EXPLANATORY MEMORANDUM TO

THE HUMAN FERTILISATION AND EMBRYOLOGY (PARENTAL ORDERS) REGULATIONS 2018

2018 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department of Health and Social Care and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 A parental order is made by a court to provide for a child to be treated as the lawful child of the applicant or applicants following the birth of a child by a surrogate. Parental orders are made under the Human Fertilisation and Embryology Act 2008. The Act is being amended separately to allow for one applicant to apply for a parental order. The purpose of this instrument is to set the legal framework for parental orders. It does this by making provision for matters 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. In addition, it provides 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.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 The territorial application of this instrument includes Scotland and Northern Ireland.

3.3 The Regulations are being made under a power which allows modification of specific adoption legislation with UK wide application, see section 55 of the Human Fertilisation and Embryology Act 2008

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales, Scotland, and Northern Ireland.

4.2 The territorial application of this instrument is England, Wales, Scotland and Northern Ireland.

5. European Convention on Human Rights

5.1 The Parliamentary Secretary for Mental Health and Inequalities has made the following statement regarding Human Rights:

"In my view the provisions of the Human Fertilisation and Embryology (Parental Orders) Regulations 2018 are compatible with the Convention rights."

6. Legislative Context

6.1 The Human Fertilisation and Embryology Act 2008 (the 2008 Act) makes provision for applications for parental orders, which transfer parenthood. The High Court ruled that the Act was not compatible with the Human Rights Act 1998 and the Government has decided to make amendments to address that incompatibility by non-urgent remedial order, the Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018 (the Order). The Government laid the Order on 19 July 2018 for a second stage of scrutiny by the Joint Committee for Human Rights (JCHR). The Order inserts a new section 54A in the 2008 Act to allow a sole applicant to apply for a parental order.

6.2 The Human Fertilisation and Embryology (Parental Order) Regulations 2010 (the 2010 Regulations) made provision for the effect of having a parental order by modifying adoption and other legislation. Modifications are now needed to reflect the changes to the 2008 Act made by the Order.

6.3 The initial proposal for the Order was laid for scrutiny on 29 November 2017 as part of a Command paper (https://www.gov.uk/government/publications/the-governments-response-to-an-incompatibility-in-the-human-fertilisation-and-embryology-act-2008) and laid for the second stage as an Act paper on 19 July 2018 (https://www.gov.uk/government/publications/proposal-for-draft-human-fertilisation-and-embryology-act-2008-remedial-order-2018). In each published paper, the Government stated that the Human Fertilisation and Embryology (Parental Order) Regulations 2010 would need to be re-made.

7. Policy background

7.1 Surrogacy has an important role to play in society, helping to create much-wanted families where that might otherwise not be possible. It enables people to provide an altruistic gift to other people who aren't able to have a child themselves, and can help people to have their own genetically-related children. The UK Government recognises the value of this in the 21st century, where family structures, attitudes and lifestyles are much more diverse than in the past. Reflecting this approach, the Government recognises the need to remedy the incompatibility in a reasonable time and not leave children born to a single intended parent in legal limbo, where some may be wards of court or may have no UK resident legal parent. The changes brought by the Order cannot take effect until the Human Fertilisation and Embryology (Parental Order) Regulations 2018 (the 2018 Regulations) come into force

7.2 It is not intended to make any change to how a parental order operates. T***he effect of a*** parental order as provided for by the modifications made in the 2010 regulations remain unchanged. The amendments made in the 2018 Regulations are purely in consequence of the amendment to the 2008 Act. This provides a framework for the successful transfer of legal parenthood from the surrogate to the intended parent(s). Some 400 parental orders were granted in 2016 in England & Wales and 331 were awarded in 2017.

7.3 The Government has addressed the incompatibility identified by the Court by way of a remedial order. Separately, the Government has asked the Law Commission to undertake a comprehensive review of all surrogacy legislation and this will include consideration of the extent to which adoption legislation is appropriate as a framework for parental orders.

What the Regulations do

7.4 The substantive provisions of the 2018 Regulations are to be found in its four Schedules. Schedule 1 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 how they are modified for the purposes of parental orders. Schedule 2 sets out the provisions of the Adoption and Children (Scotland) Act 2007 which are to be applied as modified. Schedule 3 sets out the articles of the Adoption (Northern Ireland) Order 1987 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. A full explanation is set out at Annex A.

7.5 The 2018 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. The 2018 Regulations revoke the 2010 Regulations with savings in respect of parental orders that have already been made.

England & Wales

7.6 The key provisions in Schedule 1 are as follows:

The welfare of the child

7.7 This provision sets out how a child's welfare is the paramount consideration of the court when it makes decisions about a child's upbringing and to support this it sets out a welfare checklist. This checklist has been applied and modified in the 2018 Regulations in relation to the granting of parental orders.

Parental Orders

7.8 The 2018 Regulations set out what form a parental order must take and what it means to be the subject of a parental order. The 2018 regulations achieve this by applying and modifying the definition of an adoption order from the 2002 Act.

7.9 A parental order granted under the amended 2008 Act provides for a child to be treated in law as the child of the intended parent or parents. Once an adoption order has been granted under the 2002 Act, the adopted child is deemed to be the legitimate child of the adopting parents. The 2018 Regulations make equivalent provision for a child subject to a parental order to ensure they will also be deemed to be the legitimate child of the intending parent or parents, and to provide that no-one else will have parental responsibility for that child.

Court Powers

7.10 The 2018 Regulations apply and modify sections of the adoption legislation, which provide the court with the relevant powers if a child is removed from the intending parents, while the parental order application is pending. The draft regulations enact

sections of the adoption legislation that give the court powers where a child is removed from the care of the intending parents once a parental order has been applied for.

Scotland

7.11 Schedule 2 will apply and modify provisions of the Adoption & Children (Scotland) Act 2007 to parental orders granted in Scotland. The 2002 Act and the 2007 Act are broadly similar, which means that that the provisions applied and modified for parental orders are also similar and cover the same issues as set out above for the 2002 Act (at paras 2.5- 2.11).

7.12 In Scotland, there is no welfare checklist and the status of illegitimacy has been abolished with the exception of provisions relating to any title, coat of arms, honour or dignity.

Northern Ireland

7.13 Schedule 3 will apply and modify provisions of the Adoption (Northern Ireland) Order 1987. The 1987 Order makes similar provisions as the 2002 Act does to England and Wales and the 2007 Act does in Scotland. This means that that the provisions applied and modified for parental orders are also similar and cover the same issues as set out above for the 2002 Act (at paras 2.5- 2.11).

The UK as a whole

Parental Order Register

7.14 The 2018 Regulations contain the requirement for the relevant Registrar General to hold and maintain a `Parental Order Register'. When the child is born, the surrogate and her partner (if she has one) will record the child's birth on the live birth register. Once the parental order has been granted the court will send a copy of the order to the Registrar General and a new birth certificate will be issued. This will be a certified copy of the entry in the `Parental Order Register'. The Registrar General will mark the entry in the live birth register as `Re-registered' (in Scotland the birth entry is marked "Parental Order").

7.15 The relevant Registrar General must make traceable the connection between any entry in the register of births which has been marked "Re-registered" or "Parental Order" and any corresponding entry in the Parental Order Register. Information kept by the relevant Registrar General for this purpose is not open to public inspection or search, and this principle is maintained in the re-made regulations.

Inheritance and succession

7.16 It is also necessary to set out in legislation the inheritance rights of a person who is the subject of a parental order. For example, a child cannot inherit a peerage or title of honour, or any property that is connected to the peerage or title, from one of the intended parents, unless a contrary intention has been expressed in the instrument.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

9.1 Does not apply.

10. Consultation outcome

10.1 A public consultation about the regulations took place between 8 March and 20 April 2018. There were 19 responses. 7 identified themselves as organisations; 12 as individuals. These included 3 legal-related organisations, 2 national surrogacy related organisations and 1 religious organisation. One response was clearly ethically opposed to surrogacy, one was sceptical from a child welfare perspective and the rest were generally supportive. The responses mostly concerned issues out-with the regulations and were about policy within the original remedial order and supporting comments made in the 1 March JCHR report. These were addressed in the revised order.

10.2 Some consultation respondents have commented on the continued appropriateness of basing the legal framework for surrogacy on adoption legislation, as surrogacy is different and distinct due to the genetic relationship between the child and intended parents. As noted in Section 7, this underpinning principle will be considered by the Law Commission. No significant changes to regulations have been made as a result of the consultation.

10.3 The Devolved Administrations in Scotland and Northern Ireland and other Government Departments with an interest in the policy have also been consulted and provided comments. This includes the Ministry of Justice, the Department for Education and the Department for Work and Pensions.

11. Guidance

11.1 Courts rules will be updated and the Children and Families Court Advisory & Support Service (CAFCASS) will update its guidance. Guidance for intending parents on gov.uk about the surrogacy pathway will also be updated.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 No separate Impact Assessment has been completed for the Regulations as there was no significant impact identified.

12.4 The Regulations come into force immediately. As the Regulations have no impact business and they provide a new regime for sole applicants, it is in the public interest for that regime to come into force as soon as possible.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The Law Commission has started its project to review all surrogacy legislation and as part of that review we will look at the relevant provisions in the 2008 Act, and the provision made by the 2018 Regulations.

15. Contact

15.1 Steve Pugh at the Department of Health and Social Care. Telephone: 02027 210 4350 or email: steve.pugh@dhsc.gov.uk can be contacted with any queries regarding the instrument.

15.2 Jeremy Mean at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.

15.3 Jackie Doyle-Price at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.

ANNEX A

Schedule 4 to the Human Fertilisation and Embryology (Parental Orders) Regulations 2018 ("the 2018 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, 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 2018 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 2018 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 2018 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 2018 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.