

---

## Improving Arrangements for Surrogacy Bill

---

18 July 2022

**National Office**

Level 2

205 Victoria Street

**Wellington 6011**

T: (04) 384 4349

F: (04) 382 8356

[familyplanning.org.nz](http://familyplanning.org.nz)

*Charities # CC11104*

## Family Planning submission on Improving Arrangements for Surrogacy Bill

### Introduction

1. Family Planning is New Zealand's only national provider of sexual and reproductive health services in primary care and sexual health promotion. We are a non-governmental organisation (NGO) operating 29 clinics throughout Aotearoa New Zealand as well as services in schools and through community partnerships. We offer accredited clinical courses and workshops for doctors, nurses, midwives, and other clinicians working in sexual and reproductive health, and health promotion courses for teachers, parents and the community. We operate the national abortion telehealth service, DECIDE.org.nz, in partnership with Magma Healthcare.
2. While Family Planning is not directly involved in fertility services or surrogacy, we are a stakeholder in reproductive health and rights. We believe that surrogacy is a complex health, social and legal issue, and we provide mostly general comments based on our interest in, and knowledge of, the range of factors impacting sexual and reproductive health and rights.
3. Family Planning welcomes the review of surrogacy law in New Zealand. There is ample evidence from individuals using surrogacy, and legal experts, that the current law is not fit for purpose.
4. We are aware that in addition to this Member's Bill, the Law Commission has recently provided a report to government<sup>1</sup> with 63 recommendations for improving the legal framework for surrogacy in New Zealand. Family Planning made a submission to the Law Commission Issues Paper on Surrogacy, and we have included it with this submission (Appendix A).
5. Overall, Family Planning supports reforming surrogacy laws to make them fit for purpose. We support the Law Commission recommendations for principles underpinning surrogacy law, particularly that "Surrogacy law should support surrogates and intended parents to enter surrogacy arrangements that protect and promote their health, safety, dignity and human rights." We note that surrogates have unique rights related to bodily autonomy that must be protected and, given most surrogates are women, the impact of gender discrimination must also be a consideration.
6. We reiterate a point made in our submission to the Law Commission. Power imbalances in society related to gender, class, ethnicity, income, disability and age can play a role in

---

<sup>1</sup> Te Aka Matua o te Ture Law Commission (2022) Te Kōpū Whāngai: He Arotake Review of Surrogacy. Pūrongo | Report 146. <https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC-Report146-Review-of-Surrogacy.pdf>

decision making around surrogacy including whether to be a surrogate and access to surrogacy as a means to create a family. While this may be particularly visible in international commercial surrogacy arrangements, power imbalances can also exist in domestic surrogacy arrangements and those within families. Surrogacy law and regulation should specifically seek to protect those most vulnerable to power imbalances including women living in poverty, women experiencing violence and women who experience racial or other forms of discrimination.

7. Family Planning supports the Law Commission recommendation that “the Government should commission research led by Māori to provide a better understanding of tikanga Māori and surrogacy and Māori perspectives on surrogacy in practice.” It is essential that access to surrogacy and surrogacy outcomes are equitable.
8. Family Planning believes the thorough review by the Law Commission, and subsequent recommendations, should guide the approach to new surrogacy laws in Aotearoa New Zealand. Family Planning comments on what appear to be a few major differences between the Bill and the Law Commission recommendations as they related to reproductive rights.

### **Pre-birth or post-birth consent to parenthood**

9. Family Planning understands that the Improving Arrangements for Surrogacy Bill proposes that in some circumstances, surrogacy orders could be obtained prior to the birth of a child and these orders would make surrogacy arrangements enforceable. “The court may issue a surrogacy order if it is satisfied that the parties consented to the surrogacy and the Ethics Committee on Reproductive Health provided its approval under the Human Assisted Reproductive Technology Act 2004.”<sup>2</sup> With a surrogacy order in place, the intended parents would become the legal parents automatically at birth. As described by the Law Commission, this Bill proposes a pre-birth judicial model in certain circumstances.
10. In contrast, the Law Commission recommends that surrogacy arrangements should not be enforceable, except in relation to costs incurred by the surrogate, and that New Zealand should have laws that require a post-birth model, where the surrogate provides final consent to transferring legal parenthood to the intended parents after the birth. In the rare event that a surrogate chooses to withhold consent, then the intended parents could initiate a court process to try to obtain legal parenthood.

---

<sup>2</sup> Eñano Katrina (2022). Proposed law to simplify surrogacy arrangements passes first reading. *New Zealand Lawyer* <https://www.thelawyer.com/nz/news/general/proposed-law-to-simplify-surrogacy-arrangements-passes-first-reading/411161>

11. The Law Commission explains the rationale for a post-birth consent process in sections 6.115-6.120 of the report including that this approach “protects the surrogate’s rights to bodily autonomy throughout the pregnancy and birth, including her autonomy to make decisions about her healthcare.”<sup>3</sup> This includes the surrogate’s right to terminate a pregnancy.
12. A post-birth consent approach is also most consistent with international law preventing the sale of children. Post-birth consent removes the ability to determine parenthood through a contract before a child is born, which essentially turns reproduction and a child into a commodity.
13. The Law Commission states that a majority of jurisdictions around the world require post-birth consent for surrogacy.
14. Family Planning supports the Law Commission recommendation that the surrogate must provide final consent post-birth in all circumstances, protecting bodily autonomy and reproductive rights.
15. Family Planning acknowledges that the Improving Arrangements for Surrogacy Bill would not allow surrogacy orders to be made when the surrogate has a genetic connection to the child resulting from the surrogacy. Family Planning acknowledges that when a surrogate does not have a genetic connection, the situation may be considered even more complex. Some people may believe that a surrogate does not have a right to consent or not consent to parenthood if the surrogate has no genetic connection (a donated egg) to the foetus. However, if the surrogate has no right to consent when there is no genetic connection, then the surrogate is truly just a vessel, with no reproductive rights in the surrogacy arrangement. Also, as the Law Commission states “many people become parents using donated gametes, and gamete donors themselves are not considered parents under the law. This suggests that genetic connection, of itself, is not a complete answer to determine legal parenthood.”<sup>4</sup>

### **Surrogacy orders vs an administrative pathway**

16. Family Planning supports the Law Commission recommendation that following an Ethics Committee on Assisted Reproductive Technology (ECART) process and approval, legal parenthood can be transferred to the intended parents through a simple administrative process following the consent of the surrogate post-birth. This is different to the approach in the Bill, which we understand would still require court processes either before or after birth, without the option of an administrative pathway.

---

<sup>3</sup> Law Commission Report 146 (2022) pg. 199.

<sup>4</sup> Law Commission Report 146 (2022) pg. 192.

17. The ECART process appears to be sufficiently robust, and, with the consent of the surrogate post-birth, there does not seem to be a need for a court process for many surrogacy arrangements. Removing the court process supports people's reproductive autonomy and decision making around pregnancy and parenthood.

### **Gender neutral language**

18. Family Planning notes that the Bill defines a surrogate as a "woman who becomes pregnant for the purpose of transferring custody under a surrogacy arrangement of a child born as a result of the pregnancy".

19. This language does not recognise gender diverse or transgender surrogates. We recommend that the definition be changed to read a "person who becomes pregnant for the purpose of transferring custody under a surrogacy arrangement of a child born as a result of the pregnancy".

Thank you for the opportunity to contribute.

Nāku noa, nā

A handwritten signature in dark ink, appearing to read 'Jackie Edmond', with a stylized flourish at the end.

Jackie Edmond  
Chief Executive

## **Appendix A: Family Planning submission to the Law Commission Review of Surrogacy Law**

29 September 2021

Te Aka Matua o te Ture  
Law Commission  
Review of Surrogacy  
PO Box 2590  
Wellington 6140

Email: [surrogacy@lawcom.govt.nz](mailto:surrogacy@lawcom.govt.nz)

Tēnā koutou

Thank you for the opportunity to comment on the Law Commission review of surrogacy.

Family Planning is New Zealand's only national provider of sexual and reproductive health services for primary health and sexual health promotion. We are a non-governmental organisation (NGO) operating 29 clinics throughout Aotearoa New Zealand, as well as services in schools and through community partnerships. We offer accredited clinical courses and workshops for doctors, nurses, midwives and other clinicians working in sexual and reproductive health, and health promotion courses for teachers, parents and the community.

While Family Planning is not directly involved in fertility services or surrogacy, we are a stakeholder in conversations about policy and law impacting reproductive health and rights. We believe that surrogacy is a complex health, social and legal issue and is generally not within our area of expertise. However, we would like to provide comment on the guiding principles for surrogacy law reform, given our interest in and knowledge of the range of factors impacting sexual and reproductive health and rights.

Family Planning generally supports the six guiding principles for surrogacy law reform proposed by the Law Commission, but believes they could be strengthened.

Family Planning makes two suggestions to strengthen the principles.

1. Family Planning recommends that ensuring reproductive autonomy should be explicitly included as a guiding principle. While it is clear from the issues paper that reproductive autonomy is currently included under principle 2 - *Surrogacy law should respect the*

*autonomy of consenting adults in their private lives* - Family Planning suggests that reproductive autonomy is a principle so central to surrogacy, and so inextricably linked to human rights and gender equality, that it should be highlighted and discussed separately.

The pressures and factors impacting the autonomy of a surrogacy partner or intended parent are different to those impacting the reproductive autonomy of a woman or person with a uterus within whose body reproduction takes place. Because reproduction takes place within someone's body, that person has additional rights related to bodily autonomy as compared to other adults involved in surrogacy.

Reproductive rights and freedoms have been long fought and remain unrealised for many people. Whether due to barriers accessing contraception or abortion, stigma around pregnancy or unintended pregnancy, racism, gender discrimination and/or sexual violence, many people still do not have complete autonomy over their reproductive decisions. It is essential that surrogacy laws enable and enshrine reproductive autonomy and reproductive justice.<sup>5</sup>

*"Global surrogacy should be analyzed using an intersectional analysis of race, gender, and class to best address how reproductive justice may be achieved in such [a] market."*<sup>6</sup>

Reproductive autonomy, like the best interests of the surrogate-born child, should be paramount. Surrogacy, and decision making related to surrogacy, should never override or undermine the personal and bodily autonomy of individuals and their reproductive rights and freedoms. We recommend that this principle should be clearly articulated as a guide for law reform.

2. Family Planning recommends adding a principle related to equality and non-discrimination. Power imbalances in society related to gender, class, ethnicity, income, disability and age can play a role in decision making around surrogacy including whether to be a surrogate and access to surrogacy as a means to create a family. While this may be particularly visible in international commercial surrogacy arrangements, power imbalances can also exist in domestic surrogacy arrangements and those within families. While these issues are discussed under Principle 3 - *Effective regulatory safeguards must be in place* - the principle itself does not articulate why safeguards must be in place or that safeguards should focus specifically on ensuring equality and non-discrimination. The issues paper states "In any surrogacy arrangement, there is the potential for exploitation on both sides." (pg 37). While this is true, given that some people are far more likely to

---

<sup>5</sup> Seema Mohapatra Achieving Reproductive Justice in the International Surrogacy Market, 21 Annals Health L. 191 (2012). Available at: <http://lawecommons.luc.edu/annals/vol21/iss1/18>

<sup>6</sup> Ibid, pg. 10.

experience discrimination and powerlessness in society, surrogacy law and regulation should specifically seek to protect those most vulnerable to power imbalances including women living in poverty, women experiencing violence and women who experience racial or other forms of discrimination. Power imbalances in the context of surrogacy are most likely to result in reproductive coercion and reproductive injustice. The Center for Reproductive Rights states:

*“Surrogacy contracts, especially cross-national surrogacy contracts where income and class differentials are stark, must include measures to address potential power imbalances between the potential surrogate and the intended parents.”<sup>7</sup>*

While principles and policy alone will not ensure power imbalances are addressed in surrogacy arrangements and practices, it will at least set a clear standard and expectation that these issues must be considered.

Thank you for the opportunity to make a submission on the Law Commission review of surrogacy.

Ngā mihi nui

Jackie Edmond  
Chief Executive

---

<sup>7</sup> Center for Reproductive Rights (2019) Submission from the Center for Reproductive Rights following the call for inputs by the Special Rapporteur on the Sale and Sexual Exploitation of Children on Safeguards for the protection of the rights of children born from surrogacy arrangements. <https://reproductiverights.org/wp-content/uploads/2020/12/Submission-Sale-Of-Children-Surrogacy.pdf>