House of Lords
House of Commons
Joint Committee on Human Rights

Proposal for a Draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018

Second Report of Session 2017–19

Report, together with formal minutes relating to the report

Ordered by the House of Lords to be printed 28 February 2018

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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.

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Committee staff

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Summary

1. 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.

2. In Re Z (A Child) (No. 2)¹ 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”). The Committee welcomes the Government’s action in proposing the draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018 to remedy the incompatibility of section 54 of the Human Fertilisation and Embryology Act 2008 (“HFEA”) and also in seeking to make the necessary consequential amendments that follow from those changes.

3. The power to amend statute by delegated legislation is unusual and carefully controlled. The Committee considers that the procedural requirements of the Human Rights Act 1998 (“HRA”) HRA have broadly been met in this case. The reasons relied on by the Government for proceeding by way of remedial order rather than by Bill are clearly capable of being sufficiently “compelling reasons”. Further, remedying the incompatibility by way of a non-urgent order, rather than an urgent order, strikes a reasonable balance between the competing considerations of the need to avoid undue delay before remedying the incompatibility and the need to afford a proper opportunity for parliamentary scrutiny.

4. The Remedial Order seeks to remedy the incompatibility by inserting a new s54A into the HFEA, which allows one person to apply for a parental order but only to do so if he or she is not in an enduring family relationship. According to that proposed drafting, if that person is considered by the Courts to be in an enduring family relationship with a partner, then they can only apply for a parental order as part of a couple and their partner will then be recognised as an equal parent of the child (whether or not that partner has any biological relationship to the child). The Government has not explained why it is necessary for someone applying for an order to prove that they are not in an enduring family relationship (something which might be relevant in an application for adoption) in order to have their biological relationship with their child legally recognised under HFEA. Nor has the Government explained why it is necessary to require a single parent’s partner with no biological relationship to the child (and no desire to be recognised as such a parent) to be recognised as that child’s parent merely in order for the biological parent to be so recognised. The State would not seek to create such barriers to the legal recognition of the relationship between a biological parent and child where there was no surrogacy arrangement involved. It seems surprising that a single applicant parent should need to prove to the Courts that they are not in an enduring family relationship with their partner, or that such a partner should be forced either to become an equal parent of that child or to effectively veto the recognition of that parent-child biological relationship. In this context, the Committee draws the special attention of both Houses to the proposed Order on the

¹ Re Z (A Child) (No. 2) [2016] EWHC 1191 (Fam)
grounds that it makes an unexpected use of the enabling power. Moreover, we draw the attention of both Houses to a doubt as to whether the Order is intra vires. This is because the vires in section 10 of the HRA are for the Minister “to make such amendments to the legislation as he considers necessary to remove the incompatibility”; this Order does not adequately remove the incompatibility because it fails to address the human rights of a child and his/her biological parent, where that parent also wants to assert the human rights associated with building an enduring family relationship, without requiring their (new) partner to assert a non-existent quasi-biological relationship with a child.

5. Draft section 54A(3) requires a person who has separated from their spouse or civil partner to prove to the Courts that their separation is likely to be permanent. Given that applications for parental orders must be made within 6 months of a child’s birth this may not be possible, and the child concerned could be left in legal limbo. Were this drafting to remain, the Committee would want to bring the special attention of the two Houses to subsection (3)(b) of the proposed section 54A of the HFEA on the grounds that there is a doubt whether it is intra vires, because it goes beyond the minimum amendments necessary to remove the incompatibility, by imposing a condition which may be difficult to satisfy and is not related to any obvious policy justification.

6. The Committee notes that the Order has already required correction of a serious drafting defect and the report explores further possible drafting defects in the proposed Order (see Chapter 4 of this Report). The Committee welcomes the Department’s commitment to making amendments to the draft Order as necessary.

7. Finally, the Committee encourages the Government to remedy outstanding incompatibilities with Convention rights as swiftly as possible; clarifies its understanding of the scope of section 10 HRA; encourages the Government to clarify how it considers the Courts would apply the six month deadline; notes with interest the forthcoming work of the Law Commission on surrogacy; and seeks clarification from the Government that it has complied with the consent requirements in relation to Schedule 2.

8. **While the Committee welcomes the Government’s decision to use the remedial order process in this case, in the report we raise a number of significant concerns about the Government’s drafting approach. We recommend that the proposals are amended to address these drafting concerns and that the Government then lay that draft order before both Houses.**
1 Introduction

The Issue that the proposed draft Order addresses

9. 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.

10. 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.

11. In Re Z (A Child) (No. 2), the UK Courts have 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.

12. The purpose of this Order is 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). The Committee welcomes the Government’s action in proposing the draft Order to remedy the incompatibility of the Human Fertilisation and Embryology Act with the Convention rights to private and family life and to non-discrimination and to make the necessary consequential amendments that follow from those changes.

Legislative context

13. The HFEA regulates the legal recognition of parent-child relationships following a surrogacy arrangement. Parental orders made under section 54 HFEA transfer parental responsibility to the applicants (at least one of whose gametes must have been used to create the embryo), and extinguish the parental rights of the woman who carried the child.

14. The court’s assessment of the parental order application is always made with the best interests of the child in mind. However, in contrast to adoption law, section 54 HFEA currently only allows for couples (“two people”) and not single people to obtain a parental order following a surrogacy arrangement. Under section 54(2) a couple covers marriage, civil partnerships or a couple living as partners in an enduring family relationship and which are not within prohibited degrees of relationship to each other. This restriction to “two people” has been creating anomalies in family relationships and status for children born following a surrogacy arrangement where, for whatever reason, their gamete-
donating biological parent did not fit the “two people” requirement in section 54 HFEA due to their relationship status and therefore their parent-child biological relationship could not be legally recognised.

**Litigation history**

15. In *Z (A Child) (1)*, the Court had to consider whether section 54 HFEA could be interpreted ("read down"), using section 3 of the Human Rights Act 1998 ("HRA"), so that the reference to applications from “two people” could also allow applications to be made by single parents. The High Court held that section 54 could not be so interpreted. It found that the question of who can be a parent - “two people” - is a fundamental feature of the legislation, such that to construe section 54 as applying to single people would not be “compatible with the underlying thrust of the legislation”\(^4\). However, the Court noted that the applicant might wish to seek a declaration of incompatibility under section 4 HRA.

16. The applicant (the father) then brought a second case, *Z (A Child) (No. 2)*, in which he sought a declaration of incompatibility in relation to section 54 HFEA. The applicant submitted that the provision was incompatible with the rights of the father and/or the child under Article 8 (right to private and family life) or Article 8 taken in conjunction with Article 14 (non-discrimination).

17. The applicants position is supported by ECHR case-law, such as *Mennesson v France*\(^5\) and *Labasee v France*\(^6\) which found that a child’s Article 8 rights could be engaged by a refusal by the State to recognise the child’s relationship to its biological parent following a surrogacy arrangement. It is also worth noting in this context, *Wagner v Luxembourg*\(^7\), which found (amongst other violations) that it was unlawful discrimination contrary to Article 14 taken with article 8 to refuse to recognise an inter-country adoption by a single adoptive parent, where the State would recognise a couple’s application.

18. In *Z (A Child) (No. 2)*, the Government conceded incompatibility under Article 14 taken in conjunction with Article 8, acknowledging that section 54 HFEA was discriminatory against single people. In light of this, the Court therefore did not hear further arguments and did not pronounce as to whether article 8 alone was engaged. The Court did make an order declaring that “sections 54(1) and (2) HFEA are incompatible with the rights of the applicant [father] and second respondent [child] under Article 14 taken in conjunction with Article 8 insofar as they prevent the applicant from obtaining a parental order on the sole ground of his status as a single person as opposed to being part of a couple”.

**The Committee’s role**

19. 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.\(^8\) There are special provisions to ensure that this power is not misused. In the non urgent
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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 the have effect (or continuing effect in the case of the urgent procedure).

20. A proposal for a draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018, together with the required information, was laid before both Houses on 29 November 2017.

21. The Committee’s Standing Orders require us to report to each House our recommendation as to whether a draft order in the same terms as the proposal should be laid before Parliament, and we may also report on any matter arising from our consideration of the proposal. The Committee notably reports on the technical compliance of any remedial order with the HRA and notes whether the special attention of each House should be drawn to the Order on any of the grounds specified in the Standing Orders relating to the Joint Committee on Statutory Instruments (“JCSI”).

22. We issued a call for evidence on the Government’s proposal on 5 December 2017 and received 14 written submissions. 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. We have also been in contact with officials from the Department of Health and Social Care who helpfully provided a further information note on 8 February 2018.

Matters for consideration

23. In order to adequately consider the proposed order, the Committee generally asks:

- Have the conditions for using the remedial order process (section 10 and Schedule 2 HRA) been met?
- Are there “compelling” reasons for the Government to remedy the incompatibility by remedial order?
- Is the procedure adopted (non-urgent or urgent) appropriate?
- Has the Government produced the required information and effectively responded to other requests for information from the Committee?

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9 House of Commons, Standing Orders, Public Business 2017, HC 4, 152(8), and The Standing Orders of The House of Lords relating to Public Business 2016, HL Paper 3, 72(c)
10 Secretary of State for Health, The Government’s Response to an incompatibility in the Human Fertilisation & Embryology Act 2008: A remedial order to allow a single person to obtain a parental order following a surrogacy arrangement, November 2017, Cm 9525
• Does the proposed order remedy the incompatibility with Convention rights and is it appropriate? For example, is any additional provision contained in the proposed order appropriate and *intra vires* - and does the proposed order omit additional provisions which it should have contained?

• Are the criteria of technical propriety applied by the JCSI are satisfied?

24. The relevant grounds on which the JCSI can draw a statutory instrument to the special attention of each House are¹²:

• that it imposes a charge on the public revenues or requires payments to be made to a public authority;

• that there appears to have been unjustifiable delay in the publication or laying of the Order before Parliament;

• that there appears to be a doubt whether it is *intra vires* or that it appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made;

• that for any special reason its form or purport calls for elucidation;

• that its drafting appears to be defective; or

• on any other ground which does not impinge on its merits or the policy behind it.

¹² House of Commons, Standing Orders No. 151(1)(B)
2 Use of the Remedial Order power: Procedural requirements

Compelling Reasons

25. Since remedial orders are a type of delegated legislation which can be used to amend statutes, there are controls on their use, as we have set out above. In particular, a Minister may only use the remedial power under the HRA if that Minister considers that there are “compelling reasons” to do so. The Government’s reasons for using a remedial order are set out in the statement of required information in the Command Paper which accompanies the proposed draft order.

26. They include the lack of a Bill in the existing programme which could incorporate these provisions, and the danger that a short bill to remedy the incompatibility would require Parliamentary time, which is unlikely to be available at present. The lack of parliamentary time for considering such a Bill in a reasonable timeframe is a good reason. We are less convinced by the Department’s view that a short stand-alone bill might “give the opportunity to re-open other provisions in the 2008 Act through amendments, which could undermine the intentions of the Bill and lead to debate on different issues long settled by the UK Parliament”. Parliament frequently revisits and revises legislation. We also note that the use of an order, albeit subject to its own particular procedure, precludes amendment by Parliament. Nonetheless we accept that, given the legislative burden imposed by exiting the European Union, there is unlikely to be Parliamentary time to consider a bill to remedy this incompatibility in the near future.

Use of the non-Urgent Procedure

27. Remedial orders can be made by urgent or non-urgent procedure. The Government’s reasons for proceeding by way of the non-urgent procedure in this case are not clearly set out in the information accompanying the proposed draft Order. Nonetheless, from its own consideration of the issue, the Committee considers that the non-urgent procedure strikes a reasonable balance between the competing consideration of the need to avoid undue delay before remediing the incompatibility and the need to afford a proper opportunity for parliamentary scrutiny. However, some of those who submitted evidence were concerned both by the length of time taken to produce the Order and the use of the non-urgent procedure. In their view, the failure to resolve this issue quickly was affecting their right to a family life. The Committee considers it would be helpful for the Government to address the reason for choosing the non-urgent procedure in its response to representations made on the draft order.

Required information and effective responses to requests for information

28. The Government has provided the required information, although unlike usual practice it seems to be missing an explanation for the decision to proceed by non-urgent procedure. The Committee considers that it would be helpful for the responsible Minister to provide this information in his response to the representations made. Later in this
Report the Committee is also seeking further elucidation and clarification in relation to a number of drafting points and will be interested in considering the Government’s responses carefully.

29. The Committee considers that the procedural requirements of the HRA have been met and the Government’s reasons for proceeding by way of remedial order rather than by Bill are clearly capable of being sufficiently “compelling reasons” for the purposes of section 10(2) of the Human Rights Act 1998. Further, remedying the incompatibility by way of a non-urgent order, rather than an urgent order, strikes a reasonable balance between the competing considerations of the need to avoid undue delay before remedying the incompatibility and the need to afford a proper opportunity for parliamentary scrutiny. Even so, we regret that the Government did not set out its reasons for using the non-urgent procedure.

30. We recommend that in its response to the representations made, the Government clarifies its reasoning for proceeding by way of non-urgent procedure, and addresses the points we make in this Report.
Does the proposed Order remedy the incompatibility: *vires*, discrimination and relationship status

31. The Committee has to consider whether the proposed order remedies the incompatibility with Convention rights. In reviewing this, we will consider whether any additional provision contained in the proposed order is appropriate and *intra vires* and whether the proposed order omits additional provisions which it should have contained. These considerations also relate to one of the criteria of the JCSI: where there is a doubt as to whether an order is *intra vires* or where it appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made.

32. There are a number of issues arising from the drafting of subsection (2)(b) and subsection (3)(b) of the new section 54A of the HFEA in the proposed Order that could raise *vires* and drafting concerns.

**Subsection (2)(b): *Vires* & the situation of those whose partner is not willing to take part in the application**

33. The Remodel Order seeks to remedy the incompatibility by inserting a new s54A into the HFEA, which allows one person to apply for a parental order but only to do so if he or she is not in an enduring family relationship. According to that proposed drafting, if that person is considered by the Courts to be in an enduring family relationship with a partner, then they can only apply for a parental order as part of a couple with that partner. Therefore, in order for the biological parent and child to be legally recognised, the other partner is required (within a six month deadline) to agree to be legally recognised as an equal parent of that child (whether or not that partner has any biological relationship to that child), otherwise the child and its biological parent will not be able to have their de facto biological relationship legally recognised. We have concerns about this requirement.

34. Ultimately here, we are dealing with a situation where there is a child with no real relationship with the defined parent (the surrogate and, if in existence, her husband), but who does have a biological parent who wishes to care for it in a normal parent-child relationship. Parental orders recognise the biological parent as the legal parent, while ensuring that it is the child’s interests which are paramount and which are considered by the courts in each case.

35. Family circumstances vary widely; in most cases one would expect any couple where a biological parent wanted a parental order to discuss this; they may have good reasons for not wanting both partners on the order, such as the fact a relationship is relatively new, or going through a rough patch. It is unhelpful to put a time limit of six months from the child’s birth to resolve any such difficulties, which would be the case if both parties had to agree to a parental order.

36. Such a situation could arise in numerous practical instances. For example, a couple could arrange for a surrogacy arrangement as a result of which a child is born which is the genetic child of one or both of those parents, but then separate. Why should a biological parent be barred from seeking legal recognition as biological parent merely
because they were starting a new relationship that could fall within section (2)(b)? In such a case, there is a danger that this drafting might require a single parent to have to prove to the Courts that their relationship with their new partner was not an “enduring family relationship” but merely some passing fling. Or alternatively the new partner could be placed in a stressful situation (within that critical 6 month window) of either accepting to become an equal parent of that child (effectively requiring them to assert a non-existent quasi-biological relationship) or effectively vetoing any hope for their partner to have legal recognition of that parent-child biological relationship. It is difficult to see the policy justification for seeking to distinguish between these different situations, or for placing such difficult emotional decisions on people with such significant potential impacts. This merely seems to introduce a new version of discrimination based on a new category, without any justification as to why this has been done.

37. Trying to put a blanket ban on a person who is in a couple getting a single parental order is clumsy and inflexible, as well as discriminatory. It is better for the courts to assess the child’s interests according to the circumstances of each case.

38. The Government has not explained why it is necessary for a biological single parent to prove that they are not in an enduring family relationship in order to have their biological relationship with their child legally recognised under HFEA. Nor has the Government explained why it is necessary to require a single parent’s partner with no biological relationship to the child (and no desire to be recognised as such a parent) to be recognised as that child’s parent merely in order for the biological parent to be so recognised. This would not be the case for a biological child born without recourse to a surrogacy arrangement, where the State would not seek to create such barriers to the recognition of that parent-child legal relationship. It is surprising that a single applicant parent will need to prove to the Courts that they are not in an enduring family relationship with their partner, or that such a partner will be forced to either become an equal parent of that child (effectively requiring them to assert a non-existent quasi-biological relationship) or effectively veto the recognition of the biological parent-child relationship.

39. The remedial order is intended to remove the discrimination between those applying for recognition of their relationship to their child as single people and those applying as a couple. However, it introduces a new distinction between those whose partners are willing to assume full parental responsibility for a child to which they may have no genetic bond, and those whose partners are not willing to take such a significant step.

40. Whilst this may be a result of seeking to produce a mirror image of the existing provisions in section 54 HFEA which apply to applications by a couple, it does not quite work when applied to the new section 54A. Alternatively, the Government may have intended to address situations where a couple is separating or has separated (and the risks of there being a race to submit an application). We think that there are better drafting techniques to address this policy concern. Moreover, we do not think that, in these circumstances, it will serve a child’s best interests for the law to exclude any possibility that there will be a successful application for a parental order from its biological parent.
41. Finally, the Committee notes the Government’s information note of 8 February 2018 in which the Government seeks to justify this as a deliberate drafting choice. The Government is concerned that:

“legislating in respect of other possible circumstances would require further exploration and, potentially, consultation. DHSC’s view was that such additional steps would significantly elongate the process and would be likely to cross over into the remit of the Law Commission review of surrogacy legislation and policy, for which the Government has announced its support. […] given the Government’s support for the Law Commission Review, and Ministers’ desire to address the specific situation identified by the Court without delay, DHSC felt that any further change should properly be considered in light of the findings of the upcoming review”.

42. The Law Commission review is most welcome, but is unlikely to come to fruition for several years. The Committee considers that timing considerations, or the existence of a review, is not a valid justification for choosing to discriminate where convention rights are engaged.

43. The Committee recommends that the Minister and the Department reconsider the drafting of section 54A(2). Were this drafting to remain, the Committee would wish to draw the special attention of both Houses to the subsection (2) of the proposed section 54A of the HFEA on the grounds that it makes an unexpected use of the enabling power. Moreover, we would draw the attention of both Houses to a doubt as to whether the Order is intra vires. This is because the vires in section 10 of the HRA are for the Minister “to make such amendments to the legislation as he considers necessary to remove the incompatibility”; this Order does not adequately remove the incompatibility with convention rights because it fails to address the human rights of a biological gamete-contributor who also wants to assert the human rights associated with building an enduring family relationship, without requiring their partner to assert a non-existent quasi-biological relationship with a child.

Subsection (3)(b): Requirement to prove a separation is permanent

44. Subsection (3)(b) of the proposed section 54A of the HFEA allows people to make single applications for parental orders even though they are married or in a civil partnership if they have separated from their partner and that separation is likely to be permanent. If the prohibition on a single applicant in a lasting relationship receiving a parental order is removed, as we wish, this will hopefully no longer be relevant, but it nonetheless necessary to address this here.

45. This requirement of “permanent separation” will be difficult or impossible to prove to the Courts, and would seem to be unnecessary as a matter of policy. The Government’s view is that the applicant would simply declare his or her circumstances and the courts “would usually only seek further evidence if there were reasonable grounds to challenge the facts of the declaration”. It is difficult to understand why the Court should care whether the separation of the two partners to the assisted reproduction is likely to be permanent. What is important is that at the time of making the application, which has to be within a six-month window, the applicant is unable to obtain a section 54 Order because the
partner from whom they are separating/have separated is unwilling to cooperate. If the policy intention is to deal with a situation where a couple have separated and to decide what form of legal parent recognition is in the best interests of the child, there are better ways to deal with this situation, than having the Courts seek to determine whether or not a separation is likely to be permanent.

46. **The Committee recommends that the Government reconsider the drafting of section 54A(3) to remove the requirement for a person to prove to the Courts that their separation is likely to be permanent.** Were this drafting to remain, the Committee would want to bring the special attention of the two Houses to subsection (3)(b) of the proposed section 54A of the HFEA on the grounds that there is a doubt whether it is intra vires, because it goes beyond the minimum amendments necessary to remove the incompatibility, by imposing a condition which may be difficult to satisfy and is not related to any obvious policy justification.
4 Drafting matters

47. The Committee feels it is appropriate to raise a number of defective drafting concerns and concerns that require further elucidation by the Government, so that they can be addressed before the draft order proper is laid.

Defective Drafting concerns relating to the proposed section 54A

48. Subsection (6) imposes a requirement to be satisfied both at the time of application and at the time of the making of the parental order. It is unclear why the condition in subsection (2) applies only at the time of the application, whereas the requirement in subsection (6) also applies at the time of the making of the parental order. This could be defective drafting and the Department should explain the discrepancy.

49. The reference to “incapable” in subsection (9) of new section 54A of the HFEA should include express reference to physical and mental incapability, for consistency with subsections (3)(c) and (4). This could be defective drafting and the Department should explain the inconsistency.

50. Subsection (13) appears to be displacing what might otherwise be an implicit requirement for the surrogate woman to be in the United Kingdom at the time specified in the subsection. This therefore suggests that there may be implicit requirements for other activities in subsection (1) to have occurred in the United Kingdom, but that is left unclear. This could be defective drafting or drafting requiring further elucidation, requiring an explanation from the Department.

51. The form of the period in subsection (14) (“within the period of six months”) is inconsistent with the form used in subsection (5) (“during the period of 6 months”). This difference in language used could be interpreted as altering the meaning between the time periods referred to in these two subsections and could be defective drafting, so the Department should explain the inconsistency.

52. In section 54(2) in the existing HFEA, there is a requirement that the applicant couple must, as well as living together, not be within prohibited degrees of relationship. This has been imported into section 54A as a qualification on references to the applicant being the “partner of another person in an enduring family relationship”. The problem is that in 54A(2) the reference to an enduring family relationship is in the context of a negative condition: the applicant must not be living “as the partner of another person in an enduring family relationship”. Subsection (15) then provides that the reference to “enduring family relationship” does not apply where the two people are within prohibited degrees of relationship. Therefore, a person in any form of enduring family relationship with a partner cannot apply for a parental order under this section, unless it is a relationship that is within the prohibited degrees of relationship. It is very hard to believe that this is the policy intention of this provision.

53. The Committee notes that Government, in its Command Paper, seeks to justify subsection (15) on the grounds that it does not wish inadvertently to bar individuals who live in a regular family situation with relatives. Whilst the Committee would agree with this aim, the Committee would note that such individuals would not be caught by the provision in subsection (2)(b) in any event, as it only relates to those “living as a partner...
of another person in an enduring family relationship”. Surely the “partner” requirement would mean that non-partner relationships with close family members would not be caught by subsection (2)(b).

54. The Committee finds it hard to believe that the policy intention of section 54A(15), as read with subsection (2)(b) is that a person in any form of enduring family relationship with a partner cannot apply for a parental order under this section, unless it is a relationship that is within the prohibited degrees of relationship. We do not see the need for this provision (and note that it would fall away anyway if the requirement that a single applicant for a parental order should not be in a lasting relationship with a partner was removed). However, if these provisions are not removed, we invite the Department to explain its policy intention and to consider the drafting of these subsections.

Defective Drafting concerns relating to the Schedule

55. Finally, there are a number of typographical issues concerning the Schedule which would appear to be drafting errors and therefore defective drafting:

a) in Schedule 1, paragraph 11(5) (which inserts (10A)), there are two paragraphs marked “(d)”.

b) in Schedule 1, paragraph 11(5) (which inserts (10A)), the word “article” should be replaced with “section” in the second paragraph “(d)”.

c) in Schedule 1, paragraph 11(5) (which inserts (10A)(e)), “)” should be added after “section” at the end.

d) in Schedule 2, paragraph 4(5) (which inserts (1A)), “section” should be deleted the second time it occurs.

e) in Schedule 2, paragraph 4(6) (which inserts (a)(iii)), the Department should consider whether “(8)” should instead read “(10)”.

f) Schedule 2, paragraph 7(19)(b)(ii), should read “substituted” instead of “substitute”.

g) at the beginning of the inserted text in Schedule 2, paragraph 9(21)(b), the words “This regulation applies where” should be inserted.

h) in the introductory wording to paragraph 10(7) of Schedule 2, the Department should consider whether “171ZL” should instead read “167ZL”.

i) in Schedule 2, paragraph 10(7)(d), the Department should consider whether the reference to “(8A)” should instead read “(9)”.

j) in the heading to paragraph 14 in Schedule 2, the word “Mitochondrial” should replace “Mitodchondrial”.

56. The Committee notes the serious drafting defect that has been corrected in the correction slip that the Department issued and invites the Department to consider and rectify further drafting defects in the proposed Order (as identified in Chapter 4 of this Report). The Committee welcomes the recognition by the Department of
these drafting errors in its information note of 8 February 2018, and welcomes the Department’s commitment to consider the draft further and make amendments as necessary.

57. We recommend that the Government reconsider the drafting of the Order further, in light of the potential drafting defects identified in Chapter 4 of this Report and make amendments to the draft, or clarify its position, as necessary.
5 Other Matters

Timing of remedying declarations of incompatibility

58. The Committee welcomes that the Government is seeking to remedy this incompatibility in bringing forward this remedial Order. The Committee notes that the declaration of incompatibility which is to be remedied by this order was made on 20 May 2016. We urge the Government to lay a draft Order before Parliament as swiftly as it can.

59. When the Committee and the Government first discussed the way in which incompatibilities would be remedied, the Government agreed that it would aim to decide on how to remedy an incompatibility within six months, although in some cases longer might be needed for research and consultation. Several other declarations of incompatibility have been made by UK Courts where the Government is still “considering the options for addressing the incompatibility”, even though years may have passed since the declaration was made, we note for example:

   a)  *R (on the application of Reilly (no.2) and Hewstone) v Secretary of State for Work and Pensions*\(^{16}\);

   b)  *R (on the application of Johnson) v Secretary of State for the Home Department*\(^{17}\).

60. We are disappointed that the Government has not brought forward proposals to remedy outstanding incompatibilities with Convention rights more promptly and urge it do so as swiftly as possible.

The use of the remedial power on post-1998 Acts

61. The Committee notes that there has been some limited academic questioning of the ability of a remedial order to amend post-1998 legislation. We consider that remedial orders can amend post-1998 legislation and that this was indeed the intention of the HRA.

62. This conclusion is supported by a number of factors and seems to concur with the understanding of the Government and the Courts. First it is worth noting that every power of this kind has to be construed in its own context (see the summary of the test to be applied at paragraph 1.3.11 of *Craies on Legislation*, and cited with approval in *Public Law Project v Lord Chancellor* [2016] UK C 39). Section 10 of the HRA is clearly dealing with future decisions of the courts, and it would be perverse if the ability to make remedial orders depended on whether the decision happens to relate to a pre-1998 or a post-1998 statute. Moreover, the White Paper accompanying the Bill for the HRA makes

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\(^{16}\) *R (on the application of Reilly (no.2) and Hewstone) v Secretary of State for Work and Pensions Administrative Court*; [2014] EWHC 2182; 4 July 2014. The Court of Appeal upheld this declaration of incompatibility: [2016] EWCA Civ 413.

\(^{17}\) *R (on the application on Johnson v Secretary of State for the Home Department* [2016] UKSC 56, 19 October 2016. We also note that a consent Order was made in similar terms in the case *R (on the application of David Fenton Bangs) v Secretary of State for the Home Department.*
it clear that what is required is a fast track procedure for responding to declarations of incompatibility or to findings of violations by the European Court of Human Rights in Strasbourg. There is nothing in the relevant passages of the Command Paper to suggest that the date of the offending Act would be a relevant consideration. Finally, we would note that this interpretation is supported by statements of Government Ministers during the passing of the Bill; subsequent practice of Government and Parliament; as well as caselaw, see paragraph 49 of *Thoburn v Sunderland City Council*¹⁸.

**The six month deadline**

63. There were some concerns expressed in the evidence received by the Committee that the deadline of “six months” for making an application for a parental order in section 54A HFEA might be read unduly restrictively and lead to situations that were not in the best interests of the child, in that a timing technicality could prevent a child from having legal recognition of its relationship with its parent. In this context, it is worth noting that the same deadline of “six months” in section 54 HFEA has been interpreted by the Courts as including a certain measure of flexibility¹⁹.

64. The Committee assumes that the Government intends the Courts to take the same approach to “six months” in section 54A as in section 54 HFEA, to ensure that the best interests of the child are borne in mind also when considering these technical formalistic requirements. In the interests of clarity, it might be helpful for the Government to clarify this intention.

**Wider points raised by the evidence & the forthcoming work of the Law Commission**

65. A number of matters were raised in the evidence submitted to the Committee, such as the timing of the transfer of legal parenthood, or the requirement for there to be a genetic relationship. These issues arguably go much further than the scope of this remedial Order and would be better suited to a fuller consideration by Parliament when debating a Bill on the topic. In this context, the Committee notes that the Law Commission announced its 13th Programme of Law Reform on the 14th December 2017, which includes a law reform project on surrogacy.

66. The Committee welcomes this work by the Law Commission and would be keen to ensure that such work took due regard of applicable human rights standards in this field, including the requirements of the UN Convention of the Rights of the Child 1989, in particular noting the requirements of Articles 2, 3, 7 and 8 of that Convention.

**Consent requirements**

67. A number of the consequential amendments in the Schedules to this Order amend subordinate legislation that has consent requirements or is made by non-Ministerial bodies (notably the Rules Committees). Whilst we note that the vires of Schedule 2 to the HRA permit the amendment of that legislation, the Committee would like confirmation from the Department that the relevant consenting or making bodies have been consulted on the consequential amendments.

¹⁸ *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), para 49

¹⁹ See *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam); and *AB v CD* [2015] EWFC 12
68. The Department should clarify whether the relevant consenting or making bodies have been consulted on the consequential amendments made in Schedule 2 to subordinate legislation (which would ordinarily have consent requirements or be made by non-Ministerial bodies).
Conclusions and recommendations

Summary

1. While the Committee welcomes the Government’s decision to use the remedial order process in this case, in the report we raise a number of significant concerns about the Government’s drafting approach. We recommend that the proposals are amended to address these drafting concerns and that the Government then lay that draft order before both Houses. (Paragraph 8)

The Issue that the proposed draft Order addresses

2. The Committee welcomes the Government’s action in proposing the draft Order to remedy the incompatibility of the Human Fertilisation and Embryology Act with the Convention rights to private and family life and to non-discrimination and to make the necessary consequential amendments that follow from those changes. (Paragraph 12)

Required information and effective responses to requests for information

3. The Committee considers that the procedural requirements of the HRA have been met and the Government’s reasons for proceeding by way of remedial order rather than by Bill are clearly capable of being sufficiently “compelling reasons” for the purposes of section 10(2) of the Human Rights Act 1998. Further, remedying the incompatibility by way of a non-urgent order, rather than an urgent order, strikes a reasonable balance between the competing considerations of the need to avoid undue delay before remedying the incompatibility and the need to afford a proper opportunity for parliamentary scrutiny. Even so, we regret that the Government did not set out its reasons for using the non-urgent procedure. (Paragraph 29)

4. We recommend that in its response to the representations made, the Government clarifies its reasoning for proceeding by way of non-urgent procedure, and addresses the points we make in this Report. (Paragraph 30)

Subsection (2)(b): Vires & the situation of those whose partner is not willing to take part in the application

5. The Committee recommends that the Minister and the Department reconsider the drafting of section 54A(2). Were this drafting to remain, the Committee would wish to draw the special attention of both Houses to the subsection (2) of the proposed section 54A of the HFEA on the grounds that it makes an unexpected use of the enabling power. Moreover, we would draw the attention of both Houses to a doubt as to whether the Order is intra vires. This is because the vires in section 10 of the HRA are for the Minister “to make such amendments to the legislation as he considers necessary to remove the incompatibility”; this Order does not adequately remove the incompatibility with convention rights because it fails to address the human rights of
a biological gamete-contributor who also wants to assert the human rights associated with building an enduring family relationship, without requiring their partner to assert a non-existent quasi-biological relationship with a child. (Paragraph 43)

Subsection (3)(b): Requirement to prove a separation is permanent

6. The Committee recommends that the Government reconsider the drafting of section 54A(3) to remove the requirement for a person to prove to the Courts that their separation is likely to be permanent. Were this drafting to remain, the Committee would want to bring the special attention of the two Houses to subsection (3)(b) of the proposed section 54A of the HFEA on the grounds that there is a doubt whether it is intra vires, because it goes beyond the minimum amendments necessary to remove the incompatibility, by imposing a condition which may be difficult to satisfy and is not related to any obvious policy justification. (Paragraph 46)

Defective Drafting concerns relating to the Schedule

7. The Committee notes the serious drafting defect that has been corrected in the correction slip that the Department issued and invites the Department to consider and rectify further drafting defects in the proposed Order (as identified in Chapter 4 of this Report). The Committee welcomes the recognition by the Department of these drafting errors in its information note of 8 February 2018, and welcomes the Department’s commitment to consider the draft further and make amendments as necessary. (Paragraph 56)

8. We recommend that the Government reconsider the drafting of the Order further, in light of the potential drafting defects identified in Chapter 4 of this Report and make amendments to the draft, or clarify its position, as necessary. (Paragraph 57)

Timing of remedying declarations of incompatibility

9. We are disappointed that the Government has not brought forward proposals to remedy outstanding incompatibilities with Convention rights more promptly and urge it do so as swiftly as possible. (Paragraph 60)

The use of the remedial power on post-1998 Acts

10. We consider that remedial orders can amend post-1998 legislation and that this was indeed the intention of the HRA. (Paragraph 61)

The six month deadline

11. The Committee assumes that the Government intends the Courts to take the same approach to “six months” in section 54A as in section 54 HFEA, to ensure that the best interests of the child are borne in mind also when considering these technical formalistic requirements. In the interests of clarity, it might be helpful for the Government to clarify this intention. (Paragraph 64)
Consent requirements

12. *The Department should clarify whether the relevant consenting or making bodies have been consulted on the consequential amendments made in Schedule 2 to subordinate legislation (which would ordinarily have consent requirements or be made by non-Ministerial bodies).* (Paragraph 68)
Declarations of Lords’ Interests

Baroness Hamwee
No relevant interests to declare

Baroness Lawrence of Clarendon
No relevant interests to declare

Baroness Prosser
No relevant interests to declare

Lord Woolf
No relevant interests to declare

Lord Trimble
No relevant interests to declare

Baroness O’Cathain
No relevant interests to declare
Formal minutes

Wednesday 28 February 2018

Members present:

Ms Harriet Harman MP, in the Chair

Ms Karen Buck MP  Baroness Hamwee
Alex Burghart MP  Baroness Lawrence of Clarendon
Joanna Cherry MP  Baroness O’Cathain
Jeremy Lefroy MP  Lord Trimble

Lord Woolf

Draft Report (Proposal for a Draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018), 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 68 read and agreed to.

Resolved, That the Report be the Second 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 Wednesday 7 March 2018]
Published written evidence

The following written evidence was received and can be viewed on the inquiry publications page of the Committee’s website.

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

1. All Party Parliamentary Group on Surrogacy (HFE0010)
2. Anonymous 1 (HFE0003)
3. Anonymous 2 (HFE0004)
4. Anonymous 3 (HFE0015)
5. Anonymous 4 (HFE0016)
6. British Fertility Society (HFE0013)
7. Department of Health & Social Care (HFE0017)
8. Dr Atina Krajewska and Dr Rachel Cahill-O’Callaghan (HFE0007)
9. Dr Kirsty Horsey (HFE0009)
10. Jason Brown (HFE0006)
11. Mr David Watkins (HFE0002)
12. NGA Law (HFE0008)
13. SUK Working Group on Surrogacy Law Reform (HFE0011)
14. Surrogacy UK (HFE0012)
### List of Reports from the Committee during the current Parliament

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 |
| Third Report | Legislative Scrutiny: The Sanctions and Anti-Money Laundering Bill | HC 568 |