

1<sup>st</sup> October 2021

## **Review of Surrogacy**

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The New Zealand College of Midwives is the professional organisation for midwifery. Our members are employed and self-employed and collectively represent over 90% of the practising midwives in this country. There are approximately 3,000 midwives who hold an Annual Practising Certificate (APC). These midwives provide maternity care to, on average, 60,000 women and babies each year. New Zealand has a unique and efficient maternity service model which centres care around the needs of the woman and her baby.

Midwives undertake a four-year equivalent undergraduate degree to become registered followed by a first year of practice program that includes full mentoring by senior midwives. The undergraduate curriculum meets all international regulatory and education standards. Midwives are authorised prescribers in relation to their Scope of Practice as determined by the Midwifery Council.

Midwives provide an accessible and primary health care service for women in the community within a continuity of carer model as Lead Maternity Carers. Midwives can also choose to work within secondary and tertiary maternity facilities, providing essential care to women with complex maternity needs.

The College offers information, education and advice to women, midwives, district health boards, health and social service agencies and the Ministry of Health regarding midwifery and maternity issues. Midwives interface with a multitude of other health professionals and agencies to support women to achieve the optimum outcome for their pregnancies, health and wellbeing

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1<sup>st</sup> October 2021

The Law Commission

## **Review of Surrogacy**

Tēnā koutou

The New Zealand College of Midwives (the College) welcomes the opportunity to provide feedback for the review of surrogacy. Thank you for a well written, extensively researched and referenced consultation document which presents the issues in detail.

Feedback on the consultation questions is below

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

1. The best interests of the surrogate-born child should be paramount.
2. Surrogacy law should respect the autonomy of consenting adults in their private lives.
3. Effective regulatory safeguards must be in place.
4. Parties should have early clarity and certainty about their rights and obligations.
5. Intended parents should be supported to enter surrogacy arrangements in Aotearoa New Zealand rather than offshore.
6. Surrogacy law should enable Māori to act in accordance with tikanga and promote responsible kāwanatanga (the right of the Crown to govern) that facilitates tino rangatiratanga (the right of Māori to exercise authority according to tikanga).

The College agrees with the six guiding principles for reform but feels there is a significant omission that needs to be addressed. The principles need to make it clear that it is women who are undertaking pregnancies and birthing (and potentially undertaking risk in some situations) for surrogacy purposes and although there is reference in the second principle to the autonomy of consenting adults, regulatory safeguards in the third principle, and mention of rights in the fourth

principle, we consider this is insufficient. Surrogacy arrangements raise ethical issues for women related to reproductive freedom, health and wellbeing, and this includes potential exploitation. The importance of recognition of the rights of women and the fact that pregnancy and birth are undertaken by women in this context needs to be clearly stated within the principles.

**Q2 Do you have any views on the matters of particular concern to Māori we have identified?**

**Q3 Do you think our proposals to address access to surrogacy elsewhere in this Issues Paper adequately address access to surrogacy by Māori?**

**Q4 Do you agree that surrogacy law and regulation should enable Māori to act in accordance with tikanga if they wish to do so? If so, do you think any of the options for reform we have identified, or any other option, should be adopted to improve the current position?**

**Q5 Do you think that the options for reform in Chapter 8 to ensure information about a surrogate-born child's genetic and gestational origins is collected and recorded by the state are sufficient to enable surrogate-born Māori children to access information about their whakapapa?**

**Q6 Do you agree that the law should clarify that a Māori child's whakapapa is not affected by the allocation of legal parenthood in a surrogacy arrangement?**

**Q7 Do you think the lack of legal recognition of whāngai arrangements is a particular matter of concern in the surrogacy context?**

**Q8 Do you think that Māori representation on ACART and/or ECART should be improved?**

The College supports engagement in decolonisation processes in Aotearoa. Tino rangatiratanga / Māori control over Māori lives, and mātauranga Māori means that feedback from Māori on the issues raised above is essential. We consider that appropriate Māori representation on ACART and ECART is also an issue to be carefully addressed and this should be a key part of transformational change.

**Q9 Do you agree with the issues we have identified with the approval process for surrogacy arrangements? Are there other issues we should consider?**

The College agrees that the issues for approval of surrogacy arrangements have been identified.

**Q 10 Do you agree with our preliminary view that gestational surrogacy arrangements should continue to require ECART approval? If not, please explain your views.**

Agree

**Q 11 Which options to improve the ECART process do you prefer? Are there other changes that should be made?**

The College notes the recognition in chapter 5 that women are directly and significantly more affected by assisted reproduction processes and that their wellbeing must be protected. Clear guidance which includes this should be stated as part of any reform.

Increasing the capacity of ECART would seem to make logical sense to reduce long delays for applications to be considered. There also appears to be some equity issues for these processes with the costs likely to be incurred by intended parents prohibiting access for some. Inequity of access to ECART services in terms of ECART committee capacity, regional barriers with the lack of availability or access to counsellors, medical and legal services needs to be addressed. The College notes that surrogacy law reform in Victoria, Australia has now included some reimbursement of the out of pocket expenses of birth mothers, and their partners, and also provision for counselling expenses.

Intending parents' financial status information does not seem to us to be a key issue in terms of assessing suitability for parenting, and the Oranga Tamariki requirements to be met by intending parents will need some review.

The College does not necessarily agree with the statement attributed to Fertility Associates about traditional surrogacy arrangements being the most challenging and risky when the surrogate's eggs are being used and would like to see more data obtained about this by the Law Commission before any decisions are made. We also would be interested to know how many birth mothers actually do change their minds as we suspect this occurrence is likely to be rare despite it often being described as a risk. ECART involvement with surrogacy approval processes would appear to be the best arrangement.

**Q 12 Do you agree with our preliminary view that parties to a traditional surrogacy arrangement should be able to access the same ECART process as parties to a gestational surrogacy arrangement?**

Agree

**Q 13 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?**

The College prefers Option 2 which is to enable direct applications to ECART without involving a fertility clinic. We understand that this will create capacity issues for ECART and recommend that the capacity of ECART is increased and that resourcing and funding issues are addressed.

**Q 14 Do you agree with the issues we have identified with financial support for surrogates? Are there other issues we should consider?**

The College considers that women who are undertaking surrogacy and intended parents should be eligible for parental leave. Pregnant women acting as surrogates should not incur expenses and lost earnings should be considered along with medical, travel and accommodation expenses. It should also be made clear that surrogate mothers would be entitled to ACC support for maternal birth injuries where necessary.

**Q 15 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?**

Agree – reasonable costs should be permitted to remove any financial barriers to surrogacy arrangements.

**Q 16 Are there other costs you would include in this list? 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?**

The College agrees with clarifying the law with respect to post-birth recovery leave for women who are surrogates. We consider that a woman pregnant with a surrogate baby should be eligible for the same amount of paid leave as other parents. It is important to consider the differences between maternity leave and parental leave – recovery from birth may take longer than six weeks and although it may not take as long as 26 weeks we recognise the approach of aligning current entitlements as being the simplest approach.

**Q 17 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)?**

The College does not support commercial surrogacy arrangements due to the potential for exploitation of women, but there may be situations where other reasonable expenses may be incurred by the woman acting as a surrogate and provision should be made to ensure there are no financial costs to the surrogate. It may be possible to add another category into the list of permitted costs that covers unexpected issues.

**Q 18 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?**

Agree.

**Q 19 Do you agree with proposed Pathway 1 to replace the adoption process with recognition of the intended parents as the child's legal parents by operation of law when a surrogacy arrangement receives ECART approval and the surrogate consents?**

Agree, although we are not clear of the time frame when the surrogate mother would sign the statutory declaration confirming consent to relinquish parental rights. Option A states – “after birth” and we consider that immediately after giving birth is an inappropriate time option. We consider it appropriate that the birth mother is the legal parent at birth and she should be recorded as the mother.

**Q 20 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?**

Option B clarifies the issue we raised in Q 19, in that a prescribed period of time after birth is identified, although the time for appropriate reflection is not yet decided. The College notes the differences between time periods in Canada and the UK. Given that there will be individual differences between birth mothers as to appropriate reflection times, and there is a requirement for the intended parents to register the birth of the child by eight weeks, we propose that a reasonable option would be a time frame that meets both these requirements such as within two to six weeks of the birth.

**Q 21 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?**

Agree

**Q 22 Do you agree with our proposed list of relevant considerations the Family Court should have regard to when determining the legal parenthood of a surrogate-born child? Are there other considerations you would include in this list?**

Agree

**Q 23 Do you agree that the Family Court should seek a social worker's report when determining the legal parenthood of a surrogate-born child?**

Agree

**Q 24 Do you agree that the surrogate's partner should not be a legal parent of a surrogate-born child at birth?**

Agree

**Q 25 Do you agree with the issues we have identified with children's access to information in surrogacy arrangements? Are there other issues we should consider?**

Agree

**Q 26 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?**

The College prefers option 2 - recording information about surrogacy arrangements as part of the HART register – but this is in the absence of a wide review of the birth registration system. We do consider that information about the birth mother should be accessible to the surrogate child on a birth certificate.

**Q 27 Do you agree with the issues we have identified with international surrogacy? Are there other issues we should consider?**

We agree that Aotearoa New Zealand should continue to provide a process for recognising New Zealand intended parents' legal parenthood in international surrogacy arrangements to promote the best interests of the child by ensuring their rights to identity, nationality, family life, health, and freedom from discrimination are protected.

**Q 28 Do you agree with our proposal that Pathway 2 (Family Court determination of legal parenthood) should be available to New Zealand intended parents in international surrogacy arrangements?**

Agree

**Q 29 Do you prefer Option A or Option B in relation to the timing of applications under Pathway 2 in international surrogacy arrangements, or is there another option we should consider?**

Option B

**Q 30 Do you think Aotearoa New Zealand should recognise a determination of legal parenthood made in an overseas jurisdiction if that country has similar regulation of surrogacy arrangements?**

As described in the issues document, automatic recognition of the parent-child relationship in the surrogate-born child's country of birth can be problematic particularly in terms of the best interests of the child. There is also the issue of commercial surrogacy to bear in mind. The College considers that each case should be assessed on an individual basis. The College understands that ECART is not best placed for involvement in international surrogacy at the moment and that some aspects of ECART's work such as counselling could not be applied in international situations, but we feel

strongly that an ethics committee should have some involvement with these surrogacy arrangements. It seems reasonable to review the terms of reference for ECART and to significantly increase their capacity.

**Q 31 Do you think that Oranga Tamariki should have a clearer role, such as running educational initiatives for people contemplating international surrogacy or involving social workers earlier in the international surrogacy process?**

The College considers the involvement of Oranga Tamariki could be beneficial in international surrogacy processes particularly in an educative role as the issues that need to be considered by intending parents are complex. Specialist social workers could also play a valuable role in this area. One issue of concern is the capacity of Oranga Tamariki to undertake this work which would need to be addressed prior to any decisions being made.

**Q 32 Do you agree with the issues we have identified with access to surrogacy in Aotearoa New Zealand? Are there other issues we should consider?**

Agree

**Q 33 Which option(s) to improve availability of information on and public awareness do you prefer? Are there other options we should consider?**

A comprehensive guide on surrogacy law and practice, along with a website would be beneficial. The College does not consider that a public information campaign is appropriate.

**Q 34 Which government agency do you think is best suited to provide information on and raise public awareness of surrogacy?**

The College considers the Ministry of Health should provide the information, but collaborative work between the MOH and ECART would be our preference.

**Q 35 Should advertisers be able to receive payment for publishing advertisements in relation to lawful surrogacy arrangements?**

The College does not agree with advertisers receiving payment as this increases issues of inequity and raises issues related to the commercialisation of surrogacy

**Q 36 Do you think additional steps should be taken to reduce the barriers intended parents face connecting with surrogates? If so, which option do you prefer?**

A surrogacy register would be our preferred option rather than the involvement of private intermediaries.



**Q 37 What steps do you think should be taken to address concerns about the limited number of lawyers with experience advising on surrogacy arrangements?**

The College would like to see opportunities for professional development in surrogacy matters for lawyers. Interestingly there used to be postgraduate courses in child advocacy offered at the University of Otago in Dunedin through the Children's Issues Centre which many lawyers wishing to increase their knowledge of being a legal advocate for the child attended. These courses included a range of topics including adoption and surrogacy. The development of a similar postgraduate programme again would be valuable.

**Q 38 Do you agree that the Government should conduct a review of how it funds surrogacy, with a view to making surrogacy in Aotearoa New Zealand more accessible for New Zealanders?**

The College considers that a Government review of surrogacy funding would be valuable but consultation would be essential.

**Q 39 Do you agree that the Government should investigate the supply of donor gametes in Aotearoa New Zealand, including whether donors ought to be compensated for reasonable expenses incurred and whether the restrictions on importing gametes and embryos into Aotearoa New Zealand should be relaxed in certain limited circumstances?**

The College considers that an investigation is reasonable but it should consider the different costs in terms of risk and medical requirements, for example, in terms of the procurement of different donor gametes and embryos. We also feel that women's reproductive work should be valued whether as donors of gametes/embryos, or if pregnant as a surrogate. It does feel like there is an increased potential for exploitation and also complexities due to differences in legal requirements in different countries. If this practice does go ahead, the College recommends close critical scrutiny and follow-up of all processes involved, including recruitment of donors, treatments, and appropriate reimbursement, and/or reasonable compensation. The health and safety of donors and recipients is paramount.

**Conclusion**

Midwifery in Aotearoa utilises a partnership model of care which is holistic, and underpinning this practice philosophy is a concern for women's rights, health, psychological wellbeing, sexuality, reproduction, social support, autonomy, and empowerment. <sup>1</sup>

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<sup>1</sup> New Zealand College of Midwives. (2015). *Midwives Handbook for Practice*, p. 3.  
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Powell and Baird suggest there are relevant rights related to women acting as surrogates that are recognised in international human rights law. These are the right to health; the right to privacy; the right to work; the right to just and favourable working conditions; and the right to freedom from discrimination.<sup>2</sup> The College considers that the birth mother should retain her autonomy in regards to her body and her pregnancy which includes being able to determine care received during pregnancy, labour, and birth and the postnatal period. Informed consent is paramount and this also includes the ability to refuse / withhold consent to treatment without coercion.

The College looks forward to the development of a best-practice model of surrogacy which aims to ensure that all parties, including intending parents, are fully informed about the psychological, ethical, and social issues involved in embarking on a surrogacy journey, along with equitable access to the services required. Ensuring protection for the bodily autonomy of the surrogate mother and the best interests of the child are paramount, and we consider that ECART involvement in all surrogacy matters is essential. As previously noted this would require a significant increase in resourcing and capacity for ECART. The principles of justice, autonomy, and equity, inherent in surrogacy practices will continue to be ethical challenges for ongoing consideration.

Thank you for the opportunity to provide feedback.

Ngā mihi

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New Zealand College of Midwives

Te Kāreti O Nga Kaiwhakawhanau Ki Aotearoa

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<sup>2</sup> Powell, R., & Baird, N. (2020). *Surrogacy and human rights in New Zealand*.

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