

PROGAR'S written submission re: Cm 9525 The Government's Response to an incompatibility in the Human Fertilisation & Embryology Act 2008: A remedial order to allow a single person to obtain a parental order following a surrogacy arrangement.

The British Association of Social Workers (BASW) Project Group on Assisted Reproduction, PROGAR (<https://www.basw.co.uk/progar/>) has since the 1980s campaigned in the UK and overseas on matters concerning assisted reproduction, including surrogacy. We have variously worked in partnership with donor-conceived adults, Barnardo's, Children's Society, Donor Conception Network, British Infertility Counselling Association (BICA), British Association for Adoption and Fostering (BAAF), National Association of Guardians ad Litem and Reporting Officers (NAGALRO), Children and Family Court Advisory and Support Service (CAFCASS), Children and Families Across Borders (CFAB) and UK DonorLink.

OVERALL STATEMENT

PROGAR welcomes the Government's response and supports the decision to use a Remedial Order to seek to extend eligibility to single people to apply for a Parental Order in respect of a child born as a result of surrogacy arrangements to whom they are genetically related.

SPECIFIC COMMENTS ON THE GOVERNMENT RESPONSE WHERE RELEVANT TO THE SCRUTINY PROCESS

1. We note that different terms are used in different parts of the document and suggest that consistency of terminology and use of clear definitions is crucial, not least as some of these terms are contested. For example, in places 'surrogate(s)' is used and elsewhere 'surrogate mother(s)' even on the same page (e.g. p6). In relation to the 'intended parents, the terms are confusing. On p8 second para, reference is made to applicants for Section 54 and Section 54A Parental Orders being entitled to time off to attend ante-natal appointments with 'the woman pregnant with the child' (another way of describing a surrogate) – but intended parents cannot apply for a PO until the child is at least six weeks old. In a number of places it is unclear whether the entitlements are for those who (i) are eligible to apply for a PO or (ii) have already made an application or (iii) have been granted a PO. The following terms are also variously used without definition: 'parental order parent'; 'qualifying parental order parents'; 'where a person applies for a PO'; 'where a person has applied for a PO'; 'where a person applies for an order'; 'Section 54 parental order parents'; and 'a person who applies for an order under Section 54A of the 2008 Act'. We are not lawyers and urge that close attention is paid in the Remedial Order process itself to such matters.
2. We were concerned to read the following statement at 2.1: *'The order operates like a speeded up form of adoption.....'* Unlike in adoption, there is no statutory requirement to conduct background checks or take up references on intended parents in a surrogacy arrangement or to provide them with any preparation for the additional parenting tasks that are involved in parenting a surrogate-born child. It is our view that there is a need to require such work to be undertaken and that it is therefore wrong to compare the two processes in this way and to use this terminology.

3. We were surprised to see reference in 2.1 to 'parental rights' as that is a term that is no longer used in family law or practice.
4. We believe the section which we have underlined below in the statement which appears at 2.2 in the Government Response to be potentially misleading: *'Surrogacy has an important role to play in our society, helping to create much-wanted families where that might otherwise not be possible. It enables relatives and friends to provide an altruistic gift to people who aren't able to have a child themselves, and can help people to have their own genetically-related children'*. To our knowledge, there are no robust data collected by any of the agencies involved to support such a statement. Indeed from our own practice and research experience, we know that many surrogacy arrangements involve people coming together for the specific purpose of entering into a surrogacy arrangement. To imply, as this does, that surrogates are [only] relatives and friends misses out a significant aspect of surrogacy arrangements.
5. We were not aware that the intention of the surrogacy-related law was (at 2.6): *'...that an individual seeking to acquire legal parenthood of a child born under a surrogacy arrangement would have to adopt the child. The rationale at that time was that the fuller assessment carried out in adoption proceedings was more likely to ensure that a person on their own was able to cope with the demands of bringing up a child'*. We are aware that an Adoption Order has sometimes been pursued in order that the child could have the security of the person raising them to have legal parenthood and parental responsibility but not that this had ever been a deliberate policy intention.
6. We note under 2.10 and 4.2 that the Government proposes to bring forward a new set of parental order regulations alongside the remedial order (as provided for under the 2008 Act) to apply adoption legislation to parental orders, and extend these provisions to applications by a single person. We look forward to scrutinising those regulations once published.
7. We note and welcome the proposal under 3.5 to '... allow a six-month period where an existing single parent through surrogacy can retrospectively apply for a parental order'. In the absence of robust data, there is no way of knowing how many single parents are in this position or how to reach them. We strongly urge there to be an extensive publicity campaign around this together with the collection of information about these applicants in order to better understand why they had not sought to rectify their legal status in other ways.
8. We strongly support that only single people who are genetically related to the surrogate-born child will be eligible to apply for a Parental Order (4.3). Further, we understand that the inclusion of 'or' instead of 'and' in the Remedial Order itself at Section 54A Parental Orders: one applicant Section (1)(a) was an error and is in the process of being rectified. We know of no compelling reasons or research to support the granting of Parental Orders where there is no genetic link to either the single parent (if a single parent application) or one of the partners where the application is from a couple but we are aware that there is a lobby pressing for this.

9. We are aware that there needs to be provision made for exemptions to the condition that a single applicant cannot be married or in a civil partnership. We welcome the fact that this will be determined in the same way as under the Adoption Act 2002; indeed compatibility to child and family law across the four nations is essential in our view. We assume that the exemption on capacity grounds for a single applicant in an enduring family relationship will also be required to meet the capacity requirements of the 2002 Act.

COMMENTS ON ANNEX A: THE DRAFT REMEDIAL ORDER ITSELF

In addition to our comments above, we have specific comments on the RO itself as follows:

RE: p2 'Section 54A Parental Orders: one applicant'

- a) **Section (1)(a):** the final word should be 'and' not 'or'. We understand this is a mistake (a crucial one!) and is being rectified.
- b) **Section (3)(b):** - we find the wording '*... and the separation is likely to be permanent*' to be very woolly. We were not aware that a married/civil partnered person is allowed to adopt as a single parent. Is this compatible with adoption legislation and practice?
- c) **Section (3)(c):** '*the applicant's spouse or civil partner is by reason of ill -health, whether physical or mental, incapable of making an application with the applicant for an order under section 54' (our underlining). We were perplexed at how ill-health or a physical state of a spouse/civil partner could constitute a reason for treating an applicant as a single person and again ask if this is compatible with adoption legislation and practice and if so how is it determined and by whom?*
- d) **Section (9)** Subsection (8) does not require the agreement of a person who cannot be found or is incapable of giving agreement – see our comments above in relation to what constitutes lack of capacity to consent or being incapable of giving consent.

COMMENTS IN RELATION TO SCHEDULES 1 AND 2

There is inclusion in Schedules 1 and 2 of the definitions of the terms used in relation to 'intended parents' and Parental Orders, in particular in relation to whether a Parental Order has already been awarded or whether it has been applied for or where there is an intention to apply for one.

We have raised elsewhere our concerns that intended parents can state their *intention* to apply for a Parental Order and then not do so and that there is no follow up at all. This can be especially problematic should there be future difficulties within the family that require court or other state involvement and so on.

18TH December 2017