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To Helen McQueen and Commission Members,

INTRODUCTION

Thank you for the opportunity to contribute to the Law Commission's review of New Zealand's surrogacy laws. I understand the Commission has been tasked with reviewing surrogacy laws and wider issues by the Ministry of Justice who is currently reforming adoption laws. This submission will focus on the legality and regulations of domestic surrogacy arrangements. It will provide recommendations for both traditional and gestational surrogacy arrangements to better reflect Aotearoa New Zealand's modern society and ensure children's welfare is paramount while upholding the rights of surrogates and intending parents involved.

Position

I am in support of the following approach to surrogacy in New Zealand:

- Establishment of a national governance body to oversee all surrogacy cases
- New legislation that allows intending parents legal rights to a child at birth
- Surrogacy contracts recognised as enforceable and legally binding documents
- An expansion of payments to surrogates while maintaining a prohibited stance on commercial surrogacy

BACKGROUND

Current law

As there is no specific legislation that regulates surrogacy in New Zealand, the Adoption Act 1955 and the Status of Children Amendment Act 1969 encapsulates legality regarding surrogacy arrangements. Under these current laws, the woman who gives birth to a child (and where applicable, her partner) are the legal parents of the child. Intending parents of surrogate children are not legal parents until an adoption process is complete. Gestational surrogacies are regulated under the Human Assisted Reproductive Technology Act 2004.

Gestational surrogacy

Gestational surrogacy is where intending parents provide the genetic material of a child, and a surrogate mother is used to carry and birth the child. This process requires IVF procedure and

is conducted in fertility clinic. To undergo IVF, which is an assisted reproductive procedure, intending parents must gain approval from the Ethics Committee on Assisted Reproductive Technology (ECART) (ACART, 2013). Although there is a genetic link to intending parents, the surrogate mother who gives birth to the child is still the legal parent of the child until an adoption has been finalised.

Traditional surrogacy

Traditional surrogacy is where the surrogate carries the foetus, as well as uses her own eggs with either an intending parent's or a donor's sperm. Traditional surrogacy may take place with or without the help of a fertility clinic. In traditional surrogacy cases, intending parents don't need to engage with Oranga Tamariki before making an adoption application. For most cases, Oranga Tamariki social workers only meets the intending parents once they are asked to provide a social worker report to the Court (ACART, 2013.)

DISCUSSION

Establishment of a national governance body to oversee all surrogacy cases in New Zealand

The establishment of a governing body that oversees and assesses all surrogacy arrangements in New Zealand is needed to provide clarity, consistency and support for all parties involved in the surrogacy process. Due to the transactional nature of surrogacy, a framework that offers regulation of surrogacy to address all participating parties and minimise any risk of exploitation (Galloway, 2015). The lack of uniformity in the management of traditional and gestational surrogacy arrangements provides a strong case for an over-arching process for all surrogacy cases.

The use of the Ethics Committee on Assisted Reproductive Technology (ECART) for the approval of gestational surrogacies is inadequate, as its core competency is to authorise assisted reproductive procedures (Powell, 2017). The ECART process takes into consideration the ethical and medical implications of gestational surrogacy, and more broadly is responsible for determining the parenting ability of intending parents. It requires intending parents and the surrogate to undergo extensive consultation with doctors, counsellors and legal professionals (Anderson et. al, 2012). As part of the ECART assessment and before any reproductive procedure is undertaken intending parents are required to obtain a letter of approval from Oranga Tamariki outlining their suitability as parents (ACART, 2013). The inclusion of an Oranaga Tamarki assessment ensures decisions are made in the best interest of the child, however this is an invasion of family life and privacy of the intending parents (Powell & Baird, 2020). This becomes a human rights issue when the state is responsible for determining who can become a parent, as it is a freedom for intending parents to start a family (Galloway, 2015). The requirement for intending parents to consult with a range of services outside the reproductive clinic creates significant delay and is an enduring affair. The disparity between gestational surrogacy assessment and traditional arrangements could not be greater. The absence of any assessments being carried out prior to a child being born under traditional surrogacy poses risk to their welfare (New Zealand Law Commission, 2005).

A governing body that is responsible for the monitoring and regulation of all surrogacies in New Zealand would offer a safeguard for all individuals involved in the arrangement. The incorporation of assessment for traditional surrogacy arrangements, in addition to streamlining

the process of gestational surrogacies applications, would create a framework that is user friendly for surrogates and intending parents. While still incorporating ECART and Oranga Tamariki engagement, a governing body would be the predominant service that oversees the application and assessment process. Ensuring best practice is paramount in any procedure that deals with the human body and genetic material, and surrogacy requires considerable care when the rights of the surrogate, child and intending parents could be jeopardised (Powell & Baird, 2020).

New legislation that allows intending parents legal rights to a child at birth

Despite the HART Act regulating gestational surrogacies via clinical approval process, the legislation makes assumption that the donation of genetic material for IVF would be anonymous and fails to consider the nature of many non-traditional parental arrangements, such as surrogacy (Legge, Fitzgeraald & Frank, 2007). This oversight leaves the legal issues of surrogacy arrangements up to the Family Court as there is no specific law that outlines surrogacy. This poses a risk and uncertainty in these arrangements as there is relevant and modern clear legal framework, including the legal to rights of children in surrogacy arrangements. In New Zealand the legal rights to any child are given to the birth mother, and her partner, as outlined under the Status of Children Act.

In surrogacy arrangements, intending parents must adopt a child before they are the legal parent (Daniels, 2003). This requirement can be considered controversial and inconsistent with nature, as a genetic connection is not observed to be relevant to the parentage of a child (Powell, 2017). This legality not only contradicts the intent of surrogacy but also opposes the standard in other forms of assisted reproduction (Legge et. al. 2007). As stated by the New Zealand Law Commission's 2014 report, the delay of the adoption process poses issues for intending parents to care and connect with the new-born in the first two weeks of their life. The possibility of a surrogate mother opposing to relinquish custody of the child to the intending parents creates uncertainty and offers no legal protection for the intending parents, particularly as surrogacy arrangements are unenforceable in New Zealand (Alawi, 2017). A new legislation is required to allow intending parents the legal rights to a child at birth as it is in the child's best interest to have a legal relationship with the parents intending to raise them.

Surrogacy contracts recognised as enforceable and legally binding documents

Although legal advice and contracts are sought by intending parents and surrogate mothers in surrogacy arrangements, any contracts are unenforceable under the HART Act (Powell, 2017). As parties a great deal of trust and reliance on individuals is required. There are numerous issues that can arise during the surrogacy process and minimising variables is advantageous for all parties. The possibility that a surrogate mother may refuse to relinquish custody of the child is always an underlying fear for intending parents in these situations. Due to the nature of the law, surrogate mothers are not contractually obligated to hand over rights to the child if she changes her mind, meaning the intended parents have no means of protection (Alawi, 2017). In gestational surrogacies this poses a bioethical dilemma as the intending parents have an exclusive genetic link to the child. The reliance on informal arrangements and trust in surrogacy arrangements could be eliminated by determining surrogacy contracts to be legally binding (van Zyl & Walker, 2015).

An expansion of payments to surrogates while maintaining a prohibited stance on commercial surrogacy

New Zealand's stance on commercial surrogacy differs from many other countries such as the United Kingdom and the United States of America where it is common to pay for the services and time of a surrogate (Anderson, L., & Tomlins-Jahnke, 2010). Under the HART Act, monetary compensation is banned in surrogacy arrangements, meaning arrangements are purely altruistic in New Zealand (Daniels, 2003). Under the current legislation, the expenses a surrogate may incur as part of the arrangement such as medical and legal costs, can be paid for by intending parents (Anderson et. al., 2015). The payment of reasonable costs to surrogates requires new legislation and parameters, as the Adoption Act prohibits payments in consideration for adoption- which encapsulates surrogacy (van Zyl, L., Walker, R. 2017). I am in support of New Zealand's continued prohibition of commercial surrogacy as it amounts to the exploitation of women, and the sale of children and breaches the United Nations Convention on the Rights of the Child (Baird & Powell, 2020). However, there is a need for an expansion of payments to be permitted to surrogates to ensure her rights and wellbeing needs are adequately met.

Wilson's (2019) recent survey into public perception of surrogacy, found the majority of New Zealanders were in support of surrogates being paid for their time and service which indicates

the need for expansion of current legislation. The implications that arise from commercial surrogacy should not be overlooked and a regulated approach to payments to surrogates should be taken. As the process of surrogacy is already a high cost approach to parenthood for intending parent's, additional payments for service to surrogates would make the process less viable for those choosing this approach. New Zealand's unregulated international surrogacy arrangements are a high risk option for couples who cannot conceive naturally. Therefore, it is desirable that New Zealand creates a framework and financially attractive option for both these couples and potential surrogates (van Zyl & Walker, 2015).

The commercialising of surrogacy should be condemned due to the potential for exploitation of women and a market for profit from women's bodies being encouraged as a result of this (van Zyl & Walker, 2017). Although there are legal and contractual obligations involved in surrogacy arrangements, the payment for service to the surrogate amounts to a business transaction that compromises her rights during pregnancy (Allan, 2015). As surrogacy can pose social and financial inequalities for the birth mother, it should be within the law to accommodate her needs in a way that respects her dignity and her unique requirements during the gestation period (Galloway, 2015). The ability for a surrogate to continue working without disruption is unlikely due to the medical needs and nature of assisted reproductive process. Financial support that covers wages and living costs of the surrogate should be permitted to be paid by the intending parents. It is in the best interest of the intending parents to ensure the surrogate mother is living in a healthy, stress-free environment and financial support is a way this can be achieved.

It is proposed that pre and ongoing post birth counselling services are offered to surrogates and intending parents. As the surrogacy process has a substantial financial weight for the intending parents, the implementation of a state-funded mental health option for both surrogates and intending parents is supported.

Key Recommendations

- Establish an organisation that oversees the application and assessment process for both traditional and gestational surrogacy arrangements.
- Create legislation that allows intending parents legal rights to a child at birth. This will remove the uncertainty associated with a delayed adoption process.
- Maintain New Zealand's prohibition of commercial surrogacy
- Implement a state-funded mental health payment for parties involved in the surrogacy process
- Excluded from discussion, but in New Zealand's bicultural society it is paramount that there is a commitment to supporting Te Tiriti values in policy and legislation. By recognising Te Tiriti o Waitangi as Aotearoa New Zealand's founding document, respectful relationships between Tangata Whenua and Tangata Tiriti can be achieved.

CONCLUSION

New Zealand's legal framework has failed to progress with reproductive technology and modern family arrangements. Although surrogacy may have once been viewed as a last resort for prospective parents, the advancement in human assisted reproductive technology allows for same-sex and infertile couples to have a child with their own genetic makeup, with the aid of a third party surrogate mother. The absence of legislation that considers the issues specific to surrogacy arrangements, indicates there is a need for reform in this area of the law. The fundamental principle of a surrogacy arrangement is to provide intending parents with a child, through the assistance of a surrogate who carries and births the child. In the best interest of all parties involved, including the child, that intending parents are granted legal rights to a child at birth.

I support the establishment of a governing body, that is responsible for the application and assessment process. This will require the inclusion of traditional surrogacy arrangements in

assessment, to guarantee the rights of the child and surrogate are considered during this intimate process. In an attempt to support the needs and avoid exploitation of surrogates, a governing body can oversee payments and ensure surrogates have the appropriate financial support from intending parents. To reduce the financial burden of this approach to parentage, intending parents should be discouraged from commercial and international surrogacy through the continued prohibition of surrogacy in New Zealand. As these are complex and intimate arrangements, a modern and clear legal framework must be established to support intending parents through the surrogacy process with as little uncertainty and risk as possible. Likewise, supporting surrogate's wellbeing and keeping the child's best interests central to any decision making is essential when considering legislative advancement of surrogacy arrangements.

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