

He Puka Kaupapa | Issues Paper 47

Te Kōpū Whāngai: He Arotake

Review of Surrogacy



Te Aka Matua o te Ture | Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of Aotearoa New Zealand. Its purpose is to help achieve law that is just, principled and accessible and that reflects the values and aspirations of the people of Aotearoa New Zealand.

Te Aka Matua in the Commission's Māori name refers to the parent vine that Tāwhaki used to climb up to the heavens. At the foot of the ascent, he and his brother Karihi find their grandmother Whaitiri, who guards the vines that form the pathway into the sky. Karihi tries to climb the vines first but makes the error of climbing up the aka taepa or hanging vine. He is blown violently around by the winds of heaven and falls to his death. Following Whaitiri's advice, Tāwhaki climbs the aka matua or parent vine, reaches the heavens and receives the three baskets of knowledge.

Kia whanake ngā ture o Aotearoa mā te arotake motuhake

Better law for Aotearoa New Zealand through independent review

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The Māori language version of this Issues Paper's title was developed for Te Aka Matua o te Ture | Law Commission by Kiwa Hammond and Maakere Edwards of Aatea Solutions Limited. The title was finalised in conjunction with the Commission's Māori Liaison Committee.

Kei te pātengi raraunga o Te Puna Mātauranga o Aotearoa te whakarārangi o tēnei pukapuka. A catalogue record for this title is available from the National Library of New Zealand.

ISBN 978-0-9951291-1-5 (Online)

ISSN 1177-7877 (Online)

This title may be cited as NZLC IP47. This title is available on the internet at the website of Te Aka Matua o te Ture | Law Commission: www.lawcom.govt.nz

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Foreword

For many New Zealanders, having children is an important aspiration. For some New Zealanders, surrogacy provides an opportunity to have a child when they are otherwise unable to do so.

Surrogacy has become an established method of family building in Aotearoa New Zealand and around the world. However, because surrogacy relies on the participation of a third party to create a child, it can raise complex legal, ethical and medical issues. It can also raise issues of concern to Māori, particularly in relation to tikanga (customary practices), whakapapa (genealogy) and whanaungatanga (kinship).

Te Aka Matua o te Ture | Law Commission is examining surrogacy law, regulation and practice in Aotearoa New Zealand. It will make recommendations to the Government to ensure that the law meets the needs and expectations of New Zealanders and protects the rights and interests of people involved in surrogacy arrangements, including children born as a result of a surrogacy arrangement, surrogates and intended parents.

In this Issues Paper, we identify the issues with the current law, outline our guiding principles for surrogacy law reform and discuss options for reform that aim to reflect these principles.

A key problem with the current law relates to legal parenthood. The law does not recognise surrogacy as a process that creates a legal parent-child relationship between the intended parents and the surrogate-born child. Instead, the surrogate and her partner (if she has one) are the legal parents at birth, according to rules that were originally designed to clarify the legal status of gamete donors. Intended parents must adopt the child under the Adoption Act 1955 to be recognised in law as the child's parents.

We think it is time the law caught up with the reality of surrogacy arrangements. In this Issues Paper, we propose a new legal framework to provide for the recognition of the intended parents as the legal parents of a surrogate-born child.

Other significant matters we address in this Issues Paper include the financial support that should be available to surrogates, the information that should be available to surrogate-born children and how New Zealand law should accommodate international surrogacy arrangements.

We encourage all New Zealanders to have their say. The feedback we receive on this Issues Paper will influence the final recommendations we will make in our report to the Government in 2022.



Amokura Kawharu

Tumu Whakarae | President

Have your say

We want to know what you think about the issues, options and proposals set out in this paper.

Submissions on our Issues Paper must be received by **23 September 2021**.

You can make a submission online at surrogacy-consultation.lawcom.govt.nz.

You can email your submission to surrogacy@lawcom.govt.nz.

You can post your submission to

Review of Surrogacy

Law Commission

PO Box 2590

Wellington 6140

WHAT HAPPENS TO YOUR SUBMISSION?

Te Aka Matua o te Ture | Law Commission will use your submission to inform our review, and we may refer to your submission in our publications. We will also keep all submissions as part of our official records. Information supplied to the Commission is subject to the Official Information Act 1982.

We will publish the submissions we receive on our website once we have published our final report. Your submission will be publicly available, but we will not publish your name or contact details if you are submitting as an individual and not on behalf of an organisation.

If you do not want us to release identifying information or any other part of your submission or do not want your submission to be referred to in our publications, please explain in your submission which parts should be withheld and the reasons. We will take your views into account in deciding:

- whether to withhold or release any information requested under the Official Information Act;
- if and how to make your submission publicly available on our website; and
- if and how to refer to your submission in our publications.

The Commission complies with the Privacy Act 2020, which governs how it collects, holds, uses and discloses personal information you provide. You have the right to access and correct your personal information.

Acknowledgements

Te Aka Matua o te Ture | Law Commission gratefully acknowledges the contributions of the people and organisations that have shaped our Issues Paper, especially those individuals who generously shared with us their personal experiences of surrogacy.

We acknowledge the generous contribution and expertise from our Expert Advisory Group:

- Dr Claire Achmad
- Associate Professor Debra Wilson
- Margaret Casey QC
- Stewart Dalley

We are also grateful for the support and guidance of the Māori Liaison Committee to Te Aka Matua o te Ture | Law Commission.

We acknowledge individuals who have engaged with us to share an ao Māori perspective on surrogacy, including Annabel Ahuriri-Driscoll (Ngāti Porou, Ngāti Kauwhata, Rangitāne, Ngāti Kahungunu), Professor Jacinta Ruru (Raukawa, Ngāti Ranginui, Ngāti Maniapoto, Pākehā), Karaitiana Taiuru (Ngāi Tahu, Ngāti Rārua, Ngāti Kahungunu, Pākehā), Professor Marewa Glover (Ngāpuhi) and Te Ripowai Higgins (Tūhoe).

We emphasise nevertheless that the views expressed in this Issues Paper are those of the Commission and not necessarily those of the people who have helped us.

Nō reira, ko tēnei mātou e mihi nei ki a koutou, kua whai wā ki te āwhina i a mātou. Tēnā koutou, tēnā koutou, tēnā koutou katoa.

The Commissioner responsible for this project is Helen McQueen. The project is led by Principal Legal and Policy Adviser Nichola Lambie. The legal and policy advisers who have worked on this Issues Paper are Briar Peat (Ngāti Rangiwewehi, Ngāti Whakāue) and Samuel Mellor. The law clerks who have worked on this Issues Paper are Georgia Drummond, Marko Garlick and Natalie Vaughan.

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Glossary

Key abbreviations and terms used in this Issues Paper are set out below. Our approach has been to adopt the terminology that is most widely used and understood, but we acknowledge that there are different views on appropriate terminology.

We have included basic explanations of lesser-known Māori terms throughout this Issues Paper to assist readers with understanding their meaning in the specific context in which they are used. We note that these explanations are not intended to be prescriptive or reductive and do not necessarily reflect the depth and breadth of meaning of these words in te reo Māori.

ACART	Advisory Committee on Assisted Reproductive Technology. <i>ACART</i> is established under the <i>HART Act</i> and issues guidelines to <i>ECART</i> on the approval of <i>gestational surrogacy</i> arrangements.
altruistic surrogacy	Where the <i>surrogate</i> does not receive any payment for entering into a <i>surrogacy arrangement</i> other than payment for reasonable expenses.
artificial insemination	An assisted reproductive procedure where sperm is artificially introduced into a woman's body. <i>Artificial insemination</i> is used in <i>traditional surrogacy</i> arrangements. The procedure can be completed with or without the assistance of a fertility clinic.
commercial surrogacy	Where the <i>surrogate</i> agrees to the <i>surrogacy arrangement</i> in exchange for the payment of a fee or other consideration. Commercial surrogacy is often characterised by contractual arrangements and the involvement of for-profit intermediaries that facilitate <i>surrogacy arrangements</i> .
domestic surrogacy	A <i>surrogacy arrangement</i> where the <i>surrogate</i> and the <i>intended parent(s)</i> live in the same country.
donor(s)	The person or people who donate human <i>gametes</i> (ova or sperm) for reproductive purposes.
ECART	Ethics Committee on Assisted Reproductive Technology. <i>ECART</i> is responsible under the <i>HART Act</i> for approving <i>gestational surrogacy</i> arrangements in accordance with guidance issued by <i>ACART</i> .
gamete	A <i>gamete</i> is a human reproductive cell. A female gamete is called an ovum (plural is ova). Male gametes are called sperm.
gestational surrogacy	A <i>surrogacy arrangement</i> where the surrogate does not use her own ovum in conception. Instead, an embryo is created using an ovum and sperm from the <i>intended parents</i> or <i>donors</i> . The embryo is then implanted in the surrogate.

	<p>In a <i>gestational surrogacy</i>, the <i>surrogate</i> is not the genetic mother of the child, and the child is usually genetically linked to one or both <i>intended parents</i>.</p> <p><i>Gestational surrogacy</i> is also known as “full surrogacy”, “host surrogacy” or “IVF surrogacy”.</p>
international surrogacy	A <i>surrogacy arrangement</i> where the <i>intended parent(s)</i> and <i>surrogate</i> do not live in the same country.
in vitro fertilisation (IVF)	<p>An assisted reproductive procedure where an ovum is combined with sperm outside the body.</p> <p><i>IVF</i> is used in <i>gestational surrogacy</i> arrangements and requires the assistance of a fertility clinic.</p>
HART Act	Human Assisted Reproductive Technology Act 2004.
HART Order	Human Assisted Reproductive Technology Order 2005.
intended parent(s)	<p>A single person or couple who enter a <i>surrogacy arrangement</i> with the intention of becoming parents to a <i>surrogate-born child</i> and caring for that child from birth.</p> <p>We refer to an <i>intended parent</i> who is female as an <i>intended mother</i> and an <i>intended parent</i> who is male as an <i>intended father</i>, where appropriate.</p>
New Zealander	A New Zealand citizen or a New Zealand resident.
surrogacy arrangement	An arrangement between a <i>surrogate</i> and <i>intended parent(s)</i> where the <i>surrogate</i> agrees to become pregnant and carries and delivers a child for the <i>intended parent(s)</i> to raise as the child’s parents.
Surrogacy Survey	A survey of public attitudes on surrogacy conducted by Te Whare Wānanga o Waitaha University of Canterbury in 2017-2018.
surrogate	<p>The woman who agrees to become pregnant and carries and delivers a child for the <i>intended parent(s)</i> under a <i>surrogacy arrangement</i>.</p> <p>This Issues Paper refers to the <i>surrogate</i> as a woman and uses the pronouns she/her, consistent with the language of the <i>HART Act</i>. In doing so, the Commission intends to include any person who can become pregnant. We acknowledge that trans men, takatāpui (a term encompassing diverse Māori gender and sexual identities) and other gender-diverse people may also become pregnant and may, therefore, also act as a <i>surrogate</i>.</p>
surrogate-born child	A child born as a result of a <i>surrogacy arrangement</i> .
traditional surrogacy	<p>A <i>surrogacy arrangement</i> where the <i>surrogate</i>’s ovum is used in conception, meaning she is the child’s genetic mother. Pregnancy is usually achieved by <i>artificial insemination</i> using the sperm of an <i>intended parent</i> or a <i>donor</i>.</p> <p><i>Traditional surrogacy</i> is also known as “partial surrogacy” or “genetic surrogacy”.</p>

CHAPTER 1

Introduction

- 1.1 Te Aka Matua o te Ture | Law Commission (the Commission) is reviewing surrogacy law, regulation and practice in Aotearoa New Zealand. Surrogacy is an arrangement where a woman (the surrogate) agrees to become pregnant and carries and delivers a child for another person or couple (the intended parent(s)) who intend to raise the child from birth.
- 1.2 Surrogacy provides people with an opportunity to build their family when they are unable to have a child themselves. However, because surrogacy relies on the participation of a third party to create a child, it can raise complex legal, ethical and medical issues.
- 1.3 Surrogacy may also raise matters of particular concern to Māori. It raises questions about whether Māori are enabled by surrogacy law and regulation to act in accordance with tikanga (customary practices), access to information about and implications for whakapapa (genealogy), the legal status of whāngai arrangements in the surrogacy context and Māori representation in oversight arrangements.
- 1.4 In 2005, the Commission examined aspects of surrogacy law and found there was an urgent need for reform.¹ Since then, there have been no changes to the legal framework, but both demand for surrogacy and dissatisfaction with the current regime have grown. In 2019, a petition with 32,239 signatures was presented to Parliament calling for changes to Aotearoa New Zealand's surrogacy and adoption laws.²
- 1.5 A central proposal in this Issues Paper is for a new legal framework to provide for the recognition of the intended parents as the legal parents of a surrogate-born child. This should replace reliance on adoption laws in the surrogacy context. The new legal framework should link in with the existing approval process for surrogacy arrangements so that intended parents and surrogates are not required to complete two separate legal processes.
- 1.6 The purpose of this Issues Paper is to ask for your views on this and other options for reform that seek to address the issues with the current law.
- 1.7 The feedback we receive will help us decide what recommendations for reform to make in our report to the Government in 2022.

¹ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [7.57].

² Petition of Christian John Newman "Update the Adoption Act 1955 to simplify and speed up the process for adoption" (2017/409, presented to Parliament 3 October 2019).

OUR TERMS OF REFERENCE

- 1.8 The terms of reference for this review were published in March 2021. They require us to consider:
- (a) surrogacy from an ao Māori perspective and how the law should address any matters of particular concern to Māori;
 - (b) how surrogacy arrangements should be regulated in Aotearoa New Zealand;
 - (c) whether the types of payments intended parents can make under a surrogacy arrangement should be expanded and, if so, what types of payments should be permitted;
 - (d) how the law should attribute legal parenthood in surrogacy arrangements;
 - (e) how international surrogacy arrangements (where either the intended parent(s) or the surrogate live overseas) should be provided for in New Zealand law; and
 - (f) what information should be available to children born from surrogacy arrangements.
- 1.9 Our review considers various statutes as they apply to surrogacy arrangements, including the Human Assisted Reproductive Technology Act 2004 (HART Act), Status of Children Act 1969 and Adoption Act 1955.

OUR APPROACH TO THE BROADER QUESTIONS

- 1.10 Surrogacy attracts a range of different views on two broad questions.³ First, should surrogacy be permitted or prohibited? Second, should commercial surrogacy arrangements be permitted? These broad questions are not the focus of our terms of reference for the reasons we discuss below.

Should surrogacy be permitted or prohibited?

- 1.11 Globally, there is no universal consensus on the question of whether surrogacy should be permitted or prohibited in all forms. Countries take different approaches, reflecting the different social, ethical, political, cultural, traditional and legal views on surrogacy that exist worldwide.⁴
- 1.12 In Aotearoa New Zealand, Parliament clarified in 2004 that surrogacy is permitted if certain conditions are met.⁵ This is consistent with the approach to surrogacy in comparable countries including Australia, England, Wales, Scotland and Canada.

³ We acknowledge the extensive body of academic research and literature exploring surrogacy from ethical, human rights and feminist perspectives. We do not attempt a comprehensive summary of that work in this Issues Paper. We have, however, been cognisant of that work in our consideration of the issues and when developing the options for reform presented throughout this Issues Paper.

⁴ Claire Fenton-Glynn and Jens M Scherpe “Surrogacy in a Globalised World: Comparative Analysis and Thoughts on Regulation” in Jens M Scherpe, Claire Fenton-Glynn and Terry Kaan (eds) *Eastern and Western Perspectives on Surrogacy* (Intersentia, Cambridge (UK), 2019) 515 at 517.

⁵ Human Assisted Reproductive Technology Act 2004, s 14.

- 1.13 Since 2004, surrogacy has become a legitimate and established method of family building in Aotearoa New Zealand. As we explain in Chapter 2, New Zealanders' use of surrogacy is steadily increasing, and public opinion supports surrogacy continuing to be legal. In addition, the growing body of empirical research into the impact of surrogacy arrangements outlined in Chapter 2 demonstrates largely positive outcomes for surrogates and families with surrogate-born children.
- 1.14 For these reasons, while we acknowledge the lack of universal consensus on whether surrogacy should be permitted or prohibited, this review does not reconsider Parliament's decision to permit surrogacy in Aotearoa New Zealand.
- 1.15 We think it is also important to recognise that any attempt to prohibit surrogacy is unlikely to succeed.⁶ The reality is that traditional surrogacy arrangements can take place privately without any official approval or recognition. In addition, intended parents can travel overseas to countries where surrogacy is legal and enter international surrogacy arrangements. In Australia, attempts by some states to prohibit intended parents from entering international commercial surrogacy arrangements have been seen as a "failed experiment".⁷ In Ireland, where surrogacy remains unregulated, the reality of international commercial surrogacy has been recognised as a strong reason for preferring regulation of domestic surrogacy rather than prohibition.⁸
- 1.16 Our approach to this review is therefore to ensure surrogacy is regulated in a way that protects and promotes the rights and interests of surrogate-born children, surrogates and intended parents. We discuss our approach in greater detail in Chapter 3.

Should commercial surrogacy arrangements be permitted?

- 1.17 Surrogacy arrangements are often categorised as either "commercial" or "altruistic". Under a commercial surrogacy arrangement, the relationship between the intended parents and the surrogate is a contractual one, and the surrogate receives a fee or other consideration for her role that may go beyond compensation for any reasonable expenses she incurs. Commercial arrangements are typically characterised by the involvement of for-profit intermediaries that bring together intended parents and surrogates and mediate the ongoing surrogacy arrangement for a fee. Under an altruistic surrogacy arrangement, the surrogate does not receive any payment other than for reasonable expenses incurred.

⁶ As the authors noted in Margaret Brazier, Alastair Campbell and Susan Golombok *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation – Report of the Review Team* (Cmnd 4068, October 1998) at [4.38]: "[u]nless a state is prepared to police the bedrooms of the nation, surrogacy arrangements cannot effectively be outlawed, only driven underground".

⁷ Debra Wilson and Julia Carrington "Commercialising Reproduction: In Search of a Logical Distinction between Commercial, Compensated, and Paid Surrogacy Arrangements" (2015) 21 NZBLQ 178 at 186. See also South Australian Law Reform Institute *Surrogacy: A Legislative Framework – A Review of Part 2B of the Family Relationships Act 1975* (SA) (Report 12, 2018) at [12.3.1]; and House of Representatives Standing Committee on Social Policy and Legal Affairs *Surrogacy Matters: Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements* (Parliament of the Commonwealth of Australia, April 2016) at [1.70]–[1.71] and [1.112]–[1.113].

⁸ Conor O'Mahony *A Review of Children's Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law* (Department of Children, Equality, Disability, Integration and Youth, Ireland, December 2020) at 6–8.

- 1.18 Commercial surrogacy is prohibited in Aotearoa New Zealand and in many other countries. It is, however, legal in a handful of jurisdictions, including several states in the United States as well as Ukraine, Georgia and Russia.
- 1.19 Whether surrogacy should be permitted on a commercial basis or limited to altruistic arrangements is a question that attracts a significant amount of attention. Commercial surrogacy is typically opposed on the grounds that it is inherently exploitative and commodifies women and children.⁹ More recently, concern has focused on children's rights and the risk that some commercial surrogacy arrangements may constitute the sale of children under international human rights law (as we discuss in Chapter 3).¹⁰ However, these views are not universally held. Some contest the view that commercial surrogacy amounts to the sale of children or the commodification of women and children.¹¹ Others also suggest that prohibiting commercial surrogacy can in fact create conditions for exploitation of women because it prevents surrogates from being treated fairly.¹²
- 1.20 For the purposes of our review, it is important to recognise that the precise distinction between commercial and altruistic surrogacy is unclear. There is considerable variation amongst altruistic and commercial models. In addition, regimes that are altruistic in nature may present the same risks as commercial regimes, depending on the terms of the arrangement and the legal protections in place.¹³ Conversely, commercial surrogacy arrangements may be motivated by altruism.¹⁴ For these reasons, relying on a rigid distinction between commercial and altruistic surrogacy can be unhelpful.¹⁵
- 1.21 Our approach in this review is therefore to examine each element of surrogacy law and regulation on its merits in accordance with the guiding principles we outline in Chapter 3.

⁹ See, for example, Usha Rengachary Smerdon "Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India" (2008) 39 Cumb L Rev 15 at 51–62.

¹⁰ Maud de Boer-Buquicchio *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* UN Doc A/73/174 (17 July 2018); Maud de Boer-Buquicchio *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* UN Doc A/74/162 (15 July 2019); and Committee on the Rights of the Child *List of issues in relation to the report submitted by the United States of America under article 12 (1) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* UN Doc CRC/C/OPSC/USA/Q/3-4 (7 October 2016) at [7].

¹¹ See, for example, Rhonda Powell "Exploitation of Surrogate Mothers in New Zealand" in Annick Masselot and Rhonda Powell (eds) *Perspectives on Commercial Surrogacy in New Zealand: Ethics, Law, Policy and Rights* (Centre for Commercial & Corporate Law, Te Whare Wānanga o Waitaha | University of Canterbury, Christchurch, 2019) 57 at 61; and Committee on the Rights of the Child *List of issues in relation to the report submitted by the United States under article 12 (1) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography: Addendum* UN Doc CRC/C/OPSC/USA/Q/3-4/Add.1 (23 March 2017) at [35].

¹² Rhonda Powell "Exploitation of Surrogate Mothers in New Zealand" in Annick Masselot and Rhonda Powell (eds) *Perspectives on Commercial Surrogacy in New Zealand: Ethics, Law, Policy and Rights* (Centre for Commercial & Corporate Law, Te Whare Wānanga o Waitaha | University of Canterbury, Christchurch, 2019) 57 at 58; and Ruth Walker and Liezl van Zyl *Towards a Professional Model of Surrogate Motherhood* (Palgrave MacMillan, London, 2017) at 44.

¹³ Debra Wilson "Avoiding the Public Policy and Human Rights Conflict in Regulating Surrogacy: The Potential Role of Ethics Committees in Determining Surrogacy Applications" (2017) 7 UC Irvine L Rev 653 at 662.

¹⁴ Ruth Walker and Liezl van Zyl *Towards a Professional Model of Surrogate Motherhood* (Palgrave MacMillan, London, 2017) at 12; Debra Wilson *Rethinking Surrogacy Laws: Te Kohuki Ture Kopu Whangai – Overview of Report* (Te Whare Wānanga o Waitaha | University of Canterbury, May 2020) at 40–41.

¹⁵ A similar view was expressed in Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: A new law – A joint consultation paper* (CP244/DP167, 2019) at [2.14]–[2.18]; and South Australian Law Reform Institute *Surrogacy: A Legislative Framework – A Review of Part 2B of the Family Relationships Act 1975 (SA)* (Report 12, 2018) at [3.2.1]–[3.2.12].

In Chapter 6, we discuss the types of payments that could be made to surrogates. In Chapter 10, we look at whether surrogacy agencies should be able to operate as intermediaries in Aotearoa New Zealand and, if so, on what basis.

OUR PROCESS SO FAR

- 1.22 To identify issues and options for reform, we have reviewed relevant legislation, case law, reports and commentary. We have examined how surrogacy arrangements are entered in practice, when and how surrogacy arrangements are approved and how the courts approach legal parenthood in the context of surrogacy. We have obtained data relating to how New Zealanders use surrogacy both within Aotearoa New Zealand and overseas, which we explore in Chapter 2.
- 1.23 We have analysed the research undertaken by Te Whare Wānanga o Waitaha | University of Canterbury as part of its research project Rethinking Surrogacy Laws. This includes a survey of public attitudes on surrogacy conducted in 2017-2018 (the Surrogacy Survey), a lawyers' survey and interviews with Family Court judges.
- 1.24 We have met with people who have participated in surrogacy arrangements in Aotearoa New Zealand, including intended parents who have had (or are hoping to have) a child through surrogacy, surrogates, a surrogate's partner and an ovum donor. We learned about each person's unique experience and the issues they faced. These experiences covered a wide range of different scenarios including traditional and gestational surrogacy arrangements, altruistic and commercial surrogacy arrangements and domestic and international surrogacy arrangements. In addition, we have met with representatives from Aotearoa New Zealand's three fertility clinics, academics and lawyers to hear their preliminary views. We have also met with officials from the different government agencies that have a role in the regulation of surrogacy arrangements.
- 1.25 We have drawn on the Commission's work when it reviewed legal parenthood in surrogacy arrangements in 2005.¹⁶ We have considered proposals made in three Members' Bills that addressed the regulation of surrogacy¹⁷ and the petition presented to Parliament in 2019.¹⁸
- 1.26 We have examined the law and reform initiatives in comparable jurisdictions, with a particular focus on Australia, England and Wales, Scotland, Ireland and Canada. We met with the Law Commission of England and Wales and the Scottish Law Commission on their current review of surrogacy law. We have also given particular attention to international developments. Since 2010, the Hague Conference on Private International Law has been considering international law issues relating to legal parenthood generally

¹⁶ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005).

¹⁷ Improving Arrangements for Surrogacy Bill 2021 (undrawn Member's Bill, Tāmami Coffey MP); Care of Children (Adoption and Surrogacy Law Reform) Amendment Bill 2012 (undrawn Member's Bill, Kevin Hague MP); and Jacinda Ardern MP's Member's Bill, Care of Children Law Reform Bill 2012 (62-1).

¹⁸ Petition of Christian John Newman "Update the Adoption Act 1955 to simplify and speed up the process for adoption" (2017/409, presented to Parliament 3 October 2019).

and international surrogacy arrangements in particular.¹⁹ In addition, earlier in 2021 the International Social Service published a set of principles for the protection of the rights of children born through surrogacy (the Verona Principles) with the support of the United Nations Committee on the Rights of the Child.²⁰ This followed two thematic reports on surrogacy by the United Nations Special Rapporteur.²¹ We refer to this work where relevant throughout this Issues Paper.

- 1.27 We have worked to inform ourselves of the interests of Māori in this area and appreciate from Māori the nature and cultural dimensions of surrogacy within te ao Māori. We have drawn on relevant commentary and feedback provided by several Māori academics and have been guided on our approach by the Commission's Māori Liaison Committee.
- 1.28 We met with our Expert Advisory Group to seek the Group's feedback on our proposed approach to the Issues Paper and took into account the feedback we received.

SUMMARY OF THIS PAPER

- 1.29 This Issues Paper is organised into 10 chapters. We ask questions throughout the Issues Paper to seek your views. You can respond to any or all of these questions and raise any issues we have not discussed.

Surrogacy in practice

- 1.30 In Chapter 2, we examine New Zealanders' participation in surrogacy both in Aotearoa New Zealand and overseas. We suggest that, based on available information, up to 50 children are born as a result of a surrogacy arrangement each year. We also explore New Zealanders' changing attitudes to surrogacy as reflected by the Surrogacy Survey and research that examines the impact of surrogacy on surrogate-born children, their families and surrogates.

Guiding principles for surrogacy law reform

- 1.31 In Chapter 3, we discuss our guiding principles for surrogacy law reform. We think that applying these principles will produce good surrogacy law that protects and promotes the rights and interests of people involved in surrogacy arrangements and meets the needs and expectations of New Zealanders. These guiding principles are as follows:
- The best interests of the surrogate-born child should be paramount.
 - Surrogacy law should respect the autonomy of consenting adults in their private lives.
 - Effective regulatory safeguards must be in place.

¹⁹ For more information on the Parentage / Surrogacy Project, see Permanent Bureau of the Hague Conference on Private International Law "Parentage / Surrogacy" <www.hcch.net>.

²⁰ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021).

²¹ Maud de Boer-Buquicchio *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* UN Doc A/74/162 (15 July 2019); and Maud de Boer-Buquicchio *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* UN Doc A/HRC/37/60 (15 January 2018).

- Parties should have early clarity and certainty about their rights and obligations.
- Intended parents should be supported to enter surrogacy arrangements in Aotearoa New Zealand rather than offshore.
- Surrogacy law should enable Māori to act in accordance with tikanga and promote responsible kāwanatanga (the right of the Crown to govern) that facilitates tino rangatiratanga (the right of Māori to exercise authority according to tikanga).

Māori and surrogacy

- 1.32 In Chapter 4, we consider aspects of te ao Māori relevant in the surrogacy context, Māori perspectives on surrogacy and matters that may be of particular concern to Māori in surrogacy practice, law and regulation. We identify potential issues and options for reform in relation to whether Māori are enabled by surrogacy law and regulation to act in accordance with tikanga, access to information about and implications for whakapapa, the legal status of whāngai arrangements in the surrogacy context and Māori representation in oversight arrangements.

Approving surrogacy arrangements

- 1.33 In Chapter 5, we consider how gestational surrogacy arrangements are approved in Aotearoa New Zealand by the Ethics Committee on Assisted Reproductive Technology (ECART) under the HART Act. The requirement for ECART approval is an important safeguard that protects the rights and interests of people affected by a surrogacy arrangement. However, several problems have been identified with the way the ECART process works in practice, such as the cost, delay and complexity of the process. Another question raised in this review is whether intended parents should have their parental suitability assessed in the same way as prospective adoptive parents. We explore these issues and identify options for reform. We also consider options to make the ECART process available in traditional surrogacy arrangements.

Financial support for surrogates

- 1.34 In Chapter 6, we look at the financial support available to surrogates in Aotearoa New Zealand. A key problem with the current law is the uncertainty as to what financial support surrogates are entitled to. This can place unnecessary stress on the parties, leave the surrogate out of pocket and create barriers for women considering acting as surrogates. We propose clarifying and expanding the costs that can be paid in a surrogacy arrangement and clarifying the surrogate's entitlements to post-birth recovery leave and payments provided they meet the employment thresholds under the Parental Leave and Employment Protection Act 1987.
- 1.35 We also examine the arguments for and against permitting intended parents to pay surrogates a fee for their participation in a surrogacy arrangement. On balance, our preliminary view is that a fee should not be permitted, but we are interested in views on this issue.

Legal parenthood

- 1.36 In Chapter 7, we focus on who are the legal parents of a surrogate-born child under the current law, including the need for intended parents to adopt their child under the

Adoption Act. We explore two key problems. First, the legal parenthood laws fail to reflect the reality of surrogacy arrangements, and second, the adoption process is inappropriate in surrogacy arrangements.

- 1.37 We propose a new legal framework to provide for the recognition of the intended parents as the legal parents of a surrogate-born child. This legal framework could sit within the Status of Children Act, which governs legal parenthood of children conceived as a result of assisted human reproduction procedures, or in new stand-alone surrogacy legislation.
- 1.38 We propose to introduce two alternative pathways to legal parenthood:
- **Pathway 1** would apply when the surrogacy arrangement was approved by ECART. The intended parents would be recognised as the legal parents of the surrogate-born child by operation of law, without the need for a court order, provided the surrogate confirms her consent after the baby is born.
 - **Pathway 2** would apply whenever Pathway 1 does not apply. It would allow intended parents to apply to the Family Court after the child is born for an order recognising them as the child's legal parents.
- 1.39 This proposed legal framework would provide greater certainty and minimise the administration, cost and delay in recognising intended parents as the surrogate-born child's legal parents, by relying on the safeguards already in place under the ECART approval process.

Children's rights to identity and access to information

- 1.40 In Chapter 8, we focus on children's rights to identity and different options to ensure that information is available to a surrogate-born child about their genetic and gestational origins. We identify two broad options for reform. Option 1 involves making changes to the birth registration system and information that is recorded on a surrogate-born child's birth certificate. Option 2 involves recording information about surrogacy arrangements on the register established for donor conception under the HART Act.

International surrogacy

- 1.41 In Chapter 9, we look at how the law in Aotearoa New Zealand should provide for international surrogacy. We consider the complex issues that international surrogacy can present, which are caused by the disparity in how different countries regulate surrogacy and legal parenthood. In some countries, a surrogacy arrangement may lack the same protections for the child, the surrogate and the intended parents as an arrangement entered in Aotearoa New Zealand, potentially placing the parties and any resulting child at greater risk.
- 1.42 We propose that Aotearoa New Zealand should continue to provide a process for recognising intended parents' legal parenthood when they undertake surrogacy arrangements overseas. We think that intended parents should be able to utilise Pathway 2, described above, and obtain a Family Court order recognising them as the child's legal parents. We ask whether this order should be obtained before or after entry to Aotearoa New Zealand. We also consider other options, such as a recognition system for some overseas judicial decisions and greater education and information for intended parents considering international surrogacy.

Access to surrogacy

- 1.43 In Chapter 10, we look at other problems New Zealanders face when trying to access surrogacy in Aotearoa New Zealand. We outline concerns relating to the availability of information, advertising for surrogates, barriers to connecting intended parents and potential surrogates, availability of experienced lawyers, public funding for surrogacy and availability of donor gametes in Aotearoa New Zealand. We look at options to address these issues, including whether there should be a register of potential surrogates or whether some form of intermediary agency should be provided for.
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CHAPTER 2

Surrogacy in practice

IN THIS CHAPTER, WE CONSIDER:

- New Zealanders' participation in surrogacy, both within Aotearoa New Zealand and offshore;
- changing public attitudes about surrogacy; and
- research on the impact of surrogacy on surrogate-born children, their families and surrogates.

INTRODUCTION

- 2.1 Surrogacy arrangements come in different forms. Traditional surrogacy is where the surrogate's ovum is used in conception. This means the surrogate is the child's genetic and gestational mother. This is the oldest form of surrogacy as it can occur without the assistance of a fertility clinic. Historically, conception would have occurred by natural intercourse between the surrogate and an intended parent. However, public knowledge of self-insemination techniques means that conception by natural intercourse these days would be "highly unusual".¹
- 2.2 Gestational surrogacy is a more recent phenomenon, made possible with the development of in vitro fertilisation (IVF) technology. In a gestational surrogacy, the surrogate does not use her own ovum in conception. Instead, an embryo is created using an ovum and sperm from the intended parents or donors. The embryo is then implanted in the surrogate, and the surrogate gestates and gives birth to the child. In a gestational surrogacy, the child can be the genetic child of one or both intended parents. Alternatively, if a donor ovum and donor sperm are used, the child may not have any genetic connection to either of the intended parents. Because gestational surrogacy involves the use of IVF technology, it can only occur with the assistance of a fertility clinic.

¹ Ruth Walker and Liezl van Zyl "Surrogacy and the law: three perspectives" (2020) 10 NZFLJ 9 at 9.

NEW ZEALANDERS' PARTICIPATION IN SURROGACY

- 2.3 The first reported legal cases of traditional surrogacy in Aotearoa New Zealand were in the 1990s,² but surrogacy has been practised privately throughout history.³
- 2.4 The first gestational surrogacy arrangement in Aotearoa New Zealand was approved by the National Ethics Committee on Assisted Human Reproduction in 1997.⁴ At that time, there was no specific legislation that addressed surrogacy. In 1996, MP Dianne Yates introduced a Member's Bill that would regulate aspects of surrogacy, but it took a further eight years before the Human Assisted Reproductive Technology Act 2004 became law.⁵
- 2.5 Since those first cases, the use of surrogacy has increased in Aotearoa New Zealand, although it is difficult to know exactly how common surrogacy is. No official information is kept on the number of surrogacy arrangements entered or the number of children born as a result of a surrogacy arrangement.

How common is surrogacy today?

- 2.6 There are several different sources of information relevant to the use of surrogacy in Aotearoa New Zealand. None of these sources provide a clear or complete picture, given the limitations of the information explained below. The lack of accurate information is not a New Zealand-specific problem. Similar issues have been identified in Australia and the United Kingdom,⁶ and the Hague Conference has observed that the number of international surrogacy arrangements entered globally is "impossible to determine".⁷
- 2.7 A very broad estimate, based on the information discussed below, is that up to 50 children may be born as a result of a surrogacy arrangement each year. This figure includes both gestational and traditional surrogacy in Aotearoa New Zealand and international surrogacy where the intended parents live in Aotearoa New Zealand and the surrogate lives in another country.

Approvals of gestational surrogacy arrangements

- 2.8 As we explore in Chapter 5, gestational surrogacy arrangements must receive prior approval from the Ethics Committee on Assisted Reproductive Technology (ECART). Since 2005, when ECART was established, the number of surrogacy applications

² *Re P (adoption: surrogacy)* [1990] NZFLR 385 (DC); and *Re G DC Invercargill Adopt* 6/92, 3 February 1993.

³ It is often noted that the practice of surrogacy dates back to Biblical times, with examples of traditional surrogacy arrangements found in the Book of Genesis in the stories of Sarah, Rachel and Leah: Gen 16:1–4; 30:1–10.

⁴ See National Ethics Committee on Assisted Human Reproduction *Annual Report to the Minister of Health for the year ending 31 December 2001* (June 2002) at 3. The role of the National Ethics Committee on Assisted Human Reproduction was to consider applications for ethical approval of new treatments and research in assisted reproductive technology.

⁵ Human Assisted Reproductive Technology Bill (1996) (195-3). A Government Bill was also introduced in 1998: Assisted Human Reproduction Bill (1998) (227-1). Both Bills were referred to the Health Committee for consideration, and the Committee recommended that the Human Assisted Reproductive Technology Bill proceed with modifications and the Government Bill lapse.

⁶ Debra Wilson "Avoiding the Public Policy and Human Rights Conflict in Regulating Surrogacy: The Potential Role of Ethics Committees in Determining Surrogacy Applications" (2017) 7 UC Irvine L Rev 653 at 656–657.

⁷ Permanent Bureau of the Hague Conference on Private International Law *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements* (Preliminary Document No 10, March 2012) at 8.

considered by ECART each year has steadily increased. In 2020, ECART considered the highest-ever number of surrogacy applications in a single year (37, compared to just 14 in 2005).⁸ However, the increase on 2019 (when 29 surrogacy applications were considered) may be partly due to the Covid-19 pandemic deterring intended parents from pursuing international surrogacy. On average, ECART has considered 23 surrogacy applications each year since 2010.

- 2.9 These figures are of limited value for two reasons. First, traditional surrogacy arrangements do not need to be approved by ECART, so the numbers of surrogacy applications considered by ECART are not representative of the total number of surrogacy arrangements entered into in Aotearoa New Zealand. Second, not all surrogacy arrangements that are approved by ECART may result in the birth of a child. The latest available data from fertility clinics identified that, in 2017, just 11 children were born as a result of clinic-assisted surrogacy.⁹ Surrogacy arrangements generally make up a very small proportion of assisted reproductive technology treatment cycles (0.8 per cent in 2017).¹⁰

Adoption data relating to domestic surrogacy

- 2.10 Another source of information relates to adoption applications. As we explain in Chapter 7, under the current law, the surrogate and her partner (if she has one) are the surrogate-born child's legal parents at birth.¹¹ The intended parents must adopt if they want to be recognised as the child's legal parents.¹² As part of the adoption process, an Oranga Tamariki social worker must prepare a report for the court.¹³ Oranga Tamariki's records show that, in the year ended 30 June 2021, 22 reports were written for adoption applications involving domestic surrogacy.¹⁴
- 2.11 Prior to July 2020, Oranga Tamariki did not distinguish the different categories of social work reports submitted on adoption applications to the Family Court. However, a previous manual review of Oranga Tamariki's records for the year ended 30 June 2019 revealed that 37 reports were written for adoption applications involving domestic

⁸ These figures are based on the minutes from the meetings of the Ethics Committee on Assisted Reproductive Technology, which are available on the Committee's website <ecart.health.govt.nz>. The minutes describe the applications considered and the outcome of the Committee's consideration.

⁹ Advisory Committee on Assisted Reproductive Technology *Assisted Reproductive Technology in New Zealand 2017* (March 2021) at 4.

¹⁰ Advisory Committee on Assisted Reproductive Technology *Assisted Reproductive Technology in New Zealand 2017* (March 2021) at 4.

¹¹ Status of Children Act 1969, ss 17–22. The surrogate's partner will not be a legal parent if there is evidence that establishes that they did not consent to the procedure: ss 18 and 27.

¹² Alternatives to legal parenthood when the intended parents do not adopt the surrogate-born child are discussed in Chapter 7.

¹³ Adoption Act 1955, s 10.

¹⁴ Email from Oranga Tamariki | Ministry of Children to Te Aka Matua o te Ture | Law Commission regarding domestic and international surrogacy data (16 July 2021). We note, however, that the provision of a social worker report does not necessarily equate to the making of an adoption order.

surrogacy in that time.¹⁵ Of these, 28 related to gestational surrogacy and nine related to traditional surrogacy. A manual review conducted in 2018 identified that the number of adoption reports written each year in relation to domestic surrogacy ranged between six and nine for the years 2013-2018.¹⁶

- 2.12 Adoption data does not necessarily provide an accurate picture. In 2005, the Commission observed that not all surrogacy arrangements are formalised by adoption and that:¹⁷

From the Commission's consultations, a common scenario seems to be that the surrogate mother enters her own name and the intending father's name on the birth certificate without any other steps being taken to transfer or establish the intending parents' legal status in relation to the child. They simply take custody of the child and care for it on a day-to-day basis.

- 2.13 It is unclear whether this practice continues today. In 2017, Associate Professor Debra Wilson observed that anecdotal evidence suggests a "significant disparity" between the number of surrogate-born children and the number that have a legally recognised relationship with the people they call their parents.¹⁸ However, increasing understanding of the current law (driven in part through wider media coverage and the growth of online surrogacy support forums) alongside increasing social acceptance of surrogacy as a method of family formation may have reduced the prevalence of this practice.

Prevalence of international surrogacy

- 2.14 Oranga Tamariki's records show that, in the year ended 30 June 2021, 19 reports were written for adoption applications involving international surrogacy.¹⁹ Oranga Tamariki is aware of 82 international surrogacy arrangements over the past five calendar years (2016-2020).²⁰ Table 1 below sets out the destination country in relation to these cases. It demonstrates that most international surrogacies are arranged in the United States (63 per cent), with California being the most common destination, accounting for 35 per cent of all international surrogacy arrangements. Destinations outside the United States tend to be in Asia or Eastern Europe.

¹⁵ Letter from Oranga Tamariki | Ministry for Children to Te Aka Matua o te Ture | Law Commission regarding domestic and international surrogacy data (24 March 2021).

¹⁶ Oranga Tamariki | Ministry for Children "Statistics on adoptions via surrogacy: Data about domestic and international surrogacy and adoption for 2013 to 2018" (14 November 2018) <www.orangatamariki.govt.nz>.

¹⁷ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [7.7] (citations omitted). Another possibility is that the surrogate mother registers the names of the intended parents on the child's birth certificate, having previously registered herself with her doctor, midwife or hospital in the name of an intended parent. The Commission noted at [7.8] that there was anecdotal evidence that this had happened.

¹⁸ Debra Wilson "Avoiding the Public Policy and Human Rights Conflict in Regulating Surrogacy: The Potential Role of Ethics Committees in Determining Surrogacy Applications" (2017) 7 UC Irvine L Rev 653 at 656.

¹⁹ Email from Oranga Tamariki | Ministry of Children to Te Aka Matua o te Ture | Law Commission regarding domestic and international surrogacy data (16 July 2021).

²⁰ Letter from Oranga Tamariki | Ministry for Children to Te Aka Matua o te Ture | Law Commission regarding domestic and international surrogacy data (24 March 2021).

TABLE 1: KNOWN CASES OF INTERNATIONAL SURROGACY ARRANGEMENTS INVOLVING NEW ZEALAND INTENDED PARENTS

Destination country	2016	2017	2018	2019	2020
USA <i>(USA arrangements entered into in California)</i>	2 (2)	12 (7)	12 (7)	11 (5)	15 (8)
India	3	1	1	1	
Mexico	1		1		1
Nepal	1				
Cambodia		1			
Kazakhstan		1			
Philippines		1			
Thailand		1			
Australia			1		
Canada			1	1	1
Georgia			1	3	1
Russia			1	1	
Ukraine			1	1	
Vietnam				1	
China					1
South Africa					1
TOTAL	7	17	19	19	20

- 2.15 Most international surrogacy arrangements over the past five years (68 out of 82) involved the use of donated gametes, and half (41) involved the use of an anonymous donor.²¹
- 2.16 This data may not capture all international surrogacy arrangements. When a child is born outside Aotearoa New Zealand, the New Zealand Government is reliant on the information disclosed to it. Some intended parents may not disclose that their child was

²¹ Oranga Tamariki | Ministry for Children notes that an “anonymous donor” may provide a few points of information, such as height, eye colour, ethnicity and good health (with no photo); one photo and several sentences; a pseudonym for the first name with photos; or a profile of 30 pages but no means to contact the donor.

born as a result of a surrogacy arrangement or realise that they need to adopt the child to be recognised as the child's legal parents under New Zealand law. In these cases, the New Zealand Government may never discover the nature of the arrangement, especially if the intended parents are recorded as the child's parents on the overseas birth certificate.²² Of course, single men and male couples are likely to face greater scrutiny, as it will be apparent that neither is the birth mother (and therefore the legal parent, absent a valid adoption) of the child.

Who is utilising surrogacy?

- 2.17 Surrogacy provides people with an opportunity to have a child when they are otherwise unable to. Intended parents can loosely be described as falling into one of two groups:
- (a) **People who experience infertility.** This group includes heterosexual couples and single women who experience infertility, meaning that a woman is unable to carry a foetus to term. Within this group, there can be a wide range of different experiences. Some women may have had a diagnosis or medical intervention (such as a hysterectomy) that means surrogacy is their only option to have a child genetically related to them. Other women may experience years of unsuccessful fertility treatments and miscarriages and only turn to surrogacy as a last resort.
 - (b) **People who lack the sex characteristics to become pregnant.** This group includes male couples, single men and some trans people. In this group, there is no history of failed fertility treatment. Rather, surrogacy provides the opportunity to become parents to a child that is the genetic child of one of the intended parents. People in this group will usually need an ovum donor or will seek to have a child by traditional surrogacy.
- 2.18 In our initial consultation, we also heard about an emerging third group comprising people who possess the sex characteristics to become pregnant but who do not see pregnancy and childbirth as being consistent with their sense of identity. This may include some trans men who are physically able to become pregnant but who may not wish to do so on the basis that this would conflict with their gender identity.
- 2.19 In many surrogacy arrangements in Aotearoa New Zealand, the surrogate is a close friend or family member of one or both intended parents. However, increasingly, intended parents are utilising social media to find a surrogate.²³

What is driving the increase in surrogacy?

- 2.20 The increasing use of surrogacy in Aotearoa New Zealand is likely due to several factors:
- (a) **Changing social attitudes to diverse families.** The increasing acceptance of diverse family forms, particularly male-couple and single-parent families, is a significant driver

²² Some commentators note there is anecdotal evidence of this practice occurring in situations where the surrogate-born child's birth certificate records the intended parents as the child's legal parents: Ruth Walker and Liezl van Zyl "Surrogacy and the law: three perspectives" (2020) 10 NZFLJ 9 at 9.

²³ Margaret Casey "Creating families and establishing parentage when there is a disconnect between Assisted Reproductive Technologies and the Legal System: A New Zealand perspective of a global problem" (2017) 9 NZFLJ 51 at 52.

in the increasing use of domestic surrogacy. In 2005, when the Commission reviewed legal parenthood laws, the potential for surrogacy to enable male couples to build a family was not even raised as an issue in submissions or consultation.²⁴ In 2015, the Family Court recognised for the first time that a male couple could legally adopt their surrogate-born children.²⁵ This confirmed the ability for male couples to have a child by surrogacy and be legally recognised as that child's parents. Since then, there has been a significant increase in male couples using surrogacy.²⁶ This is a trend that is also evident in the United Kingdom.²⁷

- (b) **Declining rates of adoption.** Rates of domestic and intercountry adoption are declining²⁸ as fewer children are put up for adoption. This means that surrogacy is sometimes the only way for people to have a child, even if they would have preferred to adopt a child in need of adoption instead.
- (c) **Growing rates of infertility.** Women are waiting until later in life to have children.²⁹ As the age of women giving birth increases, so do the rates of infertility and demand for fertility treatment.³⁰ Decreasing fertility is a global trend and is likely to continue in future.³¹
- (d) **Advances in assisted reproductive technology.** Ongoing improvements to assisted reproductive technology mean higher success rates for fertility treatment.³² In the context of surrogacy, this may mean that intended parents experiencing infertility have a greater chance of creating an embryo and having a child through gestational surrogacy.
- (e) **Increasing focus on fertility preservation.** Some fertility clinics we spoke with mentioned the increase in women undergoing fertility preservation treatment such as ovum extraction and freezing. Women will undertake such treatment if they want to safeguard their ability to have children in the future, for example, if they are about to undergo cancer treatment that could result in infertility. Trans people may also undergo fertility preservation treatment prior to gender-affirming surgery. The increased demand for fertility preservation is likely to result in an increased demand

²⁴ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [7.6].

²⁵ *Re Pierney* [2015] NZFC 9404, [2016] NZFLR 53 at [14]–[15].

²⁶ Interview with Andrew Murray, Medical Director, Fertility Associates (Kathryn Ryan, Nine to Noon, RNZ, 30 March 2021).

²⁷ Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: A new law – A joint consultation paper* (CP244/DP167, 2019) at [3.20].

²⁸ Tāhū o te Ture | Ministry of Justice observes that 125 adoptions were granted by the New Zealand Family Court in 2020, compared to nearly 4,000 children adopted each year in the 1970s: Tāhū o te Ture | Ministry of Justice *Adoption in Aotearoa New Zealand – Discussion document* (June 2021) at 4. Intercountry adoption rates are also declining globally: Peter Selman *Global Statistics for Intercountry Adoption: Receiving States and States of origin 2004-2019* (Hague Conference on Private International Law, 2019).

²⁹ Te Aka Matua o te Ture | Law Commission *Relationships and Families in Contemporary New Zealand | He Hononga Tangata, He Hononga Whānau | Aotearoa o Nāiane* (NZLC SP22, 2017) at 22.

³⁰ Growth of the fertility services market in Aotearoa New Zealand is predicted for these reasons: TMR Research “Australia & New Zealand fertility services market to make great impact in near future by 2026” (20 May 2020) <www.testmeasurement.com.au>.

³¹ Zoë Corbyn “Interview – Shanna Swan: ‘Most couples may have to use assisted reproduction by 2045’” *The Guardian* (online ed, London, 28 March 2021).

³² See, for example, Paul R Brezina and others “Recent Advances in Assisted Reproductive Technology” (2012) 1 Current Obstetrics and Gynecology Reports 166.

for surrogacy in future as people seek to start or build families using frozen ova but are unable to carry a child themselves.

- 2.21 These factors will continue to drive the use of surrogacy, both domestically and internationally, as a way for people to build their families in the future.
- 2.22 The increasing use of international surrogacy by New Zealanders is also likely due to the following additional factors, which we explore throughout this Issues Paper:
- (a) **Challenges in finding a surrogate in Aotearoa New Zealand.** Agencies cannot operate in Aotearoa New Zealand to provide a service matching intended parents with surrogates. Some intended parents may not know anyone who they could ask to act as a surrogate, especially if they have only recently settled in the country. Others may not want to ask their friends or family. Restrictions on advertising and payments to surrogates are likely to be contributing to these challenges, and as we noted above, while people are increasingly seeking out a surrogate through social media, some may feel uncomfortable publicising their private lives in such a way. We explore these issues in Chapter 10.
 - (b) **Increased availability of donated gametes overseas.** As we explain in Chapter 10, there is a nationwide shortage of ovum and sperm donors in Aotearoa New Zealand. This is not necessarily the case in other countries, especially where donors are compensated. As noted above, most international surrogacy arrangements (68 out of 82 arrangements over the past five years) involve the use of donated gametes.
 - (c) **Availability of commercial surrogacy.** Some intended parents prefer a commercial model of surrogacy where they can recognise the value of the surrogate's role through the payment of a fee or other compensation and rely on the services of an intermediary to manage the arrangement. Intended parents may also feel more comfortable having a child through surrogacy in jurisdictions where commercial surrogacy is socially accepted, such as California.
 - (d) **Higher success rates and greater reproductive choices overseas.** Some intended parents may prefer to go to fertility clinics overseas that report higher success rates than New Zealand-based clinics or that offer practices that are not available in Aotearoa New Zealand. IVF practices such as multiple embryo transfers³³ and gender selection³⁴ are not available in Aotearoa New Zealand but are available in some other countries. Another emerging practice overseas is the use of two or more surrogates

³³ Multiple embryo transfers significantly increase the risks for the child and the pregnant person, and standard practice in Aotearoa New Zealand is that only one embryo is transferred in each IVF cycle: Repromed "5 questions about IVF answered" <repromed.co.nz>; National Women's Health "In-vitro fertilisation (IVF)" <www.nationalwomenshealth.adhb.govt.nz>; and Fertility Associates "IVF - In vitro fertilisation" <www.fertilityassociates.co.nz>. Australian guidelines also require single embryo transfers in a surrogacy arrangement in an effort to reduce the potential harm for the surrogate: National Health and Medical Research Council *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research* (Australia, 2017) at [8.9.2].

³⁴ Human Assisted Reproductive Technology Act 2004, s 11.

at the same time.³⁵ While this is not technically prohibited in Aotearoa New Zealand, such an arrangement is unlikely to satisfy the requirements for ECART approval.³⁶

- (e) **Increasing cultural diversity in Aotearoa New Zealand.** Cultural diversity driven by increasing migration means that, increasingly, New Zealanders may have links to two or more countries. In the context of surrogacy, intended parents may choose to have a child in a country to which they have a connection. Different cultural perspectives may also mean that some intended parents may prefer a commercial model of surrogacy available elsewhere over the non-commercial altruistic model that is available in Aotearoa New Zealand.

NEW ZEALANDERS' CHANGING ATTITUDES TO SURROGACY

- 2.23 Surrogacy is increasingly becoming an accepted way to build a family in Aotearoa New Zealand. Back in the 1980s, when treatment using IVF technology first became available, there was evidence of significant public concern regarding surrogacy. In response to a 1985 Government issues paper, just 38 per cent of submissions commenting on surrogacy supported the practice, while 45 per cent opposed it.³⁷
- 2.24 The Surrogacy Survey reveals how public attitudes on surrogacy have changed over the last three decades.³⁸
- 2.25 Respondents to the Surrogacy Survey were generally supportive of surrogacy, with 84 per cent either approving (54 per cent) or not objecting (30 per cent).³⁹ Only five per cent objected to surrogacy, while nine per cent of respondents needed to know more and two per cent had no opinion or preferred not to say. In response to another question, 88 per cent of respondents said that they supported surrogacy being legal in Aotearoa New Zealand, while only three per cent did not and nine per cent were unsure or preferred not to say.⁴⁰

³⁵ See, for example, Emily Lefroy "Mum-of-21 reveals she had 20 babies by surrogates within one year – and has 16 live-in nannies" (4 June 2021) <www.essentialbaby.com.au>.

³⁶ For example, the Ethics Committee on Assisted Reproductive Technology must be satisfied that a surrogacy arrangement is "the best or the only opportunity for intended parents to have a child": Advisory Committee on Assisted Reproductive Technology *Guidelines for family gamete donation, embryo donation, the use of donated eggs with donated sperm and clinic assisted surrogacy* (September 2020) at [A(4)].

³⁷ Law Reform Division *New Birth Technologies: A summary of submissions received on the issues paper* (Department of Justice, 1986) at 31–32.

³⁸ The Surrogacy Survey was conducted by Te Whare Wānanga o Waitaha | University of Canterbury as part of a three-year project, Rethinking Surrogacy Laws, with funding from the New Zealand Law Foundation. The Surrogacy Survey was a paper-based survey that was sent to a representative sample of approximately 2,800 members of the public. Participants were selected from the New Zealand General Electoral Roll, and 557 responses were received. For more information about the survey methodology, see Debra Wilson *Understanding the Experience and Perceptions of Surrogacy Through Empirical Research: Public Perceptions Survey* (Te Whare Wānanga o Waitaha | University of Canterbury, May 2020) vol 3 at 2.

³⁹ Debra Wilson *Understanding the Experience and Perceptions of Surrogacy Through Empirical Research: Public Perceptions Survey* (Te Whare Wānanga o Waitaha | University of Canterbury, May 2020) vol 3 at 13.

⁴⁰ Debra Wilson *Understanding the Experience and Perceptions of Surrogacy Through Empirical Research: Public Perceptions Survey* (Te Whare Wānanga o Waitaha | University of Canterbury, May 2020) vol 3 at 64.

- 2.26 The Surrogacy Survey also identified strong support for reform. When asked if the Government should reconsider surrogacy laws, 68 per cent of respondents answered yes, with most preferring a review in the next five years.⁴¹ Only a small proportion (eight per cent) said no, and 25 per cent were unsure or preferred not to say.
- 2.27 We discuss the results of the Surrogacy Survey in greater detail in later chapters.

RESEARCH ON THE IMPACT OF SURROGACY

- 2.28 There is a growing body of empirical research into the impact of surrogacy arrangements on surrogate-born children, their families and surrogates, mostly from the United Kingdom and the United States, which demonstrates largely positive outcomes for those involved.⁴² Of particular note is the University of Cambridge's longitudinal study of assisted reproduction families, which has been running since 2000 (the Cambridge Study).⁴³

Outcomes for surrogate-born children and their families

- 2.29 The Cambridge Study suggests that families with surrogate-born children are just as likely to flourish as traditional families and sometimes more so.⁴⁴ That study found that:⁴⁵

When the children were one, these parents showed greater warmth and enjoyment in their babies than those who had conceived naturally. At age two, the surrogacy mothers took greater pleasure in their toddlers, and felt less anger, guilt and disappointment in them. When the children were three, the surrogacy mothers were more affectionate, and interacted more, with their toddlers.

By age seven, most of the surrogacy children knew how they had been born. The parents still had good relationships with their children, but they were no longer doing better than the natural conception parents. Although some of the surrogacy children showed an increase in psychological problems at this age, these difficulties had disappeared by the time we re-visited the families when the children were ten. Interestingly, the same pattern

⁴¹ Debra Wilson *Understanding the Experience and Perceptions of Surrogacy Through Empirical Research: Public Perceptions Survey* (Te Whare Wānanga o Waitaha | University of Canterbury, May 2020) vol 3 at 55. All figures have been rounded to the nearest percentage point.

⁴² For a systematic review of research into the obstetric, medical and psychological outcomes for surrogates, intended parents and children born as a result of surrogacy published before February 2015 and a discussion of methodological limitations, see Viveca Söderström-Anttila and others "Surrogacy: outcomes for surrogate mothers, children and the resulting families—a systematic review" (2016) 22 Human Reproduction Update 260.

⁴³ This study originally included 42 families created by surrogacy who were studied in comparison with 51 families created by ovum donation and 80 families with naturally conceived children. Of the families created by surrogacy, 26 involved traditional surrogacy and 16 involved gestational surrogacy. In 13 arrangements, the surrogate was a friend or family member, while in 29 arrangements, the surrogate was previously unknown to the intended parents. By the time the surrogate-born child was aged 14, 28 families remained in the study: Susan Golombok and others "Families Created Through Surrogacy Arrangements: Parent-Child Relationships in the 1st Year of Life" (2004) 40 *Developmental Psychology* 400 at 402; and Susan Golombok and others "A Longitudinal Study of Families Formed Through Reproductive Donation: Parent-Adolescent Relationships and Adolescent Adjustment at Age 14" (2017) 53 *Developmental Psychology* 1966 at 1968.

⁴⁴ Susan Golombok "The psychological wellbeing of ART children: what have we learned from 40 years of research" (2020) RBMO 743 at 743.

⁴⁵ Susan Golombok "The psychological wellbeing of ART children: what have we learned from 40 years of research" (2020) RBMO 743 at 744–745 (citations omitted).

has been found among internationally adopted children. A likely explanation for this phenomenon, as first suggested with regard to adoption, is that these children are faced with issues relating to their identity at a younger age than most other children.

At age 14, the adolescents were found to be flourishing. We asked them directly how they felt about being born through surrogacy. Only one expressed some unhappiness, the majority were largely uninterested, and a few saw it as an advantage.

- 2.30 These findings are consistent with other studies in relation to the impact of surrogacy on children in the United States. One study of 40 male couples with children through surrogacy found that children showed high levels of psychological adjustment and positive relationships with their parents.⁴⁶ A more recent study of 68 male couples with surrogate-born children found that “children of gay fathers by surrogacy are functioning as well or better than children in the general population”.⁴⁷
- 2.31 Another finding from the Cambridge Study was that, at age 14, approximately half of the adolescents who had no contact with their surrogate were interested in her, with the remainder being uninterested.⁴⁸ Although the number of adolescents who had no contact with their surrogate was small, researchers suggested that this indicates some surrogate-born children may have questions about their surrogate in the future or may express a desire to meet her.⁴⁹

Outcomes for surrogates

- 2.32 Research mostly from the United Kingdom and the United States has also investigated the impact of surrogacy on women who act as surrogates. This research suggests that surrogacy is generally a positive experience for surrogates.⁵⁰
- 2.33 In the Cambridge Study, most surrogates did not experience major problems in their relationship with the intended parents during the surrogacy arrangement, and no differences were observed in the quality of their relationship with the intended parents between surrogates who knew the intended parents beforehand and surrogates who did

⁴⁶ Susan Golombok and others “Parenting and the Adjustment of Children Born to Gay Fathers Through Surrogacy” (2018) 89 *Child Dev* 1223 at 1231.

⁴⁷ Robert-Jay Green and others “Gay Fathers by Surrogacy: Prejudice, Parenting and Well-Being of Female and Male Children” (2019) 5 *Psychology of Sexual Orientation and Gender Diversity* 269 at 269.

⁴⁸ At age 14, of the eight adolescents who had no contact with their surrogate, five were interested in them and three were not interested: S Zadeh and others “The perspectives of adolescents conceived using surrogacy, egg or sperm donation” (2018) 33 *Human Reproduction* 1099 at 1102.

⁴⁹ Vasanti Jadva and others “Parents’ relationship with their surrogate in cross-border and domestic surrogacy arrangements: comparisons by sexual orientation and location” (2019) 111 *Fertility and Sterility* 562 at 569.

⁵⁰ See, for example, Arushi Gabrani Bakshi, Rita Bakshi and Sonia Miglani “Psychological Aspects of Surrogacy: Her Womb My Baby!” (2018) 8 *IJSR* 1207 at 1209; Viveca Söderström-Anttila and others “Surrogacy: outcomes for surrogate mothers, children and the resulting families—a systematic review” (2016) 22 *Human Reproduction Update* 260 at 268; and Emily Koert and Judith C Daniluk “Psychological and Interpersonal Factors in Gestational Surrogacy” in E Scott Sills (ed) *Handbook of Gestational Surrogacy: International Clinical Practice and Policy Issues* (Cambridge University Press, Cambridge (UK), 2016) 70 at 71–72. Small qualitative studies have also been undertaken in Aotearoa New Zealand. See Ruth Walker and Liezl van Zyl “Fear and Uncertainty: The Surrogacy Triad’s Experience of Social Workers’ Role Ambiguity” (7 September 2020) *British Journal of Social Work* bcaa105 (advance article).

not.⁵¹ All surrogates were happy with the decision reached about when to hand over the baby, and none experienced any doubts or difficulties in relation to that decision.⁵² While some surrogates did experience difficulties following the birth, these “were not severe, tended to be short-lived, and to dissipate with time”.⁵³

- 2.34 Ten years on, the surrogates in the Cambridge Study remained positive about the surrogacy arrangement, with all reporting that their expectations of their relationship with the intended parents had been either met or exceeded and none expressing regrets about their involvement in surrogacy.⁵⁴
- 2.35 The Cambridge Study also compared the impact of surrogacy on surrogates in traditional and gestational surrogacy arrangements. Although it may be assumed that traditional surrogates who are the child’s genetic mother would be more likely to feel a special bond towards the child, this was not the case.⁵⁵ In fact, 10 years on, gestational surrogates were more likely than traditional surrogates to feel a special bond to the child.⁵⁶ The researchers suggested a possible explanation is that traditional surrogates may be more likely to distance themselves from the child emotionally either because they do not wish to interfere with the child’s family or because they want to create a clearer boundary between their own children and the surrogate-born child.⁵⁷

Limitations of the research

- 2.36 Research in this area is limited in several key respects:
- (a) First, research is typically limited by relatively small sample sizes. This means that the research cannot be said to capture the full spectrum of different experiences. Surrogacy arrangements can sometimes go wrong. What the research suggests, however, is that, in many situations, surrogacy results in positive outcomes for all involved.
 - (b) Second, there is limited information about the long-term impacts on surrogate-born children. While the Cambridge Study has looked at the impact of surrogacy on

⁵¹ Vasanti Jadva and others “Surrogacy: the experiences of surrogate mothers” (2003) 18 Human Reproduction 2196 at 2203.

⁵² Vasanti Jadva and others “Surrogacy: the experiences of surrogate mothers” (2003) 18 Human Reproduction 2196 at 2200. See also Ruth Walker and Liezl van Zyl “Fear and Uncertainty: The Surrogacy Triad’s Experience of Social Workers’ Role Ambiguity” (7 September 2020) British Journal of Social Work bcaa105 (advance article) at 8.

⁵³ Vasanti Jadva and others “Surrogacy: the experiences of surrogate mothers” (2003) 18 Human Reproduction 2196 at 2203.

⁵⁴ V Jadva, S Imrie and S Golombok “Surrogate mothers 10 years on: a longitudinal study of psychological well-being and relationships with the parents and child” (2015) 30 Human Reproduction 373 at 373 and 377.

⁵⁵ Vasanti Jadva and others “Surrogacy: the experiences of surrogate mothers” (2003) 18 Human Reproduction 2196 at 2203.

⁵⁶ V Jadva, S Imrie and S Golombok “Surrogate mothers 10 years on: a longitudinal study of psychological well-being and relationships with the parents and child” (2015) 30 Human Reproduction 373 at 377.

⁵⁷ V Jadva, S Imrie and S Golombok “Surrogate mothers 10 years on: a longitudinal study of psychological well-being and relationships with the parents and child” (2015) 30 Human Reproduction 373 at 378.

adolescent children, it might be decades before the long-term implications of surrogacy can be fairly considered.⁵⁸

- (c) Third, research typically focuses on domestic surrogacy arrangements and, in the case of the Cambridge Study, is limited to “altruistic” surrogacy arrangements that do not involve payment of a fee to the surrogate. The researchers involved in the Cambridge Study have noted that the children “spoke of the surrogate’s altruistic motivations for helping their parents, which raises questions about how children will feel in situations where their surrogate mothers [were] reimbursed financially”.⁵⁹ Indeed, some children who have written about their experience being born of a commercial arrangement have questioned whether this is in the best interests of the child.⁶⁰

- 2.37 Research on international and commercial surrogacy is emerging.⁶¹ One study compared UK-based intended parents’ relationships with their surrogate in domestic and international surrogacy arrangements.⁶² It found that intended parents who had a domestic surrogacy arrangement and those who had an international surrogacy arrangement in the United States were more likely to report feeling very involved during the pregnancy and were more likely to be very happy with their level of involvement, compared to those with an arrangement in Asia.⁶³ Intended parents who had a surrogacy in Asia were also less likely to plan to have contact with the surrogate after the birth.⁶⁴
- 2.38 That study also found that intended parents who went to the United States were more likely to think it important that their surrogate had particular traits and characteristics, which is said to reflect “the marketization of U.S. surrogacy and the greater choice of available surrogates” when compared to the UK, where there was a shortage of surrogates, and Asia, where many surrogates remain anonymous.⁶⁵

⁵⁸ Debra Wilson “Avoiding the Public Policy and Human Rights Conflict in Regulating Surrogacy: The Potential Role of Ethics Committees in Determining Surrogacy Applications” (2017) 7 UC Irvine L Rev 653 at 658.

⁵⁹ V Jadva and others “Surrogacy families 10 years on: relationship with the surrogate, decisions over disclosure and children’s understanding of their surrogacy origins” (2012) 27 Human Reproduction 3008 at 3013.

⁶⁰ Jakiam83 “Welcome to my blog :)” (11 January 2013) <www.theothersideofsurrogacy.blogspot.com>; Jakiam83 “Letter to Senator Pilcher-Cook” (26 January 2014) <www.theothersideofsurrogacy.blogspot.com>; and Brian “The Son of a Surrogate” (9 August 2006) <www.sonofasurrogate.tripod.com>.

⁶¹ See, for example, Amrita Pande *Wombs in Labor: Transnational Commercial Surrogacy in India* (Columbia University Press, New York, 2014), which investigates the outcomes for surrogates in India.

⁶² Vasanti Jadva “Parents’ relationship with their surrogate in cross-border and domestic surrogacy arrangements: comparisons by sexual orientation and location” (2019) 111 Fertility and Sterility 562.

⁶³ Vasanti Jadva “Parents’ relationship with their surrogate in cross-border and domestic surrogacy arrangements: comparisons by sexual orientation and location” (2019) 111 Fertility and Sterility 562 at 564–565.

⁶⁴ Vasanti Jadva “Parents’ relationship with their surrogate in cross-border and domestic surrogacy arrangements: comparisons by sexual orientation and location” (2019) 111 Fertility and Sterility 562 at 565.

⁶⁵ Vasanti Jadva “Parents’ relationship with their surrogate in cross-border and domestic surrogacy arrangements: comparisons by sexual orientation and location” (2019) 111 Fertility and Sterility 562 at 567.

CHAPTER 3

Guiding principles for surrogacy law reform

IN THIS CHAPTER, WE CONSIDER:

Six guiding principles for surrogacy law reform:

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

INTRODUCTION

- 3.1 We have developed six guiding principles for surrogacy law reform. These principles guide our analysis of the issues and options for reform in the following chapters. We think that applying these principles will result in good surrogacy law, namely, law that protects and promotes the rights and interests of people involved in surrogacy arrangements and meets the needs and expectations of New Zealanders.
- 3.2 These guiding principles reflect a strong human rights focus, consistent with international best-practice guidance.¹ Human rights underpin Aotearoa New Zealand's democratic society, and good law should align with these rights.²

¹ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [1.4].

² See Legislation Design and Advisory Committee *Legislation Guidelines* (March 2018).

- 3.3 Our guiding principles address the different rights and interests that need to be considered in surrogacy law reform. Surrogacy engages fundamental human rights for three key groups – surrogate-born children, women who act as surrogates and intended parents. As Margaret Casey QC has observed, “the rights of all the humans involved in the creation process are not necessarily aligned”.³ In some cases, the guiding principles will conflict with each other. Our task in the chapters that follow is to carefully balance competing rights and interests in a way we consider will make the best law.

PRINCIPLE 1: THE BEST INTERESTS OF THE SURROGATE-BORN CHILD SHOULD BE PARAMOUNT

- 3.4 Because surrogacy arrangements are concerned with the creation of a child, that child’s best interests should be paramount in surrogacy law. This reflects the rights of children affirmed in the United Nations Convention on the Rights of the Child (UNCROC), which states that:⁴

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

- 3.5 Over the past decade, significant international attention has been given to the question of surrogacy from a child’s rights perspective. In 2019, the United Nations (UN) Special Rapporteur provided a thematic review of surrogacy to the UN General Assembly.⁵ In 2021, the International Social Service published a set of principles to guide the regulation of surrogacy within a children’s rights framework (Verona Principles), with the support of the UN Committee on the Rights of the Child.⁶
- 3.6 Both the UN Special Rapporteur and the Verona Principles emphasise the significance of child’s best interests in the regulation of surrogacy arrangements.⁷ The UN Special Rapporteur recommended that “the core principle of the best interests of the child” should be “the paramount consideration” in all surrogacy law, policy and practice

³ Margaret Casey “Creating families and establishing parentage when there is a disconnect between Assisted Reproductive Technologies and the Legal System: A New Zealand perspective of a global problem” (2017) 9 NZFLJ 51 at 54. See also Natalie Baird and Rhonda Powell *Surrogacy and Human Rights in New Zealand: Rethinking Surrogacy Laws Te Kohuki Ture Kopu Whangai* (Te Kura Ture | School of Law, Te Whare Wānanga o Waitaha | University of Canterbury, 2020) at 3–4.

⁴ United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 3(1).

⁵ Maud de Boer-Buquicchio *Report of the Special Rapporteur on the sale and sexual exploitation of children, including prostitution, child pornography and other child sexual abuse material* UN Doc A/74/162 (15 July 2019). See also Maud de Boer-Buquicchio *Report of the Special Rapporteur on the sale and sexual exploitation of children, including prostitution, child pornography and other child sexual abuse material* UN Doc A/HRC/37/60 (15 January 2018).

⁶ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021). Members of the United Nations Committee on the Rights of the Child support the Verona Principles as “an important contribution to developing normative guidance for the protection of the rights of children born through surrogacy” at 3.

⁷ See also Claire Achmad “Children’s Rights in International Commercial Surrogacy: Exploring the challenges from a child rights, public international human rights law perspective” (PhD thesis, Leiden University, 2018).

concerning surrogate-born children.⁸ Similarly, the Verona Principles require that the best interests of the child “shall be the paramount consideration in all decisions concerning legal parenthood and parental responsibility related to a child born through surrogacy”.⁹

- 3.7 Other jurisdictions have embraced the best interests of the child principle in surrogacy law reform.¹⁰ In Australia, for example, state legislation often adopts the principle that the well-being and best interests of the surrogate-born child are paramount.¹¹
- 3.8 The paramouncy of children’s best interests is also reflected in other child-focused legislation in Aotearoa New Zealand. The Care of Children Act 2004 and the Oranga Tamariki Act 1989 both make the best interests of a child the “first and paramount consideration”.¹² The Adoption Act 1955 similarly places the child’s interests at the centre of decision making, requiring the court to be satisfied that the welfare and interests of the child will be promoted by the adoption and that due consideration be given to the child’s wishes, having regard to the age and understanding of the child.¹³
- 3.9 We note that this approach departs from the principles of the Human Assisted Reproductive Technology Act 2004 (HART Act), which state that the health and well-being of children is “an important consideration” in all decisions about assisted reproductive procedures.¹⁴ In 2005, the Commission observed that this was appropriate “as other factors may need to be taken into account where parenthood laws are concerned”.¹⁵ However, since that time and in the specific context of surrogacy, a clear international consensus has emerged that confirms the paramouncy of the child’s best interests.
- 3.10 This principle guides our consideration of how surrogacy should be regulated in Aotearoa New Zealand as well as how the law should provide for international surrogacy. This principle should also guide decisions made within the regulatory framework on a case-by-case basis.

What does the child’s best interests mean in the context of surrogacy law reform?

- 3.11 Giving the child’s best interests paramouncy in the surrogacy context means not only providing for their immediate safety and welfare but also considering the long-term

⁸ Maud de Boer-Buquicchio *Report of the Special Rapporteur on the sale and sexual exploitation of children, including prostitution, child pornography and other child sexual abuse material* UN Doc A/74/162 (15 July 2019) at [100(a)].

⁹ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [6.1].

¹⁰ See, for example, Conor O’Mahony *A Review of Children’s Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law* (Department of Children, Equality, Disability, Integration and Youth, Ireland, December 2020) at 8–11; and South Australian Law Reform Institute *Surrogacy: A Legislative Framework – A Review of Part 2B of the Family Relationships Act 1975 (SA)* (Report 12, 2018) at [9.3.1]–[9.3.5].

¹¹ Surrogacy Act 2019 (SA), s 6(1); Surrogacy Act 2012 (Tas), s 3(1); Surrogacy Act 2010 (Qld), s 6(1); Surrogacy Act 2010 (NSW), s 3; and Assisted Reproductive Treatment Act 2008 (Vic), s 5(a).

¹² Care of Children Act 2004, s 4; and Oranga Tamariki Act 1989, s 4A.

¹³ Adoption Act 1955, s 11(b).

¹⁴ Human Assisted Reproductive Technology Act 2004, s 4(a).

¹⁵ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [1.19]. The example given was where the interests of justice require that a presumed father who has reason to believe he is not the father should be able to have the matter resolved, regardless of the fact that the child may lose his or her financial support.

implications of surrogacy for the child.¹⁶ It also requires providing for the child's other rights recognised under UNCROC.¹⁷

- 3.12 Rights that are particularly relevant in the surrogacy context include rights to identity, nationality, family life, health, freedom from discrimination and protection from abuse, exploitation and sale.

Rights to identity

- 3.13 Children have a range of rights that relate to establishing identity, including the right to birth registration, the right to a name and, as far as possible, the right to know and be cared for by their parents.¹⁸
- 3.14 Another important element of identity rights is the right of access to a child's origins.¹⁹ The importance of this right is evident from the past practices in Aotearoa New Zealand of closed adoption and anonymous donor conception. Historical assumptions that underpinned the closed adoption regime have now been recognised as flawed, with some adoptees reporting problems in establishing a sense of identity.²⁰ As Te Kōti Pira | The Court of Appeal has observed, "[a]doption research has indicated that many adopted persons have a 'deep' psychological need to know the true identity of those who brought them into this world".²¹ This can be particularly challenging for Māori adoptees, who may grow up with no connection to their whakapapa (genealogy) and struggle to connect with their Māori identity.²²
- 3.15 In 2005, the Commission observed similar concerns arising in relation to the use of anonymous donors:²³

¹⁶ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [6.1].

¹⁷ Committee on the Rights of the Child *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1) UN Doc CRC/C/GC/14 (29 May 2013) at [4]; and Maud de Boer-Buquicchio *Report of the Special Rapporteur on the sale and sexual exploitation of children, including prostitution, child pornography and other child sexual abuse material* UN Doc A/74/162 (15 July 2019) at [19].

¹⁸ United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 7(1). See also art 8(1). The right of a child to preserve their identity must also be taken into consideration in the assessment of the child's best interests: Committee on the Rights of the Child *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1) UN Doc CRC/C/GC/14 (29 May 2013) at [55].

¹⁹ The right of access to origins is seen as a constitutive element of the right to identity: Maud de Boer-Buquicchio *Report of the Special Rapporteur on the sale and sexual exploitation of children, including prostitution, child pornography and other child sexual abuse material* UN Doc A/74/162 (15 July 2019) at [34].

²⁰ Te Aka Matua o te Ture | Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework* (NZLC R65, 2000) at [75]–[76].

²¹ *Hemmes v Young* [2004] NZCA 289, [2005] 2 NZLR 755 at [117]. See also *Adoption Action Inc v Attorney-General* [2016] NZHRR 9, [2016] NZFLR 113 at [242]–[244].

²² Alice Webb-Liddall "Finding whakapapa: The generational trauma of closed Māori adoptions" *The Spinoff* (New Zealand, 18 March 2021).

²³ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [1.22] and [10.25]–[10.34]. See also Sonia Allen and others "Donor Conception and Surrogacy" (presentation to United Nations Conference on the 30th Anniversary of the Convention on the Rights of the Child, Geneva, 19 November 2019); and Rebecca Hamilton and others "Gaping holes in law covering info for donor-conceived people" *Stuff* (online ed, New Zealand, 25 May 2021).

Already, a generation of children conceived by donor gametes have, upon reaching adulthood, articulated the same strong needs to know their genetic parentage as adult adoptees have done.

- 3.16 In the surrogacy context, a child's right of access to origins may be undermined if they are not given information about their genetic and gestational origins appropriate to their age and understanding.
- 3.17 In Aotearoa New Zealand, there appears to be a general acceptance of the importance of making information available to surrogate-born children about their genetic and gestational origins.²⁴ As we discuss in Chapter 8, anonymous gamete donations through fertility clinics are no longer permitted in Aotearoa New Zealand,²⁵ and a new health and disability services standard requires fertility service providers to encourage and support people to inform surrogate-born children of their genetic and gestational origins.²⁶
- 3.18 New Zealanders' changing attitudes are likely due in part to the influence of tikanga Māori (customary practices) and the significance of whakapapa in New Zealand society, particularly for Māori.²⁷ However, not all cultures assign the same importance to children's identity rights, and in many countries, the use of anonymously donated gametes remains the cultural norm. Aotearoa New Zealand is a culturally diverse country, which means that some New Zealanders may have different cultural attitudes to sharing information with a surrogate-born child about their genetic and gestational origins.
- 3.19 The ongoing use of anonymous donors in other countries also has implications for New Zealanders who pursue international surrogacy arrangements. As we note in Chapter 2, half of international surrogacy arrangements entered into by New Zealanders in the past five years have involved the use of anonymously donated gametes. This means that these children may be unable to access information about their genetic origins on the same basis as New Zealand-born children. Margaret Casey QC notes that:²⁸

In my view this is the most significant disconnect for New Zealanders because of the development of two groups of donor born children; those who can access information about their genetic history and access to that knowledge is mandated by our society and those who cannot access this information because donor anonymity and availability has been prioritised over that child's right to a complete picture of their genetic makeup.

²⁴ In the Surrogacy Survey, 83 per cent of respondents agreed that surrogate-born children should have access to information about their origins: Debra Wilson *Understanding the Experience and Perceptions of Surrogacy Through Empirical Research: Public Perceptions Survey* (Te Whare Wānanga o Waitaha | University of Canterbury, May 2020) vol 3 at 157 (rounded to the nearest percentage point).

²⁵ Human Assisted Reproductive Technology Act 2004, s 47 requires providers to obtain identifying information about the donor.

²⁶ Ngā Paerewa Health and Disability Services Standard NZS 8134:2021 at [1.10.1]. This will come into force in February 2022 under the Health and Disability Services (Safety) Standards Notice 2021.

²⁷ As noted in Ken Daniels "The Policy and Practice of Surrogacy in New Zealand" in Rachel Cook, Shelley Day Sclater and Felicity Kaganas (eds) *Surrogate Motherhood: International Perspectives* (Hart Publishing, Portland (OR), 2003) 55 at 65.

²⁸ Margaret Casey "Creating families and establishing parentage when there is a disconnect between Assisted Reproductive Technologies and the Legal System: A New Zealand perspective of a global problem" (2017) 9 NZFLJ 51 at 54. This problem is also identified at an international level, see: Maud de Boer-Buquicchio *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* UN Doc A/74/162 (15 July 2019) at [38].

Rights to nationality

- 3.20 Under UNCROC, children have the right to acquire a nationality, and states must ensure these rights are respected, especially where the child would otherwise be stateless.²⁹
- 3.21 Rights to nationality are important in international surrogacy. A child in an international surrogacy arrangement may end up stateless if the country of the child's birth and the intended parents' country (or countries) of citizenship refuse recognition.³⁰ As we explore in Chapter 9, if a child is stateless, this may affect their ability to travel to the intended parents' country. It may also affect the ability of the intended parents to care for the child if they are unable to travel to or remain in the child's country of birth.
- 3.22 Rights to nationality are also engaged when intended parents have dual citizenship. Surrogate-born children should be able to enjoy the same rights to nationality as other children, regardless of their method of conception.

Rights to family life

- 3.23 UNCROC places strong emphasis on maintaining family life and preventing separation from parents unless it is in the best interests of the child.³¹ In the surrogacy context, the UN Special Rapporteur has recognised that there is a "very real risk" of separation where international surrogacy arrangements are concluded by intended parents from countries where surrogacy is prohibited.³² It considers it is "vital to maintain a very high threshold for the justification of a separation in accordance with international norms and standards".³³
- 3.24 Even in domestic surrogacy arrangements, the relationship between the surrogate-born child and the intended parents is precarious, as the intended parents have no legal parental rights or responsibilities in relation to that child until such time as their adoption is finalised. This may impact on the child's rights to family life. We discuss legal parenthood in Chapter 7.

²⁹ United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), arts 7 and 8.

³⁰ Claire Achmad "Contextualising a 21st century challenge: Part Two – Public international law human rights issues: Why are the rights and interests of women and children at stake in international commercial surrogacy arrangements?" (2012) 7 NZFLJ 206 at 208.

³¹ United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), preamble and arts 5, 7, 9, 10, 16 and 18.

³² Maud de Boer-Buquicchio *Report of the Special Rapporteur on the sale and sexual exploitation of children, including prostitution, child pornography and other child sexual abuse material* UN Doc A/74/162 (15 July 2019) at [43]. See, for example, the case of *Paradiso and Campanelli v Italy* ECHR 25358/12, 24 January 2017 (Grand Chamber).

³³ Maud de Boer-Buquicchio *Report of the Special Rapporteur on the sale and sexual exploitation of children, including prostitution, child pornography and other child sexual abuse material* UN Doc A/74/162 (15 July 2019) at [43].

Right to health

- 3.25 All children have the right to the enjoyment of the highest attainable standard of health, and states must work to ensure that no child is deprived of their right to access health-care services.³⁴
- 3.26 In the surrogacy context, the ability of the child to preserve their identity has implications for their right to health because if they are conceived using anonymous gametes, they may not have access to important genetic health information. In addition, a child who is stateless may encounter barriers when attempting to access health-care, and if a child has no legal relationship with the intended parents, the intended parents may be unable to consent to medical treatment on the child's behalf, even if the child is in their care.

Rights to freedom from discrimination

- 3.27 Children are entitled to the rights set out in UNCROC without discrimination on specified grounds, including "birth or other status".³⁵ The UN Special Rapporteur explains that:³⁶

This overarching principle of non-discrimination signifies that none of the rights of the child should be impacted by the method of his or her birth, including through a surrogacy arrangement. Specifically, the rights of the child to identity, access to origins and to a family environment should not be adversely affected by surrogacy.

Rights to protection from abuse, exploitation and sale

- 3.28 Aotearoa New Zealand also has international human rights obligations to take appropriate measures to protect children from abuse and exploitation.³⁷
- 3.29 In the context of surrogacy, this is often interpreted as imposing an obligation on states to undertake some form of assessment of intended parents before their legal parent status is recognised.³⁸
- 3.30 This can be a particular concern in international surrogacy, where a surrogacy arrangement may take place in a country without the same protective laws that exist in Aotearoa New Zealand. In international human rights law, there is a concern that some

³⁴ United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 24.

³⁵ United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 2.

³⁶ Maud de Boer-Buquicchio *Report of the Special Rapporteur on the sale and sexual exploitation of children, including prostitution, child pornography and other child sexual abuse material* UN Doc A/74/162 (15 July 2019) at [23].

³⁷ Pursuant to United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), arts 19 and 35. See also arts 32–36. Aotearoa New Zealand is also a signatory to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography 2171 UNTS 227 (opened for signature 25 May 2000, entered into force 1 January 2002).

³⁸ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [5.5] and [8.2]; and Natalie Baird and Rhonda Powell *Surrogacy and Human Rights in New Zealand: Rethinking Surrogacy Laws Te Kohuki Ture Kopu Whangai* (Te Kura Ture | School of Law, Te Whare Wānanga o Waitaha | University of Canterbury, May 2020) at 23. See also Permanent Bureau of the Hague Conference on Private International Law *A Study of Legal Parentage and the Issues arising from International Surrogacy Arrangements* (Preliminary Document No 3C, March 2014) at [206]–[207], observing that there are a minority of extremely troubling cases that have resulted from a system that has no enforced minimum checks concerning intended parents.

surrogacy arrangements may constitute the sale of children if the arrangement is characterised by a contract under which a surrogate receives a fee for gestating and transferring a child to the intended parents after birth.³⁹ The UN Special Rapporteur and the Verona Principles highlight the need for appropriate safeguards and oversight mechanisms in order to guard against this risk.⁴⁰

PRINCIPLE 2: SURROGACY LAW SHOULD RESPECT THE AUTONOMY OF CONSENTING ADULTS IN THEIR PRIVATE LIVES

- 3.31 Subject to the paramountcy of the surrogate-born child's best interests, we think the law should respect the autonomy of consenting adults (including both surrogates and intended parents) in their private lives. Similar guiding principles are reflected in legislation in some Australian states⁴¹ and in reviews of surrogacy law by overseas law reform bodies.⁴²
- 3.32 Personal autonomy is a fundamental human rights value, grounded in the respect for the inherent dignity of the human person.⁴³ It is expressed in a range of different ways, including through recognition of a person's bodily integrity and reproductive freedom,⁴⁴

³⁹ Committee on the Rights of the Child *Concluding observations on the combined third and fourth reports submitted by the United States of America under article 12 (1) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* UN Doc CRC/C/OPSC/USA/CO/3-4 (12 July 2017) at [24]; Maud de Boer-Buquicchio *Report of the Special Rapporteur on the sale and sexual exploitation of children, including prostitution, child pornography and other child sexual abuse material* UN Doc A/HRC/37/60 (15 January 2018) at [41]–[42]; and International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [14.1]–[14.6].

⁴⁰ Maud de Boer-Buquicchio *Report of the Special Rapporteur on the sale and sexual exploitation of children, including prostitution, child pornography and other child sexual abuse material* UN Doc A/74/162 (15 July 2019) at [74] and [79]; and International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [1.3] and [14.7]–[14.9].

⁴¹ Surrogacy Act 2012 (Tas), s 3(d); and Surrogacy Act 2010 (Qld), s 6(2)(d).

⁴² See, for example, Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: a new law – A joint consultation paper* (CP244/DP167, 2019) at [2.65]–[2.71] and [8.96]–[8.100]; Michael Gorton *Helping Victorians create families with assisted reproductive treatment: Final Report of the Independent Review of Assisted Reproductive Treatment* (Victorian Department of Health and Human Services, Melbourne, May 2019), R63; South Australian Law Reform Institute *Surrogacy: A Legislative Framework – A Review of Part 2B of the Family Relationships Act 1975 (SA)* (Report 12, 2018), R11(5); Standing Committee of Attorneys-General, Australian Health Ministers' Conference and Community and Disability Services Ministers' Conference Joint Working Group *A proposal for a National Model to Harmonise Regulation of Surrogacy* (NSW, Australia, January 2009) at 2; and Investigation into Altruistic Surrogacy Committee *Report* (Queensland Parliament, Brisbane, October 2008), R9.

⁴³ For a discussion, see Kate Galloway "Theoretical Approaches to Human Dignity, Human Rights and Surrogacy" in Paula Gerber and Katie O'Byrne (eds) *Surrogacy, Law and Human Rights* (Ashgate, United Kingdom, 2015) 13 at 24–28.

⁴⁴ These rights and freedoms are contained within the general right to health: Committee on Economic, Social and Cultural Rights *General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12)* UN Doc E/C.12/2000/4 (11 August 2000) at [8]. The right to health is affirmed in a range of international instruments including the *Universal Declaration of Human Rights* GA Res 217A (1948), art 25; the International Covenant on Economic Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), art 12; and the Convention on the Elimination of All Forms of Discrimination against Women New York 1249 UNTS 1 (opened for signature 18 December 1979, entered into force 3 September 1981), arts 12 and 16(e).

rights to found a family⁴⁵ and rights to respect for privacy and family.⁴⁶ The European Court of Human Rights has interpreted the right to respect for privacy and family as including “the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose”.⁴⁷ These rights should be enjoyed without discrimination on grounds such as sex, gender, marital status or sexual orientation.⁴⁸

- 3.33 This principle does not suggest that adults have an unqualified right to have a child by surrogacy, as that would undermine the recognition of children as individual rights holders.⁴⁹ Rather, adults’ freedom to have a child by surrogacy should be respected provided the rights of others, in particular the rights of the child and the surrogate, are adequately protected.⁵⁰
- 3.34 This guiding principle means respecting a surrogate’s decision to enter a surrogacy arrangement and her autonomy to make decisions about how to manage her pregnancy and the birth.⁵¹ It also means respecting the intended parents’ rights to decide to build their family through surrogacy and the parties’ intentions in relation to legal parenthood, subject to appropriate safeguards. Decisions made by donors to donate gametes should also be respected. Finally, this principle also means respecting the autonomy of surrogates’ partners, who are currently co-opted into a legal parental role simply by fact of their relationship with the surrogate.

PRINCIPLE 3: EFFECTIVE REGULATORY SAFEGUARDS MUST BE IN PLACE

- 3.35 Available research suggests that most surrogacy arrangements will be positive experiences for all the parties involved (see Chapter 2). However, it is important to acknowledge that parties in a surrogacy arrangement are in an inherently vulnerable

⁴⁵ International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 23(2).

⁴⁶ International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 17(1).

⁴⁷ *SH and others v Austria* [2011] 5 ECHR 295 (Grand Chamber) at [82], dealing with article 8 of the European Convention on Human Rights, which is equivalent to article 17 of the International Covenant on Civil and Political Rights.

⁴⁸ Non-discrimination principles are found in a range of international conventions and are enshrined in domestic law under the New Zealand Bill of Rights Act 1990, ss 5 and 19; and the Human Rights Act 1993, s 21. If infertility is considered a disability, intended parents who experience infertility would also have rights to non-discrimination in the enjoyment of their rights under the Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 31 December 2006, entered into force 3 May 2008), arts 22–23 and 25.

⁴⁹ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [1.8]; and Maud de Boer-Buquicchio *Report of the Special Rapporteur on the sale and sexual exploitation of children, including prostitution, child pornography and other child sexual abuse material* UN Doc A/74/162 (15 July 2019) at [76].

⁵⁰ Australian Human Rights Commission *Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs: Inquiry into the Regulatory and Legislative Aspects of Surrogacy Arrangements* (17 February 2016) at [24].

⁵¹ Kate Galloway “Theoretical Approaches to Human Dignity, Human Rights and Surrogacy” in Paula Gerber and Katie O’Byrne (eds) *Surrogacy, Law and Human Rights* (Ashgate, United Kingdom, 2015) 13 at 28.

position. Effective regulatory safeguards are necessary to protect all parties from the potential for exploitation.⁵²

- 3.36 Women who act as surrogates are often considered to be most at risk, especially in international commercial surrogacy arrangements.⁵³ In some countries, these arrangements can be characterised by an imbalance of power between the parties, and a woman may be induced, through the promise of payment, to act as a surrogate under an arrangement without sufficient protections for her or for the surrogate-born child. In countries with less-stringent standards of fertility treatment and healthcare, women who act as surrogates may also face greater health risks. For example, in Chapter 2, we note that multiple embryo transfers are not routinely available in Aotearoa New Zealand, given they pose significantly greater risk to the surrogate, but this procedure may be available in other countries.
- 3.37 Concerns regarding the potential for exploitation are particularly prevalent when for-profit intermediaries are involved and when “economically poor women are acting as surrogates in the developing world to meet the demand of developed world customers”.⁵⁴ In some countries, contact between the intended parents and the surrogate may be discouraged or communication may be difficult due to language barriers. Even in more stable legal systems such as the United States, there remains a concern that surrogates in commercial surrogacy arrangements may still be unduly influenced by social and economic pressures, may be unable to give free and informed consent or may be exploited through racial, cultural, structural and other inequities.⁵⁵
- 3.38 The potential for exploitation of surrogates also exists in non-commercial surrogacy arrangements. As the Commission identified in 2005, even if commercial inducements are prohibited, there may be other pressures, including within a family, that make it difficult for a woman to resist a request to carry a child for others.⁵⁶ Surrogates may also come under external pressure to agree to tests or procedures they would otherwise choose

⁵² Similar principles have guided surrogacy law reform in South Australia: South Australian Law Reform Institute *Surrogacy: A Legislative Framework – A Review of Part 2B of the Family Relationships Act 1975 (SA)* (Report 12, 2018) at [9.5.1]–[9.5.12]. Other Australian law reform bodies have focused on protecting the surrogate from exploitation: Michael Gorton *Helping Victorians create families with assisted reproductive treatment: Final Report of the Independent Review of Assisted Reproductive Treatment* (Victoria Department of Health and Human Services, Melbourne, May 2019) at 119; and House of Representatives Standing Committee on Social Policy and Legal Affairs *Surrogacy Matters: Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements* (Parliament of the Commonwealth of Australia, April 2016), R2.

⁵³ For a discussion, see Claire Achmad “Contextualising a 21st century challenge: Part Two – Public international law human rights issues: Why are the rights and interests of women and children at stake in international commercial surrogacy arrangements?” (2012) 7 NZFLJ 206 at 211. See also Permanent Bureau of the Hague Conference on Private International Law *A Study of Legal Parentage and the Issues arising from International Surrogacy Arrangements* (Preliminary Document No 3C, March 2014) at [192].

⁵⁴ Claire Achmad “Contextualising a 21st century challenge: Part Two – Public international law human rights issues: Why are the rights and interests of women and children at stake in international commercial surrogacy arrangements?” (2012) 7 NZFLJ 206 at 211. See, for example, Kishwar Desai “India’s surrogate mothers are risking their lives. They urgently need protection” *The Guardian* (online ed, London, 5 June 2012).

⁵⁵ Sonia Allan “The Surrogate in Commercial Surrogacy: Legal and Ethical Considerations” in Paula Gerber and Katie O’Byrne (eds) *Surrogacy, Law and Human Rights* (Ashgate, United Kingdom, 2015) 113 at 124–128. See also Kate Galloway “Theoretical Approaches to Human Dignity, Human Rights and Surrogacy” in Paula Gerber and Katie O’Byrne (eds) *Surrogacy, Law and Human Rights* (Ashgate, United Kingdom, 2015) 13 at 18–20.

⁵⁶ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [7.64].

not to do.⁵⁷ One review in Australia reported that some surrogates felt that they had to comply with the demands for more-invasive forms of treatment because the intended parents were paying for the medical expenses involved.⁵⁸ Some commentators argue that altruistic surrogacy can be exploitative if it results in women being financially disadvantaged by agreeing to act as a surrogate.⁵⁹

- 3.39 Intended parents are also at risk of exploitation. Often, intended parents turn to surrogacy as their only opportunity to have a child or as a last resort after a long period of costly and unsuccessful fertility treatment. This leaves them vulnerable, as the South Australian Law Reform Institute has observed:⁶⁰

The urge and desperation of childless couples and individuals to become parents ... is profound, as is their willingness to pay large amounts of money (even in a non-commercial system) in order to become a parent.

- 3.40 In any surrogacy arrangement, there is the potential for exploitation on both sides, including by the surrogate. For example, a surrogate might cut contact with the intended parents during the pregnancy or make increasingly unreasonable demands on them. Intended parents may feel powerless to do anything but accede to these demands. In one Australian review, an intended parent explained that “when someone is carrying your baby, you will do anything for them” and there is “so much potential for parents ... to be taken advantage of”.⁶¹
- 3.41 Intended parents may be more vulnerable in international commercial surrogacy arrangements, especially if surrogacy intermediaries and fertility clinics are not adequately regulated. They may be in an unfamiliar country and may find it difficult to access accurate information and independent advice. Internationally, there have been reports of commercial surrogacy agencies defrauding intended parents⁶² and of clinic errors and practices where intended parents arrange for the child to be conceived using their gametes only to discover, after the child’s birth, that they have no genetic link to the child.⁶³

⁵⁷ See, for example, Tom Blackwell “Canadian surrogate eliminated baby from triplet pregnancy at urging of overseas couple” *National Post* (online ed, Canada, 9 September 2015).

⁵⁸ Michael Gorton *Helping Victorians create families with assisted reproductive treatment: Final Report of the Independent Review of Assisted Reproductive Treatment* (Victoria Department of Health and Human Services, Melbourne, May 2019) at 135.

⁵⁹ Rhonda Powell “Exploitation of Surrogate Mothers in New Zealand” in Annick Masselot and Rhonda Powell (eds) *Perspectives on Commercial Surrogacy in New Zealand: Ethics, Law, Policy and Rights* (Centre for Commercial & Corporate Law, Te Whare Wānanga o Waitaha | University of Canterbury, Christchurch, 2019) 57 at 58; and Ruth Walker and Liezl van Zyl *Towards a Professional Model of Surrogate Motherhood* (Palgrave MacMillan, London, 2017) at 44.

⁶⁰ South Australian Law Reform Institute *Surrogacy: A Legislative Framework – A Review of Part 2B of the Family Relationships Act 1975 (SA)* (Report 12, 2018) at [9.5.1] (citations omitted).

⁶¹ South Australian Law Reform Institute *Surrogacy: A Legislative Framework – A Review of Part 2B of the Family Relationships Act 1975 (SA)* (Report 12, 2018) at [9.5.10].

⁶² See, for example, Justin Fenton “Annapolis business owner sentenced for scamming people across the world who sought his help with surrogate pregnancies” *Baltimore Sun* (online ed, Baltimore (MD), 21 April 2021); and discussion in Debra Wilson “Avoiding the Public Policy and Human Rights Conflict in Regulating Surrogacy: The Potential Role of Ethics Committees in Determining Surrogacy Applications” (2017) 7 UC Irvine L Rev 653 at 663–664.

⁶³ *Re an application by DMW and KW* [2012] NZFC 2915; *Paradiso & Campanelli v Italy* ECHR 25358/12, 24 January 2017 (Grand Chamber); and Permanent Bureau of the Hague Conference on Private International Law *A Study of Legal*

- 3.42 Finally, it is also important to recognise that surrogacy does not take place within a vacuum but within an existing family environment. It may raise particular concerns for whānau Māori, due to implications for whakapapa and obligations arising from whanaungatanga (kinship). It can also have implications for any existing children. All children have the same rights under UNCROC, and any siblings of surrogate-born children therefore have the same rights to preserve their identity, including their relationship with their family.⁶⁴ They also have the right to express their views on all matters affecting them and for their views to be given due weight according to their age and maturity.⁶⁵

PRINCIPLE 4: PARTIES SHOULD HAVE EARLY CLARITY AND CERTAINTY ABOUT THEIR RIGHTS AND OBLIGATIONS

- 3.43 This reflects a guiding principle recommended in the Commission's 2005 report *New Issues in Legal Parenthood* and remains just as relevant today.⁶⁶ There should be clarity and certainty, at the earliest possible time, about each party's rights and obligations before, during and after a surrogacy arrangement. This will in turn reduce the uncertainty and risk of disagreements arising between the parties.
- 3.44 The need for early clarity and certainty is most evident in relation to the legal parent-child relationship between intended parents and surrogate-born children. Important rights and protections flow from legal parent-child relationships, including nationality and citizenship. We discuss this further in Chapter 7. Recognition of this legal parent-child relationship is also important to upholding the child's rights to identity.⁶⁷ As the Commission observed in 2005:⁶⁸

Where a number of adults have been involved in a child's creation, the law needs to declare, at the first appropriate opportunity, what their legal status, responsibilities and rights to the child are. Certainty and clarity are important for the harmonious functioning of the child's family and to enable people to plan their lives.

Parentage and the Issues arising from International Surrogacy Arrangements (Preliminary Document No 3C, March 2014, The Hague) at [189].

⁶⁴ United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 8(1).

⁶⁵ United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 12(1).

⁶⁶ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [1.20]. A similar guiding principle was recommended in South Australian Law Reform Institute *Surrogacy: A Legislative Framework – A Review of Part 2B of the Family Relationships Act 1975 (SA)* (Report 12, 2018), R11; and Michael Gorton *Helping Victorians create families with assisted reproductive treatment: Final Report of the Independent Review of Assisted Reproductive Treatment* (Victorian Department of Health and Human Services, Melbourne, May 2019), R63. The need for legal certainty is also highlighted in Claire Fenton-Glynn and Jens M Scherpe "Surrogacy in a Globalised World: Comparative Analysis and Thoughts on Regulation" in Jens M Scherpe, Claire Fenton-Glynn and Terry Kaan (eds) *Eastern and Western Perspectives on Surrogacy* (Intersentia, Cambridge (UK), 2019) 515 at 591–592.

⁶⁷ *Mennesson v France* [2014] 3 ECHR 255 at [80] and [97]–[100].

⁶⁸ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [1.20].

PRINCIPLE 5: INTENDED PARENTS SHOULD BE SUPPORTED TO ENTER SURROGACY ARRANGEMENTS IN AOTEAROA NEW ZEALAND RATHER THAN OFFSHORE

- 3.45 This principle reflects the need to recognise the reality of international surrogacy. As some commentators observe:⁶⁹

Legislators cannot bury their heads in the sand: surrogacy is not going to go away. It is now an established artificial reproductive technique, and in a global marketplace, there is always going to be somewhere, somehow, that it is available. The only question is how we deal with the consequences.

- 3.46 As we explore in Chapter 9, international surrogacy arrangements are usually commercial in nature and the disparity in regulation of surrogacy around the world means a surrogacy arrangement entered into in another country may lack safeguards and place the parties at greater risk. Additionally, international surrogacy can create complex legal and practical problems when intended parents bring their child back into their country.
- 3.47 In response to these concerns and the global reality of international surrogacy, policy makers around the world are looking at ways to support citizens to pursue surrogacy within their own country rather than overseas.⁷⁰ In 2021, Ireland's Special Rapporteur on Child Protection reported that the best way to avoid the risks associated with international surrogacy was to "incentivise intended parents to make use of a domestic process that is regulated to the highest children's rights standards".⁷¹ He recommended this could be achieved by allowing for the recognition of domestic surrogacy arrangements through a procedure that is less burdensome than that applicable to international arrangements and through awareness-raising measures designed to inform intended parents of this fact.⁷²
- 3.48 We think it is important that New Zealanders are supported to enter surrogacy arrangements in Aotearoa New Zealand to minimise the need for intended parents to rely on international surrogacy to build their family. This is consistent with the views of the

⁶⁹ Claire Fenton-Glynn and Jens M Scherpe "Surrogacy in a Globalised World: Comparative Analysis and Thoughts on Regulation" in Jens M Scherpe, Claire Fenton-Glynn and Terry Kaan (eds) *Eastern and Western Perspectives on Surrogacy* (Intersentia, Cambridge (UK), 2019) 515 at 592.

⁷⁰ See, for example, Conor O'Mahony *A Review of Children's Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law* (Department of Children, Equality, Disability, Integration and Youth, Ireland, December 2020) at 15; Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: a new law – A joint consultation paper* (CP244/DP167, 2019) at [2.72]; and (4 June 2015) South Australia Parliamentary Debates, House of Assembly 1523 (Family Relationships (Surrogacy) Amendment Bill, John Gardner MP). See also Australian Human Rights Commission *Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs: Inquiry into the Regulatory and Legislative Aspects of Surrogacy Arrangements* (17 February 2016) at [80]; and Ruth Walker and Liezl van Zyl *Towards a Professional Model of Surrogate Motherhood* (Palgrave MacMillan, London, 2017) at 43 and 187, where the authors argue that domestic surrogacy is usually preferable to international surrogacy, which tends to be poorly regulated, and that properly regulating domestic surrogacy could lead to fewer intended parents engaging in international surrogacy.

⁷¹ Conor O'Mahony *A Review of Children's Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law* (Department of Children, Equality, Disability, Integration and Youth, Ireland, December 2020) at 15.

⁷² Conor O'Mahony *A Review of Children's Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law* (Department of Children, Equality, Disability, Integration and Youth, Ireland, December 2020) at 15.

Advisory Committee on Assisted Reproductive Technology.⁷³ This will involve addressing the current practical and legal barriers to accessing surrogacy in Aotearoa New Zealand that are driving intended parents overseas, such as the lack of legal certainty and the limited availability of New Zealanders willing to act as surrogates. We look at ways to do so throughout this Issues Paper.

- 3.49 Supporting New Zealanders to enter surrogacy arrangements in Aotearoa New Zealand would avoid the risks associated with international surrogacy and would also ensure the following:
- (a) Surrogacy arrangements are undertaken within a regulatory framework with appropriate safeguards that uphold New Zealand human rights obligations and health standards. Parties to a surrogacy arrangement and any resulting children would be protected by the provisions of the HART Act and other New Zealand requirements, including the New Zealand Fertility Services Standard (which will be replaced by Ngā Paerewa Health and Disability Services Standard NZS 8134:2021 in February 2022)⁷⁴ and the Code of Health and Disability Services Consumers' Rights.⁷⁵
 - (b) Surrogate-born children can access information about their genetic and gestational origins, consistent with their rights to identity discussed above.
 - (c) The intended parents (and the surrogate-born child) are closer geographically to the surrogate, which may help to promote positive and ongoing relationships.
 - (d) The intended parents and surrogate can remain close to their own family and support networks during the pregnancy and after birth.
 - (e) The intended parents do not incur overseas travel and other costs associated with spending time away from Aotearoa New Zealand. They also avoid unforeseen events that may disrupt international travel, like the Covid-19 pandemic.
- 3.50 We also think that this approach would be supported by intended parents, as several people who pursued surrogacy offshore have told us that they would have favoured an arrangement in Aotearoa New Zealand.⁷⁶

⁷³ Advisory Committee on Assisted Reproductive Technology *Second Round of Consultation on the Proposed Donation and Surrogacy Guidelines: further changes since ACART's 2017 consultation* (February 2019) at [62]. See also Advisory Committee on Assisted Reproductive Technology *Advice to the Minister of Health on requirements for importing and exporting in vitro gametes and embryos for human reproductive research and human assisted reproductive technology* (March 2015) at [111].

⁷⁴ Pursuant to the Health and Disability Services (Safety) Standards Notice 2021.

⁷⁵ As observed in Advisory Committee on Assisted Reproductive Technology *Advice to the Minister of Health on requirements for importing and exporting in vitro gametes and embryos for human reproductive research and human assisted reproductive technology* (March 2015) at [111].

⁷⁶ Similar to the views of New Zealanders seeking ovum or sperm donors, who have a strong preference to be treated in Aotearoa New Zealand using gametes donated by New Zealanders: Advisory Committee on Assisted Reproductive Technology *Advice to the Minister of Health on requirements for importing and exporting in vitro gametes and embryos for human reproductive research and human assisted reproductive technology* (March 2015) at [18] and [108].

PRINCIPLE 6: SURROGACY LAW SHOULD ENABLE MĀORI TO ACT IN ACCORDANCE WITH TIKANGA AND PROMOTE RESPONSIBLE KĀWANATANGA THAT FACILITATES TINO RANGATIRATANGA

- 3.51 The principles above focus on the rights and interests of individuals affected by surrogacy arrangements. They reflect international best-practice guidance in relation to surrogacy. Equally important, however, is that surrogacy law reform is responsive to the unique cultural and constitutional considerations in Aotearoa New Zealand.
- 3.52 We think that surrogacy law should enable Māori to act in accordance with tikanga Māori (customary practices) and promote responsible kāwanatanga (the right of the Crown to govern) that facilitates tino rangatiratanga (the right of Māori to exercise authority according to tikanga) under te Tiriti o Waitangi | the Treaty of Waitangi (the Treaty).⁷⁷
- 3.53 Below we discuss the constitutional significance of tikanga Māori and the Treaty to the development of the law in Aotearoa New Zealand. We then explain how this principle will guide our approach to this review.

Tikanga Māori

- 3.54 Tikanga Māori is the first law of Aotearoa New Zealand and is an independent source of rights and obligations in te ao Māori.⁷⁸ It forms part of the common law⁷⁹ and can be integrated into law by reference in legislation.⁸⁰ It is also significant in terms of Treaty rights and obligations that pertain to tikanga, specifically as a necessary and inevitable expression of tino rangatiratanga guaranteed to Māori,⁸¹ discussed below.

⁷⁷ When discussing te Tiriti o Waitangi | the Treaty of Waitangi in this paper, we use “the Treaty” as a generic term that is intended to capture the Māori text (te Tiriti o Waitangi) and the English text (the Treaty of Waitangi). When we are referring to the Māori text only, we either use the term “te Tiriti”, refer to “the Māori text” or make this clear in the context. When we are referring to the English text only, we refer to “the English text” or make this clear in the context. To the extent that the principles of the Treaty, which have been developed through jurisprudence, substantively reflect the rights and obligations arising from the texts, the principles may also be captured by the term “the Treaty”. Otherwise, we specifically refer to “the principles of the Treaty” or to specific principles. For a more detailed description of the general significance of tikanga Māori and the Treaty, see the recent discussion in Te Aka Matua o te Ture | Law Commission *Review of Succession Law: Rights to a person’s property on death | He arotake i te āheinga ki ngā rawa a te tangata ka mate ana* (NZLC IP46, 2021) at [2.6]–[2.31]; and Te Aka Matua o te Ture | Law Commission *The Use of DNA in Criminal Investigations | Te Whakamahi i te Ira Tangata i ngā Mātai Taihara* (NZLC R144, 2020) at [2.6]–[2.36].

⁷⁸ See Ani Mikaere “The Treaty of Waitangi and Recognition of Tikanga Māori” in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Auckland, 2005) 330 at 331–334; and Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 *Taumauri | Waikato L Rev* 1 at 2–5.

⁷⁹ As recognised by te Kōti Mana Nui | the Supreme Court in *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94]–[95]. In *Ellis v R* [2020] NZSC 89, submissions were sought on the application of tikanga on the question of whether the Court has jurisdiction to hear an appeal against conviction after the death of the appellant. The Court issued its judgment allowing the appeal to proceed, but reasons for that decision are to be provided with the judgment on the substantive appeal: at [5]. See also *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotearoa Trust Board (No 2)* [2021] NZHC 291 at [43]–[47] and [58].

⁸⁰ Legislation referencing tikanga include the Oranga Tamariki Act 1989 (see s 2 definitions of “tikanga Māori” and “mana tamaiti (tamariki)”); Resource Management Act 1991; and Taumata Arowai—the Water Services Regulator Act 2020.

⁸¹ Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 *Taumauri | Waikato L Rev* 1 at 9.

- 3.55 Tikanga includes a system of principles that guide and direct rights and obligations in a Māori way of living. It governs relationships by providing a shared basis for “doing things right, doing things the right way, and doing things for the right reasons”.⁸²
- 3.56 The significance of tikanga to the development of the law is reinforced by Aotearoa New Zealand’s international obligations in relation to Māori as individuals, including its affirmation in 2010 of Te Whakapuakitanga o te Rūnanga Whakakotahi i ngā Iwi o te Ao mō ngā Tika o ngā Iwi Taketake | United Nations Declaration on the Rights of Indigenous Peoples.⁸³

The Treaty

- 3.57 The Treaty is a founding document of government.⁸⁴ It comprises a Māori text and an English text, and there are differences between them.
- 3.58 In the Māori text, article 1 provides that Māori rangatira grant the Crown kāwanatanga, the right to govern. Article 2 provides that the Crown will protect the exercise of tino rangatiratanga over lands, villages and taonga katoa (all things valued and treasured). Tino rangatiratanga has been described as the exercise of the chieftainship of rangatira, which is unqualified except by applicable tikanga.⁸⁵
- 3.59 Article 1 of the English text provides that Māori rangatira cede the sovereignty they exercise over their respective territories to the Crown, while article 2 guarantees to Māori full exclusive and undisturbed possession of their lands and other properties.⁸⁶
- 3.60 Under article 3 of the English text, the Crown imparted to Māori its protection as well as all the rights and privileges of British subjects. A similar undertaking was conveyed in article 3 of the Māori text, which provides that the Crown will care for Māori and give to Māori the same rights and duties of citizenship as the people of England.⁸⁷ Article 3 has been understood as a guarantee of equity between Māori and other New Zealanders.⁸⁸

⁸² Bishop Manuhia Bennett “Pū Wānanga Seminar” (presented with Te Mātāhauariki Institute) as cited in Richard Benton, Alex Frame and Paul Meredith Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law (Victoria University Press, Wellington, 2013) at 431.

⁸³ Te Whakapuakitanga o te Rūnanga Whakakotahi i ngā Iwi o te Ao mō ngā Tika o ngā Iwi Taketake | United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295 (2007).

⁸⁴ Kenneth Keith “On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government” in Cabinet Office *Cabinet Manual 2017* at 1.

⁸⁵ IH Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 319. Kawharu explained that the term emphasised to rangatira their complete control according to their customs. The term has also been translated as “paramount authority”: Margaret Mutu “Constitutional Intentions: The Treaty of Waitangi Texts” in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters – The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 13 at 19–22; and “absolute authority”: Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Whaia te Mana Motuhake | In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wai 2417, 2015) at 26.

⁸⁶ Article 2 also gave the Crown an exclusive right of pre-emption over any land Māori wanted to “alienate”.

⁸⁷ IH Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 321.

⁸⁸ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 27.

- 3.61 At the time of signing the Treaty, Crown representatives made oral undertakings and assurances to Māori, including an undertaking to respect Māori customs and law.⁸⁹ Te Rōpū Whakamana i te Tiriti | Waitangi Tribunal (the Tribunal) has held that these also form part of the agreement reached.⁹⁰
- 3.62 Not all hapū (sub-tribes) were represented among the rangatira signatories to the Treaty. The Crown has taken the position that the benefit of the promises it made in the Treaty extends to all Māori, whether or not they signed the Treaty.⁹¹
- 3.63 The overwhelming majority of rangatira signatories signed the Māori text rather than the English text.⁹² As a result, the Tribunal has said that considerable weight should be given to the Māori text when there is a difference between them.⁹³
- 3.64 Five years before the Treaty was signed, in 1835, a number of northern rangatira signed He Whakaputanga o te Rangatiratanga o Nu Tirenī | the Declaration of Independence of the United Tribes of New Zealand. He Whakaputanga was a declaration of the sovereignty and independence of those rangatira. The Tribunal has considered the “striking absence” of any record of explicit discussion about its ongoing relevance or its relationship with the Treaty.⁹⁴ The Tribunal has also considered the failure of the British to explain why and how the Treaty nullified He Whakaputanga to be significant.⁹⁵

⁸⁹ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 114.

⁹⁰ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Whakaputanga me te Tiriti | The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 526–527.

⁹¹ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Te Urewera* (Wai 894, 2017) vol 1 at 139. This is reflected in s 9(1) of the Tūhoe Claims Settlement Act 2014. In 2018, the Tribunal concluded that the Treaty applied to non-signatory hapū as a unilateral set of promises by the Crown to respect and protect their tino rangatiratanga and other rights just as it would for hapū whose leaders had signed, noting that, out of practical necessity, all Māori needed to engage with the Crown on the basis of the Treaty’s guarantees, whether they had signed the Treaty or not: Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims – Parts I and II* (Wai 898, 2018) at 188.

⁹² It has long been acknowledged that most of the more than 500 rangatira who signed the Treaty signed the Māori text, not the English text, following their debate and discussion in te reo Māori. While some signed the English sheet, most if not all of them would have relied on the oral explanation of the Treaty’s terms in Māori, which likely reflected the Māori text. See Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims – Parts I and II* (Wai 898, 2018) at 130, 136, 139–140 and 146. See also Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Whakaputanga me te Tiriti | The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 522; and Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (Victoria University Press, Wellington, 2016) at 7.

⁹³ Consistent with the *contra proferentem* rule of the law of treaties, where there is ambiguity, a provision should be construed against the party that drafted or proposed the relevant provision. See Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Report of the Waitangi Tribunal on The Orakei Claim* (Wai 9, 1987) at 180.

⁹⁴ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Whakaputanga me te Tiriti | The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 520.

⁹⁵ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Whakaputanga me te Tiriti | The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 521. See also Ani Mikaere *Colonising Myths: Māori Realities – He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011) at 127–128; and He Whakaaro Here Whakaumu Mō Aotearoa: *The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation* (January 2016) at 43–49.

Tino rangatiratanga and kāwanatanga

3.65 With respect to articles 1 and 2 of te Tiriti, the Tribunal has observed:⁹⁶

The guarantee of tino rangatiratanga requires the Crown to acknowledge Māori control over their tikanga, resources, and people and to allow Māori to manage their own affairs in a way that aligns with their customs and values.

3.66 In te ao Māori, rangatiratanga is both the authority of a rangatira and the authority of Māori as people. Rangatiratanga involves the exercise of mana (authority) in accordance with and qualified by tikanga and associated kawa (protocols). Through tikanga, rangatiratanga manages a dynamic interface between people, their environment and the non-material world.⁹⁷

3.67 It is the substance of this rangatiratanga that needs to be upheld and not interfered with through the guarantee of tino rangatiratanga. In effect, te Tiriti envisages the co-existence of both rangatiratanga and kāwanatanga as different but intersecting systems of political and legal authority.⁹⁸

3.68 Tino rangatiratanga is exercised within te ao Māori every day and independently of state law, in accordance with tikanga Māori. However, in some situations, consistency with te Tiriti may require that provision for the exercise of tino rangatiratanga be made in legislation. Te Tiriti also requires careful thought about what responsible kāwanatanga involves.

3.69 This approach to articles 1 and 2 of te Tiriti allows an end to debating the different texts in an effort to understand what was exchanged between Māori and the British and how the wording of each of the texts should be qualified.⁹⁹ Instead, it focuses on the relationship between tino rangatiratanga and kāwanatanga. This allows us to ask how responsible kāwanatanga might be exercised in specific contexts, including how tino rangatiratanga might be facilitated.

The Treaty principles

3.70 Treaty principles have also been developed by the courts and the Tribunal that substantively reflect the rights and obligations arising from the Treaty texts. The Tribunal was established under the Treaty of Waitangi Act 1975, and its functions include inquiring

⁹⁶ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019) at 28. See also Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 21; and Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Whaia te Mana Motuhake | In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wai 2417, 2015) at 26.

⁹⁷ New Zealand Māori Council *Kaupapa: te wāhanga tuatahi* (Wellington, 1983) at 5–6; Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 41–42 and 229; and Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 36–38. See also the discussion in *He Whakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation* (January 2016) at 34.

⁹⁸ See discussion in Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Whakaputanga me te Tiriti | The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 524; and Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (Victoria University Press, Wellington, 2016) at 42.

⁹⁹ Article 3 in both the Māori and English texts conveys an undertaking of similar effect.

into and making recommendations on claims that acts or omissions of the Crown are inconsistent with “the principles of the Treaty”.¹⁰⁰ In performing this function, the Tribunal must have regard to the two texts of the Treaty and, for the purposes of the Treaty of Waitangi Act, has exclusive authority to determine the meaning and effect of the texts and issues raised by the differences between them.¹⁰¹

- 3.71 The Tribunal has explained that, although its statutory role is to inquire into the consistency of the Crown’s acts and omissions against the Treaty principles, this “does not mean that the terms [of the Treaty] can be negated or reduced”.¹⁰² Rather, the principles “enlarge the terms, enabling the Treaty to be applied in situations that were not foreseen or discussed at the time”.¹⁰³
- 3.72 The principles of the Treaty have been described by the Privy Council as follows:¹⁰⁴
- ... the “principles” are the underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole and include, but are not confined to, the express terms of the Treaty.
- 3.73 Given the Treaty’s constitutional significance, in the absence of clear words to the contrary, the courts will presume that Parliament intends to legislate in a manner that is consistent with the principles of the Treaty and will interpret legislation accordingly.¹⁰⁵
- 3.74 In several landmark cases, the courts have identified three broad Treaty principles: the principles of partnership, active protection and redress.¹⁰⁶ However, the nature of the Treaty as a living document means that Treaty principles are constantly evolving as the Treaty is applied to new issues and situations.¹⁰⁷ Neither the courts nor the Tribunal have sought to produce a definitive list of principles.¹⁰⁸ As Te Kōti Pira | The Court of Appeal has observed, “[t]he Treaty obligations are ongoing. They will evolve from generation to generation as conditions change”.¹⁰⁹ Consequently, over time, other principles and duties associated with these three broad principles have been developed by the Tribunal and the courts.
- 3.75 In our view, this review engages in particular the principles of partnership, active protection, equity and “options” (Māori having choices or options available to them).

¹⁰⁰ Treaty of Waitangi Act 1975, ss 5(1) and 6(1).

¹⁰¹ Treaty of Waitangi Act 1975, preamble and s 5(2).

¹⁰² Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 385–386.

¹⁰³ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 386.

¹⁰⁴ *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) [Broadcasting Assets] at 517 per Lord Woolf.

¹⁰⁵ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [Lands] at 655–656 per Cooke P.

¹⁰⁶ See *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [Lands]; *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) [Broadcasting Assets]; and *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA).

¹⁰⁷ Te Puni Kōkiri | Ministry of Māori Development *He Tirohanga o Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal* (2001) at 77.

¹⁰⁸ Te Puni Kōkiri | Ministry of Māori Development *He Tirohanga o Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal* (2001) at 77.

¹⁰⁹ *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA) at 656 per Cooke P.

Partnership

- 3.76 The Treaty established a relationship akin to a partnership and imposed a duty on the Crown and Māori “to act towards each other reasonably and with the utmost good faith”.¹¹⁰ This principle requires Māori participation in decision making that impacts on the lives of Māori.¹¹¹ The starting point should be shared decision making, but the form partnership takes will depend on what the rights and interests of the Treaty partners require in the circumstances.¹¹² Both partners should participate in identifying the nature and extent of the rights and interests engaged and how they may be protected through the partnership.¹¹³
- 3.77 The Crown is also required to fully inform itself of the rights and interests of Māori to make informed decisions on matters that affect Māori.¹¹⁴ The requirement for the Crown to partner with Māori is heightened where disparities in outcomes exist.¹¹⁵

Active protection

- 3.78 The principle of active protection emerges from the relationship between kāwanatanga and tino rangatiratanga in articles 1 and 2 of te Tiriti.¹¹⁶ It encompasses an obligation to exercise responsible kāwanatanga while actively protecting and facilitating tino rangatiratanga, including the exercise by Māori of their authority in accordance with tikanga.¹¹⁷ Part of active protection is ensuring that health services are culturally

¹¹⁰ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [Lands] at 667 per Cooke P.

¹¹¹ This is also required by the principle of equity, discussed below and derives from the guarantees contained in article 2 of the Māori text and article 3 of the Māori and English texts. See Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Te Whanau o Waipareira Report* (Wai 414, 1998) at 231–232; and Mānuka Henare and Edward Douglas “Support for Māori Social Organisations especially Whanaunga, Hapū, Iwi” in *Report of the Royal Commission on Social Policy | Te Kōmihana A Te Karauna Mō Ngā Āhuatanga-Ā-Iwi: The April Report – Future Directions* (Associated Papers, Volume III, Part One, April 1988) 172 at 173.

¹¹² See Te Aka Matua o te Ture | Law Commission *The Treaty of Waitangi and Maori Fisheries | Mataitai: Nga Tikanga Maori me te Tiriti o Waitangi* (NZLC PP9, 1989) at [2.12], [3.9]–[3.11] and [14.12]; and Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 80.

¹¹³ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity – Te Taumata Tuarua* (Wai 262, 2011) at 341. See also *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [Lands] at 667 per Cooke P; and Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Report on the Crown’s Review of the Plant Variety Rights Regime: Stage 2 of the Trans-Pacific Partnership Agreement Claims* (Wai 2522, 2020) at 12.

¹¹⁴ This duty is also engaged by the principle of active protection, discussed below. See Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Whakatōhea Mandate Inquiry Report* (Wai 2662, 2018) at 21–22.

¹¹⁵ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 62–63.

¹¹⁶ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Report on the Crown’s Review of the Plant Variety Rights Regime: Stage 2 of the Trans-Pacific Partnership Agreement Claims* (Wai 2522, 2020) at 13; and Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Aha i Pērā Ai? The Māori Prisoners’ Voting Report* (Wai 2870, 2020) at 12.

¹¹⁷ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Aha i Pērā Ai? The Māori Prisoners’ Voting Report* (Wai 2870, 2020) at 13; Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Report on the Crown’s Review of the Plant Variety Rights Regime: Stage 2 of the Trans-Pacific Partnership Agreement Claims* (Wai 2522, 2020) at 13; and Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Ngāpuhi Mandate Inquiry Report* (Wai 2490, 2015) at 30–31.

appropriate.¹¹⁸ The Crown is also required to act, to the fullest extent practicable, to achieve equitable outcomes for Māori.¹¹⁹

Equity

- 3.79 The principle of equity arises from article 3 of the Māori and English texts of the Treaty and imposes an obligation on the Crown to act fairly between Māori and non-Māori.¹²⁰ This principle, in conjunction with the principle of active protection, imposes a duty on the Crown to commit to achieving equitable outcomes for Māori.¹²¹

Options

- 3.80 Under the principle of options, Māori have “the right to choose their social and cultural path”.¹²² The Tribunal has described the choice as one to:¹²³

... develop along customary lines and from a traditional base, or to assimilate into a new way. Inferentially it offered a third alternative, to walk in two worlds.

- 3.81 This right derives from the Treaty’s guarantee to Māori of tino rangatiratanga under article 2 of te Tiriti and the rights and privileges of British citizenship arising under article 3 of the Māori and English texts.¹²⁴ It follows that the Crown must adequately protect the availability and viability of kaupapa Māori solutions in a way that Māori are not disadvantaged by their choices.¹²⁵

Applying Principle 6 in this review

- 3.82 In the next chapter, we focus on Māori and surrogacy. We explore aspects of te ao Māori that may be relevant in the surrogacy context and consider Māori perspectives on surrogacy. We then identify potential matters of particular concern to Māori in surrogacy practice, law and regulation as well as options for reform which are intended to enable Māori to act in accordance with tikanga and promote responsible kāwanatanga that facilitates tino rangatiratanga under the Treaty. Where appropriate, we also indicate where options may ensure the Crown is complying with its obligations under the Treaty.
- 3.83 The matters addressed in Chapter 4 and the feedback we receive during consultation will be reflected throughout our report and will influence our recommendations.

¹¹⁸ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019) at 31.

¹¹⁹ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019) at 163.

¹²⁰ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 27.

¹²¹ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019) at 163.

¹²² Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Napier Hospital and Health Services Report* (Wai, 692, 2001) at 64.

¹²³ Te Rōpū Whakamana o Te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Fishing Report* (Wai 22, 1988) at 195.

¹²⁴ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019) at 35.

¹²⁵ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Matua Rautia: The Report on the Kōhanga Reo Claim* (Wai 2336, 2013) at 68.

QUESTION**Q1**

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

CHAPTER 4

Māori and surrogacy

IN THIS CHAPTER, WE CONSIDER:

- aspects of te ao Māori that may be relevant in the surrogacy context;
- Māori perspectives on surrogacy; and
- matters that may be of particular concern to Māori in surrogacy practice, law and regulation.

INTRODUCTION

- 4.1 This chapter considers matters relevant to enabling Māori to act in accordance with tikanga Māori (customary practices) and promoting responsible kāwanatanga (the right of the Crown to govern) that facilitates tino rangatiratanga (the right of Māori to exercise authority according to tikanga) under te Tiriti o Waitangi | the Treaty of Waitangi (the Treaty), consistent with our guiding principles for surrogacy law reform.
- 4.2 We have included basic explanations of lesser-known Māori terms to assist readers with understanding their meaning in the specific context in which they are used. We note that these explanations are not intended to be prescriptive or reductive and do not necessarily reflect the depth and breadth of meaning of these words in te reo Māori.

TE AO MĀORI | A MĀORI WORLD VIEW

- 4.3 In this section, we consider aspects of te ao Māori that may be relevant in the surrogacy context.

The significance of women and their ability to give birth

Māori cosmology and ngā kōrero tuku iho

- 4.4 Women and their ability to give birth have special significance in te ao Māori. Maternal figures are prominent in Māori cosmology and ngā kōrero tuku iho (narratives passed

down by Māori through oral tradition),¹ which form the basis of many tikanga pertaining to Māori women and their birthing abilities.²

4.5 According to Ani Mikaere:³

A discussion of the roles of women ... must begin with our creation stories. Māori cosmogony not only provides the key to an understanding of how our tūpuna viewed the world and their place within it; it also informs our present conceptions of ourselves and therefore continues to shape our practices and beliefs.

4.6 While there are variations in versions and interpretations of Māori cosmology, the version most widely understood and accepted places whakapapa (genealogy) at the core of cosmic creation.⁴ Whakapapa originates from the three phases of the creation of the world, from Te Kore (energy, potential, the void, nothingness) to Te Pō (form, the dark, the night) to Te Ao Mārama (emergence, light and reality, dwelling place of humans).⁵

4.7 According to some accounts, Papatūānuku (the earth mother) and Ranginui (the sky father) came into existence in Te Pō.⁶ They maintained a tight embrace until their children separated them, thus creating and enabling themselves to emerge into Te Ao Mārama.⁷

¹ Jane McRae *Māori Oral Tradition: He Kōrero nō te Ao Tawhito* (Auckland University Press, Auckland, 2017) at 1.

² See Kirsten Aroha Linda Gabel "Poipoia te tamaiti ki te ūkaipō" (PhD thesis, Te Whare Wānanga o Waikato | The University of Waikato, 2013) at 57; Wikitoria Theresa August "The Māori Female – Her Body, Spirituality, Sacredness and Mana. A Space within Spaces" (Master of Social Sciences thesis, Te Whare Wānanga o Waikato | The University of Waikato, 2004) at 62.

³ Ani Mikaere *The Balance Destroyed: the consequences for Māori women of the colonisation of Tikanga Māori* (International Research Institute for Māori and Indigenous Education, Auckland, 2003) at 13 as cited in Kirsten Aroha Linda Gabel "Poipoia te tamaiti ki te ūkaipō" (PhD thesis, Te Whare Wānanga o Waikato | The University of Waikato, 2013) at 54, n 8.

⁴ Kuni Jenkins and Helen Mountain Harte *Traditional Māori parenting: A Historical Review of Literature of Traditional Māori Child Rearing Practices in Pre-European Times* (Te Kahui Mana Ririkiki, Auckland, 2011) at 2. See also Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 12. The importance of this work lies in the significant expertise of the contributors to it, who include John Clarke (Director, Māori – Tāhū o te Ture | Ministry of Justice); Roka Paora, Te Ru Wharehoka and Te Ariki Morehu (Ngā Kaumātua Āwhina); Te Wharehuia Milroy and Wiremu Kaa (Māori Experts); Wilson Isaac, James Johnston, John MacDonald, Ani Mikaere, Moria Rolleston, Henare Tate, Merepeka Raukawa Tait, Iritana Tawhiwhirangi and Betty Wark (Māori Focus Group); Ramari Paul, Hui Kahu, Jason Ataera and Chappie Te Kani (Tangata Whenua Student Work Programme).

⁵ Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World – Māori Perspectives on Justice* (March 2001) at 12. See also Naomi Beth Simmonds "Tū te turuturu nō Hine-te-iwaiwa: Mana wahine geographies of birth in Aotearoa New Zealand" (PhD thesis, Te Whare Wānanga o Waikato | The University of Waikato, 2014) at 140–141.

⁶ Kirsten Aroha Linda Gabel "Poipoia te tamaiti ki te ūkaipō" (PhD thesis, Te Whare Wānanga o Waikato | The University of Waikato, 2013) at 58.

⁷ See Aroha Yates-Smith *Hine! E Hine! Rediscovering the feminine in Maori spirituality* (PhD thesis, Te Whare Wānanga o Waikato | The University of Waikato, 1998); and Ani Mikaere *The Balance Destroyed: the consequences for Māori women of the colonisation of Tikanga Māori* (International Research Institute for Māori and Indigenous Education, Auckland, 2003) at 14 as cited in Kirsten Aroha Linda Gabel "Poipoia te tamaiti ki te ūkaipō" (PhD thesis, Te Whare Wānanga o Waikato | The University of Waikato, 2013) at 58, n 16.

- 4.8 The three phases of creation have been likened to the birth process.⁸ According to Mikaere:⁹

The progression from Te Kore, through Te Pō and on to Te Ao Mārama is an ongoing cycle of conception, development within the womb, and birth ... The female presence at the beginning of the world is all encompassing. The female reproductive organs provide the framework within which the world comes into being.

- 4.9 The prevalence of women in te ao Māori as maternal figures continues in the whakapapa of humanity, which takes place after the children of Papatūānuku and Ranginui emerge into Te Ao Mārama. It is widely accepted that the first human, a woman named Hinetītama, was created by Papatūānuku and Ranginui's children with the assistance of Papatūānuku, who provided the uha (female element).¹⁰ Hinetītama and her daughter Hinerauwharangi "are remembered and respected as a mother and daughter model".¹¹
- 4.10 Other atua wāhine (Māori female deities) are also influential in Māori conceptions of women and their ability to give birth. For instance, Hine-te-iwaiwa (also referred to as Hina, Hinauri and other names)¹² provides the "ultimate archetype" for women.¹³ She is the "patron of new life and she presides over the whole process of conception, formation of the foetus and the ultimate birth of the infant".¹⁴
- 4.11 Further evidence of females as significant figures in te ao Māori are apparent in the quests of Māui, which Naomi Simmonds has described as being "rich in maternal metaphors".¹⁵ Māui's mother Taranga, upon giving birth to Māui prematurely and believing him still-born, cut off her hair, wrapped him in it and gifted him to the sea. Māui's kuia (grandmother) Muriranga-whenua gifted him her jawbone, which he used to fish up Te Ika a Māui (the North Island) and subdue Tamanuiterā (the sun). Mahuika, an atua wāhine, also assisted when Māui sought to control fire. Finally, in his pursuit of immortality, Māui was crushed

⁸ Ani Mikaere *Colonising Myths: Māori Realities – He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011) at 209; and Naomi Beth Simmonds "Tū te turuturu nō Hine-te-iwaiwa: Mana wahine geographies of birth in Aotearoa New Zealand" (PhD thesis, Te Whare Wānanga o Waikato | The University of Waikato, 2014) at 140–141.

⁹ Ani Mikaere *The Balance Destroyed: the consequences for Māori women of the colonisation of Tikanga Māori* (International Research Institute for Māori and Indigenous Education, Auckland, 2003) at 16–17 as cited in Kirsten Aroha Linda Gabel "Poipoia te tamaiti ki te ūkaipō" (PhD thesis, Te Whare Wānanga o Waikato | The University of Waikato, 2013) at 59, n 19.

¹⁰ See Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A Glimpse into the Māori World Māori – Perspectives on Justice* (March 2001) at 13–14; Naomi Beth Simmonds "Tū te turuturu nō Hine-te-iwaiwa: Mana wahine geographies of birth in Aotearoa New Zealand" (PhD thesis, Te Whare Wānanga o Waikato | The University of Waikato, 2014) at 157; and Kirsten Aroha Linda Gabel "Poipoia te tamaiti ki te ūkaipō" (PhD thesis, Te Whare Wānanga o Waikato | The University of Waikato, 2013) at 60–61.

¹¹ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 322.

¹² Naomi Beth Simmonds "Tū te turuturu nō Hine-te-iwaiwa: Mana wahine geographies of birth in Aotearoa New Zealand" (PhD thesis, Te Whare Wānanga o Waikato | The University of Waikato, 2014) at 157; Kirsten Aroha Linda Gabel "Poipoia te tamaiti ki te ūkaipō" (PhD thesis, Te Whare Wānanga o Waikato | The University of Waikato, 2013) at 62.

¹³ Kirsten Aroha Linda Gabel "Poipoia te tamaiti ki te ūkaipō" (PhD thesis, Te Whare Wānanga o Waikato | The University of Waikato, 2013) at 62.

¹⁴ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 323. Hinekotea, Hinekorito, Hinemakehu and Hinekorako are other atua wāhine associated with childbirth.

¹⁵ Naomi Beth Simmonds "Tū te turuturu nō Hine-te-iwaiwa: Mana wahine geographies of birth in Aotearoa New Zealand" (PhD thesis, Te Whare Wānanga o Waikato | The University of Waikato, 2014) at 157; and Kirsten Aroha Linda Gabel "Poipoia te tamaiti ki te ūkaipō" (PhD thesis, Te Whare Wānanga o Waikato | The University of Waikato, 2013) at 63.

between the thighs of Hinenuitepō as he attempted to reverse the birth process, rendering humanity mortal for all eternity.¹⁶

Continuing whakapapa

- 4.12 Māori women are seen as ngā whare tāngata (the houses of humanity)¹⁷ in te ao Māori due to their ability to give birth. A significant level of mana (authority) and tapu (sacredness) is accorded to this ability, not only because it originates from cosmic creation but because it ensures the continuation of whakapapa.¹⁸
- 4.13 An example of where a woman's ability to give birth overrode competing tensions between iwi (tribes) is when an arranged marriage was entered into by Meri Ngaroto of Te Aupōuri to Pūhipi Te Ripi of Te Rarawa in order to settle peace in the 1830s.¹⁹ Ngaroto's people wanted to perform karakia (incantations) prior to the marriage to make her infertile. However, she reminded them of the importance of her ability to give birth to continue whakapapa. She likened whānau to the harakeke (flax bush) in a whakatauākī (a proverb that can be traced to its original source). Parts of this whakatauākī are well known, though we consider its intended meaning can only be fully understood if recited in full and the context in which it was said is explained:²⁰

Hūtia te rito o te harakeke	If you pull out the shoot of the flax bush
Kei hea te kōmako e kō?	Where will the bellbird sing?
Whakataerangitia	It will mill around
Rere ki uta	It will fly inland
Rere ki tai	It will fly seawards
Māu e ui mai	Then you will ask me
He aha te mea nui o te ao?	What is the most important thing in the world?
Māku e kī atu	And I will say
He tangata, he tangata, he tangata!	The people, the people, the people!

¹⁶ Kirsten Aroha Linda Gabel "Poipoia te tamaiti ki te ūkaipō" (PhD thesis, Te Whare Wānanga o Waikato | The University of Waikato, 2013) at 63–65.

¹⁷ Rangimarie Mihomiho Rose Pere "To Us the Dreamers are Important" in Leonie Pihama and others (eds) *Mana Wahine Reader: A Collection of Writings 1987-1998 – Volume 1* (Te Kotahi Research Institute, Hamilton, 2019) 4 at 11; Naomi Beth Simmonds "Tū te turuturu nō Hine-te-iwaiwa: Mana wahine geographies of birth in Aotearoa New Zealand" (PhD thesis, Te Whare Wānanga o Waikato | The University of Waikato, 2014) at 157; and Kirsten Aroha Linda Gabel "Poipoia te tamaiti ki te ūkaipō" (PhD thesis, Te Whare Wānanga o Waikato | The University of Waikato, 2013) at 136. Whare tangata is also the word used for womb: see Tāhū o te Ture | Ministry of Justice *He Hīnātore ki te Ao Māori: A Glimpse into the Māori World Māori – Perspectives on Justice* (March 2001) at 221.

¹⁸ Kirsten Aroha Linda Gabel "Poipoia te tamaiti ki te ūkaipō" (PhD thesis, Te Whare Wānanga o Waikato | The University of Waikato, 2013) at 67.

¹⁹ See "Brief of evidence of Tania Rose Williams Blyth" (Wai 2915, A046, 21 July 2020), which is referred to in Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Pāharakeke, he Rito Whakakīkinga Whāruarua: Oranga Tamariki Urgent Inquiry* (Wai 2915, 2020) at 3.

²⁰ There are many versions of this whakatauākī. We have used the wording from the Deed of Settlement of Historical Claims between Te Aupōuri and The Crown dated 28 January 2012 on the basis that the Deed has been ratified by the people of Te Aupōuri.

- 4.14 It naturally follows that children are considered taonga (highly prized) in te ao Māori and are regarded as the responsibility of their entire iwi, hapū (sub-tribe) and whānau.²¹ Children literally embody the continuation of whakapapa, which in turn signals the iwi, hapū and whānau's well-being.

Te reo Māori | The Māori language

- 4.15 Te reo Māori indicates the significance of women and their ability to give birth. There are numerous examples in whakataukī (proverbs that, unlike whakatauākī, cannot be traced to their original source). “He wahine, he whenua, e ngaro ai te tangata”, for instance, can be translated to mean that, without women to guarantee progeny and land, the people will perish.²² “Mate i te tamaiti he aurukōwhao; mate i te wahine he takerehāia” also indicates the significance of a woman's ability to create future generations. It has been translated to “the death of a child is a small matter, but the death of a woman is a calamity”.²³
- 4.16 Certain words associated with pregnancy and childbirth also have dual meanings, which illustrate connections between pregnancy and childbirth and other matters of significance in te ao Māori. Rose Pere pointed to the use of the word whenua as meaning both land and placenta and hapū as meaning both pregnant and large kinship group.²⁴ More recent scholarship also focuses on the word ūkaipō, which can be translated to mean night feeding breast or mother.²⁵ The meaning of the word ūkaipō resonates with the significance of a woman's traditional role in te ao Māori as the source of life.

Tikanga around conception, pregnancy and childbirth

- 4.17 There are many tikanga around conception, pregnancy and childbirth in te ao Māori. Tā Hirini Mead describes the traditional example of a tohunga (sage) being enlisted to perform the whakatō tamariki (planting the seed of a child) where couples were having difficulty conceiving.²⁶ The ceremony involved karakia associated with Hine-te-iwaiwa and Tiki (another atua Māori (Māori deity) associated with fertility), and at times, elements of nature were used to awaken the power to conceive.²⁷
- 4.18 Another way of awakening the power to conceive was for a couple to enter a whāngai arrangement, where they would take care of another child to bring about conception. If

²¹ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Pāharakeke, he Rito Whakakīkinga Whāruarua: Oranga Tamariki Urgent Inquiry* (Wai 2915, 2021) at 6.

²² Rangimarie Rose Pere *Ako: Concepts and Learning in the Māori Tradition* (Te Kohanga Reo National Trust Board, Wellington, 1994) at 20.

²³ Hirini Moko Mead and Neil Grove *Ngā Pēpeha a Ngā Tipuna* (Victoria University Press, Wellington, 2001) at 286.

²⁴ Rangimarie Rose Pere *Ako: Concepts and Learning in the Māori Tradition* (Te Kohanga Reo National Trust Board, Wellington, 1994) at 13 and 19.

²⁵ See Kirsten Aroha Linda Gabel “Poipoia te tamaiti ki te ūkaipō” (PhD thesis, Te Whare Wānanga o Waikato | The University of Waikato, 2013); and Naomi Beth Simmonds “Tū te turuturu nō Hine-te-iwaiwa: Mana wahine geographies of birth in Aotearoa New Zealand” (PhD thesis, Te Whare Wānanga o Waikato | The University of Waikato, 2014). See also HW Williams *Dictionary of the Maori Language* (7th ed, Printlink, Wellington, 2016).

²⁶ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 323.

²⁷ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 323.

conception still did not occur, the couple who were not able to conceive became whare ngaro (lost houses).²⁸ The term alludes to the loss of whakapapa resulting from infertility.

- 4.19 Oriori (lullabies, though they do not resemble the lullaby of Western culture)²⁹ provide accounts of tribal history and whakapapa. Traditionally, they have been composed and sung from conception or to children from a very young age. According to Pere:³⁰

Many of the chants and songs that lulled babies and children off to sleep gave detailed accounts of their tipuna. These oriori (lullabies) revealed both the strengths and weaknesses, both the successes and failures of their tipuna. Children could identify very closely with these forebears as being “down to earth”, very ordinary beings, capable of both error and achievement. Mythological figures and supernatural influences had very human characteristics and qualities about them also, so that they become part of one’s whakapapa.

- 4.20 While tikanga around childbirth can vary across iwi, hapū and whānau, some aspects are more common. For instance, the whenua and pito (umbilical cord) of Māori children are often returned to the land to which they are connected by whakapapa.³¹ This is done predominantly to preserve the child’s mana and mauri (life principle) and also to reinforce the whakapapa connection between the child and Papatūānuku.³² According to Mead, the tikanga of the whenua and the pito is “being revived and adapted to modern conditions and circumstances”.³³

Whāngai arrangements

- 4.21 Māori have traditionally entered whāngai arrangements (also known as atawhai), where a child is given to others to raise.³⁴ The principles that underpin whāngai have been described as openness, caring for the child within the family, whakapapa and whanaungatanga (kinship).³⁵ It has also been suggested that, as whāngai arrangements are premised on kinship, they rarely stray beyond the whānau or hapū to ensure a whakapapa connection between the child and the birth parents is maintained.³⁶

²⁸ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 323.

²⁹ Kirsten Aroha Linda Gabel “Poipoia te tamaiti ki te ūkaipō” (PhD thesis, Te Whare Wānanga o Waikato | The University of Waikato, 2013) at 86–87.

³⁰ Rangimarie Rose Pere *Ako: Concepts and Learning in the Māori Tradition* (Te Kōhanga Reo National Trust Board, Wellington, 1994) at 59.

³¹ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 320–321.

³² Tāhū o te Ture | Ministry of Justice *He Hīnātore ki te Ao Māori: A Glimpse into the Māori World Māori – Perspectives on Justice* (March 2001) at 45. See also Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 320–321.

³³ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 321.

³⁴ Hirini Moko Mead *Tamaiti Whāngai: The Adopted Child: Māori Customary Practices* (paper delivered at the Adoption Conference, Te Herenga Waka | Victoria University of Wellington, 1990) as cited in Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [234], n 311.

³⁵ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [234]. See also Joseph Williams “He Aha Te Tikanga Maori” (paper prepared for Te Aka Matua o te Ture | Law Commission (draft), 1998) at 9.

³⁶ See the report of Te Wharehuia Milroy which forms part of the Court record referred to in the Māori Appellate Court decision *Hohua – Estate of Tangi Biddle or Hohua* (2001) 10 Rotorua Appellate MB 43 (10 APRO 43).

- 4.22 Whāngai arrangements are used for a variety of reasons, and tikanga relating to whāngai varies among iwi.³⁷ For instance, a whāngai arrangement could be entered into due to infertility, as mentioned above, as a means of strengthening relations within hapū or iwi³⁸ or to instil cultural knowledge in a child.³⁹

Whanaungatanga

- 4.23 Whanaungatanga is a fundamental value that informs tikanga Māori. According to Pere:⁴⁰
- Whanaungatanga is based on the principle of both sexes and all generations supporting and working alongside each other. Families are expected to interact on a positive basis with other families in the community to help strengthen the whole. Families receive sustenance ... when they feel they have an important contribution to make to the community they live in.
- 4.24 Tā Joseph Williams has also written that:⁴¹
- At iwi, hapū and whanau level, whanaungatanga operates like a magnet, emphasising commonality of whakapapa and interconnectedness while down playing the separation between groups. It is accordingly extremely difficult to exclude individuals from collective membership because of the pervasiveness of the whanaungatanga ethic.
- 4.25 It follows that the collective is naturally considered significant in te ao Māori, and many Māori consider that consultation with hapū and whānau is required in decision making, particularly on matters of significance.

MĀORI PERSPECTIVES ON SURROGACY

- 4.26 In this section, we consider what may influence Māori perspectives on surrogacy, drawing on our research and engagement with individuals who have shared an ao Māori perspective on surrogacy.
- 4.27 While Māori perspectives on surrogacy may vary, our initial research and engagement suggests that Māori are generally positive about the practice, particularly as a means of continuing whakapapa in response to infertility (whether physical or social). One kuia we spoke with said “the main thing is the tamariki ... it does not matter how they get here”.
- 4.28 However, we note that there are few studies that explore Māori perspectives on surrogacy and other forms of assisted reproductive technology. The Ethics Committee on Assisted Reproductive Technology (ECART) has noted this issue and suggested that

³⁷ Father Henare Tate provided this advice at a meeting with Tāhū o te Ture | Ministry of Justice Māori Focus Group as part of Te Aka Matua o te Ture | Law Commission’s consultation during its review of adoption laws in 1999–2000.

³⁸ See Te Aka Matua o te Ture | Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework* (NZLC R65, 2000) at [181]. See also the affidavit of Ngapare Hopa, which forms part of the Court record referred to in the Māori Land Court decision *Karauti – Succession to George or Hori Kiwa Tukua* (2000) 116 Otorohanga MB 81 (116 OT 81).

³⁹ See Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood: A discussion paper* (NZLC PP54, 2004) at [2.24].

⁴⁰ Rangimarie Mihomiho Rose Pere “To Us the Dreamers are Important” in Leonie Pihama and others (eds) *Mana Wahine Reader: A Collection of Writings 1987-1998 – Volume 1* (Te Kotahi Research Institute, Hamilton, 2019) 4 at 11.

⁴¹ Joseph Williams “He Aha Te Tikanga Maori” (paper prepared for Te Aka Matua o te Ture | Law Commission (draft), 1998) at 11.

consideration be given to funding publicly available research with a view to better understand ao Māori perspectives on surrogacy.⁴²

Precedents for surrogacy in te ao Māori

- 4.29 According to Mead, events in Māori tradition can help frame a Māori response to a new matter,⁴³ and there appears to be some precedent for surrogacy in te ao Māori.
- 4.30 One Māori academic who shared an ao Māori perspective on surrogacy described to us an ancient form of surrogacy used in pre-colonial times called whakawhiti kaimoana (the propagation of seafood). This practice involved using pōhā (*Macrocystis pyrifera* or giant kelp) to transport and propagate live seafood such as shellfish, starfish and pāua to neighbouring cockle beds that were struggling with growth and reproduction.⁴⁴
- 4.31 We were also told about an instance of traditional surrogacy involving a woman of significant mana from Ngāti Kahungunu, Niniwa-i-te-rangi (sometimes known as Niniwa Heremaia). Niniwa was unable to bear children of her own, so her husband had natural intercourse with other women, and Niniwa raised the children. We were told by other Māori academics that this type of arrangement was not unique, and a similar approach was taken at various marae around Aotearoa New Zealand.
- 4.32 Our preliminary research and engagement also tended to support the view that surrogacy is considered by some Māori to be very similar to a whāngai arrangement. One Māori academic said “surrogacy arrangements could be considered as another form of whāngai, as the principles are the same”. A respondent to a questionnaire on Māori attitudes to assisted human reproduction in 2008 also said:⁴⁵

“Why should it be any different from whāngai?” And since whāngai is acceptable, “why shouldn’t surrogacy be acceptable?”

Māori openness to and acceptance of takatāpui

- 4.33 Māori have long been open about and accepting of gender and sexual diversity. This is evident in te reo Māori, particularly in the word takatāpui, which pre-dates the arrival of Europeans in Aotearoa New Zealand and was translated in 1871 to mean “intimate companion of the same sex”.⁴⁶
- 4.34 Ngā kōrero tuku iho also detail the relationships of Māori ancestors in same-sex relationships. For instance, Tūtānekai had a close male companion, Tiki, who he openly

⁴² Letter from Ethics Committee on Assisted Reproductive Technology to Te Aka Matua o te Ture | Law Commission regarding initial views on surrogacy review (7 July 2021).

⁴³ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 375.

⁴⁴ See Karaitiana Taiuru “Te Rūnaka o Koukourarata: Genetics/DNA Position/Discussion Paper” (paper presented to SING 2021 ki Ōtautahi ki Rehua Marae).

⁴⁵ Marewa Glover *Māori Attitudes to Assisted Human Reproduction: An Exploratory Study* (School of Population Health, Te Whare Wānanga o Tāmāti Makaurau | University of Auckland, 2008) at [3.7.15].

⁴⁶ HW Williams *Dictionary of the Maori Language* (3rd ed, Government Print, Wellington, 1871) at 147 as cited in Elizabeth Kerekere “Part of the Whānau: The Emergence of Takatāpui Identity – He Whāriki Takatāpui” (PhD Dissertation, Te Herenga Waka | Victoria University of Wellington, 2017) at 17, n 2.

saw as his takatāpui.⁴⁷ Further evidence of celebration and acceptance of takatāpui can also be found in traditional whakairo (carvings), waiata (song) and karakia.

- 4.35 A recent example suggests Māori continue to be supportive of sexual diversity, including in the context of takatāpui having children by surrogacy. In June 2017, a male couple (one Australian and one Māori New Zealander) living in Australia advertised for a Māori ovum donor so that the couple could father multiple children with the same Māori genetics.⁴⁸ In response to that advertisement, 60 Māori women reportedly offered to donate their ova, and a surrogate gave birth to the couple's first child in June last year.⁴⁹

Māori engagement with te ao Māori

- 4.36 Perspectives on surrogacy may be influenced by the extent to which Māori engage with te ao Māori. As one Māori academic explained to us:

Māori are diverse. A person with whakapapa may have no access to the idealistic te ao Māori ... They are no less Māori, and their whakapapa is no less tapu than any other Māori.

Interpretation of tikanga principles engaged in surrogacy will vary, and perspectives will shift over time

- 4.37 We have not attempted to assess what and how specific tikanga principles such as tapu (sacredness), noa (freedom from restrictions) and mauri (life principle) might be engaged or interpreted in surrogacy, as perspectives are likely to vary between iwi, hapū and whānau and among Māori as individuals. Pere also observed that:⁵⁰

An over-simplification of the diversity of Maori institutions not only produces the errors inherent in averages but disregards the vivacity of the Maori people themselves. Their lives and institutions were far from static and consistent before the arrival of the Pakeha, and have certainly not been so since.

- 4.38 Consistent with Pere's view, the Commission has emphasised that tikanga is dynamic and has evolved over time to adapt to and accommodate developments in society and technology.⁵¹ Accordingly, while some Māori may consider surrogacy to be inconsistent with certain tikanga principles, other Māori may just as readily support the practice and establish ways to utilise it in accordance with their own tikanga. Tikanga around conception, pregnancy and childbirth may also be adapted for the surrogacy context, including to take into account the unique role of a surrogate.

- 4.39 We are also conscious that Māori perspectives can shift over time. We heard from Professor Marewa Glover, a Māori academic who conducted the study in 2008 on Māori attitudes to assisted human reproduction, who told us:

⁴⁷ Ngahuia Te Awekotuku "He Reka Anō: Same sex lust and loving in the ancient Māori world" in Alison J Laurie and Linda Evans (eds) *Outlines: Lesbian and gay histories of Aotearoa* (Lesbian & Gay Archives of New Zealand, Wellington, 2005) 6 at 8.

⁴⁸ Katarina Williams "Gay couple in Australia seeking Māori woman's donor eggs" *Stuff* (online ed, New Zealand, 4 July 2017).

⁴⁹ Katarina Williams "Same sex couple's baby joy following Māori egg donor classified ad" *Stuff* (online ed, New Zealand, 3 June 2020).

⁵⁰ Rangimarie Mihomiho Rose Pere "To Us the Dreamers are Important" in Leonie Pihama and others (eds) *Mana Wahine Reader: A Collection of Writings 1987-1998 – Volume 1* (Te Kotahi Research Institute, Hamilton, 2019) 4 at 7.

⁵¹ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 2–6.

I recall one kaumātua who I interviewed [in 2008] said that attitudes would change with time. The more Māori who utilised assisted human reproduction, the more general knowledge and acceptance of the technology there would be within the Māori community.

Summary of our approach

- 4.40 It is not appropriate for us to make recommendations for reform that attempt to direct the behaviour of Māori or influence tikanga Māori in the surrogacy context, particularly given the variation in the extent to which Māori engage with te ao Māori and the potential for different interpretations of tikanga and shifting perspectives. Rather, we consider that our recommendations should enable Māori to act in accordance with tikanga in a surrogacy arrangement should they wish to do so and promote responsible kāwanatanga that facilitates tino rangatiratanga under the Treaty.

MATTERS THAT MAY BE OF PARTICULAR CONCERN TO MĀORI IN SURROGACY PRACTICE, LAW AND REGULATION

- 4.41 In this section, we consider matters that may be of particular concern to Māori in surrogacy practice, law and regulation, drawing on our research and engagement with individuals who shared an ao Māori perspective on surrogacy.

Access to surrogacy

- 4.42 While Māori may be generally positive about surrogacy, the most recent available data suggests Māori participation in surrogacy arrangements is low, and Māori women are more likely to act as surrogates than as intended parents. A study of 104 applications reviewed by ECART from September 2005 up until the end of 2010 found that only nine per cent of applications involved a Māori surrogate, and only two per cent of applications involved a Māori intended mother. Of all 104 women willing to be surrogates, seven per cent had partners who were Māori. Of all intended mothers, two per cent had partners who were Māori.⁵²
- 4.43 Annabel Ahuriri-Driscoll has observed that, while the exact reasons for low participation of Māori in surrogacy arrangements are unknown, causes may include:⁵³
- (a) the high fertility rates of Māori (historically) reducing the need for surrogacy;
 - (b) the customary practice of whāngai being the preferred option;
 - (c) the difficulty involved with finding a surrogate; and
 - (d) the cost of in vitro fertilisation required for gestational surrogacy arrangements inhibiting Māori from participating as intended parents.
- 4.44 Concerns regarding equity of access and cost were also raised with us during initial consultation by ECART and by one fertility clinic, which considered the cost of in vitro

⁵² Lynley Anderson, Jeanne Snelling and Huia Tomlins-Jahnke “The practice of surrogacy in New Zealand” (2012) 52 Australian and New Zealand Journal of Obstetrics and Gynaecology 253 at 256. In the 2006 Census, Māori made up approximately 14.6 per cent of the population of Aotearoa New Zealand.

⁵³ Annabel Ahuriri-Driscoll “Adoption and surrogacy – Māori perspectives” (seminar presented to Redefining Family Conference – Growing families through adoption, donor-conception and surrogacy, Te Wānanga Aronui o Tāmaki Makau Rau | Auckland University of Technology, 13–14 January 2016) (unpublished informal notes to accompany presentation).

fertilisation limited Māori and Pacific peoples' access to surrogacy. A Māori academic also suggested to us that the body mass index requirements for public funding for surrogacy discriminated against Māori and Pacific peoples.

- 4.45 We are interested in your views on whether the difficulty involved with finding a surrogate and the cost of gestational surrogacy arrangements are reasons for limited uptake of surrogacy by Māori and whether there are any other matters limiting access that could be addressed through law reform.
- 4.46 We are also interested in whether the proposals we have suggested throughout this Issues Paper to both reduce barriers for women considering becoming surrogates and the cost of surrogacy in Aotearoa New Zealand are sufficient to address uptake of surrogacy by Māori. These proposals include options to:
- (a) reduce barriers for women considering becoming surrogates by:
 - (i) allowing surrogates to be reimbursed for reasonable expenses they incur in relation to a surrogacy arrangement and ensuring they are entitled to a period of paid employment leave on the same basis as paid parental leave (Chapter 6);
 - (ii) providing greater clarity and certainty about the parental rights and responsibilities of surrogates and intended parents (Chapter 7);
 - (iii) raising public awareness of surrogacy and allowing intended parents to advertise for lawful surrogacy arrangements (Chapter 10) – we also consider whether establishing a surrogacy register to facilitate surrogacy arrangements or permitting private intermediaries to operate in Aotearoa New Zealand would be appropriate; and
 - (b) reduce the cost of surrogacy by:
 - (i) eliminating the need for a post-birth court process to establish legal parenthood if certain conditions are met (Chapter 7);
 - (ii) recommending the Government review how it funds surrogacy, including surrogacy-related fertility treatment as well as the costs associated with the ECART process (Chapter 10).
- 4.47 Under the Treaty and the principles of partnership, active protection and equity, the Crown has an obligation to ensure equitable outcomes for Māori, particularly where disparities in outcomes exist. We are interested in your views so our recommendations can address these obligations.

Acting in accordance with tikanga

- 4.48 Our initial research and engagement has raised a question about whether Māori are enabled by surrogacy law and regulation to act in accordance with tikanga. While we acknowledge many Māori may be able to act in accordance with their own tikanga independently, we want to ensure Māori are also facilitated to do so by surrogacy law and regulation, if required.

- 4.49 A principle of the Human Assisted Reproductive Technology Act 2004 (HART Act) is that “the needs, values, and beliefs of Māori should be considered and treated with respect” by all people exercising powers or functions under the legislation.⁵⁴
- 4.50 Under guidelines issued by the Advisory Committee on Assisted Reproductive Technology (ACART), people involved in surrogacy arrangements with the assistance of a fertility clinic must attend counselling that is “culturally appropriate”.⁵⁵ ECART (which considers applications for approvals for the performance of assisted reproductive procedures) must also be satisfied that counselling “has provided for whānau and extended family involvement.”⁵⁶
- 4.51 As we outlined at the start of this chapter, surrogacy engages many aspects of te ao Māori, particularly around the significance of women and their ability to give birth. The tikanga value of whanaungatanga also means whānau and extended family (including hapū) may need to be involved in decision making in a surrogacy arrangement. This could be considered particularly important in the surrogacy context as the whakapapa of a whānau and hapū will be continued through a Māori child born from a surrogacy arrangement.
- 4.52 It is not clear whether the HART Act principle and the ACART Guidelines are currently meeting the needs of Māori who wish to engage with and act in accordance with tikanga in a surrogacy arrangement.
- 4.53 We are interested in your views on whether this is a matter of concern for Māori and whether further steps should be taken to improve the current position. Options include:
- (a) requiring counsellors of participants in surrogacy arrangements involving Māori who wish to act in accordance with tikanga to have expertise in Māori customary values and the ability to articulate issues from a Māori perspective;
 - (b) where Māori do not feel that they have sufficient knowledge within their own whānau or hapū to act in accordance with tikanga, requiring counsellors to engage local kaumātua and hapū for cultural support; and
 - (c) conducting further research to better understand ao Māori perspectives on surrogacy and developing guidelines⁵⁷ to assist ECART and others exercising powers or functions under the legislation.
- 4.54 We think these options may help ensure Māori are able to act in accordance with tikanga if they wish to as well as promote responsible kāwanatanga that facilitates tino rangatiratanga. The Treaty and the principles of partnership, active protection and options place an obligation on the Crown to ensure health services are culturally

⁵⁴ Human Assisted Reproductive Technology Act 2004, s 4(f).

⁵⁵ Advisory Committee on Assisted Reproductive Technology *Guidelines for family gamete donation, embryo donation, the use of donated eggs with donated sperm and clinic assisted surrogacy* (September 2020) at [B3].

⁵⁶ Advisory Committee on Assisted Reproductive Technology *Guidelines for family gamete donation, embryo donation, the use of donated eggs with donated sperm and clinic assisted surrogacy* (September 2020) at [B4].

⁵⁷ Research and the development of guidelines could be conducted in accordance with, and complement, Pūtaiora Writing Group *Te Ara Tika – Guidelines for Māori research ethics: A framework for researchers and ethics committee members* (Health Research Council of New Zealand, 2010).

appropriate and kaupapa Māori solutions are available to Māori in a way that they are not disadvantaged by their choices.

Whakapapa

Access to information

4.55 As we outlined at the start of this chapter, whakapapa is at the core of cosmic creation in te ao Māori and permeates Māori society. It is what connects children to their parents, to their ancestors and to the spiritual world.⁵⁸

4.56 The quest of Māui to find and seek acceptance from his parents and siblings after being raised by Tangaroa⁵⁹ illustrates how important knowledge of whakapapa can be to a Māori person because it shows how identity can be impacted as a result of being born in unique circumstances. Ensuring the identity of a surrogate-born child is nurtured and protected is likely to be significant for Māori, and any risk of a Māori child not being able to access their whakapapa is likely to be a matter of concern.

4.57 According to Pere:⁶⁰

Genealogy, whakapapa, is an important part of whanaungatanga. It is the basic right of the child to know who his or her natural parents are even if he or she is adopted out. The spirit of the child amongst other dimensions begins from conception and relates to the child's forebears. A basic belief of the Maori is to expose a child to his or her kinship groups as soon as possible and throughout his or her lifetime.

4.58 This perspective was shared by others we spoke with:

(a) One kuia who shared an ao Māori perspective was pragmatic about surrogacy but considered that access to information was important. In her view:

The only thing is that they should be able to access information about their parentage if they so wish. They may need it ... to learn about their whakapapa, which is paramount in te ao Māori.

(b) One intended parent we spoke with during initial consultation said:

You need to know where you come from, who your parents are and who connects you to your cousins. If you are going to have a child together, that is really important. The trauma that comes from not knowing, I don't know if you can come back from that ... it echoes across your life.

4.59 Whakapapa is also becoming increasingly important for Māori to gain access to entitlements under state law. As the Commission observed in 2000:⁶¹

Māori who are not aware that they are Māori cannot exercise the right to enrol on the Māori electoral roll. Similarly, young persons who have no knowledge of their whakapapa may

⁵⁸ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Pāharakeke, he Rito Whakakīkinga Whāruarua: Oranga Tamariki Urgent Inquiry* (Wai 2915, 2021) at 14–15.

⁵⁹ Kirsten Aroha Linda Gabel "Poipoia te tamaiti ki te ūkaipō" (PhD thesis, Te Whare Wānanga o Waikato | The University of Waikato, 2013) at 63–64.

⁶⁰ Rangimarie Mihomiho Rose Pere "To Us the Dreamers are Important" in Leonie Pihama and others (eds) *Mana Wahine Reader: A Collection of Writings 1987-1998 – Volume 1* (Te Kotahi Research Institute, Hamilton, 2019) 4 at 11.

⁶¹ Te Aka Matua o te Ture | Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework* (NZLC R65, 2000) at [203].

find it difficult to access scholarships available for descendants of a particular iwi. Entitlement to Māori land and other resources is dependent on the ability to establish whakapapa links or a whāngai placement.

- 4.60 In the post-Treaty settlement context, Māori may also be unable to register as members of post-settlement governance entities representing their iwi or hapū (in order to benefit from settlements received from the Crown for breaches of the Treaty) if they do not know their whakapapa.⁶²
- 4.61 Under the HART Act, where a person of Māori descent donates ova or sperm to a fertility clinic, the fertility clinic must record the donor's whānau, hapū and iwi to the extent the donor is aware of those affiliations.⁶³ This is so the information can be accessed by the child after they turn 18 or by their guardian if the child is under 18.⁶⁴ However, as we explain in Chapter 8, this information has only been collected since the HART Act came into force in August 2005 and can be withheld if it is "likely to endanger any person".⁶⁵ These requirements do not extend to private donations, donations that take place through an overseas clinic or information about the surrogate (which means her information is not captured if her ova are not used in conception). Accordingly, circumstances may arise where a Māori surrogate-born child is unable to access information about their whakapapa or knowledge of who carried them.
- 4.62 We asked some Māori academics what they thought about the HART Act provisions, and they were particularly concerned about the risk of Māori surrogate-born children not being able to access information about their whakapapa. One said "the law is incorrect if an outcome of it is that a person cannot know their whakapapa". Another said:
- It is never appropriate for the law to operate to prohibit a Māori person accessing their own whakapapa. I would suggest this is a direct breach of te Tiriti, denying a Māori person access to their taonga, whakapapa.
- 4.63 We agree. We also acknowledge that many Māori who enter into surrogacy arrangements are likely to disclose information regarding whakapapa to surrogate-born Māori children, given the significance of whakapapa in te ao Māori, without needing to rely on the HART Act. However, we consider that the law must also facilitate access to information regarding whakapapa, if required.
- 4.64 Our preliminary view is that this matter is addressed by the options for reform put forward in Chapter 8 that seek to ensure information about a surrogate-born child's genetic and gestational origins is collected and recorded by the state and is available to them except in very narrow circumstances. This would mean it would be very rare for a Māori surrogate-born child not to be able to access information about their whakapapa.
- 4.65 We are interested in your views on whether our options for reform in Chapter 8 are sufficient to address this issue for Māori.

⁶² See, for example, Trust Deed for Ngāti Whātua Ōrākei Trust (Post-Settlement Governance Entity) (2011) at 45–47.

⁶³ Human Assisted Reproductive Technology Act 2004, s 47(1)(h).

⁶⁴ Human Assisted Reproductive Technology Act 2004, s 50(3).

⁶⁵ Human Assisted Reproductive Technology Act 2004, s 50(4). We are not aware of any information being withheld under the section.

Allocation of legal parenthood

- 4.66 In te ao Māori, genetics determine a person's whakapapa. The way legal parenthood is currently allocated may be a matter of concern to Māori due to its implications for whakapapa under state law. This is because:
- (a) when a child is born as a result of a surrogacy arrangement, the surrogate and her partner (if she has one) are the child's legal parents at birth⁶⁶ and are recorded as the child's parents on the birth certificate, even if the intended parents or donors provided their ovum and/or sperm in conception; and
 - (b) if intended parents adopt a surrogate-born child, they will become the child's legal parents⁶⁷ and will be recorded as the child's parents on a newly issued birth certificate, even if the intended parents are not the child's genetic parents.
- 4.67 Accordingly, there may be situations where a surrogate-born Māori child's legal parents and birth certificate do not reflect their true whakapapa. We emphasise that we do not think whakapapa can be affected in this way in te ao Māori. As participants at hui held by the Commission around Aotearoa New Zealand in relation to its review of adoption laws in 1995 and 1996 argued:⁶⁸
- ... no law can break the links of blood in Māori tradition, so although the Adoption Act alters familial relationships in law, it does not necessarily do so in fact, as Māori children adopted within Māori families know their family connections and relationships.
- 4.68 That said, we are concerned that situations may arise where whakapapa is relevant under state law and surrogate-born Māori children may be unable to rely on their true whakapapa or may rely on inaccurate whakapapa due to the way legal parenthood has been allocated. For example, a surrogate-born Māori child adopted by intended parents who did not provide their ovum or sperm in conception and do not have the same whakapapa will have legal parents and a birth certificate that do not accurately reflect their whakapapa. As a result, the child may be unable to register as a member of the post-settlement governance entity representing that child's hapū or iwi.
- 4.69 Our preliminary view is that we do not think state law should affect a person's whakapapa in this way. Māori academics we engaged with unanimously agreed. One said "the law needs to be changed to stop this".
- 4.70 Accordingly, our preliminary proposal is that surrogacy law needs to include an explicit provision which clarifies that the whakapapa of a surrogate-born Māori child is not affected by the allocation of legal parenthood. This would ensure surrogate-born Māori children are able to rely on their real whakapapa in both te ao Māori and in matters where their whakapapa is relevant under state law.
- 4.71 We also note that there are other circumstances such as adoption other than in the context of surrogacy where there are similar implications for a Māori child's whakapapa

⁶⁶ Status of Children Act 1969, ss 17–22. The surrogate's partner will not be a legal parent if there is evidence that establishes that they did not consent to the procedure: ss 18 and 27.

⁶⁷ Adoption Act 1955, s 16.

⁶⁸ Te Aka Matua o te Ture | Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework* (NZLC R65, 2000) at [196] (citation omitted).

under state law. These circumstances are beyond the scope of our review. However, Tāhū o te Ture | Ministry of Justice is currently reviewing adoption laws, and this review includes considering how adoption laws can reflect tikanga Māori.⁶⁹

Whāngai – ensuring mātua whāngai and tamariki whāngai are not disadvantaged

- 4.72 Some Māori intended parents may choose to proceed with a whāngai arrangement following surrogacy instead of adopting the child or seeking a guardianship or parenting order.⁷⁰ ECART appears reluctant to approve these types of arrangements, citing concerns “for the child due to the instability of the proposed legal situation”⁷¹ and that adoption checks “ensure that the resulting child will go into a safe environment”.⁷²
- 4.73 Under the Adoption Act 1955, “no adoption in accordance with Māori custom shall be of any force or effect”.⁷³ Accordingly, intended parents who do not proceed with an adoption and choose to be mātua whāngai (whāngai parents) instead will not be the legal parents of a child born by surrogacy. The surrogate and their partner (if they have one) will remain the child’s legal parents. Mātua whāngai will care for the child informally, without any legally recognised parental rights or responsibilities.
- 4.74 In Chapter 7, we outline the limitations of this approach in relation to the rights and entitlements that flow from the legal parent-child relationship, including rights and entitlements to a parent’s estate under succession law,⁷⁴ child support obligations and citizenship. These limitations apply whether or not mātua whāngai obtain a guardianship or parenting order. In addition, if the intended parents are caring for their child informally, they cannot consent to medical treatment for the child or apply for a passport on behalf of the child.⁷⁵
- 4.75 Tāhū o te Ture | Ministry of Justice’s review of adoption laws considers how the law treats whāngai.⁷⁶ We are, however, interested in views on whether the lack of legal recognition of whāngai arrangements is a matter of particular concern to Māori in the surrogacy context.
- 4.76 If the legal status of whāngai arrangements in the surrogacy context is a matter of concern to Māori, an option for reform could be to recognise whāngai arrangements under state law in order to ensure mātua whāngai have the same or similar parental rights

⁶⁹ Tāhū o te Ture | Ministry of Justice *Adoption in Aotearoa New Zealand: Discussion document* (June 2021) at 6.

⁷⁰ Ethics Committee on Assisted Reproductive Technology minutes of 29 November 2005 at [3] (application 2005/08); 14 March 2006 at [15] (application 2005/08); 2 November 2018 at [6] (application E18/108); 4 July 2019 at [12] (application E18/108); and 11 February 2021 (application E18/108).

⁷¹ Ethics Committee on Assisted Reproductive Technology minutes of 29 November 2005 at [3] (application 2005/08).

⁷² Ethics Committee on Assisted Reproductive Technology minutes of 26 April 2018 (Correspondence).

⁷³ Adoption Act 1955, s 19.

⁷⁴ We note that a review of aspects of the law governing succession is currently being undertaken by Te Aka Matua o Te Ture | Law Commission: *Review of Succession Law: Rights to a person’s property on death | He arotake i te āheinga ki ngā rawa a te tangata ka mate ana* (NZLC IP46, 2021).

⁷⁵ Care of Children Act 2004, s 36(3); and Passports Act 1992, s 4(3)(a).

⁷⁶ Tāhū o te Ture | Ministry of Justice *Adoption in Aotearoa New Zealand: Discussion document* (June 2021) at 28–29.

or responsibilities as other parents or guardians.⁷⁷ If this option were desired by Māori, it would require careful consideration, particularly given the scope of our review is limited to surrogacy and the implications that legal recognition of whāngai arrangements could have on other areas of state law. Recognition would also need to be carefully designed to ensure Māori are still able to act in accordance with their own tikanga.

Māori representation on ECART and ACART

- 4.77 Another matter of potential concern to Māori is representation on ECART and ACART.
- 4.78 Under the HART Act, ACART must include one or more Māori members “with expertise in Māori customary values and the ability to articulate issues from a Māori perspective”.⁷⁸ Under ACART’s terms of reference, all members of the committee are also “expected to have an understanding of how the health sector responds to Māori issues and their application to ethical review”.
- 4.79 There is no requirement under the HART Act for Māori representation on ECART. However, ECART’s terms of reference state that the committee shall have at least two Māori members who should have a recognised awareness of te reo Māori and an understanding of tikanga Māori. Similar to ACART, all members of ECART are also “expected to have an understanding of how the health sector responds to Māori issues and their application to ethical review”.
- 4.80 Māori members of ACART and ECART are appointed by the Minister of Health. Māori representation on ACART and ECART currently meets the requirements of the terms of reference of each committee.
- 4.81 We are interested in views on whether the current requirements for Māori representation on ACART and ECART are sufficient and promote consistency with the Treaty and the principle of partnership.
- 4.82 One Māori academic who shared an ao Māori perspective on surrogacy said “[o]ne Māori person [on ACART] cannot represent the diversity of Māori views and perspectives that exist”. In contrast, another Māori academic said:
- ... one Māori member [of ACART] is suitable due to the small size of the committee and the vast aspects of society that are not represented including Asian, Indian and LGBTQ communities.
- 4.83 If Māori do think there is need for improved Māori representation on ACART and ECART, options for reform could include:
- (a) requiring an additional Māori member of ACART;
 - (b) requiring the Māori member of ACART be appointed as co-chair and removing the position of deputy chair – this was suggested by one of the Māori academics who shared an ao Māori perspective on surrogacy;
 - (c) requiring that one Māori member of ECART is appointed as co-chair and removing the position of deputy chair; and

⁷⁷ This option would require careful consideration of whether and how the rights and entitlements flowing from the legal parent-child relationship would be maintained between tamariki whāngai and their birth parents, particularly in matters of succession.

⁷⁸ Human Assisted Reproductive Technology Act 2004, s 34(4)(d).

- (d) affirming in legislation that ECART's membership must include at least two Māori members at all times.

4.84 Another matter we have considered is who should appoint the Māori members of ACART and ECART. These members are currently appointed by the Minister of Health, though the new Māori Health Authority (once established) could play a role.⁷⁹ We are interested in your views on whether this would be appropriate as well as the options listed above.

QUESTIONS

- Q2** Do you have any views on the matters of particular concern to Māori we have identified?
- Q3** Do you think our proposals to address access to surrogacy elsewhere in this Issues Paper adequately address access to surrogacy by Māori?
- Q4** Do you agree that surrogacy law and regulation should enable Māori to act in accordance with tikanga if they wish to do so? If so, do you think any of the options for reform we have identified, or any other option, should be adopted to improve the current position?
- Q5** Do you think that the options for reform in Chapter 8 to ensure information about a surrogate-born child's genetic and gestational origins is collected and recorded by the state are sufficient to enable surrogate-born Māori children to access information about their whakapapa?
- Q6** Do you agree that the law should clarify that a Māori child's whakapapa is not affected by the allocation of legal parenthood in a surrogacy arrangement?
- Q7** Do you think the lack of legal recognition of whāngai arrangements is a particular matter of concern in the surrogacy context?
- Q8** Do you think that Māori representation on ACART and/or ECART should be improved?

⁷⁹ The establishment of a Māori Health Authority was announced by the Minister and Associate Minister of Health on 21 April 2021 following the Health and Disability System Review. It is envisaged that the Māori Health Authority will have the power to directly commission health services for Māori and to partner with Health NZ in other aspects of the health system; Andrew Little and Peeni Henare "Building a New Zealand Health Service that works for all New Zealanders" (21 April 2021) <www.beehive.govt.nz>.

CHAPTER 5

Approving surrogacy arrangements

IN THIS CHAPTER, WE CONSIDER:

- the requirement for prior approval of surrogacy arrangements in Aotearoa New Zealand; and
- issues with the current law and options for reform.

THE CURRENT LAW

5.1 Surrogacy arrangements are regulated by the Human Assisted Reproductive Technology Act 2004 (HART Act), which:

- (a) establishes the legality of surrogacy arrangements; and
- (b) requires gestational surrogacy arrangements to receive prior approval.

Legality of surrogacy arrangements

5.2 Section 14 of the HART Act addresses the legality of surrogacy arrangements.¹ It provides that a surrogacy arrangement “is not of itself illegal, but is not enforceable by or against any person”.²

5.3 Any exchange of “valuable consideration” for a person’s participation in a surrogacy arrangement is prohibited, although the HART Act does permit payments in relation to medical costs, counselling and legal advice.³ We consider this prohibition further in Chapter 6.

¹ A surrogacy arrangement is defined as “an arrangement under which a woman agrees to become pregnant for the purpose of surrendering custody of a child born as a result of the pregnancy”: Human Assisted Reproductive Technology Act 2004, s 5 (definition of “surrogacy arrangement”).

² Human Assisted Reproductive Technology Act 2004, s 14(1).

³ Human Assisted Reproductive Technology Act 2004, ss 14(3)–14(4).

- 5.4 The HART Act also prohibits advertising that invites people to participate in, or to enquire about opportunities for participating in, a surrogacy arrangement that involves the exchange of valuable consideration.⁴ We consider advertising in Chapter 10.
- 5.5 The provisions of the HART Act have the effect of prohibiting commercial surrogacy in Aotearoa New Zealand but not overseas.⁵ We consider international surrogacy in Chapter 9.

Requirement for prior approval of gestational surrogacy arrangements

- 5.6 The HART Act requires all “assisted reproductive procedures”, apart from procedures classified as “established procedures”, to obtain prior approval in writing from the Ethics Committee on Assisted Reproductive Technology (ECART).⁶
- 5.7 Surrogacy is not defined as an assisted reproductive procedure. However, because gestational surrogacy arrangements involve the use of an assisted reproductive procedure (in vitro fertilisation), they will usually require ECART approval.⁷
- 5.8 Traditional surrogacy arrangements only involve the use of an established procedure (artificial insemination) and therefore do not require ECART approval.⁸ Traditional surrogacy arrangements can take place privately, outside a fertility clinic. If a fertility clinic is involved in a traditional surrogacy arrangement, it can request an ethical review by ECART, but this is not required and ECART can only provide non-binding ethical advice.⁹
- 5.9 The legislative history to the HART Act reveals little discussion around requiring ECART approval in surrogacy arrangements.¹⁰ However, the HART Act was a response to an earlier Ministerial Committee report that did consider the regulation of surrogacy and “envision[ed] ethical approval being given under strict guidelines”.¹¹

⁴ Human Assisted Reproductive Technology Act 2004, s 15(1).

⁵ As reflected in the heading of s 14: “Status of surrogacy arrangements and prohibition of commercial surrogacy arrangements”; and as interpreted by the Family Court in *Re an application to adopt a child by SCR and MCR* [2012] NZFC 5466 at [59].

⁶ Human Assisted Reproductive Technology Act 2004, ss 5 (definition of “assisted reproductive procedure or procedure”) and 16. This excludes actions that are prohibited under the Act. Prohibited actions must not be conducted at any time: s 8 and sch 1.

⁷ In vitro fertilisation is considered an established procedure in certain circumstances but not if it involves the use of a donated ovum in conjunction with donated sperm: Human Assisted Reproductive Technology Order 2005 (HART Order), schedule pt 2 cl 1(b). For the purposes of the HART Order, in a surrogacy arrangement the surrogate is the “patient” because they are “the person who is the subject of the procedure”: cl 3 (definition of “patient”). This means that the intended parents’ ovum and sperm are “donated”, as they do not come from either the surrogate or the surrogate’s partner: cl 3 (definitions of “donated eggs” and “donated sperm”).

⁸ Human Assisted Reproductive Technology Order 2005, schedule pt 1.

⁹ Advisory Committee on Assisted Reproductive Technology *Guidelines for family gamete donation, embryo donation, the use of donated eggs with donated sperm and clinic assisted surrogacy* (September 2020) at 10. See, for example, Ethics Committee on Assisted Reproductive Technology minutes of 9 May 2019 at [7] and [13] (applications E19/24 and E19/30).

¹⁰ Debra Wilson “Surrogacy in New Zealand” [2016] NZLJ 401 at 401–402.

¹¹ Ministerial Committee on Assisted Reproductive Technologies *Assisted Human Reproduction: Navigating our Future* (July 1994) at 114. Bill Atkin has noted that “[m]uch of the Ministerial Committee’s thinking is reflected in the legislation finally passed in 2004”: Bill Atkin “Regulation of Assisted Human Reproduction: The Recent New Zealand Model in Comparison with Other Systems” (2004) 11 RJP/NZACL Yearbook 81 at 83.

ECART's composition and role

- 5.10 ECART is a committee designated by the Minister of Health.¹² ECART comprises of members with expertise in assisted reproductive procedures, human reproductive research, ethics and law, as well as members with the ability to articulate issues from a consumer perspective and a disability perspective.¹³
- 5.11 At least two ECART members must be Māori, with “a recognised awareness of te reo Māori, and an understanding of tikanga Māori”.¹⁴ All ECART members “are expected to have an understanding of how the health sector responds to Māori issues and their application to ethical review”.¹⁵
- 5.12 ECART's functions include considering and determining applications for approvals for the performance of assisted reproductive procedures and for keeping prior approvals under review.¹⁶ When performing these functions, ECART must operate:¹⁷
- (a) in accordance with guidelines issued by the Advisory Committee on Assisted Reproductive Technology (ACART);¹⁸ and
 - (b) “expeditiously, having regard, in particular, to the effect that undue delay may have on the reproductive capacity of individuals”.
- 5.13 ECART must also be guided by the principles of the HART Act, which are as follows:¹⁹
- (a) the health and well-being of children born as a result of the performance of an assisted reproductive procedure or an established procedure should be an important consideration in all decisions about that procedure;
 - (b) the human health, safety, and dignity of present and future generations should be preserved and promoted;
 - (c) while all persons are affected by assisted reproductive procedures and established procedures, women, more than men, are directly and significantly affected by their application, and the health and well-being of women must be protected in the use of these procedures:

¹² Human Assisted Reproductive Technology Act 2004, s 27(1).

¹³ Human Assisted Reproductive Technology Act 2004, s 27(3); and Ethics Committee on Assisted Reproductive Technology *Terms of Reference* at 4. See also Manatū Hauora | Ministry of Health *Operational Standard for Ethics Committees* (March 2002) at [6.2].

¹⁴ Ethics Committee on Assisted Reproductive Technology *Terms of Reference* at 5.

¹⁵ Ethics Committee on Assisted Reproductive Technology *Terms of Reference* at 5.

¹⁶ Human Assisted Reproductive Technology Act 2004, s 28(1)(a)–(b).

¹⁷ Human Assisted Reproductive Technology Act 2004, s 29.

¹⁸ The Advisory Committee on Assisted Reproductive Technology (ACART) is established by the Minister of Health to issue guidelines and give advice to the Ethics Committee on Assisted Reproductive Technology (ECART) and the Minister: Human Assisted Reproductive Technology Act 2004, ss 32–35. ACART has a representative membership like ECART, with a few differences in composition. ACART must include one or more members “with the ability to articulate the interests of children” who is the Children’s Commissioner or their representative or employee and only one or more Māori members: s 34.

¹⁹ Human Assisted Reproductive Technology Act 2004, s 4.

- (d) no assisted reproductive procedure should be performed on an individual and no human reproductive research should be conducted on an individual unless the individual has made an informed choice and given informed consent;
- (e) donor offspring should be made aware of their genetic origins and be able to access information about those origins;
- (f) the needs, values, and beliefs of Māori should be considered and treated with respect;
- (g) the different ethical, spiritual, and cultural perspectives in society should be considered and treated with respect.

Requirements for approving gestational surrogacy arrangements

- 5.14 In 2020, ACART issued revised guidelines that set out the requirements that must be met before ECART can approve an application involving surrogacy (ACART Guidelines).²⁰
- 5.15 The ACART Guidelines require all parties to a prospective surrogacy arrangement to receive the following:
- (a) **Individual and joint counselling:**²¹ Counselling must be culturally appropriate, provide for whānau involvement and include any existing children of the parties.²² Counselling must continue to be available before and after pregnancy is achieved.²³ As part of the ECART application, the counsellor must report that, in their opinion:
 - (i) the health and well-being of the intended surrogate and any resulting children are adequately safeguarded;²⁴ and
 - (ii) all affected parties have understood:²⁵
 1. each other's needs and plans for continuing contact and information sharing;
 2. any specific issues that might affect the health and well-being of all affected parties;

²⁰ Advisory Committee on Assisted Reproductive Technology *Guidelines for family gamete donation, embryo donation, the use of donated eggs with donated sperm and clinic assisted surrogacy* (September 2020).

²¹ Advisory Committee on Assisted Reproductive Technology *Guidelines for family gamete donation, embryo donation, the use of donated eggs with donated sperm and clinic assisted surrogacy* (September 2020) at [B] and [I(4)]–[I(5)]. Counselling must be provided by a counsellor who is eligible for membership of the Australian and New Zealand Infertility Counsellors Association: Fertility Services Standard NZS 8181:2007 at [1.10.1]; and Ngā Paerewa Health and Disability Services Standard NZS 8134:2021 at [1.10.5].

²² Advisory Committee on Assisted Reproductive Technology *Guidelines for family gamete donation, embryo donation, the use of donated eggs with donated sperm and clinic assisted surrogacy* (September 2020) at [B(3)]–[B(5)].

²³ Advisory Committee on Assisted Reproductive Technology *Guidelines for family gamete donation, embryo donation, the use of donated eggs with donated sperm and clinic assisted surrogacy* (September 2020) at [I(5)].

²⁴ Advisory Committee on Assisted Reproductive Technology *Guidelines for family gamete donation, embryo donation, the use of donated eggs with donated sperm and clinic assisted surrogacy* (September 2020) at [I(6)].

²⁵ Advisory Committee on Assisted Reproductive Technology *Guidelines for family gamete donation, embryo donation, the use of donated eggs with donated sperm and clinic assisted surrogacy* (September 2020) at [B(7)] and [I(7)].

3. the implications if any resulting child has medical conditions, disabilities or genetic disorders; and
 4. the possibility that the surrogate may terminate the pregnancy.
- (b) **Independent legal advice:**²⁶ The lawyer must report that the parties understand the legal implications of the procedure(s).²⁷ This includes who will be recorded as parents on the surrogate-born child's birth certificate, who will be the child's legal parents on birth, the adoption process, the unenforceability of the surrogacy arrangement and the surrogate's right to terminate the pregnancy and the need for payment of costs to comply with the HART Act.²⁸ In practice, legal advice might also be given on matters such as what name can be recorded for the child on their birth certificate, making provision for testamentary guardianship, updating wills and arranging life insurance, parental leave entitlements, the parties' plans for future contact arrangements and the importance of preserving the child's rights to identity (discussed in Chapter 3).
- (c) **Independent medical advice:**²⁹ Health reports must show the parties understand the health implications of the procedure(s).³⁰

5.16 In addition, ECART requires intended parents to seek in-principle approval from Oranga Tamariki to the intended parent(s) adopting any child resulting from the surrogacy arrangement.³¹ As we explain in Chapter 7, intended parents must apply to adopt a surrogate-born child to become the child's legal parents. As part of the adoption process, Oranga Tamariki must prepare a report for the Family Court that addresses whether the intended parents are "fit and proper" to care for and raise the child and whether the welfare and interests of the child will be promoted by the adoption.³² Requiring prior in-principle approval from Oranga Tamariki before ECART approves the surrogacy arrangement helps to ensure any surrogate-born child's well-being will be safeguarded

²⁶ Advisory Committee on Assisted Reproductive Technology *Guidelines for family gamete donation, embryo donation, the use of donated eggs with donated sperm and clinic assisted surrogacy* (September 2020) at [D(1)].

²⁷ Advisory Committee on Assisted Reproductive Technology *Guidelines for family gamete donation, embryo donation, the use of donated eggs with donated sperm and clinic assisted surrogacy* (September 2020) at [D(3)].

²⁸ Advisory Committee on Assisted Reproductive Technology *Guidelines for family gamete donation, embryo donation, the use of donated eggs with donated sperm and clinic assisted surrogacy* (September 2020) at [D(3)]; and Ethics Committee on Assisted Reproductive Technology *Surrogacy Arrangements involving Providers of Fertility Services: Application Form* (2011), sections 7 and 8.

²⁹ Advisory Committee on Assisted Reproductive Technology *Guidelines for family gamete donation, embryo donation, the use of donated eggs with donated sperm and clinic assisted surrogacy* (September 2020) at [E(1)].

³⁰ Advisory Committee on Assisted Reproductive Technology *Guidelines for family gamete donation, embryo donation, the use of donated eggs with donated sperm and clinic assisted surrogacy* (September 2020) at [E(2)].

³¹ If this approval has not been obtained, ECART may defer the application or make its approval conditional on Oranga Tamariki's in-principle approval being obtained. See, for example, Ethics Committee on Assisted Reproductive Technology minutes of 23 August 2018 at [8] and [9] (applications E18/82 and E18/83), both applications were approved "subject to receipt of a letter from Oranga Tamariki that approves an adoption order in principle". Similar decisions were reached in relation to applications in Ethics Committee on Assisted Reproductive Technology minutes of 13 December 2018 (E18/134); 9 May 2019 (E19/31); 4 July 2019 (E19/53); and 27 February 2020 (E20/14 and E20/15). In Ethics Committee on Assisted Reproductive Technology minutes of 16 February 2017 at [4], application E17/06 was deferred to request further information, including a copy of a letter from Child, Youth and Family approving an adoption order in principle.

³² Adoption Act 1955, ss 10 and 11.

by ensuring there are no impediments to the intended parents adopting the child. Before giving in-principle approval, Oranga Tamariki will undertake documentary checks (police background checks, medical record checks, character references and child protection checks), and a social worker from Oranga Tamariki's adoption team will meet with the intended parents in their home.

5.17 ECART can only approve an application relating to surrogacy if satisfied that the following requirements are met:

- (a) All relevant parties have consented to the procedure, and the parties have not been subjected to any undue influence.³³ This involves consideration of the nature of the parties' relationship, including how the intended parents and surrogate met, how long they have known each other, how the offer of surrogacy came about and their intentions for the future, as well as their appreciation of the risks of the procedure.³⁴ While the ACART Guidelines do not prescribe a minimum time that parties must know each other, it is generally understood parties should form a relationship over at least six months before making an application.³⁵ On rare occasions, ECART might defer or decline an application due to concerns about the short length of the parties' relationship.³⁶
- (b) Affected parties have discussed, understood and declared intentions between themselves about the day-to-day care, guardianship and adoption of any resulting child and any ongoing contact.³⁷ These matters must be addressed in the counselling reports and are also addressed in the legal reports.
- (c) The procedure is the best or the only opportunity for intended parents to have a child, and they are not using the procedure for social or financial convenience or gain.³⁸ Intended mothers must demonstrate a medical need to resort to surrogacy, and for all applications, ECART will consider whether there will be a genetic link between one or both intended parents and the child. While a genetic link is no longer

³³ Advisory Committee on Assisted Reproductive Technology *Guidelines for family gamete donation, embryo donation, the use of donated eggs with donated sperm and clinic assisted surrogacy* (September 2020) at [A(1)]–[A(2)].

³⁴ See, for example, Ethics Committee on Assisted Reproductive Technology minutes of 16 February 2017 at [7] and [10] (applications E17/09 and E17/12); and 7 December 2020 at [10] (application E20/153).

³⁵ Rhonda M Shaw "Should Surrogate Pregnancy Arrangements be Enforceable in Aotearoa New Zealand?" (2020) 16 Policy Quarterly 18 at 21.

³⁶ See, for example, Ethics Committee on Assisted Reproductive Technology minutes of 3 November 2016 at [13] (application E16/94), where the application was deferred to request further information, including information about whether the length of the relationship between the intended parents and the surrogate has been explored during counselling sessions. In one early application, the parties had known each other for eight months, and ECART observed that "they would need to know each other for another 6 months before ECART would consider another application": Minutes from 8 May 2007 (application E07/10). See also Ethics Committee on Assisted Reproductive Technology minutes from 24 November 2011 at [14] discussing application E11/50, which was declined, noting issues that included the length of time the intended mother and birth mother had known each other and their expectations of ongoing contact.

³⁷ Advisory Committee on Assisted Reproductive Technology *Guidelines for family gamete donation, embryo donation, the use of donated eggs with donated sperm and clinic assisted surrogacy* (September 2020) at [I(1)].

³⁸ Advisory Committee on Assisted Reproductive Technology *Guidelines for family gamete donation, embryo donation, the use of donated eggs with donated sperm and clinic assisted surrogacy* (September 2020) at [A(4)]–[A(5)].

a mandatory requirement under the ACART Guidelines,³⁹ ECART considers that this remains a consideration when determining whether the procedure is the “best or only” opportunity for the intended parents to have a child “on the basis of current literature that suggests that a genetic link to parents is in the best interests of any potential child”.⁴⁰

- (d) The potential genetic, social, cultural and intergenerational aspects of the proposed arrangements, as well as the relationships between the parties, safeguard the well-being of all parties and especially any resulting children.⁴¹
- (e) The risks associated with a surrogacy for the parties and any resulting child must be justified.⁴² This includes risks to the health and well-being of:
 - (i) the surrogate, including risks associated with pregnancy, childbirth and “relinquishment of a resulting child” to the intended parents, as well as the risk that the intended parents may change their mind and the risks to the surrogate’s reproductive capacity in the future;
 - (ii) the intended parents (and embryo donor, if applicable), including the risk that the surrogate changes her mind about relinquishing a resulting child; and
 - (iii) the surrogate-born child, including risks that arise where that child becomes the subject of a dispute if the relationship between the surrogate and intended parents breaks down.
- (f) The residency status and plans of the surrogate and intended parent(s) safeguard the health and well-being of the child, particularly in relation to being born in Aotearoa New Zealand.⁴³ This requirement was introduced in 2020 because of “the possibility that some children born to overseas surrogates could, in theory, be stateless”.⁴⁴

Current practice

- 5.18 Applications to ECART are made by a fertility clinic on behalf of the intended parents. There are only three fertility clinics that operate in Aotearoa New Zealand (Fertility Associates, Fertility Plus and Repromed). Fertility clinics must operate in accordance with

³⁹ ACART removed the requirement for a genetic link in its 2020 guidelines on the basis that it was considered potentially discriminatory and unjustified: Advisory Committee on Assisted Reproductive Technology *Guidelines for family gamete donation, embryo donation, the use of donated eggs with donated sperm and clinic assisted surrogacy* (September 2020) at [1]; and Advisory Committee on Assisted Reproductive Technology *Second Round of Consultation on the Proposed Donation and Surrogacy Guidelines: further changes since ACART’s 2017 consultation* (February 2019) at 27.

⁴⁰ Ethics Committee on Assisted Reproductive Technology minutes of 29 October 2020 at [14] (application E20/115). This was an application for embryo donation, not surrogacy, but the same requirement applies to both procedures.

⁴¹ Advisory Committee on Assisted Reproductive Technology *Guidelines for family gamete donation, embryo donation, the use of donated eggs with donated sperm and clinic assisted surrogacy* (September 2020) at [A(6)]–[A(7)].

⁴² Advisory Committee on Assisted Reproductive Technology *Guidelines for family gamete donation, embryo donation, the use of donated eggs with donated sperm and clinic assisted surrogacy* (September 2020) at [I(2)].

⁴³ Advisory Committee on Assisted Reproductive Technology *Guidelines for family gamete donation, embryo donation, the use of donated eggs with donated sperm and clinic assisted surrogacy* (September 2020) at [I(3)].

⁴⁴ Advisory Committee on Assisted Reproductive Technology *Second Round of Consultation on the Proposed Donation and Surrogacy Guidelines: further changes since ACART’s 2017 consultation* (February 2019) at 35.

the safety and quality requirements set out in the New Zealand Fertility Services Standard NZS 8181:2007, which will be replaced by Ngā Paerewa Health and Disability Services Standard NZS 8134:2021 in February 2022.⁴⁵

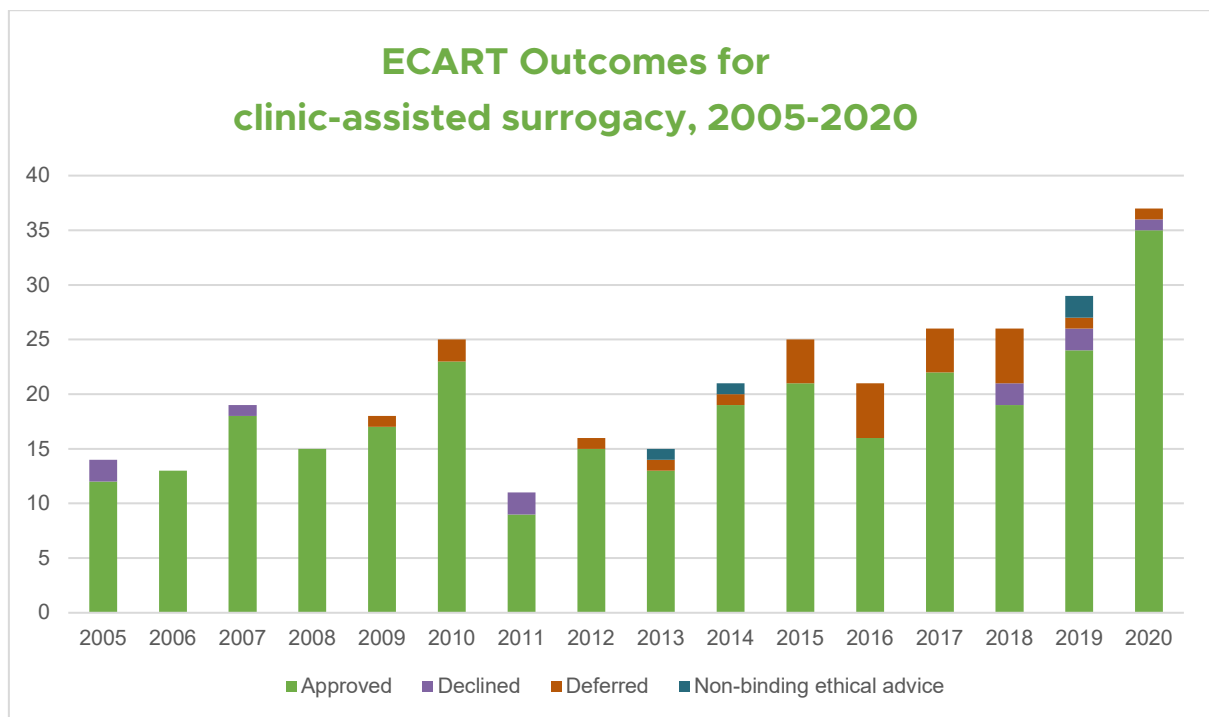
- 5.19 Since 2005, the number of surrogacy applications considered by ECART each year has increased significantly. As we observe in Chapter 2, this is likely due to several factors, including changing social attitudes to diverse families. This has meant more people are now looking to surrogacy as a way to build their family.
- 5.20 In 2020, ECART considered the highest ever number of new surrogacy applications in a single year (37, compared to just 14 in 2005). In 2019, the number of surrogacy applications was 29, and in 2018, the number was 26. The increase in 2020 may be partly due to the Covid-19 pandemic deterring intended parents from pursuing international surrogacy.
- 5.21 The number of applications ECART can consider each year is limited. ECART only meets six times a year and only considers around 12 applications for all assisted reproductive procedures at each meeting. This means that sometimes people will have to wait several months for their application to be considered by ECART. In 2020, Fertility Associates submitted 27 surrogacy applications to ECART, but by March 2021, it had a list of 29 surrogacy applications to go to ECART for the 2021 year.⁴⁶
- 5.22 Most surrogacy applications to ECART concern gestational surrogacy, as traditional surrogacy arrangements do not require ECART approval. Our review of ECART minutes identified that just two per cent of surrogacy applications are described as traditional surrogacy arrangements.⁴⁷
- 5.23 The graph below shows the outcome in surrogacy applications considered by ECART between 2005 and 2020.⁴⁸

⁴⁵ Pursuant to Health and Disability Services (Safety) Standards Notice 2021.

⁴⁶ Interview with Andrew Murray, Medical Director, Fertility Associates (Kathryn Ryan, Nine to Noon, RNZ, 30 March 2021).

⁴⁷ The surrogacy arrangement was described as a traditional surrogacy arrangement in the following applications: E19/24; E19/30; E15/109; E14/150; E13/36; E11/07; and E21/002.

⁴⁸ Graph created by Te Aka Matua o te Ture | Law Commission using information recorded in Ethics Committee on Assisted Reproductive Technology minutes. This graph demonstrates the final outcome of applications. Applications that were initially deferred or declined but later approved are counted as “approved”, as are any applications that are approved subject to conditions.



ISSUES

- 5.24 Our initial consultation suggested general support for the ECART process. It was described to us by some fertility clinic representatives as “safe” and “thorough”, and some lawyers pointed to the fact that very few surrogacy arrangements that go through the ECART process end in controversy or dispute.⁴⁹ The high rate of ECART approvals has been attributed to the robustness of the process itself, which means that surrogacy arrangements that go to ECART have already gone through a thorough review process when preparing the application.⁵⁰
- 5.25 Associate Professor Debra Wilson has stated that the ECART process “is widely regarded as playing an important and successful role in regulated assisted reproduction in New Zealand”,⁵¹ a view shared by other academics.⁵² Wilson has noted that, in international discussions, the ECART model “is frequently cited as approaching best practice”.⁵³ ECART itself endorses the requirement for prior approval, as it considers that the ECART process protects the interests of all interested parties.⁵⁴

⁴⁹ We are aware of one surrogacy arrangement that had received ECART approval where the surrogate reportedly experienced pre-natal depression and terminated the pregnancy without informing the intended parents: Cloe Willetts “Kiwi Mum’s Nightmare: ‘My Surrogacy Heartbreak’” *New Zealand Woman’s Weekly* (New Zealand, 10 May 2021) at 26.

⁵⁰ See, for example, Lynley Anderson, Jeanne Snelling and Huia Tomlins-Jahnke “The practice of surrogacy in New Zealand” (2012) 52 *Australian and New Zealand Journal of Obstetrics and Gynaecology* 253 at 256.

⁵¹ Debra Wilson “Avoiding the Public Policy and Human Rights Conflict in Regulating Surrogacy: The Potential Role of Ethics Committees in Determining Surrogacy Applications” (2017) 7 *UC Irvine L Rev* 653 at 672.

⁵² Ruth Walker and Liezl van Zyl “Surrogacy and the law: three perspectives” (2020) 10 *NZFLJ* 9 at 11.

⁵³ Debra Wilson “Surrogacy in New Zealand” [2016] *NZLJ* 401 at 409.

⁵⁴ Letter from Ethics Committee on Assisted Reproductive Technology to Te Aka Matua o te Ture | Law Commission regarding initial views on surrogacy review (7 July 2021).

- 5.26 However, many people we have spoken with identify a range of problems with the way the ECART process is operating in practice. There is a concern that these problems may deter people from pursuing clinic-assisted surrogacy in Aotearoa New Zealand and instead incentivise people to pursue an international surrogacy arrangement.
- 5.27 The fact that ECART approval is not required for all surrogacy arrangements has also been identified as a concern.
- 5.28 We consider these issues below.

Problems with the ECART process in practice

ECART process is slow and complex

- 5.29 Meeting the requirements for making an application to ECART (counselling, legal advice, medical advice and in-principle approval from Oranga Tamariki) involves a lot of work and can take a long time. One fertility clinic representative noted that surrogacy arrangements require around four times more work than other fertility services they provide. However, some acknowledged the importance of these steps. One fertility clinic representative explained that:

I think for some people the romantic idea of being a surrogate gets weeded out with all the time and appointments which is actually good for intending parents. It's also good for preparing people for what's going to happen even though sometimes you feel like the doomsday counsel. You have to ask all these hypothetical questions. So, I do think that sometimes people find it really hard, especially if the pregnancy hasn't been established and no embryos have been created, but unfortunately surrogacy pregnancy is no different to any other pregnancy and you always see things go wrong – you have to prepare people for that.

- 5.30 There are, however, additional delays in the ECART process caused primarily by a lack of resourcing. ECART only meets every two months and can only consider a limited number of applications at each meeting. It might take several months before an application is considered once it is submitted. It can then take up to a month for the minutes to be recorded and the decision to be notified to the fertility clinic. If further information is requested by ECART, applicants might have to wait another two months for their application to be reconsidered.
- 5.31 Delays in having applications considered by ECART are likely to grow given its increasing workload in relation to surrogacy arrangements.
- 5.32 We have heard about challenges in regional Aotearoa New Zealand where finding an experienced lawyer or obtaining an independent medical report can be difficult. The limited availability of counsellors, not only in the regions but also in the main centres, was also noted as a concern.
- 5.33 For one male couple we spoke with, it took 18 months from their first approach to a fertility clinic (having already found a surrogate and ovum donor) to their first pregnancy scan, even though they pushed hard to have the process completed as quickly as possible. In many cases, the ECART process can take much longer.
- 5.34 The delays and complexities of the ECART process can be frustrating and distressing for people, especially because fertility is a time-sensitive issue. Many people who turn to surrogacy have gone through years of unsuccessful fertility treatment and may not have the energy to navigate the ECART process.

ECART process is expensive

- 5.35 While ECART does not recover its own costs, intended parents must pay for counselling, legal advice and medical costs associated with compiling the application. In addition, as intended parents cannot apply directly to ECART, the application must be made by the fertility clinic, and this usually involves another cost payable by the intended parents.
- 5.36 One fertility clinic highlighted that the cost of going through the ECART process and then the adoption process was prohibitive for some intended parents, especially for some of its Māori and Pacific patients. A representative from that clinic told us, “We would like to make sure there is equitable access for all patients. This is a huge issue, and we can’t provide an equitable service for reasons outside of our control.”
- 5.37 If intended parents must reapply to ECART (for example, if a prior application was declined, if their surrogacy arrangement falls through and they find another surrogate or if the three-year time limit on the approval expires), they have to make a new or updated application, which may add further cost and delay. Several people felt that the time limit on approval does not reflect the reality that, in some surrogacy arrangements, it can take years for a pregnancy to be established. One intended parent we spoke with had been through the ECART process four times with four different surrogates.

ECART process is seen as overly invasive

- 5.38 Several intended parents we have spoken with felt that the ECART process was overly invasive. One intended parent told us “It’s hugely invasive, the whole time you have to constantly justify what you’re doing. You have no agency or power. All you are is a cheque book.”
- 5.39 Oranga Tamariki’s role in surrogacy arrangements was often identified as a source of concern.⁵⁵ As noted above, an Oranga Tamariki social worker is required under adoption law to assess whether the intended parents are “fit and proper” to care for the child. Some felt that this parental suitability assessment was not appropriate in the surrogacy context. One intended parent told us that “it’s like rubbing salt in a wound, especially since you’ve struggled so much already to get to this point”. Some intended parents saw a need for some level of involvement by Oranga Tamariki, but certain requirements, such as the need to provide character references, to disclose details about their finances and historical unrelated offending and to go through the detailed adoptive applicant assessment (discussed in greater detail in Chapter 7), felt invasive, uncomfortable and unnecessary. Many noted that people who intend to have children naturally do not have to go through this process. Some thought it was a poor use of Oranga Tamariki’s limited resources.

⁵⁵ Concerns about the role of Oranga Tamariki social workers in surrogacy arrangements were also reflected in interviews with Intended parents and surrogates about their experience of surrogacy in Aotearoa New Zealand: Ruth Walker and Liezl van Zyl “Fear and Uncertainty: The Surrogacy Triad’s Experience of Social Workers’ Role Ambiguity” (7 September 2020) British Journal of Social Work bcaa105 (advance article) at 7–10.

No right to appeal or review of ECART decisions

- 5.40 The HART Act does not explicitly provide for a right of appeal or review in relation to decisions made by ECART to decline an application, although ECART can reconsider an application it has previously declined if relevant new information becomes available.⁵⁶ While decisions made by ECART could be subject to judicial review by the High Court,⁵⁷ that option would likely be cost prohibitive for many people, and we are not aware of any judicial review applications being made in respect of a decision by ECART not to approve a surrogacy arrangement.
- 5.41 The lack of a clear appeal or review process may be a concern. For the people whose applications are declined, it may mean the end of their journey to build a family, or it may mean they consider international surrogacy or enter a traditional surrogacy arrangement outside a fertility clinic, neither of which require ECART approval.

Some surrogacy arrangements lack safeguards

- 5.42 Traditional surrogacy arrangements are unregulated and do not require ECART approval. This means there is no requirement for the parties to seek counselling, legal advice or medical advice. These are important safeguards that help to protect the parties and minimise the risk of a breakdown in the relationship during or after the surrogacy arrangement.
- 5.43 In traditional surrogacy arrangements, the surrogate's ovum is used, which means not only does she gestate the child, she is also the child's genetic parent. This potentially raises more complex ethical issues and might increase the risk of relationship problems arising, especially if the parties do not access the support available as part of the ECART process. As Fertility Associates has previously observed, "cases where the surrogate's own eggs are used are amongst the most challenging and risky surrogacy cases".⁵⁸
- 5.44 This issue was recently highlighted when it was reported in the media that a surrogate in a traditional surrogacy arrangement had changed her mind during pregnancy and wanted to keep the child.⁵⁹ The result in that case was a shared-care arrangement in relation to the resulting child between the surrogate and the intended parents. One traditional surrogate we spoke with, who did not go through the ECART process, said that traditional surrogacy is far more complex than gestational surrogacy and saw merit in having a process to ensure counselling and psychological testing. She said it was difficult to find a counsellor who understood surrogacy and would have preferred to use the counsellor she had seen through a fertility clinic during an earlier ovum donation process.
- 5.45 Another issue is that Oranga Tamariki will not provide in-principle approval in relation to a traditional surrogacy arrangement. One male couple we spoke with who had a child by traditional surrogacy tried to do everything "right" by mimicking the procedural requirements under the ECART process outside a clinic environment. However, they could

⁵⁶ Human Assisted Reproductive Technology Act 2004, s 18(3).

⁵⁷ Pursuant to the Judicial Review Procedure Act 2016.

⁵⁸ Fertility Associates 2019 submission to ACART: Advisory Committee on Assisted Reproductive Technology *Proposed Donation and Surrogacy Guidelines consultation: Organisation submissions* (2019) at 48.

⁵⁹ Katie Harris "Surrogacy Horror: Kiwi parents are having to share custody with surrogate" *NZ Herald* (online ed, New Zealand, 24 January 2021).

not obtain in-principle approval to adopt prior to conception, which was stressful and frustrating and meant there was no security or certainty that they would be approved for adoption. They said that “it felt like we were on our own” and would have liked to have been able to go to ECART directly without a fertility clinic being involved.

- 5.46 In addition to traditional surrogacy arrangements, gestational surrogacy arrangements where the surrogate’s partner donates his sperm do not require ECART approval. This appears to be an unintended consequence of how the terms “assisted reproductive procedure” and “established procedure” are defined.⁶⁰ While we do not think that these types of gestational surrogacy arrangements are very common, they may raise similar complexities as traditional surrogacy arrangements because they establish a genetic link between the surrogate’s partner and the surrogate-born child.
- 5.47 The lack of regulation of some surrogacy arrangements has been identified as a problem. In advice to the Minister of Health published in June 2021, ACART recommended that all clinic-assisted surrogacies should be subject to ECART consideration, observing that:⁶¹

All surrogacies can be ethically complex and involve both a woman’s choices about her body, and the sometimes conflicting interests of the potential child and the intending parents.

...

Also, if clinic assisted surrogacies were not subject to ECART approval, the responsibility for managing those surrogacies would lie entirely with the clinics.

OPTIONS FOR REFORM

- 5.48 The current regulatory framework was put in place at a time when gestational surrogacy was an emerging practice. It is timely to reconsider whether it remains the best form of regulation in Aotearoa New Zealand and, if so, the options to improve the ECART process to address the problems identified above.

Should gestational surrogacy arrangements continue to require prior approval?

- 5.49 Some have questioned the continued need for prior, independent approval of surrogacy arrangements, particularly given the problems with the ECART process identified above, the increasing social acceptance of surrogacy as a method of family building and the growing body of empirical research that demonstrates largely positive outcomes for surrogates, surrogate-born children and their families.⁶²

⁶⁰ In vitro fertilisation is defined as an established procedure that does not require approval, unless the procedure involves the use of a donated ovum in conjunction with donated sperm: Human Assisted Reproductive Technology Order 2005, schedule pt 2 cl 1(b). If the surrogate’s partner’s sperm is used, this is not considered “donated sperm” because the definition of donated sperm excludes sperm “contributed by the spouse or partner of the patient” and the patient is the surrogate (being the person who “is the subject of the procedure in which the eggs or sperm are used”): cl 3 (definitions of “donated sperm” and “patient”).

⁶¹ Advisory Committee on Assisted Reproductive Technology *ACART Advice and Guidelines for Gamete and Embryo Donation and Surrogacy* (June 2021) at recommendation 4A and [135]–[136].

⁶² See Ruth Walker and Liezl van Zyl “New Zealand’s Approach to International Surrogacy: An Ethical Perspective” in Annick Masselot and Rhonda Powell (eds) *Perspectives on Commercial Surrogacy in New Zealand: Ethics, Law, Policy*

5.50 However, our preliminary view is that surrogacy arrangements should continue to require prior, independent approval, for several reasons:

- (a) First, prior approval is a “proactive safeguard” that protects the rights and interests of all parties involved, including any resulting child.⁶³ It reduces the risk of problems arising during and after pregnancy by ensuring that a surrogacy arrangement only proceeds when all the protective requirements have been met.
- (b) Second, there appears to be strong public support for prior approval of surrogacy arrangements in Aotearoa New Zealand. In the Surrogacy Survey, most respondents (82 per cent) thought that there should be both medical and psychological screening by an ethics committee for surrogates, with a slightly smaller majority (70 per cent) also supporting screening for intended parents.⁶⁴
- (c) Third, prior approval is consistent with current international best practice.⁶⁵ The Verona Principles, published in 2021, advocate for “an established framework for pre-surrogacy arrangements which promotes the rights of children born of surrogacy”.⁶⁶ This framework should include screenings, multidisciplinary assessment, informed consent and reviews of those arrangements.⁶⁷ Also in 2021, Ireland’s Special Rapporteur on Child Protection recommended a prior approval model on the basis that it “offers strong protection for the rights of both children and adults”.⁶⁸ Prior approval is generally regarded as working well in most other jurisdictions where it is imposed.⁶⁹ In Victoria, a 2019 independent review found that the Patient Review

and Rights (Centre for Commercial & Corporate Law, Te Whare Wānanga o Waitaha | University of Canterbury, Christchurch, 2019) 97 at 113. Research on the impact of surrogacy is summarised in Chapter 2 of this Issues Paper.

⁶³ Conor O’Mahony *A Review of Children’s Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law* (Department of Children, Equality, Disability, Integration and Youth, Ireland, December 2020) at 16.

⁶⁴ Debra Wilson *Understanding the Experience and Perceptions of Surrogacy Through Empirical Research: Public Perceptions Survey* (Te Whare Wānanga o Waitaha | University of Canterbury, May 2020) vol 3 at 133 and 143.

⁶⁵ Prior, independent approval of a surrogacy arrangement is already a requirement in Victoria, Western Australia, Israel, South Africa and Greece. Draft legislation that seeks to introduce a requirement for prior approval has also been developed in Iceland, Ireland and Portugal (where legislation was passed but later declared unconstitutional for reasons discussed in Chapter 7 of this Issues Paper). See Jens M Scherpe, Claire Fenton-Glynn and Terry Kaan (eds) *Eastern and Western Perspectives on Surrogacy* (Intersentia, Cambridge (UK), 2019).

⁶⁶ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [5.1].

⁶⁷ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [5.1]. Similar recommendations were also made to the United Nations by a group of donor-conceived people: *International Principles for Donor Conception and Surrogacy* (November 2019), principle 2.

⁶⁸ Conor O’Mahony *A Review of Children’s Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law* (Department of Children, Equality, Disability, Integration and Youth, Ireland, December 2020) at 17. See also General Scheme of the Assisted Human Reproduction Bill 2017, head 37.

⁶⁹ See Rhona Schuz “Surrogacy in Israel” in Jens M Scherpe, Claire Fenton-Glynn and Terry Kaan (eds) *Eastern and Western Perspectives on Surrogacy* (Intersentia, Cambridge (UK), 2019) 165 at 183; Eleni Zervogianni “Surrogacy in Greece” in Jens M Scherpe, Claire Fenton-Glynn and Terry Kaan (eds) *Eastern and Western Perspectives on Surrogacy* (Intersentia, Cambridge (UK), 2019) 147 at 163; and Julia Sloth-Nielsen “Surrogacy in South Africa” in Jens M Scherpe, Claire Fenton-Glynn and Terry Kaan (eds) *Eastern and Western Perspectives on Surrogacy* (Intersentia, Cambridge (UK), 2019) 185 at 200. Compare with the findings of a review in Western Australia, which found that the current regulatory system for assisted reproductive technology in general was causing unnecessary regulatory burden and that the considerations relevant to surrogacy in particular did not present reason to form an alternative view: Sonia Allen *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008*

Panel (PRP) should “maintain an oversight role in approving surrogacy arrangements” but that this role should not require an investigative approach to reviewing applications. Unlike ECART, the PRP hears applications in person, and this was found to be confronting and stressful for people seeking approval.⁷⁰

- (d) Fourth, prior approval of surrogacy arrangements is preferable to the alternatives. It is generally considered a more effective form of regulation than post-birth regulation because it has the potential to prevent problems from arising in the first place rather than seeking to remedy any problems after the child has been born.⁷¹ We also think that prior approval is preferable over a co-regulation model under which fertility clinics are responsible for ensuring eligibility and screening requirements are complied with and for deciding whether to provide fertility services in a surrogacy arrangement.⁷² The fertility clinics and the medical specialists and counsellors employed by these clinics have an important relationship with parties in a surrogacy arrangement. Imposing on them an approval role would be an added responsibility that might impede their ability to maintain a supportive therapeutic relationship with their patients.⁷³ We also note that, in other jurisdictions, concerns have been raised about the potential conflict of interest that fertility clinics may have given their financial interest in the provision of fertility services.⁷⁴
- (e) Fifth, a robust prior approval process provides confidence that the surrogacy arrangement is in the best interests of the child. This negates the need for a comprehensive post-birth assessment of the child's best interests for the purposes

(Report: Part 1) (January 2019) at 81–82; and Sonia Allen *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008 (Report: Part 2)* (January 2019) at 66.

⁷⁰ Michael Gorton *Helping Victorians create families with assisted reproductive treatment: Final Report of the Independent Review of Assisted Reproductive Treatment* (Victorian Department of Health and Human Services, Melbourne, May 2019) at 138.

⁷¹ Debra Wilson “Avoiding the Public Policy and Human Rights Conflict in Regulating Surrogacy: The Potential Role of Ethics Committees in Determining Surrogacy Applications” (2017) 7 UC Irvine L Rev 653 at 655, 666 and 677; Conor O'Mahony *A Review of Children's Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law* (December 2020) at 17; and Claire Fenton-Glynn and Jens M Scherpe “Surrogacy in a Globalised World: Comparative Analysis and Thoughts on Regulation” in Jens M Scherpe, Claire Fenton-Glynn and Terry Kaan (eds) *Eastern and Western Perspectives on Surrogacy* (Intersentia, Cambridge (UK), 2019) 515 at 579.

⁷² A co-regulation model has been recommended in Western Australia, to replace the current requirement for prior approval by the Reproductive Technology Council, and in England, Wales and Scotland, to regulate non-profit surrogacy organisations that facilitate surrogacy arrangements: Sonia Allen *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008 (Report: Part 1)* (January 2019) at 81–82; Sonia Allen *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008 (Report: Part 2)* (January 2019) at 82–83; and Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: a new law – A joint consultation paper* (CP244/DP167, 2019), ch 9. Another model is proposed in Ruth Walker and Liezl van Zyl *Towards a Professional Model of Surrogate Motherhood* (Palgrave MacMillan, London, 2017). Under that model, surrogates and fertility clinics are licensed and registered by an independent regulatory body with responsibility for ensuring that legal and ethical standards are met.

⁷³ Similar concerns have been observed in Victoria, Australia, where counsellors have a role in reviewing the outcome of police checks: Michael Gorton *Review of assisted reproductive Treatment: Interim Report* (Victorian Department of Health and Human Services, Melbourne, October 2018) at 59–60.

⁷⁴ Legislative Council Standing Committee on Law and Justice *Legislation on altruistic surrogacy in NSW* (Report 38, 2009) at [4.62]–[4.67]; and South Australian Law Reform Institute *Surrogacy: A Legislative Framework – A Review of Part 2B of the Family Relationships Act 1975 (SA)* (Report 12, 2018) at [9.5.2] and [9.5.5].

of establishing legal parenthood.⁷⁵ In Chapter 7, we present our proposal to streamline the recognition of the intended parents as the legal parents of a surrogate-born child where ECART approval was obtained.

- 5.51 We have also considered whether prior approval should only be required in some cases but not for “straightforward” surrogacy arrangements. This would address concerns regarding cost, administrative burden and delay for some intended parents and would reduce the number of applications seeking approval. However, we think it would be difficult to determine what surrogacy arrangements should and should not be required to obtain prior approval. Each surrogacy arrangement is different and will present its own risks. Such an approach would also create a two-tier system for surrogacy arrangements, which might incentivise people to structure or describe their surrogacy arrangement in a certain way to avoid the need for prior approval.

Should ECART continue to have this approval function?

- 5.52 Our preliminary view is that ECART should continue to be responsible for approving surrogacy arrangements rather than establishing a new regulatory authority or replacing the ECART process with a court process, for the following reasons:
- (a) First, as noted above, the ECART process appears to have general support, and its track record to date suggests that very few surrogacy arrangements that go through the ECART process end in controversy or dispute.
 - (b) Second, ECART’s representative nature allows for the consideration of multiple perspectives, and its complementary functions, which include approving other forms of assisted reproductive procedures and informing ACART of emerging or potential issues, enable it to take a more holistic approach to common issues that might arise in assisted reproductive technology.⁷⁶
 - (c) Third, we think that any significant structural changes to the regulatory system (such as the creation of a new regulatory authority) should only be made following a wider review of how human assisted reproduction is regulated in Aotearoa New Zealand. This is beyond the scope of this review, which is limited to considering how surrogacy should be regulated.
- 5.53 For these reasons, our preference is to focus on improving the ECART process to address the issues identified above rather than replacing ECART with a different regulatory framework or approval body.

Options to improve the ECART process

- 5.54 An important guiding principle of our review is to encourage New Zealanders to enter surrogacy arrangements in Aotearoa New Zealand rather than offshore. To achieve this, the regulation of domestic surrogacy needs to be efficient and cost-effective, while still

⁷⁵ The Verona Principles state that, if there have *not* been adequate pre-surrogacy arrangements, a court or other competent authority needs to conduct a post-birth determination of the best interests of the child in proceedings concerning legal parentage and/or parental responsibility: International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [5.6].

⁷⁶ See Debra Wilson “Avoiding the Public Policy and Human Rights Conflict in Regulating Surrogacy: The Potential Role of Ethics Committees in Determining Surrogacy Applications” (2017) 7 UC Irvine L Rev 653 at 672.

protecting the rights and interests of all the parties involved and giving paramountcy to the child's best interests.

- 5.55 Possible options for improving the ECART process are identified below.

Increasing ECART's capacity to consider surrogacy applications

- 5.56 As noted above, ECART only meets every two months and is limited in the number of applications it can consider at each meeting. If ECART met more frequently or if it established a subcommittee that dealt solely with surrogacy arrangements, this could reduce the delay that some people experience. This would have obvious resourcing implications. Currently, ECART does not recover its costs from applicants, so additional public funding would be required. Nonetheless, this may be a necessary step to meet the increasing demand for surrogacy, especially if our proposal below to extend the ECART process to all surrogacy arrangements is accepted.

Reconsidering the parental suitability assessment in surrogacy arrangements

- 5.57 As we explain in Chapter 7, adoption and surrogacy are two different forms of family building that require separate legal frameworks. This calls into question whether intended parents' suitability to care for and raise the child should be assessed in the same way as prospective adoptive parents as is currently required. In 2005, the Commission considered that surrogacy arrangements are more similar to donor gamete conception or natural parenthood than adoption and that state assessment of parental suitability should not be required.⁷⁷ A similar view was reached by the Law Commission of England and Wales and the Scottish Law Commission in 2019.⁷⁸
- 5.58 However, some form of assessment as part of the ECART process may still be appropriate to safeguard the child's best interests and to ensure the state meets its obligations to take all appropriate measures to protect children from the future risk of harm under the United Nations Convention on the Rights of the Child.⁷⁹ The Verona Principles, published in 2021, recommend that pre-surrogacy arrangements include criminal background and child protection checks as well as "independent assessment of capacities to ensure the child's social, physical, emotional and educational well-being and development, and protection from harm".⁸⁰ Criminal record checks have been proposed by the Law Commission of England and Wales and the Scottish Law Commission.⁸¹ The

⁷⁷ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [7.72].

⁷⁸ Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: a new law – A joint consultation paper* (CP244/DP167, 2019) at [13.9].

⁷⁹ United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 19; and Committee on the Rights of the Child *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1) UN Doc CRC/C/GC/14 (29 May 2013) at [74].

⁸⁰ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [5.5]. See also Maud de Boer-Buquicchio *Report of the Special Rapporteur on the sale and sexual exploitation of children, including prostitution, child pornography and other child sexual abuse material* UN Doc A/HRC/37/60 (15 January 2018) at [77](f).

⁸¹ Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: a new law – A joint consultation paper* (CP244/DP167, 2019) at [13.69]–[13.72].

Australian Human Rights Commission has previously recommended that all Australian states and territories should include in surrogacy legislation criteria directed at parental suitability, to acknowledge the state's responsibility to ensure the safety and well-being of children in all cases where it regulates the transfer of parental responsibility.⁸²

- 5.59 We are interested in your views on what type of assessment of intended parents should be required in surrogacy arrangements and whether this role should continue to be performed by Oranga Tamariki. An alternative approach could be that the counsellor has a role in assessing parental suitability. However, a 2019 review in Victoria found that the “blending of counselling and screening functions” made it difficult for counsellors to build rapport with those involved in a surrogacy process and had an adverse effect on the therapeutic effectiveness of counselling.⁸³

Providing for an appeal or review process

- 5.60 Given the significance of a decision by ECART to decline an application, we are interested in your views about whether there is a need for an appeal or review process for applications that are declined by ECART. In Victoria, for example, legislation provides a process for decisions of the PRP not to approve a surrogacy arrangement to be reviewed by the Victorian Civil and Administrative Tribunal.⁸⁴ Alternatively, a review panel could be established to conduct an independent review of the application and ECART's decision.

Extending time for approvals

- 5.61 It may take a long time for a surrogate to become pregnant. The current time limits on ECART approval and Oranga Tamariki's in-principle approval can create further cost, administrative burden and delay in some circumstances. This could be avoided if the approval timeframes were extended, perhaps to five years, or were eliminated altogether provided the parties to the surrogacy arrangement do not change.

Other options to improve the ECART process

- 5.62 We have also identified other options for reform that could improve the general effectiveness of the ECART process and minimise the risk of problems arising during or after the surrogacy arrangement:

- (a) **Requiring surrogacy arrangements to be recorded in writing and signed by the parties.** Currently, the ECART application serves as a record of what the parties have discussed and agreed. There is some evidence, however, that more formal, non-

⁸² Australian Human Rights Commission *Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs: Inquiry into the Regulatory and Legislative Aspects of Surrogacy Arrangements* (17 February 2016) at [102]–[103].

⁸³ Michael Gorton *Helping Victorians create families with assisted reproductive treatment: Final Report of the Independent Review of Assisted Reproductive Treatment* (Victorian Department of Health and Human Services, Melbourne, May 2019) at 124 and 127. That review recommended that criminal record checks be undertaken by the fertility service provider rather than the counsellor, at R36. However, the Victorian Government subsequently removed the requirement for criminal record checks entirely to provide “easier and fairer access” to assisted reproductive treatment: Jenny Mikakos, Minister for Health, VIC “IVF now fairer and easier to access for all Victorians” (press release, 4 June 2020).

⁸⁴ Assisted Reproductive Treatment Act 2008 (Vic), s 96.

binding agreements are becoming more common.⁸⁵ A more formal agreement, signed by the parties and witnessed by their lawyers, might provide greater certainty, minimise the risk of disagreement and assist the parties to resolve any problems.⁸⁶ Several intended parents told us that they had written agreements with their surrogate even though they understood these were unenforceable. One intended parent, who did not go through the ECART process, told us that going through the process of preparing the agreement was “useful as a tool for building unison between the parties”.

- (b) **Improving counselling requirements.** We are interested in views on whether counselling requirements could be improved for the period during and after the surrogacy arrangement. The ACART Guidelines provide comprehensive guidance on counselling requirements. However, two surrogates we spoke with in initial consultation thought that counselling should focus more on post-birth care and support for the surrogate, which may be difficult to consider in detail before pregnancy is established. One fertility clinic counsellor we spoke with said that, while they offer further counselling during the surrogacy arrangement, uptake varies. In some Australian states, additional counselling must take place following the birth of the child.⁸⁷ This is seen as providing a valuable opportunity to provide emotional and psychological support to the surrogate and can help ensure that the transfer of legal parenthood from the surrogate to the intended parents is underpinned by the surrogate’s informed consent.⁸⁸ We discuss legal parenthood in Chapter 7.
- (c) **Modifying the membership of ECART.** ECART is not required to have a member with the ability to articulate the interests of children, unlike ACART.⁸⁹ This requirement might be considered appropriate, especially if our proposals in Chapter 7 are adopted.⁹⁰ Under those proposals, ECART approval would be a key condition for recognising intended parents as the child’s legal parents after birth. Some fertility clinic representatives and intended parents have also expressed a view that ECART should include counsellors with expertise in surrogacy arrangements and possibly a

⁸⁵ Debra Wilson “The Emerging Picture of the Role Played by Surrogacy Contracts in New Zealand” in Annick Masselot and Rhonda Powell (eds) *Perspectives on Commercial Surrogacy in New Zealand: Ethics, Law, Policy and Rights* (Centre for Commercial & Corporate Law, Te Whare Wānanga o Waitaha | University of Canterbury, Christchurch, 2019) 153 at 153 and 165. A survey of lawyers asked whether they advise clients to enter some form of written arrangement. Forty-one lawyers answered this question, 29 responded yes, six responded no and six said “nothing as formal as a written agreement”.

⁸⁶ Wilson argues that the process of creating a surrogacy arrangement brings an element of counselling that might not otherwise be there, can make the relationship more personal and can act as a reality check: Debra Wilson “The Emerging Picture of the Role Played by Surrogacy Contracts in New Zealand” in Annick Masselot and Rhonda Powell (eds) *Perspectives on Commercial Surrogacy in New Zealand: Ethics, Law, Policy and Rights* (Centre for Commercial & Corporate Law, Te Whare Wānanga o Waitaha | University of Canterbury, Christchurch, 2019) 153 at 179–180.

⁸⁷ Surrogacy Act 2012 (Tas), s 16; Surrogacy Act 2010 (NSW), s 35; Surrogacy Act 2010 (Qld), s 32; and Surrogacy Act 2008 (WA), s 21.

⁸⁸ Michael Gorton *Helping Victorians create families with assisted reproductive treatment: Final Report of the Independent Review of Assisted Reproductive Treatment* (Victorian Department of Health and Human Services, Melbourne, May 2019) at 123.

⁸⁹ Human Assisted Reproduction Technology Act 2004, s 34(4)(g).

⁹⁰ See Debra Wilson “Avoiding the Public Policy and Human Rights Conflict in Regulating Surrogacy: The Potential Role of Ethics Committees in Determining Surrogacy Applications” (2017) 7 UC Irvine L Rev 653 at 676.

greater number of medical professionals with expertise in obstetrics and gynaecology.

- (d) **Improving monitoring and reporting on outcomes.** ECART has a statutory role in monitoring surrogacy arrangements.⁹¹ However, in practice, there is little oversight once ECART approval is given unless a significant change in circumstances is reported to ECART. Fertility clinics themselves may not be involved in a surrogacy arrangement after the pregnancy is established. We are interested in views on whether there are ways that ECART's ongoing monitoring role could be strengthened. For example, it could ask intended parents and surrogates to provide feedback on their surrogacy experience, which could then help ECART to identify ways to improve its processes and liaise with ACART on any matters relating to the ACART Guidelines that arise.⁹²

Extending the ECART process to all surrogacy arrangements

5.63 We think that the ECART process should be available to all surrogacy arrangements in Aotearoa New Zealand. Specifically, we think that:

- (a) all gestational surrogacy arrangements should require ECART approval, regardless of who provides the gametes; and
- (b) parties to a traditional surrogacy arrangement should be able to apply to ECART for approval.

5.64 Unlike gestational surrogacy, traditional surrogacy can be arranged privately, and conception can be achieved without clinic assistance. This means that a mandatory requirement for traditional surrogacy arrangements to obtain ECART approval would be difficult to enforce. It could also have the undesired effect of driving traditional surrogacy arrangements underground.⁹³

5.65 For these reasons, we think that the better approach is to incentivise people considering a traditional surrogacy arrangement to utilise the ECART process and the protections it provides rather than attempting to make it mandatory. We think our proposal in Chapter 7 to streamline the recognition of the intended parents as the legal parents of a surrogate-born child where ECART approval was obtained would provide a clear incentive to utilise the ECART process in a traditional surrogacy arrangement. Our proposals in Chapter 10 to improve the availability of information about surrogacy should also promote the benefits of the ECART process to those considering traditional surrogacy.

5.66 There are two options for enabling people considering a traditional surrogacy arrangement to utilise the ECART process.

⁹¹ Human Assisted Reproductive Technology Act 2004, s 28(1)(b).

⁹² Consistent with its function under s 28(1)(c) of the Human Assisted Reproductive Technology Act 2004.

⁹³ Michael Gorton *Helping Victorians create families with assisted reproductive treatment: Final Report of the Independent Review of Assisted Reproductive Treatment* (Victorian Department of Health and Human Services, Melbourne, May 2019) at 121–122.

Option 1: Require all clinic-assisted surrogacy arrangements to obtain ECART approval

- 5.67 ECART approval could be required for all clinic-assisted surrogacy arrangements, including clinic-assisted traditional surrogacy arrangements. This option already has broad support, including from ACART and ECART. In June 2021, ACART published its advice to the Minister of Health recommending that all clinic-assisted surrogacies be subject to ECART approval.⁹⁴ The recommendation was made following two rounds of public consultation on the proposal, which received general support from submitters.⁹⁵ A similar recommendation was made in Victoria in 2019 to ensure that all surrogacy arrangements through a fertility clinic are subject to appropriate oversight.⁹⁶
- 5.68 ACART's view was that all surrogacies can be ethically complex and ECART's oversight would "be an ideal way of managing the risks associated with surrogacy".⁹⁷ ACART acknowledged the risk that this might delay people's treatment and cause them stress, and as a result, some people might choose not to go through fertility clinics.⁹⁸
- 5.69 ACART noted that, in practice, clinics already tend to refer all clinic-assisted surrogacies to ECART for review (including traditional surrogacy arrangements for non-binding ethical advice), so it did not think the change would make more work for ECART and clinics.⁹⁹ However, our proposals in Chapter 7 may have a different impact. As noted above, we think that people considering a traditional surrogacy arrangement should be incentivised to utilise the ECART process. If our proposals in Chapter 7 achieve this goal, this could result in a significant increase in the number of people seeking the services of fertility clinics for traditional surrogacy arrangements.
- 5.70 It is unclear how many traditional surrogacies are arranged outside fertility clinics. The most recent statistics provided by Oranga Tamariki for the year ended 30 June 2021 report that 10 of the 22 social worker reports provided to the Family Court as part of the adoption process were for traditional surrogacy arrangements.¹⁰⁰

Option 2: Enable people to apply directly to ECART

- 5.71 Because some traditional surrogacy arrangements are not facilitated by a fertility clinic, another option is to enable people to apply directly to ECART for approval without involving a fertility clinic. This could make the ECART process more accessible, thereby

⁹⁴ Advisory Committee on Assisted Reproductive Technology *ACART Advice and Guidelines for Gamete and Embryo Donation and Surrogacy* (June 2021) at [2] and [9].

⁹⁵ Advisory Committee on Assisted Reproductive Technology *ACART Advice and Guidelines for Gamete and Embryo Donation and Surrogacy* (June 2021) at [140]–[142]. Thirty-four submissions were received across two rounds of consultation (in 2017 and 2019), and of those, 31 supported the proposal and three opposed it.

⁹⁶ Michael Gorton *Helping Victorians create families with assisted reproductive treatment: Final Report of the Independent Review of Assisted Reproductive Treatment* (Victorian Department of Health and Human Services, Melbourne, May 2019) at 121–122.

⁹⁷ Advisory Committee on Assisted Reproductive Technology *ACART Advice and Guidelines for Gamete and Embryo Donation and Surrogacy* (June 2021) at [135] and [138].

⁹⁸ Advisory Committee on Assisted Reproductive Technology *ACART Advice and Guidelines for Gamete and Embryo Donation and Surrogacy* (June 2021) at [139].

⁹⁹ Advisory Committee on Assisted Reproductive Technology *ACART Advice and Guidelines for Gamete and Embryo Donation and Surrogacy* (June 2021) at [139].

¹⁰⁰ Email from Oranga Tamariki | Ministry of Children to Te Aka Matua o te Ture | Law Commission regarding domestic and international surrogacy data (16 July 2021).

extending the protective framework to more people. It may also reduce some of the financial cost to intended parents as they wouldn't have to pay a fertility clinic to make the application for them.

- 5.72 However, this option would present a significant departure from the way the current regulatory system operates. It could significantly increase ECART's workload, not only in terms of the number of applications it receives but also in terms of its administration of the application process. Currently, there are only three fertility clinics in Aotearoa New Zealand that make applications to ECART, each of which is experienced in the process and its requirements. Permitting applicants to apply directly to ECART would have implications for ECART's resourcing and funding. It might also be difficult for applicants to arrange the necessary counselling, as often counsellors with experience in surrogacy arrangements are linked to one of the three fertility clinics. Safeguards would also need to be put in place to ensure that ECART is given full and complete information (for example, lawyers, counsellors and medical experts could be required to submit their reports directly to ECART).

QUESTIONS

- Q9** Do you agree with the issues we have identified with the approval process for surrogacy arrangements? Are there other issues we should consider?
- Q10** Do you agree with our preliminary view that gestational surrogacy arrangements should continue to require ECART approval? If not, please explain your views.
- Q11** Which options to improve the ECART process do you prefer? Are there other changes that should be made?
- Q12** Do you agree with our preliminary view that parties to a traditional surrogacy arrangement should be able to access the same ECART process as parties to a gestational surrogacy arrangement?
- Q13** Do you prefer Option 1 or Option 2 to enable parties in a traditional surrogacy arrangement to access the ECART process, or is there another option we should consider?

CHAPTER 6

Financial support for surrogates

IN THIS CHAPTER, WE CONSIDER:

- the financial support available to surrogates in Aotearoa New Zealand; and
- issues with the current law and options for reform.

THE CURRENT LAW

Payments to surrogates

- 6.1 Section 14 of the Human Assisted Reproductive Technology Act 2004 (HART Act) addresses the legality of making payments in a surrogacy arrangement.
- 6.2 Section 14(3) provides that any exchange of “valuable consideration” for a person’s participation in a surrogacy arrangement is prohibited. A breach of section 14(3) is punishable by imprisonment for a term not exceeding one year or a fine not exceeding \$100,000 or both.¹
- 6.3 This means that it is illegal for intended parents to give and surrogates to receive “valuable consideration”.
- 6.4 Payment of a narrow range of costs is expressly permitted under section 14(4) but only:
- (a) to the provider concerned for any reasonable and necessary expenses incurred for:
 - (i) collecting, storing, transporting or using a human embryo or human gamete;
 - (ii) counselling one or more parties in relation to the surrogacy agreement;
 - (iii) insemination or in vitro fertilisation;
 - (iv) ovulation or pregnancy tests; and
 - (b) to a legal adviser for providing independent legal advice to the surrogate.

¹ Human Assisted Reproductive Technology Act 2004, s 14(5).

- 6.5 The HART Act does not make provision for any payments to the surrogate, including for any other costs that might be incurred by the surrogate because of the surrogacy arrangement.

What does the prohibition on “valuable consideration” mean?

- 6.6 The meaning of “valuable consideration” is unclear. It is not comprehensively defined in the HART Act, but it includes “an inducement, discount, or priority in the provision of a service”.²
- 6.7 There is limited case law on the meaning of valuable consideration in the context of the HART Act,³ and to our knowledge, no one has ever been prosecuted under section 14.
- 6.8 By criminalising the exchange of valuable consideration, Parliament sought to prohibit commercial surrogacy in Aotearoa New Zealand.⁴ Beyond that, however, the legislative history reveals little attention was given to this provision.
- 6.9 It does not appear that section 14(3) was intended to prevent the payment of the surrogate’s reasonable expenses incurred as a result of a surrogacy arrangement. For example, in 2002, the Minister of Health confirmed that intended parents should continue to be able to pay a surrogate’s “necessary expenses” related to pregnancy and childbirth under the proposed legislation on assisted human reproduction.⁵ This would have continued the existing approach established in draft guidelines issued in 1997 by the National Ethics Committee on Assisted Human Reproduction.⁶ It is unclear why the HART Act does not expressly permit payment of a surrogate’s reasonable expenses.

Does section 14 apply to international surrogacy arrangements?

- 6.10 Section 14 and the prohibition on the exchange of valuable consideration is considered to have no extraterritorial effect.⁷ This means that New Zealanders can pursue a commercial

² Human Assisted Reproductive Technology Act 2004, s 5 (definition of “valuable consideration”).

³ Only three cases refer to s 14: *Re an application by BWS to adopt a child* [2011] NZFLR 621 (FC); *Re an application to adopt a child by SCR and MCR* [2012] NZFC 5466; and *Re an application to adopt a child, Kennedy* [2014] NZFC 2526, [2014] NZFLR 797.

⁴ The heading of s 14 refers to “prohibition of commercial surrogacy arrangements”, and s 14 has been interpreted as prohibiting commercial surrogacy in *Re an application to adopt a child by SCR and MCR* [2012] NZFC 5466 at [59]; and *Re an application to adopt a child, Kennedy* [2014] NZFC 2526, [2014] NZFLR 797 at [34]. See also Human Assisted Reproductive Technology Bill 2004 (195-2) (select committee report) at 12.

⁵ Ministries of Justice and Health briefing to Minister of Health “Policy Decisions Required for HART SOP” (1 Nov 2002) at (j) including annotations by Minister of Health (Obtained under Official Information Act 1982 Request to the Ministry of Justice) as cited in Betty-Ann Kelly “Compensation for Surrogates: Doing Public Policy” in Annick Masselot and Rhonda Powell (eds) *Perspectives on Commercial Surrogacy in New Zealand: Ethics, Law, Policy and Rights* (Centre for Commercial & Corporate Law, Te Whare Wānanga o Waitaha | University of Canterbury, Christchurch, 2019) 25 at 32, n 33.

⁶ The guidelines were to remain in draft until legislation on assisted human reproduction was enacted: National Ethics Committee on Assisted Human Reproduction *Annual Report to the Minister of Health for the year ending 31 December 2001* (June 2002) at 3 and Appendix 5: Draft guidelines for non-commercial surrogacy using IVF as treatment.

⁷ See Debra Wilson “Surrogacy in New Zealand” [2016] NZLJ 401 at 409; and Alison Douglass and Michael Legge “Regulating Surrogacy in New Zealand: Evolving Policy and Cautious Liberalism under the HART Act” in Annick Masselot and Rhonda Powell (eds) *Perspectives on Commercial Surrogacy in New Zealand: Ethics, Law, Policy and Rights* (Centre for Commercial & Corporate Law, Te Whare Wānanga o Waitaha | University of Canterbury, Christchurch, 2019) 1 at 18–19.

surrogacy arrangement offshore in a jurisdiction where the exchange of valuable consideration is legal. International surrogacy arrangements are discussed in Chapter 9.

Availability of parental leave and parental leave payments

- 6.11 The Parental Leave and Employment Protection Act 1987 does not expressly provide for surrogacy arrangements. Whether surrogates and intended parents are entitled to take parental leave from their employment and to receive parental leave payments from the government therefore depends on how the Act's provisions are interpreted in the context of surrogacy.
- 6.12 Under the Parental Leave and Employment Protection Act, a “primary carer” can be eligible for parental leave⁸ and parental leave payments⁹ depending on certain employment thresholds being met.
- 6.13 An intended parent would qualify for parental leave and parental leave payments as they would satisfy the definition of primary carer (a person “who takes permanent primary responsibility for the care, development, and upbringing of a child”).¹⁰
- 6.14 It is unclear whether a surrogate can also qualify for parental leave and parental leave payments. One possible interpretation is that both the surrogate and an intended parent can qualify, as the definition of primary carer also includes the person who is pregnant or has given birth.¹¹ However, Te Tare Taake | Inland Revenue guidance suggests that paid parental leave is only available “[i]f you take time off work to care for your baby or a child who has come into your care”.¹² As the intended parents will typically care for the child from birth, they qualify, but some suggest the surrogate does not.¹³
- 6.15 A surrogate would, however, qualify for taking up to 10 days’ unpaid special leave for reasons connected to the pregnancy, as this entitlement applies to any “female employee who is pregnant”.¹⁴

⁸ Parental Leave and Employment Protection Act 1987, pt 1 provides for primary carer leave of up to 26 weeks, and pt 3 provides for extended leave of up to 52 weeks, including primary carer leave taken. We refer to both as “parental leave” in this chapter.

⁹ Parental Leave and Employment Protection Act 1987, pt 7A.

¹⁰ Parental Leave and Employment Protection Act 1987, s 7 (1)(c). See also *Bell v Ministry of Business, Innovation and Employment* [2013] NZERA Wellington 68 at [23].

¹¹ Parental Leave and Employment Protection Act 1987, s 7(1)(a). We note that this reference refers to the female who is pregnant or has given birth as the “biological mother”. However, guidance from the Employment New Zealand website does not mention the “biological” requirement when describing what primary carer means and only refers to a woman who is pregnant or who has given birth: See Employment New Zealand “Parental Leave and Payment Eligibility table” <www.employment.govt.nz> at 2; and Employment New Zealand “Parental leave eligibility” <www.employment.govt.nz>. Our view is that the use of the term “biological mother” does not exclude gestational surrogates who are not the child’s genetic parent, but this interpretation remains a possibility.

¹² Te Tare Taake | Inland Revenue “Who can get paid parental leave” <www.ird.govt.nz>.

¹³ See Annick Masselot and Ira Schelp “Parental Leave and Surrogacy: Caring is Everything” in Annick Masselot and Rhonda Powell (eds) *Perspectives on Commercial Surrogacy in New Zealand: Ethics, Law, Policy and Rights* (Centre for Commercial & Corporate Law, Te Whare Wānanga o Waitaha | University of Canterbury, Christchurch, 2019) 137 at 147. See also Anthony Drake “Surrogacy – who gets what?” (20 June 2018) Wyn Williams <www.wynnwilliams.co.nz>.

¹⁴ Parental Leave and Employment Protection Act 1987, s 15.

- 6.16 It does not appear that a surrogate's partner would be entitled to take partner's leave from employment, because this is only available if the partner "assumes or intends to assume responsibility for the care of that child".¹⁵

ISSUES

- 6.17 The current law is unclear about what financial support intended parents can provide to surrogates and what government support (in the form of parental leave and parental payments) is available to surrogates. This may leave surrogates out of pocket, may create barriers for women considering becoming surrogates in Aotearoa New Zealand and may place unnecessary stress on the parties in the surrogacy arrangement.

The current law is uncertain

Uncertainty around costs intended parents can cover

- 6.18 The prohibition on the exchange of valuable consideration, alongside the narrow range of payments expressly permitted under section 14(4), creates uncertainty around what costs intended parents can cover.
- 6.19 This uncertainty is evidenced in a range of different contexts:
- (a) There is no agreement among academics as to what the legal position is. Views range from section 14 being "frequently understood to mean that a surrogate can be given reasonable expenses"¹⁶ to "[p]ayments to the surrogate for her reasonable expenses are not permitted".¹⁷
 - (b) The Ethics Committee on Assisted Reproductive Technology (ECART) and the Advisory Committee on Assisted Reproductive Technology (ACART) have previously disagreed on what costs can be met under section 14.¹⁸ The primary example is whether life insurance premiums on policies for surrogates can be paid by the intended parents. In 2007, ECART took the view that payments for life insurance could be met by the intended parents,¹⁹ but ACART then advised ECART that its view, based on legal advice, was that this contravened section 14.²⁰ ACART considered that a change to the HART Act was necessary to allow intended parents to pay for

¹⁵ Parental Leave and Employment Protection Act 1987, s 17(1)(a).

¹⁶ Alison Douglass and Michael Legge "Regulating Surrogacy in New Zealand: Evolving Policy and Cautious Liberalism under the HART Act" in Annick Masselot and Rhonda Powell (eds) *Perspectives on Commercial Surrogacy in New Zealand: Ethics, Law, Policy and Rights* (Centre for Commercial & Corporate Law, Te Whare Wānanga o Waitaha | University of Canterbury, Christchurch, 2019) 1 at 17.

¹⁷ Rhonda Powell "Exploitation of Surrogate Mothers in New Zealand" in Annick Masselot and Rhonda Powell (eds) *Perspectives on Commercial Surrogacy in New Zealand: Ethics, Law, Policy and Rights* (Centre for Commercial & Corporate Law, Te Whare Wānanga o Waitaha | University of Canterbury, Christchurch, 2019) 57 at 57. See also Debra Wilson "Reflecting on surrogacy: perspectives of family lawyers" (2018) 9 NZFLJ 67 at 67 and 71.

¹⁸ The roles of these committees are described in Chapter 5 of this Issues Paper.

¹⁹ Ethics Committee on Assisted Reproductive Technology minutes of 26 July 2007 at [4] (application E07/14).

²⁰ Ethics Committee on Assisted Reproductive Technology minutes of 20 November 2007 at [16]; and Advisory Committee on Assisted Reproductive Technology minutes of 14 September 2007 at [11(iv)].

life insurance for the surrogate.²¹ ECART also sought legal advice on the matter,²² and a consensus appears to have been reached,²³ with ECART continuing to consider applications where intended parents put life insurance in place for the surrogate.²⁴ Regardless, the contrary views illustrate the uncertainty inherent in the current law.

- (c) The ACART Guidelines²⁵ do not address what costs can be met by intended parents. On occasion, ECART has approved applications involving, or has recommended the parties consider, payments for income protection insurance,²⁶ disability insurance²⁷ and health insurance.²⁸ On one occasion, ECART approved an application in which intended parents had established an independent bank account for the surrogate to claim pregnancy-related expenses.²⁹ Dr Ruth Walker and Dr Liesl van Zyl observed that, in practice, it appears that ECART's emphasis "is on what the payment is for, rather than who receives it, and that an expansive interpretation of s 14 is the custom".³⁰
- (d) Despite potentially falling outside of ECART's remit, guidance has been sought from ECART on what payments or benefits are permissible under section 14, indicating uncertainty about what is permitted under the law.³¹

6.20 The Surrogacy Survey also indicated uncertainty in the wider community. Many respondents believed that the current law allows for more reimbursement of the surrogate's costs than is explicitly permitted under the HART Act.³² Only five per cent of respondents thought the surrogate could not receive any money, while 19 per cent

²¹ Advisory Committee on Assisted Reproductive Technology minutes of 14 December 2007 at [14(iv)].

²² Ethics Committee on Assisted Reproductive Technology minutes of 20 November 2007 at [16]; Advisory Committee on Assisted Reproductive Technology minutes of 14 September 2007 at [11(iv)]; and Ethics Committee on Assisted Reproductive Technology minutes of 26 April 2018 (Correspondence).

²³ At a joint meeting between ECART and ACART in March 2008, payment for life insurance by intended parents was discussed, and ACART noted an "agreed process for resolution" in its next meeting: Ethics Committee on Assisted Reproductive Technology minutes of 11 March 2008 at [9]; and Advisory Committee on Assisted Reproductive Technology minutes of 14 March 2008 at [11(ii)].

²⁴ See, for example, Ethics Committee on Assisted Reproductive Technology minutes of 11 February 2021 at [5] (application E21/002).

²⁵ Advisory Committee on Assisted Reproductive Technology *Guidelines for family gamete donation, embryo donation, the use of donated eggs with donated sperm and clinic assisted surrogacy* (September 2020).

²⁶ See Ethics Committee on Assisted Reproductive Technology minutes of 18 September 2014 at [7] (application E14/151); 30 July 2015 at [5] (application E15/62); 3 March 2016 at [10] (application E16/14); and 3 November 2016 at [15] (application E16/96).

²⁷ See Ethics Committee on Assisted Reproductive Technology minutes of 3 March 2016 at [10] (application E16/14).

²⁸ See Ethics Committee on Assisted Reproductive Technology minutes of 3 December 2015 at [4] (application E15/108); and Ethics Committee on Assisted Reproductive Technology minutes of 12 June 2018 at [26] (application E18/59).

²⁹ Ethics Committee on Assisted Reproductive Technology minutes of 30 May 2013 at [9] (application E13/16).

³⁰ Ruth Walker and Liesl van Zyl "Surrogacy and the law: three perspectives" (2020) 10 NZFLJ 9 at 10.

³¹ Advice has been sought in the past from a fertility clinic on the payment of travel costs to attend medical appointments and from Child, Youth and Family on what constitutes "reasonable expenses" in surrogacy: Ethics Committee on Assisted Reproductive Technology minutes of 10 May 2012 at [13] (Correspondence); and 27 September 2012 at [14] (Correspondence).

³² Debra Wilson *Understanding the Experience and Perceptions of Surrogacy Through Empirical Research: Public Perceptions Survey* (Te Whare Wānanga o Waitaha | University of Canterbury, May 2020) vol 3 at 15.

thought general expenses (maternity clothes, supplements etc) could be paid for and 17 per cent thought loss of income could be paid for.

- 6.21 Uncertainty was also evident in our initial consultation with intended parents, surrogates, fertility clinics and lawyers. Intended parents and surrogates told us that they received different advice on what they can and cannot do. Lawyers were equally unclear on what section 14 means. One lawyer with significant experience advising on surrogacy arrangements told us:

It's hard to know what valuable consideration actually means. For most people it seems to come down to whether a fee is paid but there are different views. For instance, some people think that it covers maternity clothes and reimbursement for expenses but that is all. There's a risk of putting so much into the meaning of the words you start to wonder what they actually mean. At the end of the day, if you're not going to allow commercial surrogacy you need to be clear about what you do allow.

Impact of uncertainty on the parties' relationships

- 6.22 The uncertainty in the current law may place unnecessary stress on the relationship between intended parents and surrogates.
- 6.23 While intended parents may want to support their surrogate, they might feel they need to opt for a conservative approach for fear that, if they are discovered breaking the law, they could be prosecuted and their application to adopt any resulting child could be affected. This concern was evident in our initial consultations. One intended parent described how he and his husband constantly thought about what could happen if they paid their surrogate or reimbursed her for expenses and she ended up deciding she wanted to keep the child. They were concerned she could claim they broke the law by paying or reimbursing her, which they feared could mean they would not be able to proceed with an adoption and they could be convicted of committing a criminal offence.
- 6.24 This leaves surrogates financially vulnerable. Several surrogates we spoke with told us they felt uncomfortable about asking intended parents for things they needed during pregnancy. One surrogate said that having a lawyer say that the intended parents could not purchase maternity clothing or pre-natal vitamins "made things difficult". Another surrogate we spoke with had a difficult pregnancy so the intended parents started paying for a household cleaner. However, neither the intended parents nor the surrogate and her partner felt it was appropriate for any further support to be provided. They had been told by their fertility clinic that any payments or spending would need to be reported to ECART.
- 6.25 A fertility clinic representative we spoke with mentioned one surrogacy arrangement where the relationship between the surrogate, her partner and the intended parents soured significantly due to the costs incurred by the surrogate and her family when the surrogate had to take time off work due to the pregnancy.

Impact of uncertainty in relation to parental leave and parental leave payments

- 6.26 In addition to uncertainty under the HART Act, the law in relation to parental leave and parental leave payments is also uncertain. It is unclear to intended parents and surrogates what government support is available, which in turn makes it difficult to quantify the impact of the surrogacy arrangement on the surrogate and her family. This was evident

in our initial consultation, with surrogates and intended parents expressing confusion as to what their entitlements were under the current law.

- 6.27 The current uncertainty leaves surrogates in a vulnerable position. Their medical needs and physical recovery may be overlooked if they are treated differently to other birthing parents.³³

The current law may leave surrogates out of pocket

- 6.28 The uncertainty caused by the current law means that surrogates and their families might not be properly reimbursed for all the costs they incur because of the surrogacy arrangement.

- 6.29 This was a strong theme in our initial consultation with intended parents, surrogates and surrogates' partners. One surrogate's partner told us that a factor in choosing a lawyer and a counsellor was how far they would have to travel for appointments as they were told that they could not be reimbursed for time and money spent travelling. That partner also said "when you're pregnant, you generally spend more" on lots of things, including food, vitamins, clothing and travel.

- 6.30 Intended parents often said they wished they were able to provide more financial support to their surrogate. One intended parent told us:

No surrogate should be having to be out of pocket because she's doing this, and that includes being out of pocket for her children. You should pay for all the things you would have been paying for if you were pregnant. It's not difficult. The things you should be paying for are really obvious.

- 6.31 The law in Aotearoa New Zealand is out of step with comparable jurisdictions, where there is usually a clear statement that the payment of reasonable costs is permitted. This is often interpreted in line with the general proposition that provision for expenses should ensure "the surrogate neither gains financially from the pregnancy in any real sense, nor is left to incur the costs related to it".³⁴

The current law creates barriers for women considering becoming surrogates in Aotearoa New Zealand

- 6.32 The uncertainty surrounding the payment of costs and parental leave entitlements, as well as the prohibition on the payment of valuable consideration, creates barriers for women considering becoming surrogates in Aotearoa New Zealand. One fertility clinic representative we spoke with in initial consultation said that the current law makes it close to impossible to find people willing to be surrogates outside of family members and close friends.

³³ See discussion in Annick Masselot and Ira Schelp "Parental Leave and Surrogacy: Caring is Everything" in Annick Masselot and Rhonda Powell (eds) *Perspectives on Commercial Surrogacy in New Zealand: Ethics, Law, Policy and Rights* (Centre for Commercial & Corporate Law, Te Whare Wānanga o Waitaha | University of Canterbury, Christchurch, 2019) 137 at 147–148.

³⁴ Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: a new law – A joint consultation paper* (CP244/DP167, 2019) at [14.9]. See also South Australian Law Reform Institute *Surrogacy: A Legislative Framework – A Review of Part 2B of the Family Relationships Act 1975 (SA)* (Report 12, 2018), R52.

- 6.33 These issues have also “served to drive intended parents to resort to [international] commercial surrogacy”.³⁵ This was reflected in our initial consultations with intended parents who had pursued international surrogacy. Some intended parents told us that the prohibition on commercial surrogacy in Aotearoa New Zealand, uncertainty around the payment of costs and the consequential impact these factors have on women considering becoming surrogates were factors in their decision to pursue commercial surrogacy offshore.

OPTIONS FOR REFORM

- 6.34 We do not think the current law relating to financial support for surrogates is meeting the needs and expectations of New Zealanders or protecting and promoting the rights and interests of people involved in surrogacy arrangements.
- 6.35 Below we consider three different options for reform:
- (a) **Option 1:** Clarify and expand the list of costs that can be paid in surrogacy.
 - (b) **Option 2:** Clarify the law with respect to surrogates’ entitlements to post-birth recovery leave and payments.
 - (c) **Option 3:** Permit intended parents to pay surrogates a fee.
- 6.36 Our preliminary view is to support Options 1 and 2 but not Option 3. However, these are preliminary views only and we are interested in hearing your views.

Option 1: Clarify and expand the list of costs that can be paid in surrogacy

- 6.37 We think that the law should clarify that intended parents are able to pay or reimburse a surrogate’s reasonable costs in relation to a surrogacy arrangement.
- 6.38 We also think that the law should provide clear guidance on what constitutes reasonable costs by setting out categories of permitted costs that can be paid or reimbursed.
- 6.39 We consider that this option will:
- (a) provide greater certainty about what support intended parents can provide their surrogate and a clear, structured process for the parties to follow;
 - (b) reduce barriers for women considering becoming a surrogate in Aotearoa New Zealand and support intended parents to enter surrogacy arrangements in Aotearoa New Zealand rather than offshore, as surrogates would not be left financially disadvantaged by the arrangement;
 - (c) likely receive broad support as it is consistent with the views expressed by people we spoke with during our initial consultation, with previous attempts to reform the

³⁵ Rhonda Powell “Exploitation of Surrogate Mothers in New Zealand” in Annick Masselot and Rhonda Powell (eds) *Perspectives on Commercial Surrogacy in New Zealand: Ethics, Law, Policy and Rights* (Centre for Commercial & Corporate Law, Te Whare Wānanga o Waitaha | University of Canterbury, Christchurch, 2019) 57 at 73–74. See also Debra Wilson and Julia Carrington “Commercialising Reproduction: In Search of a Logical Distinction between Commercial, Compensated, and Paid Surrogacy Arrangements” (2015) 21 NZBLQ 178 at 182.

HART Act³⁶ and with the results of the Surrogacy Survey, which found that, of respondents who thought domestic surrogacy should be legal, 61 per cent supported the surrogate being paid for actual expenses only, 31 per cent supported the surrogate being paid for her time and service and seven per cent thought that the surrogate should receive no money;³⁷ and

- (d) align with the approach taken in Australia³⁸ and Canada,³⁹ where a more specific list of costs is provided for in legislation, and with the approach being considered in England, Wales and Scotland⁴⁰ as well as in Ireland.⁴¹

What categories of permitted costs should be provided for?

- 6.40 We think that legislation should prescribe categories of permitted costs. This would set the parameters of the surrogate's costs that can be covered under any surrogacy arrangement.
- 6.41 There would be no legal obligation to reimburse or pay for some or all permitted costs. Rather, intended parents and surrogates should be able to make their own agreement as to which permitted costs the intended parents will pay for.
- 6.42 Table 2 below compares the categories of permitted costs explicitly provided for in legislation in Australia and Canada.

³⁶ Improving Arrangements for Surrogacy Bill 2021 (undrawn Member's Bill, Tāmami Coffey MP), cl 6; Petition of Christian John Newman "Update the Adoption Act 1955 to simplify and speed up the process for adoption" (2017/409, presented to Parliament 3 October 2019); and Care of Children (Adoption and Surrogacy Law Reform) Amendment Bill 2012 (undrawn Member's Bill, Kevin Hague MP), cl 220.

³⁷ Debra Wilson *Understanding the Experience and Perceptions of Surrogacy Through Empirical Research: Public Perceptions Survey* (Te Whare Wānanga o Waitaha | University of Canterbury, May 2020) vol 3 at 64. Figures are rounded to the nearest percentage point.

³⁸ Surrogacy Act 2010 (NSW), s 7; Assisted Reproductive Treatment Regulations 2019 (Vic), reg 11; Surrogacy Act 2010 (Qld), s 11; Surrogacy Act 2008 (WA), s 6; Surrogacy Act 2019 (SA), s 11; and Surrogacy Act 2012 (Tas), s 9. Legislation in Australian Capital Territory simply allows the payment of expenses connected with a pregnancy agreement or the birth or care of a child born as a result of that pregnancy: Parentage Act 2004 (ACT), ss 40 and 41. Surrogacy is not provided for in legislation in the Northern Territory.

³⁹ Reimbursement Related to Assisted Human Reproduction Regulations SOR/2019-193 (Can), reg 4.

⁴⁰ In England, Wales and Scotland, a general provision allowing for "expenses reasonably incurred" to be paid under a surrogacy arrangement has been criticised for the lack of transparency as to what is included within expenses: Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: a new law – A joint consultation paper* (CP244/DP167, 2019) at [14.23].

⁴¹ General Scheme of the Assisted Human Reproduction Bill 2017, head 41(5); and Conor O'Mahony *A Review of Children's Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law* (Department of Children, Equality, Disability, Integration and Youth, Ireland, December 2020) at 20–21.

TABLE 2: CATEGORIES OF PERMITTED COSTS IN OTHER JURISDICTIONS

Permitted costs	NSW	Victoria	Queensland	Western Australia	South Australia	Tasmania	Canada
Medical, legal and counselling	✓	✓	✓	✓	✓	✓	✓
Travel and accommodation	✓	✓	✓			✓	✓
Care of dependants		✓					✓
Groceries							✓
Cost of obtaining any product or service recommended by health-care provider							✓
Maternity clothes							✓
Pre-natal exercise classes							✓
Insurance premiums (life, health and disability)	✓	✓	✓	✓		✓	✓
Lost earnings	✓	✓	✓	✓	✓	✓	✓
Other reasonable out-of-pocket costs		✓	✓		✓	✓	

6.43 Having considered what is happening in practice, feedback received during our initial consultation and the approaches in other jurisdictions, we think that the following categories of permitted costs should be specified:

- (a) Medical treatment, legal advice and counselling (already expressly permitted under section 14(4) of the HART Act).
- (b) Travel, including the cost of transport, parking, meals and accommodation for the surrogate, her partner and any dependants.
- (c) Care of the surrogate's dependants.
- (d) Products or services recommended by the surrogate's health provider in relation to pregnancy, birth or post-partum recovery, including physiotherapy and other therapeutic services.
- (e) Groceries.
- (f) Maternity clothes.

- (g) Loss of income, less any post-birth recovery leave payments received (see Option 2 below) and subject to a statutory time limit. For example, in Australia, loss of income payments are capped at two months (but this can be extended on medical grounds related to pregnancy or birth).⁴² If the surrogate's partner has to take unpaid leave because of the surrogacy, this loss should also be able to be met under a surrogacy arrangement.
- (h) Life, health and disability insurance, including premiums and increases in premiums if the surrogate already has insurance.
- (i) Other reasonable out-of-pocket expenses incurred in relation to the surrogacy arrangement, such as costs relating to housework services or care of pets.

What process should intended parents and surrogates follow?

- 6.44 We think that the parties should discuss and agree on what costs will be covered by the intended parents prior to conception. This could be agreed in counselling completed as part of the application to ECART. The ECART process is discussed in detail in Chapter 5.
- 6.45 We are interested in views on whether any other process requirements should be imposed on the parties to ensure that all payments are made for costs that are reasonable and are actually incurred. For example, the law could require the surrogate to keep all receipts or all receipts above a certain amount and provide these to the intended parents.

Should agreements to pay costs be enforceable?

- 6.46 Surrogacy arrangements are not enforceable in Aotearoa New Zealand⁴³ or in comparable jurisdictions.⁴⁴ However, some jurisdictions make an exception to ensure that intended parents pay a surrogate's costs and expenses relating to the surrogacy arrangement. As the Commission explained in 2000:⁴⁵

Common sense seems to dictate that an agreement to pay the surrogate's expenses should be enforceable. For example, if a surrogate mother becomes pregnant and incurs certain expenses as a result of her agreement with the commissioning parents the surrogate mother should be entitled to pursue the commissioning parents for costs incurred.

- 6.47 For this reason, the law in Australia expressly states that, while surrogacy arrangements are unenforceable, an obligation under a surrogacy arrangement to pay or reimburse the surrogate's costs is enforceable, but often only if the arrangement was entered into

⁴² Surrogacy Regulations 2020 (SA), reg 5; Surrogacy Act 2010 (NSW), s 7(3)(e); Assisted Reproductive Treatment Regulations 2019 (Vic), reg 11(1)(e); Surrogacy Act 2010 (Qld), s 11(2)(f); Surrogacy Act 2008 (WA), s 6(3)(b); and Surrogacy Act 2012 (Tas), s 9(3)(f).

⁴³ Human Assisted Reproductive Technology Act 2004, s 14(1).

⁴⁴ Legislation in Australia, the United Kingdom and Canada all provide that surrogacy arrangements are unenforceable.

⁴⁵ Te Aka Matua o te Ture I Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework* (NZLC R65, 2000) at [544]. We note that the Commission took a similar position in Te Aka Matua o te Ture I Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [7.12].

before the surrogate became pregnant.⁴⁶ This has also been provisionally proposed for England, Wales and Scotland as well as in Ireland.⁴⁷ The Law Commission of England and Wales and the Scottish Law Commission explain that making the payment of costs enforceable would avoid any dispute over money being determined indirectly through provisions on legal parenthood (for example, by a surrogate withholding her consent to the transfer of legal parenthood until her costs are paid).⁴⁸

- 6.48 However, making agreements to pay costs enforceable might be considered unfair if other aspects of the surrogacy arrangement are not enforceable. If a surrogate changed her mind and wanted to keep the child, for example, she could do so while keeping any payments made by the intended parents to cover the costs of the pregnancy.
- 6.49 A few jurisdictions (Queensland, Tasmania and South Australia) have sought to respond to this concern by providing that an agreement to pay a surrogate's costs is not enforceable if a surrogate does not relinquish the child or refuses to consent to the transfer of legal parenthood.⁴⁹ However, this approach starts to blur matters of legal parenthood and payments and may unduly risk a surrogacy arrangement being considered to constitute the sale of a child under international human rights law.⁵⁰ The United Nations (UN) Special Rapporteur has previously recommended that all payments made to the surrogate should be non-reimbursable except in cases of fraud.⁵¹ The Verona Principles similarly provide that the surrogate should be able to confirm or revoke her consent to the intended parents having exclusive legal parenthood “without any financial consequences as to either payments or reimbursements related to the surrogacy arrangement”.⁵²
- 6.50 We are interested in your views on whether agreements in relation to the payment of a surrogate's costs should be enforceable.

Option 2: Clarify the law with respect to surrogates' entitlements to post-birth recovery leave and payments

- 6.51 The second option we have considered relates to a surrogate's entitlement to government support in relation to the pregnancy.

⁴⁶ Surrogacy Act 2010 (NSW), s 6; Assisted Reproductive Treatment Act 2008 (Vic), s 44(3); Surrogacy Act 2010 (Qld), s 15; Surrogacy Act 2008 (WA), s 7; Surrogacy Act 2012 (Tas), s 10; and Surrogacy Act 2019 (SA), s 13.

⁴⁷ Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: a new law – A joint consultation paper* (CP244/DP167, 2019) at [15.95]–[15.96]. In respect of Ireland, see General Scheme of the Assisted Human Reproduction Bill 2017, head 41(3).

⁴⁸ Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: a new law – A joint consultation paper* (CP244/DP167, 2019) at [15.92].

⁴⁹ Surrogacy Act 2010 (Qld), s 15(2)(b); Surrogacy Act 2012 (Tas), s 10(2)(c); and Surrogacy Act 2019 (SA), s 13(3).

⁵⁰ Similar concerns were expressed in Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: a new law – A joint consultation paper* (CP244/DP167, 2019) at [15.96]–[15.97].

⁵¹ Maud de Boer-Buquicchio *Report of the Special Rapporteur on the sale and sexual exploitation of children, including prostitution, child pornography and other child sexual abuse material* UN Doc A/HRC/37/60 (15 January 2018) at [72] and [77(c)]. These comments were made in the context of payments in a commercial surrogacy arrangement, but we consider the point is equally applicable to the payment of costs in a non-commercial surrogacy arrangement.

⁵² International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [10.5]. See also at [14.7]–[14.8].

- 6.52 We think that surrogates should be entitled to a period of unpaid employment leave (birth recovery leave) and government payments (birth recovery payments) during that period, provided they meet the employment thresholds that apply for parental leave and parental leave payments.⁵³ This could be available for a fixed period and could start before birth on the same grounds as parental leave. Birth recovery payments should be calculated at the same rate as parental leave payments under the Parental Leave and Employment Protection Act.
- 6.53 This option would meet the surrogate's medical needs for recovery from pregnancy and childbirth and align the surrogate's entitlements with those enjoyed by other pregnant people. It would not affect intended parents' entitlements to parental leave and parental leave payments.
- 6.54 This option is consistent with the approach in comparable jurisdictions. In Australia, a surrogate may be eligible to receive a parental leave payment for up to 18 weeks for the purpose of maternal recovery.⁵⁴ In England, Wales and Scotland, surrogates are treated in the same way as women who carry their own children.⁵⁵
- 6.55 This option is also consistent with recent amendments to the Holidays Act 2003, which recognise that surrogates, their partners and intended parents are each entitled to three days' bereavement leave in the event of a miscarriage or stillbirth.⁵⁶
- 6.56 We are interested in your views on how long surrogates should be eligible for birth recovery leave and birth recovery payments. Different options include the following:
- (a) 26 weeks, to align with current entitlements for parental leave payments. This would be the simplest approach as the Parental Leave and Employment Protection Act could simply be amended to clarify that a surrogate is a primary carer for the purposes of that Act, regardless of whether an intended parent is also eligible as a primary carer. However, parental leave is concerned not only with medical needs for recovery from pregnancy and childbirth but also with the primary care of a child. It may therefore be an inappropriate comparison.
 - (b) 12 weeks, to align with the maximum period of earnings compensation for live-organ donors while recuperating from surgery, discussed below.
 - (c) Six weeks, to align with the post-partum period recognised by the Ministry of Health, during which birth parents receive free maternity care. Surrogates who are still unable to work after six weeks could be compensated for lost earnings under the surrogacy arrangement under Option 1 above.
- 6.57 We also note there are other circumstances, such as adoption other than in the context of surrogacy, where the person who has given birth is different to the person who will provide primary care for the child (and who is not their partner). Parental leave and

⁵³ Parental Leave and Employment Protection Act 1987, s 2BA.

⁵⁴ Paid Parental Leave Rules 2021 (Cth), s 13; and Australian Government *Paid Parental Leave Guide (Version 1.70)* (10 May 2021) at [1.1.S.100 Surrogacy arrangement].

⁵⁵ Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: a new law – A joint consultation paper* (CP244/DP167, 2019) at [17.6]. A surrogate in the United Kingdom is eligible for statutory maternity leave from her employer for up to 52 weeks by virtue of being pregnant and giving birth. She may also be entitled to 39 weeks of statutory maternity pay.

⁵⁶ Holidays Act 2003, s 69.

parental leave payments in these circumstances are beyond the scope of our review. However, we note that any recommendations we make to cater for surrogacy could be equally appropriate and workable in those situations.

Alternative approach: aligning surrogacy and live-organ donation

- 6.58 An alternative to Option 2 that we have considered, but do not prefer, is to align surrogacy with live-organ donation.
- 6.59 Like surrogacy, no “financial or other consideration” can be exchanged for organs under the Human Tissue Act 2008.⁵⁷ However, the Compensation for Live Organ Donors Act 2016 now provides for donors to be compensated 100 per cent of their calculated loss of earnings for up to 12 weeks after surgery while recuperating.⁵⁸ Live donors may also be reimbursed for travel and accommodation costs linked with the organ donor tests and surgery.⁵⁹
- 6.60 Surrogacy and live-organ donation could be aligned because both surrogates and organ donors are financially disincentivised⁶⁰ and because, in both surrogacy and organ transplants, demand outweighs supply.⁶¹
- 6.61 However, organ donation can also be distinguished from surrogacy on the basis that organ donation facilitates “lifesaving” treatment, while surrogacy is “life enabling”. The right to health is a fundamental human right and clearly envisages a role for the state in facilitating lifesaving treatment. It is less clear whether the state has the same role in facilitating family building. As we explain in Chapter 3, individuals have rights to found a family, but this does not extend to an unqualified right to have a child. We discuss public funding for fertility treatment associated with surrogacy in Chapter 10.
- 6.62 Perhaps a bigger concern with this option is that it would ultimately discriminate between surrogate pregnancies and other pregnancies that do not qualify for full compensation for loss of earnings. With this in mind, we prefer the model outlined above that would align surrogates’ entitlements with those of other birth parents.

Option 3: Permit intended parents to pay surrogates a fee

- 6.63 The final option we have considered is whether intended parents should be able to pay surrogates a fee for their participation in a surrogacy arrangement. In this discussion, we use the term “fee” to refer to any payment that is not for the surrogate’s reasonable

⁵⁷ Human Tissue Act 2008, s 56.

⁵⁸ Compensation for Live Organ Donors Act 2016, s 10; and Manatū Hauora | Ministry of Health “Compensation for Live Organ Donors: Information Pack” (24 March 2021) <www.health.govt.nz>. Compensation is also available before surgery if the Director-General of Health is satisfied that certain criteria have been met: s 12.

⁵⁹ Manatū Hauora | Ministry of Health “Compensation for Live Organ Donors: Information Pack” (24 March 2021) <www.health.govt.nz>.

⁶⁰ The purpose of the Compensation for Live Organ Donors Act 2016 is to remove a financial deterrent to the donation of organs by live donors: s 3.

⁶¹ In Aotearoa New Zealand, there are many more people waiting for an organ transplant than there are organs available: Manatū Hauora | Ministry of Health “Organ donation and transplantation” (8 January 2020) <www.health.govt.nz>. Demand for surrogates outweighing supply was also emphasised by fertility clinics, intended parents and surrogates we spoke with during our initial consultation.

costs actually incurred (addressed under Option 1). A fee would therefore include any payments that are described as compensation for pain and inconvenience.

- 6.64 The payment of a fee is typically characterised as “commercial surrogacy”, although, as we note in Chapter 1, the precise distinction between commercial and altruistic surrogacy is unclear, and there is a considerable variation amongst altruistic and commercial models. Below we summarise the arguments for and against permitting intended parents to pay surrogates a fee.
- 6.65 Arguments in favour of permitting the payment of a fee (in addition to Option 1 and/or Option 2) include the following:
- (a) Simply meeting the surrogate’s costs does not accurately reflect the role of a surrogate in caring for the well-being of the unborn child, the considerable inconveniences to her life and to those around her and the necessary risks to her health.⁶²
 - (b) Other people and organisations involved in surrogacy arrangements are permitted to charge a fee for their services, including lawyers and fertility clinics, so a surrogate should be able to as well.⁶³
 - (c) Prohibiting surrogates from receiving a fee creates conditions for exploitation of women because it prevents surrogates from being treated fairly.⁶⁴ Intended parents may feel payment of a fee ensures fairness and prevents them from feeling “beholden” to their surrogate.
 - (d) More women may be willing to act as surrogates if intended parents are able to pay a fee.⁶⁵
 - (e) Permitting payment of a fee would reduce the inconsistency with international surrogacy arrangements, where the payment of a fee is common.

⁶² Rhonda Powell “Exploitation of Surrogate Mothers in New Zealand” in Annick Masselot and Rhonda Powell (eds) *Perspectives on Commercial Surrogacy in New Zealand: Ethics, Law, Policy and Rights* (Centre for Commercial & Corporate Law, Te Whare Wānanga o Waitaha | University of Canterbury, Christchurch, 2019) 57 at 70–71. See also Debra Wilson *Rethinking Surrogacy Laws: Te Kohuki Ture Kopu Whangai – Overview of Report* (Te Whare Wānanga o Waitaha | University of Canterbury, May 2020) at 39.

⁶³ See Ruth Walker and Liezl van Zyl *Towards a Professional Model of Surrogate Motherhood* (Palgrave Macmillan, London, 2017) at ix.; and Rhonda Powell “Exploitation of Surrogate Mothers in New Zealand” in Annick Masselot and Rhonda Powell (eds) *Perspectives on Commercial Surrogacy in New Zealand: Ethics, Law, Policy and Rights* (Centre for Commercial & Corporate Law, Te Whare Wānanga o Waitaha | University of Canterbury, Christchurch, 2019) 57 at 71.

⁶⁴ Rhonda Powell “Exploitation of Surrogate Mothers in New Zealand” in Annick Masselot and Rhonda Powell (eds) *Perspectives on Commercial Surrogacy in New Zealand: Ethics, Law, Policy and Rights* (Centre for Commercial & Corporate Law, Te Whare Wānanga o Waitaha | University of Canterbury, Christchurch, 2019) 57 at 70. See also Ruth Walker and Liezl van Zyl *Towards a Professional Model of Surrogate Motherhood* (Palgrave Macmillan, London, 2017) at 44; and Debra Wilson *Rethinking Surrogacy Laws: Te Kohuki Ture Kopu Whangai – Overview of Report* (Te Whare Wānanga o Waitaha | University of Canterbury, May 2020) at 41.

⁶⁵ Betty-Ann Kelly “Compensation for Surrogates: Doing Public Policy” in Annick Masselot and Rhonda Powell (eds) *Perspectives on Commercial Surrogacy in New Zealand: Ethics, Law, Policy and Rights* (Centre for Commercial & Corporate Law, Te Whare Wānanga o Waitaha | University of Canterbury, Christchurch, 2019) 25 at 34 and 55–56.

- (f) Permitting payment of a fee may encourage intended parents to enter surrogacy arrangements in Aotearoa New Zealand rather than offshore.⁶⁶

6.66 There are, however, strong arguments against permitting the payment of a fee:

- (a) If the government expressly permits surrogates to be paid a fee, it may risk contravening its international human rights obligations to take all appropriate national, bilateral and multilateral measures to prevent the sale of children.⁶⁷ This is because there is a concern that the payment of a fee may increase the risk of a surrogacy arrangement amounting to the sale of a child.⁶⁸ The Verona Principles state that the risk arises when “there is a provision of unregulated, excessive or lump sum ‘reimbursements’ or consideration in any other form”.⁶⁹
- (b) Payment of a fee may not be in the best interests of the child. While research into altruistic surrogacy suggests generally positive outcomes for surrogate-born children and their families, little research has explored the impact of commercial surrogacy on children (see Chapter 2).
- (c) Payment of a fee may lead to the exploitation of surrogates by attracting economically disadvantaged women and raising the question of whether financial incentives “might override women’s consideration of the potential physical and emotional risks they assume”.⁷⁰ While exploitation is generally considered to be a greater concern in developing countries with weak regulatory protections, it is nonetheless seen as a “present and real” risk even in more stable legal systems such as the United Kingdom.⁷¹

⁶⁶ Debra Wilson and Julia Carrington “Commercialising Reproduction: In Search of a Logical Distinction between Commercial, Compensated, and Paid Surrogacy Arrangements” (2015) 21 NZBLQ 178 at 182.

⁶⁷ United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 35; and Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography 2171 UNTS 227 (opened for signature 25 May 2000, entered into force 1 January 2002).

⁶⁸ Maud de Boer-Buquicchio *Report of the Special Rapporteur on the sale and sexual exploitation of children, including prostitution, child pornography and other child sexual abuse material* UN Doc A/74/162 (15 July 2019) at [76]–[79]; Maud de Boer-Buquicchio *Report of the Special Rapporteur on the sale and sexual exploitation of children, including prostitution, child pornography and other child sexual abuse material* UN Doc A/HRC/37/60 (15 January 2018) at [41]; and International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [14.1]–[14.13].

⁶⁹ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [14.8].

⁷⁰ Betty-Ann Kelly “Compensation for Surrogates: Doing Public Policy” in Annick Masselot and Rhonda Powell (eds) *Perspectives on Commercial Surrogacy in New Zealand: Ethics, Law, Policy and Rights* (Centre for Commercial & Corporate Law, Te Whare Wānanga o Waitaha | University of Canterbury, Christchurch, 2019) 25 at 48. In Margaret Brazier, Alastair Campbell and Susan Golombok *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation – Report of the Review Team* (Cm 4068, United Kingdom, October 1998), it was noted at [4.25] that “[p]ayment increases the risk of exploitation if it constitutes an inducement to participate in an activity whose degree of risk the surrogate cannot, in the nature of things, fully understand or predict”. See also Claire Achmad “Children’s Rights in International Commercial Surrogacy: Exploring the challenges from a child rights, public international human rights law perspective” (PhD thesis, Leiden University, 2018) at 65–70.

⁷¹ Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: a new law – A joint consultation paper* (CP244/DP167, 2019) at [14.61].

- (d) Permitting payment of a fee would be inconsistent with regulatory approaches to other donative practices in Aotearoa New Zealand. Payment of a fee is not permitted for blood donation, organ donation or ovum, sperm or embryo donation.⁷²
 - (e) Permitting payment of a fee would also be inconsistent with approaches to surrogacy in comparable jurisdictions. Fees cannot be paid to surrogates in Australia, England, Wales, Scotland or Canada. Only a few jurisdictions characterised as offering commercial surrogacy permit fees, such as some states in the United States, Ukraine, Georgia and Russia.
 - (f) Permitting payment of a fee may increase the cost of surrogacy and therefore reduce accessibility for intended parents.⁷³ This could be mitigated to an extent if fees were set by a regulatory body rather than freely negotiated between the parties. However, setting the level of the fee would be a difficult task. If it is set too high, it would make surrogacy inaccessible for many New Zealanders. If it is set too low, it may lead to an increase in surrogates from socio-economically marginalised backgrounds who may be more likely to accept a lower fee. These women may face a greater risk of exploitation.
 - (g) Increasing the cost of domestic surrogacy could result in more intended parents pursuing international surrogacy. As we explain in Chapters 3 and 9, international surrogacy presents complex issues, potentially placing the parties and any resulting child at greater risk. For these reasons, a guiding principle of our review is that intended parents should be supported to enter surrogacy arrangements in Aotearoa New Zealand rather than offshore.
 - (h) Payment of a fee may not be consistent with public attitudes. As noted above, the Surrogacy Survey found that, of respondents who thought domestic surrogacy should be legal, only 31 per cent supported the surrogate being paid for their time and service.⁷⁴
- 6.67 Our preliminary view is that the arguments against outweigh the benefits of providing for a fee.
- 6.68 We are not convinced that the payment of a fee should be permitted on the basis that it is already happening overseas. This would effectively see regulation based on the “lowest common denominator”⁷⁵ by basing domestic policy on what intended parents can lawfully do elsewhere. As one Australian commentator observes:⁷⁶

⁷² See Human Tissue Act 2008, s 56; and Human Assisted Reproductive Technology Act 2004, s 13.

⁷³ Betty-Ann Kelly “Compensation for Surrogates: Doing Public Policy” in Annick Masselot and Rhonda Powell (eds) *Perspectives on Commercial Surrogacy in New Zealand: Ethics, Law, Policy and Rights* (Centre for Commercial & Corporate Law, Te Whare Wānanga o Waitaha | University of Canterbury, Christchurch, 2019) 25 at 52; and Debra Wilson *Rethinking Surrogacy Laws: Te Kohuki Ture Kopu Whangai – Overview of Report* (Te Whare Wānanga o Waitaha | University of Canterbury, May 2020) at 36–37.

⁷⁴ Debra Wilson *Understanding the Experience and Perceptions of Surrogacy Through Empirical Research: Public Perceptions Survey* (Te Whare Wānanga o Waitaha | University of Canterbury, May 2020) vol 3 at 64.

⁷⁵ Claire Fenton-Glynn and Jens M Scherpe “Surrogacy in a Globalised World: Comparative Analysis and Thoughts on Regulation” in Jens M Scherpe, Claire Fenton-Glynn and Terry Kaan (eds) *Eastern and Western Perspectives on Surrogacy* (Intersentia, Cambridge (UK), 2019) 515 at 575.

⁷⁶ Sonia Allan “The Surrogate in Commercial Surrogacy: Legal and Ethical Considerations” in Paula Gerber and Katie O’Byrne (eds) *Surrogacy, Law and Human Rights* (Ashgate, United Kingdom, 2015) 113 at 143.

Domestic laws should not be changed to permit commercial surrogacy in those jurisdictions that currently prohibit the practice solely based upon dilemmas created by people who have engaged in global surrogacy arrangements (sometimes against the law of their own jurisdiction). Such cases should be dealt with by the courts, on a case-by-case basis; or the legislature should speak as to what should occur.

- 6.69 While introducing the payment of fees could reduce barriers for women considering becoming surrogates in Aotearoa New Zealand and reduce the need for intended parents to go overseas, we have serious concerns about how this would affect access to surrogacy by intended parents who may not be able to afford a fee on top of paying the surrogate's costs (under Option 1) and the other costs associated with surrogacy outlined in Chapter 5.
- 6.70 Overall, we think that introducing payments would constitute a radical shift in Aotearoa New Zealand public policy and is not justified by the arguments identified above. Concerns regarding access can be addressed in other ways by ensuring a surrogate is not financially disadvantaged (under Options 1 and 2), by improving safeguards (discussed in Chapters 5 and 7) and by increasing access to information about becoming a surrogate (discussed in Chapter 10).

Should the payment of a fee be a criminal offence?

- 6.71 The HART Act criminalises intended parents and surrogates for exchanging valuable consideration. In practice, as we have already noted, we are unaware of anyone being prosecuted under this offence.
- 6.72 Even if paying a fee to surrogates remains unlawful, there are good reasons for focusing the criminal offence on intermediaries who facilitate commercial surrogacy rather than criminalising intended parents and surrogates who act contrary to the law:
- (a) The UN Special Rapporteur recommends that any criminal or civil penalties for illegal surrogacy arrangements should focus primarily upon intermediaries,⁷⁷ observing that:⁷⁸
- ... the real threat of exploitation and commodification of children, and potentially of surrogates, is often related to the role of intermediaries. In general, this is due to the for-profit motives of private intermediaries, who have, as a guiding motive, the successful completion of the surrogacy agreement with little to no regard for the rights of those involved.
- (b) The UN Special Rapporteur recommends that commercial surrogacy should not lead to the criminalisation of surrogates, noting that this can have “dire consequences” for their rights.⁷⁹ It is more appropriate that safeguards focus on free and informed

⁷⁷ Maud de Boer-Buquicchio *Report of the Special Rapporteur on the sale and sexual exploitation of children, including prostitution, child pornography and other child sexual abuse material* UN Doc A/HRC/37/60 (15 January 2018) at [77(k)].

⁷⁸ Maud de Boer-Buquicchio *Report of the Special Rapporteur on the sale and sexual exploitation of children, including prostitution, child pornography and other child sexual abuse material* UN Doc A/74/162 (15 July 2019) at [78].

⁷⁹ Maud de Boer-Buquicchio *Report of the Special Rapporteur on the sale and sexual exploitation of children, including prostitution, child pornography and other child sexual abuse material* UN Doc A/74/162 (15 July 2019) at [77] and [79].

consent by surrogates and the role of intermediaries.⁸⁰ Reflecting these concerns, it is not a criminal offence for the surrogate to receive consideration in the United Kingdom or in Canada.⁸¹

- (c) Equally, the UN Special Rapporteur observes that criminalising the intended parents will not normally be in the child's best interests.⁸² This is recognised in the United Kingdom, where legislation "is careful to avoid criminalising the conduct of intending parents"⁸³ due to the wish to avoid children being born with the "taint of criminality".⁸⁴

- 6.73 In Aotearoa New Zealand, lawyers appear divided on this question. A survey of family lawyers revealed that 52 per cent of respondents thought criminalisation should be removed, while 48 per cent favoured retention.⁸⁵ Associate Professor Debra Wilson has suggested that, while criminal sanctions might have been a reasonable position to take in the 1980s (when gestational surrogacy was an emerging practice), it is no longer clear that this is the case.⁸⁶ Societal attitudes towards surrogacy are changing, and the increasing level of acceptance of the practice means surrogacy is no longer a "societally-recognisable moral wrong".⁸⁷ Potential harm caused by surrogacy also appears to be a risk rather than inherent in every case, and this may mean the matter is not serious enough to warrant public condemnation.⁸⁸
- 6.74 We are interested in hearing your views on whether you think the law should continue to make it a criminal offence to facilitate surrogacy arrangements on a commercial basis but focus only on the role of intermediaries rather than on intended parents and surrogates who act contrary to the law.

⁸⁰ Maud de Boer-Buquicchio *Report of the Special Rapporteur on the sale and sexual exploitation of children, including prostitution, child pornography and other child sexual abuse material* UN Doc A/74/162 (15 July 2019) at [79].

⁸¹ Surrogacy Arrangements Act 1985 (UK), s 2(2); and Assisted Human Reproduction Act SC 2004 c 2, ss 6(1) and 60.

⁸² Maud de Boer-Buquicchio *Report of the Special Rapporteur on the sale and sexual exploitation of children, including prostitution, child pornography and other child sexual abuse material* UN Doc A/74/162 (15 July 2019) at [79].

⁸³ Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: A new law – A joint consultation paper* (CP244/DP167, 2019) at [14.40]. See also [15.80], where the Commissions endorsed this approach, observing that criminalisation is an inappropriate enforcement mechanism in the case of surrogacy arrangements.

⁸⁴ *Report of the Committee of Inquiry into Human Fertilisation and Embryology (Warnock Report)* (Cmnd 9134, 1984) at [8.19]. See also Margaret Brazier, Alastair Campbell and Susan Golombok *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation – Report of the Review Team* (Cmnd 4068, October 1998) at [4.38].

⁸⁵ Debra Wilson *Understanding the Experience and Perceptions of Surrogacy Through Empirical Research: Lawyers Survey* (Te Whare Wānanga o Waitaha | University of Canterbury, May 2020) vol 1 at 120.

⁸⁶ Debra Wilson *Rethinking Surrogacy Laws: Te Kohuki Ture Kopu Whangai – Overview of Report* (Te Whare Wānanga o Waitaha | University of Canterbury, May 2020) at 165.

⁸⁷ Debra Wilson *Rethinking Surrogacy Laws: Te Kohuki Ture Kopu Whangai – Overview of Report* (Te Whare Wānanga o Waitaha | University of Canterbury, May 2020) at 165.

⁸⁸ Debra Wilson *Rethinking Surrogacy Laws: Te Kohuki Ture Kopu Whangai – Overview of Report* (Te Whare Wānanga o Waitaha | University of Canterbury, May 2020) at 167.

QUESTIONS

- Q14** Do you agree with the issues we have identified with financial support for surrogates? Are there other issues we should consider?
- Q15** Do you agree with Option 1 to clarify and expand the list of permitted costs that can be paid in a surrogacy arrangement? If so, do you agree with our proposed list of permitted costs? Are there other costs you would include in this list?
- Q16** Do you agree with Option 2 to clarify the law with respect to surrogates' entitlements to post-birth recovery leave and payments? If so, what should be the length of time surrogates are entitled to receive leave and payments?
- Q17** Do you think intended parents should be permitted to pay surrogates a fee for their participation in a surrogacy arrangement (in addition to paying a surrogate's reasonable costs under Option 1)?
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CHAPTER 7

Legal parenthood

IN THIS CHAPTER, WE CONSIDER:

- the legal parenthood of surrogate-born children; and
- issues with the current law and options for reform.

INTRODUCTION

- 7.1 There are no specific parenthood laws to deal with the unique relationships that exist in surrogacy arrangements. Intended parents must instead rely on the adoption process to transfer legal parenthood from the surrogate (and her partner) to the intended parents. We think that the current law fails to reflect the reality of surrogacy arrangements and that the adoption process is inappropriate for establishing the intended parents' legal parenthood.
- 7.2 The adoption process itself is widely acknowledged as being out of date and in need of reform.¹ The Ministry of Justice is currently reviewing adoption law and is committed to ensuring the law aligns with Aotearoa New Zealand's values and protects children's rights.² The prospect of modernised adoption laws does not, however, change our view that adoption and surrogacy are two different and legitimate forms of family building that require different policy responses and legal frameworks.

THE CURRENT LAW

- 7.3 The legal parents of a surrogate-born child are determined in accordance with the long-existing common law rule that the legal mother is the woman who has given birth to the

¹ See, for example, Te Aka Matua o te Ture | Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework* (NZLC R65, 2000); *Re C (Adoption)* [2008] NZFLR 141 (FC) at [71]; and Bill Atkin "Adoption law: The courts outflanking Parliament" (2012) 7 NZFLJ 119.

² Tāhū o te Ture | Ministry of Justice *Adoption in Aotearoa New Zealand: Discussion Document* (June 2021).

child³ and the specific rules that were developed for donor gamete conception set out in the Status of Children Act 1969.⁴

7.4 Under these rules:

- (a) The surrogate is the legal mother of the surrogate-born child because she gave birth to the child. This rule applies regardless of whether the surrogacy is traditional (using the surrogate's ovum)⁵ or gestational (using the ovum of the intended mother or a donor).⁶
- (b) The surrogate's partner (if she has one) is also a legal parent of the surrogate-born child⁷ unless there is evidence that establishes that they did not consent to the procedure.⁸
- (c) The intended parents are not legal parents of the surrogate-born child even if the child is the genetic child of one or both intended parents.⁹

7.5 These provisions apply regardless of whether the procedure is carried out in Aotearoa New Zealand or the child is born overseas.¹⁰ We discuss the implications of this rule for international surrogacy arrangements in Chapter 9.

Role of the Adoption Act 1955 in surrogacy arrangements

7.6 The Adoption Act 1955 is the only way to alter legal parenthood in domestic surrogacy arrangements. An adoption order has the effect of transferring legal parenthood from the surrogate (and any partner) to the intended parents.¹¹

7.7 The Family Court has exclusive jurisdiction to hear and determine applications under the Adoption Act.¹² It can make an adoption order if satisfied that the applicant(s) are “fit and

³ This is evidenced in the Latin maxims *mater est quam gestation demonstrate* (by gestation, the mother is demonstrated) and *mater semper certa est* (motherhood is certain): Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [3.3].

⁴ These rules were introduced by the Status of Children Amendment Act 1987.

⁵ Traditional surrogacy is not explicitly addressed in the Status of Children Act 1969 because it does not involve the use of an ovum produced by another woman. The common law rules discussed at n 3 would therefore apply.

⁶ Status of Children Act 1969, s 17.

⁷ Status of Children Act 1969, s 18. The term “partner” means a spouse, civil union partner or de facto partner: s 14(1) (definition of “partner”).

⁸ Status of Children Act 1969, s 27 provides that the partner's consent to the procedure is presumed in the absence of evidence to the contrary and may be implicitly established through the partner's actions.

⁹ Status of Children Act 1969, ss 19–22 have the effect of treating intended parents who provide their ovum or sperm for an assisted human reproduction procedure involving a surrogate as donors. An intended parent whose ovum or sperm are used in conception will only be a legal parent if they become the surrogate's partner after conception: ss 20(2) and 22(2).

¹⁰ Status of Children Act 1969, s 16.

¹¹ Adoption Act 1955, s 16.

¹² Family Court Act 1980, s 11(1)(b).

proper” to care for and raise the child and that the welfare and interests of the child will be promoted by the adoption.¹³

The social worker’s report

- 7.8 Before making an adoption order, the Family Court must obtain a report from an Oranga Tamariki social worker.¹⁴ In order to prepare this report, the social worker will undertake an adoptive applicant assessment, which includes documentary checks (police background checks, medical record checks, character references and child protection checks) and assessment interviews with the adoptive parents. The documentary checks do not need to be repeated if they were undertaken as part of the Ethics Committee on Assisted Reproductive Technology (ECART) process (described in Chapter 5), provided the in-principle approval given by Oranga Tamariki under that process has not expired.
- 7.9 In a surrogacy arrangement, the adoptive applicant assessment can be conducted once a viable pregnancy is established (around the 12-week mark) if the intended parents notify Oranga Tamariki of the pregnancy. When the child is born, the intended parents apply for an adoption and the Family Court requests a social worker’s report. The social worker will visit the intended parents’ home so that they can observe the child in the intended parents’ care and will then prepare the report for the Court, relying on the information from the adoptive applicant assessment and the subsequent home visit.

Interim and final adoption orders

- 7.10 The Adoption Act provides for a two-stage adoption process, which envisages the Family Court making an interim adoption order in the first instance, followed by a final adoption order six months later. If there are “special circumstances”, the Court can make a final adoption order in the first instance rather than an interim order.¹⁵
- 7.11 In practice, the presence of a surrogacy arrangement is generally considered a special circumstance warranting the making of a final adoption order in the first instance.¹⁶ However, if the social worker has any concerns about the surrogacy arrangement, they may recommend in their report that an interim adoption order is made in the first instance. This gives the social worker the mandate to visit the intended parents and child during

¹³ Adoption Act 1955, ss 11(a)–(b). The Adoption Act also requires that conditions imposed with respect to religious denomination are complied with: s 11(c). However, in practice, this requirement is rarely remarked upon in adoptions involving a surrogacy arrangement.

¹⁴ Adoption Act 1955, s 10. The Adoption Act also provides for a member of the Māori community to be nominated, after consultation with the Māori community, by the Oranga Tamariki chief executive to provide a section 10 report in cases where a Māori applicant or applicants apply for an adoption order in respect of a Māori child: s 2 (definition of “social worker”). In cases where a Māori report writer is appointed, they will usually work in collaboration with an Oranga Tamariki social worker to prepare the report.

¹⁵ Adoption Act 1955, s 5(b).

¹⁶ Margaret Casey “Creating families and establishing parentage when there is a disconnect between Assisted Reproductive Technologies and the Legal System: A New Zealand perspective of a global problem” (2017) 9 NZFLJ 51 at 53. See, for example, *Re Weber (adoption)* [2020] NZFC 7259 at [15]; *Dumont v Dumont* [2019] NZFC 2529, [2019] NZFLR 202 at [12]; *Re Witt* [2019] NZFC 2482, [2019] NZFLR 91 at [19]; *Re Pierney* [2015] NZFC 9404, [2016] NZFLR 53 at [17]; and *Re H* [2015] NZFC 1541 at [8].

that interim period to continue to monitor the arrangement.¹⁷ Once a final adoption order is granted, the social worker ceases to have any monitoring role.

The requirements for consent

- 7.12 An adoption order will generally only be made if the surrogate (and any partner) consents to the adoption.¹⁸ Consent cannot be given by the surrogate until the child is at least 10 days old,¹⁹ and it is unlawful for intended parents to care for the child in their home before an interim adoption order is in force unless they have received prior approval from a social worker.²⁰
- 7.13 An adoption can proceed without the consent of the surrogate (and any partner) only in very limited circumstances.²¹ We are aware of two cases where the need for consent was dispensed with in a surrogacy arrangement. In one case, the surrogate's partner wanted no part in the surrogacy arrangement and refused to provide his consent.²² In another case, the surrogacy arrangement was entered into in Ukraine and the surrogate could not be located to provide consent, although she had earlier signed the surrogacy agreement and a declaration after the child's birth naming the intended parents as the child's parents.²³ In both cases, the Family Court had to be satisfied that the parent had "failed to exercise the normal duty and care of parenthood" in order to proceed without their consent.²⁴

Alternatives to legal parenthood

- 7.14 If the intended parents do not want to formally adopt the surrogate-born child, they could instead:
- (a) care for the child informally, without any legally recognised parental rights or responsibilities;
 - (b) proceed with a whāngai arrangement and become mātua whāngai (whāngai parents) to the child, caring for the child without any legally recognised parental rights or responsibilities (as we explore in Chapter 4, whāngai arrangements are not recognised in law);

¹⁷ Adoption Act 1955, s 15(2)(b).

¹⁸ Adoption Act 1955, s 7.

¹⁹ Adoption Act 1955, s 7(7).

²⁰ Adoption Act 1955, s 6(1).

²¹ Adoption Act 1955, s 8(1).

²² *Re an application by ALH and SFDH to adopt a child* FC North Shore FAM-2011-44-371.

²³ *Re Witt* [2019] NZFC 2482, [2019] NZFLR 91.

²⁴ *Re an application by ALH and SFDH to adopt a child* FC North Shore FAM-2011-44-371 at [23]; and *Re Witt* [2019] NZFC 2482, [2019] NZFLR 91 at [18].

- (c) apply for guardianship of the child under the Care of Children Act 2004, which would give them “all duties, powers, rights, and responsibilities that a parent of the child has in relation to the upbringing of the child”;²⁵
 - (d) apply for a parenting order under the Care of Children Act, which can determine when and how they will have the role of providing day-to-day care for, or contact with, the child.²⁶
- 7.15 These alternatives have limitations in relation to the rights and entitlements that flow from the legal parent-child relationship, including rights and entitlements to a parent’s estate under succession law,²⁷ child support obligations²⁸ and citizenship.²⁹ In addition, if the intended parents are caring for their child informally, strictly speaking according to law, they cannot consent to medical treatment for the child or apply for a passport on behalf of the child.³⁰
- 7.16 Additionally, in none of these situations would the surrogate and her partner lose their parental status. As guardianship automatically flows from legal parenthood, they would also retain duties, powers, rights and responsibilities as the child’s guardians.³¹

ISSUES

- 7.17 There are two broad problems with the current law:
- (a) First, the legal parenthood laws fail to reflect the reality of surrogacy arrangements.
 - (b) Second, the adoption process is inappropriate for establishing the intended parents’ legal parenthood, even if it is modernised as a result of the Government’s current review.

²⁵ Care of Children Act 2004, s 15. We are aware of two cases in which guardianship was sought instead of adoption: *M v C* [2014] NZFC 3587, [2014] NZFLR 922; and *CGL v SJP* [2012] NZFC 9828. In both cases, the intended parents sought guardianship orders as an interim measure, intending to move to Australia.

²⁶ Care of Children Act 2004, s 48. A parenting order was sought in addition to a guardianship order in *CGL v SJP* [2012] NZFC 9828.

²⁷ Children automatically benefit from a parent’s estate if a parent dies without a will under s 77 of the Administration Act 1969, and a child can make a claim for provision from the estate where a parent has died and the terms of their will do not make adequate provision for their maintenance and support under s 4 of the Family Protection Act 1955. A review of aspects of the law governing succession is currently being undertaken by Te Aka Matua o Te Ture | Law Commission: *Review of Succession Law: Rights to a person’s property on death | He arotake i te āheinga ki ngā rawa a te tangata ka mate ana* (NZLC IP46, 2021).

²⁸ Obligations to provide financial support flow from parenthood, not guardianship status: Child Support Act 1991, s 6. In one case involving a lesbian couple who had separated, the court held that a woman who had been appointed as guardian to her former partner’s three children (conceived using artificial insemination during their 14-year relationship) had assumed the role of step-parent under s 99 of the Child Support Act 1991: *T v T* [1998] NZFLR 776 (FC); and *A v R* [1999] NZFLR 249 (HC).

²⁹ A person acquires New Zealand citizenship by birth if they are born in Aotearoa New Zealand and one of their parents is a New Zealand citizen or entitled to be in Aotearoa New Zealand indefinitely: Citizenship Act 1977, s 6. A person can also acquire citizenship by descent if they are not born in Aotearoa New Zealand but their mother or father is a New Zealand citizen: Citizenship Act 1977, s 7.

³⁰ Care of Children Act 2004, s 36(3); and Passports Act 1992, s 4(3)(a).

³¹ Care of Children Act 2004, s 17.

- 7.18 The need for a new approach to legal parenthood in surrogacy arrangements is widely acknowledged. In 2005, the Commission published its report *New Issues in Legal Parenthood*, which identified “an urgent need to create a legislative framework for the allocation of parenthood in surrogacy arrangements”.³²
- 7.19 The Government agreed in principle with the Commission’s recommendations,³³ accepting that the adoption process “is not well-suited for implementing surrogacy arrangements for many reasons”.³⁴
- 7.20 While the Commission’s 2005 recommendations were not progressed, dissatisfaction with the current law remains.³⁵ Family Court judges considering adoption applications have repeatedly pointed to the unsuitability of adoption laws, passed over 60 years ago, to dealing with the kinds of issues arising in surrogacy arrangements.³⁶ Three Members’ Bills have sought reform,³⁷ and in 2019, a petition signed by 32,239 people was presented to Parliament calling for the simplification of adoption and surrogacy laws (the 2019 Petition).³⁸

Current legal parenthood laws fail to reflect the reality of surrogacy arrangements

- 7.21 Current legal parenthood laws do not reflect the planned nature of surrogacy arrangements. The intended parents and surrogate enter a surrogacy arrangement with the joint intention that the surrogate will become pregnant and carry and deliver the child for the intended parents to raise. The surrogate has no intention to raise the child herself. The surrogate’s partner (if she has one) normally makes no direct contribution to the creation of the child and has no intention to perform any parental role following the child’s birth.
- 7.22 One or both intended parents are usually the child’s genetic parents. In these circumstances, the law is said to create a “legal fiction” by failing to recognise a genetic parent who intends to raise the child from birth as the child’s legal parent.³⁹ Using

³² Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [7.57].

³³ Government Response to Law Commission Report on New Issues in Legal Parenthood (March 2006) at [11].

³⁴ Government Response to Law Commission Report on New Issues in Legal Parenthood (March 2006) at [29].

³⁵ See, for example, Ruth Walker and Liezl van Zyl “Surrogacy and the law: three perspectives (2020) 10 NZFLJ 9 at 13–14; Martha Ceballos “Parenthood in surrogacy agreements: a new model to complete the puzzle” (2019) 9 NZFLJ 123; Henry Kha and Kelly Rankin “Mater semper certa est? Reconceiving surrogacy law in New Zealand” (2019) 9 NZFLJ 172 at 176; Debra Wilson “Surrogacy in New Zealand” [2016] NZLJ 401 at 409; and Sarah Alawi “Highlighting the need to revisit surrogacy laws in New Zealand” [2015] NZLJ 352 at 353–354.

³⁶ *Re KJB and LRB* [2010] NZFLR 97 (FC) at [39]. See also *Re C (Adoption)* [2008] NZFLR 141 (FC) at [35] and [61]–[65]; *Re A* [2015] NZFC 3348 at [2]–[3]; *Re Witt* [2019] NZFC 2482, [2019] NZFLR 91 at [16]; *Re X* [2019] NZFC 7753 at [3]; and *Re Weber (adoption)* [2020] NZFC 7259 at [4].

³⁷ Improving Arrangements for Surrogacy Bill 2021 (undrawn Member’s Bill, Tāmami Coffey MP); Care of Children (Adoption and Surrogacy Law Reform) Amendment Bill 2012 (undrawn Member’s Bill, Kevin Hague MP); and Jacinda Ardern MP’s Bill, Care of Children Law Reform Bill 2012 (62-1).

³⁸ Petition of Christian John Newman “Update the Adoption Act 1955 to simplify and speed up the process for adoption” (2017/409, presented to Parliament 3 October 2019).

³⁹ This point is often highlighted in decisions granting adoption orders: *Re A* [2015] NZFC 3348 at [2]; *Re C (Adoption)* [2008] NZFLR 141 (FC) at [31]; and *Re X* [2019] NZFC 7753 at [3].

adoption laws to transfer legal parenthood to a child's genetic parent further perpetuates this legal fiction.⁴⁰

7.23 We think that the law's failure to reflect the reality of surrogacy arrangements is problematic for several reasons:

- (a) **The law fails to promote the child's best interests.** The current law creates a split between the intended parents' social (and often genetic) parenthood and the surrogate's legal parenthood until such time as the adoption is finalised. We do not think it is in the child's best interests to have no legal relationship with the intended parents during this time. It leaves the intended parents without any legal responsibilities to the child. Likewise, it may not be in the child's best interests that their only legal relationship is with the surrogate and her partner when they have no intention to raise the child themselves. The legal fiction created by the legal parenthood laws may also have a negative impact on the child's rights to identity and to know their genetic and gestational origins. We discuss this issue further in Chapter 8.
- (b) **The law does not respect the intentions of the surrogate and intended parents.** Their joint intention is that the child should, from birth, be raised by the intended parents as their child. The law's failure to accommodate the parties' intentions fails to respect the autonomy of the parties in their private lives, which we recognise in Chapter 3 as an important guiding principle for surrogacy law reform. This is also out of step with the weight given to the parties' intentions in donor gamete conception. Amendments to the Status of Children Act clarified that the recipients of donated gametes are the legal parents of any donor-conceived child rather than the donor(s). In doing so, the law gives priority to the intentions of parties who have created children using donor gametes rather than genetic parenthood. In contrast, the law does not produce the legal and social result intended in the case of surrogacy.⁴¹
- (c) **The law is confusing and capable of being misapplied.** The rules in the Status of Children Act were designed to clarify legal parenthood in situations of donor gamete conception rather than in surrogacy arrangements. The fact that the surrogate's partner is a legal parent is particularly confusing,⁴² and there are several examples where an intended father rather than the surrogate's partner is recorded on the child's birth certificate as the child's legal father even though that is inconsistent with the law.⁴³
- (d) **There is a disconnection between the regulation of surrogacy and the recognition of legal parenthood.** In Chapter 5, we outline the robust regulatory framework that requires prior approval of gestational surrogacy arrangements by ECART. Given the

⁴⁰ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at xix–xx; and Martha Ceballos "Parenthood in surrogacy agreements: a new model to complete the puzzle" (2019) 9 NZFLJ 123 at 129.

⁴¹ Margaret Casey "Creating families and establishing parentage when there is a disconnect between Assisted Reproductive Technologies and the Legal System: A New Zealand perspective of a global problem" (2017) 9 NZFLJ 51 at 51.

⁴² As acknowledged in *Re an application by ALH and SFDH to adopt a child* FC North Shore FAM-2011-44-371 at [18].

⁴³ See, for example, *Re an application by ALH and SFDH to adopt a child* FC North Shore FAM-2011-44-371 at [10]; *Re B* [2013] NZFC 7685 at [5]; and *M v C* [2014] NZFC 3587, [2014] NZFLR 922 at [39].

existence of this regulatory framework, it is inconsistent that there is no corresponding downstream recognition of surrogacy as a process that creates a legal parent-child relationship between the intended parents and the surrogate-born child.⁴⁴

- (e) **The law may be inconsistent with public attitudes.** The Surrogacy Survey asked respondents an open question about who should be the legal parents in a surrogacy arrangement. The most common answer given was the “intended parents” (52 per cent), while others gave a range of responses such as the genetic parents of the child (11 per cent) or some form of joint parenthood (five per cent).⁴⁵ Only five per cent of respondents who answered this question thought that the surrogate should be the child’s legal parent.⁴⁶ Public attitudes are also reflected in the 2019 Petition, which called for improvements to adoption and surrogacy laws and specifically recorded that “[w]e believe the [ECART] approval process should remove any need for adoption and the intended parents should be listed as parents from the day the child is born”.⁴⁷

Adoption process is inappropriate in surrogacy arrangements

- 7.24 Unlike Australia, England, Wales, Scotland, Canada and other jurisdictions that have specific legal frameworks for recognising legal parenthood in surrogacy arrangements, Aotearoa New Zealand continues to rely on adoption law that has not substantially changed in 66 years.

- 7.25 The Government acknowledged in its response to the Commission’s 2005 report that:⁴⁸

The adoption process is not well-suited for implementing surrogacy arrangements for many reasons, but primarily because the purpose of adoption is ensuring a permanent and secure family relationship for a child whose parents are unable or unwilling to parent it. This is quite different from surrogacy, where the purpose of the arrangements is to create a child for the intending parents.

- 7.26 Adoption and surrogacy are two different and legitimate forms of family building, and they require different policy responses and legal frameworks. We have heard from many intended parents who strongly believe that they should not have to adopt, a sentiment echoed in *Re A*, where the Court said:⁴⁹

⁴⁴ Alison Douglass and Michael Legge “Regulating Surrogacy in New Zealand: Evolving Policy and Cautious Liberalism under the HART Act” in Annick Masselot and Rhonda Powell (eds) *Perspectives on Commercial Surrogacy in New Zealand: Ethics, Law, Policy and Rights* (Centre for Commercial & Corporate Law, Te Whare Wānanga o Waitaha | University of Canterbury, Christchurch, 2019) 1 at 2; and Martha Ceballos “Parenthood in surrogacy agreements: a new model to complete the puzzle” (2019) 9 NZFLJ 123 at 129.

⁴⁵ Debra Wilson *Understanding the Experience and Perceptions of Surrogacy Through Empirical Research: Public Perceptions Survey* (Te Whare Wānanga o Waitaha | University of Canterbury, May 2020) vol 3 at 151–154.

⁴⁶ Debra Wilson *Understanding the Experience and Perceptions of Surrogacy Through Empirical Research: Public Perceptions Survey* (Te Whare Wānanga o Waitaha | University of Canterbury, May 2020) vol 3 at 153.

⁴⁷ Petition of Christian John Newman “Update the Adoption Act 1955 to simplify and speed up the process for adoption” (2017/409, presented to Parliament 3 October 2019).

⁴⁸ Government Response to Law Commission Report on New Issues in Legal Parenthood (March 2006) at [29].

⁴⁹ *Re A* [2015] NZFC 3348 at [3].

There is a desperate need for an overhaul of the legislation to recognise the modern world in which we live. For it seems wrong that [the intended mother] has to apply to the Court to adopt a child who is biologically her own.

- 7.27 The difference between adoption and surrogacy also results in practical problems when applying the adoption process to surrogacy arrangements as we explain below.

The adoption process leaves parties with no way to resolve disputes

- 7.28 Surrogacy arrangements are legal but unenforceable in Aotearoa New Zealand,⁵⁰ consistent with the approach taken in comparable jurisdictions.⁵¹ The consent-based nature of the adoption process therefore leaves parties with no way to resolve disputes over legal parenthood. This introduces an element of uncertainty as to the outcome in any surrogacy arrangement and leaves the parties in a vulnerable position.
- 7.29 If the surrogate refuses to agree to the adoption and instead wishes to raise the child herself, the intended parents cannot be recognised as the child's legal parents. To have a role in the child's care, they would need to seek a parenting order or apply to be appointed as a guardian of the child under the Care of Children Act. As explained above, this would not give intended parents the same rights and responsibilities for the child that come with legal parenthood, nor would it extinguish the surrogate's (and her partner's) parental status. In the context of a surrogacy arrangement, these alternatives do not provide the child with the same degree of security and therefore may not be in the child's best interests.⁵²
- 7.30 The consent-based nature of adoption also leaves the surrogate and her partner vulnerable. If the intended parents do not seek an adoption order, the surrogate (and any partner) will remain the child's legal parents and will be legally and financially responsible for that child.
- 7.31 In practice, it is rare for surrogacy arrangements to break down to the point where legal parenthood and parental responsibility are contested. We are only aware of one such case in Aotearoa New Zealand.⁵³ In that case, the intended parents entered a traditional surrogacy arrangement without the involvement of a fertility clinic, and the surrogate reportedly changed her mind during the pregnancy. The result was a shared-care arrangement in relation to the resulting child between the surrogate and intended parents.
- 7.32 This problem is also illustrated in the English case of *Re AB*.⁵⁴ In that case, the surrogate and her husband had handed over the children to the intended parents but then refused to consent to the making of a parental order, which was necessary to transfer legal parenthood from the surrogate and her partner to the intended parents. The Court

⁵⁰ Human Assisted Reproductive Technology Act 2004, s 14(1).

⁵¹ Surrogacy arrangements are unenforceable in Australia, the United Kingdom and Canada, although some jurisdictions make an exception to ensure that intended parents pay a surrogate's costs and expenses relating to the surrogacy arrangement, as we explain in Chapter 6.

⁵² *Re G DC Invercargill Adopt* 6/92, 3 February 1993 at 8.

⁵³ Katie Harris "Surrogacy Horror: Kiwi parents are having to share custody with surrogate" *NZ Herald* (online ed, New Zealand, 24 January 2021).

⁵⁴ *Re AB (Surrogacy: Consent)* [2016] EWHC 2643 (Fam), [2017] 2 FLR 217.

observed that the decision of the surrogate and her husband regarding consent seemed “due to their own feeling of injustice, rather than what is in the children’s best interests”.⁵⁵ Nonetheless, their refusal to consent meant that:⁵⁶

[T]he application for a parental order comes to a juddering halt, to the very great distress of the applicants. The result is that these children are left in a legal limbo, where, contrary to what was agreed by the parties at the time of the arrangement, the respondents will remain their legal parents even though they are not biologically related to them and they expressly wish to play no part in the children’s lives.

- 7.33 In that case, the Court was limited to making an order giving the intended parents parental responsibility for the children, but they remained the legal children of the surrogate and her husband. This has been criticised as “a wholly unsatisfactory situation, with the law not reflecting the reality of the situation”.⁵⁷
- 7.34 While disputes over legal parenthood are rare, their potential and the lack of any process to resolve disputes can “create an atmosphere of fear and mistrust”⁵⁸ in surrogacy arrangements.⁵⁹ This may deter some intended parents from pursuing a domestic surrogacy arrangement in favour of an international surrogacy arrangement in a jurisdiction where they have clearer legal rights and responsibilities in relation to the child. It might also deter women from acting as surrogates in Aotearoa New Zealand.
- 7.35 These concerns were evident in our initial consultation. One intended parent told us that all they could do was hope it would all work out, but “with something so serious, you need more than hope”. One surrogate’s partner we spoke with told us that their legal responsibility for the child if the intended parents changed their mind was “one of our biggest concerns when we started on this journey” because “we have everything to lose”. Several intended parents we spoke with told us that the legal uncertainty in Aotearoa New Zealand was a factor in them deciding to pursue surrogacy offshore. One male couple who pursued surrogacy in the United States said that it was reassuring knowing their rights and that their surrogate was protected and could not be taken advantage of.

The adoption process does not provide for all surrogacy situations

- 7.36 The effect of adoption is to transfer legal parenthood from one or two individuals to another individual or individuals. This transfer cannot occur in respect of an intended parent who dies before the adoption order is made. This means that the child’s birth certificate will not record a deceased intended parent as their legal parent, which fails to

⁵⁵ *Re AB (Surrogacy: Consent)* [2016] EWHC 2643 (Fam), [2017] 2 FLR 217 at [8]. The Court noted that the catalyst for the breakdown appeared to have been that the surrogate felt the intended parents had not shown sufficient concern for her well-being after she had been told, at her 12-week scan, that the continuation of the pregnancy could put her health at risk, at [19].

⁵⁶ *Re AB (Surrogacy: Consent)* [2016] EWHC 2643 (Fam), [2017] 2 FLR 217 at [9].

⁵⁷ Amel Alghrani and Danielle Griffiths “The regulation of surrogacy in the United Kingdom: the case for reform” [2017] 29 *Child and Family Law Quarterly* 165 at 179.

⁵⁸ Liezl van Zyl and Ruth Walker “Beyond altruistic and commercial contract motherhood: The professional model” (2013) 27 *Bioethics* 373 at 381.

⁵⁹ Research exploring the experiences of intended parents and surrogates in Aotearoa New Zealand found that “[t]he fear most commonly associated with surrogacy is that the surrogate will decide not to relinquish the baby”: Ruth Walker and Liezl van Zyl “Fear and Uncertainty: The Surrogacy Triad’s Experience of Social Workers’ Role Ambiguity” (7 September 2020) *British Journal of Social Work* bcaa105 (advance article) at 7.

reflect the reality of the surrogacy arrangement and may cause unwarranted distress to the parties involved, including the child, in future. It may also have consequences for the child's entitlements to the deceased intended parent's estate under succession law.

- 7.37 In addition, the adoption process is not available if the child is still-born⁶⁰ or dies before the adoption order is made. Again, this means that the child's birth certificate will not record the intended parents as the child's legal parents. Understandably, this lack of recognition of the intended parents' relationship to a child who has died would likely be very distressing.

Safeguards in the adoption process are unsuited to surrogacy

- 7.38 The safeguards built in to the adoption process are unsuited to surrogacy in two respects.
- 7.39 First, as we explore in Chapter 5, the difference between surrogacy and adoption calls into question whether the suitability of intended parents to care for and raise the child should be assessed in the same way as prospective adoptive parents.
- 7.40 Second, the planned nature of surrogacy arrangements calls into question the utility of the Family Court assessing, *after* the child is born, the suitability of the intended parents and whether the adoption is in the best interests of the child.
- 7.41 Currently, when the court considers an adoption application, the surrogate and her partner will have given their consent to the adoption, indicating their intention not to be recognised as the child's parents. The child will usually be the genetic child of one or both intended parents and will have been living with the intended parents for a period of time, consistent with the parties' intentions.
- 7.42 In these circumstances, the child's best interests will almost always require the adoption order to be approved. We are not aware of any cases where an application for an adoption order has been declined on the basis that the intended parents are not "fit and proper" people to adopt or that the order is not in the child's best interests.⁶¹ In contrast, ECART can, and does, decline approval for some surrogacy arrangements if it determines that the relevant requirements are not met (see Chapter 5).
- 7.43 The court's established practice of granting a final adoption order in the first instance also indicates that the adoption process is generally inappropriate for surrogacy. As the court observed in one surrogacy case, "it would seem somewhat bizarre to require further monitoring of an adoption by biological parents".⁶² Even in cases where there is no

⁶⁰ The Births, Deaths, Marriages, and Relationships Registration Act 1995 defines a still-born child as a dead foetus that weighed 400g or more when it issued from its mother or is issued from its mother after the 20th week of pregnancy: Births, Deaths, Marriages, and Relationships Registration Act 1995, s 2 (definition of "still-born child"). The birth of a still-born child must be registered in the same way as any other child: Births, Deaths, Marriages, and Relationships Registration Act 1995, s 12.

⁶¹ This was affirmed in interviews conducted with Family Court judges as part of the University of Canterbury's surrogacy research. All eight judges advised that "they have always held that the welfare and best interests of the child are promoted by the adoption". Only one judge had dealt with a case where a concern was raised about whether the applicants were fit and proper (concerning an instance of family violence which was reported to police but did not result in court proceedings). That was addressed in detail by the social worker's report: Debra Wilson *Understanding the Experience and Perceptions of Surrogacy Through Empirical Research: Judges Survey* (Te Whare Wānanga o Waitaha | University of Canterbury, May 2020) vol 2 at 12–13.

⁶² *Re X* [2019] NZFC 7753 at [12].

genetic link between the child and the intended parent(s), special circumstances would likely exist given the lack of parental alternatives and that the child will have been living with the intended parents since birth.⁶³

- 7.44 While the evidence is that adoption orders will almost always be approved in a surrogacy arrangement, it is important to acknowledge that some intended parents remain concerned that their adoption application will be rejected. This was a common theme in our initial consultations and was also reflected in research conducted in Aotearoa New Zealand by Dr Ruth Walker and Dr Liezl van Zyl, which found:⁶⁴

That full assessment and the Family Court process caused our participants the most stress. They were led to believe that the application to adopt could be declined and they incurred legal costs for what was in effect a fait accompli given the consent of the surrogate.

- 7.45 The general unsuitability of a post-birth best interests' assessment as a safeguard in surrogacy arrangements is a recognised problem.⁶⁵ As we explore in Chapter 5, prior authorisation of surrogacy arrangements is generally considered more likely than a post-birth approval process to effectively identify and address any concerns in relation to the arrangement and promote the best interests of children born by surrogacy.

The adoption process may prevent intended parents from caring for the surrogate-born child in the first few weeks

- 7.46 In some surrogacy arrangements, the requirement for a social worker's prior approval to the intended parents caring for the child in the first 10 days may be problematic. We understand that, in gestational surrogacy arrangements, prior approval will typically be granted. However, in traditional surrogacy arrangements, the social worker may decline to give prior approval on the basis that the child is the surrogate's genetic child.⁶⁶ Because these decisions are at the social worker's discretion, there is scope for variation in approach between social workers.
- 7.47 In cases where prior approval is not given, this may cause the parties distress and concern that their adoption application might not be approved and may make it difficult for some intended parents to care for the child at a time that is very important for parent-newborn bonding and attachment. It may also place the surrogate in the difficult position of having to care for the child against her intentions, potentially making it harder to hand over care to the intended parents when that becomes possible.

⁶³ This was the case in *Re Clifford* [2016] NZFC 1666.

⁶⁴ Ruth Walker and Liezl van Zyl "Surrogacy and the law: three perspectives (2020) 10 NZFLJ 9 at 14.

⁶⁵ Claire Fenton-Glynn and Jens M Scherpe "Surrogacy in a Globalised World: Comparative Analysis and Thoughts on Regulation" in Jens M Scherpe, Claire Fenton-Glynn and Terry Kaan (eds) *Eastern and Western Perspectives on Surrogacy* (Intersentia, Cambridge (UK), 2019) 515 at 554 and 569–570; and Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: a new law – A joint consultation paper* (CP244/DP167, 2019) at [5.106]–[5.109].

⁶⁶ In *Re Williamson* [2017] NZFC 7371, [2018] NZFLR 513, a case involving a traditional surrogacy arrangement, the Court observed that the intended parents had cared for the child since birth but that "[s]ocial work placement approval was unable to be issued as Mr and Mrs [Williamson] cared for [the child] prior to Ms [Jones'] legal consent being received": at [3]. Nonetheless, the social worker approved the adoption: at [9].

The adoption process is lengthy, costly and an administrative burden

- 7.48 People we have spoken with during our initial consultation consistently pointed to the cost, delay and administrative burden involved in the adoption process. The expectation is that adoption applications should be concluded within 15 weeks from the date of filing (13 weeks in relation to international surrogacy proceedings).⁶⁷ However, Family Court judges interviewed as part of Te Whare Wānanga o Waitaha | University of Canterbury's research project Rethinking Surrogacy Laws noted that there is often a considerable delay between the filing of the adoption application and the hearing, due to the high workload of the Family Court.⁶⁸ Until a final adoption order is made, the intended parents lack full parental rights and responsibilities for the child, even though it is likely that they will be the child's primary carers throughout this time.
- 7.49 Several people have raised concerns about the complexity of this process and the lack of lawyers with experience advising on adoption following a surrogacy arrangement. We also note that, if a social worker approves the intended parents caring for the child in the absence of an interim adoption order, that approval only remains in place for one month unless an application for an adoption order is made in that time. This means that the court documentation should be filed within one month of the child's birth. As part of that process, the child's birth needs to be registered and a birth certificate obtained, and the necessary forms and affidavits need to be completed and submitted to the Court. This creates a significant amount of procedural complexity at a time when intended parents are caring for a newborn child.
- 7.50 The cost of the adoption process is also a significant issue. Often this process comes after a comprehensive ECART process, which will have already cost the intended parents thousands of dollars. One intended parent, who organised the 2019 Petition, wrote that "[t]his unnecessarily burdensome and expensive process means adoption is out of reach for many New Zealanders and this simply should not be the case".⁶⁹

Current arrangements may deter formalising parent-child relationships

- 7.51 The problems with the current law may deter intended parents from formalising their relationship with their child.
- 7.52 In 2005, the Commission concluded that the current law was resulting in children being cared for by one or both parents who had no legal standing in relation to the child.⁷⁰ From its consultation, a common scenario seemed to be that the surrogate would record the intended father's name on the birth certificate and the intended parents would simply take custody of the child and care for them on a day-to-day basis.⁷¹

⁶⁷ *Family Court Caseflow Management Note* (November 2017) at 5.

⁶⁸ Debra Wilson *Understanding the Experience and Perceptions of Surrogacy Through Empirical Research: Judges Survey* (Te Whare Wānanga o Waitaha | University of Canterbury, May 2020) vol 2 at 10.

⁶⁹ Letter from Christian Newman to All Members of Parliament regarding Surrogacy Law Reform (8 June 2020) at 3.

⁷⁰ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [7.57].

⁷¹ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [7.7].

- 7.53 We do not know whether this practice is continuing today and, if so, how common it is. In 2017, Associate Professor Debra Wilson said that anecdotal evidence (in the form of discussions with lawyers) suggests “a significant disparity” between the number of surrogate-born children in Aotearoa New Zealand and the number of those children that have a legally recognised relationship with their parents.⁷²
- 7.54 Some Family Court judges have also expressed the view that some intended parents in a traditional surrogacy arrangement may not consider it necessary or worth the hassle and expense to apply for an adoption order.⁷³ We note that this is possible even in a gestational surrogacy arrangement that has been approved by ECART, as no one monitors the parties after the child is born to ensure that an adoption application is made.
- 7.55 Wilson has identified several possible reasons why intended parents might not apply for an adoption order:⁷⁴
- (a) First, some intended parents might not be aware that they need to adopt their child in order to become the legal parents. However, this reason may be less common today if there is increased public awareness of surrogacy and legal parenthood in surrogacy arrangements.
 - (b) Second, some intended parents may object in principle to the idea that they must adopt their own child, particularly if that child is their genetic child, and therefore refuse to go through the legal process.
 - (c) Third, intended parents who have had a child as a result of a commercial surrogacy arrangement may be deterred by the criminal sanctions on commercial surrogacy from publicising the circumstances of the child’s gestation and birth.
- 7.56 If the intended parents’ legal relationship with their child is not formalised, the child is in a vulnerable position and lacks those protections afforded to them by legal parenthood. For example, the intended parents might not be able to consent to medical treatment on the child’s behalf or enrol the child in school. They cannot apply for a passport for the child or ensure that the child is entitled to the various benefits that flow from the legal parent-child relationship, discussed above.
- 7.57 The surrogate is also left in a vulnerable position because she would remain the child’s legal parent with all the associated parental rights and responsibilities. If the surrogate had a partner when she became pregnant, that person would also remain the child’s legal parent in the absence of an adoption. This may be a source of ongoing anxiety or concern.⁷⁵

⁷² Debra Wilson “Avoiding the Public Policy and Human Rights Conflict in Regulating Surrogacy: The Potential Role of Ethics Committees in Determining Surrogacy Applications” (2017) 7 UC Irvine L Rev 653 at 656.

⁷³ Debra Wilson *Understanding the Experience and Perceptions of Surrogacy Through Empirical Research: Judges Survey* (Te Whare Wānanga o Waitaha | University of Canterbury, May 2020) vol 2 at 5.

⁷⁴ Debra Wilson “Avoiding the Public Policy and Human Rights Conflict in Regulating Surrogacy: The Potential Role of Ethics Committees in Determining Surrogacy Applications” (2017) 7 UC Irvine L Rev 653 at 657.

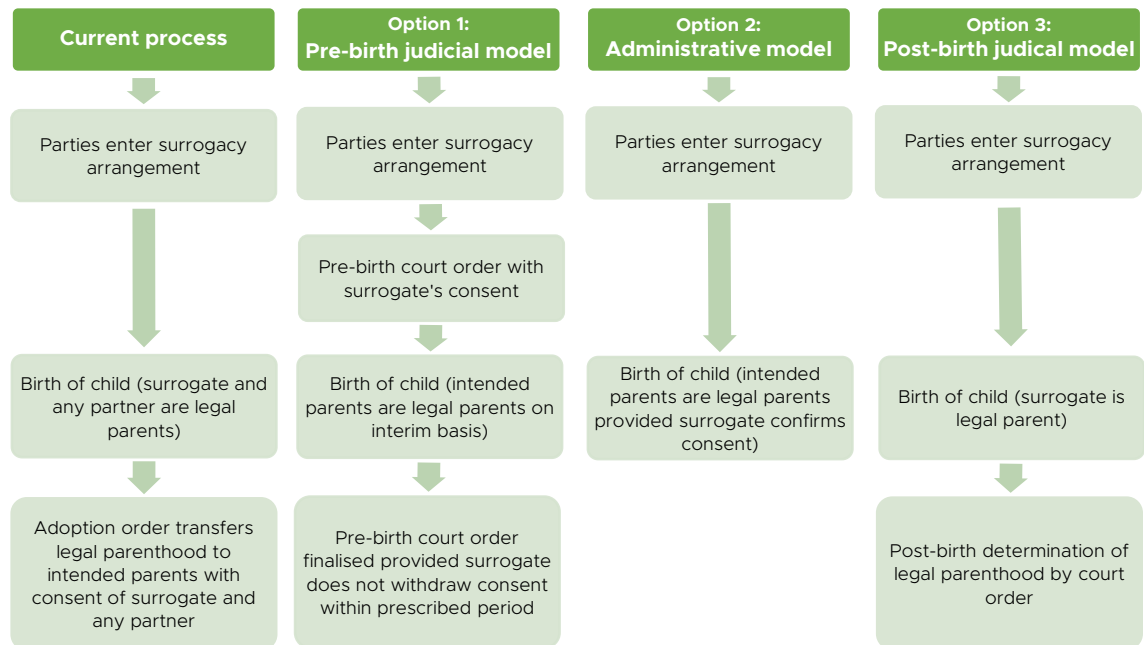
⁷⁵ This was evident from the Commission’s consultation in 2005: Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [7.23].

OPTIONS FOR REFORM

7.58 There is considerable variation in how legal parenthood in surrogacy arrangements is determined in other jurisdictions. Having considered the different approaches and the existing regulatory framework under the Human Assisted Reproductive Technology Act 2004 (HART Act), we have developed three options for reform, which are:

- (a) the pre-birth judicial model;
- (b) the administrative model; and
- (c) the post-birth judicial model.

7.59 How these different models compare to the current adoption process is illustrated in the diagram below.



7.60 We have not proposed a contractual model as an option for reform. This model is used in some jurisdictions where surrogacy arrangements are commercial in nature, such as California. Under a contractual model, the parties enter an enforceable surrogacy contract prior to conception and may then seek a court order to establish legal parenthood pursuant to the terms of that contract.⁷⁶ We do not think a contractual model is appropriate for Aotearoa New Zealand. It would enable legal parenthood to be determined by private contract, which would be contrary to public policy and “the very purpose of family law”.⁷⁷ It would also fail to ensure the best interests of the child is the

⁷⁶ See, for example, Naomi Cahn and June Carbone “Surrogacy in the United States of America” in Jens M Scherpe, Claire Fenton-Glynn and Terry Kaan (eds) *Eastern and Western Perspectives on Surrogacy* (Intersentia, Cambridge (UK), 2019) 307 at 326.

⁷⁷ Claire Fenton-Glynn and Jens M Scherpe “Surrogacy in a Globalised World: Comparative Analysis and Thoughts on Regulation” in Jens M Scherpe, Claire Fenton-Glynn and Terry Kaan (eds) *Eastern and Western Perspectives on Surrogacy* (Intersentia, Cambridge (UK), 2019) 515 at 571 and 584. See also Henry Kha and Kelly Rankin “Mater semper certa est? Reconceiving surrogacy law in New Zealand” (2019) 9 NZFLJ 172 at 175; and Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [7.64].

paramount consideration and, for this reason, is inconsistent with international best practice.⁷⁸

Option 1: Pre-birth judicial model

- 7.61 Under this option, a court order could be obtained before the child's birth. The effect of the court order would be that the intended parents are the child's legal parents from birth.
- 7.62 This model was recommended by the Commission in 2005⁷⁹ and in a Member's Bill first proposed in 2019.⁸⁰ A form of this model operates in South Africa and Greece, where a court order is required to authorise the surrogacy arrangement prior to conception, with the effect that the intended parents will be the child's legal parents from birth.⁸¹ A similar model has also been recommended in Ireland.⁸²
- 7.63 The benefit of this model is that it gives the parties certainty as to their legal rights and responsibilities in relation to the child from birth. However, a limitation of this model is that a pre-birth order can only be obtained if the parties are in agreement. It does not provide a process to resolve disputes.
- 7.64 This model also raises concerns about the timing of the surrogate's consent. International best practice is that the surrogate must have an opportunity to confirm or revoke her consent post-birth.⁸³ This is considered an important safeguard that protects the surrogate's rights and promotes confidence in the integrity of the circumstances surrounding the surrogacy arrangement.⁸⁴ In Portugal, for example, a pre-birth judicial model was introduced in 2016 but was later struck down by Portugal's Constitutional Court as unconstitutional.⁸⁵ The Court made it clear that the surrogate must retain the right to reconsider and revoke her consent post-birth as the only means to safeguard

⁷⁸ The Verona Principles recommend that states "should ensure that the law does not allow contractual provisions to irrevocably determine legal parentage or any other decisions regarding the status and/or care of a child in surrogacy": International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [1.5]. See also [6.2].

⁷⁹ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005), R15.

⁸⁰ Improving Arrangements for Surrogacy Bill 2021 (undrawn Member's Bill, Tāmami Coffey MP). At the time of writing, the proposed Member's Bill has not been drawn from the Member's Bill ballot and introduced to the House.

⁸¹ Claire Fenton-Glynn and Jens M Scherpe "Surrogacy in a Globalised World: Comparative Analysis and Thoughts on Regulation" in Jens M Scherpe, Claire Fenton-Glynn and Terry Kaan (eds) *Eastern and Western Perspectives on Surrogacy* (Intersentia, Cambridge (UK), 2019) 515 at 534–535.

⁸² Conor O'Mahony *A Review of Children's Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law* (Department of Children, Equality, Disability, Integration and Youth, Ireland, December 2020), R12 at 49.

⁸³ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [10.5]–[10.6].

⁸⁴ See, for example, Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: A new law – A joint consultation paper* (CP244/DP167, 2019) at [7.82] and [7.100]; Martha Ceballos "Parenthood in surrogacy agreements: a new model to complete the puzzle" (2019) 9 NZFLJ 123 at 130; Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [7.61]–[7.64]; and International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [7.1].

⁸⁵ Law no. 25/2016 (22 August 2016), as discussed in Rute Teixeira Pedro "Surrogacy in Portugal" in Jens M Scherpe, Claire Fenton-Glynn and Terry Kaan (eds) *Eastern and Western Perspectives on Surrogacy* (Intersentia, Cambridge (UK), 2019) 229 at 229–232.

“the continuity of her consent for the entire duration of the contract” and to guarantee the respect for her fundamental rights.⁸⁶

- 7.65 The Commission in 2005 recognised the need for the surrogate’s post-birth consent and recommended that a pre-birth order should only grant interim legal parental status. After the birth, the surrogate should have 21 days to petition the court to overturn the interim order.⁸⁷ Only if no petition is filed in that time would the order be finalised.⁸⁸ A similar provision has been recommended in Ireland to give the surrogate the opportunity to raise an objection during a prescribed period after birth.⁸⁹
- 7.66 We agree that this model would need to provide for the surrogate to confirm her consent (by not challenging the pre-birth order) in a prescribed period after birth.

Option 2: Administrative model

- 7.67 The second option is an administrative model. Under this model, the intended parents are recognised as the child’s legal parents by operation of law, if certain requirements are met. There is no need to obtain a court order.
- 7.68 The administrative model is a relatively recent development. Since 2011, it has been adopted in several Canadian provinces (Ontario, British Columbia and Saskatchewan). In these jurisdictions, the intended parents are recognised in law as the child’s legal parents provided that:⁹⁰
- (a) a written surrogacy agreement was entered into before the child was conceived; and
 - (b) after the child’s birth, the surrogate consents in writing to relinquishing her entitlement to legal parenthood.
- 7.69 An administrative model was also provisionally recommended by the Law Commission of England and Wales and the Scottish Law Commission in its 2019 consultation paper.⁹¹ They proposed a model under which the intended parents are the legal parents from

⁸⁶ Decision no. 225/2018, as discussed in Rute Teixeira Pedro “Surrogacy in Portugal” in Jens M Scherpe, Claire Fenton-Glynn and Terry Kaan (eds) *Eastern and Western Perspectives on Surrogacy* (Intersentia, Cambridge (UK), 2019) 229 at 236–238 and 251.

⁸⁷ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005), R15.

⁸⁸ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [7.74].

⁸⁹ Conor O’Mahony *A Review of Children’s Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law* (Department of Children, Equality, Disability, Integration and Youth, Ireland, December 2020), R13.

⁹⁰ Children’s Law SS 2020 c 2, s 62(3); Children’s Law Reform Act 2016 (Ontario), s 10(2)–(3); and Family Law Act SBC 2011 c 25, s 29(2)–(3).

⁹¹ Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: a new law – A joint consultation paper* (CP244/DP167, 2019) at ch 8. An administrative model has also been recommended in Iceland in a Bill introduced in Parliament in 2015, but that Bill did not progress following a change in government: Hrefna Friðriksdóttir “Surrogacy in Iceland” in Jens M Scherpe, Claire Fenton-Glynn and Terry Kaan (eds) *Eastern and Western Perspectives on Surrogacy* (Intersentia, Cambridge (UK), 2019) 259 at 272–273. In Canada, an administrative model was also favoured by the Manitoba Law Reform Commission in its report *Assisted Reproduction: Legal Parentage and Birth Registration – Issue Paper* (2014) at 36; and by Quebec’s Advisory Committee on Family Law: Law Reform Commission of Saskatchewan *Assisted Reproduction & Parentage: Final Report* (2018) at [200]–[201]. In Australia, an administrative model was proposed in in Tammy Johnson “Through the Looking-Glass: A Proposal for National Reform of Australia’s Surrogacy Legislation” in Paula Gerber and Katie O’Byrne (eds) *Surrogacy, Law and Human Rights* (Ashgate, United Kingdom, 2015) 31.

birth, subject to the surrogate exercising her right to withdraw her consent within a specified period after birth.⁹² Like the Canadian model, the Commissions have proposed that this model should only apply if the surrogacy arrangement satisfied certain eligibility requirements and procedural safeguards, such as the existence of a pre-conception agreement that meets prescribed requirements and is supervised and countersigned by either a regulated clinic or a regulated surrogacy organisation.⁹³

- 7.70 The benefit of this model is that it avoids the need for a court order, thereby reducing the cost, delay and administration in establishing legal parenthood. It also addresses the concerns with pre-birth orders in relation to the timing of the surrogate's consent identified with Option 1.
- 7.71 However, a limitation of this model is that, like Option 1, it relies on the consent of the surrogate and does not provide a process to resolve disputes. In Canada, if the surrogate does not provide consent, a party can apply to the court for an order determining legal parenthood.⁹⁴ The Law Commission of England and Wales and the Scottish Law Commission have similarly proposed that, if the surrogate withdraws her consent, the intended parents could apply to court for an order that recognises them as the child's legal parents, provided the child is already living with them or a court has determined that the child's primary residence should be with the intended parents.⁹⁵

Option 3: Post-birth judicial model

- 7.72 Under this option, the surrogate would be the child's legal parent at birth, and the intended parents, after a certain period following the birth of the child, could apply for a court order that has the effect of recognising them as the child's legal parents and extinguishing the surrogate's legal parenthood. The court could only grant an order if satisfied that it is in the best interests of the child.
- 7.73 Versions of this model are used in Australia⁹⁶ and the United Kingdom, although the Law Commission of England and Wales and the Scottish Law Commission have provisionally proposed replacing this with an administrative model for some surrogacy arrangements, discussed above.
- 7.74 The benefit of this model is that, because it is a post-birth process, the court can determine legal parenthood with the best information, including information about the post-birth intentions of the parties and how the child is being cared for. This enables the court to be satisfied that recognising the intended parents as the child's legal parents is the correct course of action at the time the order is made (not before). Because of the post-birth timing, this model could also provide a process for disputes over legal

⁹² Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: a new law – A joint consultation paper* (CP244/DP167, 2019) at [8.27] and [8.87].

⁹³ A regulated surrogacy organisation is a not-for-profit intermediary.

⁹⁴ Children's Law SS 2020 c 2, s 62(9); Children's Law Reform Act 2016 (Ontario), s 10(6); and Family Law Act SBC 2011 c 25, s 31.

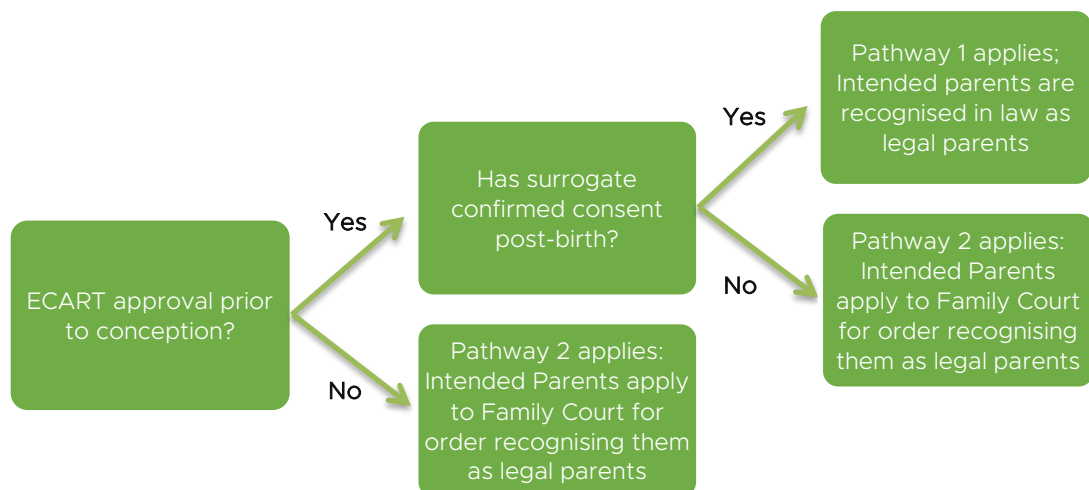
⁹⁵ Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: a new law – A joint consultation paper* (CP244/DP167, 2019) at [11.51]–[11.52].

⁹⁶ Excluding Northern Territory, which has no surrogacy laws. It is anticipated that surrogacy laws will be introduced in 2021: Lauren Roberts "The NT Government will introduce surrogacy laws in 2021 — but it's 'too late' for some" *ABC News* (online ed, Australia, 16 January 2021).

parenthood to be resolved. However, as this model is similar to the current adoption process in Aotearoa New Zealand, some of the problems identified with the current law above would also arise under this option, including the concerns about the intended parents' lack of legal rights and responsibilities in relation to a child before the order is made, the utility of the post-birth best interests' assessment and the delay, cost and administrative burden of a post-birth court process.

PROPOSALS FOR REFORM: THE DUAL PATHWAY APPROACH

- 7.75 We propose a new legal framework for determining legal parenthood in surrogacy arrangements that adopts both Options 2 and 3 above. Our view is that an administrative model should apply to surrogacy arrangements that have met certain safeguards but that there is a need for a court-based process to be available whenever these safeguards have not or cannot be met.
- 7.76 This legal framework should be separate to adoption legislation to recognise that adoption and surrogacy are different forms of family building. The Status of Children Act already governs legal parenthood of children conceived as a result of assisted human reproduction procedures, therefore this may be a logical setting for this new legal framework. Alternatively, separate surrogacy legislation may be desirable.
- 7.77 Under our proposed new legal framework, there would be two alternative pathways to establish legal parenthood:
- (a) **Pathway 1:** The intended parents are the legal parents of the surrogate-born child by operation of law, provided two key conditions are met:
 - (i) The surrogacy arrangement was approved by ECART.
 - (ii) After the child is born, the surrogate confirms her consent to relinquish legal parenthood.
 - (b) **Pathway 2:** Whenever Pathway 1 does not apply, the surrogate is the legal parent at birth and an application can be made to the Family Court for a post-birth order determining the intended parents are the legal parents of the surrogate-born child.
- 7.78 The diagram below illustrates how the new legal framework would work in practice.



7.79 We consider that the proposed new legal framework would:

- (a) promote the best interests of the child, as Pathway 1 would confer legal parenthood on those who intend to raise the child at an early opportunity, but only where the surrogacy arrangement has satisfied the requirements of the ECART process;
- (b) reduce costs, delay and administration in appropriate cases at a time when the surrogate will be recovering from the birth and the intended parents will be caring for a newborn child;
- (c) give greater weight to the parties' intentions and, in doing so, respect their autonomy subject to appropriate safeguards;
- (d) provide greater clarity and certainty about the parties' rights and obligations and a clear pathway to resolve disputes in the event of disagreement;
- (e) remove cases from the court system where judicial oversight is not required, reserving judicial oversight for cases that do require greater scrutiny or where a conflict arises;
- (f) provide a clear incentive to utilise the ECART process, which may reduce the risk of problems arising during and after the pregnancy;
- (g) support intended parents to enter surrogacy arrangements in Aotearoa New Zealand rather than offshore – for some intended parents we spoke with, dissatisfaction with the current law was a reason why they pursued international surrogacy, and providing through Pathway 1 a clear and simple pathway to legal parenthood may therefore reduce the attraction of international surrogacy with its related risks (discussed in Chapters 3 and 9); and
- (h) promote consistency with international best practice.⁹⁷

7.80 We do not favour a pre-birth judicial model (Option 1). When the Commission recommended this model in 2005, the regulation of surrogacy arrangements was in its infancy. The HART Act had only been passed one year previously, and ECART and ACART had not yet been established. As we explain in Chapter 5, the ECART process is now generally seen as a robust process that protects the rights and interests of all parties involved, including the rights of the child. Therefore, we do not think a court process is necessary in addition to ECART approval when there is no dispute over legal parenthood.

7.81 Below we detail how we think the dual pathway approach could operate in practice.

Pathway 1: Recognition of legal parenthood by operation of law

7.82 Pathway 1 would apply to surrogacy arrangements that obtained ECART approval provided the surrogate confirms her consent to relinquish legal parenthood after the child is born. As noted above, requiring the surrogate to confirm her consent post-birth is

⁹⁷ The Verona Principles emphasise the need for an established framework for pre-surrogacy arrangements and do not require a post-birth judicial process to determine legal parenthood in every case. Rather, a court or other competent authority should conduct a post-birth best interests of the child determination in surrogacy arrangements where there have *not* been adequate pre-surrogacy arrangements or where the surrogate has not confirmed her consent post-birth: International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [10.6] and [10.7].

considered an important safeguard that protects the surrogate's rights and promotes confidence in the integrity of the circumstances surrounding the surrogacy arrangement.

7.83 There are two different ways Pathway 1 could work in practice:

- **Option A:** The surrogate is the child's legal parent at birth, and after birth, she can sign a statutory declaration confirming her consent to relinquish all parental rights and responsibilities in favour of the intended parents. This is the approach in Ontario, British Columbia and Saskatchewan. Once this declaration is signed, the intended parents are recognised as the child's legal parents and can then register the child's birth. The law could specify that, before the specified period expires, the intended parents and the surrogate shall share all parental rights and responsibilities in relation to the child.⁹⁸
- **Option B:** The intended parents are the legal parents at birth, but the surrogate retains a right to withdraw her consent for a prescribed period after birth. This is similar to the Commission's 2005 recommendation that the surrogate should have the opportunity to petition the court to overturn a pre-birth interim order.⁹⁹ This option has also been provisionally recommended by the Law Commission of England and Wales and the Scottish Law Commission and in Ireland. If the surrogate exercises her right to withdraw consent, parenthood could automatically revert to the surrogate or remain with the intended parents pending a court determination under Pathway 2. If the surrogate does not exercise her right to withdraw consent, the intended parents could register the child's birth after the prescribed period expires.

7.84 Both options have advantages and disadvantages. An advantage of Option A is that legal certainty can be achieved relatively quickly. However, a short stand-down period immediately after birth might be appropriate to ensure the integrity of the surrogate's consent. For example, a surrogate cannot give consent in Ontario until seven days after birth or three days in Saskatchewan. A disadvantage of Option A is that it involves a further administrative step to be taken post-birth before the intended parents are recognised as the child's legal parents.

7.85 An advantage of Option B is that the intended parents are recognised from birth as the child's legal parents (albeit on an interim basis until the end of the prescribed period), and it avoids the need for further administrative steps. A disadvantage of Option B is that it would take longer to achieve legal certainty than Option A. The prescribed period during which a surrogate has the right to withdraw her consent would need to provide for "an appropriate reflection period" post-birth¹⁰⁰ and reflect the added burden on the surrogate under Option B to withdraw consent by petitioning the court. In 2005, the Commission

⁹⁸ See, for example, Children's Law SS 2020 c 2, s 62(5)–(6); and Children's Law Reform Act RSO 1990 c 12, s 10(5).

⁹⁹ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005), R15. A similar model has also been suggested in Ruth Walker and Liezl van Zyl "Surrogacy and the law: three perspectives (2020) 10 NZFLJ 9 at 14; Martha Ceballos "Parenthood in surrogacy agreements: a new model to complete the puzzle" (2019) 9 NZFLJ 123 at 131; and Henry Kha and Kelly Rankin "Mater semper certa est? Reconceiving surrogacy law in New Zealand" (2019) 9 NZFLJ 172 at 176–177.

¹⁰⁰ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [10.5].

suggested a 21-day period, and the Law Commission of England and Wales and the Scottish Law Commission have tentatively suggested a period that is one week less than the period for birth registration.¹⁰¹ In Aotearoa New Zealand, parents are expected to register a birth within two months, so a comparable timeframe for a right to withdraw consent could be six weeks, or 42 days, to enable the intended parents sufficient time to then register the child's birth after the prescribed period ends.

- 7.86 We are interested in your views on whether Option A or Option B should be adopted and what timeframe should apply under the preferred option.

Should Pathway 1 apply only to gestational surrogacy arrangements?

- 7.87 In 2005, the Commission's view was that a distinction should be made based on whether the intended parents are full genetic parents, are partially genetically connected or have no genetic connection to the child.¹⁰² If there is no genetic connection, the Commission recommended intended parents be subject to the same process and requirements as apply to adoption.¹⁰³
- 7.88 We agree that genetic connection is an important consideration, especially when considering the child's best interests, as we identify below. However, we do not think that the legal pathways for establishing legal parenthood should differ depending on genetic connection. Legal parenthood laws must work for all types of surrogacy arrangements from traditional to gestational. All forms of gestational surrogacy should be accommodated, including where both intended parents' gametes are used, where only one intended parent's gametes are used and where both a donor ovum and donor sperm are used.¹⁰⁴ In all surrogacy arrangements, the parties' shared pre-conception intention is that the intended parents will raise the child as their own. Under Pathway 1, only arrangements that received ECART approval would qualify. All other surrogacy arrangements, and in the event of any objection raised by the surrogate, would follow Pathway 2.

Pathway 2: Family Court determination

- 7.89 Pathway 2 would provide a mechanism for determining legal parenthood when Pathway 1 does not apply.
- 7.90 It is inevitable that some surrogacy arrangements will not satisfy the criteria for Pathway 1. Traditional surrogacy arrangements can proceed privately without clinic assistance, and while we propose in Chapter 5 that the regulatory framework should better accommodate traditional surrogacy arrangements, some may proceed without ECART approval. In addition, in very rare cases, a surrogate might revoke her consent during

¹⁰¹ Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: A new law – A joint consultation paper* (CP244/DP167, 2019) at [8.27].

¹⁰² Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [7.67].

¹⁰³ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [7.67].

¹⁰⁴ A similar view is taken by Ruth Walker and Liezl van Zyl *Towards a Professional Model of Surrogate Motherhood* (Palgrave MacMillan, London, 2017) at 116. They argue that "jurisdictions where gametes are demanded from an intended parent as a condition of approving the surrogacy arrangement are doing something profoundly unethical", at 117.

pregnancy or after the child is born, preventing that arrangement from following Pathway 1. In Chapter 9, we also propose that Pathway 2 should be followed to establish legal parenthood in international surrogacy arrangements.

- 7.91 Under Pathway 2, the surrogate would be the child's legal parent at birth, and the intended parents would be able to apply to the Family Court for an order determining that they are the child's legal parents. The Family Court should have the power to grant the order or make any other determination as it sees fit. Unlike adoption, which is a transfer of legal parenthood, a determination of legal parenthood under Pathway 2 should be deemed to be effective from the child's birth.¹⁰⁵
- 7.92 The Family Court's exercise of discretion should be clearly guided by a set of relevant considerations. In Chapter 3, we identify that the paramountcy of the best interests of the child should be a guiding principle of surrogacy law reform. Accordingly, we think that, when a court is asked to determine the legal parenthood of a surrogate-born child, the paramount consideration should be the best interests of the child.
- 7.93 Drawing on the Verona Principles, the Commission's 2005 recommendations and approaches in other jurisdictions, matters that could be considered when determining the best interests of the child are:¹⁰⁶
- (a) the parties' intentions when entering into the surrogacy agreement;
 - (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 ability of each of the parties to facilitate the child's relationships with other people involved in the creation of the child;
 - (e) the value of a stable family unit in the child's development;
 - (f) the likely effect of the decision on the child, including psychological and emotional impact, throughout the child's life;
 - (g) any harm that the child has suffered or is at risk of suffering;
 - (h) the child's ascertainable wishes and feelings regarding the decision, taking account of the child's age and understanding;
 - (i) the views of wider family and whānau, if appropriate; and
 - (j) all circumstances in relation to the surrogacy arrangement.

The need for a social worker assessment

- 7.94 Our preliminary view is that the Family Court should be required to request a social worker's report for any case considered under Pathway 2 in the same way the Court does for adoptions.

¹⁰⁵ See, for example, Children's Law Reform Act RSO 1990 c 12, s 15(2).

¹⁰⁶ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [6.7]; Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: a new law – A joint consultation paper* (CP244/DP167, 2019) at [8.107]–[8.117]; and Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [7.75].

- 7.95 The difference between adoption and surrogacy calls into question whether intended parents' suitability to care for and raise the child should be assessed in the same way as prospective adoptive parents. However, in Chapter 5 we recognise that some form of assessment as part of the ECART process may still be appropriate to safeguard the child's best interests and ensure the state meets its obligations under the United Nations Convention on the Rights of the Child.
- 7.96 Cases under Pathway 2 will either not have gone through the ECART process or will have involved some conflict between the parties. In these circumstances, we think that an independent assessment of the best interests of the child would provide an important safeguard and assist the Court's consideration of the issues. We are interested in views as to what the social worker assessment should address and how this process could be tailored to the specific circumstances of surrogacy.

Should the Family Court have the power to appoint a lawyer for the child?

- 7.97 An additional safeguard or an alternative to requiring a social worker's report could be to provide for a lawyer for the child to be appointed to independently represent the child in every case or when ordered by the Court. This would be consistent with the Verona Principles, which state that, in cases requiring a post-birth best interests of the child determination, the child should have their rights independently represented by a legal guardian or other competent authority.¹⁰⁷ However, we note that a survey of Family Court judges with experience in adoptions involving surrogacy did not think this was necessary under the current adoption model (where social worker reports are required).¹⁰⁸

Parenthood status of the surrogate's partner

- 7.98 We do not think that the surrogate's partner should be presumed to be a legal parent of a surrogate-born child at birth. While the surrogate's partner performs an important role in supporting the surrogate throughout the arrangement, we think that it is inappropriate that they should have full parental rights and responsibilities for a child they have not been directly involved in the creation of and do not intend to raise. In the rare situation where the surrogate's partner donates gametes in the surrogacy arrangement, they should be treated as any other donor under the Status of Children Act and not be considered a legal parent at birth.
- 7.99 The Status of Children Act should therefore be amended to clarify that the child's sole legal parent at birth is the surrogate (unless the intended parents are the child's legal parents under Pathway 1). This would avoid the need for the surrogate's partner to confirm their consent to relinquish legal parenthood under Pathway 1 or to participate in proceedings under Pathway 2 (unless they wish to do so). As noted above, we think the Family Court should have broad jurisdiction under Pathway 2 to make any determination as to legal parenthood as it sees fit, which would provide a pathway for the surrogate's partner to be recognised as a legal parent in the rare scenario where the Family Court finds that to be in the child's best interests.

¹⁰⁷ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [2.3].

¹⁰⁸ Debra Wilson *Understanding the Experience and Perceptions of Surrogacy Through Empirical Research: Judges Survey* (Te Whare Wānanga o Waitaha | University of Canterbury, May 2020) vol 2 at 17.

QUESTIONS

- Q18** Do you agree with the issues we have identified with the process for establishing legal parenthood in surrogacy arrangements? Are there other issues we should consider?
- Q19** Do you agree with proposed Pathway 1 to replace the adoption process with recognition of the intended parents as the child's legal parents by operation of law when a surrogacy arrangement receives ECART approval and the surrogate consents?
- Q20** Do you prefer Option A or Option B to confirm the surrogate's consent under Pathway 1, or is there another option we should consider?
- Q21** Do you agree with proposed Pathway 2, which introduces a Family Court process for establishing legal parenthood when the conditions under Pathway 1 have not been met?
- Q22** Do you agree with our proposed list of relevant considerations the Family Court should have regard to when determining the legal parenthood of a surrogate-born child? Are there other considerations you would include in this list?
- Q23** Do you agree that the Family Court should seek a social worker's report when determining the legal parenthood of a surrogate-born child?
- Q24** Do you agree that the surrogate's partner should not be a legal parent of a surrogate-born child at birth?
-

CHAPTER 8

Children's rights to identity and access to information

IN THIS CHAPTER, WE CONSIDER:

- children's rights to identity and access to information; and
- issues with the current law and options for reform.

INTRODUCTION

8.1 In Chapter 3, we explain that children have a range of rights that relate to establishing their identity.¹ An important element of a child's right to identity is their right to access information about their origins. As has been evident from the past practices of closed adoption and anonymous donor conception, when information about a person's origins is not available to them, they may struggle to establish their own sense of identity and experience a "deep psychological need" to know who brought them into the world.²

¹ Affirmed by the United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 7(1). See also art 8(1).

² *Hemmes v Young* [2004] NZCA 289, [2005] 2 NZLR 755 at [117] (quotation marks omitted); and Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [10.25]–[10.34]. See also Sonia Allen and others "Donor Conception and Surrogacy" (seminar presented to United Nations Conference on the 30th Anniversary of the Convention on the Rights of the Child, Geneva, 19 November 2019).

- 8.2 In the context of surrogacy, the importance of ensuring that children have access to information about their genetic and gestational origins is now widely acknowledged.³ The Verona Principles, published in 2021, state that:⁴

The child's ability to preserve their identity, including their genetic, gestational and social origins, has an on-going, lifetime impact on the child and future generations, in particular from the perspective of the child's right to identity, health and cultural rights.

- 8.3 The importance of information about genetic and gestational origins is also recognised in Aotearoa New Zealand in the recently published Ngā Paerewa Health and Disability Services Standard NZS 8134:2021, discussed below.
- 8.4 The Commission considered a child's right to identity and access to information about genetic origins in its 2005 report *New Issues in Legal Parenthood*.⁵ In this chapter, we build on this work and look at ways to ensure a surrogate-born child has access to their gestational as well as genetic origins.

THE CURRENT LAW

Birth registration

- 8.5 When a child is born in Aotearoa New Zealand, their birth is registered by the following steps.
- 8.6 First, a preliminary notice is given to a Registrar of Births, Deaths and Marriages (Registrar) by completing and signing a standard form within five working days after the birth.⁶ The preliminary notice is completed by the hospital or, if the birth took place outside a hospital, by the attending doctor or midwife.⁷
- 8.7 Second, both parents must jointly notify a Registrar of the birth as soon as is reasonably practicable after the birth.⁸ In practice, the expectation is that parents register the birth

³ See, for example, International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [11.2]; Conor O'Mahony *A Review of Children's Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law* (Department of Children, Equality, Disability, Integration and Youth, Ireland, December 2020) at 32; Maud de Boer-Buquicchio *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* UN Doc A/74/162 (15 July 2019) at [58]; Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: a new law – A joint consultation paper* (CP244/DP167, 2019) at [10.1]; South Australian Law Reform Institute *Surrogacy: A Legislative Framework – A Review of Part 2B of the Family Relationships Act 1975 (SA)* (Report 12, 2018) at [24.5.1]; and Claire Achmad "Children's Rights in International Commercial Surrogacy: Exploring the challenges from a child rights, public international human rights law perspective" (PhD thesis, Leiden University, 2018) at ch 8.

⁴ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [11.1] (citations omitted).

⁵ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at ch 10.

⁶ Births, Deaths, Marriages and Relationships Registration Act 1995, s 5A.

⁷ If the birth occurred outside a hospital and neither a doctor nor a midwife was present, the preliminary notice must be given by the occupier of the premises where the birth took place or where the mother was admitted immediately after the birth: Births, Deaths, Marriages and Relationships Registration Act 1995, s 5A(3)(c).

⁸ Births, Deaths, Marriages and Relationships Registration Act 1995, s 9(1).

within two months.⁹ The Registrar may accept registration by one parent in limited circumstances, including if the birth mother is the sole parent at law.¹⁰

- 8.8 In a surrogacy arrangement, the surrogate will be the child's legal parent at birth, and therefore she will be responsible for registering the birth of the child.¹¹ The surrogate will be the child's sole parent at law if she did not have a partner at the time she became pregnant.¹²
- 8.9 The information that must be contained in the preliminary notice and birth notification is prescribed in regulations.¹³ There is no requirement to include information about whether the child was born as a result of a surrogacy arrangement or whether the child was conceived using donated gametes (ovum or sperm). Information about donor conception is captured separately, as we discuss below.

Birth certificates before and after adoption

- 8.10 Once a birth is registered, a birth certificate can be issued, which will contain the information prescribed under regulations.¹⁴ A birth certificate that is issued after the child's birth but before an adoption will record the surrogate and her partner (if she has one) as the child's parents and will not include any information about the intended parents, even if they are the child's genetic parents. The birth certificate does not record that the child is born as a result of a surrogacy arrangement.
- 8.11 Adoption is the only way to transfer legal parenthood to the intended parents, as we explain in Chapter 7. When a child is adopted in Aotearoa New Zealand, the Family Court must notify the Registrar-General of Births, Deaths and Marriages (Registrar-General) of certain information about the adoption,¹⁵ and the Registrar-General must record that information in the child's birth registration.¹⁶ If a child's birth has not already been registered (for example, if the child was born overseas as a result of an international surrogacy arrangement), the Registrar-General must also record on the register the

⁹ Te Tari Taiwhenua | Internal Affairs "He whakaaturanga o te Rēhita Whānautanga o te tamaiti i whānau i Aotearoa | Notification of Birth for Registration of child born in New Zealand" (9 December 2019) <www.govt.nz> at 1.

¹⁰ Births, Deaths, Marriages and Relationships Registration Act 1995, s 9(2)(a). Other grounds for accepting a birth notification from only one parent are if the other parent is unavailable or it is not reasonably practicable to obtain the other parent's signature because they are overseas or cannot be contacted within a reasonable period of time or if requiring the other parent to sign the form would cause unwarranted distress to either of the parents: Births, Deaths, Marriages and Relationships Registration Act 1995, s 9(2)(b)–(c).

¹¹ Pursuant to Part 2 of the Status of Children Act 1969. See discussion in Chapter 7 of this Issues Paper.

¹² Births, Deaths, Marriages and Relationships Registration Act 1995, s 9(4); and Status of Children Act 1969, s 22. The surrogate will also be the sole parent of the child if she had a partner but there is evidence that establishes that the partner did not consent to the procedure: Status of Children Act 1969, ss 18 and 27.

¹³ Births, Deaths, Marriages and Relationships Registration (Prescribed Information) Regulations 1995.

¹⁴ Births, Deaths, Marriages and Relationships Registration Act 1995, s 67(1); and Births, Deaths, Marriages and Relationships Registration (Prescribed Information) Regulations 1995, reg 6.

¹⁵ Births, Deaths, Marriages and Relationships Registration Act 1995, s 23.

¹⁶ Births, Deaths, Marriages and Relationships Registration Act 1995, s 24.

information relating to the date and place of the person's birth if satisfied of the correctness or likely correctness of that information.¹⁷

- 8.12 Any birth certificate issued after the adoption is registered must be issued in respect of the child's adoptive name and must record the adoptive parents as the child's parents.¹⁸ There is provision for the birth certificate to note that the child's parents are "adoptive parents", but this only applies if the adoptive parents (or the child, once they turn 18) request that notation.¹⁹ In practice, we are not aware of this having ever been requested by intended parents in surrogacy arrangements.²⁰

Access to information about an adoption

- 8.13 No centralised information is kept on surrogate-born children. However, those who are adopted by their intended parents can access some information relating to the adoption under the Adult Adoption Information Act 1985.²¹
- 8.14 The Adult Adoption Information Act establishes a regime for adopted people to access information about their birth parents. Under the Act, an adopted person can request a copy of their original birth certificate from the Registrar-General once they reach the age of 20 years.²² If the adopted person was adopted after 28 February 1986, the Registrar-General must, on application of a request for an original birth certificate:²³
- (a) notify the adopted person in writing of the counselling services available;
 - (b) send the original birth certificate to the relevant counselling provider if the adopted person indicates that they desire counselling; and
 - (c) if no indication is received from the adopted person within 28 days, hold the original birth certificate on behalf of the adopted person until that person requests that it be sent to them.
- 8.15 Once the original birth certificate has been obtained, an adopted person can then apply to Oranga Tamariki for information relating to their birth parents.²⁴ An adopted person can request assistance of a social worker to contact a birth parent on their behalf.²⁵

¹⁷ Births, Deaths, Marriages and Relationships Registration Act 1995, s 24(2).

¹⁸ Births, Deaths, Marriages and Relationships Registration Act 1995, s 63(2).

¹⁹ Births, Deaths, Marriages and Relationships Registration Act 1995, s 24(3)–(5).

²⁰ In 2005, the Commission observed that the annotation of adoptive parents is rarely used: Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [10.64].

²¹ The Adoption Act 1955 itself also provides for the inspection of adoption records but only on very limited grounds that are unlikely to be relevant in this context: s 23. See, for example, *Re VA* (2001) 21 FRNZ 93; and *Re MJ FC* Christchurch FAM-2003-009-004670, 21 January 2005 at [14].

²² Adult Adoption Information Act 1985, s 4.

²³ Adult Adoption Information Act 1985, s 6. Different rules apply to adoptions before 1 March 1986 depending on whether the birth parents have restricted the adopted person's access to identifying information: s 5.

²⁴ Adult Adoption Information Act 1985, s 9.

²⁵ Adult Adoption Information Act 1985, s 10.

Access to information about donors

- 8.16 The Human Assisted Reproductive Technology Act 2004 (HART Act) establishes a regime to enable donor-conceived people to access information about their donor or donors. This may give a surrogate-born child access to some information about their genetic origins if they were conceived using donated gametes.
- 8.17 The HART Act requirements, discussed below, only took effect on the commencement of the Act in 2005. However, the HART Act also provides for a voluntary register to be maintained by the Registrar-General.²⁶ The voluntary register enables people who donated gametes prior to 2005, as well as people who were conceived using donated gametes prior to 2005, to voluntarily provide information to the Registrar-General for the purpose of connecting donors and donor-conceived children.

Collection of information

- 8.18 Fertility service providers must collect certain information about donors, including information about physical characteristics, ethnicity and cultural affiliations, medical history and reasons for donating.²⁷ If the donor is Māori, information must also be collected about the donor's whānau, hapū (sub-tribe) and iwi (tribe) to the extent that the donor is aware of those affiliations.²⁸
- 8.19 Providers also have an obligation to put in place an effective system for being notified of, or otherwise becoming aware of, the births of donor-conceived children.²⁹ When a provider learns of the birth of a donor-conceived child, they must take practicable steps to collect information about the child's name and sex and the date and place of the child's birth.³⁰

Retention of information

- 8.20 After the birth of a donor-conceived child, the fertility services provider must "promptly" give the Registrar-General information about the child's birth as well as the donor's name, address and date, place and country of birth.³¹
- 8.21 The Registrar-General must keep all information it receives about donor-conceived children indefinitely.³² In practice, it keeps this information on a register, which is known as the "HART register".³³

²⁶ Human Assisted Reproductive Technology Act 2004, s 63.

²⁷ Human Assisted Reproductive Technology Act 2004, s 47(1).

²⁸ Human Assisted Reproductive Technology Act 2004, s 47(1)(h).

²⁹ Human Assisted Reproductive Technology Act 2004, s 52.

³⁰ Human Assisted Reproductive Technology Act 2004, s 53(1)(a).

³¹ Human Assisted Reproductive Technology Act 2004, s 53(1)(b) and (2).

³² Human Assisted Reproductive Technology Act 2004, ss 48(3) and 55(1).

³³ Te Kāwanatanga o Aotearoa | New Zealand Government "Finding a child or parent on the sperm and ovum donor list" (14 August 2017) <www.govt.nz>.

- 8.22 Fertility service providers must keep information for a period of 50 years after the birth of the donor-conceived child or until the provider ceases to operate, if earlier.³⁴ At that point, the provider must give the additional information collected about the donor, described above, to the Registrar-General.³⁵

Access to information

- 8.23 A donor-conceived child can usually access information held on the HART register or by a fertility service provider once they turn 18.³⁶ However, a Family Court can authorise disclosure to a donor-conceived child aged 16 or 17 if the Court is satisfied that disclosure is in the best interests of the child.³⁷ Before the child turns 18 and in the absence of a court order, a child's guardian can be given access to information on request³⁸ or the child can be provided with information that does not identify the donor.³⁹ In all circumstances, the person requesting the information must be advised of "the desirability of counselling".⁴⁰
- 8.24 A donor-conceived child can be told about any genetic siblings but can only be given identifying information if the siblings (or their guardians) have already given consent to the giving of access.⁴¹
- 8.25 A donor-conceived child over the age of 18 can consent to the disclosure of information about them to the donor.⁴² In the absence of consent, a donor can only be told whether any children have been born as a result of their donation and, if so, the sex of each donor-conceived child.⁴³ If a donor-conceived child is given access to identifying information about a donor, the donor must be notified.⁴⁴
- 8.26 Any request for information can be refused if the provider or Registrar-General is satisfied, on reasonable grounds, that disclosure "is likely to endanger any person".⁴⁵

Ngā Paerewa Health and Disability Services Standard

- 8.27 In 2021, Ngā Paerewa Health and Disability Services Standard NZS 8134:2021 was approved under section 13 of the Health and Disability Services (Safety) Act 2001 to replace the current Fertility Services Standard from February 2022.⁴⁶ All healthcare

³⁴ Human Assisted Reproductive Technology Act 2004, ss 48(2) and 55(2)–(3).

³⁵ Human Assisted Reproductive Technology Act 2004, s 48(2).

³⁶ Human Assisted Reproductive Technology Act 2004, s 50(1) and 57(1).

³⁷ Human Assisted Reproductive Technology Act 2004, s 65.

³⁸ Human Assisted Reproductive Technology Act 2004, ss 50(2) and 57(2).

³⁹ Human Assisted Reproductive Technology Act 2004, ss 50(3) and 57(3).

⁴⁰ Human Assisted Reproductive Technology Act 2004, ss 50(5) and 57(4).

⁴¹ Human Assisted Reproductive Technology Act 2004, s 58.

⁴² Human Assisted Reproductive Technology Act 2004, s 59.

⁴³ Human Assisted Reproductive Technology Act 2004, ss 60(1) and 61(1).

⁴⁴ Human Assisted Reproductive Technology Act 2004, s 50(6).

⁴⁵ Human Assisted Reproductive Technology Act 2004, ss 50(4), 60(4) and 61(3). A similar provision applies to the voluntary register: Human Assisted Reproductive Technology Act 2004, s 63(10).

⁴⁶ Pursuant to Health and Disability Services (Safety) Standards Notice 2021.

providers, including fertility service providers, must comply with Ngā Paerewa. Unlike the earlier Fertility Services Standard, Ngā Paerewa includes specific requirements for donation and surrogacy, including the requirements that providers “encourage and support people to inform offspring of their genetic and gestational origins” and “store information to enable access”.⁴⁷ Ngā Paerewa does not specify how these requirements should be met, although sector guidance establishes an expectation that providers will have written policies and procedures in place before offering donation or surrogacy services.

Current practice

- 8.28 We do not know how many intended parents choose not to tell their child about the circumstances of their birth. Our initial consultation suggests that many intended parents are, or intend to be, open about the surrogacy arrangement with their child. We do not know whether this has historically been the case. The past practices of closed adoption and anonymous donor conception demonstrate that attitudes to children’s rights and interests in knowing their origins have changed significantly in recent decades.
- 8.29 Oranga Tamariki has a role in assessing intended parents before they seek approval from the Ethics Committee on Assisted Reproductive Technology (ECART) and when an application for an adoption order is made in the Family Court. We understand that Oranga Tamariki will provide information to intended parents about the importance of being open with the child about their origins from an early age.
- 8.30 It is possible, however, that some children may not learn they were born as a result of a surrogacy arrangement or the full details of the people involved in their creation until late in life (if at all).

ISSUES

- 8.31 There are several problems with the current law that may make it difficult for a surrogate-born child to access information about their genetic and gestational origins:⁴⁸
- (a) First, surrogate-born children must rely on other people to tell them that they were born as a result of a surrogacy arrangement before they will know to access information about the adoption or about any donor(s). As noted above, a birth certificate will rarely indicate that a child has been adopted, so without being told, a person may never discover the full circumstances of their birth.
 - (b) Second, the HART register does not capture information about the surrogate. A gestational surrogate does not use her ovum in conception and so is not a donor under the HART Act. Even if the surrogate used her ovum in a traditional surrogacy arrangement, she would still not be considered a donor, because the HART Act defines a “donor” as a person “from whose cells a donated embryo is formed or from whose body a donated cell is derived”, and a “donated cell” is defined as an in vitro human gamete, that is, a gamete that is outside a living organism.⁴⁹ It is possible that

⁴⁷ Ngā Paerewa Health and Disability Services Standard NZS 8134:2021 at [1.10.1].

⁴⁸ Similar issues were identified in *Te Aka Matua o te Ture | Law Commission New Issues in Legal Parenthood* (NZLC R88, 2005) at [10.11].

⁴⁹ Human Assisted Reproductive Technology Act 2004, s 5 (definitions of “donated cell”, “donor” and “in vitro”).

fertility clinics may hold some information about the surrogate and may enable access to that information pursuant to the requirements in Ngā Paerewa, discussed above. However, in the absence of any statutory requirements or process, clinics may adopt different policies and procedures, which could lead to inconsistent approaches across clinics.

- (c) Third, the HART register only captures clinic-assisted donations and other donations prior to the commencement of the HART Act. This means that, since 2005, if a traditional surrogacy occurred outside a clinic using donated sperm or if donated gametes were used in an international surrogacy arrangement, the donor's information would not be recorded on the HART register.
- (d) Fourth, the process for accessing information on the HART register is unclear, as some information may be held in two different places and the process does not ensure that applicants have access to appropriate support. This issue is anticipated to have consequences in the near future as the first cohort of people who were conceived using gametes donated after the HART Act came into force will soon be able to request information on the register.⁵⁰
- (e) Fifth, limited information may be available to a surrogate-born child about the adoption. The Adult Adoption Information Act only provides for access to the information recorded on the original birth certificate and any identifying information held by Oranga Tamariki. It is very difficult to access court adoption records. Family Court judges interviewed as part of Te Whare Wānanga o Waitaha | University of Canterbury's research project Rethinking Surrogacy Laws expressed the view that all surrogate-born children should have access to the court file.⁵¹ The social worker's report that is prepared for the court was considered particularly significant, as it will often contain important information about the surrogacy arrangement and about whether the child was conceived with donated gametes.⁵² The social worker's report is not automatically available to adoptive parents, but in practice, judges are often ordering the social worker's report be released to the intended parents when an adoption order is made.⁵³ Accessing the court file later in a child's life may, however, be more difficult in practice. Additionally, if the intended parents did not formalise their relationship with their child through adoption, no information will be available under this route. If, as we propose in Chapter 7, a court process is no longer required for intended parents to acquire legal parenthood in some situations, no information will be available under this route in future.
- (f) Sixth, even if relevant information is available under the Adult Adoption Information Act or the HART Act, a surrogate-born child can only access that information once

⁵⁰ Rebecca Hamilton and others "Gaping holes in law covering info for donor-conceived people" *Stuff* (online ed, New Zealand, 25 May 2021).

⁵¹ Debra Wilson *Understanding the Experience and Perceptions of Surrogacy Through Empirical Research: Judges Survey* (Te Whare Wānanga o Waitaha | University of Canterbury, May 2020) vol 2 at 13.

⁵² Debra Wilson *Understanding the Experience and Perceptions of Surrogacy Through Empirical Research: Judges Survey* (Te Whare Wānanga o Waitaha | University of Canterbury, May 2020) vol 2 at 13.

⁵³ See, for example, *Moss v Shui* [2020] NZFC 8443 at [21]; *Re Ponte (adoption)* [2020] NZFC 7481 at [27]; and *Re Weber (adoption)* [2020] NZFC 7259 at [18].

they turn 20 or 18 respectively. The 20-year age requirement to access adoption information has been found by the Human Rights Review Tribunal to be discriminatory on the basis of age.⁵⁴ In 2005, the Commission also questioned the basis for an age restriction on accessing information under the HART Act, noting that it was “unclear what advantage there is to a person to have their right to information about their origins withheld from them until the age of 18”.⁵⁵ The existing age restriction is arguably inconsistent with an approach that places the rights and welfare of the child at the centre of decision making.⁵⁶ As Ireland’s Special Rapporteur on Child Protection has recently observed, “the right to identity is a right of the child; it is held during childhood, and does not only crystallise upon turning 18”.⁵⁷

- (g) Seventh, as we outline in Chapter 4, the problems with the current law may mean circumstances arise where a surrogate-born child is unable to access their whakapapa (genealogy), which is likely to be a matter of particular concern to Māori.
- 8.32 During initial consultation, many intended parents we spoke with felt that their child’s birth certificate should reflect the reality of the roles played by those involved in the child’s conception and birth. Some were frustrated by the lack of a system that could record this information.⁵⁸
- 8.33 The problems with the current law also appear inconsistent with public attitudes and expectations around a child’s right to identity. The Surrogacy Survey indicated strong support for surrogate-born children having access to information about their origins. Overall, 83 per cent of respondents agreed that surrogate-born children should have access to information about their origins, 10 per cent thought access to information should be for medical reasons only, two per cent thought information about origins should not be available and five per cent were unsure.⁵⁹
- 8.34 Respondents who thought that surrogate-born children should have access to information about their origins were also asked at what age this information should be available.⁶⁰ Ages suggested ranged from “birth” to 30 years. The average age selected was 15.3 years. However, the most common age selected was 18 (125 respondents), followed by 16 (40 respondents) and birth (30 respondents).

⁵⁴ *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [238]–[256].

⁵⁵ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [10.80].

⁵⁶ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005), R22.

⁵⁷ Conor O’Mahony *A Review of Children’s Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law* (Department of Children, Equality, Disability, Integration and Youth, Ireland, December 2020) at 27.

⁵⁸ Similar observations were made in Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [10.109].

⁵⁹ Debra Wilson *Understanding the Experience and Perceptions of Surrogacy Through Empirical Research: Public Perceptions Survey* (Te Whare Wānanga o Waitaha | University of Canterbury, May 2020) vol 3 at 157 (rounded to the nearest percentage point).

⁶⁰ Debra Wilson *Understanding the Experience and Perceptions of Surrogacy Through Empirical Research: Public Perceptions Survey* (Te Whare Wānanga o Waitaha | University of Canterbury, May 2020) vol 3 at 159.

- 8.35 We are also conscious that DNA testing is increasingly accessible, and the growing prevalence of genealogy websites means surrogate-born children are able to access information about their genetic origins online without any appropriate support. Accordingly, there is increasing urgency to address the problems with the current law so that it keeps pace with advancements in technology.

OPTIONS FOR REFORM

- 8.36 By recognising surrogacy as a legitimate method of family building and providing a legal framework to facilitate its use, we consider the state has a duty to ensure that surrogate-born children can access information about their genetic and gestational origins.⁶¹ This is consistent with international best practice.⁶²
- 8.37 We have identified two options for reform that could address the gaps in the current law. We have not reached any preliminary conclusions about which option should be preferred.

Option 1: Changes to birth registration and certificates

- 8.38 The first option is to record more information about the circumstances of a person's conception and birth in the birth register and on birth certificates. This could be done in different ways:
- (a) **The information recorded on a birth certificate could indicate that a child was born as a result of a surrogacy arrangement.**⁶³ The birth certificate could record the surrogate's name and the details of any donor used in conception. In this way, the birth certificate would provide a comprehensive record of the circumstances of the child's conception and birth. The concern with this approach, however, is that it raises significant privacy concerns for surrogate-born children. Birth certificates are often relied on to establish a person's identity in a range of different circumstances. A surrogate-born child may not want the full circumstances of their birth to be disclosed in these contexts.⁶⁴ In 2005, consultation on a similar option also revealed concerns about the potential for offence, embarrassment or discrimination.⁶⁵
 - (b) **All birth certificates could be annotated with a statement that alerts the reader to the fact that more information about the circumstances of the child's birth may**

⁶¹ A similar view was reached in relation to enabling children to know they are donor-conceived, in Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [10.42].

⁶² International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [11.2].

⁶³ This option was envisaged in Tāmāti Coffey's proposed Member's Bill: Improving Arrangements for Surrogacy Bill 2021 (undrawn Member's Bill, Tāmāti Coffey MP), cl 25.

⁶⁴ Similar concerns were observed in Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: a new law – A joint consultation paper* (CP244/DP167, 2019) at [10.81]. They did not propose changes to short certificates, which are frequently used as a means of providing information to the government, but did recommend changes to full-form birth certificates to identify that the child was a result of a surrogacy arrangement: at [10.84]–[10.85].

⁶⁵ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [10.55]–[10.56].

be held on the birth register. This was recommended by the Commission in 2005⁶⁶ on the basis that it would signal the fact of other information while at the same time respecting the privacy of individuals and their families.⁶⁷ In 2021, the Advisory Committee on Assisted Reproductive Technology (ACART) also recommended this option in its advice to the Minister of Health on the basis that it would increase awareness of the HART register and make it easier for people to obtain information about their genetic origins.⁶⁸

- (c) **A two-certificate system could be introduced.** A short-form birth certificate could record the child's legal parents, similar to the current birth certificate, and be used for identification purposes. In addition, a new long-form birth certificate could give a full account of the circumstances of the child's conception and birth, including whether the child was born as a result of a surrogacy arrangement and details of any donors who provided gametes used in conception.⁶⁹ Long-form certificates could have restricted access so that they are available only to the person named on the certificate, their guardians and possibly other family members.

- 8.39 A benefit of these options is that they are proactive and ensure a person is automatically given information about the circumstances of their conception and birth or guidance on where to find such information.
- 8.40 However, each of these options would have wide implications for birth registration. Currently, the birth register is a record of a child's legal parents.⁷⁰ It does not provide a comprehensive record of the circumstances of the child's conception and birth. This is evident by the fact that donors are not recorded on the birth register but on the separate HART register. Any of the options described above would therefore represent a shift in the purpose of the birth register. Options (b) and (c) would also necessitate changes to all birth certificates, not just for those of surrogate-born children.
- 8.41 We think that any changes that fundamentally affect the purpose of the birth register should be considered as part of a broader review of birth registration.⁷¹ This would enable a coherent and consistent approach to be taken to the range of different circumstances of conception, birth and legal parenthood, including donor conception, adoption and surrogacy. Such a review could reconsider the purpose of the birth register in

⁶⁶ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [10.54]–[10.62] and R18.

⁶⁷ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [10.62].

⁶⁸ Advisory Committee on Assisted Reproductive Technology *ACART Advice and Guidelines for Gamete and Embryo Donation and Surrogacy* (June 2021), R10B and [220]–[230].

⁶⁹ A similar recommendation was made in Te Aka Matua o te Ture | Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework* (NZLC R65, 2000) at 173. However, this option did not receive significant support in submissions on the Commission's subsequent review of new issues in legal parenthood: Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [10.50].

⁷⁰ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [10.45].

⁷¹ A Bill is currently before the House that proposes some changes to birth registration, including changes to enable parents to state whether they want to be listed as "mother", "father" or "parent": Births, Deaths, Marriages, and Relationships Registration Bill 2018 (296-2), cl 12(2A).

contemporary Aotearoa New Zealand, for whose benefit it exists, what information it should provide about a child's origins and what it means to be recorded as a "parent".⁷²

Option 2: Recording information about surrogacy in the HART register

- 8.42 The second option is to record information about surrogacy arrangements separate to the birth registration system as part of the HART register. This might be the preferred reform option in the absence of a wider review of the birth registration system.
- 8.43 The purpose of the HART register is to record information about a child's origins, so we think its function could be extended to include information about a child's gestational as well as genetic origins.
- 8.44 This option would, like Option 1, promote a child's right to identity by preserving information about their genetic and gestational origins, consistent with international best practice.⁷³ It would also increase the availability of information on the prevalence of surrogacy in Aotearoa New Zealand. It would not, however, necessitate wide-reaching changes to the birth registration system as envisaged under Option 1.
- 8.45 However, a disadvantage of this option is that a surrogate-born child is still reliant on being told about the surrogacy arrangement in order to know that they can access information about that arrangement.
- 8.46 In practice, this option would operate with our proposed pathways in Chapter 7 as follows:
- (a) When a birth is registered under Pathway 1 (that is, where intended parents went through the ECART process and the surrogate confirms her consent to relinquish legal parenthood), the intended parents would supply information relating to the surrogacy arrangement to the Registrar. The Registrar would then record that information on the HART register.
 - (b) When Pathway 1 does not apply and instead the Family Court makes an order determining the legal parenthood of a surrogate-born child under Pathway 2,⁷⁴ the Court would notify the Registrar of the order, similar to the current process of notification of adoption orders. The Registrar would then update the information on the birth register and record the details of the surrogacy arrangement on the HART register. This would enable information to be registered in relation to international surrogacy arrangements that are considered under Pathway 2, although, as we note in Chapter 9, donors may be anonymous in some cases.
- 8.47 This would not affect the obligations on clinics to provide information to the Registrar-General about donors and donor-conceived people under the HART Act, but it may mean

⁷² A similar view was reached in Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: a new law – A joint consultation paper* (CP244/DP167, 2019 at [10.82] and [10.86].

⁷³ International Social Service *Principles for the protection of the rights of the child born through surrogacy* (Verona principles) (Geneva, 2021) at [11.6]–[11.7].

⁷⁴ This would include the rare situation where a court declines to make an order determining the intended parents are the child's legal parents. Relevant information would still need to be recorded on the birth register and HART register, especially if donor gametes were used in conception.

that multiple entries or information sources relate to one child, for example, if they are the result of a gestational surrogacy arrangement involving an ova or sperm donor.

- 8.48 This option is similar to recommendations made by the Commission in 2005. The Commission recommended that the intended parents of a surrogate-born child should be required to notify the Registrar-General of the same information about the surrogate as that required to be notified under the HART Act and that information should be available to surrogate-born children as prescribed under that Act.⁷⁵
- 8.49 This option is also consistent with proposals suggested in 2019 by the Law Commission of England and Wales and the Scottish Law Commission. They proposed a dedicated register of surrogacy arrangements that could be maintained as part of, or alongside, the existing Register of Information for donor-conceived people.⁷⁶ Ireland's Special Rapporteur on Child Protection also endorses a surrogacy register.⁷⁷

Age and grounds for refusing access

- 8.50 We think that entitlements to access information about a surrogacy arrangement should align with rights to access information about donor conception. Both fundamentally relate to a child's right to identity and access to information about their origins.
- 8.51 We are therefore interested in your views on whether the existing age requirements and grounds for refusing access to information on the HART register remain appropriate. As explained above, a donor-conceived child must be 18 to access identifying information on the HART register about a donor (in the absence of a court order), and access can be refused on the grounds that disclosure is likely to endanger any person.
- 8.52 The grounds for refusing access to information on the HART register are similar to the grounds for refusing access to information under the now repealed Privacy Act 1993.⁷⁸ The new Privacy Act 2020 has since replaced that ground with a more comprehensive provision that provides:⁷⁹

An agency may refuse access to any personal information requested if—

(a) the disclosure of the information would—

- (i) be likely to pose a serious threat to the life, health, or safety of any individual, or to public health or public safety; or
- (ii) create a significant likelihood of serious harassment of an individual; or
- (iii) include disclosure of information about another person who—
 - (A) is the victim of an offence or alleged offence; and

⁷⁵ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005), R26. The Commission also recommended that the Notification of Birth for Registration form should be amended to state that under New Zealand law parents must register details about a donor or surrogate, if one was used: R27.

⁷⁶ Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: a new law – A joint consultation paper* (CP244/DP167, 2019) at [10.92].

⁷⁷ Conor O'Mahony *A Review of Children's Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law* (Department of Children, Equality, Disability, Integration and Youth, Ireland, December 2020) at 33.

⁷⁸ Privacy Act 1993, s 27(1)(d).

⁷⁹ Privacy Act 2020, s 49(1).

- (B) would be caused significant distress, loss of dignity, or injury to feelings by the disclosure of the information; or
 - (b) after consultation is undertaken (where practicable) by or on behalf of the agency with the health practitioner of the individual concerned, the agency is satisfied that—
 - (i) the information relates to the individual concerned; and
 - (ii) the disclosure of the information (being information that relates to the physical or mental health of the requestor) would be likely to prejudice the health of the individual concerned; or
 - (c) the individual concerned is under the age of 16 and the disclosure of the information would be contrary to the interests of the individual concerned; or
 - (d) the disclosure of the information (being information in respect of the individual concerned who has been convicted of an offence or is or has been detained in custody) would be likely to prejudice the safe custody or the rehabilitation of the individual concerned.
- 8.53 These changes reflect the Commission's recommendations in 2011 to clarify that access to information can be refused only if disclosure would present a serious threat to public health or public safety or to the life or health of any individual.⁸⁰ As a result of the changes, the HART Act is now out of step with the grounds for refusing access to personal information under the Privacy Act 2020. It is timely, therefore, to reconsider the provisions of the HART Act and whether the new approach under the Privacy Act 2020 should be adopted.
- 8.54 In addition, given the lack of policy justification provided for the age restriction in the HART Act⁸¹ and our concerns identified above, we think it is important to revisit the appropriateness of the age restriction.
- 8.55 Our preliminary view is that the age restriction should be removed as a matter of principle, and instead, the HART Act should align with the grounds for refusal in the Privacy Act 2020. This would mean that a child under the age of 16 may be refused access if that is contrary to their interests but that the grounds for refusal for children over 16 would be limited to concerns about serious risks to health and safety. We think that this would be more likely to promote access to information based on a person's age and understanding than an arbitrary age restriction.

Counselling and ongoing support

- 8.56 We are also interested in your views on whether the current provisions in the HART Act in relation to counselling are adequate. As noted above, people seeking to access the HART register must be notified of the desirability of counselling. However, concerns have already been raised by donor-conceived people that these provisions do not go far enough and that more needs to be done to ensure that donor-conceived people are

⁸⁰ Te Aka Matua o te Ture | Law Commission *Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4* (NZLC R123, 2011) at [3.74] and R22.

⁸¹ As noted in Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [10.80].

given the opportunity to receive independent counselling before contacting their genetic relatives.⁸²

- 8.57 The approach adopted under the Adult Adoption Information Act does provide a stronger emphasis on counselling, as outlined above. An adopted person can appoint Oranga Tamariki as their counselling agency, which would give them access to government-funded counselling and support.⁸³ In 2005, the Commission recommended counselling should be available to those seeking to access the voluntary HART register and that the Government should consider paying for or subsidising such counselling.⁸⁴
- 8.58 Our preliminary view is that surrogate-born children should have the same rights to access state assistance and benefits in the form of counselling services as adopted people under the Adult Adoption Information Act.

QUESTIONS

Q25 Do you agree with the issues we have identified with children's access to information in surrogacy arrangements? Are there other issues we should consider?

Q26 Do you prefer Option 1 or Option 2 to ensure that surrogate-born children can have the opportunity to access information about their genetic and gestational origins?

⁸² Rebecca Hamilton and others "Gaping holes in law covering info for donor-conceived people" *Stuff* (online ed, New Zealand, 25 May 2021).

⁸³ Oranga Tamariki | Ministry for Children "Finding your birth family" (12 April 2021) <www.orangatamariki.govt.nz>.

⁸⁴ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005), R24.

CHAPTER 9

International surrogacy

IN THIS CHAPTER, WE CONSIDER:

- how international surrogacy arrangements are provided for in Aotearoa New Zealand; and
- issues with the current law and options for reform.

INTRODUCTION

- 9.1 Over the past two decades, international surrogacy, where the intended parents and the surrogate do not live in the same country, has become a global phenomenon. New Zealanders are increasingly entering surrogacy arrangements in other countries for a range of reasons, as we explore in Chapter 2. International surrogacy arrangements are typically commercial in nature, with commercial surrogacy now seen as a “booming, global business”.¹
- 9.2 International surrogacy arrangements present complex issues. The laws of two different countries must be considered, which can cause problems when intended parents bring the child back to their country given the disparity in how different countries regulate surrogacy and legal parenthood. In addition, in some countries, a surrogacy arrangement may lack the same protections for the child, the surrogate and the intended parents as an arrangement entered in Aotearoa New Zealand, potentially placing the parties at greater risk.
- 9.3 These issues are difficult to resolve through individual state action,² and international efforts are under way. Since 2010, the Hague Conference on Private International Law (Hague Conference) has been examining private international law issues in relation to legal parenthood, including issues arising from international surrogacy arrangements.³ An

¹ Permanent Bureau of the Hague Conference on Private International Law *A Study of Legal Parentage and the Issues arising from International Surrogacy Arrangements* (Preliminary Document No 3C, March 2014) at [122]. See also Claire Achmad “Children’s Rights in International Commercial Surrogacy: Exploring the challenges from a child rights, public international human rights law perspective” (PhD thesis, Leiden University, 2018) at 2–3.

² Permanent Bureau of the Hague Conference on Private International Law *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements* (Preliminary Document No 10, March 2012) at [44].

³ For more information on the Parentage / Surrogacy Project, see: The Permanent Bureau of the Hague Conference on Private International Law “Parentage / Surrogacy” <www.hcch.net>.

Experts' Group was convened in 2015 and is currently working on potential provisions for an international instrument to address legal parenthood as well as a separate protocol on legal parenthood established as a result of international surrogacy arrangements. The Experts' Group is expected to submit its final report to the Hague Conference in 2023.

- 9.4 In the absence of a uniform approach to the regulation of surrogacy and the recognition of legal parenthood, individual states need to consider how to provide for international surrogacy arrangements in domestic law.
- 9.5 In this chapter, we focus on the situation where intended parents live in Aotearoa New Zealand and enter a surrogacy arrangement offshore.

THE CURRENT LAW

- 9.6 International surrogacy is not provided for in New Zealand law. The Human Assisted Reproductive Technology Act 2004 (HART Act) has no extraterritorial effect,⁴ which means that intended parents pursuing surrogacy offshore do not have to seek approval from the Ethics Committee on Assisted Reproductive Technology (ECART) and the prohibition on commercial surrogacy in section 14 of the HART Act (discussed in Chapter 6) does not apply.

Who are the child's legal parents?

- 9.7 When New Zealanders enter an international surrogacy agreement, New Zealand law is applied when determining the legal parents of the child. As we explain in Chapter 7, the Status of Children Act 1969 establishes rules that determine legal parenthood in surrogacy arrangements, and section 16 of that Act states that these rules apply “whether or not the pregnancy resulted from a procedure carried out in New Zealand” and “whether or not the child was born in New Zealand”.⁵ Under these rules, the surrogate and her partner (if she has one) are, for all purposes, the legal parents of any surrogate-born child.⁶
- 9.8 This means that, as with domestic surrogacy, the intended parents in an international surrogacy arrangement will not be recognised under New Zealand law as the legal parents of a surrogate-born child. This is regardless of whether the intended parents are the child's genetic parents or are recognised as the child's legal parents in the child's country of birth.
- 9.9 Intended parents must therefore adopt the surrogate-born child to acquire legal parenthood under New Zealand law.

Adoption and international surrogacy arrangements

- 9.10 New Zealand law recognises three different types of adoption: domestic adoption, overseas adoption and intercountry adoption.

⁴ Claire Barrett (ed) *Family Law—Child Law* (online looseleaf ed, Thomson Reuters) at [SG11].

⁵ Status of Children Act 1969, ss 16(1)(b) and 16(2)(b).

⁶ Status of Children Act 1969, s 17–22. The surrogate's partner will not be a legal parent if there is evidence that establishes that they did not consent to the procedure: ss 18 and 27.

- 9.11 Intended parents in an international surrogacy arrangement will typically rely on domestic adoption, and the Government has established a process for a surrogate-born child to enter Aotearoa New Zealand to facilitate a domestic adoption, as we describe below. The effect of a domestic adoption is that the child will be entitled to New Zealand citizenship by birth,⁷ a New Zealand passport⁸ and a New Zealand birth certificate.⁹
- 9.12 An overseas adoption can be recognised under New Zealand law if it meets the requirements of section 17 of the Adoption Act 1955. If an overseas adoption is recognised and at least one intended parent is a New Zealand citizen by birth, the child will be entitled to New Zealand citizenship by descent¹⁰ and a New Zealand passport.¹¹ However, they will not be entitled to a New Zealand birth certificate¹² and will be unable to pass New Zealand citizenship on to any children born outside New Zealand (unlike children adopted under the Adoption Act, who are considered New Zealand citizens by birth).
- 9.13 The overseas adoption pathway is rarely used in the context of international surrogacy. While it may be possible that some foreign court orders transferring legal parenthood to the intended parents may be recognised as an overseas adoption, this will be assessed by the Department of Internal Affairs on a case-by-case basis when it receives an application to register a child's citizenship by descent. Alternatively, an application can be made to the High Court for a declaration that an overseas adoption meets the requirements under section 17 of the Adoption Act,¹³ although we are not aware of this process ever being followed in the context of international surrogacy.
- 9.14 The intercountry adoption pathway is not used in international surrogacy arrangements. Intercountry adoption takes place under the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (the Hague Convention).¹⁴ In 2010, a Special Commission of the Hague Convention concluded that the Hague Convention is inappropriate in cases of international surrogacy.¹⁵ In Aotearoa New Zealand, the Family Court's established approach is that the Hague Convention will not apply in the context of an international surrogacy arrangement.¹⁶

⁷ This is because, for the purposes of the Citizenship Act 1977, a person adopted under the Adoption Act 1955 is deemed to have been born when and where the adoption order was made: Citizenship Act 1977, s 3(2B)(d).

⁸ Passports Act 1992, s 3.

⁹ Births, Deaths, Marriages, and Relationships Registration Act 1995, s 24(2).

¹⁰ Citizenship Act 1977, ss 3(2)(b) and 7.

¹¹ Passports Act 1992, s 3.

¹² This is because neither the birth nor the adoption is registered in Aotearoa New Zealand under the Births, Deaths, Marriages, and Relationships Registration Act 1995.

¹³ *T v District Court at North Shore (No 2)* [2004] NZFLR 769 (HC) at [23].

¹⁴ Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1870 UNTS 167 (opened for signature 29 May 1993, entered into force 14 June 1995). The Convention is given the force of law in Aotearoa New Zealand under s 4 of the Adoption (Intercountry) Act 1997.

¹⁵ Special Commission on the practical operation of the 1993 Hague Intercountry Adoption Convention *Conclusions and Recommendations* (17–25 June 2010) at [25].

¹⁶ The Hague Convention applies where a child “habitually resident” in one country is being moved to another country by adoptive parents “habitually resident” in another country. The Family Court has consistently held that a child's habitual residence can be imputed from the intended parent's habitual residence in the context of international surrogacy, and

Entry to Aotearoa New Zealand – the joint government agency approach

- 9.15 In the absence of any international instrument or New Zealand law addressing international surrogacy, a New Zealand joint government agency approach to international surrogacy was developed.¹⁷ This approach addressed New Zealanders' emerging use of international surrogacy through the application of existing legal frameworks and the development, in 2010, of the Ministerial non-binding guidelines, discussed below.
- 9.16 A central tenet of the joint government agency approach is the protection of the rights of the child.¹⁸ As we explore in Chapter 3, children born as a result of an international surrogacy arrangement are at risk of a number of their rights not being met, including rights to identity, nationality, family life, health and freedom from discrimination.
- 9.17 The joint government agency approach also responded to specific cross-border issues that a child born to a surrogate overseas might face when seeking to travel to Aotearoa New Zealand:
- (a) Until an adoption is finalised, the absence of a legal parent-child relationship between the intended parents and the surrogate-born child means that the child will not be automatically entitled to New Zealand citizenship (unless the surrogate or her partner is a New Zealand citizen),¹⁹ even if the child is a genetic child of one or both intended parents.
 - (b) The child therefore has to travel to Aotearoa New Zealand on the passport issued in their country of birth. However, each country regulates surrogacy differently, and some countries, such as Ukraine and Georgia, will not grant citizenship to a child born in that country if the intended parents are foreign citizens. This can create a situation of statelessness for the child, as they will not be a citizen of their country of birth or

therefore the Convention does not apply: *Re application by L* [2003] NZFLR 529 (FC) at [16]; *Re KJB and LRB [Adoption]* [2010] NZFLR 97 (FC) at [23]–[27]; *Re an application by KR and DGR to adopt a female child* [2011] NZFLR 429 (FC) at [10]; *Re an application by BWS to adopt a child* [2011] NZFLR 621 (FC) at [53]–[54]; *An application to adopt a child by SCR and MCR* [2012] NZFC 5466 at [30]; *Re MSK* [2013] NZFC 2064 at [8]; *Re an application to adopt a child, Kennedy* [2014] NZFC 2526, [2014] NZFLR 797 at [27]; *Re an application by R (to adopt a child)* [2014] NZFC 7652, [2015] NZFLR 87 at [13]; *Re C (adoption)* [2015] NZFC 4072 at [7]; and *Re Clifford* [2016] NZFC 1666 at [18]. See also discussion in Debra Wilson “International surrogacy and the Adoption (Intercountry) Act: defining habitual residence” (2016) 8 NZFLJ 217. Contrast with the decision in *Re an application by DMW and KW* [2012] NZFC 2915 at [33].

¹⁷ The agencies involved were Immigration New Zealand, Te Tari Taiwhenua | Department of Internal Affairs, Te Manatū Whakahiato Ora | Ministry of Social Development, Tāhū o te Ture | Ministry of Justice and Manatū Aorere | Ministry of Foreign Affairs and Trade. The background to the joint government agency initiative is described in Oranga Tamariki | Ministry for Children *Submission on the Advisory Committee on Assisted Reproductive Technology's Proposed Donation Guidelines: for family gamete donation, embryo donation, use of donated eggs with donated sperm and surrogacy* (2017).

¹⁸ Oranga Tamariki | Ministry for Children *Submission on the Advisory Committee on Assisted Reproductive Technology's Proposed Donation Guidelines: for family gamete donation, embryo donation, use of donated eggs with donated sperm and surrogacy* (2017) at 4.

¹⁹ A person born outside Aotearoa New Zealand will, in most cases, be a New Zealand citizen by descent if, at the time of the person's birth, their mother or father was a New Zealand citizen: Citizenship Act 1977, s 7(1). The Citizenship Act does not define “mother” or “father”, but the relevant provisions of the Status of Children Act apply “for all purposes”: Status of Children Act 1969, ss 17–18. Section 3(2) of the Citizenship Act makes it clear that a person is deemed to be a child of a New Zealand citizen if they have been adopted under one of the recognised adoption pathways, discussed above.

of Aotearoa New Zealand until the adoption is finalised. This has the potential to leave a child “marooned stateless and parentless” in the country of their birth.²⁰

- (c) Even if a surrogate-born child is entitled to citizenship in their country of birth and can obtain a passport, there are no immigration instructions to facilitate the entry of a surrogate-born child to Aotearoa New Zealand on a visa.²¹ The child will not be eligible for a residence visa because the child is not a legal child of the intended parents.²²

9.18 The joint government agency approach recognised the need to mitigate, as much as possible, the risks and cross-border issues identified above. A set of Ministerial non-binding guidelines were developed and agreed by Cabinet in 2010. They are used by the Minister of Immigration when exercising discretion to grant a temporary visitor visa in respect of a surrogate-born child.²³ Visitor visas are typically granted for 12 months, during which time the adoption application will be made to the Family Court.

²⁰ *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] 1 FLR 733 at [10]. In that case, intended parents based in the United Kingdom (UK) had twins by surrogacy in Ukraine. While they were the child’s legal parents in Ukraine, they were not the child’s legal parents under UK law. The children were eventually given discretionary leave to enter the UK “outside the rules” to afford the intended parents the opportunity to regularise their status under UK law, at [10]. On the risk of statelessness in international surrogacy, see discussion in Maud de Boer-Buquicchio *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* UN Doc A/74/162 (15 July 2019) at [28]–[30]; and Claire Achmad “Children’s Rights in International Commercial Surrogacy: Exploring the challenges from a child rights, public international human rights law perspective” (PhD thesis, Leiden University, 2018) at 55–57 and ch 7.

²¹ Immigration instructions set out immigration policy and are certified by the Minister of Immigration under s 22 of the Immigration Act 2009. Immigration instructions are then applied by immigration officers when considering visa applications under s 26.

²² Immigration New Zealand “International Surrogacy” <www.immigration.govt.nz>. Confirmed in *Re IL (dependent child)* [2020] NZIPT 205529 at [73] and [96].

²³ Pursuant to the Minister’s power to grant a visa by special direction under Immigration Act 2009, s 61A. The non-binding guidelines may also be used by the Minister of Internal Affairs when exercising statutory discretion to grant citizenship in special cases. However, we are not aware of this discretion being exercised in relation to surrogate-born children. Even if citizenship were granted, this would not in itself establish a legal parent-child relationship between the intended parents and the surrogate-born child.

9.19 A copy of the non-binding guidelines is reproduced below.²⁴

1. Minister may consider
2. Whether there is a genetic link between at least one of the commissioning persons and the child.
3. The outcome that is in the best interests of the child.
4. New Zealand's international obligations.
5. The nature of the surrogacy arrangement, i.e., is it altruistic or commercial?
6. Whether the commissioning persons intend to or have taken steps to secure legal parenthood or other legal rights in respect of child in NZ.
7. What the commissioning persons have done in the child's country of birth to secure legal parenthood or other legal rights in respect of the child.
8. Whether the applicants have demonstrated respect for the laws of the jurisdiction in which the surrogacy was carried out.
9. Whether there is satisfactory evidence of informed consent from the:
 - gamete (egg/sperm donor (if relevant))
 - surrogate mother for the surrogacy arrangement to take place (was she a willing party?)
 - surrogate mother (and her partner if relevant) for the child to depart the country of birth and enter New Zealand
 - surrogate mother (and her partner if relevant) for the child's adoption.
10. Steps taken by the commissioning persons to preserve the child's identity, e.g. do the commissioning persons intend to retain information about the child's origins?
11. Whether the recognised authority of the birth country has agreed or objects to the child leaving the country permanently.
12. Any other considerations that the Minister wishes to take into account.

9.20 The pathway established under the joint government agency initiative is publicised in a fact sheet that is available on the relevant government agency websites.²⁵ New Zealanders considering international surrogacy are strongly advised to seek legal advice and consult Oranga Tamariki and Immigration New Zealand before beginning the process.²⁶ Once a viable pregnancy is achieved, Oranga Tamariki will start the domestic adoption process, which involves undertaking an adoptive applicant assessment (described in Chapter 7). This will then form part of the briefing for the Minister of Immigration to consider when deciding to exercise discretion to grant a temporary visa.

²⁴ Oranga Tamariki | Ministry for Children, Immigration New Zealand, Te Tari Taiwhenua | Internal Affairs and Manatū Aorere | Ministry of Foreign Affairs and Trade "Information Fact Sheet: International Surrogacy" (July 2020) <www.orangatamariki.govt.nz> at Appendix A.

²⁵ Oranga Tamariki | Ministry for Children, Immigration New Zealand, Te Tari Taiwhenua | Internal Affairs and Manatū Aorere | Ministry of Foreign Affairs and Trade "Information Fact Sheet: International Surrogacy" (July 2020) <www.orangatamariki.govt.nz>.

²⁶ Oranga Tamariki | Ministry for Children, Immigration New Zealand, Te Tari Taiwhenua | Internal Affairs and Manatū Aorere | Ministry of Foreign Affairs and Trade "Information Fact Sheet: International Surrogacy" (July 2020) <www.orangatamariki.govt.nz> at 1.

- 9.21 In situations where a surrogate-born child cannot acquire a passport in their country of birth, the Department of Internal Affairs may issue a certificate of identity to enable a child to travel to Aotearoa New Zealand. However, not all countries accept a certificate of identity as a valid travel document, which can require intended parents and children to take circuitous routes back to Aotearoa New Zealand.

Impact of Covid-19

- 9.22 The cross-border issues posed by international surrogacy have been highlighted during the Covid-19 pandemic. Globally, reports have emerged of intended parents being unable to travel to the surrogate-born child's country of birth or facing difficulties seeking to return to their country with the surrogate-born child.²⁷ New Zealand intended parents have also been affected by border closures and flight cancellations.²⁸
- 9.23 The Covid-19 pandemic also meant that some intended parents faced problems obtaining a passport for the child in their country of birth to enable them to travel to Aotearoa New Zealand. To respond to this concern, the Principal Family Court Judge issued a Covid-19 Protocol for the adoption process to enable adoption applications to be considered by the Family Court when the intended parents and child are not physically present in Aotearoa New Zealand.²⁹ Under the Protocol, applications are determined remotely to enable surrogate-born children to be adopted and to consequently receive New Zealand citizenship and a New Zealand passport before travelling to Aotearoa New Zealand.
- 9.24 The Protocol is intended as a temporary response to the Covid-19 pandemic. It will operate until 23 September 2021 or upon expiry of the Epidemic Notice issued under the Epidemic Preparedness Act 2006, if earlier, unless the Protocol is extended.

ISSUES

- 9.25 International surrogacy poses some complex issues. Most issues arise because of the disparity in the regulation of surrogacy worldwide. This can create complex legal and practical problems when intended parents bring the child back to Aotearoa New Zealand, as noted above. It also means that some international surrogacy arrangements may lack the same protections for the child, the surrogate and the intended parents as an arrangement entered in Aotearoa New Zealand, potentially placing the parties at greater risk. We explore the potential risks of international surrogacy in Chapter 3, where we conclude that the guiding principles for surrogacy law reform should include the principles that:
- (a) the best interests of the surrogate-born child should be paramount;
 - (b) effective regulatory safeguards must be in place; and

²⁷ See, for example, Maria Varenikova "Mothers, Babies Stranded in Ukraine Surrogacy Industry" *The New York Times* (online ed, New York, 15 August 2020).

²⁸ Alanah Eriksen "Surrogacy: Demand for overseas embryos, eggs, sperm increases in New Zealand" *NZ Herald* (online ed, New Zealand, 27 February 2021); and Gill Bonnett "Covid turmoil stops parents reaching overseas surrogate babies" *Radio New Zealand* (New Zealand, 8 September 2020).

²⁹ Principal Family Court Judge Moran "Family Court Covid-19 Protocol for the Adoption of New Zealand Surrogate babies born overseas" (26 February 2021).

- (c) intended parents should be supported to enter surrogacy arrangements in Aotearoa New Zealand rather than overseas.
- 9.26 With these risks and guiding principles in mind, below we consider issues with how Aotearoa New Zealand's current approach to international surrogacy is working in practice.

How is Aotearoa New Zealand's approach to international surrogacy working?

- 9.27 The current approach is pragmatic, utilising the existing adoption and immigration legal frameworks to ensure that:
- (a) intended parents have a clear pathway to enter Aotearoa New Zealand with the surrogate-born child and acquire legal parenthood under New Zealand law;
 - (b) children born as a result of a surrogacy arrangement overseas can acquire the same legal rights and entitlements as if they had been born in Aotearoa New Zealand (including a New Zealand birth certificate, citizenship by birth and a New Zealand passport); and
 - (c) the government can exercise an oversight role to mitigate, as much as possible, the risks international surrogacy poses to the child's rights in the absence of an international instrument that establishes agreed minimum safeguards.
- 9.28 The current approach has been described as having a "gatekeeping effect", which has "recalibrated the cross-border surrogacy machine for New Zealanders".³⁰ The result is that intended parents are engaging with the New Zealand system and its requirements earlier, with greater numbers seeking legal advice in Aotearoa New Zealand before or while engaging in an offshore process.³¹

Problems with the current approach

- 9.29 However, the current approach can also be criticised in several respects:
- (a) First, the process is complex. It involves many steps, some of which (such as the adoption process) were not designed specifically for international surrogacy. Intended parents may face delays in returning to Aotearoa New Zealand with the child if they do not start the process at the appropriate time and could potentially face a period of family separation. This may place additional financial and emotional strain on the intended parents and consequently raises concerns about whether the current approach is in the child's best interests.
 - (b) Second, the intended parents will usually have already undergone a legal process in the child's country of birth. California is the most common destination for New Zealanders pursuing international surrogacy (see Chapter 2), and there the intended parents will usually obtain a pre-birth court order that has the effect of establishing, under Californian law, that the intended parents are the child's legal parents from

³⁰ Margaret Casey "Creating families and establishing parentage when there is a disconnect between Assisted Reproductive Technologies and the Legal System: A New Zealand perspective of a global problem" (2017) 9 NZFLJ 51 at 53.

³¹ Margaret Casey "Creating families and establishing parentage when there is a disconnect between Assisted Reproductive Technologies and the Legal System: A New Zealand perspective of a global problem" (2017) 9 NZFLJ 51 at 53.

birth. In other countries, the intended parents may have undergone a legal process that closely aligns with the New Zealand adoption process. In these situations, the intended parents may feel that the adoption process adds unnecessary expense and delay at a time when they want to focus on caring for the newborn child.

- (c) Third, the domestic adoption process itself is not appropriate for surrogacy arrangements, for the reasons we detail in Chapter 7. In addition, in the context of international surrogacy, some have expressed a concern that the outcome of the adoption process is a foregone conclusion in circumstances where the child has already been granted entry to Aotearoa New Zealand and is living with the intended parents.³² By the time the Family Court considers the adoption application, the arrangement will usually have already been scrutinised by several government agencies, with the Minister of Immigration having approved entry to Aotearoa New Zealand with reference to the Ministerial non-binding guidelines. Family Court judges interviewed as part of Te Whare Wānanga o Waitaha | University of Canterbury's research project Rethinking Surrogacy Laws said that they felt "stuck between a rock and a hard place" when considering adoption applications following international commercial surrogacy, as the alternative was that the child would be deported back to their home country, which would undoubtedly not be in their best interests.³³

Problems when a child is born in Aotearoa New Zealand as a result of international surrogacy

- 9.30 Problems may also arise in situations when a child is born as a result of a surrogacy arrangement in Aotearoa New Zealand to foreign intended parents. In some of these cases, the child may travel to the intended parents' country of birth where the intended parents acquire legal parenthood without the child being formally adopted under New Zealand law. This would leave the child with "limping" legal parenthood (where two countries take different positions on the child's legal parenthood).
- 9.31 In the absence of an international instrument, Aotearoa New Zealand's legal framework needs to encourage and provide for foreign intended parents to formalise their legal relationship to the surrogate-born child in Aotearoa New Zealand. Our legal parenthood proposals are discussed in Chapter 7.

PROPOSALS FOR REFORM

- 9.32 We think it is important that Aotearoa New Zealand continues to provide a process for recognising New Zealand intended parents' legal parenthood in international surrogacy

³² See, for example, Conor O'Mahony *A Review of Children's Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law* (Department of Children, Equality, Disability, Integration and Youth, Ireland, December 2020) at 37–38; Rhonda Powell "International surrogacy and parenthood in New Zealand: crossing geographical, legal and biological borders" (2017) 29 *Child and Family Quarterly* 149 at 153; Permanent Bureau of the Hague Conference on Private International Law *Private International Law Issues Surrounding the Status of Children, Including Issues arising from International Surrogacy Arrangements* (Preliminary Document No 11, March 2011) at [14]; and *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] 1 FLR 733 at [24] per Headley J.

³³ Debra Wilson *Understanding the Experience and Perceptions of Surrogacy Through Empirical Research: Judges Survey* (Te Whare Wānanga o Waitaha | University of Canterbury, May 2020) vol 2 at 14.

arrangements.³⁴ This will promote the best interests of the child by ensuring their rights to identity, nationality, family life, health, and freedom from discrimination are protected. Simply prohibiting New Zealanders from entering international surrogacy arrangements is not a viable option.³⁵

- 9.33 However, we do not think that New Zealand law should automatically recognise the legal parent-child relationship established in the surrogate-born child's country of birth. In the absence of an international instrument that sets minimum requirements for the regulation of surrogacy and recognition of legal parenthood, Aotearoa New Zealand cannot be certain that automatically recognising legal parenthood established outside its borders will be in the child's best interests. In these circumstances, automatic recognition would be unlikely to fulfil Aotearoa New Zealand's obligations under international human rights law, including to take appropriate measures to protect children from abuse and exploitation.³⁶
- 9.34 We are also mindful of international best practice. The Verona Principles, published in 2021, state that, in international surrogacy arrangements where at least one state does not permit the specific arrangement, a best interests of the child determination should be conducted additionally by a court or other competent authority of the state where the intended parents intend to reside with the child.³⁷ This is relevant because international surrogacy arrangements are typically commercial in nature, and commercial surrogacy is prohibited in Aotearoa New Zealand.
- 9.35 For these reasons, we do not think either a prohibitive or an automatic recognition approach would be appropriate. As the United Nations Special Rapporteur has observed, international surrogacy "should neither be automatically rejected nor accepted, the only valid consideration being the best interests of the child".³⁸
- 9.36 Below we consider options for reform that may address some of the criticisms with the current approach.

³⁴ Consistent with International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [10.3].

³⁵ As noted in Chapter 1, attempts in other countries, including Australia, to prohibit citizens from entering international commercial surrogacy arrangements have failed to stop the practice. A blanket prohibition is also regarded as contrary to international human rights law because it precludes the possibility of assessing whether recognition of the legal parent-child relationship between intended parents and surrogate-born children is in the child's best interests: Conor O'Mahony *A Review of Children's Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law* (Department of Children, Equality, Disability, Integration and Youth, Ireland, December 2020) at 10.

³⁶ See discussion in Chapter 3.

³⁷ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [6.6] and [10.8]; and Maud de Boer-Buquicchio *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* UN Doc A/HRC/37/60 (15 January 2018) at [70].

³⁸ Maud de Boer-Buquicchio *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* UN Doc A/74/162 (15 July 2019) at [91].

Providing for international surrogacy under Pathway 2 (Family Court determination of legal parenthood)

- 9.37 In Chapter 7, we propose two alternative pathways to establish legal parenthood in a domestic surrogacy arrangement:
- (a) **Pathway 1:** The intended parents are the legal parents of the surrogate-born child by operation of law provided the surrogacy arrangement was approved by ECART and, after the child is born, the surrogate confirms her consent to relinquish legal parenthood.
 - (b) **Pathway 2:** Whenever Pathway 1 does not apply, the surrogate is the legal parent at birth and an application can be made to the Family Court for a post-birth order determining the intended parents are the legal parents of the surrogate-born child.
- 9.38 In the context of international surrogacy, we do not think Pathway 1 is appropriate. ECART approval should only be available in relation to domestic surrogacy arrangements, given the practical difficulties that would arise in attempting to apply the requirements of the ECART process (such as joint counselling) to international surrogacy arrangements and in seeking to impose, monitor and enforce any requirement to obtain ECART approval on intended parents pursuing surrogacy overseas.³⁹
- 9.39 We propose that Pathway 2 should be available in international surrogacy arrangements. This would replace the need for intended parents to adopt their child under New Zealand law, but it would still require them to seek a court order from the Family Court that confirms them as the legal parents of the surrogate-born child under New Zealand law.
- 9.40 This would give the Family Court the opportunity to inquire into the circumstances of the surrogacy arrangement to ensure it is genuine and that, consistent with international best practice, recognising the intended parents as the child's legal parents is in the best interests of the child. This approach would also be consistent with the recent recommendations made in Ireland and with proposals put forward by the Law Commission of England and Wales and the Scottish Law Commission in their 2019 consultation paper.⁴⁰
- 9.41 The effect of a court determination under Pathway 2 should be the same as an adoption so that the child is entitled to New Zealand citizenship by birth and a New Zealand birth certificate and passport. This would respect the child's right not to be discriminated against on the basis of the child's birth circumstances, compared to children born in Aotearoa New Zealand.

Timing of an application under Pathway 2

- 9.42 In Chapter 7, we propose that Pathway 2 should be a post-birth process. An additional reason for favouring a post-birth process in the context of international surrogacy is that sometimes the child's country of birth will not recognise the intended parents as the legal

³⁹ A similar conclusion was reached in Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: a new law – A joint consultation paper* (CP244/DP167, 2019) at [16.87].

⁴⁰ Conor O'Mahony *A Review of Children's Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law* (Department of Children, Equality, Disability, Integration and Youth, Ireland, December 2020) at 37; and Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: a new law – A joint consultation paper* (CP244/DP167, 2019) at [16.89].

parents of the child until after the child is born. We think it is preferable that the Family Court's consideration of an application under Pathway 2 follows any steps taken to secure legal parenthood in the child's country of birth. This will ensure the Family Court has all the relevant information before it when making an order.

9.43 There are two different ways Pathway 2 could operate in international surrogacy arrangements:

- **Option A:** Intended parents apply to the Family Court for an order determining that they are the child's legal parents before they return with the child to Aotearoa New Zealand. Option A is similar to the approach under the Covid-19 Protocol. Once an order is made, the intended parents would be able to apply for a New Zealand passport for the child and travel to Aotearoa New Zealand. No further steps would be required to establish legal parenthood.
- **Option B:** Intended parents return to Aotearoa New Zealand with the child and then apply to the Family Court for an order determining that they are the child's legal parents. Option B is similar to the pre-Covid-19 Protocol approach. To facilitate the child's entry to Aotearoa New Zealand, a clearer and more efficient immigration pathway could be developed. For example, a specific temporary visa category and immigration instructions could be developed under the Immigration Act 2009 to provide for surrogate-born children to enter Aotearoa New Zealand on satisfaction of certain criteria.⁴¹ This would avoid the need for the Minister of Immigration to consider each application on a case-by-case basis.⁴²

9.44 Both options have advantages and disadvantages. The practical advantages of Option A are clear, as has been observed with the Covid-19 Protocol. There would be no need to arrange a passport in the child's country of birth (or a certificate of identity if that is required) and no requirement to apply to the Minister of Immigration for a temporary visa. No further administrative or legal steps would be required once the intended parents and the surrogate-born child return to Aotearoa New Zealand. This may promote the child's best interests by reducing the risk of statelessness and of temporary separation of the child from the intended parents pending travel documentation being arranged. In addition, Option A may minimise the concern, identified above, that the outcome of the court's determination is a foregone conclusion once intended parents arrive in Aotearoa New Zealand with the child.⁴³

9.45 However, Option A also has several disadvantages. Because the order would be made before the child travels to Aotearoa New Zealand, there would be no ability for a social worker to meet with the intended parents and the child in person before reporting to the Family Court (see Chapter 7 for a discussion of the social worker's role under Pathway 2). This disadvantage could, however, be mitigated by the additional options for reform, discussed below. Another potential disadvantage of Option A is that it may impose a

⁴¹ Immigration instructions set out immigration policy and are applied by immigration officers when considering visa applications.

⁴² A similar proposal is being considered in Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: a new law – A joint consultation paper* (CP244/DP167, 2019) at [16.70].

⁴³ A similar view was expressed in Conor O'Mahony *A Review of Children's Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law* (Department of Children, Equality, Disability, Integration and Youth, Ireland, December 2020) at 38.

degree of administrative pressure on the Family Court. A delay in hearing an application while the child remains overseas may cause periods of separation between the intended parents and the child. However, fast tracking applications might result in intended parents in international surrogacy arrangements having better access to the Family Court than intended parents in domestic surrogacy arrangements. This concern is mitigated by Pathway 1, which is only available in relation to domestic surrogacy arrangements and provides a pathway to legal parenthood that does not involve the Family Court.

- 9.46 The advantage of Option B is that it would enable the Family Court to make a decision with all parties present in person. A social worker would be able to visit the child in the care of the intended parents before they report to the court. The Family Court would not be under pressure to make an order because the child's entry to Aotearoa New Zealand does not depend on it.
- 9.47 However, the clear disadvantage of Option B is that it would require the intended parents to follow additional steps. A passport would need to be obtained in the child's country of birth (if possible) and a visa obtained to enable the child to travel to Aotearoa New Zealand. While the visa process could be streamlined, this would not resolve all the cross-border issues that arise while the child has no legal relationship with the intended parents. Further, streamlining the visa process may not be considered appropriate if it reduces the government's oversight of international surrogacy arrangements at the border. As noted above, there is a concern that, once a child enters Aotearoa New Zealand and is in the care of the intended parents, the outcome of Pathway 2 may be a foregone conclusion. This might favour a more robust exercise of oversight at the border, with discretion remaining with the Minister of Immigration.

No change proposed to citizenship law

- 9.48 We do not favour changing citizenship law to enable surrogate-born children to be recognised as New Zealand citizens from birth if one of their genetic parents is a New Zealander. Such an approach would mean that there would be little incentive for intended parents to formalise their legal relationship with their child. This is evident in Australia, where a surrogate-born child is eligible for Australian citizenship due to different definitions of "parent" being applied in the context of citizenship laws.⁴⁴ As the Australian Family Law Council has observed:⁴⁵

The grant of citizenship by descent does not mean the intending parents are considered legal parents in Australian law and this means these children are vulnerable if there is no legally recognised parent in Australia. The great majority of intending parents do not seek parenting orders when they return to Australia as they generally have obtained overseas birth certificates, citizenship, and a passport ... This means that the great majority of children born as a result of surrogacy arrangements overseas do not have the legal protection of having a legally recognised parent in Australia.

⁴⁴ Australian Citizenship Act 2007 (Cth), as discussed in *H v Minister for Immigration and Citizenship* [2010] FCAFC 119, (2010) 188 FCR 393 at [128]–[130].

⁴⁵ Family Law Council *Report on Parentage and the Family Law Act* (Australia, December 2013) at 121.

Additional options for reform

9.49 In addition to our proposal that Pathway 2 be available in international surrogacy arrangements, we have identified some additional options for reform, which we discuss below.

Should some overseas judicial decisions be recognised?

9.50 We are interested in views on whether New Zealand law should recognise some overseas judicial decisions establishing legal parenthood of surrogate-born children. This could mean that, if intended parents entered a surrogacy arrangement in a particular country, the legal process followed in that country would be recognised under New Zealand law and the intended parents would not need to seek a court determination under Pathway 2.⁴⁶

9.51 This could provide for the recognition of legal parenthood if it is established in a country that has a similar regulatory framework to Aotearoa New Zealand. This could include Australia, the United Kingdom and Canada. This would reduce administration and might incentivise intended parents who are considering international surrogacy to choose destinations that have similar regulatory frameworks.

9.52 However, establishing a framework for recognising some overseas judicial decisions would likely be of limited use in practice. Most international surrogacy arrangements entered by New Zealanders are based in countries that would be unlikely to qualify under such a framework because the arrangements are commercial in nature. In addition, a recognition regime would not grant the child the same entitlements as we envisage under Pathway 2. As is the case with overseas adoptions, discussed above, under a recognition regime, provided at least one intended parent is a New Zealand citizen by birth, the child would be entitled to New Zealand citizenship by descent and a New Zealand passport. They would not be entitled to a New Zealand birth certificate and would be unable to pass New Zealand citizenship on to any children born outside Aotearoa New Zealand. Finally, it might not be appropriate to establish such a framework given that this is the focus of ongoing work by the Hague Conference to establish a recognition regime in international surrogacy arrangements, discussed below.

Clearer role for Oranga Tamariki?

9.53 We are interested in your views on whether Oranga Tamariki should have a clearer role in international surrogacy arrangements to reduce the risks associated with international surrogacy.

9.54 One option is that Oranga Tamariki could be given an educative role early in the international surrogacy process. For example, Oranga Tamariki could run educational initiatives that give intended parents contemplating international surrogacy information about a child's rights and how these might be impacted in an international surrogacy arrangement. If intended parents are aware, for example, of the importance of preserving

⁴⁶ A similar option is being considered by the Law Commission of England and Wales and the Scottish Law Commission: Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: a new law – A joint consultation paper* (CP244/DP167, 2019) at [16.91]–[16.92].

information about donated gametes for their child, they may be more likely to try to use a gamete donor who provides identifying information about themselves.

- 9.55 Another option could be to bring forward Oranga Tamariki's assessment role in international surrogacy arrangements. In Chapter 7, we propose that the Family Court should continue to require a social worker's report under Pathway 2 but that the social worker assessment should be tailored to the specific circumstances of surrogacy. Currently, this assessment is undertaken once a viable pregnancy is established. There could be benefit in bringing forward this assessment to better align with the ECART approval process so that it is undertaken prior to intended parents entering an international surrogacy arrangement. This would enable Oranga Tamariki to identify any possible issues and work through these with the intended parents before a child is conceived.
- 9.56 We acknowledge there may be a concern that these options may be seen as facilitating or endorsing international surrogacy. In our view, international surrogacy is a global reality and requires a pragmatic response to promote the best interests of the child. New Zealanders are already entering surrogacy arrangements offshore. We think that the best interests of the child could be promoted by early involvement by Oranga Tamariki. It could also provide an opportunity to promote the benefits of domestic surrogacy arrangements, which would avoid the cross-border issues identified above.

Supporting the work of the Hague Conference

- 9.57 As noted above, the risks associated with international surrogacy cannot be fully addressed by individual state action. Given the disparity of regulation of surrogacy worldwide, there are doubts as to the ability of an international instrument to develop a uniform approach.⁴⁷ It is, however, expected that consensus on a process for recognising legal parenthood in international surrogacy arrangements can be achieved.⁴⁸ This is a focus of the Experts' Group convened by the Hague Conference in 2015.
- 9.58 The Experts' Group is considering how a protocol could provide for the recognition of legal parenthood established in the surrogate-born child's country of birth.⁴⁹ Most members of the Experts' Group have affirmed the importance of having minimum standards or safeguards specifically for international surrogacy arrangements to protect the rights and welfare of the parties involved.⁵⁰ What these safeguards are and whether

⁴⁷ Maud de Boer-Buquicchio *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* UN Doc A/HRC/37/60 (15 January 2018) at [20]–[21]; and Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: a new law – A joint consultation paper* (CP244/DP167, 2019) at [4.92]–[4.99].

⁴⁸ Margaret Casey "Creating families and establishing parentage when there is a disconnect between Assisted Reproductive Technologies and the Legal System: A New Zealand perspective of a global problem" (2017) 9 NZFLJ 51 at 54.

⁴⁹ Permanent Bureau of the Hague Conference on Private International Law *Report of the Experts' Group on the Parentage / Surrogacy Project (meeting of 29 January – 1 February 2019)* (Preliminary Document No 2B, March 2019) at [12]–[15] and [22]–[24].

⁵⁰ Permanent Bureau of the Hague Conference on Private International Law *Report of the Experts' Group on the Parentage / Surrogacy Project (meeting of 29 January – 1 February 2019)* (Preliminary Document No 2B, March 2019) at [17].

they should be conditions for recognition or grounds for non-recognition are still being considered.⁵¹

- 9.59 Such a protocol would resolve some of the issues we have identified above, as the New Zealand Government would have confidence that adequate safeguards are in place in the child's country of birth and that recognising the legal parent-child relationship between the intended parents and the surrogate-born child established in that country is in the child's best interests.
- 9.60 For these reasons, we think the Government should continue to support the work of the Hague Conference on private international law issues in relation to legal parenthood, including issues arising from international surrogacy arrangements.

QUESTIONS

- Q27** Do you agree with the issues we have identified with international surrogacy? Are there other issues we should consider?
- Q28** Do you agree with our proposal that Pathway 2 (Family Court determination of legal parenthood) should be available to New Zealand intended parents in international surrogacy arrangements?
- Q29** Do you prefer Option A or Option B in relation to the timing of applications under Pathway 2 in international surrogacy arrangements, or is there another option we should consider?
- Q30** Do you think Aotearoa New Zealand should recognise a determination of legal parenthood made in an overseas jurisdiction if that country has similar regulation of surrogacy arrangements?
- Q31** Do you think that Oranga Tamariki should have a clearer role, such as running educational initiatives for people contemplating international surrogacy or involving social workers earlier in the international surrogacy process?

⁵¹ Permanent Bureau of the Hague Conference on Private International Law *Report of the Experts' Group on the Parentage / Surrogacy Project (meeting of 29 January – 1 February 2019)* (Preliminary Document No 2B, March 2019) at [18]–[20].

CHAPTER 10

Access to surrogacy

IN THIS CHAPTER, WE CONSIDER:

- availability of information and public awareness;
- advertising for surrogates;
- barriers to connecting intended parents and potential surrogates;
- availability of experienced lawyers;
- public funding for surrogacy-related fertility treatment; and
- availability of donor gametes in Aotearoa New Zealand.

INTRODUCTION

- 10.1 In this chapter, we address a range of issues that affect access to surrogacy in Aotearoa New Zealand. Addressing these issues may help to encourage New Zealanders who are considering surrogacy to enter surrogacy arrangements in Aotearoa New Zealand rather than offshore, which is a guiding principle of our review.
- 10.2 We are interested in your views on each of these issues, although we note public funding and the availability of donor ova and sperm are wider issues that affect fertility treatment in general. This means the ability to address these issues in our review of surrogacy is limited.

AVAILABILITY OF INFORMATION AND PUBLIC AWARENESS

Issues

- 10.3 There is no single, public source of official information on the surrogacy process in Aotearoa New Zealand. Instead, information is fragmented across different government websites,¹ often relates to a specific aspect of the surrogacy process, lacks detail and is not easy to find. More is found on the websites of private organisations, including fertility

¹ Including websites for Oranga Tamariki | Ministry for Children, Immigration New Zealand, the Ethics Committee on Assisted Reproductive Technology and the Advisory Committee on Assisted Reproductive Technology.

clinics and Fertility New Zealand, a registered charity dedicated to providing information, support and advocacy to people experiencing fertility issues.

- 10.4 The limited availability of information on the surrogacy process, particularly from an official government source, is concerning.² This was raised as an issue by many people we spoke with during initial consultation who told us the lack of information generated confusion and misunderstanding as to what surrogacy involved and how it is regulated in Aotearoa New Zealand. We heard an example of a woman offering to be a surrogate without realising that she could not be paid for doing so and of intended parents resorting to private online forums, some based overseas, when they could not access information elsewhere.
- 10.5 Some also thought there should be more information available to the general public, to increase public awareness and understanding of surrogacy.

Options for reform

- 10.6 Improving the availability of information on surrogacy would be consistent with international best practice.³ It would reduce the risk of intended parents and surrogates relying on inaccurate or incomplete information. It would also help to raise public awareness of surrogacy and reduce barriers for women considering becoming surrogates. We think the Government is best placed to address this issue, as information provided by a government agency is most likely to be considered trustworthy and independent.
- 10.7 We think the Government should consider ways of providing comprehensive, clear and readily available information on surrogacy and raising public awareness. This could include:
- (a) producing a comprehensive information guide on surrogacy law and practice;⁴
 - (b) establishing and maintaining a website to act as a centralised, official and up-to-date source of information for New Zealanders considering having a child by surrogacy or becoming a surrogate;⁵ and
 - (c) a one-off public information campaign, which could be timed to coincide with the implementation of the recommendations we make in our report if accepted by the Government.
- 10.8 We are interested in your views on which government agency is best suited to provide this information and raise public awareness. Possible options include the Ministry of

² This is also a concern in comparable jurisdictions. See, for example, South Australian Law Reform Institute *Surrogacy: A Legislative Framework – A Review of Part 2B of the Family Relationships Act 1975 (SA)* (Report 12, 2018) at [13.1.1] and [13.1.4].

³ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [18.1].

⁴ Similar to the guide produced in England and Wales: Department of Health and Social Care *The Surrogacy Pathway: Surrogacy and the legal process for intended parents and surrogates in England and Wales* (United Kingdom, November 2019). The Department of Health and Social Care has also published *Care in Surrogacy: Guidance for the care of surrogates and intended parents in surrogate births in England and Wales* (November 2019), which provides guidance for all healthcare professionals involved in the care of surrogates and intended parents in surrogate births.

⁵ See, for example, the information provided in Victoria: Victoria Assisted Reproductive Treatment Authority “Surrogacy” <www.varta.org.au>.

Health, Oranga Tamariki or one of the Ministerial Committees that have a role in the regulation of surrogacy, namely the Ethics Committee on Assisted Reproductive Technology (ECART) or the Advisory Committee on Assisted Reproductive Technology (ACART).

ADVERTISING FOR SURROGATES

- 10.9 During initial consultation, intended parents regularly expressed frustration with the prohibition on advertising relating to surrogacy arrangements in section 15 of the Human Assisted Reproductive Technology Act 2004 (HART Act). The prohibition prohibits advertising if it involves payment beyond what is permitted by section 14. This means that people can advertise in relation to a surrogacy arrangement except where:
- (a) the advertisement invites people to participate, or to enquire about opportunities for participating, in a surrogacy arrangement that would breach the prohibition on the exchange of valuable consideration; or
 - (b) the advertiser is paid for the advertisement, which could itself breach the prohibition on the exchange of valuable consideration “for arranging any other person’s participation in a surrogacy arrangement”.
- 10.10 We think prohibiting advertising that includes an offer to exchange valuable consideration contrary to the HART Act is appropriate and should remain. However, the prohibition on paying for advertisements that would otherwise comply with the HART Act appears problematic. It creates a distinction based on whether an advertisement is free or paid, which is becoming increasingly irrelevant in the age of social media and acts as a barrier to intended parents and potential surrogates connecting.

Options for reform

- 10.11 Allowing advertisers to be paid for advertisements in relation to lawful surrogacy arrangements would broaden the ways that intended parents and potential surrogates can reach out to each other. This would be consistent with the approach taken in some comparable jurisdictions where advertising is only prohibited if the advertisement includes an offer of payment to a person willing to participate in a surrogacy arrangement but payment for the advertisement is allowed.⁶ That said, some comparable jurisdictions are more stringent and prohibit advertising in relation to surrogacy altogether⁷ out of a desire to avoid any commercialisation of surrogacy and to keep surrogacy arrangements between family networks and close friends.⁸
- 10.12 We are interested in your views on this matter and whether you think people should be able to pay an advertiser for advertising in relation to a surrogacy arrangement.

⁶ See Assisted Human Reproduction Act SC 2004 c 2, s 6(1); Surrogacy Act 2008 (WA), s 10; and Surrogacy Act 2019 (SA), s 26(1).

⁷ See Assisted Reproductive Treatment Act 2008 (Vic), s 45(1); Parentage Act 2004 (ACT), s 43; and Surrogacy Act 2010 (Qld), s 55.

⁸ Investigation into Altruistic Surrogacy Committee Report (Queensland Parliament, Brisbane, October 2008) at 37.

BARRIERS TO CONNECTING INTENDED PARENTS AND POTENTIAL SURROGATES

Issues

- 10.13 It can be difficult for intended parents to find someone who is willing to act as a surrogate in Aotearoa New Zealand. Several intended parents we spoke with during initial consultation said that connecting with potential surrogates was one of their biggest challenges and difficulties in finding potential surrogates in Aotearoa New Zealand was a common reason for pursuing surrogacy offshore.
- 10.14 Currently, it is an offence to give or receive valuable consideration for arranging another person's participation in a surrogacy arrangement,⁹ which means that private intermediaries do not operate in Aotearoa New Zealand. While some fertility clinics maintain lists of ovum and sperm donors, they do not maintain lists of women willing to act as a surrogate. Intended parents are instead expected to find a surrogate themselves.
- 10.15 In practice, most women who act as surrogates are family members or close friends of the intended parent(s). However, increasing numbers of intended parents and surrogates are meeting online through private forums such as NZ-Surrogacy.com, Fertility New Zealand and Facebook groups. In January 2021, a New Zealand website, lovemakes.family, was launched that aims to bring people together to make a family through surrogacy and gamete donation. These forums provide a means for intended parents and potential surrogates to connect but do not actively facilitate or "match" intended parents with a potential surrogate.

Options for reform

- 10.16 Many of the proposals we have suggested throughout this Issues Paper seek to reduce barriers for women considering becoming a surrogate in Aotearoa New Zealand. In Chapter 6, we propose allowing surrogates to be reimbursed for reasonable expenses they incur in relation to a surrogacy arrangement and ensuring they are entitled to a period of paid leave on the same basis as paid parental leave. In Chapter 7, we propose changes to legal parenthood laws to provide greater clarity and certainty about the rights and obligations of surrogates and intended parents. In this chapter, we suggest raising public awareness and providing trustworthy and independent information about surrogacy, which could encourage some women to consider acting as surrogates, as well as relaxing the restriction on paid advertising in relation to lawful surrogacy arrangements.
- 10.17 There are additional steps that could be taken to reduce barriers to intended parents connecting with potential surrogates in Aotearoa New Zealand. Two options warrant specific consideration:
- (a) **Option 1:** Establishing a surrogacy register to enable women who are interested in becoming a surrogate to register their interest and be matched with intended parents.
 - (b) **Option 2:** Permit private intermediaries to operate in Aotearoa New Zealand on a non-profit and regulated basis.

⁹ Human Assisted Reproductive Technology Act 2004, s 14.

Option 1: Establish a surrogacy register

- 10.18 A surrogacy register has been considered in Australia¹⁰ and suggested in Aotearoa New Zealand in a proposed Member's Bill.¹¹
- 10.19 Under this option, a surrogacy register would be administered by a government-appointed registrar, who would be responsible for:
- (a) registering potential surrogates and intended parents if they meet the requirements for registration, which might include criminal background checks and some form of medical and psychological assessment;¹² and
 - (b) matching potential surrogates and intended parents who would then decide whether they want to enter a surrogacy arrangement.
- 10.20 A surrogacy register could make it easier for intended parents to connect with potential surrogates. It could provide a clear pathway to follow for women considering becoming a surrogate, and for intended parents to find a surrogate. It might also provide a safer environment for intended parents and surrogates to meet than existing online forums. Finally, by facilitating connections with women who are considering becoming a surrogate, a register could help reduce the risk of family members or close friends of intended parents being pressured or coerced into becoming surrogates. This is a concern we identify in Chapter 3.
- 10.21 In Australia, no state or territory has established a surrogacy register, despite general support for the concept.¹³ In South Australia, legislation was introduced to establish a surrogacy register in 2015,¹⁴ but that legislation was repealed before the register was set up, on the recommendation of the South Australian Law Reform Institute (SALRI).¹⁵ SALRI noted the Government's "significant and ongoing concerns" about the establishment of the register and the view that "strongly emerged" in consultation was that a register,

¹⁰ South Australian Law Reform Institute *Surrogacy: A Legislative Framework – A Review of Part 2B of the Family Relationships Act 1975 (SA)* (Report 12, 2018) at [10.4]; and House of Representatives Standing Committee on Social Policy and Legal Affairs *Surrogacy Matters: Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements* (Parliament of the Commonwealth of Australia, April 2016) at [1.54]–[1.57].

¹¹ Improving Arrangements for Surrogacy Bill 2021 (undrawn Member's Bill, Tāmami Coffey MP), cl 9. A register of surrogates has also been proposed for Aotearoa New Zealand in Ruth Walker and Liezl van Zyl *Towards a Professional Model of Surrogate Motherhood* (Palgrave Macmillan, London, 2017) at 18, 138–139.

¹² The need for some form of assessment of surrogates and intended parents prior to registration on the surrogacy register was identified in House of Representatives Standing Committee on Social Policy and Legal Affairs *Surrogacy Matters: Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements* (Parliament of the Commonwealth of Australia, April 2016) at [1.57]; and in Law Society of South Australia's submission to South Australian Attorney-General's Department *State Framework for Altruistic Surrogacy* (25 May 2017) at [29]–[35], as cited in South Australian Law Reform Institute *Surrogacy: A Legislative Framework – A Review of Part 2B of the Family Relationships Act 1975 (SA)* (Report 12, 2018) at [10.4.4], n 380.

¹³ See, for example, House of Representatives Standing Committee on Social Policy and Legal Affairs *Surrogacy Matters: Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements* (Parliament of the Commonwealth of Australia, April 2016) at [1.57]; and Australian Human Rights Commission *Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs: Inquiry into the Regulatory and Legislative Aspects of Surrogacy Arrangements* (17 February 2016), R3.

¹⁴ Under the Family Relationships (Surrogacy) Amendment Act 2015 (SA).

¹⁵ South Australian Law Reform Institute *Surrogacy: A Legislative Framework – A Review of Part 2B of the Family Relationships Act 1975 (SA)* (Report 12, 2018), R14.

while well intentioned, raised privacy, policy and practical concerns and was inappropriate.¹⁶

10.22 Having considered the concerns raised in SALRI's review and the current regulatory environment in Aotearoa New Zealand, we think there are several concerns with establishing a surrogacy register:

- (a) First, providing a matching service may be an inappropriate extension of the state's role. Surrogacy arrangements are fundamentally private arrangements. In Chapter 3, we explain a guiding principle of our review is that surrogacy law should respect the autonomy of consenting adults in their private lives but that this must be balanced against other principles, including the paramountcy of children's best interests and the need for sufficient regulatory safeguards to protect the parties from exploitation. Our view is that the proper role of the state is to provide a safe and effective regulatory framework for surrogacy arrangements. Actively facilitating individual surrogacy arrangements extends significantly beyond this role. It also creates a risk that the surrogacy register is seen as a de facto waiting list for intended parents to be matched with a surrogate, which may change intended parents' expectations and create a more transactional rather than relationship-based surrogacy model.¹⁷
- (b) Second, establishing a surrogacy register could duplicate existing regulatory safeguards. If the surrogacy register is to provide a safer environment for potential surrogates and intended parents to meet than the current options, there would need to be some assessment of potential surrogates and intended parents as part of the registration process. This would duplicate the assessment that is already undertaken as part of the ECART approval process (discussed in Chapter 5).
- (c) Third, a surrogacy register may not be workable or effective in practice. As noted above, intended parents and potential surrogates are already connecting through free online forums. We question whether they would prefer signing up to a state-run register, especially if that involves a more complex application process, some form of assessment and, in the case of intended parents, potentially the payment of a fee. More problematic is the fact that, by signing up to the register, potential surrogates would lose control over who they decide to connect with in the first instance. This was highlighted as a concern in SALRI's review, with one lawyer with extensive experience in surrogacy law observing that, while there is a need for surrogates and intended parents to be able to get in touch, "no surrogate mother would ever join a State Register".¹⁸

10.23 For these reasons, our preliminary view is that a surrogacy register should not be established in Aotearoa New Zealand.

¹⁶ South Australian Law Reform Institute *Surrogacy: A Legislative Framework – A Review of Part 2B of the Family Relationships Act 1975 (SA)* (Report 12, 2018) at 111.

¹⁷ Similar concerns were identified in South Australian Law Reform Institute *Surrogacy: A Legislative Framework – A Review of Part 2B of the Family Relationships Act 1975 (SA)* (Report 12, 2018) at 111–112.

¹⁸ South Australian Law Reform Institute *Surrogacy: A Legislative Framework – A Review of Part 2B of the Family Relationships Act 1975 (SA)* (Report 12, 2018) at 111.

Option 2: Permit private intermediaries to operate in Aotearoa New Zealand

- 10.24 Another option is to permit private intermediaries to operate in Aotearoa New Zealand. This could give intended parents wider options to connect with potential surrogates than simply relying on online forums or family and friend networks.
- 10.25 As discussed in Chapter 6, significant concerns have been expressed about the operation of intermediaries in surrogacy arrangements, especially for-profit intermediaries that operate internationally. The United Nations (UN) Special Rapporteur has observed that such intermediaries “often receive the largest profits and create large-scale national and transnational surrogacy markets and networks”.¹⁹ She has condemned for-profit intermediaries as being “the real threat of exploitation and commodification of children, and potentially of surrogates”, as they are motivated by “the successful completion of the surrogacy agreement with little to no regard for the rights of those involved”.²⁰ These concerns exist even in “altruistic” surrogacy models if for-profit intermediaries are permitted to operate.²¹ Given these concerns, both the UN Special Rapporteur and the Verona Principles call for appropriate safeguards and regulation of intermediaries.²²
- 10.26 In the United Kingdom, private intermediaries can operate but only on a non-profit basis.²³ This means that intermediaries must be “non-profit making bod[ies]”²⁴ and must not charge fees that exceed their costs.²⁵ This may alleviate concerns regarding intermediaries. However, it may not reduce the need for regulation. In 2019, the Law Commission of England and Wales and the Scottish Law Commission proposed that non-profit surrogacy intermediaries should be regulated, to create consistent standards and promote best practice.²⁶ As the Commissions observed:²⁷

... the fact that an organisation is non-profit is ... not a guarantee that it will adopt efficient and ethical practices; for example, provided an organisation is non-profit it can pay its staff whatever salary it wishes.

¹⁹ Maud de Boer-Buquicchio *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* UN Doc A/HRC/37/60 (15 January 2018) at [40].

²⁰ Maud de Boer-Buquicchio *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* UN Doc A/74/162 (15 July 2019) at [78].

²¹ Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: a new law – A joint consultation paper* (CP244/DP167, 2019) at [9.69]–[9.83]; and Sonia Allan *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008 (Report: Part 2)* (January 2019) at 148.

²² Maud de Boer-Buquicchio *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* UN Doc A/74/162 (15 July 2019) at [79]; and International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [16.1].

²³ Surrogacy Arrangements Act 1985 (UK), s 2(2A).

²⁴ Surrogacy Arrangements Act 1985 (UK), s 1(7A).

²⁵ Surrogacy Arrangements Act 1985 (UK), s 2(2C).

²⁶ Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: a new law – A joint consultation paper* (CP244/DP167, 2019) at [9.44].

²⁷ Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: a new law – A joint consultation paper* (CP244/DP167, 2019) at [9.67].

- 10.27 A model like that in the UK could be considered for Aotearoa New Zealand, particularly if New Zealanders' use of surrogacy continues to grow and other proposals in this Issues Paper to reduce the barriers to intended parents connecting with potential surrogates in Aotearoa New Zealand are not considered to be sufficient.
- 10.28 However, given the concerns regarding intermediaries and that international best practice calls for their regulation, we think that there would need to be a strong case for changing the current law and permitting intermediaries to charge a fee, even on a non-profit basis. We are also mindful that this could increase the cost of surrogacy for intended parents, with some non-profit organisations in the UK reportedly charging more than £15,000 for their services.²⁸
- 10.29 At this stage, we are not convinced that the case for private intermediaries is a compelling one. However, we note that demand for surrogacy has increased in Aotearoa New Zealand and will continue to increase. Accordingly, we are interested in hearing your views on whether private intermediaries should be allowed to operate in Aotearoa New Zealand on a non-profit and regulated basis.

AVAILABILITY OF EXPERIENCED LAWYERS

Issues

- 10.30 Currently, intended parents and surrogates in domestic gestational surrogacy arrangements must obtain independent legal advice as part of the ECART application process.²⁹ Intended parents will also typically require a lawyer for the adoption process, including intended parents in traditional surrogacy arrangements that do not go through the ECART process as well as intended parents who enter international surrogacy arrangements.
- 10.31 Our initial research and consultation revealed concerns about the limited number of lawyers with experience advising on surrogacy arrangements. Surrogacy law is a specialist area, and finding a lawyer with the necessary experience and understanding was identified as a concern by several intended parents, surrogates and other stakeholders we spoke with. One intended parent told us “we feel like we’ve paid lawyers to come up to speed on the law – it’s like paying for their study”. A surrogate and her partner told us that they had to use a lawyer with no prior surrogacy experience because the only lawyer with surrogacy expertise in their region was not available. They ended up relying more on information the intended parents had received from their own lawyer who was a surrogacy expert.
- 10.32 The shortage of experienced lawyers is an obvious issue given the complex legal issues that can arise in any surrogacy arrangement and particularly given the uncertainty resulting from the current law (discussed in Chapters 5-7). There is a real risk of intended parents and surrogates receiving poor legal advice, which could have significant

²⁸ Melanie Newman and Jim Reed “Surrogacy: Social media advertising plans prompt regulator warning” *BBC News* (online ed, Britain, 29 January 2020).

²⁹ Advisory Committee on Assisted Reproductive Technology *Guidelines for family gamete donation, embryo donation, the use of donated eggs with donated sperm and clinic assisted surrogacy* (September 2020) at 6.

repercussions. At the very least, inadequate legal advice has been grounds for ECART deferring approval in some cases.³⁰

Options for reform

- 10.33 This is not an issue that needs to be addressed through law reform. Instead, one way to address this issue would be to ensure that the provision of comprehensive information on a centralised, official website, discussed above, includes information for professionals involved in surrogacy arrangements.
- 10.34 Another way to help ensure there are more experienced lawyers is to provide greater opportunities for professional development in surrogacy. This could coincide with the implementation of recommendations made as part of the Commission's review, if those recommendations are accepted by the Government, to ensure lawyers are knowledgeable about any new surrogacy laws.

PUBLIC FUNDING FOR SURROGACY

Issues

- 10.35 During initial consultation, many intended parents expressed concern about the availability of public funding for surrogacy. A common concern was that the availability of public funding was discriminatory. One intended parent we spoke with noted the “stark contrast” between the availability of public funding for male couples and everyone else. He said:

If you are heterosexual, you can get public funding for fertility treatment. If you are a female couple, you do not need to rely on surrogacy or egg donation and you can also get public funding for fertility treatment. But if you are a male couple, you need a surrogate and an egg donor and you cannot get public funding for either.

- 10.36 ECART has observed that certain ethnicities are disproportionately represented in terms of access to assisted reproductive technology, which it considers raises the question about equitable access to surrogacy for different ethnicities and gender identities.³¹
- 10.37 There is no specific allocation of public funding for surrogacy-related fertility treatment. Instead, public funding for all fertility treatment is allocated to District Health Boards for distribution using the Clinical Priority Assessment Criteria (CPAC).³² The CPAC is used to determine priority for funding using set diagnostic and social criteria, such as biological or unexplained infertility, the age of the woman who is trying to conceive, her body mass index, how long a couple have been trying to conceive and how many children a couple

³⁰ Discussed in Ruth Walker and Liezl van Zyl “Surrogacy and the law: three perspectives” (2020) 10 NZFLJ 9 at 11.

³¹ Letter from Ethics Committee on Assisted Reproductive Technology to Te Aka Matua o te Ture | Law Commission regarding initial views on surrogacy review (7 July 2021).

³² *National Specialist Guidelines for Investigation of Infertility – Priority Criteria for Access to Public Funding of Infertility Treatment* (National Health Committee, July 1999).

already have.³³ The CPAC “is intended to benefit those who are most in need for therapy ... balanced by a system that will ensure maximum benefit”.³⁴

- 10.38 People who lack the sex characteristics to become pregnant (including male couples and single men) cannot qualify under the CPAC for surrogacy-related fertility treatment because the diagnostic criteria focus on whether there is a biological or “organic” cause for infertility. Even for people who do experience infertility (including heterosexual couples and single women), it can be difficult to qualify for funding.³⁵ Public funding has not increased to match growing demand.³⁶ Accordingly, even when people do qualify, the wait time for treatment can be significant.³⁷
- 10.39 Another concern relates to the lack of public funding available for making applications to ECART. While ECART does not charge an application fee, applications can only be made by a fertility clinic, and clinics do charge intended parents for the costs associated with preparing the application (see discussion in Chapter 5). Representatives from one fertility clinic we spoke with during initial consultation highlighted that the cost of the ECART process makes surrogacy cost prohibitive for Māori and Pacific peoples in particular (see discussion in Chapter 4).

Options for reform

- 10.40 The scope of our review is limited to surrogacy, which means we are not in a position to consider general changes to the CPAC. We are also conscious that, without an overall increase in public funding for fertility treatment, changes to the CPAC to improve peoples’ chances of qualifying for surrogacy-related fertility treatment are unlikely to achieve meaningful reform. It is more likely they will simply result in longer waiting times for more people.
- 10.41 That said, questions have been raised about the CPAC’s validity, consistency and fairness.³⁸ In 2019, the President of Fertility New Zealand said “[w]e do not think that the funding and criteria have kept pace with the diverse ways people now build whānau in

³³ *National Specialist Guidelines for Investigation of Infertility – Priority Criteria for Access to Public Funding of Infertility Treatment* (National Health Committee, July 1999) at 28 and 31.

³⁴ *National Specialist Guidelines for Investigation of Infertility – Priority Criteria for Access to Public Funding of Infertility Treatment* (National Health Committee, July 1999) at 24.

³⁵ Fertility Associates, one of the fertility clinics operating in Aotearoa New Zealand outlines possible scenarios where people will qualify for funding for fertility treatment on their website: Fertility Associates “Public funding and eligibility” <www.fertilityassociates.co.nz>. Scenarios include a heterosexual couple only being eligible if they suffer from severe infertility, have no children and have been trying to conceive for one year or more or have unexplained infertility and have been trying to conceive for five years. A single female will only be eligible (if her investigations are normal) if she has not become pregnant after 12 cycles of privately funded donor insemination. People in these scenarios would also have to meet other criteria that can be impossible or demanding, including being 39 or younger and having a body mass index lower than 32 at the time of treatment.

³⁶ See, for example, Wayne Gillett and Katy Crozier “Priority Criteria for Access to Infertility Services – Is the Model Fair and Justified?” [2000] Otago Bioethics Report 6 at 17; and Katarina Williams “Funding lagging behind as demand for IVF grows” *Stuff* (online ed, New Zealand, 19 December 2016).

³⁷ Fertility Plus (Auckland DHB) currently has a 9–10 month wait time for an IVF cycle. Waitemata DHB had an average wait time of up to 17 months for fertility treatment from 2016–2019.

³⁸ Wayne Gillett and Katy Crozier “Priority Criteria for Access to Infertility Services – Is the Model Fair and Justified?” [2000] Otago Bioethics Report 6 at 15.

NZ”.³⁹ In addition, when the CPAC was implemented, it was considered to be only the start and that further work would be required to ensure its validity and reliability.⁴⁰ ECART also indicated during initial consultation that it sees this review as an opportunity “for a review of funding and of any potential discriminatory practices related to ethnicity and gender identity”.⁴¹ It may therefore be appropriate for the CPAC to be reviewed to determine whether its criteria remain appropriate for contemporary Aotearoa New Zealand. Some criteria, such as the body mass index requirement, may no longer be appropriate.⁴²

- 10.42 In the context of surrogacy, while we do not propose any options for law reform, in our preliminary view, the Government should review how it funds surrogacy, including surrogacy-related fertility treatment as well as the costs associated with the ECART process. A review could consider whether different criteria and funding should be allocated for surrogacy as opposed to other forms of fertility treatment, with a specific focus on people who, because of their sex characteristics, are unable carry a child. Public funding could support intended parents to enter surrogacy arrangements in Aotearoa New Zealand and make surrogacy more accessible for all New Zealanders.

AVAILABILITY OF DONOR GAMETES IN AOTEAROA NEW ZEALAND

Issues

- 10.43 Another general issue in fertility treatment that directly impacts on surrogacy is the availability of donor gametes (ova and sperm) in Aotearoa New Zealand. It is widely acknowledged that demand for donor gametes outweighs supply and that demand is continuing to increase.⁴³ The underlying reason for low availability appears to be section 13 of the HART Act, which prohibits the exchange of valuable consideration for human gametes. In effect, donors in Aotearoa New Zealand cannot be compensated and donor gametes cannot be paid for overseas and then imported to Aotearoa New Zealand.

³⁹ Brittany Keogh “Publicly funded fertility treatment in NZ a postcode lottery” *Stuff* (online ed, New Zealand, 22 June 2019).

⁴⁰ Wayne Gillett and Katy Crozier “Priority Criteria for Access to Infertility Services – Is the Model Fair and Justified?” [2000] Otago Bioethics Report 6 at 17.

⁴¹ Letter from Ethics Committee on Assisted Reproductive Technology to Te Aka Matua o te Ture | Law Commission regarding initial views on surrogacy review (7 July 2021).

⁴² Questions have been raised about whether BMI is an appropriate measure of health, particularly for Māori and Pacific people: see Ross Wilson and J Haxby Abbott “Age, period and cohort effects on body mass index in New Zealand, 1997–2038” (2018) 42 *Australian and New Zealand Journal of Public Health* 396.

⁴³ In an interview with Dr Andrew Murray, Medical Director, Fertility Associates (Kathryn Ryan, Nine to Noon, RNZ, 30 March 2021), it was noted that the annual number of women seeking a sperm donor has doubled in the last four years, one fertility clinic in Aotearoa New Zealand had 1,000 women on their waiting list for donated sperm in March this year, and a representative of the same fertility clinic said:

The numbers are quite staggering. Each year, we get about 300 women seeking donor sperm. Each year we recruit roughly 50 donors, so that disparity is only going to get greater.

The low supply of donor sperm is also referenced in Emily Writes “The sperm drought: Why New Zealand needs more donors” *The Spinoff* (New Zealand, 9 June 2020); and Virginia Fallon “Desperately seeking donors: New Zealand’s chronic sperm shortage” *Stuff* (online ed, New Zealand, 21 February 2021).

10.44 Limited availability of donor gametes is a key driver for New Zealanders to seek fertility treatment offshore where donor gametes are more readily available.⁴⁴ This, in turn, is driving New Zealanders to international surrogacy. As we note in Chapter 9, international surrogacy often involves the use of donor gametes and many jurisdictions still permit anonymous donation, unlike Aotearoa New Zealand. Half of all international surrogacy arrangements that Oranga Tamariki is aware of over the past five years have involved anonymous gamete donors, which raises concerns for the child's identity rights (see Chapter 8).

Options for reform

- 10.45 Like public funding, the low supply of donor gametes is a general fertility treatment issue, the impact of which is not limited to surrogacy. Making recommendations for legal reform to address the problem would therefore go beyond the scope of our review.
- 10.46 That said, given the impact the low supply of donor gametes has on surrogacy, we think that the Government should consider this matter as a priority, including:
- (a) whether donors should be compensated for reasonable expenses incurred in the process of donation; and
 - (b) whether the existing restrictions on importing donated gametes and embryos into Aotearoa New Zealand should be relaxed in certain circumstances.
- 10.47 In its consideration of these issues, the Government should take into account the advice on these matters given by ACART to the Minister of Health in 2014.⁴⁵

⁴⁴ See Advisory Committee on Assisted Reproductive Technology *Advice to the Minister of Health on requirements for importing and exporting in vitro gametes and embryos for human reproductive research and human assisted reproductive technology* (March 2015) at 3.

⁴⁵ Advisory Committee on Assisted Reproductive Technology *Advice to the Minister of Health on requirements for importing and exporting in vitro gametes and embryos for human reproductive research and human assisted reproductive technology* (March 2015).

QUESTIONS

- Q32** Do you agree with the issues we have identified with access to surrogacy in Aotearoa New Zealand? Are there other issues we should consider?
- Q33** Which option(s) to improve availability of information on and public awareness do you prefer? Are there other options we should consider?
- Q34** Which government agency do you think is best suited to provide information on and raise public awareness of surrogacy?
- Q35** Should advertisers be able to receive payment for publishing advertisements in relation to lawful surrogacy arrangements?
- Q36** Do you think additional steps should be taken to reduce the barriers intended parents face connecting with surrogates? If so, which option do you prefer?
- Q37** What steps do you think should be taken to address concerns about the limited number of lawyers with experience advising on surrogacy arrangements?
- Q38** Do you agree that the Government should conduct a review of how it funds surrogacy, with a view to making surrogacy in Aotearoa New Zealand more accessible for New Zealanders?
- Q39** Do you agree that the Government should investigate the supply of donor gametes in Aotearoa New Zealand, including whether donors ought to be compensated for reasonable expenses incurred and whether the restrictions on importing gametes and embryos into Aotearoa New Zealand should be relaxed in certain limited circumstances?
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ISBN 978-0-9951291-1-5 (Online)

ISSN 1177-7877 (Online)

This title may be cited as NZLC IP47.

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