MANATŪ HAUORA
MINISTRY OF HEALTH

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16 December 2022

s 9(2)(a)

By email: s 9(2)(a)
Ref: H2022017483

Tēnā koe s 9(2)(a)

Response to your request for official information

Thank you for your request under the Official Information Act 1982 (the Act) to Manatū Hauora (the Ministry of Health) on 24 November 2022 for information regarding guidelines for clinic assisted surrogacy. You requested:

> *"... copies of the previous surrogacy guidelines ACART has had in place since its establishment pursuant to the Human Assisted Reproductive Technology Act 2004.*
>
> *I see the most recent guidelines, published in 2020, are available online. However, my primary question relates to when the prevailing vocabulary changed from "commissioning parents" (utilised in the Draft Guidelines from NECAHR) to "intending parents" (which is used in the most recent guidelines). Accordingly, I am hoping to look through the previous guidelines to pin point when this shift occurred."*

The terminology in question was changed in December 2013 when the now previous surrogacy guidelines were published.

Copies of the previous guidelines (NECAHR 2001 and ACART 2013) are attached to this letter and have been released to you in full. Please note that the NECAHR 2001 guidelines were a draft and that they have long since been rescinded.

I trust this information fulfils your request. Under section 28(3) of the Act, you have the right to ask the Ombudsman to review any decisions made under this request. The Ombudsman may be contacted by email at: info@ombudsman.parliament.nz or by calling 0800 802 602.

Please note that this response, with your personal details removed, may be published on the Manatū Hauora website at: www.health.govt.nz/about-ministry/information-releases/responses-official-information-act-requests.

Nāku noa, nā

Ruihua Gu
Acting Group Manager, Quality Assurance and Safety
Regulatory Services | Te Pou Whakariterite Ratonga

Draft Guidelines

for

Non-commercial Altruistic Surrogacy

using IVF as Treatment

Prepared by the National Ethics Committee on Assisted Human Reproduction
Last revised May 2001
c/o Ministry of Health
PO Box 5013
Wellington
NEW ZEALAND

INTRODUCTION

The National Ethics Committee on Assisted Human Reproduction (NECAHR) agreed to give ethical approval to a general application pertaining to non-commercial, altruistic surrogacy using in vitro fertilisation (IVF) as treatment in July 1997 and to review applications on a case-by-case basis. The draft guidelines have been developed progressively as cases are reviewed. NECAHR will continue to notify clinics of amendments to the guidelines.

Each and every instance of this practice with which any infertility services provider wishes to proceed must be submitted individually for ethical review and will be assessed on a case-by-case basis and in relation to these guidelines.

The following issues and reporting requirements must be addressed for ethical approval of non-commercial, altruistic surrogacy using IVF as treatment.

Provider

NECAHR requires a report on the medical status of the birth mother, including the age of the mother, existing medical conditions, and the number of children. Information on the birth mother's age is necessary as the risks to the mother's health and likelihood of a less successful outcome increase with age. Information on the number of children is necessary in order to know whether the birth mother is likely to be capable of having a normal pregnancy. Also, a surrogate mother who already has children of her own is likely to be more aware of the medical and psychological risks to herself.

- The application for ethical review should be explicit about conditions that may impact on the safety of the birth mother when undertaking treatment and pregnancy and should include documentation from medical advisers.

- The treatment must be in accordance with the RTAC[1] guidelines.

- If the birth mother has a partner, the provider must discuss with the birth mother and her partner how they will ensure that they do not conceive their own child during the IVF treatment.

- NECAHR considers that screening of the birth mother's partner should be the standard screening carried out for partners of women undergoing IVF treatment, i.e. for HIV and Hepatitis A and C.

- NECAHR requires a provider to notify it in the case of each non-commercial altruistic surrogacy using IVF as treatment which has been approved, of:
  - when the IVF programme begins
  - when pregnancy is confirmed or the programme is discontinued
  - any adverse events
  - the outcome of pregnancy, and
  - the outcome of the adoption and guardianship process.

- NECAHR requires that the clinic's policy take account of cultural diversity.

Commissioning parents

- The commissioning parents' use of their own gametes: one or both of the commissioning parents should be the potential child's genetic parents.

- The existence of a medical condition that precludes pregnancy or makes pregnancy damaging to the commissioning mother or the child: there should be medical reasons for the commissioning mother not undertaking a pregnancy.

[1] Reproductive Technology Accreditation Committee

- The relationship between the birth mother and the commissioning parents: NECAHR prefers that the birth mother be either a family member or close friend of the commissioning parents.

- Expenses related to pregnancy and childbirth: such recompense may be made, but no payment should be made in lieu of employment.

Birth mother and her partner

- The birth mother and her partner should have completed their family as this may reduce the likelihood that they will want to keep the child. Problems could arise if they had not completed their family or begun it, including in relation to medical complications due to the surrogacy, which then prevented further pregnancy.

- If the birth mother has a partner, the birth mother and her partner must take measures to ensure that they do not conceive their own child during the IVF treatment.

Legal advisers

- NECAHR requires a report from a legal adviser for each party, indicating that the party clearly understands the legal issues and the current environment in which surrogacy agreements are legally unenforceable. The same legal adviser must not advise both parties.

- NECAHR does not require a formal agreement. This does not preclude a statement of intent between the parties that allows them to work through the issues and clearly state their intentions and expectations.

- NECAHR advises that the parties discuss possible disputes, for example, about the custody of the child, termination of pregnancy, and life style issues during pregnancy, with their legal advisers and counsellors before the proposal is finalised. It should be noted that disputes may ultimately be resolved by a court.

- Legal advisers must ensure the parties understand that the child will legally be the child of the birth mother *(*and her partner if there is agreement to the surrogacy arrangement), unless adopted by the commissioning parents.

- Legal advisers must ensure that the parties clearly understand procedures relating to guardianship, custody and adoption and the requirements that

adoptive parents have to meet, including the requirements of CYFS[2], if they wish to adopt the child.

Counsellors

- NECAHR requires counselling reports which confirm that the following issues raised by NECAHR have been discussed and, in the professional judgement of the counsellors, have been adequately understood. NECAHR prefers that two counsellors be involved, one for each family group.

- Counselling must be undertaken by qualified counsellors and be culturally appropriate.

- Counselling must include discussion of the following:

  - the possibility of a breakdown in the arrangement such that the birth mother wishes to keep the child, or the commissioning parents do not wish to take custody of the child
  - the position of both parties in the event of a multiple birth
  - the risk of rejection of a child for any reason, e.g. if the child is born with a disability or abnormality
  - the possibility of legal termination of a pregnancy if foetal abnormality is diagnosed before birth, having regard for the Contraception, Sterilisation and Abortion Act 1977
  - the possibility of the birth mother deciding against a termination in the above situation, and the subsequent care of the child
  - the amount of control that genetic parents have over the birth mother's conduct of her pregnancy
  - the availability of a permanent, accurate record of conception and gestation for the child and
  - any issues covered in a written agreement.

- NECAHR expects that the parties be counselled as two separate family groups, two family groups together, and as individuals. Existing children should be included in counselling in an age-appropriate manner.

- NECAHR prefers that there be a month free of counselling after the initial counselling period and then further counselling, to allow for the issues to be thought through without counselling intervention.

- NECAHR expects counsellors to follow the usual counselling practice of recording the family histories of those involved in the surrogacy arrangement. If there are life experiences, for example, psychiatric

[2] Child Youth and Family Service

problems, substance/physical/sexual abuse which may predispose any of the persons to risk when moving into a new situation, or which may pose a risk to the potential child, these must be referred to in the counsellors' reports.

- A process should be set up for the resolution of disputes, for example, about the custody of the child or any other issues that arise in discussion with counsellors and legal advisers, before the proposal is finalised.

Further considerations

The Committee is prepared to consider an application deviating from the proposed guidelines. If applicants wish to deviate from any of the proposed guidelines, they should indicate this and give their reasons at the time of the application.

Please note that these guidelines that NECAHR wishes to see addressed in applications for ethical review of non-commercial, altruistic surrogacy using IVF as treatment are provisional only. NECAHR cannot at this time guarantee that the guidelines include all the issues it might wish to have addressed by applicants in such proposals. Where new issues do come to its attention, NECAHR undertakes to inform potential providers of this in as timely a fashion as possible.

The Committee welcomes comment on the proposed guidelines, to assist in the ongoing development of the guidelines. The Committee requests that previous draft guidelines be destroyed.

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