Patient Review Panel

Applications for approval of a surrogacy arrangement

Guidance note

July 2021

This Guidance Note has been prepared to assist applicants and assisted reproductive treatment (ART) providers 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

First published:	November 2015
Last revised:	July 2021
Review date:	July 2022

Glossary/Definitions

The Victorian *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. For the avoidance of doubt, donor does not refer to a commissioning parent who has produced gametes that have been used to create an embryo that is being used in a surrogacy arrangement;
- **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 Patient Review Panel (the Pane) 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. What documents are needed to make an application to the Panel?

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) subject to the exceptions mentioned at point 4 below, 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 also requests, 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);

(f) copies of any consent forms signed by applicants, including gamete donors, that indicates their informed consent to treatment.

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

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

such as court files and/or reports. Similarly, where an application indicates that an applicant has a serious physical or mental health issue, the Panel may ask for medical records and/or further 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, 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.

4.1 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.

Format of 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.

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.

Manner of counselling

While Panel understands that it is not always possible to conduct all counselling in face-to-face sessions, it has a preference that the parties to the arrangement have received at least one face-to-face session each and one face-to-face group session, where clinic policies, public health advice and the advice of relevant professional associations designed to limit the spread of COVID-19 allow. Where such policies and advice dictate that face-to face counselling should not occur, the Panel will continue to support the use of Zoom, Skype, Teams or equivalent videoconferencing for individual and group counselling sessions by ART counsellors 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 professional and Victorian or Federal government guidelines issued at the relevant time.

Where a clinic has returned to face-to-face counselling, and where an applicant specifically requests a video-conference session instead for any reason, the clinic should consider its own policies, and the individual clinical needs of the applicant in deciding whether to agree to this. It will be helpful for the Panel in such a case for this is explained in the counselling report.

4.2 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.

Despite the preceding paragraph, the Panel does **not** require applicants to provide a letter from a doctor confirming that the commissioning parent is unlikely to become pregnant, be able to carry a pregnancy, or give birth in the following circumstances where there is no female commissioning parent:

(a) same-sex male commissioning parents; or

(b) single male commissioning parent.[3]

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.

4.3 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.

4.4 Psychological assessment

Undergoing an independent psychological assessment and having the psychologist provide a report to the Panel is not mandatory. However, in order to approve an application, the Panel must be satisfied that parties are aware of and understand the personal consequences of entering into the proposed arrangement and are making informed decisions. To achieve this, the Panel is often 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' ART clinic and reflected in the counselling report. Therefore, for a psychological assessment to be independent, the assessing

[3] In this context, the Panel notes Recommendation 9 of *Helping Victorians create families with assisted reproductive treatment - Final Report of Independent Review of Assisted Reproductive Treatment* (the Gorton Review) which includes the recommendation that the ART Act be amended to remove the requirement for same-sex couples to demonstrate that they are unlikely to become pregnant.

psychologist should not be an employee of an ART clinic in Victoria, not be receiving payment for services provided to an ART clinic and not have a direct or indirect financial or personal interest in an ART clinic.

Any independent 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) 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 may request a report from that treating professional that also focusses on the matters outlined above. The Panel would also be assisted if the author of the independent psychological assessment report consults with that mental health professional prior to the drafting of the report to ensure that all relevant issues are covered.

As with counselling, the Panel prefers that psychological assessments be conducted in person. However, in light of the COVID-19 pandemic, and having consulted the field, the Panel supports the decision of individual psychologists to use Zoom, Skype or equivalent videoconferencing for individual counselling sessions where they think this is appropriate, following practice policies and the advice of professional associations, and while social distancing is required to manage the COVID-19 situation. Where internet access is not available, counselling conducted by teleconferencing is acceptable. Where the psychologist undertaking an assessment has resumed seeing clients face-to-face, then the assessment for the Panel would preferably also be conducted face-to-face, but the Panel leaves this to the assessing psychologist to determine in consultation with the applicant.

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.

4.5 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.

Legal advice may be provided face-to-face or via videoconferencing, where possible, during the COVID-19 pandemic.

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 or the Panel Chairperson, 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.

4.6 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, it would greatly assist the Panel to be provided with a signed and dated copy.

5. 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.

The meaning of "exceptional circumstances" will depend on the circumstances of the individual application. However, as described above (at 4.2), the Panel may consider a surrogacy application that does **not** include a letter from a doctor confirming that a male commissioning parent is unlikely to become pregnant, be able to carry a pregnancy or give birth, where there is no female commissioning parent.

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.

6. The hearing

Upon receipt of an application, it will be reviewed by Panel staff and/or the Panel Chairperson. 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. If applications are incomplete but applicants insist on being listed for hearing, then the matter will be referred by Panel staff to the Panel Chairperson for review prior to listing for hearing.

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 preference of the Panel that all parties to a surrogacy arrangement, including donors and their partners (if any), attend the Panel hearing, either in person or via videoconference.

If one or more party to an arrangement is unable to attend a 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 Panel Chairperson.

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.

When face-to-face Panel hearings are convened, they are held at the Department of Health 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).

7. What does the Panel consider when making its decision?

The Panel must have regard to the specific sections in Part 4 of the Act, and what it must be satisfied of, the legislative context, including the purpose of the Act (to regulate assisted reproductive treatment in Victoria) and the guiding principles set out in section 5 of the Act.[4]

It must be satisfied of all the matters set out in section and summarised above in section 3 of this guidance note (pages 5-6), unless it determines that it will approve a non-complying arrangement under section 41 (see section 5 above of the guidance not) and must have regard to the guiding principles of the Act.

If there is a conflict between the welfare and interests of the child to be born, and the health and wellbeing of the applicants, any conflict must be resolved in favour of the child's welfare and interests.[5]

8. The Panel's decision

8.1 Possible outcomes of a Panel decision

The possible decisions that the Panel may make are:

a. that the surrogacy arrangement is approved;
b. that the surrogacy arrangement is not approved;
c. that that the surrogacy arrangement is approved subject to any conditions imposed by the Panel.

8.2 Notification of 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.

8.3 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.

[4] *JS and LS v Patient Review Panel* [2011] VCAT 856 at paragraph 14.
[5] *JS and LS v Patient Review Panel* [2011] VCAT 856.

8.4 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, the written reasons are 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.

8.5 Review of a Panel decision not to approve an arrangement

A decision of the Panel not to approve a surrogacy arrangement may be subject to review by the Victorian Civil and Administrative Tribunal (VCAT).[6]

An application for review must be made within 28 days after the day on which the Panel's decision is made.[7]

For further information about applying to the VCAT for a review of a Panel decision, please visit https://www.vcat.vic.gov.au/privacy-and-health-records/review-of-a-decision-by-the-patient-review-panel.

7. When is a new approval required?

7.1 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 still be required. However, 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 resubmitted as part of the new surrogacy application.

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, at a minimum, it should reflect discussion in the counselling session(s) about any issues that arose during the previous surrogacy 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. However, this would be the exception and is determined on a case-by-case basis at the discretion of the Panel Chairperson. In that case, applicants are still entitled to attend the hearing of their application should they wish to.

7.2 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, such as legal advice, may still be able to be used, provided that it is up-to-date and reflects the current legal requirements. However, applicants will be required to undergo further counselling and psychological assessment. As such, new counselling reports and psychological assessments will need to be completed and should address the implications of the change of surrogate to the proposed arrangement for the other parties.

[6] *Assisted Reproductive Treatment Act 2008* (Vic), s 96(b).

[7] *Assisted Reproductive Treatment Act 2008* (Vic), s 98.

7.3 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;

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 new **donor is known** to the applicants, then the Panel will request that all parties appear before it again in order to satisfy itself of the matters it must consider under the ART Act. However, if the new **donor is unknown** to the applicants, then the Panel Chairperson **may** decide that the application can be considered on the papers and without the applicants having to attend a Panel hearing if all other aspects of the application are unchanged.

7.4 Same-sex male commissioning parents where embryos created (or intended to be created) from either commissioning parent

Where a same-sex male couple enters into a surrogacy arrangement as commissioning parents, either 150commissioning parent may choose to create embryos using their gametes. If both commissioning parents want to create embryos using their gametes, the Panel does **not** require that separate applications be made to the Panel.

Instead, a single application can be made that stipulates that embryos will be created using the gametes of both commissioning parents and how a decision will be made about which embryos will be used and when. However, the required counselling and psychological assessments must ensure that all parties to the agreement are aware of this and consent to either parent's gametes being used in the arrangement. For example, the surrogate must be aware of, and consent to, embryos formed from the gametes of either commissioning parent being implanted into her body. Moreover, the Panel must be satisfied that children born as a result of such arrangements are made aware of information about their genetic parents, as stipulated in section 5(c) of the ART Act.

Finally, this does not dispense with the need for parties to make a new application to the Panel as outlined in 7.1 above.
