SURROGACY LAW REFORM IN THE UK: THE AMBIGUOUS POSITION OF PAYMENTS TO THE SURROGATE

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This article considers the regulation of payments within surrogacy arrangements in the United Kingdom. In recent years, there has been growing academic criticism of the law governing surrogacy arrangements and repeated calls for law reform. In June 2019, the Law Commission of England and Wales and the Scottish Law Commission published a Joint Consultation Paper, 'Building Families Through Surrogacy: a New Law', which notes that, 'the current law is out of date, unclear and not fit for purpose' (para 1.50). One area where such issues are apparent is the regulation of payments from the intended parents to the surrogate. The judicial approach to the granting of 'parental orders', under section 54 of the Human Fertilisation and Embryology Act 2008, has been criticised within the academic literature and the consultation paper recognises these criticisms in considering options for reform. However, while acknowledging that the position will likely be developed in the final report, this article argues that the equivocal approach taken in the consultation paper to the regulation of payments may result in the criticisms made against the current legal regime not being effectively addressed, because the approach regarding payments is piecemeal and lacks a clear underlying regulatory rationale.

INTRODUCTION

As Lady Hale commented in *Whittington Hospital NHS Trust v XX*,[1] 'UK law on surrogacy is fragmented and in some ways obscure. In essence, the arrangement is completely unenforceable… Making surrogacy arrangements on a commercial basis is banned. The details

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[1] *Whittington Hospital NHS Trust v XX* [2020] UKSC 14, [2020] 2 WLR 972.

are more complicated.'[2] This article concerns some of those 'more complicated' details. Lady Hale's reference to the 'fragmented' and 'obscure' legal regime regulating surrogacy reflects the significant academic criticism of this regime in recent years,[3] with consensus developing that law reform was necessary.[4] Relatedly, the legal regime has been consistently criticised by participants in surrogacy arrangements, both intended parents and surrogates.[5]

In response to these sustained calls for reform, surrogacy was included within the law reform programmes of both the Law Commission of England and Wales and the Scottish Law Commission.[6] Within this joint project, in June 2019, the Law Commissions published a Joint Consultation Paper: 'Building Families Through Surrogacy: a New Law'.[7] Its starting point is that, '[t]he key aspects and principles of the current law on surrogacy… date from legislation passed nearly 30 years ago. The law on surrogacy is now overdue for re-examination in light of the societal and medical changes that have occurred during this intervening period.'[8] Subsequently, the consultation paper establishes the Law Commissions' position regarding reform, stating:

> We think that there is a strong case for reform to the law. We believe that the current law is out of date, unclear and not fit for purpose. We think that the law needs to be updated to make it workable and to bring it up to date, and ensure

[2] Ibid, per Lady Hale, at [9].
[3] Much criticism has concerned High Court decisions granting parental orders and the interpretation of s 54 of the Human Fertilisation and Embryology Act 2008 (HFEA 2008), see eg C Fenton-Glynn, 'The Regulation and Recognition of Surrogacy under English Law: An Overview of the Case-Law' [2015] 27 CFLQ 83, K Horsey, 'Fraying at the Edges: UK Surrogacy Law in 2015' (2016) 24(4) *Medical Law Review* 608 and K Norrie, 'English and Scottish Adoption Orders and British Parental Orders After Surrogacy: Welfare, Competence and Judicial Legislation' [2017] 29 CFLQ 93.
[4] See eg K Horsey and S Sheldon, 'Still Hazy After All These Years: The Law Regulating Surrogacy' (2012) 20(1) *Medical Law Review* 67 and A Alghrani and D Griffiths, 'The Regulation of Surrogacy in the United Kingdom: The Case for Reform' [2017] 29 CFLQ 165.
[5] See the reports of Surrogacy UK, which provide data on the attitudes of participants in surrogacy arrangements, K Horsey, 'Surrogacy in the UK: Further Evidence for Reform', Second Report of the Surrogacy UK Working Group on Surrogacy Law Reform, (December 2018) and K Horsey, 'Surrogacy in the UK: Myth Busting and Reform', Report of the Surrogacy UK Working Group on Surrogacy Law Reform (November 2015).
[6] Law Commission, 'Thirteenth Programme of Law Reform' (Law Com No 377, December 2017); Scottish Law Commission, 'Tenth Programme of Law Reform' (Scot Law Com No 250, February 2018). Both the Surrogacy Arrangements Act 1985 (SAA 1985) and the HFEA 2008 apply UK-wide, including in Northern Ireland, and for present purposes nothing turns on the differences in the family law systems of English law and Scots law and their different rules concerning legal parenthood and adoption.
[7] Joint Consultation Paper, 'Building Families Through Surrogacy: a New Law' (Law Com Consultation Paper No 244, Scot Law Com Discussion Paper No 167, June 2019).
[8] Ibid, para 1.5.

> that it protects the welfare of all the participants to the arrangement including, most importantly, the welfare of the child.[9]

The Law Commissions recognise the criticisms of the law and acknowledge the need for reform. Within the consultation paper various aspects of the legal regime are highlighted as requiring reform, including: the rules for determining the legal parenthood of children born through surrogacy (where a 'new pathway' to parenthood is proposed),[10] the process through which the court grants 'parental orders' to the intended parents after the birth of the child(ren),[11] the regulation of payments from the intended parents to the surrogate,[12] and the approach of domestic law to international commercial surrogacy arrangements.[13]

This article focuses upon one of these areas, the regulation of payments within surrogacy arrangements.[14] Currently, payments are situated in an ambiguous regulatory position due to the interaction between the Surrogacy Arrangements Act 1985 ('the 1985 Act'), which provides the framework regulating surrogacy arrangements, and the Human Fertilisation and Embryology Act ('the 2008 Act'), which sets out the rules concerning 'parental orders'; the post-birth order transferring legal parenthood to the intended parents. The 1985 Act prohibits aspects of a fully commercialised surrogacy regime in the UK.[15] However, the judicial interpretation of section 54(8) of the 2008 Act has resulted in parental orders being granted in circumstances involving international commercial surrogacy and relatively large payments.[16] The ambiguous regulatory position is evident as payments are seemingly constrained by one part of the legal regime, while being condoned by another part of that regime. The consultation paper is critical of the approach to payments, and their ex-post facto evaluation,[17] stating, 'we agree with stakeholders and commentators that the current state of affairs in relation to payments, where the statute is either deliberately or inadvertently not being followed,

[9] Ibid, para 1.50.
[10] Ibid, chapters 7-8.
[11] Ibid, chapters 5-6.
[12] Ibid, chapters 14-15.
[13] Ibid, chapter 16.
[14] This article inevitably considers the regulation of international commercial surrogacy, because that is the factual context in which the majority of reported cases have considered such payments, and the 'new pathway', because of the centrality of that proposal to the consultation paper.
[15] SAA 1985, ss 2-4.
[16] See further below at subsection A.2: 'The Human Fertilisation and Embryology Act 2008'.
[17] I would like to thank one of the anonymous reviewers for drawing this point to my attention.

"undermines the rules of law". Reform is clearly needed.'[18] This is highly critical language and in the chapters specifically considering payments, it is observed, '[w]e think there are three key criticisms of the current law.'[19] Those criticisms are: (1) 'there is a lack of certainty as to what is included within expenses,'[20] (2) 'there are difficulties in enforcing limitations on payments to surrogates',[21] and (3) 'there is a disparity, in practice, between the payments the SAA 1985 permits for domestic surrogacy arrangements, and those that the courts will authorise in respect of international agreements.'[22] There is clearly much force in these interrelated criticisms of the current law, which reflect the criticisms made within the academic literature.[23]

However, in this article, I will argue that the equivocal approach taken by the Law Commissions to reform of the regulation of payments may result in these 'three key criticisms' not being properly addressed by the law reform project. At this point, it is important to acknowledge that the consultation paper is only the first stage of the law reform project and that these ideas are likely to be developed further before the final report is published.[24] The role of a consultation paper is not necessarily to make definitive proposals, but rather to consult on the overarching framework for reform.[25] However, my concern is that, when compared to other parts of the consultation paper, the approach to payments is framed in a manner that appears to lack any underlying regulatory rationale. Consequently, this lack of rationale may result in final proposals which do not take the opportunity to address the issues with the current law that were identified by the consultation paper.

With that said, it is notable that there is an explicit rejection of the language of 'altruistic' and 'commercial' surrogacy,[26] with the consultation paper noting, 'we have not found the terms altruistic and commercial to be useful descriptions in considering either the current law, or

[18] Joint Consultation Paper, above n 7, para 1.47, quoting from the submission to the consultation on the 13th Programme of Law Reform of C Fenton-Glynn and J Scherpe (on behalf of Cambridge Family Law), *Surrogacy: Is The Law Governing Surrogacy Keeping Pace With Social Change?* (2017), 4, available at https://www.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.family.law.cam.ac.uk/documents/cambridge_family_law_submission.pdf.
[19] Ibid, para 14.23.
[20] Ibid.
[21] Ibid.
[22] Ibid.
[23] See eg Fenton-Glynn, above n 3, and Horsey, above n 3.
[24] Law Commission, 'Surrogacy Project', indicates this is expected in 'early 2022', available at https://www.lawcom.gov.uk/project/surrogacy/.
[25] I would like to thank both of the anonymous reviewers for emphasising this point.
[26] This rejection of the distinction between altruistic and commercial surrogacy is supported by some academic commentators, see eg E Jackson, J Millbank, I Karpin and A Stuhmcke, 'Learning from Cross Border Reproduction' (2017) 25(1) *Medical Law Review* 23.

possible reforms.'[27] This linguistic rejection is built upon in the chapters concerning payments, as the Law Commissions comment: 'our approach to reform has therefore been to step back from specific labels and consider directly the question of what payments the intended parents should be permitted to make to the surrogate.'[28] The result is that the position of commercial surrogacy in the UK is not definitively addressed by the consultation paper.[29] It is apparent that the Law Commissions believe that not focusing upon commercial surrogacy will assist in producing a reformed approach to payments. The consultation paper is correct to note the potential issues caused by this terminology, because the definitions of these terms are not fixed, but instead are contested. Indeed, there are a range of legal regimes that could be described as 'altruistic'[30] and a similar range that could be described as 'commercial'.[31] While the consultation paper's approach might represent a laudable aim,[32] I argue that the issue of whether or not the legal regime permits and facilitates the payment of a surrogate for her services as a surrogate (rather than payments only for 'expenses') is more fundamental to the framing of the regime regulating payments than the consultation paper's approach allows. I argue that this framing contributes to the ultimate lack of an underlying regulatory rationale.

This article will begin by setting out the ambiguity of the position of payments within the legal regime, starting with the provisions of the 1985 Act, before considering how the High Court's interpretation of section 54(8) of the 2008 Act furthers this ambiguity. Thereafter, the article will consider the surprisingly equivocal approach of the Law Commissions and their lack of specific proposals concerning payments, especially compared to the definitive proposals made for reform in other parts of the consultation paper.[33] I will argue that this approach may result

[27] Joint Consultation Paper, above n 7, para 2.14.
[28] Ibid, para 14.5.
[29] SAA 1985, s 2(1) sets out conduct related to surrogacy arrangements that is prohibited if undertaken on a 'commercial basis', but s 2(2) exempts the surrogate and the intended parents from this prohibition.
[30] The consultation paper notes the distinction between 'entirely altruistic' surrogacy, where there is no payment to the surrogate, and the more common understanding of 'altruistic' surrogacy, which involves the payment of some form of expenses: Joint Consultation Paper, above n 7, para 2.14-2.15.
[31] See K Horsey, 'Surrogacy in the UK: Further Evidence for Reform', Second Report of the Surrogacy UK Working Group on Surrogacy Law Reform, (December 2018), 15-19, who sets out 'three interlinked aspects', for describing surrogacy as either altruistic or commercial, which are: 'Types of Payments', 'Service Model' and 'Contractual Frameworks', with different options within each aspect.
[32] There are well-established arguments within the academic literature that are highly critical of this distinction and its role within the regulation of surrogacy, see eg S Roach Anleu, 'Surrogacy: For Love But Not for Money?' (1992) 6(1) *Gender and Society* 30 and A Stuhmcke, 'The Regulation of Commercial Surrogacy: The Wrong Answers to the Wrong Questions' (2015) 23(2) *Journal of Law and Medicine* 333.
[33] See eg the proposals for the creation of a 'new pathway' to parenthood, allowing the registration of the intended parents as legal parents at birth (Joint Consultation Paper, above n 7, chapter 8), and the proposals for a fully regulated system of surrogacy in the UK, under the oversight of the Human Fertilisation and Embryology Authority (chapter 9).

in a new legal regime which does not effectively address the 'three key criticisms' of the current law identified by the consultation paper. Finally, the article will consider the framing of payments within the consultation paper, and briefly explore some possible alternative approaches to the regulation of payments. The article will conclude by noting that the legal regime in relation to payments appears likely to continue to be based upon piecemeal and pragmatic considerations, rather than an overarching regulatory rationale and that this represents a missed opportunity within the consultation paper. I argue that this 'missed opportunity' occurs because there is the potential that the 'three key criticisms' of the current law will not be fully addressed, unless the final report presents proposals which are significantly different from those which appear to be envisaged by the consultation paper.

A. The Current Legal Position Concerning Payments

Two aspects of the law concerning payments to the surrogate contribute to the conceptually ambiguous position of such payments within the regulatory scheme, and to the criticisms of the consultation paper. First, the provisions in section 2 of the 1985 Act, which prohibit certain activities if undertaken 'on a commercial basis'.[34] Second, the High Court's interpretive approach to section 54(8) of the 2008 Act.[35] The interaction between the restrictive provisions of the 1985 Act and the permissive judicial approach to the 2008 Act contributes to this ambiguous position. The 1985 Act, the first UK legislation concerning surrogacy, creates the equivocal context of payments to surrogates within the legal regime. The consultation paper describes this Act as, 'a very short Act that does not offer a regulatory scheme for surrogacy in the UK.'[36] It was based upon the Warnock Committee report,[37] which was opposed to surrogacy on moral and ethical grounds and recommended a legal approach that limited surrogacy as far as possible.[38] These provisions created the context for the 'altruistic' model of surrogacy in the UK,[39] and some of the issues regarding the lack of enforcement mechanisms

[34] SAA 1985, s 2(1).
[35] The 'condition' of the parental order process relating to payments.
[36] Joint Consultation Paper, above n 7, para 9.1.
[37] 'Report of the Committee of Inquiry into Human Fertilisation and Embryology' (Department of Health and Social Security, July 1984), available at http://www.bioeticacs.org/iceb/documentos/Warnock_Report_of_the_Committee_of_Inquiry_into_Human_Fertilisation_and_Embryology_1984.pdf.
[38] Ibid, chapter 8.
[39] Surrogacy UK describe 'Our Vision' as: '[a]ltruistic surrogacy as a valued, accessible and inclusive pathway to parenthood', available at https://surrogacyuk.org/aboutus/.

relating to payments, identified in the consultation paper. The 'liberal'[40] and permissive judicial approach to the relevant provisions in the 2008 Act furthers the ambiguity regarding the position of payments and the issues around enforcement. This judicial approach also contributes to the consultation paper's two other criticisms, the uncertainty regarding permissible payments and the disparities in cases involving international commercial surrogacy.

1. The Surrogacy Arrangements Act 1985

The 1985 Act's provisions situate payments to surrogates in an ambiguous position within the law. This occurs because section 2(1) expressly prohibits certain 'acts'[41] relating to surrogacy arrangements if done 'on a commercial basis…in the United Kingdom',[42] but section 2(2) states, 'it is not a contravention of that subsection' if those acts are done by either 'a woman, with a view to becoming a surrogate mother herself'[43] or 'any person, with a view to a surrogate mother carrying a child for him'.[44] Thus, the parties to the surrogacy arrangement, the intended parents and the surrogate, are exempt from the prohibition of certain commercial activities, and payments (of any kind) between the intended parents and the surrogate are not prohibited by the 1985 Act.[45] Simultaneously, this Act prohibits[46] the apparatus of a regulated commercial surrogacy market in the UK,[47] and as I have previously observed, '[t]he legal regime regulating surrogacy in the UK remains restrictive.'[48] This reflects the Warnock Committee report, which justified this contradictory approach, because: 'we are anxious to avoid children being born to

[40] See eg M Welstead, 'Surrogacy: One More Nail in the Coffin' [2014] Fam Law 1637.
[41] SAA 1985, s 2(1) provides (a) 'no person shall', do any of the following on a commercial basis: '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'; and (c), 'compile any information with a view to its use in making, or negotiating the making of, surrogacy arrangements'.
[42] Ibid, s 2(1).
[43] Ibid, s 2(2)(a).
[44] Ibid, s 2(2)(b).
[45] Horsey, above n 31, 15, comments: '[u]nder the SA Act commercial surrogacy is illegal'.
[46] SAA 1985, s 2(5)-(8) prohibit the involvement of profit-making bodies in surrogacy arrangements, effectively prohibiting the operation of commercial surrogacy agencies in the UK and s 3 prohibits advertising relating to surrogacy arrangements.
[47] The provisions are limited to prohibiting acts from taking place on a 'commercial basis' within the UK. This results in both practical and ethical issues when the domestic legal regime is faced with children born to UK-based intended parents from commercial surrogacy arrangements in jurisdictions that allow commercial surrogacy.
[48] A Brown, 'Two Means Two, but Must Does Not Mean Must: An Analysis of Recent Decisions on the Conditions for Parental Orders in Surrogacy' [2018] 30 CFLQ 23, 23.

mothers subject to the taint of criminality.'[49] This is explicitly endorsed by the consultation paper, which states that criminalisation is not considered a 'viable option for reform'[50] and continues to employ the moralistic language of 'taint of criminality'.[51]

The 1985 Act sets out offences regarding the prohibited commercial acts,[52] but, interestingly, the consultation paper observes, '[w]e are not, however, aware of any prosecutions that have taken place, and none have been brought to our attention in discussions with stakeholders.'[53] This lack of enforcement[54] suggests that the provisions have largely performed a symbolic function in expressing disapproval of commercial surrogacy. They have evidently been effective in preventing the UK from having an operational commercial surrogacy market.[55] The 1985 Act's approach is to prohibit third-party commercial involvement in surrogacy arrangements,[56] preventing the creation of a marketized commercial surrogacy regime, and through this attempting to prevent surrogacy arrangements being conducted on a commercial basis. This combines with the ethos of 'altruism', promoted by non-profit surrogacy organisations, to create the current domestic surrogacy regime. Given the exemption of the parties to the surrogacy arrangement from the 1985 Act's prohibition on commercial activities, there is no possibility of enforcing any limitation on payments between the intended parents and the surrogate through the prospect of criminal sanction. As the consultation paper observes, '[b]eyond the issue of criminalisation, however, the SAA 1985 does not address payments to surrogates.'[57] This lack of sanction represents an apparent lacuna in the regulatory scheme, because payments are neither fully prohibited nor effectively regulated. Section 1A of the 1985 Act[58] does provide: 'No surrogacy arrangement is enforceable by or against any of the persons making it.' Thus, any payment agreed between the parties cannot be enforced by either party through the courts, suggesting that the apparent lacuna concerning payments may be

[49] 'Report of the Committee of Inquiry into Human Fertilisation and Embryology' (Department of Health and Social Security, July 1984), para 8.19.
[50] Joint Consultation Paper, above n 7, para 14.40.
[51] Ibid.
[52] SAA 1985, s 4 details the penalties for offences under the 1985 Act.
[53] Joint Consultation Paper, above n 7, para 4.21.
[54] Surrogacy is not regulated by the Human Fertilisation and Embryology Authority, raising questions regarding who would undertake such enforcement action.
[55] The High Court has noted the existence of Facebook groups facilitating surrogacy arrangements, but the precise role of these groups, whether they operate on a 'commercial basis', and their legality in terms of the 1985 Act has not been considered judicially, see eg *Re A (Infants)* [2016] EWFC 33, [2016] 6 WLUK 258, at [2]-[4].
[56] HFEA 2008, s 59 inserted s 2(2A)-(2C), (5A), (8A) and (B) into the 1985 Act, creating exceptions for 'non-profit making' bodies in facilitating surrogacy arrangements, clarifying their position within the regulatory regime.
[57] Joint Consultation Paper, above n 7, para 14.6.
[58] Inserted by Human Fertilisation and Embryology Act 1990, s 36(1).

intentional. The consequence of this approach is that there are neither potential criminal sanctions on the scale of payments nor the possibility of private law enforcement of any payments agreed between the parties.[59] This illustrates the criticism identified in the consultation paper regarding the issues of enforcing any limitations on payments. The only context within the current legal regime involving potential judicial consideration of payments is the parental order process, under section 54 and section 54A of the 2008 Act, where, as Sheldon and Horsey put it, '[t]he enforcement mechanism lies in the possible refusal of a Parental Order'.[60]

2. The Human Fertilisation and Embryology Act 2008

However, the judicial approach to section 54 has been subject to significant academic criticism[61] and the consultation paper notes: 'some of the eligibility criteria for a parental order in sections 54 and 54A of the HFEA 2008 are being stretched to their limits, or simply cannot be applied.'[62] This is apparent in the interpretation of the condition concerning payments in section 54(8).[63]

Before exploring this, it is necessary to set out the statutory context of the parental order process. The need for parental orders arises because of the 2008 Act's 'parenthood provisions',[64] which provide that the surrogate is the legal parent at birth.[65] To become legal parents, the intended parents apply to the court after birth for a 'parental order' and if granted this transfers legal parenthood to them.[66] Subsections 54(2)-(8) provide the conditions for

[59] However, see C Purshouse, 'The Problem of Unenforceable Surrogacy Contracts: Can Unjust Enrichment Provide a Solution?' (2018) 26(4) *Medical Law Review* 557.
[60] Horsey and Sheldon, above n 4, 77.
[61] See eg Horsey, above n 3.
[62] Joint Consultation Paper, above n 7, para 11.2.
[63] The judiciary have adopted a liberal and permissive approach to other conditions set out in s 54, see eg the six-month time limit in s 54(3) in *Re X (A Child) (Parental Order: Time Limit)* [2014] EWHC 3135 (Fam), [2015] 1 FLR 349, the requirement that the child's home be with 'the applicants' in s 54(4) and the requirement that both applicants 'have attained the age of 18' in s 54(5) in *A v P (Surrogacy: Parental Order: Death of Applicant)* [2011] EWHC 1738 (Fam), [2012] 2 FLR 145, and the requirement of the consent of the surrogate in s 54(6) in *Re D (Children) (Surrogacy: Parental Order)* [2012] EWHC 2631 (Fam), [2013] 2 FLR 275.
[64] HFEA 2008, ss 33-48.
[65] HFEA 2008, s 33(1). If the surrogate is married, her husband may also be the child's legal parent at birth: s 35(1).
[66] HFEA 2008, s 54(1) states, '[o]n an application made by two people ("the applicants"), the court may make an order providing for a child to be treated in law as the child of the applicants' and s 54A(1) provides for single applicants after the decision in *Re Z (A Child) (Surrogate Father: Parental Order) (No.2)* [2016] EWHC 1191 (Fam), [2017] Fam. 25.

granting the parental order.[67] Section 54 was altered by the Human Fertilisation and Embryology (Parental Order) Regulations 2010 ('the 2010 Regulations'),[68] which imported section 1 of the Adoption and Children Act 2002 ('the 2002 Act') into section 54.[69] Section 1(2) provides: '[t]he paramount consideration of the court or adoption agency must be the child's welfare, throughout his life.' Consequently, the 'welfare of the child' is now the court's paramount consideration in determining parental order applications. Prior to the 2010 Regulations, in *Re X and Y (Children) (Parental Order: Foreign Surrogacy)*,[70] Hedley J commented, 'welfare considerations cannot be paramount but, of course, are important.'[71] In contrast, after the 2010 Regulations, in *Re L (A Child) (Parental Order: Foreign Surrogacy*),[72] he observed, '[w]hat has changed, however, is that welfare is no longer merely the court's first consideration but becomes its paramount consideration.'[73] This change to the law led Hedley J to comment, '[t]he effect of that must be to weight the balance between public policy considerations and welfare…decisively in favour of welfare. It must follow that it will only be in the clearest case of the abuse of public policy that the court will be able to withhold an order if otherwise welfare considerations support its making.'[74] The paramountcy of welfare within the parental order process[75] has had a substantial impact upon judicial interpretation of the section 54 conditions.[76] As I have previously commented, '[i]t is in this context, where the 'welfare of the child' is the court's paramount consideration and it is highly unlikely that an application will be refused on general public policy grounds, that decisions concerning applications for parental orders are situated.'[77] The paramountcy of the welfare of the child

[67] HFEA 2008, s 54(1)(b) requires that the genetic material of at least one of the intended parents has been used.
[68] HFEA 2008, Sch 1.
[69] HFEA 2008, s 55(1) grants the Secretary of State the power to make regulations which provide, 'for any provision of the enactments about adoption to have effect, with such modifications (if any) as may be specified in the regulations, in relation to orders under section 54.' It is through this power that the 'welfare test' has been imported into the 2008 Act.
[70] [2008] EWHC 3030 (Fam), [2009] 1 FLR 733.
[71] Ibid, at [20].
[72] [2010] EWHC 3146 (Fam), [2011] 1 FLR 1423.
[73] Ibid, at [9].
[74] Ibid, at [10]. See further eg Theis J in *J v G (Parental Orders)* [2013] EWHC 1432 (Fam), [2014] 1 FLR 297 and *Re WT (Foreign Surrogacy)* [2014] EWHC 1303 (Fam), [2015] 1 FLR 960. Prior to the 2010 Regulations, Hedley J commented upon the difficultly of the public policy issues involved in *Re X and Y (Children) (Parental Order: Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] 1 FLR 733 and *Re S (Parental Order)* [2009] EWHC 2977 (Fam), [2010] 1 FLR 1156.
[75] Arguably the impact of the 2010 Regulations on judicial practice was limited, given the significant role of the 'welfare of the child' in decisions prior to their enactment. However, from Hedley J's contrasting language in *Re X and Y* and *Re L*, it is clear that the Regulations brought about an important change to the legislative context, shifting the balance between public policy and welfare. I would like to thank one of the anonymous reviewers for drawing this point to my attention.
[76] See Fenton-Glynn, above n 3.
[77] Brown, above n 48, 26.

within the determination of applications renders the parental order process an inappropriate mechanism for attempting to regulate the conduct of the adults involved in surrogacy arrangements.[78]

With that said, the relevant condition relating to payments is provided in section 54(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.[79]

There are two parts to the court's evaluation of payments made by the intended parents to the surrogate. First, the exception for 'expenses reasonably incurred' and, second, the power to authorise payments in excess of expenses. Due to the paramountcy of the welfare of the child, the court has adopted a 'liberal' and permissive approach to these issues. Consequently, the court has not tended to engage in detailed or precise evaluation of 'expenses reasonably incurred' and in cases involving the authorisation of larger payments, as the consultation paper notes, 'as far as we are aware, there is no case in which a parental order has been refused because of payments that have been made to the surrogate by the intended parents.'[80]

The concept of 'expenses reasonably incurred' is not defined in the 2008 Act, with its interpretation left to the judiciary. However, there has been limited judicial consideration of the definition, with Hedley J stating in *Re L (A Child) (Parental Order: Foreign Surrogacy)*,[81] 'I observe only that "reasonable expenses" remains a somewhat opaque concept.'[82] I suggest that this opacity is evident both in the types of payment that are permissible as 'expenses' and in how the 'reasonableness' of those expenses is to be assessed. This lack of clarity has not been assisted by the concept of 'expenses reasonably incurred' not often being substantively

[78] See Norrie, above n 3.
[79] HFEA 2008, s 54(8).
[80] Joint Consultation Paper, above n 7, para 14.33.
[81] [2010] EWHC 3146 (Fam), [2011] 1 FLR 1423.
[82] Ibid, at [7]. Earlier in his judgment, at [3], Hedley J, stated: 'It is clear to me that payments in excess of reasonable expenses were made in this case.'

considered in the reported decisions.[83] Instead those cases have focused upon international commercial surrogacy and the court's power to authorise payments in excess of expenses. Given this lack of reported cases, the Law Commissions undertook a review of court files from parental order applications[84] and observed: '[i]t was notable…that very few parental order applications included a detailed, itemised breakdown of the expenses paid to the surrogate, along with the accompanying receipts.'[85] This reflected a previous study by Cafcass, which noted, '[i]t was unfortunately not possible to reliably break the total payment figures down into their component parts'.[86] Thus, in practice, it appears that payments made in domestic surrogacy arrangements do not reflect a precise quantification of the expenses actually incurred by surrogates.[87]

This lack of detailed accounting of expenses is observed in a rare example of this issue being considered in *Re A (Infants)*.[88] This involved three separate domestic surrogacy arrangements undertaken by one set of intended parents at the same time, and Russell J stated of the payments, '[t]hese sums were, in each case, agreed without any reference to the expenses that they were covering or likely to be incurred.'[89] Despite this, the court was prepared to hold that the payments were 'expenses reasonably incurred'.[90] In explaining this, Russell J considered the details of the payments to each surrogate[91] and commented: '[h]aving heard all three women give evidence I was left in no doubt that each had acted altruistically and had not made any real financial gain out of having the babies for the applicants.'[92] This statement suggests that the court's decision determining whether payments were 'expenses reasonably incurred' was influenced by assessing whether the surrogates were 'acting altruistically'. This may or may not be an appropriate standard for assessing payments to the surrogate, but it is not the

[83] For a rare example see *Re A (Infants)* [2016] EWFC 33, [2016] 6 WLUK 258, considered below.
[84] Joint Consultation Paper, above n 7, para 14.15-14.21. It reviewed 52 court files from domestic surrogacy arrangements between 2015 and 2019, finding a mean payment of £13535.18 and noted expenses of more than £20,000 in 9.6% of cases.
[85] Ibid, para 14.17.
[86] Children and Family Court Advisory and Support Service, 'Cafcass Study of Parental Order Applications made in 2013/14' (July 2015), 17; based upon 189 parental order applications from April 2013-March 2014, and the case files of 79 applications. I would like to thank one of the anonymous reviewers for reminding me of this study.
[87] Evidence of the amounts paid in domestic surrogacy arrangements is presented in Horsey, above n 31, para 3.1, based upon their survey of 103 domestic surrogates: 27% received less than £10,000, 58.4% received between £10,000-£15,000 and no respondents received more than £20,000. See further K Horsey, 'Surrogacy in the UK: Myth Busting and Reform', Report of the Surrogacy UK Working Group on Surrogacy Law Reform, (November 2015), 20.
[88] [2016] EWFC 33, [2016] 6 WLUK 258.
[89] Ibid, at [15].
[90] Ibid, at [18].
[91] Ibid, at [19]-[21].
[92] Ibid, at [22].

standard found in section 54(8). This judgment appears to replace one opaque standard which is in the legislation with another opaque standard which is not in the legislation. The approach taken in *Re A* prompted the consultation paper to note: 'the current provision may be playing a role that is different to the one it purports to play. Rather than ensuring that the payments made to the surrogate are confined to her expenses reasonably incurred, the HFEA 2008 is operating, in practice, to ensure that the surrogate does not make a financial gain from the agreement.'[93] The consultation paper appears to be suggesting that the emphasis in judicial decision-making is shifting from the theoretically narrow concept of expenses to a wider concept of 'financial gain', which involves considering the subjective motivation of surrogates. Therefore, the lack of statutory definition of 'expenses reasonably incurred' and its permissive judicial interpretation have contributed to the lack of clarity about which payments are permissible 'expenses'.

The 2008 Act is similarly silent regarding the basis upon which payments greater than 'expenses reasonably incurred' can be 'authorised by the court'.[94] Consequently, the courts have established and refined the process for authorisation. The approach was first set out by Hedley J in *Re X and Y (Children) (Parental Order: Foreign Surrogacy)*.[95] This involves considering the following three questions: '(i) was the sum paid disproportionate to reasonable expenses? (ii) were the applicants acting in good faith and without 'moral taint' in their dealings with the surrogate mother? (iii) were the applicants party to any attempt to defraud the authorities?'[96] Subsequent cases have consistently endorsed this 'three questions' approach,[97] which appears to provide a stringent test for authorisation. However, later in *Re X and Y*, Hedley J commented: '[t]he 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.'[98] This statement has been consistently endorsed in other cases after the 2010

[93] Joint Consultation Paper, above n 7, para 14.24.
[94] HFEA 2008, s 54(8).
[95] [2008] EWHC 3030 (Fam), [2009] 1 FLR 733. As Hedley J observed, '[t]he statute affords no guidance as to the basis, however, of any such approval' (at [20]).
[96] Ibid, at [21].
[97] See eg *Re X (Children) (Parental Order: Retrospective Authorisation of Payments)* [2011] EWHC 3147 (Fam), [2012] 1 FLR 1347, *Re D (Children) (Surrogacy: Parental Order)* [2012] EWHC 2631 (Fam), [2013] 2 FLR 275 and *Re W* [2013] EWHC 3570 (Fam), [2013] 10 WLUK 271.
[98] *Re X and Y (Children) (Parental Order: Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] 1 FLR 733, at [24].

Regulations.[99] The application of the welfare test has resulted in a judicial approach to these 'three questions' that has involved the routine authorisation of payments and the efficacy of these questions appears limited.[100] Understandably, the cases in which the judicial authorisation of payments has occurred have largely concerned international commercial surrogacy, and the payments involved have been substantially larger than expenses.[101]

These decisions prompted Emily Jackson et al. to observe, 'the UK courts are effectively presented with a fait accompli: if the child's settled home is with the intended parents, a parental order will invariably be in his or her best interests'.[102] In a recent report of the APPG on Surrogacy, it was noted, 'when asked directly how many of the surrogacy cases seen by Cafcass raised a concern over the welfare of the child, the answer was "one"'.[103] The judicial approach prompted Claire Fenton-Glynn to comment, 'despite English law holding international surrogacy agreements to high standards in principle, in reality couples meet with few problems in obtaining recognition of their parenthood, in spite of evidence of commercial transactions'.[104] There is an obvious disparity between the payments authorised in cases of international commercial surrogacy and the payments ordinarily made, under the guise of 'expenses reasonably incurred', in domestic surrogacy arrangements. This disparity represents another feature of the legal regime that contributes to the ambiguous, inconsistent, and unclear position of payments to surrogates. It is difficult to argue that there remains any disincentive within the parental order process for UK intended parents to use international commercial surrogacy arrangements,[105] given the regularity with which parental orders have been granted

[99] See eg Theis J using a very similar form of words in *Re WT (Foreign Surrogacy)* [2014] EWHC 1303 (Fam), [2015] 1 FLR 960, at [35].
[100] Most strikingly, in *Re C (A Child) (Parental Order)* [2013] EWHC 2413 (Fam), [2014] 1 FLR 654, Theis J authorised payments of 50,000 Euros to a Russian surrogacy agency (around £13000 paid to the surrogate) even though the intended parents had initially lied to UK immigration authorities in applying for a passport for the child without disclosing the existence of the surrogacy arrangement. I would observe that if this case did not involve an 'attempt to defraud the authorities' the circumstances in which such attempts will be found to have occurred will clearly be very narrowly drawn.
[101] See eg payments of $65,700 ($48,000 paid to a surrogacy agency) in *P-M (Parental Order: Payments to Surrogacy Agency)* [2013] EWHC 2328 (Fam), [2014] 1 FLR 725, payments of $47,715 to the surrogate (plus 'reasonable expenses') and $22,000 to a surrogacy agency in *Re W* [2013] EWHC 3570 (Fam), [2013] 10 WLUK 271, payments of $56,750 in *J v G (Parental Orders)* [2013] EWHC 1432 (Fam), [2014] 1 FLR 297 and payments of around $48,000 (the vast majority not to the surrogate) in *Re X (Foreign Surrogacy: Child's Name)* [2016] EWHC 1068 (Fam), [2017] 2 FLR 91.
[102] Jackson et al, above n 26, 35.
[103] APPG on Surrogacy, 'Report on Understandings of the Law and Practice of Surrogacy' (October 2020), 11. I would like to thank one of the anonymous reviewers for drawing this to my attention.
[104] C Fenton-Glynn, 'Outsourcing Ethical Dilemmas: Regulating International Surrogacy Arrangements' (2016) 24(1) *Medical Review Law* 59, 60.
[105] However, legal issues concerning nationality and immigration remain in cases of international commercial surrogacy. There are also ethical, practical, or financial reasons that will continue to disincentivise some intended

in such circumstances. By contrast, the domestic legal regime remains poorly understood, surrounded by myths, and relatively inaccessible. Thus, as the consultation paper observes, '[a]t the least, current law may be said to reflect a double-standard of condemning (in its letter) payments beyond expenses being made to surrogates in domestic arrangements, while routinely condoning those made in international arrangements.'[106]

From all of the above, there is substantial evidence supporting the 'three key criticisms' of the current law identified by the Law Commissions. This article will now examine the consultation paper's approach to potential reform of the law regulating payments to the surrogate.

B. THE CONSULTATION PAPER'S APPROACH TO PAYMENTS

Before considering the consultation paper's approach to payments, this needs to be situated within the context of its central proposal – the 'new pathway' to parenthood for domestic surrogacy arrangements.[107] The main features of this 'new pathway'[108] are: first, 'it would enable the intended parents to become the parents of the surrogate-born child at birth',[109] second, the intended parents and the surrogate have entered into a 'surrogacy agreement'[110] prior to conception, and third, 'the agreement must be supervised and counter-signed by either a regulated clinic or a regulated surrogacy organisation.'[111] Due to these reforms to the attribution of legal parenthood, parental orders would not be required for surrogacy arrangements within the 'new pathway'. The consultation paper seeks to incentivise intended parents to utilise the 'new pathway' by removing (in most cases)[112] the surrogate's legal parenthood from birth, and the uncertainty this creates for the intended parents, which is a perceived disadvantage for some intended parents of the current regime for domestic

parents from using international commercial surrogacy, or in the case of financial reasons from using the more expensive jurisdictions.

[106] Joint Consultation Paper, above n 7, para 14.47.

[107] The 'new pathway' is set out, ibid, in chapter 8. Full consideration of this proposal is outside the scope of this article.

[108] Access to the 'new pathway' would be subject to certain 'eligibility requirements', discussed, ibid, in chapters 12-13.

[109] Ibid, para 8.2.

[110] The content of these proposed agreements is specified, ibid, para 8.8.

[111] Ibid, para 8.6. The consultation paper considers the role of 'Regulated Surrogacy Organisations' (paras 9.38-9.83), proposing that they 'should be non-profit making bodies' (para 9.84).

[112] Subject to the surrogate having a 'right to object' for a short period after birth, ibid, paras 8.23-8.34.

surrogacy.[113] The anticipated outcome is that there will be far fewer surrogacy arrangements where the intended parents use the parental order process,[114] with that process largely being retained for international commercial surrogacy arrangements. Thus, the consultation paper's approach to payments should be understood in light of the significance of this proposed 'new pathway' to parenthood.

With that said, the consultation paper sets out 'three key criticisms' of the law and the chapter considering payments[115] begins with the starting point, 'the current position cannot be left unchanged.'[116] Despite this clarity regarding the need for reform, the consultation paper makes no specific proposals regarding the extent of permitted payments or the overarching basis for their regulation.[117] The Law Commissions note that this absence has occurred, '[i]n light of the strongly divergent views we have heard from stakeholders.'[118] This represents a strikingly equivocal approach, especially compared to the rest of the consultation paper, which contains recommendations for substantive (and in some cases fairly radical) reforms of other aspects of the legal regime.[119] I acknowledge that the consultation paper does not represent the final proposals concerning payments of this law reform project and that within the consultation process there is clearly a role for arguments based upon pragmatic considerations, because the Law Commissions are attempting to produce a proposal that commands sufficient government support to result in legislation. However, my concern is that the consequence of relying upon such arguments is that the criticisms of the current law regarding payments will not be effectively addressed.

To illustrate this, the chapter sets out eight categories of payments and invites views on whether these types of payment should be permitted.[120] The issue is the lack of an underpinning rationale for the basis on which payments will be allowed, and the risk that this lack of rationale

[113] As acknowledged by the consultation paper, ibid, para 16.2.
[114] Ibid.
[115] Ibid, chapter 15.
[116] Ibid, para 15.2.
[117] The only proposals regarding payments allow the surrogate to enforce any terms of a surrogacy arrangement relating to payments, ibid, paras 15.90-15.98. Their potential effectiveness will be considered below, at subsection B.2, 'Enforcement of Limitations on Payments'.
[118] Ibid, para 14.5.
[119] Ibid, the 'new pathway' to parenthood (ch 8), see further the proposal for a fully regulated regime for domestic surrogacy arrangements (ch 9), and the proposals regarding surrogate-born children's access to information regarding their genetic and gestation origins, including the creation of a 'National Register of Surrogacy Arrangements' (ch 10).
[120] Ibid, para 15.4.

may be reflected in the final proposals. The consultation paper justifies its approach by stating, 'this approach will provide a clearer picture of people's views on what payments should be permitted, and the circumstances in which payments should be able to be made.'[121] Given the 'strongly divergent views' identified by the consultation paper, I suggest that it seems unlikely that seeking further views on specific options will lead to consensus regarding the categories of payments that should be permitted and the underlying basis for such regulation. This pragmatic and 'consensus-seeking' approach means that currently there appears to be a lack of clear and coherent principles underpinning this part of the law reform project. If this lack of rationale is not addressed by the time of the final report, this may lead to one of the criticisms of the current law, the lack of certainty about the scale of permitted payments, not being effectively addressed. This will occur because the reformed legal regime for payments may lack an underlying regulatory rationale, reflecting the existing ambiguous position of payments, which is central to the criticisms of the current law. Therefore, the pragmatic approach adopted by the consultation paper may lead to the issues with the law being left unresolved.

This reflects the consultation paper's choice to avoid considering whether commercial surrogacy should be permitted and regulated domestically. Instead, the consultation paper frames the issues regarding payments to the surrogate differently and does not examine the long-standing arguments concerning the distinction between altruistic and commercial surrogacy, with that language described as not being, 'useful descriptions in considering… possible reforms'.[122] This view is expanded upon, with the consultation paper stating, 'we do not think that asking the question of whether surrogacy in the UK should be able to operate commercially, or only altruistically, answers the question of what payments the intended parents should be permitted to make to the surrogate.'[123] This statement is self-evidently correct on its own limited terms, given the diversity, discussed above in the introduction, that exists between different regulatory regimes for surrogacy arrangements described as both 'altruistic' and 'commercial'. However, I argue that the consultation paper should have more clearly framed its questions concerning payments, to more explicitly address whether payments to the surrogate for her services as a surrogate should be permitted and facilitated, because without addressing this issue, the overarching basis upon which payments are permitted is not clear and there is a lack of an underpinning regulatory rationale. Consequently, this lack of rationale will

[121] Ibid.
[122] Ibid para 2.14.
[123] Ibid, para 14.3.

potentially result in continuing uncertainty regarding the extent of payments that are permitted by the law.

1. THE CATEGORIES OF PAYMENTS AND THE LACK OF CERTAINTY

I will now consider the categories of payments that are included, the types of payments within these categories, how the categories relate to one another and how such payments appear to be justified. There is a notable distinction between those categories that are capable of being understood as 'expenses' and those that are clearly not expenses. First, three categories of 'costs' relating to the pregnancy and surrogacy arrangement are included.[124] These represent attempts to define permitted costs either narrowly or widely and I suggest that these categories represent three versions of one type of payment. Second, there are two categories relating to the surrogate's direct losses resulting from the surrogacy arrangement.[125] These five categories can be understood as representing forms of 'expenses' and can be justified on the same basis as the current regime. However, I argue that these categories, without either a requirement for detailed accounting of the payments, or enforceable limitations on their scale, would be subject to the same criticism as the current law – a lack of certainty about what payments are included within these categories and the extent of those permitted payments.[126] This is significant, because the uncertainty regarding the current legal regime drives some intended parents towards either 'enforceable' international commercial surrogacy arrangements or informal 'under the table' domestic arrangements.[127]

Third, three categories that are explicitly not expenses are included: 'Compensation for Pain and Inconvenience, Medical Treatment and Complications, and the Death of the Surrogate',[128] 'Gifts'[129] and 'Payment for Being a Surrogate'.[130] These categories require a different

[124] Ibid, 'Essential Costs Relating to the Pregnancy' (paras 15.17-15.21), 'Additional Costs Relating to the Pregnancy' (paras 15.23-15.25), and 'Costs Associated with a Surrogacy Arrangement and Pregnancy' (paras 15.27-15.28).
[125] Ibid, 'Lost Earnings' (paras 15.30-15.36), and 'Lost Entitlement to Social Welfare Benefits' (paras 15.39-15.46).
[126] Ibid, paras15.13-15.15, the consultation paper attempts to address this by suggesting that the surrogate be paid an 'allowance' rather than 'costs actually incurred'.
[127] I would like to thank one of the anonymous reviewers for making this point.
[128] Joint Consultation Paper, above n 7, paras 15.48-15.52.
[129] Ibid, paras 15.57-15.59.
[130] Ibid, paras 15.61-15.68.

regulatory rationale than those understood as expenses.[131] In terms of the former, while these payments are described as compensatory and are not strictly expenses, such payments directly relate to the potential (negative) consequences of the pregnancy and therefore appear capable of justification on a similar basis to those categories involving 'expenses'. As the consultation paper notes, some of the payments in this category are 'already provided for in some surrogacy arrangements.'[132] This suggests the consultation paper is attempting to formalise payments that are already being made and which are awkwardly situated within 'expenses reasonably incurred'. Regarding gifts, the consultation paper similarly observes that gifts are already relatively common, stating, '[i]t seems entirely natural that the intended parents may wish to express their gratitude to the surrogate by buying her a modest gift, such as an item of jewellery, as a reminder of what she has done for them.'[133] This appears to conceptualise, and hence justify, gifts as flowing naturally from the personal relationship that has been established between the intended parents and the surrogate. The consultation paper conceives of such gifts (if permitted) as being limited to those that are 'modest or reasonable',[134] so as to avoid the potential to circumvent any other limitations on payments.[135]

The final category represents the most significant departure from the current law; it is described as: 'provision could be made for the intended parents to pay a woman for her service as a surrogate'.[136] Evidently, this category involves payments that would not directly relate to expenses incurred. Within this, two options are provided: 'any sum of money agreed between the intended parents and the surrogate'[137] and 'a fixed fee set by the regulator'.[138] The consultation paper notes the 'risks of exploitation and commodification of women and children'[139] associated with the first option, while commenting of the second option, '[a] fixed fee could ensure that surrogates were paid fairly, but could be set at a level that removes (or at least reduces) the risk of women being financially motivated to become surrogates'.[140] This

[131] The High Court has been prepared to deem gifts 'expenses reasonable incurred', see *Re A (Infants)* [2016] EWFC 33, [2016] 6 WLUK 258, at [17], where Russel J accepted that 'payments for recuperation holidays' were expenses.
[132] Joint Consultation Paper, above n 7, para 15.48.
[133] Ibid, para 15.57.
[134] Ibid, para 15.58.
[135] Ibid, para 15.59.
[136] Ibid, para 15.61.
[137] Ibid, para 15.62.
[138] Ibid. The consultation paper notes any fixed fee 'would operate as a cap' and lower payments could be agreed: para 15.64.
[139] Ibid, para 15.63.
[140] Ibid, para 14.65.

'fixed fee' approach would partially address the issues of clarity and certainty regarding what payments are permitted, and as the consultation paper notes, '[a] fixed fee may reduce problems with enforcement, but it would not remove them entirely.'[141] If either option is to be adopted, the Law Commissions prefer the 'fixed fee', rather than allowing payments to be negotiated between the parties. However, this chapter does not include much detail as to the basis on which the fixed fee would be set. I argue that this reflects the lack of an explicit underlying regulatory rationale for payments. While the extent of such payments is not entirely clear from the consultation paper, undoubtedly this category would result in domestic surrogates being paid more than currently. It is apparent the Law Commissions recognise the significant implications of this category, stressing that: 'If the intended parents are able to pay a woman for her service as surrogate, then we need to clarify what the surrogate is being paid for. In particular, to avoid the payment being for the sale of the child, it would need to be linked to the surrogate's gestational services, and not to the transfer of the child, or to the acquisition of legal parenthood.'[142] The 'commercial' implications of this category, even under the 'fixed fee' option, are apparent and would undoubtedly reflect a significant rhetorical shift from the 'altruistic' model of surrogacy currently emphasised.

Thus, within the consultation paper there appear to be different rationales operating to justify different categories of payment. Of course, this may be resolved by the proposals in the final report, but I argue that the consultation paper's approach to which categories of payment should be allowed, and the basis for these categories, may result in continuing uncertainty as to the extent of permitted payments.

2. ENFORCEMENT OF LIMITATIONS ON PAYMENTS

Regardless of which categories are permitted, issues of enforcement remain, reflecting the second of the 'three key criticisms', that there are difficulties in enforcing limitations on payments, largely due to the operation of the parental order process. Despite acknowledging these issues, the consultation paper states, '[w]e do not…think that there are specific measures that should be introduced to assist in the enforcement of limitations on permitted payments where a parental order application is made after the birth of the child.'[143] Thus, the court would

[141] Ibid, para 15.64.
[142] Ibid, para 15.65.
[143] Ibid, para 15.83.

retain the capacity to authorise payments in excess of those permitted under the new legal regime.[144] This reflects the consultation paper's observation, 'we do not think that the parental order hearing, where the child's welfare is the paramount consideration, is the appropriate forum for enforcing any limitations that the law o [sic] imposes on payments.'[145] The paramountcy of the welfare of the child will continue in parental order applications. Therefore, the inability of the current law to enforce any limitations on payments, identified by the consultation paper and the academic literature, will remain unaddressed within the parental order process.

However, this lack of proposals should be understood in the context of the 'new pathway' to parenthood, discussed above. This attempts to enforce limitations on payments by creating a regulated system for domestic surrogacy arrangements and encouraging intended parents into that pathway instead of undertaking international commercial surrogacy. It is through the involvement of regulated, non-profit, third-party organisations that the consultation paper envisages the 'new pathway' will achieve effective limitations on payments, because, 'the organisation or clinics will have oversight and will be able to ensure that their terms comply with all legal requirements, including in respect of payments that are being made to the surrogate.'[146] The payments will be considered by the regulated organisation before birth, rather than through judicial assessment after birth, where the welfare of the child is the court's paramount consideration. The Law Commissions suggest that potential issues relating to proposed payments can be identified at this earlier stage and if these issues are not rectified, the surrogacy arrangement will not be 'counter-signed' by the regulated organisation and the 'new pathway', with its advantages, will no longer be available.

There are some proposals regarding enforcement of payments between the parties within this 'new pathway': as the consultation paper states, '[w]e provisionally take the view that the surrogate should be able to enforce the terms of a surrogacy agreement under the new pathway to parenthood insofar as they relate to the payment of money.'[147] This would provide protection for surrogates and would potentially be an additional incentive for surrogates to utilise the 'new pathway', because for surrogacy arrangements outside that pathway the terms of such

[144] Ibid, para 15.81.
[145] Ibid, para 15.83.
[146] Ibid, para 15.85.
[147] Ibid, para 15.95.

arrangements will remain unenforceable. The consultation paper's approach is premised upon the idea that the 'new pathway', with the availability of legal parenthood at birth, will be sufficiently attractive to both intended parents and surrogates. Thus, the protections offered by a fully regulated regime for surrogacy arrangements within this 'new pathway' will act as an 'enforcement' mechanism, limiting the scale and type of payments. This will occur due to the involvement of regulated surrogacy organisations within the process[148] and because the parties to domestic surrogacy arrangements will not want to fall outside of the scope of the 'new pathway' and into the parental order process. However, for those surrogacy arrangements that remain within the latter process, the issues concerning lack of effective limitations on payments will continue, because the consultation paper makes no proposals to address their causes in the operation of the court's power, under section 54(8) of the 2008 Act, to authorise payments which exceed those expressly permitted.[149]

3. THE DISPARITY BETWEEN PAYMENTS IN DOMESTIC AND INTERNATIONAL SURROGACY ARRANGEMENTS

The lack of proposed reforms to the parental order process leads to a similar argument regarding the third 'key criticism', the disparity between the payments permitted in domestic surrogacy and those authorised in international commercial surrogacy, not being fully addressed by the consultation paper. As stated above, no changes are proposed to the parental order process regarding enforcing limitations on payments.[150] The consultation paper observes that, because of the paramountcy of the welfare of the child, in parental order applications involving international surrogacy, 'the court is presented with a "done deal" of the child living with the intended parents in the UK.'[151] This occurs regardless of the extent of payments within these surrogacy arrangements, absent the 'clearest case of the abuse of public policy',[152] which has not occurred in any reported cases. The issues regarding the court's power to authorise payments in cases of international commercial surrogacy are not addressed by the consultation paper and will continue. Unless the law reform project proposes the UK adopt a fully marketized commercial system of regulation, which seems very unlikely, disparities between

[148] Ibid, para 15.86.
[149] Section C, 'The Framing of Payments Within the Reform Process' will consider some options the consultation paper could have adopted.
[150] Joint Consultation Paper, above n 7, para 15.83.
[151] Ibid, para 16.4.
[152] Hedley J in *Re L (A Child) (Parental Order: Foreign Surrogacy)* [2010] EWHC 3146 (Fam), [2011] 1 FLR 1423, at [10].

the payments made in domestic surrogacy arrangements and those authorised in international surrogacy arrangements will continue, regardless of any changes to the categories and extent of payments permitted domestically.

However, the consultation paper's approach is that the issues caused by international commercial surrogacy will be indirectly addressed by the creation of the 'new pathway' to parenthood. While it is not proposed that the 'new pathway' would apply to international surrogacy arrangements,[153] the assumption is that the existence of that option domestically will substantially affect the use of international surrogacy by intended parents; as it notes, '[w]e hope that one of the consequences of our reform of UK law will be to reduce the incidence of international surrogacy arrangements.'[154] Regardless of the extent to which this assumption proves true, the consultation paper is aware that, 'incidents of international surrogacy will undoubtedly remain.'[155] In these cases,[156] the issues of the current law will not be effectively addressed if the consultation paper's approach is retained by the proposals made in the final report. The complexity for any domestic legal regime of effectively regulating international surrogacy is clear and the consultation paper acknowledges, '[t]he difficulties that arise in international surrogacy arrangements cannot fully be addressed by national law.'[157] However, while agreeing that national legal regimes are limited in their capacity to regulate activities that take place outside their borders, I argue that the consultation paper's approach is still disappointing, given that it proposes virtually no changes, which will leave in place the system for granting parental orders in cases of international commercial surrogacy that has been so strongly criticised, including within the consultation paper.

To summarise, while I acknowledge and appreciate that this is only the consultation paper and the proposals for reform may develop and change substantially by the final report, I argue that the consultation paper's approach does not completely or effectively address any of its 'three key criticisms' of the current law.

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[153] Joint Consultation Paper, above n 7, para 8.2.
[154] Ibid, para 16.2.
[155] Ibid, para 16.2.
[156] The consultation paper proposes that the Secretary of State be given the power to determine, 'the legal parenthood of intended 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': ibid, para 16.91. Potentially causing a further reduction in cases of international surrogacy within the parental order process, if any jurisdictions were recognised.
[157] Ibid, para 16.8.

C. THE FRAMING OF PAYMENTS WITHIN THE REFORM PROCESS

In this section, in order to support my critique of the approach adopted by the consultation paper, I will briefly consider how the issue of payments to the surrogate could have been approached differently. My starting point is that the consultation paper has identified significant issues, the 'three key criticisms',[158] with the current legal regime regarding payments. Therefore, it seems reasonable to suggest that the law reform process is seeking, in so far as possible, to address those criticisms and to develop a reformed legal regime that is not itself subject to those same issues. Relatedly, as mentioned above, given that the existing system has been criticised for being piecemeal and unprincipled, I argue that ensuring that the reformed system is based upon a principled approach, and underpinned by a clear regulatory rationale, is crucial to effectively addressing the 'three key criticisms' of the current regime. However, the consultation paper is understandably concerned by the lack of consensus amongst stakeholders about a range of issues relating to payments.[159] My argument is that due to emphasising and focusing upon these pragmatic considerations the consultation paper has framed its approach to, and its questions regarding, payments in a manner that does not indicate the underlying basis upon which payments will be regulated.[160] In this article, my concern is not the normative question of what that underlying regulatory basis should be, but rather simply that any such basis can be identified within the reformed legal regime regarding payments. As described above, there are two (related) contexts where the consultation paper's approach is problematic: first, the basis upon which payments are regulated within the regime for domestic surrogacy arrangements, and second, the approach of the domestic regime to international commercial surrogacy arrangements, where the payments will likely exceed those permitted domestically.

Regarding domestic surrogacy arrangements, I have argued above that the current approach situates payments in an ambiguous regulatory position because payments are neither prohibited nor endorsed.[161] This position has resulted in uncertainty regarding the scale of payments that are permitted. Therefore, I argue that the fundamental point of any proposed reform must be to

[158] Ibid, para 14.23.
[159] Ibid, para 14.5.
[160] Set out above in section B, 'The Consultation Paper's Approach to Payments'.
[161] Section A, 'The Current Legal Position Concerning Payments'.

address this ambiguous position and set out the principled basis upon which payments are permitted within domestic surrogacy arrangements so as to remove this uncertainty for intended parents and surrogates. The consultation paper clearly envisages that the 'new pathway' to parenthood, and the involvement within that pathway of regulated surrogacy organisations, will provide greater clarity and certainty for domestic surrogacy arrangements within the legal regime.[162] The consultation paper's approach seeks to reduce some of the ambiguity through this new regulatory framework. However, my argument is that whatever the ultimate success of the 'new pathway', this should be accompanied by a principled rationale for the basis upon which payments are permitted within the overarching regulatory framework. This could occur through a clarification and strengthening of the current approach based upon 'altruism' and a resulting model in which only clearly defined 'expenses' can be paid to the surrogate. Alternatively, this could be achieved through a model of payments based upon providing 'compensation' for the surrogate for various costs incurred as a result of the surrogacy. Another option would be a model which clearly and explicitly accepts that the surrogate can be paid for her services as a surrogate, whether or not that acceptance is accompanied by any other aspects of a fully marketized regime of 'commercial surrogacy'. In this article, it is not my intention to make moral or ethical judgements about these different potential approaches, or to assess their relative merits, or to suggest which approach should underpin the regulatory system relating to payments to surrogates within domestic surrogacy arrangements. Rather, I am arguing that what is important is that a much more explicit choice is made between these different available rationales for payments within the law reform process. Indeed, I argue that without clarity regarding underpinning principles, there is the potential that the problems of the current legal regime will not be effectively addressed, and the uncertainty regarding the scale of permitted payments will continue under the reformed legal regime.

In the context of the domestic legal regime's approach to international commercial surrogacy arrangements, the consultation paper intends for the parental order process to be retained in cases not covered by the 'new pathway' to parenthood, including those involving international commercial surrogacy.[163] While the consultation paper is proposing some reforms to the parental order process,[164] as mentioned above, this does not involve any proposals concerning

[162] Joint Consultation Paper, above n 7, para 16.2.
[163] Ibid, para 16.89.
[164] Ibid, chapters 11 and 12.

effective limitation on the scale of payments authorised within the parental order process.[165] Given the criticism within the consultation paper and the academic literature of the judicial approach to section 54(8) of the 2008 Act, it is surprising that there is not an explicit rejection of post-birth judicial consideration of payments to the surrogate, and it is striking that this much criticised part of the parental order process appears likely to be retained. As the consultation paper acknowledges, the role of the welfare of the child within parental order applications renders any consideration of payments through that process ineffective, because the parental order process does not (and cannot) provide the opportunity to enforce any limitation on the scale of payments.[166] Similarly to the approach to payments within the domestic surrogacy regime, there are various different options that could have been taken to reform in this context. These include the court taking a much stricter approach to payments within the parental order process,[167] the scrapping of the parental order process and its replacement with a different regulatory framework for the attribution of legal parenthood outside the new pathway, or most simply, completely removing the provisions relating to payments from the reformed parental order process. Even accepting that the parental order process should be retained, as the consultation paper does, given its explicit acknowledgment that there is no possibility of effective judicial scrutiny of the scale of payments within that process, I argue that it would be simpler to remove any provision regarding the extent of payments from the parental order process, thereby entirely eliminating any comparison with the payments which are permitted domestically. It appears unnecessary for the judiciary to engage in apparent scrutiny of the scale of payments made in international commercial surrogacy arrangements when any payments in excess of those permitted domestically will inevitably be authorised. Such an approach would more accurately reflect that when international commercial surrogacy is being considered judicially, it is compliance with the underlying regulatory regime in the foreign jurisdiction that is effectively being scrutinised by the court.[168] Although, even this scrutiny remains limited in scope, given that it continues to be subject to the paramountcy of the welfare of the child within the parental order process. Ultimately, my point is that if the regulatory approach accepts a difference in the scale of payments permitted in domestic surrogacy

[165] Ibid, para 15.83.
[166] Ibid, paras 15.77-15.88.
[167] Ibid, para 14.35, the consultation paper notes, 'one option for reform would be to remove the ability of the court to authorise payments in excess of expenses, and to refuse parental orders where payments in excess of expenses have been made.' Before rejecting this as neither, 'practicable or desirable', para 14.36.
[168] This is already what the 'three questions' approach of Hedley J, currently utilised in decisions on s 54(8), appears to be focusing judicial attention upon.

arrangements and those sanctioned in international surrogacy arrangements then this acceptance should be explicit, rather than implied.

With that said, across both of these contexts, in this article it is not my intention to suggest which of these different options should have framed the approach of the law reform process to payments to surrogates, or what the principles that underpin the ultimate proposals of the law reform project should be. Rather, I am making a narrower argument – that it is crucial that the approach to payments is underpinned by a principled and coherent rationale, regardless of the substantive moral or ethical content of that rationale, because otherwise the final proposals may lead to a reformed system that continues to be undermined by the same issues as the current legal regime.

CONCLUSION

This article has explored the ambiguous position of payments from the intended parents to the surrogate within both the current law and the ongoing law reform process in the UK. To that end, I argued that the Joint Consultation Paper of the Law Commission of England and Wales and the Scottish Law Commission does not effectively address the ambiguity and uncertainty regarding payments to the surrogate through its proposals concerning the regulation of such payments. The current legal regime has been subjected to sustained academic criticism and the consultation paper sets out 'three key criticisms' regarding payments and is explicit, 'that the current position cannot be left unchanged.'[169] Despite this clarity regarding the need for reform, the consultation paper adopts a pragmatic and equivocal approach to payments. Consequently, I argued that the proposals ultimately produced by the law reform project, unless significantly changed, may not effectively address the criticisms identified by the consultation paper. Relatedly, I argued that the law will continue to lack an underlying regulatory rationale, which will undermine its capacity to provide effective regulation of such payments. Fenton-Glynn has previously observed: 'English law is at an impasse: we do not effectively ban commercial surrogacy, but we do not effectively regulate it either.'[170] The consultation paper chooses to ignore this impasse, instead framing the issues concerning payments as not requiring a choice

[169] Joint Consultation Paper, above n 7, para 15.2.
[170] Fenton-Glynn, above n 104, 75.

between altruistic and commercial models of surrogacy. I argued that this framing underpins the ambiguous position of payments within the consultation paper, because the central regulatory question of whether payments to the surrogate for her services as a surrogate should be permitted and facilitated is elided and the justifications for different categories of payments are not based upon an overarching rationale and are thus piecemeal, contestable, and unclear.

The consultation paper suggests that its proposed 'new pathway' to parenthood and the regulated regime for domestic surrogacy arrangements will address many of the issues regarding payments through the pre-birth involvement of regulated organisations and clinics, and by significantly reducing the use of international commercial surrogacy by UK intended parents. The Law Commissions may be proved correct that this 'new pathway' will change the behaviour of intended parents, encouraging use of (regulated) domestic surrogacy and resulting in far fewer cases of international commercial surrogacy requiring judicial consideration. Regardless of the impact of the 'new pathway', absent either enforceable legal rules regarding permissible payments in any surrogacy arrangement or a system which allows for free negotiation of payments between the parties, neither of which appear likely to be ultimately proposed, there will continue to be difficult issues regarding how payments that exceed those expressly allowed should be addressed by the legal regime. Under the judicial interpretation of section 54(8) of the 2008 Act, payments that exceed 'expenses reasonably incurred' do not, in practice, limit the ability of the intended parents to be granted a parental order. It is apparent that effective regulation of payments within the parental order process is not possible, and the consultation paper does not propose any reforms to this aspect of the legal regime. Given this, I argued that the varied and extensive criticisms of the current law will continue to some extent, due to the proposed residual role of the parental order process for those cases outside the 'new pathway', including international commercial surrogacy. Therefore, whatever the ultimate success of the 'new pathway', this proposal on its own cannot completely address the ambiguous position of payments to the surrogate within the law.

This article has argued that there is a tension within the consultation paper regarding payments from the intended parents to the surrogate. This exists between its criticisms of the current law and its proposals for reform of the regulation of such payments. I agree with the consultation paper's 'three key criticisms' of the current law, but I argued that the consultation paper's equivocal framing of the issue of payments will not effectively address these criticisms. This

represents a missed opportunity, which fortunately there remains time to address within the ongoing law reform project before the final proposals are published next year.