EXPLANATORY MEMORANDUM TO

THE HUMAN FERTILISATION AND EMBRYOLOGY (PARENTAL ORDERS) REGULATIONS 2010

2010 No. [XXXX]

THE HUMAN FERTILISATION AND EMBRYOLOGY (PARENTAL ORDERS) (CONSEQUENTIAL, TRANSITIONAL AND SAVING PROVISIONS) ORDER 2010

2010 No. [XXXX]

1. This Explanatory Memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instruments

2.1. A parental order is an order made by a court providing for a child to be treated as the lawful child of the applicants for the order following the birth of a child by a surrogate. The Human Fertilisation and Embryology (Parental Order) Regulations 2010 replace the Parental Orders (Human Fertilisation and Embryology) Regulations 1994 and the Parental Orders (Human Fertilisation and Embryology) (Scotland) Regulations 1994 and ensure that as a result of the changes made by section 54 of the Human Fertilisation and Embryology Act 2008, processes are in place for civil partners and couples in an enduring family relationship to apply for parental orders, in addition to married couples. The Human Fertilisation and Embryology (Parental Orders) (Consequential, Transitional and Saving Provisions) Order 2010 makes necessary consequential amendments to secondary legislation and makes transitional and saving provisions.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1. None

4. Legislative Context

4.1. Section 30 of the Human Fertilisation and Embryology Act 1990 ("the 1990 Act") introduced parental orders as a way of transferring parenthood from a surrogate (and her partner if she has one) to the commissioning couple in a surrogacy arrangement. The 1990 Act set out the eligibility criteria for a parental order, including that the couple must be married.

4.2. Section 30 of the 1990 Act contained a regulation making power that provided for specified adoption legislation[1] to be applied, with modifications, to parental orders. The power also provided for references, in any enactment, to adoption, an adopted child or an adoptive relationship to be read as including a reference to a parental order.

4.3. A review of the 1990 Act led to the passing of the Human Fertilisation and Embryology Act 2008 ("the 2008 Act"), which received Royal Assent in November 2008. Section 54 of the 2008 Act replaces section 30 of the 1990 Act and maintains the same criteria for a parental order as section 30 of the 1990 Act with the exception of the eligibility criteria that now permits civil partners and couples in an enduring family relationship to apply for a parental order, in addition to married couples.

4.4. Section 55 of the 2008 Act, like the 1990 Act, contains a regulation making power that provides for specified adoption legislation[2] to be applied, with modifications, to parental orders. The power also provides for references, in any enactment, to adoption, an adopted child or an adoptive relationship to be read as including a reference to a parental order.

[1] The Adoption Act 1976, the Adoption (Scotland) Act 1978 and the Adoption (Northern Ireland) Order 1987

[2] The Adoption and Children Act 2002, the Adoption (Scotland) Act 1978, the Adoption and Children (Scotland) Act 2007 and the Adoption (Northern Ireland) Order 1987

4.5. Given the changes to adoption legislation since 1990, and the policy changes made by the 2008 Act, it was necessary to replace the Parental Orders (Human Fertilisation and Embryology) Regulations 1994 ("the1994 Regulations) and the Parental Orders (Human Fertilisation and Embryology) (Scotland) Regulations 1994 ("the 1994 Scotland Regulations").

4.6. The Human Fertilisation and Embryology (Consequential, Transitional and Saving Provisions) Order 2010 ("the Order") revokes the 1994 Regulations and the 1994 Scotland Regulations and makes necessary amendments to secondary legislation to take account of the 2008 Act.. The Order also makes transitional and saving provisions to facilitate the bringing into force of section 54 of the 2008 Act and the repeal of section 30 of the 1990 Act.

4.7. It is intended that the Human Fertilisation and Embryology (Parental Order) Regulations 2010 ("the Parental Order Regulations 2010") and the Order – both subject to the affirmative resolution making procedure – will come into force on 6th April 2010.

5. Territorial Extent and Application

5.1. These instruments apply to all of the United Kingdom.

6. European Convention on Human Rights

The Minister of State for Public Health has made the following statement regarding Human Rights:

In my view the provisions of the Order and the Parental Order Regulations 2010 are compatible with the Convention rights.

7. Policy background

- ***What is being done and why***

The Parental Order Regulations 2010

7.1. Sections 54 and 55 of the 2008 Act replace section 30 of the 1990 Act. Section 54 extends the categories of persons who can apply for a parental order so as to include civil partners and couples in an enduring family relationship, in addition to married couples. The Parental Order Regulations 2010 give effect to section 54 of the 2008 Act and replace the 1994 Regulations and the 1994 Scotland Regulations by applying certain provisions of current adoption legislation, with modifications, to parental orders.

7.2. The substantive provisions of the Parental Order Regulations 2010 are to be found in its four Schedules. Schedule 1, the first sets out the provisions of the Adoption and Children Act 2002 (which extends to England and Wales) which are to apply to parental orders and then, sets out how they are modified for the purposes of parental orders. Schedule 2 sets out the articles of the Adoption (Northern Ireland) Order 1987 which are to be applied as modified. Schedule 3 sets out the provisions of the Adoption and Children (Scotland) Act 2007 which are to be applied as modified. Finally, Schedule 4 sets out the references in other legislation to adoption, adopted child or adoptive relationship that are to be read to include references to parental orders.

7.3. The Parental Order Regulations 2010 are wide ranging covering provisions such as the legal status of a person who is the subject of a parental order, how the Parental Order Register functions and the factors a court must take into account when considering an application for a parental order. Set out below is a summary of the main provisions.

The welfare of the child provisions

7.4. The Parental Order Regulations 2010 make the welfare of the child the paramount consideration of a court when considering an application for a parental order, and also introduce a welfare checklist setting out matters that the court must take into account (such as the child's particular

needs). These are new provisions introduced by the Parental Order Regulations 2010, which were not in the 1994 Regulations or the 1994 Scotland Regulations.

Parental orders

7.5. The Parental Order Regulations 2010 make provision about the effect of a parental order for example, by providing that the subject of a parental order, made by the court, will be the legitimate child of the commissioning couple. This is similar to the 1994 Regulations and the 1994 Scotland Regulations.

Parental Order Register

7.6. The Parental Order Register is a register of all parental orders made by the courts within the relevant jurisdiction and is linked to the register of live births. Once a parental order has been made by a court, the Registrar General marks the entry in the register of live births as "Re-registered". The Parental Order Regulations 2010 continue to ensure this Register is held and maintained by the Registrar General.

7.7. The Parental Order Regulations 2010 also set out details of access rights to the register and the index of the Register. They provide that where the subject of a parental order applies to the court or Registrar General for information about the parental order, they must have been informed about the availability of counselling and have been given a suitable opportunity to receive counselling.

Court powers

7.8. The Parental Order Regulations 2010 provide the court with the relevant powers to recover a child if the child is removed from the commissioning couple, without leave of the court while the parental order application is pending. They also set out the maximum penalty that could be faced if a child is removed contrary to that provision.

Other legislation

7.9. As in the 1994 Regulations and the 1994 Scotland Regulations, the Parental Order Regulations 2010 provide that certain references to adoption, adopted child and adoptive relationship in other legislation are to be read so as to include references to parental orders. This legislation includes the Marriage Act 1948, the British Nationality Act 1981 and the Children Act 1989. **Annex A** sets out in more detail what references are applied to parental orders and the effect of that application.

The Order

7.10. The Order revokes the 1994 Regulations and the 1994 Scotland Regulations and makes the necessary amendments to secondary legislation to take account of the revocations. The Order also provides transitional and saving provisions in relation to the bringing into force of section 54 of the 2008 Act and the repeal of section 30 of the 1990 Act.

Consequential amendments

7.11. The Order updates the relevant secondary legislation to ensure references are made to the Parental Order Regulations 2010 and the 2008 Act where appropriate. For example, it is necessary to update legislation to ensure that the definition of a surrogate child includes a reference to parental order granted under section 54 of the 2008 Act in addition to the reference to a parental order granted under section 30 of the 1990 Act.

Transitional provisions

7.12. The Order makes transitional provision for applications, which are made under section 30 of the 1990 Act but not disposed of before the day on which section 30 of the 1990 Act is repealed and the 1994 Regulations and the 1994 Scotland Regulations are revoked. In such cases, applications will continue to be dealt with under section 30 of the 1990 Act and the 1994 Regulations or the 1994 Scotland Regulations.

Saving provisions

7.13. The Order saves parts of the 1994 Regulations and the 1994 Scotland Regulations relating to the status of children who are the subject of a parental order made under section 30 of the 1990 Act. It also saves those Regulations and section 30 of the 1990 Act for the purposes of outstanding applications for parental orders under section 30 of the 1990 Act.

Repeals and revocations

7.14. Finally, the Order revokes the 1994 Regulations, the 1994 Scotland Regulations, and two saving provisions which were necessary to ensure that the adoption legislation which was applied, with modifications, by the 1994 Regulations and 1994 Scotland Regulations remained in force for the purposes of parental orders when that adoption legislation was repealed.

8. Consultation outcome

8.1. The consultation took place over a 12-week period between 1 September and 23 November 2009. The consultation document highlighted proposed changes and set out why this was desirable or necessary. The document also included annexes showing the adoption legislation as it would be applied with modifications by the proposed Regulations in England and Wales, Scotland and Northern Ireland. A further annex showed additional legislation where modification was necessary to ensure references to adoption, adoptive relationship or adopted child would be read as including references to parental orders.

8.2. Twenty four responses were received from a diverse mix of stakeholders including surrogacy organisations, Local Authority Children's Departments and professional bodies.

8.3. Many of the consultation responses included comment on more general aspects of surrogacy which are outside of the scope of the regulation making power. An analysis of responses follows: further detail can be found in the consultation report on the Department of Health website.

Welfare of the child

8.4. Respondents were supportive of the provisions which ensure that the welfare of the child is the paramount consideration of the courts in England and Wales, and Scotland. In addition to this, following the consultation responses, the adoption legislation for Northern Ireland was applied with modifications to include the provisions which ensure that the welfare of the child is the paramount consideration of the courts in Northern Ireland and to include the welfare checklist.

Counselling

8.5. Following the consultation responses, the Parental Orders Regulations 2010 were amended to require the courts – in addition to the Registrar General – to signpost counselling where a person applies for information about a parental order.

Disclosure of information

8.6. Consultation respondents were concerned that no provision was made in the Parental Order Regulations 2010 allowing the courts to disclose identifying information about anyone other than the applicant. The concern was that people who have been adopted and people who are donor conceived can access identifying information about their birth parents, but people who are the subject of a parental order could not. The Parental Order Regulations 2010 now allow the courts to disclose such information.

Nationality

8.7. As a result of responses to the consultation, and to ensure parity with adoption legislation, the Parental Order Regulations 2010 now ensure that where a parental order is made in the United Kingdom and one or both of the commissioning couple are British citizens, the child – if not already so – will become a British citizen.

9. Guidance

9.1. The Human Fertilisation and Embryology Authority (HFEA) provide guidance for couples undertaking treatment at a HFEA licensed centre. The courts and CAFCASS will provide guidance for families applying for a parental order.

9.2. A version of the regulations as they appear when consolidated with the adoption legislation will be available on the Department of Health website.

10. Impact

10.1. The impact on business, charities or voluntary bodies will be negligible. The regulations (and associated order) maintain Government policy.

10.2. There will be some impact on some parts of the public sector. With the increase in the scope of people who can apply for parental orders there will be some additional costs for the HM Courts Service, but these can be met from existing allocations. There will be a potential small increase in applications for recovery of the child and also applications for people to receive information about parental orders made in respect of them, but these are not likely to be large in number and any costs can be met from existing allocations. HM Courts Service will charge court fees to meet the costs of applications, as it is required to recover its costs.

10.3. An Impact Assessment is attached to this memorandum.

11. Regulating small business

11.1. The legislation does not apply to small business.

12. Monitoring & review

12.1. The review of the regulations will be undertaken as part of the work to review the Human Fertilisation and Embryology Act 2008, which will take place in November 2010.

12.2. The provisions in the Order are either consequential amendments and will therefore already be subject to a wider form of monitoring or review, or they are transitional provisions and will only apply for a limited period: the order is therefore not appropriate for ongoing monitoring or reviewing.

13. Contact

13.1. Stephanie Croker at the Department of Health Tel: 020 797 23054 or email: Stephanie.croker@dh.gsi.gov.uk can answer any queries regarding the instruments.

Schedule 4 to the Human Fertilisation and Embryology (Parental Orders) Regulations 2010 ("the 2010 Regulations") sets out references in legislation to adoption, adopted child or adoptive relationship that are to be read as including references to parental orders. Below is a brief summary of the legislation and how it is applied to parental orders.

Schedule 1 to the Marriage Act 1949 and Schedule 1 to the Civil Partnership Act 2004
References to an adoptive relationship are to be read as including references to the corresponding relationship arising by virtue of a parental order. This provision ensures that the degrees of relationship set out in the Marriage Act 1949 and the Civil Partnership Act 2004 that are prohibited in relation to marriage and civil partnerships, are applied in relation to parental orders. For example, an adopted person cannot marry either of his adoptive parents, and therefore a person who is the subject of a parental order cannot marry either of the commissioning couple.

Section 37(1) of the Succession (Scotland) Act 1964
Currently an adopted child cannot inherit any peerage, title of honour or property related to such a title. The 2010 Regulations apply the Adoption and Children Act 2002 for England and Wales, with modifications, to prevent the subject of parental order inheriting titles. The modification made to the 1964 Act ensures that the position is the same in Scotland.

Sections 39E(5) and 43(1) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965
In Scotland, a copy of the abbreviated entry into the Register of Births is prevented from referring specifically to adoption. The entry in Schedule 4 relating to section 39E(5) of the 1965 Act also makes this the case for parental orders, so that a copy of the abbreviated entry into the Register of Births cannot refer specifically to the parental order. The application of section 43(1) of the 1965 Act to parental orders allows for corrections to the Parental Order Register in Scotland where the subject of the parental order changes their name after the parental order has been granted.

Article 37 of the Births and Deaths Registration (Northern Ireland) Order 1976
The modification made by Schedule 4 ensures that references to the Adoption (Northern Ireland) Order 1987 include references to that Order as applied, with modifications, by the 2010 Regulations and that references to the Adopted Children Register include references to the Parental Order Register. Article 37 provides for alterations of a child's name and applies to persons whose births are registered in Northern Ireland and to persons registered in Adopted Children Register. The modification made Schedule 4 ensures that Article 37 applies equally to the Parental Order Register in Northern Ireland.

Paragraph 3 to Schedule 1 to the Senior Courts Act 1981
The references to all causes and matters relating to adoption are to be read as including references to proceedings under the Adoption and Children Act 2002 as applied, with modifications, by the 2010 Regulations. This provision relates to the distribution of business in the High Court and ensures parental order proceedings are assigned to the Family Division.

Section 65(1)(h) of the Magistrates' Courts Act 1980
Section 65 of the Magistrates' Courts Act 1980 defines "family proceedings" as proceedings under the legislation listed. Schedule 4 ensures that the reference to the Adoption and Children Act 2002 in that list includes a reference to that Act as applied, with modifications by the 2010 Regulations, in relation to parental orders.

Sections 1(5)(a) and (5A)(a) of the British Nationality Act 1981
References to an order authorising the adoption of a minor order are to be read as including a parental order in respect of a minor and references to the adopter(s) are to be read to include references to the persons who obtained the parental order. The effect of this modification means that where a parental order is made in the United Kingdom and one, if not both, of the commissioning couple are British citizens, the child, if not already a British citizen, will become a British citizen.

Section 2(5)(a) of the Foster Children (Scotland) Act 1984, paragraph 5 of Schedule 8 to the Children Act 1989 and paragraph 7(a) of Article 107 of the Children (Northern Ireland) Order 1995

The references in the Foster Children (Scotland) Act 1984, the Children Act 1989 and the Children (Northern Ireland) Order 1995 to a child being placed in the care of a person who proposes to adopt the child is to be read as including references to a child being in the care of persons who propose to apply for a parental order in respect of that child. The effect of these provisions means that where an application for a parental order is pending and the child is in the care of the commissioning couple, that child is not being privately fostered.

Paragraph 5(vii) of Schedule 3 to the Child Abduction and Custody Act 1985

The reference in paragraph 5(vii) of Schedule 3 to the 1985 Act to an adoption order is to be read as including a reference to a parental order. An adoption order is one of the orders listed in Schedule 3 which links into the definition of "custody order" for the purposes of the 1985 Act. This ensures that provision includes parental orders.

Section 1(1)(b)(x) of the Family Law Act 1986

The reference to an adoption order is to be read as including a reference to a parental order. This provision ensures that Custody Orders in Scotland also apply to children who are the subject of parental orders.

Section 27(2) and 28(5)(c) of the Human Fertilisation and Embryology Act 1990 and Section 33(2) and 38(4) of the Human Fertilisation and Embryology Act 2008

These enactments provide that a woman who carries the child will be the child's mother, unless an adoption order is made. Schedule 4 ensures references to adoption are read as including references to a parental order. This means that a woman who carries a child will be the child's mother, unless a parental order is made.

Sections 6(2)(c) and (d), (5) and (7)(b) of the Judicial Pensions and Retirement Act 1993

References to adopted children are to be read as including references to children are the subject of a parental order. The effect of this means that "eligible children of the deceased" in relation to judicial pensions, are defined as including children who are the subject of a parental order in addition to adopted children.

Section 2(1)(d)(iii) of the Civil Evidence (Family Mediation) (Scotland) Act 1995

The reference to an adoption order is to be read as including a reference to a parental order. Section 1 of the 1995 Act makes provision for a general rule that no information as to what occurred during family mediation shall be admissible as evidence in any civil proceedings. Section 2 of the 1995 Act then lists exceptions to this rule. The effect of this entry in Schedule 4 is that the general rule in section 1 shall not prevent the admissibility of information as to what occurred during family mediation where those proceedings are for a parental order.

Sections 64 and 65 of the Sexual Offences Act 2003

It is an offence for an adult relative to have sex with a child. Child is defined as including an adopted child. Any reference to an adoptive relationship is to be read as including a reference to the corresponding relationship arising by virtue of a parental order. This provision ensures that it is also an offence for an adult relative to have sex with a child who is related to the adult by virtue of being the subject of a parental order.

Section 58(2)(k) of the Local Electoral Administration and Registration Services (Scotland) Act 2006

The effect of this gloss is that the Parental Order Register or any register or book maintained in pursuance of section 55(1) of the Adoption and Children (Scotland) Act 2007 (as applied with modifications by the 2010 Regulations) are excluded from the definition of "accessible material" in section 58(1) of the 2006 Act for which the Registrar General is obliged to prepare and maintain an index and make available for searching and copying.

Summary: Intervention & Options

Department /Agency:	Title:	
Department of Health	**Impact Assessment of the Human Fertilisation and Embryology (Parental Orders) Regulations 2010**	
Stage: Final	**Version:** Final	**Date:** January 2010
Related Publications: Human Fertilisation and Embryology Act 2008		

Available to view or download at:

http://www.dh.gov.uk

Contact for enquiries: Stephanie Croker **Telephone:** 020 797 23054

What is the problem under consideration? Why is government intervention necessary?

A parental order provides for a child to be treated as the lawful child of the applicants to the order where the child was born by a surrogate. Section 54 of the Human Fertilisation and Embryology Act 2008 ("the 2008 Act") replaces section 30 of the Human Fertilisation and Embryology Act 1990 ("the 1990 Act") and permits civil partners and couples in an enduring family relationship to apply for a parental order, in addition to married couples. The Parental Orders (Human Fertilisation and Embryology) Regulations 1994 ("the 1994 Regulations") and the Parental Orders (Human Fertilisation and Embryology) (Scotland) Regulations 1994 ("the 1994 Scotland Regulations") apply out of date adoption legislation, with modifications, to parental orders and need updating.

What are the policy objectives and the intended effects?

The Human Fertilisation and Embryology (Parental Orders) Regulations 2010 ("the 2010 Regulations") replace the 1994 Regulations and the 1994 Scotland Regulations and give effect to section 54 of the 2008 Act by ensuring that processes are in place for couples in an enduring family relationship and couples in a civil partnership, as well as married couples, to apply for parental orders. The 2010 Regulations ensure that the policy in relation to parental orders is closely aligned with up to date adoption legislation by applying the Adoption and Children Act 2002, the Adoption and Children (Scotland) Act 2007 and the Adoption (Northern Ireland) Order 1987, with modifications, to parental orders.

What policy options have been considered? Please justify any preferred option.

Two policy options were considered:

1. Make no change - maintain the current system

2. Replace the 1994 Regulations and the 1994 Scotland Regulations to reflect updated adoption legislation and the additional groups that can apply for parental orders under the 2008 Act.

Option 2 is preferred to give effect to the parental order provisions in the 2008 Act, allowing couples in a civil partnership, married or in an enduring family relationship to apply for parental orders. It is also necessary to align the parental order processes with current adoption legislation.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

The review of the 2010 Regulations will fall within the review of the Human Fertilisation and Embryology Act 2008, which will take place in November 2012.

Ministerial Sign-off For final proposal/implementation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) the benefits justify the costs.

Signed by the responsible Minister:

Gillian Merron.....Date: ***19th January 2010***

Summary: Analysis & Evidence

Policy Option: 2	Description: Replace 1994 Regulations and 1994 Scotland Regulations to reflect updated adoption legislation and the additional groups that can apply for parental orders under the 2008 Act

COSTS

ANNUAL COSTS	
One-off (Transition)	**Yrs**
£ 70,000	1
Average Annual Cost (excluding one-off)	
£ 0	

Description and scale of **key monetised costs** by 'main affected groups' Costs are based on estimates of the costs to the Ministry of Justice (MOJ) to update court rules, to other organisations for updating guidance and the General Register Office (GRO) for updating the Parental Order Register. The £20,000 to the GRO was paid as part of the implementation costs of the 2008 Act.

Total Cost (PV) **£ 70,000**

Other **key non-monetised costs** by 'main affected groups' Ongoing costs will be absorbed by the GRO and the MOJ. There will be a small increase in costs to the HM Court Service Service which will reflect the increase in applications.

BENEFITS

ANNUAL BENEFITS	
One-off	**Yrs**
£ 0	0
Average Annual Benefit (excluding one-off)	
£ 0	

Description and scale of **key monetised benefits** by 'main affected groups'

Total Benefit (PV) **£ 0**

Other **key non-monetised benefits** by 'main affected groups' The 2010 Regulations will ensure equality, fairness and ease of process for applicants for parental orders.

Key Assumptions/Sensitivities/Risks There is likely to be a gradual increase in the number of parental orders granted. This is likely to be a small increase and the costs related will be negligible.

Price Base Year 0	Time Period Years 0	**Net Benefit Range** (NPV) **£ N/A**	**NET BENEFIT** (NPV Best estimate) **£ N/A**

What is the geographic coverage of the policy/option?				UK	
On what date will the policy be implemented?				April 2010	
Which organisation(s) will enforce the policy?				HM Court Service	
What is the total annual cost of enforcement for these organisations?				£ 0	
Does enforcement comply with Hampton principles?				Yes	
Will implementation go beyond minimum EU requirements?				No	
What is the value of the proposed offsetting measure per year?				£ N/A	
What is the value of changes in greenhouse gas emissions?				£ N/A	
Will the proposal have a significant impact on competition?				No	
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large	
Are any of these organisations exempt?	No	No	N/A	N/A	

Impact on Admin Burdens Baseline (2005 Prices) (Increase - Decrease)

Increase of £ 0 Decrease of £ minimal **Net Impact** **£** small decrease

Kev: **Annual costs and benefits: Constant Prices** **(Net) Present Value**

Introduction

Background

1. Surrogacy can provide a vital opportunity, where a woman is unable to bear a child herself, for a couple to have a child that is genetically related to one or both of them. However, arranging for another woman, a surrogate, to carry a child on their behalf involves complex and sensitive issues about the parenthood of any child born as a result. For instance, the woman who gives birth is the child's legal mother, even where the child is created from the sperm and egg of the couple who commission the surrogacy. Therefore, to facilitate surrogacy arrangements, there needs to be a legal process to transfer parenthood from the surrogate (and her husband or partner if she has one) to the commissioning couple.
2. The Human Fertilisation and Embryology Act 1990 ("the 1990 Act") to enable parenthood to be transferred, by way of a parental order, from the birth parents to the couple who commission the surrogacy. A parental order is made by the court, provided that certain conditions are met. Approximately 50-70 parental orders are granted each year.
3. The 1990 Act also contained power to make Regulations that apply provisions of adoption legislation, with modifications, to parental orders. The Parental Orders (Human Fertilisation and Embryology) Regulations 1994 ("the 1994 Regulations") apply adoption legislation for England and Wales, and Northern Ireland, with modifications, to parental orders. The Parental Orders (Human Fertilisation and Embryology) (Scotland) Regulations 1994 ("the 1994 Scotland Regulations") apply Scottish adoption legislation, with modifications, to parental orders.
4. Since the 1994 Regulations were made there have been significant changes to adoption legislation in England and Wales and in Scotland.[3] The 1994 Regulations and the 1994 Scotland Regulations were not updated at the time of these changes because of the impending review of the 1990 Act.
5. The 2008 Act amends and updates the 1990 Act. Provision in the 2008 Act extends the category of persons who may apply for a parental order from married couples to civil partners and couples in an enduring family relationship. These provisions were recently considered by Parliament during the passage of the 2008 Act and did not form part of the consultation on the 2010 Regulations.
6. The 2008 Act also contains powers to make Regulations which apply provisions of adoption legislation, with modifications, to parental orders. The adoption legislation that may be applied, with modifications, by the 2010 Regulations is specified in the 2008 Act.[4]
7. The 2010 Regulations, replace both the 1994 Regulations and the 1994 Scotland Regulations.

Reason for intervention

8. There are two reasons as to why intervention was necessary. It is necessary to make the 2010 Regulations to give effect to the parental order provisions in the 2008 Act, allowing couples in a civil partnership, married or in an enduring family relationship to apply for parental orders.
9. Secondly the 2010 Regulations are necessary to align the parental order processes with current adoption legislation.

[3] The Adoption and Children Act 2002 and the Adoption and Children (Scotland) Act 2007.
[4] The Regulations may apply the Adoption and Children Act 2002, the Adoption and Children (Scotland) Act 2007, the Adoption (Scotland) Act 1978 and the Adoption (Northern Ireland) Order 1987, with modifications, to parental orders.

Policy objective

10. The policy objective of the 2010 Regulations is to ensure that processes are in place for couples in an enduring family relationship, married couples and couples in a civil partnership to apply for a parental order, and to ensure that parental orders are alligned with current adoption legislation.

The 2010 Regulations

11. The 2010 Regulations are wide ranging, covering provisions such as the legal status of a person who is the subject of a parental order, how the Parental Order Register functions and the factors a court must take into account when considering an application for a parental order. Set out below is a summary of the main provisions of the 2010 Regulations.

The welfare of the child provisions

12. The 2010 Regulations apply, with modifications, provisions of current adoption legislation which make the welfare of the child the paramount consideration of the court when considering an application for a parental order. They also apply provisions that introduce a welfare checklist which sets out matters that must be taken into account by the court when considering a parental order application. The checklist includes, for example, the requirement to consider the child's particular needs, their ascertainable wishes and any of the child's characteristics the court considers relevant. The welfare checklist and the paramount consideration principle are new provisions introduced for parental orders by the 2010 Regulations, which were not in the 1994 Regulations or the 1994 Scotland Regulations.

Parental orders

13. The 2010 Regulations make further provision about the effect of a parental order. They do this by applying provisions of current adoption legislation, with modifications, to parental orders. For example, the 2010 Regulations provide that once the order has been granted, the child who is the subject of the parental order will be the legitimate child of the commissioning couple and that the commissioning couple will have parental responsibility for the child. Similar provision to the 1994 Regulations and the 1994 Scotland Regulations is made by the 2010 Regulations in this respect.

Parental Order Register

14. The 1994 Regulations and the 1994 Scotland Regulations required the Registrar General to set up and maintain the Parental Order Register. The 2010 Regulations continue to require the Registrar General to hold and maintain the Register. The Parental Order Register is a register of all parental orders made by the court and is linked to the register of live births. Once a parental order has been made by the court the Registrar General marks the entry in the register of live births as "Re-registered". The 2010 Regulations also set out details of access rights to the register and the index of the Register.

Court powers

15. The 2010 Regulations apply certain provisions of adoption legislation, with modifications, to provide the court with the relevant powers to recover a child if removed from the commissioning couple, without leave of the court, while the parental order application is pending. The 2010 Regulations also set out the maximum penalty that could be faced if a child is removed contrary to the Regulations.

Counselling

16. A person who is the subject of a parental order may apply for a copy of their original birth certificate from the Registrar General. When the Registrar General receives this application, the 2010 Regulations require that the applicant is made aware of the counselling services available.

17. A person who is the subject of a parental order may also apply to the courts for information about the parental order application and hearing. The 2010 Regulations also require the courts to signpost counselling.

Other legislation

18. As in the 1990 Act, the 2008 Act includes a regulation making power which provides for references to adoption, adopted child and adoptive relationships in other legislation to be read as including references to parental orders. These include, for example, ensuring that the same prohibitions on marrying relatives apply to the subject of a parental order as to an adopted person. These are set out in Schedule 4 to the 2010 Regulations.

Consultation

19. The 2010 Regulations were subject to public consultation which ran from 1 September 2009 until 23 November 2009. Twenty four responses were received from a wide range of stakeholders, including surrogacy organisations, other Government Departments and Local Authorities.

20. In general, the respondents to the consultation welcomed the draft 2010 Regulations, in particular the requirement on the court to ensure that the welfare of the child is the paramount consideration when considering a parental order application.

21. The paragraphs below summarise the main changes to the 2010 Regulations following the consultation responses. Further details of the consultation can be found in the consultation report on the Department of Health website (www.dh.gov.uk).

Welfare provisions

22. Current adoption legislation for England and Wales and Scotland ensures the welfare of the child is the paramount consideration of the court when considering the adoption of a child. This requirement is applied, with modifications, by the 2010 Regulations to parental orders. All respondents who commented on this provision welcomed its application.

23. In addition, the 2010 Regulations apply, with modifications, the welfare checklist as set out in adoption legislation to parental orders for England and Wales and Scotland. The checklist sets out the matters a court should take into account when considering a parental order application, for example any particular needs of the child.

24. The inclusion of these principles is in line with Government policy for the care of children across all areas involving children.

25. Current adoption legislation in Northern Ireland does not make the child's welfare the paramount consideration of the court and does not include the welfare checklist in the same way as the legislation for England and Wales and Scotland.

26. However, consultation responses suggested that the welfare provisions which apply to England and Wales and Scotland, should be replicated for Northern Ireland. The 2010 Regulations therefore apply current adoption legislation for Northern Ireland, with modifications, to ensure the welfare of the child is the paramount consideration of the court and to include the welfare checklist.

Counselling provisions

27. The draft 2010 Regulations require the Registrar General to inform the applicant of the availability of counselling before disclosing any information about the parental order to the applicant. Following consultation the 2010 Regulations now also require the courts to signpost counselling before disclosing any information about the parental order application or hearing.

Disclosure of information by the Courts

28. The courts may disclose information about the parental order application. Consultation respondents highlighted that the information available from the courts for people who have been adopted includes identifying information but the 2010 regulations did not permit this in

relation to parental orders. Therefore the 2010 Regulations were amended post consultation to allow the courts to disclose identifying information to the applicant in relation to parental orders.

Nationality

29. As a result of responses to the consultation and to ensure parity with adoption legislation, the 2010 Regulations now ensure that where a parental order is made in the United Kingdom and one, or both of the commissioning couple is a British citizen, the child, if not already a British citizen, will become a British citizen.

Other issues

30. Following the consultation other minor and technical changes have been made to the 2010 Regulations. Further details of the consultation responses and the Governments response to them can be found on the Department of Health website.

Policy options

31. Two policy options were initially identified. These were to:

- make no change in relation to parental orders and maintain the current system; or
- replace the 1994 Regulations and the 1994 Scotland Regulations to reflect updated adoption legislation and the additional groups that can apply for parental orders under the 2008 Act.

Benefits and risks

Option 1 – Maintain the current system

32. If the 2010 Regulations are not made full effect would not be given to the 2008 Act.

33. The 2008 Act allows civil partners and couples in an enduring family relationship, as well as married couples, to apply for a parental order. This is consistent with wider Government policy on promoting equality, as evidenced by the Civil Partnership Act 2004 and legislation prohibiting discrimination on the grounds of sexual orientation. However, if the current system is maintained there is no way of giving effect to the provisions of the 2008 Act which would leave the Department open to risk of legal challenge and go against Departmental equalities policy.

Option 2 – Replace 1994 Regulations and 1994 Scotland Regulations to reflect updated adoption legislation and the additional groups that can apply for parental orders under the 2008 Act

34. Replacing the 1994 Regulations and the 1994 Scotland Regulations with the 2010 Regulations allows current adoption legislation to be applied, with modifications, in relation to parental orders.

35. The 2010 Regulations will ensure that the processes are in place to enable civil partners and couples in an enduring family relationship (in addition to married couples) to apply for parental orders, as provided for by the 2008 Act.

Costs

Option 1

36. Option 1 will not incur any set up costs as it will not be necessary to update any guidance or court rules as there will be no policy changes.

37. Section 55 of the 2008 Act requires new regulations to be made as the power relates to the Adoption and Children Act 2002 (and not the Adoption Act 1976 which the 1994 Regulations applies with modifications, to parental orders). Maintaining section 30 of the 1990 Act and the 1994 Regulations and 1994 Scotland Regulations would mean deciding not to implement the changes made by the 2008 Act. Those provisions ensure equal treatment for civil partners. A failure to implement the Act may leave the Secretary of State vulnerable to challenge (which might incur legal and other costs).

Option 2

38. The costs incurred by option 2 reflect the work necessary to implement the policy changes made by the 2008 Act. They are not directly related to the 2010 Regulations themselves.

39. Option 2 will incur costs of approximately £50,000. The majority of this sum reflects estimated costs to the Ministry of Justice (MOJ) in the preparation of court rules relating to parental orders. The court rules govern practice and procedures in the various courts.

40. It will also be necessary for other organisations, such as CAFCASS, to update literature and guidance once the 2010 Regulations come into force. These will be one-off costs to the organisations and have been included in the £50,000 estimate.

41. With the additional groups of couples that can apply for parental orders there will be some additional costs for the HM Courts Service, but these can be met from existing allocations. There will be a potentially small increase in applications for recovery of the child and also applications for people to receive information about parental orders made in respect of them, but these are not likely to be large in number and any costs can be met from existing allocations. HM Courts Service will charge court fees to meet the costs of applications, as it is required to recover its costs.

42. There will also be costs to the General Register Office (GRO) – across the UK – as it is necessary to update the Parental Orders Register to take into account the additional groups who may apply for parental orders. Costs were predicted to be £20,000 and were included in the estimate from the GRO when applying for funds to implement the 2008 Act. Therefore, these costs have already been accounted for as part of the implementation of the 2008 Act.

Equality issues

43. The Equality Impact Assessment, Annex A, sets out equality issues in further detail.

44. The Government believes that the 2010 Regulations are unlikely to have any adverse impact on equality, including with regard to race, disability, age, gender, sexual orientation and human rights.

45. The 2010 Regulations will have a positive effect, promoting equality of opportunity and eliminating discrimination, specifically in terms of sexual orientation.

Enforcement, sanctions and monitoring

46. Parental orders are made by the courts, the registration of parental orders and maintenance of the Parental Orders Register is the responsibility of the GRO. Therefore, it will be the responsibility of HM Court Services to monitor the application and grant of parental orders and the GRO to maintain the Parental Orders Register.

Implementation and delivery plan

47. It is intended that the 2010 Regulations will come into force on 6th April 2010.

Post-implementation review

48. The review of the 2010 Regulations will fall within a wider review of the 2008 Act which will take place in November 2012.

Summary and conclusion

49. Policy option 2 was the preferred option. It is necessary to make the 2010 Regulations to give effect to the parental order provisions in the 2008 Act, allowing couples in a civil partnership, married or in an enduring family relationship to apply for parental orders. The 2010 Regulations are also necessary to align the parental order processes with current adoption legislation.

Specific Impact Tests: Checklist

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	*Results in Evidence Base?*	*Results annexed?*
Competition Assessment	No	Yes
Small Firms Impact Test	No	Yes
Legal Aid	No	Yes
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	Yes
Race Equality	No	Yes
Disability Equality	No	Yes
Gender Equality	No	Yes
Human Rights	No	Yes
Rural Proofing	No	Yes

Annexes

Equalities Impact Assessment

Summary of the purpose and aim of the Human Fertilisation and Embryology (Parental Orders) Regulations 2010

1. A parental order transfers parental responsibility from a surrogate (and her partner if she has one) to the commissioning couple. On average 50 – 70 parental orders are granted per year.
2. Parental orders were introduced by the Human Fertilisation and Embryology Act 1990 ("the 1990 Act"), which sets out the eligibility criteria for a parental order (including the commissioning couple being married).
3. The 1990 Act provides for a regulation making power which allows specific adoption legislation to be applied, with modifications, in relation to parental orders. The Parental Orders (Human Fertilisation and Embryology Regulations ("the 1994 Regulations") and the Parental Orders (Human Fertilisation and Embryology) (Scotland) Regulations 1994 ("the 1994 Scotland Regulations") applied adoption legislation, with modifications, to parental orders.
4. The Human Fertilisation and Embryology Act 2008 ("the 2008 Act") updated the 1990 Act replacing the sections relating to parental orders. The eligibility criteria remain unchanged with the exception of people who might apply for a parental order. Couples in a civil partnership and couples in an enduring family relationship (in addition to married couples) will be able to apply for parental orders.
5. This change, made by the 2008 Act, is consistent with wider Government policy on promoting equality, as evidenced by the Civil Partnership Act 2004 and legislation prohibiting discrimination on the grounds of sexual orientation. The changes made by the 2008 Act were welcomed by equality groups such as Stonewall.
6. The 2008 Act also contains a regulation making power that allows specific adoption legislation to be applied, with modifications, in relation to parental orders. The adoption legislation that may be applied, with modifications, to parental orders is updated and is set out in the 2008 Act.[5]
7. The Regulations are subject to the affirmative procedure and so will be debated in both Houses of Parliament.

Assessment

Race/Religion or Belief

8. One of the provisions of adoption legislation which is applied, with modifications, by the 2010 Regulations to parental orders, relates to the factors a court must consider in deciding whether to grant the parental order. The Adoption and Children Act 2002 ("the 2002 Act") requires a court to give consideration to "*a child's particular needs*". This may involve consideration of the child's race or religion or belief. The 2010 Regulations apply this provision, with modifications, in relation to parental orders and the Department believe that this is an important consideration for parental order reporters.
9. We have considered whether there are any additional opportunities to promote equality of opportunity that could be applied by the 2010 Regulations but do not feel that there are any at the present time.
10. The 2010 Regulations are thought unlikely to help to eliminate harassment and are unlikely to have an effect on relations between people of different religious or belief groups. The

[5] The Adoption and Children Act 2002, the Adoption (Scotland) Act 1978, the Adoption and Children (Scotland) Act 2007 and the Adoption (Northern Ireland) Order 1987

reason for this is that the 2010 Regulations are not relevant to these issues. The 2010 Regulations are not relevant in relation to harassment.

Disability

11. The 2010 Regulations are unlikely to impact differently on people on grounds of disability.

12. A commissioning parent's disability might be taken into account by the court in deciding whether to grant a parental order. The welfare of the child must be the paramount consideration of the court in deciding whether to grant a parental order. In addition to this when considering the welfare of a child the court is required to consider any particular needs of the child, this could relate to a child's disability and whether the commissioning couple can provide the necessary care for the child.

Gender or transgender

13. The 2010 Regulations are unlikely to impact differently on people on grounds of their gender or transgender. The reasons for this are that, although it might be taken into account by the court, is not specified in the 2010 Regulations as a factor for consideration and would not in itself prevent the grant of a parental order. The criteria that must be fulfilled for a couple to apply for a parental order are set out in the 2008 Act.

Age

14. The 2010 Regulations are unlikely to impact differently on people on grounds of their age.

15. The age of the commissioning couple and the surrogate are likely to have an impact on the setting up the surrogacy arrangement and the treatment offered if it is undertaken at a centre licensed by the Human Fertilisation and Embryology Authority. This is because as a person gets older, their fertility will naturally decrease. Some surrogacy organisations recommend that the commissioning couple are under the age of 45, as older than this may be older than the natural child bearing age of a woman. However, the 2010 Regulations relate to the making of the parental order, not to the surrogacy arrangement and therefore issues around the surrogacy arrangement and the treatment of surrogates do not apply.

Sexual Orientation

16. The 2010 Regulations are thought likely to impact differently on people on grounds of their sexual orientation. The reasons for this are that the 2010 Regulations give effect to the provision that allows same sex couples to apply for parental orders. This was not possible under previous legislation.

Consultation and actions

17. The Regulations were consulted on for three months from September to November 2009. A full range of stakeholders were consulted. Further details of the consultation and respondents can be found on the Department of Health website (www.dh.gov.uk)

18. No further equality issues were raised at consultation. A full Equalities Impact Assessment will be carried out if any evidence comes to light which raises any further equality issues. A positive impact is explicitly intended and very likely.

Conclusion

19. In granting a parental order, the paramount consideration of the court must be the welfare of the child. There are criteria set out in the 2008 Act that must be fulfilled for a couple to apply for a parental order and there are also additional considerations for the court set out in the Regulations.

20. The paramount consideration of the court in making the order is the child's welfare. However, other factors such as age, race, disability, religion or belief may also be taken into consideration.

Competition assessment

29. The Regulations maintain the link between adoption legislation and parental orders, and current Government policy. The competition assessment is not relevant to these Regulations as they will not affect 'market' structure or the ability of suppliers to enter or exit the market or to compete.

Small Firms Impact Test

30. The Regulations do not affect small firms.

Legal Aid

31. The Regulations do not introduce new criminal sanctions or criminal penalties, therefore there will not be potential impacts on the workload or HM Court Service or legal aid costs.

Health Impact Assessment

32. The Regulations do not have a significant impact on human health, lifestyle or demand on NHS services, and therefore do not have any health impact relevant to this assessment.

Rural Proofing

33. The Regulations do not have an impact upon rural communities, they will not impact upon the availability or cost of public and private services in rural areas, and there will be no impact upon rural business.