



# *Normalising Surrogacy: A Threat To Human Dignity*

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## Introduction

Surrogacy is always an injustice; it fragments parenthood by intentionally depriving the child of the mother who provided intimate bodily nurture and care for the first nine months of his or her life. Surrogacy by its very nature makes the child an object of a commissioning agreement and subject to the intentions of those who ordinarily would accept him or her as a gift. Although not illegal in the UK, surrogacy continues to be a divisive issue not least when it comes to the welfare and best interests of the child born as a result of a surrogacy agreement and the risk of exploitation of women.

In its *Declaration on Human Dignity* the Dicastery for the Doctrine of the Faith has spoken out strongly against the practice of surrogacy. Quoting Pope Francis, the Declaration states that surrogacy ‘represents a grave violation of the dignity of the woman and the child.’ Echoing the 1987 document *Donum vitae*, the Pope explains that ‘a child is always a gift and never the basis of a commercial contract.’ The *Declaration* observes that every child has ‘intangible dignity’, but through the practice of surrogacy the child becomes a ‘mere object’. Equally the woman, even if she freely chooses to subject herself to surrogacy, is ‘detached from the child growing in her’ and she becomes an ‘instrument’ for fulfilling the desires of others. [1] Simply on a scientific understanding there is a profound connection between a mother and her child beginning at a cellular level, through to exchanges of oxygen and nutrients, the transfer of maternal antibodies, the lifestyle

choices the mother makes, and the psychological and emotional bonds created. In order to complete a surrogacy transaction the surrogate mother must dissociate herself from her own body and from her child. To imagine that the inside of a woman is merely a workplace or baby-making farm is to fail to appreciate the intimate bond that exists on many levels between mother and child, a bond that is spalled in surrogacy. It also fails to recognise that pregnancy is not work that produces *something*, but labour that produces *someone*.

The *Declaration’s* comments on surrogacy are timely given international concern that surrogacy, when connected to deception and coercion, can fall within offences associated with human trafficking. [2] The business of surrogacy is built on the commodification of women’s bodies. Whether impoverished women are coerced into surrogacy arrangements, or women freely consent and sign agreements, the commissioning parents in effect have control over the surrogate mother’s body and life for the length of the pregnancy, and have control over the contents of that body, the developing child. Moreover, according to a 2022 UNICEF *Briefing Note*, children born through surrogacy, especially through international surrogacy arrangements, are ‘at risk of multiple human rights violations particularly their right to an identity, including name, nationality, family relations and access to origins.’ [3] The *Declaration on Human Dignity* speaks very strongly to the practice of surrogacy precisely on the point of human dignity, and this is why it is important to

question legislation that seeks to normalise surrogacy.

In March 2023 the Law Commission of England and Wales and the Scottish Law Commission produced a joint report, *Building families through surrogacy: a new law*, aimed at clarifying the current framework. [4] With this proposed legislation surrogacy becomes simply ‘part of the range of assisted conception options’ [5] and parenthood an administrative process. Although the Government does not plan to bring forward legislation on surrogacy in this Parliament, the proposed reform is still on the table for consideration.

The first legislation in English law restricting surrogacy, the Surrogate Arrangements Act 1985, came about as a reaction to the high-profile case of baby Cotton, a baby commissioned for payment. Since 1985 surrogacy arrangements have been regarded as unenforceable in English law on the obvious ground that human beings cannot be the objects of a transaction between others. Nevertheless, from the Human Fertilisation and Embryology Act 1990 and its legal mechanism to ratify surrogacy arrangements retrospectively, attempts have been made to circumvent the serious discussion on the question of surrogacy and to deal instead with the practical implications of its implementation. This is a clear example of where what can be done supersedes what should be done. When what can be done is given a legal framework, the process of normalising an otherwise unjust action has begun.

The reforms proposed by the Law Commissions in their joint report go further in seeking to provide a ‘new pathway’ to facilitate and enable surrogacy. This push for reform ignores the foundational questioning of surrogacy

entirely and in effect legitimises and normalises surrogacy as merely another option in the arsenal of reproductive choice. This is obvious from the very title of the report where building a family treats the surrogate as merely temporary rented accommodation and the occupant, the child, as an object subject to the intentions and possibly changing intentions of the surrogate and intended parents, who make up the ‘surrogacy team’.

The normalisation of surrogacy is not the only outcome of the report of the Law Commissions. The report encourages and facilitates surrogacy arrangements by its creation of Regulated Surrogacy Organisations (RSOs) which, under the supervision of the Human Fertilisation and Embryology Authority (HFEA) act as ‘gatekeepers’ of the proposed new surrogacy ‘pathway.’ [6] By giving extra regulatory powers to the HFEA the Law Commissions intentionally extend its reach beyond its remit [7], and the fact that the HFEA, a ‘small focused body’ appointed by but independent of the Government, is itself seeking to influence legislation and increase its powers to become more effective is of concern. [8] Significantly, and despite claiming that the welfare of the child remains paramount [9] the Law Commissions have seriously undermined this welfare principle in favour of the intentions of the ‘surrogacy team.’ Their report claims that its recommendations for a new surrogacy ‘pathway’ will ‘work better for children, surrogates and intended parents.’ [10] While the existing law falls short, the new proposals significantly worsen that situation since in effect parenthood becomes simply an administrative procedure. The report outlining ‘recommendations for a robust new system to govern surrogacy’ includes a summary report (Vol.I), a Full Report (Vol.II) and a draft bill (Vol.III) implementing their recommendations. [11] References will be made to the Full Report

(the Report) as the ‘comprehensive account’ of the recommendations and representative of the ‘definitive conclusions’ of the Commissions. [12]

## Current context and reasons for change

Under current legislation the surrogate is the legal parent of a child born through surrogacy and her spouse or civil partner is recognised as the second parent. To have a legally recognised relationship to the child the intended parents must obtain a parental order through the courts. As the Report acknowledges, under the existing law ‘the paramount consideration for the court in deciding the parental order application is the welfare of the child.’ [13] Rather than having to apply for a parental order, the Law Commissions recommend that a ‘new pathway’ for surrogacy is created to enable the intended parents to become the child’s legal parents at birth through an agreement arranged pre-conception. [14] This would give due regard to the intentions of the ‘surrogacy team’, since, according to the Law Commissions, ‘the parties’ intentions are one of the defining features of a surrogacy arrangement.’ [15] The pathway would be overseen by non-profit making surrogacy organisations, Regulated Surrogacy Organisations (RSOs), regulated by the HFEA. Without approval of an RSO, the intended parents would have to apply for a parental order. Even though the Report admits that the exact number of surrogate births is ‘uncertain’ and ‘a tiny fraction’ of the total live births in the UK each year [16], it still claims reform of the existing legislation is necessary. The reasons given are that there have been ‘significant societal and medical changes’ [17] including the greater acceptance of evolving understandings of family and parenthood, and

the growing realisation that IVF does not necessarily result in the longed-for child. [18] More specifically however, the Law Commissions argue that the UK Government’s attitude to surrogacy has ‘evolved,’ moving from tolerance to, quoting the Department of Health and Social Care (DHSC) 2018 guidance, ‘supporting surrogacy as part of the range of assisted conception options.’ [19] Thus, the Law Commissions state that their ‘project takes as its starting point the UK Government’s support of surrogacy as a means of having a family.’ [20]

## Normalising surrogacy

In its consultation process the Law Commissions found that consultees in favour of surrogacy felt that changes in legislation would create a “normalising” effect [...] helping to foster a positive perception of surrogacy agreements as legitimate and legally recognised.’ [21] While the problem of stigma has been associated with surrogacy, the normalisation of surrogacy goes beyond simply seeing it as legitimate. The Report relies on the DHSC guidance that supports surrogacy as one of many assisted conception options. [22] Notably, the DHSC provided funding to the Law Commission of England and Wales for their project to reform the law. [23] In terms of options, it is noteworthy that although the Report agrees with its consultees that ‘surrogacy for elective reasons should not be encouraged or normalised’, it nevertheless decided that there should be no restriction of access to surrogacy by reference to medical necessity. [24] As an example, in its story to illustrate how the new legislation works, there is no reason given why the fictional couple are exploring surrogacy, it is simply one of their options. [25] By placing surrogacy arrangements under the responsibility of the

HFEA, surrogacy seems to become just another reproductive technique. Moreover, many celebrities are 'building' their families through surrogacy thus giving the impression that surrogacy is something to emulate. The Law Commissions' proposal that through a pre-conception agreement the intended parents become the legal parents at birth implies that surrogacy is a normal way of becoming a parent, especially since this change in legislation marks a significant shift from a judicial to an administrative process. [26] At the same time and immediately after asserting that surrogacy is now regarded as simply an aspect of reproductive choice, the Report admits that 'surrogacy continues to attract strongly held and conflicting views' with some people calling for a prohibition. [27] The Report states that the Law Commissions were not asked to consider whether the law should permit or prohibit surrogacy. Instead, the Commissions claim that this is a 'question of social policy' and a matter for Parliament to consider. [28] Nevertheless, it goes on to consider and dismiss 'objections' to surrogacy that arose in its preparatory 2019 consultation process. These real concerns include the serious risk of exploitation of women, commodification of children and women's bodies, and the fragmentation of motherhood. [29]

## Regulated Surrogacy Organisations (RSOs) and the reach of the HFEA

Underpinning the normalisation of surrogacy is the way in which the proposed law intends to State-regulate surrogacy through the creation of non-profit making RSOs through which legal parental status becomes a 'purely administrative process.' [30] As part of this

procedure and as 'gatekeepers', RSOs will check eligibility requirements, conduct screening and safeguarding checks, criminal checks, and facilitate implications counselling. 'Implications counselling' involves 'sessions to explore the nature of surrogacy' and how the parties will 'deal with the emotional and practical consequences.' [31]

Markedly amongst the other significant legal changes proposed, and in contrast to the existing framework, there is no requirement that the surrogate has previously given birth. The Law Commissions explain that such a requirement 'would not sufficiently respect the autonomy and choices of women who want to be surrogates' [32], and that reaching an informed decision can be achieved through the implications of the counselling process. [33] Homage to autonomy seems to have trumped the very serious objections to this particular change in the law presented by many consultees including those from a medical background. [34] Nor is there a limit on how many surrogate pregnancies a woman is permitted to undertake, and there is no upper age limit for surrogates, since these questions can also be dealt with by the RSO. [35] Rather than legislating for maximum or minimum age limits, the age and health of intended parents would also fall under the welfare concerns covered by the RSO's checks. [36] Pre-conception welfare of the child assessment will be akin to existing surrogacy assessments under the HFEA Code of Practice, and in effect boil down to whether the future child 'is likely to be at risk of significant harm or neglect.' [37] In authorising the surrogacy agreement to enter the pathway which entails that the intended parents become legal parents at birth, the Law Commissions note that the RSO 'will be acting as the arm of the State, and will be fulfilling a State function': it 'replaces' the courts. [38] It would actually be up to the RSO

to satisfy itself that the checks, screening and safeguarding requirements have taken place. If it transpires that ‘tests’ were not carried out, the RSO would be subject to sanctions, but the ‘team’ would remain on the pathway. [39]

In spite of concerns among consultees that RSOs and the HFEA do not have the expertise for counselling, social work, and child welfare, and that there are concerns over independence and conflicts of interest [40], the Law Commissions decided that the HFEA is the most cost-effective body and that it can gain expertise. [41] The sphere of the HFEA has thus been further expanded by the proposed legislation. [42] To qualify as an RSO an organisation need simply meet the regulatory requirements set out by the HFEA. [43] The Law Commissions accept however that HFEA-licensed fertility clinics can continue to provide surrogacy services for profit and that some professionals will be permitted to provide their services for a commercial fee to ‘surrogacy teams on the new pathway’. [44] They also recognise that the HFEA requires fertility clinics to carry out child welfare assessments as part of licence conditions and already do this for surrogate pregnancies. It would be possible for RSOs to adopt these assessments. [45] The Law Commissions clearly state that the new legislation does not introduce commercial surrogacy and that surrogacy arrangements remain unenforceable. [46] Strikingly, RSOs will be able to provide not only support networks but also ‘matching and facilitation services,’ ‘initiate negotiations’ for surrogacy arrangements, provide information regarding surrogacy, and ‘advertise the fact that they can do such things. [47] As the Report indicates, RSOs could also perform ‘the same functions as existing surrogacy organisations’ [48], not only normalising but legalising the whole process. Given that the oversight of RSOs by the HFEA requires new

enforcement powers, the Law Commissions recommend both that existing powers be extended to RSOs and that the Government undertake a ‘holistic review’ of HFEA powers, and this would include powers related to other clinics and research work already regulated by the HFEA. [49] It is of concern that there appears to be a concerted effort to increase the HFEA’s ambit, and conspicuously the HFEA is already seeking to increase its powers and broaden its reach. [50]

### Challenge to the principle that the welfare of the child is paramount

In 2018 the DHSC stated that parental orders ‘are considered the optimum legal and psychological solution for a child born through surrogacy.’ [51] The Law Commissions recommend a move away from this however, and in doing so have distanced themselves from the fundamental principle that considers the welfare of the child to be paramount. The Law Commissions complain that under existing law the courts are faced with a ‘*fait accompli* situation’ since the child is normally living with the intended parents, and it is assumed to be in the child’s best interests to remain there. In essence, they say, the child’s welfare ‘will nearly always dictate’ how parental orders are made, resulting in courts lacking options when deciding whether to grant the order. [52] The Report comments that this applies even in cases of international commercial surrogacy or where payments beyond reasonable expenses have been made. The Law Commissions seem to have overlooked the fact that the proposed Bill will not remedy these situations since international agreements and agreements made without the approval of an RSO will still be subject to the law on parental orders.

Nevertheless, according to the Report, the fact that the intended parents are not the legal parents at the child's birth 'contradicts the intentions of everyone involved in the agreement.' [53] In addition to concerns about who makes decisions about the child and uncertainty and stress affecting parents before a parental order is obtained [54], the Report notes that the 'risks' of any breakdown in a surrogacy agreement lie with the surrogate who, under existing legislation, has responsibility for the child should the intended parents 'walk away.' [55] While this focuses on the surrogate and intended parents rather than the child, this serious concern highlights not so much a problem in the law as a significant issue inherent in the practice of surrogacy itself: either the surrogate or the intended parents can at any point change their minds. [56] Inherent in surrogacy is the fact that the child is the object of a commissioning agreement.

Under the proposed new surrogacy pathway, the surrogate and intended parents complete mandatory pre-conception screening and safeguarding, and a pre-conception child welfare check is made, overseen and regulated by an RSO. The resulting agreement is officially recorded so that the intended parents become legal parents at birth. [57] The stated rationale for the proposed change in law is that this 'reflects the intentions of all parties.' [58] Protecting the intentions of the 'surrogacy team' now seems paramount. The best interests of the child are framed in terms of removing 'sources of stress and uncertainty for intended parents.' [59] While the Report recognises that 'the most fundamental element' of any surrogate agreement is 'the need to protect and respect the welfare of the surrogate-born child' [60], pre-conception 'administrative scrutiny' before accessing the pathway seems to be sufficient. [61] In contrast to the granting of a

parental order, no consideration is given to the circumstances in which the child will grow up. Some consultees advocated for a child welfare assessment to be carried out after the birth. The Law Commissions responded in the negative however, since this does not fit with the aim that the intended parents are the legal parents at birth, and this is not a requirement for natural conception. [62] Protection of the intentions of the surrogacy team is now paramount. Certainly, the Law Commissions aimed to provide some protection and clarity to the law on surrogacy. There are some positive elements in the proposed legislation such as enabling surrogate-born people to have access to information about their genetic and gestational origins and a recognition that scrutiny of the 'surrogacy team' is important. However, allowing parenthood to become merely an administrative procedure does not give due justice to the nature of the parent-child relationship.

In contrast to the normalisation of surrogacy and its primary focus on the intention of the surrogacy transaction, international concern looks to the rights of the child. In 2021 the International Social Service published its *Principles for the protection of the rights of the child born through surrogacy* ('Verona Principles'), and these have the support of the UN Committee on the Rights of the Child. Significantly, the first of the Verona Principles is human dignity. [63] Their Prefatory Note observes that 'the perspective of the rights of children born from surrogacy is often overshadowed by other interests, be it commercial or simply the claim to a right to a child, to the detriment of the child's human rights and their best interests.' The Law Commissions' Report notes that the Verona Principles 'command respect' but have no more influence than as guidance. [64] While the Report does make reference to the Verona



Principles it does so by trying to reconcile the practicalities rather than being guided by the first principle of human dignity. Indeed, for the Law Commissions, autonomy of the 'surrogacy team' takes precedence over human dignity.

## Conclusion

With the normalising of surrogacy as a reproductive choice, the welfare of the child, already precarious under previous legislation, now loses any primacy. The rationale to reform the law is not based on the issues concerning surrogacy or on remedying injustice or on responding to serious concerns or protecting those at risk of exploitation or objectivisation. Rather reform is proposed solely on the grounds that the law should reflect the intention of surrogacy: intended parents worry the surrogate may change her mind, the surrogate worries that the intended parents will change theirs. [65] The proposed law seeks ways of mitigating these worries. Anything that appears to contradict the intentions of the 'surrogacy team,' including judicial oversight, is swept away. As the Verona Principles point out, 'children born through surrogacy, surrogate mothers, intending parents, and persons providing human reproductive material are each subject to particular vulnerabilities and at risk of exploitation.' [66] Dehumanising pregnancy and motherhood by reducing their significance to a contractual arrangement and giving priority to the wishes and desires of the 'surrogacy team' over the welfare of the child create real vulnerabilities. As Pope Francis correctly observes, surrogacy is 'a grave violation of the dignity of the woman and the child.' [67] In attempting to normalise surrogacy these serious concerns and injustices have been disregarded and human dignity has been set aside in favour of an administrative process.

## Endnotes

[1] Dicastery for the Doctrine of the Faith, *Declaration On Human Dignity*, 8 April 2024, n.48-50:

<https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2024/04/08/240408c.html>

[2] European Parliament, *Amending Directive 2011/36/EU on preventing and combatting trafficking in human beings and protecting its victims*, 23 April 2024, n.6.

[3] UNICEF *Briefing Note*:

<https://www.unicef.org/media/115331/file>

[4] Law Commission and Scottish Law Commission, *Building families through surrogacy: a new law Vol.II Full Report*, 28 March 2023, 1.7:

[https://www.scotlawcom.gov.uk/files/9416/8001/1648/2\\_Surrogacy\\_full\\_report.pdf](https://www.scotlawcom.gov.uk/files/9416/8001/1648/2_Surrogacy_full_report.pdf)

[5] *Ibid.*, 1.6; quoting the Department of Health and Social Care, *Guidance: the surrogacy pathway: surrogacy and the legal process for intended parents and surrogates in England and Wales* 2018 (updated 2021):

<https://www.gov.uk/government/publications/having-a-child-through-surrogacy/the-surrogacy-pathway-surrogacy-and-the-legal-process-for-intended-parents-and-surrogates-in-england-and-wales>

[6] *Op. cit.*, Law Commissions Report Vol. II, 7.39.

[7] *Ibid.*, 7.10.

[8] *Independent review of the Human Fertilisation and Embryology Authority (HFEA): final report and recommendations* (23 November 2023):

<https://www.gov.uk/government/publications/human-fertilisation-and-embryology-authority-hfea-review-report/independent-review-of-the-human-fertilisation-and-embryology-authority-hfea-final-report-and-recommendations>

[9] *Surrogacy laws to be overhauled under new reforms – benefitting the child, surrogate and intended parents* (29 March 2023):

<https://lawcom.gov.uk/surrogacy-laws-to-be-overhauled-under-new-reforms-benefitting-the-child-surrogate-and-intended-parents/>

[10] Law Commission Project – Surrogacy:

<https://lawcom.gov.uk/project/surrogacy/>

[11] *Building families through surrogacy: a new law Volume III: Draft Surrogacy Bill* (28 March 2023):

<https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2023/03/3.-Surrogacy-draft-bill.pdf>

[12] *Op. cit.*, Law Commissions Report Vol. II, 1.70, 1.73.

[13] *Ibid.*, 2.5; 4.11.

[14] *Ibid.*, p.xx.

[15] *Ibid.*, xvii.

[16] *Ibid.*, 1.3.

[17] *Ibid.*, 1.5.

[18] *Ibid.*, 1.30.

[19] *Ibid.*, 1.6; quoting the Department of Health and Social Care (DHSC), *Guidance The surrogacy pathway: surrogacy and the legal process for intended parents and surrogates in England and Wales* 2018 (updated 2021):

<https://www.gov.uk/government/publications/having-a-child-through-surrogacy/the-surrogacy-pathway-surrogacy-and-the-legal-process-for-intended-parents-and-surrogates-in-england-and-wales>

[20] *Ibid.*, 1.36.

[21] *Ibid.*, 4.33.

[22] *Ibid.*, 1.6, 1.30.

[23] *Ibid.*, 1.78.

[24] *Ibid.*, 6.107, 6.114.

[25] Law Commission and Scottish Law Commission, *Building families through surrogacy: a new law Volume I: Core Report*, 2.7:

[https://www.scotlawcom.gov.uk/files/6616/8001/1581/1\\_Surrogacy\\_core\\_report.pdf](https://www.scotlawcom.gov.uk/files/6616/8001/1581/1_Surrogacy_core_report.pdf)

Only when it comes to discuss eligibility by age does the reader learn that the couple are in their early 40s (2.27).

[26] *Op. cit.*, Law Commissions Report Vol. II, 2.1, 2.12.

[27] *Ibid.*, 1.7.

[28] *Ibid.*, 1.35.

[29] *Ibid.*, 1.50–1.69.

[30] *Ibid.*, 2.16.

[31] *Ibid.*, 8.27.

[32] *Op. cit.*, Law Commissions Core Report Vol. I, 2.26.

[33] *Op. cit.*, Law Commissions Report Vol. II, 6.37.

[34] *Ibid.*, 6.25–6.29.

[35] *Ibid.*, 6.54, 6.22.

[36] *Ibid.*, 6.82, 6.89.

[37] Human Fertilisation and Embryology Authority (HFEA), *Code of Practice 2021*, 8.18: <https://portal.hfea.gov.uk/media/it1n3vpo/2022-07-01-code-of-practice-2021.pdf>

[38] *Op. cit.*, Law Commissions Report Vol. II, 2.26.

[39] *Ibid.*, 8.20.

[40] *Ibid.*, 7.6; 8.153. 8.167.

[41] *Ibid.*, 7.10–7.11.

[42] *Ibid.*, 7.21.

[43] *Ibid.*, 7.50.

[44] *Ibid.*, 7.28–7.29.

[45] *Ibid.*, 8.167.

[46] *Ibid.*, 1.59–1.60.

[47] *Ibid.*, 4.4; 4.14.

[48] *Ibid.*, 7.32.

[49] *Ibid.*, 7.115–7.117.

[50] Anscombe Bioethics Centre, *A Briefing on the HFEA Consultation, 'Modernising the regulation of fertility treatment and research involving human embryos'* (27 March 2023):

<https://bioethics.org.uk/research/reports-submissions/a-briefing-on-the-human-fertilisation-embryology-authority-hfea-consultation-modernising-the-regulation-of-fertility-treatment-and-research-involving-human-embryos/>

[51] *Op. cit.*, DHSC Guidance – *The surrogacy pathway*, 5. Parental order process.

[52] *Op. cit.*, Law Commissions Report Vol. II, 2.11.

[53] *Ibid.*, 4.14.

[54] *Ibid.*, 4.15.

[55] *Ibid.*, 4.14.

[56] *Ibid.*

[57] *Ibid.*, 4.39–4.40.

[58] *Ibid.*, 5.12.

[59] *Ibid.*

[60] *Ibid.*, 8.138.

[61] *Ibid.*, 8.138–8.139.

[62] *Ibid.*, 8.139, 8.157.

[63] International Social Services, *Principles for the protection of the rights of the child born through surrogacy (Verona Principles)* (2021): [https://www.iss-ssi.org/wp-content/uploads/2023/03/VeronaPrinciples\\_25February2021-1.pdf](https://www.iss-ssi.org/wp-content/uploads/2023/03/VeronaPrinciples_25February2021-1.pdf)

[64] *Op. cit.*, Law Commissions Report Vol. II, 3.20.

[65] *Op. cit.*, Law Commissions Core Report Vol. I, 1.18.

[66] *Op. cit.*, Verona Principles, 1.4.

[67] Pope Francis, *Audience with the Diplomatic Corps accredited to the Holy See for the exchange of greetings for the New Year* (8 January 2024): <https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2024/01/08/240108d.html>



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