Patient Review Panel

Surrogacy Arrangements Applications

Guidance note No. 1

This Guidance Note has been prepared to assist applicants and assisted reproductive treatment (ART) clinics in the preparation of applications to the Patient Review Panel for the approval of a surrogacy arrangement under the Assisted Reproductive Treatment Act 2008 (Victoria).

This Guidance Note does not constitute legal advice, nor does it pre-judge any decision that the Patient Review Panel might make in relation to any particular application.

NOTE:

In response to the COVID-19 pandemic, <u>from 24 March 2020</u> until further notice:

- **all applications to the Patient Review Panel must be made via email: prp@dhhs.vic.gov.au**
- **all inquiries should be made via email: prp@dhhs.vic.gov.au**
- **hearings will continue and will be held via videoconference**
- **applicants will be advised of the process for videoconference hearings once a date for the hearing of their application has been fixed**
- **applicants should provide copies of their applications to their assisted reproductive treatment (ART) clinics**

Contents

Initially published:	November 2015
Last revised:	July 2020
Review date:	July 2021

Glossary/Definitions

The *Assisted Reproductive Treatment Act 2008* (the ART Act) provides definitions for a number of terms that will be used within this Guidance Note.

- **assisted reproductive treatment** (ART) means medical treatment or a procedure that procures, or attempts to procure, pregnancy in a woman by means other than sexual intercourse or artificial insemination, and includes—
    - in-vitro fertilisation; and
    - gamete intrafallopian transfer; and
    - any related treatment or procedure prescribed by the regulations;[1]
- **commissioning parent**, for a surrogacy arrangement, means the person or persons who enter into the surrogacy arrangement for a woman to carry a child on behalf of the person or persons;
- **doctor** means a person registered under the Health Practitioner Regulation National Law to practise in the medical profession (other than as a student);
- **donor** means a person who has given a consent under section 16 of the ART Act;
- **embryo** means a discrete entity that has arisen from either—
    - the first mitotic division when fertilisation of a human oocyte by a human sperm is complete; or
    - any other process that initiates organised development of a biological entity with a human nuclear genome or altered human nuclear genome that has the potential to develop up to, or beyond, the stage at which the primitive streak appears—
        - and has not yet reached 8 weeks of development since the first mitotic division;
- **gametes** means sperm or an oocyte;
- **oocyte** means an ovum (egg) from a woman;
- **partner**, in relation to a person, means—
    - the person's spouse (other than a spouse from whom the person has separated); or
    - a person who lives with the first person as a couple on a genuine domestic basis, irrespective of gender;
- **treatment procedure** means—
    - artificial insemination, other than self-insemination; or
    - assisted reproductive treatment.

[1] *Assisted Reproductive Treatment Regulations 2019.*

1. What is a surrogacy arrangement?

There are two types of surrogacy arrangement:

- **traditional surrogacy**: where a woman uses her own eggs to conceive and carry a child that is then relinquished to another person or couple;
- **gestational surrogacy**: where a woman is implanted with an embryo created using an egg from another woman, that is then relinquished to another person or couple.

For the purposes of this Guidance Note, any reference to 'surrogacy' relates to a gestational surrogacy arrangement that is regulated by the ART Act and is subject to approval by the Patient Review Panel (the Panel).

The ART Act defines a surrogacy arrangement as an arrangement, agreement or understanding, whether formal or informal, under which a woman agrees with another person to become or try to become pregnant, with the intention—

(a) that a child born as a result of the pregnancy is to be treated as the child, not of her [the surrogate], but of another person or persons (whether by adoption, agreement or otherwise); or

(b) of transferring custody or guardianship in a child born as a result of the pregnancy to another person or persons; or

(c) that the right to care for a child born as result of the pregnancy be permanently surrendered to another person or persons.

2. What is the Patient Review Panel?

The Panel is an independent body established under the ART Act to consider different types of applications involving ART, including applications for approval if a surrogacy arrangement. Its members have specialist skills and are appointed by the Governor in Council, on the recommendation of the Minister for Health. Five Panel members together consider each surrogacy application.

3. What is the Patient Review Panel's role in surrogacy arrangements?

A registered ART provider may carry out treatment under a surrogacy arrangement only if the arrangement has been approved by the Panel (section 39 of the ART Act).

The Panel may approve a surrogacy arrangement if it is satisfied of the following matters set out in section 40 of the ART Act:

(d) that a doctor has formed an opinion that the commissioning parent is unlikely to become pregnant, be able to carry a pregnancy or give birth; or, if the commissioning parent is a woman, the woman is likely to place her life or health, or that of the baby, at risk if she becomes pregnant, carries a pregnancy or gives birth.

(e) that the surrogate mother's oocyte will not be used in the conception of the child.

(f) that the surrogate mother has previously carried a pregnancy and given birth to a live child.

(g) that the surrogate mother is at least 25 years of age.

(h) that the commissioning parent/s, the surrogate mother and the surrogate mother's partner (if any) have received counselling and legal advice as required under section 43 of the ART Act, which requires that they have:

  (i) undergone counselling, by a counsellor providing services on behalf of a registered ART provider, about the social and psychological implications of entering into the arrangement, including counselling about the 'prescribed matters';

  (ii) undergone counselling about the implications of the relinquishment of the child and the relationship between the surrogate mother and the child once it is born; and,

  (iii) obtained information about the legal consequences of entering into the arrangement.

(i) that the parties to the surrogacy arrangement are aware of and understand the personal and legal consequences of the arrangement.

(j) that the parties to the surrogacy arrangement are prepared for the consequences if the arrangement does not proceed in accordance with the parties' intentions, including the consequences if the commissioning parent/s decides not to accept the child once born; and the consequences if the surrogate mother refuses to relinquish the child to the commissioning parent/s.

(k) that the parties to the surrogacy arrangement are able to make informed decisions about proceeding with the arrangement.

Section 40(2)(a) of the ART Act also requires the Panel to have regard to a report from a counsellor providing services on behalf of a registered ART provider.

In carrying out its functions, the Panel is also required to give effect to the guiding principles of the ART Act, set out in Section 5, that are:

(a) the welfare and interests of persons born or to be born as a result of treatment procedures are paramount;

(b) at no time should the use of treatment procedures be for the purpose of exploiting, in trade or otherwise the reproductive capabilities of men and women or children born as a result of treatment procedures;

(c) children born as the result of the use of donated gametes have a right to information about their genetic parents;

(d) the health and wellbeing of persons undergoing treatment procedures must be protected at all times;

(e) persons seeking to undergo treatment procedures must not be discriminated against on the basis of their sexual orientation, marital status, race or religion.

4. Making an application to the Panel

Documents to be provided

The **mandatory documents** that must be provided to the Panel are:

(a) a surrogacy arrangement application form, signed and dated by all parties, including by any donor and their partners;

(b) a report from a counsellor providing services on behalf of a registered ART provider that addresses the prescribed matters;

(c) proof of the surrogate mother's age (for example, a certified copy of a passport, driver licence or birth certificate);

(d) proof that the surrogate mother has given birth to a live child (for example, a certified copy of a birth certificate);

(e) a letter from a doctor confirming that the commissioning parent is unlikely to become pregnant, be able to carry a pregnancy or give birth, or if the commissioning parent is a woman that the woman is likely to place her life or health, or that of the baby, at risk if she becomes pregnant, carries a pregnancy or gives birth;

(f) a report or memorandum of the legal advice provided to the commissioning parent/s; and,

(g) a report or memorandum of the legal advice provided to the surrogate and her partner (if any).

The **additional documents** that the Panel asks for, but which are not mandatory to provide, are:

(a) a report prepared by an independent psychologist[2] who has assessed the commissioning parent/s and surrogate mother and her partner (if any);

(b) a letter from a doctor or other medical professional discussing the surrogate mother's health and suitability, and outlining any risks that have been discussed with her;

(c) a letter from a doctor or other medical professional discussing the commissioning parent/s physical or mental health (only where one or both of the commissioning parents have a chronic illness, disability or other serious health condition);

(d) Victorian Assisted Reproductive Treatment Authority (VARTA) approval for the import of embryos (only where interstate embryos formed from donor gametes are to be used in the proposed arrangement);

(e) a signed copy of a surrogacy agreement (only where the applicants have made one).

Where there are matters raised in the application documentation which the Panel considers relevant to its consideration of the application and to giving effect to the guiding principles of the ART Act, the Panel may request other material on a case-by-case basis. This will be communicated to the applicants and/or their ART clinics as soon as practicable after receipt of the application.

For example, the Panel may request a party or parties to a surrogacy arrangement to provide a copy of a National Police Certificate or seek their consent to obtain child protection records if relevant matters of this nature are in issue. Where serious offences are disclosed, either in the application paperwork generally or following a request by the Panel for a criminal record check, the Panel may request additional documentation such as court files and/or reports. Similarly, where an application indicates

[2] Details as to who the Panel considers an "independent psychologist" for its purposes are set out on p10.

that an applicant has a serious physical or mental health issue, the Panel may ask for information from the applicant's treating specialist to assist it in understanding the condition and the impact on the applicant in the context of a surrogacy arrangement.

While it is not mandatory to provide the additional documents listed above, the Panel is greatly assisted by them and, if they are not provided, then the Panel may determine that it does not have enough information to be able to properly consider the application. This can lead to delays while the Panel seeks additional information that it considers it needs in order to be satisfied of the legislative requirements, or it can result in an application not being approved.

Counselling report

The prescribed matters that must be covered in the mandatory counselling are listed in regulation 10 of the *Assisted Reproductive Treatment Regulations 2019* (the Regulations) and are:

(a) the implications of surrogacy for the relationship between:
- all parties to the surrogacy arrangement including the commissioning parent/s; and
- if the surrogate mother has a partner, the surrogate mother and her partner; and
- the commissioning parent/s and the surrogate mother; and
- if donor gametes or embryos are to be used, the donor and the donor's partner, if any, and all parties to the surrogacy.

(b) the implications of surrogacy for any existing children of the surrogate mother or the commissioning parent/s.

(c) the possibility of medical complications for the surrogate mother or the child.

(d) the possibility of any party deciding not to proceed with the surrogacy.

(e) the attitudes of all parties towards the conduct of the pregnancy.

(f) the attitudes of all parties to investigation of a genetic abnormality, the possibility of termination of pregnancy or other complications.

(g) the need for the parties to agree on a process for resolving disputes relating to the pregnancy; or arising during the pregnancy.

(h) if there are 2 commissioning parents, the commissioning parents' intentions for care of the child if one of them dies.

(i) possible grief reactions on the part of the surrogate mother and her partner, if any.

(j) ways of telling the child about surrogacy;

(k) attitudes toward an ongoing relationship between the surrogate mother, her family and the child.

Clinic counsellors who are preparing a report for the Panel should note that it is important to provide a detailed explanation of what was discussed and agreed upon by the relevant parties rather than just stating that what issues were discussed.

If, upon review, Panel staff determine that one of the prescribed matters has not been covered in the counselling report or that the Panel would be assisted by more details regarding one or more of the prescribed matters then clinic counsellors may be requested to provide an amended or addendum report.

The Panel is also greatly assisted when counselling reports also address the following matters which are not listed in the Regulations:

(a) general information about the history of the relationships between all of the parties, including when and how they met, how long any couples who are parties to the arrangement have been in a relationship and lived together, and the genders and ages of any existing children of any party to the arrangement;

(b) the surrogate mother's motivation for offering to act as a surrogate, including whether she would consider acting as a surrogate for anyone else or just the commissioning parents;

(c) specific details of any support network/s available to the surrogate that can provide emotional, psychological and practical support during and after a pregnancy, including friends, family and professional support services, if applicable;

(d) the attitudes of all parties to a multiple birth;

(e) the intentions of the parties should a child be born with a serious medical condition or disability;

(f) if there is 1 commissioning parent, their intentions for the care of the child if they were to die;

(g) if there are 2 commissioning parents, their intentions for the care of the child if both of them were to die;

(h) how the surrogacy arrangement will be discussed with the existing children of all parties (if any);

(i) any agreement about lifestyle factors for the surrogate mother during the pregnancy, such as consumption of alcohol, smoking, diet or exercise;

(j) where the birth is to take place and what plans have been made regarding how and when the relinquishment of the baby will occur;

(k) the attitudes of the parties to any relevant religious or cultural practices (e.g. circumcision); and

(l) any agreement that the parties have made in relation to medical decisions, such as vaccinations, for the child in the period of time up until a Substitute Parentage Order is made.

Donor gametes

Where donor gametes or embryos are proposed to be used in the arrangement, the Panel is greatly assisted by information in the counsellor's report about:

(a) if the commissioning parents are in a same-sex relationship and one of them is using their own gametes to form an embryo, what agreement has been made regarding which commissioning parents' gametes will be used;

(b) the donor's background and relationship to the commissioning parent/s;

(c) the donor's motivation for offering to donate their gametes and whether they would consider being a donor for anyone else or just the commissioning parents;

(d) all the parties' understanding of the requirements of the ART Act in relation to disclosing the identity of the donor to any child born;

(e) implications of using the proposed donor for the surrogate and her partner if any;

(f) the implications of the arrangement for the donor, including expectations about future relationship with the recipient/s, impacts on the relationship with the recipient(s) if the donation/pregnancy is not successful and how they would feel if the arrangement did not proceed as intended (e.g. issues with relinquishment);

(g) ways of telling a child born that they are donor conceived;

(h) the possible impact of the arrangement on the donor's children if any.

Counsellors are encouraged to explore any other issues in the report that they feel are relevant to the application.

Manner of counselling

While Panel understands that it is not always possible to conduct all counselling in face-to-face sessions, it has a strong preference that the parties to the arrangement have received at least one face-to-face session each and one face-to-face group session. However, in light of the COVID-19 pandemic, and the decisions made by individual clinics about moving from face-to-face counselling appointments to other interfaces, the Panel supports the use of Zoom, Skype, Teams or equivalent videoconferencing for individual and group counselling sessions by ART counsellors while social distancing is required to manage the COVID-19 situation. This is effective from March 2020 until further notice. Where internet access is not available, counselling conducted by teleconferencing is acceptable.

Counsellors should clearly state on their written reports where video/teleconferencing facilities have been used and any perceived limitations in the accuracy of the assessment as a result of this.

Where a clinic has moved to non-face-to-face counselling, and where an applicant specifically requests a face-to-face session rather than videoconference for any reason, the clinic should consider this in line with its own occupational health and safety policies and any applicable Victorian or Federal government guidelines issued at the relevant time.

Clinic counsellors should ensure that all parties to the arrangement are provided with, and have read, the counselling report before making an application to the Panel.

Format of counselling report

The Panel is greatly assisted by counselling reports that comprehensively address each prescribed matter under its own separate heading and, preferably, in the order listed in the Regulations.

Counselling reports should be provided on clinic letterhead, provide the name, contact details and signature of the counsellor/s who provided the counselling and/or authored the report and should include numbered paragraphs and numbered pages for ease of reference.

Psychological assessment

Undergoing an independent psychological assessment and having the psychologist provide a report to the Panel is not mandatory. However, as the Panel must be satisfied before it can approve an arrangement that parties are aware of and understand the personal consequences of entering into the proposed arrangement and are making informed decisions, it is greatly assisted by an independent psychological assessment report.

The independent psychologist's report is intended to provide a view of the applicants that is independent of the applicants' view of themselves and independent of the view provided by the applicants' IVF clinic and reflected in the counselling report. Given the small size of the IVF sector in Victoria and the movement of counsellors across clinics, the Panel considers that if a psychologist is an employee of any ART clinic in Victoria, or is otherwise receiving payment for services provided to any ART clinic (whether full-time, part-time or contract-based), or has a financial or personal interest in an ART clinic, then they are not considered sufficiently independent for the Panel's purposes to be conducting the independent psychological assessment for the Panel.

For the Panel's purposes, "having a financial or personal interest in" includes circumstances where a psychologist is an immediate family member or domestic partner of a counselling or clinical staff member of the ART clinic of which the applicants are patients. Where clinics provide applicants with a list of psychologists whom they can see for the independent assessment, clinics should ensure that any psychologist who does not meet the standard of independence required by the Panel are not included on the list.

The assessment should not duplicate the prescribed counselling requirements and should focus on:

(a) the applicants' individual psychological preparedness for the arrangement;
(b) the implications of the arrangement for the applicants including respective partners and any existing children;
(c) any concerns about the applicants' ability to provide informed consent to the arrangement;
(d) any concerns about the applicants' psychopathology that may impact upon the arrangement.

Where applicants have a history of mental health issues and are currently receiving treatment from a psychiatrist, psychologist, therapist or other relevant mental health professional, the Panel would be assisted if the author of the independent psychological assessment report consult with that mental health professional prior to the drafting of the report to ensure that all relevant issues are covered. Alternatively, applicants may wish to ask their treating mental health professional to provide a letter or report to the Panel addressing any issues that are relevant.

As with counselling, the Panel has a strong preference that psychological assessments be conducted in person. However, in light of the COVID-19 pandemic, and having consulted the field, the Panel support the decision of individual psychologists to use Zoom, Skype or equivalent videoconferencing for individual counselling sessions where they think this is appropriate and while social distancing is required to manage the COVID-19 situation. Where internet access is not available, counselling conducted by teleconferencing is acceptable. This is effective from March 2020 until further notice.

In relation to the administration of the Personality Assessment Inventory (PAI), the Panel accepts that it may not be possible during the COVID-19 situation to administer this test with the psychologist observing or supervising each applicant, and supports a decision made by the psychologist to permit it to be administered remotely, whether though hard-copy or via an online link. Reports prepared for the Panel on the basis of this form of counselling and PAI testing will be acceptable.

Psychologists should state clearly on their written reports where video/teleconferencing facilities have been used and any perceived limitations in the accuracy of the assessment as a result of this.

Legal advice

As it is a requirement that the Panel be satisfied that the parties to the arrangement understand the legal consequences of the arrangement and that they are prepared for the consequences if the arrangement does not proceed in accordance with their intentions, the Panel asks that the commissioning parent/s and the surrogate mother and her partner (if any) provide the Panel with a written memorandum or report of the legal advice has been provided to them.

It is the strong preference of the Panel that the provision of legal advice take place face-to-face where practicable. However, in light of the COVID-19 pandemic, the Panel is supportive of applicants receiving legal advice via videoconferencing while social distancing is required to manage public health concerns. Where internet access is unavailable, teleconferencing is acceptable. This is effective from March 2020 until further notice.

To avoid the potential of a conflict of interest, applicants should ensure that the commissioning parent/s and the surrogate mother and her partner (if any) have received legal advice from different lawyers and that those lawyers are not parties to the arrangement.

At a minimum, the legal advice should cover the following matters:

(a) the legal status of the child at the time of birth;

(b) the consequences if the commissioning parents refuse or are unable to accept the child once it is born;

(c) the consequences if the surrogate refuses to relinquish the child once it is born or refuses to consent to the making of the Substitute Parentage Order;

(d) the need and process for the commissioning parents to apply to the court for a Substitute Parentage Order, including the relevant time-frames for making the application;

(e) arrangements for the care of the child prior to the making of a Substitute Parentage Order; and

(f) arrangements for giving consent to medical treatment for the child prior to the making of a Substitute Parentage Order; and

(g) the requirement that the arrangement be altruistic and the prescribed costs that may be reimbursed.

Where one or more of the applicants live ***interstate or in another country***, the legal advice should also address:

(a) where it intended that the child be born;

(b) the implications of the child being born in a jurisdiction other than Victoria (interstate or overseas), including the legal status of the child, its parentage, and matters such as registering the birth and liaison with the Victorian Registrar of Births, Deaths and Marriages.

Legal practitioners are encouraged to address any substantial differences between the relevant jurisdiction's legislation as it may affect the process of obtaining a Substitute Parentage Order (if applicable) and make reference to any enquiries the practitioner has made with the relevant jurisdiction's equivalent of the Registrar of Births, Deaths and Marriages regarding their processes for managing the registration of Victorian Substitute Parentage Orders.

Where ***donor gametes/embryos*** are intended to be used in the proposed arrangement, the legal advice should also address:

- the right of the donor to withdraw consent to the treatment procedure at any time before embryo transfer and any associated implications;
- the rights of donor-conceived children to identifying and non-identifying information about their donor/s;
- the information that is held on the Central Register and the Voluntary Register, including who can access what types of information about the arrangement, including information about the donor and other parties to the arrangement, and the process for accessing that information.

The legal advice should be fully up-to-date and reflect the law at the time the advice is being given. This should include any recent changes to the law, such as the changes to what a surrogate may be lawfully reimbursed for under the *Assisted Reproductive Treatment Regulations 2019* which commenced on 13 December 2019. If, upon review by Panel staff, it appears that any legal advice provided to any of the parties to the arrangement is out of date, inaccurate or incomplete then the application will not be able to be listed for hearing until further legal advice has been sought by the affected parties and a summary of that advice provided to the Panel.

Surrogacy agreements

Surrogacy agreements are not required in Victoria in order to enter into a surrogacy arrangement and are not enforceable other than in relation to the reimbursement of the prescribed costs actually incurred by the surrogate. However, if applicants have made a written agreement then it would greatly assist the Panel to be provided with a signed and dated copy.

Letter from a doctor/medical professional regarding the commissioning parent/s

In order to be able to approve an application, the ART Act requires that the Panel to be satisfied that that a doctor has formed an opinion that, in the circumstances, the commissioning parent is unlikely to become pregnant, be able to carry a pregnancy, or give birth; or if the commissioning parent is a woman, the woman is likely to place her life or health, or that of the baby, at risk if she becomes pregnant, carries a pregnancy or gives birth. As such, the Panel requires a letter from a doctor confirming this.

It is important that any medical letter that is provided clearly and explicitly states why the surrogacy arrangement is required and not just that the author supports the proposed surrogacy arrangement. The Panel would strongly encourage clinic counsellors and ART clinicians to be supportive and understanding of LGBTIQA+ applicants complying with this legislative requirement.

Where a commissioning parent has been diagnosed with a chronic illness, disability or other serious health condition, the Panel asks that this is addressed in a letter from the relevant treating medical professional. This letter should outline the severity and impact of the illness or condition and its current treatment and prognosis.

While it is one factor that the Panel will take into consideration when making its decision, applicants and clinics should note that the fact that a commissioning parent has such an illness or condition is not a barrier in and of itself to their application being considered or approved by the Panel.

Letter from a doctor/medical professional regarding the surrogate mother

The Panel asks that a letter be provided from a doctor or other relevant medical professional that discusses the surrogate mother's health and suitability to carry a pregnancy, and outlines any risks that have been discussed with her.

In individual cases, the Panel may request an additional medical letter or report for a surrogate mother if they:

(a) are of an advanced maternal age;

(b) have a complex obstetric history, including but not limited to:

  (i) post-partum haemorrhage;

  (ii) miscarriage;

  (iii) emergency hysterectomy; and/or

  (iv) gestational diabetes;

(c) have a history of mental health issues, including but not limited to perinatal anxiety and/or depression.

Where a surrogate mother is currently prescribed a medication that may have implications for a pregnancy (for example, contraindicated due to a risk of birth defects) then this should also be addressed in the doctor's letter including what, if any, impact ceasing the medication during a pregnancy may have on the surrogate mother's health.

Commissioning parent/s and surrogate mothers who are unsure whether their age, a health condition or medication that they are currently taking would be of relevance to their surrogacy application should consult with their ART provider or other relevant health professional before making an application to the Panel.

4. Non-complying surrogacy arrangements

Under section 41 of the ART Act, the Panel may approve an application that fails to meet the requirements of section 40 of the ART Act if the circumstances of the proposed surrogacy arrangement are exceptional; and it is reasonable to approve the arrangement in the circumstances.

What are exceptional circumstances will depend on the circumstances of the individual application.

For ease of reference, the requirements of section 40 of the ART Act are:

- A doctor has formed an opinion that the commissioning parent/s is unlikely to become pregnant, be able to carry a pregnancy or give birth; or if the commissioning parent is a woman, the woman is likely to place her life or health, or that of the baby, at risk if she becomes pregnant, carries a pregnancy or gives birth.
- That the surrogate mother's oocyte will not be used in the conception of the child.
- The surrogate mother has previously carried a pregnancy and given birth to a live child.
- The surrogate mother is at least 25 years of age.
- The commissioning parent/s, the surrogate mother and the surrogate mother's partner, if any, have received counselling and legal advice as required under Section 43 of the ART Act, which requires that they have:
  - undergone counselling, by a counsellor providing services on behalf of a registered ART provider, about the social and psychological implications of entering into the arrangement, including counselling about the 'prescribed matters';
  - undergone counselling about the implications of the relinquishment of the child and the relationship between the surrogate mother and the child once it is born; and

- obtained information about the legal consequences of entering into the arrangement.

- That the parties to the surrogacy arrangement are aware of and understand the personal and legal consequences of the arrangement.
- That the parties to the surrogacy arrangement are prepared for the consequences if the arrangement does not proceed in accordance with the parties' intentions, including the consequences if the commissioning parent/s decides not to accept the child once born; and the consequences if the surrogate mother refuses to relinquish the child to the commissioning parent/s.
- That the parties to the surrogacy arrangement are able to make informed decisions about proceeding with the arrangement.

5. The hearing

Upon receipt of an application, it will be reviewed by Panel staff. Applicants and/or clinic staff will be advised if any missing/additional information is required or requested.

Applications will only be listed for hearing once they are complete and all documentation has been provided. Applications are not considered to be complete until missing or requested additional information has been received.

Once a hearing date has been allocated, applicants will receive a Notice of Hearing stating:

(a) the nature of the hearing; and

(b) the time and place of the hearing; and

(c) that the applicant is entitled to be present at the hearing, to make submissions and to be accompanied by another person; and

(d) that the hearing is not open to the public; and

(e) that there is no right to legal representation at the hearing without leave from the Panel; and

(f) the possible findings or orders that the Panel may make.

It is the strong preference of the Panel that all parties to a surrogacy arrangement, including donors and their partners (if any), attend the Panel hearing in person.

If there is a reason why one or more party to an arrangement is not able to attend the Panel hearing in person then it may be possible for them to participate in the hearing via telephone. This request should be made in writing to the Panel and will be considered on a case-by-case basis by the Chairperson. The Panel does not have facilities to offer video hearings.

Applicants asking to participate in the hearing via telephone should be aware that the Panel may adjourn or even not approve the application if it cannot satisfy itself of its legislative requirements by speaking to one or more applicants on the telephone rather than in person.

Panel hearings are held at the DHHS head office located at **50 Lonsdale Street, Melbourne, Victoria, 3000** unless otherwise advised. Upon arriving at 50 Lonsdale Street, applicants will need to pick up a security pass from the ground floor reception and make their way up to the level where the hearing is being held.

Every level has a foyer area with chairs and applicants should use their passes to enter the foyer and take a seat until they are invited into the hearing room by either one of the Panel members or a Panel staff member.

Panel hearings consist of a division of five Panel members including the Chairperson, a Deputy Chairperson and three other Panel members, at least one of whom will be an expect in child protection matters. Up to three Panel staff members may also be in attendance to take notes and/or provide legal advice to the Panel members.

Panel hearings generally last for up to an hour (or longer if required) and towards the end of the hearing applicants will be asked to leave the room for a short period of time to allow the members to discuss the application. At times, the Panel may also request to speak to one or more of the parties to the arrangement alone.

In some circumstances, the Chairperson may decide that an application is suitable to be considered on the papers and without the applicants having to attend a Panel hearing. This is, however, determined on a case-by-case basis and is at the discretion of the Chairperson of the Panel. In that case, applicants are still entitled to attend the hearing of their application should they wish to.

IMPORTANT NOTE:

In light of the COVID-19 pandemic, the Panel will conduct all hearings by videoconference using Microsoft Teams from April 2020 until further notice.

Comprehensive instructions to assist applicants to participate in hearings conducted by videoconference will be provided together with the Notice of Hearing.

Applicants who are unable to participate in a hearing by videoconference are advised to communicate with Panel staff as soon as possible upon receipt of the Notice of Hearing to formally request an alternative method of participating in the hearing (such as attending via teleconference, subject to the approval of the Panel Chairperson).

6. The Panel's decision

Where possible, the Panel will advise applicants whether the surrogacy arrangement has been approved or not via email or telephone communication by Panel staff on either the day of the hearing or the following day. At times, it will require more time to consider the application or may require more information before it makes its decision.

If the Panel does not consider that it can make a decision within 1-2 days of the hearing then it will advise applicants within that time frame and advise them of what will happen next.

Certificate

Once the Panel has made a decision, applicants will be provided with a certificate stating the decision within 14 days of the hearing or, if the hearing has been adjourned, within 14 days of the date that the decision was made. An electronic copy of this certificate will also be provided to the relevant ART clinic for their records.

Under section 91(3) of the ART Act, the Panel may impose any conditions it considers necessary and reasonable in the circumstances of the decision and, if the Panel chooses to place a condition on its decision, it will be stated on the certificate.

Reasons for decision

The Panel is also required by the ART Act to provide applicants with written reasons for its decision. These reasons will be provided to the applicants in due course after they receive their certificate.

Where an arrangement has been approved, this document is not required to be presented to the ART clinic in order to commence treatment; the clinic only requires the certificate indicating the Panel's approval of the arrangement.

7. When is a new approval required?

Same applicants – arrangement to create sibling

Where a surrogacy arrangement results in the birth of a child, none of the parties have changed and the applicants wish to enter into a second surrogacy arrangement to have another child, a new approval by the Panel will be required. Depending on the length of time since the previous surrogacy arrangement, it is likely that the majority of the material from the original application can be relied upon again.

However, the following documents would be required:

(a) an addendum counselling report: it will not be necessary for the addendum counselling report to comprehensively address all of the prescribed matters again. However, it should at a minimum reflect discussion in the counselling session(s) about any issues that arose during the previous arrangement, what impact (if any) the arrangement had on the relationship between all of the relevant parties and how the relinquishment of the child went;

(b) updated legal advice for the commissioning parent/s and surrogate mother and her partner (if any) to reflect any changes to the law since the prior arrangement; such as to what a surrogate can be reimbursed for as per the *Assisted Reproductive Treatment Regulations 2019,* which came into operation on 13 December 2019;

(c) if the surrogate had any medical issues with the pregnancy or birth, or post birth, or is now of an advanced maternal age, then a fresh assessment by her doctor as to her suitability and the current risks is requested.

In some circumstances, the Chairperson may decide that an application for a subsequent arrangement to create a sibling where none of the parties have changed can be considered on the papers and without the applicants having to attend a Panel hearing. This is, however, determined on a case-by-case basis and is at the discretion of the Chairperson of the Panel. In that case, applicants are still entitled to attend the hearing of their application should they wish to.

Same commissioning parent/s, change of surrogate

A completely new application will be required and applicants will be asked to appear before the Panel where there is a new surrogate mother involved in an arrangement, regardless of whether the previous arrangement resulted in the birth of a child or not. Some documentation from the previous arrangement relating to the commissioning parents may still be able to be used, as long as it is current and up-to-date, for example, legal advice. Other documents, such as the counselling report and psychological assessment will need to be completely new and should address the implications of the change of surrogate to the proposed arrangement for the other parties.

Donor joining arrangement or change of donor

Where a surrogacy arrangement has been approved previously by the Panel, and a subsequent arrangement is proposed where there will be a change to who will be providing the gametes for the embryos, a new approval by the Panel will be required.

This will include circumstances such as:

(a) the commissioning parent/s were previously using embryos formed from their own gametes and have decided to use donor gametes or embryos;

(b) the commissioning parent/s previously used donor gametes or embryos and have decided to change donor/s;

(c) the commissioning parent/s are in a same-sex relationship and wish to form embryos using the same donor but the gametes of a different commissioning parent.

The following documents should be submitted with the new application:

(a) an addendum counselling report: it will not be necessary for the addendum counselling report to comprehensively address all of the prescribed matters again. However, it should at a minimum reflect discussion in the counselling session(s) about any issues that arose during the previous arrangement, and the implications of the new donor on the arrangement and potential future child;

(b) updated legal advice (if required) for the commissioning parent/s and surrogate mother and her partner (if any) to reflect any changes to the law since the prior arrangement; such as to what a surrogate can be reimbursed for as per the *Assisted Reproductive Treatment Regulations 2019,* which came into operation on 13 December 2019;

(c) if a donor was not previously part of the arrangement, addendum legal advice will be required by the commissioning parent/s and the surrogate mother and her partner (if any) that addresses the legal implications of using donor gametes if this was not previously covered in earlier legal advice;

(d) if the surrogate had any medical issues with the pregnancy or birth, or post birth, or is now of an advanced maternal age, then a fresh assessment by her doctor as to her suitability and the current risks is requested.

If the **donor is known** to the applicants, then the Panel will request that all parties appear before it again but if the **donor is unknown** to the applicants, then the Panel Chairperson may decide the application can be considered on the papers and without the applicants having to attend a Panel hearing.

———————————————————