for information as to genetic parentage etc.

(1) *A person who has attained the age of 16 (“the applicant”) may by notice to the Authority require the Authority to comply with a request under subsection (2).*

(2) *The applicant may request the Authority to give the applicant notice stating whether or not the information contained in the register shows that a person (“the donor”) other than a parent of the applicant would or might, but for the relevant statutory provisions, be the parent of the applicant, and if it does show that—*

(a) *giving the applicant so much of that information as relates to the donor as the Authority is required by regulations to give (but no other information), or*

(b) *stating whether or not that information shows that there are other persons of whom the donor is not the parent but would or might, but for the relevant statutory provisions, be the parent and if so—*

(c) *the number of those other persons,*

(d) *the sex of each of them, and*

(4) *Where a request is made under subsection (2)(a) and the applicant has not attained the age of 18 when the applicant gives notice to the Authority under subsection (1), regulations cannot require the Authority to give the applicant any information which identifies the donor.*

(iii) *the year of birth of each of them.*

91. However, such a request is only likely to be made if the individual concerned is aware that they were or may have been conceived via donor conception. There is currently nothing in the birth registration system which would identify to anyone reading a birth certificate that the individual named in the certificate is donor conceived.

92. There are therefore, two key policy decisions to be made when implementing any new framework:

(i) What information should be discoverable by an individual about their donor, and

(ii) Whether the birth certificate should contain any indicator that the person to whom the certificate relates was donor conceived.

93. In respect of the former, if the donated gametes come from the UK, then the provisions of the 1990 Act will apply to them insofar as the donor will not be able to maintain anonymity. Domestically, there is a decision to be taken regarding whether donors should be permitted to donate anonymously, but there is also the position of gametes sourced abroad from jurisdictions where

⁴¹ This applies to donations post 2005 which were no longer permitted to be anonymous.

gamete donation remains anonymous. In those circumstances, permitting an individual to know that they are donor conceived is not necessarily the same as allowing them to discover identifying information about their genetic origins.

94. In respect of the latter, questions regarding an individual's privacy also arise, such that the individual concerned may not wish it to be apparent to anyone looking at their birth certificate that they are donor conceived. The joint Law Commission Report stated the following;

§10.81 Where neither of the intended parents' gametes were used the certificate could also indicate that there was additional information about the child's origins. However, we need to be cautious about making personal information about a person more public than it already is. Disclosing information about genetic origins on birth certificates (or forcing parents to disclose) could be argued to be an unjustifiable interference with the family and privacy of both parents and child⁴².

95. There are a range of options which might be considered in this context, such as the birth certificate carrying a symbol to indicate that the Registrar holds additional information about the certificate, which is accessible only by the person to whom the certificate relates. However, these are practical considerations which can only realistically follow from policy decisions.
96. As identified in the joint Law Commission report in relation to surrogacy, there are additional considerations for children born via surrogacy who may also be donor conceived, including whether they should have a right to know that they were born following surrogacy. These are discussed further in Part II of this report.

⁴² K Wade "The regulation of surrogacy: a children's rights perspective" (2017) 29(2) Child and Family Law Quarterly 113.

Part II: Surrogacy;

97. Pursuant to the Surrogacy Arrangements Act 1985 (UK legislation), surrogacy is defined as follows;

(2) “Surrogate mother” means a woman who carries a child in pursuance of an arrangement—

(a) made before she began to carry the child, and

(b) made with a view to any child carried in pursuance of it being handed over to, and parental responsibility being met (so far as practicable) by, another person or other persons.

(3) An arrangement is a surrogacy arrangement if, were a woman to whom the arrangement relates to carry a child in pursuance of it, she would be a surrogate mother.

98. This is the definition adopted for the purposes of this report, save that it is acknowledged that the surrogate may identify as a man or non-binary, and that some surrogates prefer to simply be called surrogates, rather than surrogate mothers, as they do not see themselves as mothering in a surrogacy context. The word surrogate is used in this section to mean the gestational parent. In some circumstances the gestational parent may also be a genetic parent (traditional surrogacy), or the egg(s) may be donated, or those of the intended parent (host or gestational surrogacy).

99. The ethical considerations around surrogacy are complex, and sometimes competing, and the response internationally to the issues raised by surrogacy varies widely. The nature of the issues raised encompass;

- a) the right to found a family in respect of infertile or same sex male couples;
- b) the autonomy of consenting adults, including the surrogate, and the right to enter into a surrogacy agreement with other consenting adults;
- c) protecting the surrogate from exploitation or commodification;
- d) protecting the surrogate from exploitative pay and conditions;
- e) protecting the surrogate from her will being overborne by the level of payment;
- f) affording a surrogate the right to object to parentage being conferred on intended parents if she changes her mind;
- g) the best interests of the children born through surrogacy which in itself encompasses a number of factors;
 - (i) identity rights connected with the parental status of the intended parents, and associated benefits such as nationality, citizenship, financial support, and extended family relationships;
 - (ii) identity rights in relation to knowledge of genetic and gestational origin;
 - (iii) ensuring the welfare of children born through surrogacy is met, and that children have not, for example, been conceived in order to allow the intended parents to abuse them⁴³;

⁴³ For example, a case in Australia where a convicted paedophile commissioned children born through surrogacy for the purposes of abuse: <https://www.theguardian.com/australia-news/2016/may/19/man-who-sexually-abused-surrogate-twin-baby-daughters-jailed-for-22-years>

- (iv) ensuring that children are not born from circumstances which exploited their gestational parent;
- (v) ensuring that surrogacy is genuine and does not amount to a baby sale or child trafficking situation;
- (vi) ensuring the welfare of children are met where there is a dispute post birth as to whether parentage orders should be made, and with whom the child should reside or spend time.

100. The response of different countries to ethical issues raised by surrogacy is wide in principle, and in the specifics. In their book, 'Eastern and Western Perspectives on Surrogacy'⁴⁴, the authors place the different regimes internationally into 5 broad categories, within which there is significant variation, namely;

- a) Prohibitive
- b) Tolerant
- c) Regulatory
- d) Free market
- e) Regulation by the medical profession.

101. **Prohibitive approach;** Countries such as France and Spain have adopted the prohibitive approach, whereby surrogacy is illegal. However, this has not resulted in the cessation of intended parents from France and Spain entering into surrogacy arrangements. The data is not conclusive, but the author Esther Farnos Amoros of Pompeu Fabra University, Spain in her chapter on 'Surrogacy in Spain'⁴⁵ referred to research demonstrating that around 1000 children with Spanish commissioning parents were allegedly born through surrogacy in the US alone in 2003. In other data the annual figure in 2016 was estimated at 800⁴⁶. In addition, other popular destinations for Spanish families include the Ukraine, Mexico, India and Thailand. There is at present something of a crisis concerning around 30 Spanish families stranded in Ukraine, unable to register their births with the Spanish consulate in Kiev⁴⁷.

102. France has also encountered difficulties as a result of its prohibitive approach, insofar as the French system did not permit the birth certificates of children born pursuant to an international surrogacy arrangement to reflect their genetic parentage, as being contrary to public policy. In the case of Mennesson v France⁴⁸ the ECHR found that this constituted a breach of the Article 8 Rights to Private Life of the children concerned. The domestic regime meant that the children, born in California, did not have French passports or residence permits. The ECHR held;

99. The Court can accept that France may wish to deter its nationals from going abroad to take advantage of methods of assisted reproduction that are prohibited on its own territory (see paragraph 62 above). Having regard to the foregoing, however, the effects of non-recognition in French law of the legal parent-child relationship between

⁴⁴ Claire Fenton Glynn and Jens M Scherpe, 2019

⁴⁵ Written for the book 'Eastern and Western Perspectives on Surrogacy'

⁴⁶ Provided by the activist group 'Son Nuestros Hijos'

⁴⁷ https://www.bionews.org.uk/page_138143

⁴⁸ Application 65192/11

children thus conceived and the intended parents are not limited to the parents alone, who have chosen a particular method of assisted reproduction prohibited by the French authorities. They also affect the children themselves, whose right to respect for their private life – which implies that everyone must be able to establish the substance of his or her identity, including the legal parent-child relationship – is substantially affected. Accordingly, a serious question arises as to the compatibility of that situation with the children’s best interests, respect for which must guide any decision in their regard.

Following this decision France made changes to their legislation to permit the registration of birth of a child born following international surrogacy as the child of the genetic parent, and for the intended mother to adopt the child.

103. It is also important to note that the mechanism for establishing such a relationship carries a wide margin of appreciation, which might include adoption⁴⁹;

51. The Court notes that there is no consensus in Europe on this issue: where the establishment or recognition of a legal relationship between the child and the intended parent is possible, the procedure varies from one State to another (see paragraph 24 above). The Court also observes that an individual’s identity is less directly at stake where the issue is not the very principle of the establishment or recognition of his or her parentage, but rather the means to be implemented to that end. Accordingly, the Court considers that the choice of means by which to permit recognition of the legal relationship between the child and the intended parents falls within the States’ margin of appreciation.

In addition to this finding regarding the margin of appreciation, the Court considers that Article 8 of the Convention does not impose a general obligation on States to recognise ab initio a parent-child relationship between the child and the intended mother. What the child’s best interests – which must be assessed primarily in concreto rather than in abstracto – require is for recognition of that relationship, legally established abroad, to be possible at the latest when it has become a practical reality....

[53]...Depending on the circumstances of each case, other means may also serve those best interests in a suitable manner, including adoption, which, with regard to the recognition of that relationship, produces similar effects to registration of the foreign birth details.

104. **The tolerant approach;** The UK is a jurisdiction which might be termed tolerant, in that there is no legal regulatory framework established around the entering into of surrogacy arrangements (other than prohibitions on third parties acting on a commercial basis), but there is a process in the form of applications for parental orders to enable intended parents to acquire parental status in respect of the children after the fact. The effect of the law on parentage in the UK, in particular sections 33, 35, 42 and 54 of the HFE Act 2008 is that the surrogate will be the legal parent at birth, together with her spouse / civil partner

⁴⁹ Advisory Opinion of the Grand Chamber concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother in the case of Mennesson v France.

unless it can be shown that the spouse did not consent to the insemination or implantation of the surrogate, unless and until parentage is conferred by a parental order. If the surrogate is not married / civilly partnered or her spouse / civil partner did not consent, the genetic father will be the second parent⁵⁰.

105. Commercial surrogacy arrangements are prohibited. There is a lack of consensus globally regarding what constitutes a 'commercial surrogacy arrangement', but in UK terms, what is prohibited is negotiating surrogacy agreements on a commercial basis, per s.2 of the Surrogacy Arrangements Act;

(1) No person shall on a commercial basis do any of the following acts in the United Kingdom, that is—

(a) initiate any negotiations with a view to the making of a surrogacy arrangement, (aa) take part in any negotiations with a view to the making of a surrogacy arrangement,

(b) offer or agree to negotiate the making of a surrogacy arrangement, or

(c) compile any information with a view to its use in making, or negotiating the making of, surrogacy arrangements;

and no person shall in the United Kingdom knowingly cause another to do any of those acts on a commercial basis.

106. This does not prevent the negotiating of a surrogacy arrangement on a 'not for profit' basis, but it does prevent the giving of legal advice in relation to a surrogacy arrangement by anyone who charges on a commercial basis.

107. To some degree, the system in Jersey at the present time might be termed tolerant, in that there is no specific provision, but nor is it unlawful, and clinics are permitted to carry out fertility treatment in surrogacy situations. Applications for parental orders can be made by persons domiciled in the Channel Islands by virtue of s.54 of the HFE Act 2008.

108. The tolerant approach has not been without its problems, chief among which is perhaps the fact that by the time the child's welfare comes to be considered by the court, the child is already in existence. This in conjunction with the prohibition on parties taking legal advice on a commercial basis, and the lack of regulatory body or other ethical committee, has meant that a significant number of surrogacy arrangements are entered into without any advice or support, save from informal social media groups. At least two of the cases which came before the Court of Appeal concerning the breakdown of surrogacy arrangements concerned a surrogate and intended parents who met via social media with no additional support, with disastrous consequences for the child⁵¹.

109. In outlining the case for reform in their consultation document, the Scottish Law Commission and Law Commission of England and Wales stated; §1.45 *"In relation to the attribution of parenthood, many stakeholders argued that the current law does not reflect the intentions of any of the participants in*

⁵⁰ Unless his parentage has been excluded by virtue of having donated gametes in accordance with Sch.3 of the 1990 Act.

⁵¹ Re H (a child) surrogacy breakdown [2017] EWCA Civ 1798 and Re X [2017] EWCA Civ 228

a surrogacy arrangement, that the intended parents be the legal parents from birth. They argued that the law does not operate in the best interests of the child. Concerns were expressed that the intended parents may be prevented from taking important medical decisions in the days after a child's birth, as not being the legal parents of the child, they also lack parental responsibility. Surrogates also expressed concern at being legally responsible for the child, which they do not consider to be theirs, unless and until a parental order is granted"

110. In making their recommendations, the Law Commissions are moving away from a tolerant approach and towards a regulated approach. The Law Commission report concluded that *"law reform in respect of domestic surrogacy arrangements can alleviate, if not eliminate, the [ethical concerns around surrogacy] by providing more effective regulation of surrogacy arrangements, and revised eligibility requirements and safeguards"*⁵². They also identified their primary aim as being to encourage those wishing to enter into surrogacy arrangements to do so in the UK rather than overseas⁵³.
111. **The regulatory approach** has been operated with some success in a number of jurisdictions and is gaining traction internationally. In Israel there has been a regulatory system in place for surrogacy arrangements since 1996. All surrogacy arrangements are required to be approved by the Surrogacy Approvals Committee, and the Committee publishes detailed requirements regarding the content of surrogacy agreements. The evidence to be provided to the committee includes the surrogacy agreement, medical evidence including psychological evidence, confirmation that legal advice has been received, and in addition the Committee is required to hear all parties⁵⁴. Whilst the system appears to generally work well, it is not without problems. In particular, the eligibility criteria for entering into a surrogacy arrangement are quite strict, both in respect of the surrogate and the intended parents. For example, the intended parents must be married and heterosexual, Israeli citizens, and the sperm must be that of the intended father. The commissioning mother must have medical problems preventing her from bearing a child or making it medically risky for her to do so. She must also be no older than 53. In practice this has meant an increase in couples entering into International Surrogacy Arrangements, which are not regulated in Israel⁵⁵.
112. Greece has had in place a comprehensive law for medically assisted reproduction since 2002, including surrogacy. It also has an independent body, the National Authority of Assisted Reproduction which has oversight of the implementation of the legal framework of medically assisted reproduction. The legal framework includes provision for surrogacy agreements to be submitted to court for judicial authorisation before conception. Provided that the agreement has been authorised by the court, the legal parent or parents from

⁵² . §2.71

⁵³ §2.72

⁵⁴ Rhona Schuz, Sha'arei Mishpat Academic Centre, Israel "Surrogacy in Israel" appearing in 'Eastern and Western Perspectives on Surrogacy'

⁵⁵ Rhona Schuz ibid

birth are the intended parent(s) pursuant to the surrogacy arrangement. The legal framework imposes a number of specific requirements on surrogacy agreements in order for them to be eligible for judicial authorisation. In her chapter 'Surrogacy in Greece' for 'Eastern and Western Perspectives on Surrogacy, Dr Eleni Zervogianni, Professor of Law writes;

“Judging from the experience of the application of the legal framework on surrogacy in the 15 years since it entered into force, it can be ascertained that it has indeed been successful and well accepted by Greek society, without substantial objections of moral, religious political or other character.”

113. Similarly to Israel, there are some strict eligibility requirements for surrogacy. Only gestational surrogacy is permitted. It is only available to persons who cannot have a child in the natural way due to a medical condition, there is an age limit for commissioning mothers of 50 years, and it is only available to a heterosexual couple. However, in contrast with Israel, according to Dr Zervogianni, International Surrogacy arrangements are rare in practice.
114. **Regulation by the Medical Profession;** This arises in circumstances where there is no legislation in place in relation to surrogacy, but where the medical profession has self imposed regulatory guidelines. This is the position in Japan, where there are relatively few domestic surrogacies⁵⁶. The Japan Society of Obstetrics and Gynaecology Guidelines prohibit surrogacy, but it continues to be performed by some clinicians. A significant number of Japanese citizens embark on international surrogacy arrangements as a result, but there is no legal mechanism for conferring parentage thereafter save for adoption. The Assisted Reproductive Review Committee of Japan recently issued a report in which it was concluded that regulation of surrogacy in Japan is needed.
115. In some respects, the position is similar to Jersey in that no specific laws have been enacted in relation to surrogacy, but assisted reproduction including via surrogacy is carried out by members of the medical profession who follow HFEA guidelines. Jersey citizens, however, do have the option of applying for a parental order in the UK if they are domiciled in the UK or Channel Islands. I do not know the extent to which Jersey nationals are engaging in surrogacy abroad in response to a lack of regulation in Jersey
116. **Free Market;** The free market approach means that it is possible for surrogacy to take place on a commercial basis, including the payment on a commercial basis⁵⁷ of intermediaries, surrogates and others involved in the surrogacy process, sometimes in the absence of a regulatory framework. It exists in a number of States in America, in the Ukraine, and has existed in India and Thailand until recent regulatory intervention. The difference in cultural climate, economic prosperity, and social inequality, in addition to the different ways in which the system operates in practice in these different jurisdictions, has led to significant divergence in outcomes. The Executive Summary of the

⁵⁶ Surrogacy in Japan” Shinchiro Hayakwa of the University of Tokyo writing in 'Eastern and Western Perspectives on Surrogacy'

⁵⁷ As compared to a non-profit basis.

International Forum on Intercountry Adoption and Global Surrogacy summarised the concerns in less wealthy countries as follows⁵⁸;

“Structural conditions of poverty and lack of alternative support drive women to engage in surrogacy and cause parents to relinquish children – often under circumstances of temporary stress but with lifetime emotional consequences. At the same time, structural poverty makes vulnerable populations susceptible to exploitation by profit-making intermediaries in adoption and surrogacy.”

117. In the Ukraine, surrogacy may be conducted on a commercial basis, and surrogacy agreements are enforceable, meaning the intended parents can be registered as the child’s parents from birth. Regulation is relatively light touch, and it is a popular choice with families seeking surrogacy outside their own country. However, the poor socio-economic status of many women in the Ukraine in conjunction with the lack of oversight of surrogacy arrangements leaves surrogates vulnerable to exploitation. In particular, there are some ‘surrogacy giants’ such as BioTexCom in which the surrogacy agency and the treating clinic are combined, leading to allegations that the focus on profit and lack of objectivity means that surrogates’ welfare is overlooked⁵⁹. There are draft bills in circulation which aim to tighten up regulation of surrogacy in Ukraine.

118. India has been another centre for reproductive tourism, and has encountered similar difficulties. The history of surrogacy in India is complex, and over the years the government has used various administrative procedures to seek to regulate the sector. India has seen a dramatic shift from being a liberal medically regulated system, to the more recent prohibition on commercial surrogacy in 2016⁶⁰. Since 2008 the surrogacy industry in India has boomed, with reproductive tourists numbering in the thousands. However, the low literacy and low socio-economic status of surrogates, in conjunction with their lack of ability to access litigation as a remedy has led to widespread concern about exploitation. The Surrogacy (Regulation) Bill 2018 now proposes that surrogacy be restricted to altruistic surrogacy only for close relatives. This has not necessarily been greeted enthusiastically by surrogates who may have viewed surrogacy as their only opportunity to escape poverty. From their study conducted in Gujarat, Goswami and Rotabi concluded⁶¹ that it is important not to dismiss the perspective of surrogate mothers in India that surrogacy is advantageous to them rather than exploitative.

119. At the other end of the spectrum, the free market approach taken in many States in the US has led to working models in a number of individual States which include a high degree of protection for surrogates. The cultural normality of litigation in the US has perhaps contributed to a more contract based system in a number of US states, but one which often ensures proper screening, independent legal advice, and clarity of parental status. By way of example, the New Jersey Gestational Carrier Agreement Act makes

⁵⁸ Working Paper 596 December 2014.

⁵⁹ <https://www.sensiblesurrogacy.com/amid-scandals-some-sensible-advice-for-surrogacy-in-ukraine/>

⁶⁰ <https://www.bbc.co.uk/news/world-europe-42845602>

⁶¹ Prabha Kotiswaran ‘Surrogacy in India’ for ‘Eastern and Western Perspectives on Surrogacy’

In their working paper 600 for the International Forum on Intercountry Adoption and Global Surrogacy December 2014

'Gestational Carrier Agreements' enforceable, meaning that the intended parents can be the legal parents from birth. Agreements can be entered into on a commercial basis. The same Act also sets out stringent requirements for Gestational Carrier Agreements and enforceability, such as psychological screening of both surrogate and intended parents, a medical evaluation and medical care of the surrogate, independent legal advice for surrogate and intended parents.

120. As a consequence, a number of US states are considered to be jurisdictions which offer a high degree of reliability and certainty for both surrogates and intended parents, and a high degree of protection for the surrogates. However, this has also mean very high costs associated with surrogacy – often in excess of \$140,000, the majority of which is paid to a surrogacy agency and in respect of legal and medical costs. Payments to surrogates are typically around \$30,000 - \$40,000⁶². It has also meant that many states such as California are popular destinations for reproductive tourism, with a high level of international surrogacy arrangements being conducted there each year. However, the UNCRC has been vocal in its concerns about commercial surrogacy in the US. In its 2017 report on the USA, it stated;

*“the committee is nevertheless concerned that widespread commercial use of surrogacy in the State party may lead, under certain circumstances, to the sale of children. The committee is particularly concerned about the situations when parentage issues are decided exclusively on a contractual basis at pre-conception or pre-birth stage.”*⁶³

121. Commercial surrogacy such as that permitted in States like California and New Jersey has also come under criticism from the UN Special Rapporteur on the Sale and Exploitation of children, Maud de Boer-Buquicchio in her 2018 *“Report on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material”*. In addition, the commerciality of such arrangements has made it prohibitively expensive for most families.

122. **The Law Commission’s proposed Pathway;** The Scottish Law Commission and Law Commission of England and Wales in their joint consultation document have proposed, in outline, a regulated scheme which endeavours to navigate all of the ethical and welfare considerations surrounding surrogacy in a manner consistent with the particular circumstances in the UK. Not all of the recommendations have been finalised – the purpose of the consultation document being to gauge public opinion on the more controversial aspects. However, in outline, a framework is recommended which has 3 broad routes following surrogacy;

(i) a 'pathway' for domestic cases⁶⁴ which entails eligibility requirements

⁶² Some figures are given in the joint Law Commission report at §3.107.

⁶³ Joint Law Commission report at §4,105

⁶⁴ Defined at §16.88 as a surrogacy “where all elements of the process, including pre-conception screening, (artificial) conception pregnancy and birth take place in the UK.”

- (ii) and procedural safeguards and which, if complied with, would enable the intended parents to become the legal parents from birth by consent, and be named on the child(ren)'s birth certificate. This route would require supervision by a regulated clinic or regulated surrogacy organisation, but not involve any judicial oversight. It is based on operation of law and intention where the criteria are fulfilled;
- (iii) a process of recognition for some international surrogacy arrangements conducted in countries on an 'approved list' without the need for an application for a parental order;
- (iv) the availability of an application for a parental order, but with somewhat revised eligibility criteria to the current s.54 HFEAct 2008, in domestic cases falling outside the 'pathway' and in international cases falling outside the approved list (subject to the revised eligibility criteria being complied with).

123. One of the most contentious issues considered by the Law Commission was that of payment to surrogates and third parties. This is one of the areas of the consultation with the most questions being asked of the respondents. There are, however, clear proposals for relaxation of some of the current prohibitions, such as the prohibition on paying for legal advice on a commercial basis in respect of surrogacy arrangements, and the prohibition on advertising.

124. The proposals move much closer to a regulated model, with the HFEA being the overall regulatory body for regulated clinics and surrogacy agencies.

125. **Primary issue for Jersey;** As is apparent from the introduction to surrogacy above, the outcomes of a legal framework or absence of it in respect of surrogacy is sensitive to the cultural, economic and political climate prevailing in the country or State in question – what works in one State does not necessarily work in another, and similar provisions can have different effects in different jurisdictions.

126. Jersey does not currently have any legal framework in place for surrogacy, albeit its domiciled citizens can apply for a parental order in the UK under the HFEAct 2008. The process of recognition of parentage in Jersey following the making of parental orders in the UK is less clear. I am not aware that the absence of a regime has so far caused any major difficulties which it is sought to address, or that Jersey experiences any different problems than those arising from the system operating in the UK. I am unclear as to the number of Jersey families who may be going abroad for surrogacy, and then either applying for a parental order through the English courts or living in family circumstances where one or both of the intended parents' parentage is not recognised.

127. Some countries or States where there is no particular legal framework have become attractive to reproductive tourism due to the ability to have a birth certificate with the intended parents' names recorded on it from birth, and / or the exclusion of the surrogate's parentage from birth, irrespective of the domicile or residence of the intended parent. Given the absence of a legal

framework around assisted reproduction in Jersey, there is currently no means to have an intended parent's name recorded on the child's birth certificate from birth, save and except if the surrogate is not married and the intended father's gametes are used. As such, it is probably not attractive as a reproductive destination under the current system.

128. However, the absence of any surrogacy law or surrogacy agencies in Jersey may also mean;
- (a) Families are entering into surrogacy arrangements without any formal support or oversight, which may compromise the welfare of the child or the surrogate or increase the risk of breakdown. the absence of regulation of payment around surrogacy is potentially a source of exploitation or unregulated commercialisation of surrogacy;
 - (b) save for Jersey domiciled families, or via adoption, there is no provision to enable legal relationships to be established between the child and an intended parent who is not the genetic father, or for the surrogate's parentage and parental responsibility to be excluded. The means of recognition of UK parental orders is not clear;
 - (c) the absence of prohibition or regulation of commercial surrogacy agencies means that there is nothing to prevent such agencies or matching services from establishing themselves in Jersey in the future without regulation, including on a commercial basis. "*The absence of clear and comprehensive laws addressing surrogacy can lead to unregulated commercial surrogacy developing, with accompanying exploitative practices.*"⁶⁵

⁶⁵ Report of the UN Special Rapporteur Maud de Boer-Buquicchio on the sale and sexual exploitation of children.

129. It is suggested that in the first instance, the following questions are key for Jersey:

- A. Having regard to the need and experiences of Jersey families using surrogacy as a means of family creation, and/or the potential for increased reproductive tourism in Jersey in the future, what would the key objectives be of a bespoke surrogacy framework in Jersey?**
- B. What legal framework would best meet the objectives?**
- C. How would a bespoke legal framework compare to the alternative options of;**
- a) Taking no action other than to clarify the law on parentage following assisted reproduction and/or enhance the laws on adoption?**
 - b) Integrating more fully into the existing UK system as it stands?**
 - c) Awaiting implementation of new UK laws, if they become implemented in due course further to the Law Commission recommendations?**
 - d) Implementing now a legal framework in Jersey now which broadly adopts the pathway recommended by the Law Commission?**

130. It is suggested that in considering these issues, the full joint consultation document of the Law Commission bears careful reading. What follows is an overview of the key questions highlighted above.

131. **A. Objectives;** The primary aim of the Scottish Law Commission and the Law Commission of England and Wales in developing their recommendations is to “*encourage those wishing to enter into surrogacy arrangements to do so in the UK rather than overseas*”⁶⁶. This is consistent with the evidence that the lack of certainty in the UK legal system around surrogacy is the key reason for which intended parents travel abroad. In the Law Commission report, they concluded that the most common reasons for entering into international surrogacy arrangements were firstly the uncertainty in the UK law in respect of surrogacy, and secondly the unavailability of surrogates⁶⁷. In their 2018 report “Surrogacy in the UK: Myth busting and reform” the UK working group on Surrogacy Law Reform reported that most UK surrogates

⁶⁶ @ §2.72 of the report.

⁶⁷ @ §16.1 of the report

thought the legal parents of a child born to a UK surrogate should be the intended parents⁶⁸. Of those who had entered into surrogacy overseas, the most common reason was certainty, followed by availability of surrogates.

84.1% of respondents to the survey indicated that they believed automatic parenthood should rest with the intended parents at birth. Also in 2018, in their research cross-border and domestic surrogacy in the UK context: an exploration of practical and legal decision-making, Jadva, Prosser and Gamble found;

“The findings of this study show that intending parents are travelling abroad for surrogacy despite surrogacy being available in the UK. Approximately, half of those looking to use surrogacy did not consider more than one country, suggesting that many intending parents, and especially those having surrogacy in the USA, had a clear idea about where they wished to undergo their surrogacy journey. The main reason for not pursuing surrogacy in the UK for those who considered it was because of the perceived lack of a legal framework. However, other reasons, such as it being easier to find a surrogate, and wanting a professional agency to manage the surrogacy were reasons for considering and indeed pursuing cross-border surrogacy.”

132. Secondly, as already noted, surrogacy involves a number of difficult ethical considerations. The Law Commissions in their joint report considered that a framework that provides more effective regulation of surrogacy arrangements, and revised eligibility and safeguards, could alleviate or eliminate the concerns around surrogacy.

133. Thirdly, the position in respect of payment to surrogates and third parties is currently unsatisfactory in the UK. Despite the prohibition on commercial surrogacy, payments are being made to surrogates beyond the everyday understanding of ‘expenses’ with no challenge from the court, and the courts regularly authorise payments in excess of reasonable expenses in relation to overseas commercial surrogacy arrangements⁶⁹. The Law Commission considered that this undermined the rule of law, and reform was clearly needed.

134. In respect of Jersey, given the much smaller population relative to the UK, and given that there is no statutory scheme currently in place, the objectives may be different. It will be important to gain an understanding of how surrogacy is working in practice in Jersey, what numbers of people are affected, and what the issues arising are. For example, in the absence of formal surrogacy agencies, are surrogates and intended parents entering into arrangements without oversight or support, leading to increased vulnerability of breakdown of arrangements and consequent implications for the welfare of the child? Does the lack of regulation of those who might seek to match surrogates and intended parents sufficiently protect the interests of surrogates and the welfare of children? What is the position in respect of payment, and how does the lack of regulation of this impact upon surrogates and children? What is the potential for Jersey to become a destination for reproductive tourism, and is this

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⁶⁹ §1.46n

desirable, or would it lead to an unacceptable risk of women being trafficked to Jersey to act as surrogates?⁷⁰

135. Given the lack of legal framework for parentage following donor conception, if such a framework is implemented, this will inevitably have consequences in surrogacy situations also, where donor conception is a common feature, and where the question of legal parentage assumes high importance. It will be important to ensure that the implications of whatever framework for legal parentage is implemented also takes into account surrogacy situations – either by wholly excluding them from it or by having a framework in place which addresses both legal parentage and surrogacy. This will be particularly important for families who don't apply for a parental order in the UK under current legislation or aren't eligible to do so.
136. **B. Considerations for a legal framework;** If, having assessed the particular circumstances of surrogacy in Jersey, and the objectives, it is decided to implement a framework applicable to domestic surrogacy cases, it is suggested that the following key areas would need to be considered. Equally, when deciding whether Jersey intends to implement a legal framework for surrogacy, the types of issues that would need to be addressed may inform that decision because of the cost and resource implications involved, for example in establishing a regulatory committee or body, or for the judicial or administrative system. What follows is an overview, and the joint Law Commission report should be read in full which addresses these areas in detail from a UK perspective. However, this report also incorporates to a greater extent than the joint Law Commission report information concerning other jurisdictions and the regulatory schemes which they have implemented, which differ in a number of respects to the Law Commission's proposals.
137. **Timing and process: pre-conception vs post birth approval:** A key distinction can be made between those jurisdictions where oversight and approval of surrogacy arrangements takes place before the birth, leading to legal parentage for the intended parents at birth, and those where approval and the conferring of legal parentage take place after the birth. In either scenario, there are often eligibility requirements and safeguards which must be met, and particular rules regarding payments – these are discussed in more detail in the sections below.
138. Where the system is focussed on pre-conception approval, there is usually a committee or body established for this purpose, or sometimes the nature of the approval is judicial. Where the approval process is post-birth, this is usually judicial in nature. The following are examples of different processes internationally;
- (a) Greece;** Surrogacy agreements must be submitted to a court before the fertility treatment takes place so that judicial authorisation for the surrogacy can be granted. If all of the legal requirements are met, the court must

⁷⁰ See joint Law Commission report at §12.8

authorise the agreement. If the agreement is given court approval, then the intended mother will be the legal mother from birth, and either she will be a single parent or her partner will be the second legal parent from birth⁷¹.

- (b) Israel;** Israeli law has established a surrogacy Approvals Committee. The committee comprises two doctors, a clinical psychologist, a social worker, a lawyer and a religious cleric. Where the Approvals Committee approves a surrogacy agreement, it is binding, and the surrogate may not change her mind save where there has been a change in circumstances and where it is in the interests of the child. After birth, the legal parents must then apply for a parenthood order, and the court must make the order where the surrogacy arrangement has been approved by the Approvals Committee, unless it is not in the best interests of the child. In practice, none have been refused⁷².
- (c) South Africa;** The High Court must approve all surrogacy agreements prior to the artificial fertilisation of the surrogate. There are strict requirements for surrogacy agreements which must be met before they can be approved. Where court approval has taken place, the intended parents are the legal parents from birth.
- (d) New Zealand;** Two independent bodies have been established in New Zealand, the Advisory Committee on Assisted Reproduction and the Ethics Committee on assisted Reproductive technology. The advisory committee comprises experts in assisted reproductive research, human reproductive research, ethics, Maori customary values and law. The Ethics Committee members are comprised of experts in the same field as the Advisory committee and lay members. Clinics are not permitted to carry out surrogacy procedures without approval from the Ethics Committee. Certain criteria must be met before an application for approval can be made to the Ethics Committee. Legal parentage may only be conferred by adoption post birth⁷³.
- (e) Portugal;** The National Council for Medically Assisted Procreation has the power to grant authorisation for surrogacy arrangements. This must take place pre-conception, and in consultation with the Portuguese Medical Association. The National Council also supervises the whole surrogacy process. Where authorisation has been granted, the intended parents will be the legal parents from birth, without any need for additional post-birth approval⁷⁴.
- (f) Canada: Ontario and British Columbia;** Intended parents may be registered as legal parents from birth provided there was a written surrogacy agreement in place prior to conception, and the surrogate and intended parents received independent legal advice. There may be up to 4 legal parents in Ontario. In neither case is there any judicial oversight⁷⁵.
- (g) California;** Legislation includes extensive criteria for what surrogacy agreements much include, and that the agreement must be entered into pre-conception. An agreement which complies with the requirements is presumptively valid. There is a pre-birth application to court for parental rights confirmation. Where this is issued by the court, the intended parents will be the legal parents from birth⁷⁶.

⁷¹ Dr Eleni Zervogianni 'Surrogacy in Greece' *ibid*.

⁷² Rhona Schuz 'Surrogacy in Israel' *ibid*.

⁷³ Debra Wilson 'Surrogacy in New Zealand' written for 'Eastern and Western perspectives on surrogacy'.

⁷⁴ Rute Teixeira Pedro, 'Surrogacy in Portugal' written for 'Eastern and Western perspectives on surrogacy'.

⁷⁵ Joint Law Commission Report at §7.92 onwards

⁷⁶ Naomi Cahn and June Carbone 'Surrogacy in the United States of America' written for 'Eastern and Western

- (h) New Jersey;** Where a surrogacy agreement is entered into consistent with the New Jersey Gestational Carrier Agreement Act, the intended parents may make an application to the court once pregnancy is established for a pre-birth order or parentage. Where the court finds that the requirements of the Gestational Carrier Agreement Act have been complied with, it must issue an order naming the intended parent(s) as the legal parent(s) of the child. On birth, the intended parent(s) will be named on the birth certificate as the legal parent(s) of the child provided they have obtained such an order.
- (i) UK (current);** There is no pre-conception oversight. There are a number of eligibility criteria for an application for a parental order set out in s.54 HFE Act 2008, which apply equally to domestic and international surrogacy arrangements. Where they are complied with, an application may be made to the court post birth for a parental order to transfer legal parentage with the surrogate's consent.
- (j) UK (proposed);** Surrogacy arrangements supervised and counter-signed by either a regulated clinic or a regulated surrogacy organisation would enable intended parents to acquire legal parenthood at birth by operation of law, where the surrogate does not object post birth. There would be a number of eligibility requirements to be fulfilled for this to occur, and a number of requirements for the surrogacy agreement itself.

139. The Law Commissions in their joint report are clear that their proposed pathway is dependent on operation of law rather than the enforceability of a contract⁷⁷. This is in contrast to, for example, the scheme in California and New Jersey which are contract based. This is an important consideration in the context of the UNCRC. The 2018 report of the Special Rapporteur M de Boer-Buquicchio raises concerns that legally enforceable commercial surrogacy contracts breach the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography;

[56]...in some commercial surrogacy jurisdictions it is the surrogacy contract that is primarily determinative as to parentage. Hence, the gestational surrogacy contract explicitly and implicitly includes a transfer of parentage, and that transfer is usually a central part of the legal consideration for which the gestational surrogate is paid. Furthermore, the surrogate mother is also paid to give birth in a place accessible to the intending parents, and to physically hand over the child after birth; as stated above, under the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, a transfer can exist even if the transferor lacks parentage or parental responsibility.

57. The legal fiction of the “never-a-mother” gestational carrier is a legal concept which is used to justify denial of the surrogate mother’s rights. Once the surrogate mother is reduced, during pregnancy, to a never-a-mother gestational carrier acting for the benefit of intending parents, the door is open to enforcing contracts that purport to alienate her rights and freedoms (e.g. the right to health and the right to freedom of movement).

140. The UN Special Rapporteur expresses the view that breach of the Optional Protocol can only be avoided in commercial surrogacy situations where parentage of the gestational mother is not transferred until after the birth⁷⁸; *“Commercial surrogacy could be conducted in a way that does not constitute sale of children, if it were clear that the surrogate mother was only being paid for gestational services and not for the transfer of the child. In order to turn this into more than a legal fiction, the following conditions would all be necessary. First, the surrogate mother must be accorded the status of mother at birth, and at birth must be under no contractual or legal obligation to participate in the legal or physical transfer of the child....”*

141. The joint Law Commissions report takes a somewhat different view⁷⁹;

“We take the view that the fundamental principle of the convention is that it prohibits the sale of children, and therefore that, particularly in the context of an arrangement from which the surrogate is not profiting, there may be scope to query the Rapporteur’s view that not recognising the surrogate means that there is a breach of the Optional Protocol. We note the Rapporteur’s concerns seem to focus on commercial arrangements, where the surrogacy contract may be determinative of parentage. We do however believe that the surrogate should have the right to object to the acquisition of legal parenthood by the intended parents.”

142. If choosing a framework which derives legal parenthood from a surrogacy contract, and which excludes gestational parentage from birth, therefore, care needs to be taken to ensure that the framework does not breach the Optional Protocol to the UNCRC on the sale of children, child prostitution and child pornography. There is a clear link between commerciality and the sale of children in this context, such that quantum, purpose, timing and mechanism for payment also fall to be considered as part of ensuring that any framework implemented does not constitute the sale of children.

143. A framework which provides for legal parentage to arise from operation of law deriving from pre-birth approval by an independent body of the specific arrangements, without being dependent on the contract per-se, may raise fewer concerns than one which is contractually based. However, if the pre-birth approval is judicial, this also raises an issue regarding whether orders can be made in respect of an unborn child. The pathway proposed by the Law Commission, deliberately avoids the need for a pre-birth order. The Law Commission was concerned both about the ability of the court to make an order in respect of an unborn child, and about a woman’s right to retain her bodily autonomy⁸⁰.

144. Whilst post-birth approval models which don’t confer legal parentage until the child is born may be seen to afford greater respect for the bodily autonomy of the surrogate, and greater consistency with the Optional Protocol, as set out above, such models are not consistent with what surrogates and

⁷⁸ Report conclusions @ §72

⁷⁹ §7.103

⁸⁰ §7.82

intended parents in the UK have said they want – which is certainty of legal parentage. Where there is a post-birth approval model, in conjunction with no pre-birth oversight, there is also a danger of pushing the welfare consideration back to the post birth stage, by which time the child is in existence, and it is unlikely that a court would refuse to make the order where all parties consent save in the most egregious cases, as highlighted by Mr Justice Hedley in the English case of Re X and Y (foreign surrogacy)⁸¹.

“[24] I feel bound to observe that I find this process of authorisation most uncomfortable. What the court is required to do is to balance two competing and potentially irreconcilably conflicting concepts. Parliament is clearly entitled to legislate against commercial surrogacy and is clearly entitled to expect that the courts should implement that policy consideration in its decisions. Yet it is also recognised that as the full rigour of that policy consideration will bear on one wholly unequipped to comprehend it let alone deal with its consequences (i.e. the child concerned) that rigour must be mitigated by the application of a consideration of that child's welfare. That approach is both humane and intellectually coherent. The difficulty is that it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order.”

145. This has been one of the major reasons for needing reform in the UK. A model such as that in Israel, which combines the oversight of a pre-birth approvals committee, together with a post birth judicial process, endeavours to avoid the entering into of a surrogacy arrangement which does not adequately protect the interests of the surrogate or the child, whilst also delaying the moment of transfer of legal parentage until after the child's birth.
146. One of the other difficulties which has been experienced in the UK in respect of post-birth conferring of parentage, is the absence of parental responsibility for the intended parents from birth, where they are in the position of caring for the child. This can lead to difficulties before the surrogate and child have been discharged from hospital – for example cases where the surrogate's health requires that she remain in hospital, and the child cannot be discharged whilst the surrogate remains. It also leads routinely at present to a situation where the child is in the care of the intended parents for many months before the making of a parental order without parental responsibility. This is partly to do with the cumbersome and lengthy process of an application for a parental order, which could be significantly streamlined, particularly if there was also in place a pre-birth approval process.
147. As set out above, any model proposed must meet the needs and concerns of the local community, and also the particular objectives identified, which are likely to assist in establishing the particular structure. One particular factor for consideration in Jersey, if there is to be a pre-conception approval model, is the constitution and legal authority of any body which is to have oversight of the surrogacy process. Judicial pre-approval would potentially have

⁸¹ [2009] 1 FLR 733

the advantage that an entirely new body would not need to be established, but as set out above, raises other issues regarding bodily autonomy and orders in respect of unborn children. The ability to establish a committee of experts having responsibility for oversight of any surrogacy arrangement prior to conception, such as has been implemented in Portugal and New Zealand might provide a smaller scale, more cost-effective method of regulation, particularly if there are no surrogacy agencies currently in existence in Jersey. Approval by the committee might then, either lead to the conferring of parentage on birth by operation of law, or to the requirements being met for the application of a post-birth order, depending on the model adopted.

148. In developing a surrogacy framework, particularly one which entails pre-birth approval, the eventuality of the death of one or both of the intended parents prior to parentage being conferred would need to be considered and provided for.

149. **Eligibility requirements and safeguards:** The nature and extent of eligibility requirements and other safeguards varies widely between jurisdictions. Some of the requirements are matters which must be contained in the surrogacy agreement itself. Some of them relate to characteristics of the surrogate and / or the intended parents. Others of them are general requirements to be fulfilled which need not appear in the surrogacy agreement – such as a requirement for both the surrogate and intended parents to each take independent legal advice which is common to many jurisdictions. Some jurisdictions distinguish in the required safeguards and / or eligibility criteria between traditional and gestational surrogacy, or between circumstances where the intended parents (or one of them) are genetically related to the child, and those where there is no genetic relationship.

150. The HCCH have suggested a minimum level of safeguards which would need to be present for parentage following surrogacy to be capable of recognition in other signatory states, and some additional areas to consider; as set out in their 2014 feasibility study⁸²:

- (a) the free and informed consent of any surrogate to the surrogacy agreement;
- (b) appropriate information for all parties, including medical and psychological, which might include legal advice and implications counselling;
- (c) medical and psychological screening of the surrogate for suitability, which might include considerations such as whether she has given birth before;
- (d) the welfare of the child born pursuant to a surrogacy arrangement including, for example, criminal and background checks on the intended parent(s);
- (e) the regulation of competency and conduct of intermediaries – i.e. those introducing surrogates and intended parents or surrogacy agencies;
- (f) the application of medical standards to treating clinics;
- (g) provisions in case of the breakdown of a surrogacy arrangement;
- (h) restriction on what terms can properly be included in a surrogacy agreement – for example prohibiting a term which coerces a surrogate to terminate a pregnancy, or continue with a pregnancy;

⁸² Preliminary document No 3 B of March 2014: The desirability and feasibility of further work on the parentage / surrogacy project.

(i) the financial aspect of the arrangements.

151. The joint Law Commissions report makes some firm recommendations regarding minimum requirements in order to be eligible for the new pathway, or a parental order, and raises questions regarding other potential eligibility criteria⁸³;

- (a) screening requirements including health screening and medical tests;
- (b) implications counselling to be undertaken prior to conception on the implications of entering into a surrogacy agreement by an appropriately qualified person;
- (c) independent legal advice for surrogates and intended parents;
- (d) criminal record checks for intended parents and surrogates;
- (e) habitual residence or domicile of the intended parents⁸⁴;
- (f) relationship status of the applicant(s);
- (g) consideration of where the child's home is going to be;
- (h) whether there should be a requirement for a genetic link;
- (i) whether there should be a requirement for medical necessity;
- (j) a requirement of entry of information as to genetic and gestational origins into a surrogacy register;
- (k) age of the surrogate and / or intended parents;
- (l) timing of any application;

152. In addition, the joint Law Commissions report recommends that in order to be eligible for parenthood under the new pathway by operation of law, the surrogacy agreement must be supervised and / or countersigned by either a regulated clinic or a regulated surrogacy organisation.

153. The areas highlighted by the joint Law Commissions report are all areas which feature to greater or lesser extents in other jurisdictions or have formed part of the UK system to date. The issues which the joint Law Commissions report raises in relation to each in Chapters 12 and 13 merit detailed consideration. They also include comparative analysis of which eligibility criteria apply in which jurisdiction.

154. One particular consideration is that, if adopting a framework where the emphasis is on pre-birth approval, the opportunity to carry out post-birth welfare assessment is inevitably reduced. This would suggest that pre-birth screening should enable adequate consideration of welfare to be taken into account at the pre-birth stage. In the joint Law Commissions report, it is proposed that this should effectively be 'light touch' assessment consistent with the requirement for fertility clinics to take account of the welfare of any child born before embarking on treatment⁸⁵ in conjunction with, for example, medical tests to ensure the health of the surrogate and the child, criminal record checks, and a requirement for implications counselling to take place.

155. In other jurisdictions, countries which have imposed a higher degree of restriction on eligibility criteria have often seen a greater incidence of families

⁸³ Chapter 13 of the report.

⁸⁴ Although they have also raised concerns regarding whether this would be sufficient without more to deter reproductive tourism.

⁸⁵ At §7.75

travelling abroad to enter into surrogacy arrangements – for example Israel's limitation to heterosexual married couples, and requirement that the gametes of the husband are used, has meant many families who don't fit the criteria entering into international surrogacy arrangements. Accordingly, there is a balance to be struck between implementing eligibility criteria and safeguards which optimally protect the surrogate and the child, and not making the criteria so narrow that families seek out surrogates abroad in preference.

156. The small scale of Jersey may lend itself more to a model which establishes an approvals committee rather than a regulatory body. I understand there are currently no surrogacy agencies in Jersey. A requirement for agreements to be supervised or counter-signed by a regulated clinic or surrogacy organisation, may be disproportionate to establish in Jersey. However, it may be feasible to establish a committee such as in New Zealand, which is responsible for scrutinising surrogacy arrangements pre-birth. A similar model has been proposed but not implemented in Iceland, whereby surrogates and intended parents would need to jointly apply for a licence from a special committee on surrogacy. The application process would involve assessment, screening, counselling, legal advice, and the signing of statements of intent⁸⁶. In both of those jurisdictions, the approval does (or would) permit fertility treatment to be undertaken in a surrogacy situation, but does not result in the automatic conferring of parentage. However, it might be possible to incorporate the idea of an approvals committee, and combine it with the operation of law to facilitate legal parentage at birth, save where there is objection within a defined period.

157. Any system which introduces eligibility criteria, or a pre-birth approvals process gives rise to an issue regarding what the consequences would be of not meeting the criteria. In the UK, a number of families engaging in domestic surrogacy do not use an agency. Some of those families undergo their treatment abroad, even though all parties are English and domiciled and habitually resident in the UK. The law reform proposed in the joint Law Commissions report would treat these arrangements differently, meaning that an application for a parental order would still be required. A system which provided that assisted reproduction for surrogacy could not be carried out by a Jersey clinic without approval by a committee or the granting of a licence would not necessarily mean that families will choose to operate within the framework – they would have the option of going to other countries for embryo implantation, such as Cyprus. Again, there is a balance to be struck between encouraging families to operate within the regulatory framework and enabling children to have certainty of legal parentage following surrogacy. The joint Law Commissions report has endeavoured to strike that balance by still enabling children conceived outside the pathway to acquire certainty of legal parentage by permitting an application for a parental order (where criteria are met), but not facilitating it by operation of law. This gives rise to what is effectively a 2 speed system – one of pre-birth approval and one of post birth approval. Any law implemented in Jersey would need to consider all of the scenarios in which a child might be conceived through surrogacy, and be clear about what

⁸⁶ H refina Fridriksdottir "Surrogacy in Iceland" for 'Eastern and Western Perspectives on Surogacy'

the legal options and consequences for families would be of each of those scenarios.

158. **Consent and enforceability;** A key issue for any surrogacy framework is that of consent by the surrogate. There are a number of aspects to this which all require consideration;

- (i) Ensuring that consent is fully informed⁸⁷ and freely given to any agreement to;
 - a) embark upon treatment;
 - b) the terms of the surrogacy agreement;
 - c) handing over the child post birth;
 - d) The conferring of legal parentage.
- (ii) who should consent be required from? For example, if the surrogate is married;
- (iii) evidencing consent, and the circumstances in which it is given;
- (iv) the degree of autonomy afforded to a surrogate during pregnancy;
- (v) the link between payment and consent, if there is payment, and whether the amount of any payment overbears the will of the surrogate;
- (vi) whether the surrogate should be able to withdraw consent to parentage or the handing over of the child at any point before legal parentage is conferred, and what the mechanism for this should be;
- (vii) the circumstances in which consent to parentage or the handing over of the child can be withdrawn;
- (viii) what the consequences are of a withdrawal of consent, and, in particular, whether and how the court can determine where the child should live and legal parentage;
- (ix) what the consequences are of the intended parents withdrawing their agreement;

159. All of the jurisdictions which have a regulatory framework require a written surrogacy agreement, as do all of the surrogacy agencies operating in the UK⁸⁸. In some of those jurisdictions, the surrogacy agreement must contain specific things in order for it to be capable of approval. For example, in South Africa, the Children's Act 2005 makes certain requirements of a surrogacy agreement, which have been supplemented by judicial guidance⁸⁹. In New Jersey, there are specific statutory requirements for a Gestational Carrier agreement to be enforceable⁹⁰. It must be executed in writing by the surrogate and any spouse or civil partner, and after medical and psychological screenings have been carried out and independent legal advice given, but it must also contain the following specific provisions;

A gestational carrier agreement shall provide:

(1) Express terms that the gestational carrier shall:

(a) Undergo pre-embryo transfer and attempt to carry and give birth to the

⁸⁷ Including ensuring that the surrogate has capacity to consent.

⁸⁸ See §3.56 joint Law Commission report

⁸⁹ Julia Sloth-Nielsen 'Surrogacy in South Africa' for 'Eastern and Western Perspectives on Surrogacy'.

⁹⁰ Section 6 of the Gestational Carrier Agreement Act

- child;*
- (b) *Surrender custody of the child to the intended parent immediately upon the child's birth; and*
- (c) *Have the right to medical care for the pregnancy, labor, delivery, and postpartum recovery provided by a physician, physician assistant, advance practice nurse, or certified nurse midwife of her choice, after she notifies, in writing, the intended parent of her choice;*
- (2) *An express term that, if the gestational carrier is married or in a civil union or domestic partnership, the spouse or partner agrees to the obligations imposed on the gestational carrier pursuant to the terms of the gestational carrier agreement and to surrender custody of the child to the intended parent immediately upon the child's birth; and*
- (3) *Express terms that the intended parent shall:*
- (a) *Accept custody of the child immediately upon the child's birth; and*
- (b) *Assume sole responsibility for the support of the child immediately upon the child's birth.*

160. Requiring a detailed surrogacy agreement can be a mechanism for protecting the surrogate and ensuring consent, for example by ensuring that life insurance and health insurance are in place, and also evidencing the surrogate's consent, particularly where accompanied by requirements for screening, counselling and independent legal advice. It can also help to ensure that matters which may not have occurred to the surrogate or intended parents to consider are provided for. It is a clear recommendation of the joint Law Commissions report that a written agreement would be a key element of the new pathway⁹¹.

161. Requirements as to surrogacy agreements can also be prohibitive, in the sense that they can preclude terms which remove a surrogate's bodily autonomy to make decisions regarding her healthcare during the pregnancy or right to terminate a pregnancy. For example, the State of Utah provides that a surrogacy agreement "*may not limit the right of the gestational mother to make decisions to safeguard her health or that of the embryo or fetus*"⁹². The report of the UN Special Rapporteur recommends that;

"...appropriate protections of surrogate mothers, consistent with retaining the status of mother at birth, would include retention of rights of informed consent in regard to all health-care decisions, and freedom of movement and travel—including the principle that such rights cannot be alienated by contract."

The joint Law Commissions report also expressed the view that nothing they propose should prevent a woman making decisions about her own body, including a decision to terminate pregnancy or how she gives birth⁹³.

162. It is also common for surrogacy agreements to prohibit intended parents from changing their mind, thereby preventing a surrogate from becoming legally and financially responsible for a child she does not intend to be the parent of.

⁹¹ §9.126

⁹² Cahn and Carbone 'Surrogacy in the United States of America' for 'Eastern and Western Perspectives on Surrogacy'

⁹³ §7.82

163. Even in cases where the surrogate and intended parents go through an informal route, and do not engage a surrogacy agency, in my experience in the UK they still sign surrogacy agreements, without understanding the effect, or lack of, these. They are mostly ones which they have downloaded from the internet from other jurisdictions and which are wholly inappropriate to the circumstances in the UK and often inconsistent with the law in the UK, but the parties feel the need to have something in writing notwithstanding the lack of legal effect.
164. The question of what is required in writing and how this is evidenced and executed is closely linked with the overall framework including eligibility for, oversight of, and support for surrogacy arrangements, and the implications of non-compliance with any regulatory framework, and must be considered holistically.
165. In reality, the key and most difficult issue in connection with consent in any regulatory framework for surrogacy is what should happen in the event of a breakdown of a surrogacy arrangement and whether the surrogate, notwithstanding the terms of any surrogacy agreement, can be obliged to either hand over the child, or confer parentage on the legal parents.
166. In a number of States in the US, surrogacy is considered to be contractually enforceable, and statute specifically provides that they are prima facie enforceable where they meet the requirements of the statute, for example in New Jersey. In practice, enforcement is more likely to mean damages are payable for breach. The UN Rapporteur considers this to be inconsistent with the UNCRC and the Optional Protocol⁹⁴.

“States should not adopt commercial surrogacy regulations based on obligatory or automatic enforcement of surrogacy contracts and accompanying pre-birth parentage orders, for such would make the States complicit in authorizing practices that constitute the sale of children.”

167. Set against this, at the other end of the spectrum, are the implications for children where, for example, a surrogate does not consent to legal parentage being conferred, but has no role to play in the child’s life either through choice or a court order. One such example of this scenario was the English case of C, D v E, F and A, B (by their Guardian)⁹⁵ where the relationship between the surrogate and her husband and the intended parents had broken down. There was agreement that the intended parents would care for the child, and the surrogate and her husband wanted no part in the child’s life, but did not consent to the making of a parental order. Under UK law as it stands, a parental order cannot be made without the consent of the surrogate (and in some circumstances her spouse). The court identified the consequences as follows; [9]... *The result is that these children are left in a legal limbo, where, contrary to what was agreed by the parties at the time of the arrangement, the respondents will remain their legal parents even though they are not biologically related to them*

⁹⁴ In her 2018 report ‘The sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material.’

⁹⁵ [2017] 2 FLR 217

and they expressly wish to play no part in the children's lives.

10. The consequences for the children of the parental orders not being made are as follows:

(1) They remain living with the applicants, who are their biological and psychological parents, but not their legal parents. The child arrangements order, which gives the applicants parental responsibility, lasts until they are 18 years old.

(2) The respondents, who wish to play no part in the children's lives, remain the children's legal parents throughout their lives by virtue of §§ 33 and 35 HFEA.

11. Even though the children's lifelong welfare needs require a parental order to be made, which would secure their legal relationship with the applicants in a lifelong way and extinguish the respondents legal status with the children, under the provisions of s 54 (6) HFEAct 2008 if the respondent's consent is not forthcoming the court cannot make a parental order.

168. The issue for any regulatory framework is as to how to combine certainty for families – including not making a surrogate the legal parent of a child at birth if this is not what she wants – with the best interests of the child, including ensuring that their de facto parents have legal status in relation to them where this is in their best interests, whilst also ensuring that any such framework does not amount to the sale of children, or ride roughshod over a surrogate's rights to raise reasonable welfare objections to handing over the child or conferring legal parentage.

169. The UN Special Rapporteur has said that the only way to ensure that a commercial surrogacy framework does not amount to the sale of children is for *“the surrogate mother [to] be accorded the status of mother at birth, and at birth must be under no contractual or legal obligation to participate in the legal or physical transfer of the child.”*

170. This is somewhat easier to achieve in a post-birth judicial process, than in a pre- birth approval process. However, this is also a somewhat controversial view internationally, and not wholly endorsed by the joint Law Commissions report. In their recommendations, they consider that the balance is struck by providing for parentage to be conferred by operation of law (rather than contract) where all of the legal requirements of the regulatory framework are met⁹⁶, and at the same time providing the surrogate a time period in which she can object, enabling the court to determine both where the child should live, and legal parentage. They propose that the court should be able to dispense with the surrogate's consent to the making of a parental order where this is in the child's best interests⁹⁷;

“We think that the court should have the power to dispense with consent where the child is living with the intended parents (and the surrogate consents to this), or following a determination by the court that the child's primary residence should be with the intended parents”

“The court's power to dispense with consent should be subject to the paramount consideration of the child's welfare throughout his or her life ...”

⁹⁶ See §9.126

⁹⁷ See §11.50 onwards.

171. In Portugal, the Portuguese Constitutional Court declared the rule which determined that the intended parents were the legal parents from birth to be unconstitutional⁹⁸. Instead, they considered that the surrogate should have the right to revoke her consent until the moment she hands over the baby to the intended parents.
172. Some jurisdictions make distinctions between circumstances where the surrogate is genetically related to the child, and those where she is not, when considering enforceability. For example, in South Africa, where the child is genetically related to the surrogate, she has 60 days after the birth to terminate the surrogacy agreement⁹⁹.
173. It is apparent, therefore, that there is a range of mechanisms by which balance can be struck between the competing considerations, depending upon the overall legal framework which is adopted. It is possible to create both a pre-birth approvals process which offers family certainty and provide circumstances in which the welfare of the child can be revisited after the child's birth where agreements break down. What is clear, is that there must be a legal mechanism for determining dispute where it arises, both as to the care of the child, and as to legal parentage. Having a rigorous framework in place that includes pre-birth screening, advice, counselling and approval is also likely to reduce the risk that the sorts of difficulties seen in the UK with surrogacy arrangement breakdown would arise.
174. **Payments;** Perhaps the most controversial aspect of surrogacy globally is the vexed question of payments, not only to surrogates, but also to third parties. There are a number of jurisdictions which claim to permit only 'altruistic surrogacy', the UK being one of them, whilst also allowing payment to surrogates in some form. The joint Law Commissions report considers that this approach lacks transparency and certainty.
175. The nomenclature used in relation to payments is a highly sensitive subject in some jurisdictions. For example, Surrogacy UK has raised significant concerns regarding permitting surrogates to be remunerated, as opposed to receiving expenses, including that this would result in surrogacy becoming unaffordable. The 2018 Report 'Surrogacy in the UK: Further Evidence for Reform'¹⁰⁰ found that 71.4% of surrogates considered that surrogates should only be able to claim expenses. However, there is no legal definition of expenses, and in practice surrogates are often paid a lump sum, typically between £10-15,000 in the UK, without these being specifically referable to expenses actually incurred.
176. In addition, there are important considerations regarding what is being paid for, to ensure that any framework is not tantamount to the sale of children. The UN Special Rapporteur observed in relation to what is commonly called 'altruistic surrogacy';

⁹⁸ Decision 225/2018 of the Constitutional Court of Portugal.

⁹⁹ Julia Sloth-Nielsen, *Surrogacy in South Africa* 'ibid.

¹⁰⁰ Second Report of the Surrogacy UK Working Group on Surrogacy Law reform, December 2018

“In theory, a truly “altruistic” surrogacy does not constitute sale of children, since altruistic surrogacy is understood as a gratuitous act, often between family members or friends with pre-existing relationships, and often without the involvement of intermediaries. Hence, in theory, altruistic surrogacy is not an exchange of payment for services and/or transfer of a child based on a contractual relationship. However, the development of organized surrogacy systems labelled “altruistic”, which often involve substantial reimbursements to surrogate mothers and substantial payments to intermediaries, may blur the line between commercial and altruistic surrogacy. Therefore, labelling surrogacy arrangements or surrogacy systems as “altruistic” does not automatically avoid the reach of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, and it is necessary to appropriately regulate altruistic surrogacy to avoid the sale of children. Courts or other competent authorities must require all “reimbursements” to surrogate mothers to be reasonable and itemized, as otherwise “reimbursements” may be disguised payments for transfer of the child.”

177. For the purposes of this report, therefore, and consistent with the joint Law Commissions report, the labels ‘altruistic’ and ‘commercial’ are considered unhelpful in the context of payments to surrogates. There are a number of detailed considerations which are explored further below.

178. Secondly, there is a distinction to be made between payments to surrogates and payments to third parties for a range of services connected with surrogacy. These might include items such as:

- a) payment for finding or matching a surrogate to intended parent(s);
- b) payment for advertising surrogacy services;
- c) payment for legal advice or representation;
- d) payment for assisting with the preparation or negotiation of a surrogacy agreement;
- e) payment for medical services, such as health testing or psychological screening or medical treatment;
- f) payment for implications counselling;
- g) payment of a gamete donor, or agency involved in the procuring of gametes in connection with surrogacy;

179. In the UK currently, none of the above are permissible on a ‘commercial basis’ – that is to say, where a pecuniary benefit arises to the payee¹⁰¹. The Surrogacy Arrangements Act permits these activities where they are done on a ‘not for profit’ basis. As a result, the three main surrogacy agencies in the UK (Cots, Surrogacy UK and Brilliant Beginnings) all operate on a not-for profit basis. The question of whether to permit ‘commercial surrogacy’ therefore, is more about the payment of third parties on a commercial basis, than the payment of surrogates. In most jurisdictions which permit payment on a commercial basis to third parties, the monies paid cumulatively to all of those third parties in respect of any single surrogacy arrangement far outweighs the payment received by the surrogate, and is the aspect which makes surrogacy most

¹⁰¹ Pursuant to the Surrogacy Arrangements Act 1985

expensive in jurisdictions such as the US.

180. The considerations in relation to payment of surrogates and payment of third parties are wholly different and are considered separately.

181. Payment to surrogates: At present there is no legislation in Jersey restricting or prohibiting the payment of surrogates. However, insofar as the only route to obtaining recognition of parentage currently is via a parental order applied for in the UK, such an application made pursuant to s.54 HFE Act 2008 requires the court to be satisfied as follows;

(8) The court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by either of the applicants for or in consideration of—

(a) the making of the order,

(b) any agreement required by subsection (6),

(c) the handing over of the child to the applicants, or

(d) the making of arrangements with a view to the making of the order, unless authorised by the court.

182. In reality, therefore, as it stands, Jersey families would need to bring themselves within this in order to succeed in obtaining a UK parental order. This may mean that payments to surrogates are largely consistent with those experienced in the UK. However, as noted above, the UK courts routinely authorise payments exceeding reasonable expenses where the surrogacy has taken place in a jurisdiction which permits commercial payment. Therefore, a Jersey family would be unlikely to be refused a parental order on grounds of a high payment to a surrogate alone, unless the payment were so high as to be likely to have overborne the will of the surrogate, or be contrary to public policy. Similarly, given the absence of prohibition on payments to third parties in Jersey, and the ability to ask the UK court to approve payments in excess of reasonable expenses, it may be that third party payments in Jersey surrogacy cases are routinely approved by the UK courts, similarly to other jurisdictions.

183. If implementing an independent surrogacy framework, one of the issues will be whether to regulate payments to surrogates and to what extent within that framework. Secondly, the question then arises as to how payment should be approached where surrogacy takes place outside the framework, whether because it is a domestic case where the framework has not been followed, or because the surrogacy has taken place abroad. This second question relates to the broader issue of what the implications should be of entering into a surrogacy arrangement outside the framework or abroad, as discussed above. There may, however, be particular implications for the question of payment, and whether excessive payment has amounted to exploitation or results in a surrogacy being contrary to public policy.

184. A further issue also arises as to whether a surrogate ought to be able to enforce payment, and in what circumstances, including, for example, where there is a still birth or miscarriage.

185. In respect of payments in a domestic context, the joint Law Commissions report found it helpful to consider in detail the different types of payments that might be made, and to gauge public opinion in respect of each of them, including whether payment should be permitted at all. Chapter 15 of the report sets out a number of options for reform, and breaks down the types of payment into
- a) payment of an allowance;
 - b) payment of essential costs (and how to define);
 - c) payment of additional costs (and how to define);
 - d) reimbursement of all costs actually incurred;
 - e) loss of earnings;
 - f) loss of benefits entitlements;
 - g) compensation for pain and inconvenience, medical treatment and complications, including the death of the surrogate;
 - h) gifts;
 - i) payment for the service of undertaking surrogacy.
186. In addition, a question is raised regarding whether there should be a cap on any of these payments / gifts. For example, in Greece a cap of €10,000 applies.
187. The report of the UN Special Rapporteur makes important distinctions as to what the payment is for, and the timing of it, when considering whether it contravenes the Optional Protocol:

50. The third and final required element in sale of children is the term “for”, which refers to an exchange: the “remuneration or any other consideration” (payment) must be made “for” the transfer of the child.

51. Commercial surrogacy arrangements typically include this element of an exchange between the payment and the transfer. In commercial surrogacy arrangements, the promised and actual transfer of the child is usually of the essence of the arrangement and accompanying agreements and contracts, without which payments would be neither made nor promised. If a surrogate mother underwent becoming pregnant, pregnancy, and giving birth, she would not be deemed to have fulfilled her promises and contractual obligations if she refused to participate in the legal and physical transfer of the child to the intending parent(s). While the surrogate mother is paid, in commercial or compensated surrogacy arrangements, for the services of gestating and giving birth to a child, she is also being paid for the transfer of the child. Commercial surrogacy legislation and practice which mandate the enforcement of the surrogacy contract, including specifically the transfer of parentage and parental responsibility, make it even clearer that the transfer is of the essence of the contract and is a part of the consideration for which the surrogate mother is paid. Thus, under current practice, the third element of an exchange is met in most commercial surrogacy arrangements.

72. Commercial surrogacy could be conducted in a way that does not constitute sale of children, if it were clear that the surrogate mother was only being paid for gestational services and not for the transfer of the child. In order to turn this into more than a legal fiction, the following conditions would all be necessary. First, the

surrogate mother must be accorded the status of mother at birth, and at birth must be under no contractual or legal obligation to participate in the legal or physical transfer of the child. Hence, the surrogate mother would be viewed as having satisfied any contractual or legal obligations through the acts of gestation and childbirth, even if she maintains parentage and parental responsibility. Second, all payments must be made to the surrogate mother prior to the post-birth legal or physical transfer of the child, and all payments made must be non-reimbursable, even if the surrogate mother chooses to maintain parentage and parental responsibility, and these conditions should be expressly stipulated in the contract. If the surrogate mother chose to maintain parentage and parental responsibility, she may be legally obligated to share parentage and parental responsibility with others, including the intending parent(s). However, the surrogate mother would not be obligated to relinquish her own status by the surrogacy arrangement.”

188. This view is controversial in the US, and not wholly endorsed in the joint UK Law Commissions report, as set out above. The joint Law Commissions report expresses the view that by providing the surrogate with an opportunity to object to parentage being conferred on the intended parents after birth (which may or may not be endorsed by a court), the Optional Protocol is not breached¹⁰². It is important, however, that any framework which permits payment carefully considers the link between payment and transfer of parentage, and the type of payment which is made, to ensure that the Optional Protocol is not breached. For example, permitting a surrogate to receive remuneration for gestational services, and / or expenses made by monthly allowance during pregnancy, rather than on transfer of the child.

189. As already discussed, the particular circumstances and objectives in Jersey are crucial to the implementation of any surrogacy framework, to ensure consistency with domestic concerns and cultural considerations. This is no less the case for the sensitive issue of payments to surrogates.

190. Payments to third parties: The concerns in respect of payments to third parties are qualitatively different, particularly where they are involved in brokering surrogacy arrangements. The joint Law Commissions report expresses the view that

§9.69 “We see the provision of matching services, where organisations facilitate or organise the bringing together of surrogates and intended parents as particularly problematic if conducted on a commercial basis, given that this would potentially incentivise organisations to create surrogacy arrangements. We are concerned that this could lead to the exploitation of all parties and, potentially, surrogates being coerced to enter into surrogacy arrangements.”

§9.81 “In the light of concerns of exploitation, coercion, the commodification of women and children, and the tension with international law we take the view that there would have to be strong justification for allowing surrogacy agencies to operate on a profit making basis. We have not found such a justification, nor a desire for such agencies on the part of stakeholders, and, accordingly we

¹⁰² See §7.102 – 7.104

provisionally consider that regulated surrogacy organisations should have to operate on a non-profit basis.”

191. In other jurisdictions where commercial surrogacy is or has been permitted, concerns about exploitation have arisen where the medical facility responsible for carrying out the (privately paid) fertility treatment is also the same organisation which recruits surrogates and matches them to intended parents, for example in India and the Ukraine. There have been concerns that the profit making objectives of the medical facility and surrogacy agency are inimical to the welfare of the surrogate for example, Deepa Venkatachalam, director of Sama Resource Group for Women and Health in India expressed this view from her research in her keynote address for the International Forum on Intercountry Adoption and Global Surrogacy:

“Indeed, the ultimate goal of fertility clinics and commissioning parents is to produce a healthy child, which has implications for the health of the surrogate mother. For example, clinics can either hasten or delay the delivery of the baby to accommodate clients who wish to be present at the birth. However, women who bear children under contract are typically prohibited from breastfeeding in order to keep them from forming a bond with the child. Once the child is delivered, therefore, the surrogate mothers are left on their own – with whatever lingering health issues remain.”

192. Whilst concerns of this nature are likely to be less in a jurisdiction such as Jersey which does not have the same socio-economic problems, and where the clinicians follow HFEA guidance, there is still the potential for reproductive tourism, and for surrogates to be recruited from abroad by profit-making organisations if commerciality is not regulated. There is also the potential for a conflict of interest, perceived or real, to arise between clinicians and surrogates if paid medical facilities are involved in the matching of surrogates to intended parents.

193. Equally, if there are no surrogacy agencies at present in Jersey, the question arises as to how matching might properly take place in Jersey between intended surrogates and intended parents, in a way which protects all interests, including those of the child. It may be equally inimical to the welfare of surrogates and children for matching to occur through unregulated social media groups and similar, whether or not there is a commercial element. It may be possible to regulate, but not wholly prohibit, commerciality in a way which balances the competing interests in order to facilitate the establishment of organisations which will support the surrogacy process taking place in accordance with a regulatory framework if established, but not lead to exploitation.

194. Fewer ethical concerns arise in respect of third party payments for other services connected with surrogacy arrangements, such as medical treatment and legal advice. For example, private fertility clinics are not prevented under UK law from carrying out assisted reproduction for the purposes of conceiving a child following surrogacy. Additionally, it has been a concern of those proposing law reform that surrogates and intended parents in the UK are currently restricted

from seeking legal advice on a commercial basis in connection with a surrogacy agreement. The joint Law Commissions report expressly recommends that the prohibition on obtaining commercial legal advice is lifted, and that both surrogates and intended parents should in fact have access to such legal advice, as well as implications counselling¹⁰³;

“More generally, we see no reason why the current prohibition against charging for negotiating or facilitating surrogacy arrangements should not be removed entirely. If surrogacy is to be properly regulated and facilitated, advice and support should be available to intended parents at every stage of the surrogacy journey...we think that organisations, whether regulated surrogacy organisations, clinics, counsellors or law firms (as appropriate) should be able to charge to provide the necessary screening, legal advice, counselling and welfare assessment. This is subject of course to regulated surrogacy organisations being non-profit organisations and to matching and facilitation services only being provided by these organisations therefore on a non-profit basis. We bear in mind that for-profit organisations, such as private clinics already provide some of the work that we propose be made mandatory for entry to the new pathway, for example the welfare assessment and implications counselling. We do not think it viable to ask commercial organisations to undertake work on a non-profit basis that they are currently doing on a profit basis”

195. As can be seen, therefore, the question of payments to third parties is firmly enmeshed with consideration of the overall regulatory framework. Different considerations would apply in Jersey, particularly if the framework does not include regulated surrogacy agencies, and given the private healthcare system. In some respects the position in Jersey is more straightforward in that there has not been a prohibition on commerciality to date, and there may also be different public attitudes to commerciality given the different economic structure.

196. **Registration and identity information;** The other key area considered in the joint Law Commissions report linked to both parentage and surrogacy, is that of birth registration and identity information. This is explored at §88 above in connection with donor gametes. To the extent that a surrogacy arrangement involves the use of donor gametes, the same considerations arise. In addition, however, there are also questions as to;

- a) what parentage a child’s birth certificate ought to reflect where they have been born following surrogacy;
- b) where the intended parents are recorded as the child’s parents on a birth certificate, whether it ought to be evident from the birth certificate, or from further enquiry that the child has been born following surrogacy;
- c) whether a child ought to be able to discover the identity of their gestational parent.

197. These factors are, of course, interlinked with the question of what framework is in place for the conferring of legal parentage from birth, and

¹⁰³ §9.134

whether that framework provides that it is the gestational parent or the intended parent who is the parent at birth, or in some circumstances the gestational parent and one intended parent where the intended parent is also a genetic parent.

198. Where surrogacy arrangements are entered into with family members, the issues arising can be particularly acute. For example, in the UK, if the mother or sister of the intended father carries a child conceived using the intended mother's eggs and the intended father's sperm, the child's recorded mother might also be their genetic grandmother or aunt, and result in a birth certificate which shows a brother and sister or mother and son as the birth parents.
199. Equally, where the surrogate is not connected with the family, and is perhaps married, the child's birth certificate will show the surrogate and her husband as the birth parents, with neither having a genetic link.
200. Where a parental order is made, it is apparent from the existence of a parental order certificate that a child has been born following surrogacy. However, it is not currently possible for a child in respect of whom a parental order has been made to access their original birth certificate pursuant to the Human Fertilisation and Embryology (Parental Order) Regulations 2010, but they are able to access court documents pursuant to the Adoption and Children Act 2002¹⁰⁴. The joint Law Commissions report recommends that this should change to enable a child born following surrogacy to access their original birth certificate.
201. If a regulatory framework is implemented which permits the intended parents to be registered as the child's legal parents on the birth certificate, there would be no original birth certificate, and the issue arises as to how a child can obtain information as to their origins, both as to gametes and gestation, arises. The treatment may also not take place in a regulated clinic, meaning that there are no records held by a regulated clinic, or indeed a clinic in Jersey.
202. The Child Rights Information Network holds the view that a child should ideally have the right to know and contact their gestational parent, and at least have access to non-identifying medical information¹⁰⁵. The joint Law Commission report takes the provisional view that a child born of a surrogacy arrangement should have access to full knowledge of both their genetic and gestational origins¹⁰⁶. Even so, there are other issues regarding how a child would come to know that they were born through surrogacy, if not informed by their parents, such that they can request information. If this is obvious from a child's birth certificate, this also has implications for their Article 8 rights to privacy, if it is apparent not only to the child but also any person accessing that document.

¹⁰⁴ See §10.38 and 10.44 of the joint Law Commission report.

¹⁰⁵ "A children's rights approach to assisted reproduction" Baglietto, Cantwell and Dambach.

¹⁰⁶ §10.78

203. The case of *Godelli v Italy*¹⁰⁷ concerned a child who had been adopted, and was not permitted to either request non-identifying information about her birth mother or disclosure of her mother's identity. The ECHR found a breach of the Applicant's Article 8 rights and noted that; "[52]...*The court considers that the right to an identity, which includes the right to know one's parentage, is an integral part of the notion of private life. In such cases, particularly rigorous scrutiny is called for when weighing up the competing interests*". However, this was not such as to automatically guarantee a person's ability to find out the identity of their birth mother; the court held that a balance had to be struck between the person's Article 8 identity rights, and the interests of the mother in remaining anonymous.
204. The joint Law Commissions report proposes balancing these considerations by making it apparent on a child's long form birth certificate that they were born as a result of a surrogacy arrangement, but not making it apparent on the short form birth certificate. The Law Commissions report also makes recommendations for a national register of surrogacy arrangements to be kept.
205. If a new framework for legal parentage of donor conceived children and children born through surrogacy is implemented in Jersey, as part of that framework there will need to be consideration of how this impacts upon birth registration, and how the competing considerations of privacy and identity rights can be met.
206. **International surrogacy arrangements;** International surrogacy arrangements are of relevance in the development of Jersey's laws around surrogacy in two distinct ways. Firstly, to what extent does any regime implemented in Jersey (or the absence of one) encourage families to enter into international surrogacy arrangements, and should any regime developed endeavour to reduce the incidence of this? Secondly, what provision, if any, should be made in Jersey to recognise the parentage of a child born through surrogacy in another jurisdiction?
207. There is also the question of whether any regime implemented in Jersey encourages reproductive tourism, and the consequences of this for surrogates, intended parents and children. The Parliamentary Assembly and Council of Europe (PACE) report on Children's Rights related to Surrogacy 2016 highlights of the clear risks of having 'for profit' or commercial surrogacy arrangements in place in conjunction with an absence of domiciliary or residential requirement, particularly in developing countries. Whilst the resolution that 'for profit' surrogacy arrangements should be prohibited across Europe was not adopted, and while Jersey as a country of high socio-economic status is not a high risk jurisdiction for exploitation, the possibility of women being trafficked to Jersey, or Jersey becoming a destination for reproductive tourism should not be discounted when developing regulations around parentage following surrogacy.
208. The ease with which an international surrogacy arrangement may result

¹⁰⁷ Application no 33783/09

in parentage, in conjunction with the relative ease or difficulty of securing parentage domestically, has been seen to influence families' decisions regarding where to undertake surrogacy arrangements, both in the UK and in other jurisdictions. Therefore, the two apparently discrete issues of recognition of parentage and the nature of any domestic framework are interlinked.

209. The joint UK Law Commissions report has made clear that it forms part of their objective to try to encourage domestic rather than international surrogacy arrangements, not least because of the variation in ethical and welfare considerations internationally. The particular features of a domestic framework which may enhance or reduce the likelihood of families seeking to enter into international surrogacy arrangements are touched upon at various points in this report, but essentially a regime which is too strict in its eligibility criteria, or too stringent in its processes risks driving families to seek out greater ease and certainty abroad. In particular, as set out above, a lack of certainty regarding legal parentage following surrogacy has been found to have been a key feature in UK families seeking out international surrogacy arrangements. In Israel, the absence of availability of domestic surrogacy arrangements for same-sex couples has led to higher levels of international surrogacy. Conversely, the lack of regulation and / or residence requirement in countries such as the Ukraine has drawn high numbers of families to the Ukraine, but with raised associated risks of exploitation of surrogates. Inevitably, a balance needs to be struck.

210. Whether or not a regime is implemented in Jersey in respect of domestic surrogacy arrangements, the issues regarding recognition of parentage following international surrogacy arrangements remain and are inescapable. As set out above, countries such as France which prohibit surrogacy and have not had a legal framework in place enabling children born following international surrogacy arrangements to acquire recognition of the children's parentage in France, have fallen foul of the ECtHR.

211. The HCCH experts' group on Parentage and Surrogacy has consistently highlighted the undesirability for children of having limping legal parentage, whereby their legal status is different across different jurisdictions. In their most recent report on International Surrogacy Arrangements¹⁰⁸, the experts group reiterated the issues;

4. *The Group recalled the desirability of this project on legal parentage for all families and States. The absence of uniform private international law ("PIL") rules on legal parentage increasingly leads to limping parentage across borders and can create significant problems for children and families in a number of cases. The Group noted, for example, cases involving the contestation of paternity and assisted reproductive technologies (ART) in the context of establishing legal parentage. New medical developments will likely create other challenges in the area of parentage in the future, particularly in the context of the increased mobility of families.*

¹⁰⁸ Report of the Experts' Group on the Parentage / Surrogacy Project (meeting of 28 January – 1 February 2019)

5. *The Group further recalled that uniform PIL rules can assist States in resolving limping parentage, while ensuring that the diverse substantive rules of States on legal parentage are respected. The aim of any new instrument would be to provide predictability, certainty and continuity of legal parentage in international situations for all parties concerned, taking into account their rights, the United Nations Convention on the Rights of the Child and in particular the best interests of the child.*

212. The desired instrument remains in development, but in the meantime individual states have the ongoing problem of how to balance recognition of parental status so as to avoid limping legal parentage, with the need to protect the welfare of children born through surrogacy. Endorsing international surrogacy arrangements from jurisdictions which permit or facilitate exploitative practices, or fail to take account of the best interests of the children born through surrogacy can be equally damaging for the children concerned.

213. There are a number of ways in which these competing considerations might be tackled. The joint Law Commissions report proposes two methods. Firstly, by differentiating between some countries and others, permitting automatic recognition of legal parenthood granted in certain countries or States without the need for an application for a parental order¹⁰⁹.

“16.6 We acknowledge that the extent to which international surrogacy arrangements give rise to concern is dependent, to an extent, on the level of regulation provided in each country, as well as the general legal and socio-economic context. The risks of exploitation will depend, for example on the effectiveness of regulation provided by national laws in different countries, and the impact that the payment available to women to be a surrogate can have on the lives of the surrogate and her family. Concerns may be greatest where the regulation is inadequate, the sums of money payable to women who act as surrogates are life-changing, and where women do not have access to employment, education or other opportunities.”

“16.92 We think that, however, the Secretary of State should have the power to provide that the legal parenthood of intended parents born through international surrogacy arrangements established under the law of a particular country will be recognised in the UK without the need for the intended parents to make a parental order application in this jurisdiction. This power would be contained in primary legislation, and would be exercisable through secondary legislation.”

214. Secondly, by requiring that intended parents make an application for a parental order to secure recognition of parentage in respect of International Surrogacy Arrangements from countries not on the approved list, thereby retaining the element of judicial oversight;

“16.89...we think that the parental order process provides significant safeguards that need to be maintained. In particular the application ensures that the child has genuinely been born through a surrogacy arrangement. The process also offers some safeguards against concerns of exploitation

¹⁰⁹ See §16.6 onwards

of women as surrogates and, in particular, the sale of children.”

215. Other than requiring judicial oversight by way of an application for a parental order, little more is said about how else exploitation might be guarded against in international surrogacy arrangements – the Law Commissions report explicitly acknowledges that even under the parental order process concerns about the exploitation of surrogates remains¹¹⁰. The problem remains that identified by Hedley J – see §144 above, namely that *“it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order”*. I am not aware of any cases in the UK where the application for a parental order has been refused in relation to an international surrogacy arrangement on grounds that the arrangement involved an element of exploitation, despite a high level of judicial scrutiny in such cases, for precisely the reasons Hedley J identified.

216. If there is to be a genuine attempt to guard against exploitation through the use of the judicial process, clearer public policy and criteria as to when judicial approval should not be granted of an international surrogacy arrangement is likely to be required. This is one of the issues which the HCCH group of experts is aiming to tackle in developing an international instrument, in particular by advocating the use of safeguards;

3. Safeguards and other considerations

17. Acknowledging the public policy concerns at the international level concerning surrogacy, most Experts affirmed the importance of having minimum standards or safeguards specifically for ISA cases to protect the rights and welfare of the parties involved. Such safeguards would provide greater assurance to States that legal parentage established in an ISA case could be recognised in other States. Many Experts noted that safeguards in a recognition framework were the most important feature of an instrument dealing with ISAs.

18. Such safeguards could be presented as conditions that must be satisfied for recognition (i.e., mandatory) or as grounds for non-recognition at the discretion of the recognising State (i.e., non-mandatory).

217. As set out at §151 above, the HCCH envisaged that the minimum safeguards would be to ensure the following;

- 1) *The free and informed consent of surrogate mothers to any ISA;*
- 2) *That all parties are appropriately informed and educated about any ISA, both legally, in all relevant States, as well as medically and psychologically;*
- 3) *The medical and psychological suitability of a woman to become a surrogate mother;*
- 4) *The welfare of any child born to an ISA e.g., this may include some basic checks in relation to the intending parents, including child abuse*

¹¹⁰ At §16.89

and criminal background checks and possibly upper age restrictions, as well as provisions concerning the child's right to know his / her origins.

5) *The appropriate competency and conduct of intermediaries*

218. In addition, other safeguards might be put in place, either by prohibiting the recognition of parentage following an international surrogacy arrangement which did not meet such safeguards, or by making such recognition discretionary where they are not in place. This might be linked with the level of payment to the surrogate, the level of literacy of the surrogate, or include circumstances where the surrogate did not have access to independent legal advice in her own language. The question arises as to what the consequences for the status of the children born following international surrogacy arrangements which do not meet the requisite level of safeguard should be, and whether, for example, a process of adoption would be more appropriate than recognition of legal parentage, with its higher level of welfare scrutiny and assessment of the intended parents.

218. As set out at §70 above, whether in the context of cross border recognition of parentage of children conceived through assisted reproduction generally, or surrogacy specifically, there are a variety of ways in which parental status arising extra-territorially might be afforded recognition in Jersey, including a judicial mechanism whereby an application could be made for recognition of the parentage of children born or conceived abroad, subject to the fulfilment of certain requirements or safeguards. Whilst the safeguards for children born via surrogacy might be different, the judicial process for application of recognition of foreign parentage might be broadly the same.

219. **C. Comparative evaluation and conclusions;** As set out above, Jersey first needs to identify its own objectives, and then weigh the merits of each option to determine how to proceed. Without this first stage being completed, the last stage is premature, but there are a number of alternative ways forward available.

221. If the primary objective for Jersey is the conferring of legal parentage, one option for Jersey may be closer association with the UK system in conjunction with a broader system for recognition of parentage secured in other jurisdictions. As already discussed above, a parentage framework implemented in Jersey might include a judicial mechanism whereby an application can be made for recognition of the parentage of children born or conceived abroad, subject to the fulfilment of certain requirements or safeguards. This might mean, for example that Jersey parents have the options of;

- a) entering into surrogacy arrangements in Jersey or the UK, and applying for a parental order in the UK, as they can now, with a formal process in place to ensure recognition in Jersey of the parental order, or;
- b) entering into surrogacy abroad together with the facility to make an application for recognition foreign parentage, possibly with a distinction being made between countries on an approved list and countries out with an approved list, where closer scrutiny of safeguards might be

required;

222. This would not provide the certainty from birth that intended parents and surrogates in the UK have indicated they want, and, as an entirely ex post facto process, nor would it regulate a surrogacy process entered into in Jersey, or address the welfare of the surrogates or the children during that process. It may also mean more Jersey families travelling abroad for surrogacy, and have immigration implications. However, it would provide a means of conferring legal parentage on intended parents in a wider variety of situations than is currently the case.
223. If a key objective is to regulate the surrogacy arrangements entered into in Jersey in order to optimise the welfare of surrogates and children, this would be likely to require the implementation of a clear regulatory framework. It could be many years before the Law Commission's proposed reforms are implemented in the UK, if at all. However, it would be open to Jersey to implement a similar regime to that proposed in the joint Law Commissions report ahead of the UK, albeit adapted for Jersey. One practical consideration with this route is that the joint Law Commissions report envisages regulatory oversight by the HFEA, which is not yet in place as a structure, and Jersey does not fall within the scope of the HFEA as a regulatory body. Jersey would need to create its own regulatory body in order to broadly follow the structure envisaged by the joint Law Commissions report.
224. It is possible for UK clinics to enter into third party agreements with satellite clinics outside the UK – this may already be the case in respect of the Lister Clinic. The lawyer for the HFEA Catherine Drennan has indicated to me that if there is scope for engagement between the HFEA and authorities in Jersey she would be happy to try and facilitate that. Given the cost and work involved in establishing its own regulatory authority or ethics committee, if the law is to change in the UK, it may be worth exploring whether Jersey can bring itself within the UK regulatory scheme. However, until surrogacy is regulated in the UK, there is currently no scheme for Jersey to bring itself within.
225. Jersey may consider that the proposed UK law reform is not optimal, and potentially not fast or certain enough to await, that Jersey needs its own framework sooner rather than later. The development of a regulatory framework would give Jersey the opportunity to create a bespoke package for Jersey residents and visitors within its own timeframe, and which meets so far as possible the ethical considerations and concerns raised by surrogacy.
226. Additionally, given that there are currently no prohibitions in place around surrogacy related activities, Jersey will need to consider whether certain activities should be restricted or regulated – such as the matching of intended parents and surrogates, and the receiving of payment for such activities.
227. Should the UK eventually implement a new framework, there is likely to be continued provision for those domiciled in the Channel Islands to apply for a parental order, as there is now (there is no provision in the Law Commission

recommendations to remove this). If Jersey had its own legal framework in place in respect of surrogacy arrangements, it may become designated a 'named territory' exempt from a requirement to apply for a parental order, and where parentage is automatically recognised in the UK. The framework in place in Jersey may have an impact on how Jersey parentage is recognised in the UK if the UK regime changes. For these purposes it would be likely to be important to demonstrate that the framework implemented in Jersey offers similar safeguards to those recommended in the UK.

228. Finally, and in any event, clarification of parentage following surrogacy whether domestic or international is likely to be required in order to meet international obligations and ensure that the identity rights of all children born following assisted reproduction are respected and protected.

Marisa Allman

Questions

Part I: Parentage and Donor Conception;

Substantive Provision

What is the range of family structures for which it is intended to provide?

In what circumstances should legal parentage be excluded and what are the implications of that?

How should gender identity be taken into account, specifically when providing for the parental status of a person who has changed gender?

Should a distinction be made between natural conception and assisted reproduction?

Should a distinction be made between conception in a clinic, or a UK licensed clinic, or elsewhere?

Should a distinction be made between conception which occurs in Jersey and conception extra-territorially?

Mechanism and Registration

What is the appropriate mechanism for affording legal parentage to a person who is not genetically related to the child?

What evidence is to be provided to the Registrar in connection with the registration of birth?

How is any dispute as to parentage to be determined?

Should the child's birth certificate evidence the fact of them being donor conceived?

Should a donor of gametes be permitted to retain anonymity?

Part II: Surrogacy;

Having regard to the need and experiences of Jersey families using surrogacy as a means of family creation, and/or the potential for increased reproductive tourism in Jersey in the future, what would the key objectives be of a bespoke surrogacy framework in Jersey?

What legal framework would best meet the objectives?

How would a bespoke legal framework compare to the alternative options of;

Taking no action other than to clarify the law on parentage following assisted reproduction and/or enhance the laws on adoption?

Integrating more fully into the existing UK system as it stands?

Awaiting implementation of new UK laws, if they become implemented in due course further to the Law Commission recommendations?

Implementing now a legal framework in Jersey now which broadly adopts the pathway recommended by the Law Commission?