

# Feedback form

**Please provide your contact details below.**

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If this feedback is on behalf of an organisation, please name the organisation	Oranga Tamariki, Ministry for Children
Please provide a brief description of the organisation (if applicable)	Oranga Tamariki is the government agency responsible for the delivery of statutory care and protection, youth justice and adoption services in New Zealand.
Address/email	Oranga Tamariki - Ministry for Children Aurora Centre 56 The Terrace Wellington 6011 <a href="mailto:Sharyn.titchener@ot.govt.nz">Sharyn.titchener@ot.govt.nz</a> Phone: +64 4 9189147
Interest in this topic (eg, user of fertility services, health professional, researcher, member of public)	Oranga Tamariki – Ministry for Children (OT) has an interest in surrogacy because the rights and wellbeing of the child are at issue. This is one of our key priorities. OT is one of the lead New Zealand government agencies responding to cases involving New Zealanders undertaking an international surrogacy arrangement.

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### Question 1: Rescinding the biological link policy

*Refer to section 3.*

ACART is proposing that:

- the guidelines should no longer require intending parents to have a genetic or gestational link to a resulting child
- instead the guidelines should require ECART to be satisfied that where intending parents will have neither a genetic nor a gestational link to a resulting child, the lack of such links is justified.

(a) Do you agree?

Yes ☐ No ☐

(b) Do you believe there are cultural implications associated with the proposed removal of the biological link policy?

Yes ☐ No ☐

If so, please describe these implications.

Please see attached document.

Please give reasons for your views.

## Introduction

Oranga Tamariki - Ministry for Children (OT) welcomes the opportunity to make a submission to the Advisory Committee on Assisted Reproductive Technology (ACART) on the proposed guidelines for family gamete donation, embryo donation, use of donated eggs with donated sperm and surrogacy.

This submission specifically responds to ACART's proposed changes to the biological link policy and the implications this may have for surrogacy arrangements commissioned overseas. OT understands that ACART's proposed new guidelines will no longer incorporate the biological link policy as it is believed that the existing policy currently excludes some individuals and couples from using assisted reproductive procedures to create a family. OT accepts ACART's rationale for the proposed change to the biological link policy for domestic surrogacy arrangements.

However, OT provides convincing rationale in this submission on the reasons why the non-binding guideline, relating to a genetic link for international surrogacy cases, will not be reviewed or amended to be aligned to ACART's changes to their guidelines.

OT has an interest in providing this submission as it is one of the lead New Zealand government agencies responding to cases involving New Zealanders and international surrogacy arrangements. Additionally, for any international surrogacy arrangement, the rights and wellbeing of the child are at issue, and this is one of OT's key priorities.

New Zealand does not have legislation specifically addressing international surrogacy and currently there is no government policy on international surrogacy arrangements. In the absence of an international legal instrument to regulate both policy and practice, New Zealand has responded to the emerging issue of international surrogacy via the application of domestic law, and the development of Ministerial non-binding guidelines.

## Background to the development of New Zealand government's non-binding guidelines

The number of New Zealanders travelling off-shore to commission a surrogacy arrangement remains small; however the issue has received notable attention by the relevant government Ministries since 2010. This interest has been due to the complexities that exist in terms of the application of New Zealand law, international conventions such as the United Nations Convention on the Rights of the Child (UNCROC) which New Zealand is a party to, and humanitarian considerations relating to the vulnerability and rights of children and surrogate mothers. There are also many cross-jurisdictional issues to consider.

In response to an increase in the number of enquires being made by New Zealanders about the option of commissioning a surrogacy arrangement overseas, and in the absence of an international instrument to guide responses to these enquiries, in 2009 the New Zealand Central Authority<sup>1</sup> wrote to the Permanent Bureau in the Hague. This correspondence drew attention to concerns about international surrogacy arrangements and the interplay between these arrangements and the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption 1993.

In June 2010, at the Special Commission meeting in The Hague, the interplay between international surrogacy cases and the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption 1993 was discussed. The Conclusions of the Special Commission were as follows:

*"The Special Commission noted that the number of international surrogacy arrangements is increasing rapidly. It expressed concern over the uncertainty surrounding the status of many of the children who are born as a result of these arrangements. It viewed as inappropriate the use of the Convention in cases of international surrogacy"<sup>2</sup>*

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<sup>1</sup> The New Zealand Central Authority for the purposes of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. The Chief Executive of the Ministry of Social Development is vested by the Adoption (Intercountry) Act, 1997 with responsibility for the New Zealand Central Authority.

<sup>2</sup> The Special Commission of June 2010 on the practical operation of the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (17-25 June 2010).

On the basis of the conclusions made by the Special Commission, the relevant New Zealand government ministries sought legal advice on how best to proceed in responding to cases of international surrogacy involving New Zealand citizens and permanent residents. The legal advice received confirmed that the rules in Part 2 of the Status of Children Act (1969) apply to international surrogacy arrangements commissioned by New Zealanders. Under the Status of Children Act (1969) the birth mother (surrogate) and her partner if she has one (and if he or she consented to the fertility treatment), are considered to be the legal parents of the child. To obtain legal recognition as a parent of a child born via an international surrogacy arrangement, the New Zealand commissioning parents need to lodge an application to adopt their child in the New Zealand Family Court, pursuant to the Adoption Act 1955.

The decision that the application of the Status of Children Act (1969) applies in responding to cases involving international surrogacy arrangements, means that children born as a result of such arrangements do not automatically meet the requirements for New Zealand citizenship by descent and are therefore vulnerable to being 'stateless'. For example, children born in countries such as the Ukraine and Georgia through a surrogacy arrangement commissioned by New Zealand citizens, are not recognised as citizens of these countries or of New Zealand, therefore they will remain 'stateless' until an adoption is concluded in the New Zealand Family Court. The granting of an adoption will afford the child New Zealand citizenship, otherwise by descent. It was also determined that there are no immigration instructions or policy to facilitate the entry of children into New Zealand who are born as the result of an international surrogacy arrangement.

Due to the identified issues of legal parentage, immigration and citizenship, it became clear that in the absence of international guidance, a New Zealand joint government agency response was required to respond to cases where New Zealanders had commissioned a surrogacy arrangement overseas and they intended to bring the child to New Zealand to permanently reside.

### **New Zealand's joint government agency approach to international surrogacy**

A central tenet to New Zealand's approach to international surrogacy is the protection of the rights of the child, particularly the protection and preservation of the identity rights of children born through surrogacy arrangements.

Children born via an international surrogacy arrangement are at risk of a number of their rights not being met. For example the child may not be informed of their true genetic origins, presenting potential risks to their sense of identity, kinship and ethnicity. Children may not be legally registered, may not have a nationality, and may have no legal relationship with their intended parents. These potential violations contravene the United Nations Convention on the Rights of the Child, which the New Zealand Government is a signatory to.

In addition to these risks, there is often a lack of transparent and robust regulatory and legislative frameworks within countries where international surrogacy arrangements are being commissioned. As a result the issue of child trafficking or the irregular movement of children across borders cannot be excluded.

By placing the protection of children's rights at the centre of the New Zealand response to international surrogacy, it was important that a pathway was established that mitigated, as much as possible, the risks identified above. In 2010, cases were starting to emerge where the New Zealand Minister of Immigration was being asked to exercise his statutory discretion to grant entry visas to babies born via an international surrogacy arrangement, as an exception to immigration policy. This led to officials from Immigration New Zealand, the Department of Internal Affairs, Ministry of Social Development, Ministry of Justice and the Ministry of Foreign Affairs and Trade, to develop a set of non-binding guidelines.

These non-binding guidelines<sup>3</sup> were agreed by Cabinet in 2010 and may be used by the Ministers of Immigration and Department of Internal Affairs when exercising discretion with respect to immigration and citizenship matters for children who have been born via an international surrogacy arrangement. Importantly, the non-binding guidelines provide a common reference point across government as to how best to respond to cases of international surrogacy, bearing in mind that the unique characteristics of each arrangement requires a case-by-case response.

### **Application of the non-binding guidelines**

In order for the Minister of Immigration to make an informed decision on whether to grant a temporary visitor visa to a child born overseas via a surrogacy arrangement, information is required about the adherence to the non-binding guidelines. This information is acquired through an assessment by OT of the commissioning parents which is triggered as a result of an intention on the part of the commissioning parents, to adopt their children in the New Zealand Family Court.

If the Minister is satisfied with the information provided, he will issue discretionary approval for the commissioning parents to make an application for a temporary visitor visa for their child/children. In most instances the Minister provides this approval subject to the following conditions:

- DNA evidence of a genetic link between one or both of the commissioning parents and the child/children
- Evidence of the surrogacy contract
- Information on whether the children will have access to information about their identity
- Evidence that adoption proceedings are underway with the New Zealand Family Court.

Once approval is obtained from the Minister and the conditions of evidence have been provided, the commissioning parents make an application for the temporary visitor visa for their child, whilst they remain off shore. After the commissioning parents and child return to New Zealand, they lodge their application in the New Zealand Family Court for an adoption order. In the event an adoption order is granted, the Department of Internal Affairs will issue a New Zealand birth certificate which entitles the child to New Zealand citizenship.

### **Non-binding guidelines – genetic link between at least one of the commissioning persons and the child**

When the guidelines were drafted in 2010, the international surrogacy landscape was very different to what it has become in 2018. For example, the two main destination countries for New Zealand commissioning parents were India and Thailand; both of which have since banned foreigners from commissioning surrogacy arrangements. The primary destination country is now the United States of America (USA), particularly California, where commercial surrogacy is legalised and regulated.

The reason for the inclusion of the non-binding guidelines, where there is an expectation that there will be a genetic link between at least one of the parents and the child, is not specifically about the child being biologically related to his/her parent/s. At the time the guidelines were drafted, whereby India and Thailand were the primary destination countries, all donor material was anonymous and there were no laws or regulations which would enable children to seek their genetic history, if they wished to do so in the future. The unregulated surrogacy industry in these countries would have resulted in commissioning parents who used the services of full donor gametes, intentionally denying their child the right to know and access their maternal and paternal genetic origin and history.

In addition to protecting the rights of children to have access to at least a part of their genetic history (through having a genetic link to one or both of their commissioning parents), the other rationale for introducing the non-binding guideline relating to the genetic link requirement, was to reduce the risk of the New Zealand government becoming party to the movement of children across New Zealand borders as the result of child trafficking.

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<sup>3</sup> Appendix A

## Current situation

California is currently the primary destination for New Zealanders for commercial surrogacy arrangements, where access to donor information is becoming more readily available. However it is evident that countries such as Georgia and the Ukraine are likely to become popular destinations in the future. The surrogacy industry in these countries remains unregulated, donor information is not legally accessible and children are born stateless, due to the countries not recognising the children as citizens of their country of birth.

The lawful movement of children across borders, born via international surrogacy arrangements is fraught with complexities and has significant elements of risk to all parties, including the children, the commissioning parents and the New Zealand government.

The New Zealand government's response to mitigating against these risks, through the implementation of the non-binding guidelines is aligned to domestic legislation, New Zealand government's international obligations and international best practice. Although the international surrogacy landscape has changed significantly over the past eight years, the risks that were identified in 2010 when the non-binding guidelines were drafted, are still valid.

OT acknowledges that ACART have a sound rationale, from a human rights perspective, for rescinding the biological link policy for domestic surrogacy arrangements. However, children born via an international surrogacy arrangement are not afforded the same protection of their rights, as those children born via a surrogacy arranged in New Zealand. (notably the protection of a child's right to access information about their genetic heritage, identity and origin)

In addition to the difficulty in upholding the rights of children born as a result of cross-jurisdictional surrogacy arrangements, the New Zealand government is also responding to an international environment which is characterised by increased mobility and migration across borders, and humanitarian issues such as people trafficking and smuggling.

OT acknowledges that should ACART progress the rescinding of the biological link policy, there is the potential for inconsistencies to occur between the guidelines for domestic surrogacy and the non-binding guidelines for international surrogacy arrangements. However, OT takes the position that the non-binding guidelines are still 'fit for purpose' due to the uncertain and often unregulated nature of the international surrogacy environment, and the characteristics of the current international environment. It is for these reasons that OT are not intending to seek approval for a review of the non-binding guidelines in the foreseeable future.

## Appendix A: Ministerial guidelines

Below are the guidelines that Ministers are likely to take into account if and when they are deciding to exercise statutory discretion to issue a visa or grant citizenship for a baby born as a result of a surrogacy arrangement overseas, who would otherwise not be able to enter New Zealand or be granted citizenship. These guidelines are non-binding and serve as a guide only.

<b>1. Minister may consider</b>
2. Whether there is a genetic link between at least one of the commissioning persons and the child.
3. The outcome that is in the best interests of the child.
4. New Zealand's international obligations.
5. The nature of the surrogacy arrangement, i.e., is it altruistic or commercial?
6. Whether the commissioning persons intend to or have taken steps to secure legal parenthood or other legal rights in respect of child in NZ.
7. What the commissioning persons have done in the child's country of birth to secure legal parenthood or other legal rights in respect of the child.
8. Whether the applicants have demonstrated respect for the laws of the jurisdiction in which the surrogacy was carried out.
9. Whether there is satisfactory evidence of informed consent from the: <ul style="list-style-type: none"><li>- gamete (egg/sperm donor (if relevant))</li><li>- surrogate mother for the surrogacy arrangement to take place (was she a willing party?)</li><li>- surrogate mother (and her partner if relevant) for the child to depart the country of birth and enter New Zealand</li><li>- surrogate mother (and her partner if relevant) for the child's adoption.</li></ul>
10. Steps taken by the commissioning persons to preserve the child's identity, e.g. do the commissioning persons intend to retain information about the child's origins?
11. Whether the recognised authority of the birth country has agreed or objects to the child leaving the country permanently.
12. Any other considerations that the Minister wishes to take into account.