National Council of Women of New Zealand
Te Kaunihera Wahine o Aotearoa

GENDER EQUAL NZ
MAKING EQUALITY REALITY

office@ncwnz.org.nz
www.ncwnz.org.nz

C/o PSA
PO Box 3817
WELLINGTON 6140
Attn: NCWNZ

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Submission to Te Aka Matua o te Ture | Law Commission on Te Kōpū Whāngai: He Arotake | Review of Surrogacy

Introduction

1. The National Council of Women of New Zealand, Te Kaunihera Wahine o Aotearoa (NCWNZ) is an umbrella group representing over 200 organisations affiliated at either national level or to one of our 14 branches. In addition, about 450 people are individual members. Collectively our reach is over 450,000 with many of our membership organisations representing all genders. NCWNZ's vision is a gender equal New Zealand and research shows we will be better off socially and economically if we are gender equal. Through research, discussion, and action, NCWNZ in partnership with others, seeks to realise its vision of gender equality because it is a basic human right.
2. This submission has been prepared by the NCWNZ Parliamentary Watch Committee after consultation with the membership of NCWNZ.

General Comments

3. At all times, the well-being of the child must be paramount. The intended parents now have the responsibility of rearing the baby and supporting the development of their potential into adulthood.
4. A number of respondents found this topic quite overwhelming in its intricacies for what appears to be a simple life action – that of a couple who want a child but cannot conceive one together so retain a surrogate by whatever means and processes they mutually agree. They understood the need to observe legal niceties, sanctions, and safety conditions, but felt it was being made difficult. Others recognised that this is in fact a very complex arrangement which requires careful regulation to ensure the child's wellbeing from birth to adulthood and protect everyone else involved.

Terminology

5. The Commission refers throughout to *the surrogate*. The United Nations[1] uses *the surrogate mother*. The Ethics Committee (ECART) and the Advisory Committee (ACART) use *the birth mother*. NCWNZ members were equally split between *the surrogate mother* and *the birth mother*, with only a couple of responses preferring the surrogate. It would be good to have the terminology synchronised.

6. Those preferring the term *birth mother* said that this term acknowledges the role of the surrogate in this situation. *Birth mother* adds more humanity to the individual and the process they're going through. *Surrogate mother* sounds cold and degrading.

7. Those not supporting *birth mother* said that a surrogate mother is obviously the birth mother, but a birth mother could mean a natural birth mother with no surrogate involved. Including the term surrogate makes the position clear from the beginning and indicates the understanding of the outcome. *Birth mother* leaves a feeling of possessiveness which may hinder the ultimate outcome.

8. Adding mother to the term surrogate recognises her important, and in New Zealand, altruistic role, throughout the pregnancy and birthing process. While she may not care for the child once it is born, the developing child is nurtured in her womb. The *surrogate mother* also goes through the effort of labour which is necessary if the intended parents are to have a child to parent

9. The different forms of surrogacy were considered: the *surrogate mother* who offers her womb, and, in a traditional surrogacy, also the ovum. The *surrogate mother* may also only be the bearer of donated fertilised ovum and sperm gametes and the resulting baby is not linked genetically to her. The conception only occurs because the intended parents want to care for a child who would not otherwise be born. The *surrogate mother* may or may not have a partner (referred to as surrogate partner).

10. Some thought that there needed to be a clear distinction between:

    - a gestational surrogacy, where the surrogate does not use her own ovum, and
    - a traditional surrogacy, where the surrogate's own ovum is used making her the genetic mother, and artificial insemination using the sperm of a donor/parent.

[1] International Social Services. 2021. Principles for the protection of the rights of the child born through surrogacy (Verona principles). https://www.iss-ssi.org/images/Surrogacy/VeronaPrinciples_25February2021.pdf

Guiding principles for surrogacy law reform

Q1: Do you agree with our six guiding principles for surrogacy law reform? If not, what changes should we make?

11. Comments were made on a number of the principles. There was general agreement with these six guiding principles for surrogacy law reform. We would welcome further discussion with Iwi Māori for their opinions.

Principle 1: The best interests of the surrogate-born child should be Paramount

12. Many members considered that Principle 1 was the most important principle. Others thought that Principles 3 and 4 were most important as they were fundamental to the achievement of action identified in the other statements.

13. For some members it was important that Principle 1 should be more strongly worded, replacing the word *should* with *must* –The best interests of the surrogate-born child **must** be paramount."

14. It was queried how the paramount interest of a surrogate-born child was defined or measured in New Zealand, and who this was done by (ACART, ECART, or Oranga Tamariki) or whether the definition is set in New Zealand's law. Whatever the definition is it should be written down and consistent across all pathways.

Principle 2: Surrogacy law should respect the autonomy of consenting adults in their private lives

15. The consenting adults should stay within any laws, particularly in relation to the resulting child.

Principle 3: Effective regulatory safeguards must be in place

16. There must be effective safeguards particularly as relates to the child and their access to their birth circumstances.

Principle 4: Parties should have early clarity and certainty about their rights and obligations

17. As with Principle 1, it was felt that this principle would be more strongly worded by replacing *should* with *must* – Parties **must** have early clarity and certainty about their rights and obligations.

18. A few respondents felt this principle should take top priority as it relates to both parties clearly clarifying their roles both before the baby is conceived and after it is born.

Principle 5: Intended parents should be supported to enter surrogacy arrangements in Aotearoa New Zealand rather than offshore

19. The membership responses preferred that the intended parents should be supported to enter surrogacy arrangements in Aotearoa New Zealand rather than offshore.

20. It was important to recognise that the intended parents may have close connections with family and friends living outside New Zealand who might generously decide to help them become parents. Intended parents in this situation should be supported in their plans to become parents.

21. Some thought that Principle 5 leaves room for confusion. Is the intention to support intended parents to be in New Zealand at the time of the arrangement, or is it trying to suggest New Zealanders should opt for surrogacy arrangements within New Zealand?

22. If intended parents do enter a surrogacy arrangement outside New Zealand the child and the intended parent/s need to comply with the laws of the country of the baby's birth and then when the baby arrives in New Zealand, the New Zealand law takes precedence relating to the birth papers.

Principal 6: Surrogacy law should enable Māori to act in accordance with tikanga and promote responsible kāwanatanga that facilitates tino rangatiratanga

23. Principle 6 created the most discussion regarding the need to include ethnic perspectives.

24. Members considered that this principle was very important but questioned the absence of attention to enabling Pasifika to enter into surrogacy arrangements that were in accordance with their cultural traditions.

25. It would be advantageous for surrogacy laws to be developed by Māori for Māori as they relate to tikanga and kāwanatanga and presented in both languages. For instance, if a surrogate baby is born and then dies, who has the rights over where it is buried – the surrogate Māori mother or the intended parent/s?

Additional principals

26. If Principle 6 cannot be expanded as mentioned in para 26, an additional principle should be added that includes attention to the relevance of Pasifika customs and potentially the customs of other cultural communities who have made Aotearoa New Zealand their home.

27. Another important principle which is not included but is an important component of legislation in Aotearoa New Zealand, is that surrogacy should not be commercialised.

Approving surrogacy arrangements

Q13: Do you prefer Option 1 or Option 2 to enable parties in a traditional surrogacy arrangement to access the ECART process, or is there another option we should consider?

28. Opinion was split, with a majority favouring Option 1 and a number preferring parts of Option 2.

29. Both gestational and traditional surrogacies should be legally required to be approved by ECART. The law should then enable all surrogacy-born children to have access to their birth records, whatever the pathway taken to produce the child.

30. Being able to go directly to ECART was also supported, especially for non-clinic assisted surrogacy. ECART approval is important for all clinic-based surrogacy arrangements. ECART approval should not be restricted to those who apply through fertility clinics.

31. With the best interests of the surrogate born child being paramount, ECART has a role from the outset in policing that would be parents are free of criminal intent and want to do the best they can offer for the child as a loved member of their family.

32. A child or legally defined close person to the child should be able to apply directly to Births Deaths and Marriages[2] to seek their birth history. This record may be required for example for health reasons or inheritance purposes. The interests of the child should be paramount as long as there is a definition of what paramount means within the law. If it is recommended a baby requires a blood transfusion immediately after birth or any other medical intervention it must be clear who would have the right to refuse or approve such a medical intervention at that precise time.

33. Members noted that applications to ECART for approval can cause time delays as it only meets every two months and can only check up to 12 applications at a meeting. This adds frustration to those awaiting the arrival of a baby in their life, and in some cases the aging of those concerned who have already been waiting to see if they can conceive naturally. ECART needs to be resourced so that it can respond more rapidly to applications as numbers requiring the service are increasing. The time taken to process applications to ECART should not be a barrier for those wishing to use surrogacy as a pathway to build a family.

34. The Human Assisted Reproductive Technology Act 2004 (HART Act)[3], ACART and ECART should all be linked and be endorsing the same laws.

35. Oranga Tamariki and any other organisations working within the law relating to surrogacy, adoption, or child guardianship should have access to surrogacy records. All such organisations should work within a defined legal framework and be cross referenced to each organisation to eliminate any room for variation.

Financial support for surrogates

Q15: Do you agree with Option 1 to clarify and expand the list of permitted costs that can be paid in a surrogacy arrangement? If so, do you agree with our proposed list of permitted costs? Are there other costs you would include in this list?

36. Respondents largely agreed with this list and believed it is a good, broad list of expenses that could be paid in surrogacy, if agreed. A suggestion was to separate out costs that may vary per person such as medical and travel, versus a baseline cost for maternity clothes, groceries etc. It was felt that there needed to be some limit to the costs redeemed. It needs to be an equitable process for all. Option 2 was seen as too general.

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[2] Births, Deaths and Marriages Whānautanga, Matenga, Mārenatanga. https://www.govt.nz/organisations/births-deaths-and-marriages/

[3] Human Assisted Reproductive Technology Act 2004. https://www.legislation.govt.nz/act/public/2004/0092/latest/whole.html

37. The list of costs should only be for those items that can be shown to directly impact on the surrogate mother because of the pregnancy.
38. There needs to be a clear definition for d*ependant*. There was concern about the 6.43(b) including 'her partner and any dependants'. It would depend on the circumstances that required the partner and dependants to accompany the surrogate.
39. It was felt that there should there be guidelines for 6.43 for the care of the surrogate's dependants. Others did not think there should be any payment for the care of the surrogate's dependants.
40. There were various opinions on what 'reasonable expenses' should and should not cover, whether they should include insurance, and if so of what types. The review does not quite clearly explain that 'insurance' in surrogacy agreements usually refers to life insurance for the surrogate mother, to cover the rare but possible situation of her death as a result of childbirth.
41. There should be a base line list of legal guidelines and costs set down under the HART Act, including the insurance policies for the surrogate and baby relating to medical expenses. "Valuable Consideration" as used throughout the HART Act, currently legally undefined, should be clarified and set down in an amendment to the Act to clarify any misinterpretations.
42. Some saw that the costs of a surrogacy could be limited so that the process was not accessible only to those with significant wealth, especially given the size of the clinic fees.
43. Members suggested that any agreement should include a dispute resolution clause that would require mediation if any difficulties arose with respect to the arrangements between the parties, including issues that might arise relating to the costs. For example, care of the surrogate mother's dependents can be an important cost if the pregnancy means that the surrogate mother cannot provide the care she would provide if she was not pregnant. Pay for care of dependent children may be necessary during medical visits, during birth or while a surrogate mother recovers from the birth.
44. Concern was expressed on what would happen if the surrogate mother suffered post-natal depression or there are other birth complications. It was thought that an insurance policy for such contingencies should be legally included in a surrogacy agreement. Also, any birth or developing health complications for the baby should also be subject to an insurance policy if they occur outside the ACC framework. Life insurance for the surrogate mother is also really important

Q16: Do you agree with Option 2 to clarify the law with respect to surrogates' entitlements to post-birth recovery leave and payments? If so, what should be the length of time surrogates are entitled to receive leave and payments?

45. Most respondents agreed that leave should be aligned with the current parental leave period:

    a. 6 weeks – the post-partum period
    b. 12 weeks which aligns surrogate mother's recovery with organ donors' recovery
    c. 26 weeks which is the current entitlement for parental leave.

46. It was acknowledged that every situation will be different depending on the physical health, mental acceptance, and personal support available to the surrogate mother after the birth. Although the surrogate mother is not adjusting to the routines of minding a baby as the carer-parent would be, there is likely to be some psychological adjustment and possibly grief. If the surrogate still has contact with the child, the sense of loss may be reduced.

47. Members considered that there was a need for guidelines with respect to the length of time surrogate mothers might be expected to be paid for post-birth leave – how much leave should be taken by the surrogate mother and how much by the intended parents.

48. If the surrogate has a paid job, then they should receive governments payments for lost wages in the same as any other pregnant woman. There should be no arrangement for payment between the surrogate mother and the intended parents as this would amount to commercial surrogacy.

49. The phrase *post-birth recovery leave* needs to be defined.

Q17: Do you think intended parents should be permitted to pay surrogates a fee for their participation in a surrogacy arrangement (in addition to paying a surrogate's reasonable costs under Option 1)?

50. There was a suggestion that a surrogate fee should be paid to the surrogate over and above reasonable costs. Overall, paying a fee was not acceptable, otherwise New Zealand will be moving to commercialisation of surrogacy. It was recognised that this occurs in other national contexts and is justified as fair recompense for the surrogate mother who makes such an important contribution to the lives of the intended parents and also embraces the possibility of risks to her own body as well as disruption of their involvement in paid work and the need for a period of recovery after the birth.

51. There was strong support for protection for the surrogate mother if any unexpected circumstances occur, such as a long period of recovery after the birth, and this should be considered by the intended parents and the surrogate mother when they enter into the surrogacy agreement and contingency plans and any relevant payments recorded.

Legal parenthood

Q18: Do you agree with the issues we have identified with the process for establishing legal parenthood in surrogacy arrangements? Are there other issues we should consider?

52. Overall, members considered that the process should be consistent with the intentions of the parties when they entered into the surrogacy agreement – basically that the child is being conceived as a child for the intended parents. It must also ensure that after the birth, the surrogate mother, who has experienced the pregnancy and given birth, has the option of either confirming her consent that the intended parents were the legal parents, or withdrawing this consent.

53. Other members considered that the surrogate mother's right to confirm or withdraw consent depended on whether the ovum used in the conception was her own, or from another source. However, NCWNZ notes that the UN Verona Principles require that all surrogate mothers have the right to reconsider their decision after the birth

54. If there is a surrogacy agreement between the two parties agreed to by ECART then we agree the intended parents should become the legal parents at birth after the surrogate mother has confirmed her original consent soon after the birth. However, the birth certificate should declare the birth was through gestational or traditional surrogacy and name the birth mother. The rights of the child should be paramount. The birth certificate should disclose access to the surrogate's name (gestational or traditional) as the birth mother and then the parent/s name/s.

55. For many people adopted at birth, it has been a painful and exhaustive path to find out later who their natural parents are. It is considered better to have the birth certificate display the full history of the baby. Then all the time and effort to secure an adopted or surrogate born person's birth details, before they even go about finding the said person/people, will not be such an exhausting and traumatic time for them. This is where the saying 'the rights of the child shall be paramount' comes into play. A child grows and unfortunately for some adults what happened when they were born, if a surrogacy birth, adoption or whāngai arrangement, can haunt well into adulthood.

56. The question was asked who we would be protecting by not recording on a child's birth certificate the actual history of the child's birth. The child should know their birth history.

57. An additional concern was raised about the many men donating sperm (all for the right reasons) but there should be a legal register and limit on the number of donations taken and used per person (ie we agree with the existing practice). Again, if the rights of the child are paramount then give them easy access to their birth history.

58. Some respondents thought that the rights of the parents seeking surrogacy should have priority. The surrogate has given her informed consent which has to be confirmed after the birth.

59. Concerns were raised about the process if the baby is not born healthy.

Q20: Do you prefer Option A or Option B to confirm the surrogate's consent under Pathway 1, or is there another option we should consider?

60. The majority of respondents preferred Option A to confirm the surrogate's consent under Pathway 1. This option was consistent with the surrogacy agreement entered into by all the parties, but required that the surrogate mother signs a statutory declaration confirming her consent to relinquishing all parental rights and responsibilities within a specified period after the birth.

61. Those preferring Option B believed that this gives the best legal protection for the intending parents. This option means the surrogate mother has had to think through the situation early on, but still has the right to withdraw her consent This should make the process easier for all.

62. All surrogacy arrangements should align with the HART Act and therefore the ECART and ACART regulations.

63. It was felt that there was a lack of research details in the document, e.g., the number of surrogates who withdraw their consent after the child is born, the number of surrogacy arrangements not approved by ECART, the reason why cases are turned down. There should be a requirement for annual monitoring reports to keep track of such details.

Q21: Do you agree with proposed Pathway 2, which introduces a Family Court process for establishing legal parenthood when the conditions under Pathway 1 have not been met?

64. Some respondents disagreed with a Family Court pathway.

65. Those that supported a Family Court process considered there needs to be a backup in case Pathway 1 fails for whatever reason and the Family Court process seems the most sensible. It was believed that the Family Court has the expertise to respond to issues when there are disputes among parties and the well-being of children is at stake.

66. Having an open birth certificate would hopefully eliminate the need for the court to be involved in access to information.

Children's rights to identity and access to information

Q26: Do you prefer Option 1 or Option 2 to ensure that surrogate-born children can have the opportunity to access information about their genetic and gestational origins?

67. Every child has the right to know their background. The process for accessing information should be kept simple.

68. The majority of responders preferred Option 1, as all the information is in one place which helps with accessing the information. This option provides history and genetic information for all children which could be crucial in terms of family history of genetically inherited health problems.

69. There is strong support for recording more information about the circumstances of the birth and conception in the birth register and on birth certificates. Surrogacy is now an accepted practice. Information should be available in the normal way.

70. For those few who preferred Option 2 it was because while this ensures the information is recorded, it is only accessible to those for whom it is important or necessary information. This option was seen as providing more protection for the surrogate mother and intended parents. Genetic health can be determined through DNA testing if required.

71. In the event of parents having a child of different ethnic origins, every effort must be made to engage with that culture.

Should the birth mother appear on the (long form) birth certificate or sign the birth register and why?

72. Most respondents agreed that the surrogate mother's name should appear on the long form of the birth certificate because surrogate born children have a right to access information about all the people involved in their conception and birth. There may be health issues during childhood or adulthood that require access to this information, particularly in traditional surrogacy where the surrogate mother's ovum has been used in conception.

73. The short form certificate allows privacy of the origins of a person to be protected. In the long form of the certificate, not only the surrogate mother, but also potentially gamete donors, can have their names recorded. This would allow genetic factors to be followed up if necessary for the well-being of the child. It would be valuable to also include for Māori affiliations such as iwi and hapū. The full birth register should, however, contain all information about a child's origins.

74. A few respondents felt that the name and whether the birth was through gestational or traditional surrogacy should not appear on the birth certificate and appear in the ECART record. The intended parents should sign the birth certificate.

75. Some noted that if the ovum and sperm are from the receiving parents, the surrogate mother should not be on the certificate. Likewise, if both ovum and sperm are donated.

Would this option be sufficient to enable surrogate-born Māori children to access information about their whakapapa?

76. Members considered that Option 1 would be sufficient for these children to access information about their whakapapa, but it is for people of Māori descent to elaborate on their customary laws relating to surrogate-born Māori children and their whakapapa and how such cultural values should be presented and preserved in the laws of New Zealand.

77. It was noted that family trees are a tradition for non-Māori families as well. The historic rise in activity through the likes of Ancestry.com with people having DNA tests to check

their lineage demonstrates this. Maybe there needs to be a cross relationship with the adoption laws so that such information is readily available to the child when appropriate, however that is translated.

Conclusions

78. NCWNZ acknowledges the complexity of the issues presented in the Review of Surrogacy. Although there are alternative views on aspects of the review, members support the improvement of surrogacy arrangements in New Zealand.
79. Our members have offered suggestions for strengthening and extending the Guiding Principles, and for clarifying the definitions and terms used.
80. Considerations and concerns have been outlined for the Options and Pathways to ensure implementation is fair and clear for all parties, and the wellbeing of the child is paramount.

Suzanne Manning
NCWNZ National President

Beryl Anderson
Convenor, NCWNZ Parliamentary Watch Committee