

HUMAN FERTILISATION AND EMBRYOLOGY ACT 2008

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3: Miscellaneous and General

Section 59: Surrogacy arrangements

252. Some women cannot carry a child for medical reasons. In a small number of cases, they ask another woman to be a surrogate mother and carry a child for them. Under the Surrogacy Arrangements Act 1985 (“the 1985 Act”) surrogacy arrangements are not enforceable in law.
253. To avoid the commercialisation of surrogacy, the 1985 Act prohibits organisations, or people other than intended parents or surrogate mothers themselves, from undertaking certain activities relating to surrogacy on a commercial basis.
254. **Section 59** allows bodies that operate on a not-for-profit basis to receive payment for providing some surrogacy services. It does so by exempting them from the prohibition in the current law.
255. The amendments of the 1985 Act made by the section separate out into four categories the activities which are prohibited if done on a commercial basis. Not-for-profit bodies are permitted to receive payment for carrying out activity in two of those categories. The first is initiating negotiations with a view to the making of a surrogacy arrangement. A non-profit making body might charge, for example, for enabling interested parties to meet each other to discuss the possibility of a surrogacy arrangement between them. The second is compiling information about surrogacy. Not-for-profit organisations would, for example, be able to charge for establishing and keeping lists of people willing to be a surrogate mother, or intended parents wishing to have discussions with a potential surrogate mother. Section 1 of the 1985 Act as amended provides that non-profit making bodies can only recoup the costs of doing the activities for which they are no longer prohibited from charging. It provides that any reference to a “reasonable payment” is to a payment which does not exceed the body’s costs reasonably attributable to the doing of the act. This could include overheads attributable to the activities and not just the costs of carrying out the activities. This would prevent cross-subsidisation between the activities they are no longer prohibited from charging for and those which they are still prohibited from charging for, since the costs of doing the latter would not be “reasonably attributable” to the costs of doing the former.
256. It will remain the case that not-for-profit bodies will not be permitted to receive payment for offering to negotiate a surrogacy arrangement or for taking part in negotiations about a surrogacy arrangement. These activities are not unlawful if there is no charge, however.
257. **Section 59** also makes changes in relation to advertising by non-profit making bodies. Under the 1985 Act, it is an offence to publish or distribute an advertisement that

*These notes refer to the Human Fertilisation and Embryology Act
2008 (c.22) which received Royal Assent on 13 November 2008*

someone may be willing to enter into a surrogacy arrangement, or that anyone is looking for a surrogate mother, or that anyone is willing to facilitate or negotiate such an arrangement. The amendment of section 3 of the 1985 Act made by subsection (7) provides that this prohibition does not apply to an advertisement placed by, or on behalf of, a non-profit making body, provided that the advertisement only refers to activities which may legally be undertaken on a commercial basis. This would mean that a not-for-profit body could advertise that it held a list of people seeking surrogate mothers and a list of people willing to be involved in surrogacy, and that it could bring them together for discussion. But it will remain illegal for anyone to advertise that they wanted a surrogate mother or to be a surrogate mother.