

Information Fact Sheet: International Surrogacy

CAUTION

This information sheet outlines the key issues which New Zealanders must consider and get advice on if considering commissioning a surrogacy arrangement overseas. International surrogacy can be fraught with difficulty and overseas countries can change their surrogacy regulations without notice. The relevant New Zealand government Ministries endeavour to provide the most up-to-date accurate information in this Fact Sheet. However, you should take care to ensure that any decisions you make are based on current information from the country concerned. You must ensure you comply with the laws and regulations of any country where you are considering commissioning a surrogacy.

We strongly advise New Zealanders who are considering commissioning a surrogacy overseas to seek independent legal advice and consult the Ministry for Children, the Department of Internal Affairs (DIA), and Immigration New Zealand (INZ) before beginning the process (contact details can be found at the end of this Information Sheet).

What is international surrogacy?

International surrogacy is defined as a surrogacy arrangement, regardless of how it is organised, involving an overseas country. This includes:

- surrogacy involving a commercial arrangement i.e. in instances where money is paid to the surrogate mother and/or the medical practitioner and the surrogacy procedure takes place through a designated fertility clinic
- surrogacy involving a compassionate or altruistic arrangement i.e. the surrogate is known to the commissioning parent(s) and an arrangement has been made between both groups without any profit made
- surrogacy involving the export of gametes by a New Zealand Fertility Clinic for the purposes of commissioning a gestational surrogacy arrangement.

There are significant complexities with international surrogacy arrangements involving a child born via a surrogacy which takes place in a country that is different to where the commissioning parents habitually reside. Navigating the legal and medical systems in an overseas country can be extremely difficult, and due to weak legislative and regulatory frameworks in some countries where commercial surrogacy is legal, there is often very little protection for the parties involved in these arrangements. You need to be aware that you are financially responsible for all costs incurred overseas, including unexpected medical treatment such as neo-natal care in the event of premature births or other health conditions.

As well as legal and medical complexities, there are also risks associated with the movement of the child from their country of birth to New Zealand. Each country has its own set of immigration procedures and regulations relating to how individuals exit their country and these vary.

In addition, there are social risks which you need to consider; these include the potential for exploitation and trafficking of women for surrogacy purposes and the vulnerability of children due to a number of their rights not being met. For example, children may not be legally registered, may not have a nationality (and therefore will be unable to travel due to their lack of travel documentation – children require a nationality to be able to acquire a passport) and they may have no future access to information about their genetic identity.

New Zealanders must ensure they comply with the laws and requirements of the foreign jurisdiction where they intend to commission a surrogacy. This includes entry and exit requirements and domestic regulations relating to surrogacy procedures – including the movement of gametes across borders if that is applicable.

New Zealand law

Altruistic domestic surrogacy in New Zealand is governed by the Human Assisted Reproductive Technology Act 2004. Under this Act commercial surrogacy is illegal in New Zealand. New Zealand does not have legislation which specifically addresses New Zealanders travelling off-shore to commission a commercial surrogacy arrangement.

In the absence of specific legislation, in all cases where you arrange for a child to be born to a surrogate mother overseas, and you intend to bring the child back to live with you in New Zealand, New Zealand law will apply.

Who is the legal parent of a child born via a surrogacy arrangement?

Under New Zealand law, children born as the result of a surrogacy arrangement, whether in New Zealand or overseas, are unlikely to have any legal relationship to the New Zealand commissioning parents. The legal relationship is determined by the Status of Children Act 1969 and this asserts that the surrogate who gives birth to the child and her partner (if she has one) are considered to be the legal parents of the child. This is the case even when the commissioning parents are genetically related to the child or if the commissioning parents are recognised as the parents on the child's overseas birth certificate.

The most common way to transfer legal parenthood, under New Zealand law, from the surrogate mother (and her partner) to you as the commissioning parent, is by way of an adoption in the New Zealand Family Court. If you do not have a legal relationship, which is recognised under New Zealand law, your child will only have a temporary immigration status in New Zealand and the child will not be entitled to New Zealand citizenship or a New Zealand passport. Importantly, as you will not be the legal parent of the child you will have no legal ability to assume parental authority and the child will not have any inheritance rights to your estate. Legalising the parental relationship is important to ensuring current and future legal security for your child.¹

Immigration requirements

There is no immigration policy to facilitate the entry of children into New Zealand who have been born as a result of a surrogacy arrangement overseas. Any decision to grant a temporary visitor visa to a child born via a surrogacy arrangement is made by the Minister of Immigration. In making his decision, the Minister of Immigration may consider a set of non-binding guidelines, which have been agreed by Cabinet, to inform a response to cases of international surrogacy (a copy of these guidelines is attached to this Information Sheet).

A genetic link between one or both of the commissioning parents and the child is one component of the non-binding guidelines that the Minister of Immigration may consider before issuing a visitor visa for the child. In order to provide this information after the birth of your child, you will need to be prepared to have DNA testing carried out by a provider approved by Immigration New Zealand. You will need to pay for these tests and as it can take up to 6-8 weeks to receive the results you will need to be prepared to remain in the country of your child's birth, until the results are received.

Citizenship status

Children born through an international surrogacy arrangement do not meet the requirements for New Zealand citizenship by descent. The pathway to acquire New Zealand citizenship for children born as a result of a surrogacy arrangement which has been commissioned by New Zealand citizens or permanent residents is through establishing a legal relationship between yourself and your child, which is recognised under New Zealand law, as described above.

¹ In some cases, the legal relationship between the commissioning parents and the child may possibly be established via adoption in the country where the child was born, or through another legal mechanism in the country of birth (such as parentage orders). However, these processes may not necessarily meet the requirements of New Zealand law to establish the legal relationship.

If you are relying on a foreign parental order as evidence of the parent-child relationship for New Zealand citizenship by descent, you will need to obtain a declaration from the New Zealand High Court that the parental order has the same effect as a New Zealand adoption. Your lawyer can provide advice on the process of obtaining a declaration from the High Court.

If the High Court determines that a parental order does not have the same effect as a New Zealand adoption, you have the option of applying to adopt the child in the New Zealand Family Court.

Adoption process

As stated above, under New Zealand law, legal parenthood will need to be transferred from the surrogate mother and her husband/partner (if she has one) to the commissioning parents after the birth of the child. If this process is done in New Zealand, it involves the commissioning parents undergoing an assessment by the Ministry for Children about their suitability as adoptive applicants. It is imperative that commissioning parents seek advice from a New Zealand Family lawyer who is experienced in international surrogacy matters as it is important that you understand the process, including the need to ensure that documentation obtained overseas meets the requirements of the Adoption Act 1955.

Country updates

In the past there have been a number of countries which have been known to have had commercial surrogacy services available. However, since 2015 these countries have introduced laws and restrictions on foreigners commissioning surrogacy arrangements. It is important that you are guided by the government regulations of the overseas country, not by the advice given by individual fertility clinics in the overseas country or any private individual located in New Zealand who provides surrogacy advice.

New Zealanders are advised not to engage in commercial surrogacy arrangements in the following countries:

Thailand

On 30 July 2015, the 'Protection of Children Born from Assisted Reproductive Technologies Act', which places tight restrictions on commercial surrogacy in Thailand, came into effect there. The Act severely limits who may engage in a surrogacy arrangement and imposes sanctions for those that do not comply. Thailand's restrictions prohibit foreigners undertaking a surrogacy arrangement in Thailand.

India

On 5 November 2015 the Indian Government banned the issuing of visas to foreigners for the purposes of entering India to commission a surrogacy. At the same time the Indian government advised all Indian registered IVF and Surrogacy Clinics to cease offering surrogacy services to foreigners and OCI (Overseas Citizens of India) Cardholders. Currently the Indian Government is considering the Assisted Reproductive Technology (Regulation) Bill, and if enacted, these bans will become permanent.

Mexico

On 14 December 2015 a law was passed in Mexico, banning surrogacy for foreign couples. This law came into effect in the State of Tabasco on 19 January 2016. The law change has effectively prohibited surrogacy in respect of foreign couples throughout Mexico, as Tabasco is the only state that has allowed surrogacy arrangements to date.

Nepal

On 25 August 2015, the Supreme Court of Nepal issued an order to immediately ban foreigners from commissioning commercial surrogacy arrangements in Nepal. Whilst international surrogacy service providers may continue to mention Nepal as a possible location, potential parents should not consider Nepal for an IVF/surrogacy process.

Cambodia

The New Zealand government received formal advice from the Government of Cambodia on 12 November 2015 that the practice of commercial surrogacy is prohibited in Cambodia, and parties found to be involved in surrogacy arrangements will be punished by both imprisonment and fines. On 24 October 2016 the

Cambodian Government issued a ministerial directive which reaffirmed that surrogacy is banned in Cambodia..

Key Contacts

New Zealand has a joint government agency approach to all cases of international surrogacy.

Please read the advice contained in this Information Sheet and contact the following agencies **before** you begin any surrogacy process.

Immigration New Zealand - a service line of the Ministry of Business, Innovation and Employment that takes care of all New Zealand immigration issues.

To send a query use the following link: <http://dol.govt.nz/immigration/knowledgebase/contact>

Phone: 0508 558 855 within New Zealand but outside Auckland

Phone: 09 914 4100 Auckland

Phone: +64 9 924 4100 from outside New Zealand

Ministry for Children – has the responsibility for reporting to the New Zealand Family Court on the suitability and eligibility of adoptive applicants.

Email: webadoption@mvcot.govt.nz

Phone: 0508 FAMILY (0508 326 459) from within New Zealand

Phone: +64 9 912 3820 from outside New Zealand

Department of Internal Affairs - administers applications for New Zealand citizenship and issues New Zealand passports.

Email: staykiwi@dia.govt.nz

Freephone 0800 22 51 51 within New Zealand

Phone: +64 4 463 9361 outside New Zealand

Ministry of Foreign Affairs and Trade – consular support

Email: cons@mfat.govt.nz

Phone: 04 439 8000

Phone: +64 4 439 8000 from outside New Zealand

Related legislation

All legislation referred to in this Information Sheet can be found at this website: www.legislation.govt.nz

Appendix A: Ministerial guidelines

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

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| 1. Minister may consider |
| 2. Whether there is a genetic link between at least one of the commissioning persons and the child. |
| 3. The outcome that is in the best interests of the child. |
| 4. New Zealand's international obligations. |
| 5. The nature of the surrogacy arrangement, i.e., is it altruistic or commercial? |
| 6. Whether the commissioning persons intend to or have taken steps to secure legal parenthood or other legal rights in respect of child in NZ. |
| 7. What the commissioning persons have done in the child's country of birth to secure legal parenthood or other legal rights in respect of the child. |
| 8. Whether the applicants have demonstrated respect for the laws of the jurisdiction in which the surrogacy was carried out. |
| 9. Whether there is satisfactory evidence of informed consent from the: - gamete (egg/sperm donor (if relevant)) - surrogate mother for the surrogacy arrangement to take place (was she a willing party?) - surrogate mother (and her partner if relevant) for the child to depart the country of birth and enter New Zealand - surrogate mother (and her partner if relevant) for the child's adoption. |
| 10. Steps taken by the commissioning persons to preserve the child's identity, e.g. do the commissioning persons intend to retain information about the child's origins? |
| 11. Whether the recognised authority of the birth country has agreed or objects to the child leaving the country permanently. |
| 12. Any other considerations that the Minister wishes to take into account. |