

Date 6 July 2026
Your Ref
Our Ref 11552

Enquiries to Richard Mutch
Extension 35687
Direct Line 0131 465 5687
loth.freedomofinformation@nhs.scot
richard.mutch@nhs.scot

Dear

FREEDOM OF INFORMATION – SURROGACY

I write in response to your request for information in relation to surrogacy,

Question:

- Under Freedom of Information legislation I would be grateful to receive a copy of any guidance your health board holds and/or has provided to maternity teams for supporting births where the pregnancy is as a result of a surrogacy arrangement.

Answer:

Please see enclosed guidance currently used within NHS Lothian.

I hope the information provided helps with your request.

If you are unhappy with our response to your request, you do have the right to request us to review it. Your request should be made within 40 working days of receipt of this letter, and we will reply within 20 working days of receipt. If our decision is unchanged following a review and you remain dissatisfied with this, you then have the right to make a formal complaint to the Scottish Information Commissioner within 6 months of receipt of our review response. You can do this by using the Scottish Information Commissioner's Office online appeals service at www.itspublicknowledge.info/Appeal. If you remain dissatisfied with the Commissioner's response you then have the option to appeal to the Court of Session on a point of law.

If you require a review of our decision to be carried out, please write to the FOI Reviewer at the email address at the head of this letter. The review will be undertaken by a Reviewer who was not involved in the original decision-making process.

FOI responses (subject to redaction of personal information) may appear on NHS Lothian's Freedom of Information website at: <https://org.nhsllothian.scot/FOI/Pages/default.aspx>

Yours sincerely

ALISON MACDONALD
Executive Director, Nursing
Cc: Chief Executive
Enc

1. Introduction

Definition: The Surrogacy Arrangement Act 1985 (1) (amended 1990 (2)) defines a surrogate mother as:

“A woman who carries a child in pursuance of an arrangement:

- a) Made before she began to carry the child and
- b) Made with a view to any child carried in pursuance of it being handed over to, and the parental rights being exercised (so far as is practicable) by another person or persons”

WHO ARE THE MOTHER AND FATHER?

The Human Fertilisation and Embryology Act 1990 (2), Section 27, states that the legal mother is always the surrogate mother regardless of genetic makeup and she is legally responsible for the child until such time as the intended parents adopt or seek a parental order.

The legal father depends upon other factors:

- i) If the surrogate mother is married then her husband is the legal father.
- ii) If the surrogate mother has a partner then he is the legal father, unless he can prove that he did not consent to the treatment.
- iii) If the surrogate mother is single and the treatment did not take place at a centre licensed by the HFEA, then the legal father is the commissioning father.
- iv) If the surrogate mother is single and the treatment took place in a licensed clinic the child is legally fatherless.

2. Aim

To provide guidance to midwives and obstetricians providing care to the surrogate mother and commissioning parents.

3. Guidelines

Care should be offered to all involved in a non-judgmental and supportive manner.

Midwives should ensure that they keep accurate and contemporaneous records of discussions and decisions reached.

The surrogate mother should attend one antenatal clinic early in pregnancy on her own so that any confidential issues /health information can be shared with health professional

Confidentiality is vital and disclosure made on a need to know basis. Any reference to the surrogacy arrangement in the medical records should only be made after discussion with and permission from the surrogate mother.

The needs of the surrogate mother are always given priority and all (final) decisions rest with her.

This section to be completed by document control.

Information to be given to the commissioning parents must be sanctioned verbally by the surrogate mother and documented in the records.

Meet with surrogate and commissioning parent(s) antenatally, if requested, to identify their plans / wishes re A/N screening, parenthood preparation, birth plan, birth partners, infant feeding, immediate care of baby, postnatal visiting / accommodation for commissioning mother.

If the commissioning mother wishes to discuss options for giving the baby breast milk or inducing lactation, a referral to an infant feeding advisor should be initiated at the earliest opportunity.

The immediate postnatal period is a time of great emotional upheaval, which may be compounded in a surrogacy arrangement and great sensitivity is required in handling both the surrogate and commissioning parents. Where there is conflict the midwife must focus her care on the surrogate mother and baby.

The commissioning parents, even if they have taken the child, have no legal relationship with it and no rights in law until a parental order has been made or unless the commissioning father is named on the birth certificate.

The HFEA advises that, until the parental order comes into force, strictly speaking it is the legal mother who should give consent for screening of the newborn.

Commissioning or intended parents will apply for a parental order (if the genetic makeup of the baby comes from either or both of them) or an adoption order where gametes from either of the commissioning parents have not been used. Until this time (6 weeks – 6 months) the legal mother is the surrogate mother.

Handing over the baby will take place following discussion and agreement with the surrogate mother. The outcome of this discussion and agreement must be documented in the maternal and neonatal records.

The surrogate mother is cared for as per routine postnatal care guidelines. Her G.P. is notified of her discharge home.

The commissioning mother and baby are notified to the appropriate community midwife, public health nurse and G.P.

In Scotland, having the name of the father on the child's birth certificate will ensure he has full and equal parental rights and responsibilities

This section to be completed by document control.

4. Useful information

Birth certificate – is issued by the registrar of Births, Deaths and Marriages. Normally the birth of a surrogate baby will be registered by the surrogate herself and her name will be entered as the mother. The person named as father depends upon certain rules contained with the Human Fertilisation and Embryology Act 1990 and the Registration of Births, Deaths and Marriages Scotland Act 1965.

Birth father – is the surrogate's husband unless it can be shown that he did not consent to the surrogacy.

Birth mother – is the legal term for the woman who gives birth to a child as a result of a surrogacy arrangement regardless of whether the child resulted from her egg or not, in accordance with Section 30 of the Human Fertilisation and Embryology Act 1990 .

Children (Scotland) Act 1995 – is the main legislation for matters to do with children and families. Its relevance for surrogacy lies mainly in the principle of parental responsibility and in the availability of parental responsibility arrangements.

Commissioning mother / father – the person / persons who have made an arrangement with a surrogate mother to carry a child for them.

Human Fertilisation and Embryology Act 1990 – for the most part effective from October 1994, this is the main piece of legislation relating to fertility treatment. A Parental Order can be made under S30 of the act effectively transferring rights over the child held by the surrogate (birth) mother at birth to the commissioning parents. The act also provides that the surrogate's husband is the birth father of the baby unless it can be shown that he did not consent to the surrogacy which the act calls "treatment".

Law - 4 acts of parliament have a bearing on surrogacy
Registration of Births, Deaths and Marriages Scotland Act 1965
Surrogacy Arrangements Act 1985
Human Fertilisation and Embryology Act 1990
Adoption and Children (Scotland) Act 2007 ("the 2007 Act") (in regulation 3 and Schedule 3)
Parental Orders (Human Fertilisation and Embryology) (Scotland) Regulations 2010
Children (Scotland) Act 1995
Adoption and Children (Scotland) Act 2007 ("the 2007 Act") (in regulation 3 and Schedule 3)

The Court jurisdiction which will be appropriate when a Parental Order is applied for is that covering the area of residence of the applicant couple and the handed over baby.

This section to be completed by document control.

Registration of Births, Deaths and Marriages Scotland Act 1965 – legislation that relates to registering the births of babies. When registering a surrogate birth, the surrogate should tell the registrar that she is the mother of the surrogate baby in question. It is a criminal offence to give false information to a registrar.

Surrogacy Arrangements Act 1985 – legislation to regulate certain activities in connection with arrangements made with a view to women carrying children as surrogate mothers.

This section to be completed by document control.

References:

Human Fertilisation and Embryology Act (1990) HMSO London

Surrogacy Arrangements Act (1985) HMSO London

Bibliography:

British Medical Association (BMA) (1996) **Changing conceptions of motherhood: The practice of surrogacy in Britain** BMA London

Brazier M, Campbell A, Golombok S (1998) **Surrogacy. Review for health ministers of current arrangements for payments and regulation. Report of the review Team (Brazier Report)** TSO London

Childlessness overcome through surrogacy (COTS) (1997) **Childlessness overcome through surrogacy: comprehensive guide to surrogacy** COTS London

Children (Scotland) Act 1995

Dimond B (1994) **The legal aspects of midwifery** Books for Midwives Press Cheshire

Human Fertilisation and Embryology Authority (2005/6) **Guide to infertility** HFEA London

Jones SR (2000) **Ethics in midwifery** 2nd Ed Elsevier Mosby London

Jones SR & Jenkins R (2004) **The law and the midwife** 2nd ed Blackwell Publishing Oxford p 145-7

Jones, S (2006) **Surrogacy: The legal position and the midwife's duty of care**

British Journal of Midwifery 14: 5 p256

RCM (1997) **Position Paper no 18: Surrogacy: Defining motherhood** RCM London

Registration of Births, Deaths and Marriages Scotland Act 1965

Warnock M (1985) **A question of life** Blackwell Ltd Oxford

Resources:

www.surrogacyuk.org

www.surrogacy.org.uk

Document adopted from Annette Lobo NHS Fife

This section to be completed by document control.