



Improving Arrangements for Surrogacy Bill Submission by Family First NZ

Health Committee
Parliament Buildings
Wellington

This submission is being made by Family First New Zealand, a charitable organisation that researches, educates and advocates on family issues.

We call for this premature bill to be withdrawn, and for the Government to produce a bill that represents and deals with the issues raised by the Law Commission, and then to resubmit it and allow public submissions to a select committee.

Our call is made on the basis of legal advice that we received from a leading public law expert which compared the bill (introduced 23 May 2021) with the advice from the Law Commission review (published 29 April 2022). We include that legal advice as our submission. Any highlights are added by us.

- 1 There is a strong argument to be made that the Bill is premature as it was drafted prior to the completion of the Law Commission Review. As a consequence, the Bill fails to address a number of key recommendations made by the Law Commission. The most notable omissions of the Bill are:
 - (a) a failure to set out how the welfare and best interests of the child are to be considered when gaining ethics approval and determining legal parenthood of the child;
 - (b) the detail of what reasonable costs can be compensated under surrogacy arrangements;
 - (c) the rights of surrogate-born people to access information about their surrogate parent; and
 - (d) how the Ethics Committee on Assisted Reproductive Technology (ECART) should be modified to carry out new functions related to surrogacy arrangements.
- 2 The differences, that are explained in full below, are:
 - (a) The guidance provided on what costs can be compensated for under the surrogacy arrangement, and whether they are enforceable;
 - (b) The recording of information for surrogate-born children and their rights to access to that information;
 - (c) The approval process by ECART for surrogacy arrangements;
 - (d) The resourcing, membership and reporting requirements, and a process of appeal for ECART approval;
 - (e) The process by which legal parenthood is given effect to intended parents;

- (f) The accessibility of surrogacy, and information related to surrogacy, in New Zealand; and
- (g) The consideration of Te Ao Māori perspectives in surrogacy arrangements and related support and accommodation for international surrogacy.

3 **Because the Bill is less prescriptive than the Law Commission about what constitutes reasonable expenses, there is arguably greater scope for the unintended commercialisation of surrogacy arrangements.**

4 The Bill is focused on making surrogacy more accessible for the benefit of the intending parents, whereas the Law Commission Review more roundly considers the interests of all parties, including the child, surrogate and intending parents.

5 In summary:

- (a) Both the Bill and the Law Commission require ECART to consider the health of the child, but the Law Commission recommends a broader risk assessment process informed by a specialist social worker's report.
- (b) The Law Commission recommends that the arrangements with respect to the payment of reasonable costs become legally enforceable under the HART Act, whereas under the Bill it is only the arrangements relating to transfer of custody of the child that are legally enforceable under the COCA, and only if they are reflected in a surrogacy order obtained under that Act.
- (c) The Bill sets out more strict requirements for surrogates and intending parents to receive health advice, counselling and legal advice on the arrangement before they are granted ECART approval for their surrogacy arrangement.

COMPENSATION FOR SURROGACY

6 Both the Law Commission Review and the Bill uphold the prohibition on the commercialisation of surrogacy while carving out an exemption to allow the intended parents to compensate the surrogate for the reasonable expenses incurred prior to and during the pregnancy.

7 **The key difference between the Bill and the Law Commission Review is that the Bill does not specifically prescribe limits on the categories of permissible compensation.** This is unlike the Law Commission review which recommends that any compensation for loss of income be capped at 3 months wages/income less any paid parental leave payments received in the same period. The Bill then goes further than the Law Commission Review by making intended parents liable for child support payments, where the intended parents refuse to take custody of the child despite a surrogacy arrangement. The sum of these differences mean that a surrogacy arrangement under the Bill is potentially more commercially beneficial for a surrogate than the recommendations in the Law Commission Review.

8 The Law Commission Review recommends that the list of permitted payments in the Human Assisted Reproductive Technology Act 2004 (the **HART Act**) be amended to include the reasonable surrogacy costs incurred in relation to the surrogacy arrangement.¹² It further recommends that guidance on reasonable surrogacy costs should be provided which constrains loss of earnings to a maximum period of 3 months (less parental leave payments received) and any period where the surrogate was advised not to work on medical grounds.³

9 The Law Commission Review recommends the full list of permitted payments in the HART Act should include:⁴

- (a) Any reasonable medical costs incurred by the surrogate, including costs associated with achieving conception, pregnancy and birth, and post-partum recovery.
- (b) Any reasonable travel or accommodation costs incurred by the surrogate or her partner as a result

of the surrogacy arrangement.

- (c) Any reasonable costs relating to the care of the surrogate's dependants incurred as a result of the surrogacy arrangement.
- (d) The cost of obtaining any product or service recommended by the surrogate's healthcare provider in relation to conception, pregnancy, birth or post-partum recovery.
- (e) The cost of any insurance premium payable for health, disability, income protection or life insurance obtained for the surrogate in connection with the surrogacy arrangement or of any increase in an existing insurance premium payable for the surrogate as a result of the surrogacy arrangement.
- (f) The cost of reimbursing the surrogate for a loss of earnings incurred as a direct result of taking leave for the following periods (less any paid parental leave payments received in the same period):
 - (i) A period of not more than three months during which the birth occurred or was expected to occur.
 - (ii) Any other period during the pregnancy when the surrogate was advised not to work on medical grounds.
- (g) Any reasonable out-of-pocket expenses incurred as a direct result of the surrogacy arrangement, including in relation to maternity clothes, housework services, groceries and care of pets.

10 The Bill also sets out a non-exhaustive list of reasonable expenses permitted for the supply of a human embryo or gamete including the costs of counselling, travel, and

¹ Law Commission Review, Recommendation 46.

² Law Commission Review, Recommendation 59.

³ Law Commission Review, Recommendation 47(f).

⁴ Law Commission Review, Recommendation 47.

reimbursement for lost wages or salary.⁵ Specific to surrogacy, the Bill permits the payment of the actual and reasonable expenses of making the surrogacy arrangement, including payments for fertility treatment (including related counselling), legal advice, costs of travel and the reimbursement of lost wages or salary.⁶ Unlike the Law Commission Review, the Bill does not impose a maximum 3 month cap for lost wages or salary that may be reimbursed.

- 11 The Law Commission Review recommends that the reasonable costs associated with a surrogacy arrangement, entered into prior to conception, should be enforceable under the HART Act.⁷ In contrast, the Bill makes the surrogacy arrangement enforceable under the Care of Children Act 2004 (**COCA**), but only so far as it relates to custody of the child.⁸ **There is no provision in the Bill for how the financial support agreed to between parties may be enforced.**
- 12 The Law Commission Review recommends that further financial support be made available for surrogates by:
 - (a) publishing guidance clarifying that surrogates are entitled to paid parental leave for pregnancy;⁹
 - (b) providing that reasonable surrogacy costs should not be treated as income for tax purposes, other than payments for lost earnings;¹⁰ and
 - (c) exempting surrogates from work-preparation and work-test obligations for entitlement to benefits for a specified period of time after they have given birth.¹¹
- 13 **The Bill gives effect to the recommendation that a surrogate is exempt from the work- preparation and work-test obligations for entitlement to benefits,¹² but only if they are pregnant, not after they have given birth, and it is silent on the other aspects the Law Commission Review recommendations for additional financial support.** The Bill then goes further to create an obligation to pay child support on intending parents where a surrogacy order is granted and the parent fails to see through their obligations of parenthood.¹³
- 14 **Because the Bill is less prescriptive than the Law Commission about what constitutes reasonable expenses, there is arguably greater scope for the unintended commercialisation of surrogacy arrangements.**

⁵ Clause 5 of the Bill that inserts section 13(3) into the HART Act.

⁶ Clause 6 of the Bill that replaces section 14(4) of the HART Act.

⁷ Law Commission Review, Recommendation 48.

⁸ Clause 17 of the Bill that inserts section 124B(2) into the COCA; and Clause 6 of the Bill that inserts section 14(1A) of the HART Act.

⁹ Law Commission Review, Recommendation 49.

¹⁰ Law Commission Review, Recommendation 50.

¹¹ Law Commission Review, Recommendation 51.

¹² Clause 31 of the Bill, inserting regulation 3A(2)(da) into the Social Security (Exemptions under Section 105) Regulations 1998; and Clause 32 of the Bill inserting regulation 4(2)(h) into the Social Security (Exemptions under Section 105) Regulations 1998.

¹³ Clause 21 of the Bill that inserts subsection 7(2)(j) into the Child Support Act 1991.

RIGHTS TO INFORMATION AND IDENTITY

- 15 The key difference between the Law Commission Review and the Bill with regard to how information related to the surrogacy is captured and shared is that the Law Commission goes further than the Bill to require that more information is captured and provides a right of access to information key to identity for surrogate-born people.
- 16 **The Law Commission Review recommends an amendment to the HART Act to add the principle that surrogate-born people should have a right to know their genetics, whakapapa, gestational origins and to access that information.**¹⁴ It also recommends that the Advisory Committee on Assisted Reproductive Technology (the **Advisory Committee**) amend its guidelines to require counselling to address the identity rights of surrogate- born people.¹⁵
- 17 The Law Commission recommends that a national surrogacy birth register be created where the Registrar-General is responsible for registering and keeping up-to-date all surrogacy-births under a framework where the Registrar-General receives information as part of the birth registration process and when notified of a parentage orders by the Family Court.¹⁶
- 18 **The information the Law Commission recommends to be recorded by the Registrar- General is:**
- (a) **the surrogate’s legal name, date of birth, place of birth and last known address, ethnicity, cultural affiliations and any hapū or iwi affiliations;** and
 - (b) additional information about the surrogate and/or donor as is currently required only in relation to donors under section 47 of the HART Act (this includes their gender, height, eye and hair colour and signifiant aspects of their individual and family medical history).¹⁷
- 19 The Registrar-General would have an obligation to provide the information on the surrogacy register to the particular surrogate-born person on request,¹⁸ which can only be refused if the grounds under section 49 of the Privacy Act 2020 are met.¹⁹ The Law Commission also recommends that the Department of Internal Affairs publishes annual information on the number of surrogacy arrangements recorded on the register and the number of requests to access to register.²⁰
- 20 Lastly, the Law Commission recommends that the Government should consider ways to support people accessing the surrogacy birth register (learning from experience with adoptions and HART births),²¹ and to improve access to information about surrogacy arrangements for people born via surrogacy that was not clinically assisted (and accordingly, adopted under the usual Adoption Act process).²²

¹⁴ Law Commission Review, Recommendation 37.

¹⁵ Law Commission Review, Recommendation 9.

¹⁶ Law Commission Review, Recommendation 38

¹⁷ Law Commission Review, Recommendation 40.

¹⁸ Law Commission Review, Recommendation 41.

¹⁹ Law Commission Review, Recommendation 42.

²⁰ Law Commission Review, Recommendation 44.

²¹ Law Commission Review, Recommendation 43.

²² Law Commission Review, Recommendation 45

- 21 The Bill does not expressly recognise a right to access information regarding the surrogacy arrangement for surrogate-born people, nor does it create a separate registry which is publicly reported on to record information about all surrogacy arrangements in New Zealand.
- 22 The Bill does require the Registrar-General to register, as part of the birth information of a child, any information about the identity of their surrogate or donor “that is notified to the Registrar”.²³ However, **there is no requirement to notify the Registrar-General of the surrogate or donor’s name**, but only their address, whether they are a descendant of a New Zealand Māori, their ethnicity, their citizenship or residency status, their date, place and country of birth and type of cells donated.²⁴
- 23 **Accordingly, the Law Commission Review accords surrogate-born children greater rights of access to information about surrogacy arrangements than the Bill.**

ECART

- 24 The Law Commission Review and the Bill differ in terms of when the ECART should be engaged to require prior approval of the surrogacy arrangement. They also greatly differ in terms of the scheme under which ECART must consider and approve surrogacy arrangements.
- 25 The Law Commission Review recommends that only clinic-assisted surrogacy arrangements should require ECART approval, while recommending that a pathway to legal parenthood be created that is open to both clinic-assisted and non-clinic assisted surrogacy. In contrast, the Bill defines ‘surrogacy arrangement’ for the purpose of ECART approval widely, such that both clinic -assisted surrogacy and non-clinic assisted surrogacy require ECART approval for the purposes of obtaining legal parenthood under the new legislative scheme. However, the requirements the surrogacy arrangement must meet to obtain ECART approval under the Bill state ECART must be satisfied that the surrogate will not be the genetic parent of the child (which can only be achieved with clinic-assisted surrogacy).²⁵ This means that intended parents using non-clinic assisted surrogacy arrangements will not have an ability to give effect to their surrogacy arrangement under the Bill as the Bill does not set out a pathway for legal parenthood if ECART approval is not first obtained.
- 26 Further, the ECART approval process in the Bill is less prescriptive than the Law Commission Review recommends and it does not go as far to require that ECART specifically consider the welfare and best interests of the child to approve the surrogacy arrangement.

Circumstances requiring ECART approval

- 27 The Bill states that surrogacy arrangement “means an arrangement under which a woman agrees to become pregnant for the purpose of transferring custody of a child born as a result of the pregnancy to the intending parents”.²⁶ The Bill requires that prior ECART

²³ Clause 25 of the Bill that inserts section 15AA into the Births, Deaths, Marriages, and Relationships Registration Act 1995.

²⁴ Clause 28 of the Bill that inserts regulation 3A(d) into the Births, Deaths, Marriages, and Relationships Registration (Prescribed Information) Regulations 1995.

²⁵ Clause 7 of the Bill that inserts new section 23A(2)(a) the HART Act.

²⁶ Clause 4 of the Bill that amends the definition of “surrogacy arrangement” in section 5 of the HART Act.

approval is obtained for all surrogacy arrangements, if the intended parents wish to obtain a surrogacy order that allows the surrogacy arrangement to become legally enforceable.²⁷ The definition of surrogacy arrangement in the Bill captures both clinic-assisted surrogacy arrangements and non-clinic assisted surrogacy arrangements. An example of a non-clinical surrogacy arrangement is where the child is naturally conceived by a surrogate (for instance, where both intended parents have infertile eggs and sperm) solely for the purpose of the surrogate transferring custody of the child to the intended parents. Another example of a non-clinic assisted surrogacy arrangement is an at-home process of artificial insemination.

- 28 In practice however, the Bill does not allow ECART to approve a surrogacy arrangement for the purposes of a surrogacy order where the surrogate is a genetic parent of the child resulting from surrogacy.²⁸ Therefore, the intending parents would have to follow the traditional adoption pathway to obtain legal parenthood of the child in the examples of non-clinic assisted surrogacy above.
- 29 In contrast, the Law Commission recommends that ECART approval should only be required for “clinic-assisted surrogacy arrangements”.²⁹ This means that ECART approval would not be required in the examples above.

ECART approval process

- 30 The Law Commission Review recommends that, as part of the ECART approval process, a surrogacy report must be obtained from Oranga Tamariki to advise ECART on whether it has identified any serious concerns in relation to the risk of harm to the child.³⁰ The Law Commission recommends that the report be completed by a specialist team of social workers that are trained and educated on surrogacy reporting.³¹ A two staged approach is proposed where step one is a basic background check on the intended parents and if this raises any concern, a second advanced investigation must be conducted to ensure any risks to the surrogate-born child are justified.³² In contrast, the Bill states that ECART “must be satisfied” that “any health risks to the adult parties and any resulting child are justified.”³³ **This assessment is constrained only to health risks to the child, and unlike the Law Commission Review, it does not prescribe how the assessment of health risks is conducted.**
- 31 The Law Commission also recommends that the Advisory Committee amend its guidelines to require that ECART obtain a surrogacy plan from the parties to record their intentions, including their intentions with regard to the coverage of reasonable expenses.³⁴ It recommends that only the expenses part of this plan should be legally enforceable under the HART Act.³⁵

²⁷ Clause 7 of the Bill that inserts new section 23A into the HART Act, and clause 7 of the Bill that inserts new Part 2A into the COCA.

²⁸ Clause 7 of the Bill that inserts new section 23A(2)(a) the HART Act.

²⁹ Law Commission Review, Recommendation 2.

³⁰ Law Commission Review, Recommendation 5.

³¹ Law Commission Review, Recommendation 7.

³² Law Commission Review, Recommendation 6.

³³ Clause 7 of the Bill that inserts new section 23A(2)(c) of the HART Act.

³⁴ Law Commission Review, Recommendation 8.

³⁵ Law Commission Review, Recommendation 8.

- 32 Similarly, the Bill states that ECART may approve a surrogacy arrangement if it “is satisfied” that the parties have agreed to the timing and manner of transferring custody of the child, the nature of information about the pregnancy and foetus that the surrogate will disclose to the intending parents, and the method by which that information will be disclosed.³⁶ However, the surrogacy arrangement reviewed by ECART is not legally enforceable under COCA, except to the extent that custody arrangements are embodied in a surrogacy order obtained from the court.³⁷
- 33 For the instances where ECART approves the surrogacy arrangement, the Law Commission recommends that the Advisory Committee should provide guidance to ECART on time limits for the approval and the instances where an extension of an approval may be obtained.³⁸ The Bill does not contemplate time limits for an approval given to a surrogacy arrangement by ECART.
- 34 The full set of factors outlined in the Bill that ECART must be satisfied for approval are:³⁹
- (a) the surrogate will not be the genetic parent of the child resulting from surrogacy;
 - (b) that all parties have received medical advice, counselling in accordance with the Fertility Services Standard, and independent legal advice to understand the legal consequences of a surrogacy order;
 - (c) that the health risks associated with the surrogacy for all parties (including the child) are justified;
 - (d) that the parties have agreed to the timing and manner of transferring custody of the child, the nature of information about the pregnancy and foetus the surrogate will disclose to the intending parents, and the method by which that information will be disclosed; and
 - (e) that the risks that the surrogate or intending parents may change their mind about the transfer of custody of the child have been carefully considered by all the parties and are small.
- 35 In summary:
- (d) Both the Bill and the Law Commission require ECART to consider the health of the child, but the Law Commission recommends a broader risk assessment process informed by a specialist social worker’s report.
 - (e) The Law Commission recommends that the arrangements with respect to the payment of reasonable costs become legally enforceable under the HART Act, whereas under the Bill it is only the arrangements relating to transfer of custody of the child that are legally enforceable under the COCA, and only if they are reflected in a surrogacy order obtained under that Act.
 - (f) The Bill sets out more strict requirements for surrogates and intending parents to receive health advice, counselling and legal advice on the arrangement before they are granted ECART approval for their surrogacy arrangement.

³⁶ Clause 7 of the Bill that inserts new section 23A(2)(f) of the HART Act.

³⁷ Clause 17 of the Bill that inserts new sections 124B and 124D into the COCA.

³⁸ Law Commission Review, Recommendation 11.

³⁹ Clause 7 of the Bill that inserts new section 23A(2) of the HART Act.

ECART resourcing, membership, review of decisions and reporting

- 36 To acknowledge the increased workload of ECART, the Law Commission recommends that the Government should review the resourcing and operation of ECART to ensure surrogacy applications can be considered in a timely manner.⁴⁰ The Bill does not provide for additional resourcing, but the discretion to provide additional funding for ECART operations would lie with the Minister of Health and is not usually prescribed in legislation.
- 37 The Law Commission recommends a review of the membership of ECART (and the Advisory Committee) is undertaken, requiring two Māori members, two members who are able to articulate the interests of the children, two specialists in reproductive procedures, and to prescribe new membership requirements in legislation. The Bill does not propose any changes to the requirements of membership for ECART to cater to their new functions related to surrogacy.⁴¹
- 38 The Law Commission also recommends that ECART decisions on surrogacy arrangements should come with a right to have the decision independently reviewed by rehearing of a panel of three individuals (appointed at the time) with a range of expertise, within a specified timeframe.⁴² The Bill does not contemplate whether a right to review ECART's decision, or a process of review, should exist for parties that apply to have their surrogacy arrangement approved by ECART.
- 39 Finally, the Law Commission recommends that ECART should provide an opportunity for public feedback and complaints on their review processes and should publish annual reports on applications, their decisions, feedback and complaints and actions taken.⁴³ The Bill does not require any reporting or publishing of ECART applications or decisions.

OBTAINING LEGAL PARENTHOOD

- 40 The Law Commission Review and the Bill also differ on the framework by which legal parenthood for surrogacy arrangements is given effect. The Law Commission recommends a two pathway framework to establish legal parenthood to the intended parents under Status of Children Act 1969 (**SCA**): an administrative pathway and a Court- only pathway.⁴⁴ In contrast, the Bill proposes a single Court pathway where intended parents apply for a surrogacy order under the COCA for the custody of the surrogate-born child to be transferred from the surrogate to the intended parents within 10 days of the child's birth.⁴⁵
- 41 The Law Commission recommends the following conditions must be met for a surrogacy arrangement to be given effect under the administrative pathway: ECART approval; the intended parents have taken the child into their care; and that the surrogacy arrangement otherwise complies with requirements in prescribed regulations.⁴⁶ If these conditions are met, a statutory declaration of consent must be prepared and provided to the Registrar-

⁴⁰ Law Commission Review, Recommendation 4.

⁴¹ Law Commission Review, Recommendation 13.

⁴² Law Commission Review, Recommendation 12.

⁴³ Law Commission Review, Recommendations 14, 15, and 16.

⁴⁴ Law Commission Review, Recommendation 17.

⁴⁵ Clause 17 of the Bill that inserts section 124C(1) into the COCA.

⁴⁶ Law Commission Review, Recommendation 19.

General alongside the notification of birth,⁴⁷ where the surrogate's rights as a parent are relinquished and the intended parents' rights as a parent are created.⁴⁸ The declaration must be signed by the surrogate and their lawyer where the lawyer must declare that they have explained the effect and implications of the declaration to the surrogate.⁴⁹ The declaration is not valid if it is prepared before the surrogate-born child is 7 days old,⁵⁰ but from the time of birth up to the time the consent declaration is made, the intended parents are deemed to be additional guardians of the child,⁵¹ and the partner of the surrogate will not be presumed to be the parent of the child under a surrogacy arrangement.⁵² Once this is complete, the intended parents can apply to the Family Court to get an order confirming they are the child's parents.⁵³

42 The Court-only pathway recommended by the Law Commission is available to intended parents that do not meet the conditions in the administrative pathway. This allows intending parents to apply to the Court for a parentage order after the child is born,⁵⁴ which is treated the same as if it were an application for a parenting order under COCA.⁵⁵ The Family Court is able to grant the parentage order that is sought, or may make any other declaration as to parentage it sees fit.⁵⁶

43 **The Law Commission recommends that the Family Court must be satisfied that making a parentage order is in the best interests of the child, which should be determined with regard to the following factors:**⁵⁷

- (a) the parties' intentions when entering into the surrogacy arrangement;
- (b) the child's genetic and gestational links to each of the parties to the surrogacy arrangement;
- (c) all sibling relationships of the child;
- (d) the arrangements in place for preserving the child's identity, including information about their genetic and gestational origins and whakapapa;
- (e) 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;
- (f) the value of continuity in the child's care, development and upbringing;
- (g) the likely effect of the parentage order on the child, including psychological and emotional impact, throughout the child's life;
- (h) any harm that the child has suffered or is at risk of suffering;

⁴⁷ The Law Commission recommends that a standard form of such declaration be prepared by the Department of Internal Affairs in Recommendation 22.

⁴⁸ Law Commission Review, Recommendation 18.

⁴⁹ Law Commission Review, Recommendation 23.

⁵⁰ Law Commission Review, Recommendation 20.

⁵¹ Law Commission Review, Recommendation 21.

⁵² Law Commission Review, Recommendation 31.

⁵³ Law Commission Review, Recommendation 24.

⁵⁴ Law Commission Review, Recommendation 25.

⁵⁵ Law Commission Review, Recommendation 29.

⁵⁶ Law Commission Review, Recommendation 26.

⁵⁷ Law Commission Review, Recommendation 27.

- (i) where relevant, the child’s ascertainable wishes and feelings regarding the decision, taking account of the child’s age and understanding;
 - (j) all circumstances in relation to the surrogacy arrangement, including any change in circumstances since the arrangement was entered; and
 - (k) any other matter the Family Court considers relevant.
- 44 The Law Commission further recommends the appointment of a parentage order reporter, who is a social worker employed by Oranga Tamariki, to independently advise the Court on whether making the order sought is in the child’s best interests, with reference to the factors outlined above.
- 45 If the Family Court grants a parentage order, the Law Commission recommends that this information be provided to the Registrar-General and included in the child’s birth registration.⁵⁸
- 46 In contrast, the Bill does not allow a Court to grant a surrogacy order if prior ECART approval is not obtained. The Court may grant a surrogacy order if it is satisfied that all parties agree to be legally bound by the surrogacy agreement, and ECART approval (or an international equivalent to ECART) has been obtained.⁵⁹ This has implications for non- clinic assisted surrogacy, as discussed at paragraph 26.
- 47 Under the Bill, the parties may apply for a surrogacy order at any time, but custody of the child transfers under that order within 10 days of the birth of the child.⁶⁰
- 48 Also under the Bill, a surrogacy order must contain an explanation of the effect of the order (for example, the obligations it creates), and the consequences of failure to comply with the obligations.⁶¹ The explanation must be drafted in a manner that each party understands, and must be explained by a lawyer to each party.⁶² Any failure to meet a requirement of an order does not render the order invalid.⁶³ The surrogacy order is recognised as creating and extinguishing legal rights associated with parenthood if the surrogacy arrangement results in the birth of a living child,⁶⁴ and the intending parents have the obligation of notifying the birth.⁶⁵
- 49 Because surrogacy orders under the Bill would be made under COCA, the child’s welfare and best interests would still be paramount in any proceedings,⁶⁶ but the Court would not have the benefit of the Law Commission’s surrogacy-specific factors to consider in deciding what is in the child’s best interests, or advice from an independent social worker.

Contingencies where a party dies

- 50 The Law Commission recommends that where a surrogate dies prior to birth (and they are unable to provide a declaration of consent under the administrative pathway) the

⁵⁸ Law Commission Review, Recommendation 30.

⁵⁹ Clause 17 of the Bill that inserts section 124C(2) into the COCA.

⁶⁰ Clause 17 of the Bill that inserts section 124C(1) into the COCA.

⁶¹ Clause 17 of the Bill that inserts section 124D(1) into the COCA.

⁶² Clause 17 of the Bill that inserts sections 124D(2) and 124D(3) into the COCA.

⁶³ Clause 17 of the Bill that inserts section 124D(4) into the COCA.

⁶⁴ Clause 19 of the Bill that inserts section 22A into the SCA.

⁶⁵ Clause 24 of the Bill, inserting sections 9(1A) and 9(1B) into the Births, Deaths, Marriages, and Relationships Registration Act 1995.

⁶⁶ Section 4 COCA.

intended parents are still able to apply under the Court pathway for a parentage order.⁶⁷ It also recommends that the Court pathway should be available to grant a parentage order to the intended parents if the child is still-born or dies soon after birth.⁶⁸ In the instance that one or both of the intended parents to a surrogacy arrangement die, the Law Commission recommends that the personal representatives of the intended parents should be able to apply under the administrative and Court pathways to obtain a parentage order over the child.⁶⁹

- 51 The Bill does not specifically consider how a surrogacy arrangement may be affected in the instance of the death of the surrogate-child, and the intended parents will not be able to obtain a surrogacy order in this instance. However, if the surrogate or intended parents die, the Bill would automatically permit the personal representatives of the intended parents to become the parent of the child provided a surrogacy order was obtained (which can be obtained prior to the birth of the child, unlike the parentage order).

ACCESS TO SURROGACY

- 52 **Both the Law Commission Review and the Bill provide for increased accessibility of surrogacy but do so in very different ways. The Law Commission recommends that the Government publish information to help parties understand the laws relating to surrogacy better, while the Bill creates a Surrogacy Register for the purpose of matching potential surrogates with intended parents.**

- 53 The Law Commission recommends that the Government should publish up-to-date, clear information on surrogacy and the law to ensure those people considering surrogacy can have a single source of information to consider the option of surrogacy.⁷⁰

- 54 It also recommends the Government review the supply of donor gametes in New Zealand, including whether donors should be compensated for reasonable expenses, and whether restrictions on importing gametes and embryos should be related in certain limited circumstances.⁷¹

- 55 Further, it recommends the Government review the funding for surrogacy-related fertility treatment and costs associated with the ECART approval process, as part of a broader review of fertility treatment funding.⁷²

- 56 The Bill sets out a comprehensive regime to encourage the accessibility of surrogacy for New Zealanders by creating a surrogacy register (distinct from the national surrogacy birth register recommended by the Law Commission) to match intended parents with potential surrogates.⁷³ The register would be managed by a Surrogacy Registrar that is appointed by the Minister of Health, who would also prescribe the functions of the Registrar, the reporting requirements, accountability and conditions the Registrar must comply with.⁷⁴ The Surrogacy Registrar would be responsible for reviewing applications by women who are willing to become surrogates, establishing and maintaining the register of potential

⁶⁷ Law Commission Review, Recommendation 32.

⁶⁸ Law Commission Review, Recommendation 33.

⁶⁹ Law Commission Review, Recommendation 34.

⁷⁰ Law Commission Review, Recommendation 58.

⁷¹ Law Commission Review, Recommendation 63.

⁷² Law Commission Review, Recommendation 62.

⁷³ Clause 9 of the Bill that inserts section 66B into the HART Act.

⁷⁴ Clause 9 of the Bill that inserts section 66A into the HART Act.

surrogates which may include information such as why a woman wishes to become a surrogate, details of intended parents who are seeking a surrogate which may include the reasons why they are seeking a surrogate arrangement, adopting a process of matching surrogates with intended parents, and facilitating the meeting of the parties.⁷⁵ These responsibilities may be delegated providing the appointed Registrar meets the requirements for delegation under the Bill,⁷⁶ and the Registrar may prescribe a fee for intended parents wishing to apply for registration.⁷⁷ The Bill precludes civil action against the Registrar or their delegates but leaves open the possibility of judicial review of their decision making.⁷⁸

OTHER PROVISIONS

- 57 **The Law Commission also recommends the Government should commission research on Tikanga Māori and surrogacy and Māori perspectives on surrogacy in practice,⁷⁹ and recommends that ECART receive further guidance to help determine whether counselling in relation to a surrogacy arrangement is culturally appropriate from an ao Māori perspective.⁸⁰ The Bill does not specifically account for Tikanga Māori or Te Ao Māori perspectives on surrogacy, and it does not appear to have been informed by any research on such.**
- 58 The Law Commission also makes a number of recommendations regarding international surrogacy arrangements to ensure: the pathway to obtain legal parenthood for surrogacy arrangements is open to instances where the child is born overseas;⁸¹ that the child's passport can be processed as soon as possible after the child's birth;⁸² that the parentage order for surrogacy provides the child the same rights to citizenship as overseas adoption.⁸³
- 59 The Bill gives some consideration to international surrogacy arrangements but does not go as far as the Law Commission recommends to ensure a special process for New Zealand citizenship of a surrogate-born child overseas.
- 60 The Bill allows the Court to grant a surrogacy order for an international surrogacy arrangement if an overseas ethics committee that performs equivalent functions to ECART provides written notice that it is satisfied that the requirements in new section 23A(2) of the HART Act are met.⁸⁴
- 61 The Bill also provides that new section 22A of the SCA, which will create and extinguish parental rights consequent to a surrogacy order, applies even if the surrogacy arrangement involves an assisted reproductive procedure performed by an overseas

⁷⁵ Clause 9 of the Bill that inserts section 66B into the HART Act.

⁷⁶ Clause 9 of the Bill that inserts section 66D into the HART Act.

⁷⁷ Clause 9 of the Bill that inserts section 66C into the HART Act.

⁷⁸ Clause 9 of the Bill that inserts section 66E into the HART Act.

⁷⁹ Law Commission Review, Recommendation 1.

⁸⁰ Law Commission Review, Recommendation 10.

⁸¹ Law Commission Review, Recommendations 52 and 54.

⁸² Law Commission Review, Recommendation 55.

⁸³ Law Commission Review, Recommendation 56.

⁸⁴ Clause 17 of the Bill that inserts section 124C(2)(b)(ii) into the COCA.

provider of fertility services, which leaves open the ability for ECART to grant prior approval to a procedure performed internationally.⁸⁵

We call for this premature bill to be withdrawn, and for the Government to produce a bill that represents and deals with all the issues raised by the Law Commission, and then to resubmit it and allow public submissions to a select committee.

We wish to appear before the committee.

A handwritten signature in black ink, appearing to read 'Bob McCoskrie', written in a cursive style.

Bob McCoskrie
CEO / Founder – Family First New Zealand