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Submission to

ACART

on

Proposed Amendments to *Guidelines on Surrogacy Arrangements Involving Providers of Fertility Services*

and

Guidelines on Donation of Eggs or Sperm between Certain Family Members

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1. Introduction

Women's Health Action is a women's health promotion, information and consumer advisory service. We are a non-government organisation that works with health professionals, policy makers and other not for profit organisations to influence and inform health policy and service delivery for women. Women's Health Action, which grew out of Fertility Action, founded by women's health activist Sandra Coney is in its 27th year of operation and remains on the forefront of women's health in Aotearoa New Zealand. We are highly regarded as leaders in the provision of quality, evidence-based consumer-focused information and advice to ensure health policy and service delivery meets the needs of diverse women, and has intended and equitable outcomes. We have a special focus on breastfeeding promotion and support, as well as women's sexual and reproductive health and rights. We provide:

- Expertise in the development of high-quality health consumer information resources.
- Consumer representation and women's health perspectives in a range of consultations, working parties and health service reviews.
- Extensive networks in the public health and not-for-profit sector. We coordinate regional networks in breastfeeding, eating disorder services and family violence.
- Discussion forums, seminars and presentations on women's health, public health and gender issues.
- Evidence-based analysis and advice to health providers, NGOs and DHBs, the Ministry of Health, and other public agencies on women's health (including screening), public health, gender and consumer issues including a focus on reducing inequalities.
- A range of breastfeeding promotion activities which connects us with young women, their families, and communities.

Women's Health Action takes a special interest in assisted reproductive technologies and approach questions about the use of these technologies from an evidence based women's health and consumer rights perspective. We also emphasize the importance of evaluating the social impact of new biotechnologies before their use becomes common practice to ensure that new technologies are embedded in society rather than adapting society to the technologies. We remain concerned about how assisted reproductive technologies may contribute to the commodification of women's reproductive bodies and about future implications for the children born as a result of these technologies. We were active in discussion around the HART Bill 1996, contributed to the HART submissions in 2003, have produced the discussion document 'Protecting our Future: the case for greater regulation of assisted reproductive technologies' (1999) and have contributed submissions on most of ACART's consultations. We continue to advocate for the importance of informed choice and decision making for all parties involved in assisted reproductive technologies.

Thank you for the opportunity to provide a submission on the proposed amendments to *Guidelines on Surrogacy Arrangements Involving Providers of Fertility Services* and *Guidelines on Donation of Eggs or Sperm between Certain Family Members.* We trust our comments will be useful in supporting ACART to

address discrimination in access to assisted reproductive technologies on the basis of sex and sexual orientation.

2. Executive Summary

2.1 Women's Health Action **supports** the proposed amendments relating addressing discrimination faced by men in same sex relationships or single men wishing to access surrogacy arrangements through a fertility provider by removing the requirement that there be an "intending mother".

2.2 Women's Health Action **does not support** the restriction of need in 'eligible woman' to only 'medical need'. We hold that ECART should be able to determine eligibility on a case-by-case basis taking into consideration factors other than medical need.

2.3 Women's Health Action **does not support** the requirement that both women in a same sex relationship be required to establish 'eligibility'. We hold that only the woman who would have wished to become pregnant be required to establish eligibility.

2.4 Women's Health Action **supports** the changes to the Guidelines on Donation of Eggs or Sperm between Certain Family Members to ensure single men and women, and men and women in same sex relationships have equitable access to assisted reproductive technologies.

2.5 Women's Health Action **does not support** the requirement in 4.1 68. (ii) that the partner of women in same sex relationships must have a diagnosis of infertility or unsuitable eggs in order for the woman who would have wished to become pregnant to qualify for the use of donated eggs.

2.6 Women's Health Action **recommends** on-going consultation with members of queer/trans/intersex communities to ensure guidelines and legislation relating to assisted reproductive technologies do not perpetuate discrimination on the basis of sex, sexual orientations **and/or** gender identity.

3. Questions about the proposed amendments to the guidelines

3.1 Do you agree with ACART's conclusions that:

- **The surrogacy guidelines currently discriminate on the basis of sex and sexual orientation, and**
- **The discrimination is not justified in light of the principles of the Human Assisted Reproductive Technology Act 2004?**

Yes. Women's Health Action agrees that the current guidelines unjustifiably discriminate on the basis of sex and sexual orientation for those wishing to access surrogacy arrangements through a fertility provider and that the discrimination is not justified in light of the

principles of the Human Assisted Reproductive Technology Act 2004. In all areas of assisted reproductive technologies, and in particular the use of a surrogate, the right to access such technologies must be balanced against the wellbeing of women who bear the substantial burden of such technologies and the children that result from them. However we agree with the committee's conclusion that the current guidelines on surrogacy arrangements and the donation of eggs and sperm between family members discriminate on the basis of sex and sexual orientation for those wishing to access surrogacy arrangements through a fertility provider without good reason. We also agree that the proposed amendments may help improve outcomes for women who are surrogates and the children of surrogate pregnancies by encouraging the use of formal as opposed to informal surrogacy arrangements with the associated protections.

3.2 Do you agree with ACART's view that surrogacy should be used only where there is a need, and not for convenience?

Women's Health Action supports the view in principle that surrogacy should be used only on the basis of need however we are concerned that limiting the definition of need to only *medical need* in establishing who meets the criteria of an *eligible woman* provides no recognition that the *need* for surrogacy may be non-medical. Examples of non-medical need may be pre-existing trauma related to sexual or physical abuse, gender dysphoria, or simply that one partner in same sex relationship between women may not wish to donate her eggs, carry a pregnancy and give birth.

We also question whether 'health' in the criteria 'is likely to have her health significantly affected by a pregnancy or birth' includes both physical and mental health? We hold that 'health' in this criteria needs to be interpreted in its most 'holistic' form.

We recommend that ACART include an extra provision in the criteria for *eligible woman* that provides for women who may wish to access surrogacy through a fertility provider for justifiable reasons other than medical need. Suggested wording could be: *is unable to conceive, carry a pregnancy or to give birth for reasons other than medical established as reasonable by ECART on a case by case basis.*

3.3 Do you have any other comments on ACART's proposed amendments to the Guidelines on Surrogacy Arrangements involving providers of fertility services?

We are concerned that the proposed requirement for both women in a same sex relationship to meet eligibility criteria will perpetuate discrimination on the basis of sex and sexual orientation. It cannot be assumed that both women in a same sex relationship will feel willing to conceive, carry a pregnancy and give birth. We hold that women in a same sex relationship should be treated the same as a heterosexual partnership and only require the woman in the relationship who would have intended to carry a pregnancy, to establish eligibility.

Do you agree with ACART's proposal that single men and male couples applying to ECART to enter a surrogacy arrangement should also be able to apply to use eggs donated by a family member?

Yes. We support changes to the family eggs or sperm donation guidelines to ensure single men and male couples can have equitable access to assisted reproductive technologies.

3.4 Do you agree with 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?

Yes. We support changes to the family eggs or sperm donation guidelines to ensure single women and women in same sex relationships can have equitable access to assisted reproductive technologies.

3.5 Do you agree with ACART's view that the use of eggs or sperm donated by a family member should be possible only where intending parents do not have their own eggs or sperm, or if they do, that there is a medical reason for them not to use their own eggs or sperm?

In the case of women in same sex relationships, only the woman who would have wished to conceive, carry and pregnancy and give birth should have to meet this criteria. To require the other partner to be the source of the egg is discriminatory on the basis of sex and sexual orientation.

3.6 Do you have any other comments or suggestions about either the proposed amendments to the guidelines or the associated discussion?

We congratulate ACART for taking a proactive response to addressing discrimination in access to assisted reproductive technologies on the basis of sex and sexual orientation. However we are concerned that the entire premise for the guidelines and the proposed changes is that there are only two sexes (male and female), that these are consistent with two gender identities, and that intimate partner relationships always only involve two people. There is no recognition of, or allowance for, intersex people in the guidelines, nor of the diversity and fluidity of gender identities, sexualities and types of intimate relationships. For this reason the guidelines must allow sufficient flexibility to have access to surrogacy and the use of family eggs or sperm donation decided on a case by case basis. We also recommend that ACART form a reference group of stakeholders from queer, transgender and intersex communities with whom to consult when reviewing guidelines pertaining to family formation with these population groups.

4. Conclusion

Thank you again for the opportunity to comment on the proposed amendments to *Guidelines on Surrogacy Arrangements Involving Providers of Fertility Services* and *Guidelines on Donation of Eggs or Sperm between Certain Family Members*. We support ACART in its efforts to reduce discrimination on the basis of sex, sexual orientation and relationship status in the use of assisted reproductive technologies involving providers of fertility services and trust our comments are useful in your consideration.