

**EXPLANATORY MEMORANDUM TO  
THE ADOPTION AND CHILDREN (SCOTLAND) ACT 2007 (CONSEQUENTIAL  
PROVISIONS) (No.1) ORDER 2009**

**2009 No. 2233**

1. 1.1 This Explanatory Memorandum has been prepared by the Scotland Office 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 This Order makes provisions that are necessary and expedient in consequence of the Adoption and Children (Scotland) Act 2007 (the “2007 Act”).

2.2 This Order will make provisions to ensure that there is no gap in the law relating to Parental Orders under the Human Fertilisation and Embryology Act 1990 (the “1990 Act”) when the Adoption (Scotland) Act 1978 (the “1978 Act”) is repealed and replaced by the 2007 Act on 28 September 2009, until the Parental Order provisions of the Human Fertilisation and Embryology Act 2008 (the “2008 Act”) and Regulations made under these provisions come into force.

2.3 This Order will ensure that Parental Orders, which transfer parental responsibility for a child born as a result of a surrogacy arrangement from the surrogate and her partner to the commissioning couple, can continue to be applied for and granted by the Courts in Scotland.

**3. Matters of Special Interest to the Joint Committee on Statutory Instruments**

3.1 The Order is to be made in exercise of the powers conferred by sections 104, 112(1) and 113(4) of the Scotland Act 1998 (the “1998 Act”). Section 104 of the 1998 Act provides for subordinate legislation to be made in the UK Parliament which contains provisions which are necessary or expedient in consequence of any Act of the Scottish Parliament; in this case the 2007 Act.

3.2 A section 104 Order is necessary and expedient in consequence of the 2007 Act. The Order preserves those provisions of the 1978 Act which are applied, with modifications, for the purposes of Parental Orders and applications for such Orders, in the Parental Orders (Human Fertilisation and Embryology) (Scotland) Regulations 1994 (the “1994 Regulations”). These provisions are in place currently to ensure that Parental Orders can be applied for and made in Scotland.

3.3 This Order will be in force for the period between the commencement of the 2007 Act on the 28 September 2009 and when the Parental Orders provisions of the 2008 Act and any Regulations made under these provisions, which would apply (with modifications) provisions of the 2007 Act to Parental Orders, come into force. To ensure that the Order is in force to coincide with the full implementation of the 2007 Act on 28 September 2009, the Order, which is subject to the negative resolution procedure, will be laid in the UK Parliament by 7 September 2009. The Adoption and Children (Scotland) Act 2007 (Commencement No.4, Transitional and Savings Provisions) Order 2009 was made on the 25 June 2009 and it commences the provisions of the 2007 Act which replace and repeal the 1978 Act on 28 September 2009.

#### **4. Legislative Context**

4.1 This Order is in consequence of the 2007 Act which will be fully in force from 28 September 2009. The 2007 Act replaces the 1978 Act, restating and updating existing provisions as well as creating new provisions for adoption in Scotland.

4.2 The 1994 Regulations apply certain provisions of the 1978 Act (with modifications) for the purposes of Parental Orders and applications for Parental Orders under section 30 of the 1990 Act.

4.3 Schedule 3 to the 2007 Act repeals all but Part IV of the 1978 Act. The effect of the Order is to save the operation of the provisions of the 1978 Act for any of the purposes of subsections (9) and (10) of section 30 of the 1990 Act. In effect this ensures the continued operation of the 1994 Regulations relating to Parental Orders. The saving is in consequence of the repeal of the 1978 Act effected by section 120 of, and Schedule 3 to, the 2007 Act. By virtue of section 115 and Schedule 7 to the Scotland Act 1998 the section 104 Order will be subject to the negative resolution procedure.

#### **5. Territorial Extent and Application**

5.1 This Instrument extends to the United Kingdom.

#### **6. European Convention on Human Rights**

6.1 The Parliamentary Under Secretary of State at the Scotland Office has made the following statement regarding Human Rights:

In my view the provisions of the Adoption and Children (Scotland) Act 2007 (Consequential Provisions) (No.1) Order 2009 are compatible with the Convention Rights.

#### **7. Policy background**

##### ***What is being done and why?***

7.1 The 2007 Act will come into force on 28 September 2009. The 2007 Act replaces the existing 1978 Act, restating and updating existing provisions as well as creating new provisions for adoption in Scotland.

7.2 The 1994 Regulations apply certain provisions of the 1978 Act (with modifications) for the purposes of Parental Orders and applications for Parental Orders in Scotland under section 30 of the 1990 Act.

7.3 Section 30 allows a Court to make a Parental Order. The effect of a Parental Order is that a child will be treated in law as the child of a married couple where the child has been carried by a woman other than the wife of that couple, and the gametes of one, or both, of that couple were used to bring about the creation of the embryo (and other conditions in section 30 are satisfied). Section 30(9) allows Regulations to provide that: any provision of the 1978 Act (with or without modifications) may have effect in relation to Parental Orders or applications for such Orders as they have effect in relation to adoption and applications for Adoption Orders (section 30(9)(a)); and, for references in the 1978 Act to adoption, an adopted child or an adoptive relationship to be read, respectively, as references to the effect of an Order under section 30 of the 1990 Act, a child to whom such an Order applies and a relationship arising by virtue of the 1978 Act as applied by the Regulations (section 30(9)(b)).

7.4 In order to maintain the status quo with respect to the making of Parental Orders under the 1990 Act in Scotland, the Order mirrors the approach taken by the Secretary of State, in relation to England and Wales, when the Adoption and Children Act 2002 came into force. Article 14(1) of the Adoption and Children Act 2002 (Commencement No.10 Transitional and Savings Provisions) Order 2005 saved provisions of the Adoption Act 1976 for the purposes of its application, by the Parental Orders (Human Fertilisation and Embryology) Regulations 1994, to Parental Orders and applications for such Orders.

7.5 To maintain the status quo, an Order under section 104 of the Scotland Act 1998 is required. Section 104 of the 1998 Act allows subordinate legislation to make such provision as the person making that legislation considers necessary or expedient in consequence of any provision made by or under an Act of the Scottish Parliament. Schedule 3 to the 2007 Act repeals all but Part IV of the 1978 Act. The effect of the Order is to save the provisions of the 1978 Act, as applied by the 1994 Regulations, to Parental Orders and applications for such Orders, for the purposes of the 1990 Act, an Act of the UK Parliament. The saving provision is in consequence of the repeal of the 1978 Act effected by section 120 of, and Schedule 3 to, the 2007 Act.

7.6 It is intended that the 1994 Regulations will be revoked and replaced by new Regulations made under the 2008 Act. It is proposed that such Regulations will apply, with modifications, provisions of the 2007 Act to Parental Orders and applications for such Orders. The provisions in the Order would apply for the period between the implementation of the 2007 Act and the coming into force of the Parental Orders provisions of the 2008 Act and any new Regulations made under those provisions.

7.7 The effect of the section 104 Order is to preserve those provisions of the 1978 Act which are applied for the purposes of Parental Orders and applications for such Orders under the 1994 Regulations. These provisions are in place currently to ensure that Parental Orders can be made in Scotland. It is the intention that this provision remains for the period between the full implementation of the 2007 Act on the 28 September 2009 and such time as any new Regulations under section 55 of the 2008 Act come into force.

7.8 As this section 104 Order would have the effect of maintaining the current arrangements in Scotland with Parental Orders there will be no impact on the devolution settlement, either in Scotland or the rest of the United Kingdom. There would be no extra financial burden placed on either the Government or the Scottish Executive nor on the authorities involved in the process. Therefore there is no requirement for an Impact Assessment for this Order.

### ***Consolidation***

7.9 There was no consideration of consolidation as the Order makes saving provisions and therefore the issue of consolidation does not arise in relation to this particular Order.

## **8. Consultation outcome**

8.1 No formal consultation was undertaken on these provisions as they are designed to maintain the ability to consider and grant Parental Orders in Scotland under existing arrangements. Parental Orders give parental rights and responsibilities to persons who are granted such an Order, which provides for a child born as a result of a surrogacy arrangement to be treated in law as the child of the parties to a marriage (the commissioning couple).

8.2 Although there was extensive consultation on the provisions of the 2007 Act (from the two Adoption Policy Review Group papers leading to the introduction of the Bill in 2006 and the subsequent consultations on the supporting secondary legislation) the question of maintaining Parental Orders was not addressed directly. However, the Adoption Policy Review Group Phase 2 Report did recognise the need to make amendments to certain pieces of legislation, including the 1990 Act, in consequence of any primary legislation arising from that report.

***Adoption Policy Review Group Phase 2 Report:***

(<http://www.scotland.gov.uk/Resource/Doc/54357/0014208.pdf>; page 22)

**9. Guidance**

9.1 No guidance is being prepared for stakeholders and other interested parties. The effect of the Order is to maintain the position and procedures currently in place and utilised by these groups once the 2007 Act comes into force. As the procedures are well embedded, having been in existence since 1994, there is no need to issue further guidance.

**10. Impact**

10.1 There will be no impact on business, charities or voluntary bodies as this provision is designed to continue the existing arrangements for the application of Parental Orders in Scotland.

10.2 There will be no impact on the public sector as this provision is designed to maintain the current arrangements for Parental Orders in Scotland.

10.3 An Impact Assessment has not been prepared for this Instrument as there is no requirement for an impact assessment for this Order, as this continues the existing arrangements in Scotland, with Parental Orders.

**11. Regulating Small Business**

11.1 The provisions in the Order do not apply to small business.

**12. Monitoring and Review**

12.1 The intention is that the 1994 Regulations will be revoked and replaced by a new set of Regulations made under section 55 of the 2008 Act. Such Regulations would apply provisions of the 2007 Act, with modifications, to Parental Orders and applications for such Orders. The saving provision would therefore only last for a limited period and no monitoring or review of the provisions is necessary.

**13. Contact**

13.1 Jennifer Manton at the Scotland Office, Tel: 020 7270 6749 or Email: [jennifer.manton@scotlandoffice.gsi.gov.uk](mailto:jennifer.manton@scotlandoffice.gsi.gov.uk) who can answer any queries regarding the Instrument.

Scotland Office  
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