EXPLANATORY MEMORANDUM TO

THE FAMILY PROCEEDINGS (AMENDMENT) (No.2) RULES 2010

2010 No. 1064 (L. 8)

AND

THE FAMILY PROCEEDINGS COURTS (CHILDREN ACT 1989) (AMENDMENT) (No.2) RULES 2010

2010 No. 1065 (L. 9)

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 The purpose of these statutory instruments is to support applications for parental orders under section 54 of the Human Fertilisation and Embryology Act 2008.

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

3.1 These Statutory Instruments ("the Rules") are being laid in breach of the 21-day rule for Parliament to pray against Statutory Instruments. The Rules are part of a package of instruments needed to implement section 54 of the Human Fertilisation and Embryology Act 2008 on 6th April 2010. The Human Fertilisation and Embryology (Parental Orders) Regulations 2010 (SI.2010/985) ("the Regulations") are also part of that package. The Rules could not be made until the Regulations were made because they are dependent on the Regulations in referring to the Adoption and Children Act 2002 as modified for parental orders by the Regulations. For example, the preamble to the Rules cites section 102 of the 2002 Act as modified, since that section adds to the general rule making powers in section 40 of the Matrimonial and Family Proceedings Act 1984 and section 144 of the Magistrates' Courts Act 1980. The Regulations follow the affirmative resolution procedure and were laid in draft before Parliament on 26th January 2010 with a commencement date of 6th April.

3.2 The firm expectation had been that the debates on the Regulations in Parliament would have taken place in plenty of time to permit the Rules to be made and laid before 16th March to allow the Rules to be laid for 21 days before coming into force on 6th April .However, while the necessary debate in the House of Commons went ahead as anticipated, the demands on parliamentary time before the General Election led to the House of Lords debate being delayed to the extent that the Regulations were not finally approved by resolution of the full House until 24th March - too late to permit a 21 day laying period of the Rules while also permitting the Rules to come into force on 6th April 2010.

3.3 A further Order linked to the Rules is the Human Fertilisation and Embryology (Parental Orders) (Consequential, Transitional and Saving Provisions) Order 2010 (SI.2010/986) ("the Order"). The Order deals with minor amendments and

transitional provisions including amendments relating to the allocation of court proceedings and exemptions for data protection law. The Order also followed the affirmative resolution procedure and was debated at the same time as the Regulations. .

3.4 Although it was not possible to lay the Rules before the Regulations and the Order were approved by Parliament, the Government (through the Department of Health) had previously made a public commitment to implement the provisions of section 54 on 6 April 2010. The Government was aware that a number of potential applicants intended to make applications on 6 April 2010 and that there would be disappointment and substantial criticism of the Government and the family courts if these applications could not be made. As it became apparent that the Regulations and Order would not be made in sufficient time for the Rules to be laid for at least 21 days before coming into force on 6th April, the Government (through the Department of Health)decided not to alter the planned and published commencement date of the legislation of 6th April. Such a decision would have involved the withdrawal and subsequent relaying of the Regulations and Order at a later date resulting in significant delay of the new legislation on parental orders in the light of the forthcoming General Election.

3.5 If section 54 of the 2008 Act were to come into force without court rules being in place, the access of applicants for parental orders to the courts would effectively be limited to the High Court (since it has the power, in exercise of its inherent jurisdiction, to regulate its own procedure). This would be a cause for concern in respect of access to justice. The consultation on the Rules in December and January created an expectation by potential applicants for parental orders that the Rules will be in place for the coming into force of the new legislation. The Rules are modelled on the court rules for obtaining an adoption order which are contained in the Family Procedure (Adoption) Rules 2005 which have been in force for approximately 4 years. It follows that the processes provided for in the Rules will not be wholly unfamiliar to court users. The similarity of the Rules to the court rules supporting applications for adoption orders is intentional as the Adoption and Children Act 2002 applies to both types of order albeit with modifications in the case of parental orders.

3.6 In all the circumstances it was considered that to breach the 21 day rule was less undesirable than to leave potential applicants with no court rules to support applications for parental orders and that therefore these Rules should be laid with a coming into force date of 6 April 2010.

4. Legislative Context

4.1 Different rules of court apply in family proceedings, depending on whether they are in county courts or the High Court, or in family proceedings courts (magistrates' courts).

4.2 For county courts and the High Court, the relevant rules are The Family Proceedings (Amendment)(No 2) Rules 2010 which amend the Family Proceedings Rules 1991.

4.3 For family proceedings courts (magistrates' courts), the relevant rules are the Family Proceedings Courts (Children Act 1989) (Amendment) (No 2) Rules 2010 which amend the Family Proceedings Courts (Children Act 1989) Rules 1991.

4.4 It is necessary to make amendments to both sets of rules (the amending rules for the High Court and county courts and those for family proceedings courts) at the same time, as is done with the two present instruments, and this joint Explanatory Memorandum as applications for parental orders may be heard in the High Court, county court and family proceedings courts. The court rules for the family proceedings courts (the magistrates' courts) mirror those for the High Court and county court. In addition those Rules make provision for the powers of a single justice and justices' clerk to perform the powers of the court. A single justice and a justices' clerk may only perform certain functions of a family proceedings court (magistrates' court) and so the amending rules on this matter are not relevant to the High Court and county courts.

The Family Proceedings (Amendment) (No.2) Rules 2010

4.5 The Family Proceedings Rule Committee makes these Rules with the agreement of the Lord Chancellor.

The Family Proceedings Courts (Children Act 1989) (Amendment) (No.2) Rules 2010

4.6 The Lord Chief Justice makes these Rules with the concurrence of the Lord Chancellor after consulting with the Magistrates' Courts Rule Committee.

5. Territorial Extent and Application

5.1 These instruments apply to England and Wales.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

Human Fertilisation and Embryology Act 2008

7.1 Section 54 of the 2008 Act introduces new provisions extending the categories of couples who can apply for a parental order where a child has been conceived using the gametes of at least one of the couple, and has been carried by a surrogate mother.

7.2 Under the new provisions, civil partners are able to apply, as can unmarried opposite-sex couples or same-sex couples not in a civil partnership. Section 55 of the 2008 Act gives the Secretary of State power to make regulations applying the provisions of the Adoption and Children Act 2002 with modifications to parental orders. The Regulations apply certain provisions of current adoption legislation (the Adoption and Children Act 2002), with modifications, to parental orders. The other provisions in section 54 of the 2008 Act relating to parental orders are similar to the existing provisions of the Human Fertilisation and Embryology Act 1990. A single person remains unable to apply for a parental order.

- ***Consolidation***

7.3 The two statutory instruments referred to in this Memorandum amend existing rules. Work is currently ongoing to produce a new, single set of Family Procedure Rules which will apply to all levels of family courts. This is a large-scale project. It has proved necessary, in light of the coming into force of the legislative changes described in the paragraphs above to make amendments to existing rules in the meantime.

8. Consultation outcome

Human Fertilisation and Embryology Act 2008

8.1 The Government conducted an extensive consultation on the policy underlying the Human Fertilisation and Embryology Act 2008, including the provisions for parental orders. The Science and Technology Select Committee carried out an inquiry into reproductive technologies and the law and made recommendations many of which were reflected in the Bill. In addition, the draft Bill was scrutinised by a Committee of both Houses prior to introduction.

8.2 The Regulations, which provide the detailed statutory provisions for applications for parental orders by applying the Adoption and Children Act 2002 to parental orders with modifications, were published in draft for public consultation between 1 September 2009 and 23 November 2009. 24 responses were received from a range of stake holders and a report on the consultation can be found at the following link on the Department of Health:
http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/DH_111659

8.3 A targeted consultation with major stakeholders on the draft rules and forms to support parental orders was carried out in December 2009. Five responses were received to this consultation and the draft rules were amended to reflect issues raised by respondents.

9. Guidance

9.1 Information about these changes will be published on the Department of Health website, the judicial website and the HMCS website when the Statutory Instruments are laid in Parliament.

10. Impact

Human Fertilisation and Embryology Act 2008

10.1 A regulatory impact assessment was completed for the Human Fertilisation and Embryology Bill when it was first introduced into Parliament and a link to the assessment is attached below:

http://www.dh.gov.uk/en/Publicationsandstatistics/Legislation/Regulatoryimpactassessment/DH_080209

10.2 It is not anticipated that the amendments included in the Rules will have a significant impact on any single group or will have any significant impact on public expenditure. It is not anticipated that any large number of additional applications to court will arise from the implementation of these provisions of the 2008 Act.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The rules of court do not apply to small business.

12. Monitoring & review

12.1 The operation of the policy and its effect will be monitored, including applications brought to court.

13. Contact

13.1 Please contact Philip Dear, Matrimonial and Children's Proceedings Branch, Family Law and Justice, Ministry of Justice, 4.25, 102 Petty France London SW1H 9AJ. Tel: 020 3334 3125. e-mail: philip.dear@justice.gsi.gov.uk.