

Hon Ginny Andersen
Minister of Justice

Proactive release – Government response to the Law Commission’s report: *Te Kōpū Whāngai: He Arotake Review of Surrogacy*

Date of issue: 5 September 2023

The following documents have been proactively released in accordance with Cabinet Office Circular CO (23) 4.

Some information has been withheld on the basis that it would not, if requested under the Official Information Act 1982 (OIA), be released. Where that is the case, the relevant section of the OIA has been noted and no public interest has been identified that would outweigh the reasons for withholding it.

No.	Document	Comments
1	A new surrogacy system: Response to the Law Commission’s report: <i>Te Kōpū Whāngai: He Arotake Review of Surrogacy</i> <i>Cabinet minute CAB-23-MIN-0164.01</i> Cabinet Office <i>Meeting date: 8 May 2023</i>	Some information has been withheld in accordance with the following sections of the OIA: <ul style="list-style-type: none">• section 9(2)(f)(iv) to protect the confidentiality of advice tendered by Ministers of the Crown and officials, and• section 9(2)(h) to maintain legal professional privilege.
2	A new surrogacy system: Response to the Law Commission’s report: <i>Te Kōpū Whāngai: He Arotake Review of Surrogacy</i> <i>Cabinet paper</i> Minister of Justice <i>8 May 2023</i>	Some information has been withheld in accordance with section 9(2)(f)(iv) to protect the confidentiality of advice tendered by Ministers of the Crown and officials.

A new surrogacy system: Response to the Law Commission's report: *Te Kōpū Whāngai: He Arotake Review of Surrogacy*

Proposal

- 1 This paper recommends that Cabinet:
 - 1.1 agrees in-principle to modernise surrogacy law and practice, consistent with recent recommendations from the Law Commission, **Section (9)(2)(f)(iv)** [redacted]
 - 1.2 agrees to adopt the Improving Arrangements for Surrogacy Bill, a member's bill, as a Government bill and to use the bill to progress the legislative reforms recommended by the Commission;
 - 1.3 **Section (9)(2)(f)(iv)** [redacted]
[redacted]
[redacted];
and
 - 1.4 agrees that the decisions in [1.1] and [1.2] above, and a forthcoming Cabinet paper from the Minister of Internal Affairs, constitute the Government's response to the Law Commission's report.

Relation to government priorities

- 2 This paper implements the Government's 2020 manifesto commitment to review surrogacy policies with a view to removing discriminatory practices.¹

Executive Summary

- 3 Surrogacy can provide an opportunity for people to have a child when they are otherwise unable to do so. Because surrogacy requires the involvement of a surrogate who agrees to become pregnant and give birth to a child for the intended parents, regulation must balance complex ethical, cultural, legal, and medical considerations. It must protect the rights of participants, particularly surrogate-born children.
- 4 After an extensive review, the Law Commission has found:²
 - 4.1 laws about legal parenthood do not recognise surrogacy as a distinct way of building families. Intended parents, who enter a surrogacy arrangement with the intention of becoming parents to a surrogate-born

¹ Rainbow Policy Factsheet *Relentlessly Proud: Labour's Rainbow Policies*.

² Law Commission, Report 146: *Te Kōpū Whāngai: He Arotake Review of Surrogacy*, April 2022.

child, need to adopt the child to become their legal parents. The law also does not recognise international surrogacy;

4.2 there are opportunities to strengthen protections for participants, particularly surrogate-born people's right to know their origins. The state does not record that a child was born via surrogacy; and

4.3 aspects of law and practice are inaccessible. The law is unclear about whether surrogates can receive financial support, there are service delays, and there is limited government information about surrogacy.

5 I recommend changes to law and practice consistent with the Law Commission's recommendations. The principal legislative changes will:

5.1 create a new legal process for determining the legal parents of a surrogate-born child, including in international arrangements;

5.2 require the state to enable surrogate-born people to access information about their genetic and gestational origins and whakapapa; and

5.3 clarify the financial support that can be provided to surrogates.

6 I recommend the Government adopts the Improving Arrangements for Surrogacy Member's Bill (the Bill), which is currently before the Health Committee, and uses it to progress the legislative amendments. This means the Committee will determine which amendments are recommended to the House. The responsible member, Tāmati Coffey MP, is comfortable with this process.

7 Section (9)(2)(f)(iv)

[REDACTED]

8 Section (9)(2)(f)(iv)

[REDACTED]

9 I recommend the decisions in this paper, and a forthcoming paper from the Minister of Internal Affairs, constitute the Government's response to the Law Commission's report. The Minister of Internal Affairs intends to bring a paper addressing the Commission's recommendation to review the birth registration system generally.

Background

- 10 Surrogacy is generally used by people who experience infertility or lack the sex characteristics to become pregnant. Use is increasing. Currently up to 50 children are estimated to be born each year as a result of surrogacy arrangements involving New Zealand-based intended parents. About 60% of these are domestic arrangements, and 40% are international arrangements.
- 11 In 2020, the Government asked the Law Commission to review surrogacy law.

The Law Commission found that there is a pressing need for reform

- 12 The Law Commission reported in April 2022 with 63 recommendations. It found:
- 12.1 people find it hard to access surrogacy. There is no comprehensive government information available about the surrogacy process. Intended parents find it difficult to locate someone willing to be a surrogate and to access fertility treatment and donated gametes (ova and/or sperm) where these are required;
 - 12.2 there is a backlog of applications for the ethics approval process that some surrogacy arrangements must receive before they can proceed;
 - 12.3 there needs to be further exploration of tikanga Māori and surrogacy, and Māori perspectives on surrogacy in practice;
 - 12.4 laws on legal parenthood do not accommodate surrogacy well. Intended parents must adopt surrogate-born children, a process which lacks safeguards for children, does not respect participants' wishes, and does not account for all scenarios (such as the death of an intended parent). International arrangements are not directly recognised by our laws;
 - 12.5 there should be stronger protections for surrogate-born people's access to information about their origins, to give effect to their rights to identity; and
 - 12.6 there is uncertainty about whether costs incurred by surrogates as a result of a surrogacy arrangement can be reimbursed. This may reduce the number of people willing to be a surrogate and leave surrogates bearing some of the costs of an arrangement.

Reforms will create clearer processes for building families and protect rights

- 13 To address the above problems, I recommend Cabinet accepts the Law Commission's recommendations, in some cases with modifications or extensions. **Section (9)(2)(f)(iv)** I also propose Cabinet delegates three policy decisions to me, to enable further targeted consultation before policy changes are finalised. These decisions are outlined in [25], [27], and [35]. I will consult interested colleagues as required on these, including

the Minister for Children where proposals affect the rights and wellbeing children.

- 14 I describe the main proposals below, identifying any substantive modifications I propose to the Law Commission's recommendations. **Appendix A** sets out the full list of recommendations and some additional supporting changes. In some areas the Law Commission proposed a review of current policy without making a final recommendation. Several of these reviews have now been completed and the appendix recommends changes reflecting the reviews' outcomes.
- 15 Collectively these changes will mean:
 - 15.1 intended parents and surrogates have a clearer process for building a family via surrogacy; and
 - 15.2 the rights and interests of participants are protected, particularly surrogate-born children's rights to identity, nationality, and family life under the United Nations Children's Convention on the Rights of the Child; surrogates' rights to bodily autonomy; and intended parents' right to have a family.
- 16 The Minister of Internal Affairs will bring a separate paper to Cabinet to respond to the Law Commission's recommendation relating to birth registration.

Improving the ethics committee approval process for domestic surrogacies

- 17 I recommend requiring ethics committee approval for all surrogacy arrangements in New Zealand that require the assistance of a fertility clinic. Currently only gestational arrangements³ require approval, which is given by a multidisciplinary ethics committee in accordance with ethics guidelines. This proposal will extend the approval process to a small new category of surrogacy arrangement – traditional surrogacy arrangements⁴ that involve a fertility clinic.
- 18 I also propose the approval process be available (but not required) where surrogacy arrangements do not involve a clinic. Intended parents will be able to formalise their legal relationship to the surrogate-born child without the involvement of the courts if their arrangement has ethics approval (subject to other conditions including the post-birth consent of the surrogate). This change will be an incentive to seek ethics approval.
- 19 These changes will mean the regulatory system better reflects the ethical complexity of arrangements where a surrogate will be genetically linked to the surrogate-born child.

³ In a gestational surrogacy arrangement the surrogate does not use her own ovum in conception.

⁴ In a traditional surrogacy arrangement the surrogate's ovum is used in conception, meaning the surrogate has a genetic link to the child. These arrangements can occur without the assistance of a fertility clinic.

- 20 To support the ethics committee process, I also recommend:
- 20.1 narrowing the role of Oranga Tamariki in the process. Oranga Tamariki currently assesses intended parents' general suitability to care for the child. It will instead advise the ethics committee whether it has any concerns that intended parents pose risks of serious harm to any future child. The extent of its assessment will depend on whether an initial basic background check⁵ identifies a risk. The reform will make Oranga Tamariki's role more proportionate to the risk of harm and respect intended parents' rights to a family;
 - 20.2 commissioning Māori-led research into tikanga Māori and surrogacy and into Māori perspectives on surrogacy in practice. The Law Commission took account of tikanga principles like whakapapa and whanaungatanga across its report. It recommended further research to address an absence of deliberative discussions among Māori about tikanga relating to surrogacy. It considered the research could be used to inform the practice of Māori involved in surrogacy arrangements, ethics committees, and other participants within a reformed regulatory system. The research's timing will be assessed alongside other Ministry of Health priorities.

Creating new ways to determine legal parenthood in domestic surrogacies

- 21 I recommend amending the laws that determine the legal parenthood of surrogate-born children. 'Legal parenthood' refers to the parent-child relationship established in law. Rights and entitlements flow from this relationship, including under inheritance, child support, and citizenship laws. Currently a surrogate-born child is legally the child of the surrogate at birth. Intended parents must adopt the child to become their legal parents.
- 22 I recommend legal parenthood is instead determined through one of two new legal pathways. Both pathways will contain safeguards for participants, including continuing to provide that the surrogate is the child's legal parent at the child's birth.
- 23 An administrative pathway will enable intended parents to be recognised as the surrogate-born child's legal parents by operation of law, without involvement of the courts. A separate court pathway will be available where the administrative pathway does not apply: for example, where a surrogacy arrangement does not have ethics approval, or a dispute has arisen. The Family Court will determine legal parenthood based on an assessment of the child's best interests, informed by a social worker's report.
- 24 Both pathways will be available if an intended parent or the child has died. This will avoid a recurrence of the situation faced by Paige Harris.⁶

⁵ This would involve basic checks such as police vetting and child protection checks in relation to the intended parents.

⁶ Paige Harris is a surrogate-born child whose intended mother died before her birth. Under the current law, her intended mother's name was unable to be recorded on her birth certificate as she had

25 To ensure the law is clear about when the Court can hear a case, future legislation will need to set out who is eligible to take a surrogacy case to the Family Court. The Law Commission did not make a detailed recommendation about this. Further detailed work is required in consultation with the judiciary. I am therefore seeking delegated authority to make policy decisions on the policy detail of who has standing in surrogacy cases to:

25.1 achieve the Law Commission's intent that the Court's jurisdiction is sufficiently broad that it can respond to the range of circumstances in which a child's legal status could be relevant for the purposes of New Zealand's law. This will avoid the risk the child is left without a status, or with a 'default status' that does not align with the child's best interests or parties' intentions; and

25.2 ensure the Court only has jurisdiction where an applicant has sufficient connection to New Zealand. This will avoid the New Zealand court being used to bypass more restrictive overseas laws or to intrude on matters more properly decided by another jurisdiction.

Improving access to identity information

26 I recommend reforms to better recognise the fundamental importance to identity and wellbeing of knowing one's genetic and gestational origins and whakapapa. I recommend requiring the Registrar-General to preserve information about surrogate-born people's genetic and gestational origins, ethnicity, cultural affiliation, and hapū and iwi affiliations (where known) in domestic arrangements, and in international arrangements to the extent this information is available.

27 Further work is required on the legal and operational steps needed to achieve the intent of this Law Commission recommendation and give effect to the surrogate-born person's rights to identity. I am therefore seeking delegated authority to make policy decisions on the legislative and operational process required to enable this information to be captured and recorded. Officials will consult the Office of the Privacy Commissioner as necessary.

Clarifying financial support for surrogates in domestic arrangements

28 I propose continuing the current prohibition on domestic commercial surrogacy arrangements. However, I recommend clarifying that an individual may pay a surrogate reasonable surrogacy-related costs resulting from an arrangement, such as the cost of health insurance obtained for the surrogate in connection with the arrangement. This means surrogates will not be left out of pocket as a result of the arrangement.

Improving access to domestic surrogacy

29 I recommend reducing barriers to surrogacy, including by:

died prior to an adoption order being made. A private bill titled the Paige Harris Birth Registration Bill was passed to add her mother's name to her birth certificate.

- 29.1 providing comprehensive and clear online information about the surrogacy process and relevant law; and
- 29.2 allowing paid advertising for lawful surrogacy arrangements, to reduce barriers to intended parents finding potential surrogates.

Accommodating international surrogacy arrangements

- 30 International surrogacy involves New Zealand-based intended parents forming a surrogacy arrangement with a surrogate who lives overseas. Even with improved domestic regulation, there will be demand for international surrogacy.⁷
- 31 Countries regulate surrogacy in different ways. Intended parents can encounter difficulties travelling to New Zealand with a surrogate-born child, as our law may not recognise them as the child's legal parents. Some international arrangements lack protections for participants. They are predominantly commercial. Some risk being viewed as the sale of a child if a contract provides for the transfer of a child conditional upon a fee to the surrogate. Arrangements can also involve anonymously donated gametes, meaning surrogate-born people are unable to access information about their genetic origins.
- 32 International surrogacy is not addressed by New Zealand law. However, a joint agency approach has developed enabling intended parents in these cases to make an adoption application to the New Zealand Family Court.
- 33 I recommend providing the Family Court with jurisdiction to determine the legal parents of a child born as a result of international surrogacy, using the court pathway proposed for domestic arrangements. This will provide greater judicial oversight and clearer processes, to help protect the interests of participants.
- 34 I propose Cabinet accepts with modifications the Law Commission's recommendation for a special court decision-making process in international surrogacy cases. The Law Commission proposed a remote hearing process to enable the Family Court to make decisions when the intended parents and child are not physically in New Zealand. There is a risk that enabling the Court to routinely make orders in these circumstances could be perceived by other jurisdictions as overreach by New Zealand. It would involve the Court changing the legal status for the purposes of New Zealand law of a person with limited connection to New Zealand (as they will be the legal child of the surrogate under New Zealand law). This would in turn facilitate the child's departure from the jurisdiction and their travel to New Zealand.
- 35 Further work in consultation with the judiciary is needed to determine whether there is an alternative approach that would limit this risk. I am therefore

⁷ For example, because of the greater availability of surrogates and gametes overseas.

seeking delegated authority to make policy decisions on a court hearing process that:

- 35.1 achieves the intent of the Law Commission's recommendation – an efficient decision-making process that safeguards children's interests; and
- 35.2 reflects any measures necessary to reduce any perception of overreach into another jurisdiction.

Legislative Implications

Amendments should proceed via the surrogacy member's bill, which I recommend is adopted by the Government

- 36 I recommend agreeing to the legislative amendments outlined in **Appendix A**. I recommend the Government adopts Mr Coffey's Bill and progresses the amendments through the Bill and regulations. Adopting the Bill would recognise the significance of the reform and enable its alignment with Government policy **Section (9)(2)(f)(iv)**
- 37 The Bill is currently before the Health Committee. Officials' departmental report will reflect the policy decisions Cabinet makes through this paper. I propose the Bill is adopted after it is reported back to the House and before its second reading. This would be in about late 2023 or early 2024.
- 38 Mr Coffey is comfortable with this approach. The Health Committee has agreed to consider aligning the Bill with the Law Commission's report.
- 39 This approach means the Health Committee will determine which of Cabinet's changes are recommended to the House for progression. It also means there will be substantial amendment to the Bill. **Appendix B** describes the Bill. Key changes include an increase to the Bill's scope⁸ and removal of a proposed state-run register to help match potential surrogates and intended parents. The Law Commission did not recommend the register on the grounds it would be an unusual extension of the state into private arrangements. It also noted the register may not be workable as participants could be unwilling to join it. The register was not widely supported by submitters to the Commission.

Section (9)(2)(f)(iv)

[REDACTED]

This will be the Government response to the Law Commission report

⁸ For example, to cover both gestational and traditional types of surrogacy, where the Member's Bill only deals with gestational surrogacy.

- 41 If Cabinet agrees to the recommendations in this paper and the Minister of Internal Affairs's forthcoming paper, this will constitute the Government response to the Law Commission's report.⁹

Financial Implications

- 42 **Section (9)(2)(f)(iv)**
[Redacted]
- 43 The Ministry of Justice and Oranga Tamariki will absorb any additional costs within their baselines, as they are not expected to be large. The reforms will require the Ministry of Justice to support the new court parenthood pathway. The pathway is expected to be able to be operationalised as part of 'business as usual' operations, as projected numbers of arrangements requiring the Family Court's involvement are low and surrogacy cases are not expected to require significant judicial time. Based on projected demand for surrogacy, Oranga Tamariki expects to incur minor operational costs to carry out the reports for the ethics approval process and the Court.

Section (9)(2)(f)(iv)

Section (9)(2)(f)(iv)

⁹ Consistent with Cabinet Office Circular CO (09) 1.

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Section (9)(2)(f)(iv)

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Impact Analysis

Regulatory Impact Statement

- 47 Regulatory Impact Analysis requirements apply to the proposals in this paper and a Regulatory Impact Statement (RIS) has been prepared and is attached.
- 48 A Regulatory Impact Analysis Quality Assurance Panel from the Ministry of Justice reviewed the RIS and considers the information and analysis partially meets quality assurance criteria. The RIS provides a comprehensive assessment of the issues involved in regulating surrogacy arrangements as identified by the Law Commission. It notes that while evidence suggests altruistic surrogacy produces largely positive outcomes for surrogate-born children, their families, and surrogates, it is still a relatively new and

developing field. There is limited information on some aspects of surrogacy, especially the experiences of people born through surrogacy arrangements and experiences of Māori participation in surrogacy arrangements. Within the constraints clearly outlined in the RIS, the analysis in the RIS can be relied on for decision making.

- 49 The Treasury's Regulatory Impact Analysis team has agreed that the proposal relating to gamete donation (**Appendix A's** final item) is exempt from RIS requirements as it has only minor impacts on businesses, individuals, and not-for-profit entities.

Te Tiriti o Waitangi/Treaty of Waitangi Analysis

- 50 One of the principles underpinning the Law Commission's recommendations was that surrogacy law should reflect the Crown's obligations under te Tiriti o Waitangi. Relevant Crown obligations include facilitating the exercise of tino rangatiratanga in relation to surrogacy and in particular, enabling Māori to act in accordance with tikanga if they wish.
- 51 Improvements to the ethics approval process and new parenthood laws will better recognise children as taonga. They will provide another means by which to legally formalise a whāngai relationship, in place of adoption laws that can be a barrier to parenting a surrogate-born child as mātua whāngai. They will not change how rights and entitlements based on iwi affiliations operate. A new state duty to preserve identity information will recognise the importance of whakapapa. Proposed Māori-led research into tikanga Māori and surrogacy will support tikanga-consistent practice by regulators and participants.
- 52 Māori participation in surrogacy is low. A future review of surrogacy funding, recommended by the Law Commission, will consider equity of access, consistent with the Crown obligation to maintain equity of outcomes for Māori.

Population Implications

- 53 The reforms will have particular impacts on the following populations:

Population	How the proposal may affect this group
Children	Surrogate-born children's rights are affected by the manner of their conception, gestation, and birth. Reforms will have particular impacts on their access to identity information. Processes for approving surrogacy arrangements and determining legal parenthood will have an enhanced focus on children's interests, particularly identity rights. There will be better state recording of information about genetic and gestational origins, and whakapapa, particularly in domestic cases. Improvements to international surrogacy arrangements will help safeguard rights to family life and protect against statelessness.
Women	Surrogates are most commonly women. Reforms will protect surrogates' bodily autonomy and freedom from exploitation through safeguards in the legal parenthood pathways for surrogates' consent. Clarifying entitlements to surrogacy costs will better ensure surrogates are not left out of pocket.

People who lack the sex characteristics to become pregnant or experience infertility	Surrogacy may be an option considered by people who lack the sex characteristics to become pregnant or who experience infertility. This may include male couples, single men, some trans and intersex people, heterosexual couples and single women who experience infertility, and disabled people. Changes will make the law clearer and more certain and safeguard intended parents' interests.
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Human Rights

- 54 The policies contained in this paper appear to be consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. The Law Commission's recommendations were particularly influenced by the United Nations Children's Convention on the Rights of the Child and the 2021 Verona Principles. The Principles are widely regarded as setting out best practice for rights-consistent surrogacy regulation. The Commission also took account of ongoing multilateral work on a potential international instrument on legal parentage and surrogacy. Given the scale of proposed changes, officials will recommend that the Health Committee seeks further advice from the Attorney-General as to a revised Bill's consistency with the New Zealand Bill of Rights Act.

Consultation

- 55 The Law Commission's report drew on submissions from people with experience of the current system, including intended parents, surrogates, legal and health professionals, and social workers. It reflects insights from an ao Māori perspective, academics, and law reform in other countries.
- 56 Ministers have been briefed by their agencies on the recommendations that affect their portfolios. Mr Coffey is aware this paper is proceeding.
- 57 The following agencies have been consulted on this paper: Oranga Tamariki – Ministry for Children, Manatū Hauora/Ministry of Health, Department of Internal Affairs, Ministry of Business, Innovation and Employment (Immigration), Ministry of Foreign Affairs and Trade, Ministry of Social Development, Inland Revenue, the Treasury, Ministry for Women, Te Arawhiti, Te Puni Kōkiri, Statistics NZ, Ministry for Ethnic Communities, Ministry for Pacific Peoples, Office of the Privacy Commissioner, Office for Disability Issues, New Zealand Police, and Parliamentary Counsel Office. The Department of the Prime Minister and Cabinet, Public Service Commission, Ministry of Education, and Crown Law Office have been informed.

Communications

- 58 As the Health Committee is considering the Law Commission's recommendations as part of its consideration of the Bill, any communications need to be consistent with select committee confidentiality. I will consult the Committee Chair as to whether a public statement is possible.

Proactive Release

- 59 The Minister of Justice plans to proactively release this paper and publish the RIS, subject to any redaction as appropriate under the Official Information Act 1982, as soon as feasible and consistent with select committee confidentiality.

Recommendations

The Minister of Justice recommends that the Committee:

- 1 **note** that the Law Commission published a report in April 2022 that found a pressing need for reform of surrogacy law. Laws on legal parenthood do not accommodate surrogacy well, and there are opportunities to strengthen protections for participants in surrogacy arrangements;
- 2 **Section (9)(2)(f)(iv)**
[Redacted]
[Redacted]
[Redacted]
- 3 **agree** in-principle to the Law Commission's recommendations - in some cases with modifications or extensions - as set out in **Appendix A, Section (9)**
[Redacted]
- 4 **agree** that statutory amendments agreed through this paper will be included in officials' advice to the Health Committee considering the Improving Arrangements for Surrogacy Bill (the Bill), which is a member's bill;
- 5 **agree** that the Government will adopt the Bill as a Government bill;
- S **Section (9)(2)(f)(iv)**
[Redacted]
[Redacted]
[Redacted]
- [Redacted]
[Redacted]
[Redacted]
[Redacted]
- [Redacted]
[Redacted]
[Redacted]
- 9 **note** the Minister of Internal Affairs will return to Cabinet with a paper responding to the Law Commission's recommendation for a review of the birth registration system;
- 10 **agree** to invite relevant portfolio Ministers to issue drafting instructions to Parliamentary Counsel Office to give effect to the regulatory changes set out in **Appendix A**;
- 11 **authorise** the Minister of Justice and Minister of Internal Affairs to make minor policy decisions within the overall framework approved by Cabinet, consistent with the Minister of Justice's portfolio responsibilities for surrogacy

regulation and the Minister of Internal Affairs' responsibilities for the regulation of identity information;

- 12 **agree** that the advice referred to in recommendation 4 will recommend the removal from the Bill of its proposed register for matching potential surrogates and intended parents, as it would be an unusual extension of the state's role, is unlikely to achieve its policy intent, and was not widely supported by submitters to the Law Commission; and
- 13 **agree** the decisions in this paper and the forthcoming paper brought by the Minister of Internal Affairs will constitute the Government's response to the Law Commission's report.

Authorised for lodgement

Hon Kiri Allan
Minister of Justice

Appendix A: Government response to the Law Commission's recommendations

Notes

- This appendix sets out:
 - The proposed response to the Law Commission's recommendations for change, and
 - amendments that extend or support the Law Commission's recommendations, including Law Commission recommendations that proposed further work but did not make a final or detailed recommendation.
- Recommendations that significantly change legislation and practice are highlighted in green.
- The acceptance of the recommendation is subject to drafting changes and/or further minor policy modifications.
- The proposed commencement date of changes is a year after enactment of legislative changes, unless otherwise stated.
- The recommendations are summarised. The full text of the recommendations is found in the Law Commission's report at <https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC-Report146-Review-of-Surrogacy.pdf>.

Law Commission recommendation <i>(recommendations that significantly change legislation and practice are highlighted in green)</i>		Proposed Government response, Section (9)(2)(f)(iv)	Section (9)(2)(f)(iv)
1	Commission Māori-led research on tikanga Māori and surrogacy 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.	Accept. Timing to be assessed alongside other Ministry of Health priorities.	
2	Extend the ethics approval process (ECART) to all clinic-assisted surrogacy Clinic-assisted surrogacy arrangements should remain subject to the requirement for prior approval of the Ethics Committee on Assisted Reproductive Technology (ECART), and the Human Assisted Reproductive Technology Order 2005 should be amended to extend this requirement to all clinic-assisted surrogacy arrangements, including clinic-assisted traditional surrogacy arrangements.	Accept. Officials' departmental report to the Health Committee will recommend amendments to the Human Assisted Reproductive Technology Order 2005 or amendments will be developed in parallel with statutory changes.	
3	Consider ways to encourage parties to traditional surrogacy arrangements outside a clinic setting to directly apply and participate in the ethics approval process The Government should consider ways to encourage parties to traditional surrogacy arrangements to participate in the approval process, including whether parties should be supported to make applications directly to ECART.	Accept recommendation to consider ways to encourage non-clinic assisted traditional surrogacy arrangements to participate in ECART, and progress in the following ways: <ul style="list-style-type: none"> ○ officials' departmental report to the Health Committee will recommend addressing any legislative impediments to direct applications in the Human Assisted Reproductive Technology Act 2004, and ○ information about the ECART process will be included in online information recommended in recommendation 58. 	
4	Review operations and resourcing of the ethics approval committee The Government should review the resourcing and operation of ECART and its associated processes with a view to ensure surrogacy applications can be considered in a timely manner, consistent with the principles of the Human Assisted Reproductive Technology Act 2004.	Accept. Section (9)(2)(f)(iv)	
5	Require Oranga Tamariki to prepare reports on whether applications for ethics approval raise serious concerns about risk of harm The Human Assisted Reproductive Technology Act should be amended to require Oranga Tamariki Ministry for Children to prepare a surrogacy report in relation to all applications for approval of a surrogacy arrangement. The purpose of the surrogacy report should be to advise ECART on whether it has identified any serious concerns in relation to the risk of harm to any resulting child of the proposed surrogacy arrangement.	Accept. Officials' departmental report to the Health Committee will recommend necessary amendments to the Human Assisted Reproductive Technology Act. This will include a new regulation-making power enabling regulations to be made on recommendation of the Minister for Children, following consultation with the Minister of Justice, prescribing actions Oranga Tamariki is to undertake to prepare surrogacy reports.	
6	Oranga Tamariki should develop a framework for surrogacy reports Oranga Tamariki Ministry for Children should develop a specialised framework for preparing surrogacy reports for ECART. Consideration should be given to a two-step process as follows: <ul style="list-style-type: none"> • Step One: Conducting basic background checks (such as criminal background and child protection checks) in relation to the intended parents. This step should be followed whenever a request for a surrogacy report is made. • Step Two: Advanced investigation. This step should only be followed if the basic background checks identify information that raises a concern about the risk of harm to any resulting child and warrants further investigation. The social worker should be able to investigate further, obtain information from the intended parents and conduct a risk assessment to determine whether the proposed arrangement poses any serious risk of harm to any resulting child. 	Accept. Oranga Tamariki to make operational changes to progress the recommendation. Begin in time to ensure changes are complete ahead of commencement of legislative amendments.	

Law Commission recommendation <i>(recommendations that significantly change legislation and practice are highlighted in green)</i>		Proposed Government response, Section (9)(2)(f)(iv)	Section (9)(2)(f)(iv)
7	Oranga Tamariki should establish a specialist unit of social workers with responsibility for surrogacy matters Oranga Tamariki Ministry for Children should establish a specialist unit of social workers with responsibility for exercising functions in relation to surrogacy arrangements.	Accept with modifications. Oranga Tamariki will review the need for operational changes to the delivery of its services, as part of implementation. Begin in time to ensure changes are complete ahead of commencement of legislative amendments.	
8	The ethics committee responsible for setting ethics guidelines (ACART) should consider a requirement that parties prepare a surrogacy plan The Advisory Committee on Assisted Reproductive Technology (ACART) should consider revising its guidelines to include a requirement that ECART be satisfied that the intended parents and the surrogate have prepared and signed a surrogacy plan. The surrogacy plan should record the parties' intentions in respect of the surrogacy arrangement. It would be unenforceable except in relation to the payment of reasonable surrogacy costs	Noted. ACART accepts the recommendation in principle and will work with the Ministry of Health on the detail. Begin in time to ensure changes are complete ahead of commencement of legislative amendments.	
9	ACART should require counselling to address identity rights ACART should revise its guidelines to require counselling to address the identity rights of surrogate-born people, including: a. their rights to access information about their genetic and gestational origins and whakapapa (see R37–R41); and b. the parties' plans for sharing identity information with the child.	Noted. ACART accepts the recommendation in principle, subject to consultation. Complete in time for revised guidelines to be in place ahead of commencement of legislative amendments.	
10	ACART should provide guidance on how to determine if counselling is consistent with te ao Māori ACART should provide further guidance or advice to ECART on what matters ECART should consider when determining whether counselling in relation to a surrogacy arrangement is culturally appropriate from an ao Māori perspective	Noted. ACART will review its guidance. Undertake the review after the research in recommendation 1 is completed.	
11	ACART should consider guidance on the duration of approvals for surrogacy arrangements ACART should consider providing guidance or advice to ECART in relation to time limits on the duration of approvals of surrogacy arrangements, when an application for an extension to approval will be considered and the process for making and granting extensions.	Noted. Review complete.	
12	Enable a right of review of ECART decisions The Human Assisted Reproductive Technology Act should be amended to provide for a right of independent review of any decision made in relation to a surrogacy arrangement by ECART. Reviews should be by way of rehearing. The review process must operate expeditiously and consideration should be given to: a. establishing a panel of individuals with a range of expertise who can be appointed to review a decision as and when required; b. appointing three panellists to review any decision to ensure relevant expertise is available; and c. imposing time limits on making applications for review and on the completion of reviews.	Accept recommendation to enable a right of review, and progress with a modification to the Law Commission's proposed review model. The modification would mean that the legislation would require that reviews be completed expeditiously rather than within a prescribed time limit as proposed in 12c. This modification would achieve the intent of the recommendation while maintaining operational flexibility. Additionally, agree that the review process should have the following features: <ul style="list-style-type: none"> ○ a person will be able to seek a review of an ECART decision if they were directly affected by a decision to decline, defer or impose conditions and they make an application for review within 28 working days after the day on which the parties were notified of the decision ○ the responsible Minister will have powers to appoint a review panel of individuals with relevant expertise, and appoint one of the individuals the chair of the panel ○ the Minister will have the power to terminate the appointment of a member of the panel ○ each panel member will be appointed on any terms and conditions that the Minister determines by written notice to the member ○ on receipt of a relevant request for review, the panel chair will appoint three panellists to review any decision to ensure relevant expertise is available ○ the chair or review panel will be able to dismiss an application that is frivolous, vexatious or whose subject matter is trivial ○ the review will be via rehearing, and ○ a review will be able to affirm, vary or set aside ECART's decision, and in the latter case the panel can refer the case back to ECART for reconsideration. Officials' departmental report to the Health Committee will recommend necessary amendments to the Human Assisted Reproductive Technology Act.	

Law Commission recommendation <i>(recommendations that significantly change legislation and practice are highlighted in green)</i>		Proposed Government response, Section (9)(2)(f)(iv)	Section (9)(2)(f)(iv)
13	Review the membership requirements of ACART and ECART and consider strengthening representation of Māori, children's interests and medical expertise The Government should review the membership requirements for the Advisory Committee on Assisted Reproductive Technology (ACART) and the Ethics Committee on Assisted Reproductive Technology (ECART). As part of this review, the Government should consider amending the Human Assisted Reproductive Technology Act 2004 to: <ol style="list-style-type: none"> require a minimum of two Māori members to be appointed to each of ACART and ECART; require at least two members of each of ACART and ECART to have the ability to articulate the interests of children; require a minimum of two members to be appointed to ECART with expertise in assisted reproductive procedures; and prescribe the membership requirements for ECART in legislation (rather than terms of reference). 	Accept recommendation to review membership requirements and additionally agree to the outcome of the recommended review by progressing a modified version of the Law Commission's suggested model: <ul style="list-style-type: none"> require that ACART and ECART have two members able to articulate the interests of children, and provide that the appointing Minister should have regard to prospective ACART and ECART appointees' knowledge and experience of mātauranga Māori, but not change the minimum number of Māori or medical members. This modification of the Law Commission's model is necessary as more prescriptive membership requirements would create a risk that committees would be legally unable to function if they encounter recruitment difficulties that prevented them meeting legislative requirements. Prescriptive legislative qualification requirements are often avoided because of this risk. Officials' departmental report to the Health Committee will recommend necessary amendments to the Human Assisted Reproductive Technology Act.	
14	ECART should establish an online feedback and complaints process ECART should establish and publish on its website a procedure for providing feedback on and making complaints in relation to the operation of the ECART approval process.	Noted. Ministry of Health to work with ECART to progress.	
15	Require ECART to produce an annual report The Human Assisted Reproductive Technology Act should be amended to require ECART to prepare an annual report on its operations. The annual report should include information on: <ol style="list-style-type: none"> applications received and decisions made by ECART; any feedback or complaints received on the operation of the ECART approval process; and any actions taken in response to the feedback or to resolve the complaint. 	Accept. Officials' departmental report to the Health Committee will recommend necessary amendments to the Human Assisted Reproductive Technology Act. Commence immediately after legislation is in force.	
16	ACART and ECART annual reports should be published online as soon as practicable Annual reports of both the ECART and ACART should be published on their websites as soon as practicable.	Accept. Officials' departmental report to the Health Committee will recommend necessary amendments to the Human Assisted Reproductive Technology Act. Ministry of Health to work with ACART and ECART to progress.	
17	Establish bespoke provisions for determining legal parenthood of a surrogate-born child The Status of Children Act 1969 should be amended to include specific provisions for determining the legal parenthood of a child born as a result of a surrogacy arrangement. This should provide for: <ol style="list-style-type: none"> an administrative pathway under which the child becomes the legal child of the intended parents and ceases to be the child of the surrogate by operation of law provided certain conditions are met (see R18 and R19); and a court pathway under which te Kōti Whānau Family Court can make a parentage order determining the legal parenthood of a surrogate-born child when the conditions of the administrative pathway are not met. 	Accept. Officials' departmental report to the Health Committee will recommend necessary amendments to the Status of Children Act 1969.	
18	Provide how parenthood is conferred under an administrative pathway New Part 3 of the Status of Children Act 1969 should provide that, when a child is born as a result of a surrogacy arrangement, upon the surrogate providing written consent to the intended parents in the prescribed form and manner (see R22 and R23) relinquishing any claim to legal parenthood: <ol style="list-style-type: none"> the child becomes the legal child of each intended parent and each intended parent becomes the legal parent of the child; and the child ceases to be the legal child of the surrogate and the surrogate ceases to be a legal parent of the child. 	As above.	

Law Commission recommendation <i>(recommendations that significantly change legislation and practice are highlighted in green)</i>		Proposed Government response, Section (9)(2)(f)(iv)	Section (9)(2)(f)(iv)
19	Define when the administrative parenthood pathway applies The administrative pathway in R18 should apply only if: a. the surrogacy arrangement was approved by ECART and complied with any conditions imposed by ECART; b. the intended parents who entered the surrogacy arrangement that was approved by ECART have taken the child into their care; and c. the surrogacy arrangement otherwise complied with any requirements prescribed in regulations.	Accept with modifications. Recommendation 19(c) has two purposes: <ul style="list-style-type: none"> making the administrative pathway conditional on a surrogacy arrangement's compliance with any regulations made under the Human Assisted Reproductive Technology Act, and providing for the future-proofing of the reforms by enabling regulations to be made under the Status of Children Act prescribing any additional safeguards for the administrative pathway that may be required by any future international instrument. I propose the latter change is progressed with modifications. Future changes to parenthood law would appropriately be made via statute, while new ethical safeguards could be made by regulation under the Human Assisted Reproductive Technology Act. The proposed new regulation-making power therefore is not required. Officials' departmental report to the Health Committee will recommend necessary amendments to the Status of Children Act.	
20	Define surrogate consent requirements for the administrative pathway Consent under the administrative pathway in R18 should not be valid if it is given before the child is seven days old.	Accept. Officials' departmental report to the Health Committee will recommend necessary amendments to the Status of Children Act.	
21	Define the status of intended parents in the period between birth and consent under the administrative pathway From the time of the child's birth until consent is given under the administrative pathway in R18, the intended parents should be deemed to be additional guardians of the child under the Care of Children Act 2004.	As above.	
22	Develop a statutory declaration for the administrative pathway Te Tari Taiwhenua Department of Internal Affairs should develop a standard form statutory declaration for the surrogate to complete to give consent under the administrative pathway in R18. The statutory declaration should be provided to the Registrar-General alongside the notification of birth.	Accept. Officials' departmental report to the Health Committee will recommend any necessary amendments to the Status of Children Act. The Department of Internal Affairs will develop the form and make it available for download online.	
23	Set requirements for demonstrating consent The surrogate's statutory declaration of consent should be witnessed by the surrogate's lawyer, and the lawyer should be required to certify on the standard form that they have explained the effect and implications of the statutory declaration to the surrogate.	Accept. Officials' departmental report to the Health Committee will recommend any necessary amendments to the Status of Children Act.	
24	Permit parties to seek a court order confirming administrative pathway's conferral of consent Where the intended parents become the legal parents of a child under the administrative pathway, they should be able to apply to te Kōti Whānau Family Court for an order confirming that they are the child's parents.	Accept. Officials' departmental report to the Health Committee will recommend necessary amendments to the Status of Children Act.	
25	Provide when and how the Family Court parenthood pathway applies New Part 3 of the Status of Children Act should provide that, when a child is born as a result of a surrogacy arrangement but the conditions of the administrative pathway in R18 and R19 are not met, any party to the arrangement may apply to te Kōti Whānau Family Court for a parentage order. The effect of a parentage order is that: a. the child becomes the legal child of each intended parent and each intended parent becomes the legal parent of the child; and b. the child ceases to be the legal child of the surrogate and the surrogate ceases to be a legal parent of the child.	Accept. In addition, to ensure the law is clear as to when the Family Court can hear a case, agree to delegate authority to the Minister of Justice to make policy decisions on the policy detail of who has standing in the Family Court in surrogacy cases to: <ul style="list-style-type: none"> achieve the Law Commission's intent that the Court's jurisdiction is sufficiently broad that it can manage the range of circumstances in which a child's legal status could be relevant for the purposes of New Zealand's law; and ensure the Court only has jurisdiction where an applicant has sufficient connection to New Zealand, to avoid the jurisdiction being so broad that it intrudes on matters more properly decided by another jurisdiction. Officials' departmental report to the Health Committee will recommend necessary amendments to the Status of Children Act.	
26	Enable the Family Court under the court pathway to make the order sought or any other parentage order Te Kōti Whānau Family Court may grant the parentage order that is sought or may make any other declaration as to parentage it sees fit.	Accept. Officials' departmental report to the Health Committee will recommend necessary amendments to the Status of Children Act.	

Law Commission recommendation <i>(recommendations that significantly change legislation and practice are highlighted in green)</i>		Proposed Government response, Section (9)(2)(f)(iv)	Section (9)(2)(f)(iv)
27	Set out factors the Court should take into account when determining whether a parentage order is in a child's best interests Te Kōti Whānau Family Court must be satisfied that making a parentage order is in the best interests of the child. When determining the best interests of the child, the Court should take into account: <ol style="list-style-type: none"> the parties' intentions when entering into the surrogacy arrangement; the child's genetic and gestational links to each of the parties to the surrogacy arrangement; all sibling relationships of the child; the arrangements in place for preserving the child's identity, including information about their genetic and gestational origins and whakapapa; any arrangements in place to enable the child's relationships with other people involved in the creation of the child and their family groups, whānau, hapū and iwi; the value of continuity in the child's care, development and upbringing; the likely effect of the parentage order on the child, including psychological and emotional impact, throughout the child's life; any harm that the child has suffered or is at risk of suffering; where relevant, the child's ascertainable wishes and feelings regarding the decision, taking account of the child's age and understanding; all circumstances in relation to the surrogacy arrangement, including any change in circumstances since the arrangement was entered; and any other matter the Family Court considers relevant. 	As above.	
28	Provide for the appointment of a parentage order reporter to provide a report on a child's best interests A parentage order reporter must be appointed to prepare a parentage order report whenever an application for a parentage order is made (subject to R35). The parentage order reporter should be a social worker employed by Oranga Tamariki Ministry for Children. The role of the parentage order reporter should be to independently advise the Court on whether making the order sought is in the child's best interests, with reference to the proposed list of relevant considerations outlined in R27. A copy of the parentage order report should be made available to all the parties to the application prior to the hearing.	As above.	
29	Provide the powers available to the court when making an order When an application for a parentage order is made, te Kōti Whānau Family Court should be able to exercise powers under the Care of Children Act as if it were an application for a parenting order under section 48 of that Act.	As above.	
30	Require the Registrar-General to record information in the birth register following a parentage order When te Kōti Whānau Family Court makes a parentage order, the Registrar of the Court must ensure the relevant information is sent to the Registrar-General, and the Registrar-General shall ensure the information is included in the child's birth registration (or if the child's birth is not registered, record the information in the register as if the child's birth is registered).	Accept. Officials' departmental report to the Health Committee will recommend necessary amendments to the Birth, Deaths, Marriages, and Relationships Registration Act 2021 and/or Status of Children Act.	
31	Provide that a surrogate's partner is not presumed to be the parent of a surrogate-born child The Status of Children Act should be amended to provide that, when a woman becomes pregnant as a result of a surrogacy arrangement, any partner of the pregnant woman shall not be presumed to be a parent of any child of the pregnancy.	Accept. Officials' departmental report to the Health Committee will recommend necessary amendments to the Status of Children Act.	
32 - 34	Provide for the application of the parenthood pathways if a party dies during the process If the surrogate dies before giving consent under the administrative pathway in R18, is unable to give informed consent or cannot be located to provide consent, the intended parents should be able to apply for a parentage order under the court pathway. The administrative pathway and the court pathway should be available if the surrogate-born child was still-born or died soon after birth. If an intended parent or both intended parents die, the administrative pathway and the court pathway should continue to be available and amendments to the Status of Children Act should provide for: <ol style="list-style-type: none"> the surrogate to give consent under the administrative pathway to the intended parent's personal representative provided they have taken the child into their care; and the intended parent's personal representative to apply for a parentage order under the court pathway on the deceased intended parent's behalf. 	As above.	

Law Commission recommendation <i>(recommendations that significantly change legislation and practice are highlighted in green)</i>		Proposed Government response, Section (9)(2)(f)(iv)	Section (9)(2)(f)(iv)
35	Prescribe how the parenthood pathways apply to people born before the law is changed The court pathway should be available in respect of a surrogate-born child, regardless of whether that child was born before the commencement of the amendments to the Status of Children Act recommended in R25–R30. If an application for a parentage order is made in relation to a child born before commencement, te Kōti Whānau Family Court should have discretion to decide not to appoint a parentage order reporter.	As above.	
36	Prescribe when the parenthood pathways take effect The administrative pathway should be available in respect of a surrogate-born child who is born after the commencement of the amendments to the Status of Children Act recommended in R18–R24.	As above.	
37	Establish new legislative principle that surrogate-born people should be aware of their origins Section 4 of the Human Assisted Reproductive Technology Act should be amended to include an additional principle stating that surrogate-born people should be made aware of their genetic and gestational origins and whakapapa and be able to access information about those origins.	Accept. Officials’ departmental report to the Health Committee will recommend necessary amendments to the Human Assisted Reproductive Technology Act.	
38	Establish a register of surrogate-born people The Human Assisted Reproductive Technology Act should be amended to: <ul style="list-style-type: none"> a. establish a national register of surrogate-born people (the surrogacy birth register); and b. require the Registrar-General to record information about a surrogacy arrangement on the surrogacy birth register when it receives information as part of the birth registration process and when notified of a parentage order issued by te Kōti Whānau Family Court. 	Accept. Officials’ departmental report to the Health Committee will recommend necessary amendments to the Human Assisted Reproductive Technology Act. Further work is required on the legal and operational steps needed to achieve the intent of the Law Commission’s recommendation and give effect to the surrogate-born person’s rights to identity. Agree to delegate authority to the Minister of Justice to make policy decisions on the legislative and operational process to enable this information to be captured and recorded.	
39	Review birth registration system The Government should review the birth registration system to consider whether it meets the needs and reasonable expectations of people in contemporary Aotearoa New Zealand.	The Minister of Internal Affairs will seek agreement to a Government response through a forthcoming Cabinet paper.	
40	Registrar-General should collect and record information on surrogacy birth register relating to child’s identity The Registrar-General should collect and record information on the surrogacy birth register that promotes the surrogate-born child’s rights to identity, including: <ul style="list-style-type: none"> a. in each case, the surrogate’s legal name, date of birth, place of birth and last known address as well as their ethnicity, any relevant cultural affiliation and hapū and iwi affiliations (if known); b. in traditional surrogacy arrangements, additional information about the surrogate as is required in relation to donors under section 47 of the Human Assisted Reproductive Technology Act; and c. if the surrogacy arrangement involved the use of a donor, information about the donor as is required in relation to donors under section 47 of the Human Assisted Reproductive Technology Act to the extent that information is known. 	Accept. Officials’ departmental report to the Health Committee will recommend necessary amendments to the Human Assisted Reproductive Technology Act.	
41	Registrar-General must provide information from the register to surrogate-born people If asked to do so by a surrogate-born person, the Registrar-General should be required to provide access to any information about that surrogacy arrangement kept on the surrogacy birth register.	As above.	
42	Registrar-General may refuse access to register on certain grounds The Registrar-General may refuse to provide access to information on the surrogacy birth register if satisfied the grounds under section 49 of the Privacy Act 2020 are met.	As above.	
43	Consider ways to support people to access identity information The Government should consider ways to support people accessing information on the surrogacy birth register, drawing on the experience of people accessing information under the Adult Adoption Information Act 1985 and the Human Assisted Reproductive Technology Act 2004.	Accept recommendation to review support for people accessing identify information, and additionally agree to the outcome of the recommended review by agreeing that officials’ departmental report to the Health Committee will recommend amending the Human Assisted Reproductive Technology Act to require that people accessing information are told that counselling may be desirable. Research into the experiences of surrogate-born people is limited, but counselling is widely understood to be a helpful for some donor-conceived and adopted people accessing previously unknown identity information. Section (9)(2)(f)(iv) <div></div> <div></div> <div></div>	

Law Commission recommendation <i>(recommendations that significantly change legislation and practice are highlighted in green)</i>		Proposed Government response, Section (9)(2)(f)(iv)	Section (9)(2)(f)(iv)
44	Publish annual information about register Te Tari Taiwhenua Department of Internal Affairs should publish information annually on the number of surrogacy arrangements recorded on the surrogacy birth register and the number of requests made to access the surrogacy birth register.	Accept. Department of Internal Affairs to make operational changes to progress the recommendation.	
45	Consider ways to improve access to information for surrogate-born children previously adopted The Government should consider ways to improve access to information about surrogacy arrangements by surrogate-born people who have been adopted by the intended parents under the Adoption Act 1955.	Accept. Cabinet will have an opportunity to consider options as part of the Government's separate adoption law reform process.	
46	Provide that reasonable surrogacy costs may be paid to surrogates The list of permitted payments in section 14(4) of the Human Assisted Reproductive Technology Act should be amended to include payments to the surrogate for any reasonable surrogacy costs actually incurred in relation to the surrogacy arrangement.	Accept. Officials' departmental report to the Health Committee will recommend amending the Human Assisted Reproductive Technology Act.	
47	Provide guidance on what constitutes reasonable surrogacy costs The Human Assisted Reproductive Technology Act should be amended to provide guidance on what "reasonable surrogacy costs" can include.	As above.	
48	Provide that surrogacy costs are enforceable Section 14 of the Human Assisted Reproductive Technology Act should be amended to provide that, notwithstanding section 14(1), an obligation under a surrogacy arrangement entered pre-conception to pay or reimburse the surrogate's reasonable surrogacy costs is enforceable.	As above.	
49	Publish guidance clarifying surrogates' entitlement to paid parental leave The Government should publish guidance clarifying that surrogates are entitled to paid parental leave on the same basis as other pregnant people under the Parental Leave and Employment Protection Act 1987	Accept. The Ministry of Business, Innovation and Employment will publish updated guidance on its website. Similar information will be provided on the website recommended in recommendation 58. The Inland Revenue Department is also updating its website with similar information.	
50 - 51	Clarify relationship between costs paid to surrogates and social security entitlements The money value of any payments to (or for the benefit of) the surrogate for any reasonable surrogacy costs actually incurred in relation to the surrogacy arrangement should not be treated as income for the purposes of the Social Security Act 2018 (other than payments that reimburse the surrogate for a loss of earnings). Surrogates who receive a benefit should be exempted from work-preparation and work-test obligations under the Social Security Act for a specified period of time after they have given birth.	Accept, and additionally agree to: <ul style="list-style-type: none"> exclude payments for costs reasonably incurred as part of a volunteer service (including reasonable surrogacy costs) from income and asset testing for assistance the Ministry of Social Development administers on behalf of other agencies. This will require changes to the Social Security Regulations 2018 and the Student Allowance Regulations 1998 exempt anyone who has just given birth from work-preparation obligations and exempt anyone from work-test obligations where they have given birth but do not keep their child, under the Social Security Regulations 2018 for a specified period of time, and amend the Income Tax Act 2007 to clarify how payments to surrogates interact with income tax liabilities, by providing that only the reimbursement of a surrogate's loss of wages are taxable. Officials' departmental report to the Health Committee will recommend the amendments to the Income Tax Act. Regulatory changes would be progressed in parallel. Commence amendments to the Income Tax Act on 1 April of the year following the commencement of the statutory changes in recommendation 46, to correspond with the beginning of a tax year.	
52	Provide the Family Court with jurisdiction to make parentage orders for children born by surrogacy overseas while the child and applicants are still overseas Te Kōti Whānau Family Court should have jurisdiction to make a parentage order under the court pathway in R25–R30 whether or not the surrogate-born child was born in Aotearoa New Zealand.	Accept. Officials' departmental report to the Health Committee will recommend necessary amendments to the Status of Children Act. Amendments will include considerations currently included in the non-binding Ministerial guidelines dealing with international surrogacies.	
53	Further consider a regime for recognising legal parenthood established in other jurisdictions after the completion of multilateral work The Government should consider further a regime for the recognition of legal parenthood established in respect of surrogacy in other jurisdictions following the completion of the work of the Hague Conference on Private International Law on parentage and surrogacy.	Accept.	

Law Commission recommendation <i>(recommendations that significantly change legislation and practice are highlighted in green)</i>		Proposed Government response, Section (9)(2)(f)(iv)	Section (9)(2)(f)(iv)
54	Family Court should adopt a special process for applications for parentage orders involving international surrogacy Te Kōti Whānau Family Court should adopt a special process for applications for parentage orders under the court pathway in R25–R30 where the intended parents live in Aotearoa New Zealand and the child is born to a surrogate overseas (international surrogacy protocol). The international surrogacy protocol should set out the information the Family Court considers relevant to its consideration of the matters in R27 in the context of international surrogacy and provide for processes to support the hearing (such as electronic filing and hearings by video link, priority scheduling, and applications determined without parties being required to be physically present).	Accept with modifications. To reduce any risk that the proposed decision-making process is perceived by other countries as overreach into their jurisdictions, agree to delegate authority to the Minister of Justice to make policy decisions on a special court hearing process for international cases that: <ul style="list-style-type: none"> o achieves the intent of the Commission's recommendation - an efficient decision-making process that safeguards children's interests, and o reflects any measures necessary to reduce any perception of overreach into another jurisdiction. Officials' departmental report to the Health Committee will recommend any necessary legislative amendments to the Status of Children Act. Regulatory changes would be progressed in parallel.	
55	Expedite approvals for passports to enable surrogate-born child to travel to New Zealand Te Tari Taiwhenua Department of Internal Affairs should adopt procedures that expedite the approval of a surrogate-born child's passport after a parentage order is issued for the purpose of ensuring the child can travel to Aotearoa New Zealand as soon as possible after birth.	Accept.	
56	Children who are subject of parentage orders to be treated the same way as adopted children for citizenship purposes Section 3 of the Citizenship Act 1977 should be amended to ensure that a child who is the subject of a parentage order is treated the same way as a child adopted under the Adoption Act 1955 (or its replacement) for citizenship purposes.	Accept.	
57	As part of adoption review, consider how foreign parentage orders can be recognised for surrogate-born child's New Zealand citizenship entitlement As part of its review of adoption laws, Tāhū o te Ture Ministry of Justice should consider whether amendments to the Citizenship Act 1977 are desirable to ensure an overseas adoption or other legal parenthood determination can be recognised for the purposes of establishing a surrogate-born child's entitlement to citizenship by descent in situations where the child's parents are not habitually resident in Aotearoa New Zealand. The Government's approach to overseas surrogate-born children should be consistent with the approach it takes in relation to children adopted overseas when the parents are not habitually resident in Aotearoa New Zealand.	Accept recommendation to review how to recognise foreign parentage orders, and additionally agree to the outcome of the recommended review by amending the Status of Children Act to provide that legal parenthood in overseas surrogacies can be recognised through an administrative process, for the purposes of determining eligibility to citizenship and for other purposes, such as visa entitlement. The overseas determination could be recognised where: <ul style="list-style-type: none"> o the intended parents were not habitually resident in New Zealand when the surrogacy arrangement was undertaken o there is overseas documentation that establishes a parent-child legal relationship between the intending parent and surrogate-born child, and that is legally valid according to the law of the place in which it was issued; and o there is evidence of relevant consents associated with the arrangement. This approach protects the rights and autonomy of individuals living in other jurisdictions and respects the laws of those jurisdictions. Also agree that: <ul style="list-style-type: none"> o a surrogate-born person's identity information provided as part of the administrative recognition process for citizenship purposes (to the extent known) must be recorded by the Registrar-General, and o adoption policy should not be used to recognise legal parenthood in overseas surrogacy arrangements, even if the surrogacy is finalised via an overseas adoption order (or equivalent). Officials' departmental report to the Health Committee will recommend necessary amendments to the Status of Children Act and Human Assisted Reproductive Technology Act.	
58	Provide comprehensive information online about surrogacy The Government should produce comprehensive and clear information on surrogacy law and practice. This information should be made available on a website that acts as a centralised, official and up-to-date source of information for New Zealanders considering having a child by surrogacy or becoming a surrogate. The information and website should be administered by Manatū Hauora Ministry of Health.	Accept.	
59	Clarify permissibility of paid advertising for lawful surrogacy arrangements The list of permitted payments in section 14(4) of the Human Assisted Reproductive Technology Act should be amended to include payment for advertisements in relation to lawful surrogacy arrangements.	Accept. Officials' departmental report to the Health Committee will recommend necessary amendments to the Human Assisted Reproductive Technology Act. Commence on enactment of legislative changes.	

Law Commission recommendation <i>(recommendations that significantly change legislation and practice are highlighted in green)</i>		Proposed Government Section (9)(2)(f)(iv)	Section (9)(2)(f)(iv)
60	Online information provided under recommendation 58 should provide advice on use of photos of children The information made available on the website recommended in R58 should explain that the best interests of children should be considered if referring to or using photos of existing children of the families involved or any children that resulted from a previous surrogacy arrangement.	Accept.	
61	New Zealand Law Society and other lawyer bodies should consider professional development about surrogacy Te Kāhui Ture o Aotearoa New Zealand Law Society and other professional lawyer bodies should consider providing ongoing professional development in relation to surrogacy, including following the enactment of any new surrogacy law, and ensure that those lawyers specialising in surrogacy law can be identified by practice area and have appropriate mentoring opportunities.	Noted.	
62	Review the funding of surrogacy, including surrogacy-related fertility treatment The Government should review how it funds surrogacy, including surrogacy-related fertility treatment and the costs associated with the ECART approval process. The Government should consider conducting such a review as part of a broader review of funding for fertility treatment generally. Any broader review of fertility treatment funding should include reconsideration of the use of the Clinical Priority Assessment Criteria for fertility treatment.	Accept. Timing of this review will be subject to its prioritisation against other Ministry of Health responsibilities.	
63	Review supply of donor gametes The Government should review the supply of donor gametes in Aotearoa New Zealand, including: a. whether donors should be compensated for reasonable expenses incurred in the donation; and b. whether the restrictions on importing gametes and embryos into Aotearoa New Zealand should be relaxed in certain limited circumstances.	Accept. Timing of this review will be subject to its prioritisation against other Ministry of Health responsibilities.	
-	No recommendation.	To support the reforms: Agree to a new rule-making power enabling Family Court Rules to be made setting the detailed procedural requirements that apply when people seek legal parenthood determinations. This will help ensure a clear process is in place. Officials' departmental report to the Health Committee will recommend necessary amendments to the Family Court Act 1980 and the Status of Children Act. Agree in-principle subject to judicial consultation that people born by surrogacy, and people closely associated with them, should have greater access to information that relates to court applications determining their legal parenthood. To the extent this might involve changes to legislation relating to court processes or access to court information and/or changes to court rules, the views of the judiciary will be obtained about the content of any such changes and how they would be progressed.	
-	No recommendation.	Amend regulation of donations of gametes (ova or sperm) in some circumstances Agree to amend the Human Assisted Reproductive Technology Act to enable an adult to use gametes that they had extracted when they were a minor. This would ensure they have the same amount of autonomy over their extracted gametes as someone who had them extracted as an adult. This change was not considered by the Law Commission but would be useful. Commence immediately following enactment of legislation. Officials' departmental report to the Health Committee will recommend necessary amendments to the Human Assisted Reproductive Technology Act.	

Appendix B: The Improving Arrangements for Surrogacy Bill

1. The Bill's Explanatory Note outlines the Bill's intent to simplify surrogacy arrangements, ensure that information recorded on birth certificates is complete, and provide a mechanism for enforcing surrogacy arrangements. It would amend five Acts and two sets of regulations.
- The Bill proposes:
 - clarifying the law to enable 'actual and reasonable costs' to be paid for expenses incurred in supplying gametes (ova or sperm) or embryos, or undertaking a surrogacy arrangement;
 - appointing a Surrogacy Registrar with responsibilities to set up a surrogacy register to match prospective surrogates and intending parents;
 - enabling intended parents and surrogates to seek a new form of order – a 'surrogacy order' – from the Family Court. This would have the effect of making the intended parents the legal parents of a surrogate-born child from birth. It would also require custody of the child to be transferred from the surrogate to the intended parents within 10 days of the child's birth. The Court could make a surrogacy order if satisfied the parties consent to be bound and their surrogacy arrangement has ethics committee approval; and
 - providing for information about a surrogate and donors of embryos or cells to be registered as part of birth information.



Cabinet

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

A New Surrogacy System: Response to the Law Commission's Report - Te Kōpū Whāngai: He Arotake Review of Surrogacy

Portfolio Justice

On 8 May 2023, following reference from the Cabinet Social Wellbeing Committee, Cabinet:

- 1 **noted** that in April 2022, the Law Commission published a report that found a pressing need for reform of surrogacy law, as laws on legal parenthood do not accommodate surrogacy well, and there are opportunities to strengthen protections for participants in surrogacy arrangements;
- 2 Section (9)(2)(f)(iv) [REDACTED]
- 3 **agreed in-principle** to the Law Commission's recommendations - in some cases with modifications or extensions - as set out in Appendix A to the paper under SWC-23-SUB-0040 (Appendix A), Section (9)(2)(f)(iv) [REDACTED]
- 4 **agreed** that statutory amendments agreed through the paper under SWC-23-SUB-0040 will be included in officials' advice to the Health Committee considering the Improving Arrangements for Surrogacy Bill (the Bill), which is a member's bill;
- 5 **agreed** that the government will adopt the Bill as a government bill;
- 6 **agreed** to add the Bill to the 2023 Legislation Programme Section 9(2)(h) [REDACTED]
Section 9(2)(h) [REDACTED]
- 7 Section (9)(2)(f)(iv) [REDACTED]
- 8 **authorised** the Minister of Justice, in consultation with other Ministers as needed, to take further policy decisions on:
 - 8.1 the Family Court's jurisdiction in regard to surrogacy cases;
 - 8.2 the legal and operational steps needed to give effect to a surrogate-born person's rights to identity;
 - 8.3 developing an efficient decision-making process that safeguards children's interests;

- 9 **noted** that the Minister of Internal Affairs intends to submit a separate Cabinet paper responding to the Law Commission's recommendation for a review of the birth registration system;
- 10 **invited** relevant portfolio Ministers to issue drafting instructions to Parliamentary Counsel Office to give effect to the regulatory changes set out in Appendix A;
- 11 **authorised** the Minister of Justice and Minister of Internal Affairs to make any further minor policy decisions within the overall framework approved by Cabinet, consistent with each Minister's portfolio responsibilities;
- 12 **agreed** that officials' advice to the Health Committee recommend removal of the proposed register for matching potential surrogates and intended parents from the Bill, as it would be an unusual extension of the State's role, is unlikely to achieve its policy intent, and was not widely supported by submitters to the Law Commission;
- 13 **agreed** that the above decisions and those from the paper noted in paragraph 9 will constitute the government's response to the Law Commission's report.

Rachel Hayward
Secretary of the Cabinet

***Secretary's Note:** This minute replaces SWC-23-MIN-0040. Cabinet agreed to add paragraph 6.*
