

*These notes refer to the Scotland Act 1998 (c.46)
which received Royal Assent on 19th November 1998*

SCOTLAND ACT 1998

EXPLANATORY NOTES

SCHEDULES

[Schedule 5](#)

Part II: Preliminary paragraphs

SECTIONS

Section J3: Embryology, Surrogacy and Genetics

Purpose and Effect

This Section reserves surrogacy arrangements, human fertilisation and embryology and genetics.

General

Certain other matters in the health field which raise major ethical issues and/or which require expertise to be pooled at a United Kingdom level for them to be satisfactorily regulated (abortion, xenotransplantation) are also reserved. With the exception of the matters which are reserved in this Head, the Scottish Parliament has legislative competence over matters of sexual behaviour, whether as a health or social issue, involving civil or criminal law.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	31-Mar-98	1093

Details of Provisions

First reservation

This reserves surrogacy arrangements, as defined by the Surrogacy Arrangements Act 1985, including the subject-matter of the 1985 Act.

The 1985 Act defines surrogacy arrangements by reference to a ‘surrogate mother’ who is a woman who carries a child in pursuance of an arrangement made before she began to carry the child and made with a view to that child being handed over to, and the parental rights being exercised by, another person. The arrangement is a surrogacy arrangement if, were a woman to whom the arrangement relates to carry a child in pursuance of it, she would be a surrogate mother.

The Act makes provision prohibiting third parties from initiating or negotiating any surrogacy arrangements on a commercial basis, receiving any payments from the surrogate mother or the person for whom she is carrying the child and advertising in connection with surrogacy arrangements.

The Act does not however deal with the legality under the common law of surrogacy arrangements. It is not an offence in the criminal law of Scotland to enter into a surrogacy arrangement and it is not an offence under the common law or the 1985 Act for persons to enter into a private arrangement. Section 36(1) of the Human Fertilisation and Embryology Act 1990 amended the 1985 Act to the effect that no surrogacy arrangement is enforceable and the 1990 Act also makes provision as to the parentage of children born as the result of surrogacy arrangements.

The Scottish Parliament is not able to legislate in respect of any matter relating to surrogacy arrangements within the meaning of the 1985 Act, including the legality of surrogacy arrangements for the purposes of the criminal law or the enforceability of any such arrangements for the purposes of the civil law nor will it be able to amend the provisions of the 1985 Act, except as permitted by paragraph 3 of Schedule 4.
Second reservation

This reserves the subject-matter of the Human Fertilisation and Embryology Act 1990 which deals principally with:

the regulation of the creation, keeping or using of human embryos or gametes outside the body;

the regulation or prohibition of any activities involving the creation, keeping or using of human embryos or gametes outside the body, including research and the provision of infertility treatment services; and

the definition of the parents of any child being or having been carried by a woman as the result of the placing in her of an embryo or of eggs and sperm or her artificial insemination.

The Act also established the Human Fertilisation and Embryology Authority which regulates research or treatment which involves the creation, keeping and using of human embryos outside the body, or the storage or donation of human eggs and sperm.

The 1990 Act also makes provision regarding the parentage of children born as a result of surrogacy arrangements and confers a power on the Courts to make an Order providing for a child born as a result of a surrogacy arrangement to be treated in law as the child of the couple who commissioned the surrogate mother to carry the child. Whilst parentage is usually a matter for Scots private law, the Scottish Parliament is not able to make provision amending section 30 in relation to surrogacy arrangements or the other matters covered by the 1990 Act.

Third reservation

All matters relating to human genetics not already reserved by the reservation of the subject-matter of the Human Fertilisation and Embryology Act 1990 will be reserved. This includes research, testing or treatment concerning the human genome or genetic disorders including gene therapy research and all matters relating to the social, ethical and economic consequences of human genetics, such as providing genetic tests for insurance or employment purposes or patenting genetic material.

Executive Devolution

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

The Human Fertilisation and Embryology Act 1990 (c.37) , section 30(9).	The function of the Secretary of State to make regulations under section 30(9), as read with section 45 to provide (a) for any provision of the enactments about adoption to have effect with or without modifications in relation to orders under section 30 and applications
---	--

*These notes refer to the Scotland Act 1998 (c.46)
which received Royal Assent on 19th November 1998*

	for such orders as it has effect in relation to adoption, and applications for adoption orders, and (b) for references to adoption in any enactment to be read in the way specified in section 30(9). These orders are considered to have effect similar to adoption orders.
--	---