



House of Commons  
House of Lords

Joint Committee on Human  
Rights

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# Draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018 - Second Report

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**Fourteenth Report of Session 2017–19**

*Report, together with formal minutes  
relating to the report*

*Ordered by the House of Commons  
to be printed 14 November 2018*

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and House of Lords

## Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

### Current membership

#### House of Commons

[Ms Harriet Harman QC MP](#) (*Labour, Camberwell and Peckham*) (Chair)

[Fiona Bruce MP](#) (*Conservative, Congleton*)

[Ms Karen Buck MP](#) (*Labour, Westminster North*)

[Alex Burghart MP](#) (*Conservative, Brentwood and Ongar*)

[Joanna Cherry QC MP](#) (*Scottish National Party, Edinburgh South West*)

[Jeremy Lefroy MP](#) (*Conservative, Stafford*)

#### House of Lords

[Baroness Hamwee](#) (*Liberal Democrat*)

[Baroness Lawrence of Clarendon](#) (*Labour*)

[Baroness Nicholson of Winterbourne](#) (*Conservative*)

[Baroness Prosser](#) (*Labour*)

[Lord Trimble](#) (*Conservative*)

[Lord Woolf](#) (*Crossbench*)

### Powers

The Committee has the power to require the submission of written evidence and documents, to examine witnesses, to meet at any time (except when Parliament is prorogued or dissolved), to adjourn from place to place, to appoint specialist advisers, and to make Reports to both Houses. The Lords Committee has power to agree with the Commons in the appointment of a Chairman.

### Publication

Committee reports are published on the Committee's website at [www.parliament.uk/jchr](http://www.parliament.uk/jchr) by Order of the two Houses.

### Committee staff

The current staff of the Committee are Eve Samson (Commons Clerk), Simon Cran-McGreehin (Lords Clerk), Eleanor Hourigan (Counsel), Samantha Godec (Deputy Counsel), Katherine Hill (Committee Specialist), Shabana Gulma (Specialist Assistant), Miguel Boo Fraga (Senior Committee Assistant) and Heather Fuller (Lords Committee Assistant).

### Contacts

All correspondence should be addressed to the Clerk of the Joint Committee on Human Rights, Committee Office, House of Commons, London SW1A 0AA. The telephone number for general enquiries is 020 7219 2467; the Committee's email address is [jchr@parliament.uk](mailto:jchr@parliament.uk)

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## Summary

As the law stands, where a child is born as the result of a surrogacy arrangement, a couple can apply for a parental order for that child within a period of six months after its birth, providing that the gametes of at least one of them were used to bring about the creation of the embryo. A single person whose gametes were used to create an embryo carried by a surrogate cannot do so. At the heart of this issue is the right to family life and the right of children and their biological parent to have their parental relationship legally recognised following a surrogacy arrangement, whether that parent is in a relationship with another person or not.

In *Re Z (A Child) (No. 2)*<sup>1</sup> the court found this distinction between single parents and couples was incompatible with the right to private and family life and to non-discrimination under the European Convention on Human Rights 1950 (“Convention”). On 29 November 2017 a proposal for a draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018 was laid before both Houses.<sup>2</sup> The Joint Committee produced its Report on this proposal, “Proposal for a Draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018” on 2 March 2018.<sup>3</sup>

The Government then laid a revised draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018, together with the Government’s Response.<sup>4</sup> The Committee is now considering this revised draft remedial Order, which seeks to remedy the incompatibility of section 54 of the Human Fertilisation and Embryology Act 2008 (“HFEA”) and also seeks to make the necessary consequential amendments that follow from those changes.

In Chapter 3 of our first Report we raised concerns that the proposed draft remedial Order still discriminated against some people based on family relationship status, in particular due to the requirement to prove that one is not in a relationship (such as an enduring family relationship) and the requirement to prove that a separation was permanent in order to be eligible for a parental order. We are pleased that the revised draft order now enables sole applications from biological parents regardless of relationship status.

We are content that the Government has revised its draft Order and has adequately taken into consideration the drafting points made in Chapter 4 of our first Report. The Government has also helpfully provided explanations and information in their response which respond to the other points made in our first Report.

The Committee considers that the procedural requirements of the Human Rights Act 1998 (“HRA”) for the use of the remedial power have been met in this case and considers that the draft Order remedies the incompatibility identified by the Courts.

1 *Z (A Child) (No. 2)* [2016] EWHC 1191 (Fam)

2 HC Deb, 29 November 2017, [col 282WS](#) and HL Deb, 29 November 2017, [col 282WS](#)

3 Joint Committee on Human Rights, Second Report of Session 2017–19, [Proposal for a Draft Human Fertilisation and Embryology Act 2008 \(Remedial\) Order 2018](#), HL Paper 68 / HC 645

4 Department of Health and Social Care, [The Government’s Response to the Joint Committee for Human Rights 2nd 2018 Report: Proposal for a Draft Human Fertilisation & Embryology Act 2008 \(Remedial\) Order 2018](#), July 2018

The Committee concludes, after taking into account representations made, that the special attention of each House is not required to be drawn to the draft order on any of the relevant grounds, or on any other grounds, and recommends that the draft order should be approved.

# Recommendation

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## Introduction

1. This remedial order concerns the rights of children and their biological parent to have their parental relationship legally recognised following a surrogacy arrangement, whether that parent is in a relationship with another person or not.

2. At present, there are children who live with their biological parent, but where the parental relationship cannot be legally recognised due to the fact that the Human Fertilisation and Embryology Act 2008 (“HFEA”) requires any application for a parental order after a surrogacy arrangement to be made by two people who are married, civil partners or in an “enduring family relationship”. Where a single person wishes to apply for a parental order the child will be in legal limbo. Even though the child may be living in a healthy and happy environment with that parent, the lack of legal recognition can lead to a significant amount of uncertainty for these families.

3. In *Re Z (A Child) (No. 2)*,<sup>5</sup> the UK Courts found section 54 of the HFEA to be discriminatory, contrary to Article 14 (prohibition on discrimination) taken in conjunction with Article 8 (right to private and family life) of the European Convention on Human Rights (“Convention”), given that the parent’s relationship status can preclude whether or not a child will be legally recognised as the child of their biological parent.

4. The Human Rights Act 1998 provides that where a court has found legislation to be incompatible with a convention right, Ministers may correct that incompatibility through a “remedial order”, and may use such an order to amend primary legislation.<sup>6</sup> There are special provisions to ensure that this power is not misused.<sup>7</sup>

5. The Government proposed a draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018 to remedy the incompatibility of section 54 of the HFEA with the rights under the Convention, and to remove the discrimination found by the Court in *Re Z (A Child) (No. 2)*. This draft Order, together with the required information, was laid before both Houses on 29 November 2017. As is required, the Joint Committee produced its Report on this proposed Order “Proposal for a Draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018” on 2 March 2018.<sup>8</sup>

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5 *Z (A Child) (No. 2)* [2016] EWHC 1191 (Fam)

6 See Human Rights Act 1988, [section 10](#) & [schedule 2](#)

7 In the non-urgent procedure, a proposal for a draft has to be laid before Parliament for 60 days, during which representations may be made. If the Government decides to proceed, it will then lay a draft Order, accompanied by a statement responding to the representations and explaining what changes, if any, have been made to the draft in consequence. In order to be made, the draft Order must be approved by each House of Parliament, a further 60 days after laying. There is also an urgent procedure, in which the Minister may lay a made order, but there is a period of 120 days (again, divided in two 60 day periods) during which representations may be made and responded to. In both cases, each House of Parliament must then approve the Order if it is to have effect (or continuing effect in the case of the urgent procedure).

8 Joint Committee on Human Rights, Second Report of Session 2017–19, [Proposal for a Draft Human Fertilisation and Embryology Act 2008 \(Remedial\) Order 2018](#), HL Paper 68 / HC 645

6. A revised draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018 was subsequently laid before Parliament on 18 July 2018. This was accompanied by the Government's Response<sup>9</sup> to the Committee's earlier Report.

7. The Committee's Standing Orders require us to report to each House—

- Whether the special attention of each House should be drawn to the draft order on any of the grounds on which the Joint Committee on Statutory Instruments may so report in relation to most other statutory instruments; and
- Our recommendation whether the draft order should be approved.<sup>10</sup>

8. We issued a call for evidence on the Government's proposal on 19 July 2018 and received seven written submissions, all of which supported this Order being approved without delay. We are grateful to all those who responded to our call for evidence or drew our attention to other relevant information. A list of those who contributed is included at the back of this Report and all written submissions we received can be found on our website.<sup>11</sup>

## The Government's response to our first Report on the proposal for a draft Order

9. In our first Report we considered that the procedural requirements of the HRA had been met—the Government's reasons for proceeding by way of remedial order were sufficiently compelling reasons and using the non-urgent procedure struck a reasonable balance. However, we recommended that the Government clarify its reasons for proceeding by way of non-urgent procedure as this information was missing from the earlier required information. We are now pleased to see that this has been addressed in the Government's Response to the Committee's report.<sup>12</sup>

10. In Chapter 3 of our first Report we raised concerns that the proposed draft remedial Order still discriminated against some people based on family relationship status, in particular due to the requirement to prove that one is not in a relationship (such as an enduring family relationship) and the requirement to prove that a separation was permanent in order to be eligible for a parental order. We are pleased that the revised draft order now enables sole applications from biological parents regardless of relationship status.

11. We are content that the Government has revised its draft Order and has adequately taken into consideration the drafting points made in Chapter 4 of our first Report. The Government has also helpfully provided explanations and information in their response which respond to the other points made in our first Report.

9 Department of Health and Social Care, [The Government's Response to the Joint Committee for Human Rights 2nd 2018 Report: Proposal for a Draft Human Fertilisation & Embryology Act 2008 \(Remedial\) Order 2018](#), July 2018

10 House of Commons, Standing Orders, Public Business 2017, HC 4, [152\(B\)](#), and The Standing Orders of The House of Lords relating to Public Business 2016, HL Paper 3, [72\(c\)](#)

11 Joint Committee on Human Rights, [Publications](#)

12 Department of Health and Social Care, [The Government's Response to the Joint Committee for Human Rights 2nd 2018 Report: Proposal for a Draft Human Fertilisation & Embryology Act 2008 \(Remedial\) Order 2018](#), July 2018, see paras 3.2–3.5

12. Finally, we note that the Department has tidied up some of the drafting in the Schedules since it laid the proposal for a draft Order. Whilst much of this is an improvement, we had a further concern that the new drafting in paragraph 7(20) of Schedule 2 to the draft Order could be defective now that the wording has been changed in between the proposal for a draft Order and the draft order being laid. The wording of new Regulation 20A which this sub-paragraph inserts appears to contain a drafting error by the omission of the word 'substitute' which gives rise to a lack of clarity as to the modification being made. However, the Department informed us that they do not think that the court could interpret this as anything other than "substitute".

### **Does the draft Order remedy the incompatibility?**

13. **The Committee welcomes the Government's acceptance of our recommendations in our first Report and the amendments it has made to the draft Order to give effect to those recommendations.**

14. **We consider that the procedural requirements of the Human Rights Act 1998 for the use of the remedial power have been met in this case and consider that the draft Order remedies the incompatibility identified by the Courts.**

15. *The Committee concludes, after taking into account representations made, that the special attention of each House is not required to be drawn to the draft order on any of the relevant grounds, or on any other grounds.*

16. *We consider that there are no reasons why this Order should not be agreed to by both Houses of Parliament. We therefore recommend that the draft order should be approved.*

## Conclusions and recommendations

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1. The Committee welcomes the Government's acceptance of our recommendations in our first Report and the amendments it has made to the draft Order to give effect to those recommendations. (Paragraph 13)
2. We consider that the procedural requirements of the Human Rights Act 1998 for the use of the remedial power have been met in this case and consider that the draft Order remedies the incompatibility identified by the Courts. (Paragraph 14)
3. *The Committee concludes, after taking into account representations made, that the special attention of each House is not required to be drawn to the draft order on any of the relevant grounds, or on any other grounds.* (Paragraph 15)
4. *We consider that there are no reasons why this Order should not be agreed to by both Houses of Parliament. We therefore recommend that the draft order should be approved.* (Paragraph 16)

# Declaration of Interests<sup>1</sup>

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## **Baroness Hamwee**

- No relevant interests to declare

## **Baroness Lawrence of Clarendon**

- No relevant interests to declare

## **Baroness Nicholson of Winterbourne**

- No relevant interests to declare

## **Baroness Prosser**

- No relevant interests to declare

## **Lord Trimble**

- No relevant interests to declare

## **Lord Woolf**

- No relevant interests to declare

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<sup>1</sup> A full list of Members' interests can be found in the Register of Lords' Interests: <https://www.parliament.uk/mps-lords-and-offices/standards-and-financial-interests/house-of-lords-commissioner-for-standards-/register-of-lords-interests/>

# Formal minutes

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**Wednesday 14 November 2018**

Members present:

Rt Hon Harriet Harman MP, in the Chair

Fiona Bruce MP	Baroness Lawrence of Clarendon
Ms Karen Buck MP	Baroness Nicholson of Winterbourne
Jeremy Lefroy MP	Lord Trimble
	Lord Woolf

Draft Report (*Draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018 – Second Report*), proposed by the Chair, brought up and read.

*Ordered*, That the Chair's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 16 be read and agreed to.

Summary agreed to.

*Resolved*, That the Report be the Fourteenth Report of the Committee.

*Ordered*, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

[Adjourned till 21 November 2018 at 3.00pm]

## Published written evidence

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The following written evidence was received and can be viewed on the [inquiry publications page](#) of the Committee's website.

DHE numbers are generated by the evidence processing system and so may not be complete.

- 1 Anonymous 1 ([DHE0002](#))
- 2 Anonymous 2 ([DHE0003](#))
- 3 British Association of Social Workers PROGAR group ([DHE0001](#))
- 4 Jason Brown ([DHE0004](#))
- 5 Mr David Watkins ([DHE0007](#))
- 6 Surrogacy UK ([DHE0005](#))
- 7 Surrogacy UK Working Group on Surrogacy Law Reform ([DHE0006](#))

## List of Reports from the Committee during the current Parliament

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All publications from the Committee are available on the [publications page](#) of the Committee's website. The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

### Session 2017–19

First Report	Legislative Scrutiny: The EU (Withdrawal) Bill: A Right by Right Analysis	HC 774 HL 70
Second Report	Proposal for a Draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018	HC 645 HL 86
Third Report	Legislative Scrutiny: The Sanctions and Anti-Money Laundering Bill	HC 568 HL 87
Fourth Report	Freedom of Speech in Universities	HC 589 HL 111
Fifth Report	Proposal for a draft British Nationality Act 1981 (Remedial) Order 2018	HC 926 HL 146
Sixth Report	Windrush generation detention	HC 1034 HL 160
Seventh Report	The Right to Freedom and Safety: Reform of the Deprivation of Liberty Safeguards	HC 890 HL 161
Eighth Report	Freedom of Speech in Universities: Responses	HC 1279 HL 162
Ninth Report	Legislative Scrutiny: Counter-Terrorism and Border Security Bill	HC 1208 HL 167
Tenth Report	Enforcing Human Rights	HC 669 HL 171
Eleventh Report	Second Legislative Scrutiny Report: Counter-Terrorism and Border Security Bill	HC 1616 HL 195
Twelfth Report	Legislative Scrutiny: Mental Capacity (Amendment) Bill	HC 1662 HL 208
Thirteenth Report	Proposal for a draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2018	HC 1451 HL 209
First Special Report	Human Rights and Business 2017: Promoting responsibility and ensuring accountability: Government Response to the Committee's Sixth Report of Session 2016–17	HC 686
Second Special Report	Mental Health and Deaths in Prison: Interim Report: Government Response to the Committee's Seventh Report of Session 2016–17	HC 753
Third Special Report	Legislative Scrutiny: Counter-Terrorism and Border Security Bill: Government Response to the Committee's Ninth Report of Session 2017–19	HC 1578

Fourth Special Report Windrush generation detention: Government  
Response to the Committee's Sixth Report of  
Session 2017–19

HC 1633