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Submission 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.

Organisation background: Community Law Wellington and Hutt Valley (Community Law) is a community law centre with the goal of meeting unmet legal needs, including supporting community groups to submit on legal and policy changes which may have an impact on their communities. Community law has been operating for 31 years in the Wellington region. We run daily legal advice sessions and provide legal education to our local community.

Submission development: Community Law developed this submission in consultation with groups and members of the Wellington region lesbian, gay, transgender, intersex and gender variant communities. We consulted: the Legalise Love Wellington community meeting; Queer Avengers (a Wellington-based queer activist group); Tabby Besley, National Co-ordinator of Queer Straight Alliance Aotearoa, Chairperson of the QSA Network Aotearoa Trust and gender and sexual orientation educator; Griffin Nichol, previous facilitator for Tranzform (wellington-based transgender youth support group), gender and sexuality educator, and secretary for the QSA Network Aotearoa Trust; and Mani Mitchell, the CEO and founder of Intersex Trust Aotearoa New Zealand, counsellor, educator, and clinical supervisor, who is internationally renowned for work with intersex, trans*, and gender non-conforming communities.

1. Introduction

Community Law and the communities we consulted with would like to commend the Advisory Committee on Assisted Reproductive Technology (**ACART**) on the steps they have taken to improve their guidelines' consistency with the Human Rights Act 1993. These amendments are an excellent first step and were enthusiastically welcomed by those we consulted.

2. Executive Summary

We **support** the amendments to allow single men and male couples to access surrogacy.

We **support** the amendments to allow single men and male couples to apply to use eggs donated by a family member.

We **support** the amendments to allow single women and lesbian couples to apply to use sperm donated by a family member, without needing to demonstrate a medical need.

We **do not support** the requirement that an intending mother have a medical condition which makes pregnancy or childbirth dangerous.

We **do not support** the requirement that within a lesbian couple both partners must be eligible women before the couple can have access to surrogacy.

We **recommend** further consultation with the trans*, intersex and gender variant communities to bring these guidelines in line with the provisions that prohibit discrimination on the basis of sex within the Human Rights Act 1993.

3. Responses to consultation questions

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, we agree with ACART's conclusions. As the guidelines are currently written there appears to be discrimination on the basis of sex and sexual orientation against same-sex couples and single men, among others. This is largely corrected by the proposed amendments.

The groups we consulted expressed the positive impacts the removal of this discrimination would have for male couples and single men wishing to access surrogacy services in order to become parents. They also affirmed the importance of access to these services for men for whom parenthood may be otherwise inaccessible, citing raising children as an important part of many men's hopes for the future.

Also warmly welcomed by those consulted was the decision to consider and include lesbian partners as potential applicants, as the absence of this in the current guidelines effectively

discriminates on the basis of sexual orientation. Further, the communities wished to express their thanks for the positive steps ACART has made in recognising the diversity of our communities and the importance of raising and rearing children to many people in Aotearoa society irrespective of their sex or sexual identity, as well as the special relevance assisted reproductive technologies may have for same sex couples.

Community Law Wellington and Hutt Valley and the communities we consulted welcome these proposed changes as an excellent first step towards removing the discriminatory effects of the guidelines, however we recognise there are further areas for improvement. These are around recognition of the effects these guidelines will have on the basis of gender identity, specifically with respect to trans*, intersex, queer and gender variant communities.

The Human Rights Commission currently recognises that discrimination on the basis of gender identity is prohibited under the Human Rights Act 1993, s21(1)(a). Section 19 of the Bill of Rights Act 1990 also affirms the right to be free from discrimination. Accordingly, where it is not prohibited by the wording of the Human Assisted Reproductive Technology Act 2004 (the **HART Act**), the guidelines should be free from discrimination on the basis of gender identity. From Community Law's reading of the principles of the HART Act there is nothing in the principles of the Act which would justify discrimination on the grounds of gender identity of the sort discussed in this submission.

Community Law also notes that the principles of the HART Act provide that "different ethical, spiritual, and cultural perspectives in society should be considered and treated with respect". While generally this appears to be well provided for in the guidelines, the communities we consulted noted that gender variance, including gender variance recognised by other cultures was excluded by the narrow gender constructions of the guidelines, explicitly the undefined use of male/female, man/woman.

The communities noted the need for terminology which would encompass culturally recognised gender variant groups including Māori and Pacific identities such as takatāpui, whakawahine, hinehi, hinehua, tangata ira tane, fa'afafine, fakaleiti, leiti, fakafifine, akava'ine, mahu, vakasalewalewa and palopa.

As mentioned elsewhere in this submission, Community Law and the communities we consulted are keen to be involved in further work to meet these needs.

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

We agree with the amendment which would explicitly prohibit the use of surrogacy for convenience.

We agree that surrogacy should be used only where there is a need for surrogacy services, but we do not support limiting 'need' to medical conditions. The communities consulted felt that

limiting 'need' to medical conditions could unfairly discriminate against groups such as trans* men who may be legally female and physically able to become pregnant and to carry a baby to term, but who might experience other negative consequences (discussed below) if they became pregnant.

In addition to the ECART being able to consider medical conditions, the groups we consulted proposed the following which ECART should consider:

Gender Identity – Queer and gender variant communities include a wide variety of gender identities. Some people consulted expressed that while they may be considered 'ineligible' due to their physical capacity to conceive and carry a child to term, having a baby would be at odds with their identification, for example as butch, or male (for a transgender man). Restricting access to a couple based on the ineligibility (on the basis of medical conditions) of one or both of the couple fails to recognise that for some eligible people their gender identifications will be experienced as strongly incompatible with the reproductive functions traditionally assigned to their physical sex, if indeed their sex is accepted as male or female.

Physical safety – People within the community discussed the physical danger some people may be exposed to if pregnant as another possible non-medical basis for eligibility. The danger a transgender man may experience if presenting as male and pregnant was given as an example of a potential serious threat to physical safety in a society where this would currently be experienced as abnormal and could possibly result in violence. This is another example of the need to consider these amendments in fuller consultation with trans* and gender variant communities so that undue discrimination on the basis of sex is fully removed from the guidelines.

Mental Health - Some people we consulted highlighted the possibility of including mental health as a factor when assessing eligibility for services. While a person may physically be able to give birth, and therefore be considered 'eligible', the mental health impacts that going through a pregnancy may have on someone who does not identify as female could be extensive and serious.

3.3 Do you have any other comments on ACART's proposed amendments to the *Guidelines on Surrogacy Arrangements involving Providers of Fertility Services*?

The communities we consulted with found the use of the terms 'man' and 'woman' without clear definition to be problematic.

We recommend further work be done on affirming and including people for whom these binary gender categories are problematic, including intersex people, trans* people, and the range of people referred to in new clinical research as "gender non-conforming". We also recommend ensuring a variety of ethnic and cultural groups are involved in this consultation process.

3.4 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 agree with ACART's proposal regarding single men and male couples' ability to apply for use of eggs donated by family members. The reasons Community Law and the communities we consulted support this are the same as those mentioned in 3.1 regarding our support for male couples to apply to have a surrogate.

3.5 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 agree with ACART's proposal regarding single women and lesbian couples being able to apply to use sperm donated by family members. The reasons Community Law and the communities we consulted support this are the same as those mentioned in 3.1 regarding our support for male couples to apply to have a surrogate.

3.6 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?

The community we consulted expressed a need to further discuss this issue and fully explore the implications of such a requirement.

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

While these amendments take great steps towards removing discrimination, further work is needed.

Community Law recommends a further set of amendments be developed to take account of the unintended discriminatory effect of the current guidelines on trans*, intersex and gender variant communities. These amendments should be developed in consultation with queer, trans*, intersex and gender variant communities.

People within the intersex community have a high incidence of fertility issues which may require approval from this committee. Recognition of the unique challenges facing intersex people should be provided for in these guidelines.

Community Law offers to assist ACART in this consultation by putting ACART in contact with the community groups we have consulted with. In addition Mani Mitchell warmly extends an offer to assist and participate in further work to fully consider these communities and how best to

acknowledge them in these guidelines. Mani Mitchell was a wonderful resource in producing this submission, and has an invaluable wealth and breadth of experience with intersex, trans*, queer and gender variant communities.

Some people in the Wellington based communities we spoke to expressed a desire to have known about these proposed amendments earlier or to be consulted more directly by the Committee. They recognised that these were big changes which could have significant effects on their lives and families, and were very enthusiastic to give their responses. Community Law recommends greater publicity around proposed amendments and a greater effort to consult with affected interest groups.

4. Conclusion

Community Law wishes once again to commend the steps taken to remove any discriminatory effects from the guidelines. As noted above we are generally supportive of the amendments proposed however we believe that ACART has unintentionally overlooked how the proposed guidelines will affect those in gender variant communities. We strongly recommend consultation with these communities is undertaken in order to remove any unintended discriminatory effect.

Glossary

(definitions taken from the Human Right Commission *'To be who I am - Transgender report'* 2007)

Fa'afafine (Samoa, American Samoa and Tokelau), Fakaleiti or Leiti (Tonga), Fakafifine (Niue), Akava'ine (Cook Islands), Mahu (Tahiti and Hawaii), Vakasalewalewa (Fiji), Palopa (Papua New Guinea) - Terms that Pasifika trans and 'third sex' people who came to the Inquiry* used to describe themselves and within their cultural context. *Human Rights Commission Inquiry into Discrimination Experienced by Transgender People, 2007.

Intersex - A general term used for a variety of conditions in which a person is born with reproductive or sexual anatomy that does not seem to fit the typical biological definitions of female or male. Some people now call themselves 'intersex'.

Takatāpui - An intimate companion of the same sex. Today used to describe Māori gay, lesbian, bisexual and trans people.

Tangata ira tane - A Māori term describing someone born with a female body who has a male gender identity.

Trans* - an umbrella term recognising not all gender variant people identify as 'trans'.

Trans man - Some born with a female body who has a male gender identity.

Trans woman - Someone born with a male body who has a female gender identity.

Transgender - A person whose gender identity is different from their physical sex at birth.

Whakawahine, Hinehi, Hinehua - Some Māori terms describing someone born with a male body who has a female gender identity.