

Submission to the Health Select Committee on the Improving Arrangements for Surrogacy Bill (the Bill)

Introducing Mana Mokopuna – Children and Young People's Commission

Mana Mokopuna – Children and Young People's Commission is the independent Crown entity with the statutory responsibility to advocate for the rights, interests, participation and wellbeing of all children and young people (mokopuna) under 18 years old in Aotearoa New Zealand, including young persons aged over 18 but under 25 years old years if they are, or have been, in care or custody.

We independently advocate for and with mokopuna within the context of their families, whānau, hapū, iwi and communities, based on evidence, data and research, including direct mokopuna experiences and views.

Our work is grounded in the United Nations Convention on the Rights of the Child (the Children's Convention), Te Tiriti o Waitangi and other international human rights instruments. We are a National Preventative Mechanism under the Optional Protocol to the Convention Against Torture, meaning we monitor places where mokopuna are deprived of their liberty, including in the care and protection, youth justice, youth mental health and intellectual disability spaces.

We have a statutory mandate to promote the Children's Convention and monitor the Government's implementation of its duties under the Convention, and to work in ways that uphold the rights of mokopuna Māori including under Te Tiriti o Waitangi. We place a focus on advocating for and with mokopuna who are experiencing disadvantage, and we recognise and celebrate the diversity of mokopuna in all its forms.

Our moemoeā (vision) is *Kia kuru pounamu te rongō – All mokopuna live their best lives*, which we see as a collective vision and challenge for Aotearoa New Zealand. One of our current strategic advocacy priority areas is a strong start in life for all mokopuna, which sees us focus on mokopuna in their first 2000 days.

Our particular mandate relating to this Bill

Mana Mokopuna has a statutory role under the Human Assisted Reproductive Technologies Act (2004) to provide advice and represent the interests of children and young people on the Advisory Committee on Assisted Reproductive Technologies (ACART). This means we are well-placed to provide a children's rights perspective on this Bill, which this submission brings forward. We have addressed particular consultation questions throughout this submission, too.



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The implications of surrogacy on children's rights

- 1 Surrogacy is a form of family and whānau formation that has impacts on children's rights, yet the promotion and protection of children's rights are not always at the forefront of surrogacy arrangements. Mana Mokopuna urges the Health Committee to keep the rights of mokopuna at the forefront of its consideration of this Bill, including the children's right to identity. We emphasise that mokopuna exist within the context of their family, whānau, hapū and iwi, and that familial and whānau connections and relationships are of utmost importance for mokopuna.
- 2 We welcome the work that has been done to redraft the earlier Surrogacy Bill to incorporate some of the recommendations of the Law Commission's 2022 report on surrogacy law, *E Kōpū Whāngai: He Arotake, Review of Surrogacy*.¹
- 3 This Bill affects the right that all mokopuna have to identity, which is established and protected in international children's rights law under Article 8 of the UN Convention on the Rights of the Child (the Children's Convention),² and reinforced by Article 7 of the Children's Convention.³ For mokopuna Māori, whakapapa is a central aspect of Māori identity, Mokopuna have the right to know and be connected to their whakapapa, as reinforced under Te Tiriti o Waitangi. A child's sense of their own identity is fundamental to their wellbeing – and this includes being able to know and connect with all elements of their origins and identity.
- 4 A child's identity includes elements such as name, nationality, and family relations as well as the genetic and biological, personal narrative, and cultural elements of the child's identity⁴. These rights can be at risk for children born through domestic and international surrogacy unless there are adequate protections being put in place – both domestically and internationally – to uphold children's rights to identity in surrogacy arrangements.

"It is crucial that identity information is collected and preserved on behalf of children conceived and born through [surrogacy], and that such children are made aware of the existence of that identity information and have access to it in line with their evolving capacities."⁵

- 5 The UN Special Rapporteur on the sale and sexual exploitation of children has called on all nations to:

"protect the rights of all surrogate-born children, regardless of the legal status of the surrogacy arrangement under national or international law, including by protecting the best interests of the child, protecting rights to identity and to access to origins, and cooperating internationally to avoid statelessness;"⁶

¹ [Review of surrogacy \(lawcom.govt.nz\)](https://www.lawcom.govt.nz/reports/review-of-surrogacy/)

² [UN Convention on the rights of the Child](#), article 8.

³ [UN Convention on the rights of the Child](#), article 7.

⁴ Achmad, C. I. (2018). Children's Rights in International Commercial Surrogacy: Exploring the challenges from a child rights, public international human rights law perspective. Chapter 8. Retrieved from <https://hdl.handle.net/1887/63088> (Rights in relation to international surrogacy apply also to domestic surrogacy.)

⁵ *ibid.*

⁶ [Surrogacy | OHCHR](#)

- 6 In 2021, the Principles for the protection of the rights of the child born through surrogacy (the Verona Principles),⁷ were endorsed by the UN Committee on the Rights of the Child. They identified particular risks of surrogacy in relation to children’s rights, and recommended procedural and safeguarding requirements to protect of the rights of mokopuna born through surrogacy.
- 7 At the international level as well, UNICEF and Child Identity Protection have stated in their joint Briefing Note on Key Considerations: Children’s Rights and Surrogacy (2022), the following, noting the interrelated nature of the child’s right to identity with the ability to experience other fundamental human rights:

“Decisions about whether to preserve information relevant to a child’s identity can have a lifetime impact on the child, and future generations, in several ways. Knowing one’s origins is fundamental to the child’s physical, psychological, cultural and spiritual development. Having one’s own identity is also a gateway to the enjoyment of the child’s other fundamental rights, such as those related to protection, health, education, and the maintenance of family ties.”⁸

- 8 As described in the Law Commission’s 2022 report on surrogacy law, *E Kōpū Whāngai: He Arotake, Review of Surrogacy*,⁹ Aotearoa New Zealand has long held that mokopuna should be able to know their genetic parentage. Te Tiriti o Waitangi provides for equal rights and privileges of all people in New Zealand to their taonga, which includes whakapapa – knowing one’s genetic heritage, and being connected to whānau. The Law Commission’s in-depth mahi relating to surrogacy from a te ao Māori perspective as outlined in its 2022 report is important in relation to this Bill. We note the Law Commission’s statement, based on the mahi of esteemed Māori scholars, that observes:

“the tikanga principles of whakapapa and whanaungatanga are of central importance to considering surrogacy from an ao Māori perspective. We also suggest that the tikanga principles of tapu, mana, manaakitanga, kaitiakitanga and aroha are also likely to be relevant.”¹⁰

- 9 Although surrogacy in Aotearoa New Zealand currently applies to only a few dozen mokopuna each year, this number is growing, and Mana Mokopuna has called for surrogacy and adoption law reform in the past, so that our legislation in these areas which directly impact on children and their rights, including the rights of mokopuna Māori, can uphold and promote their rights. This submission is consistent with our previous advice to government in relation to the rights of children in the context of surrogacy.

This Bill improves surrogacy law which will help to protect children’s rights

- 10 The Law Commission found in its 2005 report *New Issues in Legal Parenthood*¹¹ that, in an unknown number of surrogacy cases in Aotearoa New Zealand intending parents of

⁷ [VeronaPrinciples_2021 \(iss-ssi.org\)](#)

⁸ [file \(unicef.org\)](#) At para 2.

⁹ [Review of surrogacy \(lawcom.govt.nz\)](#)

¹⁰ Ibid, at 2.63, p.57.

¹¹ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [7.7]

mokopuna born through surrogacy did not go through the process to transfer parentage through adoption after the birth. While this might not necessarily affect family and whānau relationships, it may cause identity, care, decision-making and legal problems for the child during their lifetime. In some cases (particularly for international surrogacy) it may leave the child with no legal parents or nationality. These are inconsistent with the rights of mokopuna under the Children's Convention.

- 11 This Bill ensures mokopuna born from surrogacy can have their legal parentage established from birth without needing to go through a separate adoption process, providing that the surrogacy arrangement is not commercial, was entered into after approval by the Ethics Committee on Assisted Reproductive Technology (ECART), and the surrogate continues to consent *after* the birth to the establishment of legal parentage for the 'intending parents'.
- 12 The Bill also provides important processes for people born through surrogacy in relation to accessing information about one's identity, which are consistent with the Verona Principles.
- 13 Finally, the Bill provides court processes to make decisions on parentage when surrogacy agreements do not proceed as originally planned.

Mana Mokopuna supports this Bill as redrafted because it upholds the rights of mokopuna in relation to their legal parentage

- 14 Our view is that this Bill achieves the goal of addressing the legal parenthood of mokopuna born through surrogacy. In relation to some of the specific questions raised in the consultation document, we note the following:

Question 6: should an older surrogate-born child be able to apply for a parentage order?

- 15 Yes. It is every child's right to be able to do this. As in all court cases involving mokopuna, we emphasise that mokopuna have the right to have their views heard and be provided with legal representation (lawyer for child). The court must decide, consistent with article 3 of the Children's Convention, *in the best interests of the child*.

Question 9: when should the legal parentage be transferred? When the surrogate makes the statement or when the intending parents receive it?

- 16 Mana Mokopuna suggests it should be when the 'intending parents' receive the surrogate's signed statutory declaration, and they are looking after the mokopuna. Given the effect of the transference is to ensure parental responsibilities are bestowed on the intending parents, it makes sense for them to physically receive it – so they know their status – for it to take effect.

Mana Mokopuna supports this Bill because it upholds children's rights to know their identity through genetic and gestational connections

- 17 Both genetic and gestational connections result in biological links to offspring.
- 18 Genetic parental information is important because it ensures a child knows their whakapapa lineage, can access information about medical histories of their genetic parents, tipuna and ancestors, and because genetics bestows a 'likeness' with a parent.

- 19 Tikanga Māori and Te Tiriti o Waitangi provide rights for mokopuna to know their biological heritage. A 2023 study paper by the Law Commission on tikanga Māori¹² demonstrates that tikanga Māori has been steadily gaining recognition in the courts and in statutes. Te Kōti Mana Nui (the Supreme Court of New Zealand) has recently affirmed that tikanga Māori may be a source of enforceable rights and interests and is relevant to developing the common law. It is also recognised in much existing legislation.
- 20 One aspect of tikanga Māori is recognition of whakapapa as an inherent right of people. Whakapapa is an integral aspect of Māori identity as it is toto (blood connection) creating a link between the offspring and the atua (gods) through mātua (parents) in tikanga Māori. Whakapapa also provides identity associations with whānau, hapū and iwi, including ancestors, and whenua (land or location). Whakapapa connections can provide certain inheritance rights such as collective ownership and guardianship of assets and taonga, or access to iwi resources. In addition, there may be wairuatanga - spiritual or emotional - connections between a child and their gestational parent (whare tangata). It is therefore essential to ensure Māori offspring can know their genetic *and* gestational whakapapa and parentage.
- 21 It is also articulated in the principles of the Human Assisted Reproductive Technology Act 2004 (HART Act). Section 4(e) of the HART Act sets out the principle that donor offspring should be made aware of their genetic origins and be able to access information about those origins.
- 22 Gestational parental information is an important and relevant part of any child's identity, not just because it defines 'where I came from,' but physiologically - some biological components cross the placenta creating a biological link with a gestational parent. The time spent in utero has particular impacts on mokopuna for their lifetime, and the connection between the birthing mother and the mokopuna is important to recognise in the surrogacy context. There may also be spiritual, emotional, or family-like connections to a birth mother, depending on the mokopuna and their relationship throughout life.

Question 5. Do you have any views on what information should be collected about surrogates and donors, including whether surrogates' and donors' hapū and iwi should be collected separately from their ethnicity and cultural affiliations?

- 23 Consistent with the application of law including the common law of tikanga above, Mana Mokopuna agrees that identifying information should be collected about both surrogates and donors so mokopuna can find out about their gestational and genetic heritage. Information about donors is consistent with, and required by, the HART Act and we agree it should be extended to surrogates for reasons described above.
- 24 In addition, iwi and hapū information about donors and surrogates should also be collected and stored in the births registry information if they agree. Some Māori are not registered with their iwi, so collection only of *identifying information* of a donor or surrogate may not be enough to help offspring find their iwi and other tangata whenua to whom they have connections. Any knowledge that donors or surrogates have about their hapū and/or iwi should be able to be stored for future access by offspring.

¹² [Tikanga Māori \(lawcom.govt.nz\)](https://www.lawcom.govt.nz)

25 However, we suggest they should be offered the opportunity to provide this information, rather than being required to provide it. This is because iwi and hapū information belongs to them and their whānau, hapū and iwi. It may have been learned through oral tradition (it may not be immediately verifiable through written records). Donors and surrogates should have the opportunity to choose what information about iwi and hapū to share and the births registry records system should be flexible to be able to store different types of information. (For example, iwi or hapū may relate specifically to a rohe, or place, which may be part of their identity. Therefore, the records should be able to store the name of the place.)

Question 14: how can a child be advised about information held about them?

26 Mana Mokopuna agrees with the mechanism proposed in section 92A. This means when a person applies for a birth certificate, an extra advisory is provided indicating that there is additional, restricted surrogacy information available to the person named on the birth certificate, that they can access. This means no additional information is added directly to the birth certificate, thereby protecting the privacy of the offspring.

27 Noting that the Registrar-General must advise the person accessing surrogacy information that counselling may be desirable, we suggest that it would be useful for the information provided to include the name of the fertility service provider (if any) that facilitated the surrogacy that led to the person's conception and birth. Then, if the service is still operating, the offspring may contact them, as these services have counsellors expert in discussing reproductive and parentage issues, and the service may consider they have a natural or moral duty of care to that person, in relation to facilitating the preservation of their identity rights.

Traditional surrogacy may need more incentives to use ECART

28 The benefits of this Bill will not apply to those parties who do not use the ECART approval process.

29 Mokopuna born from 'traditional surrogacy' (those not involving fertility service providers because they do not use IVF or embryo transfer) may still remain with uncertain legal parentage if their parents do not seek the ECART approval process. While we expect some or many traditional surrogacies would use the ECART approval process to achieve greater certainty of legal parenthood, the costs of ECART approval may be a barrier for some intending parents.

30 Therefore, to optimise the incentives to use the ECART approval process, we suggest keeping the costs down for traditional surrogacy parties. One way to achieve that is to ensure ECART is well-supported through their number of members appointed, their secretariat, and members' funded time to process the applications for approvals. While this cannot be included in the Bill, it is a general recommendation to the Ministry of Health and ministers involved in budget decisions in this area. A well-supported ECART process would increase the likelihood of the process being used, and mokopuna having their rights to legal parenthood established more readily after being born through surrogacy.

Conclusion: the rights of mokopuna should be the primary consideration in relation to this Bill

- 31 The purpose of surrogacy and fertility services is family and whānau formation. At the very centre of surrogacy arrangements are children. However, in many cases, children's rights are the last thing considered in this process – and sometimes an afterthought post-birth, or with crucial opportunities missed to promote and protect the rights of the child.
- 32 Mana Mokopuna endorses this Bill because it improves arrangements for surrogacy in ways that promote and uphold children's rights to legal parentage. We commend the Health Committee for the process to achieve the current position of the Bill.

Glossary - Kuputaka | Definition of Māori terms

Term	Definition
Aroha	Love, affection, compassion
Atua	Gods
Hapū	Kinship, group, clan, subtribe. Pregnant.
Iwi	Extended kinship group, tribe, nation, people
Kaitiakitanga	Guardianship, stewardship
Mahi	Work
Mana	Prestige, authority, control, power, inherent rights
Mana Mokopuna	The Children and Young People's Commission
Manaakitanga	Hospitality, kindness, generosity, support, care
Mātua	Parents
Mokopuna	We refer to all children and young people in Aotearoa as mokopuna.
Tangata whenua	People of the land
Taonga	Treasure, property
Tapu	Be sacred, prohibited, restricted
Te ao Māori	Māori world view, perspective
Te Kōti Mana Nui	The Supreme Court of New Zealand
Te Tiriti o Waitangi	The foundational document in Aotearoa New Zealand. It represents the partnership between Māori and the Crown.
Tikanga	Correct procedure, custom, customary law
Tīpuna	Ancestors, grandparents
Toto	Blood
Wairuatanga	Spirituality
Whakapapa	Genealogy, lineage, descent. Referring to the past, present and future generations.
Whānau	The term whānau refers to all families including extended family and mokopuna.
Whare tangata	House of humanity, womb, uterus
Whenua	Land, country, nation, territory. Placenta/afterbirth