

Briefing

Surrogacy Delegation

Date due to MO:	22 February 2024	Action required by:	N/A
Security level:	IN CONFIDENCE	Health Report number:	H2024035866
To:	Hon Casey Costello, Associate Minister of Health		
Copy to:	Hon Dr Shane Reti, Minister of Health		
Consulted:	Health New Zealand: <input checked="" type="checkbox"/> Māori Health Authority: <input type="checkbox"/>		

Contact for telephone discussion

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Minister's office to complete:

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|---|------------------------------------|--|
| <input type="checkbox"/> Approved | <input type="checkbox"/> Decline | <input type="checkbox"/> Noted |
| <input type="checkbox"/> Needs change | <input type="checkbox"/> Seen | <input type="checkbox"/> Overtaken by events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn | |

Comment:

Surrogacy Delegation

Security level: IN CONFIDENCE **Date:** 22 February 2024

To: Hon Casey Costello, Associate Minister of Health

Purpose of report

1. This briefing provides information about your surrogacy portfolio delegation. This report discloses all relevant information.

Summary

2. Surrogacy is an arrangement in which a person agrees to become pregnant with a child that will be raised by someone else. Surrogacy can be traditional (using the surrogate's ovum) or gestational (using someone else's ovum).
3. Surrogacy arrangements are regulated by the Human Assisted Reproductive Technology Act 2004 (HART Act), which is administered by the Ministry of Justice. The Ministry of Health has roles under this Act, including supporting the ethics committee that makes decisions on applications for assisted reproductive procedures in surrogacy arrangements.
4. The Improving Arrangements for Surrogacy Bill (the Bill) is currently before the Health Select Committee, and the Parliamentary Counsel Office is redrafting the bill to reflect the Law Commission's recommendations following a review of surrogacy law. Ministry of Justice officials are the lead advisors to the Health Committee, with advisory support from the Ministry of Health.
5. The expected outcome of the bill is a clear legal process that protects participants' rights. The bill will have substantial benefits, but it will not eliminate risks associated with all surrogacies. While domestic surrogacy arrangements will be held to high ethical standards, risks remain with regard to non-clinic-assisted and international surrogacies.
6. The Health Committee is to report the bill back to the House by 29 March 2024. However, the Ministry of Justice expects the report-back date to be substantially extended to accommodate the scale of redrafting required and potentially a public submissions process. The Health Committee is scheduled to meet soon to discuss the bill.
7. Due to the unusual history of the bill, funding has not been set aside for implementing the reforms. The Ministry of Justice is preparing a briefing for the Associate Minister of Justice, Hon Nicole McKee, about the funding shortfall and options.
8. The Ministry of Health does not support two of the bill proposals agreed to by the previous government.
 - a. enabling direct applications to the Ethics Committee on Assisted Reproductive Technology (ECART)
 - b. providing for a right of independent review of ECART decisions.

9. We intend to give you further advice on these issues including the broader surrogacy work programme in April.
10. As requested, attached as Appendix One is a list of key stakeholders and interested groups.

Recommendations

We recommend you:

- a) **Note** that the Health Committee will meet soon to discuss the Improving Arrangements for Surrogacy Bill, which is currently being redrafted by the Parliamentary Counsel Office.
- b) **Note** that the Health Committee is due to report back to Parliament on the bill on 29 March 2024, but we expect this date will be substantially extended.
- c) **Note** our initial advice about two policy proposals in the bill that we do not support, and we will brief you further on these issues in April.



Allison Bennett

**Group Manager, Health System Settings
Strategy, Policy and Legislation**

Date: 23/02/2024

Hon Casey Costello

Associate Minister of Health

Date:

Surrogacy Delegation

Background

What is surrogacy?

1. Surrogacy is an arrangement in which a person agrees to become pregnant and give birth to a child on behalf of someone else (the intended parent or parents), who will raise the child as their own. It is a means by which people who cannot become pregnant, or cannot bring a pregnancy to term, are able to have children.
2. New Zealanders' use of surrogacy is increasing. Currently up to 50 children are estimated to be born each year as a result of surrogacy arrangements involving New Zealand-based intended parents. About 60% of these are domestic arrangements, and 40% are international arrangements.
3. There are two types of surrogacy:
 - a. **Traditional surrogacy** involves use of the surrogate's ovum, so that the surrogate is the genetic mother of the child. Pregnancy is usually achieved via artificial insemination, which can occur with or without the assistance of a fertility clinic.
 - b. **Gestational surrogacy** involves creating an embryo via in-vitro fertilisation (IVF), using sperm and ova from the intended parents and/or donors. The embryo is then implanted into the surrogate, who will not be a genetic parent of the child. Pregnancy can only be achieved with the assistance of a fertility clinic.

How is surrogacy currently regulated?

4. Surrogacy arrangements are regulated by the Human Assisted Reproductive Technology Act 2004 (HART Act), which is administered by the Ministry of Justice.
5. The HART Act requires the Minister of Health to establish the Advisory Committee on Assisted Reproductive Technology (ACART) and the Ethics Committee on Assisted Reproductive Technology (ECART). The Secretariats for ACART and ECART both sit within the Ministry of Health and the committees are both funded through Vote Health.
6. Under the HART Act all "assisted reproductive procedures", apart from procedures that are "established procedures", must be approved by ECART. Surrogacy is not defined as an assisted reproductive procedure or an established procedure. However, when surrogacies involve assisted reproductive procedures, such as those involving a donated ovum (a gestational surrogacy), they must be assessed by ECART.
7. As traditional surrogacy involves the use of the surrogate's own ovum, this type of arrangement does not normally require ECART approval. If a fertility clinic is involved in a traditional surrogacy arrangement, it can request an ethical review by ECART, and ECART can provide non-binding ethical advice.

The ethical approval process

8. ECART considers all applications to perform assisted reproductive procedures, including within gestational surrogacy arrangements, and decides whether to approve, defer or decline the application. ECART comprises members with expertise in assisted reproductive procedures,

human reproductive research, ethics and law as well as members with the ability to articulate issues from consumer, tikanga Māori, and disability perspectives.

9. In the performance of its functions and the exercise of its powers, ECART must operate in accordance with any guidelines issued by ACART. Under ACART's surrogacy guidelines, ECART may only approve a surrogacy if satisfied:
 - a. the parties meaningfully consent to the arrangement
 - b. the parties have agreed on matters such as day to day care, guardianship, and any ongoing contact
 - c. the surrogacy is the best or only opportunity for the intended parents to have a child
 - d. the arrangement will safeguard the wellbeing of all parties
 - e. the risks associated with the arrangement are justified, and
 - f. the residency status of the surrogate and parents safeguard the health and wellbeing of the child (essentially, that the child will not be at risk of statelessness).

Intended parents must adopt a surrogate-born child to become their legal parent

10. When a child is born via surrogacy, the surrogate and their partner (if they have one) are the legal parents of the child, under the Status of Children Act 1969. To gain legal parenthood, the intended parents must adopt the child under the Adoption Act 1955. The Family Court determines whether the adoption will be approved, assisted by an assessment by the Ministry for Children | Ōranga Tamariki.
11. In an unknown number of cases, the intended parents do not adopt the child. Instead, the surrogate remains the legal mother of the child and the intended parents raise the child with limited legal protections.

Role of the Minister of Health

12. You have been delegated responsibility for the Minister of Health roles in relation to surrogacy. The Minister of Health has the following roles:
 - a. establish, maintain and support the functions of the ACART and ECART, and
 - b. administer the HART Order, including making recommendations to the government about improving it, based on advice from ACART.

Funding of surrogacy

13. Surrogacy is generally paid for by the intended parents. Some intended parents will be eligible for a level of public funding based on an assessment of their clinical priority. Public funding covers up to two packages of treatment, such as two IVF cycles.
14. There is no fee for making an application to ECART, but there are costs to intended parents associated with the process, including fees to fertility clinics for compiling the application, costs for counselling, and legal fees (approximately \$6,000 to \$7,000).

Surrogacy law reform

15. There is widespread agreement that the regulation of surrogacy in New Zealand is not fit for purpose. Because surrogacy arrangements involve multiple parties in the creation of a child, regulation is complex and must balance ethical, cultural, legal, and medical considerations.

The Law Commission review

16. In 2020, the Government asked the Law Commission to conduct a review of surrogacy law, regulation, and practice in New Zealand. Following public consultation on its Issues Paper, the Law Commission reported in April 2022 with 63 recommendations.¹ It found:
 - a. Laws about legal parenthood do not recognise surrogacy as a distinct way of building families. Intended parents, who enter a surrogacy arrangement with the intention of becoming parents to a surrogate-born child, need to adopt the child to become their legal parents. The law also does not recognise international surrogacy.
 - b. There are opportunities to strengthen protections for participants, particularly surrogate-born people's right to know their origins. The state does not record that a child was born via surrogacy.
 - c. The law is unclear about whether surrogates can receive financial support, there are service delays, and there is limited government information about surrogacy.

Reform is progressing through a bill before select committee

17. Surrogacy reform is progressing through the Improving Arrangements for Surrogacy Bill, which was recently reinstated and is before the Health Committee.
18. The bill emerged out of two distinct reform proposals. It was initially introduced in 2021 as a member's bill in the name of Tāmami Coffey MP, with a relatively narrow scope. Subsequently the Law Commission recommended different and more extensive reforms. On 30 May 2023, the government announced it had agreed to adopt the bill as a government bill and support the Health Committee to amend the bill to reflect the Law Commission's recommendations.
19. The bill is being redrafted to reflect the Law Commission's recommendations. The Health Committee at the end of the last parliamentary term published an interim progress report on the bill.² The new Committee is due to report the bill back to the House by 29 March 2024. The Ministry of Justice expect the report-back date to be substantially extended to accommodate the scale of redrafting required and potentially a public submissions process. The Ministry of Justice and Ministry of Health recommended a round of public submissions.
20. The bill proposes the following:
 - a. End the requirement for intended parents to adopt a surrogate-born child. Intended parents instead seek legal parenthood from one of two new pathways:
 - i. An administrative pathway, which would enable a transfer of parenthood from the surrogate without the need for a court process, if certain safeguards are satisfied.³
 - ii. A court pathway, which would be available if the administrative pathway did not apply, including for international surrogacies.

¹ Law Commission, Report 146: Te Kōpū Whāngai: He Arotake Review of Surrogacy. April 2022.

<https://www.lawcom.govt.nz/assets/Publications/Reports/NZLC-R146.pdf>

² Improving Arrangements for Surrogacy Bill: Second interim report of the Health Committee. August 2023.

<https://selectcommittees.parliament.nz/v/SelectCommitteeReport/41f50fa9-d811-4c6d-5e7f-08dba4137996>

³ The surrogacy arrangement has ethics committee approval, the surrogate gives consent, and the child is in the intended parents' care.

- b. Extend the requirement for ethics committee approval to all clinic-assisted surrogacies (not just gestational ones) and make the process available (but not required) for non-clinic-assisted surrogacy arrangements. This would mean the regulatory system better reflects the ethical complexity of arrangements.
 - c. Narrow the role of the Ōranga Tamariki in the approval process to make its role more proportionate to the risk of harm and respect intended parents' rights to a family.
 - d. Require the Register-General to record information about surrogate-born person's genetic and gestational origins, so the person can access this information consistent with their identity rights.
 - e. Retain the current prohibition on commercial surrogacy arrangements but permit the surrogate to be paid reasonable surrogacy-related costs. This means surrogates will not be left out of pocket.
 - f. Enable international surrogacy arrangements to be recognised in our laws.
21. The reforms are expected to create a clear legal process that protects participants' rights. However, risks associated with surrogacies will remain, particularly where surrogacies do not involve a clinic, and international surrogacies. It is very difficult for governments to regulate these areas without causing unintended consequences.
22. Some international surrogacies arranged by New Zealanders have been by way of commercial markets that are not held to the same high ethical standards as domestic surrogacies. For instance, the parents may have used anonymous gamete donors, meaning the resulting surrogate-born person may never be able to find out the identity of their genetic parents.
23. Risks may be mitigated by agencies ensuring there is sufficient guidance available to stakeholders, legal advisors, clinicians and counsellors, so that the risks are well understood before intended parents embark on a surrogacy arrangement. Improvements in the domestic surrogacy system may mean more people undertake surrogacy arrangements in New Zealand.

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Other ongoing work related to surrogacy

39. The Ministry of Health are also working on implementing some of the non-legislative Law Commission recommendations which the previous Government accepted. We will brief you separately on these.

Next steps

40. The next steps for the bill are for the Health Committee to decide on a report back date for the drafted bill. Decisions about funding the bill will need to be made by Ministers. We will keep you informed.

Appendix One: Key stakeholders and groups

HART committees
<ul style="list-style-type: none"> • Advisory Committee on Assisted Reproductive Technology (ACART) • Ethics Committee on Assisted Reproductive Technology (ECART)
Fertility clinics
<ul style="list-style-type: none"> • Fertility Plus • Fertility Associates • Repromed
Workforce groups
<ul style="list-style-type: none"> • Aotearoa New Zealand Association of Social Workers • Australian and New Zealand Infertility Counsellors Association • New Zealand College of Midwives • New Zealand Council of Trade Unions • New Zealand Nurses Organisation • Nurse Practitioners New Zealand • Nurses Society of New Zealand • Royal Australian and New Zealand College of Obstetricians and Gynecologists • Te Kāhui Ture o Aotearoa New Zealand Law Society
Interested charity and community groups
<ul style="list-style-type: none"> • Auckland Women’s Health Council • Center for Bioethics and Culture Network • Disabled Persons Assembly NZ • Donor Conceived Aotearoa • Equal Justice Project • Family First New Zealand • Feminist Legal Clinic • Fertility New Zealand • Humanist Society of New Zealand Incorporated • International Coalition for Abolition of Surrogate Motherhood • Maternity Services Consumer Council • Ministry of Men’s Affairs • National Council of Women of New Zealand • New Zealand Council of Christian Social Services • New Zealand Law Society • Sexual Wellbeing Aotearoa (previously ‘Family Planning New Zealand’) • Voice for Life Hutt Valley • Wellington Community Justice Project

ENDS.

Minister's Notes

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