

# **COMMISSIONING POLICY FOR SURROGACY INVOLVING ASSISTED CONCEPTION**

## **Document History**

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## **Consultation**

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## **Document Status**

This is a controlled document. Whilst it may be printed, the electronic version posted on the Clinical Commissioning Groups' (CCGs) websites is the controlled copy. Any printed copies of this document are not controlled. As a controlled document, this policy should not be saved onto local network drives but should always be accessed from the Intranet / Internet.

## **NHS FUNDING**

CCGs buy healthcare on behalf of their local populations. They each have a fixed budget for this and are required by law to keep within this budget. Demand for healthcare is greater than can be funded from this fixed budget. Unfortunately, this means that some healthcare which patients might wish to receive and which professionals might wish to offer cannot be funded.

CCGs prioritise what they spend, so that their local populations get access to the healthcare that is most needed. This assessment of need is made across the whole population and wherever possible, on the basis of best evidence about what works. They aim to prioritise in a way that is fair, so that different people with equal need have equal opportunity to access services.

## **ASSISTANCE WITH THE APPLICATION OF THIS POLICY AND UPDATES**

This policy has been prepared to reflect the situation at the time of its development, and will require periodic review to reflect subsequent changes in law, guidelines, evidence etc.

For advice and assistance in relation to the application of this policy, and to obtain updates, please contact your local CCG.

This policy has been prepared by East Midlands Affiliated Commissioning Committee (EMACC). EMACC has been established as a joint committee of nineteen participating CCGs in the East Midlands to enable CCGs to work collaboratively on the development and maintenance of Commissioning Policies.

1. NHS Southern Derbyshire CCG
2. NHS North Derbyshire CCG
3. NHS Erewash CCG
4. NHS Hardwick CCG
5. NHS Nottingham City CCG
6. NHS Nottingham West CCG
7. NHS Nottingham North & East CCG
8. NHS Rushcliffe CCG
9. NHS Newark & Sherwood CCG
10. NHS Mansfield & Ashfield CCG
11. NHS Corby CCG
12. NHS Nene CCG
13. NHS West Leicestershire CCG
14. NHS Leicester City CCG
15. NHS East Leicestershire & Rutland CCG
16. NHS Lincolnshire West CCG
17. NHS South West Lincolnshire CCG
18. NHS South Lincolnshire CCG
19. NHS Lincolnshire East CCG

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## **1. EQUALITY STATEMENT**

EMACC and its constituent CCGs aim to create policy documents that meet the diverse needs of the populations to be served and to exercise the duty enshrined in the Health and Social Care Act (2012) to have regard to the need to reduce inequalities, in access to health services and in health outcomes achieved.

CCGs are committed to ensuring equity of access and non-discrimination, irrespective of age, disability (including learning disability), gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex (gender) or sexual orientation.

This policy takes into account current UK legislative requirements, including the Equality Act 2010 and the Human Rights Act 1998, and promotes equality of opportunity for all. This document has been designed to ensure that no-one receives less favourable treatment owing to their personal circumstances.

## **2. DUE REGARD**

In carrying out their functions, CCGs must have due regard to the Public Sector Equality Duty (PSED). This applies to all the activities for which CCGs are responsible for, including policy development and review.

## **3. POLICY STATEMENT**

EMACC's participating CCGs do not support the commissioning of assisted conception treatments involving surrogates for any patient group. Support and funding will not be provided for any associated treatments related to those in surrogacy arrangements. The CCG will not therefore:

- Be involved in the recruitment of surrogate mothers.
- Fund that element of treatment which relates specifically to addressing fertility treatments directly associated with surrogacy arrangements.
- Fund any payments to the surrogate mother.

This is because:

- (a) There are concerns that the funding of such treatment raises substantial medico-legal risks that NHS bodies and doctors providing care connected to surrogacy arrangements would be exposed to.
- (b) NHS bodies are unlikely to be in a position to properly assess whether the parties have concluded a lawful surrogacy arrangement.

(The East Midlands Commissioning Policy for In Vitro Fertilisation (IVF)/Intracytoplasmic Sperm Injection (ICSI) within Tertiary Infertility Services (2014) does not elaborate on surrogacy beyond advice on referring to individual CCG policies<sup>1</sup>.)

## **4. PURPOSE OF THE POLICY**

### **4.1 Aim of the Policy**

The aim of the policy is to confirm the commissioning arrangements for assisted conceptions involving surrogates for CCGs participating in EMACC.

### **4.2 Scope of the Policy**

This policy area falls under the commissioning responsibility of CCGs. It is applicable to any patient group and relates to patients registered with general practices which are members of the CCGs which constitute EMACC.

The commissioning of the creation, storage and implantation of eggs/embryos falls outside the remit of this policy.

## **5. SURROGACY**

Surrogacy is defined as the process by which a woman bears a child for another individual/couple and once delivered, the child is surrendered to the requesting individual/couple. There are two types of surrogacy: partial/traditional surrogacy and full/gestational surrogacy<sup>2</sup>.

Surrogacy may be appropriate where a medical condition makes it impossible or dangerous to get pregnant and to give birth, for example<sup>3</sup>, the absence or malformation of the womb, recurrent loss of pregnancy and repeated in vitro fertilisation failure. Surrogacy can also be a fertility option for male couples.

## **6. EXISTING CLINICAL GUIDANCE DOCUMENTS**

The National Institute for Health and Care Excellence (NICE) Clinical Guideline for Fertility does not include specific advice on surrogacy<sup>4</sup>. Surrogacy does not fall within the scope of the NICE guideline.

The Surrogacy Arrangements Act 1985<sup>5</sup> and the Human Fertilisation and Embryology Act 2008<sup>6</sup> regulate surrogacy from a legal standpoint.

The Human Fertilisation and Embryology Authority (HFEA) acts as the UK regulating body for fertility in clinical practice and research, however does not regulate surrogacy itself. The HFEA provides Code of Practice in the form of guidance on the assessment and screening in surrogacy arrangements.

Altruistic surrogacy (but not commercial surrogacy) is legal in the UK. Healthcare professionals in fertility clinics are not permitted to be involved in surrogacy arrangements but can be involved in providing routine maternity services for the pregnant surrogate.

Patients can seek advice on surrogacy from non-profitable organisations such as Childlessness Overcome Through Surrogacy (COTS)<sup>7</sup> and Surrogacy UK<sup>8</sup>.

## **7. EPIDEMIOLOGY**

It is difficult to quantify the exact incidence of surrogacy within the UK as only altruistic surrogacy is lawful in the UK and not all individuals adopt a formal process when entering into surrogacy arrangements. With better recognition, social acceptance and regulation of surrogacy, and with medical advances in assisted conception techniques, the recognised incidence is rising<sup>9, 10</sup>.

## **8. CLINICAL EFFECTIVENESS EVIDENCE SUMMARY**

This section outlines some of the ethical and legal issues in relation to surrogacy, rather than the clinical effectiveness.

### **Ethical considerations:**

- Surrogate mother wanting to keep the child.
- Rejection of the child by the surrogate mother and the commissioning parents.
- Decision making during the pregnancy.
- Long term psychological effects on all those involved in the surrogacy arrangement.
- Commercial surrogacy arrangements are illegal, but reasonable expenses can be paid for altruistic surrogacy.

### **Legal considerations:**

- Surrogacy is regulated by the Surrogacy Arrangements Act 1985 and Human Fertilisation and Embryology Act 2008.
- Commercial surrogacy arrangements are not permitted.
- The Human Fertilisation and Embryology Authority<sup>11</sup> states that surrogacy involves complicated legal issues and people are advised to obtain legal advice prior to making any decisions. The Authority provides information on a number of legal issues.
- Surrogacy agreements are not legally enforceable.
- The surrogate mother is always the legal mother and a parental order is required to transfer parentage.

### **Professional bodies**

The Royal College of Obstetricians and Gynaecologists highlight key medical, ethical and legal considerations in surrogacy arrangements<sup>12, 13</sup>.

## **9. SAFETY**

The key issues for this policy are in relation to medico-legal risks and some of these are outlined in section 8.

## **10. COMMISSIONING POLICY**

EMACC's participating CCGs do not support the commissioning of assisted conception treatments involving surrogates for any patient group. This policy falls under the commissioning responsibility of CCGs. It is applicable to any patient group and relates to patients registered with general practices which are members of the CCGs which constitute EMACC.

## **11. EXCEPTIONAL CIRCUMSTANCES**

CCGs will consider individual cases for funding outside this commissioning policy in accordance with their Individual Funding Request (IFR) Policy which sets out a decision making framework for determining these cases. For an IFR request to be considered, it must be demonstrated that the patient fulfils the strict criteria for exceptionality.

It should be noted that the criteria for exceptionality is very unlikely to be satisfied if an individual is part of an identifiable cohort of patients, who at the same disease stage would derive similar benefit from the intervention.

## APPENDIX 1

### SOME EVIDENCE ON THE LEGAL AND ETHICAL ISSUES IN RELATION TO SURROGACY

Source	Evidence
The Human Fertilisation and Embryology Authority (HFEA).	The HFEA provides information on the legal issues around surrogacy. This includes for example: the rights of the surrogate, what if the surrogate mother changes her mind, becoming the child's legal parents (parental orders and adoption), arrangements prior to parental order/adoption and what happens if the child is born outside the UK.
Burrell C, O'Connor H. (2013) Surrogate pregnancy: ethical and medico-legal issues in modern obstetrics. The Obstetrician & Gynaecologist. 15,113–9.	This paper provides a literature review of the medico-legal challenges of surrogacy. It highlights the relevant UK law, the limited guidelines and legislation available, and the legal requirements for parenthood and parental rights. The paper also outlines ethical and legal dilemmas for healthcare professionals in managing surrogate pregnancies in the absence of professional guidance.
Bhatia K, Martindale EA, Rustamov O et al. (2009) Surrogate pregnancy: an essential guide for clinicians. The Obstetrician and Gynaecologist 11(1),49-54.	This guide provides information on some of the main ethical and legal issues in relation to surrogacy. This includes for example issues in relation to the surrogate unwilling to surrender the child and rejection of a child by the surrogate mother/commissioning parent. The guide provides information on the law and surrogacy and what constitutes reasonable expenses in altruistic surrogacy arrangements.

## GLOSSARY

WORD / PHRASE	MEANING
Altruistic surrogacy	<p>A surrogacy arrangement is one in which a woman carries a pregnancy for another individual/couple.</p> <p>In altruistic surrogacy arrangements there are no financial gains to the surrogate. However, the intended parent(s) can pay reasonable expenses to the surrogate, for example, travel. These arrangements are legal in the UK.</p>
Commercial surrogacy	<p>A surrogacy arrangement is one in which a woman carries a pregnancy for another individual/couple.</p> <p>In commercial surrogacy arrangements, the surrogate is paid for carrying the pregnancy. These arrangements are illegal in the UK.</p>
Human Fertilisation and Embryology Act 2008	This Act follows on from the Human Fertilisation and Embryology Act 1990 and the Surrogacy Arrangements Act 1985, with updates on lawful parentage.
Human Fertilisation and Embryology Authority (HFEA)	The HFEA is the UK's independent regulator overseeing the use of gametes and embryos in fertility treatment and research.
The National Institute for Health and Care Excellence (NICE)	NICE provides national guidance and advice to improve health and social care.
Surrogacy Arrangements Act 1985	This Act legally oversees surrogacy arrangements.

## REFERENCES

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