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ACART Secretariat
P O Box 5013
Wellington

Dear John Angus

PROPOSED AMENDMENTS TO GUIDELINES

Thank you for the opportunity to provide comments on proposed amendments to two of the guidelines published by the Advisory Committee on Assisted Reproductive Technology (ACART).

As ACART's consultation document notes, this review resulted from a 2011 complaint to the Human Rights Commission that the *Guidelines on Surrogacy Arrangements involving Providers of Fertility Services* discriminate on the basis of sex and sexual orientation. The Commission welcomes ACART's proactive decision to reconsider provisions that were limited to an "intending mother" who has a "medical condition or diagnosis that justifies the use of a surrogacy arrangement". This has resulted in the current review of the surrogacy guidelines mentioned above and the related *Guidelines on Donation of Eggs or Sperm between Certain Family Members*.

From the outset the Commission would like to emphasise the importance of ensuring that both guidelines prioritise the best interests of any children born as a result of surrogacy arrangements. This would accord with New Zealand's obligations under article 3(1) of the United Nations Convention on the Rights of the Child.

This short submission now turns to each of ACART's seven consultation questions.

1. Discrimination

The Commission agrees with ACART's conclusion that the surrogacy guidelines currently discriminate on the basis of sex and sexual orientation. The consultation document notes that this discrimination is not justified in light of the principles of the Human Assisted Reproductive Technology Act 2004 (HARTA).

The Advisory Committee's work falls within Part 1A of the Human Rights Act 1993 (HRA) because the Committee is acting with legal authority under Part 2 subpart 3 of the HARTA. Section 19 of the New Zealand Bill of Rights Act 1990 (NZBORA) is the relevant anti-discrimination standard for Part 1A complaints. Both sex and sexual orientation are prohibited grounds under section 19 of the NZBORA.

As the Advisory Committee has acknowledged, its current guidelines amount to *prima facie* unlawful discrimination under Part 1A of the HRA. In addition, they do not meet the threshold for justifiable discrimination in section 5 of the NZBORA.¹

The Commission welcomes the proposals in the consultation document that have been designed to address the current exclusion of gay male couples and single men from applying to access surrogacy arrangements through a fertility provider. Those excluded under the current guidelines are likely to use informal arrangements that do not provide the same level of support and protections available through formal surrogacy arrangements. By improving access to formal surrogacy procedures, ACART's proposed changes are likely to result in better outcomes for all parties, including intending parent/s, women who are surrogates and the children of surrogate pregnancies.

2. Need and not convenience

The Commission agrees with ACART's view that surrogacy should be used only where there is need, and not for convenience. However, as noted in subsequent comments below, the Commission considers that the term "medical need" may not always be sufficiently broad to encompass some of the reasons why an intending parent may require surrogacy services. Given the complexity of individual circumstances, the Commission recommends some level of discretion so that the Ethics Committee on Assisted Reproductive Technology (ECART) is able to consider other factors on a case-by-case basis.

3. Other comments on *Guidelines on Surrogacy Arrangements involving Providers of Fertility Services*

The Commission welcomes this review as it enables ACART to consider any broader ramifications beyond the specific details of the complaint brought to the Human Rights Commission.

The current guidelines refer to "the intending mother". Under the proposed amendments the guidelines will now refer to an intending parent or parents. This change is welcomed.

However the Commission is concerned that where the two intending parents are a lesbian couple *both* women must meet the eligibility criteria for accessing surrogacy arrangements. In other words, both must have medical reasons why

¹ The test for justifiable discrimination is set out in *R v Hansen* [2007] 3 NZLR 1 and requires the following considerations. Firstly, does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom? If so:

- Is the limiting measure rationally connected with its purpose?
- Does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose? and
- Is the limit in due proportion to the importance of the objective?

they cannot or should not conceive, carry a pregnancy or give birth. While many lesbian couples are likely to make decisions about who will try to conceive based on these medical factors, there may be other valid non-medical reasons why a surrogacy arrangement is the most appropriate option.

One possible unintended consequence of this requirement is that if an intending lesbian parent is single and meets the eligibility criteria she is able to access surrogacy arrangements. However if she subsequently enters a lesbian relationship she would no longer be eligible unless her new partner is also unable to conceive, carry a pregnancy or give birth.

Therefore the Commission recommends that the last bullet-point in section 2(a)(iii) of the guidelines is revised to state that:

Where there are two intending parents, the intending parents are:

- a man and an eligible woman, or
- two men, or
- *at least one* eligible woman

In making this recommendation the Commission strongly supports the overarching principles in the HARTA. These require important consideration be given to the health and wellbeing of children born as a result of any surrogacy arrangement, including their right to be made aware of their genetic origins. The Act's principles highlight that women, more than men, are directly and significantly impacted by assisted reproductive procedures and that their health and wellbeing must be protected. In the Commission's view, a wellbeing focus incorporates principles of reproductive autonomy including freedom from coercion around such decisions.

In addition, the Commission recommends that ECART is given a greater level of flexibility to consider applications, including from female same-sex couples in situations where only one of the women meets the eligibility criteria.

4. Single men's and male couples' use of eggs donated by a family member

The Commission supports ACART's proposal that single men and male couples applying to ECART to enter a surrogacy arrangement should be able to apply to use eggs donated by a family member. This is a logical and necessary change to enable single men and male couples to enter a surrogacy arrangement on a non-discriminatory basis.

The Commission would like to acknowledge ACART's evidence-based approach to this proposal. Specifically ACART's overview of peer-reviewed studies on the outcomes of parenting by gay male couples and single fathers is a valuable contribution to both this review and policy debates around same-sex adoption.

5. Single women and lesbian couples' access to sperm donated by a family member

Similarly, the Commission supports ACART's proposal that single women and lesbian couples should be able to apply to ECART to use sperm donated by a family member, without needing a medical justification.

6. Medical reason required to not use one's own eggs or sperm

The Commission notes ACART's view that family donation of eggs or sperm should be used only when needed, and never as a matter of convenience. Reasons given include the possible confusion of relationships within families and the risk that donors may feel pressured to assist. Furthermore, all egg donations involve risk for donors because of the processes used to obtain eggs.

The Commission agrees that such decisions should never be based on a matter of convenience. However, it has concerns about ACART's proposal to limit use of such donations to "only where intending parents do not have their own eggs or sperm or, if they do, that there is a medical reason for them to not use their own eggs or sperm".

In the Commission's view, there may be other reasonable grounds for accepting an application beyond medical necessity and therefore it supports ensuring ECART has some level of discretion when considering applications. The higher threshold for lesbian couples, where both are required to meet the eligibility criteria, has already been raised as a concern in the Commission's response to question three.

7. Other comments or suggestions

The ACART guidelines do not adequately address the needs of trans² and intersex people. Largely this is because the guidelines assume that all women will have female bodies and all men will have male bodies. Intersex and trans people fall outside those assumptions. As a result, it is unclear how such guidelines apply to trans and intersex people. In addition, trans and intersex people face are likely to face specific fertility challenges that may increase their need to access surrogacy arrangements.

Both trans and intersex people are protected from unlawful discrimination under the ground of sex in the HRA and the NZBORA. A 2008 Crown Law opinion to the Attorney-General concurred with the Commission's view that discrimination based on a person's gender identity is also prohibited under the ground of sex.³ Therefore the Commission recommends that the ACART guidelines specifically mention that trans and intersex people are able to apply to enter a surrogacy

² The Commission uses the term 'trans' to describe a range of diverse gender identities including transsexual, transgender, FtM (female to male), MtF (male to female), genderqueer, whakawahine, fa'afafine, akava'ine and leiti.

³ Accessible online at:

<http://www.beehive.govt.nz/sites/all/files/SG%20Opinion%202%20Aug%202006.pdf>

arrangement, regardless of their sex or gender identity. Furthermore, that ECART is given discretion to consider such applications on a case-by-case basis, to ensure that surrogacy arrangements can be accessed on a non-discriminatory basis.

In addition, the Commission encourages ACART to consult further with trans and intersex people about their access to assisted reproductive procedures and is happy to provide further information or guidance to support such an initiative. In 2008 the Commission published the final report of its Inquiry into discrimination experienced by transgender people.⁴ Access to health services was one of the three key areas of focus in the Inquiry's terms of reference. Since 2008 the Commission has facilitated a number of dialogue processes between trans people and health professionals. These included consultation around development of national good practice guidelines on the provision of gender reassignment health services in New Zealand.⁵ In addition the Commission has hosted two roundtable discussions between health professionals and intersex people.⁶

Thank you again for the opportunity to comment on proposed amendments to the *Guidelines on Surrogacy Arrangements Involving Providers of Fertility Services* and the *Guidelines on Donation of Eggs or Sperm between Certain Family Members*. The Commission supports ACART's work in this area to ensure that access to assisted reproductive procedures is made available on a non-discriminatory basis.

If you have any questions about this submission please feel free to contact me directly on jackb@hrc.co.nz or (09) 375 8647.

Yours sincerely



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⁴ Accessible online at: <http://www.hrc.co.nz/human-rights-environment/action-on-the-transgender-inquiry/resources>

⁵ Counties Manukau District Health Board (2011) *Gender Reassignment Health Services for Trans People within New Zealand*. Wellington: Ministry of Health. Accessible online at: <http://www.health.govt.nz/publication/gender-reassignment-health-services-trans-people-within-new-zealand>

⁶ Notes from both intersex roundtables are available on the Commission's website here: <http://www.hrc.co.nz/human-rights-environment/action-on-the-transgender-inquiry/intersex-people>