

EXPLANATORY MEMORANDUM TO

THE HUMAN FERTILISATION AND EMBRYOLOGY ACT 2008 (REMEDIAL) ORDER 2018

2018 No. 1413

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 This remedial order amends the Human Fertilisation and Embryology Act 2008 following a declaration by the High Court that section 54 of the Act was incompatible with Article 14 of the European Convention for Human Rights. The Court stated that Section 54 of the Human Fertilisation and Embryology Act 2008 was incompatible in that it only allowed couples to apply for a parental order, which transfers legal parenthood after a surrogacy arrangement. The order will amend the Act to allow for a sole applicant for a parental order, and makes provisions consequential on this change.

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 Wales, Scotland and Northern Ireland.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England, 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 Act 2008 (Remedial) Order 2018 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 When a child is born under a surrogacy arrangement, the intended parents of the child may apply to a court for a parental order to transfer the legal parenthood of the child to the intended parents. The Human Fertilisation and Embryology Act 2008 allows for

the transfer of legal parenthood from the birth mother to the intended parents by means of a parental order. A parental order can be granted to married couples, civil partners and couples in an enduring family relationship, of opposite or same sex.

- 6.2 On 20 May 2016, the High Court made a declaration (*Neutral Citation Number: [2016] EWHC 1191 (Fam)*) that the provision in Section 54 of the Human Fertilisation & Embryology Act 2008 which enable couples, but not a sole applicant, to obtain a parental order following surrogacy is incompatible with Article 14 of the European Convention on Human Rights. Article 14 prohibits discrimination in the enjoyment of Convention Rights (in this case, the right to respect for private and family life in Article 8) on the grounds of a person's status, and it was accepted that this could include a single person in this context.
- 6.3 The Government considered that there were compelling reasons to amend the 2008 Act by a remedial order made under the power in section 10 of the Human Rights Act 1998 to take remedial action where the court has made a declaration of incompatibility with Convention Rights. JCHR accept that this is the most appropriate route to change the legislation.
- 6.4 The JCHR have two statutory periods of 60 Parliamentary sitting days to scrutinise the order, take evidence from interested parties and report to Parliament, before making a recommendation about whether a debate is necessary.

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 relatives and friends to provide an altruistic gift to 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 has supported a project by the Law Commission to review all surrogacy legislation across the UK, which started in May 2018.
- 7.2 An initial draft remedial order replicated the functions of Section 54, which covers an application made by two people, with a new Section 54A for 'one applicant'. The provisions were narrowly drawn so that only a person who was not in a relationship as defined in Section 54, the same as Child Z's father, would qualify to apply.
- 7.3 JCHR reviewed this approach as part of their scrutiny and identified that there is a group of people not covered by the provisions of the initial draft order. There are circumstances where a new partner, a recently reconciled partner or someone not involved in the original surrogacy arrangement, may not wish to be the child's parent. The Committee raised concerns specifically in respect of couples in an enduring relationship.
- 7.4 The Government recognises the uniqueness of surrogacy in relation to parenthood for people with a genetic link to their child and the risk of legal limbo for the child if the genetically related parent cannot get a parental order. We agreed with the Committee that there is a group of people not covered by the provisions of the initial draft order. However, those in marriage or a civil partnership may also be affected in the same way. We therefore propose to remove all requirements in Section 54A in respect of relationship status.

- 7.5 The revised order therefore enables sole applications from individuals regardless of relationship status. This will ensure that a biological parent is not prevented from applying for a parental order, by the decision of a partner who is not biologically related to the child and who may not wish to be recognised as a legal parent.
- 7.6 The order also makes consequential amendments to other related primary and secondary legislation. The Human Fertilisation and Embryology (Parental Order) Regulations 2010, which modify aspects of adoption legislation in order to make the order work in practice, are also being revised and will be laid in Autumn 2018 for scrutiny.
- 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 The procedure for review and scrutiny of the draft remedial order is undertaken by the JCHR, who called for evidence from Parliamentarians and stakeholders. This evidence informed the Committee in coming to its conclusions. The JCHR's report was published on 1 March 2018 and is available at <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/645/64502.htm>
- 10.2 Devolved Administrations and other Government Departments with an interest have also been consulted, including in particular, the Ministry of Justice and the Department for Education.
- 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 A full Impact Assessment is submitted with this memorandum and was originally published alongside the Command paper Cm 9525 on 27 November 2017.
- 13. Regulating small business**
- 13.1 The legislation does not apply to activities that are undertaken by small businesses.
- 14. Monitoring & review**
- 14.1 This legislation is to remedy an incompatibility so there are no plans to monitor it in isolation. The Law Commission has started its project to review surrogacy legislation and as part of that review we will look at the relevant provisions in the HFE Act generally and as amended by this order.

15. Contact

- 15.1 Steve Pugh at the Department of Health and Social Care. Telephone: 02027 210 4350 or email: steve.pugh@dh.gsi.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.