Building families through surrogacy: a new law

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Kelly Sizer outlines LITRG's response to a joint Law Commission and Scottish Law Commission consultation on reforming surrogacy law.

The law relating to surrogacy arrangements is under review by the Law Commission and Scottish Law Commission. Their joint consultation (https://tinyurl.com/y4kmhtwp) concentrates mainly on modernising the law by introducing a new 'pathway to parenthood', with the aim of streamlining the process for all concerned – that is, for the child's 'intended parents', the surrogate and, of course, aiming to focus on the best interests of the child.

LITRG's interest in the consultation was confined to considering the tax, National Insurance and related welfare benefits implications of payments made by intended parents to surrogates.

The law presently confines intended parents to reimbursing the reasonable expenses of the surrogate incurred in relation to the arrangement. We are not clear what HMRC's approach to such payments has been to date. The consultation document seems to imply that surrogates have not been taxed on any amounts, yet it states that the family court has retrospectively approved payment of round sums to surrogates without receipts or other supporting evidence of the expenses having been incurred. As tax practitioners, it is not difficult for us to conclude that HMRC might take issue with this! Prima facie, it seems that the surrogate could be taxed on such amounts as 'miscellaneous income' (ITTOIA 2005 Part 5 Chapter 8), in the absence of any specific relieving provision in the legislation.

LITRG's response therefore raises a concern that surrogates might be in a vulnerable position – for example, at risk of HMRC penalties for failure to notify HMRC of a tax liability.

The consultation goes on to consider whether surrogates might be paid in future, or at the very least whether the existing expenses regime might be reformed. Our response highlights that some fundamental points would need to be addressed upfront. For example, would it be considered that surrogates are self-employed in the event of surrogacy being a fee-paid service? Would this depend on whether the surrogacy is a one-off arrangement, or might a series of surrogate pregnancies be more indicative of a trade? Even if the surrogate were not considered to be trading, it would seem likely that payments would be taxable as miscellaneous income. Moreover, a clear ability to profit financially from a surrogacy arrangement makes it much more likely that HMRC would take an interest in them in future.

We also highlighted that the tax, National Insurance and benefits treatment of payments can influence people's behaviour.

Taking just tax as an example, we could see the following effects:

- If the surrogate were treated as providing a service, with any 'income' from it being potentially taxable on the surrogate, this would necessitate the keeping of business records and would mean the surrogate would have to comply with requirements of the tax system such as notification of liability, completion of tax returns, potential enquiry by HMRC and the risk of penalties for non-compliance. These obligations would be (and arguably already are, given our comments above on the potential tax issues surrounding round sum expense payments, etc.) a disincentive to potential surrogates, who may be dissuaded from providing such services due to the associated tax hassle and bureaucracy.
- By contrast, some form of tax relief or exemption that would be automatically given to surrogates, provided they meet its terms, could be helpful. Properly structured, this could remove the disincentive of having to comply with tax obligations. However, such a tax relief or exemption could influence the behaviour of potential surrogates; that is to say, the ability to 'earn' a certain amount 'tax free' might be seen as a way of incentivising surrogates.

The above points could of course be seen as positive or negative in terms of their influence on behaviour, depending on your viewpoint. If the law wishes to encourage more surrogates by allowing payment for services (or even reimbursement of expenses without having to prove every amount with receipts), a positive incentive could be achieved by being able to put to potential surrogates that there is a specific tax relief or exemption which means that HMRC will not be bothering them and they

will not have to fill in reams of forms. But equally, even if there is no wish to provide a positive incentive in this way, a relief or exemption would remove the disincentive of a potential tax and administrative burden.

In conclusion, LITRG's response to the consultation emphasises that surrogacy arrangements raise significant questions about tax, National Insurance and related welfare benefits which must be addressed at an early stage in the process of reforming the law more generally.

We recommend that HM Treasury, HMRC and the Department for Work and Pensions (and other government departments as relevant) are involved in further detailed consultation on these issues.