

Pūrongo | Report 146

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

The Commissioners are:

Amokura Kawharu — Tumu Whakarae | President

Helen McQueen — Tumu Whakarae Tuarua | Deputy President

Geof Shirtcliffe — Kaikōmihana | Commissioner

The Hon Justice Christian Whata — Kaikōmihana | Commissioner

The Māori language version of this Report'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 978-0-9951291-6-0 (Print)

ISBN 978-0-9951291-5-3 (Online)

ISSN 0113-2334 (Print)

ISSN 1177-6196 (Online)

This title may be cited as NZLC R146. This title is available on the internet at the website of Te Aka Matua o te Ture | Law Commission: www.lawcom.govt.nz

Copyright © 2022 Te Aka Matua o te Ture | Law Commission.



This work is licensed under the Creative Commons Attribution 4.0 International licence. In essence, you are free to copy, distribute and adapt the work, as long as you attribute the work to Te Aka Matua o te Ture | Law Commission and abide by other licence terms. To view a copy of this licence, visit <https://creativecommons.org/licenses/by/4.0>



Tumu Whakarae | President

Amokura Kawharu

Kaikōmihana | Commissioners

Helen McQueen

Geof Shirtcliffe

The Hon Justice Christian Whata

Hon Kris Faafoi

Minister Responsible for the Law Commission

Parliament Buildings

WELLINGTON

29 April 2022

Tēnā koe Minister

NZLC R146 – Te Kōpū Whāngai: He Arotake | Review of Surrogacy

I am pleased to submit to you the above Report under section 16 of the Law Commission Act 1985.

Nāku noa, nā

A handwritten signature in blue ink, reading 'Amokura Kawharu'.

Amokura Kawharu

Tumu Whakarae | President



Foreword

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

Surrogacy requires careful regulation. Complex legal, ethical, cultural and medical issues can arise. The law needs to meet the needs and reasonable expectations of New Zealanders in a way that promotes and protects the rights and interests of surrogate-born children, surrogates and intended parents.

This review has examined surrogacy law, regulation and practice, both in the domestic context and overseas. We have taken account of recent international developments in the regulation of surrogacy as well as law reform in other countries.

A key problem is that the law does not recognise surrogacy as a process that creates a parent-child relationship between the intended parents and the surrogate-born child. Instead, intended parents must use the Adoption Act 1955, now over 65 years old and designed at a time when the modern practice of surrogacy could not have been contemplated. The prompt introduction and enactment of the Paige Harris Birth Registration Act 2022 with the unanimous support of the House illustrates the failure of the current law to meet the needs and reasonable expectations of New Zealanders.

This Report recommends a new legal framework for determining legal parenthood in surrogacy arrangements. Surrogacy should be recognised as a legitimate method of family building that is distinct from adoption. Our recommendations accommodate all forms of surrogacy arrangements as we think that this will best promote the paramountcy of children's best interests.

Alongside a new framework for determining legal parenthood, we recommend a surrogacy birth register to preserve information for surrogate-born people about their genetic and gestational origins and whakapapa. We know from the experiences of adopted and donor-conceived people that such information is fundamental to a person's identity and wellbeing.

Another key conclusion of our review is that the Government, as part of its kāwanatanga responsibilities under te Tiriti o Waitangi, should commission Māori-led research to enable a better understanding of tikanga Māori and surrogacy and Māori perspectives on surrogacy in practice. Surrogacy, as it is practised in contemporary Aotearoa New Zealand, raises new issues for tikanga Māori that would benefit from further examination.

We also make recommendations to improve access to surrogacy in Aotearoa New Zealand and reduce barriers to intended parents connecting with potential surrogates. While we affirm the existing prohibition on commercial surrogacy in Aotearoa New Zealand, we recommend clarifying and expanding the types of costs incurred by the surrogate that intended parents should be able to meet, including compensation for lost earnings.

We are grateful for the views of all of those who have engaged with us on this review. We are confident our recommendations will provide the foundation for better surrogacy law for Aotearoa New Zealand.



Amokura Kawharu

Tumu Whakarae | President

Acknowledgements

Te Aka Matua o te Ture | Law Commission gratefully acknowledges the contributions of all who have helped us in this review.

We acknowledge the generous contribution to the review made by our Expert Advisory Group in sharing their expertise on the issues arising from current surrogacy law and engaging in rigorous discussion of our reform proposals. Members of the Group were Dr Claire Achmad, Associate Professor Debra Wilson, Margaret Casey QC and Stewart Dalley.

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

We acknowledge and appreciate the ongoing support and guidance from the Māori Liaison Committee to the Commission.

Finally, we thank the individuals and organisations who kindly shared their expertise, experience and views through taking the time to make a submission.

We emphasise nevertheless that the views expressed in this Report 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 worked on this Report are Briar Peat (Ngāti Rangiwewehi, Ngāti Whakaue), Samuel Mellor and Tom White. The law clerks who worked on this Report are Emma Sidnam and Marko Garlick.

Contents

Foreword.....	iv
Acknowledgements	v
Glossary	3
Executive summary	6
Recommendations.....	17
Chapter 1: Introduction.....	29
Our review	29
Our approach to broader questions	31
Matters addressed in this report	35
Terminology and other matters.....	36
Chapter 2: Surrogacy in practice.....	38
Introduction	38
Participation in surrogacy	38
New Zealanders' changing attitudes to surrogacy	48
Empirical Research on the impact of surrogacy	50
Limitations of the research.....	53
Te ao Māori and surrogacy	54
The need for further research.....	66
Chapter 3: Developing good surrogacy law	69
Introduction	69
Tikanga Māori.....	69
Te Tiriti o Waitangi Treaty of Waitangi	71
Human rights and surrogacy.....	75
Results of consultation.....	88
Conclusions.....	88
Chapter 4: Regulating surrogacy arrangements	97
Introduction	97
Current law.....	97
Issues	104
Results of consultation.....	105
Conclusions.....	114
Chapter 5: Improving the approval process	121
Introduction	121
Oranga Tamariki's role in the approval process	122
Recording surrogacy arrangements in writing	131

Improving counselling requirements	134
Supporting Māori to act in accordance with tikanga	139
Duration of ECART approvals	143
Reviewing ECART decisions.....	145
Composition of ACART and ECART	151
Monitoring and reporting on outcomes	157
Chapter 6: Legal parenthood.....	161
Introduction	161
Current law.....	162
Issues	166
Results of consultation.....	173
Conclusions.....	188
Chapter 7: Preserving access to identity information	212
Introduction	212
Current law.....	212
Issues	219
Results of consultation.....	221
Conclusions.....	229
Chapter 8: Financial support for surrogates	238
Introduction	238
Current law.....	238
Issues	240
Results of consultation.....	243
Conclusions.....	253
Chapter 9: International surrogacy	269
Introduction	269
Current law.....	270
Issues	276
Results of consultation.....	279
Conclusions.....	294
Chapter 10: Improving access to surrogacy	302
Introduction	302
Issues with access to surrogacy generally	302
Availability of information and public awareness	303
Barriers to connecting intended parents and potential surrogates	308
Availability of experienced lawyers.....	320
Public funding for surrogacy.....	322
Availability of donor gametes in Aotearoa New Zealand.....	326

Glossary

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 parents</i> live in the same country.
donors	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 <i>gamete</i> is called an ovum (plural is ova). Male <i>gametes</i> 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 <i>surrogate</i> .

	<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>
Hague Conference	Hague Conference on Private International Law. Since 2010, the <i>Hague Conference</i> has been considering international law issues in relation to legal parenthood of children as well as in relation to international surrogacy arrangements. The Hague Conference established an Experts’ Group that is currently focused on developing potential provisions for inclusion in both a general private international law instrument on legal parentage and a separate protocol on legal parentage established as a result of international surrogacy arrangements.
HART Act	Human Assisted Reproductive Technology Act 2004.
HART Order	Human Assisted Reproductive Technology Order 2005 made under the <i>HART Act</i> .
HART register	The register established under the <i>HART Act</i> that records people conceived from sperm or ova donation in Aotearoa New Zealand and their <i>donors</i> .
international surrogacy	A <i>surrogacy arrangement</i> where the <i>intended parents</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>
intended parents	<p>People who enter a <i>surrogacy arrangement</i> with the intention of becoming parents to a <i>surrogate-born child</i> and raising that child from birth.</p> <p>The term <i>intended parents</i> is used in this Report to refer to situations where there are two intended parents or where there is only one intended parent.</p>
Issues Paper	Te Aka Matua o te Ture Law Commission <i>Review of Surrogacy</i> <i>Te Kōpū Whāngai: He Arotake</i> (NZLC IP47, 2021). The <i>Issues Paper</i> is available at our website: www.lawcom.govt.nz .
New Zealander	A New Zealand citizen or a New Zealand resident.

Registrar-General	The Registrar-General appointed under the Births, Deaths, Marriages, and Relationships Registration Act 1995 (soon to be replaced by the Births, Deaths, Marriages, and Relationships Registration Act 2021).
surrogacy arrangement	An arrangement between a <i>surrogate</i> and <i>intended parents</i> where the <i>surrogate</i> agrees to become pregnant and carries and gives birth to a child for the <i>intended parents</i> to raise as their own.
Surrogacy Survey	A survey of public attitudes on surrogacy conducted by Te Whare Wānanga o Waitaha University of Canterbury in 2017–2018 as part of its research project Rethinking Surrogacy Laws.
surrogate	A woman who agrees to become pregnant and carries and gives birth a child for the <i>intended parents</i> under a <i>surrogacy arrangement</i> .
surrogate-born child or person	Both terms are used in this Report to refer to a child or person born as a result of a <i>surrogacy arrangement</i> .
traditional surrogacy	<p>A <i>surrogacy arrangement</i> where the <i>surrogate's</i> 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>
UN Special Rapporteur	United Nations Special Rapporteur on the sale and exploitation of children, including child prostitution, child pornography and other child sexual abuse material. In 2019, the <i>UN Special Rapporteur</i> presented a report to the United Nations General Assembly on safeguards for the protection of the rights of children born from surrogacy arrangements. The report was written as a follow-up to the 2018 report on surrogacy and sale of children presented to the 37th session of the Human Rights Council.
Verona Principles	A set of principles to guide the regulation of surrogacy within a children's rights framework, developed and published in 2021 by International Social Service and endorsed by the United Nations Committee on the Rights of the Child.

Executive summary

INTRODUCTION (CHAPTER 1)

1. Surrogacy is a unique method of building a family that provides intended parents with an opportunity to have a child when they are otherwise unable to do so. It can, however, involve complex legal, ethical, cultural and medical issues because it relies on the participation of a surrogate, who agrees to become pregnant, carry and give birth to a child for the intended parents.
2. This review has examined surrogacy law, regulation and practice in Aotearoa New Zealand. We have looked at the regulatory framework established under the Human Assisted Reproductive Technology Act 2004 (HART Act), the rules that determine a surrogate-born child's legal parents under the Status of Children Act 1969 and the adoption process that must be followed under the Adoption Act 1955 to transfer legal parenthood from the surrogate to the intended parents.
3. We have identified a pressing need for reform. The law fails to meet the needs and reasonable expectations of New Zealanders in many respects. This Report makes 63 recommendations for reform that seek to amend existing legislation, including the HART Act and the Status of Children Act, and drive changes to regulatory practice to better provide for surrogacy in Aotearoa New Zealand. These recommendations, taken as a whole, affirm the prohibition on commercial surrogacy in Aotearoa New Zealand and make improvements to safeguard the rights and interests of surrogate-born children, surrogates and intended parents.

SURROGACY IN PRACTICE (CHAPTER 2)

4. More New Zealanders are using surrogacy to build their family, although exact numbers are difficult to establish. A very broad estimate is that up to 50 children may be born as a result of surrogacy arrangements each year. This includes children born as a result of gestational and traditional surrogacy arrangements and domestic and international surrogacy arrangements where the intended parents live in Aotearoa New Zealand and the surrogate lives in another country.
5. The increasing use of surrogacy in Aotearoa New Zealand is likely due to several factors, including changing social attitudes to diverse families and increasing acceptance of surrogacy as a legitimate form of family building, especially for male couples, trans people and single men who are unable to carry a child themselves. Other factors likely include declining rates of adoption, growing rates of infertility, advances in assisted reproductive technology and increasing focus on fertility preservation. These factors will continue to drive the use of surrogacy in future. The use of international surrogacy is also increasing. This appears to be driven factors including difficulties finding a surrogate in Aotearoa New Zealand, increased availability of donated gametes overseas, the availability of commercial

surrogacy, higher success rates and greater reproductive choices overseas and increasing cultural diversity in Aotearoa New Zealand, which means many New Zealanders have links to two or more countries.

6. A growing body of empirical research demonstrates largely positive outcomes for surrogates, surrogate-born children and their families. Most of this research is based in the United Kingdom, although several small studies have examined the experiences of surrogates and intended parents in Aotearoa New Zealand. There is, however, limited research about Māori participation in surrogacy, which is low, and Māori perspectives of surrogacy. There is also limited information about the long-term impacts of surrogacy on surrogate-born people. These and other limitations suggest a cautious approach to regulation is required to protect and promote the rights and interests of surrogate-born children, surrogates and intended parents.
7. In te ao Māori, the modern practice of surrogacy requires tikanga Māori to respond to new circumstances. We suggest that the core tikanga principles of whakapapa and whanaungatanga are of central importance to considering surrogacy from an ao Māori perspective. The tikanga principles of tapu, mana, manaakitanga, kaitiakitanga and aroha are also likely to be relevant. Further consideration is needed to explore how tikanga responds to surrogacy. We recommend the Government commission Māori-led research to provide a better understanding of tikanga Māori and surrogacy and Māori perspectives on surrogacy.

DEVELOPING GOOD SURROGACY LAW (CHAPTER 3)

8. Surrogacy engages important rights and interests that must be considered and, at times, carefully balanced in order to develop good surrogacy law. We have examined rights and interests that arise from tikanga Māori, te Tiriti o Waitangi | Treaty of Waitangi and human rights law and have developed a set of guiding principles for surrogacy law reform.
9. Our guiding principles are:
 - Principle 1: Surrogacy law should reflect the Crown's obligations under te Tiriti o Waitangi to exercise kāwanatanga in a responsible manner, including facilitating the exercise of tino rangatiratanga by Māori in the context of surrogacy. This principle requires ensuring that Māori can act in accordance with tikanga in the surrogacy context, should they wish to do so. It also means weaving new law that reflects tikanga Māori and other values shared by New Zealanders, such as the importance of children's best interests and the significance of whakapapa for tamariki Māori. Inequities in access to surrogacy must also be addressed, and promoting tino rangatiratanga requires better representation of Māori in decision-making.
 - Principle 2: The best interests of the surrogate-born child should be paramount. Children have rights under the United Nations Convention on the Rights of the Child (UNCROC) that must be protected in the surrogacy context. Under UNCROC, the best interests of the child must be a primary consideration in all actions concerning children. Given surrogacy is concerned with the creation of a child, we consider that their best interests should be paramount. This is consistent with international best practice and requires protecting and promoting children's rights to identity, nationality, family life, health, freedom from discrimination and protection from abuse, exploitation and sale.

- Principle 3: Surrogacy law should support surrogates and intended parents to enter surrogacy arrangements that protect and promote their health, safety, dignity and human rights. People who enter surrogacy arrangements have human rights and interests that need to be protected and promoted, including rights related to personal autonomy, equality and non-discrimination, rights to respect cultural identity, and health and disability rights.
 - Principle 4: Parties to a surrogacy arrangement should have early clarity and certainty about their rights and obligations. This will reduce uncertainty and the risk of disagreements arising between the parties.
 - Principle 5: New Zealand intended parents should be supported to enter surrogacy arrangements in Aotearoa New Zealand rather than offshore. We have sought to improve the conditions for domestic surrogacy arrangements where appropriate to reduce the need for intended parents to rely on international surrogacy, which can present complex issues and greater risks.
10. These guiding principles underpin the recommendations we make in this Report. We think that applying these principles will result in good surrogacy law, namely, law that meets the needs and reasonable expectations of New Zealanders and protects and promotes the rights and interests of people involved in surrogacy arrangements.

REGULATING SURROGACY ARRANGEMENTS (CHAPTER 4)

11. Surrogacy arrangements are regulated by the HART Act, which establishes a regulatory framework for assisted reproductive procedures and human reproductive research. Certain procedures that fall under the HART Act require prior approval by the Ethics Committee on Assisted Reproductive Technology (ECART) in accordance with guidelines issued by the Advisory Committee on Assisted Reproductive Technology (ACART).
12. Currently, gestational surrogacy arrangements require prior approval from ECART, but traditional surrogacy arrangements do not.
13. We conclude that the ECART approval process is appropriate for surrogacy arrangements. It is an effective and robust safeguard that protects the rights and interests of the surrogate, the intended parents and the resulting child and reduces the risk of problems arising during the arrangement. It received broad support from submitters on the Issues Paper, is consistent with international best practice and provides confidence in the integrity of a surrogacy arrangement, reducing the need for a prescriptive process to establish legal parenthood.
14. For these reasons, we recommend that all clinic-assisted surrogacy arrangements should be required to obtain ECART approval, including traditional surrogacy arrangements that seek clinic assistance (which currently do not require ECART approval). All surrogacy arrangements can be ethically complex and present their own risks. Participants in a traditional surrogacy arrangement should be able to access the benefits of the ECART process on the same basis as parties to gestational surrogacy arrangements, regardless of the surrogate's genetic connection to the surrogate-born child. For this reason, we also recommend that the Government should consider ways to encourage parties to traditional surrogacy arrangements to participate in the ECART approval process.
15. We also conclude that the Government should review the resourcing and operation of ECART and its associated processes. There was a widespread view among submitters that

the current process is too slow and inadequately resourced. As more people seek to use surrogacy to build their families in future, changes will be needed to ensure applications can be considered in a timely manner, consistent with the principles of the HART Act.

IMPROVING THE APPROVAL PROCESS (CHAPTER 5)

16. We make several recommendations to improve the operation of the ECART approval process.

Redefining Oranga Tamariki's role in the approval process

17. Currently, an Oranga Tamariki | Ministry for Children social worker must assess whether intended parents are “fit and proper” to care for and raise the child as part of the adoption process. As a consequence of this requirement, ECART requires in-principle approval from Oranga Tamariki to the intended parents adopting any resulting child before approving a surrogacy arrangement. Oranga Tamariki's role includes making documentary checks (police background checks, medical record checks, character references and child protection checks) and conducting home visits and assessment interviews.
18. We conclude that a different approach is needed for surrogacy arrangements. The state should not assess intended parents' general suitability to be parents. It is, however, important to retain some form of minimum pre-conception checks, to safeguard the wellbeing of any resulting child and ensure the state meets its international human rights obligations under UNCROC. Oranga Tamariki's role in the approval process should therefore be redefined to focus on advising ECART on whether it has any serious concerns in relation to the risk of harm to any resulting child. Its process should include basic background checks (such as criminal record and child protection checks) and further investigation only if those basic checks identify a concern that should be investigated further. These changes would simplify Oranga Tamariki's role for the vast majority of applications that will not require further investigation and would enable the state to meet its obligations under UNCROC in a minimally invasive manner.

Recording surrogacy arrangements in writing

19. Currently, there is no requirement to record surrogacy arrangements in writing. This is a common requirement in other jurisdictions. We think that there are clear benefits to requiring the parties to record their intentions prior to conception in a single document that they can refer to throughout the arrangement. We therefore recommend that parties to surrogacy arrangement prepare and sign a “surrogacy plan”. While not an enforceable contract (except in relation to payment of costs, discussed below), it would provide a greater degree of certainty for the parties and assist them to resolve any problems that occur later in the arrangement. A surrogacy plan would also provide clear evidence of the parties' original intentions in the event of any dispute that must be resolved by the court.

Improving counselling requirements

20. The parties' participation in individual and joint counselling is an integral part of the ECART approval process. We found a high level of satisfaction with the current counselling requirements. However, we recommend improving counselling requirements in one respect to expressly require counselling to address the identity rights of surrogate-born people, including the parties' plans for sharing identity information with the child, and the child's

rights to access information about their genetic and gestational origins and whakapapa that is preserved on the surrogacy birth register (see below). Ensuring the parties are supported and encouraged to think about how they will share identity information with the child will help promote the rights and future wellbeing of surrogate-born people.

Supporting Māori to act in accordance with tikanga

21. A principle of the HART Act is that the needs, values and beliefs of Māori should be considered and treated with respect. While there is a requirement for counselling to be “culturally appropriate”, we have identified a gap between these requirements and what it means in practice to ensure that counselling meets the needs of Māori. We therefore recommend that ACART provide further guidance on providing counselling that is culturally appropriate from an ao Māori perspective.

Duration of ECART approvals

22. ECART’s practice is to impose a three-year time limit on surrogacy approvals with the possibility to extend this if there have been no significant changes to the arrangement. However, in some situations, it may take a long time for a surrogate to become pregnant. The current time limit can create further cost, administrative burden and delay in some circumstances. We recommend that ACART consider issuing guidance or advice in relation to duration of approvals of surrogacy arrangements, when an application for an extension of approval will be considered and the process for making and granting extensions.

Reviewing ECART decisions

23. A decision made by ECART to decline a surrogacy application can have a significant impact on the lives of the applicants. Despite this, the HART Act does not provide for a right of independent review of ECART decisions, although ECART may reconsider an application previously declined if new information becomes available. When legislation authorises decisions that significantly affect individual interests, there generally ought to be an opportunity for challenge by way of independent appeal or review. This serves to correct error, to supervise and improve decision-making at first instance and to help maintain public confidence in the regulatory system. We therefore recommend establishing a right to independent review of any decision made in relation to a surrogacy arrangement by ECART and the creation of an expert panel to review ECART decisions as and when required.

Composition of ECART and ACART

24. The HART Act was enacted 18 years ago, and the existing membership requirements for both ACART and ECART are out of date. We recommend the Government review the membership requirements for ACART and ECART in order to strengthen their knowledge and expertise. We recommend giving particular consideration to improving Māori representation and representation of the interests of children and increasing expertise in assisted reproductive procedures.

Monitoring and reporting on outcomes

25. ACART and ECART have statutory roles in monitoring the outcomes of surrogacy arrangements and other assisted reproductive procedures. Given the importance of these roles to the integrity of the regulatory framework, we make several recommendations to

support the performance of these roles in practice. We recommend that ECART establish clear procedures for applicants and other affected parties to provide feedback on, and make complaints in relation to, the operation of the ECART approval process. We also recommend that ECART be required under legislation to prepare an annual report on its operations and for both ACART and ECART annual reports to be published as soon as practicable.

LEGAL PARENTHOOD (CHAPTER 6)

26. Currently, there are no specific legal parenthood laws that deal with the unique relationships that exist in surrogacy arrangements. Instead, parties must rely on the adoption process to transfer legal parenthood from the surrogate (and any partner) to the intended parents. This fails to reflect the reality of surrogacy arrangements. Adoption and surrogacy are two legitimate but conceptually different forms of family building that require different policy responses and legal frameworks. The adoption process is inappropriate for establishing legal parenthood in surrogacy arrangements and results in problems, as illustrated by the introduction and enactment of the Paige Harris Birth Registration Act 2022.
27. A new framework is required for determining legal parenthood in surrogacy arrangements. We recommend amending the Status of Children Act to introduce two pathways for intended parents to establish legal parenthood, an administrative pathway and a court pathway. Under both pathways, the child would become the legal child of the intended parents and cease to be the legal child of the surrogate. Providing for two pathways to determine legal parenthood in surrogacy arrangements would accommodate the diversity of surrogacy arrangements that are possible.
28. We recommend introducing an administrative pathway for determining legal parenthood under which the intended parents are recognised as the surrogate-born child's legal parents by operation of law without the need for a court order. The administrative pathway would apply in situations where the surrogacy arrangement was approved by ECART and, after the child is born, the intended parents have taken the child into their care and the surrogate has consented to relinquish any claim to legal parenthood. The intended parents should, from the time of the child's birth until the surrogate gives consent, be deemed to be additional legal guardians of the child which would give them legal rights and responsibilities to care for the child and make decisions about their care from birth. We expect this administrative pathway will be the primary means of establishing the intended parents' legal parenthood in domestic surrogacy arrangements.
29. We also recommend introducing a court pathway to enable te Kōti Whānau | Family Court to make a parentage order determining the intended parents are the child's legal parents after the child is born in situations when the administrative pathway does not apply. The court pathway would be available in respect of a traditional surrogacy arrangement that was not required to obtain ECART approval. It would also provide a pathway for resolving a dispute over legal parenthood, although we note that such disputes are rare in practice. The Family Court must be satisfied that making the parentage order is in the best interests of the child, having regard to a list of relevant considerations. When an application for a parentage order is made, the Family Court will be required to appoint a parentage order reporter, who will be a specialist Oranga Tamariki social worker, to independently advise the Court on matters relevant to the child's best interests. In situations where the parties

did not go through the ECART process or there is a dispute over legal parenthood, we think it is important that the Court hears an independent voice on the matters relevant to the parentage order application.

30. We make specific recommendations to accommodate the different situations that might arise in the surrogacy context that are not currently accommodated within the adoption process. In addition to providing the Family Court with jurisdiction to resolve disputes over legal parenthood, we clarify that the surrogate's partner should not be presumed to be the parent of any surrogate-born child and that, if a surrogate dies or is unable to give consent under the administrative pathway, the Family Court should be able to make a parentage order. Both pathways should continue to be available if the surrogate-born child was still-born or died shortly after birth or if an intended parent or both intended parents die. We also accommodate historical surrogacy arrangements that have not been formalised by adoption. We think that a parentage order should be available in respect of any child born as a result of a surrogacy arrangement, regardless of when that child was born.

PRESERVING ACCESS TO IDENTITY INFORMATION (CHAPTER 7)

31. Information about genetic and gestational origins and whakapapa is fundamental to a surrogate-born person's identity and wellbeing. While many intended parents are, or intend to be, open with their child about their origins, we think that the state also has a duty to preserve access to identity information for surrogate-born people.
32. There is no single, centralised system to collect, record and provide access to information about a surrogate-born person's genetic and gestational origins and whakapapa. Rather, different information is collected and accessed under the Births, Deaths, Marriages, and Relationships Registration Act 1995, the HART Act and the Adult Adoption Information Act 1985.
33. We recommend establishing a national register of surrogate-born people (the surrogacy birth register) to preserve access to certain information for surrogate-born people about their genetic and gestational origins and whakapapa. The surrogacy birth register would be administered by Te Tari Taiwhenua | Department of Internal Affairs and would require the Registrar-General to record information about a surrogacy arrangement at the time a child's birth is registered or when notified of a parentage order issued by the Family Court. Information about the surrogate, including name, date and place of birth, ethnicity, any relevant cultural affiliation and hapū and iwi affiliations (if known), should be captured. In traditional surrogacy arrangements, additional genetic information should be recorded about the surrogate, consistent with the current requirements for gamete donors under the HART Act.
34. A surrogate-born person should be able to access information about their origins subject only to the limitations under the Privacy Act 2020. We do not recommend a blanket age restriction as currently exists in respect of access to adoption information and information about gamete donors. We also acknowledge that people receiving their information may require support such as counselling. We therefore recommend that the Government consider ways to support people accessing information on the surrogacy birth register.
35. We do not recommend changes to the information that is recorded on a surrogate-born child's birth certificate. Instead, we conclude that the Government should conduct a thorough, first-principles review of the birth registration system to consider whether it

meets the needs and reasonable expectations of people in contemporary Aotearoa New Zealand. Consultation revealed strong support for changes to the birth registration system and what information is recorded on a birth certificate, but we are conscious that similar issues arise for people born through donor conception, adopted people, people raised under whāngai and other cultural arrangements and people in diverse family arrangements, such as three or more parent models. Our view is that any changes to birth certificates and the birth registration system need to consider the range of different circumstances of conception, birth and legal parenthood.

FINANCIAL SUPPORT FOR SURROGATES (CHAPTER 8)

36. The HART Act prohibits the exchange of “valuable consideration” in surrogacy arrangements. While this is directed towards prohibition of commercial surrogacy, it creates uncertainty about what financial support, if any, intended parents can provide to surrogates. This uncertainty is undesirable because it may leave surrogates financially worse off as a result of participating in a surrogacy arrangement, place unnecessary stress on the relationship between intended parents and surrogates and create barriers for women considering becoming a surrogate in Aotearoa New Zealand.
37. We recommend that the law be clarified to allow payments to the surrogate for reasonable surrogacy costs actually incurred in relation to a surrogacy arrangement. The HART Act should be amended to provide guidance on what constitutes reasonable surrogacy costs. This should include reasonable medical, travel and accommodation costs, costs relating to care of the surrogate’s dependants, insurance costs, compensation for a surrogate’s loss of earnings and reasonable out-of-pocket expenses. Payment of any of these costs would be by agreement between the parties. Any agreement to pay surrogacy costs made prior to conception should be enforceable. This will encourage the parties to plan in advance for the payment of surrogacy costs and reduces the risk of undue pressure being exerted by any party throughout the arrangement to alter the agreement.
38. We do not recommend permitting the payment of a fee to surrogates for their participation in a surrogacy arrangement in addition to paying a surrogate’s reasonable surrogacy costs actually incurred. We have concluded that, while potential benefits exist in allowing the payment of fees, these do not outweigh the strong arguments against such an approach. Payment of fees to surrogates would constitute a radical change in public policy and would represent a significant step towards the commercialisation of surrogacy. We are not satisfied that this reflects the reasonable expectations of New Zealanders, and it would be inconsistent with the approach to other donative practices in Aotearoa New Zealand, such as embryo and gamete donation, organ donation and blood donation. Furthermore, permitting the payment of fees may contravene New Zealand’s international human rights obligations to take appropriate measures to prevent the sale of children, would run counter to calls from those with lived experience of surrogacy to avoid commercialisation and may increase the risk of exploitation of women who offer to be surrogates. Additional factors that weigh against allowing the payment of fees to surrogates are that it would be inconsistent with the approach in comparable jurisdictions, thereby making cross-border recognition of surrogacy arrangements more difficult, and it would increase the cost of surrogacy, thereby reducing its accessibility for some intended parents.
39. We have also considered what government support should be available to surrogates. We recommend that the Government publish guidance clarifying that surrogates are entitled

to paid parental leave on the same basis as other pregnant people under the Parental Leave and Employment Protection Act 1987. We also conclude that the effect of entering a surrogacy arrangement on benefits a surrogate receives under the Social Security Act 2018 should be clarified to ensure that surrogates who receive a benefit under that Act are not financially disadvantaged by their decision to enter a surrogacy arrangement.

INTERNATIONAL SURROGACY (CHAPTER 9)

40. International surrogacy, where the intended parents and the surrogate do not live in the same country, has become a global phenomenon over the past two decades. Most international surrogacy arrangements are commercial in nature. There is no internationally agreed framework or agreement to regulate international surrogacy arrangements, although the Hague Conference on Private International Law (Hague Conference) is continuing to work towards an international instrument.
41. International surrogacy presents complex issues. Countries regulate surrogacy and legal parenthood in different ways, which can cause problems when intended parents seek to return to Aotearoa New Zealand with a surrogate-born child. Some international surrogacy arrangements lack the same protections for the child, the surrogate and the intended parents as domestic surrogacy arrangements.
42. Throughout this Report, we make recommendations designed to support intended parents to enter surrogacy arrangements in Aotearoa New Zealand rather than overseas. However, some intended parents will still choose to engage in international surrogacy. We conclude that international surrogacy arrangements must be accommodated within the new framework we recommend for determining legal parenthood in domestic surrogacy arrangements.
43. We acknowledge that this issue attracts competing views. Some people think that New Zealanders should be prohibited from engaging in international surrogacy arrangements given the risks such arrangements pose to surrogate-born children, surrogates and intended parents, while others consider that legal parenthood established as a result of an international surrogacy arrangement should be automatically recognised in Aotearoa New Zealand. Our view is that neither of these approaches promote the child's best interests. Prohibiting international surrogacy precludes an examination of whether recognising the intended parents as the child's legal parents is in the child's best interests. On the other hand, in the absence of an internationally agreed framework that sets minimum requirements for the regulation of surrogacy and the recognition of legal parenthood, Aotearoa New Zealand cannot be confident that automatically recognising legal parenthood established in an international surrogacy arrangement is in the child's best interests. The Government must exercise oversight to promote and protect the rights and interests of the surrogate-born child and fulfil its obligations under international human rights law.
44. We therefore recommend that the Family Court should have jurisdiction to make a parentage order under the court pathway when a child is born as a result of a surrogacy arrangement, whether or not the child was born in Aotearoa New Zealand. We also recommend that the Family Court adopt a special process for applications that concern a child born outside Aotearoa New Zealand, implementing on a permanent basis the approach introduced by the Family Court in response to the Covid-19 pandemic. The consequence of these recommendations is that intended parents will be able to start the

process to secure legal parenthood of a surrogate-born child under New Zealand law at an early opportunity and have legal parenthood determined shortly after the child is born and before returning with the child to Aotearoa New Zealand. As with domestic surrogacy arrangements, the Family Court would need to be satisfied that granting a parentage order is in the child's best interests.

45. We also recommend that the Government consider further a regime for the recognition of legal parenthood established in respect of surrogacy in other jurisdictions following the completion of the ongoing work of the Hague Conference on parentage and surrogacy. Should this work result in an international instrument that outlines minimum safeguards for international surrogacy or a clear process for recognition of legal parenthood, this would provide confidence that recognising the legal relationship between the intended parents and a surrogate-born child established in a member state is in the child's best interests.

IMPROVING ACCESS TO SURROGACY (CHAPTER 10)

Availability of information

46. There is no single, public source of official information on surrogacy in Aotearoa New Zealand. Instead, information is fragmented across different government departments, lacks detail and is not easy to find. We conclude that the Government should produce comprehensive and clear information on surrogacy law and practice. This information should be made available on a website that acts as a centralised, official and up-to-date source of information for New Zealanders considering having a child by surrogacy or becoming a surrogate. We recommend that the information and website should be administered by Manatū Hauora | Ministry of Health.

Reducing barriers to connecting intended parents and potential surrogates

47. It can be difficult for intended parents to find someone who is willing to act as a surrogate in Aotearoa New Zealand. In practice, many women who act as surrogates are family members or close friends of the intended parents, although increasing numbers of intended parents and surrogates are meeting online through private surrogacy forums.
48. Several recommendations in this Report seek to reduce barriers for women considering becoming a surrogate, including clarifying the financial support available for surrogates. Improving the availability of information, discussed above, could also encourage some women to consider acting as surrogates. We considered other options to reduce barriers to connecting intended parents and potential surrogates, including permitting advertisers to be paid for advertising lawful surrogacy arrangements, establishing a surrogacy register to enable women who are interested in becoming a surrogate to register their interest and be matched with intended parents and permitting private intermediaries to operate in Aotearoa New Zealand on a non-profit and regulated basis.
49. We conclude that the HART Act should be amended to allow paid advertising in respect of lawful surrogacy arrangements. The current prohibition is problematic and is becoming increasingly irrelevant in the age of social media. Allowing paid advertising would broaden the ways that intended parents and potential surrogates can reach out to each other.
50. We do not recommend a surrogacy register and matching service or permitting private intermediaries to operate on a non-profit and regulated basis. Neither option received strong support in consultation. We think that the state's role should be to provide a safe

and effective regulatory framework for surrogacy arrangements – actively facilitating individual surrogacy arrangements through a surrogacy register and matching service would extend significantly beyond this. We are also concerned that a surrogacy register may not be workable in practice and may duplicate existing safeguards. We are not persuaded that the law should permit private intermediaries to operate in Aotearoa New Zealand given that online communities already operate and that enabling intended parents to pay for advertisements for a surrogate will provide a new avenue through which surrogates and intended parents may connect. There would be a cost associated with regulating intermediaries and even non-profit intermediaries would charge fees to intended parents which would increase the cost of surrogacy in Aotearoa New Zealand.

Availability of experienced lawyers

51. There are a limited number of lawyers with experience advising on surrogacy arrangements. We recommend that Te Kāhui Ture o Aotearoa | New Zealand Law Society and other professional lawyer bodies consider providing ongoing professional development in relation to surrogacy, including following the enactment of any new surrogacy law. In addition, lawyers specialising in surrogacy law should be able to be identified by practice area and have appropriate mentoring opportunities.

Public funding for surrogacy

52. The availability of public funding for surrogacy is a common concern. There is no specific allocation of public funding for surrogacy-related fertility treatment. Instead, public funding is determined using the Clinical Priority Assessment Criteria (CPAC). People who use surrogacy because they lack the sex characteristics to become pregnant, such as male couples and single men, do not qualify for funding under this model. There are also concerns regarding equity of access and cost for Māori and Pacific peoples.
53. We recommend that the Government should review how it funds surrogacy, including surrogacy-related fertility treatment as well as the costs associated with the ECART process. We also think that the Government should consider conducting a broader review of funding for fertility treatment generally. Any broader review should include reconsideration of CPAC and whether it disadvantages Māori and Pacific peoples.

Availability of donor gametes in Aotearoa New Zealand

54. The availability of donor gametes (ova and sperm) directly impacts on access to surrogacy in Aotearoa New Zealand. Limited availability of donor gametes is a key driver for New Zealanders to seek fertility treatment overseas. However, as with public funding, this is a matter that cannot be addressed in the context of surrogacy alone. We recommend therefore that the Government review the supply of donor gametes in Aotearoa New Zealand. It should consider whether donors should be compensated for reasonable expenses incurred and whether restrictions on importing gametes and embryos into Aotearoa New Zealand should be relaxed in certain limited circumstances.
-

Recommendations

CHAPTER 2: SURROGACY IN PRACTICE

R1

The Government should commission research led by Māori to provide a better understanding of tikanga Māori and surrogacy and Māori perspectives on surrogacy in practice.

CHAPTER 4: REGULATING SURROGACY ARRANGEMENTS

R2

Clinic-assisted surrogacy arrangements should remain subject to the requirement for prior approval of the Ethics Committee on Assisted Reproductive Technology, and the Human Assisted Reproductive Technology Order 2005 should be amended to extend this requirement to all clinic-assisted surrogacy arrangements, including clinic-assisted traditional surrogacy arrangements.

R3

The Government should consider ways to encourage parties to traditional surrogacy arrangements to participate in the approval process, including whether parties should be supported to make applications directly to the Ethics Committee on Assisted Reproductive Technology.

R4

The Government should review the resourcing and operation of the Ethics Committee on Assisted Reproductive Technology and its associated processes with a view to ensure surrogacy applications can be considered in a timely manner, consistent with the principles of the Human Assisted Reproductive Technology Act 2004.

CHAPTER 5: IMPROVING THE APPROVAL PROCESS

R5

The Human Assisted Reproductive Technology Act 2004 should be amended to require Oranga Tamariki | Ministry for Children to prepare a surrogacy report in relation to all applications for approval of a surrogacy arrangement. The purpose of the surrogacy report should be to advise the Ethics Committee on Assisted Reproductive Technology whether it has identified any serious concerns in relation to the risk of harm to any resulting child of the proposed surrogacy arrangement.

R6

Oranga Tamariki | Ministry for Children should develop a specialised framework for preparing surrogacy reports. Consideration should be given to a two-step process as follows:

- a. Step One: Conducting basic background checks (such as criminal background and child protection checks) in relation to the intended parents. This step should be followed whenever a request for a surrogacy report is made. If these checks do not identify any information or concerns that warrant further investigation, the surrogacy report should be made within 30 days confirming that background checks have been completed and have not identified any information that indicates the proposed arrangement poses any serious risk of harm to any resulting child.
- b. Step Two: Advanced investigation. This step should only be followed if the basic background checks identify information that raises a concern about the risk of harm to any resulting child and warrants further investigation. The social worker should be able to investigate further, obtain information from the intended parents and conduct a risk assessment to determine whether the proposed arrangement poses any serious risk of harm to any resulting child. A more comprehensive surrogacy report may be required that enables the Ethics Committee on Assisted Reproductive Technology to properly assess whether the risks associated with a surrogacy for any resulting child are justified.

R7

Oranga Tamariki | Ministry for Children should establish a specialist unit of social workers with responsibility for exercising functions in relation to surrogacy arrangements. Specialist training and ongoing education should be made available to those social workers in respect of the functions of advanced investigation and preparation of parentage order reports under R28.

R8

The Advisory Committee on Assisted Reproductive Technology should consider revising its guidelines to include a requirement that the Ethics Committee on Assisted Reproductive Technology be satisfied that the intended parents and the surrogate have prepared and signed a surrogacy plan. The surrogacy plan should record the parties' intentions in respect of the surrogacy arrangement. It would be unenforceable except in relation to the payment of reasonable surrogacy costs, pursuant to R46–R48.

R9

The Advisory Committee on Assisted Reproductive Technology should revise its guidelines to require counselling to address the identity rights of surrogate-born people, including:

- a. their rights to access information about their genetic and gestational origins and whakapapa (see R37–R41); and
- b. the parties' plans for sharing identity information with the child.

- R10** The Advisory Committee on Assisted Reproductive Technology should provide further guidance or advice to the Ethics Committee on Assisted Reproductive Technology (ECART) on what matters ECART should consider when determining whether counselling in relation to a surrogacy arrangement is culturally appropriate from an ao Māori perspective.
- R11** The Advisory Committee on Assisted Reproductive Technology should consider providing guidance or advice to the Ethics Committee on Assisted Reproductive Technology in relation to time limits on the duration of approvals of surrogacy arrangements, when an application for an extension to approval will be considered and the process for making and granting extensions.
- R12** The Human Assisted Reproductive Technology Act 2004 should be amended to provide for a right of independent review of any decision made in relation to a surrogacy arrangement by the Ethics Committee on Assisted Reproductive Technology. Reviews should be by way of rehearing. The review process must operate expeditiously and consideration should be given to:
- establishing a panel of individuals with a range of expertise who can be appointed to review a decision as and when required;
 - appointing three panellists to review any decision to ensure relevant expertise is available; and
 - imposing time limits on making applications for review and on the completion of reviews.
- R13** The Government should review the membership requirements for the Advisory Committee on Assisted Reproductive Technology (ACART) and the Ethics Committee on Assisted Reproductive Technology (ECART). As part of this review, the Government should consider amending the Human Assisted Reproductive Technology Act 2004 to:
- require a minimum of two Māori members to be appointed to each of ACART and ECART;
 - require at least two members of each of ACART and ECART to have the ability to articulate the interests of children;
 - require a minimum of two members to be appointed to ECART with expertise in assisted reproductive procedures; and
 - prescribe the membership requirements for ECART in legislation (rather than terms of reference).
- R14** The Ethics Committee on Assisted Reproductive Technology (ECART) should establish and publish on its website a procedure for providing feedback on and making complaints in relation to the operation of the ECART approval process.

R15

The Human Assisted Reproductive Technology Act 2004 should be amended to require the Ethics Committee on Assisted Reproductive Technology (ECART) to prepare an annual report on its operations. The annual report should include information on:

- a. applications received and decisions made by ECART;
- b. any feedback or complaints received on the operation of the ECART approval process; and
- c. any actions taken in response to the feedback or to resolve the complaint.

R16

Annual reports of both the Ethics Committee on Assisted Reproductive Technology and the Advisory Committee on Assisted Reproductive Technology should be published on their websites as soon as practicable.

CHAPTER 6: LEGAL PARENTHOOD

R17

The Status of Children Act 1969 should be amended to include specific provisions for determining the legal parenthood of a child born as a result of a surrogacy arrangement. This should provide for:

- a. an administrative pathway under which the child becomes the legal child of the intended parents and ceases to be the child of the surrogate by operation of law provided certain conditions are met (see R18 and R19); and
- b. a court pathway under which te Kōti Whānau | Family Court can make a parentage order determining the legal parenthood of a surrogate-born child when the conditions of the administrative pathway are not met.

R18

New Part 3 of the Status of Children Act 1969 should provide that, when a child is born as a result of a surrogacy arrangement, upon the surrogate providing written consent to the intended parents in the prescribed form and manner (see R22 and R23) relinquishing any claim to legal parenthood:

- a. the child becomes the legal child of each intended parent and each intended parent becomes the legal parent of the child; and
- b. the child ceases to be the legal child of the surrogate and the surrogate ceases to be a parent of the child.

R19

The administrative pathway in R18 should apply only if:

- a. the surrogacy arrangement was approved by the Ethics Committee on Assisted Reproductive Technology (ECART) and complied with any conditions imposed by ECART;
- b. the intended parents who entered the surrogacy arrangement that was approved by ECART have taken the child into their care; and

- c. the surrogacy arrangement otherwise complied with any requirements prescribed in regulations.

R20

Consent under the administrative pathway in R18 should not be valid if it is given before the child is seven days old.

R21

From the time of the child's birth until consent is given under the administrative pathway in R18, the intended parents should be deemed to be additional guardians of the child under the Care of Children Act 2004.

R22

Te Tari Taiwhenua | Department of Internal Affairs should develop a standard form statutory declaration for the surrogate to complete to give consent under the administrative pathway in R18. The statutory declaration should be provided to the Registrar-General alongside the notification of birth.

R23

The surrogate's statutory declaration of consent should be witnessed by the surrogate's lawyer, and the lawyer should be required to certify on the standard form that they have explained the effect and implications of the statutory declaration to the surrogate.

R24

Where the intended parents become the legal parents of a child under the administrative pathway, they should be able to apply to te Kōti Whānau | Family Court for an order confirming that they are the child's parents.

R25

New Part 3 of the Status of Children Act 1969 should provide that, when a child is born as a result of a surrogacy arrangement but the conditions of the administrative pathway in R18 and R19 are not met, any party to the arrangement may apply to te Kōti Whānau | Family Court for a parentage order. The effect of a parentage order is that:

- a. the child becomes the legal child of each intended parent and each intended parent becomes the legal parent of the child; and
- b. the child ceases to be the legal child of the surrogate and the surrogate ceases to be a legal parent of the child.

R26

Te Kōti Whānau | Family Court may grant the parentage order that is sought or may make any other declaration as to parentage it sees fit.

R27

Te Kōti Whānau | Family Court must be satisfied that making a parentage order is in the best interests of the child. When determining the best interests of the child, the Court should take into account:

- a. the parties' intentions when entering into the surrogacy arrangement;

- b. the child's genetic and gestational links to each of the parties to the surrogacy arrangement;
- c. all sibling relationships of the child;
- d. the arrangements in place for preserving the child's identity, including information about their genetic and gestational origins and whakapapa;
- e. any arrangements in place to enable the child's relationships with other people involved in the creation of the child and their family groups, whānau, hapū and iwi;
- f. the value of continuity in the child's care, development and upbringing;
- g. the likely effect of the parentage order on the child, including psychological and emotional impact, throughout the child's life;
- h. any harm that the child has suffered or is at risk of suffering;
- i. where relevant, the child's ascertainable wishes and feelings regarding the decision, taking account of the child's age and understanding;
- j. all circumstances in relation to the surrogacy arrangement, including any change in circumstances since the arrangement was entered; and
- k. any other matter the Family Court considers relevant.

R28

A parentage order reporter must be appointed to prepare a parentage order report whenever an application for a parentage order is made (subject to R35). The parentage order reporter should be a social worker employed by Oranga Tamariki | Ministry for Children. The role of the parentage order reporter should be to independently advise the Court on whether making the order sought is in the child's best interests, with reference to the proposed list of relevant considerations outlined in R27. A copy of the parentage order report should be made available to all the parties to the application prior to the hearing.

R29

When an application for a parentage order is made, te Kōti Whānau | Family Court should be able to exercise powers under the Care of Children Act 2004 as if it were an application for a parenting order under section 48 of that Act.

R30

When te Kōti Whānau | Family Court makes a parentage order, the Registrar of the Court must ensure the relevant information is sent to the Registrar-General, and the Registrar-General shall ensure the information is included in the child's birth registration (or if the child's birth is not registered, record the information in the register as if the child's birth is registered).

R31

The Status of Children Act 1969 should be amended to provide that, when a woman becomes pregnant as a result of a surrogacy arrangement, any partner of the pregnant woman shall not be presumed to be a parent of any child of the pregnancy.

- R32** If the surrogate dies before giving consent under the administrative pathway in R18, is unable to give informed consent or cannot be located to provide consent, the intended parents should be able to apply for a parentage order under the court pathway.
- R33** The administrative pathway and the court pathway should be available if the surrogate-born child was still-born or died soon after birth.
- R34** If an intended parent or both intended parents die, the administrative pathway and the court pathway should continue to be available and amendments to the Status of Children Act 1969 should provide for:
- the surrogate to give consent under the administrative pathway to the intended parent's personal representative provided they have taken the child into their care; and
 - the intended parent's personal representative to apply for a parentage order under the court pathway on the deceased intended parent's behalf.
- R35** The court pathway should be available in respect of a surrogate-born child, regardless of whether that child was born before the commencement of the amendments to the Status of Children Act 1969 recommended in R25–R30. If an application for a parentage order is made in relation to a child born before commencement, te Kōti Whānau | Family Court should have discretion to decide not to appoint a parentage order reporter.
- R36** The administrative pathway should be available in respect of a surrogate-born child who is born after the commencement of the amendments to the Status of Children Act 1969 recommended in R18–R24.

CHAPTER 7: PRESERVING ACCESS TO IDENTITY INFORMATION

- R37** Section 4 of the Human Assisted Reproductive Technology Act 2004 should be amended to include an additional principle stating that surrogate-born people should be made aware of their genetic and gestational origins and whakapapa and be able to access information about those origins.
- R38** The Human Assisted Reproductive Technology Act 2004 should be amended to:
- establish a national register of surrogate-born people (the surrogacy birth register); and
 - require the Registrar-General to record information about a surrogacy arrangement on the surrogacy birth register when it receives information as part of the birth registration process

and when notified of a parentage order issued by te Kōti Whānau | Family Court.

R39

The Government should review the birth registration system to consider whether it meets the needs and reasonable expectations of people in contemporary Aotearoa New Zealand.

R40

The Registrar-General should collect and record information on the surrogacy birth register that promotes the surrogate-born child's rights to identity, including:

- a. in each case, the surrogate's legal name, date of birth, place of birth and last known address as well as their ethnicity, any relevant cultural affiliation and hapū and iwi affiliations (if known);
- b. in traditional surrogacy arrangements, additional information about the surrogate as is required in relation to donors under section 47 of the Human Assisted Reproductive Technology Act 2004; and
- c. if the surrogacy arrangement involved the use of a donor, information about the donor as is required in relation to donors under section 47 of the Human Assisted Reproductive Technology Act 2004 to the extent that information is known.

R41

If asked to do so by a surrogate-born person, the Registrar-General should be required to provide access to any information about that surrogacy arrangement kept on the surrogacy birth register.

R42

The Registrar-General may refuse to provide access to information on the surrogacy birth register if satisfied the grounds under section 49 of the Privacy Act 2020 are met.

R43

The Government should consider ways to support people accessing information on the surrogacy birth register, drawing on the experience of people accessing information under the Adult Adoption Information Act 1985 and the Human Assisted Reproductive Technology Act 2004.

R44

Te Tari Taiwhenua | Department of Internal Affairs should publish information annually on the number of surrogacy arrangements recorded on the surrogacy birth register and the number of requests made to access the surrogacy birth register.

R45

The Government should consider ways to improve access to information about surrogacy arrangements by surrogate-born people who have been adopted by the intended parents under the Adoption Act 1955.

CHAPTER 8: FINANCIAL SUPPORT FOR SURROGATES

R46 The list of permitted payments in section 14(4) of the Human Assisted Reproductive Technology Act 2004 should be amended to include payments to the surrogate for any reasonable surrogacy costs actually incurred in relation to the surrogacy arrangement.

R47 The Human Assisted Reproductive Technology Act 2004 should be amended to provide guidance on what “reasonable surrogacy costs” can include. A new provision should be inserted that explains that, without limiting section 14(4), “reasonable surrogacy costs” includes the following:

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

R48 Section 14 of the Human Assisted Reproductive Technology Act 2004 should be amended to provide that, notwithstanding section 14(1), an obligation under a surrogacy arrangement entered pre-conception to pay or reimburse the surrogate’s reasonable surrogacy costs is enforceable.

R49 The Government should publish guidance clarifying that surrogates are entitled to paid parental leave on the same basis as other pregnant people under the Parental Leave and Employment Protection Act 1987.

R50 The money value of any payments to (or for the benefit of) the surrogate for any reasonable surrogacy costs actually incurred in relation to the surrogacy arrangement should not be treated as income for the purposes of the Social Security Act 2018 other than payments that reimburse the surrogate for a loss of earnings.

R51 Surrogates should be exempt from work-preparation and work-test obligations under the Social Security Act 2018 for a specified period of time after they have given birth.

CHAPTER 9: INTERNATIONAL SURROGACY

R52 Te Kōti Whānau | Family Court should have jurisdiction to make a parentage order under the court pathway in R25–R30 whether or not the surrogate-born child was born in Aotearoa New Zealand.

R53 The Government should consider further a regime for the recognition of legal parenthood established in respect of surrogacy in other jurisdictions following the completion of the work of the Hague Conference on Private International Law on parentage and surrogacy.

R54 Te Kōti Whānau | Family Court should adopt a special process for applications for parentage orders under the court pathway in R25–R30 where the intended parents live in Aotearoa New Zealand and the child is born to a surrogate overseas (international surrogacy protocol). The international surrogacy protocol should set out the information the Family Court considers relevant to its consideration of the matters in R27 in the context of international surrogacy and provide for:

- a. parties to file a notice of intention to make an application for a parentage order before the child is born and for the Registrar of the Court to appoint a parentage order reporter under R28 on receipt of such a notice;
- b. electronic filing;
- c. witnessing of affidavits by a barrister and solicitor of te Kōti Matua | High Court by audio visual link;
- d. hearings to be conducted via audio visual link and applications determined without requiring the parties to be physically present;
- e. priority scheduling of these matters;
- f. specialist judges to oversee proceedings;
- g. a streamlined registry process including immediate release of parentage orders and expedited notification to the Registrar-General; and
- h. any other procedures that reduce delays associated with an application for a parentage order.

- R55** Te Tari Taiwhenua | Department of Internal Affairs should adopt procedures that expedite the approval of a surrogate-born child's passport after a parentage order is issued for the purpose of ensuring the child can travel to Aotearoa New Zealand as soon as possible after birth.
- R56** Section 3 of the Citizenship Act 1977 should be amended to ensure that a child who is the subject of a parentage order is treated the same way as a child adopted under the Adoption Act 1955 (or its replacement) for citizenship purposes.
- R57** As part of its review of adoption laws, Tāhū o te Ture | Ministry of Justice should consider whether amendments to the Citizenship Act 1977 are desirable to ensure an overseas adoption or other legal parenthood determination can be recognised for the purposes of establishing a surrogate-born child's entitlement to citizenship by descent in situations where the child's parents are not habitually resident in Aotearoa New Zealand. The Government's approach to overseas surrogate-born children should be consistent with the approach it takes in relation to children adopted overseas when the parents are not habitually resident in Aotearoa New Zealand.

CHAPTER 10: IMPROVING ACCESS TO SURROGACY

- R58** The Government should produce comprehensive and clear information on surrogacy law and practice. This information should be made available on a website that acts as a centralised, official and up-to-date source of information for New Zealanders considering having a child by surrogacy or becoming a surrogate. The information and website should be administered by Manatū Hauora | Ministry of Health.
- R59** The list of permitted payments in section 14(4) of the Human Assisted Reproductive Technology Act 2004 should be amended to include payment for advertisements in relation to lawful surrogacy arrangements.
- R60** The information made available on the website recommended in R58 should explain that the best interests of children should be considered if referring to or using photos of existing children of the families involved or any children that resulted from a previous surrogacy arrangement.
- R61** Te Kāhui Ture o Aotearoa | New Zealand Law Society and other professional lawyer bodies should consider providing ongoing professional development in relation to surrogacy, including following the enactment of any new surrogacy law, and ensure that those lawyers specialising in surrogacy law can be identified by practice area and have appropriate mentoring opportunities.

R62

The Government should review how it funds surrogacy, including surrogacy-related fertility treatment and the costs associated with the Ethics Committee on Assisted Reproductive Technology approval process. The Government should consider conducting such a review as part of a broader review of funding for fertility treatment generally. Any broader review of fertility treatment funding should include reconsideration of the use of the Clinical Priority Assessment Criteria for fertility treatment.

R63

The Government should review the supply of donor gametes in Aotearoa New Zealand, including:

- a. whether donors should be compensated for reasonable expenses incurred in the donation; and
 - b. whether the restrictions on importing gametes and embryos into Aotearoa New Zealand should be relaxed in certain limited circumstances.
-

CHAPTER 1

Introduction

- 1.1 Surrogacy is a unique method of family building. It provides intended parents 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 (the surrogate) who agrees to become pregnant, carry and give birth to a child for the intended parents, it can raise complex legal, ethical, cultural and medical issues.
- 1.2 In 2020, Te Aka Matua o te Ture | Law Commission (the Commission) was asked to undertake a review of surrogacy in Aotearoa New Zealand. This is not the first time the Commission has reviewed this area of law. 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.
- 1.3 Our review has comprehensively examined surrogacy law, regulation and practice in Aotearoa New Zealand. We have focused on identifying improvements to meet the needs and reasonable expectations of New Zealanders in a way that safeguards the rights and interests of people involved in surrogacy arrangements, including surrogate-born children, surrogates and intended parents.
- 1.4 This Report sets out our findings and makes recommendations for change.²

OUR REVIEW

- 1.5 The terms of reference for this review were published in March 2021. The terms of reference explained that our review would include (but not be limited to) consideration of:
 - (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;

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

² In te reo Māori, the title of this Report is Te Kōpū Whāngai: He Arotake. The term “kōpū whāngai” is used to describe surrogacy and comprises kōpū (womb, uterus) and whāngai (to care for an adopted or fostered child), and a literal translation could be “the adoptive womb”. The term “he arotake” translates to “a review”. Whāngai arrangements are discussed in greater detail in Chapter 2 of this Report.

- (d) how the law should attribute legal parenthood in surrogacy arrangements;
 - (e) how international surrogacy arrangements (where either the intended parents or the surrogate live overseas) should be provided for in New Zealand law; and
 - (f) what information should be available to surrogate-born children.
- 1.6 Our review has considered 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.
- 1.7 In July 2021, we published our Issues Paper and consultation website. This followed extensive research and preliminary consultation with people who shared with us their personal experience of surrogacy arrangements and the issues they faced as well as representatives from fertility clinics, academics, lawyers and officials from the different government agencies that have a role in the regulation of surrogacy.³ We also engaged with individuals who shared an ao Māori perspective on surrogacy with us to better understand the interests of Māori in this area.
- 1.8 We received 223 submissions on the Issues Paper. This comprised 183 submissions from individuals submitting in a personal capacity (personal submissions), 31 submissions from organisations,⁴ eight submissions from individuals submitting from an academic perspective (academic submissions)⁵ and comments from the Judges of the Family Court.
- 1.9 Throughout this review, we have drawn on recent research undertaken in Aotearoa New Zealand, including Te Whare Wānanga o Waitaha | University of Canterbury's project Rethinking Surrogacy Laws. We have also examined the law and reform initiatives in comparable jurisdictions, with a particular focus on Australia, England and Wales, Scotland, Ireland and Canada. At the time of writing, proposed reforms are progressing through legislative bodies in Ireland, the Northern Territory and Quebec, and the Law Commission of England and Wales and the Scottish Law Commission are actively reviewing surrogacy law.

³ See Te Aka Matua o te Ture | Law Commission *Review of Surrogacy | Te Kōpū Whāngai: He Arotake* (NZLC IP47, 2021) at [1.22]–[1.28] for further discussion of the process leading up to the publication of the Issues Paper.

⁴ Advisory Committee on Assisted Reproductive Technology, Auckland Women's Health Council, Australian and New Zealand Infertility Counsellors Association, Center for Bioethics and Culture Network, Ethics Committee on Assisted Reproductive Technology, Family First New Zealand, Family Planning New Zealand, Federation of Women's Health Councils Aotearoa, Feminist Legal Clinic, Fertility Associates, Fertility New Zealand, Fertility Plus, International Coalition for Abolition of Surrogate Motherhood, Maternity Services Consumer Council, National Council of Women of New Zealand, New Zealand College of Midwives, New Zealand Council of Trade Unions, New Zealand Nurses Organisation, Ngā Rangahautira, Nurse Practitioners New Zealand, Office for Disability Issues, Office of the Children's Commissioner, Office of the Health and Disability Commissioner, Privacy Commissioner, Oranga Tamariki | Ministry for Children, Queerly Legal, Karetai Wood-Bodley & Co and ILGA Oceania (submitting jointly), Repromed, Royal Australian and New Zealand College of Obstetricians and Gynaecologists, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Te Tari Taiwhenua | Department of Internal Affairs and Voice for Life Hutt Valley.

⁵ Dr Anne Else, Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff (submitting jointly), Adjunct Professor Ken Daniels, Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly), Associate Professor Maria Hook and Jack Wass (submitting jointly), Professor Mark Henaghan, Associate Professor Rhonda Shaw and Dr Ronli Sifris.

- 1.10 We have also given particular attention to international developments on the regulation of surrogacy. Since 2010, the Hague Conference on Private International Law (Hague Conference) has been considering international law issues relating to legal parentage. It convened an Experts' Group in 2015, which is working on potential provisions for a general private international law instrument on legal parentage and a separate protocol on legal parentage established as a result of international surrogacy arrangements.⁶ In addition, in 2021, the International Social Service⁷ 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.⁸ This followed two thematic reports on surrogacy by the United Nations Special Rapporteur on the sale and exploitation of children, including child prostitution, child pornography and other child sexual abuse material (UN Special Rapporteur).⁹ In 2022, UNICEF and Child Identity Protection¹⁰ also published recommendations for the regulation of surrogacy to protect the rights of the child.¹¹ We draw on this work where relevant throughout this Report.
- 1.11 Throughout this review, we have been supported by an Expert Advisory Group and have received guidance from the Commission's Māori Liaison Committee.

OUR APPROACH TO BROADER QUESTIONS

- 1.12 Any examination of surrogacy law must start with two broad questions. First, should surrogacy be permitted or prohibited in all forms? Second, if surrogacy is to be permitted, should commercial surrogacy arrangements be permitted? An extensive body of academic research and literature examines these questions from legal, ethical, human rights and feminist perspectives. Nonetheless, these questions continue to attract a range of different views and regulatory responses.

⁶ For more information on the Parentage / Surrogacy Project see Permanent Bureau of the Hague Conference on Private International Law "Parentage / Surrogacy" <www.hcch.net>.

⁷ The International Social Service (ISS) is an international non-governmental organisation consisting of a network of national entities and a General Secretariat that assist children and families confronted with complex social problems as a result of migration. ISS has a presence in more than 120 countries. In addition to casework, ISS undertakes training projects, awareness raising and advocacy work in an effort to better respect children's rights. For more information see International Social Service "Who We Are" <iss-ssi.org>.

⁸ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021). The Verona Principles were prepared by a core group of experts convened and coordinated by the International Social Service (Claire Achmad, Nigel Cantwell, Patricia Fronek, Olga Khazova, John Pascoe, David Smolin, Katarina Trimmings and Michael Wells-Greco). Preparation of the Verona Principles involved substantial consultations and contributions from over 100 experts covering multiple disciplines and perspectives, regions and national and international contexts, at 5. 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.

⁹ 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).

¹⁰ Child Identity Protection is an international non-governmental organisation that advocates for the protection of children's identity rights in family relations. For more information see Child Identity Protection "About Us" <www.child-identity.org>.

¹¹ UNICEF and Child Identity Protection *Key Considerations: Children's Rights & Surrogacy* (Briefing Note, February 2022).

Should surrogacy be permitted or prohibited?

- 1.13 Globally, there is no consensus on 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.¹²
- 1.14 Section 14 of the HART Act addresses the legality of surrogacy arrangements in Aotearoa New Zealand.¹³ It provides that a surrogacy arrangement “is not of itself illegal, but is not enforceable by or against any person”.¹⁴ This can be said to reflect a “permissive” approach to surrogacy that is consistent with the approach taken in other jurisdictions to which Aotearoa New Zealand often compares itself (including Australia, England, Wales, Scotland and Canada).
- 1.15 Surrogacy continues to be prohibited in other countries, including Germany, France, Austria and Spain as well as in the Nordic countries of Sweden, Iceland, Finland and Norway. In such jurisdictions, all forms of surrogacy arrangements are viewed as violating the dignity of women:¹⁵
- The concern is not about the individual woman as such but about the way in which it treats female body parts as a means to an end, rather than for their essential value as part of humanity. On this view, surrogacy does violence to the way we think about the body, life, and women’s reproductive capacities in commodifying them, and thus reducing them to an economic value.
- 1.16 In consultation, we received some submissions that expressed this view, arguing that surrogacy violates the dignity of women and leads to exploitation and commodification of women and children. We received 30 submissions that opposed all forms of surrogacy on this basis (13 per cent of submissions received).¹⁶
- 1.17 While we acknowledge this perspective, this review does not reconsider Parliament’s decision to permit surrogacy in Aotearoa New Zealand. Since the enactment of the HART Act in 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 evidence suggests that public opinion supports surrogacy continuing to be legal. In addition, the growing body of empirical research into the impact of surrogacy arrangements we outline in Chapter 2 demonstrates largely positive outcomes for surrogate-born children, their families and surrogates.
- 1.18 It is also important to highlight the practical difficulties with adopting a prohibitive approach. These have been demonstrated in overseas experience. A prohibitive

¹² 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.

¹³ 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”).

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

¹⁵ 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 577. See also Maria De Koninck *Stolen Motherhood: Surrogacy and Made-to-Order Children* (Baraka Books, Montréal, 2020).

¹⁶ Comprising 25 personal submissions and 5 submissions from organisations (Center for Bioethics and Culture Network, Family First New Zealand, Feminist Legal Clinic, International Coalition for Abolition of Surrogate Motherhood and Voice for Life Hutt Valley).

approach has been unable to prevent citizens from countries such as Germany and France from travelling abroad to achieve their goal to build their family through surrogacy.¹⁷ In Australia, attempts by some states to prohibit intended parents from entering international commercial surrogacy arrangements have been seen as a “failed experiment”.¹⁸ In Ireland, where a Bill has been introduced to regulate surrogacy for the first time in that country,¹⁹ the reality of international commercial surrogacy has been recognised as a strong reason for preferring regulation of domestic surrogacy rather than prohibition.²⁰ In reality, a prohibitive approach “has simply exported the issue to other jurisdictions with a more permissive approach”.²¹

- 1.19 A prohibitive approach has other problems. Traditional surrogacy arrangements, where the surrogate uses her own ovum in conception, can take place privately without any official approval or medical involvement. Therefore, “[u]nless a state is prepared to police the bedrooms of the nation, surrogacy arrangements cannot be effectively outlawed, only driven underground”.²²
- 1.20 For these reasons, our approach to this review is not to re-examine whether surrogacy should be permitted in Aotearoa New Zealand but rather to ensure surrogacy is regulated in a way that meets the needs and reasonable expectations of New Zealanders and 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?

- 1.21 Another key debate in the regulation of surrogacy is whether it should be available only on an altruistic basis (where the surrogate does not receive any payment other than for reasonable expenses incurred) or whether commercial surrogacy should be permitted.
- 1.22 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.

¹⁷ 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 577.

¹⁸ 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].

¹⁹ An Bille Sláinte (Atáirgeadh Daonna Cuidithe) | Health (Assisted Human Reproduction) Bill 2022 (29) (Ireland).

²⁰ 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.

²¹ 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 567.

²² 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].

- 1.23 Commercial surrogacy is currently prohibited in Aotearoa New Zealand and in many other countries, including Australia, England, Wales, Scotland and Canada. Under the HART Act, the exchange of “valuable consideration” for a person’s participation in a surrogacy arrangement is an offence²³ and all forms of surrogacy arrangement are unenforceable.²⁴ Intermediaries cannot receive valuable consideration for arranging a person’s participation in a surrogacy arrangement,²⁵ and advertising in relation to surrogacy arrangements is also restricted.²⁶
- 1.24 Few jurisdictions allow commercial surrogacy. Those that do include some states in the United States as well as Ukraine, Georgia and Russia.²⁷ Some jurisdictions, such as India, have previously permitted commercial surrogacy but have since moved to prohibit or restrict the practice in response to emerging concerns.²⁸
- 1.25 Commercial surrogacy is typically opposed on the grounds that it is inherently exploitative and commodifies women and children.²⁹ 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 (see Chapter 3).³⁰ 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.³¹ Others also suggest that prohibiting commercial surrogacy can in fact create conditions for exploitation of women because it prevents surrogates from being treated fairly.³²
- 1.26 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

²³ Human Assisted Reproductive Technology Act 2004, s 14(3).

²⁴ Human Assisted Reproductive Technology Act 2004, s 14(1). See definition of surrogacy at [1.14], n 13 above.

²⁵ Human Assisted Reproductive Technology Act 2004, s 14(3).

²⁶ Human Assisted Reproductive Technology Act 2004, ss 14(3) and 15(1).

²⁷ But see “Russia’s liberal surrogacy rules are under threat” *The Economist* (online ed, London, 18 March 2021); and Christina Weis “Russian State Duma proposes bill restricting surrogacy... again” *BioNews* (online ed, London, 15 March 2021).

²⁸ See for example Neeta Lal “India’s New Reproductive Laws Trigger Debate” *The Diplomat* (online ed, United States, 7 January 2022).

²⁹ 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.

³⁰ 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].

³¹ 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].

³² 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.

amongst altruistic and commercial models. 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.³³ Conversely, commercial surrogacy arrangements may be motivated by altruism.³⁴ For these reasons, relying on a rigid distinction between commercial and altruistic surrogacy can be unhelpful.³⁵

- 1.27 Our approach in this review has been to examine each element of surrogacy law and regulation on its merits in accordance with the guiding principles we outline in Chapter 3. Our recommendations for reform in this Report, taken as a whole, affirm the prohibition of commercial surrogacy in Aotearoa New Zealand but make improvements to provide greater legal protections and certainty for surrogate-born children, surrogates and intended parents.

MATTERS ADDRESSED IN THIS REPORT

- 1.28 This Report makes 63 recommendations addressing a range of issues with existing surrogacy law, regulation and practice.
- 1.29 In developing these recommendations, we have recognised that change can be achieved in a variety of ways and that legislation is not an exclusive solution.³⁶ We have also recognised that some issues raise broader policy questions and that recommending a legislative “fix” in the surrogacy context alone may be undesirable. In considering each issue, we have therefore considered:
- (a) whether, instead of legislative reform, the issue could be addressed through operational changes, provision of clearer information to the public or greater education of professionals; and
 - (b) whether the issue reflects a broader policy problem that might benefit from separate examination.
- 1.30 Finally, we recognise that it is important when making law reform proposals to ensure, as far as practicable, that they do not have unintended consequences. Where we have not identified significant practical issues with the current law, the potential for introducing unintended consequences may weigh against proposing reform.
- 1.31 Following on from this chapter, this Report is organised as follows:

³³ 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.

³⁴ 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.

³⁵ 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].

³⁶ See Lord Toulson “Democracy, Law Reform and the Rule of Law” in Matthew Dyson, James Lee and Shona Wilson Stark (eds) *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (Hart Publishing, Oxford, 2016) 127; David Ormerod “Reflections on the Courts and the Commission” in Matthew Dyson, James Lee and Shona Wilson Stark (eds) *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (Hart Publishing, Oxford, 2016) 326; and Ellen France, Judge of the Supreme Court of New Zealand “Something of a Potpourri: A Judge’s Perspective on Law Reform” (address to Te Aka Matua o te Ture | Law Commission’s 30th Anniversary Symposium, Wellington, 3 November 2016).

- (a) Chapter 2 examines New Zealanders' participation in surrogacy in Aotearoa New Zealand and overseas and what we know about New Zealanders' attitudes in relation to surrogacy. We look at empirical research on the impact of surrogacy on surrogate-born children, their families and surrogates. We also explore some aspects of te ao Māori and surrogacy.
- (b) Chapter 3 explores the rights and interests that arise from tikanga Māori, te Tiriti o Waitangi | Treaty of Waitangi and human rights law. We outline our guiding principles for surrogacy law reform that underpin the recommendations for reform made in the following chapters.
- (c) Chapter 4 considers the regulation of surrogacy arrangements in Aotearoa New Zealand and the case for retaining and extending the requirement for prior approval of surrogacy arrangements by the Ethics Committee on Assisted Reproductive Technology (ECART).
- (d) Chapter 5 considers concerns with how the ECART approval process is working in practice and how its operation could be improved.
- (e) Chapter 6 considers how legal parenthood should be determined in surrogacy arrangements.
- (f) Chapter 7 focuses on children's rights to identity and what information the state should preserve for surrogate-born people about their genetic and gestational origins and whakapapa.
- (g) Chapter 8 addresses the financial support that should be available to surrogates in Aotearoa New Zealand.
- (h) Chapter 9 examines international surrogacy and how international surrogacy arrangements should be provided for in New Zealand law.
- (i) Chapter 10 addresses other problems New Zealanders face when trying to access surrogacy in Aotearoa New Zealand.

TERMINOLOGY AND OTHER MATTERS

- 1.32 This Report includes a glossary of key terms and abbreviations used throughout this Report. 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.
- 1.33 The terms "parentage" and "parenthood" are both used in legislation and commentary to denote a child's parents. In this Report, we use the term "parenthood" for consistency with the Status of Children Act and the Adoption Act. However, in Chapter 6, we recommend introducing "parentage orders" to determine legal parenthood. This promotes consistency with the language adopted by the Hague Conference in its work on parentage and surrogacy, discussed above.
- 1.34 We use the term "surrogate-born child" throughout this Report. In some contexts, we also use the term "surrogate-born person" when discussing the life-long impact of surrogacy on surrogate-born people and future generations. This includes our discussion in Chapter 7 of the need to ensure that surrogate-born people can access information concerning their identity.

- 1.35 We use the term “parent” rather than “mother” or “father” throughout this Report except where it is necessary to do otherwise, for example, when referring to existing law, the facts of a particular situation or specific research findings.
- 1.36 When referring to the surrogate, we use the term “woman” and the pronouns she/her, consistent with the language of the HART Act. In doing so, we intend to include any person who can become pregnant. While surrogates predominantly identify as women, 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 agree to act as a surrogate. We also acknowledge that the practice of surrogacy directly engages women’s human rights and raises issues relating to structural inequalities women can face (see Chapter 3).
- 1.37 Many kupu Māori are not defined in the Report because their meanings are well understood in contemporary Aotearoa New Zealand. We have used simple in-text definitions for those kupu Māori that are less well known to assist readers with understanding their meaning in the specific context in which they are used. These definitions 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.
- 1.38 When we refer to submissions we received in consultation, we are referring to submissions received through the consultation website as well as submissions received directly on the Issues Paper. The consultation website comprised summaries of the topics covered in the Issues Paper alongside links to the relevant Issues Paper chapter, and the consultation questions asked on the consultation website mirror the questions asked in the Issues Paper.
- 1.39 When we refer to or summarise submissions received on the Issues Paper, we use the submitter’s language, with minor edits if needed for readability.
- 1.40 Te Kōti Whānau | Family Court decisions, including decisions under the Adoption Act, are subject to publication restrictions.³⁷ To address this, we have replaced the names of parties with initials when it is not clear from the judgment or the judgment database³⁸ that the decision has already been anonymised using fictitious names.
-

³⁷ Family Court Act 1980, ss 11B–11D.

³⁸ Judicial decisions from a representative sample of te Kōti-ā-Rohe | District Court cases are published at www.districtcourts.govt.nz.

CHAPTER 2

Surrogacy in practice

INTRODUCTION

- 2.1 In this chapter, we consider New Zealanders' participation in surrogacy in Aotearoa New Zealand and overseas and what we know about New Zealanders' attitudes in relation to surrogacy. We look at empirical research on the impact of surrogacy on surrogate-born children, their families and surrogates. We also explore some aspects of te ao Māori and surrogacy.

PARTICIPATION IN SURROGACY

- 2.2 Surrogacy arrangements come in different forms, but the uniting feature is the parties' shared intention that the surrogate will become pregnant, carry and give birth to a child for the intended parents to raise.
- 2.3 Traditional surrogacy is where the surrogate's ovum is used in conception. This means the surrogate is the child's genetic and gestational mother. Pregnancy is usually achieved by artificial insemination, which can occur with or without the assistance of a fertility clinic.¹ The first known court cases relating to traditional surrogacy in Aotearoa New Zealand were in the 1990s,² but traditional surrogacy has been practised in different cultures throughout history.³
- 2.4 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

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

² *Re P (adoption: surrogacy)* [1990] NZFLR 385 (DC); and *Re G DC Invercargill Adopt* 6/92, 3 February 1993. These were identified as the first two cases involving an application to adopt a child born through surrogacy in Anne Else "Surrogacy" in Sandra Coney and Anne Else (eds) *Protecting our future: the case for greater regulation of assisted reproductive technology* (Women's Health Action Trust and New Zealand Law Foundation, 1999) 50 at 53.

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. See also the instance of traditional surrogacy in te ao Māori discussed at [2.52] below.

genetic connection to the intended parents or the surrogate. Because gestational surrogacy involves the use of IVF technology, it can only occur with the assistance of a fertility clinic.

- 2.5 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, Dianne Yates MP 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 (HART Act) became law.⁵
- 2.6 Since the 1990s, the use of surrogacy has increased in Aotearoa New Zealand, although it is difficult to know exactly how common surrogacy is for the reasons discussed below.

How common is surrogacy today?

- 2.7 There are several different sources of information relevant to the use of surrogacy in Aotearoa New Zealand. However, none of these sources provide a complete picture on the number of surrogacy arrangements entered or the number of children born as a result of a surrogacy arrangement. The lack of accurate information is not a problem specific to Aotearoa New Zealand. Similar issues have been identified in Australia and the United Kingdom,⁶ and the Hague Conference on Private International Law has observed that the number of international surrogacy arrangements entered globally is "impossible to determine".⁷
- 2.8 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

- 2.9 As we explore in Chapter 4, 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 considered by ECART each year has increased. In 2020, ECART considered the highest-

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 (195-1). A Government Bill was subsequently introduced, the 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: Human Assisted Reproductive Technology Bill 1996 (195-2) (select committee report) at 1.

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.

ever number of surrogacy applications in a single year (37, compared to just 14 in 2005).⁸ 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. On average, ECART has considered 23 surrogacy applications each year since 2010.⁹

- 2.10 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 2018, 18 children were born as a result of clinic-assisted surrogacy,¹⁰ up from 11 children in 2017.¹¹ Surrogacy arrangements generally make up a very small proportion of assisted reproductive technology treatment cycles (0.7 per cent in 2018).¹²

Adoption data relating to domestic surrogacy

- 2.11 Another source of information relates to adoption applications. As we explain in Chapter 6, under the current law, the surrogate and her partner (if she has one) are the surrogate-born child's legal parents at birth.¹³ The intended parents must adopt if they want to be recognised as the child's legal parents.¹⁴ As part of the adoption process, a social worker from Oranga Tamariki | Ministry for Children must prepare a report for te Kōti Whānau | Family Court.¹⁵ Oranga Tamariki's records show that, in 2021, 21 reports were written for adoption applications involving domestic surrogacy.¹⁶
- 2.12 Prior to July 2020, Oranga Tamariki did not distinguish between the different categories of social worker's 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

⁸ These figures are based on the minutes from the meetings of the Ethics Committee on Assisted Reproductive Technology (ECART), which are available on ECART's website <ecart.health.govt.nz>. The minutes describe the applications considered and the outcome of ECART's consideration. At the time of writing, minutes were not available in respect of all meetings held in 2021. In meetings held between February and October 2021, ECART had considered 34 surrogacy applications.

⁹ Based on figures from 2010–2020.

¹⁰ Advisory Committee on Assisted Reproductive Technology *Assisted Reproductive Technology in New Zealand 2018* (October 2021) at 4.

¹¹ Advisory Committee on Assisted Reproductive Technology *Assisted Reproductive Technology in New Zealand 2017* (March 2021) at 4.

¹² Advisory Committee on Assisted Reproductive Technology *Assisted Reproductive Technology in New Zealand 2018* (October 2021) at 4.

¹³ 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.

¹⁴ Alternatives to legal parenthood when the intended parents do not adopt the surrogate-born child are discussed in Chapter 5.

¹⁵ Adoption Act 1955, s 10.

¹⁶ Email from Oranga Tamariki | Ministry for Children to Te Aka Matua o te Ture | Law Commission regarding domestic and international surrogacy data (1 March 2022). We note, however, that the provision of a social worker's report does not necessarily equate to the making of an adoption order.

domestic surrogacy in that time.¹⁷ 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 2013–2018.¹⁸

- 2.13 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:¹⁹

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.

- 2.14 It is unclear whether the practice of intended parents caring for and raising a surrogate-born child without formalising their parental status through adoption continues today. In 2017, Associate Professor Debra Wilson observed that anecdotal evidence suggests a "significant disparity" between the number of surrogate-born children in Aotearoa New Zealand and the number that have a legally recognised relationship with the people they call their parents.²⁰ 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.²¹ Wilson has identified three possible reasons why intended parents might not apply for an adoption order.²² First, some intended parents might not be aware that they need to adopt their child in order to become the legal parents. Second, other intended parents may object in principle to the idea they must adopt their own child, especially if the child is their genetic child. Third, some intended parents who have had a child through a commercial surrogacy arrangement may be deterred by the criminal sanctions on commercial surrogacy from publicising the circumstances of the child's birth. In some cases, the availability of parenting and guardianship orders under the Care of Children Act 2004 may be considered sufficient.²³ The practice of whāngai within te ao Māori also means there are

¹⁷ 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).

¹⁸ 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>.

¹⁹ 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.

²⁰ 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.

²¹ 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.

²² 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.

²³ See for example the case of *KMT v RAB* [2011] NZFLR 190 (FC). Prior to the child's birth, the biological mother, KMT, promised her friend, LJB, that she would give her the child to bring up as her child. Subsequently, the child had been in LJB and RAB's care since a few hours after her birth, and a parenting order had been made in favour of LJB and RAB. KMT then applied to discharge the order and sought an order for day-to-day care. The Court refused, preferring for existing arrangements to continue where the biological parents had contact with the child.

likely to be surrogate-born children who are not legally adopted because establishing a whāngai relationship is seen as sufficient.²⁴

- 2.15 However, increasing understanding of the current law (driven in part through media coverage and the growth of online surrogacy support forums) alongside increasing social acceptance of surrogacy as a method of family formation likely means that most intended parents now do formalise their parental status through adoption. In its submission on the Issues Paper, Te Kāhui Ture o Aotearoa | New Zealand Law Society observed that it has seen no evidence in practice of the current adoption pathway deterring parents from formalising their parental status, and there were no reports of parents refusing to engage with the adoption pathway because they object on principle to the process. It is, however, impossible to know whether there are instances of traditional surrogacy arrangements that proceed without any lawyer involvement. It is also likely that some whāngai arrangements proceed without adoption under state law.

Prevalence of international surrogacy arrangements

- 2.16 Oranga Tamariki's records show that, in 2021, it completed 14 reports for adoption applications involving international surrogacy.²⁵ This is down on previous years, which may be due to the ongoing impacts of the Covid-19 pandemic. Between 2016 and 2021, Oranga Tamariki completed reports for 96 international surrogacy arrangements.²⁶ Table 1 below sets out the countries where New Zealand intended parents entered international surrogacy arrangements. It demonstrates that most international surrogacies are arranged in the United States (61 per cent), with most of these taking place in California.²⁷ Destinations outside the United States tend to be in Asia or Eastern Europe.

TABLE 1: COUNTRIES WHERE INTENDED PARENTS HAVE ENTERED INTERNATIONAL SURROGACY ARRANGEMENTS

Country	2016	2017	2018	2019	2020	2021
USA	2	12	12	11	15	7
Australia			1			
Cambodia		1				
Canada			1	1	1	1

²⁴ In the comments made on the Issues Paper by the Judges of the Family Court, the Judges observed that informal surrogacy arrangements are common among Māori within whānau and friendship groups to address female infertility or childlessness within same-sex relationships and that these are often formalised by applications under the Care of Children Act 2004.

²⁵ Email from Oranga Tamariki | Ministry for Children to Te Aka Matua o te Ture | Law Commission regarding domestic and international surrogacy data (1 March 2022). Oranga Tamariki received 21 referrals in 2021 for international surrogacy, but some of these were still in progress at the time of writing.

²⁶ Email from Oranga Tamariki | Ministry for Children to Te Aka Matua o te Ture | Law Commission regarding domestic and international surrogacy data (1 March 2022); and 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).

²⁷ 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: COUNTRIES WHERE INTENDED PARENTS HAVE ENTERED INTERNATIONAL SURROGACY ARRANGEMENTS

China					1	1
Colombia						1
Georgia			1	3	1	1
India	3	1	1	1		
Kazakhstan		1				
Mexico	1		1		1	1
Nepal	1					
Philippines		1				
Russia			1	1		
South Africa					1	
Thailand		1				1
Ukraine			1	1		1
Vietnam				1		
TOTAL	7	17	19	19	20	14

- 2.17 Most of the international surrogacy arrangements over the past six years involved the use of donated gametes (79 out of 98),²⁸ and in just under half (48), the gamete donor was anonymous.²⁹
- 2.18 This data may not capture all international surrogacy arrangements. When a child is born overseas, the New Zealand Government is reliant on the information disclosed to it. Some intended parents may not disclose that their child was 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 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.³⁰ Of course, single men and male couples

²⁸ This figure includes the 96 reports completed for adoption applications involving international surrogacy noted above and an additional 2 referrals received in 2021 that are still in progress but for which the genetic makeup of the child is known.

²⁹ 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.

³⁰ 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.

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 uses surrogacy?

- 2.19 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 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 often no history of failed fertility treatment. Rather, surrogacy provides an opportunity to have a child that is the genetic child of an intended parent. People in this group will usually need an ovum donor or will seek to have a child by traditional surrogacy, although some trans men may have fertility preservation treatment to collect and freeze ova prior to gender-affirming medical care (discussed below).
- 2.20 An emerging third group comprises 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.
- 2.21 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.³¹ ECART, in its submission on the Issues Paper in 2021, estimated there was a 50/50 split in the previous year between close family or friends and women previously unknown to the intended parents entering into surrogacy arrangements that go through the ECART process.

What is driving the increase in surrogacy?

- 2.22 As we observed in the Issues Paper, 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 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.³² In 2015, the Family Court recognised for the first time that a male couple could legally adopt their

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 52.

³² Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [7.6].

surrogate-born children.³³ 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.³⁴ This is a trend that is also evident in the United Kingdom.³⁵

- (b) **Declining rates of adoption.** Rates of domestic and intercountry adoption are declining as fewer children are in need of adoption.³⁶ 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.³⁷ As the age of women giving birth increases, so do the rates of infertility and demand for fertility treatment.³⁸ Decreasing fertility for both men and women is a global trend and is likely to continue in future.³⁹
- (d) **Advances in assisted reproductive technology.** Ongoing improvements to assisted reproductive technology mean higher success rates for fertility treatment.⁴⁰ 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.** Women are increasingly undergoing fertility preservation treatment such as ovum extraction and freezing.⁴¹ 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 medical care that could affect their fertility.⁴² The increased

³³ *Re Pierney* [2015] NZFC 9404, [2016] NZFLR 53 at [14]–[15].

³⁴ Interview with Andrew Murray, Medical Director, Fertility Associates (Kathryn Ryan, Nine to Noon, RNZ, 30 March 2021).

³⁵ 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].

³⁶ Tāhū o te Ture | Ministry of Justice observes that 125 adoptions were granted by te Kōti Whānau | 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).

³⁷ Te Aka Matua o te Ture | Law Commission *Relationships and Families in Contemporary New Zealand* | *He Hononga Tangata, He Hononga Whānau i Aotearoa o Nāianei* (NZLC SP22, 2017) at 22.

³⁸ Growth of the fertility services market in Aotearoa New Zealand is predicted for these reasons: Report Ocean “Australia & New Zealand Fertility Services Market Size, Key Players Analysis, Competitive Scenario, Opportunities, Development Status 2021–2030” (press release, 15 March 2022).

³⁹ Zoë Corbyn “Interview — Shanna Swan: ‘Most couples may have to use assisted reproduction by 2045’” *The Guardian* (online ed, London, 28 March 2021).

⁴⁰ See for example Paul R Brezina and others “Recent Advances in Assisted Reproductive Technology” (2012) 1 *Current Obstetrics and Gynecology Reports* 166.

⁴¹ Molly Johnston and others “A major increase in oocyte cryopreservation cycles in the USA, Australia and New Zealand since 2010 is highlighted by younger women but a need for standardized data collection” (2021) 36 *Human Reproduction* 624.

⁴² See for example Hauora Tāhine | Pathways to Transgender Healthcare Services “Gender Affirming Medical Care” (2 March 2022) Healthpoint <www.healthpoint.co.nz>; and Jeannie Oliphant and others *Guidelines for Gender Affirming Healthcare for Gender Diverse and Transgender Children, Young People and Adults in Aotearoa New Zealand* (Transgender Health Research Lab, Te Whare Wānanga o Waikato | University of Waikato, October 2018) at 28–29.

demand for fertility preservation is likely to result in an increased demand for surrogacy in future as people seek to build families using their frozen gametes or embryos but are unable to carry a child themselves.

2.23 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.

2.24 The increasing use of international surrogacy by New Zealanders appears to be driven by a range of factors, including the following:

- (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. Intended parents must instead rely on their own family and friend networks or use social media or online forums to find a surrogate. 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 and uncertainty about advertising and payments to surrogates are likely to contribute to these challenges. While people are increasingly seeking out a surrogate through social media and online forums, some may feel uncomfortable publicising their private lives in such a way. We explore these issues in Chapters 8 and 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 entered into by New Zealanders (79 out of 98 arrangements over the past six years) involved 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, record the arrangement in a contract that may be enforceable 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 transfers⁴³ and gender selection⁴⁴ 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

⁴³ 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].

⁴⁴ Human Assisted Reproductive Technology Act 2004, s 11.

at the same time.⁴⁵ While this is not technically prohibited in Aotearoa New Zealand, such an arrangement is unlikely to satisfy the requirements for ECART approval.⁴⁶

- (e) **Increasing cultural diversity in Aotearoa New Zealand.** Cultural diversity driven by historically high levels of migration means that many New Zealanders have links to two or more countries. In the context of surrogacy, intended parents may choose to have a child in another 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.

Māori participation in surrogacy

- 2.25 Available information on ethnicity of participants in surrogacy arrangements is limited.⁴⁷ The most recent available research (relating to 2005–2010) suggests that, despite the general increase in the use of surrogacy, Māori participation in surrogacy arrangements is low, and Māori women are more likely to act as surrogates than as intended parents.⁴⁸
- 2.26 Dr Annabel Ahuriri-Driscoll has observed that, while the exact reasons for low participation of Māori in surrogacy arrangements are unknown, causes may include:⁴⁹
 - (a) high fertility rates (historically) reducing the need for surrogacy;
 - (b) preference for the customary practice of whāngai;
 - (c) the difficulty involved with finding a surrogate; and
 - (d) the cost of IVF inhibiting Māori from participating in gestational surrogacy as intended parents.
- 2.27 A three-year study of fertility and infertility from a Māori perspective (conducted between 2007 and 2010) also found that whāngai was viewed as a cultural alternative to

⁴⁵ 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>.

⁴⁶ 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)].

⁴⁷ Ethnicity data is collected by fertility clinics under applicable health information standards, but it is not routinely published: Donna Cormack “He Kākano: Māori Views and Experiences of Fertility, Reproduction and Assisted Reproductive Technology — A Review of Epidemiological and Statistical Data” in Paul Reynolds and Cheryl Smith (eds) *The Gift of Children: Māori and Infertility* (Huia Publishers, Wellington, 2012) 41 at 93. See Ngā Paerewa Health and Disability Services Standard NZS 8134:2021 at [2.5.1]; and Manatū Hauora | Ministry of Health “Sector Guidance for Ngā Paerewa Health and Disability Services Standard NZS 8134:2021” (18 October 2021) <www.health.govt.nz> at [2.5.1].

⁴⁸ A study of 104 applications considered by ECART between September 2005 and December 2010 found that only 9 per cent of applications involved a Māori surrogate and only 2 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, 2 per cent had partners who were Māori: 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.

⁴⁹ 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).

undertaking fertility treatment.⁵⁰ Other reasons for low Māori participation in fertility services were also suggested, including the distribution of Māori geographically throughout Aotearoa New Zealand affecting access to reproductive and fertility services,⁵¹ a longer duration of infertility before referral for treatment among Māori⁵² and fertility clinics not being well equipped to deal with whānau Māori.⁵³

- 2.28 Research published in 2021 found that, while Māori and Pacific peoples have higher total fertility rates than European and Asian populations, this does not translate to lower infertility levels in Māori and Pacific women.⁵⁴ Rather, infertility rates for Māori are similar to those experienced by non-Māori (and infertility rates of Pacific peoples are higher).⁵⁵ That research also found that Māori and Pacific peoples are less likely to seek fertility treatment.⁵⁶ For Māori women in particular, ethnicity differences remained after accounting for age and household income, suggesting that “factors other than economic disadvantage” could be preventing Māori women from seeking fertility treatment.⁵⁷ The research noted that institutional racism has been shown to increase barriers to infertility services for Māori and Pacific women, such as the body mass index requirements to access public funding.⁵⁸

NEW ZEALANDERS’ CHANGING ATTITUDES TO SURROGACY

- 2.29 Surrogacy is increasingly becoming an accepted way to build a family in Aotearoa New Zealand. 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 that was published to promote and inform public debate on the issues raised by new reproductive methods, just 38 per cent of submissions commenting on surrogacy supported the practice, while 45 per cent opposed it.⁵⁹

⁵⁰ Leonie Pihama “Experiences of Whānau Māori within Fertility Clinics” in Paul Reynolds and Cherryl Smith (eds) *The Gift of Children: Māori and Infertility* (Huia Publishers, Wellington, 2012) 203 at 234.

⁵¹ Donna Cormack “He Kākano: Māori Views and Experiences of Fertility, Reproduction and Assisted Reproductive Technology — A Review of Epidemiological and Statistical Data” in Paul Reynolds and Cherryl Smith (eds) *The Gift of Children: Māori and Infertility* (Huia Publishers, Wellington, 2012) 41 at 50.

⁵² Donna Cormack “He Kākano: Māori Views and Experiences of Fertility, Reproduction and Assisted Reproductive Technology — A Review of Epidemiological and Statistical Data” in Paul Reynolds and Cherryl Smith (eds) *The Gift of Children: Māori and Infertility* (Huia Publishers, Wellington, 2012) 41 at 88 and 93.

⁵³ Leonie Pihama “Experiences of Whānau Māori within Fertility Clinics” in Paul Reynolds and Cherryl Smith (eds) *The Gift of Children: Māori and Infertility* (Huia Publishers, Wellington, 2012) 203 at 234.

⁵⁴ Antoinette Righarts and others “The burden of infertility in New Zealand: A baseline survey of prevalence and service use” (2021) 61 ANZJOG 439 at 446.

⁵⁵ Antoinette Righarts and others “The burden of infertility in New Zealand: A baseline survey of prevalence and service use” (2021) 61 ANZJOG 439 at 443.

⁵⁶ The study found that 70 per cent of men and women sought help for infertility, compared to 46.5 per cent of Māori women and 39.8 per cent of Pacific women: Antoinette Righarts and others “The burden of infertility in New Zealand: A baseline survey of prevalence and service use” (2021) 61 ANZJOG 439 at 446.

⁵⁷ Antoinette Righarts and others “The burden of infertility in New Zealand: A baseline survey of prevalence and service use” (2021) 61 ANZJOG 439 at 446.

⁵⁸ Antoinette Righarts and others “The burden of infertility in New Zealand: A baseline survey of prevalence and service use” (2021) 61 ANZJOG 439 at 446.

⁵⁹ Law Reform Division *New Birth Technologies: A summary of submissions received on the issues paper* (Department of Justice, 1986) at 31–32. See discussion in Ken Daniels and Katrina Hargreaves “The Policy and Ethics of Surrogacy in New Zealand: Who is Left Holding the Baby?” (1997) 6 Otago Bioethics Report 1 at 2.

- 2.30 During consultation, we received a submission from a parent who had a child through surrogacy over 30 years ago. That submitter explained that, back then, surrogacy took place but was forced underground. They did not start the adoption process for several years for fear that the child would be taken off them.
- 2.31 Aotearoa New Zealand did not have any formal policy or legislation in place to regulate surrogacy until the HART Act was enacted in 2004. The HART Act was heralded as “catch-up” legislation⁶⁰ that reflected changing social understandings of family formation in Aotearoa New Zealand.⁶¹
- 2.32 A survey of public attitudes on surrogacy conducted by Te Whare Wānanga o Waitaha | University of Canterbury in 2017–2018 (the Surrogacy Survey) reveals how, since the enactment of the HART Act, surrogacy has become embedded in New Zealand society as a legitimate method of family formation.⁶²
- 2.33 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).⁶³ 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.⁶⁴
- 2.34 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.⁶⁵ Only a small proportion (eight per cent) said no, and 25 per cent were unsure or preferred not to say.
- 2.35 The results of the Surrogacy Survey are consistent with the feedback we received on the Issues Paper. As we explain in Chapter 1, of the 223 submissions we received in consultation, just 30 (13 per cent) were opposed to surrogacy in all forms.

⁶⁰ M Legge, R Fitzgerald and N Frank “A retrospective study of New Zealand case law involving assisted reproduction technology and the social recognition of ‘new’ family” (2007) 22 Human Reproduction 17 at 17.

⁶¹ M Legge, R Fitzgerald and N Frank “A retrospective study of New Zealand case law involving assisted reproduction technology and the social recognition of ‘new’ family” (2007) 22 Human Reproduction 17 at 18. As Daniels and Hargreaves explained, “issues do not usually become the target of state intervention until they have been established as areas of legitimate social concern”: Ken Daniels and Katrina Hargreaves “The Policy and Ethics of Surrogacy in New Zealand: Who is Left Holding the Baby?” (1997) 6 Otago Bioethics Report 1 at 4.

⁶² The Surrogacy Survey was conducted by Te Whare Wānanga o Waitaha | University of Canterbury as part of a 3-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. Just 5 per cent of respondents identified as Māori, which is perhaps attributable to using only the General Electoral Roll and not also the Māori Electoral Roll for selecting participants. 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.

⁶³ 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.

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 64.

⁶⁵ 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.

- 2.36 Two recent petitions calling for changes to different aspects of Aotearoa New Zealand's surrogacy laws⁶⁶ and the enactment of the Paige Harris Birth Registration Act 2022 with unanimous support of the House⁶⁷ also indicate growing social acceptance and support for surrogacy in Aotearoa New Zealand.

EMPIRICAL RESEARCH ON THE IMPACT OF SURROGACY

- 2.37 There is a growing body of empirical research that demonstrates largely positive outcomes for surrogates, surrogate-born children and their families. This research is mostly from the United Kingdom. Of particular note is the University of Cambridge's longitudinal study of assisted reproduction families, which has been running since 2000 (the Cambridge Study).⁶⁸ However, several smaller qualitative studies have examined experiences of surrogates and intended parents in Aotearoa New Zealand.⁶⁹ We have drawn on the findings of these studies throughout our review.

Outcomes for surrogates

- 2.38 Research on the impact of surrogacy on women who act as surrogates suggests that surrogacy is generally a positive experience for surrogates.⁷⁰
- 2.39 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 the relationship between surrogates who

⁶⁶ 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), which received 32,239 signatures and called for changes to Aotearoa New Zealand's surrogacy and adoption laws; and Petition of Josh Johnson "Let Paige Have Her Mum's Name on her Birth Certificate (Instead of "Not Recorded")" (2021, Change.org), which had received over 55,000 signatures at the time of writing.

⁶⁷ Discussed in Chapter 6 of this Report.

⁶⁸ 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.

⁶⁹ See Hannah Gibson "Kin-making in the Reproductive Penumbra: Surrogacy in Aotearoa New Zealand" (PhD Dissertation, Te Herenga Waka | Victoria University of Wellington, 2021); Hannah Gibson "'Doing it Our Way" Participation and Kinship in Traditional Surrogacy Narratives in Aotearoa New Zealand" (2021) 8 *Medicine Anthropology Theory* 1. This research involved ethnographic fieldwork carried out between 2016 and 2019. Gibson followed 25 intended parents and 20 surrogates. Of these participants, just 2 surrogates identified as Māori. See also Rhonda M Shaw "Should Surrogate Pregnancy Arrangements be Enforceable in Aotearoa New Zealand?" (2020) 16 *Policy Quarterly* 18 at 21; and Rhonda Shaw "Rethinking Reproductive Gifts as Body Projects" (2008) 42 *Sociology* 11. Participants in Shaw's research identified as NZ/European or Pākehā. See also Ruth Walker and Liezl van Zyl "Fear and Uncertainty: The Surrogacy Triad's Experience of Social Workers' Role Ambiguity" (2021) 51 *British Journal of Social Work* 2982. An ethnicity breakdown of participants in van Zyl and Walker's research is not provided.

⁷⁰ 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.

knew the intended parents beforehand and surrogates who did not.⁷¹ 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.⁷² While some surrogates did experience difficulties following the birth, these “were not severe, tended to be short-lived, and to dissipate with time”.⁷³

- 2.40 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.⁷⁴
- 2.41 The Cambridge Study also compared the impact of surrogacy on surrogates in traditional and gestational surrogacy arrangements. Although it may be assumed that a traditional surrogate who is the child’s genetic mother would be more likely to feel a special bond towards the child, this was not the case.⁷⁵ In fact, 10 years on, gestational surrogates were more likely than traditional surrogates to feel a special bond to the child.⁷⁶ 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.⁷⁷
- 2.42 Recent research in Canada involving 184 gestational surrogates resulted in similar findings, with most participants reporting their surrogacy participation was life transformative and empowering.⁷⁸
- 2.43 In Aotearoa New Zealand, anthropologist Dr Hannah Gibson’s three-year research project examined the experiences of traditional and gestational surrogates and intended parents.⁷⁹ Gibson found that surrogacy is generally a fulfilling experience for surrogates, even though at times it can feel unsatisfactory.⁸⁰ Gibson argued that surrogacy itself is not inherently exploitative but did not deny that exploitation exists in some spaces, as

⁷¹ Vasanti Jadva and others “Surrogacy: the experiences of surrogate mothers” (2003) 18 Human Reproduction 2196 at 2203.

⁷² 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” (2021) 51 British Journal of Social Work 2982 at 2989.

⁷³ Vasanti Jadva and others “Surrogacy: the experiences of surrogate mothers” (2003) 18 Human Reproduction 2196 at 2203.

⁷⁴ 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.

⁷⁵ Vasanti Jadva and others “Surrogacy: the experiences of surrogate mothers” (2003) 18 Human Reproduction 2196 at 2203.

⁷⁶ 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.

⁷⁷ 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.

⁷⁸ Samantha Yee, Shilini Hemalal and Clifford L Librach ““Not my child to give away”: A qualitative analysis of gestational surrogates’ experiences” (2020) 33 Women and Birth 256.

⁷⁹ Hannah Gibson “Kin-making in the Reproductive Penumra: Surrogacy in Aotearoa New Zealand” (PhD Dissertation, Te Herenga Waka | Victoria University of Wellington, 2021); and Hannah Gibson ““Doing it Our Way” Participation and Kinship in Traditional Surrogacy Narratives in Aotearoa New Zealand” (2021) 8 Medicine Anthropology Theory 1.

⁸⁰ Hannah Gibson “Kin-making in the Reproductive Penumra: Surrogacy in Aotearoa New Zealand” (PhD Dissertation, Te Herenga Waka | Victoria University of Wellington, 2021) at 194.

was illustrated in some narratives of the times where surrogates felt used and underappreciated by the intended parents.⁸¹

Outcomes for surrogate-born children and their families

- 2.44 The Cambridge Study suggests that families with surrogate-born children are just as likely to flourish as traditional families and sometimes more so.⁸² That study found that:⁸³

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 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.

- 2.45 These findings are consistent with other studies in relation to the impact of surrogacy on surrogate-born children in the United States. One study of 40 male couples with surrogate-born children found that children showed high levels of psychological adjustment and positive relationships with their parents.⁸⁴ 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”.⁸⁵
- 2.46 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.⁸⁶ Although the number of adolescents who had no contact with their surrogate was small, researchers suggested that this indicates some surrogate-

⁸¹ Hannah Gibson “Kin-making in the Reproductive Penumra: Surrogacy in Aotearoa New Zealand” (PhD Dissertation, Te Herenga Waka | Victoria University of Wellington, 2021) at 196.

⁸² Susan Golombok “The psychological wellbeing of ART children: what have we learned from 40 years of research” (2020) RBMO 743 at 743.

⁸³ 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).

⁸⁴ Susan Golombok and others “Parenting and the Adjustment of Children Born to Gay Fathers Through Surrogacy” (2018) 89 Child Dev 1223 at 1231.

⁸⁵ 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.

⁸⁶ At age 14, of the 8 adolescents who had no contact with their surrogate, 5 were interested in them and 3 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.

born children may have questions about their surrogate in the future or may express a desire to meet her.⁸⁷

LIMITATIONS OF THE RESEARCH

2.47 While the findings summarised above support the ongoing practice of surrogacy, it is important to acknowledge that research in this area is limited in several key respects:

- (a) First, there is limited research about Māori participation in and perspectives on surrogacy. While there are a small number of qualitative studies examining the impact of surrogacy in Aotearoa New Zealand, these studies either did not identify Māori participants or did not provide a comprehensive ao Māori view. While some research has examined fertility and infertility from a Māori perspective,⁸⁸ research to better understand surrogacy in particular within te ao Māori is required, as discussed below.
- (b) Second, available empirical research is typically limited by relatively small sample sizes. This means that the research cannot be said to capture the full spectrum of 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.
- (c) Third, there is limited information about the life-long impacts on surrogate-born people. While the Cambridge Study has looked at the impact of surrogacy on adolescent children, it might be decades before the long-term implications of surrogacy can be fairly considered.⁸⁹ We note, however, that the experiences of surrogate-born people informed the development of the International Principles for Donor Conception and Surrogacy (see Chapter 3)⁹⁰ and that, in some respects, lessons can be learned from research examining the experiences of donor-conceived and adopted people. We discuss this research where relevant throughout this Report.
- (d) Fourth, 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.⁹¹ The researchers involved in the Cambridge Study noted that the children “spoke of the surrogate’s altruistic

⁸⁷ Vasanti Jadvā 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.

⁸⁸ The findings of a 3-year study that involved interviews with 74 people (the majority being Māori) were published in what was described as “the first book that looks at the issues of fertility and infertility from a Māori or indigenous perspective”: Paul Reynolds and Cheryl Smith (eds) *The Gift of Children: Māori and Infertility* (Huia Publishers, Wellington, 2012) at xiii.

⁸⁹ 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.

⁹⁰ *International Principles for Donor Conception and Surrogacy* (November 2019). 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).

⁹¹ Some research on international and commercial surrogacy is emerging. See for example Amrita Pande *Wombs in Labor: Transnational Commercial Surrogacy in India* (Columbia University Press, New York, 2014), which investigated the outcomes for surrogates in India; and Vasanti Jadvā “Parents’ relationship with their surrogate in cross-border and domestic surrogacy arrangements: comparisons by sexual orientation and location” (2019) 111 *Fertility and Sterility* 562, which compared UK-based intended parents’ relationships with their surrogate in domestic and international surrogacy arrangements.

motivations for helping their parents, which raises questions about how children will feel in situations where their surrogate mothers [were] reimbursed financially”.⁹² The International Principles for Donor Conception and Surrogacy also suggest that some surrogate-born people do feel different about commercial surrogacy:⁹³

Many feel that they are the products of an international industry in human eggs, sperm, embryos and wombs which profits from human life — their lives. Yet as of this writing there is no jurisdiction in the world that fully protects the human rights of donor-conceived or surrogacy-born people despite all UN Member States having signed, and all but one having ratified, the [United Nations Convention on the Rights of the Child].

- 2.48 These limitations suggest a cautious approach to regulation is required to protect and promote the rights and interests of surrogate-born children, surrogates and intended parents, including as understood in te ao Māori.

TE AO MĀORI AND SURROGACY

- 2.49 In the Issues Paper, we drew on research and initial engagement with individuals who shared an ao Māori perspective to describe aspects of te ao Māori and tikanga Māori that may be relevant to surrogacy. We explained the special significance in te ao Māori of the ability of wāhine Māori to give birth. This is evident from Māori cosmology and ngā kōrero tuku iho (narratives passed down by Māori through oral tradition), the role of wāhine Māori in continuing whakapapa and examples in whakataukāki, whakatauki and te reo Māori that indicate this significance.⁹⁴ We also outlined some of the tikanga around conception, pregnancy and birth.⁹⁵
- 2.50 We considered what may influence Māori perspectives on surrogacy. As explained above, there is limited research about Māori perspectives on surrogacy. However, we observed that there is a long history of Māori openness and acceptance of gender and sexual diversity.⁹⁶ We mentioned an example where, 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 several children through surrogacy with the same

⁹² V Jadvā 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. Surrogate-born people also spoke of the surrogate’s altruistic motivations in Aasma Day “We were born through surrogacy and couldn’t be happier. If it’s done openly and honestly, it’s wonderful” *inews* (online ed, London, 15 March 2022).

⁹³ *International Principles for Donor Conception and Surrogacy* (November 2019). See also 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>.

⁹⁴ Te Aka Matua o te Ture | Law Commission *Review of Surrogacy | Te Kōpū Whāngai: He Arotake* (NZLC IP47, 2021) at [4.4]–[4.16].

⁹⁵ Te Aka Matua o te Ture | Law Commission *Review of Surrogacy | Te Kōpū Whāngai: He Arotake* (NZLC IP47, 2021) at [4.17]–[4.20].

⁹⁶ Te Aka Matua o te Ture | Law Commission *Review of Surrogacy | Te Kōpū Whāngai: He Arotake* (NZLC IP47, 2021) at [4.33]–[4.35]. See also Cherryl Smith “Tamaiti Whāngai and Fertility” in Paul Reynolds and Cherryl Smith (eds) *The Gift of Children: Māori and Infertility* (Huia Publishers, Wellington, 2012) 143 at 196.

- Māori genetics.⁹⁷ 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 2020.⁹⁸
- 2.51 We also explained that events in Māori tradition can help frame a Māori response to a new matter⁹⁹ and that there appears to be some precedent for surrogacy in te ao Māori.¹⁰⁰ During this review, one Māori academic 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.¹⁰¹
- 2.52 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 resulting 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.¹⁰²
- 2.53 In the Issues Paper, we observed that our research and preliminary engagement suggested that Māori are generally positive about surrogacy, particularly as a means of continuing whakapapa in response to infertility. One kuia we spoke with said “the main thing is the tamariki ... it does not matter how they get here”.
- 2.54 We said that the perspectives held by Māori may also be influenced by the extent of their engagement with te ao Māori. Engagement varies due to a range of factors, including the impact of colonisation and the advent and influence of Western notions of religion. However, as one Māori academic explained to us during this review:
- 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.
- 2.55 Responses to the Issues Paper¹⁰³ affirmed that individual Māori hold varying attitudes to surrogacy. A small number of personal submitters who identified as Māori opposed all

⁹⁷ Katarina Williams “Gay couple in Australia seeking Māori woman’s donor eggs” *Stuff* (online ed, New Zealand, 4 July 2017).

⁹⁸ Katarina Williams “Same sex couple’s baby joy following Māori egg donor classified ad” *Stuff* (online ed, New Zealand, 3 June 2020).

⁹⁹ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 375.

¹⁰⁰ See for example Cherryl Smith “Tamaiti Whāngai and Fertility” in Paul Reynolds and Cherryl Smith (eds) *The Gift of Children: Māori and Infertility* (Huia Publishers, Wellington, 2012) 143 at 198.

¹⁰¹ See Karaitiana Taiuru “Te Rūnaka o Koukourarata: Genetics/DNA Position/Discussion Paper” (paper presented to SING 2021 ki Ōtautahi ki Rehua Marae).

¹⁰² See also the story told of an aunty who agreed to have a baby for her sister in Cherryl Smith “Tamaiti Whāngai and Fertility” in Paul Reynolds and Cherryl Smith (eds) *The Gift of Children: Māori and Infertility* (Huia Publishers, Wellington, 2012) 143 at 155.

¹⁰³ We received 151 submissions that engaged with Māori and surrogacy (Chapter 4 of the Issues Paper), comprising 126 personal submissions, 20 submissions from organisations, comments from the Judges of the Family Court and 4 academic submissions. Of the 126 personal submissions, 15 (12 per cent) were from individuals who identified as Māori. One organisation submitter, Ngā Rangahautira, identified itself as a Māori organisation and another organisation submitter, the Royal Australian and New Zealand College of Obstetricians and Gynaecologists, noted that the Issues Paper was reviewed by He Hono Wāhine, a subcommittee of the College that works to “improve health outcomes for wāhine Māori and their pēpi”. Te Hunga Rōia Māori o Aotearoa was unable to make a submission on the Issues Paper but shared with us its submission on Te Tāhū o te Ture | Ministry of Justice’s review of adoption laws: Te Hunga Rōia

forms of surrogacy, but most supported surrogacy in some form. One personal submitter had experience of surrogacy as an intended parent and explained that their lack of knowledge of te ao Māori and their own whakapapa limited their ability to engage with te ao Māori in the surrogacy context. Another personal submitter called for caution in looking for precedents for surrogacy in te ao Māori:

I do think we need to be careful, whāngai and concepts centring women as givers of life are core but very different to modern concepts of use of surrogates and other technology to facilitate having a child. Those concepts cannot be used to bolster this, rather it needs to stand on its own.

Tikanga Māori and surrogacy

2.56 The modern practice of surrogacy requires tikanga Māori to respond to new circumstances. For example, how might tikanga respond where a gestational surrogate carries and gives birth to a child to whom they have no genetic connection or where a wāhine Māori acts as a traditional surrogate and the resulting child is then raised outside of the surrogate's whānau or hapū? What if one or both intended parents are Māori but the child's genetic parents are not?

2.57 In this section, we consider some principles in tikanga Māori and how they might apply in the context of surrogacy. In doing so, we are not aware of deliberative discussions among Māori on how tikanga is engaged by the modern practice of surrogacy,¹⁰⁴ nor have we had detailed comments about tikanga Māori and surrogacy from submitters in this review. Nonetheless, tikanga principles provide important context given the kaupapa of this review, which is the use of surrogacy in family building for New Zealanders otherwise unable to have a child.

2.58 One Māori academic who shared an ao Māori perspective on surrogacy with us during this review explained that “it all depends on the kaupapa, the purpose or aim and aroha ki te tangata involved”. They further explained:

The precedent to look for is not, was there a method or a protocol or process that was used that sets a precedent, but rather did the kaupapa (purpose or aim of the act) exist? That is, were there ever Māori who found themselves infertile and displeased with this they sought and found a solution? Well yes, of course there were. That is the precedent of import. He aha te kaupapa? Is the kaupapa tika? Of course, it was and still is.

2.59 Whānau is central to the kaupapa of surrogacy. Whānau, which can be understood as household units or large extended families, are the basic building blocks of the social

Māori o Aotearoa Ngā tāpaetanga a Te Hunga Rōia Māori o Aotearoa | *Submissions of Te Hunga Rōia Māori o Aotearoa to Adoption Reform Committee* (6 September 2021).

¹⁰⁴ As acknowledged in Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 367. See also Jacinta Ruru “Kua tutū te puehu, kia mau: Māori aspirations and family law policy” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 57 at 75; and 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) at 9. We acknowledge, however, the contribution of the 3-year study of fertility and infertility from a Māori perspective, the results of which are published and discussed in Paul Reynolds and Cheryl Smith (eds) *The Gift of Children: Māori and Infertility* (Huia Publishers, Wellington, 2012).

system in te ao Māori.¹⁰⁵ Whānau can also mean to “be born”.¹⁰⁶ Whanaungatanga, which we discuss further below, is about the importance of kin relationships. The significance in te ao Māori of creating new life, bringing a child into its whānau and therefore hapū and iwi, is clear.

2.60 One Māori academic who shared an ao Māori perspective with us suggested that surrogacy might be considered as a modern development of whānau, given that whānau is already an inclusive dynamic concept and can easily adapt to include surrogacy. This is consistent with a general understanding that tikanga is dynamic and has evolved over time to adapt to and accommodate developments in society and technology.¹⁰⁷

2.61 Nonetheless, certain principles of tikanga are fundamental. As Dr Te Kahautu Maxwell has explained:¹⁰⁸

There are a number of core values that underpin tikanga: whanaungatanga; mana; tapu; manaakitanga; and aroha. There are iwi variations of the core values, and therefore the above list is how I understand tikanga and see tikanga to being. Therefore, these core values are not prescribed and may differ from iwi to iwi. These core values are like a whariki; a woven mat, they must go together for tikanga to stand up. You must understand the core values for you to understand tikanga, because it is these core values that instruct you how to behave in the correct manner, which is tikanga.

2.62 Further, Tā Hirini Moko Mead, in his consideration of the underlying principles and values of tikanga, emphasised tika and pono.¹⁰⁹ He observed that the concept of tika, or being correct, is a base principle that applies to all tikanga and that, in making a judgement about correctness, the concept of pono should be considered. Pono means true or genuine in terms of the principles of Māoritanga.¹¹⁰

2.63 With these observations in mind, we suggest that the tikanga principles of whakapapa and whanaungatanga are of central importance to considering surrogacy from an ao Māori perspective.¹¹¹ We also suggest that the tikanga principles of tapu, mana,

¹⁰⁵ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 224. See also the discussion of the diversity of whānau in Cheryl Smith “Tamaiti Whāngai and Fertility” in Paul Reynolds and Cheryl Smith (eds) *The Gift of Children: Māori and Infertility* (Huia Publishers, Wellington, 2012) 143 at 200–201.

¹⁰⁶ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 224. As we explained in the Issues Paper, certain kupu Māori associated with pregnancy and childbirth have dual meanings, which illustrates the connections between pregnancy and childbirth and other matters of significance in te ao Māori. In addition to the dual meaning of whānau, whenua can mean “land” and “placenta”, and hapū can mean “pregnant” and “large kinship group”: Te Aka Matua o te Ture | Law Commission *Review of Surrogacy | Te Kōpū Whāngai: He Arotake* (NZLC IP47, 2021) at [4.16].

¹⁰⁷ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 2–6.

¹⁰⁸ In expert evidence given in *Re Reeder (Ngā Pōtiki Stage 1 — Te Tāhuna o Rangataua)* [2021] NZHC 2726 at [48]. Dr Maxwell’s qualifications as an expert in mātauranga Māori and his evidence were not disputed: at [46]. See also the evidence of Moana Jackson as cited in Jacinta Ruru and Leo Watson “An Introduction to Māori land, Taonga and the Māori Land Court” (paper presented to Property Law Conference — Change, it’s inevitable!, Auckland, 28 June 2018) at 4, and referenced in Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (Wai 2478, 2016) at 17.

¹⁰⁹ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 29.

¹¹⁰ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 29.

¹¹¹ Ani Mikaere discussed the centrality of these concepts in considering guardianship, custody and access: Di Pitama, George Ririnui and Ani Mikaere *Guardianship, Custody and Access: Māori Perspectives and Experiences* (Te Manatū Ture | Ministry of Justice and Te Tari Kooti | Department for Courts, August 2002) at 19 and following. In the context of assisted reproductive technology, Carl Mika highlights as relevant the concepts of whakapapa, tapu, kaitiakitanga and

manaakitanga, kaitiakitanga and aroha are also likely to be relevant. We discuss these principles below. We do not suggest our description of this tikanga is comprehensive, nor do we purport to set out specific tikanga practices. We give this explanation to underpin our later references to tikanga in support of the recommendations we make in this Report.

Whakapapa and whanaungatanga

- 2.64 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.¹¹² Whakapapa connects all things, animate and inanimate, positioning an individual not only within their kinship collective, but within the wider world and universe.
- 2.65 Ahuriri-Driscoll has suggested two things are transmitted in the creation of life — ira tangata, the human element or life principle, and whakapapa, the relationships and genealogical connections that build out from or upon this base.¹¹³ Ahuriri-Driscoll has observed that whānau are both the transmitters of ira tangata and, in terms of relationships and support structures, the embodiment of whakapapa.¹¹⁴ Mead described whakapapa as an attribute of identity that gives an individual the right to say “I am Māori”.¹¹⁵ Mead has also explored the spiritual aspects of identity that every Māori child is born with, including personal tapu, mana, mauri, wairua and hau.¹¹⁶ We discuss some of these aspects further below.
- 2.66 The continuity, values and practices of Māori societies began with whakapapa.¹¹⁷ Whakapapa is the:¹¹⁸

mauri: Carl Mika “A Review of the Law Relating to Assisted Reproductive Technology in New Zealand, and Its Implications for Māori: Application to Other Areas of Law” in Paul Reynolds and Cheryl Smith (eds) *The Gift of Children: Māori and Infertility* (Huia Publishers, Wellington, 2012) 101 at 135–137.

¹¹² 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.

¹¹³ 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) at 1.

¹¹⁴ 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) at 2.

¹¹⁵ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 47.

¹¹⁶ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 49–67.

¹¹⁷ Lyn Waymouth “The Bureaucratisation of Genealogy” (2003) 6 *Ethnologies Comparées* 1 at 3 as cited in Bevan Tipene-Matua and Mark Henaghan “Māori Perspectives on Pre-Birth Genetic Testing with Particular Focus on PGD” in Human Genome Research Project *Choosing Genes for Future Children: Regulating Preimplantation Genetic Diagnosis* (Te Whare Wānanga o Ōtākou | University of Otago, Dunedin, 2006) 69 at 75. Parts A and B of this chapter (pp 73–95) were written by Bevan Tipene-Matua and Victoria Guyatt. Part C of this chapter (pp 96–110) was written by Danny Tuato’o. Part D of this chapter (pp 111–136) was written by Sacha McMeeking.

¹¹⁸ A Mahuika “Whakapapa is in the heart” in K S Coates and P G McHugh (eds) *Living Relationships: Kotahi Ngatahi | The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998) as cited in Bevan Tipene-Matua and Mark Henaghan “Māori Perspectives on Pre-Birth Genetic Testing with Particular Focus on PGD” in Human Genome Research Project *Choosing Genes for Future Children: Regulating Preimplantation Genetic Diagnosis* (Te Whare Wānanga o Ōtākou | University of Otago, Dunedin, 2006) 69 at 75. See also Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 47.

... determinant of mana rights to land, to marae, to membership of a whanau, hapu, and collectively the iwi, the whakapapa determines kinship roles and responsibilities to other kin, as well as one's place and status within society.

2.67 Mead has further described whakapapa as legitimising participation in hapū affairs and opening doors to the assets of the iwi.¹¹⁹ In short, Mead has said, “whakapapa is belonging”.¹²⁰

2.68 Tamariki Māori literally embody the continuation of whakapapa, which in turn signals the wellbeing of the iwi, hapū and whānau. Children are considered taonga in te ao Māori,¹²¹ a point that has been emphasised by Waihoroi Shortland:¹²²

... the starting point for the Māori worldview is ‘he tamaiti, he taonga’; every child is precious, every child is a taonga of their entire whānau, hapū and iwi — and as such tamariki are the responsibility of all of them.

2.69 According to Dr Rangimārie Mihomiho Rose Pere:¹²³

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.

2.70 Whanaungatanga is considered to be the most pervasive tikanga principle.¹²⁴ It has been described as “the glue that held, and still holds, the system together”.¹²⁵ Pere has said that:¹²⁶

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.

2.71 Professor Patu Hohepa has explained that:¹²⁷

[W]hānau refers to the close relationship engendered between members of the whānau of extended family as a consequence of working together. All members must ideally share compassion (aroha), trust (pono), truthfulness (tika) with each other. That

¹¹⁹ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 47.

¹²⁰ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 47.

¹²¹ See Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [240]. See also Donna Hall and Joan Metge “Kua Tutū Te Puehu, Kia Mau | Māori aspirations and family law” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (2nd ed, Oxford University Press, Auckland, 2002) at 57.

¹²² In expert evidence given in Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Pāharakeke, He Rito Whakakīkinga Whāruarua: Oranga Tamariki Urgent Inquiry* (Wai 2915, 2021) at 15.

¹²³ 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.

¹²⁴ Joseph Williams “He Aha Te Tikanga Maori” (paper prepared for Te Aka Matua o te Ture | Law Commission (draft), 1998) at 9.

¹²⁵ Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Waikato L Rev 1 at 4.

¹²⁶ 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.

¹²⁷ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 20.

feeling of whanaungatanga must also extend to others to whom one develops a close familial, friendship or reciprocal relationship.

- 2.72 Tā Joseph Williams has also explained that the importance of kin relationships, the priority accorded to the collective and the responsibility of the collective for its individuals remain powerful values in contemporary Māori life.¹²⁸ The ethic of collectivism does not diminish the value of the individual in te ao Māori but adds to their significance, each person representing a link in the chain of life.¹²⁹
- 2.73 It has been suggested that, most simply, whanaungatanga is the rights, responsibilities and expected mode of behaviour that accompany relationships and that the term has been widened by modern Māori to include kin-like reciprocal relationships among people generally.¹³⁰
- 2.74 It follows that whānau and wider kin groups may take a considerable interest in surrogacy, given the significance of whakapapa and children.¹³¹ Whānau may be involved in a decision by a whānau member to have a child through surrogacy or to act as a surrogate. Whānau may also have whakawhanaungatanga responsibilities in relation to the parties to a surrogacy arrangement and the surrogate-born child. Hapū and iwi may have an interest in the consequences of surrogacy more generally, given the implications of whakapapa for responsibilities to and entitlements from hapū and iwi.¹³²

Other relevant tikanga principles

- 2.75 Tapu is a principle in te ao Māori that acts as a “corrective and coherent power”.¹³³ Hohepa has defined it as:¹³⁴

... the essence of sanctity, cultural protection, sacredness, set apartness. It is not only a possible source of protection for all things, it also has a ‘potential for power’.

¹²⁸ Joseph Williams “He Aha Te Tikanga Maori” (paper prepared for Te Aka Matua o te Ture | Law Commission (draft), 1998) at 10.

¹²⁹ Di Pitama, George Ririnui and Ani Mikaere *Guardianship, Custody and Access: Māori Perspectives and Experiences* (Te Manatū Ture | Ministry of Justice and Te Tari Kooti | Department for Courts, August 2002) at 22.

¹³⁰ Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: a Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 524.

¹³¹ The tensions between the right of the collective and the right of the individual are discussed in the pre-birth genetic testing context in Bevan Tipene-Matua and Mark Henaghan “Māori Perspectives on Pre-Birth Genetic Testing with Particular Focus on PGD” in Human Genome Research Project *Choosing Genes for Future Children: Regulating Preimplantation Genetic Diagnosis* (Te Whare Wānanga o Ōtākou | University of Otago, Dunedin, 2006) 69 at 92 and 116.

¹³² In Chapter 3, we examine the importance of genetic and gestational origins and whakapapa from a child’s rights perspective. In Chapter 7, we recommend a surrogacy birth register to preserve information for surrogate-born people about their genetic and gestational origins and whakapapa.

¹³³ 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 59. 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); and Ramari Paul, Hui Kahu, Jason Ataera and Chappie Te Kani (Tangata Whenua Student Work Programme).

¹³⁴ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 18.

- 2.76 Tapu can be traced to the tūpuna, then to the atua Māori and then to Ranginui and Papatūānuku.¹³⁵ This gives rise to an “intrinsic tapu” that all people, places and things possess by virtue of their connection to the atua Māori.
- 2.77 It may be particularly relevant in the context of surrogacy to note Mead’s description of respect for the person as te tapu o te tangata, the sanctity of the person, and the identity and spiritual attributes of an individual born of a Māori parent or parents.¹³⁶
- 2.78 Mauri may also be relevant. Dr Cleve Barlow has described how, when a person is born, only the mauri or power of Io can join the two parts of body and spirit together.¹³⁷ Mead has explained that mauri, the spark of life, is the active component that indicates a person is alive.¹³⁸
- 2.79 Mead has observed that surrogacy aims to create a new mauri in a way that does not follow the accepted norm, asking whether this puts the mauri of the child at risk.¹³⁹ While not discussing the issues in depth, Mead expressed the view that “most of the concerns are probably focused on moral and social issues rather than on risks to the mauri”.¹⁴⁰
- 2.80 Pere describes several examples of mauri, including mauri o te tangata, observing that:¹⁴¹
- If a person feels that she is respected and accepted for what she herself represents and believes in, particularly by people who relate or interact with her, then her mauri waxes; but should she feel that people are not accepting her in her totality, so that she is unable to make a positive contribution from her own makeup as a person, then her mauri wanes.
- 2.81 The principle of mana must also be considered. In a narrow sense, mana can be defined as “the integrity of a person or object”.¹⁴² In a wider sense, it is a measure of all things that are gathered from “ancestral and spiritual inheritance, prestige, power, recognition, efficacy, influence, authority and personal ability”.¹⁴³ Mead has explained that “tapu is inseparable from mana”¹⁴⁴ and, as noted above, that every Māori child is born with mana.¹⁴⁵

¹³⁵ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 50.

¹³⁶ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 43–67.

¹³⁷ Cleve Barlow *Tikanga Whakaaro: Key Concepts in Māori Culture* (Oxford University Press, Auckland, 1994) at 83.

¹³⁸ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 57.

¹³⁹ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 373–374.

¹⁴⁰ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 374.

¹⁴¹ Rangimarie Rose Pere *Ako: Concepts and Learning in the Māori Tradition* (Te Kohanga Reo National Trust Board, Wellington, 1994) at 32.

¹⁴² Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Māori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 19.

¹⁴³ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Māori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 18.

¹⁴⁴ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 34.

¹⁴⁵ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 55. The concept of mana has been incorporated into legislation about the care of children, the Oranga Tamariki Act 1989. The purposes of this Act “are to promote the well-being of children, young persons, and their families, whānau, hapū, iwi, and family groups” including by “recognising mana tamaiti (tamariki), whakapapa, and the practice of whanaungatanga for children and young persons who come to the attention of the department”: s 4(1)(g). The Oranga Tamariki Act defines mana tamaiti (tamariki) to mean “the intrinsic value and inherent dignity derived from a child’s or young person’s whakapapa (genealogy) and their belonging to a whānau, hapū, iwi, or family group, in accordance with tikanga Māori or its equivalent in the culture of the child or young person”: s 2 definition of “mana tamaiti (tamariki)”. See discussion in

2.82 Dr Mānuka Hēnare has observed that:¹⁴⁶

In the Maori world, virtually every activity, ceremonial or otherwise, has a link with the maintenance of and enhancement of mana. It is central to the integrity of the person and the group. Many everyday measures, threaded into the fabric of existence, are designed, consciously or otherwise, as maintainers of mana.

2.83 While mana is both inherited and bestowed, it is not something that people or groups can claim for themselves (even though it may be bestowed on an individual, it is always within the context of enhancing the mana of the group).¹⁴⁷ Therefore, mana has very little relevance outside of a collective context.

2.84 Mana plays an important role in whānau. The whānau as a whole has its own mana that comprises a core of mana tūpuna, but it is also affected by the behaviour of individual members and the way in which the whānau fulfils its function as a collective.¹⁴⁸ Whānau members have a shared responsibility to work to build up the mana of the group and also to restore it when damaged.¹⁴⁹ Pere has said that “the mantle of mana embraces people, and when worn demands and provides far more than just prestige and status”.¹⁵⁰

2.85 It is said that mana, kaitiakitanga and rangatiratanga are all infused in the maintenance and enhancement of whakapapa.¹⁵¹ Mead has argued that ideally a new idea (which might include the modern practice of surrogacy) should maintain, enhance or improve mana and lift everybody who participates in the event.¹⁵²

2.86 Kaitiakitanga is an obligation on those who have mana to act unselfishly, with right mind and heart and with proper procedure.¹⁵³ Mana and kaitiakitanga operate together as “right

Mihiata Pirini and Anna High “Dignity and Mana in the “Third Law” of Aotearoa New Zealand” (2021) 29 NZULR 623 at 641–642 and 644.

¹⁴⁶ Manuka Henare “Nga Tikanga Me Nga Ritenga O Te Ao Maori | Standards and Foundations of Maori Society” in Mental Health Foundation of New Zealand *Te Ao Pumau: Standards and Foundations of Maori Society* (Auckland, 1997) 7 at 22.

¹⁴⁷ Rosemary Du Plessis and others *The Social, Cultural, Ethical and Spiritual Implications of Genetic Testing: Preliminary Findings* (Constructive Conversations | Kōrero Whakaaetanga, Te Whare Wānanga o Waitaha | University of Canterbury, December 2004) at 15; and Bevan Tipene-Matua and Mark Henaghan “Māori Perspectives on Pre-Birth Genetic Testing with Particular Focus on PGD” in Human Genome Research Project *Choosing Genes for Future Children: Regulating Preimplantation Genetic Diagnosis* (Te Whare Wānanga o Ōtākou | University of Otago, Dunedin, 2006) 69 at 79.

¹⁴⁸ Bevan Tipene-Matua and Mark Henaghan “Māori Perspectives on Pre-Birth Genetic Testing with Particular Focus on PGD” in Human Genome Research Project *Choosing Genes for Future Children: Regulating Preimplantation Genetic Diagnosis* (Te Whare Wānanga o Ōtākou | University of Otago, Dunedin, 2006) 69 at 79.

¹⁴⁹ Joan Metge *New Growth from Old — The Whanau in the Modern World* (Victoria University Press, Wellington, 1995) as cited in Bevan Tipene-Matua and Mark Henaghan “Māori Perspectives on Pre-Birth Genetic Testing with Particular Focus on PGD” in Human Genome Research Project *Choosing Genes for Future Children: Regulating Preimplantation Genetic Diagnosis* (Te Whare Wānanga o Ōtākou | University of Otago, Dunedin, 2006) 69 at 79.

¹⁵⁰ Rangimarie Rose Pere *Ako: Concepts and Learning in the Māori Tradition* (Te Kohanga Reo National Trust Board, Wellington, 1994) at 38.

¹⁵¹ Bevan Tipene-Matua and Mark Henaghan “Māori Perspectives on Pre-Birth Genetic Testing with Particular Focus on PGD” in Human Genome Research Project *Choosing Genes for Future Children: Regulating Preimplantation Genetic Diagnosis* (Te Whare Wānanga o Ōtākou | University of Otago, Dunedin, 2006) 69 at 79.

¹⁵² Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 379.

¹⁵³ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity — Te Taumata Tuatahi* (Wai 262, 2011) at 23.

and responsibility”.¹⁵⁴ Kaitiakitanga obligations exist over all taonga.¹⁵⁵ Kaitiakitanga has been described as the reciprocal obligation to care for the wellbeing of a person or resources,¹⁵⁶ and manaakitanga, literally translated, means to care for a person’s mana.¹⁵⁷

- 2.87 Aroha conveys that the values of care, respect and affection are important.¹⁵⁸ Barlow has observed that “[a] person who has aroha for another expresses genuine concern towards them and acts with their welfare in mind, no matter what their state of health or wealth”.¹⁵⁹ Pere has said that:¹⁶⁰

... the commitment of ‘aroha’ is vital to whanaungatanga and the survival of what the group sees as important. Loyalty, obligation, commitments, an inbuilt support system made the whanau a strong stable unit, within the hapū, and consequently the tribe.

- 2.88 Pere explained that, in this context, aroha pertains to the commitment of people who see themselves as having the same ancestral presence and breath of life.¹⁶¹

Implications for our review

- 2.89 In this section, we have sought to highlight tikanga principles that we suggest are relevant in the context of surrogacy. How tikanga responds to surrogacy is a matter that requires further consideration by Māori, as we explain below. Nonetheless, we suggest that it is likely that tikanga imposes obligations on the parties to a surrogacy arrangement and their whānau to protect and care for surrogate-born tamariki Māori. The principles of whakapapa, whanaungatanga, manaakitanga, kaitiakitanga and aroha indicate this. Obligations may also fall on whānau to care for and enhance the mana of a surrogate and intended parents, given the responsibilities they have in relation to the surrogate-born child. Complex questions may arise about the application of tikanga when not all parties involved in the creation of the child are Māori.

Whāngai arrangements

- 2.90 Understanding the nature and role of whāngai relationships in te ao Māori provides further important context to considering surrogacy.

¹⁵⁴ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity — Te Taumata Tuatahi* (Wai 262, 2011) at 23.

¹⁵⁵ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity — Te Taumata Tuatahi* (Wai 262, 2011) at 23.

¹⁵⁶ 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 4.

¹⁵⁷ 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 166.

¹⁵⁸ 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 151.

¹⁵⁹ Cleve Barlow *Tikanga Whakaaro: Key Concepts in Māori Culture* (Oxford University Press, Auckland, 1994) at 8.

¹⁶⁰ Rangimarie Rose Pere *Ako: Concepts and Learning in the Māori Tradition* (Te Kohanga Reo National Trust Board, Wellington, 1994) at 26.

¹⁶¹ Rangimarie Rose Pere *Ako: Concepts and Learning in the Māori Tradition* (Te Kohanga Reo National Trust Board, Wellington, 1994) at 26.

- 2.91 Māori have traditionally entered whāngai (also known as atawhai) arrangements where a child is given to others to raise.¹⁶² These arrangements continue to be made today.¹⁶³ The principles that underpin whāngai have been described as openness, caring for the child within the family, whakapapa and whanaungatanga.¹⁶⁴ 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.¹⁶⁵
- 2.92 Whāngai arrangements are used for a variety of reasons, and tikanga relating to whāngai varies among iwi in its application.¹⁶⁶ For instance, a whāngai arrangement could be entered into due to infertility,¹⁶⁷ as a means of strengthening relations within hapū or iwi¹⁶⁸ or to instil cultural knowledge in a child.¹⁶⁹ Whāngai relationships are underpinned by the primacy of children in the whānau and Māori society.¹⁷⁰ Dr Lorna Dyall explained that “the sharing of kin was and is still seen today by Maori as a taonga in which all involved have a responsibility to ensure that the interests of the child are paramount”.¹⁷¹
- 2.93 Surrogacy may be considered by some Māori to be similar to or a form of whāngai arrangement. As we explain in Chapter 6, we are aware of several surrogacy arrangements where the parties were interested in exploring a whāngai arrangement in relation to the surrogate-born child rather than pursuing a legal adoption. One Māori academic told us “surrogacy arrangements could be considered as another form of

¹⁶² 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.

¹⁶³ See discussion in Cherryl Smith “Tamaiti Whāngai and Fertility” in Paul Reynolds and Cherryl Smith (eds) *The Gift of Children: Māori and Infertility* (Huia Publishers, Wellington, 2012) 143.

¹⁶⁴ *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.

¹⁶⁵ See the report of *Te Wharehuia Milroy*, which forms part of the Court record referred to in *te Kooti Pira Māori o Aotearoa | Māori Appellate Court decision Hohua — Estate of Tangi Biddle or Hohua* (2001) 10 Rotorua Appellate MB 43 (10 APRO 43).

¹⁶⁶ 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.

¹⁶⁷ Cherryl Smith “Tamaiti Whāngai and Fertility” in Paul Reynolds and Cherryl Smith (eds) *The Gift of Children: Māori and Infertility* (Huia Publishers, Wellington, 2012) 143 at 202.

¹⁶⁸ 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 *te Kooti Whenua Māori | Māori Land Court decision Karauti — Succession to George or Hori Kiwa Tukua* (2000) 116 Otorohanga MB 81 (116 OT 81).

¹⁶⁹ See *Te Aka Matua o te Ture | Law Commission New Issues in Legal Parenthood: A discussion paper* (NZLC PP54, 2004) at [2.24].

¹⁷⁰ Annabel Ahuriri-Driscoll “Adoption and surrogacy — Māori perspectives” (seminar presented to *Redefining Family — growing families through adoption, donor-conception and surrogacy conference*, Te Wānanga Aronui o Tāmaki Makau Rau | Auckland University of Technology, 13-14 January 2016) (unpublished informal notes to accompany presentation) at 3. Ahuriri-Driscoll notes that whāngai relationships can, however, be unsuccessful on occasion.

¹⁷¹ Lorna Dyall “Awhina i te hangarau whakato: Tiaki te whakapapa | Assisted reproductive technologies: Protecting the generations” in Sandra Coney and Anne Else (eds) *Protecting our future: the case for greater regulation of assisted reproductive technology* (Women's Health Action Trust and New Zealand Law Foundation, 1999) 35 at 37.

whāngai, as the principles are the same”.¹⁷² A respondent to a questionnaire on Māori attitudes to assisted human reproduction in 2008 also said:¹⁷³

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

- 2.94 The basis for suggesting surrogacy and whāngai arrangements are similar may focus on the fact the child is cared for by people other than the woman who gave birth to the child. However, there are differences. A significant difference is that, in a surrogacy arrangement, the surrogate-born child may whakapapa to the intended parents and/or to third party gamete donors rather than the surrogate. The parties in a surrogacy arrangement may be whānau or close friends or they may have connected solely for the purpose of the surrogacy arrangement. An ongoing relationship between the surrogate and the surrogate-born child might be contemplated, but that will not always be an objective of the arrangement. In contrast, whāngai arrangements rarely stray beyond the whānau or hapū and are not always entered into due to the inability of the mātua whāngai to have children of their own. A relationship with the birth parents of tamariki whāngai is generally a prerequisite of a whāngai arrangement to ensure that the child remains aware of their whakapapa. In a whāngai arrangement, the child may return to the care of their birth parents.
- 2.95 For these reasons, Māori may have differing views about whether surrogacy can be considered tika in reliance on its similarities to whāngai arrangements. Some Māori may consider that surrogacy should not be likened to whāngai and that it instead should be established appropriately within a tikanga context on its own merits. Ahuriri-Driscoll has observed that some Māori may not see surrogacy as acceptable given its emphasis on nuclear family and a sense of biological entitlement that is not “tika” when other options are available, such as whāngai arrangements or specific roles for those who do not have children.¹⁷⁴
- 2.96 In Chapter 6, we address the emphasis in state law on the legal status of parenthood, the lack of legal recognition of whāngai arrangements and the consequences of this for Māori. We note that, in its review of adoption law, Tāhū o te Ture | Ministry of Justice is considering whāngai relationships more broadly.¹⁷⁵

¹⁷² See also Cherryl Smith “Tamaiti Whāngai and Fertility” in Paul Reynolds and Cherryl Smith (eds) *The Gift of Children: Māori and Infertility* (Huia Publishers, Wellington, 2012) 143 at 198. However, as we note at [2.55] above, a Māori submitter on the Issues Paper thought whāngai arrangements were “very different” to modern concepts of surrogacy.

¹⁷³ Marewa Glover *Māori Attitudes to Assisted Human Reproduction: An Exploratory Study* (School of Population Health, Waipapa Taumata Rau | University of Auckland, 2008) at [3.7.15].

¹⁷⁴ Annabel Ahuriri-Driscoll “Adoption and surrogacy — Māori perspectives” (seminar presented to Redefining Family — growing families through adoption, donor-conception and surrogacy conference, Te Wānanga Aronui o Tāmaki Makau Rau | Auckland University of Technology, 13–14 January 2016) (unpublished informal notes to accompany presentation) at 9. Ahuriri-Driscoll also notes that increasing attention to infertility among Māori and its potential stigma will be another factor in considering surrogacy as an appropriate option, at 10.

¹⁷⁵ Te Tāhū o te Ture | Ministry of Justice *Adoption in Aotearoa New Zealand — Discussion document* (June 2021) at 28–29.

THE NEED FOR FURTHER RESEARCH

RECOMMENDATION

R1

The Government should commission research led by Māori to provide a better understanding of tikanga Māori and surrogacy and Māori perspectives on surrogacy in practice.

- 2.97 The starting place for understanding tikanga Māori and surrogacy is to locate the principles and practices related to surrogacy within a Māori philosophical framework.¹⁷⁶
- 2.98 While core tikanga principles undoubtedly inform surrogacy in te ao Māori, further consideration and articulation of tikanga Māori as it relates to the practice of surrogacy is required,¹⁷⁷ and this was supported in submissions received on the Issues Paper.¹⁷⁸
- 2.99 This research might consider how tikanga could inform practice in different situations. For example, the research may consider how tikanga could inform Māori intended parents who are considering arranging for a surrogate to carry a child who is genetically unrelated to them or a Māori surrogate who is considering carrying a child for non-Māori intended parents. Complex questions may arise about the application of tikanga when one or more of the surrogate-born child, surrogate and intended parents are not Māori.
- 2.100 The research might also explore whether existing tikanga can be adapted for the surrogacy context. For example, the tikanga around conception, pregnancy and childbirth might be adapted to take into account the role of a surrogate in the creation of a child. This might include considering the appropriate approach to the practice of returning the whenua and pito (umbilical cord) of a Māori child to the land to which they are connected through whakapapa, where the surrogate has no genetic connection to the child. This practice is undertaken predominantly to preserve the child's mana and mauri and to

¹⁷⁶ This approach was proposed in Di Pitama, George Ririnui and Ani Mikaere *Guardianship, Custody and Access: Māori Perspectives and Experiences* (Te Manatū Ture | Ministry of Justice and Te Tari Kooti | Department for Courts, August 2002) at 92. Research undertaken in the context of genetic testing may provide relevant models for the research we recommend here: Bevan Tipene-Matua and Mark Henaghan "Māori Perspectives on Pre-Birth Genetic Testing with Particular Focus on PGD" in Human Genome Research Project *Choosing Genes for Future Children: Regulating Preimplantation Genetic Diagnosis* (Te Whare Wānanga o Ōtākou | University of Otago, Dunedin, 2006) 69; Bevan Tipene-Matua and Benita Wakefield "Establishing a Māori, Ethical Framework for Genetic Research with Māori" in Human Genome Research Project *Genes, Society and The Future: Volume 1* (Te Whare Wānanga o Ōtākou | University of Otago, Dunedin, 2007) 379; and Rosemary Du Plessis and others *The Social, Cultural, Ethical and Spiritual Implications of Genetic Testing: Preliminary Findings* (Constructive Conversations | Kōrero Whakaaetanga, Te Whare Wānanga o Waitaha | University of Canterbury, December 2004). See also the tikanga Māori framework proposed for new issues in Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016), ch 21.

¹⁷⁷ It may be appropriate for the research to be conducted as part of broader research into Māori perspectives and tikanga relating to assisted reproductive technology given that existing research in this area was undertaken more than a decade ago: Paul Reynolds and Cheryl Smith (eds) *The Gift of Children: Māori and Infertility* (Huia Publishers, Wellington, 2012) at xiii. See in particular the discussion of the potentially broad implications of assisted reproductive technology for Māori in Carl Mika "A Review of the Law Relating to Assisted Reproductive Technology in New Zealand, and Its Implications for Māori: Application to Other Areas of Law" in Paul Reynolds and Cheryl Smith (eds) *The Gift of Children: Māori and Infertility* (Huia Publishers, Wellington, 2012) 101.

¹⁷⁸ Further research was supported by 74 submissions, comprising 63 personal submissions and 11 submissions from organisations (Australian and New Zealand Infertility Counsellors Association, Ethics Committee on Assisted Reproductive Technology, Fertility New Zealand, Fertility Plus, New Zealand Council of Trade Unions, New Zealand Nurses Organisation, Ngā Rangahautira, Office of the Children's Commissioner, Oranga Tamariki | Ministry for Children, Repromed and Te Kāhui Ture o Aotearoa | New Zealand Law Society).

reinforce the whakapapa connection between the child and Papatūānuku.¹⁷⁹ Mead has already observed that the tikanga of the whenua and the pito is “being revived and adapted to modern conditions and circumstances”.¹⁸⁰ One Māori academic we engaged with in this review suggested that those involved in a surrogacy may consider replanting a plant from a donor’s iwi in the rohe of the receiving parent so that a balance of mauri may prevail.

- 2.101 In seeking to better understand tikanga as it relates to surrogacy, engagement with mātauranga Māori and tikanga Māori is necessary, and it should be Māori who lead the recommended research.¹⁸¹ Consultation with whānau, hapū and iwi as well as with Māori health providers will be required. A common theme in consultation was that law reform specific to Māori requires consultation with Māori and that anything “for Māori” should be “by Māori”.
- 2.102 Such research will give effect to the HART Act principle that “the needs, values, and beliefs of Māori should be considered and treated with respect”¹⁸² and would facilitate compliance with Ngā Paerewa Health and Disability Services Standard NZS 8134:2021.¹⁸³ This sets out specific criteria for fertility clinics that, if met, generates an outcome people utilising the service should expect to experience.¹⁸⁴ One outcome is that Māori should be able to expect that fertility clinics “embrace, support and encourage a Māori worldview of health”,¹⁸⁵ and one criteria to generate this outcome is ensuring services are operating in ways that are culturally safe.¹⁸⁶
- 2.103 The Advisory Committee on Assisted Reproductive Technology, as the committee established to issue guidelines to ECART on “any matter relating to any kind of assisted reproductive procedure”,¹⁸⁷ may be best placed to work with Māori in relation to this research. The Health Research Council and the Māori Health Authority, contemplated by Pae Ora (Healthy Futures) Bill 2021 (82-1), could also play a role.¹⁸⁸ The completed research should be readily accessible to the public.

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

¹⁸⁰ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 321.

¹⁸¹ Mead explained, in Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 8:

All tikanga Māori are firmly embedded in mātauranga Māori, which might be seen as Māori philosophy as well as Māori knowledge. While mātauranga Māori might be carried in the minds, tikanga Māori puts that knowledge into practice and adds the aspects of correctness and ritual support.

¹⁸² Human Assisted Reproductive Technology Act 2004, s 4(f).

¹⁸³ Pursuant to the Health and Disability Services (Safety) Standards Notice 2021.

¹⁸⁴ Ngā Paerewa Health and Disability Services Standard NZS 8134:2021 at [0.5].

¹⁸⁵ Ngā Paerewa Health and Disability Services Standard NZS 8134:2021 at [1.1].

¹⁸⁶ Ngā Paerewa Health and Disability Services Standard NZS 8134:2021 at [1.1.2].

¹⁸⁷ Human Assisted Reproductive Technology Act 2004, s 35(1)(a). We discuss the roles of the Advisory Committee on Assisted Reproductive Technology and the Ethics Committee on Assisted Reproductive Technology in Chapter 4 of this Report.

¹⁸⁸ The Health Research Council is the Government’s principal funder of health research. It funded the 3-year study of fertility and infertility from a Māori perspective, the results of which are published and discussed in Paul Reynolds and Cheryl Smith (eds) *The Gift of Children: Māori and Infertility* (Huia Publishers, Wellington, 2012). At the time of writing,

- 2.104 The remaining recommendations in this Report draw on our broad understanding of relevant tikanga Māori, especially whakapapa and whanaungatanga. We also make several recommendations to support Māori to be able to act in accordance with tikanga when entering a surrogacy arrangement. In Chapter 5, we recommend further guidance or advice be provided to ensure counselling is culturally appropriate from an ao Māori perspective, and in Chapter 10, we recommend the Government produces comprehensive and clear information on surrogacy law and practice that recognises ao Māori. The research we recommend be undertaken will ensure that these steps are able to be implemented in a meaningful way.
-

Pae Ora (Healthy Futures) Bill 2021 (85-1) was before the Pae Ora Legislation Committee. Clause 19 of the Bill contemplates functions for the Māori Health Authority that would enable it to be involved in facilitating the research recommended in this Report.

CHAPTER 3

Developing good surrogacy law

INTRODUCTION

- 3.1 In this chapter, we consider the rights and interests that arise from tikanga Māori, te Tiriti o Waitangi | Treaty of Waitangi (the Treaty)¹ and human rights law and develop a set of guiding principles for surrogacy law reform.
- 3.2 Our guiding principles for surrogacy law reform underpin the recommendations we make in this Report. We think that applying these principles throughout the law reform process will result in good surrogacy law, namely, law that meets the needs and reasonable expectations of New Zealanders and protects and promotes the rights and interests of people involved in surrogacy arrangements.
- 3.3 It is important to note, however, that the rights and interests of those involved in surrogacy, including the surrogate-born child, the surrogate, and the intended parents, will not always align.² Our task throughout this review has been to carefully balance competing rights and interests where they arise. For reasons we explain below, however, we consider it necessary to give paramountcy to the best interests of the child.

TIKANGA MĀORI

- 3.4 Tikanga Māori is constitutionally significant to the development of the law in four mutually reinforcing respects:³

¹ When discussing te Tiriti o Waitangi | Treaty of Waitangi in this Report, we use “the Treaty” as a generic term that is intended to capture both the Māori text (te Tiriti o Waitangi or “te Tiriti”) and the English text (the Treaty of Waitangi). However, in this chapter, we conclude that te Tiriti, the Māori text, should be regarded as the primary source of the commitments made when Māori and the Crown entered into the Treaty in 1840 and the appropriate foundation for understanding the rights and obligations of Māori and the Crown in 21st century Aotearoa New Zealand. For this reason, we often refer to te Tiriti rather than the Treaty in this Report.

² 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.

³ Te Aka Matua o te Ture | Law Commission is currently undertaking a study of tikanga Māori as a system of ethics and law.

- (a) First, as an independent source of rights and obligations in te ao Māori and the first law of Aotearoa New Zealand.⁴
 - (b) Second, in terms of Treaty rights and obligations that pertain to tikanga.
 - (c) Third, where tikanga values comprise a source of the New Zealand common law⁵ or have been integrated into state law by statutory reference.⁶
 - (d) Fourth, to give effect to Aotearoa New Zealand's international obligations in relation to Māori as indigenous people, including under 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 (UNDRIP).⁷
- 3.5 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”.⁸
- 3.6 We discuss tikanga in the surrogacy context in Chapter 2. There, we observe that we are not aware of deliberative discussions among Māori on how tikanga is engaged in the context of surrogacy in its contemporary form. We recommend that the Government should commission research led by Māori to provide a better understanding of tikanga Māori and surrogacy and Māori perspectives on surrogacy in practice.

⁴ Ani Mikaere “The Treaty of Waitangi and Recognition of Tikanga Māori” in Michael Belgrave, Merata Kawharu and David V Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Auckland, 2005) 330 at 331 and 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. See also *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, particularly the reasons given by William Young and Ellen France JJ at [166]–[169], Glazebrook J at [237], Williams J at [297] and Winkelmann CJ at [332].

⁵ As recognised by te Kōti Mana Nui | Supreme Court in *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94]–[95]; and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [9] and [169]. 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 Aotea Trust Board (No 2)* [2021] NZHC 291 at [43]–[47] and [58].

⁶ Statutes 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. See also Christian N Whata “Evolution of legal issues facing Maori” (paper presented to Maori Legal Issues Conference, Legal Research Foundation, Auckland, 29 November 2013).

⁷ Aotearoa New Zealand affirmed 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) (UNDRIP) in 2010. UNDRIP recognises the importance of protecting the collective rights of indigenous peoples and addresses the rights to self-determination, preservation of culture and institutions, participation in decision-making and consultation, and rights to lands and resources. As a declaration rather than a convention, UNDRIP does not have legally binding force attached to it in international law. However, UNDRIP is widely viewed as not creating new rights but rather elaborating on internationally recognised human rights as they apply to indigenous peoples and individuals, thus in this way having a binding effect: see 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 34–35 and 38–44; Te Rōpū Whakamana | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity — Te Taumata Tuatahi* (Wai 262, 2011) at 42 and 233–234; and Claire Charters “The UN Declaration on the Rights of Indigenous Peoples in New Zealand Courts: A Case for Cautious Optimism” in *UNDRIP Implementation: Comparative Approaches, Indigenous Voices from CANZUS — Special Report* (Centre for International Governance Innovation, 2020) 43 at 48–50.

⁸ Bishop Manuhua 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.

- 3.7 The tikanga principles we discuss in Chapter 2 nonetheless provide context for the recommendations in this Report, and we refer to tikanga throughout this Report where it informs our approach.

TE TIRITI O WAITANGI | TREATY OF WAITANGI⁹

- 3.8 The Treaty is a foundation of government in Aotearoa New Zealand.¹⁰ As recorded in Cabinet guidance:¹¹

The Treaty creates a basis for civil government extending over all New Zealanders, on the basis of protections and acknowledgements of Maori rights and interests within that shared citizenry.

- 3.9 The Treaty was signed in 1840 by representatives of the British Crown and rangatira representing many, but not all, hapū.¹² There is a Māori text and an English text. There are differences between the two texts, and the meaning and significance of each text, the relationship between them and whether they can or should be reconciled through interpretation and the elaboration of Treaty principles are the subject of significant debate, scholarship and judicial consideration.¹³
- 3.10 In the Māori text, article 1 provides that Māori rangatira grant the Crown kāwanatanga, the right to govern (ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu — te Kawanatanga katoa o o ratou wenua). Article 2 provides that the Crown will protect the exercise of tino rangatiratanga over lands, villages and all things valued and treasured (ko te Kuini o Ingarani ka wakarite ka wakaee ki nga Rangatira ki nga hapu — ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa). Tino rangatiratanga has been described as the exercise of the chieftainship of rangatira, which is unqualified except by applicable tikanga.¹⁴

⁹ The discussion in this section is based on the discussion of te Tiriti o Waitangi | Treaty of Waitangi 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 R145, 2021) at [2.54]–[2.67] and [2.122]–[2.124].

¹⁰ 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* 1 at 1.

¹¹ Cabinet Office Circular “Te Tiriti o Waitangi/Treaty of Waitangi Guidance” (22 October 2019) CO (19) 5 at [7].

¹² 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 14.

¹³ See for example Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (Victoria University Press, Wellington, 2016); 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; Ani Mikaere *Colonising Myths: Māori Realities — He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011); and Ned Fletcher “A Praiseworthy Device for Amusing and Pacifying Savages? What the Framers Meant by the English Text of the Treaty of Waitangi” (PhD Dissertation, Waipapa Taumata Rau | University of Auckland, 2014). See also the Waitangi Tribunal reports referred to in the following discussion, in particular, the 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 chs 8 and 10.

¹⁴ IH Kawharu “Translation of Maori text” in IH Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 319 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.

- 3.11 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.¹⁵
- 3.12 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.¹⁶ Article 3 has been understood as a guarantee of equity between Māori and other New Zealanders.¹⁷
- 3.13 Five years before the Treaty was signed, in 1835, a number of northern rangatira signed He Whakaputanga o te Rangatiratanga o Nu Tireni | the Declaration of Independence of the United Tribes of New Zealand (He Whakaputanga). He Whakaputanga was a declaration of the sovereignty and independence of those rangatira. Te Rōpū Whakamana i te Tiriti | Waitangi Tribunal (the Tribunal) has considered the “striking absence” of any record of explicit discussion about its ongoing relevance or its relationship with the Treaty.¹⁸ The Tribunal has also considered the failure of the British to explain why and how the Treaty nullified He Whakaputanga to be significant.¹⁹
- 3.14 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.²⁰ The Tribunal has concluded that these also form part of the agreement reached.²¹ Not all hapū 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.²²

¹⁵ Article 2 also gave the Crown an exclusive right of pre-emption over any land Māori wanted to “alienate”.

¹⁶ IH Kawharu “Translation of Maori text” in IH Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 319 at 321.

¹⁷ 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. See also 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 [13.5]–[13.7].

¹⁸ 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.

¹⁹ 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.

²⁰ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 114.

²¹ 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.

²² 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.

- 3.15 The overwhelming majority of Māori signatories signed te Tiriti, the Māori text, rather than the English text.²³ It has long been acknowledged that the more than 500 rangatira who signed would have done so 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 te reo Māori, which likely reflected the Māori text. It is noteworthy that, on behalf of the British Crown, Lieutenant-Governor William Hobson signed te Tiriti.²⁴
- 3.16 The Tribunal has mentioned these matters in various reports. For example, the Tribunal has said that precedence, or at least considerable weight, should be given to the Māori text when there is a difference between it and the English text, given the circumstances mentioned above and because this was consistent with the *contra proferentem* rule of the law of treaties that, where there is ambiguity, a provision should be construed against the party that drafted or proposed the relevant provision.²⁵
- 3.17 With respect to articles 1 and 2 of te Tiriti, the Tribunal has observed:²⁶
- 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.
- 3.18 Within te ao Māori, rangatiratanga can embody the authority of a rangatira but also that of the people, which, in the context of this review, includes whānau and hapū. It involves the exercise of mana in accordance with and qualified by tikanga and its associated kawa and, through tikanga, the managing of a dynamic interface between people, their environment and the non-material world.²⁷ It is the substance of this rangatiratanga that

²³ 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.

²⁴ 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.

²⁵ See for example Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims* (Wai 215, 2010) at 148; Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Report of The Waitangi Tribunal on The Orakei Claim* (Wai 9, 1987) at 180; and Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Ngai Tahu Report 1991* (Wai 27, 1991) at 223. See also FM Brookfield *Waitangi and Indigenous Rights: Revolution, Law, and Legitimation* (Auckland University Press, Auckland, 1999) at 55 as cited in Judith Pryor “‘The Treaty always speaks’: Reading the Treaty of Waitangi/Te Tiriti O Waitangi” in *Constitutions: Writing Nations, Reading Difference* (Birkbeck Law Press, Abingdon (UK), 2008) 85 at 99; and see also Ruth Ross “Te Tiriti o Waitangi: Texts and Translations” (1972) 6 NZJH 129 at 133. But see 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), where the Tribunal did not rely on the *contra proferentem* doctrine in its interpretation of the Treaty: at 522. For a detailed discussion of the application of the *contra proferentem* rule by the Tribunal see Benjamin Suter “The Contra Proferentem Rule in the Reports of the Waitangi Tribunal” (LLM Research Paper, Te Herenga Waka | Victoria University of Wellington, 2014).

²⁶ 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.

²⁷ New Zealand Māori Council *Kaupapa: Te Wahanga Tuatahi* (February 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.

needs to be upheld and not interfered with through the guarantee of tino rangatiratanga. In effect, te Tiriti envisages the co-existence of different but intersecting systems of political and legal authority.²⁸

- 3.19 Rangatiratanga is exercised within te ao Māori every day 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. Implicit in this is that te Tiriti requires careful thought about what responsible kāwanatanga involves.
- 3.20 Following the publication of the Issues Paper, the Commission published its Report, *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana* | *Review of succession law: rights to a person's property on death* (Succession Report).²⁹ There, we concluded that te Tiriti, the Māori text, should be regarded as the primary source of the commitments made when Māori and the Crown entered into the Treaty in 1840 and the appropriate foundation for understanding the rights and obligations of Māori and the Crown in 21st century Aotearoa New Zealand.³⁰
- 3.21 We also concluded that this 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.³¹ Instead, it focuses on the relationship between tino rangatiratanga and kāwanatanga and allows us to ask how kāwanatanga can be responsibly exercised in specific contexts, including how the exercise of tino rangatiratanga might be facilitated.
- 3.22 While few submitters commented directly on our discussion of tikanga and te Tiriti in the Issues Paper, two personal submitters, who identified as Māori and were opposed to surrogacy in principle, disagreed with our approach. They considered that te Tiriti and He Whakaputanga mean Māori are entitled to manage their own affairs in relation to whānau and tamariki.
- 3.23 However, Ngā Rangahautira agreed with the Commission's approach,³² explaining that:

Family law in general has attempted to assimilate Māori through the denial of tikanga Māori. This can be evidenced by the exclusion of whāngai under the Adoption Act 1955, the

²⁸ 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 see Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (Victoria University Press, Wellington, 2016) at 42.

²⁹ 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 R145, 2021).

³⁰ 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 R145, 2021) at [2.54]–[2.67] and [2.122]–[2.123]. We acknowledged the extensive discussion and development of the principles of the Treaty in matters dealt with by the Tribunal and the courts, including in circumstances where statutes require reference to the principles. We said that this has led to some insightful and sophisticated consideration of important questions, and we appreciate that statutory references to the Treaty mean that this is likely to continue. We accepted that, on some matters, Treaty principles may promote the exploration of what responsible kāwanatanga looks like in specific circumstances. In *Te Aka Matua o Te Ture | Law Commission Review of Surrogacy* | *Te Kōpū Whāngai: He Arotake* (NZLC IP47, 2021) at [3.75]–[3.81], we said that this review engages the principles of partnership, active protection, equity and options (Māori having choices or options available to them).

³¹ Article 3 in both the Māori and English texts conveys an undertaking of similar effect.

³² Ngā Rangahautira said in their submission on the Issues Paper that, when making submissions on law reform, it “does not seek to usurp the authorities and responsibilities of whānau, hapū and iwi”.

exclusion of ōhaki as a valid expression of testamentary wishes, and the exclusion of Māori customary marriage as a recognised relationship within succession.

It is important that any new law for surrogacy does not go down the same path of assimilation and denial of tikanga Māori. Facilitating tikanga Māori in this area through responsible kāwanatanga, and the promotion of Māori rangatiratanga, is therefore of the utmost importance within this review.

- 3.24 This approach contemplates the exercise of tino rangatiratanga by Māori on a daily basis together with the exercise of kāwanatanga by the Crown.

HUMAN RIGHTS AND SURROGACY

- 3.25 Human rights underpin Aotearoa New Zealand’s democratic society, and good law should align with these rights.³³ Surrogacy engages fundamental human rights for three key groups — surrogate-born children, women who act as surrogates and intended parents. Below, we explore key human rights with reference to international instruments, domestic law and best-practice guidance, research and commentary.³⁴
- 3.26 While international human rights instruments are often regarded as having an individualistic focus, UNDRIP recognises the right of indigenous peoples to full enjoyment, as a collective or as individuals, of human rights and fundamental freedoms.³⁵ A clear mechanism for balancing individual and collective interests is still developing.³⁶ However, Dr Paula King, Donna Cormack and Mark Kōpua have observed that international human rights instruments, such as UNDRIP and the United Nations Convention on the Rights of the Child (UNCROC), can further develop and support tāngata whenua rights grounded in tikanga Māori.³⁷

Human rights of surrogate-born children

- 3.27 Surrogate-born children have a number of rights that need to be considered. These rights are affirmed in UNCROC.³⁸
- 3.28 Over the past decade, significant international attention has been given to the question of surrogacy from a child’s rights perspective. In 2021, the International Social Service

³³ Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021), ch 4.

³⁴ See for example 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); 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; 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 [23]–[40]; and Paula Gerber and Katie O’Byrne (eds) *Surrogacy, Law and Human Rights* (Ashgate, United Kingdom, 2015).

³⁵ 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), art 1.

³⁶ Susan Glazebrook “The Declaration on the Rights of Indigenous Peoples and the Courts” (2019) 25 Auckland U L Rev 11 at 19.

³⁷ Paula King, Donna Cormack and Mark Kōpua “Oranga Mokopuna: A tāngata whenua rights-based approach to health and wellbeing” (2018) 7 MAI Journal 186 at 186 and 194. But see Ani Mikaere “Seeing Human Rights Through Māori Eyes” (2007) 10 Yearbook of New Zealand Jurisprudence 53.

³⁸ United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).

published a set of principles to guide the regulation of surrogacy within a children's rights framework (Verona Principles).³⁹ This followed two thematic reports on surrogacy by the UN Special Rapporteur.⁴⁰ In 2022, UNICEF and Child Identity Protection also published recommendations for the regulation of surrogacy to protect the rights of the child.⁴¹

3.29 While research on the life-long impacts of surrogacy on surrogate-born people is still emerging (see Chapter 2), in 2019, a group of surrogate-born and donor-conceived people presented on their experiences at the United Nations Conference on the 30th anniversary of UNCROC and prepared the International Principles of Donor Conception and Surrogacy.⁴² These principles are informed by the drafters' experience and outline what regulation they see as necessary to uphold children's rights and interests under UNCROC.⁴³

3.30 We refer to this work below and throughout this Report.

Best interests of the child

3.31 Article 3(1) of UNCROC states that:⁴⁴

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.

3.32 This is widely interpreted as requiring the best interests of the child to be the paramount consideration in the regulation of surrogacy. 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 concerning surrogate-born children.⁴⁵ 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

³⁹ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021). The development of the Verona Principles is discussed in Chapter 1 of this Report. They were designed to respond to the urgent need for guidance for ensuring respect for the human rights of children born through surrogacy in the context of diverse state approaches to the practice of surrogacy. They do not address the question of whether surrogacy in any form should be permitted or prohibited, and as such “the Principles should not be used as a basis for condoning or encouraging surrogacy”, at 8.

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); 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/HRC/37/60 (15 January 2018).

⁴¹ UNICEF and Child Identity Protection *Key Considerations: Children's Rights & Surrogacy* (Briefing Note, February 2022).

⁴² Sonia Allan 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); and *International Principles for Donor Conception and Surrogacy* (November 2019).

⁴³ *International Principles for Donor Conception and Surrogacy* (November 2019) at 1.

⁴⁴ United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) (UNCROC), art 3(1). Claire Breen has suggested that UNCROC together with 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 provide a comprehensive package of rights protection for Māori children in Aotearoa New Zealand: Claire Breen “The Declaration and the Implementation of the Rights of the Indigenous Child in Aotearoa New Zealand” in Andrew Erueti (ed) *International Indigenous Rights in Aotearoa New Zealand* (Victoria University Press, Wellington, 2017) 86 at 89. Breen observed at 89–90 that:

[T]he individualism inherent in article 3 can be tempered by the fact that what is in the best interests of the individual indigenous child may be a decision that can only be made with reference to collective cultural rights as guaranteed in article 30 of [UNCROC].

⁴⁵ 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)].

responsibility related to a child born through surrogacy”.⁴⁶ UNICEF and Child Identity Protection also recommend that the best interests of the child “must be the paramount consideration in decision-making regarding children born through surrogacy arrangements”.⁴⁷

- 3.33 Giving paramountcy to the child’s best interests in the surrogacy context means not only providing for their immediate safety and welfare but also considering the long-term implications of surrogacy for the child.⁴⁸ It also requires providing for the child’s other rights recognised under UNCROC.⁴⁹
- 3.34 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

- 3.35 Children have several 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.⁵⁰
- 3.36 An important element of identity rights is the right of access to a child’s origins.⁵¹ In the context of surrogacy, the right of access to a child’s origins is widely regarded as

⁴⁶ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [6.1] and n 27. See also 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), art 16(f).

⁴⁷ UNICEF and Child Identity Protection *Key Considerations: Children’s Rights & Surrogacy* (Briefing Note, February 2022) at 3. See also *International Principles for Donor Conception and Surrogacy* (November 2019), art 1.

⁴⁸ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [6.1].

⁴⁹ 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].

⁵⁰ 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].

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/74/162 (15 July 2019) at [34].

extending to information about a child's genetic and gestational origins.⁵² The Verona Principles explain that:⁵³

Every child should be able to enjoy and exercise their right to preserve their identity (nationality, name and family relations) with appropriate assistance and protection. 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.

- 3.37 The importance of preserving information about a surrogate-born child's origins is explained by UNICEF and Child Identity Protection:⁵⁴

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

- 3.38 The importance of the right of identity and access to origins is also evident from the past practices 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.⁵⁵ As te Kōti Pira | 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".⁵⁶ This can be particularly challenging for Māori adoptees, who may grow up not having an awareness of their whakapapa and struggle to connect with their Māori identity.⁵⁷

⁵² 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]; Andrea Mulligan "Protecting Identity in Collaborative Assisted Reproduction: The Right to Know One's Gestational Surrogate" (2020) 34 *International Journal of Law, Policy and The Family* 20; 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; *International Principles for Donor Conception and Surrogacy* (November 2019) at arts 3 and 8–11; 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] and [10.78]; 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 Dissertation, Leiden University, 2018) at ch 8.

⁵³ 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).

⁵⁴ UNICEF and Child Identity Protection *Key Considerations: Children's Rights & Surrogacy* (Briefing Note, February 2022) at 2.

⁵⁵ 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].

⁵⁶ *Hemmes v Young* [2004] NZCA 289, [2005] 2 NZLR 755 at [117]. See also *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [242]–[244].

⁵⁷ See for example discussion of Dr Erica Newman's research on the impact of the Adoption Act 1955 on the identity of descendants of Māori adoptees yet to connect to their taha Māori in Bruce Munro "No mountain, no river" *Otago Daily Times* (New Zealand, 7 February 2022) and Alice Webb-Liddall "Finding whakapapa: The generational trauma of closed Māori adoptions" *The Spinoff* (New Zealand, 18 March 2021). See also Kim McBreen "Cast adrift: My story of adoption" *E-Tangata* (New Zealand, 6 February 2022); Annabel Ahuriri-Driscoll "Ka Tū te Whare, Ka Ora: The Constructed and

- 3.39 In 2005, the Commission observed similar concerns arising in relation to the use of anonymous donors:⁵⁸
- 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.
- 3.40 Studies consistently report that most donor-conceived people have an interest in securing information about their genetic and biographical heritage.⁵⁹ Research involving donor-conceived people using DNA databases to connect with donors has illustrated that non-disclosure can have detrimental impacts on donor-conceived people when the truth is revealed, sometimes in accidental or unplanned ways.⁶⁰ A recent study exploring the experience and wellbeing of donor-conceived people born in Aotearoa New Zealand before the introduction of the Human Assisted Reproductive Technology Act 2004 (HART Act) has found that there is a need to prioritise the long-term wellbeing of those who are donor-conceived.⁶¹ Participants in that study expressed the belief that their needs and wishes had often come second to those of parents, donors and the fertility industry.⁶² They expressed the need for openness to prioritise the wellbeing of donor-conceived people.⁶³
- 3.41 This research suggests that, in the surrogacy context, a child's right of access to origins as well as their long-term wellbeing may be undermined if they are not given information about their genetic and gestational origins appropriate to their age and understanding.
- 3.42 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.⁶⁴ Anonymous gamete donations through fertility clinics are no longer

Constructive Identities of the Māori Adoptee" (PhD Dissertation, Te Whare Wānanga o Waitaha | University of Canterbury, 2020); Cherryl Smith "Tamaiti Whāngai and Fertility" in Paul Reynolds and Cherryl Smith (eds) *The Gift of Children: Māori and Infertility* (Huia Publishers, Wellington, 2012) 143 at 170–173; and Maria Haenga Collins "Belonging and Whakapapa: The Closed Stranger Adoption of Māori Children into Pākehā Families" (PhD Dissertation, Te Kūnenga Ki Pūrehuroa | Massey University, 2011).

⁵⁸ 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 Allan 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).

⁵⁹ Eric Blyth and others "Donor-conceived people's views and experiences of their genetic origins: A critical analysis of the research evidence" (2012) 19 *Journal of Law and Medicine* 769.

⁶⁰ Lucy Frith and others "Secrets and disclosure in donor conception" (2017) 40 *Sociology of Health & Fitness* 188; Lucy Frith and others "Searching for 'relations' using a DNA linking register by adults conceived following sperm donation" (2018) 13 *BioSocieties* 170 as cited in Marilyn Crawshaw and Ken Daniels "Revisiting the use of 'counselling' as a means of preparing prospective parents to meet the emerging psychosocial needs of families that have used gamete donation" (2019) 8 *Families, Relationships and Societies* 395 at 396.

⁶¹ Samantha Best "The experience and wellbeing of donor-conceived adults" (MHSc dissertation, Te Wānanga Aronui o Tāmaki Makau Rau | Auckland University of Technology, 2021) at 77–79.

⁶² Samantha Best "The experience and wellbeing of donor-conceived adults" (MHSc dissertation, Te Wānanga Aronui o Tāmaki Makau Rau | Auckland University of Technology, 2021) at 79.

⁶³ Samantha Best "The experience and wellbeing of donor-conceived adults" (MHSc dissertation, Te Wānanga Aronui o Tāmaki Makau Rau | Auckland University of Technology, 2021) at 82.

⁶⁴ 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).

permitted in Aotearoa New Zealand,⁶⁵ and Ngā Paerewa Health and Disability Services Standard NZS 8134:2021 (Ngā Paerewa) requires fertility service providers to encourage and support people to inform surrogate-born children of their genetic and gestational origins.⁶⁶

- 3.43 New Zealanders' changing attitudes are likely due in part to the influence of tikanga Māori and the significance of whakapapa in New Zealand society, particularly for Māori.⁶⁷ In one retelling, the quest of Māui to find and seek acceptance from his parents and siblings after being raised by Tangaroa⁶⁸ illustrates how important knowledge of whakapapa can be to a Māori person. It shows how identity can be impacted as a result of being born in unique circumstances. In the whāngai context, it has been suggested that the open transmission of whakapapa knowledge is key to making complex, wider notions of parenting work, given the diversity of Māori whānau, and that there needs to be an openness about whānau, hapū and iwi origins.⁶⁹ As we said in the Issues Paper, this means that ensuring the identity of a surrogate-born child is nurtured and protected is significant for Māori.
- 3.44 However, not all cultures assign the same importance to children's identity rights. In many countries, the use of anonymously donated gametes remains the cultural norm. Some people may also face social, cultural and religious stigma and disapproval for using surrogacy to build their family. This could result in a reluctance to share information with a surrogate-born child about their genetic and gestational origins.⁷⁰ Others may fear that disclosure would endanger their relationship with their child or impact on their wellbeing.⁷¹
- 3.45 The ongoing use of anonymous donors in other countries also has implications for New Zealanders who pursue international surrogacy. As we note in Chapter 2, just under half of international surrogacy arrangements entered into by New Zealanders in the past six years (48 out of 98) 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 has noted that:⁷²

⁶⁵ Human Assisted Reproductive Technology Act 2004, s 47 requires providers to obtain identifying information about the donor.

⁶⁶ Ngā Paerewa Health and Disability Services Standard NZS 8134:2021 at [1.10.1].

⁶⁷ 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.

⁶⁸ Kirsten Aroha Linda Gabel "Poipoia te tamaiti ki te ūkaipō" (PhD Dissertation, Te Whare Wānanga o Waikato | University of Waikato, 2013) at 63–64.

⁶⁹ Cherryl Smith "Tamaiti Whāngai and Fertility" in Paul Reynolds and Cherryl Smith (eds) *The Gift of Children: Māori and Infertility* (Huia Publishers, Wellington, 2012) 143 at 201. See also Leonie Pihama "Experiences of Whānau Māori within Fertility Clinics" in Paul Reynolds and Cherryl Smith (eds) *The Gift of Children: Māori and Infertility* (Huia Publishers, Wellington, 2012) 203 at 205.

⁷⁰ See for example in the context of donor conception: Marilyn Crawshaw and Ken Daniels "Revisiting the use of 'counselling' as a means of preparing prospective parents to meet the emerging psychosocial needs of families that have used gamete donation" (2019) 8 *Families, Relationships and Societies* 395 at 399.

⁷¹ This has been observed in the context of donor-conceived families: Elia Wyverkens, Hanna Van Parys and Ann Buysse "Experiences of Family Relationships Among Donor-Conceived Families: A Meta-Ethnography" (2014) *Qualitative Health Research* 1 at 13.

⁷² 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: 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].

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.

3.46 Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) in its submission on the Issues Paper said that the right to identity is a central issue that has arisen in many surrogacy cases. It acknowledged that this concept is likely to present challenges in finding a balance between the ability to access donors and ensuring surrogate-born children are afforded the greatest opportunity to have information on their identity. Nevertheless, NZLS considered this right reflects the emphasis in Aotearoa New Zealand on whakapapa as a primary cultural principle for Māori.

3.47 NZLS also noted emerging concerns for children when intended parents participate in multiple surrogacy arrangements:

Currently, a number of parents engaging in international surrogacy arrangements engage two surrogates at the same time (or in quick succession). For some this relates to the savings arising from engaging a clinic only once. For others, it affords the opportunity to create their entire family at one time. However, this almost invariably results in siblings being born within weeks of each other, raising questions as to their origins during their young life and at school. In our view, this is a matter which can be minimised through greater education and awareness at a pre-conception stage for intended parents.

3.48 In Chapter 5, we explore how a surrogate-born child's rights to identity should be protected and promoted as part of the approval process for domestic surrogacy arrangements. In Chapter 7, we consider what information about a surrogate-born person's genetic and gestational origins and whakapapa should be preserved by the state on a surrogacy birth register for the surrogate-born person to access in future. This would provide for situations where identity information has not otherwise been shared with the child. In relation to whakapapa information, we recommend recording any hapū and iwi affiliations of the surrogate, to the extent this information is known. This, along with the surrogate's name, date of birth and place of birth, will ensure, in the case of traditional surrogacy, that a surrogate-born person is able to learn of their whakapapa. In the case of a gestational surrogacy, this information will provide the surrogate-born person with important information about those people involved in their creation. We do not propose further information about a surrogate's whakapapa should be recorded by the state. We suggest such information should be shared with the child in accordance with the whakawhanaungatanga responsibilities of the surrogate and her whānau, hapū or iwi (see Chapter 2).

3.49 Our recommendations in relation to the surrogacy birth register apply to all surrogacy arrangements, including gestational and traditional surrogacy arrangements as well as international surrogacy arrangements where a parentage order is issued (see Chapter 9).

Rights to nationality

3.50 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.⁷³

⁷³ 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.

- 3.51 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.⁷⁴ As we explore in Chapter 9, if a child is born 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.
- 3.52 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

- 3.53 UNCROC places strong emphasis on maintaining family life and preventing separation from parents unless it is in the best interests of the child.⁷⁵ 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.⁷⁶ It considers it is "vital to maintain a very high threshold for the justification of a separation in accordance with international norms and standards".⁷⁷
- 3.54 Even in domestic surrogacy arrangements, the relationship between the surrogate-born child and the intended parents is precarious under current law, 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 6.

Rights to health

- 3.55 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 healthcare services.⁷⁸
- 3.56 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 or lacks New Zealand citizenship may encounter barriers when attempting to

⁷⁴ 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.

⁷⁵ 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.

⁷⁶ 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).

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/74/162 (15 July 2019) at [43].

⁷⁸ 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.

access healthcare,⁷⁹ 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

- 3.57 Children are entitled to the rights set out in UNCROC without discrimination on specified grounds, including “birth or other status”.⁸⁰ The UN Special Rapporteur explains that:⁸¹

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

- 3.58 Aotearoa New Zealand also has international human rights obligations to take appropriate measures to protect children from abuse and exploitation.⁸²
- 3.59 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.⁸³
- 3.60 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 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

⁷⁹ Te Kāhui Ture o Aotearoa | New Zealand Law Society observed in its submission that the experience of lawyers working with intended parents is that limitations on the right to health have arisen based on the ability to demonstrate a genetic link to the parent who has New Zealand citizenship or residency.

⁸⁰ 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. See also *Universal Declaration of Human Rights* GA Res 217A (1948), art 25(2).

⁸¹ 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].

⁸² 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).

⁸³ 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.

transferring a child to the intended parents after birth.⁸⁴ UNICEF and Child Identity Protection state that:⁸⁵

Sale and trafficking of children born through surrogacy is occurring, especially in [International Surrogacy Agreements], due to a lack of protective safeguards being implemented by States. A legally binding contractual relationship between the surrogate mother and the intending parent(s) established pre-birth, in which the transfer of the child would be made conditional upon payment, would constitute the sale of a child ... The identity and family relations of a child cannot be for sale.

- 3.61 UNICEF and Child Identity Protection as well as the UN Special Rapporteur and the Verona Principles highlight the need for appropriate safeguards and oversight mechanisms in order to guard against the risk of the sale and trafficking of children.⁸⁶

Human rights of surrogates

- 3.62 The surrogate's human rights to personal autonomy, including bodily integrity and reproductive freedom,⁸⁷ are central considerations in the regulation of surrogacy.⁸⁸ For the surrogate to enjoy these rights, she must be able to make free and informed decisions

⁸⁴ 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].

⁸⁵ UNICEF and Child Identity Protection *Key Considerations: Children's Rights & Surrogacy* (Briefing Note, February 2022) at 2.

⁸⁶ 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].

⁸⁷ 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). The right to refuse to undergo any medical treatment, which is an aspect of the general right to health, is enshrined in the New Zealand Bill of Rights Act 1990, s 11.

⁸⁸ 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 211–212. Powell and Baird also explore the surrogate's rights to privacy, work and freedom from discrimination in 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).

in relation to the surrogacy arrangement, and her pregnancy and birth.⁸⁹ There must also be sufficient regulatory protections in place to protect her from exploitation.⁹⁰

- 3.63 Women who act as surrogates are often considered to be at risk of exploitation, especially in international commercial surrogacy arrangements.⁹¹ 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.
- 3.64 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”.⁹² 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 countries with more stable legal systems, 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.⁹³
- 3.65 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.⁹⁴ Family Planning New Zealand, in its submission on the Issues Paper, explained that some people are far more likely to

⁸⁹ 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 27–28; 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 [8.96]–[8.100].

⁹⁰ See UNICEF and Child Identity Protection *Key Considerations: Children’s Rights & Surrogacy* (Briefing Note, February 2022) at 1; 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) at [25]–[26].

⁹¹ 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 211–212. 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 [27]. The risk of exploitation of surrogates was also raised by several submitters in consultation, including Family Planning New Zealand, New Zealand College of Midwives and the Royal Australian and New Zealand College of Obstetricians and Gynaecologists.

⁹² 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).

⁹³ 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.

⁹⁴ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [7.64].

experience discrimination and powerlessness in society, and surrogacy law and regulation must specifically seek to protect those most vulnerable to power imbalances, including women living in poverty, women experiencing violence and women who experience racial and other forms of discrimination. Power imbalances in the context of surrogacy may also mean that surrogates come under external pressure to agree to tests or procedures they would otherwise choose not to do. 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.⁹⁵

- 3.66 There is no consensus on whether the surrogate's human rights require surrogacy to be prohibited or limited to altruistic surrogacy only.⁹⁶ As we note in Chapter 1, commercial surrogacy is often opposed on the basis that it risks the exploitation of women who act as surrogates. However, some argue that commercial surrogacy promotes surrogates' right to autonomy and that prohibiting commercial surrogacy creates conditions for exploitation.⁹⁷ We explore the need for safeguards to protect surrogates' autonomy and protect them from exploitation in Chapter 6 and Chapter 8.

Human rights of intended parents

- 3.67 International human rights instruments recognise that the family is the natural and fundamental group in society.⁹⁸ Intended parents enjoy rights to found a family⁹⁹ and rights to respect for their private and family life.¹⁰⁰ 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”.¹⁰¹

⁹⁵ 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. See also for example Tom Blackwell “Canadian surrogate eliminated baby from triplet pregnancy at urging of overseas couple” *National Post* (online ed, Canada, 9 September 2015).

⁹⁶ As noted at [3.28], n 39 above, ethical considerations as to whether surrogacy in any form should be permitted or prohibited fall outside the scope of the Verona Principles: International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at 8.

⁹⁷ See for example Ronli Sifris “Commercial surrogacy and the human right to autonomy” (2015) 23 JLM 365 at 366; 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. This view was also expressed by some submitters in consultation.

⁹⁸ International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 23(1); 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 *Universal Declaration of Human Rights* GA Res 217A (1948), art 16(3).

⁹⁹ 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).

¹⁰⁰ 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).

¹⁰¹ *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.

- 3.68 Intended parents should be able to enjoy these rights without discrimination on grounds such as sex, gender, marital status or sexual reorientation.¹⁰² Intended parents who experience disability should also be enabled to enjoy their rights to family without discrimination.¹⁰³ These are important considerations given that surrogacy may be the only opportunity for some single men, male couples, trans people and disabled people to have a child that is genetically related to them.
- 3.69 Because children are individual rights holders¹⁰⁴ and given that surrogacy involves decisions by each of those involved in the arrangement,¹⁰⁵ there is no unqualified right to have a child by surrogacy. Rather, intended parents should have the freedom to do so provided the rights of others, in particular the rights of the child and the surrogate, are adequately protected.¹⁰⁶
- 3.70 As we observed in the Issues Paper, intended parents also face the risk of exploitation in surrogacy arrangements. 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:¹⁰⁷
- 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.
- 3.71 Intended parents may be more vulnerable in international commercial surrogacy arrangements, especially if 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 parents¹⁰⁸ and of clinic errors and practices where intended parents arrange for the child to be conceived using their

¹⁰² 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.

¹⁰³ 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.

¹⁰⁴ 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].

¹⁰⁵ 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].

¹⁰⁶ 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].

¹⁰⁷ 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).

¹⁰⁸ 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.

gametes only to discover, after the child's birth, that they have no genetic link to the child.¹⁰⁹

RESULTS OF CONSULTATION

- 3.72 In the Issues Paper, we proposed six guiding principles for surrogacy law reform, based on the rights and interests arising from tikanga, the Treaty and human rights law:
- (a) The best interests of the surrogate-born child should be paramount.
 - (b) Surrogacy law should respect the autonomy of consenting adults in their private lives.
 - (c) Effective regulatory safeguards must be in place.
 - (d) Parties should have early clarity and certainty about their rights and obligations.
 - (e) Intended parents should be supported to enter surrogacy arrangements in Aotearoa New Zealand rather than offshore.
 - (f) Surrogacy law should enable Māori to act in accordance with tikanga and promote responsible kāwanatanga that facilitates tino rangatiratanga.
- 3.73 We asked submitters whether they agreed with these guiding principles and, if not, what changes they would make.
- 3.74 There was strong support for the proposed guiding principles. We received 192 submissions that addressed this question, and of these, 84 per cent either agreed (61 per cent)¹¹⁰ or agreed in part (23 per cent)¹¹¹ with the proposed guiding principles. Of the 15 per cent of submitters who did not agree,¹¹² most were either generally opposed to surrogacy in principle or supported tightening restrictions on surrogacy on ethical and religious grounds. We explore some key comments from these submissions below.

CONCLUSIONS

- 3.75 Having considered the rights and interests engaged in the surrogacy context, and the feedback from consultation, we conclude that the following five principles should underpin surrogacy law reform in Aotearoa New Zealand:

¹⁰⁹ *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 Parentage and the Issues arising from International Surrogacy Arrangements* (Preliminary Document No 3C, March 2014, The Hague) at [189].

¹¹⁰ 118 submissions comprising 103 personal submissions, 12 submissions from organisations (Advisory Committee on Assisted Reproductive Technology, Federation of Women's Health Councils, Fertility Associates, Fertility New Zealand, Fertility Plus, National Council of Women of New Zealand, New Zealand Council of Trade Unions, New Zealand Nurses Organisation, Office of the Health and Disability Commissioner, Oranga Tamariki | Ministry for Children, Repromed and Te Kāhui Ture o Aotearoa | New Zealand Law Society) and 3 academic submissions (Adjunct Professor Ken Daniels, Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly) and Associate Professor Rhonda Shaw).

¹¹¹ 45 submissions comprising 38 personal submissions, 5 submissions from organisations (Ethics Committee on Assisted Reproductive Technology, Family Planning New Zealand, Maternity Services Consumer Council, New Zealand College of Midwives and Office of the Children's Commissioner), comments from the Judges of the Family Court and 1 academic submission (Dr Anne Else).

¹¹² 29 submissions comprising 25 personal submissions and 4 submissions from organisations (Auckland Women's Health Council, Center for Bioethics and Culture Network, Feminist Legal Clinic and International Coalition for Abolition of Surrogate Motherhood).

- Principle 1: Surrogacy law should reflect the Crown's obligations under te Tiriti o Waitangi to exercise kāwanatanga in a responsible manner, including facilitating the exercise of tino rangatiratanga by Māori in the context of surrogacy.
 - Principle 2: The best interests of the surrogate-born child should be paramount.
 - Principle 3: Surrogacy law should support surrogates and intended parents to enter surrogacy arrangements that protect and promote their health, safety, dignity and human rights.
 - Principle 4: Parties in a surrogacy arrangement should have early clarity and certainty about their rights and obligations.
 - Principle 5: New Zealand intended parents should be supported to enter surrogacy arrangements in Aotearoa New Zealand rather than offshore.
- 3.76 These principles largely reflect the proposed guiding principles in the Issues Paper with some modifications to clarify our approach, including in response to some of the consultation feedback. This includes combining the previously separate principles relating to respecting the autonomy of consenting adults in their private lives and ensuring effective regulatory safeguards are in place into Principle 3, discussed below.
- 3.77 These guiding principles for surrogacy law reform underpin our recommendations for reform in this Report. We have not recommended making these statutory principles. Statutory principles can be helpful guides for decision-making under legislation.¹¹³ However, we do not recommend a standalone Surrogacy Act for the reasons we explain in Chapter 6. In that chapter, we instead recommend providing specific guidance for te Kōti Whānau | Family Court when determining a parentage order application. We have developed this guidance having considered the existing statutory principles that underpin decision-making under the HART Act, the Care of Children Act 2004 and the Oranga Tamariki Act 1989.¹¹⁴ In Chapter 7, we recommend amending the principles of the HART Act to better reflect the rights of surrogate-born people, consistent with our guiding principles for surrogacy law reform.

Principle 1: Surrogacy law should reflect the Crown's obligations under te Tiriti o Waitangi to exercise kāwanatanga in a responsible manner, including facilitating the exercise of tino rangatiratanga by Māori in the context of surrogacy

- 3.78 Consistent with the approach we took in our Succession Report, we conclude that surrogacy law should reflect the Crown's obligations under te Tiriti o Waitangi to exercise kāwanatanga in a responsible manner, which includes facilitating the exercise of tino rangatiratanga by Māori in the context of surrogacy.¹¹⁵

¹¹³ Legislation Design Advisory Committee *Supplementary Material: Design purpose provisions and statements of principle* (2019) at 6.

¹¹⁴ Human Assisted Reproductive Technology Act 2004, s 4; Care of Children Act 2004, ss 4–5; Oranga Tamariki Act 1989, ss 4A and 5.

¹¹⁵ 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 R145, 2021), at R4a and [2.122]–[2.124].

- 3.79 In the Succession Report, we concluded that responsible kāwanatanga required us to approach our recommendations for weaving new succession law from three separate starting points:¹¹⁶
- (a) First, state law should facilitate tino rangatiratanga through recognising tikanga Māori where that is necessary, in light of the commitment in te Tiriti, to enable Māori to live according to tikanga.
 - (b) Second, state law should weave new law that reflects tikanga Māori and other values shared by New Zealanders (a “third law”).
 - (c) Third, kāwanatanga should recognise its own limits in particular contexts by not applying state law and allowing tikanga to prevail.
- 3.80 In the surrogacy context, we consider that the Crown’s first step in meeting this principle is reflected by our first recommendation, set out in Chapter 2, that the Government commission research led by Māori to provide a better understanding of tikanga Māori and surrogacy and Māori perspectives on surrogacy in practice. This would provide Māori an opportunity to consider tikanga in the context of surrogacy and to explore Māori attitudes to surrogacy. In Chapter 2, we identify and discuss some core tikanga principles to provide context to our consideration of the practice of surrogacy.
- 3.81 Acknowledging this material and in light of submissions we received on the Issues Paper,¹¹⁷ we have concluded that exercising responsible kāwanatanga and facilitating the exercise of tino rangatiratanga by Māori in the surrogacy context requires the following:
- (a) First, ensuring that state law enables Māori to act in accordance with tikanga should Māori wish to do so. As noted above, this requires an understanding of how te ao Māori might engage with and respond to surrogacy so that matters that may be of particular concern can be identified and addressed. In Chapter 5 and Chapter 6, we address ways to support Māori to act in accordance with tikanga when participating in a surrogacy arrangement. This includes recognising that intended parents may wish to parent as mātua whāngai and ensuring that information and counselling has been culturally appropriate from an ao Māori perspective. Recognising and respecting whāngai arrangements also demonstrates that responsible kāwanatanga should recognise its own limits in particular contexts by not applying state law and allowing tikanga to prevail.
 - (b) Second, weaving new law that reflects tikanga Māori and other values shared by New Zealanders. We think that prioritising the best interests of a surrogate-born child is not only consistent with New Zealand’s human rights commitments but also with tikanga. Given the significance of genetic and gestational origins for all surrogate-born people, we make recommendations in Chapter 7 for identity information to be preserved and recorded by the state. This recognises and builds on the significance of whakapapa for Māori children and their whānau, hapū and iwi, showing the shared significance for all New Zealanders of identity information.

¹¹⁶ 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 R145, 2021), at [2.125]–[2.130].

¹¹⁷ We received 151 submissions that engaged with Māori and surrogacy (Chapter 4 of the Issues Paper). We refer to these submitters’ views on the matters of particular concern to Māori throughout this Report. Submissions that did not engage with Māori and surrogacy, including submissions that answered no questions on this topic, responded “no comment” or consistently selected “no view” to all Māori and surrogacy questions on the consultation website, are not counted in our analysis of submissions on these questions.

- (c) Third, addressing inequities in access to surrogacy. In Chapter 2, we note that evidence suggests Māori uptake of surrogacy is low. Te Tiriti places an obligation on the Crown to ensure that health services are culturally appropriate and kaupapa Māori services are available to Māori in a way that they are not disadvantaged by their choices. We consider ways to address these matters in Chapter 10.
- (d) Fourth, promoting tino rangatiratanga in decision-making by recommending better representation of Māori on the Ethics Committee on Assisted Reproductive Technology (ECART) and the Advisory Committee on Assisted Reproductive Technology (see Chapter 5).

Principle 2: The best interests of the surrogate-born child should be paramount

- 3.82 Because surrogacy arrangements are concerned with the creation of a child, that child's best interests should be paramount in surrogacy law. This accords with UNCROC and with the approach in other child-focused legislation in Aotearoa New Zealand.¹¹⁸ We also suggest that this principle can be considered consistent with tikanga Māori, as we discuss in Chapter 2.¹¹⁹
- 3.83 Principle 2 is consistent with the emerging international consensus, as highlighted above, and with the approach taken in other comparable jurisdictions.¹²⁰ In Australia, for example, state legislation often adopts the principle that the best interests of the surrogate-born child are paramount.¹²¹
- 3.84 As we explained in the Issues Paper, giving the child's best interests paramountcy in the surrogacy context means not only providing for their immediate safety and welfare but also considering the long-term implications of surrogacy for the child.¹²² Some submitters suggested that the child's welfare or wellbeing and other specific UNCROC rights relevant

¹¹⁸ Care of Children Act 2004, s 4; Oranga Tamariki Act 1989, s 4A; and Adoption Act 1955, s 11(b). See also Oranga Tamariki Act, s 5, which makes explicit reference to the child's or young person's rights under the United Nations Convention on the Rights of the Child.

¹¹⁹ This approach is consistent with the view expressed by Te Hunga Rōia Māori o Aotearoa (THRMOA) in its submission on Te Tāhū o te Ture | Ministry of Justice's review of adoption laws: Te Hunga Rōia Māori o Aotearoa *Ngā tāpaetanga a Te Hunga Rōia Māori o Aotearoa | Submissions of Te Hunga Rōia Māori o Aotearoa to Adoption Reform Committee* (6 September 2021). THRMOA submitted, at [5]:

The Government's intention to review Aotearoa's adoption laws is a positive step forward in an area long overdue for reform. In particular, in order to uphold Te Tiriti o Waitangi, any new legislation needs to be 'child-centred'. In this way we better align with tikanga Māori and also Aotearoa's international obligations under the United Nations Convention on the Rights of the Child (UNCROC) and the United Nations Declaration on the Rights of Indigenous People (UNDRIP).

¹²⁰ See for example discussion 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 8–11; 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 119–121; 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]; House of Representatives Standing Committee on Social Policy and Legal Affairs *Surrogacy Matters: Inquiry into the regulator and legislative aspects of international and domestic surrogacy arrangements* (The Parliament of the Commonwealth of Australia, April 2016) at [1.30]; and Manitoba Law Reform Commission *Assisted Reproduction: Legal Parentage and Birth Registration — Issue Paper* (2014) at 23.

¹²¹ The paramountcy principle is variously expressed as applying to the child's "best interests": Surrogacy Act 2019 (SA), s 6(1), Surrogacy Act 2010 (NSW), s 3, and Surrogacy Bill 2022 (50) (NT), cl 5; the child's "wellbeing and best interests": Surrogacy Act 2012 (Tas), s 3(1), and Surrogacy Act 2010 (Qld), s 6(1); and the child's "welfare and interests": Assisted Reproductive Treatment Act 2008 (Vic), s 5(a).

¹²² International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [6.1].

to surrogacy, such as the right to identity, should be given more explicit recognition in the guiding principles. Our approach, however, is that this principle *requires* providing for the child's wellbeing and the other rights recognised under UNCROC and explored above.¹²³ As the United Nations Committee on the Rights of the Child explained in General Comment No. 14 (2013):¹²⁴

The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child. The Committee has already pointed out that "an adult's judgment of a child's best interests cannot override the obligation to respect all the child's rights under the Convention." It recalls that there is no hierarchy of rights in the Convention; all the rights provided for therein are in the "child's best interests" and no right could be compromised by a negative interpretation of the child's best interests.

3.85 In the surrogacy context, the UN Special Rapporteur has explained that:¹²⁵

... in addition to giving full effect to the main parameters outlined in general comment No. 14 (2013), the best interests of the child must be ensured, at a minimum, by providing certainty of identity; of status; and of parenthood.

3.86 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.

Principle 3: Surrogacy law should support surrogates and intended parents to enter surrogacy arrangements that protect and promote their health, safety, dignity and human rights

3.87 Principle 3 reflects our view that the state should have a role in supporting individuals who are contemplating surrogacy arrangements to ensure that they enter arrangements that protect and promote their health, safety, dignity and rights. This principle reflects the language of the HART Act¹²⁶ and acknowledges that surrogacy engages a range of rights and interests that must be carefully considered in the regulation of surrogacy.¹²⁷ While available research suggests that most surrogacy arrangements will be positive

¹²³ See for example Surrogacy Bill 2022 (50) (NT), cl 5. This states that the paramount consideration in respect of the administration and operation of the Act is the best interests of any child born under a surrogacy arrangement. A drafting note to this clause explains that "[t]he best interests of a child include the child's safety and wellbeing and the right to know the child's origins".

¹²⁴ 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]. See also [71]:

When assessing and determining the best interests of a child or children in general, the obligation of the State to ensure the child such protection and care as is necessary for his or her well-being (art. 3, para. 2) should be taken into consideration. ... Children's well-being, in a broad sense includes their basic material, physical, educational, and emotional needs, as well as needs for affection and safety.

¹²⁵ 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]. UNICEF and Child Identity Protection also explain that a best interest determination in any surrogacy arrangement should consider not only the best interests of the child but also the child's full range of rights: UNICEF and Child Identity Protection *Key Considerations: Children's Rights & Surrogacy* (Briefing Note, February 2022) at 3.

¹²⁶ Human Assisted Reproductive Technology Act 2004, s 3(a) states that a purpose of that Act is:

to secure the benefits of assisted reproductive procedures, established procedures, and human reproductive research for individuals and for society in general by taking appropriate measures for the protection and promotion of the health, safety, dignity, and rights of all individuals, but particularly those of women and children, in the use of these procedures and research:

¹²⁷ For a discussion of the relationship between the concepts of mana and dignity see: Mihiata Pirini and Anna High "Dignity and Mana in the "Third Law" of Aotearoa New Zealand" (2021) 29 NZULR 623.

experiences for the surrogate and intended parents (see Chapter 2), they are nonetheless inherently vulnerable and effective regulatory safeguards are necessary.¹²⁸

- 3.88 In the Issues Paper, we had expressed this principle differently as two separate principles (surrogacy law should respect the autonomy of consenting adults in their private lives and sufficient safeguards should be in place). We acknowledge the views of some submitters that the focus on autonomy separate to the need for safeguards could be misconstrued and that the objective of safeguards should be clearer. We think that merging these principles and adopting the language of the HART Act is a clearer expression of our intentions and reduces the scope for confusion.
- 3.89 We intend, by the broader language of “health, safety, dignity and human rights”, to capture the range of rights identified above, including but not limited to rights related to autonomy as well as equality and non-discrimination rights, rights to respect cultural identity, and health and disability rights. As with Principle 2, we suggest that this principle can be considered consistent with tikanga (see Chapter 2).¹²⁹
- 3.90 This guiding principle requires consideration of the health, safety, dignity and rights of the surrogate and the intended parents. We acknowledge the views of some submitters that the rights and interests of the surrogate should be more expressly protected. We also note the acknowledgment in the HART Act that “women, more than men, are directly and significantly affected by [the application of assisted reproductive procedures], and the health and well-being of women must be protected in the use of these procedures”.¹³⁰ However, we are also conscious of the strong views of some submitters, many of them intended parents, who feel that their rights and interests are often overlooked or minimised in the surrogacy context. Our view is that the rights and interests of *all* parties must be protected and promoted in the surrogacy context.

Principle 4: Parties to a surrogacy arrangement should have early clarity and certainty about their rights and obligations

- 3.91 There should be clarity and certainty, at the earliest possible time, about each party’s rights and obligations before, during and after a child is born as a result of a surrogacy arrangement. This will reduce the uncertainty and the risk of disagreements arising between the parties. This reflects a guiding principle recommended in the Commission’s 2005 Report, *New Issues in Legal Parenthood*, which remains just as relevant today.¹³¹

¹²⁸ The need for regulatory protections to guard against the potential for exploitation is recognised in other reviews. 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 [9.5.1]–[9.5.12]; 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), Recommendation 2.

¹²⁹ The reconciliation of whanaungatanga, mana and other tikanga with the rights of adults as surrogates and intended parents may be further explored in the research we recommend in R1 (see Chapter 2 of this Report).

¹³⁰ Human Assisted Reproductive Technology Act 2004, s 4(c).

¹³¹ 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), Recommendation 11; and Michael Gorton *Helping*

- 3.92 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. As the Commission observed in 2005:¹³²

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.

- 3.93 Many submitters emphasised the need for pre-conception certainty. As Dr Anne Else observed in her submission on the Issues Paper:

Fundamentally this means that everyone involved should understand and agree on exactly what the planned surrogacy arrangement means, including the pathway to legal parenthood, being honest with the child, and contact plans post-birth, before they apply to ECART for approval.

- 3.94 As the Judges of the Family Court observed, it is important that decision-making occurs before the surrogacy process is under way and that legislation is unambiguous and prevents or diminishes the likelihood of future conflict.
- 3.95 This guiding principle must be balanced against the other guiding principles, including Principle 2 and Principle 3. This means that, while the benefits of early clarity and certainty have underpinned the recommendations in this Report, we have not prioritised clarity and certainty where that would fail to promote the child's best interests or adequately protect and promote the human rights of the surrogate-born child, the surrogate or the intended parents.

Principle 5: New Zealand intended parents should be supported to enter surrogacy arrangements in Aotearoa New Zealand rather than offshore

- 3.96 New Zealanders should be supported to enter surrogacy arrangements in Aotearoa New Zealand. This guiding principle aims to reduce the need for intended parents to rely on international surrogacy to build their family by improving the conditions for domestic surrogacy arrangements.
- 3.97 As we explore in greater detail in Chapter 9, international surrogacy presents complex issues. The laws of two different countries must be considered, which can cause problems when intended parents bring the surrogate-born child back to Aotearoa New Zealand. The disparity in how different countries regulate surrogacy and legal parenthood mean that some international surrogacy arrangements lack the same protections for the child, the surrogate and the intended parents as an arrangement entered in Aotearoa New Zealand. This can potentially place the child and the parties at greater risk.

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), Recommendation 63. 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.

¹³² Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [1.20].

3.98 That said, international surrogacy is a present reality and will remain an option for New Zealand intended parents in the foreseeable future. As Ireland’s Special Rapporteur on Child Protection has observed:¹³³

... there is no escaping the reality of surrogacy as an international phenomenon. ... global prohibition of all forms of surrogacy is not within the gift of any individual state or international organisation. It is also highly unlikely to arise on foot of an international convention, since a significant number of jurisdictions are accepting of the practice of surrogacy, either expressly authorising it or tolerating it on an unregulated basis.

3.99 In response to the potential risks posed by international surrogacy, efforts are taking place around the world to support citizens to pursue surrogacy within their own country rather than overseas.¹³⁴

3.100 Supporting New Zealanders to enter surrogacy arrangements in Aotearoa New Zealand helps avoid the risks associated with international surrogacy and also ensures the following:

- (a) Surrogacy arrangements are undertaken within a regulatory framework that recognises te Tiriti and has appropriate safeguards that uphold New Zealand’s 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 Ngā Paerewa and the Code of Health and Disability Services Consumers’ Rights.
- (b) Surrogate-born children can access information about their genetic and gestational origins and whakapapa, 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 whanaungatanga and other 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, promoting whanaungatanga and manaakitanga.
- (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 and the invasion of

¹³³ 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.

¹³⁴ 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. In 2022, the Irish Government established a Special Joint Oireachtas Committee to examine the issues surrounding international surrogacy: An Roinn Dlí agus Cirt | Department of Justice, Ireland “Government to establish Special Joint Oireachtas Committee on International Surrogacy” (press release, 21 January 2022). See also: 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.

Ukraine, both of which have had significant implications for some surrogacy arrangements.¹³⁵

- 3.101 We acknowledge the mixed views this guiding principle received in consultation. Some submitters felt that international surrogacy should be more strongly discouraged given the potential for exploitation and commodification. However, some were also concerned that supporting domestic surrogacy over international surrogacy could lead to a weakening of domestic legal and regulatory safeguards in order to make it more attractive. On the other hand, Oranga Tamariki | Ministry for Children observed in its submission that:

... this [principle] will reduce the risk of the surrogate child becoming a stateless child and will provide greater certainty for intended parents in the approval of legal parenthood for their surrogate child. This principle also reflects the importance of whakapapa and the whanaungatanga responsibilities of whānau, hapū and iwi because a surrogacy arrangement in Aotearoa New Zealand will ensure that children can have better access to their identifying information, birth family, culture and heritage.

- 3.102 Our view is that this guiding principle involves addressing the current problems with surrogacy in Aotearoa New Zealand that may be driving intended parents overseas, such as the lack of a specific pathway to establish legal parenthood and lack of clarity around financial support for surrogates.
- 3.103 However, like Principle 4, this principle must be balanced against the other guiding principles. This means that, while this review intends to improve the conditions for domestic surrogacy arrangements in order to support New Zealand intended parents to enter surrogacy arrangements in Aotearoa New Zealand, we have not made recommendations that would achieve this objective at the expense of the best interests of the surrogate-born child or the rights of parties to the surrogacy arrangement. As commentators observe, regulation that relies on creating conditions that seek to encourage intended parents and surrogates to stay within the jurisdiction “may potentially result in the reduction of protection to the lowest common denominator”.¹³⁶

¹³⁵ See for example Andrew E Kramer and Maria Varenikova “In a Kyiv Basement, 19 Surrogate Babies are Trapped by War but Kept Alive by Nannies” *The New York Times* (online ed, New York, 13 March 2022); Marion Langford “Aussie parents’ desperate journey to reach their premature baby daughter in Ukraine” *NZ Herald* (online ed, New Zealand, 27 February 2022); Simon Carswell “Irish couples awaiting surrogacy births in Ukraine face ‘daily horror’” *The Irish Times* (online ed, Dublin, 27 February 2022); Gill Bonnett “Covid turmoil stops parents reaching overseas surrogate babies” *Radio New Zealand* (New Zealand, 8 September 2020); and Maria Varenikova “Mothers, Babies Stranded in Ukraine Surrogacy Industry” *The New York Times* (online ed, New York, 15 August 2020).

¹³⁶ 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.

CHAPTER 4

Regulating surrogacy arrangements

INTRODUCTION

- 4.1 In this chapter, we examine the current requirement for prior approval of surrogacy arrangements in Aotearoa New Zealand. We look at how it is working in practice and conclude that this requirement should remain. We recommend what arrangements should be subject to a requirement for prior approval and reviewing the resourcing and operation of the approval process to ensure applications can be considered in a timely manner. In Chapter 5, we further examine discrete aspects of the approval process and make recommendations to improve its operation.

CURRENT LAW

- 4.2 Surrogacy arrangements are regulated by the Human Assisted Reproductive Technology Act 2004 (HART Act), which establishes a regulatory framework for assisted reproductive procedures and human reproductive research. Section 14 of the HART Act provides that a surrogacy arrangement “is not of itself illegal, but is not enforceable by or against any person”.¹

Gestational surrogacy arrangements require prior approval

- 4.3 Under the HART Act, all “assisted reproductive procedures”, apart from procedures classified as “established procedures”, must be approved by the Ethics Committee on Assisted Reproductive Technology (ECART).² Established procedures are defined in the Human Assisted Reproductive Technology Order 2005 (“HART Order”). A person who performs an assisted reproductive procedure without prior ECART approval commits an offence and is liable on conviction to a fine not exceeding \$50,000.³
- 4.4 Surrogacy is not defined as an assisted reproductive procedure or an established procedure. However, because gestational surrogacy arrangements involve the use of an

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

² 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.

³ Human Assisted Reproductive Technology Act 2004, s 16.

assisted reproductive procedure (in vitro fertilisation), they will usually require ECART approval.⁴

- 4.5 Traditional surrogacy arrangements only involve the use of an established procedure (artificial insemination) and therefore do not require ECART approval.⁵ Traditional surrogacy arrangements can take place privately, without the involvement of 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.⁶
- 4.6 The legislative history to the HART Act reveals little discussion about requiring ECART approval in surrogacy arrangements.⁷ 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”.⁸

The approval process

- 4.7 ECART considers and determines all applications for approvals for the performance of assisted reproductive procedures, including gestational surrogacy arrangements.⁹ ECART is a committee established by the Minister of Health.¹⁰ It comprises 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.¹¹ At least two ECART members must be Māori, with “a recognised awareness of te reo Māori, and an understanding of tikanga Māori”.¹² We discuss the composition of ECART and the Advisory Committee on Assisted Reproductive Technology (ACART) in greater detail in Chapter 5.
- 4.8 In performing its functions, ECART must operate:¹³

⁴ 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), sch 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”).

⁵ Human Assisted Reproductive Technology Order 2005, sch pt 1.

⁶ 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).

⁷ See discussion in Debra Wilson “Surrogacy in New Zealand” [2016] NZLJ 401 at 401–402.

⁸ 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.

⁹ Human Assisted Reproductive Technology Act 2004, s 28(1)(a).

¹⁰ Human Assisted Reproductive Technology Act 2004, s 27.

¹¹ 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].

¹² Ethics Committee on Assisted Reproductive Technology *Terms of Reference* at 5.

¹³ Human Assisted Reproductive Technology Act 2004, s 29.

- (a) in accordance with guidelines issued ACART;¹⁴ and
 - (b) “expeditiously, having regard, in particular, to the effect that undue delay may have on the reproductive capacity of individuals”.
- 4.9 ECART must also be guided by the principles of the HART Act, which are as follows:¹⁵
- (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:
 - (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.

The ACART Guidelines

- 4.10 In 2020, ACART issued revised guidelines that set out the requirements that must be met before ECART can approve an application involving gestational surrogacy (ACART Guidelines).¹⁶
- 4.11 The ACART Guidelines require all parties to a prospective surrogacy arrangement to have received the following:
- (a) **Counselling.** All affected parties must have received joint and individual counselling.¹⁷ Counselling must be provided by a person who is eligible to be an Australian and New Zealand Infertility Counsellors Association (ANZICA) approved counsellor.¹⁸ The counsellors must provide a report to ECART as part of the application process that addresses a range of matters outlined in the ACART Guidelines.¹⁹

¹⁴ 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.

¹⁵ Human Assisted Reproductive Technology Act 2004, s 4.

¹⁶ 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).

¹⁷ 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 [(4)].

¹⁸ Ngā Paerewa Health and Disability Services Standard NZS 8134:2021 at [1.10.5].

¹⁹ 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 [(6)]–[(7)].

- (b) **Legal advice.** Each party must receive independent legal advice.²⁰ The lawyer must report to ECART that the parties understand the legal implications of the procedure(s).²¹ 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.²² 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.
- (c) **Medical advice.** All parties must have received independent medical advice.²³ Health reports must show the parties understand the health implications of the procedure(s).²⁴
- 4.12 In addition, ECART requires the intended parents to obtain in-principle approval from Oranga Tamariki | Ministry for Children to their adoption of any child resulting from the surrogacy arrangement.²⁵ As we explain in Chapter 6, 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 te Kōti Whānau | 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.²⁶ ECART requires prior in-principle approval from Oranga Tamariki before it approves a surrogacy arrangement to ensure there are no impediments to the intended parents adopting the child. We address Oranga Tamariki's role in surrogacy arrangements in Chapter 5 and Chapter 6.
- 4.13 Under the ACART Guidelines, ECART can only approve an application relating to surrogacy if satisfied that the following requirements are met:

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) at [D(1)].

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 [D(3)].

²² Ethics Committee on Assisted Reproductive Technology *Surrogacy Arrangements involving Providers of Fertility Services: Application Form* (2011), sections 7 and 8.

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 [E(1)].

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 [E(2)].

²⁵ If this approval has not been obtained, ECART may defer the application or make its approval conditional on Oranga Tamariki | Ministry for Children'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.

²⁶ Adoption Act 1955, ss 10 and 11.

- (a) All relevant parties have consented to the procedure, and the parties have not been subjected to any undue influence.²⁷ 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.²⁸ 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.²⁹ On rare occasions, ECART might defer or decline an application due to concerns about the short length of the parties' relationship.³⁰
- (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.³¹ 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.³² 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 a mandatory requirement under the ACART Guidelines,³³ 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".³⁴

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 [A(1)]–[A(2)].

²⁸ 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).

²⁹ Rhonda M Shaw "Should Surrogate Pregnancy Arrangements be Enforceable in Aotearoa New Zealand?" (2020) 16 Policy Quarterly 18 at 21.

³⁰ 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 8 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.

³¹ 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)].

³² 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)].

³³ 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 [I]; 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.

³⁴ 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.

- (d) The potential genetic, social, cultural and intergenerational aspects of the proposed arrangement as well as the relationships between the parties, safeguard the wellbeing of all parties and especially any resulting children.³⁵
- (e) The risks associated with the proposed surrogacy arrangement for the parties and any resulting child must be justified.³⁶ This includes risks to the health and wellbeing 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 parents safeguard the health and wellbeing of the child, particularly in relation to being born in Aotearoa New Zealand.³⁷ This requirement was introduced in 2020 because of “the possibility that some children born to overseas surrogates could, in theory, be stateless”.³⁸

Current practice

- 4.14 In practice, applications to ECART are made by a fertility clinic on behalf of the intended parents. This is not a strict legal requirement, but the HART Act does require applications to nominate an appropriate person to be responsible for the activity,³⁹ and if approval is given, it is limited to that nominated person performing the procedure.⁴⁰ 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 the safety and quality requirements set out in Ngā Paerewa Health and Disability Services Standard NZS 8134:2021.
- 4.15 Since 2005, the number of surrogacy applications considered by ECART each year has increased significantly. ECART considers more surrogacy applications than any other type of application, and they account for over half of all applications it considers.⁴¹

³⁵ 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)].

³⁶ 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)].

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(3)].

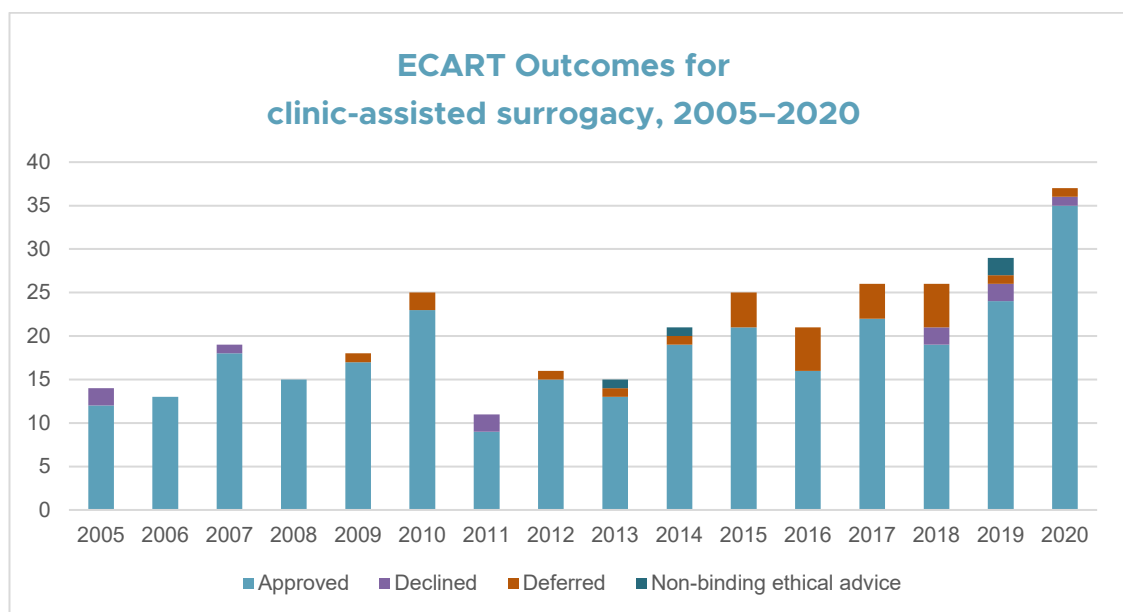
³⁸ Advisory Committee on Assisted Reproductive Technology *Second Round of Consultation on the Proposed Donation and Surrogacy Guidelines: further changes since ACART’s 2017 consultation* (February 2019) at 35.

³⁹ Human Assisted Reproductive Technology Act 2004, s 18(1)(d).

⁴⁰ Human Assisted Reproductive Technology Act 2004, s 19(1)(a).

⁴¹ According to most recent available data: Advisory Committee on Assisted Reproductive Technology *Annual Report 2019/20* (May 2021) at 8; and Advisory Committee on Assisted Reproductive Technology *Annual Report 2018/19* (May 2021) at 7.

- 4.16 As we observe in Chapter 2, the increase in surrogacy applications 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.
- 4.17 In 2020, ECART considered the highest ever number of new surrogacy applications in a single year (37, compared to just 14 in 2005).⁴² 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.
- 4.18 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.⁴³
- 4.19 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.⁴⁴
- 4.20 The graph below shows the outcome in surrogacy applications considered by ECART between 2005 and 2020.⁴⁵



⁴² These figures are based on the minutes from the meetings of the Ethics Committee on Assisted Reproductive Technology (ECART). At the time of writing, minutes were not available in respect of all meetings held in 2021. In meetings held between February and October 2021, ECART had considered 34 surrogacy applications.

⁴³ Interview with Andrew Murray, Medical Director, Fertility Associates (Kathryn Ryan, Nine to Noon, RNZ, 30 March 2021).

⁴⁴ 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; E21/002; E21/067; and E21/155.

⁴⁵ 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

- 4.21 In the Issues Paper, we explained that our initial research and consultation suggested broad support for the ECART process, which was generally regarded as a safe, effective and robust process.⁴⁶
- 4.22 However, we said that many people we had spoken with had identified concerns with the way the ECART process is operating in practice. A key concern is that the process is slow and complex. 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. We pointed to additional delays resulting primarily from a lack of resourcing. ECART only meets six times a year, and there are limited numbers of experienced counsellors and lawyers. We noted that, without additional resourcing for the ECART process, the increasing number of surrogacy applications is likely to result in increased delays for intended parents in the future.
- 4.23 Other concerns with the ECART process in practice were identified, and these are addressed elsewhere in this Report. They include the invasiveness of certain aspects of the process (primarily in relation to Oranga Tamariki's role under the Adoption Act 1955 in assessing intended parents (see Chapter 5 and Chapter 6), the lack of independent appeal or review of ECART decisions (see Chapter 5) and the costs associated with compiling an application to ECART). While ECART does not recover its own costs, intended parents must pay for counselling, legal advice and medical advice as well as the costs associated with the fertility clinic compiling the application. We consider costs further in Chapter 10.
- 4.24 A further concern is that some surrogacy arrangements lack important safeguards. Traditional surrogacy arrangements do not need to be approved by ECART, which means the requirements for counselling, independent legal advice and medical advice do not apply to a significant proportion of domestic surrogacy arrangements.⁴⁷ This is despite traditional surrogacy arrangements having the potential to raise complex ethical issues given the surrogate not only gestates the child, but is also the child's genetic parent.⁴⁸ We noted there has been one case reported in the media of a private traditional surrogacy arrangement in which the surrogate changed her mind during pregnancy and wanted to keep the child.⁴⁹ In addition, some gestational surrogacy arrangements where

⁴⁶ See for example Ruth Walker and Liezl van Zyl "Surrogacy and the law: three perspectives" (2020) 10 NZFLJ 9 at 11; 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; Debra Wilson "Surrogacy in New Zealand" [2016] NZLJ 401 at 40; and 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.

⁴⁷ For example, in the year ended 30 June 2021, 10 of the 22 social worker's reports prepared for te Kōti Whānau | Family Court in relation to domestic surrogacy arrangements were for traditional surrogacy arrangements: Email from Oranga Tamariki | Ministry for Children to Te Aka Matua o te Ture | Law Commission regarding domestic and international surrogacy data (16 July 2021).

⁴⁸ Fertility Associates has previously observed that "cases where the surrogate's own eggs are used are amongst the most challenging and risky surrogacy cases": Fertility Associates 2019 submission to ACART: Advisory Committee on Assisted Reproductive Technology *Proposed Donation and Surrogacy Guidelines consultation: Organisation submissions* (2019) at 48.

⁴⁹ The result in that case was a shared-care arrangement in relation to the resulting child between the surrogate and the intended parents: Katie Harris "Surrogacy Horror: Kiwi parents are having to share custody with surrogate" *NZ Herald* (online ed, New Zealand, 24 January 2021).

the surrogate's partner donates 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.⁵⁰ While we do not think that these 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. 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:⁵¹

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.

- 4.25 In the Issues Paper, we explained that, because the current regulatory framework was put in place at a time when gestational surrogacy was an emerging practice, it was timely to reconsider whether it remains the best form of regulation in Aotearoa New Zealand. We expressed a preliminary view that, despite the issues identified above, the requirement for prior approval of surrogacy arrangements by ECART should remain and should be extended to include all surrogacy arrangements. We outline the results of consultation on these matters below.

RESULTS OF CONSULTATION

Issues

- 4.26 We asked submitters whether they agreed with the issues we had identified with the approval process for surrogacy arrangements and whether there were any other issues we should consider. We received 190 submissions that addressed this question. Of these submissions, 81 per cent either agreed (58 per cent)⁵² or agreed in part (23 per cent)⁵³ with the issues we had identified.
- 4.27 Personal submitters often mentioned the emotional and financial cost of surrogacy and the length, complexity and invasiveness of the existing approval process. As we discuss below, Oranga Tamariki's role was highlighted as a key issue. One submitter with

⁵⁰ 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, sch 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").

⁵¹ 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].

⁵² 111 submissions comprising 93 personal submissions, 14 submissions from organisations (Advisory Committee on Assisted Reproductive Technology, Australian and New Zealand Infertility Counsellors Association, Fertility Associates, Fertility New Zealand, Fertility Plus, Maternity Services Consumer Council, New Zealand College of Midwives, New Zealand Nurses Organisation, Nurse Practitioners New Zealand, Office for Disability Issues, Office of the Children's Commissioner, Oranga Tamariki | Ministry for Children, Repromed and Te Kāhui Ture o Aotearoa | New Zealand Law Society), comments from the Judges of the Family Court and 3 academic submissions (Adjunct Professor Ken Daniels, Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly) and Australian academics Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff (submitting jointly)).

⁵³ 42 submissions comprising 39 personal submissions, 2 submissions from organisations (Federation of Women's Health Councils Aotearoa and Ethics Committee on Assisted Reproductive Technology) and 1 academic submission (Associate Professor Rhonda Shaw).

experience of the ECART process as an intended parent described it as one of the most invasive and upsetting processes they have been through. Another explained that “people looking for surrogacy aren’t doing so as a first choice or on a whim. It is often a thought-out decision and the process puts them off.” Another submitter said, “It needs to be made more approachable for people so that more people will be willing to go through this for someone else.” Several submitters told us that they preferred an international surrogacy arrangement or flew their New Zealand-based surrogate overseas for treatment to avoid the ECART process.

- 4.28 ACART recognised that the process of surrogacy is not an easy journey and can be long, expensive and invasive. It noted that there are many issues that affect the length of time it takes to review an application, including the fees that committee members are paid, difficulty in obtaining committee members and the length of time it takes for an application to get to ECART while it is put together via the clinic. ACART recognised the cost and frustration that can be felt if an application is either deferred or declined and the applicants’ only options are to submit new information to ECART or have the decision judicially reviewed. ECART commented that it is understandable that its role is perceived as being invasive. It noted that its role involves looking at the finer details of the dynamic of the relationships between the parties to try to prevent negative outcomes for any of the parties.
- 4.29 Some submitters raised additional issues with the ECART process. These submitters were generally concerned that ECART is too conservative in its decision-making. Examples were given of surrogacy arrangements being declined based on the length of time the intended parents and the surrogate knew each other or the surrogate’s weight or age. Some submitters told us that such decisions resulted in a surrogate travelling overseas for successful IVF treatment. One submitter noted that ECART’s low decline rates may not be truly representative, as fertility clinics won’t send an arrangement to ECART if they know it will be declined. Another submitter commented, “If [ECART] were a little more open with who they approve then this would go towards making the process easier here.”
- 4.30 Of the 15 per cent of submissions that did not agree with the issues we identified,⁵⁴ most were generally opposed to surrogacy in principle, while a smaller number preferred an approach that did not require any form of regulatory approval. We discuss this view further below. The remaining four per cent of submissions that addressed this question selected “no view”.⁵⁵

Retaining the ECART process for gestational surrogacy arrangements

- 4.31 We asked submitters whether they agreed with our preliminary view that gestational surrogacy arrangements should continue to require ECART approval. We received 190 submissions that addressed this question. Of these submissions, 78 per cent either

⁵⁴ 29 submissions comprising 27 personal submissions and 2 submissions from organisations (Center for Bioethics and Culture Network and Feminist Legal Clinic).

⁵⁵ 8 personal submissions.

agreed (63 per cent)⁵⁶ or agreed in part (15 per cent).⁵⁷ Twenty per cent of submissions did not agree,⁵⁸ and the remaining two per cent selected “no preference”.⁵⁹

Submissions supporting the ECART process

- 4.32 Submitters who supported retaining the ECART process often commented that it is a rigorous and robust process that supports and protects the parties involved and any resulting child. One personal submission, from a parent through gestational surrogacy, explained:

I am strongly in favour of ECART. I think the counselling is invaluable, it forces you to have conversations you might not have had on your own. It also makes sure that everyone involved in the surrogacy is on the same page. My surrogate was my best friend, and we assumed we would be on the same page with everything, but nothing beats actually having the conversation with a third party and having a definitive plan for all eventualities.

- 4.33 Organisations that addressed this question were largely in support of the ECART process, including the fertility clinics (Fertility Associates, Fertility Plus and Repromed), Fertility New Zealand, the Maternity Services Consumer Council (MSCC), ACART and ECART. ACART explained that all surrogacies can be ethically complex and that the wellbeing of surrogate-born children depends on the relationship between the surrogate and intended parents proceeding as expected. In addition, surrogacy involves both a woman’s choices about her body and sometimes conflicting interests of the potential child and the intended parents. ACART also noted that surrogates could be subject to coercion or undue influence, particularly if the arrangement occurs within a close family relationship between intended parents and the surrogate. ECART observed that the process “allows for the balancing of all ethical issues and implications inherent in such arrangements with a view to protecting the interests of all parties [including any resulting child] by an independent, multi-disciplinary committee”. It noted that:

ECART sees intending parents who are highly motivated and have often been on long journeys to have a baby. ECART’s role is to preserve the interests and dignity of all parties and consider ethical issues in relation to all parties, including any unborn child, in a way that is consistent with the principles of the HART Act.

- 4.34 The Office of the Children’s Commissioner (OCC) and Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) also supported the ECART process. OCC observed it is a robust and internationally well-respected process and that regulatory oversight is warranted because of the risks of surrogacy to the parties and to any surrogate-born

⁵⁶ 120 submissions comprising 98 personal submissions, 15 submissions from organisations (Advisory Committee on Assisted Reproductive Technology, Australian and New Zealand Infertility Counsellors Association, Ethics Committee on Assisted Reproductive Technology, Fertility Associates, Fertility New Zealand, Fertility Plus, Maternity Services Consumer Council, National Council of Women of New Zealand, New Zealand College of Midwives, Nurse Practitioners New Zealand, Office of the Children’s Commissioner, Oranga Tamariki | Ministry for Children, Repromed, Royal Australian and New Zealand College of Obstetricians and Gynaecologists and Te Kāhui Ture o Aotearoa | New Zealand Law Society), comments from the Judges of the Family Court and 6 academic submissions (Dr Anne Else, Adjunct Professor Ken Daniels, Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly), Professor Mark Henaghan, Associate Professor Rhonda Shaw and Australian academics Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff (submitting jointly)).

⁵⁷ 29 submissions comprising 28 personal submissions and 1 submission from an organisation (Federation of Women’s Health Councils Aotearoa).

⁵⁸ 38 submissions comprising 35 personal submissions and 3 submissions from organisations (Center for Bioethics and Culture Network, Feminist Legal Clinic and New Zealand Nurses Organisation).

⁵⁹ 3 personal submissions.

child. NZLS similarly submitted that “overall, we consider the ECART process is a sound one that is more than capable of balancing difficult issues that can and have arisen”. Professor Mark Henaghan commented that, while there may be some refinement of the ECART process, “it is essential to have this oversight to protect the mana of everyone involved”.

4.35 The Judges of the Family Court also considered the ECART process was robust and sound. They supported ECART approval for all surrogacy arrangements, observing that each surrogacy creates a unique child and “the creation of each child demands the same scrutiny to ensure the intended child’s best interests and welfare is upheld”.

4.36 Some submitters prefaced their support for the ECART process on the issues identified above being addressed. Many submitters wanted the ECART process to be better resourced and made more efficient, which they considered would reduce the stress and cost for intended parents. A small number of submitters, including the Federation of Women’s Health Councils Aotearoa, supported a simpler, less-intrusive and lighter-touch ECART process given that surrogacy has become a widely accepted process. One personal submitter explained:

I do think there are merits in ECART being involved. However, we need to change the process so that they’re a lot lighter touch in their approach. For example, there should be no requirement for ECART to meet to approve these applications. They should be required to formulate a framework that the IVF clinics can meet and then delegate a clerical task to check that they meet these requirements. Only in special or marginal cases should the ECART panels consideration be required.

Submissions opposing the ECART process

4.37 Submitters who opposed the ECART process broadly fell into two groups. Some were opposed to surrogacy in principle. Others opposed the requirement for prior approval of surrogacy arrangements. This latter group included some people who had experience of the ECART process or were parents through international surrogacy arrangements.⁶⁰ These submitters pointed to the fact that people conceiving naturally or using other forms of assisted reproductive technology are not subject to the same government oversight and assessment. Some saw the process as unnecessary, demeaning, unfair, discriminatory and based on flawed assumptions. Several submitters argued that surrogacy arrangements should instead be governed by agreements, pointing to the approach in other jurisdictions such as in some states in the United States. As one personal submitter explained:

I don’t understand how the state feels it can decide who can reproduce, and give permission or not. This should be a contractual right however to safeguard the rights of the child & wellbeing of the child.

4.38 Another submitter, who is a parent to a child born through gestational surrogacy with the assistance of a Canadian fertility clinic, explained:

Looking at ECART from our perspective, it feels somewhat unnecessary. We were able to create and transfer an embryo through the support of counsellors and the fertility clinic, without the additional oversight of another costly, scrutinising body. To me this process

⁶⁰ Of the 29 personal submissions that addressed this question and disclosed a personal experience with surrogacy, 9 disagreed with the ECART process and 20 agreed with it.

strengthens the case to seek arrangements overseas. I would prefer to avoid New Zealand if possible for any subsequent children, largely in part because of this component.

- 4.39 One personal submitter told us that she had been through the ECART process as a potential surrogate, but the application was declined due to her age and weight. She submitted:

This is altruistic and I am doing this out of the goodness of my heart. Who gives them the right to make the choice of whether I can help someone or not? If there was a serious medical risk then the doctors would've declined it then and it wouldn't have gone any further. All this has done is cause heartache, financial difficulty, mental anguish and what it has achieved is that we are now looking at going overseas to do this.

Extending the ECART process to traditional surrogacy arrangements

- 4.40 We asked submitters whether they agreed with our preliminary view that parties to a traditional surrogacy arrangement should be able access the same ECART process as parties to a gestational surrogacy arrangement. We received 188 submissions that addressed this question. Of these submissions, 82 per cent either agreed (73 per cent)⁶¹ or agreed in part (9 per cent).⁶² Thirteen per cent of submissions did not agree,⁶³ and five per cent selected “no preference”.⁶⁴

Submissions supporting extending the ECART process to traditional surrogacy

- 4.41 Submitters who supported extending the ECART process to traditional surrogacy arrangements often mentioned the need to treat all surrogacy arrangements equally and pointed to the benefits of the ECART process, including counselling and legal advice, which safeguard the wellbeing of the parties and the resulting child. ACART submitted that the robust process helps to ensure it is a secure arrangement, providing confidence to all parties. ECART similarly submitted that the ECART process allows for the balancing of all ethical issues and implications inherent in such arrangements.
- 4.42 Some submitters made the point that ECART approval could not, or should not, be a mandatory requirement for traditional surrogacy. A counsellor with experience of the ECART process explained that there is a cost, both financially and in terms of loss of autonomy, in relation to the ECART process and that not all people will want to comply with the process. Several submitters, including NZLS, Oranga Tamariki and OCC, supported incentivising participation in the ECART process by those involved in a

⁶¹ 138 submissions comprising 116 personal submissions, 17 submissions from organisations (Advisory Committee on Assisted Reproductive Technology, Australian and New Zealand Infertility Counsellors Association, Ethics Committee on Assisted Reproductive Technology, Fertility Associates, Fertility New Zealand, Fertility Plus, Maternity Services Consumer Council, National Council of Women of New Zealand, New Zealand College of Midwives, New Zealand Council of Trade Unions, New Zealand Nurses Organisation, Nurse Practitioners New Zealand, Office of the Children's Commissioner, Oranga Tamariki | Ministry for Children, Repromed, Royal Australian and New Zealand College of Obstetricians and Gynaecologists and Te Kāhui Ture o Aotearoa | New Zealand Law Society), comments from the Judges of the Family Court, and 4 academic submissions (Dr Anne Else, Adjunct Professor Ken Daniels, Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly) and Australian academics Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff (submitting jointly)).

⁶² 17 submissions comprising 16 personal submissions and 1 academic submission (Associate Professor Rhonda Shaw).

⁶³ 25 submissions comprising 23 personal submissions and 2 submissions from organisations (Center for Bioethics and Culture Network and Feminist Legal Clinic).

⁶⁴ 8 submissions comprising 7 personal submissions and 1 submission from an organisation (Federation of Women's Health Councils Aotearoa).

traditional surrogacy arrangement through providing a fast-tracked process to transfer parentage after the birth. Repromed noted that ECART can already give non-binding ethical advice in relation to a traditional surrogacy arrangement but the numbers of applications made for such advice are low. It considered there is potential for greater numbers of traditional surrogacy arrangements to go through the ECART process if the Commission's proposed changes to legal parenthood are adopted.

- 4.43 Several personal submitters who agreed with extending the ECART process to traditional surrogacy arrangements had personal experience as an intended parent or surrogate in a traditional surrogacy arrangement. Some noted that they had sought out their own counselling arrangements to replicate the ECART process, a trend also reported by Oranga Tamariki in its submission. One personal submitter who was expecting a child through traditional surrogacy explained:

We took the initiative to seek counselling as the intended parents and a further joint session with our surrogate and found this to be of huge value, and enabled the process to be smooth and all parties on the same page the whole way. We tried to mimic the ECART process so as to not run into any topics or issues that caused friction in our relationship with our surrogate.

- 4.44 Some personal submitters, however, expressed frustration about not being able to get any assistance from fertility clinics without going through ECART. One submitter said:

There needs to be a middle ground between REQUIRING ECART approval and REFUSAL to even do a blood test. This is why people are forced to do it under the radar with no support. As a twice-over traditional surrogate, we were unable to use fertility services for [intra uterine insemination] or even blood tests without ethical committee approval. This meant we had to go "off-grid" and do home inseminations ourselves, estimating ovulation and when to [inseminate].

- 4.45 Several submitters, including Fertility Associates, ANZICA and MSCC, noted the impact this proposal would have on ECART's workload and supported greater resourcing to enable ECART to cope with the potential increase in applications. ANZICA submitted that "[i]n order to avoid further increased wait times for intended parents, the additional resourcing required under this option needs to be included in its implementation".

Submissions opposing extending the ECART process to traditional surrogacy arrangements

- 4.46 Of the 13 per cent of submissions that did not agree that traditional surrogacy arrangements should be able to access the ECART process, some were generally opposed to surrogacy in principle while others preferred a regulatory approach that did not require any form of ECART approval. One submitter who had been an intended parent through traditional surrogacy submitted:

Traditional surrogacy needs support not hold ups from rules. ECART as it stands needs to be more focussed on the creating of families for the couples who don't have the ability to create their own family and less about making adults prove they are worthy. Traditional surrogacy should have the ability to access any help they require, however the help and support should be from another group or replacement to ECART. ECART's purpose as they put it is to take appropriate measures for the protection and promotion of the health, safety, dignity, and rights of all individuals ... yet they are controlling the rights and making decisions of individuals. The SLOW and inefficient process of ECART completely impinges people's ability to move forward as they have already spent years trying to create a family. As Intended Parents we often didn't know how much energy we had left to keep fighting for a family.

Options for extending the ECART process to traditional surrogacy arrangements

4.47 In the Issues Paper, we identified two options for extending the ECART process to traditional surrogacy arrangements:

- (a) Option One: Require all clinic-assisted surrogacy arrangements to obtain ECART approval.
- (b) Option Two: Enable people to apply directly to ECART without going through a fertility clinic.

4.48 We received 180 submissions that addressed this question. Views of submitters were mixed, with 28 per cent preferring Option One,⁶⁵ 34 per cent preferring Option Two⁶⁶ and 22 per cent preferring another option.⁶⁷ The remaining 16 per cent did not express a preference.⁶⁸

4.49 Submitters who favoured Option One pointed to the fact that there is currently a route for traditional surrogacy arrangements to seek non-binding ethical advice and that a clinic-assisted process would promote consistency. Some submitters who favoured Option One focused on what they saw as the disadvantages of Option Two. ACART noted that direct applications to ECART may be of low quality or fail to have all the required reports. Furthermore, ACART noted that patients will need to use clinic counsellors anyway because they are the only ones that qualify under the ACART Guidelines. ECART noted that Option Two would increase the burden on its Secretariat and ECART in trying to manage inconsistency in applications that this approach would create, a point also made by Fertility Associates, Repromed and ANZICA. Fertility Associates explained:

While a direct approach to ECART sounds appealing and easier, it may not be so. Clinics would no longer have the ability, or responsibility, to ensure all aspects were covered for a smooth journey through the ECART process. A surrogacy application is complex with interlocking requirements. A few years ago, Fertility Associates created the role of ECART coordinator to organise all that needs to be done for an ECART application. DIY could be daunting and time consuming for patients, and the ECART secretariat could well end up playing the role that the clinic coordinator does now.

4.50 NZLS did not support Option Two for similar reasons, observing that:

Our concerns relate primarily to timing and that there is a false economy in the expected costs saving. If people can apply directly to ECART there is unlikely be a cost saving or time saving and, as the Commission has identified, it will significantly increase ECART's workload.

⁶⁵ 51 submissions comprising 44 personal submissions and 7 submissions from organisations (Advisory Committee on Assisted Reproductive Technology, Australian and New Zealand Infertility Counsellors Association, Ethics Committee on Assisted Reproductive Technology, Fertility Associates, New Zealand Council of Trade Unions, Repromed and Te Kāhui Ture o Aotearoa | New Zealand Law Society).

⁶⁶ 61 submissions comprising 55 personal submissions, 5 submissions from organisations (Fertility Plus, Oranga Tamariki | Ministry for Children, Office of the Children's Commissioner, New Zealand College of Midwives and New Zealand Nurses Organisation) and 1 academic submission (Australian academics Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff (submitting jointly)).

⁶⁷ 40 submissions comprising 30 personal submissions, 6 submissions from organisations (Center for Bioethics and Culture Network, Nurse Practitioners New Zealand, Royal Australian and New Zealand College of Obstetricians and Gynaecologists, Maternity Services Consumer Council, Fertility New Zealand and National Council of Women of New Zealand), comments from the Judges of the Family Court and 3 academic submissions (Dr Anne Else, Adjunct Professor Ken Daniels, and Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly)).

⁶⁸ 28 submissions comprising 25 personal submissions, 2 submissions from organisations (Federation of Women's Health Councils Aotearoa and Feminist Legal Clinic) and 1 academic submission (Associate Professor Rhonda Shaw).

We also expect that in terms of administration ECART may need to introduce a filing fee to cover the increased administration costs, which will again increase intended parents' costs and defeat the purpose of a direct application. We also expect that it will transfer the costs to another agency or entity which is likely to take the place of a fertility clinic. We are concerned that it could result in an agent filling the void with a less ethical framework than is currently available through fertility clinics. We acknowledge the risk of "patch protection" by clinics, but in our experience their professionalism and ethics counters against this. We believe people would struggle to navigate the process on their own given the specialist nature of the information needed. This includes the counselling, which is specialist counselling and an important part of the process, as well as the targeted and specialist legal advice. We also note that delays are already experienced in the current system and changes should expedite, not delay, an already slow system.

- 4.51 In contrast, submissions in favour of Option Two considered that this would be more accessible to people considering a traditional surrogacy arrangement, especially as traditional surrogacies are seldom clinic-assisted. Some also thought this could present a much-needed cost saving for the intended parents by not having to pay the clinic to compile the application on their behalf and would give people the freedom to pursue a private surrogacy arrangement without clinic involvement but with the same safeguards in place. One submitter who has a child through gestational surrogacy explained:

In our experience I did a lot of the administration and organisation for our ECART application even though we had paid \$3000.00 to the fertility clinic to co-ordinate the process for our egg donor and surrogate and their partners. I think a more straightforward direct approval process should be created so that intending parents can collate the information required from all parties involved and then be able to submit the application directly to ECART.

- 4.52 Fertility Plus preferred Option Two on the basis that Option One forces people to pay the additional costs to have treatment at a clinic subsequent to ECART approval that they otherwise would have accessed independently. Several submitters, including Fertility Plus, the New Zealand College of Midwives and MSCC, acknowledged that Option Two would have implications for ECART's workload and submitted that this would need to be supported with increased resourcing.
- 4.53 Of the 22 per cent of submissions that preferred another option, the most common response was a preference for enabling both Options One and Two. These submitters supported all clinic-based surrogacy arrangements going to ECART but also thought that ECART approval should not be restricted to those who apply through fertility clinics. OCC submitted that "to help a greater number of people, and to meet diverse abilities and cultural interests and rights, it should not be a requirement to go through clinics".

Increasing ECART's capacity to consider surrogacy applications

- 4.54 In the Issues Paper, we identified a range of options for improving the ECART process and asked submitters what options they preferred. We explore these options and make recommendations for reform in Chapter 5.
- 4.55 What was clear from consultation, however, was the high degree of support for increasing ECART's capacity to consider surrogacy applications. Of the 168 submissions that addressed options for improving the ECART process, 80 per cent supported

increasing ECART's capacity to consider surrogacy applications.⁶⁹ This made it the most popular option for reform.

- 4.56 While submitters often acknowledged that a thorough and robust approval process does take time, there was a widespread view among submitters that the current process is too slow and inadequately resourced. As one submitter who had been through the ECART process as an intended parent explained:

The rush to submit documents to meet the ECART deadline, the nervous wait time before results are submitted and the knowledge that other families would miss out as spots were limited must be addressed. These pressures put more hurdles in the way for hopeful parents and willing surrogates.

- 4.57 Another submitter with experience of the ECART process as a surrogate similarly commented that:

It can take some time to get an application together and then to be told that meetings are already full adds even more time to a lengthy process. Some people just don't have time to sit around and wait.

- 4.58 Those operating within the ECART process, including the fertility clinics (Fertility Associates, Fertility Plus and Repromed) and ANZICA, all agreed that ECART's capacity needed to be increased. Fertility Associates noted there is a growing backlog, and ANZICA explained that the current 12 application limit per meeting is a constraint that causes intended parents increased wait times "when time is of particular essence and can impact treatment outcomes", a point made by several other submitters. Adjunct Professor Ken Daniels also submitted that the wait time for consideration of applications is inappropriate, and a fertility counsellor noted that ECART is "wildly overloaded", with a queue of three meetings before a new application can be considered. MSCC was concerned that unnecessary delays because of insufficient capacity within the ECART process could encourage intended parents to engage in international commercial surrogacy and disincentivise women offering to be a surrogate in Aotearoa New Zealand.
- 4.59 Different ways of increasing ECART's capacity were suggested, including more frequent ECART meetings, establishing sub-committees or alternate committees to hear applications more regularly, increasing fees paid to ECART committee members and increasing ECART's secretariat support to improve the administration of the process and support the work of ECART. NZLS submitted that alternate committees could reduce the onus on individual members, enable more frequent meetings, mitigate the risk of conflicts, allow the sharing of workload and give greater opportunity for diversity of membership.
- 4.60 ANZICA and Repromed noted other benefits of increased meetings, including ECART being able to respond in a more timely manner to deferred applications and general enquiries or updates from clinic counsellors that they rely on to progress applications. ANZICA and Repromed did note, however, that increasing ECART's capacity would have consequences for clinic counsellors' workload and that clinic counsellors are already

⁶⁹ 134 submissions comprising 117 personal submissions, 12 submissions from organisations (Advisory Committee on Assisted Reproductive Technology, Australian and New Zealand Infertility Counsellors Association, Fertility Associates, Fertility New Zealand, Fertility Plus, Maternity Services Consumer Council, National Council of Women of New Zealand, New Zealand College of Midwives, Office of the Children's Commissioner, Oranga Tamariki | Ministry for Children, Repromed and Te Kāhui Ture o Aotearoa | New Zealand Law Society) and 5 academic submissions (Dr Anne Else, Adjunct Professor Ken Daniels, Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly), Associate Professor Rhonda Shaw and Australian academics Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff (submitting jointly)).

working at capacity in “this ever growing and evolving field”. They submitted that there needs to be adequate resourcing provided to both ECART and fertility clinics to enable this increased workload to be met.

- 4.61 ECART observed that a number of issues contribute to the complexity and length of the application process and that there is limited resourcing within the entire process, including in the lead-up to an application being submitted to ECART. It also noted that the numbers of applications for surrogacy have increased, due in part to new Guidelines being issued by ACART⁷⁰ and more New Zealanders seeking treatment in Aotearoa New Zealand in the light of the Covid-19 pandemic. ECART noted its terms of reference allow it to meet every two months or more frequently if required and that, in recent years, ECART has increased the number of meetings it holds in a year. ECART also noted that, while it reviews 12 applications per meeting as a matter of course, it does accept and consider more applications when there is a need to do so.

CONCLUSIONS

- 4.62 We conclude that the ECART approval process is appropriate for surrogacy arrangements for the following reasons:
- (a) First, prior approval is a proactive safeguard that protects the rights and interests of the surrogate, the intended parents and any resulting child. 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. The effectiveness of the ECART process is evident in practice. Many submitters and the Judges of the Family Court cited the robustness of the current process.
 - (b) Second, as noted above, our review identified broad support from submitters for the ECART approval process remaining in place. This is consistent with the results of the Surrogacy Survey, where 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.⁷¹
 - (c) Third, prior approval is consistent with current international best practice, evident from the publication of the Verona Principles in 2021.⁷² Prior approval is generally

⁷⁰ The 2020 Guidelines provide for on-donation of embryos and remove the requirement for a genetic link between at least one intended parent and a surrogate-born child: Advisory Committee on Assisted Reproductive Technology *ACART Advice and Guidelines for Gamete and Embryo Donation and Surrogacy* (June 2021) at 26. The Committee notes that this change means that more people can now take advantage of fertility procedures, which will likely lead to an increase in the number of surrogacy applications considered by the Ethics Committee on Assisted Reproductive Technology, at 27.

⁷¹ 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.

⁷² International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [5.1]. See also UNICEF and Child Identity Protection *Key Considerations: Children's Rights & Surrogacy* (Briefing Note, February 2022) at 2. Prior independent approval of a surrogacy arrangement is a requirement in Victoria, Western Australia, Israel, South Africa and Greece.

regarded as working well in most other jurisdictions where it is required⁷³ and has recently been proposed in Ireland⁷⁴ and adopted in Portugal.⁷⁵

- (d) Fourth, a robust prior approval process reduces the need for a prescriptive post-birth process to establish legal parenthood.⁷⁶ Prior approval provides confidence in the integrity of the surrogacy arrangement, including that it is in the child's best interests. In Chapter 6, we recommend streamlining the recognition of the intended parents as the legal parents of a surrogate-born child where ECART approval has been obtained.
- (e) Fifth, ECART's membership allows for the consideration of multiple perspectives. 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 holistic approach to common issues that might arise in relation to assisted reproductive technology.⁷⁷

4.63 We prefer the ECART model of regulation over alternatives explored in the Issues Paper.⁷⁸ Prior approval of surrogacy arrangements is generally considered a more effective form of regulation than post-birth regulation because it has the potential to prevent problems arising in the first place rather than seeking to remedy any problems after the child has

⁷³ See 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; 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 that 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 Allan *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008 (Report: Part 1)* (January 2019) at 81–82; 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 66.

⁷⁴ An Bille Sláinte (Atáirgeadh Daonna Cuidithe) | Health (Assisted Human Reproduction) Bill 2022 (29) (Ireland), cl 51. See also 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.

⁷⁵ In 2021, the Portuguese Parliament adopted new legislation that introduces a requirement for prior approval of surrogacy arrangements following an earlier decision by the Portuguese Constitutional Court that the legislation was unconstitutional for reasons we discuss in Chapter 6. See: Rohit Ranjan "Portugal: Parliament approves new law authorising surrogacy in country" (republicworld.com, 27 November 2021) and IANS "Portuguese parliament approves surrogacy law" (fresherslive.com, 27 November 2021). Prior approval was also recommended in Iceland in a Bill introduced in Parliament in 2015, but that Bill did not progress following a change in government: Hrefna Fríðriksdóttir "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 263–264.

⁷⁶ 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].

⁷⁷ 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.

⁷⁸ Te Aka Matua o te Ture | Law Commission *Review of Surrogacy | Te Kōpū Whāngai: He Arotake* (NZLC IP47, 2021) at [5.50(d)].

been born.⁷⁹ We also prefer the ECART model over a co-regulation model under which fertility clinics are responsible for ensuring eligibility and screening requirements are complied with and deciding whether to provide fertility services in a surrogacy arrangement.⁸⁰ A co-regulation model would impose an approval role on fertility clinics, which might impede their ability to maintain a supportive therapeutic relationship with their patients.⁸¹ We also note that concerns have been raised in Australia that a co-regulatory approach raises the risk of actual or perceived conflicts of interest⁸² and that fertility clinics can come under considerable pressure to operate outside any guidelines.⁸³ Neither of these alternative models received strong support in consultation.

- 4.64 We acknowledge the strong views of a minority of submitters that surrogacy arrangements should not have to be subject to ECART approval on the basis that it is an undue state intrusion into individuals' private lives. We also acknowledge the concern that this discriminates against people who are unable to have a child without recourse to surrogacy. However, surrogacy raises complex issues because it is concerned with the creation of a child and because it involves multiple parties in that process. This calls for regulation to ensure that there are adequate safeguards against the risks to the parties and any resulting surrogate-born child. This includes risks to health, risks that people may not make informed decisions about entering a surrogacy arrangement, risks of relationship breakdown and the long-term consequences this would have on the child, the parties and their families. Ultimately, we consider that the ECART approval process is reasonable and justified for these reasons. We believe, however, that our recommendations in the subsequent chapters, particularly in relation to redefining Oranga Tamariki's role in the approval process and legal parenthood, help to address the concerns expressed in consultation and clarify that the focus of the ECART process is on safeguarding the rights of the child and the parties and minimising the risk of problems occurring as a result of the surrogacy arrangement.

⁷⁹ 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.

⁸⁰ 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 Allan *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 Allan *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 would be licensed and registered by an independent regulatory body with responsibility for ensuring that legal and ethical standards are met.

⁸¹ Similar concerns have been observed in Victoria, Australia, when counsellors had 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.

⁸² 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].

⁸³ See for example: Legislative Council Standing Committee on Law and Justice *Legislation on altruistic surrogacy in NSW* (Report 38, 2009) at [4.47] and [4.62]–[4.67].

ECART approval for all clinic-assisted surrogacy arrangements

RECOMMENDATION

R2

Clinic-assisted surrogacy arrangements should remain subject to the requirement for prior approval of the Ethics Committee on Assisted Reproductive Technology, and the Human Assisted Reproductive Technology Order 2005 should be amended to extend this requirement to all clinic-assisted surrogacy arrangements, including clinic-assisted traditional surrogacy arrangements.

- 4.65 We recommend that all clinic-assisted surrogacy arrangements should be required to obtain ECART approval. This would confirm that all gestational surrogacy arrangements and those traditional surrogacy arrangements that involve a clinic require ECART approval. This recommendation could be given effect by amending Part 2 of the HART Order to clarify that an assisted reproductive procedure performed in a surrogacy arrangement is not an established procedure.
- 4.66 We have not preferred a model where prior approval is only required in some cases but not for “straightforward” surrogacy arrangements. Our view is that all surrogacy arrangements can be ethically complex, and each surrogacy arrangement will present its own risks. In relation to traditional surrogacy, as noted above, a significant proportion of domestic surrogacy arrangements are traditional surrogacy arrangements,⁸⁴ a trend that is likely to continue in future as people who are unable to contribute their own ova (such as single men and male couples) increasingly use surrogacy to build their family. We consider that people who enter traditional surrogacy arrangements should be able to access the benefits of the ECART process on the same basis as parties to gestational surrogacy arrangements, regardless of the surrogate’s genetic connection to the surrogate-born child or any other matter.
- 4.67 This recommendation is consistent with advice given by ACART to the Minister of Health recommending that the HART Order be amended to require all clinic-assisted surrogacies to be considered by ECART.⁸⁵ It is also consistent with the recommendations made in the Australian state of Victoria in 2019 to extend the requirement for prior approval in that jurisdiction to include traditional surrogacy arrangements.⁸⁶ The Law Commission of England and Wales and the Scottish Law Commission have similarly proposed including traditional surrogacy within their proposed regulatory framework, explaining that “excluding traditional arrangements from the new pathway would exclude a sizeable proportion of domestic surrogacy arrangements” and “that exclusion would represent a

⁸⁴ For the year ended 30 June 2021, 10 of the 22 social worker’s reports prepared for te Kōti Whānau | Family Court for surrogacy arrangements were for traditional surrogacy arrangements: Email from Oranga Tamariki | Ministry for Children to Te Aka Matua o te Ture | Law Commission regarding domestic and international surrogacy data (16 July 2021).

⁸⁵ Advisory Committee on Assisted Reproductive Technology *ACART Advice and Guidelines for Gamete and Embryo Donation and Surrogacy* (June 2021) at Recommendation 4A.

⁸⁶ 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), Recommendation 64.

missed opportunity to improve the conduct of such arrangements for the benefit of all concerned”.⁸⁷

Encouraging parties in traditional surrogacy arrangements to participate in the approval process

RECOMMENDATION

R3

The Government should consider ways to encourage parties to traditional surrogacy arrangements to participate in the approval process, including whether parties should be supported to make applications directly to the Ethics Committee on Assisted Reproductive Technology.

- 4.68 We recommend that the Government consider ways to encourage parties to traditional surrogacy arrangements to participate in the approval process. In principle, we see merit in enabling parties to a traditional surrogacy arrangement to apply to ECART without involving a fertility clinic. While we acknowledge the views of some submitters, including NZLS, that this may not lead to cost savings in practice, this could make the ECART process more accessible, thereby extending the protective framework to more people.⁸⁸
- 4.69 We recognise, however, that this would be a significant departure from the way the current regulatory system operates. Currently, applications are made on behalf of parties by the fertility clinic and approvals are on the basis that a nominated person is responsible for conducting the procedure in accordance with the relevant requirements. A workable process would need to be put in place to ensure that parties applying directly to ECART have adequate information and support. Changes may also be needed to the ACART Guidelines to facilitate ECART’s consideration of applications concerning surrogacy arrangements that are not assisted by a fertility clinic.⁸⁹ We also acknowledge the concern that the only ANZICA qualified counsellors operating in Aotearoa New Zealand are employed by fertility clinics. However, increased demand for this service could be expected to incentivise independent counsellors to meet demand and facilitate applications. Several submitters who have engaged in traditional surrogacy outside the ECART process told us that they were able to access counselling.

⁸⁷ 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 [9.21]. We note, in contrast, the proposed regulatory regime in Ireland would apply only to gestational surrogacy arrangements: An Bille Sláinte (Atáirgeadh Daonna Cuidithe) | Health (Assisted Human Reproduction) Bill 2022 (29) (Ireland), cls 2 (definition of “surrogacy”) and 51. This is despite a number of arguments identified against this approach in the pre-legislative scrutiny stage of the Bill: Joint Committee on Health *Tuarascáil ar an nGrinnscrúdú Réamhreachtach ar Scéim Ghinearálta an Bhille um Atáirgeadh Daonna Cuidithe* | Report on Pre-Legislative Scrutiny of the General Scheme of the Assisted Human Reproduction Bill (Houses of the Oireachtas, Dublin, July 2019) at 20 and Recommendation 7.

⁸⁸ We note that, in Victoria, the intended parents and the surrogate apply directly to the Patient Review Panel for prior approval of a surrogacy arrangement: Assisted Reproductive Treatment Act 2008 (Vic), s 40(1).

⁸⁹ For example, one requirement is that counselling has been received by each party in accordance with the current Fertility Services Standard: 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(1)]. Ngā Paerewa Health and Disability Services Standard NZS 8134:2021 is the current fertility services standard, and it requires that fertility clinics ensure people participating in surrogacy receive counselling from a person who is eligible to be an Australian and New Zealand Infertility Counsellors Association approved counsellor, at [1.10.5].

- 4.70 Expanding ECART's role to consider applications made directly by parties to a traditional surrogacy arrangement could also 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. 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).
- 4.71 Given these operational matters, we think that the costs and benefits of enabling parties to a traditional surrogacy arrangement to apply directly to ECART need to be considered further as one possible way of encouraging greater participation in the ECART approval process. We do not think that a desire to preserve current practices and concerns about resource constraints are adequate reasons to exclude traditional surrogacy arrangements from the ECART process. However, it may be that R2 above, which would enable parties to a traditional surrogacy arrangement to apply for ECART approval through a clinic and thereby utilise our recommended administrative pathway to legal parenthood (see Chapter 6), is sufficient to encourage participation in the ECART process. Our recommendation in Chapter 10 to produce comprehensive and clear information on surrogacy law and practice would also highlight the advantages of utilising the ECART process.

Reviewing the resourcing and operation of the ECART process

RECOMMENDATION

R4

The Government should review the resourcing and operation of the Ethics Committee on Assisted Reproductive Technology and its associated processes with a view to ensure surrogacy applications can be considered in a timely manner, consistent with the principles of the Human Assisted Reproductive Technology Act 2004.

- 4.72 Our recommendations to extend ECART's role to all clinic-assisted surrogacy arrangements and to incentivise the use of the ECART process for traditional surrogacy arrangements by providing a streamlined pathway for legal parenthood will add to ECART's already growing workload and will likely present significant resourcing implications.
- 4.73 We therefore recommend that the Government review the resourcing and operation of ECART to ensure that surrogacy applications can be considered in a timely manner, consistent with ECART's statutory duty to operate expeditiously, having regard to the effect that undue delay may have on the reproductive capacity of individuals.⁹⁰ Increasing ECART's capacity to consider surrogacy applications received broad support in consultation and was the most favoured reform option. While many submitters acknowledged that a thorough and robust approval process does take time, there was a widespread view among submitters that the current process is too slow and inadequately resourced.

⁹⁰ Human Assisted Reproductive Technology Act 2004, s 29(b).

- 4.74 We acknowledge ECART's comment that it does consider more than 12 applications every two months when there is a need. However, given the way the current process operates, fertility clinics will work to meet the application deadlines for the next meeting with the knowledge that only a limited number of applications can be considered at the meeting. In practice, this means that the fertility clinics have a backlog of surrogacy applications, which can delay the progress of surrogacy applications. If these limitations are not addressed, there is a risk that more New Zealanders will prefer to enter surrogacy arrangements overseas rather than participate in the ECART process and the protections that process provides.
- 4.75 The Government review should consider the options identified in consultation, including establishing subcommittees to consider surrogacy arrangements, ECART meeting monthly instead of two-monthly and increasing secretariat support.
-

CHAPTER 5

Improving the approval process

INTRODUCTION

- 5.1 In Chapter 4, we examine the case for retaining and extending the requirement for prior approval of surrogacy arrangements by the Ethics Committee on Assisted Reproductive Technology (ECART). We conclude that the existing approval process remains appropriate as it provides a safe, effective and robust process that safeguards the rights and interests of surrogates, intended parents and any resulting child.
- 5.2 However, we also identify concerns with the way the approval process is operating in practice. This chapter examines discrete aspects of the approval process and makes recommendations to improve its operation.
- 5.3 Some of the issues we identify in this chapter relate to the general operation of the Human Assisted Reproductive Technology Act 2004 (HART Act) and have broader implications beyond surrogacy arrangements. These issues may indicate a need for a wider review of the HART Act, which has not been substantively reviewed in the 18 years since it was enacted.¹ A review of the HART Act could consider wider questions, including whether the purpose and principles of the HART Act remain appropriate in contemporary Aotearoa New Zealand² and whether the existing committee-based regulatory framework remains fit for purpose or if this should be replaced with an assisted reproductive treatment authority similar to the authorities established in the Australian state of Victoria and the United Kingdom and proposed in Ireland.³

¹ A case for reviewing the Human Assisted Reproductive Technology Act 2004 (HART Act) is set out in Michael Legge and Ruth Fitzgerald “Does the Human Assisted Reproductive Technology Act 2004 need a review?” (2021) 17 Policy Quarterly 79.

² In the Issues Paper, we noted the reference in s 4(a) of the HART Act to the health and wellbeing of children as “an important consideration” no longer aligns with the international consensus that confirms the paramountcy of the child’s best interests: Te Aka Matua o te Ture | Law Commission *Review of Surrogacy | Te Kōpū Whāngai: He Arotake* (NZLC IP47, 2021) at [3.9]. Any review of the HART Act should also consider whether the principle in s 4(f), “the needs, values, and beliefs of Māori should be considered and treated with respect” adequately recognises tikanga Māori and gives effect to the Crown’s obligations under te Tiriti o Waitangi. See discussion in Chapter 3 of this Report.

³ In Victoria, see the Victorian Assisted Reproductive Treatment Authority: <www.varta.org.au>; in the United Kingdom, see the Human Fertilisation and Embryology Authority: <www.hfea.gov.uk>; and in Ireland, see the proposals for An tÚdarás Rialála um Atáirgeadh Daonna Cuidithe | Assisted Human Reproduction Regulatory Authority in An Bille Sláinte (Atáirgeadh Daonna Cuidithe) | Health (Assisted Human Reproduction) Bill 2022 (29) (Ireland), pt 8.

- 5.4 In any event, we encourage further consideration of how some of our recommendations below, such as the need for an independent review process, could apply to all applications that require ECART approval, not just surrogacy applications.

ORANGA TAMARIKI'S ROLE IN THE APPROVAL PROCESS

Current law

- 5.5 As we explain in Chapter 6, intended parents must adopt a child born through surrogacy to become that child's legal parents. As part of the adoption process, a social worker from Oranga Tamariki | Ministry for Children must prepare a report for te Kōti Whānau | 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.⁴
- 5.6 As a consequence of this requirement, ECART requires in-principle approval from Oranga Tamariki to the intended parents adopting any child resulting from the surrogacy arrangement, before ECART approves the surrogacy arrangement.⁵ This helps to safeguard the surrogate-born child's wellbeing by ensuring there are no impediments to the intended parents adopting the child.
- 5.7 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. If a surrogacy arrangement is approved by ECART and a viable pregnancy is established (around the 12-week mark), Oranga Tamariki will then undertake a more comprehensive adoptive applicant assessment, which involves assessment interviews with the intended parents. Once the child is born, the social worker will again visit the intended parents' home so that they can observe the child in the intended parents' care. The social worker will then prepare the report for the Court, relying on the information from the adoptive applicant assessment and the subsequent home visit.

Issues

- 5.8 In the Issues Paper, we said that Oranga Tamariki's role in assessing the parental suitability of intended parents in surrogacy arrangements is often identified as a source of concern.⁶ Some consider the assessment process is overly invasive and inappropriate in the context

⁴ Adoption Act 1955, ss 10 and 11.

⁵ If this approval has not been obtained, ECART may defer the application or make its approval conditional on Oranga Tamariki | Ministry for Children'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.

⁶ See for example Ruth Walker and Liezl van Zyl "Fear and Uncertainty: The Surrogacy Triad's Experience of Social Workers' Role Ambiguity" (2021) 51 British Journal of Social Work 2982 at 2989–2991.

of surrogacy, especially in situations where one or both intended parents are the child's genetic parents.

- 5.9 In Chapter 6, we recommend a new legal framework for determining legal parenthood in surrogacy arrangements. It is therefore necessary to reconsider the appropriate role of the state in assessing intended parents' suitability in the surrogacy context.

Results of consultation

- 5.10 In the Issues Paper, we identified a list of options to improve the ECART process that addressed the topics explored in this chapter. We asked submitters which options they preferred. Of the 168 submissions that addressed this question, 58 per cent supported a reconsideration of the parental suitability assessment in surrogacy arrangements.⁷

- 5.11 Many submitters who supported reconsideration of the parental suitability assessment felt strongly that the current requirements were unnecessarily invasive. These submitters often noted the lack of any similar requirement for other people conceiving with or without fertility treatment and the need to treat intended parents fairly and with respect. Some submitters drew on their own experience of being an intended parent. One personal submission from a parent through gestational surrogacy explained:

People who pursue surrogacy have thought long and hard about their wishes to parent a child, including their self-assessed ability and readiness, and that already speaks volumes to their parental "fitness." In some sense it feels discriminatory to be unable to "have kids on a whim" ourselves.

- 5.12 Some also considered the current requirement to be a poor use of Oranga Tamariki's resources. A parent through gestational surrogacy explained:

To be assessed whether we would be fit parents and have a social worker visit our home after 5 years of trying, 50K + of fees was traumatic, insulting and unfair. Not one person we have ever met from all walks of life, whether fit or not — are assessed before being allowed to become parents, yet potential parents willing to pay extraordinary amounts, go through invasive treatments and risk grief and loss in the process are put through this. Oranga Tamariki should be spending their time with children of families who are not fit, not assessing those who would go to the ends of the earth to welcome a child into their home.

- 5.13 Another personal submission from a counsellor emphasised the personal cost on intended parents who have often struggled with fertility and must then tell their story not only to ECART but also to Oranga Tamariki. Several submitters were concerned that ongoing Oranga Tamariki involvement in the ECART process might disincentivise people considering a traditional surrogacy arrangement from engaging in the ECART process. The Office for Disability Issues also noted that assessing an intended parent's fitness to parent may have an unintended discriminatory impact on disabled people and disabled children born from surrogacy.

- 5.14 Submitters expressed mixed views as to what should replace the existing assessment requirements. Some submitters supported removing the parental suitability assessment entirely from the ECART process. Fertility Plus explained that, while it supports the

⁷ 97 submissions comprising 82 personal submissions, 10 submissions from organisations (Ethics Committee on Assisted Reproductive Technology, Federation of Women's Health Councils Aotearoa, Fertility Associates, Fertility New Zealand, Fertility Plus, Maternity Services Consumer Council, New Zealand College of Midwives, New Zealand Nurses Organisation, Oranga Tamariki | Ministry for Children and Te Kāhui Ture o Aotearoa | New Zealand Law Society) and 2 academic submissions (Dr Anne Else and Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly)).

paramountcy of the best interests of the surrogate-born child, the ECART assessment and approval process could adequately include oversight on this matter.

- 5.15 Other submitters supported some form of assessment continuing but considered that this should be less invasive and designed specifically for surrogacy. The Judges of the Family Court suggested that a set of minimum requirements could be set to streamline the process and a standard brief designed for a psychosocial suitability assessment. Some submitters expressly supported criminal background checks. However, the Federation of Women's Health Councils submitted that any approval should depend on the sentence rather than the fact of a conviction, observing that "[u]sing a history of imprisonment as a criteria for access to surrogacy assumes that 'having done one's time' is a predictor of lack of parenthood responsibilities". They were concerned that this could discriminate against Māori given they are more likely to be sentenced to prison than Pākehā. A few submitters expressly opposed requiring character references or the disclosure of financial information. Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) submitted that:

... with gestational surrogacies any assessment requirement that involves a social setting or home assessment, financial disclosure, or detailed family histories for birth parents, is not as relevant as the intended parents' plan for sharing their birth story with their child, their relationship with the surrogate and their plans for, and preparation to, parent a child created through surrogacy rather than their own pregnancy.

- 5.16 ECART also considered that checks such as home visits to ensure the house is child friendly are not appropriate in the context of surrogacy arrangements but nonetheless considered it important that there are adequate mechanisms for ensuring the interests of any future child are safeguarded as much as possible and that this information is made available to ECART as part of any application.
- 5.17 Other suggestions to improve the assessment process included a more streamlined process for gestational surrogacy where the intended parents' gametes are used, specific training for Oranga Tamariki social workers and reducing the timeframe in which Oranga Tamariki assessments are carried out from 90 days to 30 days. Fertility Plus submitted that, if Oranga Tamariki continue to conduct assessments, it should no longer carry the role of assessing intended parents' health and life expectancy. Instead, this should be information provided to ECART by an intended parent's medical specialist.
- 5.18 There were mixed views on who should perform this assessment role. The Judges of the Family Court supported Oranga Tamariki continuing to perform this role because of its expertise. Other submitters supported a different organisation taking on this role. NZLS submitted that other experts with a background in fertility issues, parenting and attachment could be used for this assessment process and are likely to be less confronting for the parties to the planned surrogacy than an Oranga Tamariki social worker. ECART considered that there ought to be consideration of an appropriate agency to undertake an appropriate check in the context of any new framework.
- 5.19 Some submitters supported counsellors having a role in assessing parental suitability rather than Oranga Tamariki, with Fertility Plus noting that clinic counsellors and other clinic staff can respond appropriately to any concerns for the welfare of a resulting child, which is current practice in other areas of fertility treatment. Others, however, did not favour this option. The Australian and New Zealand Infertility Counsellors Association (ANZICA), Fertility Associates, Repromed, the Judges of the Family Court and Dr Anne Else did not think counselling and screening roles were compatible and were concerned about the potential for conflicts of interest. As ANZICA and Repromed explained, "[o]ur

role is to provide supportive and implications counselling and ... acting in a screening role will be detrimental to the provision of this”.

- 5.20 Oranga Tamariki agreed that the parental suitability assessment in surrogacy arrangements should be reconsidered and performed in a reduced and more focused capacity. It submitted that:

In our view, state involvement should be around supporting parents to safely care for their children thus preventing harm to children, rather than policing their ability to have children.

- 5.21 Oranga Tamariki submitted that parental assessments should be focused on identifying any major risks or concerns (such as through New Zealand Police and care and protection checks) rather than an in-depth assessment to determine if intended parents are fit and proper. It submitted that:

Through our role in supporting the regulatory process for gestational surrogacy arrangements, we have observed there is little risk in domestic surrogacy arrangements. Intending parents to date have nearly always been found ‘fit and proper’. When there have been issues raised regarding the parent’s ability to care for a child, these have typically been in relation to life limiting medical issues — these have been uncommon.

Conclusions

RECOMMENDATIONS

R5

The Human Assisted Reproductive Technology Act 2004 should be amended to require Oranga Tamariki | Ministry for Children to prepare a surrogacy report in relation to all applications for approval of a surrogacy arrangement. The purpose of the surrogacy report should be to advise the Ethics Committee on Assisted Reproductive Technology whether it has identified any serious concerns in relation to the risk of harm to any resulting child of the proposed surrogacy arrangement.

R6

Oranga Tamariki | Ministry for Children should develop a specialised framework for preparing surrogacy reports. Consideration should be given to a two-step process as follows:

- a. Step One: Conducting basic background checks (such as criminal background and child protection checks) in relation to the intended parents. This step should be followed whenever a request for a surrogacy report is made. If these checks do not identify any information or concerns that warrant further investigation, the surrogacy report should be made within 30 days confirming that background checks have been completed and have not identified any information that indicates the proposed arrangement poses any serious risk of harm to any resulting child.
- b. Step Two: Advanced investigation. This step should only be followed if the basic background checks identify information that raises a concern about the risk of harm to any resulting child and warrants further investigation. The social worker should be able to investigate further, obtain information from the intended parents and conduct a risk assessment to determine whether the proposed arrangement poses any serious risk of harm to any resulting child. A more comprehensive surrogacy report may be required that enables the Ethics Committee on Assisted Reproductive Technology to properly assess whether the risks associated with a surrogacy for any resulting child are justified.

R7

Oranga Tamariki | Ministry for Children should establish a specialist unit of social workers with responsibility for exercising functions in relation to surrogacy arrangements. Specialist training and ongoing education should be made available to those social workers in respect of the functions of advanced investigation and preparation of parentage order reports under R28.

- 5.22 We consider that Oranga Tamariki’s role in the regulation of surrogacy arrangements needs to be clarified and redefined to focus on advising ECART on whether it has any serious concerns in relation to the risk of harm to any resulting child. This role should be prescribed in the HART Act, given it will replace Oranga Tamariki’s current role in surrogacy arrangements performed under the Adoption Act 1955. We consider that redefining Oranga Tamariki’s role in this way, along with other recommendations made in this Report, will give paramountcy to the child’s best interests in a way that is reasonable and justified. Specifically, in addition to redefining Oranga Tamariki’s role, we make recommendations in this chapter that seek to strengthen the focus of the ECART process on children’s best interests. This includes improving the focus of counselling on children’s rights to identity and amending the composition of ECART and the Advisory Committee on Assisted Reproductive Technology (ACART) to require at least two members with the ability to articulate the interests of children. In Chapter 7, we also recommend an additional principle in section 4 of the HART Act stating that surrogate-born people should be made aware of their genetic and gestational origins and whakapapa and be able to access information about those origins. This principle will guide the exercise of powers and the performance of functions under the HART Act.

Redefining Oranga Tamariki’s role in surrogacy arrangements

- 5.23 We do not think that the state should assess intended parents’ general suitability to be parents as it does currently under the Adoption Act. However, it is important to retain some form of minimum pre-conception checks to safeguard the wellbeing of any resulting child. Oranga Tamariki’s role in surrogacy regulation should therefore be limited to establishing and applying a process to identify whether there are any serious concerns in relation to the risk of harm to any resulting child.⁸ Its findings should then be reported to ECART in the surrogacy report. Currently, ECART can only approve an application if it is satisfied that the risks associated with a surrogacy for any resulting child are justified in

⁸ We note, by way of example, a new Bill introduced in Ireland to regulate assisted human reproduction (AHR) treatment imposes an obligation on AHR providers to be satisfied that the intended parents as well as the surrogate and any partner “[do] not present a potential significant risk of harm or neglect to any child that may be born as a result of such treatment”: An Bille Sláinte (Atáirgeadh Daonna Cuidithe) | Health (Assisted Human Reproduction) Bill 2022 (29) (Ireland), cl 16(1) and 16(7). That Bill envisages AHR providers to require each relevant person to complete a “section 16 assessment”, the parameters of which will be prescribed by the Minister in regulations: cl 16(2). The Bill requires the Minister to have regard to three matters when making regulations: cl 16(2)(c). First, that “the paramount consideration is the safety of any child”. Second, that the information sought needs to be “appropriate and proportionate” to satisfying the AHR treatment provider as referred to in cl 16(1). Third, any information sought that may reasonably be regarded as sensitive information is protected from any unnecessary further disclosure.

the proposal.⁹ The surrogacy report would therefore provide an important source of relevant information to assist ECART to perform its functions.

- 5.24 We acknowledge that other people who become parents with or without assisted reproductive technology do not need to undergo such checks. It is important to emphasise that we do not think that people who engage in surrogacy represent any greater risk than other parents. Rather, the need for some minimum checks stems from the state's unique role in the regulation of surrogacy arrangements.¹⁰ Our view is that the state should continue to actively facilitate surrogacy arrangements, including through the application of a regulatory approval process and the establishment of a separate process for recognising the intended parents as the legal parents of any surrogate-born child. In doing so, the state has obligations under the United Nations Convention on the Rights of the Child to ensure that the best interests of the child are a primary consideration¹¹ and to take all appropriate measures to protect children from future risk and harm.¹² In the surrogacy context, we consider that this amounts to a responsibility to identify and exclude arrangements where there is an unjustified risk of harm to any resulting child. This would align with the Verona Principles, which require an established framework for pre-surrogacy arrangements that promotes the rights of surrogate-born children.¹³
- 5.25 Providing for some basic pre-conception checks that are consistent with international best practice will also futureproof the regulatory system. It will help to ensure that legal parenthood established in Aotearoa New Zealand will be recognised internationally under any future international instrument.¹⁴ This will be important for New Zealanders who move overseas.

Introducing a specialist process for surrogacy reports

- 5.26 We recommend consideration be given to a two-step framework for preparing surrogacy reports. Step One would involve basic background checks such as criminal background and child protection checks. In our view, such checks are a reasonable and proportionate

⁹ As required under 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 [(2)].

¹⁰ See discussion 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 [11.10]–[11.13] and [13.66]–[13.72]; 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 [18.2.20]–[18.2.22]; 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 [91]–[104]. Sonia Allan *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008 (Report: Part 2)* (January 2019) at 106.

¹¹ 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.

¹² 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].

¹³ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [5.1].

¹⁴ In 2023, the Experts' Group on Parentage / Surrogacy convened by the Hague Conference on Private International Law will report on the feasibility of a possible future general private international law instrument on legal parentage and a separate protocol on legal parentage established as a result of international surrogacy arrangements.

step to identify any specific concerns for the welfare of the child.¹⁵ Such checks are currently undertaken by Oranga Tamariki in relation to intended parents as part of the broader process for obtaining in-principle approval to adoption. Similar requirements are also in place in Aotearoa New Zealand for the appointment of additional guardians¹⁶ and for people who work with children.¹⁷ Criminal background checks are also endorsed in the Verona Principles¹⁸ and form part of pre-conception surrogacy regulation or recommendations in other jurisdictions.¹⁹ As the Australian Human Rights Commission has observed:²⁰

A requirement to conduct such checks in all cases is likely to be of significant benefit if it is effective in some cases in identifying people who should not be granted approval (or if such people are discouraged from making an application to be approved as an intended parent).

- 5.27 If those basic background checks do not reveal any concerns, no further investigation or assessment should be necessary and the surrogacy report to ECART should confirm that background checks have not revealed any information that indicates the proposed arrangement poses any serious risk of harm to any resulting child.
- 5.28 We do not think that intended parents should be required to prove their parental suitability through home safety checks, provision of character references or disclosing detailed personal and family histories and financial information unless background checks reveal relevant concerns that should be investigated further. We also agree with Fertility Plus that the intended parents' health and life expectancy status should not be addressed by Oranga Tamariki but by the independent health reports that are prepared for the

¹⁵ A prior conviction is a recognised risk factor to future offending: Leon Bakker, David Riley and James O'Malley *Risk of Reconviction: Statistical Models which predict four types of re-offending* (Department of Corrections, 1999). However, it is well established that people who pose a risk to children are rarely convicted of a crime, although they may be known to social services or police. This underscores the need to consider wider interactions with police and child protection services: Lorraine R Beyer, Daryl J Higgins and Leah M Bromfield *Understanding Organisational Risk Factors for Child Maltreatment: A Review of Literature* (National Child Protection Clearinghouse, Australian Institute of Family Studies, November 2005) at 77–79.

¹⁶ A spouse or partner of a parent can be appointed as an additional guardian by consent provided the spouse or partner is not, and has never been, involved in proceedings concerning a child under the Care of Children Act, or Part 2 of the Oranga Tamariki Act 1989, is not, and has never been, either a respondent or an associated respondent in proceedings under the Family Violence Act 2018, and has never been convicted of an offence involving harm to a child (including without limitation certain specified offences): Care of Children Act 2004 s 23(2)(b)–(d). The spouse or partner's criminal record must be filed with the court along with a statutory declaration by the parents making the appointment confirming that, to the best of their knowledge, the spouse or partner is not ineligible to be appointed for the reasons identified above: ss 23(5)(a) and 24.

¹⁷ Children's Act 2014, s 31.

¹⁸ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [5.3(b)] and [5.5(b)].

¹⁹ See for example Surrogacy Act 2019 (SA), s 10(4)(g). Background checks have been proposed 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 [13.69]–[13.72]; Sonia Allan *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008 (Report: Part 2)* (January 2019) at 106 (recommending a “welfare check” as part of pre-surrogacy counselling, which should include the ability to obtain further information via requesting a criminal record or child protection order check if needed in individual cases); and in 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].

²⁰ 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 [104].

parties.²¹ This would also simplify Oranga Tamariki's role and reduce duplication in the process.

- 5.29 In some cases, background checks may identify a concern that should be investigated further by an Oranga Tamariki social worker. Not all prior convictions or interactions with Police or Oranga Tamariki should trigger further investigation, only those that raise a concern about the risk of future harm to a child. We do not recommend prescribing a list of offences or circumstances that should trigger further investigation but note that the list of specified offences that prevent employment in a role with contact with children²² or the circumstances that disqualify appointment of an additional guardian by consent²³ could provide useful indicators. Further investigation should include seeking information from the intended parents. Even serious offending should not automatically exclude a person from having a child through surrogacy if their circumstances have changed materially since the offending. It is important, however, that a framework is in place for situations where past behaviour suggests that there may be a serious risk of harm to any resulting child. If Oranga Tamariki forms a view that the arrangement poses a serious risk of harm to any resulting child, it should report on the nature of that concern to ECART.
- 5.30 We expect that these changes would simplify Oranga Tamariki's role for the vast majority of applications that will not require further investigation. It would enable the state to meet its international human rights obligations in a minimally invasive manner and should reduce the burden on Oranga Tamariki staff and the time it takes to obtain information. We note that Step One is largely an administrative task that may or may not require the expertise of a social worker. However, for the reasons given below, we consider Oranga Tamariki is the best-placed agency to conduct these checks. We recommend setting a timeframe for the provision of surrogacy reports under Step One of 30 days rather than the current 90 days, as suggested by Repromed and ANZICA. We do not recommend a shorter timeframe for Step Two, acknowledging that these investigations and risk assessments will be case specific. However, any surrogacy report that engages Step Two should still be prepared as soon as practicable and in any event within the existing 90-day timeframe.

Establishing a specialist unit in Oranga Tamariki

- 5.31 We consider that a specialist unit should be established within Oranga Tamariki to undertake the role of preparing surrogacy reports as well as the functions we discuss in Chapter 6 in relation to surrogacy arrangements that do not go through the ECART process or result in a legal parenthood dispute. We acknowledge that this will have resourcing implications for Oranga Tamariki, especially if our recommendations in relation to extending the ECART process to include traditional surrogacy arrangements in Chapter 4 are accepted.

²¹ As required under 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)].

²² Children's Act 2014, s 28 and sch 2.

²³ Care of Children Act 2004, s 23(2).

- 5.32 We agree with submitters that this role should not be undertaken by counsellors working with the intended parents and surrogates given the potential conflict of interest.²⁴ This is consistent with professional guidelines in the United Kingdom that call for a separation between counselling and welfare of the child assessments.²⁵ We have also considered the option of requiring a fertility clinic to obtain criminal records and provide these to ECART without the need for Oranga Tamariki involvement. We do not support this approach, however, as we do not think it is necessary or appropriate for the clinic or ECART to sight full criminal histories of the parties involved.²⁶ Only if Oranga Tamariki considers the arrangement poses a serious risk of harm to any resulting child should relevant information about that risk be disclosed to ECART.
- 5.33 We also prefer Oranga Tamariki over another independent organisation or professional performing this role given Oranga Tamariki's statutory responsibility for the care of children and its responsibility for maintaining child protection information systems.²⁷ If another organisation or professional was responsible for preparing surrogacy reports, they would still need to rely on information and records held by Oranga Tamariki, adding to the administration and potentially creating another source of delay.
- 5.34 We have also considered whether the surrogate (and any partner) should also be subject to the same background checks as intended parents. In some jurisdictions, this is also required or recommended to safeguard the best interests of the child,²⁸ sometimes on the basis that the child may remain in the surrogate's care after birth.²⁹ Ultimately, we do not consider that imposing background checks on the surrogate (and any partner) is

²⁴ This was also the conclusion in 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. See also Marilyn Crawshaw and others "Counselling challenges associated with donor conception and surrogacy treatments — time for debate" (2021) *Human Fertility* 1 at 5 and Marilyn Crawshaw and Ken Daniels "Revisiting the use of 'counselling' as a means of preparing prospective parents to meet the emerging psychosocial needs of families that have used gamete donation" (2019) 8 *Families, Relationships and Societies* 395 at 403.

²⁵ See discussion in Marilyn Crawshaw and others "Counselling challenges associated with donor conception and surrogacy treatments — time for debate" (2021) *Human Fertility* 1 at 4.

²⁶ We note our recommendations differ to the approach proposed in a Bill introduced in Ireland, discussed at [5.23], n 8 above. As discussed, that Bill would impose an obligation on the treatment provider to be satisfied that the intended parents, surrogate and any partner do not present a "potential significant risk of harm or neglect to any child": An Bille Sláinte (Atáirgeadh Daonna Cuidithe) | Health (Assisted Human Reproduction) Bill 2022 (29) (Ireland), cl 16(1). It is unclear what this will involve in practice, although the Minister, when prescribing the requirements for this assessment, must have regard to the need to protect any sensitive information from "unnecessary further disclosure by the AHR treatment provider concerned": cl 16(2)(c)(iii).

²⁷ Information held on Oranga Tamariki | Ministry for Children's information systems (CYRAS and TRIM) are currently checked as part of the adoptive applicant assessment. Oranga Tamariki guidance states that any reports of concern or matters relating to youth offending regarding either the applicant, their own history as a child and the applicant's family need to be considered, and any information on CYRAS or TRIM that details offending should be independently verified, such as through a police check: Oranga Tamariki | Ministry for Children "Assessing information from suitability checks" (1 April 2019) <www.orangatamariki.govt.nz>.

²⁸ 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 [13.67] and [13.72]; 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 [18.2.22]; Sonia Allan *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008 (Report: Part 2)* (January 2019), Recommendation 22; and International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [5.4](c).

²⁹ 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].

necessary given the planned intentions of the parties that the intended parents will care for and raise the child as the child's legal parents. In the rare situation where legal parenthood is disputed, the Family Court would be required to determine legal parentage in accordance with the best interests of the child, as we explore in Chapter 6.

RECORDING SURROGACY ARRANGEMENTS IN WRITING

Current law

- 5.35 Unlike many other comparable jurisdictions, there is no legal requirement in Aotearoa New Zealand to record a surrogacy arrangement in writing prior to conception.³⁰ Rather, the ECART application serves as a record of what the parties have discussed and agreed.

Issues

- 5.36 In the Issues Paper, we noted that there is some evidence that written surrogacy agreements are becoming more common in Aotearoa New Zealand³¹ even though such agreements are not required and are unenforceable under the HART Act,³² as we discuss in Chapter 6. Requiring surrogacy arrangements to be recorded in writing and signed by the parties could minimise the risk of problems arising during or after the surrogacy arrangement. Recent research that examined surrogacy arrangements in Aotearoa New Zealand found that some parties write a “letter of intent” that records their expectations, which, while unenforceable, “can serve as a source of security for everyone”.³³

Results of consultation

- 5.37 We asked submitters which options they preferred to improve the ECART process. Of the 168 submissions that addressed this question, 76 per cent supported a requirement for surrogacy arrangements to be recorded in writing and signed by the parties.³⁴
- 5.38 Submitters who supported this option thought it would help ensure the participants fully understand all the legal and health implications of the arrangement and give informed

³⁰ A pre-conception written surrogacy agreement is a precondition to establishing legal parenthood in most Australian states: Surrogacy Act 2019 (SA), ss 10(3)(d) and 10(5); Surrogacy Act 2012 (Tas), ss 5(5) and 16(2)(e); Surrogacy Act 2010 (Qld), s 22(2)(e)(iv)–(v); Surrogacy Act 2010 (NSW) ss 24(1) and 34; Surrogacy Act 2008 (WA) s 17(b) and (e). See also Surrogacy Bill 2022 (50) (NT), cls 14–15. A pre-conception written surrogacy agreement is also required in Ontario, British Columbia and Saskatchewan: Children's Law Reform Act RSO 1990 c 12, s 10(2); Family Law Act SBC 2011 c 25, s 29(2)(a); and Children's Law Act SS 2020 c 2, s 62(2)(a).

³¹ 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. 41 lawyers answered this question, 29 responded yes, 6 responded no and 6 said “nothing as formal as a written agreement”.

³² Human Assisted Reproductive Technology Act 2004, s 14(1).

³³ Hannah Gibson “Kin-making in the Reproductive Penumra: Surrogacy in Aotearoa New Zealand” (PhD Dissertation, Te Herenga Waka | Victoria University of Wellington, 2021) at 133.

³⁴ 128 submissions comprising 116 personal submissions, 8 submissions from organisations (Fertility Associates, Fertility New Zealand, Fertility Plus, Maternity Services Consumer Council, Nurse Practitioners New Zealand, Office of the Children's Commissioner, Oranga Tamariki | Ministry for Children and Te Kāhui Ture o Aotearoa | New Zealand Law Society), comments from the Judges of the Family Court and 3 academic submissions (Dr Anne Else, Adjunct Professor Ken Daniels, Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly)).

consent. NZLS and the Judges of the Family Court supported a requirement for written surrogacy agreements to be signed by the parties and certified by a lawyer. The Judges of the Family Court explained that certification provides an additional safeguard to ensure that the consent given at the time to enter the surrogacy agreement is true consent. NZLS explained that, while the agreement is not enforceable, it does set out the intention of the parties, and this may become a form of evidence should a dispute arise requiring proceedings in the Family Court.

- 5.39 NZLS did not think that the creation of a surrogacy agreement would add significantly to the process as the legal and counselling reports already provided to ECART document many of the issues that would be recorded in an agreement. NZLS suggested that checklists of key issues used by counsellors may be useful in compiling a list of considerations for surrogacy agreements. NZLS noted that many jurisdictions require such documents, and it enables a record to be kept in a single document of the parties' key expectations and understandings. NZLS said that:

Lawyers do report that many clients often express surprise there is no written agreement recording the surrogacy plans and some even draft their own as an adjunct to the ECART process.

- 5.40 NZLS supported including in agreements information around how cultural and identity information will be shared with the child.
- 5.41 Some submitters, including ANZICA, ECART and Repromed, did not support this option. ANZICA and Repromed explained that there is potential for the parties to sign their ECART application as a means of confirming their consent to their agreement. They noted that written agreements seem to be more common in traditional surrogacy arrangements that do not come through ECART and that the need for this could reduce if these arrangements access the ECART process in future. Fertility Plus similarly noted that written agreements would mostly be beneficial and relevant to traditional surrogacy arrangements that are not going through the ECART process and therefore have no written record of their intentions.
- 5.42 ECART explained that parties are usually not encouraged to record surrogacy arrangements in writing as surrogacy agreements are not enforceable by law. ECART noted, however, that the key aspects of surrogacy arrangements are discussed, agreed and recorded in counselling sessions.

Conclusions

RECOMMENDATION

R8

The Advisory Committee on Assisted Reproductive Technology should consider revising its guidelines to include a requirement that the Ethics Committee on Assisted Reproductive Technology be satisfied that the intended parents and the surrogate have prepared and signed a surrogacy plan. The surrogacy plan should record the parties' intentions in respect of the surrogacy arrangement. It would be unenforceable except in relation to the payment of reasonable surrogacy costs, pursuant to R46–R48.

- 5.43 There are clear benefits to requiring a surrogacy arrangement to be recorded in writing and signed by the parties. It would give the parties a record of their intentions in a single document that they can refer to over the course of the arrangement. This could provide greater certainty, minimise the risk of disagreement and assist the parties to resolve any problems in future.³⁵ We think this is important given that, in some cases, a pregnancy may not be achieved for months or years following ECART approval. A record of intentions would also provide clear evidence of the parties' original intentions in the event of any dispute.
- 5.44 Requiring a written record of the parties' intentions is consistent with the approach taken in many comparable jurisdictions³⁶ and would therefore futureproof the regulatory system, especially given the ongoing work by the Hague Conference on Private International Law to establish uniform laws on the recognition of legal parenthood and surrogacy.³⁷
- 5.45 In Chapter 8, we recommend that agreements to cover surrogacy costs that are entered into before the surrogate becomes pregnant should be enforceable. A natural consequence of this recommendation will be that parties will be encouraged to record their intentions in writing.
- 5.46 We appreciate the concerns raised by some submitters that requiring a written "surrogacy agreement" may wrongly suggest that such agreements are enforceable. However, we think this risk can be avoided by calling the record of intentions a "surrogacy plan" rather than an "agreement". Building this requirement into the ECART process also ensures that surrogacy plans are discussed with the parties' lawyers. The surrogacy plan itself could also include a statement to the effect that it is unenforceable except in relation to the payment of surrogacy costs, which we think would adequately address this concern.
- 5.47 Surrogacy plans would not need to be complex. As well as the parties' intentions in relation to legal parenthood and parental responsibility, the plan should address the parties' plans for sharing identity information with the surrogate-born child and payment of surrogacy costs. We suggest that the surrogacy information website we recommend in Chapter 10 include discussion of the matters that should be addressed in a surrogacy plan.

³⁵ 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.

³⁶ See [5.35], n 30 above. Requiring a written record of the surrogacy arrangement is also consistent with proposals made 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 [8.8]; and with the provisions of An Bille Sláinte (Atáirgeadh Daonna Cuidithe) | Health (Assisted Human Reproduction) Bill 2022 (29) (Ireland) cls 50 and 51.

³⁷ See Permanent Bureau of the Hague Conference on Private International Law "Parentage / Surrogacy" <www.hcch.net>.

IMPROVING COUNSELLING REQUIREMENTS

Current law

- 5.48 Counselling is a central feature of the ECART process. The ACART Guidelines require all parties to a prospective surrogacy arrangement to have received individual and joint counselling,³⁸ and ECART must be satisfied that counselling will continue to be available to all parties before and after pregnancy is achieved.³⁹ This recognises that surrogacy arrangements can raise significant psychological and social issues for all parties and that these issues need to be addressed alongside medical, legal and cultural factors.⁴⁰
- 5.49 Counselling must be provided by a person who is eligible to be an ANZICA approved counsellor.⁴¹ ANZICA's role includes providing ethical guidance to its members, including specific guidance on surrogacy counselling.⁴²
- 5.50 Counselling must address a range of matters. As part of the ECART application, the counsellor must report that, in their opinion:
- (a) the health and wellbeing of the intended surrogate and any resulting children are adequately safeguarded;⁴³ and
 - (b) all affected parties have understood:⁴⁴
 - (i) each other's needs and plans for continuing contact and information sharing;
 - (ii) any specific issues that might affect the health and wellbeing of all affected parties;
 - (iii) the implications if any resulting child has medical conditions, disabilities or genetic disorders; and
 - (iv) the possibility that the surrogate may terminate the pregnancy.

Issues

- 5.51 In the Issues Paper, we sought views on whether counselling requirements could be improved. We noted that, while the ACART Guidelines provide comprehensive guidance on counselling requirements, two surrogates we spoke with in our 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.

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 [B] and [I(4)]–[I(5)].

³⁹ 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)].

⁴⁰ 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 62.

⁴¹ Ngā Paerewa Health and Disability Services Standard NZS 8134:2021 at [1.10.5].

⁴² See Australian and New Zealand Infertility Counsellors Association *Guidelines for Professional Standards of Practice Infertility Counselling* (31 August 2018).

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(6)].

⁴⁴ 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)].

One fertility clinic counsellor we spoke with said that, while they offer further counselling during the surrogacy arrangement, uptake varies.

- 5.52 In some Australian states, additional counselling must take place following the birth of the child.⁴⁵ Post-birth counselling for the surrogate is seen as a particularly valuable opportunity to provide the surrogate emotional and psychological support 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.⁴⁶

Results of consultation

- 5.53 We asked submitters which options they preferred to improve the ECART process. Of the 168 submissions that addressed this question, 63 per cent supported improving counselling requirements.⁴⁷

- 5.54 A clear theme of submissions in support of improved counselling was a desire to see more counselling available for the surrogate as well as the intended parents in the later stages of pregnancy and after birth. One personal submitter with experience as an intended parent explained:

The support of the counselling team also abruptly stops after approval, as you enter the most challenging part of the process (the 9 months of pregnancy and beyond) there is no additional support unless you can afford to pay for it and seek it out. In my experience, the trauma of not being able to carry my own child was never addressed. When our first transfer failed our surrogate was very shaken, having been so positive in her ability to carry children and never having experienced loss, we needed to push hold for a few months to allow her to grieve and regroup. At this point surrogates need professional guidance and care.

- 5.55 Another personal submitter with experience as a traditional and gestational surrogate explained:

During my [gestational surrogacy] journey counselling was offered by the fertility clinic during treatments however I almost felt like they considered their job done once pregnant and no further contact was made. However during my [traditional surrogacy] (through a different clinic) the counsellor made regular contact during and after journey to check in on how things were going. I actually found this very beneficial and feel that there could very easily be many intended parents and surrogates that could benefit from this. The clinics offer that they can provide this but I actually think it should be a requirement to ensure things work out well.

⁴⁵ 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. See also Surrogacy Bill 2022 (50) (NT), cl 23.

⁴⁶ 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. 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 [20.3.31]–[20.3.36].

⁴⁷ 105 submissions comprising 88 personal submissions, 11 submissions from organisations (Australian and New Zealand Infertility Counsellors Association, Fertility Associates, Fertility New Zealand, Fertility Plus, Maternity Services Consumer Council, New Zealand Council of Trade Unions, New Zealand Nurses Organisation, Nurse Practitioners New Zealand, Oranga Tamariki | Ministry for Children, Repromed and Te Kāhui Ture o Aotearoa | New Zealand Law Society), comments from the Judges of the Family Court and 5 academic submissions (Dr Anne Else, Adjunct Professor Ken Daniels, Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly), Associate Professor Rhonda Shaw and Australian academics Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff (submitting jointly)).

- 5.56 However, some submitters who had experienced the ECART process as intended parents considered that the counselling provided by fertility clinics is already of a high standard and did not support further improvements. ECART similarly did not consider that there needs to be an improvement in counselling requirements. It noted that ECART's expectations in terms of the matters that need to be addressed in counselling are clearly understood by clinics and that applications are deferred and further information requested if those matters have not been addressed.
- 5.57 Adjunct Professor Ken Daniels, a former ACART member, did support clarifying and developing the provision of counselling services as part of the application process, noting that counsellors do not necessarily agree on what their purpose or contribution is, which has, in his experience, led to inconsistent approaches.
- 5.58 Submitters expressed mixed views on whether counselling after ECART approval is given should be mandatory. ANZICA considered that post-birth counselling should not be mandatory but that it should be a more formalised process. It explained that it is best practice that support be offered throughout the surrogacy process, including during treatment, pregnancy and post-birth. It noted, however, that there were resourcing implications for increasing counselling. NZLS also supported additional counselling once pregnancy is established but did not consider that this should be mandatory. NZLS noted that:

Even well-meaning intended parents can become insensitive to the surrogate's own needs and family situation once they have the newborn baby to focus on. Family lawyers practising in this area of law have experienced cases where surrogates have suffered considerable physical difficulties during pregnancy, at birth or following birth and are left feeling somewhat abandoned as the focus moves to the baby and intended parents.

- 5.59 Repromed, however, supported mandatory post-birth counselling requirements, observing that:

The clinic counsellors experience is that in the ECART counselling surrogates are often not anticipating the range of complex emotions which may arise during a pregnancy or post-birth. At Repromed we inform people we will follow up post-birth and do make these contacts. If all clinic counsellors were mandated to make contact post-birth this would ensure it happened for clients across all clinics. It would formalise the contact and counsellors would be supported by clinics to do this additional work. In making the post-birth counselling contact mandatory it still allows the client the option of taking up the support or not if they don't believe they need it.

- 5.60 Oranga Tamariki also supported improved counselling requirements to highlight the importance of supporting a child's right to identity, emotional transfer, and parental bonding and attachment. It supported mandating a discussion around a child's right to identity as part of the counselling sessions.
- 5.61 Some submitters questioned whether counselling should be provided independently of the fertility clinic. One submitter who experienced the ECART process as an intended parent felt constrained in counselling, explaining that:

... knowing that my words and actions would be recorded and shared with the committee and potentially impact whether we were approved stopped us all from opening up to our counsellors.

Conclusions

RECOMMENDATION

R9

The Advisory Committee on Assisted Reproductive Technology should revise its guidelines to require counselling to address the identity rights of surrogate-born people, including:

- a. their rights to access information about their genetic and gestational origins and whakapapa (see R37–R41); and
- b. the parties' plans for sharing identity information with the child.

- 5.62 Counselling is an integral part of the ECART process. It promotes the wellbeing of the parties involved in the surrogacy arrangement as well as any surrogate-born child.
- 5.63 Our review identified a high level of support for the quality of prior approval counselling. The current arrangements ensure that the parties have discussed the implications of the surrogacy arrangement and enable ECART to be satisfied that counselling has met the requirements of the ACART Guidelines. However, we acknowledge that, because the focus of prior approval counselling is on the implications of the surrogacy arrangement, some parties may still benefit from further therapeutic counselling provided outside the ECART process, independent from the clinics.
- 5.64 We agree with Oranga Tamariki that the current counselling requirements could be strengthened to highlight the importance of the identity rights of surrogate-born children. In Chapter 7, we recommend the establishment of a surrogacy birth register to record certain information about a child's genetic and gestational origins and whakapapa. Counselling should address the rights of surrogate-born people to access information on this register. Counselling should also be required to address the parties' plans for sharing identity information with the child. Currently, while the ACART Guidelines do require counselling to address how the health and wellbeing of any resulting child will be safeguarded,⁴⁸ there is no explicit reference to surrogate-born children's identity rights, although there is an explicit reference to the rights of donor-conceived people.⁴⁹
- 5.65 As we explain in Chapter 3, non-disclosure of information about genetic and gestational origins can impact on a child's rights to identity and can have a detrimental impact on their wellbeing if they later find out this information accidentally or in an unplanned way. Research involving donor-conceived people born in Aotearoa New Zealand before the introduction of the HART Act found there is a need to prioritise the long-term wellbeing of those who are donor-conceived, including through encouraging continuous conversations and openness.⁵⁰ We consider this is equally relevant in the surrogacy context because, like donor-assisted conception, surrogacy can have life-long implications for surrogate-born people and future generations.

⁴⁸ 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)].

⁴⁹ 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)(a)].

⁵⁰ Samantha Best "The experience and wellbeing of donor-conceived adults" (MHSc dissertation, Te Wānanga Aronui o Tāmaki Makau Rau | Auckland University of Technology, 2021) at 77–79 and 82.

- 5.66 Recent years have seen increased awareness of the importance of surrogate-born children growing up with knowledge of their genetic and gestational origins.⁵¹ In te ao Māori, openness about a child's genetic and gestational origins and whakapapa may be understood as consistent with the whakawhanaungatanga responsibilities of the intended parents, the surrogate and their respective whānau.⁵²
- 5.67 However, some intended parents may still struggle with disclosure for a range of reasons, such as cultural, religious and social stigma or disapproval or concern that disclosure would harm the child-parent relationship or the child's wellbeing.⁵³ Others may want to be open but lack information or strategies about how best to share the information.
- 5.68 A psycho-educational approach⁵⁴ to counselling is increasingly advocated alongside traditional therapeutic approaches to give intended parents information about how to talk with the child about their genetic and gestational origins and how to prepare for managing ongoing feelings in the context of family life and its social setting.⁵⁵ It is argued that such an approach would better enable prospective parents to make well-informed decisions, meet the needs of the child and enhance family relationships.⁵⁶ Dr Marilyn Crawshaw and Adjunct Professor Ken Daniels explain that, in practice, a psycho-educational approach could start pre-treatment by introducing early simple information and concepts and building on them, thus modelling how parents themselves might later talk with their children.⁵⁷ Prior approval counselling could also raise the possibility of ongoing peer support (such as parenthood preparation groups) in the immediate and longer term as well as the potential usefulness of later professional support.⁵⁸

⁵¹ Marilyn Crawshaw and others "Counselling challenges associated with donor conception and surrogacy treatments — time for debate" (2021) *Human Fertility* 1 at 4 (citations omitted).

⁵² See for example Leonie Pihama "Experiences of Whānau Māori within Fertility Clinics" in Paul Reynolds and Cheryl Smith (eds) *The Gift of Children: Māori and Infertility* (Huia Publishers, Wellington, 2012) 203 at 205. In the whāngai context, it has been suggested that the open transmission of whakapapa knowledge is key to making complex, wider notions of parenting work, given the diversity of Māori whānau, and that there needs to be an openness about whānau, hapū and iwi origins: Cheryl Smith "Tamaiti Whāngai and Fertility" in Paul Reynolds and Cheryl Smith (eds) *The Gift of Children: Māori and Infertility* (Huia Publishers, Wellington, 2012) 143 at 201.

⁵³ See discussion of relevant research in Marilyn Crawshaw and Ken Daniels "Revisiting the use of 'counselling' as a means of preparing prospective parents to meet the emerging psychosocial needs of families that have used gamete donation" (2019) 8 *Families, Relationships and Societies* 395 at 399–411.

⁵⁴ A psycho-educational approach is described as "a combination of information- and knowledge-sharing with strategy building delivered within a supportive and emotionally alert relationship that pays attention to individual, family and social contexts": Marilyn Crawshaw and Ken Daniels "Revisiting the use of 'counselling' as a means of preparing prospective parents to meet the emerging psychosocial needs of families that have used gamete donation" (2019) 8 *Families, Relationships and Societies* 395 at 398.

⁵⁵ See Marilyn Crawshaw and others "Counselling challenges associated with donor conception and surrogacy treatments — time for debate" (2021) *Human Fertility* 1 at 3 and 5; and Marilyn Crawshaw and Ken Daniels "Revisiting the use of 'counselling' as a means of preparing prospective parents to meet the emerging psychosocial needs of families that have used gamete donation" (2019) 8 *Families, Relationships and Societies* 395 at 398.

⁵⁶ Marilyn Crawshaw and Ken Daniels "Revisiting the use of 'counselling' as a means of preparing prospective parents to meet the emerging psychosocial needs of families that have used gamete donation" (2019) 8 *Families, Relationships and Societies* 395 at 398. Discussion in this article is concerned with donor-conception but we consider the same principles apply to surrogacy as another form of third-party assisted reproduction.

⁵⁷ Marilyn Crawshaw and Ken Daniels "Revisiting the use of 'counselling' as a means of preparing prospective parents to meet the emerging psychosocial needs of families that have used gamete donation" (2019) 8 *Families, Relationships and Societies* 395 at 402.

⁵⁸ Marilyn Crawshaw and Ken Daniels "Revisiting the use of 'counselling' as a means of preparing prospective parents to meet the emerging psychosocial needs of families that have used gamete donation" (2019) 8 *Families, Relationships and Societies* 395 at 402.

- 5.69 We consider that there is merit in ACART taking account of this work and providing greater guidance about what the role of counsellors in safeguarding the health and wellbeing of the child requires in practice.
- 5.70 This is consistent with our recommendation in Chapter 7 to include an additional principle in section 4 of the HART Act stating that surrogate-born people should be made aware of their genetic and gestational origins and whakapapa and be able to access information about those origins. This would also be consistent with Ngā Paerewa Health and Disability Services Standard NZS 8134:2021 (Ngā Paerewa), which requires service providers to “encourage and support people to inform offspring of their genetic and gestational origins”.⁵⁹ It would also align with the Verona Principles, which recommend that pre-surrogacy arrangements address communication about the child’s origins, recognising that a child’s ability to preserve their identity, including their genetic and gestational origins, “has an on-going, lifetime impact on the child”.⁶⁰

Ongoing counselling requirements

- 5.71 We do not make any specific recommendations in relation to encouraging greater use of counselling after a surrogacy arrangement is approved by ECART. It is already a requirement that ECART must be satisfied that counselling will be made available to all parties before and after pregnancy is achieved,⁶¹ and ongoing access to counselling would be a sensible matter to include in the parties’ surrogacy plan, discussed above.

SUPPORTING MĀORI TO ACT IN ACCORDANCE WITH TIKANGA

Current law

- 5.72 A principle of the 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.⁶²
- 5.73 The ACART Guidelines require that counselling is “culturally appropriate” and ECART must be satisfied that counselling “has provided for whānau and extended family involvement”.⁶³

Issues

- 5.74 In the Issues Paper, we observed that it was not clear whether the HART Act and the ACART Guidelines are currently meeting the needs of Māori who wish to engage with and

⁵⁹ Ngā Paerewa Health and Disability Services Standard NZS 8134:2021 at [1.10.1].

⁶⁰ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [5.5(g)] and [11.1]. See also UNICEF and Child Identity Protection *Key Considerations: Children’s Rights & Surrogacy* (Briefing Note, February 2022) at 3 and *International Principles for Donor Conception and Surrogacy* (November 2019) at [11].

⁶¹ 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)].

⁶² Human Assisted Reproductive Technology Act 2004, s 4(f). At [5.3], n 2 above, we noted that a review of the HART Act could consider whether this principle adequately recognises tikanga Māori and gives effect to the Crown’s obligations under te Tiriti o Waitangi.

⁶³ 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(4)].

act in accordance with tikanga in a surrogacy arrangement.⁶⁴ In Chapter 2, we explain that surrogacy engages many aspects of te ao Māori, including the tikanga of whanaungatanga, which may mean whānau are involved in decision-making in a surrogacy arrangement. In Chapter 3, we discuss how te Tiriti o Waitangi means that Māori must be able to act in accordance with tikanga should they wish to do so.

Results of consultation

- 5.75 We asked submitters whether they agreed that surrogacy law and regulation should enable Māori to act in accordance with tikanga if they wish to do so. We received 128 submissions that addressed this question. Of these submissions, 78 per cent agreed,⁶⁵ five per cent did not agree⁶⁶ and 17 per cent expressed no view.⁶⁷
- 5.76 Submitters made a variety of comments on this question. Two personal submitters who identified as Māori responded “of course” and “we will anyway”. Another personal submitter supported “having a Māori policy which embraces their traditional values and ways of doing things”. Some submitters, including Ngā Rangahautira, emphasised the ability for tikanga to adapt and develop and to vary across iwi, hapū and whānau. Several submitters considered that surrogacy law and regulation should not restrict or prohibit Māori acting in accordance with tikanga.
- 5.77 In the Issues Paper, we identified three possible options for reform:
- (a) Option One: 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) Option Two: Requiring counsellors to engage local kaumātua and hapū for cultural support where Māori do not feel that they have sufficient knowledge within their own whānau or hapū to act in accordance with tikanga.
 - (c) Option Three: Conducting further research to better understand ao Māori perspectives on surrogacy and developing guidelines to assist ECART and others exercising powers or functions under the legislation.

⁶⁴ Research conducted between 2007 and 2010 examined Māori experiences within fertility clinics and identified a general view that fertility clinics are not well equipped to deal with whānau Māori: Leonie Pihama “Experiences of Whānau Māori within Fertility Clinics” in Paul Reynolds and Cheryl Smith (eds) *The Gift of Children: Māori and Infertility* (Huia Publishers, Wellington, 2012) 203 at 234. Some research participants felt that the fertility clinic experience had no cultural acknowledgement of them as Māori, that fertility professionals lacked an understanding of the significance of whakapapa and that there was a concerning lack of access to Māori-focused resources or information, at 223–227.

⁶⁵ 100 submissions comprising 84 personal submissions, 12 submissions from organisations (Advisory Committee on Assisted Reproductive Technology, Australian and New Zealand Infertility Counsellors Association, Fertility Associates, Fertility New Zealand, Fertility Plus, New Zealand Council of Trade Unions, New Zealand Nurses Organisation, Ngā Rangahautira, Nurse Practitioners New Zealand, Office of the Children’s Commissioner, Repromed and Te Kāhui Ture o Aotearoa | New Zealand Law Society), comments from the Judges of the Family Court and 3 academic submissions (Adjunct Professor Ken Daniels, Professor Mark Henaghan and Associate Professor Rhonda Shaw).

⁶⁶ 6 personal submissions.

⁶⁷ 22 submissions comprising 21 personal submissions and 1 submission from an organisation (Federation of Women’s Health Councils Aotearoa).

- 5.78 Submitters expressed mixed views on these options.⁶⁸ Of the 139 submissions that addressed this question, 53 per cent supported Option One,⁶⁹ 45 per cent supported Option Two,⁷⁰ 53 per cent supported Option Three,⁷¹ 2 per cent preferred another option⁷² and 29 per cent expressed no view.⁷³
- 5.79 Several submitters supported all three options, including ANZICA, New Zealand Nurses Organisation (NZNO), Ngā Rangahautira, Fertility Plus, Office of the Children's Commissioner (OCC) and Repromed. ANZICA submitted that each of the options identified used in combination "would support Māori to act in accordance with tikanga". NZNO said the system needs a whānau-centred approach and emphasised the importance of whanaungatanga. Ngā Rangahautira submitted:
- We agree with the options proposed by the Commission, and we hope these options can be implemented all together opposed to a 'one or the other' approach. Holistic support within processes for Māori to act in accordance with tikanga is needed. This needs to include services that are front facing, such as counsellors having expertise in tikanga Māori and engaging with kaumatua, as well as the guidelines that will trickle down into practice. It will ensure that wāhine Māori are respected and supported at every step of the process.
- 5.80 In relation to improving counselling (Options One and Two), OCC observed that, given counselling must be "culturally appropriate" under the HART Act, the availability of culturally appropriate counselling, particularly Māori practitioners for Māori participants in fertility treatment, "is imperative". Further, OCC submitted that:
- People seeking surrogacy services should be able to identify the mātauranga Māori experts they prefer, and clinics should support them to be involved, eg with counsellors. It should be a partnership decision between Māori and the clinic. It may take time for relationships between clinics and local kaumatua to develop, that can help them to identify Māori practitioners.
- 5.81 Several submitters, including ACART, Fertility Plus and Fertility Associates, supported a mechanism for professionals in this area to access guidance from Māori cultural leaders and experts.
- 5.82 In relation to the need for further research (Option Three), ANZICA thought research would be "useful" and Repromed considered it "necessary to honour commitments as Te

⁶⁸ Some submitters preferred more than one option, meaning the percentage of submissions referred to in relation to each option do not add up to 100.

⁶⁹ 73 submissions comprising 63 personal submissions, 9 submissions from organisations (Australian and New Zealand Infertility Counsellors Association, Fertility Plus, New Zealand Council of Trade Unions, New Zealand Nurses Organisation, Ngā Rangahautira, Nurse Practitioners New Zealand, Office of the Children's Commissioner, Repromed and Te Kāhui Ture o Aotearoa | New Zealand Law Society) and 1 academic submission (Associate Professor Rhonda Shaw).

⁷⁰ 63 submissions comprising 54 personal submissions, 7 submissions from organisations (Australian and New Zealand Infertility Counsellors Association, Fertility Plus, New Zealand Nurses Organisation, Ngā Rangahautira, Office of the Children's Commissioner, Repromed and Te Kāhui Ture o Aotearoa | New Zealand Law Society) and 2 academic submissions (Adjunct Professor Ken Daniels and Associate Professor Rhonda Shaw).

⁷¹ 74 submissions comprising 63 personal submissions and 11 submissions from organisations (Australian and New Zealand Infertility Counsellors Association, Ethics Committee on Assisted Reproductive Technology, Fertility New Zealand, Fertility Plus, New Zealand Council of Trade Unions, New Zealand Nurses Organisation, Ngā Rangahautira, Office of the Children's Commissioner, Oranga Tamariki | Ministry for Children, Repromed and Te Kāhui Ture o Aotearoa | New Zealand Law Society).

⁷² 3 personal submissions.

⁷³ 40 submissions comprising 39 personal submissions and 1 submission from an organisation (Federation of Women's Health Councils Aotearoa).

Tiriti partners”. Oranga Tamariki also supported consideration being given to funding publicly available research “with a view to better understanding an indigenous te ao Māori perspective on surrogacy”. OCC stressed the importance of direct discussion with hapū and iwi on these matters:

We support research, in general, to better understand Māori perspectives on health services, fertility and family formation generally and surrogacy as one of those. OCC supports Māori led discussion on this issue and by Māori for Māori approaches.

Conclusions

RECOMMENDATION

R10

The Advisory Committee on Assisted Reproductive Technology should provide further guidance or advice to the Ethics Committee on Assisted Reproductive Technology (ECART) on what matters ECART should consider when determining whether counselling in relation to a surrogacy arrangement is culturally appropriate from an ao Māori perspective.

- 5.83 Our review has identified a gap between the general requirements of the HART Act and the ACART Guidelines and what it means in practice to ensure that counselling meets the needs of Māori. There is little guidance around supporting Māori to act in accordance with tikanga beyond the requirement that counselling provide for whānau involvement (which is important for Māori given the significance of whanaungatanga and whakapapa, as we discuss in Chapter 2).
- 5.84 We recommend ACART provide further guidance or advice⁷⁴ to ECART on what matters ECART should consider when determining whether counselling has been “culturally appropriate” from an ao Māori perspective.⁷⁵ Such guidance or advice would then support counsellors who are performing this role to understand what is required to meet the current criteria for approval. We would expect this guidance or advice to address matters such as the need for parties in a surrogacy arrangement to have the options of including a tikanga expert and/or member(s) of their whānau or hapū in counselling and when it may be appropriate for counsellors to engage directly with hapū on behalf of a party (for example, if a counsellor lacks the necessary expertise but a participant wishes to seek advice on tikanga-based practices). The guidance or advice should also address the availability of whāngai arrangements in a surrogacy context, as we discuss in Chapter 6.
- 5.85 We consider this would facilitate the exercise of tino rangatiratanga through recognising tikanga Māori in light of the commitment in te Tiriti to enable Māori to live according to tikanga. There is an obligation on the Crown to ensure health services are culturally appropriate and kaupapa Māori solutions are available to Māori in a way that they are not

⁷⁴ Under the Human Assisted Reproductive Technology Act 2004, the Advisory Committee on Assisted Reproductive Technology can “issue guidelines and give advice to the ethics committee on any matter relating to any kind of assisted reproductive procedure”: s 35(1)(b).

⁷⁵ As required under 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)].

disadvantaged by their choices.⁷⁶ This recommendation would also support fertility clinics to comply with Ngā Paerewa, which requires service providers to recognise and commit to Māori mana motuhake and provide culturally safe services for Māori.⁷⁷

- 5.86 The process by which ACART develops guidance or advice is important. ACART should ensure that any guidelines or advice are prepared in consultation with iwi, hapū, whānau and Māori health providers. Once further research has been undertaken to better understand tikanga Māori and surrogacy and Māori perspectives on surrogacy in practice (see R1), these guidelines or advice should be revisited to build on that knowledge base.

DURATION OF ECART APPROVALS

Current law

- 5.87 Under the HART Act, ECART can limit the duration of any approval of a surrogacy arrangement as it thinks fit.⁷⁸ Its current practice is to impose a three-year time limit on all surrogacy approvals. It can extend an approval when a request is made and currently does so in situations where there have been no significant changes and the parties simply wish to extend the time to continue with treatment. In situations where there has been a significant change in circumstances, for example, the applicants wish to use a new surrogate, ECART considers the application anew.

Issues

- 5.88 In the Issues Paper, we observed that it may take a long time for a surrogate to become pregnant and that the current time limit on the duration of ECART surrogacy approvals can create further cost, administrative burden and delay in some circumstances.
- 5.89 The existing time limit also means that the parties must reapply to ECART in situations where the surrogate offers to carry a subsequent child for the intended parents as it will be unlikely that a subsequent pregnancy will be achieved within the three-year timeframe.

Results of consultation

- 5.90 We asked submitters which options they preferred to improve the ECART process. Of the 168 submissions that addressed this question, 58 per cent supported extending the time limit for ECART surrogacy approvals.⁷⁹
- 5.91 ANZICA, Repromed, Fertility Associates, NZLS and the Judges of the Family Court supported a five-year period rather than eliminating time limits altogether. ANZICA and Repromed noted that, if treatment has not commenced after five years, it is important

⁷⁶ 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.

⁷⁷ Ngā Paerewa Health and Disability Services Standard NZS 8134:2021 at [1.3]–[1.5].

⁷⁸ Human Assisted Reproductive Technology Act 2004, s 19(3)(a).

⁷⁹ 97 submissions comprising 84 personal submissions, 8 submissions from organisations (Australian and New Zealand Infertility Counsellors Association, Fertility Associates, Maternity Services Consumer Council, Nurse Practitioners New Zealand, Office of the Children's Commissioner, Oranga Tamariki | Ministry for Children, Repromed and Te Kāhui Ture o Aotearoa | New Zealand Law Society), comments from the Judges of the Family Court and 4 academic submissions (Dr Anne Else, Adjunct Professor Ken Daniels, Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly) and Associate Professor Rhonda Shaw).

that arrangements are reviewed due to the nature of these arrangements and in recognition of changes to people's lives and feelings over time. In their joint submission, Dr Liezl van Zyl and Dr Ruth Walker supported a period of 6–8 years and an expedited process for intended parents reapplying with a new surrogate.

- 5.92 The Maternity Services Consumer Council (MSCC) preferred a streamlined process be put in place for intended parents who fall outside the three-year limit and for those who are seeking approval for a subsequent surrogacy arrangement to expand their families rather than a longer time for approval to remain in place. Dr Else preferred allowing for a time extension on a case-by-case basis only, to accommodate the rare instances where this is sought.
- 5.93 ACART did not have a strong position on this option, although it did note that ECART makes its decision based on a set of facts that will change over time and the further away from the original approval date, the more likely it is that the current circumstances have deviated from the original application, which may increase risk. That said, ACART recognised that, because it may take some time for the surrogate to become pregnant and that sometimes there are delays with treatment for various reasons, three years might be too short.

Conclusions

RECOMMENDATION

- R11** The Advisory Committee on Assisted Reproductive Technology should consider providing guidance or advice to the Ethics Committee on Assisted Reproductive Technology in relation to time limits on the duration of approvals of surrogacy arrangements, when an application for an extension to approval will be considered and the process for making and granting extensions.

- 5.94 We consider that the questions of how long a surrogacy approval should remain in place, when an extension to an approval will be considered and the process for making and determining applications for extensions are all matters that could usefully be addressed in advice or guidance issued by ACART. This would be consistent with ACART's function "to issue guidelines and give advice to the ethics committee on any matter relating to any kind of assisted reproductive procedure".⁸⁰ Having a clear, written policy or approach to these matters would provide greater certainty.
- 5.95 Such guidance or advice would need to balance the concerns identified in consultation that, in some cases, a pregnancy may not be achieved within three years against the risk that circumstances change significantly in that time.⁸¹ There may be a need to put in place safeguards for extension applications, such as a requirement for an additional joint counselling session, to ensure that all the parties continue to give their informed consent

⁸⁰ Human Assisted Reproductive Technology Act 2004, s 35(1)(a).

⁸¹ We note that comparable jurisdictions take different approaches. There is no statutory time limit on approvals in Victoria under the Assisted Reproductive Treatment Act 2008 (Vic). In Ireland, An Bille Sláinte (Atáirgeadh Daonna Cuidithe) | Health (Assisted Human Reproduction) Bill 2022 (29) (Ireland) proposes a maximum time limit of 2 years on approvals: cl 51(4). In South Africa, court confirmation of a surrogacy agreement lapses 18 months after the date of confirmation: Children's Act 2005 (South Africa), s 296(1)(b).

to the arrangement. Any guidance or advice should also address situations where the surrogate has successfully carried a child for the intended parents and has offered to carry another child. We note, by way of example, the guidance that has been issued in relation to the Patient Review Panel in the Australian state of Victoria.⁸²

REVIEWING ECART DECISIONS

Current law

- 5.96 The HART Act does not explicitly provide for a right of appeal in relation to decisions made by ECART to decline an application for approval of a surrogacy arrangement, although ECART can reconsider an application it has previously declined if relevant new information becomes available.⁸³
- 5.97 While decisions made by ECART could be subject to judicial review by te Kōti Matua | High Court,⁸⁴ 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 to decline an application.

Issues

- 5.98 In the Issues Paper, we said that the lack of a clear appeal or review process may be a concern given the significance of a decision by ECART to decline an application. For people whose applications are declined, it may mean the end of their journey to build a family or it may mean that they pursue international surrogacy or enter a private traditional surrogacy arrangement, neither of which require ECART approval.
- 5.99 The lack of any process for independent review or appeal of ECART decisions is a recognised issue. Professor Nicola Peart has said that the absence of a specially designated appeal process “is troubling when individuals’ reproductive opportunities are at stake”.⁸⁵ Dr Jeanne Snelling has argued that this “is a substantial barrier to ECART achieving transparency and fairness, and may affect public confidence in the decision-making process”.⁸⁶ It is also out of step with the arrangements in place for other health and disability ethics committees administered by Manatū Hauora | Ministry of Health, which operate with an established review and appeal process.⁸⁷

⁸² Patient Review Panel *Applications for approval of a surrogacy arrangement: Guidance note* (Victoria, July 2021) at 14–15.

⁸³ Human Assisted Reproductive Technology Act 2004, s 18(3).

⁸⁴ Pursuant to the Judicial Review Procedure Act 2016.

⁸⁵ Nicola Peart “Alternative Means of Reproduction” in Peter Skegg and others *Health Law — A to Z of New Zealand Law* (online ed, Thomson Reuters) at [30.17.2].

⁸⁶ Jeanne Snelling “Law and Regulation” in Human Genome Research Project *Choosing Genes for Future Children: Regulating Preimplantation Genetic Diagnosis* (Te Whare Wānanga o Ōtākou | University of Otago, Dunedin, 2006) 229 at 252.

⁸⁷ Manatū Hauora | Ministry of Health *Standard Operating Procedures for Health and Disability Ethics Committees* (December 2019), ch 9. The need for an independent appeal from ethics committees was highlighted in A P Duffy, D K Barrett and M A Duggan *Report of the Ministerial Inquiry into the Under-Reporting of Cervical Smear Abnormalities in the Gisborne Region* (Manatū Hauora | Ministry of Health, April 2001), which recommended consideration be given to providing for an independent appeal process, at [11.23]. Following that report, the Minister authorised the Health

- 5.100 It is unclear why no right of review or appeal exists for ECART decisions. The predecessor to ECART, the National Ethics Committee on Assisted Human Reproduction, did provide in its terms of reference a process for independent review,⁸⁸ although the lack of any statutory right of appeal was considered “problematic”.⁸⁹ One possible reason may have been an expectation that the same operational procedures (including appeal procedures) that applied to health and disability ethics committees would also apply to ECART. The HART Act provides that ECART is subject to any applicable ethical standards determined by the National Ethics Advisory Committee (NEAC).⁹⁰ However, in practice, ethical standards are largely irrelevant to ECART’s role in relation to assisted reproductive procedures. The appeal procedures that apply to health and disability committees are set out in standard operating procedures determined by the Ministry of Health rather than ethical standards determined by NEAC.⁹¹

Results of consultation

- 5.101 We asked submitters which options they preferred to improve the ECART process. Of the 168 submissions that addressed this question, 64 per cent supported an appeal or review process for applications that are declined by ECART.⁹²
- 5.102 Fertility Associates noted that this may allow for ECART to be more measured in its approval “since saying ‘no’ now means ‘no’ forever”. The Judges of the Family Court considered that a mechanism for appeal or review would provide a further safeguard to ensure that the process remains fair and is administered appropriately.
- 5.103 Several submitters, including ANZICA, Repromed and Dr Else, supported the establishment of a review panel to conduct an independent review of ECART decisions

Research Council Ethics Committee to undertake the additional function of considering appeals against decisions made by health and disability ethics committees by written notice issued under s 25(1)(h)(ii) of the Health Research Council Act 1990.

⁸⁸ The terms of reference for the National Ethics Committee on Assisted Human Reproduction (NECAHR) provided for applicants to request a review of any new information by NECAHR, and if parties are not satisfied with the outcome of the review, the issue should be referred to the Director-General of Health (or the Health Research Council Ethics Committee in the case of issues relating to health research). An independent person or group would then be appointed by the Director-General to undertake a review of the decision-making process used by the committee. The terms of reference for NECAHR were published in National Ethics Committee on Assisted Human Reproduction *Annual Report to the Minister of Health for the year ending 31 December 2001* (Manatū Hauora | Ministry of Health, Wellington, 2002) at 12–13.

⁸⁹ Crown Law’s advice to the National Ethics Advisory Committee stated that the lack of any statutory right of appeal from the National Ethics Committee on Assisted Human Reproduction (NECAHR) was “somewhat more problematic” than the lack of appeal right from the National Ethics Advisory Committee, given that NECAHR “has the function of reviewing assisted human reproductive proposals (i.e. making decisions with impact on third parties)”. Crown Law Office *Second opinion and appeal processes for ethical review* (6 August 2003) at [12], published in National Ethics Advisory Committee *System of Ethical Review of Health and Disability Research in New Zealand: Discussion Document* (Manatū Hauora | Ministry of Health, September 2003), Appendix 2.

⁹⁰ Human Assisted Reproductive Technology Act 2004, s 27(4). See also s 27(3)(a), which requires the Minister to ensure the committee complies in its composition with any applicable standard governing ethics committees determined by the National Ethics Advisory Committee.

⁹¹ Manatū Hauora | Ministry of Health *Standard Operating Procedures for Health and Disability Ethics Committees* (December 2019) at [3].

⁹² 108 submissions comprising 95 personal submissions, 9 submissions from organisations (Australian and New Zealand Infertility Counsellors Association, Fertility Associates, Fertility New Zealand, Fertility Plus, Maternity Services Consumer Council, New Zealand Council of Trade Unions, Nurse Practitioners New Zealand, Oranga Tamariki | Ministry for Children and Repromed), comments from the Judges of the Family Court and 3 academic submissions (Dr Anne Else, Adjunct Professor Ken Daniels and Associate Professor Rhonda Shaw).

declining approval, where sought. ANZICA and Repromed noted that the panel could comprise independent experts, which could include ACART and/or Ministry of Health representation. If dissatisfaction remained, they submitted that further review could be accessed through the Health and Disability Commission. ANZICA, Fertility Plus and Repromed noted that any review or appeal process needs to be clearly documented and accessible.

- 5.104 However, some submitters did not support an independent appeal or review process. These submitters noted that very few applications are declined and that there is a form of review process already in place. ECART explained that it has the power to reconsider an application if relevant new information becomes available, which it has interpreted as a review mechanism that allows it to review any decline decision at the request of the applicant. It notes that, in the past six years, there has been only one such application for review. ECART agreed that it was appropriate to continue to provide for a review process and said it will consider making specific reference to the review mechanism in its terms of reference and in all decline decision letters going forward. ECART did not support an appeal process. It noted its mandate as an expert body with specialist perspectives and did not consider that this type of decision is amenable to appeal. Adjunct Professor Daniels submitted that the current system needs to be clarified and formalised. In their joint submission Dr van Zyl and Dr Walker were not in favour of an appeal or review process, assuming that ECART would only decline an application if there is a significant problem that cannot be rectified.

Conclusions

RECOMMENDATION

R12

The Human Assisted Reproductive Technology Act 2004 should be amended to provide for a right of independent review of any decision made in relation to a surrogacy arrangement by the Ethics Committee on Assisted Reproductive Technology. Reviews should be by way of rehearing. The review process must operate expeditiously and consideration should be given to:

- a. establishing a panel of individuals with a range of expertise who can be appointed to review a decision as and when required;
- b. appointing three panellists to review any decision to ensure relevant expertise is available; and
- c. imposing time limits on making applications for review and on the completion of reviews.

Instituting independent review of ECART decisions

- 5.105 A decision made by ECART to decline a surrogacy application can have a significant impact on the applicants' lives. For some people, it may bring an end to their hopes of growing their family. Others might turn to surrogacy outside the ECART process, potentially putting the parties at greater risk.
- 5.106 When legislation authorises decisions that affect individual rights, interests or legitimate expectations, there generally ought to be an opportunity for challenge by way of

independent appeal or review.⁹³ This serves to correct error, to supervise and improve decision-making at first instance and to help maintain public confidence in the legal system.⁹⁴ Given the significance of ECART decisions to individual interests, we consider it is important that applicants have options to challenge these decisions.

- 5.107 We consider that the current arrangements (reconsideration of new information by ECART and judicial review) are inadequate. Where individual rights and interests are at stake, a review process that is independent from the original decision-maker is central to the maintenance of the rule of law.⁹⁵ The perception of independence is in many ways as important as the reality of independence as it goes to the question of public confidence in the decision-making process.⁹⁶ Independent review also promotes accountability and, as Fertility Associates noted, may allow for ECART to be more measured in its approval.
- 5.108 While judicial review provides an independent review, it is largely concerned with the process leading to a decision rather than re-evaluating the merits of the decision reached.⁹⁷ It can also be costly and time consuming. For these reasons it is not generally considered as effective or desirable as a right of appeal to an established body.⁹⁸ The limitations of judicial review are even more pronounced in the specific context of ECART decision-making given the committee's specialist expertise. As the High Court has observed:⁹⁹

The ethical and moral dilemmas that arise in the area of assisted human reproduction are not well suited to judicial intervention. Parliament has made a deliberate decision to entrust evaluation of competing policy considerations to the Advisory Committee, with its power “to issue guidelines and give advice to the [Ethics Committee] on any matter relating to any kind of assisted reproductive procedure ... and to keep such guidelines and advice under review”. Similarly, the Ethics Committee has been empowered to make decisions in respect of assisted reproductive procedures that are not classified as “established”.

Parliament's decision to create specialist bodies (from whose decisions there are no rights of appeal) recognises that the mix of scientific, ethical, cultural, spiritual and moral factors at play are not readily justiciable. While judicial review might lie from a decision of the Ethics Committee, the grounds on which the High Court might exercise its jurisdiction are likely to be narrow. As Venning J observed, in *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd*, the High Court “should not seek to determine or resolve scientific questions demanding the evaluation of contentious expert opinion”. That concern exacerbates when the decision-making involved extends to moral, ethical, cultural and spiritual considerations.

- 5.109 ECART's view, noted above, was that its specialist expertise means that its decisions are not of a type that are amenable to appeal. While the expertise of the decision-maker can

⁹³ Te Aka Matua o te Ture | Law Commission *Tribunal Reform* (NZLC SP20, 2008) at [2.30]. See also Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at 140.

⁹⁴ Te Aka Matua o te Ture | Law Commission *Tribunal Reform* (NZLC SP20, 2008) at [2.30].

⁹⁵ Te Aka Matua o te Ture | Law Commission *Tribunal Reform* (NZLC SP20, 2008) at [2.14] and Te Aka Matua o te Ture | Law Commission *Tribunals in New Zealand* (NZLC IP6, 2008) at [2.31]–[2.32].

⁹⁶ Te Aka Matua o te Ture | Law Commission *Tribunals in New Zealand* (NZLC IP6, 2008) at [5.1].

⁹⁷ Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at 140 and Te Aka Matua o te Ture | Law Commission *Tribunals in New Zealand* (NZLC IP6, 2008) at [2.61].

⁹⁸ Te Aka Matua o te Ture | Law Commission *Tribunals in New Zealand* (NZLC IP6, 2008) at [8.3] and Jeanne Snelling “Law and Regulation” in Human Genome Research Project *Choosing Genes for Future Children: Regulating Preimplantation Genetic Diagnosis* (Te Whare Wānanga o Ōtākou | University of Otago, Dunedin, 2006) 229 at 252.

⁹⁹ *Re Long* [2017] NZHC 3263 at [92]–[93] (citations omitted).

be a reason for not providing a right of appeal¹⁰⁰ and we acknowledge ECART's specialist expertise, we do not think this is an adequate reason to deprive applicants of a right of independent review, given the significance of ECART decisions. As noted above, the lack of independent review is out of step with the approach in relation to other health and disability ethics committees. It is also inconsistent with the review procedures in place for decisions to decline to approve a surrogacy arrangement in the Australian state of Victoria.¹⁰¹

- 5.110 We acknowledge that, to date, very few applications have been declined by ECART. However, in Chapter 4, we explain that surrogacy applications to ECART are increasing in number. In its submission on the Issues Paper, ACART explained that surrogacy arrangements are becoming increasingly more complicated. We think it is critical that the regulatory framework anticipates and provides for an increase in the number of applications that are declined in future. We also think that decisions to defer an application or to impose conditions on an approval should be reviewable as these types of decisions can still be significant and may, in practice, have the same effect as a decision to decline approval.¹⁰² While ECART reports that only one application for review has been received in the past six years, this may be attributable to the lack of a clearly documented review process that is independent of ECART.

Practical, simple and low-cost review mechanism

- 5.111 Ultimately, we see value in adopting a flexible and low-cost model that can provide an efficient method of review following simple and expedited procedures. We recommend the Government consider establishing a panel of individuals who can be appointed to review a decision as and when required. Panellists should have expertise that generally reflects the mix of legal, medical and ethical expertise of ECART. It should also include Māori representation in line with ECART. These members could, for example, be previous members of ACART and ECART. It may be appropriate to appoint three panellists to undertake any review so that relevant expertise is available.
- 5.112 We considered but discounted reviews being conducted by an existing body. As noted above, the specialist nature of ECART decisions means an appeal to a court of general jurisdiction may be inappropriate.¹⁰³ While ACART has the necessary expertise to review

¹⁰⁰ Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at 140.

¹⁰¹ In Victoria, decisions to decline approval of a surrogacy arrangement by the Patient Review Panel can be reviewed by the Victorian Civil and Administrative Tribunal: Assisted Reproductive Treatment Act 2008 (Vic), s 96. In Ireland, An Bille Sláinte (Atáirgeadh Daonna Cuidithe) | Health (Assisted Human Reproduction) Bill 2022 (29) (Ireland) does not provide an independent right of appeal of decisions to decline approval, but it does require the Assisted Human Reproduction Regulatory Authority, "in the interests of procedural fairness", to give notice in writing to the applicant where the Authority is minded to refuse to approve a surrogacy agreement and give the applicant an opportunity to provide supplementary material for the Authority's further consideration before making a determination: cl 51(5).

¹⁰² For example, the Ethics Committee on Assisted Reproductive Technology may defer an application until the surrogate achieves a certain body mass index (BMI). Such a decision may have the same effect as a decision to decline if the surrogate is unable to achieve the required weight loss. See for example Ethics Committee on Assisted Reproductive Technology minutes of 5 September 2019 at [6] (application E19/80). That application was subsequently approved once the required BMI was achieved: Ethics Committee on Assisted Reproductive Technology minutes of 29 October 2020 at [15].

¹⁰³ The *Legislation Guidelines* explain that courts of general jurisdiction are more appropriate for second appeals from specialist courts or for first appeals where general matters of criminal or civil law are involved, whereas a specialist

ECART decisions, it would be inappropriate to extend ACART's functions in this way given its current responsibility for setting the guidelines that ECART must apply in practice. The Health Research Council Ethics Committee (HRCEC) is responsible for hearing appeals from health and disability committees. However, the focus of these committees is on research rather than assisted reproductive procedures, and HRCEC's membership and constitution reflects that focus.¹⁰⁴ Changes to HRCEC's membership and composition would be necessary, for example, through the establishment of an ad hoc subcommittee with appropriate expertise, if it were to take on the role of reviewing ECART decisions in relation to surrogacy arrangements.

- 5.113 Reviews should be by way of rehearing.¹⁰⁵ This means that the reviewers should come to their own conclusion based on the material presented to ECART and any further information that is permitted. This ensures the focus of the review is on whether ECART properly interpreted and applied any relevant ACART guidelines or advice in reaching its decision.¹⁰⁶ The reviewers should be able to affirm the decision under review, vary the decision or set it aside and either substitute it with its own decision or refer the matter back to ECART for reconsideration with any directions or recommendations it makes.
- 5.114 The procedure adopted to review decisions on surrogacy arrangements in Victoria¹⁰⁷ and for independent reviewers under the Accident Compensation Act 2001¹⁰⁸ provide useful models. Consideration should be given to imposing time limits on making an application for review¹⁰⁹ and on the review being concluded.¹¹⁰

Review rights for other types of ECART decisions

- 5.115 Our recommendations are limited to decisions made on surrogacy applications given the scope of our terms of reference. However, our view is that it would be appropriate to provide a right of review for all decisions made by ECART. All applications concerning assisted reproductive procedures have significant consequences for individual rights and interests. While human reproductive research may not affect individual interests in the

body will generally be appropriate for first appeals from decision-makers in narrow fields or in cases that require technical expertise: Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at 141. In Victoria, a right of appeal exists to the Victorian Civil and Administrative Tribunal (see [5.109], n 101 above). However, there is no comparable tribunal in Aotearoa New Zealand.

¹⁰⁴ Health Research Council Act 1990, s 26.

¹⁰⁵ Reviews by way of rehearing is a common form of appeal, and in 2008, the Commission recommended that it should continue to be the procedure used for most rights of appeal from tribunal decisions: Te Aka Matua o te Ture | Law Commission *Tribunal Reform* (NZLC SP20, 2008) at [8.28]. The working definition of "tribunal" used for the purpose of that project was focused on the primary characteristics of tribunals, many of which are arguably shared by the Ethics Committee on Assisted Reproductive Technology, namely, that they determine questions affecting people's rights, they do this by considering facts and evidence and applying standards (generally rules or policies) to the facts, they exercise a defined specialist jurisdiction and they are independent from the executive, at [2.11].

¹⁰⁶ As required under Human Assisted Reproductive Technology Act 2004, ss 19(2) and 29(a).

¹⁰⁷ See Victorian Civil and Administrative Tribunal Act 1998 (Vic), ss 49–51.

¹⁰⁸ See Accident Compensation Act 2001, ss 134–148.

¹⁰⁹ In Victoria, an application for review must be made within 28 days after the day on which the decision was made: Assisted Reproductive Treatment Act 2008 (Vic), s 98.

¹¹⁰ We note that independent reviewers under the Accident Compensation Act 2001 must make a review decision within 28 days after the day on which the hearing finishes (or the day on which the applicants would have been entitled to have a hearing or agreed not to have a hearing): s 144(1).

same way, we suggest the same approach to other health and disability ethics committee decisions on research should be followed.

COMPOSITION OF ACART AND ECART

Current law

- 5.116 ACART is a committee established by the Minister of Health.¹¹¹ The HART Act prescribes comprehensive membership requirements for ACART. It must consist of between eight and 12 members and must include members with expertise in assisted reproductive procedures, human reproductive research, ethics and law.¹¹² In addition, ACART must include one or more Māori members with expertise in Māori customary values and practice and the ability to articulate issues from a Māori perspective¹¹³ and at least one member with the ability to articulate issues from a consumer perspective.¹¹⁴ Finally, at least one member must be the Children's Commissioner or a representative or employee of the Office of the Children's Commissioner with the ability to articulate the interests of children.¹¹⁵
- 5.117 ECART is also a committee established by the Minister of Health.¹¹⁶ ECART's membership is not as comprehensively prescribed under the HART Act, although the HART Act does require at least one member with expertise in the areas of assisted reproductive procedures and human reproductive research.¹¹⁷ Otherwise, ECART membership requirements are set out in its terms of reference, which state that ECART must consist of between eight and 12 members and must include members with expertise in ethics and law as well as members with the ability to articulate issues from a consumer perspective and a disability perspective.¹¹⁸ ECART's terms of reference also require that at least two ECART members must be Māori with "a recognised awareness of te reo Māori, and an understanding of tikanga Māori".¹¹⁹ All ECART members "are expected to have an understanding of how the health sector responds to Māori issues and their application to ethical review".¹²⁰

Issues

- 5.118 In the Issues Paper, we identified several potential issues with the membership requirements for ACART and ECART.

¹¹¹ Human Assisted Reproductive Technology Act 2004, s 32.

¹¹² Human Assisted Reproductive Technology Act 2004, ss 33(1) and 34(4)(a)–(c) and (f).

¹¹³ Human Assisted Reproductive Technology Act 2004, s 34(4)(d).

¹¹⁴ Human Assisted Reproductive Technology Act 2004, s 34(4)(e).

¹¹⁵ Human Assisted Reproductive Technology Act 2004, ss 34(4)(g) and 34(5).

¹¹⁶ Human Assisted Reproductive Technology Act 2004, s 27(1).

¹¹⁷ Human Assisted Reproductive Technology Act 2004, s 27(3)(b).

¹¹⁸ 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].

¹¹⁹ Ethics Committee on Assisted Reproductive Technology *Terms of Reference* at 5.

¹²⁰ Ethics Committee on Assisted Reproductive Technology *Terms of Reference* at 5.

- 5.119 First, we questioned whether the current requirements for Māori representation on ACART and ECART are sufficient and promote consistency with the Treaty and the principle of partnership. We noted that one Māori academic who shared an ao Māori perspective on surrogacy with us said “[o]ne Māori person [on ACART] cannot represent the diversity of Māori views and perspectives that exist”. In contrast, another Māori academic thought that one Māori member on 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”, preferring that the HART Act require the Māori member to be co-chair and the deputy chair position be removed.
- 5.120 Second, we noted that ECART is not required to have a member with the ability to articulate the interests of children, unlike ACART. We observed that this requirement might be considered appropriate especially if ECART approval becomes a key condition for determining legal parenthood in surrogacy arrangements, as we recommend in Chapter 6.
- 5.121 Third, we noted that fertility clinic representatives and intended parents expressed a view that ECART should include counsellors with expertise in surrogacy arrangements and a greater number of medical professionals with expertise in obstetrics and gynaecology.

Results of consultation

Improving Māori representation on ACART and ECART

- 5.122 We asked submitters whether they thought that Māori representation on ACART and/or ECART should be improved. We received 127 submissions that addressed this question. Of these submissions, 63 per cent said yes,¹²¹ nine per cent said no¹²² and 28 per cent selected “no view”.¹²³
- 5.123 We also received 114 submissions that selected one or more options for improving Māori representation. These submissions expressed different views:
- (a) Requiring an additional Māori member of ACART was supported by 39 per cent of submitters who answered this question.¹²⁴
 - (b) Affirming in legislation that ECART’s membership must include at least two Māori members at all times was supported by 36 per cent of submitters who answered this question.¹²⁵

¹²¹ 80 submissions comprising 69 personal submissions, 10 submissions from organisations (Advisory Committee on Assisted Reproductive Technology, Australian and New Zealand Infertility Counsellors Association, Fertility New Zealand, Fertility Plus, New Zealand College of Midwives, New Zealand Council of Trade Unions, Ngā Rangahautira, Nurse Practitioners New Zealand, Office of the Children’s Commissioner and Repromed) and 1 academic submission (Dr Anne Else).

¹²² 12 submissions comprising 11 personal submissions and 1 submission from an organisation (Ethics Committee on Assisted Reproductive Technology).

¹²³ 35 submissions comprising 32 personal submissions, 2 submissions from organisations (Federation of Women’s Health Councils Aotearoa and New Zealand Nurses Organisation) and 1 academic submission (Associate Professor Rhonda Shaw).

¹²⁴ 44 submissions comprised of 39 personal submissions, 4 submissions from organisations (Fertility Associates, New Zealand Council of Trade Unions, Office of the Children’s Commissioner and Repromed) and 1 academic submission (Adjunct Professor Ken Daniels).

¹²⁵ 41 submissions comprised of 36 personal submissions and 5 submissions from organisations (Fertility Plus, New Zealand Council of Trade Unions, New Zealand Nurses Organisation, Office of the Children’s Commissioner and Repromed).

- (c) The appointment of Māori co-chairs to ACART and ECART was supported by 23 per cent of submitters who answered this question.¹²⁶
 - (d) Another option was preferred by 10 per cent of submitters who answered this question.¹²⁷ Views of these submitters were mixed. Some thought that Māori should comprise up to half of the membership of ACART and ECART, while others disagreed with any membership requirements based on ethnicity rather than specialist expertise.
 - (e) Finally, 28 per cent of submitters who answered this question selected “no view”.¹²⁸
- 5.124 Several submitters emphasised the importance of both ECART and ACART having more than one Māori member. OCC considered that “it is not a safe practice to have only one Māori representative on a panel to hold te Tiriti partnership for Māori”. It submitted that multiple members would support continued expertise, a point also noted by Repromed, which observed that having two Māori members would allow for a Māori member to be present if the other were not able to attend due to other commitments. The New Zealand College of Midwives considered Māori representation needed to be carefully addressed and “should be a key part of transformational change”. Another personal submitter similarly submitted that “Māori represent best when they are more than one person even if they have divergent views”.
- 5.125 Ngā Rangahautira preferred the appointment of Māori co-chairs as an option to improve Māori representation, explaining:
- To truly operationalise the partnership that te Tiriti envisaged, we believe it should be a legal requirement that both ECART and ACART have a Māori co-chair. The current legislative provisions dictating the representation on these committees are not strong enough to ensure that Māori are granted rangatiratanga, exercised alongside the Crown’s kāwanatanga, in this sphere. We agree the committees are quite small, so adding more Māori members may not give light to the diversity of people who enter surrogacy arrangements. We need to ensure that other perspectives such as the perspectives of the LGBTQIA+ community are represented within these committees as well. It is important to ensure, however, that Māori are granted their inherent rights as tangata whenua and also their rights under te Tiriti in this sphere. This is why requiring the Māori member on these committee’s to be the co-chair would be desirable. It would allow the other diverse perspectives of Aotearoa to be heard on these committees whilst also ensuring Māori status as tangata whenua are upheld.
- 5.126 Other submitters, including ECART, considered the current arrangements to be adequate. NZLS questioned whether there is a need for increased Māori representation given the low numbers of Māori participating in surrogacy arrangements.

Increasing other specialist expertise on ECART

- 5.127 Modifying the specialist expertise of ECART was also identified as an option to improve the ECART process. We asked submitters which options to improve the ECART process they preferred. Of the 168 submissions that addressed this question, 57 per cent

¹²⁶ 26 submissions comprised of 21 personal submissions and 5 submissions from organisations (Australian and New Zealand Infertility Counsellors Association, Fertility New Zealand, Ngā Rangahautira, Office of the Children’s Commissioner and Repromed).

¹²⁷ Comprised of 11 personal submissions.

¹²⁸ 32 submissions comprised of 31 personal submissions and 1 submission from an organisation (Federation of Women’s Health Councils Aotearoa).

supported modifying the membership of ECART to include members with counselling or medical expertise and/or members able to articulate the interests of children.¹²⁹

- 5.128 Some submitters who supported this option commented on the need to increase the number of ECART members with medical expertise and to include counsellors with expertise in surrogacy arrangements. Fertility Associates noted that several Fertility Associates doctors have been members of ECART and ACART over the years, and their common feedback was that ECART should have at least two doctors plus an expert in the area of psychology, social work or fertility counselling, since many of the cases are socially and medically complex. Because ECART spends a lot of time considering the suitability of surrogates, they suggested one of the doctors should be an obstetrician or an obstetric physician. ANZICA and Repromed submitted that appointing an additional medical specialist would support ECART to manage potential conflicts of interest. Adjunct Professor Daniels, who supported counsellor representation on ECART, considered that this should not be a counsellor currently employed in one of the clinics.
- 5.129 Some submitters (including Oranga Tamariki, NZLS, MSCC and Fertility Plus) commented on the need to modify ECART's membership to include people who represent the interests of children (as is required for ACART). Repromed, in contrast, considered that Oranga Tamariki's involvement in parental suitability assessments meant that the interests of children are well represented and that an additional member may not be required. They observed that:
- In the counsellors experience from observing ECART meetings the Committee members always place the wellbeing of the child as paramount when considering applications as per the principles of the HART Act.
- 5.130 Other suggestions for improving membership were made. NZLS highlighted the need for a range of cultural experts to be available to sit as committee members when required to ensure appropriate cultural expertise is available. MSCC preferred that ECART membership should reflect its focus on ethical considerations and did not favour ECART members having counselling or medical expertise. Some personal submitters supported membership including people with experience in surrogacy arrangements (such as intended parents, surrogates and adults born through surrogacy) and people that represent or support Aotearoa New Zealand's diverse community, including the LGBTIQ+ community.

¹²⁹ 96 submissions comprising 83 personal submissions, 11 submissions from organisations (Advisory Committee on Assisted Reproductive Technology, Australian and New Zealand Infertility Counsellors Association, Fertility Associates, Fertility New Zealand, Fertility Plus, Maternity Services Consumer Council, New Zealand Nurses Organisation, Office of the Children's Commission, Oranga Tamariki | Ministry for Children, Repromed and Te Kāhui Ture o Aotearoa | New Zealand Law Society) and 2 academic submissions (Dr Anne Else and Adjunct Professor Ken Daniels).

Conclusions

RECOMMENDATION

R13

The Government should review the membership requirements for the Advisory Committee on Assisted Reproductive Technology (ACART) and the Ethics Committee on Assisted Reproductive Technology (ECART). As part of this review, the Government should consider amending the Human Assisted Reproductive Technology Act 2004 to:

- a. require a minimum of two Māori members to be appointed to each of ACART and ECART;
- b. require at least two members of each of ACART and ECART to have the ability to articulate the interests of children;
- c. require a minimum of two members to be appointed to ECART with expertise in assisted reproductive procedures; and
- d. prescribe the membership requirements for ECART in legislation (rather than terms of reference).

5.131 The current membership requirements for ACART and ECART reflect the specialist nature of their functions and facilitate the consideration of complex ethical, medical and legal issues. However, it has been 18 years since the HART Act was enacted, and our review has identified a range of improvements that should be made to strengthen the knowledge, experience and skills of ACART and ECART. We note that, as a practical matter, some members may be able to provide expertise in more than one of the areas prescribed.

5.132 We recommend that these improvements be considered by the Government as part of a wider review of the current membership requirements under the HART Act. Our review is limited to the regulation of surrogacy, and we recognise that there may be other improvements that could be made to the current membership requirements to accommodate other functions performed by the committees. A wider review of current membership requirements would ensure any other issues and potential improvements can be considered.

Improving Māori representation

5.133 We recommend affirming in legislation a requirement that both ACART and ECART have a minimum of two Māori members.¹³⁰ We consider that this would promote the exercise of *kāwanatanga* in a responsible manner. It would provide for different Māori perspectives and go some way to ensuring continuity of Māori representation at each meeting. It would also encourage greater attention being given to the proportionately low uptake of surrogacy and other forms of assisted reproductive technology by Māori (see Chapter 2) and efforts to address this (see discussion above and Chapter 10).

¹³⁰ The Māori Health Authority, contemplated by Pae Ora (Healthy Futures) Bill 2021 (85-1), will have a role in providing policy and strategy advice to the Minister on matters relevant to hauora Māori, at cl 19(1)(h). This could include a role in advising the Minister on prospective Māori appointees to the Advisory Committee on Assisted Reproductive Technology and the Ethics Committee on Assisted Reproductive Committee.

- 5.134 We have not recommended prescribing in legislation a requirement for Māori co-chairs on the committees.¹³¹ However, we acknowledge the benefits that such a model may have in recognising rangatiratanga, as noted by Ngā Rangahautira. Consideration should therefore be given to ensuring that the committees can choose to put in place a co-chair model should they wish to.

Articulating children's interests on ECART

- 5.135 We recommend including on both ACART and ECART two members with the ability to articulate the interests of children.¹³² Consideration of children's interests is a significant aspect of both committees' roles. In relation to ECART, our recommendations above to redefine Oranga Tamariki's role further emphasise these interests as ECART will be required to consider and weigh information received from Oranga Tamariki, and decide whether the risks associated with a surrogacy for any resulting child are justified. In relation to ACART, as the committee responsible for setting the ACART Guidelines, we consider that having at least two members with the ability to articulate the interests of children would be desirable.
- 5.136 We do not think that these members need to be an employee or representative of the Office of the Children's Commissioner as is currently required for ACART.¹³³ We appreciate there may be practical issues with limiting eligible candidates in this way. Social workers, lawyers and infertility counsellors may be just as capable of articulating children's interests in assisted reproductive procedures such as surrogacy. In appointing members with the ability to articulate the interests of children, the Government should have regard to the views of those with lived experience, where practicable.

Increasing expertise in assisted reproductive procedures on ECART

- 5.137 We also recommend considering modifying the membership of ECART to require a minimum of two members with expertise in assisted reproductive procedures. Currently, ECART's terms of reference provide for one or more members with expertise in assisted reproductive procedures. However, in practice, there may only be one such member. This member is often associated with one of the three fertility clinics that operate in Aotearoa New Zealand. This can be problematic given that committee deliberations involve the consideration of medical aspects of an application and the presence of only one member with expertise in assisted reproductive procedures may give rise to an actual or perceived conflict of interest. Improving medical expertise on ECART received broad support from organisations with an interest in the ECART process, including the fertility clinics, ANZICA and ACART. ECART also considered that this could be appropriate.

Affirming ECART membership requirements in legislation

- 5.138 Finally, the statutory provisions in the HART Act in relation to ECART's membership are incomplete and leave important requirements to its terms of reference. Our view is that these membership requirements should be enshrined in legislation rather than in terms of

¹³¹ For an example of co-chairs prescribed in legislation see Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010, sch 4 cl 6.

¹³² 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.

¹³³ Human Assisted Reproductive Technology Act 2004, s 34(4)(g).

reference. This would affirm the significance of these areas of expertise to the performance of ECART's functions and would align with the statutory provision made for ACART's membership.

MONITORING AND REPORTING ON OUTCOMES

Current law

- 5.139 ECART's functions include keeping under review any approvals previously given for the performance of assisted reproductive procedures, including, but not limited to, approvals in relation to surrogacy arrangements.¹³⁴ The HART Act explains that this includes monitoring the progress of any assisted reproductive procedures performed under current approvals.¹³⁵ In its submission on the Issues Paper, ECART explained that, in practice, this means that, if issues are raised by fertility clinics, these matters will come to ECART's attention for discussion and ECART will bring issues to ACART's attention as appropriate.
- 5.140 In terms of reporting, there is no statutory obligation on ECART to publish an annual report on its performance of its functions. The preparation of an annual report is required under ECART's terms of reference.¹³⁶ However, the last annual report available on ECART's website at the time of writing was for the 2014–2015 year.¹³⁷
- 5.141 ACART also has a role in monitoring the application and health outcomes of assisted reproductive procedures and established procedures.¹³⁸ Unlike ECART, ACART is required to report annually on its progress in carrying out its functions.¹³⁹ ACART explained in its annual report for 2019–2020 how it carries out its monitoring function.¹⁴⁰ It commissions quantitative reports on outcomes of assisted reproductive treatments provided in Aotearoa New Zealand.¹⁴¹ It also monitors published papers on psychosocial outcomes for parties involved in assisted reproduction and resulting children and monitors ECART decisions by including summaries of applications and ECART minutes in ACART meeting agendas.

Issues

- 5.142 In the Issues Paper, we observed that, while ECART and ACART have statutory roles in monitoring surrogacy arrangements, in practice, there is little oversight of surrogacy arrangements once ECART approval is given unless a fertility clinic brings an issue to ECART's attention. We sought views on whether ECART's monitoring role should be strengthened, for example, by giving participants in the process the opportunity to

¹³⁴ Human Assisted Reproductive Technology Act 2004, s 28(1)(b).

¹³⁵ Human Assisted Reproductive Technology Act 2004, s 28(1)(b).

¹³⁶ Ethics Committee on Assisted Reproductive Technology *Terms of Reference* at 10–11.

¹³⁷ Ethics Committee on Assisted Reproductive Technology *Annual Report 2014–2015* (July 2018).

¹³⁸ Human Assisted Reproductive Technology Act 2004, s 35(2).

¹³⁹ Human Assisted Reproductive Technology Act 2004, s 42(3).

¹⁴⁰ Advisory Committee on Assisted Reproductive Technology *Annual Report 2019/20* (May 2021) at 5–6.

¹⁴¹ See for example Advisory Committee on Assisted Reproductive Technology *Assisted Reproductive Technology in New Zealand 2018* (October 2021).

provide feedback, which could help ECART to identify ways to improve its processes and liaise with ACART on any issues that arise in relation to the ACART Guidelines.

- 5.143 Another potential issue relates to the availability of information on the performance of ECART's and ACART's functions. There appear to be significant delays in the publication of annual reports, which are an important source of public information. Transparency is important to maintain public confidence in the regulatory framework and to assist with research and evaluation.

Results of consultation

- 5.144 We asked submitters which options they preferred to improve the ECART process. Of the 168 submissions that addressed this question, 59 per cent supported improving monitoring and reporting requirements.¹⁴²
- 5.145 Several submitters, including MSCC and NZLS, considered there were important benefits to ECART having an ongoing role in monitoring and reporting on outcomes in surrogacy arrangements. NZLS suggested that ECART could seek feedback on the experiences of both intended parents and surrogates, which could then be used to improve its processes, be published annually as part of ECART's annual reports and be made available on the ECART website. The National Council of Women of New Zealand also suggested a requirement for annual monitoring reports. Dr Else emphasised that monitoring needs to be independent. Adjunct Professor Daniels noted that ACART could have a broader monitoring role.
- 5.146 However, other submitters did not support improved monitoring and reporting of surrogacy arrangements. Some submitters were concerned that this might be too invasive for applicants.
- 5.147 ECART's view was that monitoring and reporting does not need to be further strengthened. The Judges of the Family Court also did not consider there was a need for ECART to be involved in monitoring and reporting, observing that the Family Court is independent of the ECART process and would provide resolution post-birth for any legal issues that may arise. They considered that community agencies in the health sector could provide support and oversight for any issues that may arise.
- 5.148 ACART considered monitoring and reporting could be a Ministry of Health role rather than a role for ECART. ACART noted that:

ECART has not previously had a role to delve into people's personal lives after the committee has given them approval for their family formation through assisted reproductive technology. This seems an intrusion on privacy of whānau. However, researchers could seek voluntary participants to study outcomes of surrogacy arrangements, such as whether mokopuna (children) get to meet the surrogate and know their birth story.

¹⁴² 99 submissions comprising 87 personal submissions, 9 submissions from organisations (Australian and New Zealand Infertility Counsellors Association, Fertility Plus, Maternity Services Consumer Council, National Council of Women of New Zealand, New Zealand Nurses Organisation, Nurse Practitioners New Zealand, Oranga Tamariki | Ministry for Children, Repromed and Te Kāhui Ture o Aotearoa | New Zealand Law Society) and 3 academic submissions (Dr Anne Else, Adjunct Professor Ken Daniels and Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly)).

Conclusions

RECOMMENDATIONS

R14

The Ethics Committee on Assisted Reproductive Technology (ECART) should establish and publish on its website a procedure for providing feedback on and making complaints in relation to the operation of the ECART approval process.

R15

The Human Assisted Reproductive Technology Act 2004 should be amended to require the Ethics Committee on Assisted Reproductive Technology (ECART) to prepare an annual report on its operations. The annual report should include information on:

- a. applications received and decisions made by ECART;
- b. any feedback or complaints received on the operation of the ECART approval process; and
- c. any actions taken in response to the feedback or to resolve the complaint.

R16

Annual reports of both the Ethics Committee on Assisted Reproductive Technology and the Advisory Committee on Assisted Reproductive Technology should be published on their websites as soon as practicable.

- 5.149 ECART and ACART's statutory monitoring functions are important to ensure continuous improvement of the regulatory framework.
- 5.150 We recommend that ECART establish a clear procedure for applicants and affected parties to provide feedback on and make complaints in relation to the operation of the ECART approval process. Such information is important to ensure that emerging issues can be identified and addressed. While fertility clinics can raise issues directly with ECART, we think it is important that applicants and affected parties also have a clear avenue for providing feedback on the process or making a complaint. We do not recommend more formal monitoring or reporting requirements in relation to the outcomes of surrogacy arrangements, acknowledging the concern raised by some submitters that this may be unduly invasive. Our recommendations in Chapter 7 would ensure some information about surrogacy arrangements is collected by the state, and this would support future policy work and research.
- 5.151 We also recommend that the HART Act enshrine the requirements in ECART's terms of reference regarding the preparation of annual reports. Annual reports for both ECART and ACART should be published on their websites as soon as practicable. Consideration should be given to prescribing in the HART Act a timeframe for publication of annual reports.¹⁴³ Several submitters noted the delay in the publication of annual reports on the ACART and ECART websites. These reports are important sources of information for

¹⁴³ For example, in Ireland, it is proposed that the Assisted Human Reproduction Regulatory Authority must prepare an adopt an annual report no later than 30 April in each year for the immediately preceding calendar year and the Minister must, within 21 days of receiving the annual report, cause copies of it to be laid before each House of the Oireachtas: An Bille Sláinte (Atáirgeadh Daonna Cuidithe) | Health (Assisted Human Reproduction) Bill 2022 (29) (Ireland), cl 101.

researchers and the public and must be available in a timely manner to promote transparency and public confidence in the regulatory regime.

- 5.152 These recommendations, like many others we make in this Report, will have resource implications for the committees and the Ministry of Health, which provides the committees with administrative support.¹⁴⁴ Our view, which we explain in Chapter 4, is that the current resourcing of the regulatory system is inadequate and must be addressed to respond to the increased demand for ECART approval of surrogacy arrangements. This is needed to ensure that the system safeguards the rights and interests of those involved, including surrogate-born children, surrogates and intended parents, and promotes public confidence in the regulatory system.
-

¹⁴⁴ Pursuant to Human Assisted Reproductive Technology Act 2004, ss 28(2) and 35(3).

CHAPTER 6

Legal parenthood

INTRODUCTION

- 6.1 There are no specific legal parenthood laws to deal with the unique relationships that exist in surrogacy arrangements. Parties to a surrogacy arrangement must instead rely on the adoption process to transfer legal parenthood from the surrogate (and any partner) to the intended parents.
- 6.2 The need for a new approach to legal parenthood in surrogacy arrangements is widely acknowledged. In 2005, the Commission identified “an urgent need to create a legislative framework for the allocation of parenthood in surrogacy arrangements”.¹ The Government at the time agreed in principle with the Commission’s recommendations,² accepting that the adoption process “is not well-suited for implementing surrogacy arrangements for many reasons”.³
- 6.3 The Commission’s 2005 recommendations have not been progressed, and dissatisfaction with the current law remains.⁴ Judges of the Family Court considering adoption applications have repeatedly pointed to the unsuitability of adoption laws, enacted over 60 years ago, to deal with the kinds of issues arising in surrogacy arrangements.⁵ Three Members’ Bills have sought reform, including Tāmāti Coffey MP’s Improving Arrangements for Surrogacy Bill 2021 which is currently before the House.⁶ Public

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

² Government Response to Law Commission Report on New Issues in Legal Parenthood (March 2006) at [11].

³ Government Response to Law Commission Report on New Issues in Legal Parenthood (March 2006) at [29].

⁴ See for example Mark Henaghan, Ken Daniels and John Caldwell “Family law policy and assisted human reproduction” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 237 at 263–272; 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.

⁵ *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].

⁶ Improving Arrangements for Surrogacy Bill 2021 (72-1); 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).

petitions have also drawn attention to the need for change,⁷ and in early 2022, a Private Bill to correct a problem caused by the current law was introduced and enacted with the unanimous support of the House.⁸

- 6.4 This chapter examines the issues with the current law and recommends a new framework for determining legal parenthood in surrogacy arrangements.

CURRENT LAW

- 6.5 The legal parents of any surrogate-born child are determined in accordance with the long-existing common law rule that the legal mother is the woman who gives birth to the child⁹ and the specific rules that were developed for donor gamete conception set out in the Status of Children Act 1969.¹⁰
- 6.6 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 arrangement is traditional (using the surrogate’s ovum)¹¹ or gestational (using the ovum of an intended parent or a donor);¹²
 - (b) the surrogate’s partner (if she has one) is also a legal parent of the surrogate-born child¹³ unless there is evidence that establishes that they did not consent to the procedure;¹⁴ and
 - (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.¹⁵
- 6.7 These rules apply regardless of whether the procedure is carried out in Aotearoa New Zealand or the child is born overseas.¹⁶ We discuss the implications of this rule for international surrogacy arrangements in Chapter 9.

⁷ 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), which called for the simplification of adoption and surrogacy laws and received 32,239 signatures; and Petition of Josh Johnson “Let Paige Have Her Mum’s Name on her Birth Certificate (Instead of “Not Recorded”)” (2021, Change.org), which drew attention to the law’s failure to effectively provide for all surrogacy situations and had received over 55,000 signatures at the time of writing.

⁸ Paige Harris Birth Registration Act 2022. See [6.31(a)], n 63 below.

⁹ 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].

¹⁰ These rules were introduced by the Status of Children Amendment Act 1987.

¹¹ 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 [6.5], n 9 above would therefore apply.

¹² Status of Children Act 1969, s 17.

¹³ 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”).

¹⁴ 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.

¹⁵ 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).

¹⁶ Status of Children Act 1969, s 16.

Role of the Adoption Act 1955 in surrogacy arrangements

- 6.8 The Adoption Act 1955 is the only way to alter legal parenthood under New Zealand law. Intended parents must apply for an adoption order if they want legal parenthood to be transferred to them from the surrogate (and any partner).¹⁷
- 6.9 Te Kōti Whānau | Family Court has exclusive jurisdiction to hear and determine applications under the Adoption Act.¹⁸ It can make an adoption order if satisfied that the applicant(s) are “fit and proper” to care for and raise the child and that the welfare and interests of the child will be promoted by the adoption.¹⁹

Social worker’s report

- 6.10 Before making an adoption order, the Family Court must obtain a report from an Oranga Tamariki | Ministry for Children social worker.²⁰ 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) approval process (see Chapter 4) provided the in-principle approval given by Oranga Tamariki under that process has not expired.²¹
- 6.11 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

- 6.12 The Adoption Act provides for a two-stage adoption process that 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.²²

¹⁷ Adoption Act 1955, s 16.

¹⁸ Family Court Act 1980, s 11(1)(b).

¹⁹ 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.

²⁰ 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 | Ministry for Children 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.

²¹ In-principle approval is valid for 2 years.

²² Adoption Act 1955, s 5(b).

- 6.13 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.²³ 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 that interim period to continue to monitor the arrangement.²⁴ Once a final adoption order is granted, the social worker ceases to have any monitoring role.

Requirements for consent

- 6.14 An adoption order will generally only be made if the surrogate (and any partner) consents to the adoption.²⁵ Consent cannot be given by the surrogate until the child is at least 10 days old,²⁶ 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 an Oranga Tamariki social worker.²⁷
- 6.15 An adoption can proceed without the consent of the surrogate (and any partner) only in very limited circumstances.²⁸ 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.²⁹ 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.³⁰ 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.³¹

Alternatives to legal parenthood

- 6.16 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.³²

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 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].

²⁴ Adoption Act 1955, s 15(2)(b).

²⁵ Adoption Act 1955, s 7.

²⁶ Adoption Act 1955, s 7(7).

²⁷ Adoption Act 1955, s 6(1).

²⁸ Adoption Act 1955, s 8(1).

²⁹ *Re an application by ALH and SFDH to adopt a child* FC North Shore FAM-2011-44-371.

³⁰ *Re Witt* [2019] NZFC 2482, [2019] NZFLR 91.

³¹ *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].

³² Intended parents do, however, have legal responsibilities that flow from their care or charge of a child under the Crimes Act 1961, s 152.

- (b) Proceed with a whāngai arrangement and become mātua whāngai to the child. Under the Adoption Act, “no adoption in accordance with Māori custom shall be of any force or effect”.³³ This means mātua whāngai have no legally recognised parental rights in state law, although tikanga Māori governs how a whāngai relationship operates.
 - (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”.³⁴
 - (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.³⁵
- 6.17 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,³⁶ child support obligations³⁷ and citizenship.³⁸ In addition, if the intended parents are caring for their child informally or as mātua whāngai, technically (in a legal sense), they cannot consent to medical treatment for the child or apply for a passport on behalf of the child.³⁹

³³ Adoption Act 1955, s 19.

³⁴ 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.

³⁵ 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.

³⁶ 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. In 2021, the Commission recommended repealing the Family Protection Act and replacing it with a new Act to provide that certain family members of the deceased may claim family provision awards, including a child who is an accepted child (being a child for whom the deceased had assumed, in an enduring way, the responsibilities of a parent) and a whāngai: *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 R145, 2021), R18 and R23. When considering an application for a family provision award by a whāngai, the Commission said that the extent to which a whāngai should receive provision from the estate of the mātua whāngai and the estate of the birth parent should be informed by the tikanga of the relevant whānau, at R25. In relation to intestacy entitlements, the Commission also recommended that, where there is no adoption under the Adoption Act 1955, the eligibility of people in whāngai relationships to succeed in an intestacy should be determined in accordance with the tikanga of the relevant whānau, at R32. In making these recommendations, the Commission noted that the nature of whāngai arrangements and the rights of whāngai to succeed according to tikanga relating to succession by whāngai varies amongst whānau, hapū and iwi, at [5.22]. See also the discussion of the rights of tamaiti whāngai both to their new whānau and to their parents’ mana whenua in Cheryl Smith “Tamaiti Whāngai and Fertility” in Paul Reynolds and Cheryl Smith (eds) *The Gift of Children: Māori and Infertility* (Huia Publishers, Wellington, 2012) 143 at 161.

³⁷ 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).

³⁸ 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.

³⁹ Care of Children Act 2004, s 36(3); and Passports Act 1992, s 4(3)(a).

- 6.18 Additionally, in none of these alternatives to legal parenthood would the surrogate and any 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.⁴⁰

ISSUES

- 6.19 In the Issues Paper, we identified two major problems with the current law. First, the law fails to reflect the reality of surrogacy arrangements. Second, the adoption process is inappropriate for establishing legal parenthood in surrogacy arrangements.

Current law fails to reflect the reality of surrogacy arrangements

- 6.20 The legal assumption that the surrogate and her partner are the parents of a surrogate-born child at birth is said to create a “legal fiction”, especially if they are not the child's genetic parents.⁴¹ While adoption in the surrogacy context might be seen as correcting this legal fiction, the effect “for all purposes” of an adoption order is to treat the child as if they were born to the adoptive parents.⁴² This can obscure the child's gestational origins and possibly their genetic origins and their whakapapa. As we explain in Chapter 7, birth certificates record legal parenthood, and it is rare for an adopted child's birth certificate to record the fact of the adoption.⁴³

Current law obscures the child's genetic and gestational origins and whakapapa

- 6.21 Many people who enter surrogacy arrangements will be open with the resulting child about the circumstances of their conception and birth. However, the law's failure to reflect the reality of surrogacy arrangements obscures the child's genetic and gestational origins and their whakapapa and enables legal fictions to be maintained. This is contrary to the child's rights and best interests. As the Verona Principles state, 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”.⁴⁴
- 6.22 The current law is also inconsistent with tikanga Māori because it both obscures a child's whakapapa and compromises their ability to access information about it. The centrality of whakapapa in te ao Māori is explored in Chapter 2, and the detrimental impact on Māori who grow up not knowing their whakapapa is well documented in the experiences of

⁴⁰ Care of Children Act 2004, s 17.

⁴¹ 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].

⁴² Adoption Act 1955, s 16(2).

⁴³ In Chapter 7, we explain that, while some information about gamete donors is collected and recorded by the state under the Human Assisted Reproductive Technology Act 2004, there are several significant gaps in this regime as it applies to surrogacy arrangements.

⁴⁴ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [11.1].

Māori adoptees and their descendants.⁴⁵ In its submission to the Government's review of adoption laws, Ināia Tonu Nei explained that:⁴⁶

The legal fiction that adoption creates — that the child is deemed to have been born to another parent — is an obvious undermining of the whakapapa and whānau values. It also compromises the tapu inherited by whakapapa of a child. We consider this act itself to be antithetical to aroha.

- 6.23 The law is also likely inconsistent with tikanga in its failure to maintain and enhance the mana of the child or the parties to the surrogacy arrangement.
- 6.24 Whakapapa (rather than legal parenthood) may also determine certain entitlements, including to land under Te Ture Whenua Maori Act 1993. Whakapapa may also be used by hapū and iwi to determine entitlements to hapū and iwi resources,⁴⁷ including resources negotiated through Treaty of Waitangi claim settlements.⁴⁸ Such entitlements may be difficult to establish if Māori do not know their whakapapa or if a child is presumed to share the whakapapa of their legal parents as recorded on their birth certificate. One Māori adoptee has explained that the process for adopted people to prove their whakapapa for iwi membership “hurts people who had no power in their adoption”.⁴⁹
- 6.25 In the context of surrogacy, several Māori academics we spoke with in this review expressed concern 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.

⁴⁵ See for example discussion of Dr Erica Newman's research on the impact of the Adoption Act 1955 on the identity of descendants of Māori adoptees yet to connect to their taha Māori in Bruce Munro “No mountain, no river” *Otago Daily Times* (New Zealand, 7 February 2022) and Alice Webb-Liddall “Finding whakapapa: The generational trauma of closed Māori adoptions” *The Spinoff* (New Zealand, 18 March 2021). See also Kim McBreen “Cast adrift: My story of adoption” *E-Tangata* (New Zealand, 6 February 2022); Annabel Ahuriri-Driscoll “Ka Tū te Whare, Ka Ora: The Constructed and Constructive Identities of the Māori Adoptee” (PhD Dissertation, Te Whare Wānanga o Waitaha | University of Canterbury, 2020); Cherryl Smith “Tamaiti Whāngai and Fertility” in Paul Reynolds and Cherryl Smith (eds) *The Gift of Children: Māori and Infertility* (Huia Publishers, Wellington, 2012) 143 at 170–173; and Maria Haenga Collins “Belonging and Whakapapa: The Closed Stranger Adoption of Māori Children into Pākehā Families” (PhD Dissertation, Te Kunenga Ki Pūrehuroa | Massey University, 2011).

⁴⁶ Ināia Tonu Nei *Submission by Ināia Tonu Nei on the review of adoption laws* (2021) at 7.

⁴⁷ For example, some iwi have rejected the Crown's view that legally adopted children of Treaty settlement beneficiaries are themselves beneficiaries by descent and have instead asserted the tikanga of whakapapa to determine beneficiaries: Kirsty Gover “The Politics of Descent: Adoption, Discrimination and Legal Pluralism in the Treaty Claims Settlements Process” [2011] *New Zealand Law Review* 261 at 266–272. Ngāi Tahu, for example, require adopted and surrogate-born people to establish that at least one of their biological parents were Ngāi Tahu to qualify for registration on the Te Rūnanga o Ngāi Tahu roll of beneficiaries: Te Rūnanga o Ngāi Tahu *Whakapapa Ngāi Tahu: A guide to Enrolment* at 10–11. See also [6.17], n 36 above.

⁴⁸ Te Aka Matua o te Ture | Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework* (NZLC R65, 2000) at [203] and Lorna Dyal “Awhina i te hangarau whakato: Tiaki te whakapapa | Assisted reproductive technologies: Protecting the generations” in Sandra Coney and Anne Else *Protecting our future: the case for greater regulation of assisted reproductive technology* (Women's Health Action Trust and New Zealand Law Foundation, 1999) 35 at 35.

⁴⁹ Kim McBreen “Cast adrift: My story of adoption” (*E-Tangata*, 6 February 2022).

- 6.26 While whakapapa is of great significance for Māori, it is also an important value for all New Zealanders. As Dr Lorna Dyal has observed:⁵⁰

Knowledge and protection of whakapapa is now no longer an important issue for Maori only, but is an integral part of the values and knowledge that all New Zealanders hold as important. It is a taonga (gift) which people wish to pass on to future generations.

Other problems with the current law

- 6.27 As well as the risk of obscuring a child's genetic and gestational origins and their whakapapa, the law's failure to reflect the reality of surrogacy arrangements is also problematic for the following 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 (but often not genetic) 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.
- (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. The law is out of step with the weight given to the parties' intentions in donor gamete conception. Recipients of donated gametes are the legal parents of any donor-conceived child rather than the donor(s). This 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.⁵¹
- (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 inappropriate,⁵² 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.⁵³
- (d) **There is a disconnect between the regulation of surrogacy and the recognition of legal parenthood.** In Chapter 4, we outline the robust regulatory framework that requires prior approval of gestational surrogacy arrangements by ECART. Given the existence of this regulatory framework, it is problematic that there is no

⁵⁰ Lorna Dyal "Awhina i te hangarau whakato: Tiaki te whakapapa | Assisted reproductive technologies: Protecting the generations" in Sandra Coney and Anne Else *Protecting our future: the case for greater regulation of assisted reproductive technology* (Women's Health Action Trust and New Zealand Law Foundation, 1999) 35 at 35.

⁵¹ 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.

⁵² As acknowledged in *Re an application by ALH and SFDH to adopt a child* FC North Shore FAM-2011-44-371 at [18].

⁵³ 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].

corresponding downstream recognition of surrogacy as a process that creates a legal parent-child relationship between the intended parents and the surrogate-born child.⁵⁴

- (e) **The law may be inconsistent with public attitudes.** The Surrogacy Survey asked respondents an open question about who the legal parents in a surrogacy arrangement should be. 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).⁵⁵ Only five per cent of respondents who answered this question thought that the surrogate should be the child’s legal parent.⁵⁶

Adoption process is inappropriate in surrogacy arrangements

- 6.28 Tāhū o te Ture | Ministry of Justice is currently reviewing adoption law,⁵⁷ which is widely acknowledged as being out of date and in need of reform.⁵⁸ The Adoption Act has been described as the family law statute “most offensive to tikanga Māori”,⁵⁹ and it “continues to openly reject Māori beliefs and practices”.⁶⁰ As we explain below, as part of the Ministry of Justice’s review of adoption law, it is considering whether there should be changes to the way the law treats whāngai.
- 6.29 The prospect of modernised adoption laws does not change our view that adoption and surrogacy are two legitimate but conceptually different forms of family building that require different policy responses and legal frameworks. The purpose of adoption is to ensure a permanent and secure family relationship for a child whose parents are unable or unwilling care for them.⁶¹ The purpose of a surrogacy arrangement is, like other forms of assisted reproductive technology such as donor conception, to create a child for the intended parents to raise.
- 6.30 By continuing to require intended parents to rely on adoption law to establish legal parenthood, New Zealand law is out of step with comparable jurisdictions, including

⁵⁴ 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.

⁵⁵ 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.

⁵⁶ 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.

⁵⁷ Tāhū o te Ture | Ministry of Justice *Adoption in Aotearoa New Zealand: Discussion Document* (June 2021).

⁵⁸ 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.

⁵⁹ Di Pitama, George Ririnui and Ani Mikaere *Guardianship, Custody and Access: Māori Perspectives and Experiences* (Te Manatū Ture | Ministry of Justice and Te Tari Kooti | Department for Courts, August 2002) at 38, referring to Donna Durie-Hall and Joan Metge “Ka Tū te Puehu, Kia Mau: Māori Aspirations and Family Law” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (Oxford University Press, Auckland, 1992).

⁶⁰ Jacinta Ruru “Kua tutū te puehu, kia mau: Māori aspirations and family law policy” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 57 at 72.

⁶¹ *Norman v Attorney-General* [2021] NZCA 78 at [130].

Australia, England, Wales, Scotland and Canada, that all have specific legal frameworks for recognising legal parenthood in surrogacy arrangements.

6.31 Relying on adoption, a process that was not drafted with surrogacy in mind, also results in the following practical problems:

- (a) **The adoption process does not provide for all surrogacy situations.** The purpose of an adoption order is to transfer legal parenthood from the birth parents to another individual or couple. This transfer cannot occur in respect of an intended parent who has died.⁶² This means that the child's birth certificate will not record a deceased intended parent as their parent, which fails to reflect the reality of the surrogacy arrangement and may cause unwarranted distress to the parties involved, including the child, in future.⁶³ It may also have consequences for the child's entitlements to the deceased intended parent's estate under succession law. In addition, the adoption process is not available if the child is still-born⁶⁴ 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. This lack of legal recognition of the intended parents' relationship to a child who has died would likely be very distressing.
- (b) **Reliance on the adoption process may prevent Māori acting in accordance with tikanga Māori.** Given the incompatibility of existing adoption law with tikanga Māori, some Māori intended parents may wish to become mātua whāngai to a child born through surrogacy, rather than pursue a legal adoption.⁶⁵ However, as we noted in the Issues Paper, ECART appears reluctant to approve surrogacy arrangements where the parties express a desire to enter a whāngai arrangement rather than proceed with a legal adoption,⁶⁶ citing concerns "for the child due to the instability

⁶² See for example *Re Wilkins* [2020] NZFC 4786.

⁶³ This issue has recently come to light in Aotearoa New Zealand: Natalie Akoorie "Kyle Harris takes fight to correct baby Paige's birth certificate to Parliament" *NZ Herald* (online ed, New Zealand, 27 January 2022) and Jo Lines-MacKenzie "Kyle Harris's battle to correct daughter's birth certificate after wife's death" *Stuff* (online ed, 29 October 2021). In February 2022, Louisa Wall MP introduced the Paige Harris Birth Registration Bill 2022 (109-1), a Private Bill to require the Registrar-General to enter the details of the intended mother on Paige Harris' birth certificate. The Bill was enacted in March 2022 with unanimous support of the House.

⁶⁴ 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. These provisions are carried through into the Birth, Deaths, Marriages, and Relationships Registration Act 2021, ss 4 (definition of "still-born child") and 13.

⁶⁵ For example, in a traditional surrogacy arrangement, the parties may wish to preserve the child's legal connection to the surrogate and her whakapapa.

⁶⁶ The possibility of entering a whāngai arrangement was explored in two surrogacy applications considered by ECART. One application was declined: Ethics Committee on Assisted Reproductive Technology minutes of 29 November 2005 at [3] (application 2005/08); and 14 March 2006 at [15] (application 2005/08). One application was deferred twice, including for further detail of how the whāngai arrangement would work, and was subsequently approved following the intended parents' obtaining in-principle approval to adoption from Oranga Tamariki | Ministry for Children and indicating that they "would wish to proceed with adoption but also raise any child born of this arrangement within an extended family environment": Ethics Committee on Assisted Reproductive Technology minutes of 2 November 2018 at [6] (application E18/108); 4 July 2019 at [12] (application E18/108); and 11 February 2021 (application E18/108).

of the proposed legal situation”⁶⁷ and explaining that adoption checks “ensure that the resulting child will go into a safe environment”.⁶⁸

- (c) **The adoptive applicant assessment process is unsuited to surrogacy.** 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. 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 be living with the intended parents, consistent with the parties’ intentions. In many cases, the surrogacy arrangement will have been approved by ECART prior to conception, ensuring, among other things, that the parties underwent counselling and obtained independent legal advice. In these circumstances, the child’s best interests will almost always require the adoption order to be approved.⁶⁹ 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.
- (d) **The adoption process may prevent intended parents from caring for the surrogate-born child in the first few weeks.** 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.⁷⁰ Because these decisions are at the social worker’s discretion, there is scope for variation in approach between social workers. 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 from birth. It may also place the surrogate in the difficult position of having to care for the child against her intentions.
- (e) **The adoption process is lengthy, costly and an administrative burden.** The process for obtaining an adoption order creates a significant amount of administration at a time when intended parents are caring for a newborn child and the surrogate is

⁶⁷ Ethics Committee on Assisted Reproductive Technology minutes of 29 November 2005 at [3] (application 2005/08).

⁶⁸ Ethics Committee on Assisted Reproductive Technology minutes of 26 April 2018 (Correspondence).

⁶⁹ This was affirmed in interviews conducted with Judges of the Family Court as part of Te Whare Wānanga o Waitaha | 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 that 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.

⁷⁰ 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’s] legal consent being received”: at [3]. Nonetheless, the social worker approved the adoption: at [9].

recovering from childbirth.⁷¹ Adoption applications can also face considerable delay due to the high workload of the Family Court,⁷² and the cost of engaging lawyers can be a significant issue for some people. Often, the adoption process comes after a comprehensive ECART process, which will have already cost the intended parents thousands of dollars. One intended parent who organised a petition calling for surrogacy law reform in 2019 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”.⁷³

- (f) **The adoption process leaves parties with no way to resolve disputes over legal parenthood.** Surrogacy arrangements are legal but unenforceable in Aotearoa New Zealand,⁷⁴ consistent with the approach taken in comparable jurisdictions.⁷⁵ The consent-based nature of the adoption process therefore introduces an element of uncertainty as to the outcome in any surrogacy arrangement and leaves the parties in a vulnerable position. If the surrogate refuses to agree to the adoption, the intended parents cannot be recognised as the child’s legal parents. They would be able to seek a parenting order or apply to be appointed as a guardian of the child under the Care of Children Act, but this may not provide the child with the same degree of security and therefore may not be in the child’s best interests.⁷⁶ In contrast, 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. In practice, it is rare for surrogacy arrangements to break down to the point where legal parenthood and parental responsibility are contested. We are aware of only one such case in Aotearoa New Zealand.⁷⁷ However, the potential for dispute and the lack of any process to resolve disputes can “create an atmosphere of fear and mistrust” in surrogacy arrangements.⁷⁸

⁷¹ 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 1 month unless an application for an adoption order is made in that time: Adoption Act 1955, s 6(2).

⁷² 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.

⁷³ Letter from Christian Newman to All Members of Parliament regarding Surrogacy Law Reform (8 June 2020) at 3.

⁷⁴ Human Assisted Reproductive Technology Act 2004, s 14(1).

⁷⁵ Surrogacy arrangements are unenforceable in Australia, the United Kingdom and Canada (see [6.118], n 165 below), 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 8.

⁷⁶ *Re G DC Invercargill* Adopt 6/92, 3 February 1993 at 8. This was illustrated in the English case of *Re AB (Surrogacy: Consent)* [2016] EWHC 2643 (Fam), [2017] 2 FLR 217, where the surrogate-born children were being cared for by the intended parents but, because the surrogate and her husband refused to consent to the making of a parental order, the Court could not recognise the intended parents as the legal parents of the child, the result being that the children were “left in a legal limbo”, at [9]. 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, a result criticised as “a wholly unsatisfactory situation, with the law not reflecting the reality of the situation”: 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.

⁷⁷ 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: Katie Harris “Surrogacy Horror: Kiwi parents are having to share custody with surrogate” *NZ Herald* (online ed, New Zealand, 24 January 2021).

⁷⁸ Liezl van Zyl and Ruth Walker “Beyond altruistic and commercial contract motherhood: The professional model” (2013) 27 Bioethics 373 at 381.

RESULTS OF CONSULTATION

Issues

- 6.32 We asked submitters whether they agreed with the issues we had identified with the process for establishing legal parenthood and whether there were any other issues we should consider. We received 192 submissions that addressed this question. Of these submissions, a significant majority (87 per cent) either agreed (74 per cent)⁷⁹ or agreed in part (13 per cent)⁸⁰ with the issues we had identified. Only 11 per cent of submitters did not agree,⁸¹ and two per cent expressed no view.⁸²
- 6.33 Personal submissions from people who had been involved in surrogacy arrangements often emphasised the inadequacy and unsuitability of the adoption process. Submitters commented on the stress and uncertainty caused by the parental suitability assessment conducted by Oranga Tamariki and the need to obtain its prior approval to care for the child before the surrogate gives her consent. The expense and delay caused by the court process was also a common concern. The following extracts from a sample of personal submissions illustrate these themes:

We (same sex married male couple) have just welcomed our son into the world. Our surrogacy journey started well over two years ago; it has been a laboriously institutional process, as well as emotionally and financially taxing. Ideally, the surrogacy journey would be over now: we have our son at home with us and want to get on with being new parents. Unfortunately, it is not. Our son will be registered as the son of two dear, dear friends who, nonetheless, have no biological connection to our child. Our son carries their surname. To change this, we need to undergo one last social worker assessment, apply to the Family Court to adopt a child that is biologically my own, go through that process, and then (hopefully) our child will finally, legally become ours, and we can obtain a correct birth certificate, etc., etc. (Parent through gestational surrogacy)

Our surrogate relationship is centred around her offer to carry a child for my husband and I, this has always been the intent of our relationship with her. We do not see how Oranga Tamariki has added value to the process we have gone through to seek approval for adoption of a child that is biologically linked to us and where the birth mother has no intent to care for the child ... The questions we were asked felt incredibly invasive, topics where a couple having a child on their own naturally would not even need to consider ... (Parent through traditional surrogacy)

⁷⁹ 142 submissions comprising 119 personal submissions, 18 submissions from organisations (Advisory Committee on Assisted Reproductive Technology, Australian and New Zealand Infertility Counsellors Association, Ethics Committee on Assisted Reproductive Technology, Federation of Women's Health Councils, Fertility Associates, Fertility New Zealand, Fertility Plus, Maternity Services Consumer Council, New Zealand College of Midwives, New Zealand Council of Trade Unions, New Zealand Nurses Organisation, Nurse Practitioners New Zealand, Office for Disability Issues, Office of the Children's Commissioner, Oranga Tamariki | Ministry for Children, Queerly Legal, Karetai Wood-Bodley & Co and ILGA Oceania (submitting jointly), Repromed and Te Kāhui Ture o Aotearoa | New Zealand Law Society), comments from the Judges of the Family Court and 4 academic submissions (Dr Anne Else, Adjunct Professor Ken Daniels, Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly) and Australian academic Dr Ronli Sifris).

⁸⁰ 25 submissions comprising 23 personal submissions and 2 academic submissions (Associate Professor Rhonda Shaw and Australian academics Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff (submitting jointly)).

⁸¹ 22 submissions comprising 20 personal submissions and 2 submissions from organisations (Center for Bioethics and Culture Network and Feminist Legal Clinic).

⁸² 3 personal submissions.

The most difficult part of the process was the 12 day stand-down role that intended parents have to apply for — to spend time with their child right from birth and the long wait of months for the adoption to be formalised. This was a lot of unnecessary stress for them when trying to bond with their child and not worry that something may go wrong with the legalities. (Woman who had been a traditional surrogate)

The double approval process of ECART and adoption is cumbersome intrusive and unnecessary. Most people are very resentful of having to adopt their own genetic child. They resent the adoption process where they are assessed as suitable so they can be approved to have a child. (Counsellor with experience of the ECART process)

- 6.34 Organisations and academics also broadly agreed with the issues we identified in the Issues Paper. For example, in their joint submission Queerly Legal, Karetai Wood-Bodley and IGLA Oceania explained that the adoption process and the need to meet the “fit and proper” threshold “can be a terrifying and inaccessible process to go through” and have been described as “degrading and costly”, especially for many LGBTQIA+ parents.
- 6.35 ACART submitted that safeguarding the parties was the “key ethical argument” for amending the pathway for legal parenthood. It considered that three principles need to be applied when streamlining the legal parenthood process. First, all people born of surrogacy must be able to learn their genetic heritage and who gestated them. Second, the wellbeing of the child must be protected. Third, the wellbeing of all parties must be protected.
- 6.36 Dr Ronli Sifris emphasised the importance of legal parenthood for children’s rights, arguing that a child’s “functional parents” should be recognised as their legal parents, irrespective of biological connection and without the need to rely on adoption. Dr Sifris explained that:
- Legal parentage provides public validation of the child’s family structure, a concept which transcends the practical consequences of guardianship or parenting orders; it provides recognition of the meaningful relationships established between parents and their children. It also has practical consequences; for example, if legal parentage is not established then who will be liable to pay child support in the event of relationship breakdown?
- 6.37 Most submitters who did not agree with the issues we had identified in the Issues Paper were generally opposed to surrogacy in principle, while a smaller number thought that the adoption process should remain on the basis that it best protects the rights of the surrogate.

Our proposal for a new legal framework

- 6.38 In the Issues Paper, we proposed a new legal framework for determining legal parenthood in surrogacy arrangements. We proposed two alternative pathways to establish legal parenthood:
- (a) An administrative pathway (Pathway 1) under which the intended parents would be recognised as 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) A court pathway (Pathway 2), which would apply whenever the administrative pathway does not apply. The surrogate would be the legal parent at birth, and an application can be made to the Family Court to transfer legal parenthood to the intended parents.
- 6.39 We also explored the alternative options of a pre-birth judicial model and a contractual model, but we discounted these options for the reasons we discuss below.⁸³

The administrative pathway

- 6.40 The administrative pathway received strong support from submitters. We asked submitters whether they agreed with the proposed administrative pathway, and of the 191 submissions that addressed this question, 85 per cent either agreed (69 per cent)⁸⁴ or agreed in part (16 per cent).⁸⁵ Only 15 per cent of submissions did not agree,⁸⁶ and one per cent expressed no view.⁸⁷
- 6.41 Reasons given by submitters for supporting the administrative pathway included that it would provide greater certainty and would incentivise parties to utilise the ECART process in traditional surrogacy arrangements. ACART agreed that adoption and surrogacy need to be treated differently and considered that the administrative pathway would provide a safer and more robust process for all involved. The Office of the Children's Commissioner (OCC) considered that, if legal parenthood is assured during pregnancy, there would be fewer risks both to the intended parents and the surrogate. OCC also considered the administrative pathway would enable the post-birth registration process to be streamlined so people can focus on healing after childbirth and caring for the newborn baby without having to also address legal issues around parenthood. Oranga Tamariki supported the proposal on the basis that it is in a child's best interests to have a legal relationship with the parents who will be raising them at the earliest opportunity.
- 6.42 Repromed considered that the administrative pathway "provides a humane and straightforward pathway for intended parents and will reduce anxiety for intended parents and their partners". In their joint submission, Queerly Legal, Kareta Wood-Bodley & Co and ILGA Oceania considered that the proposals would remove unnecessary and costly barriers to having children through surrogacy, particularly for LGBTQI+ parents.

⁸³ Te Aka Matua o te Ture | Law Commission *Review of Surrogacy | Te Kōpū Whāngai: He Arotake* (NZLC IP47, 2021) at [7.60]–[7.66].

⁸⁴ 131 submissions comprising 112 personal submissions, 17 submissions from organisations (Advisory Committee on Assisted Reproductive Technology, Australian and New Zealand Infertility Counsellors Association, Federation of Women's Health Councils, Fertility Associates, Fertility New Zealand, Fertility Plus, Maternity Services Consumer Council, National Council of Women of New Zealand, New Zealand College of Midwives, New Zealand Council of Trade Unions, New Zealand Nurses Organisation, Nurse Practitioners New Zealand, Office of the Children's Commissioner, Oranga Tamariki | Ministry for Children, Queerly Legal, Kareta Wood-Bodley & Co and ILGA Oceania (submitting jointly), Repromed and Te Kāhui Ture o Aotearoa | New Zealand Law Society) and 2 academic submissions (Dr Anne Else and Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly)).

⁸⁵ 31 submissions comprising 27 personal submissions, comments from the Judges of the Family Court and 3 academic submissions (Adjunct Professor Ken Daniels, Associate Professor Rhonda Shaw and Australian academics Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff (submitting jointly)).

⁸⁶ 30 submissions comprising 26 personal submissions, 3 submissions from organisations (Auckland Women's Health Council, Center for Bioethics and Culture Network and the Feminist Legal Clinic) and 1 academic submission (Professor Mark Henaghan). 1 personal submission selected "no view" in response to this question.

⁸⁷ 1 personal submission.

- 6.43 Submitters who did not agree with the administrative pathway expressed a range of views. Most of these submitters were generally opposed to surrogacy in principle. A smaller number opposed an administrative pathway because they did not agree that a surrogate should be required to confirm her consent to the arrangement after the child is born (this view is discussed further below). In contrast, several other submitters did not think that this proposal adequately safeguarded the surrogate's or the child's interests. The Auckland Women's Health Council considered that any legal severing of the relationship between the surrogate and the child is incompatible with the best interests of the child. It favoured an approach involving shared parenting practices that make the wellbeing, needs and interests of the child paramount. Professor Mark Henaghan did not support the proposal, submitting that:

It is likely to lead to undue pressure on the surrogate mother to consent to relinquish her legal parenthood. It also gives the impression to commissioning parents that, once the arrangement is approved by ECART, the child is essentially legally theirs with the one hurdle of consent. This leads to an expectation that the surrogate is a means to their ends, it does not fully respect the mana of the surrogate as a pregnant woman, nor does it protect her legally.

Operation of the administrative pathway

- 6.44 In the Issues Paper, we identified two options for how the administrative pathway could work in practice:
- (a) 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, at which point they become the child's legal parents.
 - (b) Option B: The intended parents are the child's legal parents at birth, but the surrogate retains a right to withdraw her consent for a prescribed period after birth.
- 6.45 Submitters generally expressed mixed views on these options. We asked submitters which option they preferred, and of the 182 submissions that addressed this question, 43 per cent preferred Option A,⁸⁸ 25 per cent preferred Option B⁸⁹ and 29 per cent preferred another option.⁹⁰

Support for Option A

- 6.46 Submitters who preferred Option A gave a range of reasons. Some submitters, including personal submitters with experience as an intended parent or a surrogate, considered Option A would provide for a more active and positive role for the surrogate and would

⁸⁸ 79 submissions comprising 71 personal submissions, 6 submissions from organisations (Fertility New Zealand, National Council of Women of New Zealand, New Zealand College of Midwives, New Zealand Council of Trade Unions, New Zealand Nurses Organisation and Te Kāhui Ture o Aotearoa | New Zealand Law Society) and 2 academic submissions (Dr Anne Else and Adjunct Professor Ken Daniels).

⁸⁹ 46 submissions comprising 35 personal submissions, 8 submissions from organisations (Australian and New Zealand Infertility Counsellors Association, Ethics Committee on Assisted Reproductive Technology, Fertility Associates, Fertility Plus, Office of the Children's Commissioner, Oranga Tamariki | Ministry for Children and Repromed), comments from the Judges of the Family Court and 2 academic submissions (Associate Professor Rhonda Shaw and Australian academics Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff (submitting jointly)).

⁹⁰ 52 submissions comprising 46 personal submissions, 4 submissions from organisations (Center for Bioethics and Culture Network, Federation of Women's Health Councils, Feminist Legal Clinic and Maternity Services Consumer Council) and 2 academic submissions (Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly) and Australian academic Dr Ronli Sifris).

enable legal parenthood to be determined more quickly than under Option B. Several personal submitters who had acted as a surrogate commented that Option A may help to provide a sense of closure for the surrogate. Some submitters also thought Option A promoted the child's best interests as it ensured a permanent record of the arrangement, which would be important for the child later in life. Several personal submitters who had experience of a similar process overseas commented that it worked well for them.

- 6.47 Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) acknowledged that both options had advantages and disadvantages but supported Option A on the basis that “the role of the surrogate and her rights must be respected”. Dr Anne Else strongly supported Option A over Option B for several reasons, including that it promotes consistency with existing rules of legal parenthood:

Option A upholds the rule applying to every mother and child at birth in New Zealand: the woman who gives birth is always the child's legal mother, no matter how she became pregnant or whose gametes were involved. This rule is in the child's best interests. It provides initial certainty which protects both the child and the birth mother, and ensures the child's nationality and other rights. There is no good reason for it to be set aside in cases of surrogacy. It is the only connection that the child will automatically have from the moment of birth, regardless of what takes place afterwards with regard to the intending parents (rare though any untoward events appear to be in this country to date).

- 6.48 Dr Else considered that Option A “represents the bottom line for ethical surrogacy”.
- 6.49 Few submitters commented on the timeframe for the surrogate to confirm consent under Option A, although the New Zealand College of Midwives considered that the period immediately after giving birth was inappropriate. It proposed a timeframe of between two and six weeks after birth. Dr Else supported a period of 14 days, while a personal submitter suggested 21 days.

Support for Option B

- 6.50 Submitters who preferred Option B generally felt that this would better give effect to the intentions of the parties and the reality of surrogacy. One personal submitter stated, “It is not logical for a surrogate to enter an agreement that states you will relinquish legal parenthood of the child, whilst being granted legal parenthood through the entire process.” Option B was also supported on the basis that it does not require the surrogate to undertake an “unnecessary extra step” after the child is born, that it makes it clear that the intended parents can care for the child from the moment of birth and that it would ensure that the intended parents could not back out of the arrangement.
- 6.51 ACART and OCC supported Option B on the basis that it provides certainty for all parties involved and requires no further action after birth while also upholding the best interests of the surrogate by continuing to give her the option to withdraw consent, in which situation, the Court can decide on the outcome for the baby. OCC submitted that:

It is appropriate for disputes to be dealt with properly through the Family Court. For example, if the surrogate were to discover the intending parents were exploitative, fraudulent manipulative or violent, the surrogate could take a case to the Family Court to withhold consent and keep the baby.

Even option A would still need to give the surrogate a few days to sign the statutory declaration, resulting in a few days' uncertainty of parenthood of the baby. That is why we prefer option B.

- 6.52 Oranga Tamariki also supported Option B but questioned whether the surrogate should have the ability to withdraw consent at all post-birth:

If the intention was always to confer legal parenthood to the intending parents, then this should be reflected in law. If the surrogate has no genetic link to the child, we consider they should not have the right to stop a Family Court approving legal parenthood of genetic parents to their genetic child. Being able to stop the approval of legal parentage under these circumstances does not reflect the importance of establishing and maintaining connection of the child to their whānau, family, culture, whakapapa and heritage. We believe the settings in the Status of Children Act 1969, which gives rights to the woman who bears the child, needs to be reviewed. This may leave the intended (genetic) parents in a vulnerable position if the surrogate (who has no genetic link) decides to keep the child.

- 6.53 The Judges of the Family Court also supported Option B, observing that, in the context of a surrogacy arrangement supported by legal advice and counselling and endorsed by ECART, “the onus should then be on the surrogate to withdraw consent, rather than the surrogate being the legal parent upon birth”. However, the Judges considered that the administrative pathway should only be available to gestational surrogacy arrangements and that, in traditional surrogacy arrangements where the surrogate is the genetic parent of the child, legal parenthood should only be transferred under the court pathway:

Even though we support traditional surrogacies having access to ECART process, the fact that the surrogate is the biological mother in traditional surrogacies means that she is unable to provide true consent to that child’s parentage being transferred until after the child has been born.

- 6.54 Some submitters commented on the timeframe for withdrawing consent under Option B. Australian and New Zealand Infertility Counsellors Association (ANZICA) and Repromed supported a period of 14 days. Other submitters, including ECART and Fertility Plus, supported a period of 21 days. Associate Professor Rhonda Shaw considered the timeframe should be 42 days.

Support for another option

- 6.55 Most of the 29 per cent of submitters who preferred another option thought that the law should recognise the intended parents as the legal parents at birth and did not think that the surrogate should have any right to confirm consent or challenge the arrangement after the child is born. Without a guarantee of legal parenthood, some submitters strongly felt that the law would continue to lack sufficient certainty for intended parents and would continue to drive intended parents overseas to jurisdictions where surrogacy contracts are enforceable against the surrogate. Some submitters focused on gestational surrogacy and when intended parents share a genetic connection with the child. Personal submissions supporting such an option included the following:

If the agreement is that legal parenthood belongs with the intended parents this should be upheld — a surrogate should not be given opportunity to change this course when there is no genetic tie to the child. Intended Parents should never be put in a position where their child could be withheld from them after birth, or that their legal parenthood be challenged. (Parent through gestational surrogacy)

It’s a long and heart-breaking process to get to the point where you need a surrogate, to think they can legally keep your child makes me very hesitant. (Personal submission)

The surrogate should be able to sign the declaration prior to the birth if she wishes. It is paternalistic to suggest that surrogates need further time to consider these matters post-partum. Surrogacies differ from traditional adoptions. In most cases, they have undertaken months of counselling, taken legal advice, and undergone medical treatment. They clearly

know what they want to do, and that they do not intend or want to parent the child. It is also not in the welfare and best interests for the child to have no legal relationship with their social (and in some cases full or part genetic) parents while an arbitrary timeline awaits completion before the intended parents can register the birth. (Parent through traditional surrogacy)

Once the pre-IVF process is complete ... then the intending parents are the legal guardians and the surrogate is simply the vessel carrying the child, and has no rights to the child. (Parent through gestational surrogacy)

Neither of these options offer protection for intending parents — completely rubbing their commitment to the process. In my businesses if I change my mind on a legal contract and it disadvantages the other party, I would expect to be taken to court and I would expect to lose. Where is the protection for intending parents? (Personal submission)

The persons that have paid all costs for the child being produced (including fee to the surrogate) should be the legal parents. (Personal submission)

You say that you feel this is in the best interests of the child but the child being fought over is not in its best interests, the best interests are for the child to be in legal care of their intended biological parents, not a gestational surrogate who has no biological relationship to the child and never intended to take care of them. What's best for the child is that the surrogate can't change their mind. There is no legal right for donors to claim the child and change their mind so why is there for surrogacy. (Parent through gestational surrogacy)

- 6.56 In their joint submission, Dr Liezl van Zyl and Dr Ruth Walker submitted that they did not see how a right to withdraw consent would serve to protect the best interests of the child, the surrogate or the intended parents:

The surrogacy arrangements in these cases would have gone through ECART, so it is unlikely that serious concerns about the intended parents' suitability as parents would have arisen over the course of the pregnancy ... The main (possibly only) reason why a surrogate might want to withdraw her consent at this stage is that she wants to keep the child and raise it as her own. Leaving this option open immediately introduces cause for fear and uncertainty for the intended parents, as it is now up to the Family Court to decide the matter ... The Court will almost certainly decide in favour of the intended parents. Thus, by granting her a right to withdraw consent for a specified time after birth, the state is not protecting her rights or interests. It does not really give her the power to change the outcome. It only gives her the power to force intended parents to go through a legal ordeal and to incur extra costs (at a time that they should be focusing on their new baby). In short, it gives her the power to harm the intended parents.

- 6.57 Other submitters who preferred another option expressed a range of different views, including opposition to surrogacy in principle, preference for both Options A and B or preference for a court process in traditional surrogacy arrangements.

The court pathway

- 6.58 Submitters were generally supportive of the court pathway as an alternative to the administrative pathway. We asked submitters whether they agreed with the court pathway, and of the 184 submissions that addressed this question, 78 per cent either

agreed (57 per cent)⁹¹ or agreed in part (21 per cent).⁹² Only 17 per cent of submissions did not agree with the court pathway,⁹³ and four per cent expressed no view.⁹⁴

- 6.59 NZLS supported the court pathway on the assumption that it is centralised, faster than the current adoption process and has designated specialist Family Court Judges. OCC submitted that the court pathway should ensure Māori participants are supported to have their tikanga recognised in the processes and that reports include a Māori cultural lens. Dr Else supported the court pathway but did not agree that a Family Court determination of legal parenthood should have effect “from birth”, explaining:

This creates yet another form of legal fiction. When the legal parents register the child, they will appear to have been the legal parents from birth. There seems to be little difference between this and the legal fiction in existing adoption law, whereby the adoptive parents are deemed to have been the child’s only parents from birth. Yet that legal fiction has been widely and severely criticised.

There is no reason for this legal fiction to apply in surrogacy. It appears to encourage the new legal parents to ignore the surrogacy itself. The process should not require the legal obliteration of the birth mother’s earlier legal parenthood. Instead it should be recorded in the long-form birth certificate.

- 6.60 The Judges of the Family Court considered that the court pathway should be incorporated into the Care of Children Act, which provides the Court with the ability to apply for cultural and psychologist reports and appoint a lawyer for the child and gives the surrogate and any partner (and potentially gamete donors) a legal avenue to have contact with a child if that is considered to be in the child’s best interests and welfare.
- 6.61 Submitters who did not agree with the court pathway fell into three distinct categories. First, just under half of submitters who disagreed with the court pathway strongly objected to a post-birth Family Court process to establish legal parenthood. These submitters generally felt that intended parents should be recognised as legal parents at birth with no rights for the surrogate to challenge that outcome after birth for the same reasons explored above. Second, a similar number of submitters were generally opposed to surrogacy in principle. Third, a small number of submitters argued that there should be no ability for intended parents to challenge or dispute the surrogate’s decision to withdraw consent to the surrogacy arrangement and remain the child’s legal parent. In their joint submission, Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff submitted that:

⁹¹ 105 submissions comprising 87 personal submissions, 15 submissions from organisations (Advisory Committee on Assisted Reproductive Technology, Australian and New Zealand Infertility Counsellors Association, Ethics Committee on Assisted Reproductive Technology, Federation of Women’s Health Councils, Fertility Associates, Fertility New Zealand, Fertility Plus, Maternity Services Consumer Council, New Zealand College of Midwives, New Zealand Council of Trade Unions, Nurse Practitioners New Zealand, Office of the Children’s Commissioner, Oranga Tamariki | Ministry for Children, Repromed and Te Kāhui Ture o Aotearoa | New Zealand Law Society), comments from the Judges of the Family Court and 2 academic submissions (Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly) and Professor Mark Henaghan).

⁹² 39 submissions comprising 34 personal submissions, 2 submissions from organisations (National Council of Women of New Zealand and New Zealand Nurses Organisation) and 3 academic submissions (Dr Anne Else, Adjunct Professor Ken Daniels and Associate Professor Rhonda Shaw).

⁹³ 32 submissions comprising 29 personal submissions, 2 submissions from organisations (Center for Bioethics and Culture Network and Feminist Legal Clinic) and 1 academic submission (Australian academics Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff (submitting jointly)).

⁹⁴ 8 personal submissions.

We have serious concerns about giving a court the power to refuse to recognise the birth mother's right to refuse to relinquish the child. In the Australian case law, the interests of the intended parents are prioritised and we suspect that the same thing would happen in such proceedings. [The court pathway] is also problematic for traditional surrogacy arrangements because it makes it impossible to ensure that safeguards (like counselling and legal advice) have been applied; the court is presented with a *fait accompli* and in Australian cases this inevitably results in a transfer of parentage even when the arrangement has not observed basic requirements of the surrogacy legislation. Given the inherent power imbalance within surrogacy arrangements, it is vital that any surrogacy arrangement be open to review as a question of substance. In our view, ECART approval should be an essential requirement.

Operation of the court pathway

- 6.62 In the Issues Paper, we identified a list of relevant considerations we said the Family Court should have regard to when determining the legal parenthood of a surrogate-born child.⁹⁵
- 6.63 We asked submitters whether they agreed with this proposed list of relevant considerations. Of the 178 submissions that addressed this question, 78 per cent either agreed (66 per cent)⁹⁶ or agreed in part (12 per cent)⁹⁷ with the proposed list of relevant considerations, while 12 per cent disagreed⁹⁸ and 10 per cent expressed no view.⁹⁹
- 6.64 A number of comments were made in relation to the proposed list. Some submitters thought the parties' pre-conception intentions should be a key consideration and that a child's genetic links should be weighted more strongly than gestational connection. One submitter considered that the ability of each of the parties to facilitate the child's relationships with other people involved in the creation of the child was a key consideration, and several other submitters thought that the surrogate's views should be given greater consideration. Two submitters were concerned that considering "the value of a stable family unit in the child's development" was outdated and discriminated against single parents, parents with limited relationships with their whānau, non-traditional family

⁹⁵ Specifically, (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.

⁹⁶ 117 submissions comprising 99 personal submissions, 15 submissions from organisations (Advisory Committee on Assisted Reproductive Technology, Australian and New Zealand Infertility Counsellors Association, Federation of Women's Health Councils, Fertility Associates, Fertility New Zealand, Fertility Plus, Maternity Services Consumer Council, New Zealand College of Midwives, New Zealand Council of Trade Unions, New Zealand Nurses Organisation, Nurse Practitioners New Zealand, Office of the Children's Commissioner, Oranga Tamariki | Ministry for Children, Repromed and Te Kāhui Ture o Aotearoa | New Zealand Law Society), comments from the Judges of the Family Court and 2 academic submissions (Adjunct Professor Ken Daniels and Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly)).

⁹⁷ 21 submissions comprising 20 personal submissions and 1 academic submission (Associate Professor Rhonda Shaw).

⁹⁸ 22 submissions comprising 19 personal submissions, 2 submissions from organisations (Center for Bioethics and Culture Network and Feminist Legal Clinic) and 1 academic submission (Australian academics Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff (submitting jointly)).

⁹⁹ 18 personal submissions.

units or non-heterosexual couples. Another submitter did not think that the views of the wider family and whānau should be a major consideration.

- 6.65 Some additional considerations were suggested. ACART submitted the court could consider the actions taken by the intended parents to secure the arrangement in the first place and the development of emotional and physical attachment felt by the surrogate during the pregnancy that may be the reason for a dispute or withdrawal of consent and desire to keep the baby. ANZICA and Repromed noted that the list provides scope to consider other issues that may be present but are not listed, such as coercion. NZLS submitted that a further consideration should be the access to information about a child's identity and how and when parents plan to discuss this with the child and any other siblings in the family. NZLS explained that:

Many donor-born surrogate children may not be told their genetic story by their parents. In these cases, the pre-court order stage is the point when parents are most open to being educated about the benefits of openness for their child. At the pre-conception stage it may not feel “real enough” for many intended parents, especially when there are competing concerns and demands around this time.

- 6.66 Just over half of the submitters who did not agree with the proposed list of relevant considerations were generally opposed to surrogacy. Others were opposed to the court pathway or thought that the Family Court should simply apply the terms of the surrogacy agreement.

Social worker's report

- 6.67 In the Issues Paper, we expressed a preliminary view that the Family Court should continue to be required to obtain a social worker's report when hearing an application under the court pathway and asked submitters whether they agreed with this proposal.
- 6.68 Submitters were divided on this matter. Of the 182 submissions that addressed this question, 49 per cent agreed that the Family Court should seek a social worker's report when determining the legal parenthood of a surrogate-born child,¹⁰⁰ 39 per cent did not agree¹⁰¹ and 12 per cent expressed no view.¹⁰²
- 6.69 Submitters who agreed a social worker's report should be required often commented that this would ensure the child's best interests are paramount and would be important to support the Family Court's decision-making. However, a common theme of these submissions was that the social worker's role needs to be more tailored to surrogacy and less invasive than the current parental suitability assessment performed under the Adoption Act. These submitters strongly supported social workers having a deep

¹⁰⁰ 90 submissions comprising 69 personal submissions, 15 submissions from organisations (Advisory Committee on Assisted Reproductive Technology, Australian and New Zealand Infertility Counsellors Association, Ethics Committee on Assisted Reproductive Technology, Fertility Associates, Fertility New Zealand, Fertility Plus, Maternity Services Consumer Council, New Zealand College of Midwives, New Zealand Council of Trade Unions, New Zealand Nurses Organisation, Nurse Practitioners New Zealand, Office of the Children's Commissioner, Oranga Tamariki | Ministry for Children, Repromed and Te Kāhui Ture o Aotearoa | New Zealand Law Society), comments from the Judges of the Family Court and 5 academic submissions (Dr Anne Else, Adjunct Professor Ken Daniels, Dr Ruth Walker and Dr Liezl van Zyl (submitting jointly), Associate Professor Rhonda Shaw and Australian academics Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff (submitting jointly)).

¹⁰¹ 71 submissions comprising 68 personal submissions and 3 submissions from organisations (Center for Bioethics and Culture Network, Federation of Women's Health Councils and Feminist Legal Clinic).

¹⁰² 21 personal submissions.

understanding and knowledge of the emotional, social and legal implications of surrogacy. One parent through gestational surrogacy explained:

As a social worker, I can tell you that it was incredibly undermining and upsetting to have a — often incompetent — social worker come into our home to assess whether our daughter was safe and whether we were fit. I also understand, though, why it is important, and I recognise that the Court would need information in order to make a judgement.

A lot of work would need to be done here to ensure the social workers involved are working from the same framework and lens. One of the major shortcomings of the current system is the variation in social worker approach and perspective. I wonder if the social workers could be independent from Oranga Tamariki, people who are not spending the large part of their day viewing clients through a lens of child protection and risk mitigation. Intended parents should not be assessed as if there is an impending removal. There are suitable professionals — such as private social workers — who could be contracted as Family Court surrogacy assessors, specialising in family systems theory, Māori tikanga, attachment theory, social policy, and myriad other applicable frameworks and perspectives.

I do not believe that social worker involvement at this stage should be arduous, and at the same time I don't even know what it should include. I understand the need for criminal record checks, but wonder what crime equates to a life without children. What personal history results in disapproval?

It is important to acknowledge that, by this stage, intended parents have been paying thousands, sometimes hundreds of thousands, of dollars, showing financial security. They have been through counselling with donors and surrogates, showing commitment and thoughtfulness. They have attended appointments, utilised project management skills, self-advocated, navigated through hundreds of pages of information, policy, and legislation, which speaks to a level of mental fitness, endurance, and responsibility. They have been through medical assessments and blood tests, often including genetic disorder screening, which speaks to adequate health status and likely longevity. This is already a surplus of information that the Family Court has as its foundation.

6.70 ACART also supported a narrower focus on the risks that could be present and the best interests of the child, observing that Oranga Tamariki's current role appears to be invasive in some scenarios and duplicated by what is covered in an ECART report. OCC similarly considered that the social worker's report should be tailored to surrogacy and that it should cover the items the Family Court needs to be aware of, such as police records, cultural perspectives of the participants and the intended parents' understanding of the need for the offspring to be aware of their birth origins.

6.71 The Judges of the Family Court commented that an independent social worker's report is imperative and should be a mandatory requirement, explaining:

The evidence we receive from parties themselves can be incomplete and is provided through their own perception of what is relevant. The decision we are required to make for a child will create a permanent pathway for their childhood and identity. As a minimum requirement, there should be an independent report to supplement the evidence filed by the parties themselves.

6.72 NZLS also supported ongoing provision for a social worker's report, submitting:

A detailed report by an independent report writer that addresses all relevant matters required by the court to make a determination, would reduce the volume of evidence an applicant(s) would need to include in their application. This would make the application process more tailored, user-friendly and reduce legal costs. Having an independent report would also ensure that New Zealand orders are well recognised overseas.

- 6.73 Some submitters, including NZLS, suggested that the Family Court should have the power to dispense with the need for a social worker's report in appropriate cases. Other submitters thought that the social worker's role should differ depending on how the court pathway is triggered. For example, if the Family Court is considering an application because the parties are in dispute, Oranga Tamariki observed that a more in-depth social worker assessment would be beneficial to support identifying the child's best interests.
- 6.74 Some submitters, including NZLS, considered that a social worker's report should be provided by a social worker independent of Oranga Tamariki. ANZICA, Repromed and Fertility Plus suggested that the social worker could be from Oranga Tamariki or could be an independent social worker with appropriate expertise, such as an independent psychologist with fertility counselling experience. OCC also noted that the role could be performed by any expert in child rights and family dynamics, such as a child psychologist, or by a Māori community-mandated expert. The Judges of the Family Court, however, supported the establishment of a specialist unit within Oranga Tamariki to undertake this role, observing that:

Our experience of the reports prepared by [the existing Adoption] Unit has been consistently positive. The investigation and social work undertaken is done to an exceptionally high standard. We value the reports that are prepared and place significant weight on them currently when we use them for surrogacy cases under the Adoption Act. We would want the same standard for any reports directed to determine legal parenthood for a surrogate-born child.

- 6.75 Submitters who disagreed with requiring a social worker's report under the court pathway expressed mixed views. Some thought this should be an option but not a requirement, while others were generally opposed to surrogacy in principle. Most submitters who explained their reasons for disagreeing with requiring a social worker's report were opposed to all forms of social worker involvement in surrogacy arrangements, for the same reasons we explore in Chapter 5. For example, a parent through gestational surrogacy explained:

After my experience with social workers from Oranga Tamariki as we went through our gestational surrogacy I have no confidence in their ability to assess intended parents involved in a surrogacy arrangement let alone understand the process undertaken by all of the parties involved in a surrogacy arrangement. The social worker assessing us couldn't differentiate between text book social work practice and what happens in a real life surrogacy arrangement. There are many things that were said by our social worker at our home visits that annoyed and offended me as an intending parent but I didn't feel that I could give the social worker any constructive feedback because I needed their approval for our application to undertake a surrogacy arrangement. I felt like they had all of the questions in their head and just fit our answers into the boxes of their process without taking into our account who we were as people and intended parents.

Ensuring a child's whakapapa is not affected by the allocation of legal parenthood

- 6.76 In the Issues Paper, we asked whether submitters agreed that the law should clarify that a Māori child's whakapapa is not affected by the allocation of legal parenthood in a surrogacy arrangement. We received 125 submissions that addressed this question. Of

these submissions, 65 per cent agreed,¹⁰³ 10 per cent did not agree¹⁰⁴ and 26 per cent expressed no view.¹⁰⁵ Ngā Rangahautira submitted:

We agree that the law should not allow the whakapapa of tamariki Māori to be impacted by the allocation of legal parenthood within a surrogacy arrangement. This idea has its basis in the “clean break” principle which is seen in the adoption law context. This principle has significant detrimental impacts for Māori and has continued the process of colonisation and assimilation within the family law context.

6.77 Repromed similarly submitted that state law should allow legal parenthood to be determined without creating issues for Māori in relation to their whakapapa. Fertility Plus thought that this is an area that may need clarification in accordance with input from Māori experts, leaders, kaumātua and hapū.

6.78 Submitters who did not support clarifying the legal impact of parenthood on whakapapa expressed a range of views. Some, including ACART and ECART, thought that it was self-evident that whakapapa is not affected by legal parenthood. Another submitter thought that a surrogate-born child should live by the intended parents’ whakapapa. Others thought this should be a decision for Māori. OCC, for example, submitted:

This is a complex decision for iwi to make, given different iwi have different tikanga regarding whakapapa recognition. We understand, definitions of whakapapa confer rights of iwi and hapū membership on offspring, regardless of who the acting parents are. Whakapapa sits above any law on legal parenthood. However, this understanding is up to iwi to decide, and OCC believes iwi should be consulted about whether it is appropriate to codify this in Crown law.

Whāngai arrangements and surrogacy

6.79 In the Issues Paper, we also asked submitters whether they thought the lack of legal recognition of whāngai arrangements was a particular matter of concern in the surrogacy context. We received 120 submissions that addressed this question. Of these submissions, 42 per cent thought it was a matter of concern,¹⁰⁶ 22 per cent did not¹⁰⁷ and 37 per cent expressed no view.¹⁰⁸ In addition, the Judges of the Family Court observed that:

There are different types of care arrangements that are described as whāngai. That has been the subject of a number of cases in the Māori Land Court and the Family Court. In some of those care arrangements, the lack of legal recognition would be problematic. For

¹⁰³ 81 submissions comprising 69 personal submissions, 10 submissions from organisations (Australian and New Zealand Infertility Counsellors Association, Federation of Women’s Health Councils Aotearoa, Fertility New Zealand, Fertility Plus, New Zealand Council of Trade Unions, New Zealand Nurses Organisation, Ngā Rangahautira, Nurse Practitioners New Zealand, Repromed and Te Kāhui Ture o Aotearoa | New Zealand Law Society) and 2 academic submissions (Adjunct Professor Ken Daniels and Associate Professor Rhonda Shaw).

¹⁰⁴ 12 submissions comprising 11 personal submissions and 1 submission from an organisation (Office of the Children’s Commissioner).

¹⁰⁵ 32 submissions comprising 31 personal submissions and comments from the Judges of the Family Court.

¹⁰⁶ 50 submissions comprising 43 personal submissions, 6 submissions from organisations (Federation of Women’s Health Councils Aotearoa, Fertility Plus, New Zealand Council of Trade Unions, New Zealand Nurses Organisation, Ngā Rangahautira and Repromed) and 1 academic submission (Associate Professor Rhonda Shaw).

¹⁰⁷ 26 submissions comprising 25 personal submissions and 1 submission from an organisation (Ethics Committee on Assisted Reproductive Technology).

¹⁰⁸ 44 submissions comprising 43 personal submissions and 1 submission from an organisation (Office of the Children’s Commissioner).

instance, where a child is not in the care of guardians. That might be addressed in part by amendment to the rules around birth registration. The jurisdiction of the Māori Land Court might also be considered.

For some whāngai, the lack of recognition is problematic. However, there is already a legal avenue for a whāngai parent to be made a child's guardian under COCA and obtain a parenting order.

- 6.80 Submitters who thought the lack of legal recognition of whāngai was a particular concern in surrogacy arrangements expressed a range of views. One personal submitter considered that “in-family arrangements such as whāngai or whāngai-type arrangements should be promoted and supported financially by the state over stranger surrogacy adoption” and that mātua whāngai should have the same rights and responsibilities as intended parents who adopt. Ngā Rangahautira submitted that:

The law should facilitate options for Māori intended parents to engage in whāngai arrangements following surrogacy. The exclusion of whāngai has deep roots in colonisation and assimilation of Māori and this should not be allowed to continue within the surrogacy context.

- 6.81 Fertility Plus considered that “whāngai arrangements are an important part of traditional whakapapa and whanaungatanga” and “how to address this in the context of surrogacy arrangements needs to be further investigated so that legal recognition is allowed for”. Repromed submitted:

Māori involved in whāngai arrangements and/or surrogacy whether this is in clinics or outside of clinics need the option to access a legal framework that recognises their unique cultural perspectives while creating a legal relationship between tamariki whāngai and mātua whāngai ... As a fertility clinic Repromed is largely involved with clinic assisted gestational surrogacy where the end result is usually a formal adoption ... if whāngai arrangements were legally recognised it would allow Māori intended parents accessing clinic assisted surrogacy to create a legal relationship with a child born by surrogacy which would be more in line with tikanga Māori than the current options of adoption or parenting orders. A legally recognised whāngai arrangement may be better able to provide a process that incorporates wider whānau involvement.

- 6.82 Of the submitters who did not think that the lack of legal recognition of whāngai was a particular concern in the surrogacy context, those that gave reasons for their view generally felt that legal recognition of whāngai was a matter to be dealt with by whānau, hapū and iwi. Some considered whāngai to be a method of family formation separate to surrogacy. ACART, for example, submitted:

We think that the concept of legal recognition of an indigenous arrangement such as whāngai sits differently to the law. The legal recognition of parenthood is a construct that is based on two parents, whereas whāngai conceptualises a wider family involvement in the raising of tamariki and decisions about them. We note that whāngai arrangements provide Māori a culturally relevant method of family formation that sits separately from, and is different to, surrogacy arrangements. We also believe that in all cases of surrogacy it is important there is transfer of legal parentage, which may not necessarily be required in whāngai arrangements.

- 6.83 ECART similarly submitted:

ECART does not consider that whāngai arrangements ought to be afforded legal recognition; and is unclear what that would look like. ECART notes that, in the last 6 years, it has considered one application for surrogacy where there was consideration of a potential child being whāngai-ed.

Legal parenthood of a surrogate's partner

- 6.84 In the Issues Paper, we expressed a preliminary view that the surrogate's partner should not be a legal parent of a surrogate-born child at birth and asked submitters whether they agreed with this proposal.
- 6.85 There was a high level of support for this proposal. Of the 183 submissions that addressed this question, 80 per cent agreed that the surrogate's partner should not be a legal parent of a surrogate-born child at birth,¹⁰⁹ 16 per cent did not agree¹¹⁰ and four per cent expressed no view.¹¹¹
- 6.86 Many submitters who agreed with this proposal expressed strong views. One personal submitter considered the legal fiction created by the current law is "extremely paternalistic and disrespectful to all parties". Several submitters pointed to the surrogate partner's lack of genetic or gestational contribution to the surrogacy arrangement and the fact that the partner does not want to be a parent to the child, nor do they want the legal liability.
- 6.87 Oranga Tamariki strongly agreed that the surrogate's partner should not be a legal parent at birth, stating that the law "is archaic and not reflective of modern relationships or modern means of conception" and that "[t]he current system gives more rights to the unrelated surrogate's partner than the intended parents who may be genetically linked to the surrogate child". OCC also considered that the surrogate's partner should not be held liable for the child, as this could cause tension at a time when the surrogate is in need of support. OCC considered that it was arguable that, if the surrogate is the sole parent until she consents post-birth, this may be an incentive to complete the surrogacy arrangement after the birth, as "[t]here is more at stake in the decision of the surrogate if the surrogate were to become solely financially responsible for child support". ANZICA and Repromed noted that changing the law to remove the partner's legal parenthood status could result in an unusual situation if there is a dispute between the intended parents and the surrogate, as the surrogate could be a legal parent but not their partner. However, they observed that the Family Court would be involved in such cases and would be able to clarify legal rights and responsibilities based on the best interests of the child.
- 6.88 NZLS considered that the current presumption is "unnecessary and onerous". However, while it was the experience of family lawyers practising in this area that the surrogate's partner would rarely want to be the legal parent at birth, NZLS observed that there may be instances where this is appropriate or what all parties want. NZLS gave the example of a surrogacy involving extended family, in which case, a surrogate's partner may feel

¹⁰⁹ 146 submissions comprising 127 personal submissions, 16 submissions from organisations (Advisory Committee on Assisted Reproductive Technology, Australian and New Zealand Infertility Counsellors Association, Ethics Committee on Assisted Reproductive Technology, Federation of Women's Health Councils, Fertility Associates, Fertility New Zealand, Fertility Plus, Maternity Services Consumer Council, New Zealand College of Midwives, New Zealand Nurses Organisation, Office of the Children's Commissioner, Oranga Tamariki | Ministry for Children, Repromed and Te Kāhui Ture o Aotearoa | New Zealand Law Society), comments from the Judges of the Family Court and 4 academic submissions (Dr Anne Else, Adjunct Professor Ken Daniels, Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly) and Associate Professor Rhonda Shaw).

¹¹⁰ 30 submissions comprising 26 personal submissions, 3 submissions from organisations (Center for Bioethics and Culture Network, Feminist Legal Clinic and New Zealand Council of Trade Unions) and 1 academic submission (Australian academics Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff (submitting jointly)).

¹¹¹ 7 submissions comprising 6 personal submissions and 1 submission from an organisation (Nurse Practitioners New Zealand).

some familial connection to the child and may have been part of the surrogacy and pregnancy process. NZLS considered these situations could be addressed by allowing the partner to “opt in” as the initial legal parent of a surrogate-born child at birth by recording this in the written surrogacy agreement.

- 6.89 Of those submitters who disagreed with removing the partner’s legal parenthood status, most thought that partners should have greater rights in relation to the child or that greater consideration needed to be given to the complexity of surrogacy arrangements. Others were generally opposed to surrogacy in principle.

CONCLUSIONS

New framework to determine legal parenthood in surrogacy arrangements

RECOMMENDATION

R17

The Status of Children Act 1969 should be amended to include specific provisions for determining the legal parenthood of a child born as a result of a surrogacy arrangement. This should provide for:

- a. an administrative pathway under which the child becomes the legal child of the intended parents and ceases to be the child of the surrogate by operation of law provided certain conditions are met (see R18 and R19); and
- b. a court pathway under which te Kōti Whānau | Family Court can make a parentage order determining the legal parenthood of a surrogate-born child when the conditions of the administrative pathway are not met.

- 6.90 We recommend a new framework for determining legal parenthood in surrogacy arrangements to better reflect the reality of surrogacy arrangements and to acknowledge the conceptual difference between surrogacy and adoption as forms of family building. We consider that both pathways promote the best interests of the surrogate-born child along with the rights and interests of the surrogate and the intended parents.

- 6.91 The recommendations in this chapter are intended to operate alongside our recommendations in Chapter 7 for a surrogate birth register, which will preserve access to identity information for the surrogate-born child. This will address the problem the current law creates in relation to obscuring a child’s genetic and gestational origins and whakapapa.

Integrating the new framework within the Status of Children Act

- 6.92 We recommend that the new framework for determining legal parenthood should sit in a new Part 3 of the Status of Children Act. That Act establishes the rules for determining legal parenthood of children conceived as a result of assisted reproductive procedures. It is therefore the logical setting for this new framework and is more appropriate than the Care of Children Act, which is concerned with guardianship and care arrangements rather than legal parenthood. However, we make recommendations below to ensure any judicial decisions on legal parenthood are made within the same child-focused framework as Care of Children Act decisions.

- 6.93 We have not proposed a standalone Surrogacy Act. We carefully considered this option, but ultimately, we are not satisfied that this would promote the public accessibility of surrogacy law. This is because the regulation of surrogacy spans two significant pieces of legislation — the Human Assisted Reproductive Technology Act 2004 (HART Act), which regulates surrogacy arrangements alongside other assisted reproductive procedures, and the Status of Children Act, which determines legal parenthood. In Chapter 4, we propose retaining the requirement for prior ECART approval of surrogacy arrangements. To ensure continuity and avoid unnecessary legal complexity, we think that surrogacy arrangements should continue to be regulated alongside other assisted reproductive procedures under the HART Act. A standalone Surrogacy Act that only addresses legal parenthood would not therefore be a comprehensive source of surrogacy law. We think that public accessibility of surrogacy law should instead be promoted through the development of comprehensive and clear information for people who are considering surrogacy (see Chapter 10).

Introducing two pathways to determine legal parenthood

- 6.94 We recommend introducing an administrative pathway for determining legal parenthood under which the intended parents are recognised as the surrogate-born child's legal parents by operation of law provided certain conditions are met. These conditions are set out in R18 and R19 and discussed below. We also recommend introducing a court pathway to enable the Family Court to make a parentage order determining the intended parents are the child's legal parents when the administrative pathway does not apply.
- 6.95 Both pathways would have the same effect. The child would become the legal child of the intended parents and cease to be the legal child of the surrogate.¹¹² This would mean the surrogate would cease to have any legal parental rights or responsibilities in respect of the child that flow from legal parenthood and the child will be considered, with regard to all the legal rights and responsibilities of parents and children in relation to each other, as the child of the intended parents.¹¹³ In practice, the effect of both pathways would be similar to the effect of an adoption order.¹¹⁴ We do not, however, recommend adopting the same language of section 16 of the Adoption Act, which states that, “for all purposes, whether civil, criminal or otherwise”, the adopted child is deemed to become the child of an adopted parent “as if the child had been born to that parent in lawful wedlock”.¹¹⁵ This language would perpetuate the harmful legal fiction of adoption described above and fail to reflect the reality of surrogacy arrangements.

¹¹² This is consistent with mechanisms to transfer legal parentage of a surrogate-born child in other jurisdictions. See for example Surrogacy Act 2010 (NSW), s 39; Surrogacy Bill 2022 (50) (NT), cl 37; and Children's Law Reform Act RSO 1990 c 12, s 10(3).

¹¹³ See by way of example the effect of parental orders in An Bille Sláinte (Atáirgeadh Daonna Cuidithe) | Health (Assisted Human Reproduction) Bill 2022 (29) (Ireland), cl 64(1).

¹¹⁴ Consistent with the existing approach under s 16(2)(e) of the Adoption Act 1955, surrogate-born children should retain New Zealand citizenship passed on from the surrogate at birth or otherwise conferred under the Citizenship Act 1977 in situations where the intended parents are not New Zealand citizens. This would ensure that surrogate-born children are not disadvantaged under the new legal framework. We note that the 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) already require that the Ethics Committee on Assisted Reproductive Treatment be satisfied that “the residency status and plans of the surrogate and intending parent(s) safeguard the health and wellbeing of the child, particularly in relation to being born in New Zealand”, at [I(3)].

¹¹⁵ Adoption Act 1955, s 16(2)(a).

- 6.96 Providing an administrative pathway to determine legal parenthood in surrogacy arrangements recognises surrogacy as a legitimate form of family building that, like other forms of assisted reproductive procedures, should not require judicial oversight if appropriate safeguards are in place. Our recommendations for an administrative pathway also:
- (a) ensure the surrogate-born child can be cared for from birth by those who intend to raise the child and confer legal parenthood on the intended parents at an early opportunity;
 - (b) reduce the administration, cost and delay intended parents face when seeking to be recognised as the surrogate-born child's legal parents;
 - (c) give greater weight to the parties' shared intentions;
 - (d) provide greater clarity and certainty about the parties' rights and obligations;
 - (e) remove cases from the court system where judicial oversight is not required;
 - (f) provide a clear incentive to utilise the ECART process, which may reduce the risk of problems arising during and after the pregnancy; and
 - (g) promote consistency with international best practice¹¹⁶ and with developments in comparable jurisdictions, including law changes in Canada¹¹⁷ and proposals currently being considered in England, Wales and Scotland.¹¹⁸
- 6.97 Our expectation is that the administrative pathway will be the primary means of establishing the intended parents' legal parenthood in domestic surrogacy arrangements. The court pathway would reserve judicial oversight for cases that require greater scrutiny. This would include surrogacy arrangements that did not receive prior approval from ECART, such as traditional surrogacy arrangements that were not made with assistance from a fertility clinic (see Chapter 4) and international surrogacy arrangements (see Chapter 9). The court pathway would also be available in the unlikely event of a dispute arising over legal parenthood. However, it is important to emphasise that such disputes are very rare. We are only aware of one legal parenthood dispute in Aotearoa New

¹¹⁶ 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]. See also UNICEF and Child Identity Protection *Key Considerations: Children's Rights & Surrogacy* (Briefing Note, February 2022) at 3.

¹¹⁷ An administrative model for determining legal parenthood in surrogacy arrangements has been adopted in several Canadian provinces since 2011 (Ontario, British Columbia and Saskatchewan). In 2021, Quebec and Manitoba introduced Bills to establish a similar model, although Manitoba's model involves obtaining a declaratory order from the court once the surrogate has given consent after the child is born. See: An Act respecting family law reform with regard to filiation and amending the Civil Code in relation to personality rights and civil status Bill (No 2) SQ 2021, c1 96; Family Maintenance Amendment Act SM 2021 c 63, s 24.1; Children's Law Act SS 2020 c 2, s 62; Family Law Act SBC 2011 c 25, s 29; and Children's Law Reform Act RSO 1990 c 12, s 10.

¹¹⁸ The Law Commission of England and Wales and the Scottish Law Commission provisionally proposed an administrative model for determining legal parenthood in their 2019 consultation paper: 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. The Commissions are expected to report with their final recommendations for reform later in 2022. In addition, an administrative model was proposed in Iceland in a Bill introduced in Parliament in 2015, but that Bill did not progress following a change in government: Hrefna Fríðriksdóttir "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.

Zealand, and that arose in a private, traditional surrogacy arrangement that did not go through the ECART process.¹¹⁹ We are not aware of any ECART-approved surrogacy arrangement resulting in a dispute.

- 6.98 We prefer a dual-pathway approach over the alternative of a pre-birth judicial model under which a court order could be obtained before the child's birth that recognises the intended parents are the child's legal parents from birth. We do not think a court process is necessary if the surrogacy arrangement was approved by ECART and there is no dispute over legal parenthood. While a pre-birth judicial model was recommended by the Commission in 2005,¹²⁰ at that stage, the regulation of surrogacy arrangements was in its infancy. The HART Act had only been enacted the previous year, and ECART and ACART had not yet been established. As we explain in Chapter 4, the ECART process is now regarded as a robust process that protects the rights and interests of the parties involved and any resulting child.
- 6.99 A pre-birth judicial model is also problematic because it raises public policy concerns in relation to the timing of the surrogate's consent, which we explore at paragraphs 6.117–6.120 below. The Commission's response to these concerns in 2005 was to recommend that any pre-birth court order should only grant interim legal parental status to the intended parents. The surrogate would retain an ability to petition the court to overturn the interim order in the first 21 days after the child is born, at which point the court would determine legal parenthood according to the best interests of the child.¹²¹ We think the need for a pre-birth judicial model to include such a safeguard undermines the certainty it would provide to the parties.
- 6.100 Our view is that surrogacy arrangements that are not approved by ECART are best accommodated by a post-birth Family Court process. This would ensure that the Family Court can determine legal parenthood in the best interests of the child with comprehensive information available, including information about who is caring for the child and the post-birth intentions of the parties. A post-birth model also has a wider scope as it provides a pathway for resolving any disputes that arise during the pregnancy or after the child is born and avoids the risk associated with a pre-birth judicial model that a child is born before a pre-birth order is obtained.¹²²

Application of new framework should not depend on genetic connection

- 6.101 We do not recommend restricting the new framework to gestational surrogacy only, nor do we recommend requiring a genetic connection between the intended parents and the child. All surrogacy arrangements are characterised by the same shared, planned intention that the intended parents will raise the child that the surrogate carries and gives birth to. We think that the law should respect the parties' intentions regardless of their genetic connection (or lack of) to the child. The safeguards proposed in the regulatory framework will ensure that the child's and the parties' rights and interests are protected and that genetic and gestational connections and whakapapa remain relevant

¹¹⁹ See [6.31(f)] above.

¹²⁰ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005), R15.

¹²¹ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [7.73]–[7.75].

¹²² For example, a couple in Michigan must adopt surrogate-born children after they were born early, before a pre-birth order could be finalised: Anna Medaris Miller "A couple is fighting to adopt their own twins who were born via surrogate" *Insider* (New York, 25 November 2021).

considerations, for example, in the rare event of a dispute. Genetic connection holds a deep significance for many people. It is often argued that genetic connection should be prioritised over gestational connection when determining legal parenthood in surrogacy arrangements. However, many people become parents using donated gametes, and gamete donors themselves are not considered parents under the law. This suggests that genetic connection, of itself, is not a complete answer to determine legal parenthood.

- 6.102 In relation to traditional surrogacy, we acknowledge the views of some submitters who thought the administrative pathway should be restricted to gestational surrogacy only. While there is an important difference between traditional surrogacy and gestational surrogacy because the surrogate is donating her ovum as well as gestating the child, we think that the safeguards proposed for the administrative pathway appropriately protect the best interests of the child regardless of their genetic connections as well as the rights and interests of the traditional surrogate. Our concern with excluding traditional surrogacy from the administrative pathway is that, while intending to safeguard the parties, it may have the opposite effect of exposing them to a higher degree of risk. This is because, if the parties in a traditional surrogacy arrangement must go through a court process after the child is born, there is little incentive for them to also participate in the ECART process and access the safeguards that process provides. As we observed in the Issues Paper, there is no way to enforce a requirement for ECART approval in private, traditional surrogacy arrangements. If traditional surrogacy arrangements do not utilise the ECART approval process, there may be a greater risk of the arrangement resulting in a dispute.
- 6.103 In relation to requiring a genetic connection between the intended parents and the child, we agree with ACART that such a requirement may discriminate against people who are unable to contribute their own gametes.¹²³ In 2020, ACART revised its guidelines to permit gestational surrogacy in situations where both ovum and sperm are donated, observing that this may encourage some people who would otherwise be excluded from fertility treatment to remain in Aotearoa New Zealand for their treatment.¹²⁴

Whāngai arrangements in the new framework

- 6.104 Current practice, outlined at paragraph 6.31(b) above, suggests that some Māori intended parents may wish to proceed with a whāngai arrangement following a surrogacy rather than formally acquiring legal parenthood.
- 6.105 Our view is that surrogacy law should enable Māori to act according to tikanga should they wish to do so. Facilitating the exercise of tino rangatiratanga in this way would reflect the Crown's obligations under te Tiriti to exercise kāwanatanga in a responsible manner. This is also consistent with the principle of the HART Act that "the needs, values and beliefs of Māori should be considered and treated with respect".¹²⁵ It is already possible for Māori to proceed with a whāngai arrangement following a traditional surrogacy arrangement because these arrangements do not require state approval or fertility clinic

¹²³ Advisory Committee on Assisted Reproductive Technology *ACART Advice and Guidelines for Gamete and Embryo Donation and Surrogacy* (June 2021) at [66].

¹²⁴ Advisory Committee on Assisted Reproductive Technology *ACART Advice and Guidelines for Gamete and Embryo Donation and Surrogacy* (June 2021) at [71].

¹²⁵ Human Assisted Reproductive Technology Act 2004, s 4.

assistance. The parties can make their own arrangements in relation to the care of the child according to tikanga.

- 6.106 In relation to clinic-assisted surrogacy arrangements, ECART's apparent reluctance to approve surrogacy applications involving whāngai has been twofold. First, a whāngai arrangement does not require Oranga Tamariki approval like an adoption. Without in-principle approval from Oranga Tamariki, ECART lacks the necessary information to be satisfied that the risks associated with a surrogacy for any resulting child are justified in the proposal.¹²⁶ Our recommendations in Chapter 5 will address this concern and support ECART to consider and, where appropriate, approve surrogacy applications involving a whāngai arrangement. There, we recommend Oranga Tamariki's role in the regulation of surrogacy arrangements is redefined to focus on identifying whether there are any serious concerns in relation to the risk of harm to any resulting child. Drawing this role out from the adoption regime and including it in the HART Act will ensure it applies to all surrogacy applications, regardless of the type of care arrangements that will be in place for the child.
- 6.107 Second, ECART has previously cited concerns "for the child due to the instability of the proposed legal situation".¹²⁷ This stems from the Adoption Act's treatment of whāngai, which denies mātua whāngai any legally recognised parental rights or responsibilities. Whether and, if so, how state law should provide for whāngai arrangements is a significant issue for Māori and one that is beyond the scope of this review.¹²⁸ The Government's current review of adoption laws is considering whether there should be changes to the way the law treats whāngai, and in particular, whether whāngai should be legally recognised.¹²⁹ Given the significance of this matter for Māori, consideration of any changes must be Māori-led.¹³⁰

¹²⁶ As required under 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(2)].

¹²⁷ Ethics Committee on Assisted Reproductive Technology minutes of 29 November 2005 at [3] (application 2005/08).

¹²⁸ In *Puao-Te-Ata-Tu (day break): The Report of the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare* (September 1988), the Committee saw no reason why Māori adoption models cannot be provided for in law as an option for any Māori who may choose them, at 76. Ināia Tonu Nei has also called for legal recognition of whāngai in Tāhū o te Ture | Ministry of Justice's review of adoption laws as the way in which kāwanatanga acknowledges the existing legitimacy of this tikanga and provides for its expression within the Western legal system: Ināia Tonu Nei *Submission by Ināia Tonu Nei on the review of adoption laws* (2021) at 11. Te Hunga Rōia Māori o Aotearoa (THRMOA), in *Ngā tāpaetanga a Te Hunga Rōia Māori o Aotearoa | Submissions of Te Hunga Rōia Māori o Aotearoa to Adoption Reform Committee* (6 September 2021), similarly submitted, at [12]:

In practical terms, one way to give tino rangatiratanga in this space would be to create legislation that acknowledges whāngai and gives a simple process for whānau and hapū to:

- i. confirm a whāngai arrangement; and
- ii. give effect to the arrangement by issuing a whāngai order that whāngai parents can show to get access to health and education for that child.

THRMOA noted, at [3], that, when making submissions on law reform, THRMOA does not attempt to provide a unified voice for its members or to usurp the authorities and responsibilities of whānau, hapū and iwi but rather seeks to provide a whakaaro Māori-based legal analysis and submissions on law reform.

¹²⁹ Tāhū o te Ture | Ministry of Justice *Adoption in Aotearoa New Zealand: Discussion document* (June 2021) at 5 and 28–29.

¹³⁰ Te Hunga Rōia Māori o Aotearoa has recommended that an independent commission of inquiry with the involvement of the Office of the Children's Commissioner and iwi and hapū be established to drive these reforms. It cites the need for strong Māori leadership and guidance and targeted consultation with tangata whenua: Te Hunga Rōia Māori o Aotearoa *Ngā tāpaetanga a Te Hunga Rōia Māori o Aotearoa | Submissions of Te Hunga Rōia Māori o Aotearoa to Adoption Reform Committee* (6 September 2021) at [7].

- 6.108 In the meantime, we do not consider that a transfer of legal parenthood to the intended parents should be required if the parties prefer that the surrogate retain legal parenthood and that the intended parents care for the child as mātua whāngai in accordance with tikanga. Under our recommendations below, the intended parents would be treated as additional guardians to the child until such time as they become the child's legal parents under the administrative pathway. This would give mātua whāngai legally recognised parental responsibilities, addressing the concerns previously identified by ECART.

Operation of the administrative pathway

RECOMMENDATIONS

- R18** New Part 3 of the Status of Children Act 1969 should provide that, when a child is born as a result of a surrogacy arrangement, upon the surrogate providing written consent to the intended parents in the prescribed form and manner (see R22 and R23) relinquishing any claim to legal parenthood:
- the child becomes the legal child of each intended parent and each intended parent becomes the legal parent of the child; and
 - the child ceases to be the legal child of the surrogate and the surrogate ceases to be a parent of the child.
- R19** The administrative pathway in R18 should apply only if:
- the surrogacy arrangement was approved by the Ethics Committee on Assisted Reproductive Technology (ECART) and complied with any conditions imposed by ECART;
 - the intended parents who entered the surrogacy arrangement that was approved by ECART have taken the child into their care; and
 - the surrogacy arrangement otherwise complied with any requirements prescribed in regulations.
- R20** Consent under the administrative pathway in R18 should not be valid if it is given before the child is seven days old.
- R21** From the time of the child's birth until consent is given under the administrative pathway in R18, the intended parents should be deemed to be additional guardians of the child under the Care of Children Act 2004.
- R22** Te Tari Taiwhenua | Department of Internal Affairs should develop a standard form statutory declaration for the surrogate to complete to give consent under the administrative pathway in R18. The statutory declaration should be provided to the Registrar-General alongside the notification of birth.
- R23** The surrogate's statutory declaration of consent should be witnessed by the surrogate's lawyer, and the lawyer should be required to certify on the standard form that they have explained the effect and implications of the statutory declaration to the surrogate.

R24

Where the intended parents become the legal parents of a child under the administrative pathway, they should be able to apply to te Kōti Whānau | Family Court for an order confirming that they are the child's parents.

- 6.109 We recommend that the law should provide for the intended parents to become the legal parents of the surrogate-born child by operation of law provided the surrogacy arrangement was approved by ECART and the surrogate confirms her consent to relinquish any claim to legal parenthood no earlier than seven days after the birth of the child.
- 6.110 From the time of the child's birth until the surrogate confirms her consent, the intended parents should be deemed to be additional legal guardians of the child.¹³¹ This would give them legal rights and responsibilities to care for the child and make decisions about their care from birth.¹³² There should be no requirement for Oranga Tamariki to approve the intended parents caring for the child before the surrogate gives her consent or to assess the intended parents as being "fit and proper" to raise the child.¹³³ As guardians, the intended parents would share all parental duties, powers, rights and responsibilities with the surrogate until she gives her consent.¹³⁴ The parties would be able to make their own agreement as to how the child will be cared for in this time, and we expect that this will be outlined in the parties' record of intentions or "surrogacy plan" we recommend they write as part of the ECART process (see Chapter 5). Granting the intended parents guardianship status in the period immediately after the child's birth is consistent with recent proposals in Ireland¹³⁵ and with the approach in several Canadian provinces.¹³⁶
- 6.111 These recommendations adopt Option A as put forward in the Issues Paper (under which the surrogate is the child's legal parent at birth, and after birth, she confirms her consent to relinquish all parental rights and responsibilities in favour of the intended parents, at which point they become the child's legal parents). We prefer Option A over Option B (under which the intended parents would be the child's legal parents at birth, but the surrogate would retain a right to withdraw her consent for a prescribed period after birth) for several reasons:
- (a) It best respects the surrogate's role in the surrogacy arrangement. By confirming her consent after the child is born, the surrogate is actively involved in a positive way in affirming the arrangement and recognising the intended parents as the legal parents of the child. In contrast, under Option B, the surrogate has no legal relationship with

¹³¹ As if they were appointed under s 23 or s 27 of the Care of Children Act 2004.

¹³² Care of Children Act 2004, ss 15 and 16.

¹³³ Required under the Adoption Act 1955, ss 6 and 10.

¹³⁴ As the child's legal parent at birth, the surrogate is also a guardian: Care of Children Act 2004, s 17(1).

¹³⁵ An Bille Sláinte (Atáirgeadh Daonna Cuidithe) | Health (Assisted Human Reproduction) Bill 2022 (29) (Ireland), cls 64 and 156. That Bill proposes that legal parenthood be transferred to the intended parents under a post-birth parental order, and until such time, the intended parents, in addition to the surrogate, shall be legal guardians of the child provided all parties agree.

¹³⁶ In Ontario and Saskatchewan, unless the surrogacy agreement provides otherwise, the surrogate and the intended parents share the rights and responsibilities of a parent with respect to the child from the time of the child's birth until the time at which the surrogate can give her consent: Children's Law Act SS 2020 c 2, s 62(5); and Children's Law Reform Act RSO 1990 c 12, s 10(5).

the child she gives birth to, and the only active step the surrogate could take after the child is born is a negative one, to actively challenge legal parenthood.

- (b) It can achieve legal certainty for the parties sooner than under Option B. We recommend that the surrogate can give her consent once the child is seven days old, at which point, the intended parents become the child's legal parents and can register the child's birth and obtain a birth certificate recording them as the child's legal parents. Option B would require a longer period of interim arrangements because it is premised on the surrogate having a period of reflection and time within which to bring a challenge in the Family Court. Comparable timeframes for exercising a right to withdraw consent include six months in Greece¹³⁷ and 60 days in South Africa.¹³⁸ In 2005, the Commission suggested a 21-day period, and the Law Commission of England and Wales and the Scottish Law Commission have tentatively suggested a period of around two to four weeks.¹³⁹
- (c) It best promotes the child's rights to identity as it creates a record that outlines details of the child's birth origins that will be preserved by the state and available to the child in future (see Chapter 7).
- (d) Recognising the surrogate as a legal parent at birth maintains a consistent approach in law to all women who give birth. This provides certainty, including for the healthcare professionals who will be providing care for the surrogate and the child during and after birth. It is also more coherent with our recommendations for parentage orders below. In all cases, the woman who gives birth is a parent initially, and either the administrative pathway or the court pathway will apply.
- (e) It is consistent with approaches to establishing legal parenthood in comparable jurisdictions. Globally, the surrogate is a legal parent at birth "in the vast majority of States",¹⁴⁰ and several Canadian provinces have already put in place an administrative model like Option A.¹⁴¹ Conformity with legal parenthood rules in other jurisdictions will be important for cross-border recognition of legal parenthood established in Aotearoa New Zealand, especially considering the ongoing work by the Hague Conference on Private International Law to establish uniform laws on the recognition of legal parenthood. While a model similar to Option B has been provisionally proposed by the Law Commission of England and Wales and the

¹³⁷ For traditional surrogates only: 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 152.

¹³⁸ For traditional surrogates only: 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 191.

¹³⁹ 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].

¹⁴⁰ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [10.2]. 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 [45].

¹⁴¹ Ontario, British Columbia and Saskatchewan have introduced administrative models of determining legal parenthood in surrogacy arrangements that depend on the surrogate giving consent to relinquish legal parenthood after the child is born. In 2021, Quebec and Manitoba introduced Bills to establish a similar model, although Manitoba's model involves obtaining a declaratory order from the court once the surrogate has given consent. See: An Act respecting family law reform with regard to filiation and amending the Civil Code in relation to personality rights and civil status Bill (No 2) SQ 2021, cl 96 (proposed article 541.14); Children's Law Act SS 2020 c 2, s 62; Family Law Act SBC 2011 c 25, s 29; Family Maintenance Amendment Act SM 2021 c 63, s 24.1; and Children's Law Reform Act RSO 1990 c 12, s 10.

Scottish Law Commission,¹⁴² the final form of the Commissions' recommendations and if and how they are implemented are yet to be confirmed.

- (f) It best protects the child's best interests and wellbeing in the interim period after birth in the unlikely event of a dispute. Under our recommendations, if the surrogate refused to relinquish care of the child to the intended parents, as guardians, the intended parents would have standing to apply to the court for a parenting order on an urgent, interim basis without seeking the leave of the court.¹⁴³ In contrast, under Option B, the surrogate would lack any parental rights or responsibilities to care for the child after birth, which raises the prospect of the child being removed from her care against her will without Family Court oversight.¹⁴⁴ In the equally unlikely scenario where the intended parents are unwilling or unable to care for the child as planned, our recommendations would ensure that the surrogate has parental rights and responsibilities to care for the child on an interim basis until permanent arrangements can be made. Under Option B, the surrogate would lack legal standing to care for the child in the interim unless and until she challenges legal parenthood in the Family Court. While some submitters argued that Option B would ensure that the intended parents are held legally accountable for the child, we are not convinced that either option could effectively compel them to accept the child. We also are mindful of the recognition in the Verona Principles that neither the surrogate nor the intended parents should be forced to maintain parental responsibility as this is generally contrary to the best interests of the child.¹⁴⁵

- 6.112 We acknowledge that our recommendations may not give immediate effect to the parties' pre-conception intentions in relation to the care of the child in the event of a dispute. We also acknowledge the view of some submitters that, when the surrogate changes her mind, the onus of challenging the parties' pre-conception intentions should rest on her rather than requiring the intended parents to file proceedings in the Family Court. However, as the Commission observed in 2005, "the purpose and function of parenthood laws ... is to provide important protections to children — not to "give rights" to parents".¹⁴⁶ Where there is a dispute over legal parenthood, we consider that the best interests of the child call for continuity of care with parental rights and responsibilities for the carer(s) until a best interests of the child assessment can be made by the Family Court. Our recommendations achieve this objective, whereas Option B would not.

Limiting administrative pathway to surrogacy arrangements with ECART approval

- 6.113 We recommend restricting the administrative pathway to surrogacy arrangements that are approved by ECART and have complied with any conditions (including, for example, complying with the timeframe on the approval). This will ensure that appropriate

¹⁴² 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.

¹⁴³ Care of Children Act 2004, s 47(1)(b).

¹⁴⁴ To address this issue, the Law Commission of England and Wales and the Scottish Law Commission have proposed granting the surrogate guardianship status until the period in which she can exercise her right to withdraw lapses: 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 [8.135]–[8.139].

¹⁴⁵ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [10.12].

¹⁴⁶ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [2.20].

safeguards are in place to protect and promote the rights and interests of the surrogate and the intended parents and the best interests of the surrogate-born child. As we explain in Chapter 4, the ECART process ensures that, before the child is conceived, the parties obtained independent legal and medical advice and received counselling on the implications of the arrangement. In Chapter 5, we recommend consideration of further improvements to the ECART process, including a requirement that the parties prepare and sign a written record of intentions or “surrogacy plan” in respect of the surrogacy arrangement. Before approving a surrogacy arrangement, ECART must be satisfied of a range of matters, including that the risks associated with the arrangement for the parties and the child are justified.¹⁴⁷

- 6.114 With these safeguards built in to the ECART process, we do not think it is necessary to prescribe detailed procedural requirements for the administrative pathway in legislation.¹⁴⁸ We note NZLS’s submission that these safeguards should be included in legislation to ensure compliance with any future international convention on the cross-border recognition of legal parenthood resulting from surrogacy. However, it is difficult to predict what safeguards should be codified in advance of the terms of any international convention being finalised. Our preference is to provide for regulations to be made under the Status of Children Act at a later point in time. That would futureproof the regime by enabling the safeguards above to be prescribed in regulations should that be required for the purposes of any future international convention.

Requiring the surrogate to confirm consent after the child is born

- 6.115 Under our recommendations, the intended parents would become the child’s legal parents upon the surrogate confirming her consent to relinquish any claim to legal parenthood after the child is born.
- 6.116 We acknowledge that some submitters on the Issues Paper strongly felt that the surrogate’s post-birth consent should not be required to establish the intended parents’ legal parenthood. It is understandable that intended parents want as much early certainty as possible that they will be recognised as the child’s legal parents. However, as we explained above, the likelihood of a surrogate refusing to confirm her consent after the child is born is very low. It is also important to emphasise that requiring the surrogate to give post-birth consent under the administrative pathway does not mean she has an unqualified right to remain the child’s legal parent.¹⁴⁹ Rather, if the surrogate withholds her consent, the administrative pathway would no longer be available to the parties and the

¹⁴⁷ 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 [l(2)].

¹⁴⁸ In Canada, where there is no pre-approval process, procedural requirements for the administrative pathway are prescribed in the legislation. Common requirements are that the parties had a written surrogacy arrangement that was entered before the child was conceived and that each party obtained independent legal advice before entering the arrangement. The Law Commission of England and Wales and the Law Commission of Scotland have proposed a range of preconditions and eligibility criteria, such as a pre-conception agreement that meets prescribed requirements and screening requirements: Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: A new law — A joint consultation paper* (CP244/DP167, 2019), chs 9 and 13.

¹⁴⁹ In Australia and the United Kingdom, the intended parents cannot apply for a parentage order if the surrogate refuses to consent to the making of the order. See for example Surrogacy Act 2010 (NSW), s 31; Surrogacy Bill 2022 (50) (NT), cl 32; and Human Fertilisation and Embryology Act 2008 (UK), ss 54(6) and 54A(6). In Ireland, it is also proposed that the surrogate’s consent must be given before the court may grant a parental order: An Bille Sláinte (Atáirgeadh Daonna Cuidithe) | Health (Assisted Human Reproduction) Bill 2022 (29) (Ireland), cl 63(1)(iii). For a criticism of this approach see: Brian Tobin “Proposed laws discourage surrogacy arrangements here” *Irish Examiner* (online ed, 16 March 2022).

matter would then follow the court pathway. As we explain below, the Family Court would determine, in accordance with the best interests of the child, whether to grant a parentage order establishing the intended parents as the child's legal parents. This type of model is consistent with international best practice¹⁵⁰ and with the approach adopted in Canada¹⁵¹ and proposed by the Law Commission of England and Wales and the Scottish Law Commission.¹⁵²

6.117 Giving the surrogate an opportunity to confirm or revoke her consent post-birth operates as an important safeguard in several respects:

(a) First, it protects the surrogate's rights to bodily autonomy throughout the pregnancy and birth, including her autonomy to make decisions about her healthcare.¹⁵³ As the Law Commission of England and Wales and the Scottish Law Commission explained, if legal parenthood is determined before birth, there is:¹⁵⁴

... the unwelcome potential for such a law to suggest that a pregnant woman does not, during her pregnancy, retain her right to choose what happens to her own body, including a decision to terminate the pregnancy or how she gives birth.

In Portugal, for example, legislation that sought to grant the intended parents legal parenthood from birth was later struck down by the Portuguese Constitutional Court as unconstitutional.¹⁵⁵ 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 "the continuity of her consent for the entire duration of the contract" and to guarantee the respect for her fundamental rights.¹⁵⁶

(b) Second, we suggest it is consistent with the special significance in te ao Māori of the ability of wāhine Māori to give birth, the role of women in continuing whakapapa and

¹⁵⁰ The Verona Principles require any legal parenthood framework to provide for the surrogate to confirm or revoke her consent post-birth. If consent is revoked, a court or other competent authority should expeditiously conduct a post-birth best interests of the child determination: International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [10.4]–[10.7]. See also UNICEF and Child Identity Protection Key Considerations: *Children's Rights & Surrogacy* (Briefing Note, February 2022) at 3; and discussion 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 585–586.

¹⁵¹ Children's Law SS 2020 c 2, s 62(9); Family Law Act SBC 2011 c 25, s 31; and Children's Law Reform Act RSO 1990 c 12, s 10(6).

¹⁵² 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 [8.23]–[8.30] and [11.51]–[11.52].

¹⁵³ See for example Martha Ceballos "Parenthood in surrogacy agreements: a new model to complete the puzzle" (2019) 9 NZFLJ 123 at 130; and Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [7.61]–[7.64].

¹⁵⁴ 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].

¹⁵⁵ 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.

¹⁵⁶ 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. In 2021, new legislation was adopted that provides for prior regulatory approval of surrogacy arrangements and gives the surrogate with post-birth rights in relation to the child: See: Rohit Ranjan "Portugal: Parliament approves new law authorising surrogacy in country" (republicworld.com, 27 November 2021); and IANS "Portuguese parliament approves surrogacy law" (fresherslive.com, 27 November 2021).

the tikanga around conception, pregnancy and birth.¹⁵⁷ It is therefore likely to maintain and enhance the mana of a surrogate.

- (c) Third, it promotes the child's best interests by providing confidence in the integrity of the surrogacy arrangement, which "is of great importance to the child's rights".¹⁵⁸ If the surrogate had no standing to raise an objection after the child is born, the Family Court would be unable to intervene on the question of legal parenthood to ensure a result that is in the child's best interests.
- (d) Fourth, it promotes compliance with international law by minimising any risk that surrogacy arrangements amount to the sale of children.¹⁵⁹ Considerable concern has been expressed about the scope for abuse where parenthood is decided exclusively on a contractual basis before the child is born.¹⁶⁰ The UN Special Rapporteur has argued that even surrogacy regimes labelled "altruistic" must be regulated appropriately to avoid the sale of children¹⁶¹ and has indicated that a post-birth transfer of legal parenthood with the surrogate's consent would not amount to the sale of children and would appropriately prioritise the child's best interests.¹⁶²

The requirement that the surrogate mother have non-exclusive parentage and parental responsibility at birth is necessitated by the norm against sale of children, and protects the rights of the surrogate mother.

6.118 If the surrogate was not required to confirm her consent after the child is born, the question of legal parenthood is effectively determined prior to conception. This raises the same public policy concerns as enforceable surrogacy agreements.¹⁶³ While a small

¹⁵⁷ Te Aka Matua o te Ture | Law Commission *Review of Surrogacy | Te Kōpū Whāngai: He Arotake* (NZLC IP47, 2021) at [4.4]–[4.20].

¹⁵⁸ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [7.1]. See also UNICEF and Child Identity Protection *Key Considerations: Children's Rights & Surrogacy* (Briefing Note, February 2022) at 1.

¹⁵⁹ Aotearoa New Zealand is 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). See arts 1 and 2(a).

¹⁶⁰ 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 [68]; and UNICEF and Child Identity Protection *Key Considerations: Children's Rights & Surrogacy* (Briefing Note, February 2022) at 2.

¹⁶¹ 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 [69]; and UNICEF and Child Identity Protection *Key Considerations: Children's Rights & Surrogacy* (Briefing Note, February 2022) at 2.

¹⁶² 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 [71]. The Law Commission of England and Wales, the Scottish Law Commission and Ireland's Special Rapporteur have also argued that an administrative legal parenthood framework similar to what is recommended in this report would not amount to sale of children and would provide a sufficient safeguard for the best interests of the child: 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 [7.101]–[7.104] 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 22–23.

¹⁶³ See Law Reform Commission of Saskatchewan *Assisted Reproduction & Parentage: Final Report* (2018) at [185] and Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [7.61]–[7.64].

number of jurisdictions allow surrogacy agreements to determine legal parenthood (including some states in the United States such as California) or for enforceable court orders to be made before a child is born (Greece and South Africa),¹⁶⁴ this approach stands in the minority. Other jurisdictions, including Australia, the United Kingdom and Canada, deem surrogacy agreements to be unenforceable and favour a post-birth transfer of parental status.¹⁶⁵ In these jurisdictions:¹⁶⁶

Allowing surrogacy contracts to be enforceable is consistently argued to be inconsistent with public policy, women's personal autonomy rights and the principle that no agreement can displace the court's inherent *parens patriae* jurisdiction to act in the best interests of the child.

- 6.119 As we said in the Issues Paper, we do not think that legal parenthood should be determined by the terms of a surrogacy agreement. This would enable legal parenthood to be determined by private contract, which would be contrary to “the very purpose of family law”.¹⁶⁷ It would also fail to ensure the best interests of the child is the paramount consideration by removing the Family Court's oversight in cases where there is a dispute over legal parenthood and, for this reason, is inconsistent with international best practice.¹⁶⁸

¹⁶⁴ Greece and South Africa stand out in permitting a pre-birth court order determining legal parenthood prior to birth. However, both regimes provide for a right to withdraw consent if the surrogate was a traditional surrogate (see [6.111(b)], n 137 and 138 above). As we explained above, we are not in favour of drawing distinctions between surrogacy arrangements based on genetic connection. It is also notable that the regimes in Greece and South Africa pre-date the Verona Principles and the contrary position reached in Portugal, described at [6.117(a)].

¹⁶⁵ In relation to Australia, see: Surrogacy Act 2010 (NSW), ss 6 and 16; Assisted Reproductive Treatment Act 2008 (Vic), s 44(3) and Status of Children Act 1974 (Vic), s 20(2); Surrogacy Act 2010 (Qld), ss 15 and 21(1); Surrogacy Act 2008 (WA), ss 7 and 20(2); Surrogacy Act 2019 (SA), ss 13 and 18(2); Surrogacy Act 2012 (Tas) ss 10 and 15; and Parentage Act 2004 (ACT), ss 26 and 31. In relation to the United Kingdom, see: Surrogacy Arrangements Act 1985 (UK), s 1A and Human Fertilisation and Embryology Act 2008 (UK), ss 54(7) and 54A(6). In relation to Canada, see: Children's Law Reform Act RSO 1990 c 12, ss 10(3) and (9); Civil Code Q 1991, art 541; Family Law Act SBC 2011 c 25, s 29(3); Family Maintenance Amendment Act SM 2021 c 63, ss 24.1(1) and 24.2(5); Children's Law Act SS 2020 c 2, ss 62(3) and (12); Family Law Act SA 2003 c F-4.5, ss 8.2(6) and (8). Bills recently introduced in Ireland, the Northern Territory and Quebec similarly state that surrogacy arrangements are unenforceable and provide for a post-birth transfer of parentage: An Bille Sláinte (Atáirgeadh Daonna Cuidithe) | Health (Assisted Human Reproduction) Bill 2022 (29) (Ireland), cls 56 and 61; Surrogacy Bill 2022 (50) (NT), cls 11 and 26; and An Act respecting family law reform with regard to filiation and amending the Civil Code in relation to personality rights and civil status Bill (No 2) SQ 2021, cl 96 (proposed articles 541.13–541.15).

¹⁶⁶ Manitoba Law Reform Commission *Assisted Reproduction: Legal Parentage and Birth Registration — Issue Paper* (2014) at 33. See also: Law Reform Commission of Saskatchewan *Assisted Reproduction & Parentage: Final Report* (2018) at [234] and Uniform Law Conference of Canada *Uniform Child Status Act (2010)* (As amended, August 2016) at 13.

¹⁶⁷ 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. At 571 the authors explain:

Family law as a distinct area of law exists precisely because the personal relations between family members, adults and children as well as the wider kin, are fundamentally different than those between strangers. There are many considerations that do not arise in similar form in the general law, particularly (but not exclusively) the need to protect weaker parties and especially the children, and that is why family law steps in. Hence it would be extraordinary to simply cede a part of the law of filiation to the free market. It would be contrary to what family law stands for.

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].

¹⁶⁸ 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

- 6.120 We conclude that the administrative pathway must provide for the surrogate to confirm her consent after the child is born. If consent is not given, the intended parents would need to seek a parentage order under the court pathway.

Timing and process for surrogate's consent

- 6.121 We recommend a period of seven days after the child is born before the surrogate can give her consent. This is consistent with the approach in Ontario¹⁶⁹ and with legislation recently proposed in Quebec.¹⁷⁰ While shorter periods are adopted in other Canadian provinces,¹⁷¹ we agree with the submission from the New Zealand College of Midwives that the period immediately after giving birth is inappropriate for important decision-making. The surrogate should have the time to rest and begin recovery from the birth before giving her consent.
- 6.122 We do not consider a period longer than seven days is necessary. While longer timeframes are imposed in some jurisdictions,¹⁷² it is understandable that intended parents want certainty of legal parenthood as soon as possible. In addition, we think it is important to make a distinction between adoption and surrogacy. The purpose of a waiting period in adoption is to give the birth mother the opportunity to reflect on her decision to place her child for adoption. As we have already explained above, we do not think that, in a surrogacy arrangement, the surrogate should have an unqualified right to change her mind and keep the child. Rather, the requirement for the surrogate's consent is to protect her rights and ensure the integrity of the surrogacy arrangement. The waiting time should reflect this.
- 6.123 We recommend the production of a standard form statutory declaration for the surrogate to complete verifying that she relinquishes any claim to legal parenthood.¹⁷³ The surrogate's statutory declaration should then be provided to Te Tari Taiwhenua | Department of Internal Affairs alongside the notification of birth. This would operate like the process to apply for registration of a name change¹⁷⁴ and the recently enacted process for an eligible person to apply for registration of their nominated sex.¹⁷⁵

principles) (Geneva, 2021) at [1.5]. See also [6.2]. UNICEF and Child Identity Protection also recommend that “[c]ontractual provisions purporting to determine definitively legal parentage or parental responsibility pre-birth should not be enforceable”: UNICEF and Child Identity Protection *Key Considerations: Children's Rights & Surrogacy* (Briefing Note, February 2022) at 3.

¹⁶⁹ Children's Law Reform Act RSO 1990 c 12, s 10(4).

¹⁷⁰ An Act respecting family law reform with regard to filiation and amending the Civil Code in relation to personality rights and civil status Bill (No 2) SQ 2021, cl 96 (proposed article 541.14).

¹⁷¹ No minimum timeframe applies in British Columbia. In Saskatchewan, consent cannot be provided before the child is 3 days old, and in Manitoba, consent must not be given before the child is 2 days old: Children's Law Act SS 2020 c 2, s 62(4); and Family Maintenance Amendment Act SM 2021 c 63, s 24.1(2).

¹⁷² In the United Kingdom, for example, a surrogate cannot give consent to a parental order until 6 weeks after the child is born: Human Fertilisation and Embryology Act 2008 (UK), ss 54(7) and 54A(6).

¹⁷³ See for example the statutory declaration forms published in relation to surrogacy arrangements by the Ontario Department of Vital Statistics available at <www.ontario.ca>.

¹⁷⁴ Births, Deaths, Marriages, and Relationships Registration Act 1995, s 21A; Births, Deaths, Marriages, and Relationships Registration Act 2021, s 69.

¹⁷⁵ Births, Deaths, Marriages, and Relationships Registration Act 2021, s 24. This Act is expected to come into force mid-2023: s 2.

- 6.124 That statutory declaration should be made before the surrogate's lawyer, and the lawyer should be required to certify that they have explained the effect and implications of the statutory declaration to the surrogate.¹⁷⁶ This would ensure that the consent given by the surrogate is informed consent and safeguards against the risk of fraud or duress. As the surrogate's lawyer will already have given them advice as part of the ECART process, we do not think this imposes any significant additional burden or cost on the parties.
- 6.125 If the parties to the surrogacy arrangement have agreed that the intended parents will care for the resulting child as *mātua whāngai*, the surrogate would not need to complete the statutory declaration as she would remain the legal parent of the child. The surrogate would, therefore, need to register the child's birth in the normal way.

Requiring the intended parents to take the child into their care

- 6.126 The intended parents who entered the surrogacy arrangement that was approved by ECART must have taken the child into their care before the surrogate gives her consent under the administrative pathway. This requirement promotes the best interests of the child by ensuring that the parties' intentions in relation to the care of the child have proceeded as planned and that there has not been a significant change in circumstances that would warrant oversight from the Family Court under the court pathway. In the rare situation where the intended parents have not taken the child into their care, the surrogate would be able to seek a parentage order under the court pathway, discussed below.
- 6.127 It is possible that the intended parents may separate after the surrogate becomes pregnant. If the intended parents both wish to proceed with the surrogacy arrangement and share care for the child regardless of their separation, the administrative pathway should continue to apply. Any disputes that arise between the intended parents in relation to the care of the child should be resolved in the usual way under the Care of Children Act. In some cases, however, only one intended parent may wish to proceed with the surrogacy arrangement after the intended parents separate.¹⁷⁷ In this situation, the requirement that the child has been taken into care by both intended parents who were parties to the surrogacy arrangement will not be met. One intended parent should be able to be recognised as the child's sole legal parent but only by applying for a parentage order. If one intended parent does not want to proceed with the surrogacy arrangement, we consider that the surrogacy arrangement has been fundamentally altered. Oversight by the Family Court under the court pathway is necessary to ensure that the child's best interests continue to be promoted by recognising an intended parent as the child's sole legal parent.

Orders confirming legal parenthood

- 6.128 Given the variation in how legal parenthood in surrogacy arrangements is determined in other jurisdictions, sometimes it might be necessary for intended parents to produce a court order in another jurisdiction confirming their legal parenthood, for example, to secure citizenship for their child in that jurisdiction. We therefore recommend that the

¹⁷⁶ Similar to the requirements for certification of contracting out agreements: Property (Relationships) Act 1976, s 21F(5), and for witnessing enduring powers of attorney: Protection of Personal and Property Rights Act 1988, s 94A.

¹⁷⁷ Such situations have reportedly arisen overseas. See for example "India-Japan baby in legal wrangle" *BBC News* (online ed, 6 August 2008).

Status of Children Act include provision for intended parents to seek an order from the Family Court confirming the legal parent-child relationship established under the administrative pathway should they wish to do so. This would facilitate cross-border recognition of legal parenthood established in Aotearoa New Zealand without requiring the parties to seek a parentage order from the Family Court under the court pathway.

Operation of the court pathway

RECOMMENDATIONS

R25

New Part 3 of the Status of Children Act 1969 should provide that, when a child is born as a result of a surrogacy arrangement but the conditions of the administrative pathway in R18 and R19 are not met, any party to the arrangement may apply to te Kōti Whānau | Family Court for a parentage order. The effect of a parentage order is that:

- a. the child becomes the legal child of each intended parent and each intended parent becomes the legal parent of the child; and
- b. the child ceases to be the legal child of the surrogate and the surrogate ceases to be a legal parent of the child.

R26

Te Kōti Whānau | Family Court may grant the parentage order that is sought or may make any other declaration as to parentage it sees fit.

R27

Te Kōti Whānau | Family Court must be satisfied that making a parentage order is in the best interests of the child. When determining the best interests of the child, the Court should take into account:

- a. the parties' intentions when entering into the surrogacy arrangement;
- b. the child's genetic and gestational links to each of the parties to the surrogacy arrangement;
- c. all sibling relationships of the child;
- d. the arrangements in place for preserving the child's identity, including information about their genetic and gestational origins and whakapapa;
- e. any arrangements in place to enable the child's relationships with other people involved in the creation of the child and their family groups, whānau, hapū and iwi;
- f. the value of continuity in the child's care, development and upbringing;
- g. the likely effect of the parentage order on the child, including psychological and emotional impact, throughout the child's life;
- h. any harm that the child has suffered or is at risk of suffering;
- i. where relevant, the child's ascertainable wishes and feelings regarding the decision, taking account of the child's age and understanding;
- j. all circumstances in relation to the surrogacy arrangement, including any change in circumstances since the arrangement was entered; and
- k. any other matter the Family Court considers relevant.

R28

A parentage order reporter must be appointed to prepare a parentage order report whenever an application for a parentage order is made (subject to R35). The parentage order reporter should be a social worker employed by Oranga Tamariki | Ministry for Children. The role of the parentage order reporter should be to independently advise the Court on whether making the order sought is in the child's best interests, with reference to the proposed list of relevant considerations outlined in R27. A copy of the parentage order report should be made available to all the parties to the application prior to the hearing.

R29

When an application for a parentage order is made, te Kōti Whānau | Family Court should be able to exercise powers under the Care of Children Act 2004 as if it were an application for a parenting order under section 48 of that Act.

R30

When te Kōti Whānau | Family Court makes a parentage order, the Registrar of the Court must ensure the relevant information is sent to the Registrar-General, and the Registrar-General shall ensure the information is included in the child's birth registration (or if the child's birth is not registered, record the information in the register as if the child's birth is registered).

- 6.129 We recommend a court pathway should be available when the conditions for the administrative pathway are not met. The Family Court should have jurisdiction to hear and determine applications under the court pathway consistent with its jurisdiction under the Adoption Act and the Care of Children Act.
- 6.130 Any party to the surrogacy arrangement should be able to apply for a parentage order. In the normal course, applications will be made by intended parents. However, the surrogate should also be able to make an application for a parentage order. This would provide for the very unlikely situation where the intended parents become unwilling or unable to accept the child into their care. In such situations, the surrogate may seek a parentage order from the Family Court. The Family Court may determine that granting a parentage order establishing a legal parent-child relationship between the intended parents and the surrogate-born child is in the best interests of the child to ensure, for example, the intended parents have parental responsibilities to financially support the child even if the child is not in their care.
- 6.131 We recommend minimal preconditions on applying for a parentage order.¹⁷⁸ Other jurisdictions often include preconditions such as a written surrogacy agreement that was entered prior to conception, minimum age requirements and requirements for the parties to have received independent legal advice or to have undertaken counselling.¹⁷⁹ The problem with such preconditions, however, is that, in situations of non-compliance, it leaves the Family Court in a position where it is unable to recognise the intended parents as the child's legal parents even if that would promote the child's best interests. It is also

¹⁷⁸ As we note in Chapter 1, we use the term "parentage order" to promote consistency with the language adopted by the Hague Conference on Private International Law, which is working towards a private international law instrument on legal parenthood and a separate protocol on legal parenthood established as a result of international arrangements.

¹⁷⁹ See for example Surrogacy Act 2010 (NSW), ss 24, 27 and 34–36, and Surrogacy Act 2019 (SA), ss 10 and 14.

important to note that no such preconditions currently exist in relation to adoption applications under the Adoption Act. Our view is that the Family Court must have the power to recognise legal relationships created through surrogacy in order to give paramountcy to the best interests of the child.

Relevant considerations

- 6.132 The Status of Children Act should require the Family Court to be satisfied that making a parentage order is in the child's best interests. A list of relevant considerations should guide the Family Court's consideration of the child's best interests. This list draws on the Verona Principles,¹⁸⁰ the Commission's recommendations in 2005,¹⁸¹ the principles that guide decision-making under other child-centred legislation¹⁸² and approaches in other jurisdictions.¹⁸³ These considerations emphasise the importance of taking a life-long approach to the child's best interests, including on matters such as preserving information about the surrogacy arrangement for the child, making plans for how that information will be shared with the child and preserving the ability for the child to have a relationship with the different people involved in the arrangement in future.

Parentage order reporters

- 6.133 We recommend creation of a new role of parentage order reporter. Parentage order reporters should be responsible for independently advising the Court on whether making the order sought is in the child's best interests, with reference to the relevant considerations outlined in R27 above. This recommendation is modelled on the existing role of parental order reporters in England and Wales.¹⁸⁴
- 6.134 We recommend that a parentage order reporter should be appointed in relation to every application for a parentage order.¹⁸⁵ An application for a parentage order will only be required if the surrogacy arrangement was not approved by ECART or there is a dispute over legal parenthood. In these circumstances, we think that it is important that the Family Court hears an independent voice on the matters relevant to the parentage order application.¹⁸⁶ This would assist the Court's consideration of the issues and promote the

¹⁸⁰ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [6.7] and [11.8].

¹⁸¹ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [7.75].

¹⁸² Including the Care of Children Act 2004, s 5; and Oranga Tamariki Act 1989, s 5.

¹⁸³ See 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].

¹⁸⁴ In England and Wales, a parental order reporter is appointed to prepare a report for the court when it receives an application for a parental order: Adoption and Children Act 2002 (UK), s 102, applied and modified by the Human Fertilisation and Embryology (Parental Orders) Regulations 2018 (UK), sch 1 cl 26. The parental order reporter investigates and reports on matters relating to the welfare of the child and advises the court on whether there is any reason to refuse the parental order: Family Procedure Rules 2010 (UK), rr 16.34–16.35. See also the reporting roles of independent counsellors in Surrogacy Act 2010 (Qld), s 32; Surrogacy Act 2010 (NSW), s 17(1)–(2); and Surrogacy Bill 2022 (50) (NT), cl 24.

¹⁸⁵ But see R35 below, where we recommend te Kōti Whānau | Family Court should have discretion to decide not to appoint a parentage order reporter if an application is made in relation to a child born before the commencement of the proposed amendments. This discretion could be exercised in relation to a historical surrogacy arrangement where the surrogate-born child has reached adulthood.

¹⁸⁶ See 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 [6.62].

best interests of the child, consistent with international best practice.¹⁸⁷ The parentage order reporter's report should be made available to the parties before the Family Court hearing to ensure they have the ability to address anything within the report if necessary. The Court should be able to redact aspects of the report to protect the child's privacy, if appropriate.

- 6.135 In Chapter 5, we recommend the establishment of a specialist unit of social workers within Oranga Tamariki to exercise functions in relation to surrogacy arrangements, with provision for specialist training and ongoing education. This is consistent with Oranga Tamariki's specialist advisory role in other care of children matters.¹⁸⁸ Social workers from this unit should act as parentage order reporters. While we acknowledge the strong views of many submitters who expressed dissatisfaction with Oranga Tamariki's existing role in surrogacy arrangements, many of these concerns can be attributed to the legal framework within which it currently operates. As explained above, the Adoption Act requires the social worker to assess whether intended parents are fit and proper to care for the child and makes no distinction between surrogacy and adoption. In its submission, Oranga Tamariki agreed that its role in relation to parental suitability assessments needed to be reconsidered and redefined. Our recommendations above seek to do so by focusing Oranga Tamariki's role not on parental suitability but on promoting the best interests of the child with reference to a specific list of relevant considerations.

Care of Children Act powers should otherwise apply

- 6.136 In proceedings relating to an application for a parentage order, the Family Court should be able to exercise powers under the Care of Children Act as if the application were an application for a parenting order under section 48 of that Act. This should ensure the Court has all the necessary powers for the proper disposition of the proceedings. It would include, for example, the Family Court's power to appoint a lawyer to represent the child,¹⁸⁹ to appoint a lawyer to assist the court,¹⁹⁰ to obtain cultural, medical and psychiatric reports¹⁹¹ and to hear a person speak on the child's cultural background.¹⁹²

Legal parenthood status of the surrogate's partner

RECOMMENDATION

- R31** The Status of Children Act 1969 should be amended to provide that, when a woman becomes pregnant as a result of a surrogacy arrangement, any partner of the pregnant woman shall not be presumed to be a parent of any child of the pregnancy.

¹⁸⁷ The Verona Principles 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: International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [2.3].

¹⁸⁸ Care of Children Act 2004, ss 131A–132.

¹⁸⁹ Care of Children Act 2004, s 7.

¹⁹⁰ Care of Children Act 2004, s 130.

¹⁹¹ Care of Children Act 2004, s 133.

¹⁹² Care of Children Act 2004, s 136.

- 6.137 We recommend that the Status of Children Act should be amended to clarify that the surrogate's partner (if any) should not be presumed to be a legal parent of the surrogate-born child at birth. We consider that this best reflects the reality of surrogacy arrangements, which are primarily between the surrogate and the intended parents. While the surrogate's partner (and family) play an important role, their role is primarily to support the surrogate. We do not think they should have any legal rights or responsibilities to the child. 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. This proposal received strong support in consultation and would be consistent with the approach taken in several Canadian provinces¹⁹³ and recently proposed in Ireland.¹⁹⁴
- 6.138 This recommendation would simplify the process to establish legal parenthood as it means that the surrogate's partner would not be required to consent to relinquishing their legal parenthood under the administrative pathway. In the rare situation where legal parenthood is contested, either because the surrogate does not consent or the intended parents are unable or unwilling to assume care of the child, the Family Court should have the power to recognise the surrogate's partner as a legal parent if it finds that to be in the child's best interests.
- 6.139 We note the possibility put forward by NZLS that, in some situations, the parties may desire greater recognition of the surrogate's partner's role in the arrangement by allowing the partner to "opt in" as the initial legal parent of a surrogate-born child at birth by recording this in the written surrogacy agreement. We do not think that the law should provide the option to opt in to legal parenthood on this basis. This would add complexity to the law and to the administrative process (as there would need to be a separate process under the administrative pathway for the surrogate's partner to consent to relinquish any claim to legal parenthood if they do opt in) for what we consider will be very rare situations. We are also not satisfied that providing the option to opt in promotes the child's best interests if it adds complexity to the legal process and in doing so potentially increases the scope for delay or dispute. The lack of legal parent-child relationship does not, of course, prevent a relationship with the child in practice should that be the shared wish of all the adult parties.
- 6.140 We recommend that the surrogate's partner is not presumed to be a legal parent of any surrogate-born child regardless of whether the surrogacy arrangement qualifies for the administrative pathway or the parties must apply for a parentage order. We note that the Law Commission of England and Wales and the Scottish Law Commission have proposed that the surrogate's partner should continue to have legal parenthood status if the administrative pathway was not to apply on the basis that it may not be immediately clear that the child has, in fact, been born as a result of a surrogacy arrangement.¹⁹⁵ However,

¹⁹³ The surrogate's partner is not a legal parent in Ontario, British Columbia and Saskatchewan: Children's Law Reform Act RSO 1990 c 12, s 8(4); Family Law Act SBC 2011 c 25, ss 27(1)(b) and 29; Family Law Act SA 2003 c F-4.5, s 7(5); Children's Law Act SS 2020 c 2, s 60(4)(a).

¹⁹⁴ An Bille Sláinte (Atáirgeadh Daonna Cuidithe) | Health (Assisted Human Reproduction) Bill 2022 (29) (Ireland), cl 59(1). The effect of this provision is to remove the presumption of legal parentage in respect of the husband of a surrogate mother: An Bille Sláinte (Atáirgeadh Daonna Cuidithe) | Health (Assisted Human Reproduction) Bill 2022 (29) (explanatory memorandum) at 7.

¹⁹⁵ 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 [8.54]–[8.55].

we see procedural merits in applying the same rules as to legal parenthood at birth to all surrogacy arrangements. The Court's ability to declare the surrogate's partner is a legal parent would provide an avenue to remedy the unlikely situation where the child is not, in fact, born as a result of the surrogacy arrangement.¹⁹⁶

Legal parenthood where the surrogate dies, is unable to give informed consent or cannot be located

RECOMMENDATION

R32

If the surrogate dies before giving consent under the administrative pathway in R18, is unable to give informed consent or cannot be located to provide consent, the intended parents should be able to apply for a parentage order under the court pathway.

- 6.141 In the rare circumstance where the surrogate dies before giving consent, is unable to give informed consent (for example, because she is in a coma) or cannot be located to provide consent, the intended parents should still be able to apply for a parentage order to establish their legal parenthood. Even if the surrogacy arrangement was approved by ECART, in the absence of a positive, active step by the surrogate of giving consent, we consider it appropriate that the Family Court exercise oversight. For this reason, we do not prefer the alternative options of waiving the requirement for consent¹⁹⁷ or providing for consent to be given by another person (such as the surrogate's spouse, personal representative or welfare guardian or attorney appointed under the Protection of Personal and Property Rights Act 1988).¹⁹⁸

Legal parenthood in the event of the death of the surrogate-born child or one or both intended parents

RECOMMENDATIONS

R33

The administrative pathway and the court pathway should be available if the surrogate-born child was still-born or died soon after birth.

¹⁹⁶ See for example "Surrogate mother of 'twins' finds one is hers" *BBC News* (online ed, 3 November 2017).

¹⁹⁷ This has recently been proposed in Quebec: An Act respecting family law reform with regard to filiation and amending the Civil Code in relation to personality rights and civil status Bill (No 2) SQ 2021, cl 96 (proposed article 541.17).

¹⁹⁸ Te Aka Matua o te Ture | Law Commission's current review, He Arotake i te Ture mō ngā Huarahi Whakatau a ngā Pakeke | Review of Adult Decision-making Capacity Law, will examine the law and associated practice relating to adult decision-making capacity.

R34

If an intended parent or both intended parents die, the administrative pathway and the court pathway should continue to be available and amendments to the Status of Children Act 1969 should provide for:

- a. the surrogate to give consent under the administrative pathway to the intended parent's personal representative provided they have taken the child into their care; and
- b. the intended parent's personal representative to apply for a parentage order under the court pathway on the deceased intended parent's behalf.

6.142 The importance of establishing a legal parent-child relationship between an intended parent and a surrogate-born child endures beyond death. It enables the intended parent's details to be recorded on the child's birth certificate, which is an important means of affirming the parent-child relationship. It also has implications for rights and entitlements that flow from the legal parent-child relationship, including rights and entitlements to a parent's estate under succession law as well as citizenship rights (see paragraph 6.17 above). We therefore recommend that the new framework apply if a child was still-born or died soon after birth. We also recommend making express provision for situations where one or both intended parents die. This would enable a surrogate-born child's birth certificate to record the intended parents as legal parents like in other situations where a child is born after the death of a parent.¹⁹⁹ If both intended parents die, this would recognise the child's membership of the intended parents' wider family and facilitate appropriate guardianship and care arrangements.

Transitional arrangements

RECOMMENDATIONS

R35

The court pathway should be available in respect of a surrogate-born child, regardless of whether that child was born before the commencement of the amendments to the Status of Children Act 1969 recommended in R25–R30. If an application for a parentage order is made in relation to a child born before commencement, te Kōti Whānau | Family Court should have discretion to decide not to appoint a parentage order reporter.

R36

The administrative pathway should be available in respect of a surrogate-born child who is born after the commencement of the amendments to the Status of Children Act 1969 recommended in R18–R24.

6.143 We recommend that parentage orders under the court pathway should be available in respect of any surrogate-born child, including a child born prior to the commencement of the proposed amendments to the Status of Children Act. As we explain in Chapter 2,

¹⁹⁹ Section 5 of the Status of Children Act 1969 provides that a child born to a woman during marriage, or within 10 months after the marriage has been dissolved by death or otherwise, shall, in the absence of evidence to the contrary, be presumed to be the child of its mother and her husband, or former husband, as the case may be.

some historical surrogacy arrangements may not have been formalised by adoption.²⁰⁰ In these cases, the intended parents may have cared for the child informally or become mātua whāngai to the child without taking any steps to establish their legal status in relation to the child. The result is that a child is left without a complete legal record of their birth origins.²⁰¹ In addition, some rights and entitlements that flow from the legal parent-child relationship have life-long implications for a child and their family, including rights and entitlements to a parent's estate under succession law as well as citizenship rights (see paragraph 6.17 above). This may leave the child in a vulnerable position if their legal relationship with the intended parents is not formalised.²⁰² It could also leave the surrogate and her family in a vulnerable position because the surrogate and any partner would remain the child's legal parents with all the consequential parental rights and entitlements.²⁰³

- 6.144 We therefore consider that providing a pathway, via a parentage order, for legal recognition of the parent-child relationship in historical surrogacy arrangements is important to promote the child's rights and best interests throughout their lifetime. The Family Court should have discretion to depart from the requirement to appoint a parentage order reporter in these cases to streamline and simplify the process for cases where a parentage order simply formalises the child's legal status and the Court does not consider it necessary to obtain a report, for example, because the child has reached adulthood.
- 6.145 We do not think it is necessary to make the administrative pathway apply retrospectively. The number of surrogacy arrangements that were approved by ECART but have not gone through the adoption process before commencement date are likely to be minimal. These cases would in any event be eligible for a parentage order. Surrogacy arrangements that are on foot, however, should be able to benefit from the new regime if the child is born after commencement date.

²⁰⁰ See discussion in Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [7.7]–[7.8] and 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.

²⁰¹ In the absence of an adoption, the birth registration will record the surrogate and any partner as the child's legal parents, or it may inaccurately record one or both intended parents as the legal parents: Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [7.23].

²⁰² See for example the English case of *X v Z (Parental Order Adult)* [2022] EWFC 26, where a parental order was sought in relation to a surrogate-born person born in 1998. In that case the intended parents were not aware that they were not the legal parents of the surrogate-born person under English law until September 2021, at [3].

²⁰³ This was identified as a source of ongoing anxiety and concern in Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [7.23].

CHAPTER 7

Preserving access to identity information

INTRODUCTION

- 7.1 In Chapter 3, we explain that surrogate-born people have rights relating identity, including the right to access information about their origins.¹ As the Verona Principles explain:²

Every child should be able to enjoy and exercise their right to preserve their identity (nationality, name and family relations) with appropriate assistance and protection. 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.

- 7.2 In this chapter, we examine the current systems in place for recording information about a surrogate-born person's origins as well as the measures to ensure they have access to these records. We recommend a new framework for preserving access to information about a surrogate-born person's genetic and gestational origins and whakapapa. From a child's rights perspective, each of these elements is essential to fully understand their origins and establish their identity.³
- 7.3 The new framework recommended in this chapter is intended to sit alongside our recommendations in Chapter 6 for a new framework to determine legal parenthood in surrogacy arrangements.

CURRENT LAW

- 7.4 There is no single, centralised system that records information about surrogate-born people and their genetic and gestational origins and whakapapa. Rather, relevant

¹ The right of access to origins is seen as a constitutive element of the right to identity affirmed by the United Nations Convention on the Rights of the Child: 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].

² 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). See also UNICEF and Child Identity Protection *Key Considerations: Children's Rights & Surrogacy* (Briefing Note, February 2022) at 2.

³ For a discussion of the importance of knowing one's gestational origins, see: Andrea Mulligan "Protecting Identity in Collaborative Assisted Reproduction: The Right to Know One's Gestational Surrogate" (2020) 34 *International Journal of Law, Policy and The Family* 20.

information about a surrogate-born person's conception and birth is collected and accessed under separate pieces of legislation:

- (a) The Births, Deaths, Marriages, and Relationships Registration Act 1995 (soon to be replaced by the Births, Deaths, Marriages, and Relationships Registration Act 2021)⁴ provides for the registration of every child's birth and the issuing of birth certificates. Information is collected about the child's legal parents, as explained below.
- (b) The Adoption Act 1955 provides for the transfer of legal parenthood in surrogacy arrangements, and the Adult Adoption Information Act 1985 provides for access to information about an adopted person's parents at birth.
- (c) The Human Assisted Reproductive Technology Act 2004 (HART Act) provides for collection and access to information about gamete donors involved in a surrogacy arrangement.

Birth registration

- 7.5 When a child is born in Aotearoa New Zealand, their birth is registered by the following steps:
- (a) 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.⁵ The preliminary notice is completed by the hospital or, if the birth took place outside a hospital, by the attending doctor or midwife.⁶
 - (b) Second, both parents must jointly notify a Registrar of the birth as soon as is reasonably practicable after the birth.⁷ In practice, the expectation is that parents register the birth within two months.⁸ The Registrar may accept registration by one parent in limited circumstances, including if the child has only one parent at law.⁹
- 7.6 In a surrogacy arrangement, the surrogate (and any partner) will be the child's legal parent at birth, and therefore she will be responsible for registering the birth of the child.¹⁰ The

⁴ The Births, Deaths, Marriages, and Relationships Registration Act 2021 is expected to come into force mid-2023: s 2.

⁵ Births, Deaths, Marriages, and Relationships Registration Act 1995, s 5A; Births, Deaths, Marriages, and Relationships Act 2021, s 11.

⁶ 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); Births, Deaths, Marriages, and Relationships Act 2021, s 11(3)(c).

⁷ Births, Deaths, Marriages, and Relationships Registration Act 1995, s 9(1); Births, Deaths, Marriages, and Relationships Act 2021, s 12(1).

⁸ 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.

⁹ Births, Deaths, Marriages, and Relationships Registration Act 1995, s 9(2)(a); Births, Deaths, Marriages, and Relationships Act 2021, s 12(2)(a). The child will have only one parent at law in limited circumstances, such as if a single woman becomes pregnant using donated gametes: Status of Children Act 1969, ss 20 and 22. 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); Births, Deaths, Marriages, and Relationships Act 2021, s 12(2)(a)(iii)(B), 12(2)(a)(iv).

¹⁰ Pursuant to Part 2 of the Status of Children Act 1969. See discussion in Chapter 6 of this Report.

surrogate will be the child's sole parent at law if she did not have a partner at the time she became pregnant.¹¹

- 7.7 The information that must be contained in the preliminary notice and birth notification is prescribed in regulations.¹² 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

- 7.8 Once a birth is registered, a birth certificate can be issued, which will contain the information prescribed under regulations.¹³ A birth certificate that is issued after the surrogate-born person'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.
- 7.9 As we explain in Chapter 6, adoption is the only way to transfer legal parenthood to the intended parents. When a child is adopted in Aotearoa New Zealand, te Kōti Whānau | Family Court must notify the Registrar-General appointed under the Births, Deaths, Marriages, and Relationships Registration Act (Registrar-General) of certain information about the adoption,¹⁴ and the Registrar-General must record that information in the child's birth registration.¹⁵ 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 information relating to the date and place of the person's birth if satisfied of the correctness or likely correctness of that information.¹⁶
- 7.10 Any birth certificate issued after the adoption is registered must be issued with the child's adoptive name and must record the adoptive parents as the child's parents.¹⁷ While there is provision for the birth certificate to note that the child's parents are "adoptive parents",

¹¹ Births, Deaths, Marriages, and Relationships Registration Act 1995, s 9(4); Births, Deaths, Marriages, and Relationships Act 2021, s 12(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.

¹² Births, Deaths, Marriages, and Relationships Registration (Prescribed Information) Regulations 1995.

¹³ Births, Deaths, Marriages, and Relationships Registration Act 1995, s 67(1); Births, Deaths, Marriages, and Relationships Act 2021, s 80; and Births, Deaths, Marriages, and Relationships Registration (Prescribed Information) Regulations 1995, reg 6.

¹⁴ Births, Deaths, Marriages, and Relationships Registration Act 1995, s 23; Births, Deaths, Marriages, and Relationships Act 2021, s 31.

¹⁵ Births, Deaths, Marriages, and Relationships Registration Act 1995, s 24; Births, Deaths, Marriages, and Relationships Act 2021, s 32.

¹⁶ Births, Deaths, Marriages, and Relationships Registration Act 1995, s 24(2); Births, Deaths, Marriages, and Relationships Act 2021, s 32(2).

¹⁷ Births, Deaths, Marriages, and Relationships Registration Act 1995, s 63(2); Births, Deaths, Marriages, and Relationships Act 2021, s 83.

this notation is optional,¹⁸ and in practice, we are not aware of it being requested by intended parents in surrogacy arrangements.¹⁹ The original birth certificate remains unavailable until the child makes an application under the Adult Adoption Information Act.

Access to information about an adoption

- 7.11 Surrogate-born people who are adopted by their intended parents can access some information relating to the adoption under the Adult Adoption Information Act.²⁰
- 7.12 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.²¹ If the adopted person was adopted after 28 February 1986, the Registrar-General must, on receiving a request for an original birth certificate:²²
- (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.
- 7.13 Once the original birth certificate has been obtained, an adopted person can then apply to Oranga Tamariki | Ministry for Children for information relating to their birth parents.²³ An adopted person can also request the assistance of a social worker to contact a birth parent on their behalf.²⁴

Information about gamete donors

- 7.14 A principle of the HART Act is that “donor offspring should be made aware of their genetic origins and be able to access information about those origins”.²⁵ Accordingly, the HART Act establishes a regime to enable donor-conceived people to access information about their donor or donors. Information is collected by the state and is kept on a register known

¹⁸ The adoptive parents (or the adopted person once they turn 18) must request the notation: Births, Deaths, Marriages, and Relationships Registration Act 1995, s 24(3)–(5); Births, Deaths, Marriages, and Relationships Act 2021, ss 34–35. Note that, under the new Act (due to come into force in 2023), the age at which the adopted person may apply for additional information to be included has been reduced to 16 years or older.

¹⁹ 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].

²⁰ 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].

²¹ Adult Adoption Information Act 1985, s 4.

²² 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.

²³ Adult Adoption Information Act 1985, s 9.

²⁴ Adult Adoption Information Act 1985, s 10.

²⁵ Human Assisted Reproductive Technology Act 2004, s 4(e). The term “donor offspring” is used in the Act but is rejected by many donor-conceived people: NZ donor conceived adults “Please don’t refer to us as offspring, we are people like everyone else” (26 February 2022) Instagram <donor conceived adult (@donorconceivedaotearoa)>. Accordingly, in this Report, we use the language of “donor-conceived people” except where expressly referring to the terms of the Human Assisted Reproductive Technology Act.

as the “HART register”.²⁶ This may give a surrogate-born person access to some information about their genetic origins and whakapapa if they were conceived using donated gametes.

- 7.15 While the HART Act is administered by Tāhū o te Ture | Ministry of Justice, the HART register is administered by the Registrar-General. In practice, the HART register is maintained by officers from Te Tari Taiwhenua | Department of Internal Affairs (DIA) who process birth registration. The two systems are linked, as the child’s birth registration number is noted on the HART register to link the two records and the information is cross-referenced to ensure the information held on the HART register is accurate.
- 7.16 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.²⁷ 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 people. In practice, however, few donors and donor-conceived people have registered on the voluntary register.²⁸

Collection of information

- 7.17 Fertility service providers must collect certain information about donors, including information about physical characteristics, ethnicity and cultural affiliations, medical history and reasons for donating.²⁹ If the donor is Māori, information must also be collected about the donor’s whānau, hapū and iwi to the extent that the donor is aware of those affiliations.³⁰
- 7.18 Fertility service providers also have an obligation to put in place an effective system to be notified of, or otherwise become aware of, the births of donor-conceived children.³¹ 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.³²

Retention of information on the HART register

- 7.19 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.³³

²⁶ 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>.

²⁷ Human Assisted Reproductive Technology Act 2004, s 63.

²⁸ As of 2 February 2022, 29 donor-conceived people and 28 donors had registered on the voluntary register since it was established, compared to 2,974 donor-conceived people and 3,098 donors recorded on the mandatory register: Te Tari Taiwhenua | Department of Internal Affairs “3000th donor-conceived child’s record added to HART register” (press release, 22 February 2022).

²⁹ Human Assisted Reproductive Technology Act 2004, s 47(1).

³⁰ Human Assisted Reproductive Technology Act 2004, s 47(1)(h).

³¹ Human Assisted Reproductive Technology Act 2004, s 52.

³² Human Assisted Reproductive Technology Act 2004, s 53(1)(a).

³³ Human Assisted Reproductive Technology Act 2004, s 53(1)(b) and (2).

- 7.20 The Registrar-General must keep all information it receives about donor-conceived people indefinitely.³⁴
- 7.21 Fertility service providers must keep information for a period of 50 years after the birth of the donor-conceived person or until the provider ceases to operate, if earlier.³⁵ At that point, the provider must give the additional information collected about the donor, described above, to the Registrar-General.³⁶

Access to information

- 7.22 A donor-conceived person can access information held on the HART register or by a fertility service provider once they turn 18.³⁷ However, a Family Court can authorise disclosure to a donor-conceived person aged 16 or 17 if the Court is satisfied that disclosure is in their best interests.³⁸ Before the donor-conceived person turns 18 and in the absence of a court order, their guardian can be given access to information on request³⁹ or the donor-conceived person can be provided with information that does not identify the donor.⁴⁰ In all circumstances, the person requesting the information must be advised of “the desirability of counselling”.⁴¹
- 7.23 A donor-conceived person 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.⁴²
- 7.24 A donor-conceived person over the age of 18 can consent to the disclosure of information about them to the donor.⁴³ 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 person.⁴⁴ If a donor-conceived person is given access to identifying information about a donor, the donor must be notified.⁴⁵
- 7.25 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”.⁴⁶

³⁴ Human Assisted Reproductive Technology Act 2004, ss 48(3) and 55(1).

³⁵ Human Assisted Reproductive Technology Act 2004, ss 48(2) and 55(2)–(3).

³⁶ Human Assisted Reproductive Technology Act 2004, s 48(2).

³⁷ Human Assisted Reproductive Technology Act 2004, s 50(1) and 57(1).

³⁸ Human Assisted Reproductive Technology Act 2004, s 65.

³⁹ Human Assisted Reproductive Technology Act 2004, ss 50(2) and 57(2).

⁴⁰ Human Assisted Reproductive Technology Act 2004, ss 50(3) and 57(3).

⁴¹ Human Assisted Reproductive Technology Act 2004, ss 50(5) and 57(4).

⁴² Human Assisted Reproductive Technology Act 2004, s 58.

⁴³ Human Assisted Reproductive Technology Act 2004, s 59.

⁴⁴ Human Assisted Reproductive Technology Act 2004, ss 60(1) and 61(1).

⁴⁵ Human Assisted Reproductive Technology Act 2004, s 50(6).

⁴⁶ 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).

Ngā Paerewa Health and Disability Services Standard

- 7.26 Fertility service providers must comply with Ngā Paerewa Health and Disability Services Standard NZS 8134:2001 (Ngā Paerewa).⁴⁷ This 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”.⁴⁸ 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.⁴⁹

Current practice

- 7.27 We do not know how many intended parents choose not to tell their child about the circumstances of their conception and birth. Our consultation suggests that many intended parents are, or intend to be, open about the surrogacy arrangement with their child.⁵⁰ 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.
- 7.28 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 provides information to intended parents about the importance of being open with the child about their origins from an early age.
- 7.29 In Chapter 5, we recommend redefining Oranga Tamariki’s role in the ECART process and ensuring that counselling, which is an integral part of the ECART process, addresses children’s identity rights and the parties’ plans for sharing identity information with the child.
- 7.30 It remains possible, however, that some children may not learn they were born as a result of a surrogacy arrangement or the full details of their origins until later in life (if at all). While there is limited research into the experiences of surrogate-born people, research into the impact of closed adoption and anonymous donor conception on the wellbeing and sense of identity of adoptees and donor-conceived people is relevant. In Chapter 3, we explore research that reveals a detrimental impact of non-disclosure on donor-conceived people if they later discover the circumstances of their conception, sometimes

⁴⁷ Ngā Paerewa Health and Disability Services Standard NZS 8134:2021 replaced the Fertility Services Standard NZS 8181:2007 on 28 February 2022, pursuant to the Health and Disability Services (Safety) Standards Notice 2021.

⁴⁸ Ngā Paerewa Health and Disability Services Standard NZS 8134:2021 at [1.10.1].

⁴⁹ Manatū Hauora | Ministry of Health “Sector Guidance for Ngā Paerewa Health and Disability Services Standard NZS 8134:2021” (18 October 2021) <www.health.govt.nz> at [1.10.1].

⁵⁰ A 3-year study of Māori perspectives of fertility and infertility found that many participants who used the services of fertility clinics wanted to ensure that they would not be repeating the issues faced in the past through closed adoptions, and that tamariki Māori are raised having an awareness of their whakapapa: Leonie Pihama “Experiences of Whānau Māori within Fertility Clinics” in Paul Reynolds and Cherryl Smith (eds) *The Gift of Children: Māori and Infertility* (Huia Publishers, Wellington, 2012) 203 at 205.

in accidental or unplanned ways.⁵¹ In Chapter 6, we explain that the detrimental impact on Māori who grow up not knowing their whakapapa is well documented in the experiences of Māori adoptees and their descendants.⁵²

ISSUES

- 7.31 In the Issues Paper, we identified several problems with the current law that may make it difficult for a surrogate-born person to access information about their genetic and gestational origins and whakapapa:⁵³
- (a) First, surrogate-born people must rely on other people to tell them that they were born as a result of a surrogacy arrangement. As we explain in Chapter 6, legal parenthood can obscure a child's genetic and gestational origins and whakapapa. Birth certificates do not record when a child is born as a result of a surrogacy arrangement, and there are no other notification procedures in place to ensure that this information is given to a child. If a surrogate-born person is not made aware of their origins, they will not know to access information that is held by the state about the adoption or about any donor(s).
 - (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 does use 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.⁵⁴ These definitions mean that, if conception is achieved by artificial insemination (as is the case in traditional surrogacy) rather than by in vitro fertilisation, the surrogate will not fall within the definition of a donor. It is possible that 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

⁵¹ See for example recent research into the experience of donor-conceived people using DNA databases to connect with donors: Lucy Frith and others "Secrets and disclosure in donor conception" (2017) 40 *Sociology of Health & Fitness* 188; Lucy Frith and others "Searching for 'relations' using a DNA linking register by adults conceived following sperm donation" (2018) 13 *BioSocieties* 170 as cited in Marilyn Crawshaw and Ken Daniels "Revisiting the use of 'counselling' as a means of preparing prospective parents to meet the emerging psychosocial needs of families that have used gamete donation" (2019) 8 *Families, Relationships and Societies* 395. See also Samantha Best "The experience and wellbeing of donor-conceived adults" (MHSc dissertation, Te Wānanga Aronui o Tāmaki Makau Rau | Auckland University of Technology, 2021).

⁵² See for example discussion of Dr Erica Newman's research on the impact of the Adoption Act 1955 on the identity of descendants of Māori adoptees yet to connect to their taha Māori in Bruce Munro "No mountain, no river" *Otago Daily Times* (New Zealand, 7 February 2022) and Alice Webb-Liddall "Finding whakapapa: The generational trauma of closed Māori adoptions" *The Spinoff* (New Zealand, 18 March 2021). See also Kim Mcbreen "Cast adrift: My story of adoption" *E-Tangata* (New Zealand, 6 February 2022); Annabel Ahuriri-Driscoll "Ka Tū te Whare, Ka Ora: The Constructed and Constructive Identities of the Māori Adoptee" (PhD Dissertation, Te Whare Wānanga o Waitaha | University of Canterbury, 2020); Cherryl Smith "Tamaiti Whāngai and Fertility" in Paul Reynolds and Cherryl Smith (eds) *The Gift of Children: Māori and Infertility* (Huia Publishers, Wellington, 2012) 143 at 170–173; and Maria Haenga Collins "Belonging and Whakapapa: The Closed Stranger Adoption of Māori Children into Pākehā Families" (PhD Dissertation, Te Kūnenga Ki Pūrehuroa | Massey University, 2011).

⁵³ Similar issues were identified in Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [10.11].

⁵⁴ Human Assisted Reproductive Technology Act 2004, s 5 (definitions of "donated cell", "donor" and "in vitro").

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 requires information to be recorded about donations made through a New Zealand fertility clinic.⁵⁵ This means that 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.⁵⁶
- (e) Fifth, limited information may be available to a surrogate-born person about their 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. Adopted people do not have access to their Family Court adoption records as of right.⁵⁷ 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 people should have access to the court file.⁵⁸ 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.⁵⁹ 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.⁶⁰ However, accessing the court file later in a child's life may 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.

⁵⁵ While a voluntary register is also maintained that enables donors and donor-conceived people to register information directly with the Registrar-General, the voluntary register only applies to gamete donations made, and donor-conceived people who were conceived, prior to 2005: Human Assisted Reproductive Technology Act 2004, s 63.

⁵⁶ Rebecca Hamilton and others "Gaping holes in law covering info for donor-conceived people" *Stuff* (online ed, New Zealand, 25 May 2021).

⁵⁷ Adoption records held by te Kōti Whānau | Family Court are only open to inspection on limited grounds under s 23 of the Adoption Act 1955. None of these grounds relate to a person's rights of access to information about their origins. While the Court has a residual discretion to grant access to adoption records "on any other special ground", applications under this ground have been refused in situations where the reason for accessing the adoption records was to establish contact with an adopted sibling: *Re V A* (2001) 21 FRNZ 93; and *Re MJ* (FC Christchurch, FAM-2003-009-004670, 21 January 2005). In *Re V A*, the Judge stated that "I do not consider the applicant's wish to know her sister and to provide a sense of closure as sufficient to constitute special grounds": at 95.

⁵⁸ 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.

⁵⁹ 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.

⁶⁰ See for example *Re Shui* [2020] NZFC 8443 at [21]; *Re Ponte (adoption)* [2020] NZFC 7481 at [27]; and *Re Weber (adoption)* [2020] NZFC 7259 at [18].

- (f) Sixth, even if relevant information is available under the Adult Adoption Information Act or the HART Act, a surrogate-born person can only access that information once 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.⁶¹ 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”.⁶² 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.⁶³ 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”.⁶⁴

RESULTS OF CONSULTATION

Issues

- 7.32 We asked submitters whether they agreed with the issues we identified with children’s access to information in surrogacy arrangements and whether there were any other issues we should consider. We received 182 submissions that addressed this question. Of these submissions, a strong majority (83 per cent) either agreed (74 per cent)⁶⁵ or agreed in part (9 per cent)⁶⁶ with the issues we had identified. Nine per cent of submitters did not agree with the issues we had identified,⁶⁷ and eight per cent expressed no view.⁶⁸
- 7.33 Personal submitters who agreed or agreed in part with the issues identified considered that the existing regime is not fit for purpose. As one submitter wrote, “the existing laws are inconsistent, confusing and inequitable, and none are specifically designed for surrogacy information”. Some submitters considered that the law has not kept pace with current understanding about children’s capacity to receive open and honest information

⁶¹ *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [238]–[256].

⁶² Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [10.80].

⁶³ Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005), R22.

⁶⁴ 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.

⁶⁵ 134 submissions comprising 111 personal submissions, 17 submissions from organisations (Advisory Committee on Assisted Reproductive Technology, Australian and New Zealand Infertility Counsellors Association, Ethics Committee on Assisted Reproductive Technology, Federation of Women’s Health Councils Aotearoa, Fertility Associates, Fertility New Zealand, Fertility Plus, Maternity Services Consumer Council, National Council of Women of New Zealand, New Zealand College of Midwives, New Zealand Council of Trade Unions, New Zealand Nurses Organisation, Ngā Rangahautira, Nurse Practitioners New Zealand, Office of the Children’s Commissioner, Repromed and Te Kāhui Ture o Aotearoa | New Zealand Law Society), comments from the Judges of the Family Court and 5 academic submissions (Dr Anne Else, Adjunct Professor Ken Daniels, Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly), Professor Mark Henaghan and Associate Professor Rhonda Shaw).

⁶⁶ 17 submissions comprising 16 personal submissions and 1 academic submission (Australian academics Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff (submitting jointly)).

⁶⁷ 17 submissions comprising 15 personal submissions and 2 submissions from organisations (Center for Bioethics and Culture Network and Feminist Legal Clinic).

⁶⁸ 14 personal submissions.

about their origins. Submitters also clearly expressed the view that it is a child's "right" to have this knowledge, with reasons given for this view including the equivalent rights of donor-conceived people, the deleterious psychological effect of living without the knowledge and an affinity for full transparency or opposition to secrecy. One submitter said, "We know from adoption and sperm donation that children can cope with their information and are not ashamed of it." Another submitter with experience as an intended parent noted that:

Anything and everything should be done to ensure children are able to access information that will help inform their identity and understanding of self ... our relationships with our egg donor and surrogate are rooted in the values of transparency.

- 7.34 Some personal submitters who supported improved access to information pointed out that a balance needed to be struck between privacy and transparency. One submitter cautioned that "[w]hile I agree children should have a right to know 'where they come from' I firmly believe that for their own mental wellbeing this needs to be a very structured and supported conversation, had at the right time, with information delivered in the right way".
- 7.35 Some personal submitters, however, disagreed that the person having to rely on others to tell them they were surrogate-born was a problem. One submitter with experience as an intended parent said, "The reality is we have to trust the [intended parents] to do what's best for their children. There are so many ways that parents can screw their children up, regardless of the way they came into the world." Another submitter, also with experience as an intended parent, commented similarly: "I don't think it makes any difference for the child how a child was born. I would say most parents would tell their child but if they choose not to, that is the parents' decision."
- 7.36 Organisations generally agreed with the issues we identified, and many commented on the importance of children, both surrogate-born and donor-conceived, having ready access to information about their origins. For most, this was viewed as an essential component of a child-focused approach and necessary for a child's overall wellbeing. The Advisory Committee on Assisted Reproductive Technology (ACART) recognised that the current regime is not well suited to surrogacy arrangements. Fertility Plus and Repromed commented that it was important that the information is "socialised" with the child from an early age. Fertility Associates said there was a need to address both the availability of the information (so that the child is not dependent on family telling them) and confidentiality (so that the child has control over further disclosure). In their joint submission, Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff called for a stronger focus on how access to information would be addressed in the context of international commercial surrogacy arrangements.
- 7.37 The Judges of the Family Court agreed with the issues identified and noted that they "accord with domestic legislation which highlights the need for children to know their identity". The Judges observed that they are aware of a variety of situations currently where children's birth registrations do not reflect their true genealogy and whakapapa. These cases go before the Court to determine when conflict subsequently arises or when relationships need to be reinstated. The Judges pointed to the need for increased education so that regulation is viewed as being protective and not a barrier to those creating families in a diverse way.

- 7.38 Most submitters who did not agree with the issues we had identified were generally opposed to surrogacy in principle, while one submitter commented that children's access to information was not a problem that needed to be addressed.

Options for reform

- 7.39 In the Issues Paper, we identified two options for reform to address gaps in the current law and ensure that surrogate-born people can access information about their genetic and gestational origins:
- (a) **Option One: Changes to birth registration and certificates.** This option was to record more information about a person's conception and birth in the birth register and on birth certificates. We noted that this could be done in different ways:
 - (i) The information recorded on a birth certificate could indicate that a child was born as a result of a surrogacy arrangement. The birth certificate could record the surrogate's name and the details of any donor used in conception.
 - (ii) 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 be held on the birth register.⁶⁹
 - (iii) A two-certificate system could be introduced. A short-form birth certificate could record the child's legal parents and be used for identification purposes, and a long-form birth certificate could give a full account of the circumstances of the child's conception and birth.⁷⁰
 - (b) **Option Two: Recording information about surrogacy arrangements in the HART register.** This option was to expand the function of the HART register to include information about a surrogate-born person's genetic and gestational origins.
- 7.40 We did not express a preliminary preference for either option, but we did suggest that Option Two may be preferred in the absence of a wider review of the birth registration system.
- 7.41 We asked submitters which of the two options they preferred. We received 173 submissions that addressed this question. Of these submissions, 48 per cent preferred

⁶⁹ This was recommended by the Commission in 2005: Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [10.54]–[10.62] and R18. In 2021, the Advisory Committee on Assisted Reproductive Technology (ACART) also recommended this option in its advice to the Minister of Health: Advisory Committee on Assisted Reproductive Technology *ACART Advice and Guidelines for Gamete and Embryo Donation and Surrogacy* (June 2021), R10B and [220]–[230].

⁷⁰ 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].

Option One,⁷¹ 38 per cent favoured Option Two⁷² and 14 per cent expressed no preference.⁷³ In addition, some submitters, including the Privacy Commissioner and DIA, commented on the options for reform but did not express a preference for either option.

Support for Option One: Changes to birth registration and certificates

- 7.42 Submitters who supported changes to birth registration and certificates did so for a variety of reasons. Some were in favour of this option because the openness of the birth register would facilitate children's access to information and counter the risk of non-disclosure. One personal submitter with experience as an intended parent said, "I prefer Option One because Option Two requires the child to know they have been born as a result of a surrogacy arrangement before they will know to seek information." Another submitter similarly commented they preferred this option because it "safeguards against situations where the child may not be told by anyone they were born through surrogacy". Other submitters preferred Option One because it would then be a single source of information for the child and possibly easier to access than a separate register.
- 7.43 A common theme in personal submissions was that the birth registration system is outdated or not fit for purpose. One submitter said reform was needed "to better record the complexity of modern and culturally diverse conception, birth and family arrangements". Another submitter agreed that the current birth certificate system does not reflect the reality of the roles played by those involved in the child's conception and birth. They cited with approval the birth registration system in British Columbia, which allows more than two people to be listed on a birth certificate with appropriate options to record the details of assisted reproduction or additional parents.
- 7.44 Oranga Tamariki strongly endorsed Option One due to the New Zealand Government's obligations under the United Nations Convention on the Rights of the Child (UNCROC). They noted that the child's right to identity is also enshrined in the Oranga Tamariki Act 1989. They rejected Option Two because it "relies on the parent to tell the child of the circumstances of their surrogate birth" and therefore does not uphold the right to identity. In Oranga Tamariki's view, the right to identifying information is "unconditional". Oranga Tamariki also noted that Option One aligns with the Commission's recommendation in its 2000 Report on adoption regarding the registration of adoptions and "unconditional access as of right to this information".
- 7.45 Academic submitters in favour of Option One included Professor Mark Henaghan, who commented that children's full access to information of their birth would "enhance and protect their whakapapa". Adjunct Professor Ken Daniels noted that Option One has "the effect of parents knowing their offspring will know of the family building history". Dr Anne

⁷¹ 85 submissions comprising 67 personal submissions, 12 submissions from organisations (Australian and New Zealand Infertility Counsellors Association, Ethics Committee on Assisted Reproductive Technology, Feminist Legal Clinic, Fertility Associates, Fertility New Zealand, National Council of Women of New Zealand, New Zealand Council of Trade Unions, New Zealand Nurses Organisation, Ngā Rangahautira, Oranga Tamariki | Ministry for Children, Repromed and Te Kāhui Ture o Aotearoa | New Zealand Law Society) comments from the Judges of the Family Court and 5 academic submissions (Dr Anne Else, Adjunct Professor Ken Daniels, Professor Mark Henaghan, Dr Ruth Walker and Dr Liezl van Zyl (submitting jointly) and Associate Professor Rhonda Shaw).

⁷² 65 submissions comprising 61 personal submissions, 3 submissions from organisations (Advisory Committee on Assisted Reproductive Technology, Fertility Plus and New Zealand College of Midwives) and 1 academic submission (Australian academics Kate Galloway, Mary Keyes and Sarah Hoff (submitting jointly)).

⁷³ 23 submissions comprising 20 personal submissions and 3 submissions from organisations (Maternity Services Consumer Council, Nurse Practitioners New Zealand and Office of the Children's Commissioner).

Else supported a mandatory requirement for the surrogate's identity and role to be officially recorded and accessible, as is required under the current provisions of the Adult Adoption Information Act. Dr Else preferred Option One for several reasons, including that it reflected the opinion expressed by intended parents during the Commission's period of initial consultation and was consistent with the International Principles for Donor Conception and Surrogacy, which were prepared by a group of donor-conceived and surrogate-born people and presented to the United Nations.⁷⁴ Dr Else considered Option Two was inadequate because the surrogate's role as the "birth mother" is distinctly different from that of a donor and because donor-conceived people who have sought access to the voluntary HART register have had negative experiences with the process. Dr Else considered that the same procedures that were suggested in relation to Option Two (discussed below) could be adapted for Option One.

- 7.46 Some submitters who supported Option One commented on how this option could be given effect. Several submitters, including the Australian and New Zealand Infertility Counsellors Association (ANZICA), Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) and Repromed as well as the Judges of the Family Court, supported a two-certificate system. These submitters saw the birth certificate system as the most effective method at giving expression to the child's right to know their genetic and gestational origins. NZLS justified a two-certificate system because it balances access to knowledge with privacy:

The long form would contain all the key birth story information. This is the child's family history document. It will record the identity of the surrogate, a reference to use of any donated gametes and possibly the date of any parenthood order. The document's primary purpose is to provide information for the child. It is the child's documentation. For everyday use and administrative purposes, the Law Society supports the availability of a short-form birth certificate for general identification. It would record the name and date of birth of the child and the legal parents. However, we believe that a short-term certificate should be neutral: it should not be annotated with a statement that alerts the reader to the fact that more information about the circumstances of the child's birth may be held on the birth register. This is to protect the child's right to privacy and as the person entitled to share their story.

- 7.47 Fertility Associates supported an annotation that indicates additional information is available. ACART noted that it had made this recommendation to previous governments but that this had been declined "on the basis that it could infringe on the rights of the parents not to tell the child about their origins", which ACART considers contravenes the paramountcy principle of the child's best interests.

Support for Option Two: Recording information about surrogacy arrangements in the HART register

- 7.48 Personal submitters who supported Option Two generally considered that recording information about surrogacy arrangements in the HART register was preferable to Option One. Some submitters thought that reforming the birth registration system was too complex, while others were concerned that changes to birth registration and certificates could have a negative impact on surrogate-born people.

⁷⁴ *International Principles for Donor Conception and Surrogacy* (November 2019), principles 8–10.

- 7.49 On complexity, one submitter commented that Option Two was “considerably more straightforward than an overhaul of the existing birth registration system”. On the potential negative impact on surrogate-born people, several submitters were concerned about the privacy implications if they were to have a different birth certificate and the risk that this could lead to discrimination. One personal submitter stated they were:

Strictly against adding such information on birth certificates. It would be a major privacy intrusion combined with serious disadvantages for the child later in life. It would lead to stigmatisation if practically everyone who requests a birth certificate for whatever reason can see that a person is a result of a surrogacy arrangement.

- 7.50 Another personal submitter said that:

Under Option One the child would have a birth certificate that looks different from everyone else, which may make them think they are different and not normal. Therefore I think Option Two is the best.

- 7.51 Some of those who raised this concern acknowledged that it might be mitigated by the introduction of a two-certificate system but still preferred Option Two. Others, however, felt that such a mitigation measure would create practical problems. One submitter said that short-form certificates would not solve the issue: “They used to issue them and they are not accepted as identification. Only the long form is, I have had this rejected when trying to apply for tertiary study.”
- 7.52 One submitter with experience as an intended parent expressed the view that only the intended parents should appear on the birth certificate.
- 7.53 ACART supported Option Two, acknowledging both the lack of a truly accessible central repository for information about surrogate-born people and the overlapping issue that there is also no mechanism to alert them that they are donor-conceived or surrogate-born. ACART also pointed to the gaps in the HART Act, which can mean the full genetic history of the donor remains unrecorded (for instance, if one female partner donates an ovum to another female partner, they are not considered a “donor” and their information is not recorded on the HART register). ACART concluded that Options One and Two are not mutually exclusive, but they would support Option Two where it leads to clarifying and strengthening the HART Act requirements.
- 7.54 Fertility Plus supported Option Two for different reasons. As outlined above, the HART Act includes requirements for those seeking their information to have access to counselling during the process. Fertility Plus submitted that this was a good reason to keep access to information provisions under the HART Act rather than the birth registration system.
- 7.55 The New Zealand College of Midwives also preferred Option Two due to potential complexity and time taken to conduct a review of the birth registration system. However, the College still thought that the surrogate should appear on the birth certificate.

No preference or the “hybrid” option

- 7.56 Some submitters who expressed no preference commented further. Some submitters were generally opposed to surrogacy in principle, while others commented that it should always be up to the parents to provide information about children’s origins even if information about them was kept on the HART register. Another submitter commented that the revelation of information “must be handled with extreme delicacy and sensitivity” and “there must be very specialised support to handle the intensely complex issues of identity that will arise for the children”. Several organisations, including Nurse Practitioners

New Zealand, the Privacy Commissioner and the Office of the Children's Commissioner, supported the principle of access to information and considered that either option was feasible.

- 7.57 The Maternity Services Consumer Council (MSCC) supported a hybrid model of the two options. MSCC favoured the collection and retention of information in the dedicated HART register because it provides better mechanisms to protect the privacy of both the surrogate and the child, it can record more detailed information, it could prevent accidental disclosure and access to the information would be supplemented by counselling and other support under the HART Act. Alongside this, MSCC suggested that birth certificates could still indicate by way of annotation that more information could be supplied. This "hybrid" model was also supported by several personal submitters who indicated a preference for both Option One and Option Two.

Age restrictions on accessing information

- 7.58 Some submitters commented on whether age restrictions should apply to the access to information about a child's origins. Several submitters, including ANZICA, ACART, Repromed, Dr Else and Dr Liezl van Zyl and Dr Ruth Walker in their joint submission supported removing existing age restrictions on access to information on the HART Act. NZLS considered that a surrogate-born person should be able to access information in a long-form birth certificate at any age, stating that it "does not believe this is a guardianship decision but the child's autonomous right to all of the information contained in the long-form certificate". Some submitters supported relying on the grounds for refusing access to information under the Privacy Act 2020. The Privacy Commissioner agreed that, if there is no policy rationale for an age-based restriction on rights of access to information under the HART Act, it would be better to substitute grounds for refusal based on those in section 49 of the Privacy Act. ACART supported a more flexible system based on the competency of the young person. Fertility Plus and MSCC preferred reducing the age restrictions to 16 years. Some personal submitters thought that access to information should continue to be restricted to those over the age of 18 years.
- 7.59 DIA commented that it regularly receives requests seeking information about family history, therefore:

It would be useful for the access regimes set out under the HART and Adoption Acts to be consistent, so that a child can get a full picture of their genetic origins/whakapapa at one point in time.

Support when accessing information

- 7.60 Several submitters, including ACART and ANZICA, Fertility Associates, Fertility Plus and MSCC, also supported surrogate-born people having the same rights to access state-funded counselling services as adopted people under the Adult Adoption Information Act. ACART suggested that, if surrogate-born people could not access the same level of support and counselling as donor-conceived people, this may amount to unjustified discrimination. Dr Else, however, considered that those provisions were outdated and patronising. Dr Else supported new, consistent, equitable, fit-for-purpose provisions for getting assistance and support to access information and make contact with surrogates or donors and to have appropriate counselling if requested.

Enabling Māori to access information about their whakapapa

- 7.61 In the Issues Paper, we asked submitters whether they thought the options for reform outlined above are sufficient to enable surrogate-born Māori to access information about their whakapapa. We received 127 submissions that addressed this question. Of these submissions, 69 per cent thought the options for reform were sufficient,⁷⁵ 10 per cent did not⁷⁶ and 21 per cent expressed no view.⁷⁷
- 7.62 Submitters who thought the options for reform would be sufficient to enable Māori to access information about their whakapapa expressed mixed views. Some personal submitters emphasised the significance of genetic and gestational origins and whakapapa, for all surrogate-born people. Another thought that the options for reform would be a “backup”, as Māori are generally open about and proud of their whakapapa. Some personal submitters expressed a preference for Option Two over Option One.
- 7.63 Organisations were generally in agreement that the options for reform would enable Māori to access information about their whakapapa. Ngā Rangahautira preferred Option One and thought that birth certificates should include a surrogate’s whānau, hapū and iwi affiliations regardless of whether a Māori surrogate-born child shares genetics with the surrogate. If Option Two were preferred, Ngā Rangahautira supported abolishing the age restriction and aligning access with the Privacy Act 2020, submitting that:
- We agree the law regarding the reconciling of and access to information about a surrogate-born child’s genetic and gestational origins must be reformed as the current law does not meet the needs of Māori. As the paper highlights, the legal barriers to accessing information about the circumstances of a surrogate-born child’s birth have detrimental consequences for tamariki Māori in numerous respects. Denying whakapapa through the law upholds the assimilation and colonisation of Māori that has been consistently encouraged through family law. Surrogacy law should not allow this cycle to continue.
- 7.64 Submitters who did not think the options above were sufficient to enable surrogate-born Māori to access information about their whakapapa expressed mixed views. Some were generally opposed to surrogacy in principle, while others thought that additional information should be recorded and available to a child or that a combination of Options One and Two should be adopted. One submitter thought that Māori will require their own systems to record whakapapa.
- 7.65 The Judges of the Family Court, while expressing no view on this question, did observe that “tikanga Māori requires that children grow up with knowledge of their whakapapa. Collecting and recording the above information is therefore vital”.

⁷⁵ 87 submissions comprising 73 personal submissions, 12 submissions from organisations (Australian and New Zealand Infertility Counsellors Association, Ethics Committee on Assisted Reproductive Technology, Fertility Associates, Fertility New Zealand, Fertility Plus, National Council of Women of New Zealand, New Zealand Nurses Organisation, Ngā Rangahautira, Nurse Practitioners New Zealand, Office of the Children’s Commissioner, Repromed and Te Kāhui Ture o Aotearoa | New Zealand Law Society) and 2 academic submissions (Adjunct Professor Ken Daniels and Associate Professor Rhonda Shaw).

⁷⁶ 13 submissions comprising 12 personal submissions and 1 submission from an organisation (New Zealand Council of Trade Unions).

⁷⁷ 27 submissions comprising 26 personal submissions and 1 submission from an organisation (Federation of Women’s Health Councils Aotearoa).

CONCLUSIONS

- 7.66 We consider that, by recognising surrogacy as a legitimate method of family building and facilitating its use under the HART Act, the state has a duty to ensure that surrogate-born people can access information about their genetic and gestational origins and whakapapa.⁷⁸ We explore below the parameters of identify information that should be preserved by the state.
- 7.67 As explained above, information about origins has significance not just for the surrogate-born person but also for future generations. A child's identity can be negatively impacted by decisions made about the child in surrogacy situations (for example, if the child is not given information about the surrogate), and state systems to preserve identity information are important to ensure that restoration of a child's identity and enjoyment of other rights is possible.⁷⁹
- 7.68 Recognising the state's duty to preserve access to information about origins is consistent with the findings of the UN Special Rapporteur,⁸⁰ the Verona Principles⁸¹ and recommendations made by UNICEF and Child Protection Identity.⁸² The Verona Principles provide that states should "ensure rigorous collection and storage to preserve in perpetuity identity information relating to all surrogacy arrangements"⁸³ and:⁸⁴
- ... should establish and maintain registers and national records containing information about the genetic and gestational origins of children born through surrogacy, to which children can seek access, in accordance with the age and maturity of the child and subject to conditions set out in national legislation.
- 7.69 The broad agreement among submitters with the issues we identified in the Issues Paper affirms our view that the current systems in place to collect, record and provide access to information about a surrogate-born person's origins are inadequate and fail to promote the child's right to identity or satisfy the state's duty to surrogate-born people.
- 7.70 In Chapter 6, we propose a new legal framework for determining legal parenthood in surrogacy arrangements. Under this framework, intended parents will no longer be required to adopt the child to be recognised as their legal parents, and the Adult Adoption Information Act would therefore no longer apply. Below we make recommendations that

⁷⁸ 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 7 and 8.

⁷⁹ UNICEF and Child Identity Protection *Key Considerations: Children's Rights & Surrogacy* (Briefing Note, February 2022) at 2–3.

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 [34]–[38]; [58]–[63]; and [101(d)–(f)]. See discussion 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 32.

⁸¹ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [11.1] and [11.2].

⁸² UNICEF and Child Identity Protection *Key Considerations: Children's Rights & Surrogacy* (Briefing Note, February 2022) at 3.

⁸³ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [11.6].

⁸⁴ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [11.7].

protect and promote the rights of surrogate-born people to access information about their origins that align with our proposed legal parenthood framework.

Giving effect to the identity rights of surrogate-born people

RECOMMENDATION

R37

Section 4 of the Human Assisted Reproductive Technology Act 2004 should be amended to include an additional principle stating that surrogate-born people should be made aware of their genetic and gestational origins and whakapapa and be able to access information about those origins.

- 7.71 Surrogacy arrangements are regulated under the HART Act (see Chapter 4). While the HART Act acknowledges the rights of donor-conceived people to know their genetic origins, an overarching issue is the omission from this Act of a similar acknowledgement of the rights of surrogate-born people. It is possible for some surrogate-born people to have relevant information captured under the provisions directed at “donor offspring” if their conception was achieved using donated gametes. However, this is a tangential benefit rather than a specified outcome of the HART Act and, for the reasons discussed above, is inadequate to secure a surrogate-born person’s rights to information about their origins.
- 7.72 We recommend affirming a surrogate-born person’s identity rights by including an additional principle in section 4 of the HART Act. This would reflect the state’s duty to ensure surrogate-born people can access information about their genetic and gestational origins and whakapapa. It would also guide the exercise of powers and performance of functions under the HART Act, including in relation to the administration of the register of surrogate-born people, proposed below, and by ACART and ECART in their roles as they relate to the regulation of surrogacy arrangements (see Chapter 4 and Chapter 5). In Chapter 5, we recommend that ACART revise its guidelines to require that counselling address the identity rights of surrogate-born people, including their rights to access information and the parties’ plans for sharing information with the child. We suggest this is consistent with the whakawhanaungatanga responsibilities of the intended parents, the surrogate and their respective whānau.

Establishing a national register of surrogate-born people

RECOMMENDATION

R38

The Human Assisted Reproductive Technology Act 2004 should be amended to:

- a. establish a national register of surrogate-born people (the surrogacy birth register); and
- b. require the Registrar-General to record information about a surrogacy arrangement on the surrogacy birth register when it receives information as part of the birth registration process and when notified of a parentage order issued by te Kōti Whānau | Family Court.

- 7.73 We recommend that information in relation to each surrogate-born person be collected and recorded in a register maintained by the state (the surrogacy birth register) that can be accessed by surrogate-born people.
- 7.74 Establishing the surrogacy birth register:
- (a) enables the state to meet its obligations to preserve the rights of surrogate-born people to their identity, including information about their genetic and gestational origins and whakapapa;
 - (b) meets the needs and expectations of surrogate-born people as articulated in the International Principles for Donor Conception and Surrogacy;⁸⁵
 - (c) is consistent with proposals to establish a “surrogacy register” in England, Wales, Scotland and Ireland,⁸⁶ which are argued to be “an important development from a child’s right perspective” and in line with the UN Special Rapporteur’s recommendations;⁸⁷ and
 - (d) aligns with existing rights and entitlements of donor-conceived people under the HART Act and with the values underpinning Ngā Paerewa while resolving the problems with the gaps in coverage of the HART register for surrogate-born people, discussed above.
- 7.75 Consultation revealed strong support for a legal requirement on the state to preserve information for surrogate-born people. This is broadly consistent with the results of the Surrogacy Survey, which found that 83 per cent of respondents agreed that surrogate-born people should have access to information about their origins.⁸⁸
- 7.76 We acknowledge that a limitation of a surrogacy birth register is that its existence alone does not guarantee that a surrogate-born person will be told of the circumstances of their birth and therefore know to access information held on the register. In 2005, the Commission considered, but discounted, the option of imposing a legal obligation on parents to tell their children the circumstances of their birth.⁸⁹ The conclusion then was that such a rule would “represent an unprecedented intervention by the law into the way parents raise their children”.⁹⁰ We also note the obvious practical difficulties in seeking to enforce such a rule. Our preference is to encourage intended parents to be open with their child about their origins. In Chapter 5, we recommend clarifying the importance of

⁸⁵ *International Principles for Donor Conception and Surrogacy* (November 2019), principles 8–10. As noted above, these principles were developed by a group of donor-conceived and surrogate-born people and presented to the United Nations.

⁸⁶ 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 [10.90]–[10.95]. *An Bille Sláinte (Atáirgeadh Daonna Cuidithe) | Health (Assisted Human Reproduction) Bill 2022 (29) (Ireland)*, cl 65.

⁸⁷ Elaine O’Callaghan “Surrogacy reform and its impact on the child’s right to birth registration” (2021) 13 *Reproductive BioMedicine and Society Online* 46 at 47. See also 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 32–33 and Andrea Mulligan “Protecting Identity in Collaborative Assisted Reproduction: The Right to Know One’s Gestational Surrogate” (2020) 34 *International Journal of Law, Policy and The Family* 20 at 42.

⁸⁸ 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).

⁸⁹ *Te Aka Matua o te Ture | Law Commission New Issues in Legal Parenthood* (NZLC R88, 2005) at [10.40]–[10.43].

⁹⁰ *Te Aka Matua o te Ture | Law Commission New Issues in Legal Parenthood* (NZLC R88, 2005) at [10.41].

discussing a child's identity rights in pre-conception counselling, and in Chapter 6, we recommend including, as a relevant consideration for the Family Court in determining a parentage order application, the arrangements in place for preserving the child's identity. In addition, in Chapter 10, we recommend the Government establish a new website to provide clear, comprehensive and up-to-date information for New Zealanders considering having a child through surrogacy or becoming a surrogate. This website will fulfil an important educative role and should include an explanation of the importance of a child's identity rights.

- 7.77 The establishment of a surrogacy birth register would, however, preserve the ability for the Government to take further steps if necessary to give effect to children's rights to identity. For example, once the surrogacy birth register is established, we would expect DIA to provide information to the public on how they can find out if they are registered on the surrogacy birth register. If non-disclosure is revealed to be a significant concern, further options could be explored, such as mandating an automatic notification to surrogate-born people that relevant information is available on the surrogacy birth register once they reach a certain age.⁹¹
- 7.78 Our recommendation calls for the establishment of a separate surrogacy birth register rather than extending the scope of the existing HART register, which was an option for reform put forward in the Issues Paper. While there would be benefits to aligning the two registers, our recommendations in relation to accessing the surrogacy birth register depart from the existing HART register provisions. Given the scope of our review is limited to surrogacy, we have limited our recommendations to the surrogacy context. It may, however, be desirable to consider making amendments to the existing HART register to align with our recommendations as the policy basis for our recommendations applies equally to the situation of donor-conceived people and given that some surrogate-born people will also be donor-conceived.

Operation of the surrogacy birth register

- 7.79 In Chapter 6, we recommend two pathways for establishing legal parenthood in surrogacy arrangements. The administrative pathway involves the surrogate signing a statutory declaration that is provided to the Registrar-General as part of the notification of birth by the intended parents. The court pathway involves the Family Court making a parentage order that is then notified to the Registrar-General. Our recommendation is that the information required for the surrogacy birth register should be supplied to the Registrar-General along with the statutory declaration or the notification of the parentage order, as applicable. We envision some adaptation of current forms and procedures to allow this to occur.
- 7.80 Our recommendations in relation to recording information on the surrogacy birth register would apply to all surrogacy arrangements, including gestational and traditional surrogacy arrangements as well as international surrogacy arrangements where a parentage order is granted (see Chapter 9).
- 7.81 We do not express a view on whether fertility clinics should have the task of passing relevant information directly to the Registrar-General. This could provide an additional

⁹¹ We note that the *International Principles for Donor Conception and Surrogacy* (November 2019) state that "[a]ll donor-conceived and surrogacy-born people have the right to be notified of their status and to access records pertaining to their identity, familial medical history, and birth registration": principle 9.

source of information in relation to surrogacy arrangements, but it would duplicate the information provided as part of the birth registration process and notification of parentage orders. However, we note that clinics have an existing responsibility to give information about donors and donor-conceived people to the Registrar-General for the purposes of the HART register. It may be considered appropriate to impose a similar duty on fertility clinics in respect of surrogacy arrangements, which would be consistent with their obligations under Ngā Paerewa.

Wider review of birth registration system required

RECOMMENDATION

- R39** The Government should review the birth registration system to consider whether it meets the needs and reasonable expectations of people in contemporary Aotearoa New Zealand.

- 7.82 We recommend the Government should review the birth registration system to consider whether it meets the needs and reasonable expectations of people in contemporary Aotearoa New Zealand. Currently, the birth register is a record of a child's legal parents.⁹² It does not provide a comprehensive record of the circumstances of the child's conception and birth. Consultation revealed strong support for changes to the birth registration system and what information is recorded on birth certificates in the surrogacy context. We also acknowledge the advantages of changing the birth registration system rather than establishing a separate surrogacy birth register. It would ensure that a single, comprehensive source of information about a child's origins is maintained. It would also be easier to access than a surrogacy birth register (as a person would not need to know they are surrogate-born before they know to access information on the birth register).
- 7.83 However, we are not in favour of making significant changes to the birth registration system for surrogacy arrangements in isolation.⁹³ The values underpinning many submissions we received on this point, such as the symbolic significance of birth certificates to the family unit, the rights of children to access information about their origins and the role of birth certificates in contributing to a person's sense of identity, have far broader application. What information should be recorded in the birth register and on birth certificates for surrogate-born people raises similar issues for people born through donor conception, adopted people, people raised under whāngai and other cultural arrangements and people in diverse family arrangements, such as three or more parent models.
- 7.84 Our view is that there is a need to undertake a first-principles review of the birth registration system. Such a review should reconsider the purpose of the birth register in contemporary Aotearoa New Zealand, for whose benefit it exists and what information it

⁹² Te Aka Matua o te Ture | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [10.45].

⁹³ The need for any reform of birth certificates in respect of surrogacy to also consider the situation of donor conception is highlighted in Elaine O'Callaghan "Surrogacy reform and its impact on the child's right to birth registration" (2021) 13 *Reproductive BioMedicine and Society Online* 46 at 49. See also 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].

should provide about a child's origins, having regard to both a child's rights to identity and rights to privacy.⁹⁴ This would enable a coherent and consistent approach to be taken to the different circumstances of conception, birth and legal parenthood. Any changes to the birth registration system in respect of surrogate-born people should be considered on this basis.

Information to be recorded on the surrogacy birth register

RECOMMENDATION

R40

The Registrar-General should collect and record information on the surrogacy birth register that promotes the surrogate-born child's rights to identity, including:

- a. in each case, the surrogate's legal name, date of birth, place of birth and last known address as well as their ethnicity, any relevant cultural affiliation and hapū and iwi affiliations (if known);
- b. in traditional surrogacy arrangements, additional information about the surrogate as is required in relation to donors under section 47 of the Human Assisted Reproductive Technology Act 2004; and
- c. if the surrogacy arrangement involved the use of a donor, information about the donor as is required in relation to donors under section 47 of the Human Assisted Reproductive Technology Act 2004 to the extent that information is known.

7.85 We recommend that the surrogacy birth register records information necessary to promote the surrogate-born child's rights to identity. Our approach is that information recorded should generally align with the information requirements in respect of the HART register.⁹⁵

7.86 In terms of whakapapa information, we consider that any hapū and iwi affiliations of the surrogate should be recorded to the extent this information is known. This, along with the surrogate's name, date of birth and place of birth, will ensure, in the case of traditional surrogacy, that a surrogate-born person is able to learn of their whakapapa. In the case of a gestational surrogacy, this information will provide the surrogate-born person with important information about those people involved in their creation. We do not propose further information about a surrogate's whakapapa should be recorded by the state. We suggest such information should be shared with the child in accordance with the whakawhanaungatanga responsibilities of the surrogate and her whānau, hapū or iwi (see Chapter 2).

⁹⁴ Calls for reform of birth registration have been made in the United Kingdom: Elaine O'Callaghan "Surrogacy reform and its impact on the child's right to birth registration" (2021) 13 *Reproductive BioMedicine and Society* Online 46. O'Callaghan observes that the initial focus of birth registration was on property rights and inheritance and that, since then, international human rights law has ascribed birth registration as a right of the child, at 47–48. O'Callaghan states that "any law reform must first clarify the purpose of birth registration and that this purpose may differ now from what was originally intended in the 1800s", at 47. See also 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 [10.86].

⁹⁵ Our use of the terminology of "ethnicity" and "any relevant cultural affiliation" reflects the existing terminology of the Human Assisted Reproductive Technology Act 2004, ss 47 and 63. This terminology should be examined to ensure it continues to reflect best practice for drafting legislation.

- 7.87 We propose distinguishing between gestational and traditional surrogacy when it comes to genetic information, such as information about appearance, health information and family medical history. Requiring such information from a gestational surrogate who has not used her own ovum in the arrangement would be an unjustified intrusion on the privacy of the surrogate and her family or whānau.⁹⁶
- 7.88 We also propose that the surrogacy birth register include information about any gamete donors used in the surrogacy arrangement. This information should align with the scope of the information requirements in relation to the HART register. In an operational sense, this information may be linked to the information held on the HART register. However, as we note above, not all donors in surrogacy arrangements will fall under the HART register provisions, such as donors in private traditional surrogacy arrangements and international surrogacy arrangements. Explicit inclusion of gamete donors in the surrogacy birth register is therefore necessary to ensure a comprehensive record is available.

Accessing information on the surrogacy birth register

RECOMMENDATIONS

- R41** If asked to do so by a surrogate-born person, the Registrar-General should be required to provide access to any information about that surrogacy arrangement kept on the surrogacy birth register.
- R42** The Registrar-General may refuse to provide access to information on the surrogacy birth register if satisfied the grounds under section 49 of the Privacy Act 2020 are met.
- R43** The Government should consider ways to support people accessing information on the surrogacy birth register, drawing on the experience of people accessing information under the Adult Adoption Information Act 1985 and the Human Assisted Reproductive Technology Act 2004.
- R44** Te Tari Taiwhenua | Department of Internal Affairs should publish information annually on the number of surrogacy arrangements recorded on the surrogacy birth register and the number of requests made to access the surrogacy birth register.

- 7.89 We recommend that surrogate-born people, like donor-conceived people, should have the right to request information held on the surrogacy birth register and the right to have that information provided to them subject only to limited exceptions (discussed below).⁹⁷

⁹⁶ The role of gestation and its association with genetics is the subject of ongoing scientific inquiry. We recognise the possibility that the surrogate's genetic information may, in future, be discovered to have some relevance to the surrogate-born person. In our view, responding to such an eventuality will be a matter for future reform proposals. A requirement to collect and hold genetic information that is predicated on future scientific consensus would be unjustified.

⁹⁷ See for example section 50(1) of the Human Assisted Reproductive Technology Act in relation to the right of donor-conceived people.

Rights of access to such information should not depend on the consent of any party to the surrogacy arrangement.⁹⁸

- 7.90 We recommend that the rights of surrogate-born people to access information on the surrogacy birth register align with rights of access to private information under the Privacy Act 2020. This enables the Registrar-General to refuse access to people under the age of 16 only if satisfied that the disclosure of the information would be contrary to the interests of the individual concerned.⁹⁹
- 7.91 This recommendation departs from the current provisions in the HART Act that restrict access to identifying information on the HART register to people under the age of 18 and provide grounds for refusing access to information that are based on the now repealed Privacy Act 1993. It also departs from the current 20-year age requirement in relation to access to adoption records under the Adult Adoption Information Act. As we identified in the Issues Paper, we are not satisfied that these age restrictions are justified restrictions on the rights of surrogate-born people to access information about their origins. Submissions received on the Issues Paper affirm this view.
- 7.92 We recommend that consideration be given to ways to support people accessing information on the surrogacy birth register, drawing on the experience of people accessing information under the Adult Adoption Information Act and the HART Act. As we noted in the Issues Paper, the HART Act currently requires the Registrar-General to advise the person accessing information of the desirability of counselling. A clearer process applies under the Adult Adoption Information Act that includes offering to send the relevant information directly to a nominated counsellor. In the Issues Paper, we sought views on whether this provision is adequate, and while some submitters supported the provision of government-funded counselling in principle, it may be too early to know how the current provisions under the HART Act are working in practice. Some research suggests there may be a need for more support, such as counselling, when people seek out information on the HART register.¹⁰⁰ We therefore recommend further consideration be given to implementing a process that supports the needs of the person requesting access to the register.
- 7.93 Finally, we recommend that DIA publish information annually on the number of surrogacy arrangements recorded on the surrogacy birth register and the number of requests made to access the surrogacy birth register. In Chapter 5, we note the lack of publicly available information on surrogacy arrangements in Aotearoa New Zealand. Such information will help inform the ongoing development and review of policy in relation to surrogacy. Publishing information about surrogacy would also help to normalise such arrangements and remove any stigma around genetic and gestational origins (which may be precluding openness with surrogate-born people currently).

⁹⁸ Unlike the operation of the voluntary donor register under s 63 of the Human Assisted Reproductive Technology Act 2004 and the ability for birth parents to “veto” the release of information to adopted children under s 3 of the Adult Adoption Information Act 1985.

⁹⁹ Privacy Act 2020, s 49(1)(c)).

¹⁰⁰ Samantha Best “The experience and wellbeing of donor-conceived adults” (MHSc dissertation, Te Wānanga Aronui o Tāmaki Makau Rau | Auckland University of Technology, 2021) at 86–92.

Transitional matters

RECOMMENDATION

R45

The Government should consider ways to improve access to information about surrogacy arrangements by surrogate-born people who have been adopted by the intended parents under the Adoption Act 1955.

- 7.94 Our recommendations above would establish a register of children born as a result of surrogacy arrangements entered under the new legal parenthood framework. However, we think that, as a matter of principle, surrogate-born people who have previously been adopted by the intended parents should be able to access information about the surrogacy arrangement on the same basis regardless of when they were born and where that information is held.
- 7.95 As noted above, surrogate-born people who have been adopted by the intended parents cannot access their original birth certificate under the Adult Adoption Information Act until they reach 20 years of age. We do not think this 20-year age restriction is justified in the context of surrogacy.
- 7.96 The Ministry of Justice is currently reviewing adoption law, including the Adult Adoption Information Act.¹⁰¹ It acknowledges that the current law makes it hard for a person who has been adopted to find out who their birth parents and birth family and whānau are.¹⁰² We therefore recommend the Government consider the access requirements of this cohort of surrogate-born people as part of the design of any revised adoption records access regime. This should include attention to the existing restrictions in place, including age of the adopted person and the ability of birth parents to restrict access to identifying information.¹⁰³

¹⁰¹ Tāhū o te Ture | Ministry of Justice *Adoption in Aotearoa New Zealand: Discussion Document* (June 2021) at 57–58.

¹⁰² Tāhū o te Ture | Ministry of Justice *Adoption in Aotearoa New Zealand: Discussion Document* (June 2021) at 58.

¹⁰³ See Adult Adoption Information Act 1985, s 3.

CHAPTER 8

Financial support for surrogates

INTRODUCTION

- 8.1 In this chapter, we address the financial support available to surrogates in Aotearoa New Zealand. We consider the extent to which the intended parents are lawfully permitted to financially support the surrogate as well as the surrogate's entitlements to state support. We explore issues with the current law and make recommendations for reform.

CURRENT LAW

Payments to surrogates under the HART Act

- 8.2 Section 14 of the Human Assisted Reproductive Technology Act 2004 (HART Act) prohibits the exchange of “valuable consideration” in surrogacy arrangements. Any person who gives or receives (or agrees to give or receive) valuable consideration for a person's participation in a surrogacy arrangement commits an offence that is punishable by imprisonment for a term not exceeding one year or a fine not exceeding \$100,000 or both.¹
- 8.3 The prohibition on the exchange of valuable consideration does not apply to the payment of a narrow range of costs that are expressly permitted under the HART Act, namely:²
- (a) payments 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) payments to a legal adviser for providing independent legal advice to the surrogate.
- 8.4 The HART Act does not provide for payments to the surrogate for other costs she might incur as a result of the surrogacy arrangement. It is not clear whether such payments

¹ Human Assisted Reproductive Technology Act 2004, ss 14(3) and 14(5).

² Human Assisted Reproductive Technology Act 2004, s 14(4).

would constitute the exchange of “valuable consideration”. The term is not comprehensively defined in the HART Act,³ and there is limited case law as to its meaning.⁴ To our knowledge, no one has ever been prosecuted under section 14.

- 8.5 Parliament’s intent in prohibiting the exchange of valuable consideration was to prohibit commercial surrogacy in Aotearoa New Zealand.⁵ Beyond that, however, the legislative history reveals little attention was given to this provision. It does not appear that the prohibition on the exchange of valuable consideration was intended to prevent the payment of the surrogate’s reasonable costs 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.⁶ This would have continued the existing approach established in draft guidelines issued in 1997 by the National Ethics Committee on Assisted Human Reproduction.⁷ It is unclear why the HART Act does not expressly permit the payment of a surrogate’s reasonable costs.

Availability of paid parental leave

- 8.6 The Parental Leave and Employment Protection Act 1987 grants entitlements for a primary carer of a child to take parental leave from their employment⁸ and receive parental leave payments out of public money⁹ (collectively referred to below as “paid parental leave”) provided certain employment thresholds are met. The Act does not expressly provide for surrogacy arrangements. Whether surrogates and intended parents are entitled to paid parental leave therefore depends on how the Act’s provisions are interpreted in the context of surrogacy.
- 8.7 In the Issues Paper, we said it was unclear whether a surrogate can qualify for paid parental leave. We identified two possible interpretations of the Parental Leave and Employment Protection Act. On one interpretation, the surrogate and an intended parent can both qualify for paid parental leave on the basis that the definition of “primary carer”

³ The term “valuable consideration” includes “an inducement, discount, or priority in the provision of a service”: Human Assisted Reproductive Technology Act 2004, s 5 (definition of “valuable consideration”).

⁴ We are only aware of three reported cases that 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.

⁵ 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 1996 (195-2) (select committee report) at 12.

⁶ 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.

⁷ 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.

⁸ Parental Leave and Employment Protection Act 1987, ss 1A and 1B(2).

⁹ Parental Leave and Employment Protection Act 1987, s 71A.

includes both the woman who is pregnant or has given birth as well as a person “who takes permanent primary responsibility for the care, development, and upbringing of a child”.¹⁰ An alternative interpretation is that the surrogate does not qualify for paid parental leave because she does not care for the child after it is born. In the Issues Paper, we noted that guidance published by Te Tare Taake | Inland Revenue (IRD) 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”.¹¹ An intended parent would qualify because they will typically care for the child from birth,¹² but some suggest the surrogate does not.¹³

- 8.8 Since the publication of the Issues Paper, IRD has confirmed its position is that both the surrogate and an intended parent are eligible for paid parental leave provided they meet the employment thresholds outlined in the Act. IRD noted that in almost no other situation can two people take paid parental leave simultaneously with respect to the same child.¹⁴
- 8.9 In addition, a surrogate would 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”.¹⁵
- 8.10 The surrogate’s partner would not qualify for unpaid partner’s leave under the Parental Leave and Employment Protection Act, as this is only available if the partner “assumes or intends to assume responsibility for the care of that child”.¹⁶

ISSUES

Current law is uncertain

- 8.11 The current law is unclear about what financial support, if any, intended parents can provide to surrogates and what government support (in the form of paid parental leave) is available to surrogates.
- 8.12 The uncertainty this creates in relation to what costs intended parents can cover under the HART Act is evident in several 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

¹⁰ Parental Leave and Employment Protection Act 1987, ss 7(1)(a) and 7(1)(c).

¹¹ Te Tare Taake | Inland Revenue “Who can get paid parental leave” <www.ird.govt.nz>.

¹² 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].

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 Email from Te Tare Taake | Inland Revenue to Te Aka Matua o te Ture | Law Commission regarding eligibility for paid parental leave (5 August 2021).

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

¹⁶ Parental Leave and Employment Protection Act 1987, s 17(1)(a).

reasonable expenses”¹⁷ to “[p]ayments to the surrogate for her reasonable expenses are not permitted”.¹⁸

- (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. In 2007, ECART took the view that payments for life insurance could be met by 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 life insurance for the surrogate.²¹ ECART also sought legal advice on the matter,²² and a consensus appears to have been reached.²³ In its submission on the Issues Paper, ECART explained that its current view is that life insurance cannot be seen as providing any incentive or inducement for a person to enter a surrogacy arrangement as any payment would be contingent on the death of the surrogate so she could never benefit from such an insurance policy.
- (c) The ACART Guidelines²⁴ do not address what costs can be met by intended parents. In its submission on the Issues Paper, ECART explained its current view is that the definition of valuable consideration does not allow for reimbursement of expenses or costs to the surrogate, such as travel time to the clinic or maternity clothes. However, it considers it does not have jurisdiction to do anything beyond outlining its understanding of section 14 to the applicants, which it may do if it is provided with information that indicates that they are applying a broader definition. On occasion, ECART has approved applications involving, or has recommended the parties consider, payments for income protection insurance,²⁵ disability insurance²⁶ and

¹⁷ 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.

¹⁸ 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.

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)].

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 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).

²⁵ 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).

²⁶ See Ethics Committee on Assisted Reproductive Technology minutes of 3 March 2016 at [10] (application E16/14).

health insurance.²⁷ 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.²⁸

- (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.²⁹
- (e) 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.³⁰ Only five per cent of respondents thought the surrogate could not receive any money, while 19 per cent thought general expenses (such as maternity clothes and supplements) could be paid for and 17 per cent thought loss of income could be paid for.

8.13 The law in relation to paid parental leave is also uncertain and creates confusion. This was evident in our conversations with surrogates and intended parents as part of this review. In the absence of clear guidance from IRD, intended parents and surrogates may be unaware of what government support is available or fear they are breaking the law if they apply for paid parental leave.

Impact of uncertain law on the surrogate and intended parents

8.14 In the Issues Paper, we identified three negative impacts of the current uncertainty:

- (a) **It may leave surrogates out of pocket.** The uncertainty caused by the current law means that surrogates and their families might be left financially worse off as a result of participating in the surrogacy arrangement.
- (b) **It places unnecessary stress on the relationship between intended parents and surrogates.** 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 under the HART Act and their application to adopt any resulting child could be affected. In addition, surrogates may feel uncomfortable about asking intended parents for things they need during pregnancy given the legal uncertainty. If the surrogate and her family are left to cover the financial costs of the surrogacy arrangement, this may place unnecessary strain on the parties' relationship.
- (c) **It creates barriers for women considering becoming surrogates in Aotearoa New Zealand.** Few women are likely to consider becoming a surrogate for someone who is not a close friend or family member if there is a chance that they will be financially worse off as a result. This contributes to the wider concern that the absence of financial incentives for New Zealand women to consider becoming surrogates has

²⁷ 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).

²⁸ Ethics Committee on Assisted Reproductive Technology minutes of 30 May 2013 at [9] (application E13/16).

²⁹ 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).

³⁰ 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.

“served to drive intended parents to resort to [international] commercial surrogacy”.³¹

RESULTS OF CONSULTATION

Issues

- 8.15 In the Issues Paper, we asked submitters whether they agreed with the issues we had identified with financial support for surrogates and whether there were any other issues we should consider. We received 188 submissions that addressed this question. Of these submissions, a strong majority (80 per cent) either agreed (67 per cent)³² or agreed in part (13 per cent)³³ with the issues we had identified, 17 per cent did not agree³⁴ and three per cent expressed no view.³⁵
- 8.16 A common theme of submissions was the lack of clarity in the current law. Australian and New Zealand Infertility Counsellors Association (ANZICA) noted “a widely held belief among fertility counsellors that there is no consensus, legally or otherwise, on the legitimate expenses that a surrogate can expect intended parents to cover”. ANZICA explained that this has made discussions with intended parents and surrogates in counselling difficult and had often been cited as a reason for preferring overseas surrogacy where payments are clearly defined at the outset. Fertility Plus submitted that:
- At present intended parents and surrogates report feeling scared of breaking the law, and this often places undue stress on all parties and has the potential to cause relationship breakdowns. It unnecessarily prevents intended parents from participating in the care of the surrogate and therefore their child. It also prevents the surrogate accessing crucial supports that could make it more feasible for someone to consider this commitment.
- 8.17 Other points made by submissions included the need to reduce barriers to women considering becoming a surrogate, the need to protect and promote the surrogate’s rights and interests and the need to balance this against the risks associated with commercial surrogacy.

³¹ 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.

³² 126 submissions comprising 108 personal submissions, 14 submissions from organisations (Advisory Committee on Assisted Reproductive Technology, Australian and New Zealand Infertility Counsellors Association, Federation of Women’s Health Councils Aotearoa, Fertility Associates, Fertility New Zealand, Fertility Plus, Maternity Services Consumer Council, New Zealand Council of Trade Unions, New Zealand Nurses Organisation, Nurse Practitioners New Zealand, Office of the Children’s Commissioner, Repromed, Royal Australian and New Zealand College of Obstetricians and Gynaecologists and Te Kāhui Ture o Aotearoa | New Zealand Law Society) and 4 academic submissions (Dr Anne Else, Adjunct Professor Ken Daniels, Professor Mark Henaghan and Australian academic Dr Ronli Sifris).

³³ 24 submissions comprising 18 personal submissions, 3 submissions from organisations (Ethics Committee on Assisted Reproductive Technology, National Council of Women New Zealand and New Zealand College of Midwives), and 3 academic submissions (Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly), Associate Professor Rhonda Shaw and Australian academics Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff (submitting jointly)).

³⁴ 32 submissions comprising 30 personal submissions and 2 submissions from organisations (Center for Bioethics and Culture Network and Feminist Legal Clinic).

³⁵ 6 personal submissions.

- 8.18 Submitters who did not agree with the issues we had identified were generally opposed to surrogacy in principle or supported it only on purely altruistic grounds with no provision of compensation of any kind.

Options for reform

- 8.19 In the Issues Paper, we identified three different options for reform:

- (a) **Option One: Clarify and expand the list of costs that can be paid in surrogacy.** Under this option, the law would clarify that intended parents are able to pay or reimburse a surrogate's reasonable costs in relation to a surrogacy arrangement. We proposed a list of permitted costs that could be prescribed in legislation to set the parameters of the surrogate's costs that could be covered under any surrogacy arrangement.
- (b) **Option Two: Clarify the law with respect to surrogates' entitlements to paid parental leave.** Under this option, surrogates would be entitled to a period of paid leave to recover from birth on the same basis as other pregnant people provided they meet the employment thresholds that apply for paid parental leave. We sought views on whether paid leave should be available for 26 weeks, 12 weeks or 6 weeks.
- (c) **Option Three: Permit intended parents to pay surrogates a fee.** Under this option, the prohibition on the payment of valuable consideration would be removed entirely and the intended parents would be able to pay the surrogate a "fee" that goes beyond payment for a surrogate's reasonable costs actually incurred (addressed under Option One). The payment of a fee is typically characterised as "commercial surrogacy".

- 8.20 Our preliminary view was to support Options One and Two but not Option Three.

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

- 8.21 We asked submitters whether they agreed with clarifying and expanding the list of permitted costs that can be paid in a surrogacy arrangement. We received 188 submissions that addressed this question. Of these submissions, a strong majority (81 per cent) agreed,³⁶ 16 per cent did not agree³⁷ and three per cent expressed no preference.³⁸
- 8.22 Submitters were generally of the view that surrogates should not be left out of pocket as a result of participating in a surrogacy arrangement. ECART, for example, considered that a surrogate "should be in the same financial position they would have been in if they had not acted as a surrogate". Dr Anne Else similarly submitted that the proposition that a

³⁶ 152 submissions comprising 128 personal submissions, 17 submissions from organisations (Advisory Committee on Assisted Reproductive Technology, Australian and New Zealand Infertility Counsellors Association, Ethics Committee on Assisted Reproductive Technology, Federation of Women's Health Councils, Fertility Associates, Fertility New Zealand, Fertility Plus, Maternity Services Consumer Council, National Council of Women of New Zealand, New Zealand College of Midwives, New Zealand Council of Trade Unions, New Zealand Nurses Organisation, Nurse Practitioners New Zealand, Office of the Children's Commissioner, Repromed, Royal Australian and New Zealand College of Obstetricians and Gynaecologists and Te Kāhui Ture o Aotearoa | New Zealand Law Society) and 7 academic submissions (Dr Anne Else, Adjunct Professor Ken Daniels, Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly), Professor Mark Henaghan, Associate Professor Rhonda Shaw and Australian academics Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff (submitting jointly) and Dr Ronli Sifris).

³⁷ 31 submissions comprising 29 personal submissions and 2 submissions from organisations (Center for Bioethics and Culture Network and Feminist Legal Clinic).

³⁸ 5 personal submissions.

surrogate neither gains from nor loses as a result of the surrogacy is what “reasonable expenses” should add up to in practice. Another personal submitter said:

I firmly believe that surrogates are doing something incredibly selfless and for that they should not be impacted financially in any way. The law and wording should be expanded in a way that means a surrogate is not left in a worse or better position financially than prior to their surrogacy process with the intended parents — they should come out of pregnancy recovered at the same position they were in at the start.

- 8.23 Some submitters considered this option would reduce barriers to women considering becoming a surrogate, acknowledging that cost can be a significant barrier to acting as a surrogate. However, ACART observed that, while reimbursement of costs can be a barrier for intending surrogates, there are many different motivations and ways that people benefit from being a surrogate.
- 8.24 Some submitters also thought that this option could strengthen the relationship between the intended parents and the surrogate. Repromed explained that, in its experience, “intending parents wish to ensure they can support the wellbeing of their surrogate and ultimately that of their unborn child by ensuring the surrogate is adequately supported financially”. ANZICA and Repromed noted that, in Aotearoa New Zealand, there is an “established, mutually respectful relationship between surrogate and intending parents” and that therefore “it is anticipated that intending parents will be open to covering the surrogate’s costs as generously as they are permitted to and surrogates will not inflate their costs to take advantage of the arrangement”. Fertility Plus considered that extending the list of costs intended parents are permitted to pay could help intended parents feel more involved in the pregnancy, and that this could “help to strengthen relationships and create bonds”.
- 8.25 Many submitters supported a regulated approach to payments, with clear parameters as to what is and is not permitted and early discussion and agreement between the parties. ACART noted that certainty protects each party and provides relief as there is then no guesswork as to whether a surrogate could be reimbursed for major material costs. The Maternity Services Consumer Council (MSCC) said costs payable by the intended parents should be defined and included in their written and signed surrogacy agreement. One personal submitter noted that the issue of costs is an area where there is potential for relationship breakdown — again, an argument for greater clarity. However, several submitters also emphasised the need to provide for flexibility to accommodate unexpected costs in the event of complications to do with the pregnancy or birth.
- 8.26 Some submitters emphasised the need for some reasonable limits on the costs that can be reimbursed. Submitters generally thought that parties should be able to reach their own agreement as to what costs will be paid. However, in their joint submission Dr Liezl van Zyl and Dr Ruth Walker expressed a different view that the surrogate has a right to reimbursement for all expenses during pregnancy and, as such, they preferred the list be referred to as a list of *expected* reimbursements.
- 8.27 Some submitters commented on whether agreements as to costs should be enforceable, expressing mixed views. Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS), MSCC, Dr van Zyl and Dr Walker in their joint submission and Associate Professor Rhonda Shaw considered that agreements as to costs should be enforceable. NZLS further stated that agreements as to costs should not be enforceable in certain circumstances, such as where the surrogate refuses to relinquish the child or consent to the transfer of legal parenthood. However, Dr Else considered that agreements to pay costs should be non-

reimbursable except in the cases of fraud. Fertility Associates noted that an agreement to pay costs would be difficult to enforce “unless there is some type of escrow arrangement”. It considered that “[i]n reality, it may be difficult to set levels of permitted costs that meet the expectations of all parties over time” and that, as such, it may be useful to treat those agreements as a guide giving “expectations that are indicative rather than binding”. ANZICA similarly considered that a legal obligation to pay the surrogate’s costs “rests outside the premise that surrogacy is an altruistic arrangement”.

- 8.28 There was some concern to ensure that proposed changes do not go too far, either to make surrogacy a “lucrative option” for the surrogate or to reduce access to surrogacy by imposing an unreasonable financial burden on the intended parents who may already be paying significant costs, such as costs related to IVF treatment and legal processes. Some submitters expressed concern at the prospect of intended parents being required to pay all of a surrogate’s costs, with one personal submitter saying that an “extended list of costs to cover puts intended parents at risk of being taken advantage of, just as much as the surrogate”.
- 8.29 Submitters who did not agree with Option One or the proposed list of permitted costs expressed mixed views. Most were generally opposed to surrogacy in principle. Some preferred Option Three over Option One. Others were concerned that surrogates would take advantage of intended parents if Option One was adopted.

Proposed list of permitted costs

- 8.30 In the Issues Paper, we proposed a list of categories of costs that we said should be included in legislation as permitted costs.³⁹ We asked submitters whether they agreed with our proposed list of permitted costs and whether there were other costs that should be included in this list. We received 179 submissions that addressed this question. Of these submissions, 80 per cent agreed with the proposed list,⁴⁰ 15 per cent did not agree⁴¹ and six per cent expressed no preference.⁴²
- 8.31 Submitters who commented on the proposed list generally thought that it was comprehensive. Some thought it would assist intended parents and surrogates to estimate the true costs and reimbursements. Submitters were interested in ensuring that

³⁹ Specifically, (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; (h) life, health and disability insurance, including premiums and increases in premiums if the surrogate already has insurance; and (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.

⁴⁰ 143 submissions comprising 120 personal submissions, 17 submissions from organisations (Advisory Committee on Assisted Reproductive Technology, Australian and New Zealand Infertility Counsellors Association, Ethics Committee on Assisted Reproductive Technology, Federation of Women’s Health Councils, Fertility Associates, Fertility New Zealand, Fertility Plus, Maternity Services Consumer Council, National Council of Women of New Zealand, New Zealand College of Midwives, New Zealand Council of Trade Unions, New Zealand Nurses Organisation, Nurse Practitioners New Zealand, Office of the Children’s Commissioner, Repromed, Royal Australian and New Zealand College of Obstetricians and Gynaecologists and Te Kāhui Ture o Aotearoa | New Zealand Law Society) and 6 academic submissions (Dr Anne Else, Adjunct Professor Ken Daniels, Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly), Professor Mark Henaghan, Associate Professor Rhonda Shaw and Australian academics Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff (submitting jointly)).

⁴¹ 26 submissions comprising 25 personal submissions and 1 submission from an organisation (Feminist Legal Clinic).

⁴² 10 personal submissions.

the surrogate receive adequate financial support for not only lost wages but also adequate living support, especially because, as a personal submitter noted, “surrogacy can pose social and financial inequalities for the birth mother”. Several submitters supported provision for post-birth recovery needs as well as during pregnancy.

8.32 Comments on the specific categories of costs proposed in the Issues Paper included the following:

- (a) **Medical treatment, legal advice and counselling.** Submitters commenting on this category were universally supportive of medical costs being covered by the intended parents. One submitter suggested this should extend to all consequential costs related to medical treatment, including parking costs at medical providers. Submitters also supported counselling services being covered, though some submitters felt this should be state-funded.
- (b) **Travel costs.** These costs were also supported. Multiple submitters, including the New Zealand College of Midwives, submitted that pregnant women acting as surrogates should not incur expenses personally and therefore be out of pocket. However, the National Council of Women of New Zealand (NCWNZ) was concerned about making provision for travel costs incurred by the surrogate’s partner and dependants. It suggested that whether these costs are covered should depend on whether the circumstances required the partner and dependants to accompany the surrogate. One submitter suggested the list should be worded carefully so that costs such as petrol and accommodation expenses would not go beyond a reasonable amount.
- (c) **Care of surrogate’s dependants.** NCWNZ said that this “can be an important cost if the pregnancy means that the surrogate mother cannot provide the care she would provide if she was not pregnant”. However, it did also relate that some of its members did not think there should be any payment for the care of the surrogate’s dependants. In any case, NCWNZ suggested that, if this cost was permitted, there should be guidelines around when it is compensable. The Royal Australian and New Zealand College of Obstetricians and Gynaecologists noted that, for surrogates who experience pregnancy complications, additional home or childcare services may be required to support the pregnancy.
- (d) **Products or services recommended by a health provider.** Some submitters highlighted the importance of ensuring that a surrogate receive post-partum physiotherapy. One submitter mentioned there should be provision for pregnancy pillows, vitamin supplements, pregnancy massages or acupuncture costs, or other therapies agreed upon pre-conception.
- (e) **Groceries.** Most submitters who spoke to this point agreed that food or groceries should be a cost able to be covered. However, some were concerned this went too far, with one personal submitter commenting that groceries should not be included in the list “because groceries are part of a woman’s normal costs”.
- (f) **Maternity clothes.** Three submitters specifically supported provision for maternity clothes. NCWNZ suggested there should be a limit to the costs redeemed as it “needs to be an equitable process for all”.
- (g) **Loss of income.** Loss of income is an opportunity cost, and the key argument for the intended parents covering this is that, as one submitter pointed out, had the intended parents been pregnant, it is they who would have had to manage these costs. One

submitter queried whether loss-of-income payments would also include the loss of an employer's contribution to their KiwiSaver. Another submitter suggested this category should be limited to one month of financial support prior to the birth or expected due date. NZLS suggested following Tasmania's example in limiting intended parents' responsibility for the surrogate's actual lost earnings to two months.⁴³ However, NZLS supported an ability to extend this period if medical issues meant the surrogate was unable to work during the pregnancy.

- (h) **Insurance premiums.** One submitter suggested that covering insurance costs as well as the surrogate's loss of income for two months could put the cost of surrogacy outside what the intended parents could afford, particularly since they would be dropping in income due to parental leave as well. NCWNZ noted that "insurance" should refer to life insurance for the surrogate in case of her death as a result of the arrangement. Dr Else believed it was important to include life and health insurance for the surrogate, and potentially other contingency insurance, "given the actual (and mostly unpredictable) physical and mental health risks involved, and how these may affect both her and her family".
- (i) **Other reasonable out-of-pocket expenses.** Submitters were generally supportive that other reasonable expenses could be covered by the intended parents. Several submitters supported the flexibility of this category, including NZLS.

Option Two: Clarify the law with respect to a surrogate's entitlement to paid parental leave

- 8.33 We asked submitters whether they agreed that the law with respect to surrogates' entitlements to post-birth paid leave should be clarified. We received 177 submissions that addressed this question. Of these submissions, a strong majority (86 per cent) agreed,⁴⁴ 12 per cent did not agree⁴⁵ and two per cent expressed no preference.⁴⁶
- 8.34 Most submitters were of the view that the surrogate should be entitled to a period of paid leave to recover from birth on the same basis as other pregnant people. Some submitters thought that some surrogates currently obtain parental leave and parental leave payments, with NZLS relating its understanding that there may be some "existing informal internal protocols" around this issue. However, submitters agreed that the law is ambiguous, and some suggested that IRD often provides unclear information in response to enquiries, which causes further confusion.

⁴³ See Surrogacy Act 2012 (Tas), s 9(3)(f).

⁴⁴ 152 submissions comprising 30 personal submissions, 17 submissions from organisations (Advisory Committee on Assisted Reproductive Technology, Australian and New Zealand Infertility Counsellors Association, Ethics Committee on Assisted Reproductive Technology, Federation of Women's Health Councils, Fertility Associates, Fertility New Zealand, Fertility Plus, Maternity Services Consumer Council, National Council of Women of New Zealand, New Zealand College of Midwives, New Zealand Council of Trade Unions, New Zealand Nurses Organisation, Nurse Practitioners New Zealand, Office of the Children's Commissioner, Repromed, Royal Australian and New Zealand College of Obstetricians and Gynaecologists and Te Kāhui Ture o Aotearoa | New Zealand Law Society) and 5 academic submissions (Dr Anne Else, Adjunct Professor Ken Daniels, Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly), Associate Professor Rhonda Shaw and Australian academics Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff (submitting jointly)).

⁴⁵ 21 submissions comprising 20 personal submissions and 1 submission from an organisation (Feminist Legal Clinic).

⁴⁶ 4 personal submissions.

- 8.35 NZLS submitted that making it clear that surrogates are entitled to paid parental leave mitigates one potential obstacle to being a surrogate, which encourages women in Aotearoa New Zealand to act as a surrogate, a point supported by Fertility Plus as well as the Office of the Children's Commissioner (OCC). ACART did not think clarifying these entitlements would create a significant incentive to become a surrogate in order to "get a paid holiday" since parental leave payments are capped at approximately \$600 per week.
- 8.36 ACART and Fertility New Zealand drew attention to surrogates who are not entitled to paid parental leave, including casual employees. Those surrogates who are working but for whatever reason are not eligible for paid parental leave would be out of pocket if they have to take annual or sick leave to heal after the birth.
- 8.37 Submitters who did not agree with Option Two expressed mixed views. Some were opposed to surrogacy in principle, while others considered that support for the surrogate should be provided by the intended parents under the surrogacy arrangements rather than by the state.

Views on the appropriate length of post-birth paid leave

- 8.38 We asked submitters how long surrogates should be entitled to post-birth paid leave. Of the 156 submissions that addressed this question, views were mixed:
- (a) 26 per cent of submissions supported six weeks.⁴⁷ Arguments in favour of six weeks included that, as MSCC noted, the maternity cycle is complete on six weeks and all funded maternity entitlements end at six weeks after birth. NZLS supported six weeks on the basis that this aligns with recovery from childbirth as well as medical guidance around recovery both from caesarean section and from live organ donation.
 - (b) 36 per cent of submissions supported 12 weeks.⁴⁸ Supporters of 12 weeks were generally of the view that this provided a good balance and that it gives a surrogate plenty of time to recover from the birth and to prepare to go back to work. Some submitters noted there is both physical and emotional healing that needs to take place following the birth of a child, even if the surrogate has no intention to care for that child after the birth. Fertility Plus suggested that the 12-week entitlement could be accessed one month prior to the birth and two months post-birth.
 - (c) 19 per cent of submissions supported 26 weeks.⁴⁹ The most common argument in favour of a 26-week period was that paid entitlements for a surrogate should be equivalent to the paid parental leave available to any person otherwise eligible under the law. The New Zealand College of Midwives said that recovery from birth may take longer than six weeks and that aligning a surrogate's entitlements with current paid parental leave entitlements is the simplest approach. Several submitters said

⁴⁷ 41 submissions comprising 35 personal submissions, 3 submissions from organisations (Federation of Women's Health Councils Aotearoa, Maternity Services Consumer Council and Te Kāhui Ture o Aotearoa | New Zealand Law Society) and 3 academic submissions (Adjunct Professor Ken Daniels, Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly) and Associate Professor Rhonda Shaw).

⁴⁸ 56 submissions comprising 55 personal submissions and 1 submission from an organisation (Fertility Plus).

⁴⁹ 30 submissions comprising 25 personal submissions, 4 submissions from organisations (Fertility Associates, New Zealand College of Midwives, New Zealand Council of Trade Unions and Nurse Practitioners New Zealand) and 1 academic submission (Australian academics Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff (submitting jointly)).

that recovery involves more than just physical processes, and a longer arrangement such as 26 weeks best supports this full recovery.

- (d) 19 per cent supported some other length of time.⁵⁰ These submitters selected a range of different periods between six and 26 weeks. Some thought that surrogates should receive the same entitlements as other pregnant people, while others thought it should depend on the specific circumstances of the pregnancy and birth. Several submitters noted that the length of time it takes to recover from pregnancy and birth will vary for each person and supported a flexible approach.

Option Three: Permit intended parents to pay surrogates a fee

- 8.39 We asked submitters whether they thought 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 expenses). We received 189 submissions that addressed this question. Submitters' views on this question were mixed. Just 33 per cent agreed that intended parents should be able to pay surrogates a fee,⁵¹ 59 per cent did not agree⁵² and eight per cent expressed no preference.⁵³

Support for introducing fees in surrogacy arrangements

- 8.40 Submitters who supported the ability for intended parents to pay a surrogate a fee for their participation in a surrogacy arrangement raised a number of arguments for doing so:

- (a) **Payment of a fee compensates surrogates for the provision of a valuable service.** A number of submitters considered that surrogates should be compensated above and beyond material costs as an acknowledgement of the value of the surrogacy service. In their joint submission, Dr van Zyl and Dr Walker submitted that intended parents should not be prohibited from paying surrogates a fee "as a way of compensating them for the time, effort, discomfort and risk associated with pregnancy and childbirth". This was echoed by a number of personal submitters who emphasised the value of what a surrogate does for another family. Dr Ronli Sifris argued that the payment of a fee to a surrogate should be construed not as payment for a child but rather as compensation for the provision of a service. Dr Sifris submitted that the UN Committee on the Rights of the Child has failed to adopt a

⁵⁰ 29 submissions comprising 21 personal submissions, 7 submissions from organisations (Australian and New Zealand Infertility Counsellors Association, Fertility New Zealand, National Council of Women New Zealand, New Zealand Nurses Organisation, Office of the Children's Commissioner, Repromed and Royal Australian and New Zealand College of Obstetricians and Gynaecologists) and 1 academic submission (Dr Anne Else).

⁵¹ 62 submissions comprising 59 personal submissions, 1 submission from an organisation (New Zealand Nurses Organisation) and 2 academic submissions (Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly) and Australian academic Dr Ronli Sifris).

⁵² 112 submissions comprising 94 personal submissions, 15 submissions from organisations (Advisory Committee on Assisted Reproductive Technology, Australian and New Zealand Infertility Counsellors Association, Center for Bioethics and Culture Network, Federation of Women's Health Councils Aotearoa, Feminist Legal Clinic, Fertility Associates, Fertility New Zealand, Fertility Plus, Maternity Services Consumer Council, National Council of Women of New Zealand, New Zealand College of Midwives, Office of the Children's Commissioner, Repromed, Te Kāhui Ture o Aotearoa | New Zealand Law Society and Voice for Life Hutt Valley) and 3 academic submissions (Dr Anne Else, Adjunct Professor Ken Daniels and Associate Professor Rhonda Shaw).

⁵³ 15 submissions comprising 12 personal submissions, 2 submissions from organisations (New Zealand Council of Trade Unions and Nurse Practitioners New Zealand) and 1 academic submission (Australian academics Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff (submitting jointly)).

clear position on whether compensated surrogacy amounts to the sale of a child and that the UN Special Rapporteur has “conceded” that commercial surrogacy could be conducted in such a way that it does not constitute the sale of children.

- (b) **Improving access to surrogacy.** Several submitters commented on the difficulty in finding a woman who is willing to act as a surrogate and the concern that this will remain the case if there is no financial incentive. One personal submitter explained:

My concern is that if no fee over and above reimbursement of costs is permitted, then there is little incentive for a woman to become a surrogate, and intended parents looking for surrogates — particularly independent surrogates — will have greater difficulty finding persons willing to become a surrogate. Why would someone agree to be a surrogate effectively for free, in the absence of a very close relationship or friendship?

- (c) **Supporting and protecting the surrogate’s rights.** Some submitters argued that the current law is exploitative as it prevents a surrogate from being compensated for the pain and inconvenience they experience. Fertility Associates did not think that surrogates should be paid a fee but instead that compensation for pain and inconvenience should be a permitted cost that can be paid under Option One. Fertility Associates argued that not allowing compensation for pain and inconvenience is a form of exploitation for surrogates (and gamete donors under the current law). Dr Sifris similarly argued that to insist that the surrogate perform her role for free “is inherently exploitative and perpetuates the patriarchal tradition of failing to pay for “women’s work””.
- (d) **Respecting the surrogate’s bodily autonomy.** Some submitters argued that allowing a surrogate to be paid a fee for her service as a surrogate respected a surrogate’s right to make decisions about her own body. For example, one submitter explained, “If someone wants to put their body through the stress of pregnancy for the sake of a dollar that’s on them.” Another said, “If you strive to respect the autonomy and private lives of surrogates, why does it matter if financial gain is the primary motivation for becoming a surrogate?” This submitter continued, “It still results in a family, as well as a better financial circumstance of the surrogate.”
- (e) **Encouraging domestic surrogacy.** A number of submitters in favour of allowing a fee for surrogacy services pointed to the fact that commercial surrogacy operates overseas and that, if intended parents should be supported to enter surrogacy arrangements in Aotearoa New Zealand rather than overseas, the supply of surrogates must be increased. The “financial incentive”, one personal submitter said, “will most certainly expand the supply of surrogates.” If commercial surrogacy is not permitted in Aotearoa New Zealand, several submitters argued that intended parents will continue to seek out commercial surrogacy arrangements in overseas jurisdictions. One submitter said domestic commercial surrogacy would be “likely to have the single greatest impact” in encouraging domestic over international surrogacy “by reducing the need for people to instead go abroad”.

- 8.41 Some submitters supported the regulation and oversight of the payment of fees. For example, one submitter said:

I do not want to have a friend or close acquaintance act as surrogate; I would prefer to have an independent surrogate. Rather than disallowing a fee altogether, a better approach would be to permit fees but with some appropriate regulatory constraints to ensure the regime does not create perverse incentives. There could be some limited form of price regulation to ensure fees are not extortionate, and to ensure the majority or

entirety of the fees are actually received by the surrogate, and not by for-profit intermediaries between intended parents and surrogates.

- 8.42 It was argued that a regulatory model would have positive benefits for surrogacy in Aotearoa New Zealand. A larger pool of potential surrogates, incentivised by the payment of a fee, would enable more flexibility to screen potential candidates and select someone appropriate. Suggestions for the regulation of the payment of fees included prior approval of fees by a regulator or the setting of a fixed fee that could be capped to address concerns about equity of access as well as exploitation of vulnerable women as surrogates.

Opposition to introducing fees in surrogacy arrangements

- 8.43 Most submitters were opposed to introducing the payment of fees to surrogates. Some of these submitters were generally opposed to surrogacy in principle. Most, however, expressed a view that surrogacy should be permitted but only on an altruistic basis.
- 8.44 Arguments raised by submitters against the payment of fees included the following:
- (a) **Concerns relating to commodification and sale of children.** The most common argument from submitters opposing the payment of fees to surrogates was that it would constitute, or else potentially lead to, the commodification and sale of children. Submitters generally were strongly of the view that children are not commodities to be bought or sold and that, as NZLS submitted, this is not what the parties involved in a surrogacy arrangement want or expect. Some submitters likened paid surrogacy to “renting a uterus”, which they considered could in turn result in the sale of children and said there are ethical and moral problems in this.
 - (b) **Concerns relating to the child’s best interests.** Many submitters were concerned that, even if it did not constitute the sale of children, commercial surrogacy would not be in a child’s best interests in any case. MSCC considered that commercial surrogacy could have a potentially “huge impact on the physical and psychological health of the surrogate-born child”. Another submitter was concerned about how well a child would be looked after if the parties involved, particularly the surrogate, are simply trying to make money from the arrangement. OCC also suggested that commercial surrogacy could result in commercial intermediaries “whose interests may not focus on the best interests of the mokopuna”.
 - (c) **The risk of exploitation, coercion and undue pressure on women.** A number of submitters, including OCC, the New Zealand College of Midwives and Voice for Life Hutt Valley, expressed the view that commercial surrogacy can be exploitative and set unfair expectations. As one personal submitter said, the ability to make payments brought with it “the risk of this being an inducement” and, as OCC expressed, “[c]ommercial surrogacy can lead to disproportionate negative consequences for low income population groups”. Many submitters, including Fertility Plus, Repromed, ANZICA, the Feminist Legal Clinic and Voice for Life Hutt Valley, were of the view that commercial surrogacy commodifies women’s bodies. Views included that it “should not be legal to pay for the use of women’s bodies” or to “rent a womb” and that commercial surrogacy compromises a surrogate’s rights during pregnancy. OCC was concerned that commercial surrogacy could undermine surrogates’ mana and cause them to bear undue risks and can also lead to disproportionate negative consequences for low-income population groups.

- (d) **Inconsistency with international norms.** Some submitters considered that permitting the payment of fees is inconsistent with international norms, citing its inconsistency with the UN Convention on the Rights of the Child, the Verona Principles and the statements from the UN Committee on the Rights of the Child and the UN Special Rapporteur.
- (e) **Inconsistency with public attitudes.** Some submitters were of the view that commercial surrogacy was “not acceptable in New Zealand”. Adjunct Professor Ken Daniels, for example, considered that commercial surrogacy was “not part of our culture” and that the jurisdictions that provide for a fee to be paid “are not countries that share our cultural values in relation to altruism”. ANZICA similarly, said the payment of a fee is “not in accordance with Aotearoa’s stance on the altruistic donation of eggs, sperm, embryos, blood, plasma, and live organs”. MSCC, however, did believe that commercial surrogacy “is a wider ethical and social issue that will need to be fairly urgently addressed” and noted that it could see that the percentage of people supporting commercial surrogacy is “likely to grow”, particularly as “both the rate of infertility and the numbers of non-traditionally gendered couples wanting to form families will continue to grow”. Consequently, MSCC believes there will be pressure to legalise some form of commercial surrogacy in the “not too distant future”.
- (f) **Providing for the payment of fees is unnecessary.** Some submitters were of the view that implementing a fees regime was unnecessary, especially if Options One and Two are implemented. In the words of one submitter, “If there is to be a major expansion of the compensation available to the surrogate, [that is] designed to eliminate any financial cost for the surrogate of having a baby, then there is no need for additional compensation.”
- (g) **Introducing a fees regime may reduce the accessibility of surrogacy for some intended parents.** Finally, some submitters emphasised the value of surrogacy as a means of family formation and the concern that introducing a fees regime may make it an unaffordable option for some intended parents. One personal submitter argued that, if we were to introduce commercial surrogacy, we would “essentially be locking people out of having families where they cannot afford a fee to do so” and making access even more inequal.

CONCLUSIONS

Allowing payments for reasonable surrogacy costs

RECOMMENDATIONS

R46

The list of permitted payments in section 14(4) of the Human Assisted Reproductive Technology Act 2004 should be amended to include payments to the surrogate for any reasonable surrogacy costs actually incurred in relation to the surrogacy arrangement.

R47

The Human Assisted Reproductive Technology Act 2004 should be amended to provide guidance on what “reasonable surrogacy costs” can include. A new provision should be inserted that explains that, without limiting section 14(4), “reasonable surrogacy costs” includes the following:

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

R48

Section 14 of the Human Assisted Reproductive Technology Act 2004 should be amended to provide that, notwithstanding section 14(1), an obligation under a surrogacy arrangement entered pre-conception to pay or reimburse the surrogate’s reasonable surrogacy costs is enforceable.

- 8.45 We recommend amending the HART Act to clarify that the intended parents can cover the surrogate’s reasonable surrogacy costs actually incurred in relation to the surrogacy arrangement. Our view is that the intended parents should be able to pay any costs incurred by the surrogate (or, in some cases, her partner) that would not have otherwise been incurred but for the surrogacy arrangement. This will promote the surrogate’s rights in relation to financial support and, in doing so, reduce the barriers for women considering becoming a surrogate in Aotearoa New Zealand. We think this approach is consistent with maintaining the mana of both the surrogate and intended parents as well as encouraging them to act in accordance with the tikanga of whanaungatanga and manaakitanga (see Chapter 2).

- 8.46 These recommendations are consistent with the approach to other donative practices in Aotearoa New Zealand⁵⁴ and with approaches to surrogacy in comparable jurisdictions, including Australia,⁵⁵ England, Wales, Scotland,⁵⁶ Ireland⁵⁷ and Canada.⁵⁸ Consultation revealed strong support for these recommendations which is consistent with the results of the Surrogacy Survey⁵⁹ and with other proposals to reform the HART Act.⁶⁰

Additional payments to surrogates not recommended

- 8.47 We do not recommend permitting the payment of a fee to surrogates for their participation in a surrogacy arrangement in addition to paying a surrogate's reasonable surrogacy costs actually incurred. In the Issues Paper, we acknowledged there were arguments for permitting the payment of fees to surrogates.⁶¹ We noted the argument that simply meeting the surrogate's costs does not accurately reflect her role in caring for the unborn child, the considerable inconveniences to her life and to those around her

⁵⁴ In 2016, legislation introduced compensation for loss of earnings for live organ donors as a way to "remove a financial deterrent to the donation of organs": Compensation for Live Organ Donors Act 2016, s 3. The Human Tissue Act also provides that, while financial or other consideration for the collection of blood or a controlled human substance from a person is prohibited, this does not prevent the collector from providing consideration "that is reasonably related to, or that does not exceed, the actual and reasonable costs incurred by that person in connection with its collection": Human Tissue Act 2008, s 58(3).

⁵⁵ 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. See also Surrogacy Bill 2022 (50) (NT), cl 12.

⁵⁶ Before making a parental order, the court "must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received": Human Fertilisation and Embryology Act 2008 (UK), ss 54(8) and 54A(7). This provision 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]. In that Joint Consultation Paper, the Commissions took the view that the current position cannot be left unchanged. They presented a number of different categories of payment that the law could enable intended parents to pay surrogates and sought views on each of those categories: at [15.2]–[15.4].

⁵⁷ An Bille Sláinte (Atáirgeadh Daonna Cuidithe) | Health (Assisted Human Reproduction) Bill 2022 (29) (Ireland) was introduced in the Dáil in March 2022. It will regulate assisted human reproduction procedures, including gestational surrogacy, for the first time. The Bill permits the payment of a surrogate's reasonable expenses actually incurred and verifiable by receipts or other documentation: cl 54–55. The Bill prescribes a list of matters that are included as reasonable expenses and provides for the Minister to prescribe further matters: cl 55(3)–(6).

⁵⁸ Assisted Human Reproduction Act SC 2004 c 2, s 12(c); Reimbursement Related to Assisted Human Reproduction Regulations SOR/2019-193 (Can), reg 4; and Health Canada *Guidance Document: Reimbursement Related to Assisted Human Reproduction Regulations* (30 August 2019) at 9–14.

⁵⁹ The Surrogacy Survey 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 7 per cent thought that the surrogate should receive no money: 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.

⁶⁰ Improving Arrangements for Surrogacy Bill 2021 (72-1), 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.

⁶¹ Te Aka Matua o te Ture | Law Commission *Review of Surrogacy | Te Kōpū Whāngai: He Arotake* (NZLC IP47, 2021) at [6.65]–[6.66].

and the necessary risks to her health that she takes on.⁶² We also noted the argument made by some that prohibiting the payment of fees creates conditions for exploitation of women because it prevents surrogates from being treated fairly especially in comparison to other people and organisations involved in surrogacy arrangements, such as lawyers and fertility clinics, who can charge for their services.⁶³ We said that permitting the payment of a fee could encourage more women to consider acting as surrogates,⁶⁴ which could in turn support more intended parents to enter domestic surrogacy arrangements rather than resorting to international surrogacy.⁶⁵

8.48 Ultimately, however, we conclude that the potential benefits of permitting the payment of fees to surrogates, in addition to covering their costs, do not outweigh the strong arguments against such an approach:

- (a) First, permitting the payment of fees to surrogates would constitute a radical change in public policy. The current, altruistic model of surrogacy in Aotearoa New Zealand is consistent with the treatment of other donative practices, such as embryo and gamete donation, organ donation and blood donation.⁶⁶ The law views these practices as a gift, not a commercial transaction.⁶⁷ This reflects deeply held societal values around the inherent dignity of the individual and the need to protect against commodification of the human body, which we suggest is reflected in tikanga Māori.⁶⁸ Permitting the payment of fees as a way to incentivise women to act as surrogates would represent a significant step towards the commercialisation of surrogacy. We are not satisfied that this would reflect the reasonable expectations of New Zealanders. Only a third of submitters supported the payment of fees, which was similar to the findings of the Surrogacy Survey.⁶⁹

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 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 Ruth Walker and Liezl van Zyl *Towards a Professional Model of Surrogate Motherhood* (Palgrave MacMillan, London, 2017) at ix and 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.

⁶⁴ 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.

⁶⁵ 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.

⁶⁶ Human Assisted Reproductive Technology Act 2004, s 13; and Human Tissue Act 2008, ss 56 and 58.

⁶⁷ See discussion 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 [4.22]–[4.37]; and Rhonda M Shaw “Should Surrogate Pregnancy Arrangements be Enforceable in Aotearoa New Zealand?” (2020) 16 Policy Quarterly 18.

⁶⁸ We note, however, the need for further research to provide a better understanding of tikanga Māori and surrogacy, as we explore in Chapter 2.

⁶⁹ The Surrogacy Survey found that, of respondents who thought domestic surrogacy should be legal, 31 per cent supported the surrogate being paid for her time and service: Debra Wilson *Understanding the Experience and*

- (b) Second, permitting the payment of fees to surrogates may also contravene Aotearoa New Zealand's international human rights obligations to take appropriate measures to prevent the sale of children.⁷⁰ The work of the UN Special Rapporteur and the Verona Principles highlight the risk that the payment of a fee to the surrogate constitutes or unduly risks the sale of children.⁷¹ The Verona Principles state that the risk also arises when “there is a provision of unregulated, excessive or lump sum ‘reimbursements’ or consideration in any other form”.⁷² We suggest that payment of a fee to a surrogate may be inconsistent with the tikanga relating to children, in particular, with the idea that children are taonga (see Chapter 2). The concept of taonga may include an element of “gift” as may also be seen in whāngai arrangements, which seems incompatible with making a payment to a surrogate.
- (c) Third, the impact of introducing fees on surrogate-born children is unclear. As we note in Chapter 2, while research into altruistic surrogacy suggests generally positive outcomes for surrogate-born children, there has been little research that has explored the impact of commercial surrogacy on children. In the absence of such research, we note that the International Principles for Donor Conception and Surrogacy, prepared by a group of donor-conceived and surrogate-born people and presented to the United Nations, call for all forms of commercialisation of surrogacy to be prohibited.⁷³ It is possible that, in Aotearoa New Zealand, the commercialisation of surrogacy may be seen by as diminish the mana of surrogate-born children.
- (d) Fourth, the introduction of a fee may increase the risk of exploitation of women who offer to be surrogates. This is a long-standing concern,⁷⁴ although the extent to which it is a real or serious risk in countries with stable legal systems such as Aotearoa New

Perceptions of Surrogacy Through Empirical Research: Public Perceptions Survey (Te Whare Wānanga o Waitaha | University of Canterbury, May 2020) vol 3 at 64. We also note the findings of research that explored stakeholders' concerns in relation to payment for gamete donations in Australia and Aotearoa New Zealand: Sonja Goedeke, Daniel Shepherd and Iolanda S Rodino “Fertility stakeholders' concerns regarding payment for egg and sperm donation in New Zealand and Australia” (2022) 14 *Reproductive BioMedicine and Society Online* 8. That research found that participants broadly held concerns about the type of donor they assumed would be attracted by financial reward as opposed to those motivated by altruism, at 14.

⁷⁰ 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).

⁷¹ 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].

⁷² International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [14.8]. See also UNICEF and Child Identity Protection *Key Considerations: Children's Rights & Surrogacy* (Briefing Note, February 2022).

⁷³ *International Principles for Donor Conception and Surrogacy* (November 2019) at [12].

⁷⁴ 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”.

Zealand is open to debate.⁷⁵ In any event, while it is not possible to know how the payment of a fee might change the demographics of women who offer to be surrogates in Aotearoa New Zealand, it is possible that a fee might attract disadvantaged women in working or beneficiary households.⁷⁶ This raises the question of whether financial incentives “might override women’s consideration of the potential physical and emotional risks they assume”.⁷⁷ As we note in Chapter 3, even in countries with more stable legal systems, there is a concern that women in commercial surrogacy arrangements may 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.⁷⁸ The Law Commission of England and Wales and the Scottish Law Commission have similarly observed that, while the risks of exploitation associated with the payment of fees may be less likely in the United Kingdom, they remain “present and real”.⁷⁹

- (e) Fifth, permitting the payment of fees to surrogates is inconsistent with the approach taken in other jurisdictions to which Aotearoa New Zealand often compares itself. Fees cannot be paid to surrogates in Australia,⁸⁰ England, Wales, Scotland⁸¹ or Canada.⁸² Legislation introduced in Ireland to regulate domestic surrogacy would also prohibit the payment of fees.⁸³ Departing from the approach in comparable jurisdictions may have consequences for the cross-border recognition of legal parenthood in other jurisdictions, particularly in light of the ongoing work of the Hague Conference on Private International Law on an international instrument to

⁷⁵ 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; and Te Aka Matua o te Ture | Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework* (NZLC R65, 2000) at [535]. In relation to the United States, see Steven H Snyder “Reproductive Surrogacy in the United States of America: Trajectories and Trends” in E Scott Sills (ed) *Handbook of Gestational Surrogacy: International Clinical Practice and Policy Issues* (Cambridge University Press, Cambridge (UK), 2016) 276 at 279–280.

⁷⁶ 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 48–49.

⁷⁷ 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. Similar concerns have also been identified in relation to payments for gamete donation: Sonja Goedeke, Daniel Shepherd and Iolanda S Rodino “Fertility stakeholders’ concerns regarding payment for egg and sperm donation in New Zealand and Australia” (2022) 14 *Reproductive BioMedicine and Society Online* 8 at 16.

⁷⁸ 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; and Adeline A Allen “Surrogacy and Limitations to Freedom of Contract: Toward Being More Fully Human” (2018) 41 *Harvard Journal of Law and Public Policy* 753 at 784–786.

⁷⁹ 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].

⁸⁰ Surrogacy Act 2010 (NSW), ss 8–9; Assisted Reproductive Treatment Act 2008 (Vic), s 44; Surrogacy Act 2010 (Qld), ss 10 and 56; Surrogacy Act 2008 (WA), ss 6 and 8; Surrogacy Act 2019 (SA), s 23; Surrogacy Act 2012 (Tas), ss 8 and 40; Parentage Act 2004 (ACT), ss 40 and 41. See also Surrogacy Bill 2022 (50) (NT), cl 48.

⁸¹ Human Fertilisation and Embryology Act 2008 (UK), ss 54(8) and 54A(7).

⁸² Assisted Human Reproduction Act SC 2004 c 2, s 6(1).

⁸³ An Bille Sláinte (Atáirgeadh Daonna Cuidithe) | Health (Assisted Human Reproduction) Bill 2022 (29) (Ireland), cl 54.

facilitate cross-border recognition of legal parenthood. As NZLS noted in its submission, “[a] profit based or commercial surrogacy may not be as easily accepted in a cross-border situation”.

- (f) Sixth, while permitting the payment of fees may increase the number of women who consider becoming surrogates, it would also be likely to increase the cost of surrogacy and therefore reduce accessibility for some intended parents.⁸⁴ This might result in more intended parents pursuing international surrogacy in cheaper and potentially less regulated countries where the risk of exploitation may be greater. This risk 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.

8.49 We understand that providing financial support to surrogates that does not go beyond their costs or include an element of profit will mean that some New Zealanders will continue to enter commercial surrogacy arrangements overseas, either because they cannot find a woman willing to act as a surrogate in Aotearoa New Zealand or because they prefer a commercial model. While supporting New Zealand intended parents to enter domestic surrogacy arrangements rather than going overseas is an important guiding principle of our review, this must be balanced against other principles, including the need to ensure children’s best interests are paramount and that surrogacy law supports surrogates and intended parents to enter surrogacy arrangements that protect and promote their health, safety, dignity and human rights.

Payments for reasonable surrogacy costs should be by agreement

- 8.50 Our recommendations will clarify what costs intended parents can lawfully pay for, which will enable the parties to a surrogacy arrangement to make their own agreement as to the payment of surrogacy costs. We do not recommend that the law should confer an entitlement on the surrogate to have all her surrogacy costs met by the intended parents. Such a potentially open-ended liability lacks certainty and could foster an environment of mistrust given the potential for the surrogate to take unfair advantage of the entitlement.
- 8.51 Ideally, the parties should agree on the payment of surrogacy costs prior to conception so that all parties enter the arrangement with a clear understanding of their rights and obligations in relation to costs. Such an agreement could still make provision for unexpected events. If the surrogacy arrangement follows the ECART process, the parties will be supported by counselling and legal advice to arrive at their agreement, and we expect that this will be outlined in the parties’ record of intentions or “surrogacy plan” we recommend they write as part of the ECART process (see Chapter 5).

⁸⁴ 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. See also Sonja Goedeke, Daniel Shepherd and Iolanda S Rodino “Fertility stakeholders’ concerns regarding payment for egg and sperm donation in New Zealand and Australia” (2022) 14 *Reproductive BioMedicine and Society Online* 8 at 15 (where participants expressed similar concerns related to payment for donated gametes increasing the costs carried by intended parents).

- 8.52 Our recommendations would also support people to make their own agreement as to the payment of surrogacy costs if they do not go through the ECART process. Providing guidance in the HART Act on what “reasonable surrogacy costs” includes would assist parties who do not opt to seek professional support to structure their own agreement. Our recommendation that only agreements reached prior to conception should be enforceable against the intended parents would incentivise people to make their agreements early on.
- 8.53 We do not recommend a specific process that parties must follow in relation to the payment of surrogacy costs. We note that, in Canada, regulations establish a verifiable process by which reimbursements may be made,⁸⁵ which requires the provision of receipts⁸⁶ and does not accommodate the payment of “anticipated expenses” or an “unaccountable allowance”.⁸⁷ Our view, however, is that the process for paying surrogacy costs should be agreed between the parties. This could involve the intended parents reimbursing surrogacy costs upon the provision of receipts. Alternatively, the intended parents could set up a bank account that the surrogate can access for the payment of agreed surrogacy costs as and when required. There could be a cap on this account, or the intended parents could make regular payments of a certain amount into this account. Receipts could be kept by the surrogate when she uses the account, as a safeguard. An alternative model could be that the intended parents pay a set amount to the surrogate each month to reflect anticipated costs. However, this model would only meet the legal requirements proposed in our recommendations if there was a reconciliation process at the end of the surrogacy arrangement to ensure that only costs “actually incurred” were reimbursed.

Providing statutory guidance on the interpretation of reasonable surrogacy costs

- 8.54 We recommend providing guidance as to what types of costs are considered reasonable surrogacy costs. This would promote clarity and certainty and provide practical assistance to the parties when discussing financial support arrangements.
- 8.55 This guidance should be prescribed in the HART Act rather than in regulations or guidance so that it is more publicly accessible. A clear consensus has emerged internationally as to what costs should be permitted under a surrogacy arrangement, which provides confidence that this guidance will not require regular review and amendment. In any event, we recommend that this guidance should be inclusive and not exhaustive. This will futureproof the legislation by ensuring that other costs that fall within the general meaning of “reasonable surrogacy costs” but have not been contemplated in the guidance can be covered. Other payments, such as gifts or compensation for “pain and inconvenience”, for example, would clearly fall outside the meaning of reasonable surrogacy costs actually incurred.

⁸⁵ Reimbursement Related to Assisted Human Reproduction Regulations SOR/2019-193 (Can).

⁸⁶ Assisted Human Reproduction Act SC 2004 c 2, s 12(2).

⁸⁷ Health Canada *Guidance Document: Reimbursement Related to Assisted Human Reproduction Regulations* (30 August 2019) at 5.

8.56 Based on the approaches in comparable jurisdictions,⁸⁸ we recommend that the following costs should be included within the definition of “reasonable surrogacy costs”:

- (a) **Any reasonable medical costs incurred by the surrogate, including costs associated with achieving conception, pregnancy and birth, and post-partum recovery.** While medical treatment for pregnant people in Aotearoa New Zealand is publicly funded for the most part, this category clarifies that any additional medical costs incurred by the surrogate because of the surrogacy arrangement can be covered by the intended parents. For example, if the intended parents would like the surrogate to be under the care of a private obstetrician rather than a publicly funded midwife, they should be able to cover those costs.
- (b) **Any reasonable travel or accommodation costs incurred by the surrogate or her partner as a result of the surrogacy arrangement.** This category recognises that additional costs may be incurred as a result of the surrogacy arrangement not only by the surrogate but also by the surrogate’s partner if they are supporting the surrogate through the pregnancy and birth. This category would include travel costs to get to appointments during pregnancy and those associated with the birth.
- (c) **Any reasonable costs relating to the care of the surrogate’s dependants incurred as a result of the surrogacy arrangement.** In many cases, the surrogate may have dependants of her own. She may need to make alternative care arrangements when she is attending appointments, when she gives birth and in the period immediately after birth or if she is put on bedrest or recommended to reduce her activity during the pregnancy. This category clarifies that the intended parents can cover these costs.
- (d) **The cost of obtaining any product or service recommended by the surrogate’s healthcare provider in relation to conception, pregnancy, birth or post-partum recovery.** This category is broadly worded to recognise the wide range of support that surrogates may require in their individual circumstances. This category would include, for example, alternative or complementary health services recommended by a surrogate’s doctor, midwife or other healthcare provider, such as physiotherapy, chiropractic treatment or pre- or ante-natal exercise as well as products to support conception, pregnancy and post-natal recovery. It would also include services recommended by the surrogate’s healthcare provider to avoid her strenuous activity or support bedrest, such as household maintenance.
- (e) **Insurance premiums or increases in premiums.** Currently, there is an expectation that, as part of the ECART process, the parties consider life insurance for the surrogate⁸⁹ although this has been the subject of debate, as noted above. Our recommendations would clarify that the intended parents can cover the cost of obtaining or maintaining life insurance for the surrogate. We also recommend that

⁸⁸ Including Australia and Canada: 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; and Reimbursement Related to Assisted Human Reproduction Regulations SOR/2019-193 (Can), regs 4 and 8. See also An Bille Sláinte (Atáirgeadh Daonna Cuidithe) | Health (Assisted Human Reproduction) Bill 2022 (29) (Ireland), cl 55; and Surrogacy Bill 2022 (50) (NT), cl 12. For more detailed discussion see Te Aka Matua o te Ture | Law Commission *Review of Surrogacy | Te Kōpū Whāngai: He Arotake* (NZLC IP47, 2021) at [6.40]–[6.43].

⁸⁹ Ethics Committee on Assisted Reproductive Technology *Surrogacy Arrangements involving Providers of Fertility Services: Application Form* (2011) at 12.

the cost of obtaining or maintaining health, disability and income protection insurance should be able to be covered, should the parties agree to do so.

- (f) **The cost of reimbursing the surrogate for a loss of earnings.** We have proposed a maximum limit of three months at or around the birth to give the parties greater certainty as to what can be covered in a surrogacy arrangement. Any reimbursement should be less any paid parental leave payments received during that period (see below). We think three months is an appropriate maximum amount of time for a surrogate to be reimbursed for lost earnings in the ordinary course of events.⁹⁰ However, the parties should also be able to make further provision for the possible situation where the surrogate is unable to work on medical grounds during the pregnancy.
- (g) **Any reasonable out-of-pocket expenses incurred as a direct result of the surrogacy arrangement.** This category is broad and flexible, reflecting the reality that pregnancy costs will vary. For example, in the last trimester, the surrogate may find it difficult to clean the house or walk the dog due to the pregnancy, and intended parents should therefore be able to cover the costs of paying for housekeeping or dog walking. In relation to groceries, it is recognised that a woman's nutritional health, before and during pregnancy, influences the health of the baby and that nutrient intake for pregnant women is generally greater than for other women.⁹¹ Intended parents may ask a surrogate to adapt her diet when trying to become pregnant or throughout pregnancy, which may also result in additional grocery expenses for the surrogate. Intended parents should therefore be able to cover a surrogate's additional grocery costs needed to support a healthy pregnancy.

Enforcing agreements as to surrogacy costs

- 8.57 Surrogacy arrangements are unenforceable under the HART Act⁹² for public policy reasons we discuss in Chapter 6. However, we recommend making an exception to this general rule in relation to the payment of surrogacy costs. This would promote and

⁹⁰ We note that the maximum period prescribed in most Australian jurisdictions is 2 months during which the birth happened or was expected to happen and any other period when the surrogate is unable to work during the pregnancy on medical grounds. In Ireland, the proposed maximum period is 6 months during which the birth happened or was expected to happen and any other period (not exceeding 12 months) when the surrogate is unable to work on medical grounds related to the pregnancy or birth: 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); Surrogacy Regulations 2020 (SA), reg 5(c); Surrogacy Act 2012 (Tas), s 9(3)(f); Surrogacy Bill 2022 (50) (NT), cl 12(2)(f); and An Bille Sláinte (Atáirgeadh Daonna Cuidithe) | Health (Assisted Human Reproduction) Bill 2022 (29) (Ireland), cl 55(3)(c).

⁹¹ Health Canada *Guidance Document: Reimbursement Related to Assisted Human Reproduction Regulations* (30 August 2019) at 10.

⁹² Human Assisted Reproductive Technology Act 2004, s 14(1). Legislation in Australia, the United Kingdom and Canada similarly provide that surrogacy arrangements are unenforceable.

protect the rights of the surrogate and is consistent with the approach taken in comparable jurisdictions.⁹³ As the Commission explained in 2000:⁹⁴

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.

- 8.58 Making agreements as to the payment of surrogacy costs enforceable would also separate issues of financial support and legal parenthood. As the Law Commission of England and Wales and the Scottish Law Commission have observed, this could 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).⁹⁵
- 8.59 Only agreements made prior to conception should be enforceable. We acknowledge there is a case for making all agreements to pay surrogacy costs enforceable regardless of when they are made to ensure that the surrogate is not financially disadvantaged in the event of an unforeseen circumstance. However, limiting enforceability to pre-conception agreements promotes the benefits of having an agreement in place before embarking on the surrogacy journey (regardless of whether the ECART process is followed) and reduces the risk of undue pressure being exerted by either party throughout the arrangement to alter the agreement. As noted above, the payment of surrogacy costs would usually be discussed in counselling and surrogacy plans developed with the support of lawyers as part of the ECART process. An agreement made prior to conception would still be able to make provision for the different circumstances that might eventuate throughout the pregnancy and after birth. In any event, our recommendations would not, of course, prevent the intended parents from agreeing to cover surrogacy costs not provided for in a pre-conception agreement if they wish to do so. It simply means that such agreements cannot be enforced by or against any person.
- 8.60 We note that that a few Australian jurisdictions provide that agreements as to surrogacy costs are not enforceable against the intended parents if the surrogate does not relinquish the child or refuses to consent to the transfer of legal parenthood to the intended parents.⁹⁶ While we can see the desirability of such an approach from the intended parents' perspective, it is problematic from an international human rights perspective. This is because the payment of costs becomes linked to the matter of legal

⁹³ In Australia, see: 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; Surrogacy Act 2019 (SA), s 13; and Surrogacy Bill 2022 (50) (NT), cl 12(3). In Ireland, see: An Bille Sláinte (Atáirgeadh Daonna Cuidithe) | Health (Assisted Human Reproduction) Bill 2022 (29) (Ireland), cl 55(1). This is to "ensure that intending parents cannot resile from any financial agreement made to the surrogate after she becomes pregnant": An Roinn Sláinte | Department of Health *General Scheme of the Assisted Human Reproduction Bill 2017* (6 October 2017) at 103. This has also been provisionally proposed for England, Wales and Scotland: 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].

⁹⁴ Te Aka Matua o te Ture | 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 | Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at [7.12].

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 [15.92].

⁹⁶ Surrogacy Act 2010 (Qld), s 15(2)(b); Surrogacy Act 2012 (Tas), s 10(2)(c); and Surrogacy Act 2019 (SA), s 13(3).

parenthood. This may unduly risk a surrogacy arrangement being considered to constitute the sale of a child under international human rights law.⁹⁷ For this reason, the Verona Principles 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”.⁹⁸

- 8.61 In any event, we do not think that such an approach is necessary in the New Zealand context given the difference in our proposed approach to legal parenthood from the Australian approach, where the surrogate remains the child’s legal parent if she refuses to consent to the parental order. In contrast, under our recommendations in Chapter 6, in the unlikely event that the surrogate does not consent to relinquish any claim to legal parenthood, te Kōti Whānau | Family Court would have the discretion to recognise the intended parents as the child’s legal parents if satisfied that is in the child’s best interests.

The criminal offence in section 14(5)

- 8.62 In the Issues Paper, we noted that criminalising the parties to a surrogacy arrangement for exchanging valuable consideration under section 14(5) of the HART Act may raise concerns in relation to the potential vulnerability of the surrogate⁹⁹ and the risk that a surrogate-born child may be born with the “taint of criminality” if the intended parents are prosecuted for their part in a commercial surrogacy arrangement.¹⁰⁰ The UN Special Rapporteur has recommended that any criminal or civil penalties for illegal surrogacy arrangements should instead focus primarily upon intermediaries,¹⁰¹ observing that:¹⁰²

... 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.

- 8.63 However, in practice, we are unaware of anyone ever being prosecuted under this provision. We also note that removing the offence altogether or focusing it solely on intermediaries and not on the parties to an arrangement themselves may not deter people from engaging in commercial surrogacy arrangements and would risk undermining the policy reasons outlined above for retaining a prohibition on the payment to surrogates

⁹⁷ 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].

⁹⁸ 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].

⁹⁹ 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].

¹⁰⁰ *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]. 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/74/162 (15 July 2019) at [79].

¹⁰¹ 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)].

¹⁰² 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].

of a fee for their participation in a surrogacy arrangement. Retaining an offence for commercial surrogacy is also consistent with the approach taken in relation to the commercialisation of other donative practices in Aotearoa New Zealand¹⁰³ and with the approach taken in Australia¹⁰⁴ and proposed in Ireland.¹⁰⁵

- 8.64 Our view is that any reconsideration of the criminal offence provisions for commercial surrogacy should only take place within a wider review of the general desirability of using criminal offences to deter commercial arrangements under the HART Act. A consistent approach must be taken to the commercial supply of embryos and gametes and commercial surrogacy. Given our review is limited to surrogacy, we have not recommended changes to the criminal offence provisions in the HART Act.

Clarifying eligibility to paid parental leave

RECOMMENDATION

- R49** The Government should publish guidance clarifying that surrogates are entitled to paid parental leave on the same basis as other pregnant people under the Parental Leave and Employment Protection Act 1987.

- 8.65 We recommend that the Government's position on the eligibility of surrogates to paid parental leave (see paragraph 8.8 above) be clarified in published guidance published. We endorse this interpretation of the Parental Leave and Employment Protection Act as it applies to surrogates. It would help 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 without affecting the entitlements of the intended parent who is the primary caregiver. This aligns with the approach taken in Australia¹⁰⁶ and England and Wales¹⁰⁷ and 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 still-birth.¹⁰⁸ As NZLS observed in its submission on the Issues Paper, given the small number of surrogacies that take place each year, the cost implications of providing leave and payments to surrogates will be limited.
- 8.66 In the Issues Paper, we explained that there was widespread uncertainty as to whether a surrogate can qualify for paid parental leave in addition to an intended parent and that

¹⁰³ See Human Assisted Reproductive Technology Act 2004, s 13; Human Tissue Act 2008, ss 56(2) and 58(2).

¹⁰⁴ Surrogacy Act 2010 (NSW), s 8; Assisted Reproductive Treatment Act 2008 (Vic), s 44(1); Surrogacy Act 2010 (Qld), s 56; Surrogacy Act 2008 (WA), s 8; Surrogacy Act 2019 (SA), s 23(1); Surrogacy Act 2012 (Tas), s 40; Parentage Act 2004 (ACT), s 41; and Surrogacy Bill 2022 (50) (NT), cl 48.

¹⁰⁵ An Bille Sláinte (Atáirgeadh Daonna Cuidithe) | Health (Assisted Human Reproduction) Bill 2022 (29) (Ireland), cl 54(3) and 147(3).

¹⁰⁶ 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].

¹⁰⁷ 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.

¹⁰⁸ Holidays Act 2003, s 69.

this uncertainty was a cause of stress and anxiety. In its submission, NZLS described the current situation as “confusing and challenging for all parties to navigate”. Consultation revealed strong support for clarifying a surrogate’s eligibility to a period of paid employment leave to recover from pregnancy and birth.

- 8.67 We therefore recommend the Government publish guidance clarifying its interpretation of the Parental Leave and Employment Protection Act in the surrogacy context. This would address the current uncertainty that is causing concern and reduce barriers to women considering acting as a surrogate.
- 8.68 We note that the Government interpretation means that surrogates would be entitled to paid parental leave for up to 26 weeks. While there may be an argument for a shorter period, given the surrogate is not caring for the child once it is born, on balance, we see merit in maintaining one rule for all pregnant people. Such an approach is simpler to administer and does not require changes to the law or to operational systems. It also promotes the relationship between the parties because they do not have to consider themselves who should be entitled to parental leave payments or how to share parental leave entitlements and because the surrogate’s entitlements are not affected by her decision to give the care of the child to the intended parents. Overall, we consider that it is justified for surrogates to access the same entitlements as other pregnant people.

Clarifying the effect of a surrogacy arrangement on benefits received under the Social Security Act 2018

RECOMMENDATIONS

- R50** The money value of any payments to (or for the benefit of) the surrogate for any reasonable surrogacy costs actually incurred in relation to the surrogacy arrangement should not be treated as income for the purposes of the Social Security Act 2018 other than payments that reimburse the surrogate for a loss of earnings.
- R51** Surrogates should be exempt from work-preparation and work-test obligations under the Social Security Act 2018 for a specified period of time after they have given birth.

- 8.69 In some cases, a surrogate may receive a benefit under the Social Security Act 2018.¹⁰⁹ We think that the effect of entering a surrogacy arrangement on a surrogate’s benefit entitlements and obligations under the Social Security Act should be clarified in two respects. This will ensure that surrogates who receive a benefit are not financially disadvantaged by their decision to enter a surrogacy arrangement.
- 8.70 First, we recommend that the money value of payments for any reasonable surrogacy costs actually incurred by the surrogate should not be treated as income for the purposes of the Social Security Act. This would include payments the surrogate receives directly from the intended parents to cover her surrogacy costs (other than payments for lost

¹⁰⁹ Benefits available under the Social Security Act 2018 include jobseeker support (ss 20–28) and sole parent support (ss 29–33).

earnings, discussed below) as well as the value of payments for surrogacy costs made to another person for the surrogate's benefit. Under the Social Security Act, both eligibility requirements and rates of assistance are income tested. Income is defined broadly as "the money value (before income tax) of a thing that ... is money received, or an interest acquired, by the person".¹¹⁰ The definition of income includes the value of any goods, services, transport or accommodation supplied on a regular basis to the person by any other person.¹¹¹ Payments made under a surrogacy arrangement could therefore be treated as income and affect the level of state assistance available to a surrogate.

- 8.71 The Social Security Act provides for regulations to declare certain payments from a specified source not to be income.¹¹² We consider that the money value of payments for the surrogacy costs as outlined above should be excluded from the definition of income. These payments are for costs that the surrogate would not otherwise have incurred but for the surrogacy arrangement and should not affect the surrogate's benefit entitlements. However, payments that reimburse the surrogate's lost income should not be excluded given the purpose of these payments is to replace income the surrogate would have otherwise earned had she not entered the surrogacy arrangement. It is appropriate that this be treated as income under the Social Security Act to avoid the surrogate obtaining a financial benefit from the arrangement.¹¹³
- 8.72 Second, we recommend that a surrogate who receives a benefit should be automatically exempt from certain obligations in the period immediately following the birth of the child. The Social Security Act imposes obligations on beneficiaries in respect of some benefits, including work-preparation and work-test obligations.¹¹⁴ While exemptions and deferrals of these obligations are available during pregnancy,¹¹⁵ there is no specific exemption for the period immediately following childbirth.¹¹⁶ A surrogate would therefore need to apply

¹¹⁰ Social Security Act 2018, sch 3, cl 3(a). The definition of income excludes an interest in capital received or acquired by the person: sch 3, cl 3(b).

¹¹¹ Social Security Act 2018, sch 3 cl 7.

¹¹² Social Security Act 2018, s 422 and sch 3 cl 9. Examples of income exemptions include Canterbury Earthquake payments, health services and disability support services, Christchurch mosques attack support payment and income, and energy dividends: Social Security Regulations 2018, sch 8 cl 4.

¹¹³ See discussion 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 [15.39]–[15.46]. The Commissions explored the option of the intended parents being able to cover any reduction in the surrogate's benefit caused by the surrogacy arrangement but noted that such payments could also constitute income that would, in turn, again reduce the surrogate's entitlement, at [15.43].

¹¹⁴ Social Security Act 2018, ss 109–154. Work-preparation obligations include a general obligation to take all steps that are reasonably practicable in the person's circumstances to prepare for employment, whereas work-test obligations include a general obligation to be available for, and take reasonable steps to obtain, suitable employment, accept any offer of suitable employment and attend and participate in an interview for any opportunity of suitable employment to which the beneficiary is referred by Te Manatū Whakahiato Ora | Ministry of Social Development: ss 124 and 144.

¹¹⁵ Social Security Regulations 2018, regs 75–76 address the deferral of work-test obligations for a person who receives jobseeker support on the ground of "health condition, injury or disability". The Social Security Act 2018, sch 2 explains that "health condition includes pregnancy after the 26th week". The Social Security Regulations also provide for exemptions from work-test obligations for sole parent support beneficiaries, including on the grounds that the person is at least 27 weeks pregnant or less than 27 weeks pregnant if Te Manatū Whakahiato Ora | Ministry of Social Development is satisfied that the person is suffering from complications arising from the pregnancy: reg 104(2)(b).

¹¹⁶ A person who receives the sole parent support benefit is required to meet work-test obligations but only once their youngest dependent child is aged 3 years or older: Social Security Act 2018, s 140(1)(d) and sch 2 definition of "work-tested sole parent support beneficiary". That exemption would not apply to the surrogate in respect of a surrogate-born child because that child is not a dependent child of the surrogate: sch 2 definition of "dependent child".

for a deferral or exemption on the general ground that they are suffering from a health condition, injury or disability that affects their ability to work.¹¹⁷

- 8.73 We consider that a surrogate who receives a benefit should be automatically exempt from work-preparation and work-test obligations for a defined period from the date of the child's birth. This would ensure that a surrogate is not subject to any sanctions if they fail to meet their obligations while they are recovering from pregnancy and birth.¹¹⁸ This would be consistent with the Compensation for Live Organ Donors Act 2016, which provides a statutory exemption from work-preparation and work-test obligations for organ donors while they recuperate from donor surgery.¹¹⁹ Te Manatū Whakahiato Ora | Ministry of Social Development must set an end date to the exemption taking into account when “the donor will have recuperated sufficiently to safely comply with the relevant obligations”, that date being no later than 12 weeks after the donor surgery.¹²⁰ We consider that a similar approach would be appropriate in the context of surrogacy. As we explain above, a period of 12 weeks in relation to post-birth paid employment leave received the most support from submitters.
-

¹¹⁷ Social Security Regulations 2018, ss 76 and 104(2)(c).

¹¹⁸ Pursuant to Social Security Act 2018, ss 126 and 153. Sanctions include reduction, suspension and cancellation of a person's main benefit: ss 236, 237 and 238.

¹¹⁹ Compensation for Live Organ Donors Act 2016, s 14.

¹²⁰ Compensation for Live Organ Donors Act 2016, s 14(3).

CHAPTER 9

International surrogacy

INTRODUCTION

- 9.1 International surrogacy, where the intended parents and the surrogate do not live in the same country, has become a global phenomenon over the past two decades. New Zealanders are pursuing international surrogacy arrangements for a variety of reasons, as we explain in Chapter 2. Most international surrogacy arrangements are commercial in nature.
- 9.2 In Chapter 3, we explain that a guiding principle of this review is to support New Zealand intended parents to enter surrogacy arrangements in Aotearoa New Zealand rather than offshore. This is because international surrogacy presents complex issues. Countries regulate surrogacy and legal parenthood in different ways. This can cause problems when intended parents seek to return to Aotearoa New Zealand with a surrogate-born child. The absence of any internationally agreed framework to regulate surrogacy also means that some international surrogacy arrangements lack the same protections for the child, the surrogate and the intended parents as domestic surrogacy arrangements.¹
- 9.3 Throughout this Report, we make recommendations that are designed to support intended parents to enter domestic surrogacy arrangements. We acknowledge, however, that some New Zealanders may continue to pursue international surrogacy, especially if they have a connection to another country, are unable to find a surrogate in Aotearoa New Zealand or prefer a commercial surrogacy contract.
- 9.4 In this chapter, we look at how surrogacy arrangements that occur overseas are dealt with by domestic law as well as global efforts to develop an international instrument to address the issues associated with international surrogacy. We make recommendations to ensure that international surrogacy arrangements are accommodated in Aotearoa New Zealand in a way that promotes the best interests of the child.
- 9.5 The focus of this chapter is arrangements where the intended parents live in Aotearoa New Zealand and the child is born to a surrogate overseas with the intent that the child is brought to live with the intended parents in Aotearoa New Zealand shortly after birth. Other scenarios involving international surrogacy are also discussed, with a view to clarifying the law as it applies to those circumstances.

¹ See for example UNICEF and Child Identity Protection *Key Considerations: Children's Rights & Surrogacy* (Briefing Note, February 2022) at 1.

CURRENT LAW

- 9.6 International surrogacy is not provided for in New Zealand legislation. The Human Assisted Reproductive Technology Act 2004 (HART Act) has no extraterritorial effect. This means that intended parents pursuing surrogacy overseas 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 does not apply.

Legal parenthood

- 9.7 When New Zealanders enter an international surrogacy agreement, New Zealand law is applied to determine the legal parents of the child. As with domestic surrogacy, the Status of Children Act 1969 establishes rules that determine legal parenthood in surrogacy arrangements. 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”.² Under these rules, the surrogate and her partner (if she has one) are, for all purposes, the legal parents of any surrogate-born child.³
- 9.8 Therefore, as with domestic surrogacy, the intended parents in an international surrogacy arrangement will not be automatically 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 who wish to have their parenthood status legally recognised under New Zealand law must therefore adopt the surrogate-born child.

Adoption and international surrogacy

- 9.10 New Zealand law recognises three different types of adoption: domestic adoption, overseas adoption and intercountry adoption.
- 9.11 Intended parents who live in Aotearoa New Zealand and enter 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 (provided an intended parent is a New Zealand citizen),⁴ a New Zealand passport⁵ and a New Zealand birth certificate.⁶
- 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

² Status of Children Act 1969, ss 16(1)(b) and 16(2)(b).

³ 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.

⁴ 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, ss 3(2)(d) and 3(2B)(d).

⁵ Passports Act 1992, s 3.

⁶ Births, Deaths, Marriages, and Relationships Registration Act 1995, s 24(2); Births, Deaths, Marriages, and Relationships Registration Act 2021, s 32.

will be entitled to New Zealand citizenship by descent⁷ and a New Zealand passport.⁸ However, they will not be entitled to a New Zealand birth certificate⁹ and will be unable to pass New Zealand citizenship on to any children born outside Aotearoa 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.¹⁰ It may, however, be possible that some foreign court orders transferring legal parenthood to the intended parents could be recognised as an overseas adoption, particularly for citizenship purposes. For example, intended parents who are habitually resident overseas might apply to Te Tari Taiwhenua | Department of Internal Affairs (DIA) to register a child's citizenship by descent in reliance on a foreign court order. Whether such an order meets the requirements of section 17 of the Adoption Act will be assessed by DIA on a case-by-case basis. Alternatively, an application can be made to te Kōti Matua | High Court for a declaration that an overseas court order meets the requirements under section 17 of the Adoption Act,¹¹ 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.¹² In 2010, a Special Commission concluded that use of the Convention in cases of international surrogacy was inappropriate.¹³ In Aotearoa New Zealand, the established approach of te Kōti Whānau | Family Court is that the Convention will not apply in the context of an international surrogacy arrangement.¹⁴

⁷ Citizenship Act 1977, ss 3(2)(b) and 7.

⁸ Passports Act 1992, s 3.

⁹ 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 (or its replacement the Births, Deaths, Marriages, and Relationships Registration Act 2021).

¹⁰ The Family Court Caseflow Management Note envisions that international surrogacy arrangements will proceed as an adoption under the Adoption Act 1955 rather than be recognised as an overseas adoption under s 17: *Family Court Caseflow Management Note* (November 2017) at 5–7.

¹¹ *T v District Court at North Shore (No 2)* [2004] NZFLR 769 (HC) at [23].

¹² 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.

¹³ Special Commission on the practical operation of the 1993 Hague Intercountry Adoption Convention *Conclusions and Recommendations* (17–25 June 2010) at [25].

¹⁴ The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption applies where a child “habitually resident” in one country is being moved to another country by adoptive parents “habitually resident” in another country. Te Kōti Whānau | 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 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].

Efforts to develop an international instrument on international surrogacy

- 9.15 Currently, there is no international instrument that governs international surrogacy like there is for intercountry adoption. It is recognised, however, that the issues posed by international surrogacy are difficult to resolve through individual state action,¹⁵ and international efforts are ongoing.
- 9.16 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.¹⁶ An 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.
- 9.17 The Experts' Group comprises specialists representing member states and includes a representative from Aotearoa New Zealand. Its work includes considering how a protocol could provide for the recognition of legal parenthood established in the surrogate-born child's country of birth.¹⁷ 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 child, the surrogate and the intended parents.¹⁸ What these safeguards are and whether they should be conditions for recognition or grounds for non-recognition are still being considered.¹⁹ The Experts' Group is expected to submit its final report to the Council on General Affairs and Policy of the Hague Conference in 2023.
- 9.18 Given the different approaches and attitudes towards surrogacy and its regulation worldwide and evolving surrogacy practices in underregulated countries around the world, questions remain as to whether it will be possible to develop an effective, uniform approach under an international instrument.²⁰ It is, however, expected that consensus on a process for recognising legal parenthood in international surrogacy arrangements can be achieved.²¹

¹⁵ 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].

¹⁶ 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>.

¹⁷ 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].

¹⁸ 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].

¹⁹ 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].

²⁰ Louisa Ghevaert "International surrogacy law: existing conflicts unresolved" *BioNews* (online ed, London, 14 March 2022); 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].

²¹ 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.

New Zealand joint government agency approach to international surrogacy

- 9.19 In the absence of any international instrument or New Zealand legislation addressing international surrogacy, a New Zealand joint government agency approach to international surrogacy was developed.²² 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.
- 9.20 A central tenet of the joint government agency approach is the protection of the rights of the child.²³ 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, freedom from discrimination and protection from abuse, exploitation and sale.²⁴
- 9.21 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),²⁵ even if the child is a genetic child of one or both intended parents.
 - (b) The child therefore must 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 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.²⁶

²² 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).

²³ 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.

²⁴ UNICEF and Child Identity Protection *Key Considerations: Children's Rights & Surrogacy* (Briefing Note, February 2022).

²⁵ 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.

²⁶ *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

- (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.²⁷ The child will not be eligible for a residence visa because the child is not a legal child of the intended parents.²⁸
- 9.22 The joint government agency approach recognised the need to mitigate, as much as possible, the risks and cross-border issues identified above. The approach is publicised in a fact sheet that is available on the relevant government agency websites.²⁹
- 9.23 Under the joint government agency approach, New Zealanders considering international surrogacy are strongly advised to seek legal advice and consult Oranga Tamariki | Ministry for Children, DIA and Immigration New Zealand before beginning the process.³⁰ Once a viable pregnancy is achieved, Oranga Tamariki can start the adoptive applicant assessment, which is required as part of the domestic adoption process (see Chapter 6). This will then form part of the briefing for the Minister of Immigration to consider when deciding whether to grant a temporary visitor visa in respect of the surrogate-born child.
- 9.24 The Minister of Immigration exercises discretion to grant a temporary visitor visa in respect of a surrogate-born child in accordance with a set of Ministerial non-binding guidelines, which were developed and agreed by Cabinet in 2010.³¹ The non-binding guidelines provide that the Minister may consider:³²
- (a) whether there is a genetic link between at least one of the intended parents and the child;
 - (b) the outcome that is in the best interests of the child;
 - (c) New Zealand's international obligations;
 - (d) the nature of the surrogacy arrangement (whether it is altruistic or commercial);

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 Dissertation, Leiden University, 2018) at 55–57 and ch 7.

²⁷ 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.

²⁸ Immigration New Zealand “International Surrogacy” <www.immigration.govt.nz>. Confirmed in *Re IL (dependent child)* [2020] NZIPT 205529 at [73] and [96].

²⁹ 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>.

³⁰ 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.

³¹ 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.

³² 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.

- (e) whether the intended parents intend to or have taken steps to secure legal parenthood or other legal rights in respect of the child in Aotearoa New Zealand;
 - (f) what the intended parents have done in the child's country of birth to secure legal parenthood or other legal rights in respect of the child;
 - (g) whether the applicants have demonstrated respect for the laws of the jurisdiction in which the surrogacy was carried out;
 - (h) whether there is satisfactory evidence of informed consent from:
 - (i) any gamete donors;
 - (ii) the surrogate, for the surrogacy arrangement to take place;
 - (iii) the surrogate and any partner, for the child to depart the country of birth and enter Aotearoa New Zealand; and
 - (iv) the surrogate and any partner, for the child's adoption;
 - (i) steps taken by the intended parents to preserve the child's identity;
 - (j) whether the recognised authority of the birth country has agreed or objects to the child leaving the country permanently; and
 - (k) any other considerations that the Minister wishes to take into account.
- 9.25 Visitor visas are typically granted in respect of a surrogate-born child for 12 months, during which time the adoption application will be made to the Family Court.
- 9.26 In situations where a surrogate-born child cannot acquire a passport in their country of birth, DIA 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 surrogate-born children to take circuitous routes to Aotearoa New Zealand.

Impact of the Covid-19 pandemic

- 9.27 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.³³ New Zealand intended parents have also been affected by border closures and flight cancellations.³⁴
- 9.28 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 the Family Court Covid-19 Protocol for the Adoption of New Zealand Surrogate Babies born

³³ See for example Maria Varenikova "Mothers, Babies Stranded in Ukraine Surrogacy Industry" *The New York Times* (online ed, New York, 15 August 2020). The invasion of Ukraine is also having significant implications for some surrogacy arrangements. See for example Andrew E Kramer and Maria Varenikova "In a Kyiv Basement, 19 Surrogate Babies are Trapped by War but Kept Alive by Nannies" *The New York Times* (online ed, New York, 13 March 2022); Marion Langford "Aussie parents' desperate journey to reach their premature baby daughter in Ukraine" *NZ Herald* (online ed, New Zealand, 27 February 2022); Simon Carswell "Irish couples awaiting surrogacy births in Ukraine face 'daily horror'" *The Irish Times* (online ed, Dublin, 27 February 2022).

³⁴ 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).

overseas (Covid-19 Protocol).³⁵ This enables adoption applications under the Adoption Act to be considered by the Family Court when the intended parents and child are not physically present in Aotearoa New Zealand. Applications are determined remotely, and consequently, surrogate-born children receive New Zealand citizenship and a New Zealand passport before travelling to Aotearoa New Zealand. The Covid-19 Protocol also provides for specific registries and judges to oversee all international surrogacy adoption applications or hearings, for applications to be filed electronically and for a remote hearing to be scheduled within a maximum of six weeks.

9.29 A further aspect of the adoption process is streamlined under the Covid-19 Protocol. Oranga Tamariki social workers who conduct adoptive applicant assessments of intended parents are permitted to perform interviews via audio visual link, including a post-birth interview. Reports required under section 10 of the Adoption Act must also include consideration of the same factors contained in the Ministerial non-binding guidelines, outlined above. The Covid-19 Protocol also provides that, ideally, social workers will commence assessments before the birth of the child, and they will have access to documents, including:

- (a) a copy of the surrogacy arrangement contract;
- (b) proof of consent from the surrogate (and her partner, if applicable) for the adoption application and the child travelling to New Zealand to reside permanently;
- (c) evidence of a genetic link between at least one of the intended parents and the baby; and
- (d) information about how the child will have access to information about their identity.

9.30 The Covid-19 Protocol is intended as a temporary response to the Covid-19 pandemic. It was initiated in August 2020 and its application has been extended, most recently in March 2022. The ongoing necessity of the Protocol is to be reviewed in September 2022.

ISSUES

9.31 As explained above, international surrogacy presents complex issues. Many of these arise because there are some fundamental differences in how countries regulate surrogacy and legal parenthood. This can create legal and practical problems when intended parents attempt to bring a surrogate-born child to Aotearoa New Zealand.³⁶ It also means that some international surrogacy arrangements may lack adequate protections for the surrogate-born child, the surrogate and the intended parents, potentially placing the parties at greater risk. We explore the potential risks of international surrogacy in Chapter

³⁵ Principal Family Court Judge Moran “Family Court Covid-19 Protocol for the Adoption of New Zealand Surrogate babies born overseas” (26 February 2021).

³⁶ This is illustrated in a recent case from the United Kingdom. In *Re X, Y and Z* [2022] EWHC 198 (Fam), three children were born as a result of commercial surrogacy arrangements in the United States. The intended parents, one of whom was a Danish citizen and the other a British citizen, lived in Denmark at the time. While Danish authorities originally recognised parenthood established in the United States and granted Danish citizenship to X and Y, when the intended parents sought to register Z, they were advised that citizenship had been granted in error and that, under Danish law, the intended parent who was a Danish citizen had no legal status as the children’s parent. The Danish authorities rescinded X and Y’s registration as the children of the intended parents and their Danish passports. The Danish authorities discussed deporting the children from Denmark, at which point the intended parent who was a British citizen registered the children as British citizens. The family subsequently relocated to the United Kingdom and sought a parental order in that jurisdiction, which was complicated further by the application being made outside the statutory timeframe. Ultimately, the Court exercised its discretion to extend the time limit and grant the application.

3. These include risks of exploitation, commodification and trafficking and risks to the child's rights to identity, nationality, family life, health and freedom from discrimination. These risks are likely to be greater in jurisdictions where surrogacy is not regulated or where safeguards are minimal.

- 9.32 With these risks in mind, in the Issues Paper, we considered issues with how Aotearoa New Zealand's current approach to international surrogacy is working in practice. We drew on the work of the UN Special Rapporteur and the Verona Principles, both of which consider how individual states should regulate international surrogacy.

How is New Zealand's approach to international surrogacy working?

- 9.33 In the Issues Paper, we explained that New Zealand's current approach where the intended parents live in Aotearoa New Zealand and the child is born to a surrogate overseas is pragmatic, using the existing frameworks of adoption and immigration law to ensure that:

- (a) intended parents have a 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 an international surrogacy arrangement 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 oversight to mitigate the risks international surrogacy poses to surrogate-born children, surrogates and intended parents in the absence of an international instrument that establishes agreed minimum safeguards.

- 9.34 The current approach has been described as having a "gatekeeping effect", which has "recalibrated the cross-border surrogacy machine for New Zealanders".³⁷ 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 overseas surrogacy process.³⁸

Problems with the current approach for children born overseas as a result of an international surrogacy arrangement

- 9.35 However, as we explained in the Issues Paper, the current approach still presents issues in several respects.

- 9.36 First, the process is complex. It involves several steps, some of which were not designed specifically for international surrogacy. Intended parents may face delays in returning to Aotearoa New Zealand with the surrogate-born child if they do not engage with Oranga Tamariki at the appropriate time (once the pregnancy is established) and could potentially face a period of family separation. This may place additional financial and emotional strain

³⁷ 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.

³⁸ 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.

on the intended parents and consequently raises concerns about whether the current approach is in the child's best interests.

- 9.37 Second, the intended parents must usually go through two legal processes to establish legal parenthood, one in the child's country of birth and another in Aotearoa New Zealand. For example, in California (the most common destination for New Zealanders pursuing international surrogacy),³⁹ intended parents will usually obtain a pre-birth court order that has the effect of establishing that the intended parents are the child's legal parents from birth under Californian law. In other jurisdictions, such as Australia or the United Kingdom, the intended parents may have undergone a legal process that closely aligns with the New Zealand adoption process. In these situations, intended parents may feel that the New Zealand adoption process adds unnecessary expense and delay at a time when they want to focus on caring for the newborn child. In cases where New Zealand intended parents are habitually resident overseas but wish to affirm their child's citizenship status, they may have to pursue a High Court declaration that an overseas court order meets the requirements under section 17 of the Adoption Act. If a declaration is not granted, they must adopt the child under the Adoption Act to pass on their citizenship.
- 9.38 Third, the domestic adoption process itself is not appropriate for surrogacy arrangements, whether domestic or international, for the reasons we set out in Chapter 6. Further, in the context of international surrogacy, some express the 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.⁴⁰ 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. The two-step nature of the non-binding guidelines process introduces ambiguity regarding the lines of accountability by blurring questions of legal parenthood and immigration. 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 not be in their best interests.⁴¹ Judges of the Family Court expressed similar misgivings to the Commission in comments on the Issues Paper, discussed below.

³⁹ 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). See discussion in Chapter 2 of this Report.

⁴⁰ This is a widely recognised problem with any regime where legal parenthood is determined after the child has entered the intended parents' country of residence. 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.

⁴¹ 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.

Problems when a child is born in Aotearoa New Zealand as a result of an international surrogacy arrangement

- 9.39 In the Issues Paper, we explained that 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 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).⁴²
- 9.40 In the absence of an international instrument, New Zealand's legal framework should encourage and provide for foreign intended parents to formalise their legal relationship to the surrogate-born child in Aotearoa New Zealand.

RESULTS OF CONSULTATION

Issues

- 9.41 We asked submitters whether they agreed with the issues we had identified with international surrogacy and whether there were any other issues we should consider. We received 178 submissions that addressed this question. Of these submissions, 74 per cent either agreed (62 per cent)⁴³ or agreed in part (12 per cent)⁴⁴ with the issues we had identified. Thirteen per cent of submitters did not agree with the issues we had identified,⁴⁵ and 12 per cent expressed no view.⁴⁶
- 9.42 Personal submissions generally agreed with the issues identified. One submitter with experience of international surrogacy as an intended parent said that "the process is a minefield ... it is incredibly difficult to manage the amount of paperwork and requirements". That submitter commented that the immigration process was unclear and uncertain from the intended parents' perspective.
- 9.43 Several personal submitters expressed concern about unethical surrogacy practices occurring overseas. The risk of exploitation of surrogates and the risks to the surrogate-born child were often highlighted. One submitter referred to well-publicised examples of wealthy foreigners arranging multiple surrogacy arrangements simultaneously in

⁴² See 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 [181]–[183].

⁴³ 111 submissions comprising 92 personal submissions, 15 submissions from organisations (Advisory Committee on Assisted Reproductive Technology, Australian and New Zealand Infertility Counsellors Association, Ethics Committee on Assisted Reproductive Technology, Federation of Women's Health Councils Aotearoa, Fertility Associates, Fertility New Zealand, Fertility Plus, New Zealand College of Midwives, New Zealand Council of Trade Unions, New Zealand Nurses Organisation, Nurse Practitioners New Zealand, Office of the Children's Commissioner, Oranga Tamariki | Ministry for Children, Repromed and Te Kāhui Ture o Aotearoa | New Zealand Law Society), comments from the Judges of the Family Court and 3 academic submissions (Dr Anne Else, Adjunct Professor Ken Daniels and Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly)).

⁴⁴ 21 submissions comprising 18 personal submissions, 1 submission from an organisation (Maternity Services Consumer Council) and 2 academic submissions (Associate Professor Rhonda Shaw and Australian academics Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff (submitting jointly)).

⁴⁵ 24 submissions comprising 22 personal submissions and 2 submissions from organisations (Center for Bioethics and Culture Network and Feminist Legal Clinic).

⁴⁶ 22 personal submissions.

developing countries.⁴⁷ Others were troubled by the application of different standards depending on whether a surrogacy is conducted domestically or internationally. These submitters felt that this ethical dilemma could only be remedied through rigorous assessment of the arrangement. One submitter with experience as a surrogate noted that the needs of the child should be the central consideration but also that Aotearoa New Zealand has a “duty of care” to surrogates based overseas to ensure the arrangement is “ethical”.

- 9.44 Several personal submitters supported our guiding principle that intended parents should be supported to enter surrogacy arrangements in Aotearoa New Zealand rather than offshore. One submitter said that there would be fewer international issues if New Zealand law was fairer and made surrogacy easier to achieve. Another submitter similarly noted that “keeping surrogacy arrangements within Aotearoa New Zealand will help them to be ethically conducted”.
- 9.45 In contrast, some personal submitters expressed the view that the reform process should not favour either domestic or international surrogacy. One personal submitter argued that reform should allow “consenting adults to make what choices they want (not limit them) in a safe environment for all parties, with the child’s best interests at the forefront”.
- 9.46 Academics expressed various concerns with international surrogacy and New Zealand’s current approach. Dr Anne Else considered the main issue was the difficulty of overseas surrogate-born children having access to or knowledge of any gamete donors and the surrogate. Dr Else noted that overseas surrogate-born children could be severely disadvantaged in this regard simply due to practicality but also because other countries may allow donors or even surrogates to be anonymous. Associate Professor Rhonda Shaw noted that issues including citizenship and potential statelessness addressed in the Issues Paper were important but there was also a risk that framing issues in this way would “normalise” international surrogacy arrangements despite their commercial nature. In their joint submission, Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff agreed in part with the issues we explored. However, they called for greater consideration of the issues that arise in international commercial surrogacy (as opposed to intranational altruistic surrogacy), including child trafficking and other criminal behaviour, the potential for coercion of the surrogate, the difficulties in obtaining fully informed consent, such as language barriers, upholding the surrogate’s autonomy to manage their pregnancy, the potential abandonment or rejection of surrogate-born children by intended parents and challenges arising from sudden changes in regulatory frameworks or clinic closures. They also agreed that there were gaps in the regime concerning protection of a child’s access to information.
- 9.47 Organisations generally acknowledged that international surrogacy will continue to be a pathway used by New Zealanders to build their families and that the Government’s approach needs to consider the increased risks associated with international surrogacy while also ensuring that the best interests of the child are protected and promoted. The

⁴⁷ The examples were of a “wealthy Japanese man” who became the sole parent to 13 children born as a result of surrogacy in Thailand in the early 2010s: Daniel Hurst “Japanese man wins sole custody of 13 surrogacy children” *The Guardian* (online ed, London, 20 February 2018); and of Kristina Ozturk and her husband who are raising 21 children born as a result of commercial surrogacy arrangements entered in Georgia: “Oh baby: A 24-year-old supermum who has 21 babies reveals how it became possible” *NZ Herald* (online ed, New Zealand, 5 December 2021).

Advisory Committee on Assisted Reproductive Technology (ACART), for example, submitted that:

ACART recognise the reality that international surrogacies for family formation will continue to be undertaken and that there is a need for both clarity in recognising legal parentage and for a smooth entry into New Zealand. However, ACART also recognises the risks inherent in international surrogacy arrangements in terms of the difficulty in accessing information about an individual's surrogate and potentially its genetic parents, and we prefer that domestic surrogacies are incentivised where possible.

- 9.48 Australian and New Zealand Infertility Counsellors (ANZICA) and Repromed similarly considered that there will remain a need for international surrogacy, explaining that:

As counsellors we are aware that there is a group of intended parents who may engage with international surrogacy because they have a family member who is a suitable surrogate living in a different country, as well as those intended parents who seek international surrogates because they struggle to find a surrogate in New Zealand.

- 9.49 The Maternity Services Consumer Council (MSCC) also said that they were aware of cases of “inter-family altruistic international surrogacy” and that, given high levels of migration, some New Zealanders may choose to enter into a surrogacy arrangement with a family member living in another country. MSCC submitted that these arrangements need to be accommodated alongside international commercial surrogacy arrangements.

- 9.50 Fertility New Zealand agreed with the issues identified and stated that:

While international surrogacy is an option people choose, it is often because they feel they can't achieve their goal of creating a family here in New Zealand. It is our hope that formalised support, structure and guidance around surrogacy here in New Zealand will encourage people to build their whānau in New Zealand. Also, with a stronger framework around surrogacy here, this will likely increase the pool of surrogates and donors, reducing the need for intended parents to look offshore.

- 9.51 Several submitters highlighted the risk of international surrogacy to a child's identity rights, including Oranga Tamariki and the Office of the Children's Commissioner (OCC).

- 9.52 Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) agreed with the issues identified and submitted that the question of how informed consent of the surrogate in a foreign jurisdiction is obtained needed to be addressed in legislation. It said that the advice provided to the surrogate should be provided by a New Zealand lawyer, that witnessing and certification of the consent should take place via audio visual links and that electronic documents should be accepted by the Family Court.

- 9.53 The Judges of the Family Court also agreed with the issues identified. They endorsed the comment in the Issues Paper that judges can feel constrained at times when considering international surrogacy arrangements under the current law. They explained that, at times, they have been concerned about the lack of process preceding the child entering the world and then Aotearoa New Zealand. However, they “have little option but to grant the adoption once the child is in New Zealand as to decline it would leave the child parentless and stateless”. Despite that concern, the Judges observed that their experience overall is that there is a good process in states where commercial surrogacy is legal and even in some states where surrogacy is simply not prohibited. They were, however, aware of some cases where the surrogacy occurred in a country where it was not legal and that, despite this, the surrogate-born children had been approved to travel to Aotearoa New Zealand under the special approval of the Minister of Immigration. The Judges said that these cases “suggest there may be some cracks in the current process”.

- 9.54 Submitters who did not agree with the issues identified and gave reasons for their view were generally opposed to surrogacy in principle or to permitting international commercial surrogacy on the grounds that it is inherently exploitative and commodifies women and children.

Our proposals for reform

- 9.55 In the Issues Paper, we identified three possible responses the Government could make to international surrogacy. It could:
- (a) prohibit New Zealanders from participating in international surrogacy (as some Australian states do);⁴⁸
 - (b) automatically recognise legal parenthood established in the surrogate-born child's country of birth; or
 - (c) accommodate international surrogacy within New Zealand's domestic framework for determining legal parenthood in surrogacy arrangements.
- 9.56 We rejected a prohibition approach, saying that it was important that Aotearoa New Zealand continues to provide a process for recognising New Zealand intended parents' legal parenthood in international surrogacy arrangements. We also rejected an automatic recognition approach. We proposed that, to promote the best interests of the child, international surrogacy should be accommodated within the court pathway of a new framework for determining legal parenthood in surrogacy arrangements.
- 9.57 Submitters were generally supportive of this proposal. We asked submitters whether they agreed that the court pathway should be available to New Zealand intended parents in international surrogacy arrangements. Of the 178 submissions that addressed this question, 70 per cent either agreed (62 per cent)⁴⁹ or agreed in part (eight per cent)⁵⁰ with the proposal, 17 per cent did not agree⁵¹ and 13 per cent expressed no view.⁵²

Support for the court pathway in international surrogacy

- 9.58 The need for a new framework for determining legal parenthood in circumstances of international surrogacy was widely supported in consultation.

⁴⁸ New South Wales, Queensland and Australian Capital Territory prohibit citizens from engaging in commercial surrogacy abroad: Surrogacy Act 2010 (NSW), s 11; Surrogacy Act 2010 (Qld), s 54; Parentage Act 2004 (ACT), s 45.

⁴⁹ 110 submissions comprising 88 personal submissions, 15 submissions from organisations (Advisory Committee on Assisted Reproductive Technology, Australian and New Zealand Infertility Counsellors Association, Ethics Committee on Assisted Reproductive Technology, Federation of Women's Health Councils, Fertility Associates, Fertility New Zealand, Fertility Plus, New Zealand College of Midwives, New Zealand Council of Trade Unions, New Zealand Nurses Organisation, Nurse Practitioners New Zealand, Office of the Children's Commissioner, Oranga Tamariki | Ministry for Children, Repromed and Te Kāhui Ture o Aotearoa | New Zealand Law Society), comments from the Judges of the Family Court and 6 academic submissions (Dr Anne Else, Adjunct Professor Ken Daniels, Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly), Associate Professor Maria Hook and Jack Wass (submitting jointly), Professor Mark Henaghan and Associate Professor Rhonda Shaw).

⁵⁰ 15 submissions comprising 14 personal submissions and 1 submission from an organisation (Maternity Services Consumer Council).

⁵¹ 30 submissions comprising 27 personal submissions, 2 submissions from organisations (Center for Bioethics and Culture Network and Feminist Legal Clinic) and 1 academic submission (Australian academics Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff (submitting jointly)).

⁵² 23 submissions comprising 22 personal submissions and 1 submission from an organisation (Te Tari Taiwhenua | Department of Internal Affairs).

9.59 While many personal submitters agreed with the court pathway, few gave their reasons for doing so. However, one personal submitter who had experience as an intended parent in an international surrogacy arrangement said that their own experience with the courts during the adoption process had been positive. They said having an experienced lawyer to guide them through the process was key. Notably, 20 other personal submitters who shared that they had experience as an intended parent or a surrogate agreed (15) or agreed in part (five) with the proposal. Other personal submitters who supported the proposal thought that a judicial process was needed to establish clarity for intended parents undertaking international surrogacy. One person supported the proposal with the proviso that the process was able to be completed quickly and that it should include genetic parenthood as a consideration.

9.60 Some personal submitters only agreed in part with the proposal because they thought intended parents should have access to an administrative process to recognise parenthood determinations made overseas.⁵³ These submitters thought the court pathway was better than the current approach, but they preferred an administrative option. One submitter commented:

I agree that the court pathway should be available to intended parents in international surrogacy if it is the court pathway that is put in place. However, I prefer the option that New Zealand recognise a determination of legal parenthood made in an overseas jurisdiction if that country has similar regulations of surrogacy arrangements, first and foremost. I think this to be the best, least stressful and safest option for all parties involved in international surrogacy.

9.61 Another personal submitter said:

There should be a more streamlined process available if the intended parents are able to demonstrate that the surrogacy and them being the legal parents of the child are in the child's best interests. We recognise that it may be administratively excessive to apply the full ECART process in international jurisdictions, but there are other options to solve this issue than just dismissing it out of hand (e.g., a panel of experts reviewing the process and documentation that was followed in the international jurisdiction). Further, it is reductive to argue that only countries with similar regulatory frameworks to New Zealand provide sufficient evidence to demonstrate that the surrogacy and the intended parents being the legal parents is in the best interest of the child. Countries with commercial arrangements such as the United States also have frameworks through which the surrogacy process could meet similar evidence thresholds.

9.62 In their joint submission, Associate Professor Maria Hook and Jack Wass expressed general support for the proposals in the Issues Paper. They considered that the law should specify clear jurisdictional requirements for any court process for determining legal parentage, whether the child is born in Aotearoa New Zealand or overseas. However, overall, they favoured a broad jurisdictional basis for parentage orders to be made in Aotearoa New Zealand, especially in the absence of any general recognition of foreign orders. Hook and Wass explained that there are “varied circumstances in which a child’s status may become relevant for the purposes of New Zealand law” and “it could cause real injustice if a child was left without a status ... from the perspective of New Zealand law simply because the jurisdictional requirements to make a parentage order are not satisfied”.

⁵³ See Chapter 6 of this Report for a description of the administrative pathway recommended for domestic surrogacy arrangements.

- 9.63 Organisations were generally supportive of the court pathway being available in international surrogacy arrangements. OCC submitted that “it is imperative that there be Court oversight over international surrogacies and not automated legal parenthood, which could be used for exploitation and support child trafficking”. ACART also agreed that:

Cases of international surrogacy should be decided by New Zealand courts on a case-by-case basis, and with the best interests of the child as a paramount consideration, which includes access to information. If the court approved the case, then the child would be eligible for a New Zealand birth certificate and citizenship.

- 9.64 NZLS supported the proposal for three reasons. First, the complexity of legal issues arising from international surrogacy and the variability of the processes and practices themselves warrant judicial scrutiny. Second, a judicial process is best placed to provide a check on risks such as trafficking and exploitation. NZLS said that Aotearoa New Zealand needs to take these risks seriously and maintain the rule of law. Third, a court process is desirable for the practical reason that court orders are recognised across jurisdictions. NZLS submitted:

It is desirable that there is a New Zealand court process for international surrogacy cases because these are the cases that are most likely to need to be recognised in other jurisdictions. A court order will be the best method for ensuring recognition in another jurisdiction. A court process is a familiar concept in most countries, and more easily explained to foreign lawyers and clinics by New Zealand citizen parents who are investigating surrogacy options in a foreign jurisdiction. The current adoption process that must be undertaken by both parents is something many overseas clinics, lawyers and surrogates struggle to comprehend.

- 9.65 The Judges of the Family Court also supported the court pathway. They agreed that Aotearoa New Zealand should not automatically accept other jurisdictions’ recognition of parenthood when there is no international standard. They referred to the Verona Principles, which provide that, where one state does not permit a specific arrangement, a court should determine the best interests of the child.

Opposition to the court pathway in international surrogacy

- 9.66 Submitters who opposed our proposal for a court pathway can be split broadly into three categories.

- 9.67 First, submitters who were generally opposed to surrogacy in principle or opposed to international surrogacy in particular. This included the Center for Bioethics and Culture Network and the Feminist Legal Clinic.

- 9.68 Second, submitters who thought the court pathway was inadequate to deal with the challenges posed by international surrogacy. For example, one personal submitter was not convinced the court pathway would provide an adequate check on the risks associated with international surrogacy and commented that the process might be susceptible to fraud:

I don’t believe the courts have the means or the time to find out if each international surrogacy arrangement is bona fide or not ... It would be very easy for New Zealanders to produce any kind of fraudulent document that our courts could not easily verify.

- 9.69 Associate Professor Galloway, Professor Keyes and Hoff in their joint submission were also concerned that the court pathway would not address all the challenges posed by international surrogacy, commenting that:

This is problematic because the court will be presented in all cases ... with a fait accompli. Although the report notes that the court must make any determination in the best interests of the child, it will inevitably find that it is in the best interests of the child to do so, even if the circumstances are extremely concerning ... The consequence is that the courts will have to sanction the arrangement, irrespective of how concerning the arrangement might have been.

- 9.70 The third category of submitters opposing our proposal for a court pathway comprised personal submitters who thought there should be a less-onerous process or automatic recognition of legal parenthood established overseas. One personal submitter said:

If the child can be proven to be linked by DNA to a New Zealand citizen, then NZ should automatically recognise that child and offer citizenship. International surrogacy is hard enough to navigate without taking into account local laws and regulations.

- 9.71 A couple with experience as intended parents in an international surrogacy arrangement were strongly opposed to the court pathway and thought that surrogacy arrangements should be treated more in line with the recognition of adoptions that have occurred overseas. One submitter said:

I think New Zealand should recognise overseas jurisdiction where it has been established legally. In our case, we received a Pre-Birth Order around 26 weeks of pregnancy which was a court order that established our parental rights and when our sons were born, their birth certificates were issued within 48 hours of their births with both our names on them as their parents and by the time our oldest son was 5 days old we had his US passport in our hands and we could have travelled home, however, we had to wait until 12 days for the surrogate to sign the Adoption Consent and then apply for the visa, this was the part that actually took longest.

...

Allowing for the overseas process to be recognised, and then being able to apply for citizenship by descent would speed up the process and allow the children to return home with their parents as soon as it's safe to fly. As you mention currently you need a dual legal process which is costly and unnecessary. We spent in excess of \$50,000 NZD just on lawyers in both countries for our first son.

The issues paper also implies that you want to discourage people to go overseas and one way to do that is by making it easier to obtain parentage in New Zealand, however, the cost alone is enough to discourage people to go overseas. We spent in excess of over \$600,000 NZD having both of our children. If you want to encourage people to do it in New Zealand then you need to make sure these reforms increase the number of surrogates in New Zealand as well as donors.

- 9.72 That submitter's partner submitted that:

Overseas jurisdictions which permit surrogacy have robust processes in place that do not need to be duplicated in New Zealand. Where there have been issues, such as in India, Cambodia, etc the governments in those countries have acted quickly to prevent overseas parents from doing surrogacy in those countries.

Operation of the court pathway in international surrogacy arrangements

- 9.73 In the Issues Paper, we identified two options for how the court pathway for international surrogacy arrangements could operate in practice:

- (a) 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.

- (b) 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.

9.74 Submitters generally expressed mixed views on these options. We asked submitters which option they preferred, and of the 158 submissions that addressed this question, 55 per cent preferred Option A,⁵⁴ 23 per cent preferred Option B,⁵⁵ 21 per cent preferred another option⁵⁶ and one per cent did not express a preference.⁵⁷

Support for Option A: Apply for order determining legal parenthood before returning to Aotearoa New Zealand

- 9.75 Personal submitters who supported Option A often commented on its simplicity and the certainty it affords intended parents. One submitter with experience as an intended parent in an international surrogacy arrangement thought that Option A would result in fewer last-minute applications and approvals and would enable travel arrangements to be made in a more timely manner. Another submitter noted the similarity of Option A to the current operation of the Covid-19 Protocol, which they supported because it provides “adequate protections and timescales” but “without the need for parents ... to return to New Zealand first to complete the court process”. Another submitter with experience as an intended parent in an international surrogacy arrangement said that they supported Option A over Option B because the latter had too many steps. That submitter noted that Option A still had downsides, however, because it involves costs associated with the court process and lacks a target timeframe, thereby risking the intended parents being “stuck overseas until this process is complete”.
- 9.76 Some submitters thought that Option A should go hand in hand with a pre-birth process to determine legal parenthood. One submitter thought that parents should be assessed before they enter an international surrogacy arrangement, while another thought that a pre-birth court process would promote the best interests of the child by “getting all legal processes out of the way before they are born”.
- 9.77 ACART supported Option A on the basis that it would simplify the acquisition of identity documents and would ensure the child could travel with the intended parents. ACART noted that a process as proposed under Option B would exacerbate the problem of the court's determination becoming a *fait accompli* because the child would have already been removed from their country of birth. ECART also preferred Option A. Fertility Associates, Fertility New Zealand and MSCC all supported Option A given the speed and efficiency of the process as well as the certainty it would provide to intended parents.

⁵⁴ 87 submissions comprising 71 personal submissions, 11 submissions from organisations (Advisory Committee on Assisted Reproductive Technology, Ethics Committee on Assisted Reproductive Technology, Federation of Women's Health Councils, Fertility Associates, Fertility New Zealand, Maternity Services Consumer Council, New Zealand Council of Trade Unions, Nurse Practitioners New Zealand, Office of the Children's Commissioner, Oranga Tamariki | Ministry for Children and Te Kāhui Ture o Aotearoa | New Zealand Law Society), comments from the Judges of the Family Court and 4 academic submissions (Dr Anne Else, Adjunct Professor Ken Daniels, Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly) and Associate Professor Rhonda Shaw).

⁵⁵ 36 submissions comprising 33 personal submissions and 3 submissions from organisations (Fertility Plus, New Zealand College of Midwives and New Zealand Nurses Organisation).

⁵⁶ 33 submissions comprising 30 personal submissions, 2 submissions from organisations (Center for Bioethics and Culture Network and Feminist Legal Clinic) and 1 academic submission (Australian academics Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff (submitting jointly)).

⁵⁷ 2 submissions from organisations (Australian and New Zealand Infertility Counsellors Association and Repromed).

- 9.78 NZLS supported a process that mirrors the Covid-19 Protocol, although it noted that any post-birth process could be overwhelming and costly for intended parents at a time when they would prefer to be focused on their newborn. It therefore supported front-end loading the process pre-birth as much as possible while acknowledging international best practice necessitates an element of post-birth oversight. NZLS noted the high degree of satisfaction among lawyers with the Covid-19 Protocol. It considered the process has been a success and has not compromised the integrity of the determination. Finally, NZLS noted that it is inevitable international surrogacy cases will involve a judicial process and therefore some delay. Nonetheless, providing a “clear pathway and the potential to front load the process will give those parties an incentive to engage early on with the appropriate authorities in New Zealand”.
- 9.79 OCC submitted that Option A was in the best interests of the child because it requires the parental relationship to be finalised before the child is brought to Aotearoa New Zealand and incentivises good process prior the arrangement taking place. In contrast, OCC considered that Option B presented more risks from the perspective of the child. These risks include the temporary nature of travel documentation and the hazard this presents to crossing the border. Further, OCC noted that a process under Option B may be a foregone conclusion. An overall benefit of Option A is the guarantee of the child’s citizenship prior to travel, which removes the prospect the child could be stateless.
- 9.80 Oranga Tamariki also supported Option A for the primary reason that this would allow an assessment of the intended parents prior to a child being born overseas. Oranga Tamariki submitted that this has worked well under the Covid-19 Protocol:
- In these cases, social workers have met the intending parents in person and had the opportunity to talk in depth about the needs of the child. A Skype call takes place post-birth and is a ‘proof’ of life call. These interviews are sufficient to provide relevant information in the report to the Family Court regarding the intending parents’ adoption application.
- 9.81 Oranga Tamariki cautioned, however, that there are situations where an international surrogacy arrangement will only come to the attention of authorities in Aotearoa New Zealand after the child has been born overseas. In this case, Oranga Tamariki submitted that best practice is for a social worker to meet the intended parents in person. This would require a process akin to Option B so a social worker’s report could be provided to the Family Court. Oranga Tamariki also supported addressing the situation of New Zealand citizens habitually resident overseas who wish to obtain citizenship for their surrogate-born children. Currently, they will be required to adopt in order to be recognised as legal parents.
- 9.82 The Judges of the Family Court also expressed support for Option A, likening it favourably to the Covid-19 Protocol process. They commented that this process is well established, has been shown to work and has received “overwhelmingly positive feedback about its efficiency and how it provides access to justice in a timely and efficient way”. Overall, they considered that Option A provided the best safeguard in accordance with international best practice. It provides an opportunity to assess surrogacy arrangements overseas as genuine and in the child’s best interests.
- 9.83 Dr Else also supported Option A and noted that it was imperative that the safeguard of Oranga Tamariki assessment remains. Dr Else further noted that domestic prohibitions on commercial surrogacy and “donor (or even birth mother) anonymity” have not prevented adoption orders from being made. Dr Else considered that the uncertainty of international

arrangements should mean that weight continues to be given to a proven genetic connection with at least one intended parent.

Support for Option B: Apply for order determining legal parenthood after returning to Aotearoa New Zealand

- 9.84 Few submitters who supported Option B gave reasons for their preference. One personal submitter with experience as an intended parent in an international surrogacy arrangement chose Option B because they were concerned that Option A would cause unwarranted delay and additional strain on the intended parents. They said:

Option A would cause a great deal of stress. What if the baby is premature? What if baby has medical needs? This would mean lengthy time away from home in what is already a long time away. You need to be home with your newborn, not in a strange country. What if the court systems are back logged and decisions are held up?

My lawyer pre-empted my application with the appropriate people and all checks and balances took place prior to my daughter's birth. This meant when I came back to New Zealand all paperwork was already completed. There should be some checks and balances, but the baby should be permitted to fly home to New Zealand.

- 9.85 Two other personal submitters thought that the process should depend on whether the child and the intended parents have a genetic link. For these submitters, proof of such a genetic link should be sufficient for both legal parenthood and immigration purposes. One said:

Surely that genetic link should be enough for the father, at least, to have parental rights, and the child (assuming the father is a citizen) to be a New Zealand citizen? I imagine the case where the child is not genetically linked to a New Zealand citizen to be rare and should be the only time immigration is concerned with the child.

What happens if a non-surrogate birth occurs overseas to New Zealand parents? Should be more like that.

- 9.86 Fertility Plus was the only organisation to comment on their preference for Option B. It submitted that Option B more readily addresses the complexities of international surrogacy arrangements by providing post-birth oversight. This oversight is needed to ensure the child's best interests are upheld especially since ECART does not have a role in international surrogacy. Fertility Plus acknowledged that Option B requires additional steps by intended parents to secure entry to Aotearoa New Zealand. However, it submitted these steps simply reflected "the nature and realities of international surrogacy".

Support for other options

- 9.87 Most submitters who preferred another option were generally opposed to surrogacy in principle or were opposed to international surrogacy. The remainder of submitters who preferred another option expressed several views. Some offered modifications to either Option A or B or expressed a preference for a model that incorporated both options. Some other submitters thought that parties to an international surrogacy arrangement should be able to gain "prior approval" in Aotearoa New Zealand. This conditional approval would ensure intended parents had a desired level of "security and certainty". Following the birth, intended parents could then submit evidence they had complied with the conditional approval and be granted final approval to return to Aotearoa New Zealand. Two personal submitters were in favour of automatic recognition of parenthood based on an overseas determination.

Recognition of determinations of legal parenthood made in comparable overseas jurisdictions

9.88 In the Issues Paper, we asked submitters whether Aotearoa New Zealand should recognise a determination of legal parenthood made in an overseas jurisdiction if that country has similar regulation of surrogacy arrangements. We received 174 submissions that addressed this question. Of these submissions, 66 per cent supported recognition of overseas determinations in comparable jurisdictions,⁵⁸ 20 per cent did not support recognition⁵⁹ and 15 per cent expressed no view.⁶⁰

Support for recognition of overseas determinations

9.89 Personal submitters in favour of this option generally thought that intended parents should only have to go through one legal process to establish legal parenthood. One submitter with experience as an intended parent explained:

Speaking as someone who went through surrogacy arrangements twice in Canada, this would be the best option. The surrogacy process in a country like Canada is robust, with checks and balances throughout the process, contracts drafted and the surrogate confirming the transfer of parental intent after the baby is born so that the intended parents' names are on the birth certification. New Zealand should recognise that process and thereby allowing the intended parents to not have to endure more procedural and costly hoop-jumping when a robust process has been followed overseas.

9.90 Some submitters acknowledged that a recognition regime might be of limited use given that most New Zealanders pursue international surrogacy in countries that are not comparable (because they permit commercial surrogacy). However, several submitters strongly favoured recognition of overseas determinations in countries that do not regulate surrogacy arrangements in the same way as Aotearoa New Zealand. For example, one submitter with experience as an intended parent in an international surrogacy arrangement said:

By far the most important destination for New Zealanders to find a surrogate is the USA and they have a very solid framework throughout all steps of a surrogacy arrangement. Most importantly they have safeguards to screen both surrogates and intended parents, they have professional agencies to handle all steps, they have a fair compensation model, and they have a solid success record over many decades.

When intended parents already establish their parental status in the USA and are legal parents as per birth certificate, there is absolutely no reason for New Zealand to not recognise such a status. The duplicate adoption process needs to be removed most importantly. It adds unnecessary costs of more than \$20,000 that practically change

⁵⁸ 114 submissions comprising 100 personal submissions, 12 submissions from organisations (Australian and New Zealand Infertility Counsellors Association, Ethics Committee on Assisted Reproductive Technology, Federation of Women's Health Councils Aotearoa, Fertility Associates, Fertility New Zealand, Fertility Plus, Maternity Services Consumer Council, New Zealand Council of Trade Unions, New Zealand Nurses Organisation, Nurse Practitioners New Zealand, Repromed and Te Kāhui Ture o Aotearoa | New Zealand Law Society) and 2 academic submissions (Adjunct Professor Ken Daniels and Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly)).

⁵⁹ 34 submissions comprising 25 personal submissions, 4 submissions from organisations (Advisory Committee on Assisted Reproductive Technology, Feminist Legal Clinic, New Zealand College of Midwives and Office of the Children's Commissioner), comments from the Judges of the Family Court and 4 academic submissions (Dr Anne Else, Professor Mark Henaghan, Associate Professor Rhonda Shaw and Australian academics Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff (submitting jointly)).

⁶⁰ 26 submissions comprising 25 personal submissions and 1 submission from an organisation (Center for Bioethics and Culture Network).

nothing. It literally only helps the lawyers who charge \$600 per hour for preparing template documents, without contributing anything of real value for the surrogate, the intended parents or the child.

- 9.91 Another personal submitter with experience as an intended parent through international surrogacy made similar comments:

I do not believe they need to be very similar, for example, commercial surrogacy arrangements made overseas should be recognised regardless of whether this is allowed in New Zealand. This work admits that it's not completely clear that commercial surrogacy should not be allowed in New Zealand but merely comes down on balance against allowing it here. This means there is not a strong reason for disregarding surrogacy processes done overseas that are commercial.

- 9.92 Organisations that supported a recognition regime often emphasised it should only be available in respect of jurisdictions with similar regulatory frameworks as Aotearoa New Zealand. ANZICA and Repromed submitted that a recognition regime might offer some “futureproofing” as more jurisdictions create regulatory regimes for surrogacy in response to the work of the Hague Conference and that having a simplified process may encourage people who are considering international surrogacy to choose destinations that have a similar framework to Aotearoa New Zealand. Fertility Plus was also supportive of a recognition regime that could incentivise intended parents to choose surrogacy destinations with similar safeguards to Aotearoa New Zealand. They cautioned, however, that there would need to be “robust measures in place to firstly assess the regulation in other countries and to continue to monitor and review” these jurisdictions.

- 9.93 NZLS proposed that there ought to be a conflicts of law provision similar to that in section 17 of the Adoption Act and that this should be drafted bearing in mind the ongoing work of the Hague Conference. Anticipating that it may take some time to finalise an international instrument on international surrogacy, NZLS considered it may be preferable to have two different categories of cases for recognition. NZLS suggested that there could be streamlined recognition processes for surrogate-born children:

- (a) where the intended parents are habitually resident (or long-term residents) in the child's country of birth; and
- (b) where the intended parents have obtained a post-birth parentage order or judgment from certain specified countries where there are adequate safeguards in place, such as England, some Australian states, South Africa, Vietnam and Canada.

- 9.94 NZLS considered that its category (a) should enable New Zealand-citizen parents who are habitually resident in another country and have acquired legal parenthood through a regulatory process in that country to register the child for New Zealand citizenship by descent. This would include New Zealand citizens resident in countries that do not have a similar surrogacy regulatory regime, such as the United States. NZLS submitted that it is expensive and time consuming as well as being logistically demanding for these parents to undertake an adoption or a similar kind of parentage pathway in order for the child to obtain the benefit of New Zealand citizenship by descent. NZLS distinguishes category (a) from those cases where the overseas jurisdiction has only been accessed by the intended parents for a limited period of time and for the sole purpose of surrogacy.

- 9.95 In relation to category (b), NZLS submitted that there is little to be gained from repeating legal parenthood processes where they have already occurred in countries with similar regulatory regimes to Aotearoa New Zealand. They note that DIA is already recognising post-birth parentage orders made in England and Tasmania on a case-by-case basis.

- 9.96 In their joint submission, Associate Professor Hook and Wass suggested that Aotearoa New Zealand should wait for the completion of the work of the Hague Conference before introducing specific rules on the recognition of foreign parentage determinations of surrogate-born children. They did, however, consider that foreign determinations could be given greater weight in the context of any New Zealand process for determining legal parenthood, especially in situations where there are no obvious reasons for second-guessing the foreign decision.

Opposition to recognition of overseas legal parenthood determinations

- 9.97 Submitters who opposed this option expressed different concerns. However, most personal submitters were generally opposed to surrogacy or to international surrogacy in principle.
- 9.98 Several organisations opposed the proposal on the basis that it does not protect the best interests of the child. ACART submitted that non-recognition “voids the risks of contravening international child protection protocols, particularly in countries with commercial surrogacy”. OCC was also opposed to the proposal on the basis that a court pathway would provide more protection for the child. OCC acknowledged that the proposal is consistent with the conflict of laws provision in section 17 of the Adoption Act but still preferred that Aotearoa New Zealand not automatically recognise transfers of legal parenthood in international surrogacy arrangements, especially in relation to countries with poor regulation of surrogacy “because it could be akin to supporting exploitation and sale of children, child trafficking etc that we as a country have agreed to avoid and help prevent”. The New Zealand College of Midwives expressed a preference that all cases be assessed on an individual basis and that ECART approval should be part of the process, a view also supported by Professor Mark Henaghan.
- 9.99 The Judges of the Family Court were also opposed to this proposal. They commented that a recognition regime alongside the availability of a court pathway for international surrogacy would create a “fragmented” approach. In their view, judges considering applications under the court pathway are capable of factoring in overseas determinations of parentage and will place appropriate levels of weight on them depending on the circumstances. The Judges submitted that the ongoing Hague Conference work is best-placed to provide a regime for cross-jurisdictional recognition.

Role of Oranga Tamariki in relation to international surrogacy

- 9.100 In the Issues Paper, we asked submitters whether Oranga Tamariki should have a clearer role in international surrogacy arrangements to reduce the risks associated with international surrogacy. We noted that Oranga Tamariki could run educational initiatives for people contemplating international surrogacy or could involve social workers earlier in international surrogacy arrangements.

- 9.101 We received 169 submissions that addressed this question. Of these submissions, just 48 per cent of submitters supported Oranga Tamariki having a clearer role,⁶¹ 34 per cent did not⁶² and 18 per cent expressed no view.⁶³
- 9.102 The views of personal submitters were mixed. Some were in favour of the proposal and welcomed more education and support. Other personal submitters opposed the proposal for several reasons. Some of these submitters were generally opposed to surrogacy or international surrogacy in principle. Other submitters thought that an educative or early intervention role was not an effective use of resources. Many personal submitters, including some who supported the proposal, expressed reservations as to whether Oranga Tamariki is the correct agency to deliver educational initiatives. Some suggested Manatū Hauora | Ministry of Health, ECART, a new government agency or a not-for-profit organisation as an alternative. Other submitters emphasised the need for any educator to have specialist skills, training and resources.
- 9.103 Some organisations also expressed reservations about Oranga Tamariki's role in international surrogacy. ECART noted that an educative role would depend wholly on the context and expertise required. For example, they cautioned that Oranga Tamariki would not be an appropriate authority to provide information on or oversee citizenship or residency issues. Fertility Associates, while supportive of Oranga Tamariki having a clearer role, expressed doubt as to whether Oranga Tamariki's "current imperatives are aligned with areas such as international surrogacy". The New Zealand College of Midwives considered Oranga Tamariki could play a positive role in both educative and early intervention capacities but it was concerned as to whether Oranga Tamariki had the capacity to undertake such work.
- 9.104 OCC submitted that Oranga Tamariki is not the correct agency to be involved in either education or assessment because its mandate is focused on child protection rather than the transfer of legal parenthood. OCC referred to its submission to Tāhū o te Ture | Ministry of Justice on its review of adoption law, in which it recommended removing the management of adoption services from the child protection framework.⁶⁴ In OCC's view, social workers or other professionals need not be employed by Oranga Tamariki but should have specific training in surrogacy issues so they can counsel intended parents on matters such as the child's rights to know their origins.
- 9.105 NZLS made a similar submission. It did not accept the premise that Oranga Tamariki should have an "extensive role in international surrogacy matters". Its view was that the

⁶¹ 81 submissions comprising 66 personal submissions, 11 submissions from organisations (Australian and New Zealand Infertility Counsellors Association, Ethics Committee on Assisted Reproductive Technology, Fertility Associates, Fertility Plus, New Zealand College of Midwives, New Zealand Council of Trade Unions, New Zealand Nurses Organisation, Nurse Practitioners New Zealand, Office of the Children's Commissioner, Oranga Tamariki | Ministry for Children and Repromed), comments from the Judges of the Family Court and 3 academic submissions (Dr Anne Else, Adjunct Professor Ken Daniels and Australian academics Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff).

⁶² 57 submissions comprising 52 personal submissions, 4 submissions from organisations (Center for Bioethics and Culture Network, Federation of Women's Health Councils Aotearoa, Feminist Legal Clinic and Te Kāhui Ture o Aotearoa | New Zealand Law Society) and 1 academic submission (Associate Professor Rhonda Shaw).

⁶³ 31 submissions comprising 28 personal submissions, 2 submissions from organisations (Advisory Committee on Assisted Reproductive Technology and Fertility New Zealand) and 1 academic submission (Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly)).

⁶⁴ Office of the Children's Commissioner *Adoption Law Reform: Submission to the Ministry of Justice: Adoption in Aotearoa New Zealand* (2021) at 24.

basis of the agency's current involvement is provision of a social worker's report to the court as part of the adoption process. Given the general agreement that the adoption process is not suited to surrogacy arrangements, NZLS suggested that there is also scope to reevaluate Oranga Tamariki's involvement in surrogacy arrangements. NZLS submitted that intended parents are currently "subjected to enquiries by Oranga Tamariki that are inappropriately exhaustive and intrusive" and that sectors of the public hold negative, distrustful views of the agency. They submitted that "even if erroneous, such perceptions do not align well with a role in international surrogacy situations and the need for a trusting, open and transparent exchange of information".

9.106 NZLS supported the gathering of "assessment information" for the court that is tailored to the specific circumstances of surrogacy. It saw this as being limited to information on the child's safety with the intended parents (including criminal record checks) and information as to how the intended parents plan to share identity information with the child. NZLS submitted that there needs to be a distinction between assessment enquiries that are largely administrative in nature and those requiring "specialist assistance". In their view, neither function needs to be overseen or performed by Oranga Tamariki. It considered that specialist assistance should be narrowly confined to the intended parents' plan for sharing identity information with the child. While this information can be provided through the intended parents' affidavit evidence, NZLS saw merit in this being supported by the following:

- (a) The provision of a certificate that the intended parents have completed an educative programme. NZLS suggested that the Ministry of Justice could deliver an education programme through appropriate contractors, noting that it already delivers educative programmes like Parenting through Separation.
- (b) Confirmation by a suitability qualified expert of the intended parents' plan around sharing identity information with the child. NZLS suggested this could be provided by a report writer for the court who may be a private counsellor or social worker with specialist experience in the field of fertility matters.

9.107 The Judges of the Family Court, in contrast, expressed a high level of confidence in Oranga Tamariki's involvement, given the value of its reports provided in adoption applications involving surrogacy arrangements. The Judges also noted the importance of early intervention by social workers in reducing legal matters that would otherwise come before the Court for determination.

CONCLUSIONS

Accommodating international surrogacy in New Zealand's domestic framework

RECOMMENDATIONS

- R52** Te Kōti Whānau | Family Court should have jurisdiction to make a parentage order under the court pathway in R25–R30 whether or not the surrogate-born child was born in Aotearoa New Zealand.
- R53** The Government should consider further a regime for the recognition of legal parenthood established in respect of surrogacy in other jurisdictions following the completion of the work of the Hague Conference on Private International Law on parentage and surrogacy.

- 9.108 We conclude that Aotearoa New Zealand must provide a process for recognising New Zealand intended parents' legal parenthood in international surrogacy arrangements. We consider that international surrogacy arrangements should be accommodated within New Zealand's domestic framework for determining legal parenthood in surrogacy arrangements, using the court pathway we recommend in Chapter 6. The Family Court should have jurisdiction to make a parentage order under the court pathway whether or not the surrogate-born child was born in Aotearoa New Zealand. This would promote the best interests of the child, provide a practical and pragmatic response to the issues posed by international surrogacy and meet Aotearoa New Zealand's international human rights obligations.
- 9.109 We acknowledge the view held by some that international surrogacy should be prohibited rather than accommodated in New Zealand law due to the potential risks it poses.⁶⁵ However, in our view, a prohibitive approach is not a viable option for two reasons. First, a prohibitive approach would fail to uphold international human rights law because it precludes an assessment of whether legal recognition of the parent-child relationship between intended parents and the surrogate-born child is in the child's best interests.⁶⁶ Second, a prohibitive approach is unlikely to be effective in practice. As we note in Chapter 1, attempts in Australia to prohibit intended parents from entering

⁶⁵ We note also the position expressed in the *International Principles for Donor Conception and Surrogacy* (November 2019), which were prepared by a group of surrogate-born and donor-conceived people (discussed in Chapter 3). Articles 15–16 call for extraterritorial prohibitions to prevent intended parents from circumventing domestic laws and engaging in cross-border assisted reproduction and to prevent intercountry transfer of gametes to avoid a child being separated from their genetic families by geographical, linguistic or cultural barriers.

⁶⁶ 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 10; and European Court of Human Rights Grand Chamber *Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother* (P16-2018-001, Strasbourg, 10 April 2019) at [46].

international commercial surrogacy arrangements have been assessed as a “failed experiment”.⁶⁷ As the UN Special Rapporteur has observed:⁶⁸

[T]he prohibition of surrogacy arrangements carried out abroad is problematic as domestic laws prohibiting surrogacy will often be sidestepped. States will inevitably be confronted with surrogacy arrangements carried out abroad, leading to issues surrounding, inter alia, rights to identity, access to origins and the family environment for the child. Such surrogacies should neither be automatically rejected nor accepted, the only valid consideration being the best interests of the child.

- 9.110 We agree with the UN Special Rapporteur that a “pragmatic response” to international surrogacy is necessary to ensure the paramountcy of the child’s best interests.⁶⁹ We note that, in Ireland, recent surrogacy law reform efforts have been criticised for not providing a legal framework to address international surrogacy arrangements.⁷⁰
- 9.111 We also acknowledge the view expressed by some submitters that intended parents should not have to go through a legal process in Aotearoa New Zealand to establish legal parentage if they have already done so overseas. We note that most submitters were supportive of a regime to recognise legal parenthood determinations made in comparable jurisdictions and that some submitters supported a wider recognition regime that includes jurisdictions that permit commercial surrogacy.
- 9.112 However, as we note above, there are fundamental differences in how countries regulate surrogacy and legal parenthood. 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 New Zealand’s obligations under international human rights law, including to take appropriate measures to protect children from abuse and exploitation.⁷¹ Confidence in the integrity of the circumstances of each surrogacy arrangement is essential to uphold the child’s rights.⁷²
- 9.113 An automatic recognition approach would also be inconsistent with the Verona Principles, which provide 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

⁶⁷ 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].

⁶⁸ 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].

⁶⁹ 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 [92].

⁷⁰ Ellen Coyne “Surrogacy bill ‘contrary to children’s rights’, says watchdog” *Irish Independent* (online ed, Ireland, 7 April 2022); Jennifer Bray “No legal framework in place for international surrogacy, committee hears” *The Irish Times* (online ed, Dublin, 7 April 2022); and “Rapporteur in ‘slow down’ plea on AHR bill” *Law Society Gazette* (online ed, Dublin, 11 April 2022). A special Oireachtas Committee on International Surrogacy has been established to consider and make recommendations on measures to address issues arising from international surrogacy: An Roinn Dlí argus Cirt | Department of Justice, Ireland “Government to establish Special Joint Oireachtas Committee on International Surrogacy” (press release, 21 January 2022).

⁷¹ See discussion in Chapter 3.

⁷² UNICEF and Child Identity Protection *Key Considerations: Children’s Rights & Surrogacy* (Briefing Note, February 2022).

conducted additionally by a court or other competent authority of the state where the intended parents intend to reside with the child.⁷³ This is relevant because international surrogacy arrangements are typically commercial in nature, and commercial surrogacy is prohibited in Aotearoa New Zealand. Post-birth best interest determinations are also recommended by UNICEF and Child Protection Identity whenever pre-surrogacy evaluations lack sufficient rigour.⁷⁴

- 9.114 While we see merit, in principle, in providing for recognition of parenthood determinations in comparable jurisdictions, we note that, in practice, most New Zealanders who enter surrogacy arrangements do so in jurisdictions that permit commercial surrogacy and therefore are not comparable, so such a regime would fail to achieve meaningful change.⁷⁵
- 9.115 For these reasons, we recommend that the Government should only consider a recognition regime for legal parenthood established overseas once the ongoing work on legal parentage and international surrogacy by the Hague Conference is complete. Should this work result in an international instrument that outlines minimum safeguards for international surrogacy or a clear process for recognition of legal parenthood, this would provide confidence that recognising the legal relationship between the intended parents and a surrogate-born child established in a member state is in the child's best interests.
- 9.116 Until such time, our view is that accommodating international surrogacy within the court pathway of New Zealand's domestic framework for determining legal parenthood in surrogacy arrangements is necessary to promote and protect the child's best interests. We accept that some view a post-birth process as less effective at regulating surrogacy arrangements than a pre-conception process. However, when a surrogacy arrangement takes place overseas, the ability of New Zealand institutions to oversee that arrangement is inevitably limited. The court pathway ensures a child-focused assessment once that child is born and, under our proposed procedure below, before the child enters Aotearoa New Zealand. As with parentage orders in the domestic context, this provides the Family Court with an opportunity to exercise oversight and put in place measures to respond to any concerns it detects in the arrangement. For example, the Family Court would be able to make any necessary orders under the Care of Children Act 2004, such as directing a party to undertake a parenting information programme.⁷⁶ Oranga Tamariki would continue to have involvement in these international surrogacy arrangements through the role of parentage order reporter (see Chapter 6).

⁷³ 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].

⁷⁴ UNICEF and Child Identity Protection *Key Considerations: Children's Rights & Surrogacy* (Briefing Note, February 2022).

⁷⁵ Of the 96 international surrogacy arrangements between 2016 and 2021 involving New Zealand intended parents of which Oranga Tamariki | Ministry for Children is aware, just 6 could be considered to have been arranged in a comparable jurisdiction (1 in Australia, 4 in Canada and 1 in South Africa).

⁷⁶ Care of Children Act 2004, s 46O. The only parenting information programme that is currently prescribed in regulations made under the Act is Parenting Through Separation: Care of Children (Parenting Information Programme) Regulations 2014, reg 3. This could be appropriate if the intended parents have separated. Additional information programmes could be prescribed in future that could be tailored to surrogacy generally or international surrogacy in particular if that is considered appropriate.

- 9.117 Another important benefit of providing for international surrogacy in the court pathway is that it would preserve information for the surrogate-born person on the surrogacy birth register (see Chapter 7) to the extent that information is known. In Chapter 2, we explain that many international surrogacy arrangements involve the use of anonymously donated gametes. This means that children born through international surrogacy may be unable to access information about their genetic and gestational origins in future. This is a significant issue for rights of surrogate-born people and one that requires an international response. In Chapter 10, we recommend the Government produce comprehensive information on surrogacy law and practice. It is essential that this includes information about international surrogacy and the importance to the child of preserving identity information for that child, including through the use of non-anonymous gamete donors.

Jurisdiction of the Family Court to make parentage orders

- 9.118 We do not propose to limit access to parentage orders to New Zealand citizens or residents. A broad jurisdictional approach is in line with Adoption Act⁷⁷ and with the general application of the Status of Children Act, which applies whether or not the birth or procedure takes place in Aotearoa New Zealand.⁷⁸ It also best accommodates the different situations that might arise in the international surrogacy context. For instance, it would accommodate situations where the intended parents are based overseas but the child is born in Aotearoa New Zealand and the surrogate does not want to retain legal parenthood under New Zealand law.
- 9.119 Our recommendations in this Report, taken as a whole, affirm the prohibition on commercial surrogacy. We therefore think the risk of Aotearoa New Zealand becoming a destination or forum for “surrogacy tourism” is low.⁷⁹ Nonetheless, the Family Court would continue to have the discretion to decline jurisdiction in appropriate cases,⁸⁰ for example, where there is insufficient connection between Aotearoa New Zealand and the applicant.⁸¹

⁷⁷ Adoption Act 1955, s 3(1). In *Norman v Attorney-General* [2021] NZCA 78, te Kōti Pira | Court of Appeal considered the relevance of immigration status when determining an adoption application. It stated that “[i]mmigration legislation gives way where an adoption order is made precisely because our statute book proceeds on the basis that if the purposes of the [Adoption] Act are engaged, they prevail over the purposes of the Immigration Act”, at [136].

⁷⁸ Status of Children Act 1969, s 16.

⁷⁹ For a discussion of surrogacy tourism see 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 [12.8]–[12.9].

⁸⁰ See Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [9.80]; and *Newport v Sumner* [2016] NZFC 10904, [2017] NZFLR 375.

⁸¹ See for example *Re P* [2000] NZFLR 181 (HC) at 184 and 186.

Procedure for parentage orders in international surrogacy arrangements

RECOMMENDATIONS

R54

Te Kōti Whānau | Family Court should adopt a special process for applications for parentage orders under the court pathway in R25–R30 where the intended parents live in Aotearoa New Zealand and the child is born to a surrogate overseas (international surrogacy protocol). The international surrogacy protocol should set out the information the Family Court considers relevant to its consideration of the matters in R27 in the context of international surrogacy and provide for:

- a. parties to file a notice of intention to make an application for a parentage order before the child is born and for the Registrar of the Court to appoint a parentage order reporter under R28 on receipt of such a notice;
- b. electronic filing;
- c. witnessing of affidavits by a barrister and solicitor of te Kōti Matua | High Court by audio visual link;
- d. hearings to be conducted via audio visual link and applications determined without requiring the parties to be physically present;
- e. priority scheduling of these matters;
- f. specialist judges to oversee proceedings;
- g. a streamlined registry process including immediate release of parentage orders and expedited notification to the Registrar-General; and
- h. any other procedures that reduce delays associated with an application for a parentage order.

R55

Te Tari Taiwhenua | Department of Internal Affairs should adopt procedures that expedite the approval of a surrogate-born child's passport after a parentage order is issued for the purpose of ensuring the child can travel to Aotearoa New Zealand as soon as possible after birth.

9.120 We recommend the Family Court adopt a special process for parentage order applications under the court pathway recommended in Chapter 6 where the intended parents live in Aotearoa New Zealand and the child is born to a surrogate overseas (international surrogacy protocol).

9.121 We consider that a special process for accommodating such international surrogacy arrangements under the court pathway is necessary to promote the best interests of overseas surrogate-born children, as recognised by the existing arrangements (the joint government agency approach and the Covid-19 Protocol). Unlike children born in Aotearoa New Zealand as a result of domestic surrogacy arrangements, who obtain New Zealand citizenship from birth and can be cared for by the intended parents from birth (see Chapter 6), children born overseas may be born stateless and face practical and legal obstacles to entering Aotearoa New Zealand until such time as the intended parents acquire legal parenthood under New Zealand law. The international surrogacy protocol is therefore necessary to ensure that an overseas surrogate-born child can obtain New Zealand citizenship and enter Aotearoa New Zealand with the intended parents shortly

after birth. This promotes the child's rights to identity, family life, nationality and health. The international surrogacy protocol also ensures that the Government can exercise oversight to mitigate the risks international surrogacy poses to surrogate-born children, surrogates and intended parents in the absence of an international instrument that establishes agreed minimum standards.

9.122 These recommendations adopt Option A as put forward in the Issues Paper (intended parents apply for a parentage order before they return with the child to Aotearoa New Zealand) and would put in place on a permanent basis the approach introduced by the Covid-19 Protocol. We prefer Option A over Option B (intended parents return to Aotearoa New Zealand with the child and then apply for a parentage order) for three reasons:

- (a) First, it would provide greater efficiency than Option B because it does not require two decision-making processes (a decision by the Minister of Immigration in relation to the granting of a temporary visa and a decision by the Family Court in relation to the adoption application).
- (b) Second, it is appropriate that the best interests of the surrogate-born child are assessed by the specialist Family Court in the first (and only) instance, with independent advice from the parentage order reporter.
- (c) Third, the experience with the Covid-19 Protocol demonstrates that Option A, which enables the Family Court to determine an application for a parentage order shortly after birth and before the child and intended parents return to Aotearoa New Zealand, is feasible, would work well in practice and would place a minimal operational burden on the Family Court. The Covid-19 Protocol has received positive response from parties, academics, practitioners and judges.⁸²

9.123 The international surrogacy protocol would, like the Covid-19 Protocol, allow for the parentage order reporter (see Chapter 6) to be appointed before the child is born, which would enable them to start preparing their report for the Family Court on the matters outlined in R27 and minimise post-birth administration. The international surrogacy protocol should outline information the Family Court considers relevant to its consideration of the matters in R27 in the international surrogacy context. We would expect this to include the matters currently outlined in the Covid-19 Protocol and the Ministerial non-binding guidelines. This may include additional information not typically required by the Court in relation to domestic surrogacy (such as information about the steps taken to secure legal parenthood in the child's country of birth, whether the surrogacy arrangement is altruistic or commercial and whether the parties have acted in accordance with the laws of the jurisdiction in which the arrangement was carried out).

9.124 The international surrogacy protocol would also put in place the necessary procedural modifications to ensure that applications can be heard and determined shortly after a child's birth, and before the child enters Aotearoa New Zealand. As with the Covid-19 Protocol, this should include the use of electronic filing and audio visual link to witness

⁸² See Margaret Casey "Changing practice in response to Covid-19: An evaluation of the temporary return pathway to New Zealand for international surrogate born babies" (2021) 23 *The Family Advocate* 26. A survey of members of the Family Law Section of Te Kāhui Ture o Aotearoa | New Zealand Law Society reported positively on the operation of the Covid-19 Protocol: Debra Wilson *Survey of Lawyers on Their Experience with Surrogacy Arrangements During Covid* (Te Whare Wānanga o Waitaha | University of Canterbury, 2021).

affidavits and conduct hearings, priority scheduling and specialist judges, and a streamlined registry process to reduce procedural delays in issuing parentage orders.

- 9.125 We do not recommend a requirement that the intended parents complete an educative programme as suggested by NZLS. Our preference is to ensure that the Government produce comprehensive information on surrogacy law and practice, including information for people considering international surrogacy, the risks involved and the importance of protecting and promoting the rights of the child including, for example, by ensuring identity information about any gamete donors is available. We make this recommendation in Chapter 10. The availability of such information, alongside the role of the parentage order reporter, should help to ensure that New Zealanders considering international surrogacy are aware of the associated risks and the importance of making decisions that prioritise the child's best interests.

Citizenship and parentage orders

RECOMMENDATION

R56

Section 3 of the Citizenship Act 1977 should be amended to ensure that a child who is the subject of a parentage order is treated the same way as a child adopted under the Adoption Act 1955 (or its replacement) for citizenship purposes.

- 9.126 We consider that surrogate-born children should enjoy the same rights and entitlements under our proposed legal parenthood framework as they do currently under the Adoption Act. A parentage order should therefore have the same effect as an adoption order under the Adoption Act (or its replacement)⁸³ to confer citizenship by birth on the overseas surrogate-born child provided one of the intended parents is a New Zealand citizen.⁸⁴ As we noted in the Issues Paper, this would respect the child's right not to be discriminated against on the basis of their birth circumstances, compared to surrogate-born children born in Aotearoa New Zealand.⁸⁵ It would also remove any advantage in pursuing an adoption order over a parentage order. There are two disadvantages to citizenship by descent as opposed to citizenship by birth. The first is that citizenship by descent is not automatically registered. It must instead be applied for separately. The second is that citizens by descent cannot pass on citizenship to any children born outside Aotearoa New Zealand.

⁸³ Tāhū o te Ture | Ministry of Justice is currently reviewing adoption law, which may result in the repeal and replacement of the Adoption Act 1955 with a new adoption statute.

⁸⁴ This is consistent with the specific carve-outs that apply to children born to diplomats, state service employees or armed forces personnel serving overseas as well as a specific carve-out for Tokelauan children born in Samoa whose mother through "medical necessity" had to travel from Tokelau to Samoa to give birth: Citizenship Act 1977, ss 6(4), 6(5).

⁸⁵ The citizenship status of surrogate-born children born in Aotearoa New Zealand is addressed in Chapter 6. There we explain that, consistent with the existing approach under s 16(2)(e) of the Adoption Act 1955, surrogate-born children should retain New Zealand citizenship it was passed on from the surrogate at birth or otherwise conferred under the Citizenship Act 1977 in situations where the intended parents are not New Zealand citizens. This would ensure that surrogate-born children are not disadvantaged under the new legal framework.

Citizenship where intended parents are not habitually resident in Aotearoa New Zealand

RECOMMENDATION

R57

As part of its review of adoption laws, Tāhū o te Ture | Ministry of Justice should consider whether amendments to the Citizenship Act 1977 are desirable to ensure an overseas adoption or other legal parenthood determination can be recognised for the purposes of establishing a surrogate-born child's entitlement to citizenship by descent in situations where the child's parents are not habitually resident in Aotearoa New Zealand. The Government's approach to overseas surrogate-born children should be consistent with the approach it takes in relation to children adopted overseas when the parents are not habitually resident in Aotearoa New Zealand.

- 9.127 In principle, we agree that there are good reasons why a parentage order should not be required simply to establish a child's citizenship status if the intended parents are New Zealand citizens who are habitually resident in another country. In these situations, the intended parents are not living in Aotearoa New Zealand, have not travelled outside Aotearoa New Zealand solely for the purposes of having a child through surrogacy and do not intend to permanently reside in Aotearoa New Zealand with the child immediately following their birth. The application for citizenship may be made several years after the child's birth and in all cases following the completion of a legal process in another jurisdiction. Requiring these intended parents to obtain a parentage order simply to pass on their citizenship is, in our view, unnecessary in order to promote the child's best interests or fulfil New Zealand's international obligations.
- 9.128 However, this issue raises broader questions as to how overseas adoptions are recognised for the purpose of citizenship. As noted above, under the current law, it is possible for an overseas legal parenthood determination to be treated as an overseas adoption under section 17 of the Adoption Act. This provision is currently being reviewed by the Ministry of Justice as part of its review of adoption law. As part of this work, we therefore recommend that the Ministry of Justice consider the need for a specific provision for citizenship to be passed on to surrogate-born children whose parents are not habitually resident in Aotearoa New Zealand. Consideration will need to be given to how habitual residence is defined to maintain a distinction between New Zealanders who travel outside Aotearoa New Zealand in order to have a child through surrogacy and New Zealanders who have a child through surrogacy while living overseas. This will ensure DIA takes a consistent approach to adopted and surrogate-born children when it receives an application to register citizenship by descent thereby avoiding discrimination based on the form or nature of a transfer of legal parentage determination.
-

CHAPTER 10

Improving access to surrogacy

INTRODUCTION

- 10.1 In this chapter, we address issues that affect access to surrogacy in Aotearoa New Zealand. We consider the availability of information about and public awareness of surrogacy in Aotearoa New Zealand, barriers to connecting intended parents and potential surrogates, the availability of experienced lawyers, public funding for surrogacy-related fertility treatment and the availability of donor gametes in Aotearoa New Zealand.
- 10.2 The recommendations we make to address 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. We note, however, that public funding and the availability of donor gametes are wider issues that affect fertility treatment in general. This means the ability to address these issues in this Report is limited.

ISSUES WITH ACCESS TO SURROGACY GENERALLY

- 10.3 In the Issues Paper, we asked submitters whether they agreed with the issues we had identified with the access to surrogacy in Aotearoa New Zealand and whether there were any other issues we should consider. We received 162 submissions that addressed this question. Of these submissions, 85 per cent either agreed (75 per cent)¹ or agreed in part (10 per cent)² with the issues we had identified. Nine per cent did not agree with the issues we had identified,³ and six per cent expressed no view.⁴

¹ 122 submissions comprising 109 personal submissions, 12 submissions from organisations (Ethics Committee on Assisted Reproductive Technology, Federation of Women's Health Councils Aotearoa, Fertility Associates, Fertility New Zealand, Fertility Plus, Maternity Services Consumer Council, New Zealand College of Midwives, New Zealand Council of Trade Unions, New Zealand Nurses Organisation, Nurse Practitioners New Zealand, Office of the Children's Commissioner and Repromed) and 1 academic submission (Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly)).

² 16 submissions comprising 13 personal submissions, 1 submission from an organisation (Te Kāhui Ture o Aotearoa | New Zealand Law Society) and 2 academic submissions (Adjunct Professor Ken Daniels and Associate Professor Rhonda Shaw).

³ 15 submissions comprising 13 personal submissions and 2 submissions from organisations (Center for Bioethics and Culture Network and the Feminist Legal Clinic).

⁴ 9 personal submissions.

- 10.4 Submitters commented on a range of access issues that are either discussed later in this chapter or earlier in this Report. Those who disagreed with the issues identified generally opposed surrogacy in principle.

Issues with access to surrogacy for Māori

- 10.5 In Chapter 2, we explain that the most recent available data suggests that Māori participation in surrogacy arrangements is low and that research highlights concerns regarding equity of access to fertility treatment for Māori. In the Issues Paper, we asked submitters whether our proposals to address access to surrogacy adequately address access to surrogacy by Māori.
- 10.6 We received 121 submissions that addressed this question. Of these submissions, 47 per cent thought our proposals would adequately address access to surrogacy by Māori,⁵ 15 per cent did not think our proposals were adequate⁶ and 38 per cent expressed no view.⁷ Few submitters provided reasons for their views. However, several submitters, including Australian and New Zealand Infertility Counsellors Association (ANZICA) and the Ethics Committee on Assisted Reproductive Technology (ECART), supported targeted information for Māori on fertility treatment and surrogacy. One personal submitter noted “there is a dire lack of knowledge around appropriate options for Māori in accordance with tikanga”. That submitter and Fertility Plus supported a robust review of access to surrogacy in a culturally appropriate and sensitive manner for Māori. Some submitters, including the Advisory Committee on Assisted Reproductive Technology (ACART), considered that cost is likely to be a barrier for Māori. Other submitters, including New Zealand Nurses Organisation (NZNO), supported further engagement with Māori as a way to identify and address access issues.
- 10.7 In Chapter 2, we recommend the Government commission research led by Māori to provide a better understanding of tikanga Māori and surrogacy and Māori perspectives on surrogacy in practice. We address the need for information targeted to Māori and for a review of funding below.

AVAILABILITY OF INFORMATION AND PUBLIC AWARENESS

Issues

- 10.8 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,⁸ often relates to a specific aspect of the surrogacy process, lacks detail and is

⁵ 57 submissions comprising 53 personal submissions, 2 submissions from organisations (Repromed and Te Kāhui Ture o Aotearoa | New Zealand Law Society) and 2 academic submissions (Adjunct Professor Ken Daniels and Associate Professor Rhonda Shaw).

⁶ 18 submissions comprising 14 personal submissions and 4 submissions from organisations (Australian and New Zealand Infertility Counsellors Association, Center for Bioethics and Culture Network, Fertility Plus and New Zealand Nurses Organisation).

⁷ 46 submissions comprising 42 personal submissions and 4 submissions from organisations (Federation of Women's Health Councils Aotearoa, Fertility New Zealand, New Zealand Council of Trade Unions and Office of the Children's Commissioner).

⁸ 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.

not easy to find. Information is also found on the websites of private organisations, including fertility clinics and Fertility New Zealand, a registered charity dedicated to providing information, support and advocacy to people experiencing fertility issues.

- 10.9 In the Issues Paper, we said that the limited availability of information on the surrogacy process, particularly from an official government source, was a concern raised with us in initial consultation. It generates confusion and misunderstanding as to what surrogacy involves and how it is regulated in Aotearoa New Zealand.

Options for reform

- 10.10 In the Issues Paper, we expressed our preliminary view that the Government should consider ways of providing comprehensive, clear and readily available information on surrogacy and raising public awareness. We suggested this could include:

- (a) producing a comprehensive information guide on surrogacy law and practice;
- (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; and
- (c) a one-off public information campaign, which could be timed to coincide with the implementation of the recommendations we make in this Report if accepted by the Government.

- 10.11 We also sought views on which government agency is best suited to provide this information and raise public awareness. We said that possible options include Manatū Hauora | Ministry of Health, Oranga Tamariki | Ministry for Children, ECART or ACART.

Results of consultation

- 10.12 We asked submitters which options to improve the availability of information and public awareness they preferred. We received 155 submissions that addressed this question.⁹ Of these submissions, 74 per cent preferred a comprehensive information guide on surrogacy law and practice,¹⁰ 83 per cent preferred a website to act as a centralised, official and up-to-date source of information for New Zealanders considering surrogacy¹¹ and 37 per cent preferred a public information campaign.¹²

⁹ Some submitters preferred more than one option, meaning the percentage of submissions referred to in relation to each option do not add up to 100.

¹⁰ 115 submissions comprising 101 personal submissions, 11 submissions from organisations (Federation of Women's Health Councils Aotearoa, Fertility New Zealand, Fertility Plus, Maternity Services Consumer Council, New Zealand College of Midwives, New Zealand Council of Trade Unions, New Zealand Nurses Organisation, Office of the Children's Commissioner, Office of the Health and Disability Commissioner, Repromed and Te Kāhui Ture o Aotearoa | New Zealand Law Society) and 3 academic submissions (Adjunct Professor Ken Daniels, Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly) and Associate Professor Rhonda Shaw).

¹¹ 129 submissions comprising 115 personal submissions, 10 submissions from organisations (Ethics Committee on Assisted Reproductive Technology, Fertility New Zealand, Fertility Plus, Maternity Services Consumer Council, New Zealand College of Midwives, New Zealand Council of Trade Unions, New Zealand Nurses Organisation, Nurse Practitioners New Zealand, Office of the Children's Commissioner and Repromed), comments from the Judges of the Family Court and 3 academic submissions (Dr Anne Else, Adjunct Professor Ken Daniels and Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly)).

¹² 58 submissions comprising 54 personal submissions and 4 submissions from organisations (Feminist Legal Clinic, Fertility Plus, New Zealand Nurses Organisation and Repromed).

- 10.13 Submitters generally confirmed the difficulty in finding information and the desirability of making more information available. One personal submitter commented that the information should be evidence-based and directed to both intended parents and surrogates. Another commented that having a website is fine as “the generation that is seeking surrogacy are all computer savvy”. One personal submitter suggested that a website should “be established with a step-by-step process, and there should be an ability to submit questions to an information/assistance service”. Another personal submitter observed that:

Currently there are private organisations that hold surrogacy information conferences and meetings. This is something the government could consider doing for interested parties. This could be similar to what Oranga Tamariki do in terms of adoption information meetings.

- 10.14 The Judges of the Family Court favoured a website to provide official and up-to-date information about surrogacy. ECART favoured a website that could provide an overview of assisted reproductive technology in Aotearoa New Zealand and also point to other interfaces with government, including importation and exportation of gametes. ANZICA supported a more comprehensive approach to support people considering surrogacy, similar to the role performed by the Victorian Assisted Reproductive Treatment Authority (VARTA):

We agree that access to information is fragmented and that a cohesive, integrated approach to information provision, regulation and support is needed. In conjunction with ACART and ECART, and working alongside iwi and pasifika health providers, we believe there is a call for a specific, central, independent government agency that provides education, information, support for ART treatments and processes, counselling and longer-term follow up (including donor, surrogate and recipient linking services) for consumers, and outcome research. This could be something akin to VARTA.

- 10.15 Adjunct Professor Ken Daniels submitted that “there needs to be extensive coverage of the ‘practice’ as this is where there is the greatest need on the part of those who would want to use surrogacy”. Daniels also noted that, while he was a member of ACART, it was a frequent frustration that an educational role was not included in its terms of reference.
- 10.16 Dr Anne Else submitted that any sources of information currently available paint an unrealistic, overly simplified picture of surrogacy and that it would be very useful to have an official site providing comprehensive, accurate information on surrogacy in Aotearoa New Zealand.
- 10.17 In their joint submission, Dr Liezl van Zyl and Dr Ruth Walker did not think there should be a public information campaign, saying, “Given limited resources, this should not be a priority.” Some personal submitters thought a public information campaign would be a waste of time, with one commenting that surrogacy is a niche area.

Which government agency should provide information and raise public awareness?

- 10.18 Submitters expressed mixed views on which government agency should provide information on and raise public awareness of surrogacy. Among personal submitters, the most preferred option was the Ministry of Health, with Oranga Tamariki the next preferred. The third preferred option was a new dedicated government body. Several personal submitters also proposed that a combination of agencies should work together to provide information, but there was little consistency in the agencies chosen. A few personal submitters preferred no involvement by a government agency either because of a distrust in government or because they objected to surrogacy in principle.

- 10.19 Of the academics who addressed this question, Adjunct Professor Daniels, preferred ACART while Dr Else preferred the Ministry of Health. Associate Professor Rhonda Shaw thought no government agency was best suited to undertake this role.
- 10.20 Of the 15 organisations that addressed this question, Nurse Practitioners New Zealand, the Maternity Services Consumer Council (MSCC), Fertility New Zealand, Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS), the New Zealand College of Midwives and ECART preferred the Ministry of Health performing this role. Many commented that there should be collaboration with health professionals including Māori and Pacific peoples health providers and other agencies such as ECART in the creation of such a website.
- 10.21 NZLS commented that it should not be Oranga Tamariki because:
- Historically, Oranga Tamariki comes from a child protection perspective. Assisted reproductive technology and surrogacy are not a response to a child protection issue but a response to medical and social fertility issues. In the current pathway, acquiring legal parenthood via adoption is often criticised by parties involved because they react negatively to the involvement of Oranga Tamariki. Many clients struggle with engaging with Oranga Tamariki (even if it is an adoption caseworker) because of the perception that the function of Oranga Tamariki is primarily to protect children and address “poor parenting”. It is important that the guidance is regularly updated.
- 10.22 ANZICA, Repromed and the Federation of Women’s Health Councils Aotearoa supported the establishment of a specific, central independent agency. ANZICA and Repromed suggested something similar to VARTA, as noted above. Repromed said that VARTA provides the “gold standard” in supporting donor conception and surrogacy arrangements and those involved in them. Repromed supported the Ministry of Health as an alternative.
- 10.23 ACART expressed no strong preference but observed that they did not believe ACART or ECART are best suited to provide information on and raise public awareness of surrogacy. ACART thought that Te Tari Taiwhenua | Department of Internal Affairs (DIA) could hold the information, with links to Ministry of Health, district health boards and fertility clinics. ACART favoured DIA as it holds information on births, adoption and the register established under the Human Assisted Reproductive Technology Act 2004 (HART Act), factors that also influenced the Office of the Children’s Commissioner (OCC) to favour DIA or alternatively the Ministry of Health.

Conclusions

RECOMMENDATION

R58

The Government should produce comprehensive and clear information on surrogacy law and practice. This information should be made available on a website that acts as a centralised, official and up-to-date source of information for New Zealanders considering having a child by surrogacy or becoming a surrogate. The information and website should be administered by Manatū Hauora | Ministry of Health.

- 10.24 There is a clear need for better information in relation to surrogacy law and practice in Aotearoa New Zealand. Improving the availability of information on surrogacy would be

consistent with international best practice.¹³ 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 the public can have confidence in the information accurately reflecting surrogacy law and practice.

- 10.25 When the law and practice relating to surrogacy in Aotearoa New Zealand changes, an information resource should be readily available to the public. It is also important that this information is kept up to date. To facilitate this, the information should be held online. We think a bespoke website holding this information should be established.
- 10.26 This website should act as a centralised, official and up-to-date source of information. It should address all aspects of the domestic surrogacy process and provide tailored information for both intended parents and women considering becoming a surrogate. The website should also provide information on international surrogacy. In Chapter 9, we explain that international surrogacy presents complex issues and that some international surrogacy arrangements lack the same protections for the child, the surrogate and the intended parents as domestic surrogacy arrangements. For example, one significant concern is the use of anonymously donated gametes in international surrogacy arrangements, which negatively impacts on a child's rights and long-term wellbeing (see Chapter 3). While the issues that international surrogacy raise are difficult to resolve through individual state action, it is imperative that clear and comprehensive information is made available to New Zealanders contemplating international surrogacy about these risks and the importance of protecting and promoting the rights of the child including, for example, by ensuring identity information about any gamete donors is available.
- 10.27 We think it is desirable that the Ministry of Health take responsibility for the establishment and maintenance of such a website given the responsibilities the Minister of Health and the Director-General of Health already have under the HART Act, including their roles in relation to ECART and ACART. This is consistent with the approach in other jurisdictions where health departments have a role in providing information about surrogacy arrangements.¹⁴ The Ministry of Health should consider whether ACART should also take a role in relation to the website. We are not persuaded that it is necessary to establish a new agency, nor do we think it is practical to share responsibility for a website between agencies (although this does not mean there should not be collaboration between agencies to prepare and update material on the website).
- 10.28 Information on the website should be easily understandable. Consideration should be given to setting out a step-by-step guide to the surrogacy process, the provision of checklists for intended parents and surrogates and the capacity to submit questions to

¹³ International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (Geneva, 2021) at [18.1].

¹⁴ See for example 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. See also Health Canada *Guidance Document: Reimbursement Related to Assisted Human Reproduction Regulations* (30 August 2019).

an information/assistance service.¹⁵ The Ministry of Health should consult with Oranga Tamariki, DIA and other stakeholders in the preparation of the website material, including the fertility clinics and Māori and Pacific peoples health providers.¹⁶

- 10.29 The Ministry of Health should consider the accessibility of the website to all users. Special attention should be given to ensuring information is accessible to disabled people and people for whom English is not their first language. The Ministry of Health will also need to ensure that the information on the website recognises te ao Māori and is otherwise culturally appropriate.
- 10.30 We do not recommend a one-off public information campaign. The value of such a campaign would be limited as it would only be useful to those interested in surrogacy at the time of the campaign. Further, people considering surrogacy as a way to build their family and women contemplating becoming a surrogate are likely to actively seek out information or be referred to the website by others, such as their fertility service provider. In our view, creating and maintaining a website as discussed above would be a more desirable and effective use of resources.

BARRIERS TO CONNECTING INTENDED PARENTS AND POTENTIAL SURROGATES

Issues

- 10.31 In the Issues Paper, we explained that it can be difficult for intended parents to find someone who is willing to act as a surrogate in Aotearoa New Zealand and that this challenge is a common reason for pursuing surrogacy overseas.
- 10.32 Currently, it is an offence to give or receive valuable consideration for arranging another person's participation in a surrogacy arrangement under the HART Act,¹⁷ which means advertisers cannot be paid for advertising in relation to surrogacy arrangements and 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.
- 10.33 In practice, many women who act as surrogates are family members or close friends of the intended parents. 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

¹⁵ See for example the information provided in Victoria: Victoria Assisted Reproductive Treatment Authority "Surrogacy" <www.varta.org.au>; and in Ireland, the proposed requirements on the Assisted Human Reproduction Regulatory Authority to prepare and publish on its website information documents that contain prescribed information in relation to surrogacy: An Bille Sláinte (Atáirgeadh Daonna Cuidithe) | Health (Assisted Human Reproduction) Bill 2022 (29) (Ireland), cls 12 and 14.

¹⁶ The Māori Health Authority, contemplated by Pae Ora (Healthy Futures) Bill 2021 (85-1), could also have a role in the development of information on surrogacy law and practice to ensure it meets the needs of Māori. Its proposed functions include, for example, providing policy and strategy advice to the Minister on matters relevant to hauora Māori, at cl 19(1)(h). The Minister can also direct that the Authority perform any other functions relevant to its objectives, at cl 19(1)(p).

¹⁷ Human Artificial Reproductive Technology Act 2004, ss 14 and 15.

parents and potential surrogates to connect but do not actively facilitate or “match” intended parents with a potential surrogate.

10.34 ECART, in its submission on the Issues Paper in 2021, observed that:

In the previous year it saw around a 50/50 split of surrogates who are a close family member or friend of the intending parents and surrogates who the intending parents met via social network platforms.

Options for reform

10.35 Many of our recommendations throughout this Report seek to reduce barriers for women considering becoming a surrogate in Aotearoa New Zealand. In Chapter 6, we recommend changes to legal parenthood laws to provide greater clarity and certainty about the rights and obligations of surrogates and intended parents. In Chapter 8, we recommend allowing surrogates to be reimbursed for reasonable expenses they incur in relation to a surrogacy arrangement and clarifying their entitlement to paid parental leave on the same basis as other pregnant people. In this chapter, we recommend the Government establishes a website to provide comprehensive and clear information on surrogacy law and practice, which could encourage some women to consider acting as surrogates.

10.36 There are additional steps that could be taken to reduce barriers to intended parents connecting with potential surrogates in Aotearoa New Zealand. In the Issues Paper, we considered three options:

- (a) Permitting advertisers to be paid for advertisements in relation to lawful surrogacy arrangements.
- (b) Establishing a surrogacy register to enable women who are interested in becoming a surrogate to register their interest and be matched with intended parents.¹⁸ Under this option, a surrogacy register would be administered by a government-appointed registrar, who would be responsible for:
 - (i) 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;¹⁹ and
 - (ii) matching potential surrogates and intended parents who would then decide whether they want to enter a surrogacy arrangement.

¹⁸ This was described as Option 1 in Te Aka Matua o te Ture | Law Commission *Review of Surrogacy* | Te Kōpū Whāngai: He Arotake (NZLC IP47, 2021), at [10.18]–[10.23].

¹⁹ 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.

- (c) Permitting private intermediaries to operate in Aotearoa New Zealand on a non-profit and regulated basis.²⁰
- 10.37 In the Issues Paper, we noted that a surrogacy register has been considered in Australia²¹ and suggested in Aotearoa New Zealand in a Member's Bill.²² In Australia, no state or territory has established a surrogacy register, despite general support for the concept.²³ In South Australia, legislation was introduced to establish a surrogacy register in 2015,²⁴ but that legislation was repealed before the register was set up, on the recommendation of the South Australian Law Reform Institute (SALRI).²⁵ 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, while well intentioned, raised privacy, policy and practical concerns and was inappropriate.²⁶
- 10.38 In the Issues Paper, we reached a preliminary view that a surrogacy register should not be established in Aotearoa New Zealand because:²⁷
- (a) providing a matching service may be an inappropriate extension of the state's role in what are fundamentally private arrangements;
 - (b) establishing a surrogacy register could duplicate existing regulatory safeguards that exist through the ECART approval process; and
 - (c) a surrogacy register may not be workable or effective in practice.
- 10.39 We also identified permitting private intermediaries to operate on a non-profit and regulated basis in Aotearoa New Zealand as another option. We noted the significant concerns that have been expressed about the operation of private intermediaries in surrogacy arrangements, particularly for-profit intermediaries that operate internationally. We referred to the use of non-profit intermediaries in the United Kingdom and the need for their regulation to create consistent standards and promote best

²⁰ In the Issues Paper, we noted the concerns expressed by the UN Special Rapporteur and others in relation to for-profit intermediaries, including that the presence of for-profit intermediaries increase the risk of commodification and exploitation of children and potentially surrogates. For these reasons, we did not propose for-profit intermediaries as an option for reform: *Te Aka Matua o te Ture | Law Commission Review of Surrogacy | Te Kōpū Whāngai: He Arotake* (NZLC IP47, 2021) at [10.25].

²¹ 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].

²² Improving Arrangements for Surrogacy Bill 2021 (72–1), 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.

²³ 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.

²⁴ Under the Family Relationships (Surrogacy) Amendment Act 2015 (SA).

²⁵ 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.

²⁶ 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.

²⁷ *Te Aka Matua o te Ture | Law Commission Review of Surrogacy | Te Kōpū Whāngai: He Arotake* (NZLC IP47, 2021) at [10.22].

practice. We observed 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, and that this could increase the cost of surrogacy for intended parents.

- 10.40 We did not express a preliminary view on the question of permitting paid advertisements. However, our preliminary view was that a surrogacy register should not be established in Aotearoa New Zealand and that the case for allowing non-profit regulated private intermediaries was not a compelling one.

Results of consultation

Permitting payment for advertisement of lawful surrogacy arrangements

- 10.41 In the Issues Paper, we asked whether advertisers should be able to receive payment for publishing advertisements in relation to lawful surrogacy arrangements. We received 169 submissions that addressed this question. Of these submissions, 44 per cent were in favour of permitting payment for advertising lawful surrogacy arrangements,²⁸ 38 per cent were opposed²⁹ and 17 per cent expressed no preference.³⁰
- 10.42 The submissions in favour of paid advertising focused on the need to help intended parents find a surrogate. They noted that surrogacy is a legal activity and that distinctions between paid advertising and social media were no longer relevant.
- 10.43 Repromed supported clarifying that advertising for a lawful (non-commercial) surrogacy arrangement is legal and said that:
- Since the HART legislation was created the landscape of surrogacy is much changed including the establishment of public forums which people use to try and find surrogates however forums do not suit everyone, and advertising should be a legal option available.
- 10.44 Fertility Associates had a similar view, observing that “the growth of social media and electronic media make the differentiation of outreach between ‘advertising’ and not advertising obsolete”. One personal submitter commented that “this restriction is absurd and severely limits the ability to find surrogates. Most social media platforms require paid advertising to reach outside your own network”.
- 10.45 NZLS commented that there is already a prevalent use of online forums and social media to connect people and that will always be difficult to regulate. NZLS also supported non-profit surrogacy organisations being able to advertise, although suggested guidelines should be developed in relation to advertising.
- 10.46 Some of the submitters who opposed paid advertising did so because they were opposed to surrogacy in principle. Some others considered that allowing paid advertising would prey on vulnerable women and promote the commercialisation of surrogacy. One

²⁸ 75 submissions comprising 65 personal submissions, 8 submissions from organisations (Advisory Committee on Assisted Reproductive Technology, Australian and New Zealand Infertility Counsellors Association, Ethics Committee on Assisted Reproductive Technology, Fertility Plus, Maternity Services Consumer Council, New Zealand Nurses Organisation, Repromed and Te Kāhui Ture o Aotearoa | New Zealand Law Society) and 2 academic submissions (Dr Anne Else and Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly)).

²⁹ 65 submissions comprising 56 personal submissions, 7 submissions from organisations (Center for Bioethics and Culture Network, Feminist Legal Clinic, Nurse Practitioners New Zealand, Federation of Women’s Health Councils Aotearoa, Fertility New Zealand, New Zealand Council of Trade Unions and New Zealand College of Midwives) and 2 academic submissions (Adjunct Professor Ken Daniels and Associate Professor Rhonda Shaw).

³⁰ 29 submissions comprising 28 personal submissions and 1 submission from an organisation (Office of the Children’s Commissioner).

submitter suggested that advertisements should only be permitted on a government-managed website. Another personal submitter who had experience as a surrogate said they did not think advertising was necessary as:

There are a number of online forums and websites where intended parents can meet surrogates. Personally, as a surrogate I would never respond to an advertisement. I prefer to 'stalk' someone (get to know someone via their presence online) before then contacting them and meeting them.

- 10.47 However, even some of those in favour of advertising were concerned that it be regulated to ensure the confidentiality of both potential intended parents and surrogates is protected and to avoid their exploitation. NZLS also submitted that there should be an absolute prohibition on advertisements involving existing children of the families involved or any children that may have resulted from a previous surrogacy arrangement.

Options for reform to reduce barriers

- 10.48 In the Issues Paper, we also asked whether additional steps should be taken to reduce the barriers intended parents face connecting with potential surrogates and, if so, whether submitters preferred the option of a government-run surrogacy register or of permitting the operation of non-profit and regulated private intermediaries.
- 10.49 We received 169 submissions that addressed this question. Of these submissions, 28 per cent favoured establishing a government-run surrogacy register,³¹ 39 per cent favoured permitting non-profit and regulated private intermediaries³² and 22 per cent preferred neither option and thought no additional steps should be taken.³³ In addition, 11 per cent of submitters preferred another option.³⁴ Some of these submitters preferred both options, while others suggested variations on the options of a surrogacy register or non-profit intermediaries.

Views on a government-run surrogacy register

- 10.50 For several personal submitters, any step that might increase the supply of surrogates and connect intended parents with surrogates was seen as desirable.
- 10.51 Several personal submitters thought that a surrogacy register should be operated by fertility clinics. One personal submitter commented that fertility clinics are well placed to play this role. They considered that this would encourage people to seek information and advice from a fertility clinic early in the process. That submitter commented that using

³¹ 48 submissions comprising 39 personal submissions, 8 submissions from organisations (Federation of Women's Health Councils Aotearoa, Fertility Associates, Fertility New Zealand, Fertility Plus, New Zealand College of Midwives, New Zealand Council of Trade Unions, New Zealand Nurses Organisation and Nurse Practitioners New Zealand) and 1 academic submission (Dr Liezl van Zyl and Dr Ruth Walker(submitting jointly)).

³² 66 submissions comprising 65 personal submissions and 1 submission from an organisation (Te Kāhui Ture o Aotearoa | New Zealand Law Society).

³³ 37 submissions comprising 30 personal submissions, 3 submissions from organisations (Australian and New Zealand Infertility Counsellors Association, Advisory Committee on Assisted Reproductive Technology and Office of the Children's Commissioner) and 4 academic submissions (Dr Anne Else, Adjunct Professor Ken Daniels, Associate Professor Rhonda Shaw and Australian academics Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff (submitting jointly)).

³⁴ 18 submissions comprising 13 personal submissions and 5 submissions from organisations (Center for Bioethics and Culture Network, Ethics Committee on Assisted Reproductive Technology, Feminist Legal Clinic, Maternity Services Consumer Council and Repromed).

online forums places pressure on intended parents to have a “relationship” with their surrogate, observing that:

It takes months if not years of effort and time creating a presence on the forum for the sole and ultimate purpose of eventually being seen to be actively involved in the community and worthy of ‘being chosen’.

- 10.52 That submitter thought a register would be a much better and fairer way to connect and that most intended parents and surrogates would choose this option over the current web forums.
- 10.53 Some personal submitters favoured a register including intended parents as well as potential surrogates. However, some submitters who favoured a surrogacy register expressed doubt about whether the government was best placed to establish and run it.
- 10.54 ECART said it did not have a preference about who manages a surrogacy register so long as they are regulated. ECART noted, that if fertility clinics were to hold a register and apply a similar process to surrogates as they do to gamete and embryo donors, this may improve “the quality of surrogates” and allow more people access to surrogacy arrangements.
- 10.55 Repromed expressed concern about some groups of intended parents facing particular barriers in finding surrogates, for example, because they come from an ethnic or social culture where surrogacy is not talked about or is illegal in their country of origin or because English is their second or third language. For those who do not use social media, do not have English as a first language or do not want others to know about their need for surrogacy, online forums do not offer a way to connect with a suitable surrogate. Repromed did not think there should be a government agency providing a matching service but did think a service could provide a central database of surrogates and intended parents and undertake police vetting of potential surrogates. Repromed saw this service being provided by a private non-profit regulated intermediary, audited under Ngā Paerewa Health and Disability Services Standard NZS 8134:2021 or by another government agency.
- 10.56 Fertility Plus favoured a surrogacy register. Fertility Associates observed that fertility clinics could have a role in bringing intended parents and surrogates together, as they do for gamete and embryo donation, and that this could be a better option than a new entity established to run a surrogacy register. However, it went on to say that:

Our counsellors are uncomfortable with clinics (or any agency) being a conduit for potential intending parents and surrogates to meet, thinking that it is best that people meet and get to know each other in a social environment. They see this as a protective factor that allows people to take time to see if friendship and trust can be developed, and to decline if a surrogacy relationship does not feel right.

- 10.57 In their joint submission, Dr van Zyl and Dr Walker favoured a surrogacy register but in a different form. They favoured a registration process that did not duplicate existing regulatory safeguards but instead formed part of the ECART process. They said:

So we don’t see it so much as a matching service as a way to streamline the process. Instead of the intended parents and surrogates going through the whole ECART process as a team, which necessitates going through the whole process again with a new surrogate if the first doesn’t work out, the first part of the process can be independent. Another benefit of a registration process is that it gives the registrar an opportunity to decline her application, without having to disclose the reason to the intended parents ... this prevents coercion of a friend or family member, who often come under significant emotional pressure to act as their surrogate. The fact that the registration process is confidential and

independent of the surrogacy arrangement, means that the surrogate can be honest about any reservations she might have.

- 10.58 ACART, while supporting reducing barriers to connecting intended parents and surrogates in principle, did not see this as a government role. It explained that intended parents already have many routes by which they can seek a surrogate, such as online support groups and Fertility New Zealand, and that the best connections “are those with existing relationships, such as family and friends”. ACART noted that, if the government were to play a role in match-making, it would also have to be responsible for the quality of the arrangement and checking or investigating each surrogate and intended parent. ACART considered that there are more important calls on government resources and that “the best arrangements are ones made between private individuals”.
- 10.59 MSCC strongly opposed a surrogacy register, considering it outside the scope of the public service and potentially posing a risk to the best interests of the child. It considered that the needs of a surrogate-born child are best served when surrogacy services are gifted by a whānau member or family friend. ANZICA also did not support a surrogacy register. Instead, it supported the establishment of a central agency similar to VARTA (discussed above) that would be able to support potential surrogates and intended parents coming to the process better informed. The Federation of Women’s Health Councils Aotearoa noted the difficulties experienced in Australia with a surrogacy register and thought more work and consultation is needed before a decision is made. The Federation and some personal submitters were also concerned about the cost for intended parents if a non-governmental organisation or private intermediary is involved in a surrogacy register. The Privacy Commissioner did not have a position on whether a surrogacy register is desirable but commented that, if there is a strong policy argument for a register, it should be possible to address privacy concerns through appropriate design of the register and of the legal framework establishing it.
- 10.60 A personal submitter who identified as a surrogate said they would never sign up to a register and that intended parents should instead get more involved in the surrogacy communities, getting their stories out there.

Views on non-profit and regulated private intermediaries

- 10.61 Some submitters who supported private non-profit intermediaries were generally supportive of any step being taken that could make it easier for intended parents to connect with potential surrogates. One submitter noted that there are already Facebook groups and a French for-profit site operating to connect intended parents and potential surrogates, making the point it is unlikely such services could be stamped out. Some submitters thought private entities would be better placed than government to connect intended parents and prospective surrogates. Several submitters favoured for-profit arrangements on the basis it would ensure arrangements occur in a manner that is beneficial to all parties. Another submitter said:

I went through an agency and I cannot fault them. They are ethical, and held to highest standards of the law. Government do not have the expertise to run a surrogacy screening program.

- 10.62 One personal submitter noted that fertility clinics already provide this service for donor gametes and that it would be a natural extension of their service to perform the same for surrogates and intended parents. Another said that allowing private non-profit intermediaries would likely result in better outcomes than a government-run body.

- 10.63 NZLS thought that non-profit surrogacy organisations that endorse altruistic surrogacy and ethical practices should be supported. NZLS considered that such organisations would start to assume a similar role and place in the surrogacy process as Inter-Country Adoption New Zealand (ICANZ) does with intercountry adoptions and that, to encourage domestic surrogacy, there need to be organisations that support the matching of families and provide early information on the surrogacy process.
- 10.64 MSCC thought websites and social media groups in the non-profit sector may already be providing services to connect potential surrogates and intended parents. They strongly favoured that such intermediaries be organisations with charitable status and that their services be monitored and regulated.
- 10.65 Some personal submitters supported allowing for-profit agencies to operate in Aotearoa New Zealand. One submitter suggested bringing in some expertise from the United States to support local staff in Aotearoa New Zealand. In contrast, other submitters were concerned that the introduction of private intermediaries would too closely resemble commercial surrogacy. Fertility Plus and the New Zealand College of Midwives did not agree with using private intermediaries. The comments of Fertility Associates and their counsellors are noted above.

Support for neither option — no additional steps needed

- 10.66 Some submitters thought neither a surrogacy register nor permitting private non-profit private intermediaries was desirable. This was the view of Adjunct Professor Daniels, Dr Else, Associate Professor Shaw, and Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff in their joint submission. Dr Else explained that, in her view:

Permitting surrogacy registers or private intermediaries or even actual payment is unlikely to greatly improve the ‘supply’ of people willing to become potential birth mothers. The reality is that most people do not want to use their gametes or their bodies in order for people who are not connected to them in any way to have children. Only poverty and the lack of other options have driven large numbers of women in some countries to be involved in surrogacy, often on exploitative terms. Sperm donation scandals where one man’s sperm is used scores or hundreds of times also continue to surface.

- 10.67 Several organisations expressed a similar view. ANZICA, for example, submitted:

We do not believe that a government agency should provide a matching service. Neither do we believe this is appropriate for private intermediaries, which could become commercialised, are not regulated and do not have the ability to ensure appropriate screening or implications counselling.

We believe that government has a responsibility to ensure the appropriate provision of consistent, comprehensive information, and support, as stated above.

- 10.68 OCC also held this view, saying:

Surrogacy arrangements are inherently personal, and best when they are between related people or friends, as the existing relationship strengthens the commitment to the arrangement, protecting the outcomes and the offspring. If government were to get involved, it would also have to both vet and vouch for surrogates and intending parents. There is a risk the government would get it wrong and then have responsibilities to put things right (eg through ACC payments). It would cost the taxpayer money that could better be spent on infant health, maternal mental health, or any number of priority health needs. Current systems that people use to find a surrogate are working.

- 10.69 Personal submitters who did not favour additional steps to reduce barriers expressed a range of views. One submitter said that the government should not be involved in

facilitating surrogacy arrangements. Rather, it should be about having clear and sensible regulatory control and education.

- 10.70 Several personal submitters were concerned about the cost either option could add to the surrogacy process (unless there was government funding). One submitter said that, if there was government funding, a government-run register would be welcomed or the government could administer and oversee others conducting this work similar to the way Oranga Tamariki and others assist with intercountry adoptions.
- 10.71 Other submitters who were opposed to the options identified above did not think further steps were necessary or were generally opposed to surrogacy in principle.

Conclusions

RECOMMENDATIONS

R59 The list of permitted payments in section 14(4) of the Human Assisted Reproductive Technology Act 2004 should be amended to include payment for advertisements in relation to lawful surrogacy arrangements.

R60 The information made available on the website recommended in R58 should explain that the best interests of children should be considered if referring to or using photos of existing children of the families involved or any children that resulted from a previous surrogacy arrangement.

- 10.72 We consider that the prohibition on paying for advertisements in relation to lawful surrogacy arrangements is 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.
- 10.73 As NZLS commented, there is already significant use of social media and online forums to connect intended parents and potential surrogates, and that will always be difficult to regulate. We agree with Fertility Associates and Repromed that the growth of social and electronic media makes the distinction between advertising and use of social media obsolete.
- 10.74 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.³⁵ We are not persuaded that Aotearoa New Zealand should follow the approach of some other comparable jurisdictions that prohibit advertising in relation to surrogacy altogether³⁶ out

³⁵ 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). See also Surrogacy Bill 2022 (50) (NT), cl 50.

³⁶ See Assisted Reproductive Treatment Act 2008 (Vic), s 45(1); Parentage Act 2004 (ACT), s 43; and Surrogacy Act 2010 (Qld), s 55. See also An Bille Sláinte (Atáirgeadh Daonna Cuidithe) | Health (Assisted Human Reproduction) Bill 2022 (29) (Ireland), cl 57.

of a desire to avoid any commercialisation of surrogacy and to keep surrogacy arrangements between family networks and close friends.³⁷

- 10.75 Consultation confirmed that finding a surrogate can be a key barrier for intended parents entering a surrogacy arrangement. Clarifying that it is permissible under the HART Act to pay for an advertisement to find a surrogate is one step that may help intended parents who are unable or unwilling to find a surrogate from within their family, whānau and friends. It will also assist those who prefer not to use social media to find a surrogate. It will support intended parents to enter surrogacy arrangements in Aotearoa New Zealand rather than offshore, which is a guiding principle of our review.
- 10.76 For these reasons, we recommend specifying in section 14(4) of the HART Act that the prohibition on the exchange of valuable consideration does not apply to payments made in relation to advertising for a lawful surrogacy arrangement. We think it is appropriate to retain the prohibition in section 15 of the HART Act on advertising that includes an offer to exchange valuable consideration in relation to unlawful surrogacy arrangements. This is consistent with our conclusion in Chapter 8 that Aotearoa New Zealand should continue to prohibit payments to surrogates beyond payments for the reasonable surrogacy costs they incur.
- 10.77 We acknowledge the concerns expressed about ensuring that any advertisements respect the privacy of the intended parents, potential surrogates and any existing children of the families involved. These matters should be addressed in the material included on the website we recommend in R58 above in order to educate intended parents and prospective surrogates about the importance of protecting children's privacy as part of acting in their best interests. We do not think that advertising in relation to lawful surrogacy arrangements needs to be regulated beyond the existing general law.³⁸

No provision for a surrogacy register

- 10.78 We do not recommend establishing a surrogacy register to enable women who are interested in becoming a surrogate to register their interest and be matched with intended parents. We have reached this conclusion for several reasons.
- 10.79 First, we think that providing a matching service for a surrogacy arrangement is an inappropriate extension of the state's role in what are fundamentally private arrangements. We consider 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.³⁹ In this context, we note the views of counsellors at Fertility Associates who expressed greater confidence in surrogacy arrangements that are made following the establishment of a relationship between intended parents and a surrogate and the long-term benefits that

³⁷ Investigation into Altruistic Surrogacy Committee *Report* (Queensland Parliament, Brisbane, October 2008) at 37.

³⁸ This could include the law relating to privacy and the Advertising Standards Code (in relation to which complaints may be made to the Advertising Complaints Authority).

³⁹ 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.

this can bring for any resulting child. We also note that neither ANZICA nor OCC favoured establishing a surrogacy register.

- 10.80 Second, establishing a surrogacy register would duplicate the regulatory safeguards that exist through the improved ECART approval process we propose in Chapter 5. As we said in the Issues Paper, if the surrogacy register is to provide a safer environment for potential surrogates to meet intended parents than is currently available, 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.⁴⁰
- 10.81 Third, a surrogacy register may not be workable or effective in practice. As noted earlier, there has been a significant increase in the use of online forums and social media to connect intended parents and potential surrogates. As evidenced through some submissions, surrogates may not wish to sign up to a state-run register, especially if that involves a more complex application process and some form of assessment. For intended parents, signing up to a register may involve 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".⁴¹
- 10.82 Fourth, consultation on the question of a surrogacy register did not allay our concerns. Just 29 per cent of submitters favoured this option, and organisations, including fertility clinics, expressed mixed views, as noted above. While some submitters focused on a greater role for fertility clinics in connecting intended parents and potential surrogates, similar to their role in relation to gamete and embryo donors, Fertility Plus and ANZICA opposed a surrogacy register and Fertility Associates counsellors also expressed concerns. Repromed did not favour a matching service, although it did suggest a central database of surrogates together with some assessment. As we noted above, we think this would duplicate the ECART approval process. Some submitters also raised concerns about the cost of establishing and running a surrogacy register, which would impact on intended parents unless it was publicly funded.
- 10.83 Finally, we are confident that the other recommendations we have made in this Report will reduce the barriers for intended parents connecting with potential surrogates. Overall, we do not think there is a convincing case for the Government to develop a surrogacy register in principle or given the costs necessarily involved in setting up and regulating such a register.

⁴⁰ We acknowledge the alternative proposal made by Dr Liezl van Zyl and Dr Ruth Walker in their joint submission, which is intended not to duplicate the ECART process. We do not favour their proposal given our other reasons against establishing a surrogacy register.

⁴¹ 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. We note also the comment made by a surrogate in their submission on the Issues Paper, set out above: "Personally, as a surrogate I would never respond to an advertisement. I prefer to 'stalk' someone (get to know someone via their presence online) before then contacting them and meeting them."

No provision for private intermediaries

- 10.84 We are not persuaded the law should permit private intermediaries to operate in Aotearoa New Zealand at this time, even on a non-profit and regulated basis. There are several reasons for our conclusion.
- 10.85 First, while we acknowledge that demand for surrogacy has increased and will likely continue to do so, we believe that the recommendations we make in this Report will reduce the barriers for intended parents wanting to connect with potential surrogates. In addition to the online communities that are currently operating, enabling intended parents to advertise for a surrogate will provide new avenues for intended parents and surrogates to connect. In addition, R58 above would mean that up-to-date, comprehensive and clear information on surrogacy law and practice will be available on a public website. Alongside the work of existing bodies such as Fertility New Zealand and fertility clinics, this will improve the availability of information about surrogacy to New Zealanders.
- 10.86 Second, we are concerned that permitting private intermediaries will increase the cost of surrogacy in Aotearoa New Zealand, even if intermediaries are restricted to operating on a non-profit basis. In the United Kingdom, it has been reported that some non-profit organisations charge more than £15,000 for their services.⁴² There would also be a regulatory cost associated with permitting intermediaries to operate in Aotearoa New Zealand.⁴³ 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.⁴⁴ As the Commissions observed:⁴⁵
- ... 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.
- 10.87 Third, we accept the point made by some submitters that it would be very difficult to regulate intermediaries that operate online or over social media. We think this is another reason to retain the clear policy in the HART Act that facilitating surrogacy arrangements in exchange for a fee is not legal in Aotearoa New Zealand.
- 10.88 We acknowledge the role of ICANZ in facilitating intercountry adoptions for New Zealanders. However, we note that inter-country adoptions take place against the backdrop of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, the provisions of which have been incorporated into domestic law in the Adoption (Intercountry) Act 1997.⁴⁶ Under that regime, ICANZ is accredited as a child placement service by Oranga Tamariki, the “Central Authority for Adoptions”

⁴² Melanie Newman and Jim Reed “Surrogacy: Social media advertising plans prompt regulator warning” *BBC News* (online ed, Britain, 29 January 2020).

⁴³ UNICEF and Child Identity Protection recommended that intermediaries are regulated and subject to national oversight: UNICEF and Child Identity Protection *Key Considerations: Children’s Rights & Surrogacy* (Briefing Note, February 2022) at 3.

⁴⁴ 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].

⁴⁵ 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].

⁴⁶ Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption signed at The Hague on 29 May 1993 and Adoption (Intercountry) Adoption Act 1997, s 4.

under the Convention. There is currently no equivalent international convention in relation to surrogacy, although work on such a convention is ongoing.⁴⁷ We suggest that the Government reconsider the role of non-profit private intermediaries once there is an international instrument on surrogacy to which Aotearoa New Zealand has acceded. Regulating private intermediaries in the surrogacy context will best occur in this context, as happened in relation to intercountry adoption.

AVAILABILITY OF EXPERIENCED LAWYERS

Issues

- 10.89 In the Issues Paper, we noted concerns about the limited number of lawyers with experience advising on surrogacy arrangements. Currently, intended parents and surrogates in domestic gestational surrogacy arrangements must obtain independent legal advice as part of the ECART application process.⁴⁸ 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. Under our proposals elsewhere in this Report (see Chapter 4, Chapter 5 and Chapter 6), intended parents and surrogates will still need to obtain independent legal advice as part of the ECART process and to establish legal parenthood.
- 10.90 Surrogacy law is a specialist area. Complex legal issues can arise in any surrogacy arrangement, and this is exacerbated by the uncertainty of the current law (see Chapter 6 and Chapter 9). As part of this review, we heard from intended parents and surrogates that finding a lawyer with the necessary experience and understanding can be difficult. In the Issues Paper, we said there is a real risk of intended parents and surrogates receiving poor legal advice, which could have significant repercussions. At the very least, inadequate legal advice has been grounds for ECART deferring approval in some cases.⁴⁹

Options for reform

- 10.91 In the Issues Paper, we said that this is not an issue that needs to be addressed through law reform. Instead, we identified two ways to address the issue:
- (a) First, ensure that comprehensive information is provided on a centralised, official website (as recommended above) includes information for professionals involved in surrogacy arrangements.
 - (b) Second, provide greater opportunities for professional development for lawyers in relation to 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 new surrogacy laws.

⁴⁷ See discussion of the work of the Hague Conference on Private International Law in Chapter 9 of this Report.

⁴⁸ 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.

⁴⁹ Discussed in Ruth Walker and Liezl van Zyl "Surrogacy and the law: three perspectives" (2020) 10 NZFLJ 9 at 11.

Results of consultation

- 10.92 In the Issues Paper, we asked what steps should be taken to address concerns about the limited number of lawyers with experience advising on surrogacy arrangements. We received 101 submissions that addressed this question.⁵⁰ Personal submitters made comments that included the following suggestions:
- (a) Make the law as simple as possible so everyone can understand it and so that expensive lawyers are not needed to explain it. This might include providing resources setting out simple steps and instructions and documents and forms that can be downloaded. This information could be included on the website discussed above.
 - (b) Publish a register of lawyers experienced in advising on surrogacy arrangements. This could also be included on the website discussed above.
 - (c) Provide more education and professional development for lawyers and legal executives, including those working at Community Law Centres. This will be especially needed if new law is made. One submitter suggested a free training webinar together with written resources as well as a mentoring system.
 - (d) Provide some public funding for legal advice.
- 10.93 One personal submitter noted that a lack of expertise meant their surrogate was unable to use her family lawyer and she had to form a new relationship with another lawyer, resulting in an impersonal and more costly experience. Another noted that it was quite normal for only some lawyers to have expertise in particular areas and that surrogacy is a niche area. Several personal submitters commented that the lack of surrogacy lawyers will self-correct over time. As the number of surrogacy arrangements increase in Aotearoa New Zealand, so will the number of lawyers with relevant expertise.
- 10.94 Organisations made a range of comments. ANZICA commented that professional development for lawyers is desirable. Fertility Plus observed that the ability for lawyers to have virtual meetings is important for New Zealanders living in remote parts of the country. Fertility Associates noted that health websites list fertility clinics and other health specialists and that the legal profession could do the same.
- 10.95 NZLS did not consider that there are too few lawyers with experience advising on surrogacy arrangements. To the best of its knowledge, no party who has identified a lawyer experienced in surrogacy issues has ever been turned away because of case load issues. The real issue, NZLS said, is identifying those experienced lawyers and ensuring that their information is publicly available. NZLS also confirmed that meeting clients remotely is common and that the court hearings have occurred using audio visual link. NZLS considered that any new surrogacy law should ensure that documentation that requires witnessing and/or certification by lawyers should be able to be completed electronically. NZLS suggested that its Family Law Section could proactively identify

⁵⁰ Comprising 81 personal submissions, 14 submissions from organisations (Advisory Committee on Assisted Reproductive Technology, Australian and New Zealand Infertility Counsellors Association, Center for Bioethics and Culture Network, Ethics Committee on Assisted Reproductive Technology, Feminist Legal Clinic, Fertility Associates, Fertility Plus, Maternity Services Consumer Council, New Zealand College of Midwives, New Zealand Nurses Organisation, Nurse Practitioners New Zealand, Office of the Children's Commissioner, Repromed and Te Kāhui Ture o Aotearoa | New Zealand Law Society), comments from the Judges of the Family Court and 5 academic submissions (Dr Anne Else, Adjunct Professor Ken Daniels, Professor Mark Henaghan, Associate Professor Rhonda Shaw and Australian academics Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff (submitting jointly)).

those lawyers with surrogacy expertise as well as formalising a mentoring system for those lawyers interested in acquiring experience. The Judges of the Family Court advised that they would provide support for further education through universities or lawyers' professional development seminars.

- 10.96 The New Zealand College of Midwives observed that there used to be postgraduate courses in child advocacy offered at Te Whare Wānanga o Ōtākou | University of Otago through the Children's Issues Centre, which many lawyers wishing to increase their knowledge of being a legal advocate for the child attended. It suggested that such a postgraduate programme might be valuable.
- 10.97 Several academic submitters said there is a need for lawyers knowledgeable about surrogacy law. Dr Else observed that incorrect or inadequate advice can be costly in many ways. Associate Professor Galloway, Professor Keyes and Hoff suggested in their joint submission that a system of specialist accreditation might upskill lawyers in the field. Associate Professor Shaw favoured the creation of a comprehensive accessible guide to surrogacy law and practice.
- 10.98 Several submitters, including the Center for Bioethics and Culture Network and the Feminist Legal Clinic, were generally opposed to surrogacy in principle and accordingly opposed taking steps to improve availability of experienced lawyers.

Conclusions

RECOMMENDATION

R61

Te Kāhui Ture o Aotearoa | New Zealand Law Society and other professional lawyer bodies should consider providing ongoing professional development in relation to surrogacy, including following the enactment of any new surrogacy law, and ensure that those lawyers specialising in surrogacy law can be identified by practice area and have appropriate mentoring opportunities.

- 10.99 There are opportunities for the legal profession to provide further education, training and mentoring to law students or practitioners providing advice on surrogacy arrangements. If new surrogacy law is enacted, support for those providing such advice will be particularly important. It would also be beneficial for family law and related courses offered by tertiary education providers to include surrogacy law, especially given increasing use of surrogacy in Aotearoa New Zealand.

PUBLIC FUNDING FOR SURROGACY

Issues

- 10.100 A common concern expressed to us throughout this review was the availability of public funding for surrogacy, in particular, that it is discriminatory.
- 10.101 In the Issues Paper, we explained that 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).⁵¹ This 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 (BMI), how long a couple have been trying to conceive and how many children a couple already have.⁵² CPAC “is intended to benefit those who are most in need for therapy ... balanced by a system that will ensure maximum benefit”.⁵³

- 10.102 People who lack the sex characteristics to become pregnant (including male couples and single men) cannot qualify under 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.⁵⁴ Public funding has not increased to match growing demand.⁵⁵ Accordingly, even when people do qualify, the wait time for treatment can be significant.⁵⁶
- 10.103 There are also concerns regarding equity of access and cost for Māori and Pacific peoples. As we explain in Chapter 2, Māori and Pacific peoples are less likely to seek fertility treatment. In that chapter, we refer to research showing that institutional racism has been shown to increase barriers to infertility services for Māori and Pacific women, such as the BMI requirements to access public funding.⁵⁷ In relation to Māori, these matters give rise to a risk of the Crown failing to exercise kāwanatanga in a responsible manner.
- 10.104 Another concern relates to the lack of public funding available for making an application to ECART for approval of a surrogacy arrangement. While ECART does not charge an application fee, at present, applications can only be made by a fertility clinic, and clinics charge intended parents for the costs associated with preparing the application. In

⁵¹ *National Specialist Guidelines for Investigation of Infertility — Priority Criteria for Access to Public Funding of Infertility Treatment* (National Health Committee, July 1999).

⁵² *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.

⁵³ *National Specialist Guidelines for Investigation of Infertility — Priority Criteria for Access to Public Funding of Infertility Treatment* (National Health Committee, July 1999) at 24.

⁵⁴ 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 1 year or more or have unexplained infertility and have been trying to conceive for 5 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.

⁵⁵ 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).

⁵⁶ Wait times for publicly funded in vitro fertilisation treatment vary across district health boards. Fertility Plus (Auckland District Health Board) currently has a 9–10 month wait time: Auckland District Health Board “Fertility Plus” (14 March 2022) <www.adhb.health.nz>. In 2019, it was reported that MidCentral District Health Board had the longest wait time at 428 days: Brittany Keogh “Publicly funded fertility treatment in NZ a postcode lottery” *Stuff* (online ed, New Zealand, 22 June 2019).

⁵⁷ Antoinette Righarts and others “The burden of infertility in New Zealand: A baseline survey of prevalence and service use” (2021) 61 ANZJOG 439 at 446.

addition, counselling, legal advice and medical advice are all mandatory requirements of the ECART process, and these costs are borne by the intended parents.

Options for reform

- 10.105 In the Issues Paper, we noted that, as the scope of our review is limited to surrogacy, we are not able to consider general changes to CPAC. We also said that, without an overall increase in public funding for fertility treatment, changes to CPAC to improve people's chances of qualifying for surrogacy-related fertility treatment are unlikely to achieve meaningful reform. It is more likely that any changes will simply result in longer waiting times for more people.
- 10.106 However, questions have been raised about CPAC's validity, consistency and fairness.⁵⁸ 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 [Aotearoa New Zealand]".⁵⁹ In addition, when CPAC was implemented, it was considered to be only the start and that further work would be required to ensure its validity and reliability.⁶⁰ 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".⁶¹
- 10.107 In the Issues Paper, we expressed our preliminary views that:
- (a) it may be appropriate for CPAC to be reviewed to determine whether its criteria remain appropriate for contemporary Aotearoa New Zealand and that some criteria, such as the BMI requirement, may no longer be appropriate;⁶² and
 - (b) the Government should review how it funds surrogacy, including surrogacy-related fertility treatment as well as the costs associated with the ECART process.

Results of consultation

- 10.108 In the Issues Paper, we asked if submitters agreed that the Government should conduct a review of how it funds surrogacy, with a view to making surrogacy in Aotearoa New Zealand more accessible to New Zealanders. We received 170 submissions that

⁵⁸ 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.

⁵⁹ Brittany Keogh "Publicly funded fertility treatment in NZ a postcode lottery" *Stuff* (online ed, New Zealand, 22 June 2019).

⁶⁰ 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.

⁶¹ 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).

⁶² Questions have been raised about whether BMI is an appropriate measure of health, particularly for Māori and Pacific peoples: 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.

addressed this question. Of these submissions, 73 per cent agreed,⁶³ 21 per cent did not agree⁶⁴ and six per cent expressed no preference.⁶⁵

- 10.109 Personal submitters who favoured a review by the Government were often concerned about inequalities in the availability of funding for fertility treatment, particularly with respect to gamete donation and surrogacy. They expressed concern about the availability of funding for those who lack the sex characteristics to become pregnant. One suggested CPAC needs to be reviewed. Several commented that the cost of making an ECART application is a further barrier to access surrogacy. One commented that a review needs to ensure that nothing prevents charities from stepping in to cover costs.
- 10.110 In contrast, several personal submitters favoured a review to stop government funding for surrogacy, either because they opposed surrogacy in principle or because they thought the intended parents wanting a child should pay all costs. Several others thought that funding surrogacy was not a priority issue. One commented that it was not a good use of public resources given other pressing health concerns in the wider population. Another questioned whether it is a human right to become a parent and whether the state should fund a person to have a child if a person cannot biologically reproduce. They observed that the state does not fund many of the ways that people look after members of their extended family or non-kin. Only one personal submitter who said they had no preference also commented. They favoured permitting commercial surrogacy arrangements so did not agree with the Government funding someone who could not conceive naturally.
- 10.111 Organisations were generally in favour of a review of funding for surrogacy, but several, including Repromed and MSCC, thought that any review should consider public funding of fertility treatment as a whole. Fertility Plus said that surrogacy is an expensive exercise, making it unattainable for many New Zealanders. Several organisations, including ACART and ANZICA, agreed that the current funding model is potentially discriminatory. Fertility Associates supported public funding to cover the significant costs of preparing ECART applications and lawyers' fees. Fertility New Zealand also commented that the lack of funding for fertility counsellors needs to be addressed urgently.
- 10.112 OCC said it had no position on government funding of surrogacy but did observe that children in Aotearoa New Zealand have significant unmet health needs and there are other priorities for health funding. NZNO considered that, within government spending overall, a cost-benefit analysis would be beneficial.
- 10.113 The Center for Bioethics and Culture Network and the Feminist Legal Clinic oppose surrogacy in principle and therefore did not favour government funding of surrogacy.

⁶³ 124 submissions comprising 109 personal submissions, 13 submissions from organisations (Advisory Committee on Assisted Reproductive Technology, Australian and New Zealand Infertility Counsellors Association, Ethics Committee on Assisted Reproductive Technology, Federation of Women's Health Councils Aotearoa, Fertility Associates, Fertility New Zealand, Fertility Plus, Maternity Services Consumer Council, New Zealand College of Midwives, New Zealand Council of Trade Unions, New Zealand Nurses Organisation, Nurse Practitioners New Zealand and Repromed) and 2 academic submissions (Professor Mark Henaghan and Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly)).

⁶⁴ 36 submissions comprising 31 personal submissions, 3 submissions from organisations (Center for Bioethics and Culture Network, Feminist Legal Clinic and Office of the Children's Commissioner) and 2 academic submissions (Associate Professor Rhonda Shaw and Australian academics Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff (submitting jointly)).

⁶⁵ 10 personal submissions.

- 10.114 Two academics commented on this question. Professor Mark Henaghan supported public funding for surrogacy and lowering barriers generally. Associate Professor Shaw did not favour a review of surrogacy funding but observed that CPAC should be reviewed for a variety of reasons, not just relating to surrogacy.

Conclusions

RECOMMENDATION

R62

The Government should review how it funds surrogacy, including surrogacy-related fertility treatment and the costs associated with the Ethics Committee on Assisted Reproductive Technology approval process. The Government should consider conducting such a review as part of a broader review of funding for fertility treatment generally. Any broader review of fertility treatment funding should include reconsideration of the use of the Clinical Priority Assessment Criteria for fertility treatment.

- 10.115 The Government should review how it funds surrogacy, including surrogacy-related fertility treatment and the costs associated with the ECART approval process. We favour this review taking place within a broader review of funding of fertility treatment generally to ensure a coherent approach. It is apparent that the application of CPAC in the context of fertility treatment requires reconsideration, and this task falls sensibly within a review of fertility treatment funding. This is important because research suggests that the use of CPAC may disadvantage Māori and Pacific peoples. In relation to Māori, this engages the Crown's obligation under te Tiriti o Waitangi to exercise responsible kāwanatanga. We think the Government is required to review CPAC for this reason.
- 10.116 While some submitters would prefer that the Government did not fund surrogacy, it already does provide some funding. From a policy perspective, it is highly desirable that government funding for surrogacy and for other fertility treatment is consistent and non-discriminatory. Our recommendation acknowledges the views of fertility clinics (and other key organisations closely involved in the provision of surrogacy-related treatment) who supported a review that extends to funding of fertility treatment more generally.

AVAILABILITY OF DONOR GAMETES IN AOTEAROA NEW ZEALAND

Issues

- 10.117 Another general issue in fertility treatment that directly impacts on access to surrogacy is the availability of donor gametes (ova and sperm) in Aotearoa New Zealand. It is widely acknowledged that demand for donor gametes outweighs availability and that demand is continuing to increase.⁶⁶ The underlying reason for low availability appears to be section

⁶⁶ Sonja Goedeke, Daniel Shepherd and Iolanda S Rodino "Fertility stakeholders' concerns regarding payment for egg and sperm donation in New Zealand and Australia" (2022) 14 Reproductive BioMedicine and Society Online 8 at 8–9. 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 4 years. One

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 intended parents cannot purchase donor gametes overseas and import them into Aotearoa New Zealand.

- 10.118 Limited availability of donor gametes is a key driver for New Zealanders to seek fertility treatment overseas where donor gametes are more readily available.⁶⁷ This, in turn, is driving New Zealanders to international surrogacy. As we note in Chapter 2, international surrogacy often involves the use of donor gametes, and many jurisdictions still permit anonymous donation, unlike Aotearoa New Zealand. Just under half of all international surrogacy arrangements that Oranga Tamariki is aware of over the past six years have involved anonymous gamete donors, which raises concerns for the child's identity rights (see Chapter 3).

Options for reform

- 10.119 In the Issues Paper, we identified that 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.
- 10.120 Given the impact the low supply of donor gametes has on surrogacy, we said 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.
- 10.121 We also said that, 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 2014.⁶⁸

Results of consultation

- 10.122 In the Issues Paper, we asked if submitters agreed 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

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).

⁶⁷ 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.

⁶⁸ 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).

restrictions on importing gametes and embryos into Aotearoa New Zealand should be relaxed in certain limited circumstances.

- 10.123 We received 156 submissions that addressed this question. Of these submissions, 67 per cent agreed,⁶⁹ 23 per cent did not agree⁷⁰ and 10 per cent expressed no preference.⁷¹
- 10.124 Personal submitters who agreed emphasised that, without an increase in the supply of donated gametes in Aotearoa New Zealand, other changes to surrogacy law will be meaningless because couples will still need to go overseas. One submitter also noted that allowing imported gametes increases the gene pool accessible to New Zealanders. One submitter noted the lack of public understanding about why this is important.
- 10.125 Of the personal submitters who did not agree that the Government should investigate the supply of donor gametes in Aotearoa New Zealand, many objected to surrogacy in principle. One submitter was concerned that compensating gamete donors commodified children, and another thought importation of gametes should not be permitted because of concerns about the child's identity. Another was concerned that donor-conceived people should not be subject to satellite siblings and parents.
- 10.126 Organisations that supported increasing the availability of donor gametes recognised that the lack of donor gametes in Aotearoa New Zealand is a key driver for intended parents entering international surrogacy arrangements.
- 10.127 In its submission, ACART referred to its earlier advice to the Minister of Health concerning the import into or export from New Zealand of in vitro donated cells or in vitro donated embryos in relation to human assisted reproductive technology.⁷² In that advice, ACART recommended developing new regulations to set out requirements for importing and exporting gametes and embryos. ACART's recommendations about compensating gamete donors were that:
- (a) section 13 of the HART Act should be amended to enable donors to be compensated for reasonable expenses incurred in the process of donation;
 - (b) regulations should also be made about the scope of reasonable expenses that are available for donors; and
 - (c) for consistency, the scope of reasonable expenses available for surrogates should also be considered.

⁶⁹ 104 submissions comprising 95 personal submissions, 8 submissions from organisations (Advisory Committee on Assisted Reproductive Technology, Ethics Committee on Assisted Reproductive Technology, Fertility New Zealand, Fertility Plus, New Zealand College of Midwives, Nurse Practitioners New Zealand, Repromed and Te Kāhui Ture o Aotearoa | New Zealand Law Society) and 1 academic submission (Dr Liezl van Zyl and Dr Ruth Walker (submitting jointly)). In addition, 3 submissions (Australian and New Zealand Infertility Counsellors Association, Fertility Associates and Dr Anne Else) agreed in part with the proposals discussed in the Issues Paper.

⁷⁰ 36 submissions comprising 28 personal submissions, 5 submissions from organisations (Federation of Women's Health Councils Aotearoa, Feminist Legal Clinic, Maternity Services Consumer Council, New Zealand Council of Trade Unions and New Zealand Nurses Organisation) and 3 academic submissions (Adjunct Professor Ken Daniels, Associate Professor Rhonda Shaw and Australian academics Associate Professor Kate Galloway, Professor Mary Keyes and Sarah Hoff (submitting jointly)).

⁷¹ 16 submissions comprising 15 personal submissions and 1 submission from an organisation (Office of the Children's Commissioner).

⁷² 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).

- 10.128 ECART also agreed that the Government should investigate these matters, including in the context of extended storage applications, because of the restrictions that the current law imposes.
- 10.129 Fertility Plus strongly favoured compensation for the expenses of gamete donors and said the very tight rules about gamete importation mean New Zealanders are faced with a very small pool of donors and an unacceptable waiting time for donated gametes. Fertility Plus also said that there are many places overseas that procure donors in a way that would satisfy the HART Act and would therefore protect the best interests of a resulting child.
- 10.130 The New Zealand College of Midwives considered that an investigation into the supply of donor gametes in Aotearoa New Zealand is reasonable, but it should consider the different costs in terms of risk and medical requirements, for example, in terms of the procurement of different donor gametes and embryos. The College recommended close critical scrutiny and follow-up of all processes involved, including recruitment of donors, treatments and appropriate reimbursement and/or reasonable compensation. The health and safety of donors and recipients is paramount.
- 10.131 ANZICA and Repromed said that, while they believe that ways in which to address donor gamete supply could be considered, they do not believe that donors should be paid for their gametes in terms of outright financial reward. ANZICA and Repromed reiterated the importance of altruistic and open donation in Aotearoa New Zealand, meaning that restrictions should remain on paid and anonymous donations from overseas jurisdictions. ANZICA and Repromed noted the possible exception to restrictions on importing embryos in circumstances where parents already have offspring resulting from donor gametes accessed in other jurisdictions.
- 10.132 NZLS was also concerned about ensuring access to identifying information consistent with the HART rules. It favoured considering some exceptions to the rules prohibiting importation of embryos created using commercially obtained gametes, for example, during a time when the parents resided in another country or during times of global emergencies such as the current pandemic.
- 10.133 Some organisations opposed a government investigation because of opposition to surrogacy in principle. MSCC firmly opposed the importation of anonymous donor gametes on the basis that this is unlikely to support the belief that the needs of the resulting child are paramount. It only supported relaxing restrictions on the importation of gametes or embryos from overseas in cases where the overseas donor is a family member of the intended parents. Family First New Zealand also opposed anonymous sperm donations.
- 10.134 In their joint submission, Dr van Zyl and Dr Walker favoured an investigation into the supply of donor gametes in Aotearoa New Zealand, but three other academics did not. Adjunct Professor Daniels expressed his concern that the shortage of donors is framed as simply a supply and demand issue. He considered that a new approach to family building is needed where gamete donation and the donor are valued and donation is framed as one family donating to another would-be family. Daniels also disagreed with payment for gametes because of the difficulty knowing what is an expense and what is a cover for commercial payment. He also disagreed with the importation of gametes or embryos, citing concern about identity issues for any resulting children. Dr Else agreed with reasonable expenses being paid to donors but opposed relaxing the restrictions on the importation of gametes, suggesting that this would promote a kind of reverse

international surrogacy with the same issues of anonymity, widening the gap between donors and offspring and increasing the difficulties of mutual knowledge and contact. Associate Professor Shaw suggested that the Government should consider funding quality research on the medium to long-term effects of ovum donation in the interests of women's health, in accordance with the principles of the HART Act.

Conclusions

RECOMMENDATION

R63

The Government should review the supply of donor gametes in Aotearoa New Zealand, including:

- a. whether donors should be compensated for reasonable expenses incurred in the donation; and
- b. whether the restrictions on importing gametes and embryos into Aotearoa New Zealand should be relaxed in certain limited circumstances.

10.135 Given the connection between surrogacy and the supply of donor gametes, we think it is important to review further the questions of whether donors of gametes should receive compensation for reasonable expenses incurred in the donation⁷³ and whether the restrictions on importing gametes and embryos into Aotearoa New Zealand should be relaxed in certain limited circumstances.

10.136 We recognise these are issues that require thoughtful consideration. They affect fertility treatment beyond surrogacy. For these reasons, we have not been able to express a view on the issues, preferring to recommend that the Government give them further consideration.

10.137 We do, however, note that our recommendation to permit a surrogate to receive compensation for the reasonable expenses she incurs because of the surrogacy arrangement is relevant to the question of whether gamete donors should similarly receive compensation for reasonable expenses relating to the donation. We also note that compensation for reasonable expenses incurred by gamete donors would be consistent with the approach taken to other donative practices in Aotearoa New Zealand⁷⁴ and with the approach taken to the donation of gametes in other jurisdictions.⁷⁵

⁷³ A multi-stakeholder study of concerns about payment of gamete donors concluded that, given the preference for altruistic donations, enhanced public promotion of donor programmes that focus on altruism but maintain the donor financial status quo may offer a way forward: Sonja Goedeke, Daniel Shepherd and Iolanda S Rodino "Fertility stakeholders' concerns regarding payment for egg and sperm donation in New Zealand and Australia" (2022) 14 Reproductive BioMedicine and Society Online 8 at 17.

⁷⁴ See for example Human Tissue Act 2008, s 58(3), which permits the provision of consideration to a person from whom blood or a controlled human substance is collected "that is reasonably related to, or that does not exceed, the actual and reasonable costs incurred by that person in connection with its collection". See also: Compensation for Live Organ Donors Act 2016, the purpose of which is "to remove a financial deterrent to the donation of organs by live donors": s 3.

⁷⁵ See for example Prohibition of Human Cloning for Reproduction Act 2002 (Cth), s 21; Reimbursement Related to Assisted Human Reproduction Regulations SOR/2019-193 (Can), reg 2; An Bille Sláinte (Atáirgeadh Daonna Cuidithe) | Health (Assisted Human Reproduction) Bill 2022 (29) (Ireland), cl 35.

10.138 We also observe that, in relation to the restrictions on importing gametes and embryos into Aotearoa New Zealand, the best interests of any resulting child must be paramount, consistent with our conclusions in the context of surrogacy. The child's rights to know their genetic and gestational origins and whakapapa remain fundamental.



Level 9, Solnet House, 70 The Terrace, Wellington 6011

PO Box 2590, Wellington 6140

Telephone: 0800 832 526

Email: com@lawcom.govt.nz
