

TE KŌPŪ WHĀNGAI: HE AROTAKE | REVIEW OF SURROGACY

FREQUENTLY ASKED QUESTIONS

What is surrogacy?

Surrogacy is an arrangement where a woman (the surrogate) agrees to become pregnant and carries and gives birth to a child for another person or people who intend to raise the child from birth (the intended parents).

There are two types of surrogacy: **Traditional surrogacy** is where the surrogate's ovum is used in conception, meaning she is the child's genetic parent. **Gestational surrogacy** is where an embryo is created using gametes from the intended parents or donors. The embryo is then implanted in the surrogate using in vitro fertilisation. In a gestational surrogacy the surrogate is not the child's genetic parent.

What is the Law Commission?

Te Aka Matua o te Ture | Law Commission is an independent crown entity. Its function is to keep New Zealand's law under review and to make recommendations to reform and develop the law.

Why has the Law Commission reviewed surrogacy law?

In 2020, the Government asked the Law Commission to undertake a review of surrogacy. The [terms of reference](#) for our review required us to examine surrogacy law, regulation and practice in Aotearoa New Zealand and make recommendations to ensure the law meets the needs and expectations of New Zealanders and protects and promotes the rights and interests of people involved in surrogacy arrangements, including surrogate-born children, surrogates and intended parents.

How did the Law Commission conduct its review?

The Law Commission's review spanned 18 months and involved:

- Examining how the law works in practice, issues with the current law and available research on surrogacy from New Zealand and overseas.
- Engaging with a wide range of stakeholders including individuals with experience of surrogacy, lawyers, academics, interested organisations and government agencies.

- Publishing an Issues Paper for public consultation and considering the 223 submissions received from individuals and organisations.
- Considering international developments in surrogacy regulation and law reform initiatives in other countries.

Why is law reform needed?

The law does not recognise surrogacy as a process that creates a parent-child relationship between a surrogate-born child and the intended parents. Intended parents must instead rely on adoption law which was developed over 65 years ago and did not contemplate the modern practice of surrogacy.

Adoption and surrogacy are different forms of family building that require different legal frameworks. Surrogacy arrangements are characterised by a shared, planned intention that the surrogate will become pregnant and give birth to a child that will be raised by the intended parents. In most cases at least one intended parent will be a genetic parent to the child. Requiring parties in a surrogacy arrangement to rely on adoption law is therefore problematic – it doesn't reflect the reality of their circumstances and fails to provide for all situations (as illustrated by the Paige Harris Birth Registration Act 2022 discussed below).

There is broad acknowledgment that the current law is not fit for purpose. In its 2005 Report, *New Issues in Legal Parenthood*, the Law Commission found there was an urgent need for reform. Since then, there have been no changes to the legal framework despite both growing numbers of surrogacy arrangements and increasing dissatisfaction with the current law.

What are the Law Commission's key recommendations?

The Law Commission recommends a new framework for determining legal parenthood in surrogacy arrangements and other improvements to the way surrogacy is regulated in Aotearoa New Zealand. You can read more information about our recommendations in the executive summary or full report which are available on [our website](#).

A simple administrative pathway for establishing legal parenthood

We recommend removing the need for a court order and providing for the intended parents to become the legal parents of a surrogate-born child when three conditions are met:

- The surrogacy arrangement was approved by the Ethics Committee on Assisted Reproductive Technology (ECART). This is an existing requirement for gestational surrogacy arrangements and we found that it is a robust and effective safeguard that is widely supported.
- The intended parents have taken the child into their care.
- The surrogate gives her written consent after the child is born, confirming that she relinquishes any claim to legal parenthood.

When these conditions are met, the intended parents would become the child's legal parents by operation of law and would be able to register the child's birth in the ordinary way. From the time of the child's birth until the surrogate gives her consent, the intended parents would be deemed additional guardians of the child so that they have legal rights and responsibilities to care for the

child. The current requirement that an Oranga Tamariki social worker approve the intended parents caring for the child in their home would be removed.

A separate court pathway for establishing legal parenthood in other situations

If a surrogacy arrangement didn't go through the ECART process, or in the unlikely situation of a dispute between the parties, the Family Court should have the power to make a parentage order to recognise the intended parents as the child's legal parents, if satisfied that is in the best interests of the child. This ensures that there is an inquiry into what is in the child's best interests when the conditions of the administrative pathway haven't been met.

Financial support for surrogates

The current law is unclear about what financial support, if any, intended parents can provide to surrogates. This may leave surrogates out of pocket, places unnecessary stress on the parties' relationship and creates barriers for women considering becoming a surrogate. We recommend clarifying the law to allow intended parents to cover reasonable costs incurred by the surrogate in relation to a surrogacy arrangement, including compensation for lost income if the surrogate is unable to work because of the pregnancy or birth.

Preserving information for surrogate-born children

Information about a person's origins and whakapapa is fundamental to their sense of identity and wellbeing. It is therefore important that information about a surrogacy arrangement is preserved for the child to access in future. Currently there is no single, centralised system to collect, store and provide access to this information.

We recommend establishing a national register to record this information for surrogate-born people to access in future. It would operate like the existing register of donor-conceived people under the Human Assisted Reproductive Technology Act 2004 and would be administered by Te Tari Taiwhenua | Department of Internal Affairs.

What does the Report say about the current requirement for ECART approval?

Gestational surrogacy arrangements in New Zealand require prior ECART approval. This ensures the parties receive medical and legal advice and undertake individual and joint counselling. ECART will only approve a surrogacy arrangement if satisfied that it complies with requirements set out in guidelines issued by the Advisory Committee on Assisted Reproductive Technology.

The Commission found that the ECART process is a robust and effective safeguard that is widely supported. We recommend it remains in place for gestational surrogacy arrangements and that it also be made available for traditional surrogacy arrangements. With this process in place, we do not think that a separate court process to establish legal parenthood is necessary.

The Commission makes a range of recommendations to improve the ECART process and ensure that it operates in a timely manner. This includes recommendations to redefine and simplify Oranga Tamariki's role in the ECART process.

What will happen to birth certificates?

The existing birth register and birth certificates will continue to record a child's legal parents, which means it will record the intended parents as the surrogate-born child's parents either from the moment the child's birth is registered (under the administrative pathway) or once a court order is issued (under the court pathway). Information about the surrogate and any gamete donors will be recorded in a separate but linked register so that surrogate-born people have access to information about their genetic and gestational origins and whakapapa.

We also recommend the Government conduct a first principles review of the birth registration system to consider whether it meets the needs and reasonable expectations of New Zealanders. This review should look at the range of different circumstances of conception and birth and what information should be recorded on a birth certificate in different situations, including when a child is born through surrogacy.

What does the Report say about commercial surrogacy?

Commercial surrogacy (where the surrogate agrees to the surrogacy arrangement in exchange for the payment of a fee and the arrangement is usually governed by a contract) is illegal in Aotearoa New Zealand and would remain so under the Law Commission's recommendations.

The Commission found that paying a fee to surrogates would constitute a radical change in policy and lacked widespread support. A commercial model also raises concerns for the rights of the surrogate and the child and is inconsistent with established principles of family law. At a practical level, a commercial model would likely increase the cost of surrogacy in Aotearoa New Zealand thereby reducing access for some New Zealanders.

How will the Law Commission's recommendations improve access to surrogacy?

Intended parents can face challenges in trying to connect with potential surrogates. Improving the way surrogacy is regulated and clarifying the law in relation to financial support for surrogates should help to reduce the barriers women face when considering becoming a surrogate. We also recommend changing the law to allow advertising for lawful surrogacy arrangements, which will help intended parents seeking to connect with a surrogate, and establishing an official surrogacy website to provide up-to-date information to intended parents and women considering becoming a surrogate.

We carefully considered whether the Government should take further steps to improve access to surrogacy. One option is establishing a surrogacy register to enable those who are interested in becoming a surrogate to register their interest and be matched with intended parents. We did not recommend this option for several reasons. We think the state's proper role is to provide a safe and effective regulatory framework but not to actively facilitate private surrogacy arrangements. We also have concerns that it could duplicate some of the safeguards that exist in the ECART process and may not be workable in practice. Consultation revealed that few submitters supported a surrogacy register.

What about international surrogacy arrangements?

New Zealanders enter surrogacy arrangements overseas for different reasons, often because intended parents cannot find a surrogate in New Zealand. International surrogacy presents complex issues because countries regulate surrogacy and legal parenthood in different ways. Some international surrogacy arrangements may lack the same protections for the child, the surrogate and the intended parents as domestic surrogacy arrangements.

We recommend accommodating international surrogacy arrangements in the court pathway. This will promote and protect the rights and interests of the surrogate-born child by continuing to provide for international surrogacy arrangements to be recognised under New Zealand law. We also recommend adopting a special procedure to address the practical and legal obstacles faced by overseas surrogate-born children. It would adopt on a permanent basis the approach introduced by the Family Court in response to the Covid-19 pandemic. The intended parents would be able to start an application under the court pathway at an early opportunity and have the application heard remotely soon after the child is born so that a surrogate-born child can obtain New Zealand citizenship and enter Aotearoa New Zealand with the intended parents shortly after birth.

We also recommend that the Government consider a regime for the recognition of legal parenthood established in respect of surrogacy overseas following the completion of the work of the Hague Conference on Private International Law. This work includes proposals for an international agreement for recognising legal parentage in the context of international surrogacy arrangements.

Does the Law Commission recommend changes to adoption law?

No. Our report recommends a new framework for surrogacy arrangements that would mean intended parents would not need to rely on adoption law to become the legal parents of a surrogate-born child.

The Ministry of Justice is conducting a separate [review of adoption laws](#). The Ministry will undertake a second round of consultation in mid-2022 to report back on feedback and seek the public's views on the options the Government is considering for reform.

Isn't Parliament already changing surrogacy laws?

The Law Commission's review is separate to the Paige Harris Birth Registration Act 2022 and Tāmati Coffey's Member's Bill, the Improving Arrangements for Surrogacy Bill 2021.

Paige Harris Birth Registration Act 2022

In March 2022, Parliament unanimously passed a Private Bill to ensure that the intended mother of Paige Harris, who died before her birth, would be recorded on her birth certificate. This highlighted a problem with the current law. We make recommendations to address future circumstances where a party to a surrogacy arrangement or the child dies, so that the intended parents can still be recorded on the child's birth certificate (as happens in other situations where a child is born after the death of a parent).

Improving Arrangements for Surrogacy Bill 2021

In September 2021, the Improving Arrangements for Surrogacy Bill, a Member's Bill that proposes to amend some aspects of surrogacy law, was introduced in Parliament. Our Report and the Bill both recognise the need for change, however the scope of the Commission's review is broader and the detail of Commission's recommendations differ from the Bill's provisions.

What happens next?

The Government will consider our recommendations and decide whether to implement them.