Improving Arrangements for Surrogacy Bill

Second interim report of the Health Committee

August 2023

Contents

Dr Tracey McLellan
Chairperson

Improving Arrangements for Surrogacy Bill

Recommendation

The Health Committee is considering the Improving Arrangements for Surrogacy Bill and recommends that the House take note of this second interim report.

Purpose of this second interim report

We are currently considering the Improving Arrangements for Surrogacy Bill. As introduced, the bill seeks to simplify surrogacy arrangements and provide a mechanism for enforcing them, and ensure that information recorded on birth certificates is complete. The bill was referred to us on 18 May 2022.

The bill was initially a Member's bill in the name of Tāmati Coffey, MP. However, on 30 May 2023, the Government announced that it had agreed to adopt the bill as a Government bill.

On 27 October 2022, we presented an interim report to the House to provide an update on our consideration of the bill and highlight how we intended to progress it.[1] At that time, the Business Committee had granted our requests to extend the report-back date and to consider out-of-scope amendments to the bill. These requests were to enable us to consider how we could incorporate recommendations from the Law Commission's report, *Te Kōpū Whāngai: He Arotake, Review of Surrogacy.* That report was published on 27 May 2022.

We are now presenting this second interim report to provide a public update of our work on the bill and to enable us to publish the advice that we have received to date.

Update on our consideration of the bill

Following the Business Committee's confirmation of our requests, we sought advice on whether the bill could be amended to incorporate the Law Commission's recommendations for legislative change. We considered that advice, in the form of a departmental report and supplementary advice, at our meetings on 7 June and 16 August 2023. The departmental report and supplementary advice are attached to this report as Appendix B.

The departmental report and supplementary advice contain 62 recommendations for amendments to the bill, to align it with the Law Commission's findings. On 7 June and 16 August 2023, we asked the Parliamentary Counsel Office to redraft the bill to reflect these recommendations (known as a revision-tracked version). Given the extensive redrafting this would entail, we also sought and received another extension to the report-back date, to 8 September 2023. This will enable our consideration of the bill to continue until the 53rd Parliament is dissolved. Although the bill would be paused during the election period, drafting of the revision-tracked version of the bill could continue.

[1] A copy of the interim report is available on the Parliament website.

Next steps for the bill

If the bill is reinstated by the House in the 54th Parliament, the next step would be for the next Health Committee to consider the revision-tracked version of the bill. We note that our recommendations will result in a substantially different bill than was introduced. We therefore strongly encourage the next Health Committee to seek further public input on the redrafted bill.

We are publicly releasing the departmental report and supplementary advice now to give individuals and organisations with an interest in the bill sufficient time to consider the information in the report and supplementary advice. We note that the proposed amendments and the wording of the new legislative provisions are subject to advice from the Parliamentary Counsel Office about the best approach to drafting them.

Appendix A: Committee process

Committee procedure

The Improving Arrangements for Surrogacy Bill was referred to the committee on 18 May 2022. We called for submissions on the bill with a closing date of 20 July 2022. We received and considered submissions from 34 interested groups and individuals. We heard oral evidence from 12 submitters at hearings in Wellington and by videoconference. We published an interim report on 27 October 2022.

We received advice on the bill from the Ministry of Justice, the Department of Internal Affairs, the Inland Revenue Department, and the Ministry of Health.

Committee members

Dr Tracey McLellan (Chairperson)
Tangi Utikere (Chairperson and member until 8 February 2023)
Matt Doocey
Dr Elizabeth Kerekere
Dr Anae Neru Leavasa
Marja Lubeck (from 8 February 2023)
Debbie Ngarewa-Packer
Sarah Pallett
Soraya Peke-Mason (from 3 May 2023)
Dr Shane Reti
Toni Severin
Lemauga Lydia Sosene (until 3 May 2023)

Tāmati Coffey also took part in the consideration of this item of business.

Advice and evidence received

The advice and evidence we received for this bill are available on the Parliament website, www.parliament.nz.

Appendix B: Departmental report and supplementary advice

Departmental Report

Improving Arrangements for Surrogacy Bill

May 2023

MINISTRY OF JUSTICE
Tāhū o te Ture

New Zealand Government

Contents

Terminology[1]

ACART: the Advisory Committee on Assisted Reproductive Technology. ACART is established under the Human Assisted Reproductive Technology Act 2004 (the HART Act) and issues guidelines to ECART on the approval of gestational surrogacy arrangements.

Commercial surrogacy: where the surrogate agrees to the surrogacy arrangement 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 surrogacy arrangements.

ECART: the Ethics Committee on Assisted Reproductive Technology, which assesses applications to undertake assisted reproductive procedures and research against the ACART guidelines. ECART is established under the HART Act.

Gamete: a human reproductive cell (ovum (plural ova) or sperm).

Gestational surrogacy: an arrangement where the surrogate does not use their own ovum in conception. An embryo is created using an ovum and sperm from the intended parents or donors.

HART Act: the Human Assisted Reproductive Technology Act 2004, which regulates the use of assisted reproductive technology in New Zealand.

International surrogacy: a surrogacy arrangement where the intended parents and surrogate do not live in the same country.

Intended parents: people who enter a surrogacy arrangement with the intention of becoming parents to a surrogate-born child and raising that child from birth. The term intended parents is used in this report to refer to situations where there are two intended parents or where there is only one intended parent.

Overseas surrogacy: a surrogacy arrangement where the intended parents and the surrogate all live outside New Zealand at the time the surrogacy arrangement is undertaken.

Surrogacy arrangement: an agreement between a surrogate and intended parents where the surrogate agrees to become pregnant and carries and gives birth to a child for the intended parents to raise as their own.

Surrogate: a person who agrees to become pregnant and carries and gives birth a child for intended parents under a surrogacy arrangement.

Traditional surrogacy: an arrangement where the surrogate's ovum is used in conception. Pregnancy is usually achieved by artificial insemination using the sperm of an intended parent or a donor.

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.

[1] These definitions are largely taken from the Law Commission's glossary in *Te Kōpū Whāngai: He Arotake Review of Surrogacy*, report 146.

Introduction

1. This report provides advice to the Health Committee (the Committee) on how the Improving Arrangements for Surrogacy Bill (the Bill) could be amended to incorporate the Law Commission's recommendations relating to surrogacy. It was prepared by the Ministry of Justice for the Committee, with input from the Ministry of Health, the Department of Internal Affairs, Oranga Tamariki—Ministry for Children, the Inland Revenue Department, and the Ministry of Social Development.
2. The Bill and Law Commission review developed in parallel and are different. The Committee requested advice from officials about how the Bill could be amended to incorporate the Law Commission's recommendations.
3. This report sets out the Law Commission's recommendations for legislative amendment, whether or how the Bill and submissions on the Bill address these issues, and officials' recommendations for changes to the Bill to align with the Law Commission's findings.
4. Where officials recommend the Committee accepts a Law Commission recommendation, we generally have not provided further comment as we agree with the Law Commission's rationale for the recommendation. Where officials recommend extending or modifying a Law Commission recommendation, we have provided an explanation. The Law Commission's non-legislative recommendations are not addressed in this report.
5. Officials' initial briefing to the Committee provides information about the current regulation of surrogacy.[2]

Structure of this report

6. This report is in four sections covering:

   - **Part A:** Overview and context

     A table summarising officials' recommendations, a brief history of the parallel Bill and Law Commission processes, a high-level summary of what the Bill and Law Commission report say, and what the parallel processes mean for this report.

   - **Part B:** Policy issues, submissions and recommendations

     A discussion of the Law Commission's recommendations for legislative amendment, whether or how the Bill and submissions on the Bill address these issues, and officials' recommendations for change.

   - **Part C:** Clause-by-clause analysis

     How the Bill could be amended to reflect officials' recommendations to align the Bill with the Law Commission's findings.

   - **Part D:** Appendix of submitters on the Bill.

[2] *Improving Arrangements for Surrogacy Bill – Initial briefing*, 1 August 2022.

Part A: Overview and context

7. This part of the report sets out a summary of officials' recommendations, a brief history of the parallel Bill and Law Commission processes, a high-level summary of what the Bill and Law Commission report say, and what the parallel processes means for this report.

Summary of officials' recommendations

8. The table below summarises officials' recommendations should the Committee decide to align the Bill with the Law Commission's findings. Where officials recommend the Committee accepts a Law Commission recommendation, we generally have not provided further comment as we agree with the Law Commission's rationale for the recommendation. Where officials recommend extending or modifying a Law Commission recommendation, we have provided an explanation. The Law Commission's non-legislative recommendations are not addressed in this report.

Ethics committee approval process for domestic surrogacy arrangements

OR	Officials' recommendation	LC	Para
1.	The Human Assisted Reproductive Technology Act 2004 and/or the Human Assisted Reproductive Technology Order 2005 should be amended as needed so that all clinic-assisted surrogacy arrangements require prior approval of the Ethics Committee on Assisted Reproductive Technology. (To help achieve Law Commission R2)	R2	[48]
2.	Ensure that direct applications to the Ethics Committee on Assisted Reproductive Technologies are possible under the Human Assisted Reproductive Technology Act 2004. (In order to progress Law Commission R3)	R3	[54]
3.	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 concerns in	R5	[62]

OR	Officials' recommendation	LC	Para
	relation to the risk of serious harm to any resulting child of the proposed surrogacy arrangement. (Law Commission R5) In addition, the Human Assisted Reproductive Technology Act 2004 should be amended to: • provide for a two-step process to prepare the surrogacy report, involving background checks and an advanced assessment if required; and • enable regulations to be made by the Governor-General in Council on advice of the Minister responsible for the Oranga Tamariki Act 1989, after consultation with the Minister of Justice, prescribing the actions or steps that must be taken by Oranga Tamariki to prepare the surrogacy report. The Minister responsible for the Oranga Tamariki Act may recommend the regulations be made if satisfied the actions or steps are necessary to identify risks of serious harm and are proportionate.		
4.	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 (ECART). Reviews should be by way of rehearing. The review process must operate expeditiously. (Law Commission R12) In order to achieve Law Commission R12, the Human Assisted Reproductive Technology Act 2004 should be amended to provide that: a. a person directly affected by an ECART decision to decline, defer or impose conditions on a surrogacy arrangement may, by written application, seek a review of the decision within 28 working days after the day on which the parties were notified of the decision b. the Minister has powers to appoint a panel of individuals with relevant expertise to review a decision as and when required, and appoint one of the individuals the chair of the panel c. the Minister has power to terminate the appointment of a panel member	R12	[70]

OR	Officials' recommendation	LC	Para
	d. each panel member is appointed on any terms and conditions (including terms and conditions as to remuneration and travelling allowances and expenses) that the Minister determines by written notice to the member e. on receipt of a relevant request for review, the panel chair should appoint three panel members to review the decision f. the chair or panel can dismiss an application that is frivolous, vexatious or the subject matter is trivial g. if an application is made, ECART must provide the reviewers with the statement of its reasons for a decision and other documents in its possession that ECART considers relevant to a review of the decision h. the review should be by way of rehearing i. the commencement of a review does not affect the operation of ECART's decision j. on completion of review, ECART's decision can be affirmed, varied or set aside and either a new decision substituted or the matter referred back to ECART for reconsideration with any directions or recommendations it makes k. panel members must act independently and comply with principles of natural justice l. reviews must be completed expeditiously; and m. if the application is approved, the panel members must give a copy of the approval and the relevant proposal to Advisory Committee on Assisted Reproductive Technology.		
5.	The Human Assisted Reproductive Technology Act 2004 should be amended to require that: • the Advisory Committee on Assisted Reproductive Technology (ACART) and the Ethics Committee on Assisted Reproductive Technology (ECART) have two members able to articulate the interests of children; and	R13	[77]

OR	Officials' recommendation	LC	Para
	• the appointing Minister have regard to prospective ACART and ECART appointees' knowledge and experience of mātauranga Māori. (Law Commission R13 with modification)		
6.	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: • applications received and decisions made by ECART; • any feedback or complaints received on the operation of the ECART approval process; and • any actions taken in response to the feedback or to resolve the complaint. (Law Commission R15)	R15	[86]
7.	Subject to scope advice, the Human Assisted Reproductive Technology Act 2004 should be amended to require annual reports of both the Ethics Committee on Assisted Reproductive Technology and the Advisory Committee on Assisted Reproductive Technology to be published on their websites as soon as is practicable. (To achieve Law Commission R16)	R16	[92]

Legal parenthood in domestic surrogacy arrangements

OR	Officials' recommendation	LC	Para
8.	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 officials' R9 and R10); and	R17	[101]

OR	Officials' recommendation	LC	Para
	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. (Law Commission R17)		
9.	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 officials' R13 and R14) 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 legal parent of the child. (Law Commission R18)	R18	[120]
10.	The administrative pathway in officials' R9 should apply only if: a. the surrogacy arrangement was approved by ECART and complied with any conditions imposed by ECART and any regulations made under the HART Act; and b. the intended parents who entered the surrogacy arrangement that was approved by ECART have taken the child into their care (Law Commission R19 with modifications) In addition, the Status of Children Act 1969 should provide that the administrative pathway is not available if the Family Court has previously made a determination on an application for a parentage or adoption order to transfer legal parenthood of the same surrogate-born person from the surrogate to the intended parents.	R19	[123]
11.	Consent under the administrative pathway in officials' R9 should not be valid if it is given before the child is seven days old. (Law Commission R20)	R20	[130]

OR	Officials' recommendation	LC	Para
12.	From the time of the child's birth until consent is given under the administrative pathway in officials' R9, the intended parents should be deemed to be additional guardians of the child under the Care of Children Act 2004. (Law Commission R21)	R21	[137]
13.	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 officials' R9. The statutory declaration should be provided to the Registrar-General alongside the notification of birth. (Law Commission R22)	R22	[141]
14.	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. (Law Commission R23)	R23	[144]
15.	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. (Law Commission R24)	R24	[148]
16.	New Part 3 of the Status of Children Act should provide that, when a child is born as a result of a surrogacy arrangement but the conditions of the administrative pathway in officials' R9 and R10 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. (Law Commission R25) In addition:	R25	[152]

OR	Officials' recommendation	LC	Para
	The Status of Children Act 1969 should provide that the Family Court would not be able to make a parentage order if it has previously made a determination of an application for a parentage or adoption order relating to the same surrogate-born person to transfer legal parenthood from the surrogate to the intended parents. The Status of Children Act 1969 and the Family Court Act 1980 as required should provide for the Governor-General by Order in Council to make rules regulating the practice and procedure of the Family Court in proceedings relating to surrogacy.		
17.	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. (Law Commission R26) In addition, the Status of Children Act 1969 should provide that Te Kōti Whānau | Family Court can only make such a declaration if it has decided not to make a parentage order (that is, where legal parenthood remains with the surrogate), and the Court is satisfied that another person is the surrogate-born person's legal parent alongside the surrogate.	R26	[160]
18.	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;	R27	[167]

OR	Officials' recommendation	LC	Para
	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. (Law Commission R27) In addition, the Status of Children Act 1969 should expressly provide that, as part of the Family Court's assessment of whether a parentage order is in a child's best interest, it may consider if consents were provided: • by the surrogate and the intended parents to the surrogacy arrangement before the child's conception, and • by the surrogate to relinquishing legal parenthood and by the intended parents to becoming legal parents.		
19.	A parentage order reporter must be appointed to prepare a parentage order report whenever an application for a parentage order is made (subject to officials' R26). 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 officials' R18. A copy of the parentage order report should be made available to all the parties to the application prior to the hearing. (Law Commission R28) In addition: a. an application for a parentage order must be supplied to the chief executive of Oranga Tamariki—Ministry for Children	R28	[178]

OR	Officials' recommendation	LC	Para
	b. the parentage order reporter must report to the Court on the application and may appear on the application personally or by a lawyer, and c. a party to the proceedings, or any lawyer appointed to act for a child who is the subject of the proceedings, may present evidence on any matter referred to in the parentage order report.		
20.	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 as if it were an application for a parenting order under section 48 of that Act. (Law Commission R29) Law Commission R29 should be given effect in the Status of Children Act 1969 by providing that the Court has power to: a. appoint a lawyer for child b. appoint a lawyer to assist the court, and c. order cultural, medical, and/or psychiatric reports about the surrogate-born person who is the subject of the application.	R29	[183]
21.	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). (Law Commission R30)	R30	[190]
22.	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. (Law Commission R31)	R31	[193]
23.	If the surrogate dies before giving consent under the administrative pathway in officials' R9, 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.	R32	[199]

OR	Officials' recommendation	LC	Para
	(Law Commission R32)		
24.	The administrative pathway and the court pathway should be available if the surrogate-born child was still-born or died soon after birth. (Law Commission R33)	R33	[202]
25.	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. (Law Commission R34)	R34	[206]
26.	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 officials' R16–R21. 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. (Law Commission R35) In addition, the Status of Children Act 1969 should additionally provide te Kōti Whānau | Family Court discretion not to appoint a parentage order reporter if a surrogate-born person is an adult and Court is satisfied the information that the report will provide is not needed for the proper disposition of the application.	R35	[212]
27.	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 officials' R9–R15. (Law Commission R36)	R36	[218]

Preserving access to identity information

OR	Officials' recommendation	LC	Para
28.	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. (Law Commission R37)	R37	[229]
29.	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. (Law Commission R38) In addition, the Human Assisted Reproductive Technology Act 2004 should be amended to require the Registrar-General to record information about a surrogacy arrangement on the surrogacy birth register when notified of a birth resulting from a surrogacy arrangement by a provider of fertility services.	R38	[233]
30.	The Human Assisted Reproductive Technology Act 2004 should be amended to state that Registrar-General should keep information on the surrogacy birth register that promotes the surrogate-born child's rights to identity, including, to the extent the information is known: • 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, in the case of a Māori surrogate, the surrogate's hapū and iwi affiliations (if known), and the surrogate's reasons for acting as a surrogate; • where the surrogate's ovum is used in conception, additional information about the surrogate – the surrogate's height, eye and hair colour, and any aspects considered significant of the medical history	R40	[243]

OR	Officials' recommendation	LC	Para
	of the surrogate, their parents and grandparents, and their children and siblings (if any); and • if the surrogacy arrangement involved the use of a donor or donors, information about the donor or donors as is required in relation to donors under section 47 of the Human Assisted Reproductive Technology Act 2004, with the replacement of the requirement for "gender" with "the type of gametes or cells donated". (Law Commission R40 with modification)		
31.	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. (Law Commission R41)	R41	[257]
32.	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. (Law Commission R42)	R42	[261]
33.	The Human Assisted Reproductive Technology Act 2004 should be amended to require that people accessing information must be advised of the desirability of counselling. (In order to progress Law Commission R43)	R43	[266]

Financial support for surrogates in domestic surrogacy arrangements

OR	Officials' recommendation	LC	Para
34.	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. (Law Commission R46)	R46	[279]

OR	Officials' recommendation	LC	Para
35.	The Human Assisted Reproductive Technology Act 2004 should be amended to provide guidance on what "reasonable surrogacy costs" can include. It recommends the provision should explain that these costs include: 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. (Law Commission R47) In addition, the Human Assisted Reproductive Technology Act 2004 should be amended to provide that references to the surrogate's partner additionally refer to the surrogate's support person.	R47	[291]

OR	Officials' recommendation	LC	Para
36.	The Income Tax Act 2007 should be amended to clarify how payments of reasonable surrogacy costs to surrogates interact with income tax liabilities and Working for Families tax credit entitlement by providing that only the reimbursement of a surrogate's loss of wages are taxable or considered family scheme income. (To support Law Commission R46 and R47)		[299]
37.	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. (Law Commission R48)	R48	[300]

Accommodating international and overseas surrogacy arrangements

OR	Officials' recommendation	LC	Para
38.	Te Kōti Whānau | Family Court should have jurisdiction to make a parentage order under the court pathway in officials' R16–R21 whether or not the surrogate-born child was born in Aotearoa New Zealand. In addition, the Status of Children Act 1969 should provide that when the Family Court is assessing whether a parentage order is the best interests of a child born as a result of an international surrogacy arrangement, the Court may consider the following in addition to considerations outlined in officials' recommendation 18: a. the steps the intended parents have taken to secure legal parenthood of the surrogate-born person in the surrogate-born person's place of birth if they were born outside New Zealand b. whether the surrogacy agreement was legally valid in the place in which it was carried out, if it occurred outside New Zealand c. evidence of the following consents: i. consent of any gamete donor to the use of their gamete in the surrogacy arrangement, if the surrogate-born person was conceived outside New Zealand	R52	[319]

OR	Officials' recommendation	LC	Para
	ii. consent of the surrogate's partner to relinquish legal parenthood and to the intended parents becoming legal parents, if the surrogate-born person was born outside New Zealand and the partner is considered a legal parent under the law of the place in which the birth occurred iii. consent of the surrogate to the surrogate-born person leaving the place of birth, if the surrogate-born person was born outside New Zealand iv. consent of the surrogate's partner to the surrogate-born person leaving the country of birth, if the surrogate-born person was born outside New Zealand and the surrogate's partner is considered a legal parent under the law of the jurisdiction in which the birth occurred. (Law Commission R52 with additions and modifications)		
39.	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. (Law Commission R56)	R56	[329]
40.	The Status of Children Act 1969 should provide that an overseas determination that a surrogate-born person is the legal child of the intended parents will have the same legal effect in New Zealand as a parentage order or a transfer of parenthood that has occurred in under the administrative parenthood pathway under the Status of Children Act, if the overseas determination meets certain criteria. The criteria are: • the parents and child were not habitually resident in New Zealand when the surrogacy was undertaken • the overseas legal parenthood determination established a legal parent-child relationship between the intended parent and surrogate-born child, and the determination is final and legally valid according to the law of the place in which the determination was made, and • there is evidence of relevant consents to the intended parents' legal parenthood.	R57	[335]

OR	Officials' recommendation	LC	Para
	The Status of Children Act 1969 should provide that the recognition of the overseas determination can occur through an administrative process. The Status of Children Act 1969 should require the Registrar-General to record information, to the extent available, on the surrogacy birth register where the Department of Internal Affairs has recognised the overseas legal parenthood determination. The 'relevant information' should as far as possible be consistent with that recorded for other people in the surrogacy birth register. The Status of Children Act 1969 should provide that the above administrative recognition pathway should apply to all cases in which a child was born via overseas surrogacy. (In order to progress Law Commission R57)		

Improving access to domestic surrogacy arrangements

OR	Officials' recommendation	LC	Para
41.	The list of permitted payments in section 14(4) of the Human Assisted Reproductive Technology Act should be amended to include payment for advertisements in relation to lawful surrogacy arrangements. (Law Commission R59)	R59	[351]

Further minor amendment

OR	Officials' recommendation	Para
42.	Subject to scope advice, the Human Assisted Reproductive Technology Act 2004 should be amended to enable an adult who had gametes extracted when they were a minor to use the gametes for any legal purpose in the manner that any other person could if the extraction had occurred when they were an adult. (In addition to Law Commission recommendations)	[354]

Recommendations for changes to the Bill

Amendments to the Bill are discussed in detail in Part C.

OR	Officials' recommendation	Para
43.	The title of the legislation should be updated by the Parliamentary Counsel Office as required.	[363]
44.	The Bill should come into force a year after the date of Royal Assent, apart from amendments relating to officials' recommendation 6 (Law Commission R15) and officials' recommendation 7 (Law Commission R16) (amendments to the HART Act to require annual reporting by ECART) and officials' recommendation 42 (amendment to the HART Act in relation to an adult's use of gametes extracted when they were a minor) which should come into force immediately.	[365]
45.	No changes are recommended to clause 3 (stating that Part 1 of the Bill amends the Human Assisted Reproductive Technology Act 2004).	[370]
46.	Remove clause 4 and – subject to the Parliamentary Counsel Office advice on wording – replace with: **Intended parent** means people who enter a surrogacy arrangement with the intention of becoming parents to a surrogate-born person and raising that person from birth **Surrogate** means a person who agrees to become pregnant and carries and gives birth to a child for the intended parents under a surrogacy agreement **Surrogacy arrangement** means an agreement between a surrogate and intended parents where the surrogate agrees to become pregnant and carries and gives birth to a child for the intended parents to raise as their own **Surrogate-born person** means a person born as the result of a surrogacy arrangement.	[378]
47.	Remove clauses 5 and 6 and replace with officials' recommendations 34-37 in relation to financial support for surrogates (Law Commission R46, R47, R48).	[394]
48.	Remove clauses 7 and 8 and replace with officials' recommendations 2-7 in relation to the ethics committee approval process and oversight (Law Commission R3, R5, R12, R13, R15, R16).	[419]
49.	Remove clause 9 (proposed surrogacy matching register).	[427]

OR	Officials' recommendation	Para
50.	Remove clause 10 (proposed regulations relating to surrogacy matching register fees).	[428]
	As detailed above, officials recommend additional amendments to the Human Assisted Reproductive Technology Act 2004: a. Extending requirements for ECART approval (officials' recommendation 1, to help achieve R2) b. Access to identity information by surrogate-born people (officials' recommendations 28-33, Law Commission R37, R38, R40, R41, R42, R43) c. Paid advertisements for lawful surrogacy arrangements (officials' recommendation 41, Law Commission R59). d. Use of gametes by adults that were extracted when they were a minor (officials' recommendation 42).	[429]
51.	Remove Part 2 of the Bill (clauses 11-17). See officials' recommendations 8-27 in relation to legal parenthood (Law Commission R17-R36; R52).	[455]
52.	No changes are recommended to clause 18 (stating that Part 3 of the Bill amends the Status of Children Act 1969).	[457]
53.	Remove clause 19. See officials' recommendations 8-27 in relation to legal parenthood (Law Commission R17-R36; R52).	[470]
54.	Remove Part 4 of the Bill (clauses 20 and 21). If the Bill is amended consistent with officials' recommendations in relation to matters of legal parenthood, intended parents who become a surrogate-born child's legal parents would be liable for child support without any amendments being required to the Child Support Act.	[477]
55.	Remove Part 5 (clauses 22-25). Replace with officials' recommendations 13 and 21 in relation to the provision of information to the Registrar-General (Law Commission R22 and R30). See also officials' recommendations 28-33 in relation to access to identity information by surrogate-born people, including the establishment of a surrogacy birth register to collect information relating to a surrogate-born child's identity (Law Commission R37, R38, R40-R43).	[499]

OR	Officials' recommendation	Para
56.	Remove Part 6 (clauses 26-28). See officials' recommendations 28-33 in relation to access to identity information by surrogate-born people, including the establishment of a surrogacy birth register to collect information relating to a surrogate-born child's identity (Law Commission R37, R38, R40-R43).	[506]
57.	Remove Part 7 (clauses 29-32). See discussion in relation to work-preparation and work-test obligations (Law Commission R50-51) at [305].	[517]
58.	Add a New Part 8 to the Bill to amend the Income Tax Act 2007 to clarify how payments of reasonable surrogacy costs to surrogates interact with income tax liabilities and Working for Families tax credit entitlement. See officials' recommendation 36 (to support Law Commission R46 and R47).	[518]
59.	Add a New Part 9 to the Bill to amend the Citizenship Act 1977 to ensure surrogate-born people have a pathway to citizenship and that they are treated the same as adopted people. See officials' recommendation 39 (Law Commission R56).	[519]

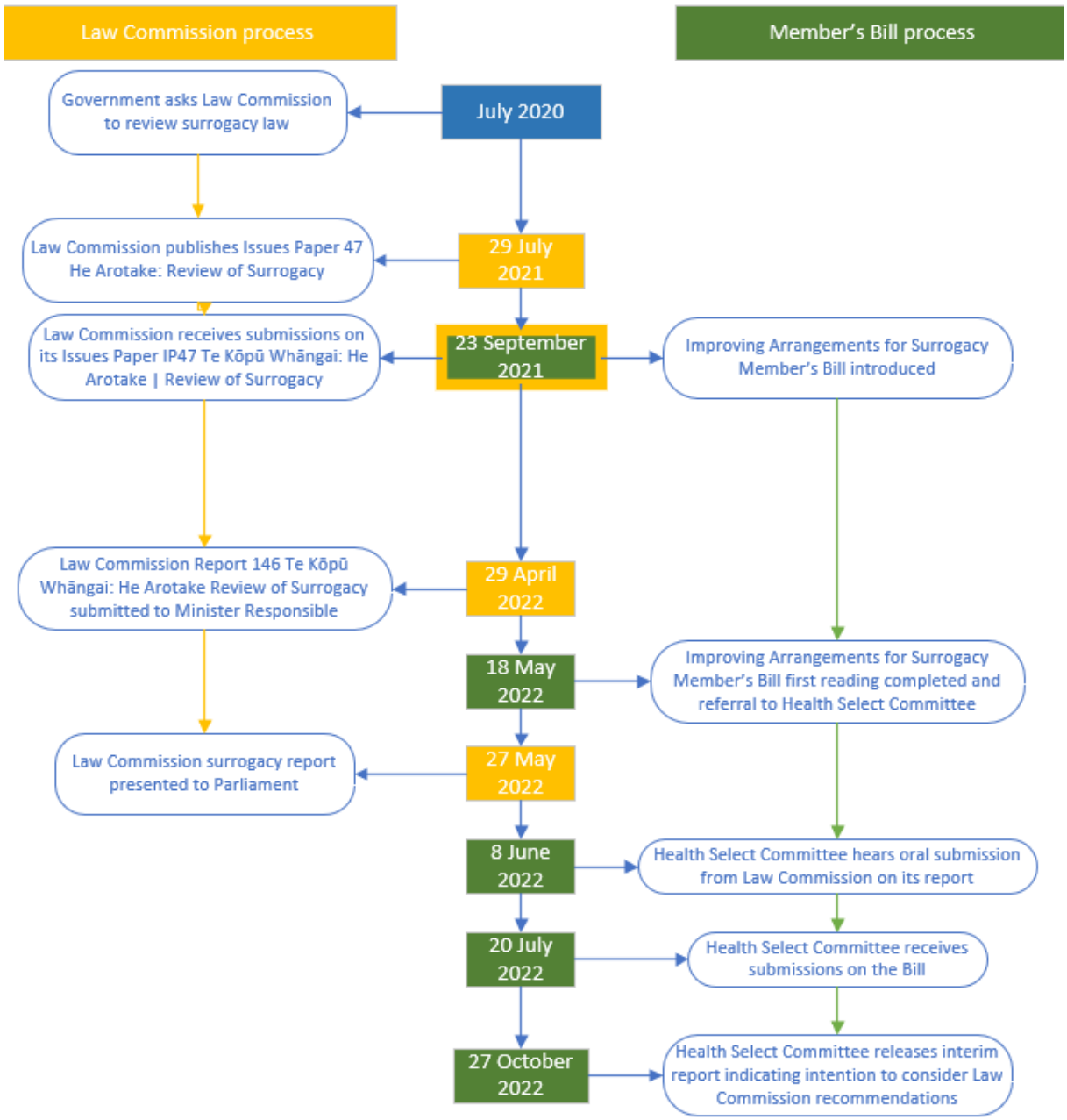
Process recommendations

OR	Officials' recommendation	Para
60.	Seek further public input on a redrafted bill.	[26]
61.	Seek further human rights advice on a redrafted bill.	[30]

Drafting approach

OR	Officials' recommendation
62.	Note that the recommendations made in this report, and the final wording of any amendments recommended in this report, are subject to advice from the Parliamentary Counsel Office about the best approach to draft the amendments.
63.	Authorise the Parliamentary Counsel Office to make any technical or consequential amendments that may be required to improve the workability of the Bill and the clarity of the drafting.

The Bill and the Law Commission review developed in parallel and are different



9. The Improving Arrangements for Surrogacy Bill was introduced as a member's bill in the name of Labour MP Tāmati Coffey. It was introduced on 23 September 2021 and completed its first reading and was referred to the Committee on 18 May 2022.

10. Separately in 2020, the Government asked the Law Commission to undertake a review of surrogacy law. The Law Commission submitted its report *Te Kōpū Whāngai: He Arotake Review of Surrogacy* to the Minister Responsible for the Commission on 29 April 2022. The report was presented to Parliament on 27 May 2022.

11. The Committee invited the Law Commission to make an oral submission on its report, which the Commission did on 8 June 2022. The Committee also received 34 written submissions on the Bill from organisations and individuals. It also heard 12 oral submissions, including from the member in charge of the Bill.

12. In October 2022, the Committee wrote to the Business Committee seeking an extension of scope to enable it to consider amendments to the Bill in relation to the recommendations in the Law Commission report. This was granted. On 27 October, the Committee issued an interim report noting this extension of scope and stating its intention to consider whether to incorporate the Law Commission's recommendations for legislative change into the Bill. The interim report did not consider the detail of the Bill or submissions on the Bill.

What the Bill says

13. The Bill's Explanatory Note outlines its intent to simplify surrogacy arrangements, ensure that information recorded on birth certificates is complete, and provide a mechanism for enforcing surrogacy arrangements. It would amend five Acts and two sets of regulations.

14. The Bill proposes:

- clarifying the law to enable 'actual and reasonable costs' to be paid for expenses incurred in supplying gametes (ova or sperm) or embryos, or undertaking a surrogacy arrangement
- appointing a Surrogacy Registrar with responsibilities to set up a surrogacy register to match prospective surrogates and intending parents
- enabling intended parents and surrogates to seek a new form of order – a 'surrogacy order' – from te Kōti Whānau | Family Court. This would have the effect of making the intended parents the legal parents of a surrogate-born child from birth. It would also require custody of the child to be transferred from the surrogate to the intended parents within 10 days of the child's birth. Te Kōti Whānau | Family Court could make a surrogacy order if satisfied the parties consent to be bound and their surrogacy arrangement has ethics committee approval, and
- providing for information about a surrogate and donors of embryos or cells to be registered as part of birth information.

What the Law Commission review says

15. The Law Commission undertook a comprehensive review of the law of surrogacy in Aotearoa New Zealand. It found law and practice is out of step with New Zealanders' needs and expectations.

16. The Law Commission found:

- people find it hard to access surrogacy. There is no comprehensive government information available about the process. Intended parents find it difficult to locate someone willing to be a surrogate and to access fertility treatment and donated gametes where required
- there is a backlog of applications for the ethics approval process that must be completed for some surrogacy arrangements. Many submitters noted this was a concern, particularly as delays can affect people's reproductive capacity
- there needs to be further Māori-led research into tikanga Māori and surrogacy and Māori perspectives on surrogacy, which could then inform the future practice of participants in surrogacy arrangements and the operation of the ethics approval process
- laws on legal parenthood do not accommodate surrogacy well. Intended parents must adopt surrogate-born children, a process which lacks safeguards for children, does not respect participants' wishes, and does not account for all scenarios (such as the death of an intended parent). International arrangements are not directly recognised by our laws
- there should be stronger protections for surrogate-born people's access to information about their genetic and gestational origins and whakapapa, to give effect to their rights to identity, and
- there is uncertainty about whether costs incurred by surrogates as a result of a surrogacy arrangement can be reimbursed. This may reduce the number of people willing to be a surrogate and leave surrogates to bear some of the costs of an arrangement.

17. The Law Commission's review took account of the complex ethical, legal, cultural and medical issues involved. It made 63 recommendations for improvement in relation to:

- the ethics committee approval process for domestic surrogacies
- developing a new legal framework for determining legal parenthood in surrogacy arrangements, to recognise surrogacy as a legitimate method of family building distinct from adoption and to promote the best interests of the surrogate-born child
- establishing a surrogacy birth register to preserve information for surrogate-born people about their genetic and gestational origins and whakapapa
- financial support for surrogates in domestic arrangements
- accommodating international and overseas surrogacy arrangements, and
- access to domestic surrogacy.

18. The Law Commission's report draws on submissions from people with experience of the current system, including intended parents, surrogates, and professionals. It also reflects input from an ao Māori perspective, the Law Commission's Māori Liaison Committee, research, feedback from academics, and recent international developments, including ongoing multilateral work on a potential international instrument setting minimum safeguards for recognising legal parenthood. The Law Commission was particularly influenced by the 2021 Verona Principles, which are widely regarded as setting out best practice for rights-consistent surrogacy regulation.

19. The Law Commission took a different approach to the Bill on many issues and considered a wider range of policy matters, for example the Bill only deals with some types of surrogacy, there are different emphases given to participants' rights and interests, and legal parenthood is treated differently. The Commission's recommendations are discussed in more detail in Part B.

Te Tiriti o Waitangi | Treaty of Waitangi

20. One of the principles underpinning the Law Commission's recommendations was that surrogacy law should reflect the Crown's obligations under te Tiriti o Waitangi. Relevant Crown obligations include facilitating the exercise of tino rangatiratanga in relation to surrogacy and in particular, enabling Māori to act in accordance with tikanga if they wish.

21. The Law Commission's recommended improvements to the ethics approval process and new parenthood laws would better recognise children as taonga. They would also provide another means by which to legally formalise a whāngai relationship, in place of adoption laws that can be a barrier to parenting a surrogate-born child as mātua whāngai. They would not change how rights and entitlements based on iwi affiliations operate. A new state duty to preserve identity information would recognise the importance of whakapapa.

What these parallel processes mean for this report

22. The Committee requested advice from officials about how the Bill could be amended to incorporate the Law Commission's recommendations. As noted, the Law Commission took a different approach to the Bill on many issues and considered a wider range of policy matters. As outlined in more detail below, for the purposes of this report and the process from here, this means:

- officials' recommendations are less detailed than is usual in a departmental report
- substantial redrafting of the Bill would be required to align the Bill with the Law Commission's recommendations
- further public input is desirable
- further human rights advice should be sought on any redrafted bill

- officials are undertaking consultation with the judiciary about several elements of the Law Commission recommendations, and
- a further extension of scope may need to be sought by the Committee

Officials' recommendations are less detailed

23. The Law Commission report recommends a new legal framework for surrogacy. It sets out recommendations for change but generally does not go into the practical detail of how these changes should be given effect in the way a draft bill does. The recommendations are set out at a higher policy level.

24. Officials' recommendations therefore relate to the policy decisions required to align the Bill with the Law Commission's findings, rather than the specific wording of the Bill (as in standard departmental reports). The detail of any redrafted Bill can only be worked out once the Committee makes decisions about the Commission's findings.

Substantial redrafting required

25. Given the scale of recommended changes, should the Committee accept officials' recommendations the Bill will need to be significantly re-drafted before it is reported back to the House. The Parliamentary Counsel Office (the PCO) will provide advice about the time required for redrafting.

Further public input is desirable

26. In a standard select committee process, submitters – including those who would be most affected by the proposed law – are given the opportunity to comment on a draft bill and how the law might work in practice. Submissions often go into a significant level of detail about the specific wording of provisions and the relationship between proposed provisions and existing law. This enables officials and the committee to receive the benefit of expert advice to amend the draft bill (sometimes substantially) in order to improve the resulting law and help ensure it avoids any unintended consequences.

27. There has not been an opportunity for public input on a bill implementing the Law Commission's report:

    - The Law Commission received submissions on its Issues Paper. These submissions informed the Law Commission's final report.
    - The Committee received submissions on the Bill. As noted, the Bill took a different approach to the Law Commission and did not consider the same breadth of policy matters.

28. As a result, submissions on the Bill were not directly relevant to officials' advice because they largely relate to the Bill and not the Law Commission report or a bill implementing the Law Commission's report. A number of submitters expressed general support for the Law Commission's findings and/or stated that this Bill should be aligned with or withdrawn and replaced with a bill reflecting the Law Commission's findings. However, these submissions did not focus on the drafting detail of a revised Bill.

29. Translating the Law Commission's recommendations into law involves many policy and drafting choices about fundamental matters of some legal complexity (such as te Kōti Whānau | Family Court's jurisdiction). Given the scale of recommended changes, officials consider that further public input on a revised Bill is desirable if the Committee accepts officials' recommendations. This would recognise the significant difference between enabling public comment on policy concepts (such as the opportunity to comment on the issues raised in the Law Commission Issues Paper) and enabling public comment on draft legislative provisions that show how the concepts might work in law and practice.

Further human rights advice should be sought

30. The recommendations in this report appear to be consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. The Law Commission's recommendations were particularly influenced by the 2021 Verona Principles, which are widely regarded as setting out best practice for rights-consistent surrogacy regulation. It also took account of ongoing multilateral work on an international instrument on legal parentage and surrogacy.

31. The Ministry of Justice advice on the Bill as introduced found the Bill to be consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990.[3] However, given the scale of recommended changes, officials recommend that the Committee seek further advice from the Attorney-General as to a revised Bill's consistency with the New Zealand Bill of Rights Act.

Officials are undertaking consultation with the judiciary

32. Officials are undertaking consultation with the judiciary about several elements of the Law Commission recommendations that relate to the Family Court, including who has standing to apply for a parentage order and how Court process operates when an international surrogacy is involved and the intended parents and child are not in New Zealand. In February 2023 the Committee gave officials permission to undertake this consultation. Officials will provide further advice to the Committee once this consultation is completed.

Further extension of scope may be needed

33. In October 2022 the Business Committee determined that the Health Committee's powers should be extended to permit the Committee to consider Law Commission recommendations that are outside the scope of the Bill.

34. After further work looking at how to translate the Law Commission's recommendations into law, officials recommend two further changes that may fall outside the scope of the Bill as introduced. These changes were not included in the Committee's October 2022 request to the Business Committee to consider out-of-scope amendments. If the Committee wishes to progress these changes through the Bill, it may wish to seek a further extension of scope from the Business Committee. The changes are:

[3] *Advice on consistency with the New Zealand Bill of Rights Act 1990: Improving Arrangements for Surrogacy Bill* Ministry of Justice, 13 October 2021. Available at Date (justice.govt.nz)

- an amendment to the Human Assisted Reproductive Technology Act 2004 to require ethics committees' annual reports to be published online. This Law Commission recommendation was originally envisaged as being operationalised without legislative change, so was not proposed for inclusion in the scope advice (officials' recommendation 7, Law Commission R16), and
- a minor amendment to the Human Assisted Reproductive Technology Act 2004 that was not part of the Law Commission's report or the Bill. Officials propose an amendment to that would clarify the ability of an adult to use gametes where the gametes were extracted from them when they were a minor (officials' recommendation 42).

35. These recommendations are discussed in more detail in Part B.

Part B: Policy issues, submissions, and recommendations

36. The policy issues are discussed under the following themes:

    I. Ethics committee approval process for domestic surrogacy arrangements at [42]

    II. Legal parenthood in domestic arrangements at [96]

        i. *Administrative pathway* at [119]

        ii. *Court pathway* at [151]

    III. Preserving access to identity information at [221]

    IV. Financial support for surrogates in domestic arrangements at [276]

    V. Accommodating international and overseas arrangements at [311]

    VI. Improving access to domestic arrangements at [346]

    VII. Further minor amendment at [354]

37. Under each theme, this part of the report sets out:

    - the Law Commission recommendations for legislative change
    - whether or how the Bill addresses the issues
    - relevant submissions; and
    - officials' recommendations for change.

38. The Committee received 34 written submissions from 17 organisations and 17 individuals on the Bill. The Committee heard 12 oral submissions, including from the member in charge of the Bill.

39. In this part, submissions are discussed to the extent that they relate to the policy issues raised in the Law Commission report. While many submitters made general statements in support of the Law Commission's findings, the submissions were generally focussed on the detail of the Bill. Therefore, in some cases, there were no submissions directly relevant to the issue being discussed.

40. Submissions on the Bill can be found here,[4] or by searching 'Improving Arrangements for Surrogacy Bill' on the New Zealand Parliament website. A list of submitters is set out at **Appendix A**. In discussing submissions in this report, we have named organisations and individuals submitting in their capacity as professionals or experts working in the area. We have not named individuals who submitted in their personal capacity.

[4] See: https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_115955/tab/submissionsandadvice?Criteria.PageNumber=1

41. Where officials recommend the Committee accepts a Law Commission recommendation, we generally have not provided further comment as we agree with the Law Commission's rationale for the recommendation. Where officials recommend extending or modifying a Law Commission recommendation, we have provided further explanation.

I. Ethics committee approval process for domestic surrogacy arrangements

42. The HART Act establishes two committees that develop and implement detailed policy relating to surrogacy, other assisted reproductive procedures, and human reproductive research:

- The Advisory Committee on Assisted Reproductive Technology (ACART), which:
  - provides independent advice to the Minister of Health on a range of matters relating to assisted reproductive procedures, including whether a procedure should be an "established procedure", and
  - issues guidelines and provide advice to the Ethics Committee on Assisted Reproductive Technology on procedures and research requiring case-by-case ethical approval.
- The Ethics Committee on Assisted Reproductive Technology (ECART), which assesses applications to undertake assisted reproductive procedures and research against the ACART guidelines.

43. Under the HART Act, all "assisted reproductive procedures", apart from procedures that are "established procedures", must be approved by ECART. Surrogacy is not defined as an assisted reproductive procedure or an established procedure. However, when surrogacies involve assisted reproductive procedures, such as gestational surrogacies where both donated ova and sperm are used, they must be assessed by ECART.

44. As traditional surrogacy involves the use of the surrogate's own ovum, this type of arrangement does not normally require ECART approval unless an assisted reproductive procedure is involved, such as the posthumous use of stored sperm.

45. Traditional surrogacy arrangements can also take place without the involvement of a fertility clinic. If a fertility clinic is involved in a traditional surrogacy arrangement, for example by providing an established procedure such as artificial insemination, it can request an ethical review by ECART, and ECART can provide non-binding advice.

46. The ACART guidelines require all parties to a proposed gestational surrogacy arrangement to receive counselling, legal advice, and medical advice.[5] In addition, ECART requires intended parents to obtain in-principle approval from Oranga

[5] ACART Guidelines for family gamete donation, embryo donation, the use of donated eggs with donated sperm and clinic assisted surrogacy. https://acart.health.govt.nz/publications-and-resources/guidelines-issued/guidelines-for-family-gamete-donation-embryo-donation-the-use-of-donated-eggs-with-donated-sperm-and-clinic-assisted-surrogacy/

Tamariki—Ministry for Children to the adoption of any child resulting from the surrogacy arrangement. Intended parents must adopt a surrogate-born child to become the child's legal parents. As part of that process Oranga Tamariki—Ministry for Children must provide a report to 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. In recognition of this, ECART requires prior in-principle approval to ensure there are no barriers to a future adoption.

47. While the Law Commission found there was broad support among their submitters for an approval process via ECART to continue,[6] it identified several ways to improve safeguards in the process. The Commission's legislative recommendations are discussed below.

Ethics approval for clinic-assisted surrogacy arrangements

Law Commission R2

48. The Commission recommended that 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.

How the Bill deals with this

49. The Bill does not propose to change which surrogacies are required to have ECART approval.

Submissions

50. The Aotearoa New Zealand Association of Social Workers submitted that it supports ECART retaining responsibility for approving and granting surrogacy arrangements.

51. The National Council of Women of New Zealand submitted that all clinic-assisted surrogacies should be required to obtain ECART approval, including traditional surrogacy arrangements that seek clinic assistance.

52. The New Zealand Law Society, in its submission to the Law Commission on its Issues Paper which it attached to its submission on the Bill, said that ECART is a functional, independent body and it should continue to be responsible for approving surrogacy arrangements.

[6] Of the 190 submissions to the Law Commission that addressed the question, 78% agreed or agreed in part that ECART approval should continue to be required for gestational surrogacy arrangements: Law Commission report 146, at 4.31.

Officials' recommendation 1:

The Human Assisted Reproductive Technology Act 2004 and/or the Human Assisted Reproductive Technology Order 2005 should be amended as needed so that all clinic-assisted surrogacy arrangements require prior approval of the Ethics Committee on Assisted Reproductive Technology.

(To help achieve Law Commission R2)

Comment

53. Officials agree with the intent of the Law Commission's recommendation and will seek the PCO's advice on the best way to achieve it.

Participation in ethics process by parties to traditional surrogacy arrangements

Law Commission R3

54. The Commission recommended that 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 ECART.

How the Bill deals with this

55. The Bill does not address the involvement of parties to traditional surrogacy arrangements in the ECART process.

Submissions

56. The National Council of Women of New Zealand suggested that the government consider ways to encourage parties to traditional surrogacy arrangements to participate in the ECART process. Stewart Dalley considered that the Bill should also allow people engaging in traditional arrangements to apply to ECART, in line with the Law Commission recommendation.

57. One submitter noted that the Bill primarily covers gestational arrangements and recommended more work be done to ensure parents entering traditional arrangements are also supported by the ECART process.

Officials' recommendation 2:

Ensure that direct applications to the Ethics Committee on Assisted Reproductive Technologies are possible under the Human Assisted Reproductive Technology Act 2004.

(In order to progress Law Commission R3)

Comment

58. As a result of requiring all clinic-assisted surrogacy arrangements to obtain ECART approval (see officials' recommendation 1, Law Commission R2 above), only traditional surrogacies occurring outside the clinic setting would need to make direct applications to participate in the ECART process. Some requirements in the HART Act appear to assume applications to ECART will occur via a clinic. These may be an impediment to direct applications.

59. Officials will consult with the PCO to confirm whether existing provisions in the HART Act would require amendment to enable direct applications to occur.

The role of Oranga Tamariki in the approval process

60. The Law Commission noted that Oranga Tamariki—Ministry for Children's role in assessing the parental suitability of intended parents is often seen as a source of concern. It said that some see Oranga Tamariki—Ministry for Children's role as overly invasive and inappropriate in the context of surrogacy, especially where one or both of the intended parents are the child's genetic parents.

61. The Law Commission noted that while it did not consider the state should assess intended parents' general suitability to be parents, there was an ongoing role for Oranga Tamariki—Ministry for Children to perform minimum pre-conception checks. The Law Commission said the state's role in establishing regulatory processes to enable surrogacy arrangements creates a responsibility to ensure the processes contain safeguards for children's interests, consistent with New Zealand's international human rights obligations.

Law Commission R5

62. The Law Commission recommended that the HART Act 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 ECART whether it has identified any concerns in relation to the risk of serious harm to any resulting child of the proposed surrogacy arrangement.

How the Bill deals with this

63. The Bill proposes replacing the adoption process with a different process for establishing legal parentage in relation to certain surrogacy arrangements.[7] The Bill does not envisage a role for Oranga Tamariki—Ministry for Children in the proposed new process.

Submissions

64. Several submissions supported the Bill's intention to remove Oranga Tamariki—Ministry for Children's involvement in the surrogacy process. One submitter expressed how difficult and traumatic it was to talk to social workers, all while being unsure whether their ethics applications would be approved, or their fertility treatment would be successful. Another submission supported Oranga Tamariki—Ministry for Children's role in safeguarding children at risk but said that it is not appropriate in surrogacy arrangements.

65. Aotearoa New Zealand Association of Social Workers noted that the current requirements for a social worker assessment after ECART approval places additional pressure on adoption team resources and stigmatises certain whānau types by formally assessing their 'fitness to parent'.

66. The New Zealand Council of Christian Social Services supported the Bill's simplification of this process, but recognised the role of the state in providing some level of oversight to ensure the safety of surrogate-born children in respect to their intending parents. It stated that it failed to see where this would take place within the proposed Bill and sought clarity as to whether the remains a requirement for Oranga Tamariki—Ministry for Children or another government agency.

67. In its submission to the Law Commission, which was attached to its submission to the Health Committee, the New Zealand Law Society supported some form of parental assessment. However, it suggested that there are other professionals that could undertake the assessment.

[7] The Bill would reform gestational surrogacy and some types of international surrogacy, but not traditional surrogacy. This means current adoption law would continue to apply to traditional surrogacy arrangements and most international surrogacies.

Officials' recommendation 3:

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 concerns in relation to the risk of serious harm to any resulting child of the proposed surrogacy arrangement.

(Law Commission R5)

In addition, the Human Assisted Reproductive Technology Act 2004 should be amended to:

- provide for a two-step process to prepare the surrogacy report, involving background checks and an advanced assessment if required; and
- enable regulations to be made by the Governor-General in Council on advice of the Minister responsible for the Oranga Tamariki Act 1989, after consultation with the Minister of Justice, prescribing the actions or steps that must be taken by Oranga Tamariki to prepare the surrogacy report. The Minister responsible for the Oranga Tamariki Act may recommend the regulations be made if satisfied the actions or steps are necessary to identify risks of serious harm and are proportionate.

Comment

68. This recommendation would involve Oranga Tamariki—Ministry for Children reporting to ECART if it had identified anything that constitutes a risk of serious harm to the resulting child. Oranga Tamariki—Ministry for Children would use a two-step process. Firstly conducting basic background checks in relation to the intended parents, then conducting an advanced assessment if the background checks identify information that indicate a risk of serious harm. The recommended regulation-making power would enable guidance to be given about the preparation of the surrogacy report. The reform would make Oranga Tamariki's role more proportionate to the risk of harm and respect intended parents' rights to a family in surrogacy arrangements. It would be consistent with the Verona Principles.[8]

Reviewing ECART decisions

69. The HART Act does not include a right to review or appeal ECART decisions to decline a surrogacy application. ECART can currently reconsider an application if relevant new information becomes available. The Law Commission found the lack of a clear appeal or review process may be a concern as ECART's decisions may end a person's pathway to build a family or encourage them to engage in an arrangement outside the ECART process or in international surrogacy arrangements, with reduced oversight.

[8] Law Commission report 146, at 5.24.

Law Commission R12

70. The Commission recommended that the HART Act should be amended to provide for a right of independent review of any decision made in relation to a surrogacy arrangement by ECART. 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.

How the Bill deals with this

71. The Bill does not provide for the review of ECART decisions.

Submissions

72. Family First New Zealand noted in its submission that the Bill does not discuss a right of review. The submission called for the Bill to be withdrawn and for the Government to produce a Bill that deals with the issues raised by the Law Commission.

73. The National Council of Women of New Zealand stated that the ECART appeals process should be streamlined and efficient, and there must be legal aid available for dispute and legal processes.

74. Aotearoa New Zealand Association of Social Workers noted that the Law Commission's recommendations for an appeal and complaints process for ECART decisions had not been included in the Bill. It advocated for these to be included. It stated that this is an important part of ensuring a system is built upon a human rights approach.

Officials' recommendation 4:

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 (ECART). Reviews should be by way of rehearing. The review process must operate expeditiously.

(Law Commission R12)

In order to achieve Law Commission R12, the Human Assisted Reproductive Technology Act 2004 should be amended to provide that:

a. a person directly affected by an ECART decision to decline, defer or impose conditions on a surrogacy arrangement may, by written application, seek a review of the decision within 28 working days after the day on which the parties were notified of the decision

b. the Minister has powers to appoint a panel of individuals with relevant expertise to review a decision as and when required, and appoint one of the individuals the chair of the panel

c. the Minister has power to terminate the appointment of a panel member

d. each panel member is appointed on any terms and conditions (including terms and conditions as to remuneration and travelling allowances and expenses) that the Minister determines by written notice to the member

e. on receipt of a relevant request for review, the panel chair should appoint three panel members to review the decision

f. the chair or panel can dismiss an application that is frivolous, vexatious or the subject matter is trivial

g. if an application is made, ECART must provide the reviewers with the statement of its reasons for a decision and other documents in its possession that ECART considers relevant to a review of the decision

h. the review should be by way of rehearing

i. the commencement of a review does not affect the operation of ECART's decision

j. on completion of review, ECART's decision can be affirmed, varied or set aside and either a new decision substituted or the matter referred back to ECART for reconsideration with any directions or recommendations it makes

k. panel members must act independently and comply with principles of natural justice

l. reviews must be completed expeditiously; and

m. if the application is approved, the panel members must give a copy of the approval and the relevant proposal to ACART.

Comment

75. Officials recommend the HART Act be amended to reflect the range of procedural requirements that would be necessary to ensure the procedural fairness of the review. These requirements are based on the legislative models the Law Commission noted in its report.

76. The Law Commission recommended that consideration be given to imposing a time limit within which a review would be completed. Officials recommend the legislation requires that reviews should be completed expeditiously, rather than setting a specific time limit as the Commission proposed (but did not formally recommend). This will achieve the intent of the recommendation while maintaining operational flexibility.

Composition of ACART and ECART

Law Commission R13

77. The Law Commission recommended that the Government should review the membership requirements for ACART and ECART. As part of this review, the Government should consider amending the HART Act 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).

How the Bill deals with this

78. The Bill does not address ACART and ECART membership.

Submissions

79. Family First New Zealand noted that the Bill does not discuss membership requirements.

80. Donor Conceived Aotearoa noted its concern that there is no donor-conceived person among ECART and ACART members.

81. In its submission on the Law Commission's Issues Paper, which was attached to its submission to the Health Committee, the New Zealand Law Society said that the membership of ECART should be modified to include a mandatory member with the ability to articulate the interests of the child. It also said that it may be appropriate to have a range of cultural experts who are brought in as members of the committee to consider applications requiring their specific cultural knowledge or expertise.

Officials' recommendation 5:

The Human Assisted Reproductive Technology Act 2004 should be amended to require that:

- the Advisory Committee on Assisted Reproductive Technology (ACART) and the Ethics Committee on Assisted Reproductive Technology (ECART) have two members able to articulate the interests of children; and
- the appointing Minister have regard to prospective ACART and ECART appointees' knowledge and experience of mātauranga Māori.

(Law Commission R13 with modification)

Comment

82. The HART Act sets requirements for ACART's membership. The Act sets more limited requirements for ECART's membership, which are otherwise set by non-legislative terms of reference. The requirements provide for multidisciplinary membership in reflection of the ethical, medical, cultural, and legal aspects of surrogacy and assisted reproductive technology:

Committee	**Current law**
ACART	Must have between eight and twelve members. Membership must include at least one member: • expert in assisted reproductive procedures • expert in assisted reproductive research • expert in ethics • expert in relevant law • who is Māori with expertise in Māori customary values • able to articulate issues from a consumer perspective • who is the Children's Commissioner or a representative of the Commissioner[9] with an ability to articulate the interests of children
ECART	Membership must include: • at least one member with expertise in assisted reproductive procedures, and

[9] The Children and Young People's Commission Act 2022 will replace this with a 'board member, representative, or employee of the Children and Young People's Commission.'

	• one with expertise in assisted reproductive research. Membership is otherwise provided for non-legislatively through the terms of reference that provide for multi-disciplinary expertise. The terms of reference require between eight and twelve members at least two Māori members. They do not include express requirements for members able to articulate the interests of children.

83. Officials recommend modifications to the membership requirements suggested by the Law Commission. Officials recommend:

- progressing the recommendation that ACART and ECART have two members able to articulate the interests of children
- requiring the appointing Minister have regard to prospective ACART and ECART appointees' knowledge and experience of mātauranga Māori, rather than amending the minimum number of Māori members, and
- not progressing a change to the minimum number of members on ECART with medical expertise.

84. Historically there have been challenges recruiting Māori and medical expertise to the Committees. Having prescriptive legislative requirements for membership would mean that if the required expertise was not available, the Committees could not legally perform their functions under the HART Act. This would mean assisted reproductive procedures and research could not be approved, and ethical guidelines could not be updated. Prescriptive qualification requirements are often avoided in legislative regimes because of this risk.

85. Specific phrasing for determining membership requirements as they relate to mātauranga Māori is subject to the PCO drafting.

ECART and ACART reporting requirements

Law Commission R15

86. The Law Commission recommended that the HART Act should be amended to require ECART to prepare an annual report on its operations. The annual report should include information on:

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

How the Bill deals with this

87. The Bill does not address ECART reporting requirements.

Submissions

88. Family First New Zealand noted that the Bill does not require any reporting or publishing of ECART applications or decisions.

89. The New Zealand Law Society considered it would be beneficial for ECART to have an ongoing role in monitoring and reporting on outcomes. It suggested that ECART could ask for feedback on the experiences of both intended parents and surrogates, which would be used to improve its processes, and be published annually as a part of ECART's annual reports and made available on the ECART website.

Officials' recommendation 6:

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:

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

(Law Commission R15)

Comment

90. The information contained in these reports is useful for early identification of emerging issues, and the reports can be an important information source for the public.

91. ACART is currently required to provide a report annually to the Minister of Health outlining its progress in carrying out its functions and on the number and kinds of decisions given by ECART in that period. The HART Act outlines that this report is to be provided as soon as is practicable after each 12-month period ended on 30 June. For consistency, the date by which ECART is required to provide a report could align with that for ACART.

Law Commission R16

92. The Law Commission recommended that annual reports of both ECART and ACART be published on their websites as soon as is practicable.

How the Bill deals with this

93. The Bill does not address publishing requirements for ECART and ACART annual reports.

Submissions

94. Submissions on ECART and ACART reporting requirements are outlined under the discussion of Law Commission recommendation 15 above.

Officials' recommendation 7:

Subject to scope advice, the Human Assisted Reproductive Technology Act 2004 should be amended to require annual reports of both the Ethics Committee on Assisted Reproductive Technology and the Advisory Committee on Assisted Reproductive Technology to be published on their websites as soon as is practicable.

(To achieve Law Commission R16)

Comment

95. This recommendation was not included in the Committee's October 2022 request to the Business Committee to consider out-of-scope amendments. If the Committee wishes to progress the amendment it may wish to seek scope advice as to whether it is possible to progress this change through this Bill.

II. Legal parenthood in domestic surrogacy arrangements

96. 'Legal parenthood' refers to the parent-child relationship established in law. A number of rights and entitlements flow from this legal relationship, including in relation to inheritance, child support, and citizenship. Parental status is distinct from guardianship status.[10] Guardianship encompasses duties, powers, rights, and responsibilities relating to the upbringing of a child, such as providing day-to-day care to the child and determining important matters affecting them, such as the child's name, residence, and medical treatment.

97. The legal parents of a surrogate-born child are determined by the common law and rules under the Status of Children Act 1969 that were developed for people born by donor-gamete conception. These rules mean that the surrogate is the legal mother of the surrogate-born child. If the surrogate has a partner, the partner is also a legal parent unless there is evidence they did not consent to the assisted human reproduction procedure.[11]

98. There are no laws that deal specifically with the transfer of legal parenthood in surrogacy arrangements. Intended parents must apply to te Kōti Whānau | the Family Court to adopt the surrogate-born child to become the legal parents in place of the

[10] Noting that guardianship usually automatically flows from legal parenthood. A person can be also a guardian without being a legal parent.
[11] Sections 17, 18 and 27 Status of Children Act 1969.

surrogate and any partner of the surrogate. The Family Court can make an adoption order if it is satisfied the applicants are fit and proper to care for and raise the child, and the child's welfare and interests will be promoted by the adoption.[12]

99. The Law Commission found current adoption law is inappropriate for dealing with surrogacy cases. Issues include:

- The law fails to promote the child's best interests. In particular, there is no legal relationship between the child and the intended parents until an adoption order is finalised, and an adoption order obscures the child's gestational origins and, in some cases, their genetic origins and whakapapa
- The law does not respect the intent of the parties to the surrogacy arrangement
- The adoption process is not suited to surrogacy and does not account for all scenarios
- There is no avenue to resolve disputes about legal parenthood, and
- The adoption process may also prevent arrangements that accord with tikanga Māori.

100. The Commission made recommendations that would replace adoption as the legal mechanism for transferring legal parenthood from a surrogate to the intended parents. The legislative recommendations are discussed below.

Determining legal parenthood of surrogate-born children

Law Commission R17

101. The Law Commission recommended that the Status of Children Act should be amended to include specific provisions for determining the legal parenthood of a person born as a result of a surrogacy arrangement.

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 Law Commission 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 conditions of the administrative pathway are not met.

How the Bill deals with this

102. The Bill provides for intended parents to be a surrogate-born child's legal parents from birth if te Kōti Whānau | Family Court has made a surrogacy order in relation to the surrogacy arrangement. The surrogate and any partner of the surrogate would no longer be legal parents at the child's birth.

[12] Section 11 Adoption Act 1955.

103. The Bill provides that te Kōti Whānau | the Family Court could make a surrogacy order if:

- both the surrogate and intending parents consent to be legally bound by the surrogacy arrangement, and
- ECART has approved the surrogacy arrangement.

104. The Bill provides that ECART could approve a surrogacy arrangement for the purposes of a surrogacy order if it is satisfied of each of the following requirements:

a) The surrogate will not be the genetic parent of the surrogate-born child

b) The surrogate and intending parents have each received medical advice

c) Any health risks to the parties and child are justified

d) The surrogate and intending parents have each received independent legal advice and clearly understand the legal consequences of a surrogacy order

e) The surrogate and intending parents have each received counselling

f) The surrogate and intending parents have agreed to when and how custody will be transferred, and the information about the pregnancy that the surrogate will communicate to the intending parents.

g) The risks that either party will change their mind about a transfer of custody have been considered by all parties and are small.

105. If a surrogacy order is not or cannot be sought (for example, if the arrangement involved a traditional surrogacy), it appears that the current law would apply. Intended parents would need to apply to adopt a surrogate-born child in order to obtain legal parenthood.

Submissions

106. Many submissions supported changes to the current law on legal parenthood. Several commented on aspects of the current law they found unsatisfactory, and none supported the current law. Submissions from several individuals, particularly those from intended parents, emphasised the current law does not reflect parties' intentions in participating in an arrangement. Aotearoa New Zealand Association of Social Workers submitted that the current processes fail to adequately recognise surrogacy as a legitimate way of forming a whānau.

107. Submissions expressed mixed views on the Bill's proposed pathway for legal parenthood. Some submissions supported it, while others noted the Law Commission's proposal for two alternative pathways to establish legal parenthood and submitted in support of this approach.

108. Some supported the Bill's proposal for intended parents to be the surrogate-born child's legal parents at the child's birth, subject to certain conditions. These submissions highlighted the security this would provide, particularly to intended parents, and that it was consistent with the intentions of the parties to the surrogacy arrangement.

109. Other submissions opposed the Bill's provision for intended parents to be the surrogate-born child's legal parents at the child's birth. Several noted this approach relied on a surrogate giving consent before the child's birth to the change in the child's parenthood. Family Planning New Zealand, the National Council of Women of New Zealand, and the New Zealand College of Midwives considered the Law Commission's post-birth consent model was more consistent with a surrogate's rights to bodily autonomy. The New Zealand Law Society and Margaret Casey KC were concerned the Bill's approach may mean New Zealand surrogacy orders would not be recognised in other countries.

110. Some submissions suggested changes or clarifications to the way in which ECART's approval for surrogacy arrangements would operate under the Bill's proposed amendments. Some suggested the Bill should contain more protections for children's and surrogates' rights, noting this would be consistent with international norms.

111. The joint submission from ACART and ECART opposed the Bill's proposed pathway for legal parenthood. It also opposed the Bill's proposed role for ECART in approving surrogacy arrangements for the purposes of surrogacy orders. It submitted this would be a significant deviation from the Committee's current role of determining applications for surrogacy, and would involve it in determining the legal parentage of a child.

112. A number of submissions noted that the Bill only provides a parenthood pathway for a subsection of surrogacies (as it only applies to gestational surrogacy and some types of international surrogacy). Some noted that this appears to leave some intended parents in the position of having to adopt to achieve the desired legal parenthood arrangement, which is what the Bill sets out to change.

113. Several submissions noted that the Law Commission's recommended framework covered the diverse nature of surrogacy arrangements. The joint submission from ACART and ECART suggested that the Law Commission's recommended approach better recognised the important role of ECART and clearly set out the Family Court's role in resolving disputes.

114. The New Zealand Law Society and the Wellington Community Justice Project considered that surrogacy orders should be established through the Status of Children Act rather than through the Care of Children Act as proposed by the Bill. The Care of Children Act deals with guardianship, day-to-day care, and contact, rather than legal parenthood.

Officials' recommendation 8:

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 officials' R9 and R10); 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.

(Law Commission R17)

Comment

115. The Law Commission's recommended approach would continue the current legal position under which a surrogate is a surrogate-born child's legal parent at the time of the child's birth (regardless of the child's place of birth). This would protect a surrogate's bodily autonomy and reflect international best practice. The pathways described below would provide ways in which legal parenthood could be transferred from the surrogate to the intended parents. They would deal with all types of surrogacy arrangement.

116. The Status of Children Act should provide that a change in the legal status of the surrogate-born person takes effect from the time the conditions of the parenthood pathway are met or the court order is made, rather than being deemed to have been effective from the child's birth. This avoids creating a legal fiction about the circumstance of the child's birth.

117. The law would continue to enable up to two intended parents to be recognised as legal parents. There would not be a requirement that intended parents are partners.

118. The Law Commission proposed the Status of Children Act would contain the new provisions dealing with legal parenthood in surrogacy arrangements. This Act sets rules for determining legal parenthood, including parenthood of children conceived as a result of assisted reproductive procedures. The Law Commission considered that on balance this would create the most publicly accessible surrogacy law.[13]

[13] The Law Commission considered but did not recommend a standalone statute for surrogacy. Two significant pieces of legislation currently regulate surrogacy - the HART Act and the Status of Children Act. To ensure continuity and avoid unnecessary legal complexity, the Law Commission thought surrogacy arrangements should continue to be regulated alongside other assisted reproductive procedures under the HART Act. A standalone Surrogacy Act that only addressed legal parenthood would not be a comprehensive source of surrogacy law, and therefore was not recommended.

Administrative pathway

119. This section deals with the Law Commission's recommendations relating to the proposed new administrative pathway for legal parenthood (Law Commission R18 – R24). The Commission's recommendations relating to the proposed new court pathway are discussed in the next section.

Determining legal parenthood under the administrative pathway

Law Commission R18

120. The Commission recommended that 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 Law Commission 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.

How the Bill deals with this

121. The Bill does not provide for an administrative pathway for determining legal parenthood. Please see the discussion of Law Commission R17 above for an outline of the Bill's proposed approach to determining legal parenthood.

Submissions

122. The New Zealand Law Society, Family Planning New Zealand, the National Council of Women of New Zealand, and the New Zealand College of Midwives supported the Law Commission's recommendation that legal parenthood could be transferred through an administrative pathway. Family Planning New Zealand considered that a non-court process supports people's reproductive autonomy and decision-making about pregnancy and parenthood.

Officials' recommendation 9:

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 officials' R13 and R14) 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 legal parent of the child.

(Law Commission R18)

When the administrative pathway applies

Law Commission R19

123. The Commission recommended that the administrative pathway in Law Commission 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.

How the Bill deals with this

124. The Bill does not provide for an administrative pathway for determining legal parenthood. Please see the discussion of Law Commission R17 above for an outline of the Bill's proposed approach to determining legal parenthood.

Submissions

125. No submissions directly addressed this matter.

Officials' recommendation 10:

The administrative pathway in officials' R9 should apply only if:

a. the surrogacy arrangement was approved by ECART and complied with any conditions imposed by ECART and any regulations made under the HART Act; and

b. the intended parents who entered the surrogacy arrangement that was approved by ECART have taken the child into their care.

(Law Commission R19 with modifications)

In addition, the Status of Children Act 1969 should provide that the administrative pathway is not available if the Family Court has previously made a determination on an application for a parentage or adoption order to transfer legal parenthood of the same surrogate-born person from the surrogate to the intended parents.

Comment

126. We understand the Law Commission R19(c) has two purposes:

- making the administrative pathway conditional on a surrogacy arrangement's compliance with any regulations made under the HART Act, and
- future-proofing reforms by enabling regulations to be made under the Status of Children Act prescribing safeguards for the administrative pathway. This would give greater flexibility to adjust our legislation in future. The Hague Conference on Private International Law is currently undertaking work on potential new instruments relating to parentage and surrogacy. A new regulation-making power could enable New Zealand to adapt its law in future to ensure compliance with a new international instrument, without the need for primary legislation. Any international instrument is not expected to be completed for some years.

127. We do not recommend progressing the latter change. Changes to laws relating to parenthood would appropriately be made via primary legislation given changes to legal parenthood have such a fundamental legal effect.

128. The additional recommendation would mean that parties to a surrogacy arrangement who had already been through a court process, seeking to either adopt or obtain a parentage order relating to the surrogate-born person, could not use the administrative pathway (eg, to seek to override a Family Court decision declining to make a parentage order for the surrogate-born person).

129. The legislation would not set a timeframe within which the pathway would need to be completed after a child's birth.

Consent requirements for the administrative pathway

Law Commission R20

130. The Commission recommended that consent under the administrative pathway in Law Commission R18 should not be valid if it is given before the child is seven days old.

How the Bill deals with this

131. The Bill does not provide for an administrative pathway for determining legal parenthood. Please see discussion of Law Commission R17 above for an outline of the Bill's proposed approach to determining legal parenthood, including the Bill's provision for intended parents to be a surrogate-born child's legal parents from birth if certain conditions are met.

Submissions

132. The Aotearoa New Zealand Association of Social Workers, the Humanist Society of New Zealand, the New Zealand Council of Christian Social Services, and some individual submitters supported intended parents being legal parents of the surrogate-born child from birth, if certain conditions are met. Some of these submissions considered this would provide more certainty and stability for the child and was consistent with the intention of the parties to the surrogacy arrangement.

133. A number of submissions raised concerns about the Bill providing that parties give pre-birth consent to the transfer of legal parenthood. The New Zealand College of Midwives and Family Planning New Zealand strongly opposed a pre-birth consent model and argued that it would not support surrogates' human rights, such as rights to bodily autonomy and privacy and reproductive rights.

134. Family Planning New Zealand considered that pre-birth consent is inconsistent with international law and could effectively turn both reproduction and children into a commodity and make a surrogate just a vessel. Another submission cited the 2019 recommendations on surrogacy made by the United Nations Special Rapporteur on the sale and sexual exploitation of children. The submission opposed requiring mandatory handing over of a child, especially if a surrogate's consent had changed or been withdrawn.

135. The National Council of Women of New Zealand noted that most overseas jurisdictions require post-birth consent from surrogates. It was concerned that the Bill did not clearly state that the surrogate has the right to maintain control over their own body, including to refuse, restrict or request a medical procedure including termination, and the right to decide on the conditions in which a birth would occur (such as the people present). It was also concerned the Bill did not indicate what would occur in situations where a surrogate may change their mind.

136. Many submissions commented on the Law Commission's recommendations that legal parenthood be transferred to the intended parents after the completion of pre- and post-birth steps intended to retain the surrogate's right to pre- and post-birth consent. These submissions considered the Commission's approach was more appropriate.

Officials' recommendation 11:

Consent under the administrative pathway in officials' R9 should not be valid if it is given before the child is seven days old.

(Law Commission R20)

Status of intended parents in the period between birth and consent under the administrative pathway

Law Commission R21

137. The Commission recommended that from the time of the child's birth until consent is given under the administrative pathway in Law Commission R18, the intended parents should be deemed to be additional guardians of the child under the Care of Children Act 2004.

How the Bill deals with this

138. The Bill does not provide for an administrative pathway for determining legal parenthood. Please see the discussion of Law Commission R17 above for an outline of the Bill's proposed approach to determining legal parenthood.

Submissions

139. Submissions did not directly address this matter.

Officials' recommendation 12:

From the time of the child's birth until consent is given under the administrative pathway in officials' R9, the intended parents should be deemed to be additional guardians of the child under the Care of Children Act 2004.

(Law Commission R21)

Comment

140. While the Law Commission's recommendation deals with guardianship status in the context of the administrative pathway, it will sometimes affect cases in the court pathway. Some surrogacy arrangements will have completed sufficient steps in the administrative pathway to make the intended parents guardians, but parties will be using the court pathway to determine legal parenthood. This could be because parties have not been able to – or have chosen not to – pursue the administrative pathway (for example, in the unlikely scenario in which one of the participants in the arrangement becomes unwilling to proceed with a transfer of parenthood).

Statutory declaration by surrogate under the administrative pathway

Law Commission R22

141. The Commission recommended that 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 Law Commission R18. The statutory declaration should be provided to the Registrar-General alongside the notification of birth.

How the Bill deals with this

142. The Bill does not provide for an administrative pathway for determining legal parenthood. Please see the discussion of Law Commission R17 above for an outline of the Bill's proposed approach to determining legal parenthood.

Submissions

143. Family First New Zealand noted that the Law Commission's recommendation under the administrative pathway included a requirement that a surrogate completes a declaration of consent alongside the notification of birth. Family First considered that the Bill should be withdrawn, and that the Government should produce a Bill that deals with the issues raised by the Law Commission.

Officials' recommendation 13:

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 officials' R9. The statutory declaration should be provided to the Registrar-General alongside the notification of birth.

(Law Commission R22)

Requirements for demonstrating consent by statutory declaration

Law Commission R23

144. The Commission recommended that 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.

How the Bill deals with this

145. The Bill does not provide for an administrative pathway for determining legal parenthood. Please see the discussion of Law Commission R17 above for an outline of the Bill's proposed approach to determining legal parenthood.

Submissions

146. Please see Family First New Zealand's submission outlined at [143] above.

Officials' recommendation 14:

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.

(Law Commission R23)

Orders confirming legal parenthood under administrative pathway

147. Jurisdictions regulate legal parenthood in surrogacy arrangements in different ways. Some may require a court order to confirm legal parenthood. The Law Commission therefore proposed allowing a court order to be sought confirming a legal parent-child relationship where parenthood is established through the administrative pathway. This would help a surrogate-born person's parenthood to be recognised in another jurisdiction.

Law Commission R24

148. The Commission recommended that 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.

How the Bill deals with this

149. The Bill does not provide for an administrative pathway for determining legal parenthood. Please see the discussion of Law Commission R17 above for an outline of the Bill's proposed approach to determining legal parenthood.

Submissions

150. Submissions did not directly address this matter.

Officials' recommendation 15:

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.

(Law Commission R24)

Court pathway

151. This section deals with the Law Commission's recommendations relating to the proposed new court pathway for legal parenthood (Law Commission R25 – R30). The Commission's recommendations relating to the proposed new administrative pathway are discussed in the section above.

When the court pathway applies

Law Commission R25

152. The Commission recommended that 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 Law Commission 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.

How the Bill deals with this

153. The Bill provides for a court pathway for determining legal parenthood, as outlined above in the discussion above of Law Commission R17. It provides for intended parents to be a surrogate-born child's legal parents from birth if te Kōti Whānau | Family Court has made a surrogacy order under the Care of Children Act in relation to the surrogacy arrangement.

Submissions

154. Submissions did not directly address this matter.

Officials' recommendation 16:

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 officials' R9 and R10 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.

(Law Commission R25)

In addition:

The Status of Children Act 1969 should provide that the Family Court would not have jurisdiction to make a parentage order if it has previously made a determination of an application for a parentage or adoption order relating to the same surrogate-born person to transfer legal parenthood from the surrogate to the intended parents.

The Status of Children Act 1969 and the Family Court Act 1980 as required should provide for the Governor-General by Order in Council to make rules regulating the practice and procedure of the Family Court in proceedings relating to surrogacy.

Comment

155. The law would enable the intended parents or the surrogate to apply for a parentage order. If only one of two original intended parents wished to proceed with the court application, the Family Court could still determine that both intended parents are legal parents.

156. The legislation would not set a timeframe within which an application for a parentage order must be filed after a child's birth.

157. Officials recommend ensuring that parties to a surrogacy arrangement cannot use the court pathway as a way to appeal or review a previous Court decision about a parentage or adoption order relating to the same surrogate-born person.

158. Officials recommend statutory changes to enable Family Court Rules to be made setting the detailed procedural requirements that apply when people seek legal parenthood determinations through the Family Court. The Law Commission did not expressly recommend this change. Enabling the making of rules would help establish a clear process is in place for people using the Court.

159. The Status of Children Act would need to specify who has standing to apply to the Court for a parentage order and who can participate in the Court process. Officials are undertaking consultation with the judiciary about these matters, as permitted by the Health Committee in February 2023. Officials will provide further advice to the Committee when this consultation is complete.

Parentage orders under court pathway

Law Commission R26

160. The Commission recommended that 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.

How the Bill deals with this

161. The Bill allows te Kōti Whānau | Family Court to make a surrogacy order in relation to the surrogacy arrangement. The Bill automatically deems intended parents to be the legal parents of a surrogate-born child from the child's birth if a surrogacy order is in place.

162. If a 'surrogacy order' is not, or cannot be, sought, the current law would appear to apply, and the intended parents would need to apply to adopt.

Submissions

163. Submissions did not directly address this matter.

Officials' recommendation 17:

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.

(Law Commission R26)

In addition, the Status of Children Act 1969 should provide that Te Kōti Whānau | Family Court can only make such a declaration if it has decided not to make a parentage order (that is, where legal parenthood remains with the surrogate), and the Court is satisfied that another person is the surrogate-born person's legal parent alongside the surrogate.

Comment

164. Having heard an application for a parentage order, the Court will decide whether to:

a. make the parentage order, such that legal parenthood transfers from the surrogate to the intended parents, or

b. decline to make the order such that legal parenthood remains with the surrogate.

165. Law Commission R26 gives the Court the power to additionally make any other declaration as to the surrogate-born person's parenthood. This is intended to deal with the scenario in which the Court has determined the surrogate is the legal parent and additionally considers some other person – such as the surrogate's partner - is also the legal parent.

166. Officials' additional recommendation would make it clear that the Court could exercise this power in narrow circumstances only: when it has determined that the surrogate is one of the parents of the child, and the surrogate-born person is also the child of the second person. The legislation would set out legal presumptions, drawn from existing law, that the Court could take account of when determining if it is satisfied the second person is a legal parent.

Factors the court should take into account in determining best interests of the child

Law Commission R27

167. The Commission recommended that 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.

How the Bill deals with this

168. The Bill allows te Kōti Whānau | Family Court to make a 'surrogacy order' in relation to the surrogacy arrangement.

169. Under the Bill, te Kōti Whānau | Family Court may make a surrogacy order if:

- both the surrogate and intending parents consent to be legally bound by the surrogacy arrangement, and
- ECART has approved the surrogacy arrangement.

170. The Bill provides that ECART could approve a surrogacy arrangement for the purposes of a surrogacy order if it is satisfied of each of the following requirements:

a) The surrogate will not be the genetic parent of the surrogate-born child

b) The surrogate and intending parents have each received medical advice

c) Any health risks to the parties and child are justified

d) The surrogate and intending parents have each received independent legal advice and clearly understand the legal consequences of a surrogacy order

e) The surrogate and intending parents have each received counselling

f) The surrogate and intending parents have agreed to when and how custody will be transferred, and the information about the pregnancy that the surrogate will communicate to the intending parents.

g) The risks that either party will change their mind about a transfer of custody have been considered by all parties and are small.

171. The Bill does not require that ECART (when approving surrogacy arrangements for the purposes of surrogacy orders) or te Kōti Whānau | Family Court (when making surrogacy orders) consider the best interests of the child.

Submissions

172. Family First New Zealand noted that the Family Court would not have the benefit of the Law Commission's surrogacy-specific factors or advice from an independent social worker in deciding what is in the child's best interests.

173. Aotearoa New Zealand Association of Social Workers recommended that the best interests of the child are also considered as part of the ethics committee approval process.

174. In its submission to the Law Commission, which was attached to its submission on the Bill, the New Zealand Law Society supported legislation setting out a list of considerations for the Family Court to use when assessing if a transfer of legal parenthood to the intended parents would be in the best interests of a surrogate-born child.

Officials' recommendation 18:

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.

(Law Commission R27)

In addition, the Status of Children Act 1969 should expressly provide that, as part of the Family Court's assessment of whether a parentage order is in a child's best interest, it may consider if consents were provided:

- by the surrogate and the intended parents to the surrogacy arrangement before the child's conception, and
- by the surrogate to relinquishing legal parenthood and by the intended parents to becoming legal parents.

Comment

175. The Commission's recommended list of considerations draws on the Verona Principles, a previous Commission report, principles that guide decision-making in other child-centred legislation, and approaches in other jurisdictions. The intention of the provision is to enable the Court to have discretion as to whether each individual consideration is to be taken into account in a particular case.

176. Officials recommend the legislation additionally expressly identifies consent as a factor the Family Court may consider in determining best interests. This would reflect the relevance of consent to a child's interests (particularly to their rights not to be sold and

trafficked) and the prominence of this consideration in international human rights instruments, the Verona Principles, and in the work of the Hague Conference Experts' Group considering a potential international surrogacy protocol.[14]

177. The recommended decision-making framework differs from that used in child-focused legislation such as the Care of Children Act 2004 and Oranga Tamariki Act 1989. Those Acts provide for overarching principles to inform decision-making about welfare and best interests. The Law Commission considered that it was not within the scope of its review to reflect equivalent overarching child-focused principles in the Status of Children Act. It therefore recommended a more targeted and direct approach of reflecting considerations that the Family Court must take account of in its decision-making about parenthood in surrogacy-related cases specifically. We expect judicial decision-making under the proposed decision-making framework would therefore draw on concepts and precedents that are used under other child-focused legislation concerning a child's welfare and best interests.

Parentage order reporter to report on child's best interests

Law Commission R28

178. The Commission recommended that a parentage order reporter must be appointed to prepare a parentage order report whenever an application for a parentage order is made (subject to Law Commission 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.

How the Bill deals with this

179. The Bill does not provide for a role like a parentage order reporter.

Submissions

180. Family First New Zealand noted that the Law Commission's recommendation would mean the Court would have the benefit of an independent social worker's advice in deciding what is in a child's best interests.

181. In the New Zealand Law Society's submission to the Law Commission, which was attached to its submission on the Bill, the Society supported the Family Court requesting an independent report to assist its decision-making. However, it thought Oranga Tamariki—Ministry for Children should not undertake the role. It considered other experts with a background in fertility issues, parenting and attachment could be used for this assessment process. It thought such experts were likely to be less confronting for the parties to the planned surrogacy than an Oranga Tamariki social worker.

[14] See 6d8eeb81-ef67-4b21-be42-f7261d0cfa52.pdf (hcch.net)

Officials' recommendation 19:

A parentage order reporter must be appointed to prepare a parentage order report whenever an application for a parentage order is made (subject to officials' R26). 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 officials' R18. A copy of the parentage order report should be made available to all the parties to the application prior to the hearing.

(Law Commission R28)

In addition:

a. An application for a parentage order must be supplied to the chief executive of Oranga Tamariki—Ministry for Children

b. The parentage order reporter must report to the Court on the application and may appear on the application personally or by a lawyer; and

c. A party to the proceedings, or any lawyer appointed to act for a child who is the subject of the proceedings, may present evidence on any matter referred to in the parentage order report.

Comment

182. Officials' additional recommendations would set procedural requirements similar to those applying in the Family Court when it is hearing cases involving guardianship matters.

Powers available to court when making parentage order

Law Commission R29

183. The Commission recommended that 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 s 48 of that Act.

How the Bill deals with this

184. The Bill allows Te Kōti Whānau | Family Court to make a surrogacy order. It does not set out powers available to the Court when it is determining whether to make an order. It enables an order as far as it related to custody to be enforced as if it was a parenting order.

Submissions

185. Several submissions noted their support for the Bill's provision for the enforcement of arrangements. One noted this would provide additional security for the parties to an arrangement and the child. The Disabled Persons Assembly NZ submitted that the legislation needed to prevent intended parents from not taking a child from the surrogate because the child is disabled.

186. Some submissions raised concerns that the Bill's provision for the order to be enforced could place undue burden on surrogates, particularly if they decided they did not wish to continue with aspects of a surrogacy agreement. There was also concern the provision may not be in the best interests of the child.

Officials' recommendation 20:

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 as if it were an application for a parenting order under section 48 of that Act.

(Law Commission R29)

Law Commission R29 should be given effect in the Status of Children Act 1969 by providing that the Court has power to:

a. appoint a lawyer for child

b. appoint a lawyer to assist the court; and

c. order cultural, medical, and/or psychiatric reports about the surrogate-born person who is the subject of the application.

Comment

187. Officials recommend the Status of Children Act provides the Family Court with the powers it may require in making a parenthood determination. A lawyer for child acts for the surrogate-born person to promote their interests, provide advice to them, and ensure their views are communicated to the Court. A lawyer to assist provides independent legal advice to the court on complex factual and legal issues. Expert reports provide information that can inform the Court's assessment of the child's best interests.

188. Officials do not recommend further powers that are available under the Care of Children Act in respect of parenting orders, as those powers are more relevant to guardianship, rather than parenthood, determinations.

189. Officials recommend the design of these powers is based on equivalent powers held by the Court in proceedings relating to the guardianship and care of children.

Registrar-General to record information in birth register following parentage order

Law Commission R30

190. The Commission recommended that 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).

How the Bill deals with this

191. The Bill provides for the birth information of a child to include information about the identity of the surrogate and any person who donated the embryo or cells for the pregnancy.

Submissions

192. No submissions directly addressed this policy area.

Officials' recommendation 21:

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).

(Law Commission R30)

Other changes relating to legal parenthood

Status of surrogate's partner

Law Commission R31

193. The Commission recommended that 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.

How the Bill deals with this

194. The Bill provides that if a child is born as a result of surrogacy arrangement that is subject to a 'surrogacy order,' the intending parents automatically become the parents

of the child from the child's birth, and the surrogate and the surrogate's partner (if applicable) are not the parents of the child for any purpose.

195. If an order is not or cannot be sought, it appears that the current law would apply: the surrogate and the surrogate's partner would be the legal parents at the child's birth, and the intended parents would need to apply to adopt.

Submissions

196. Several submitters noted the current law does not reflect parties' intentions and is undesirable for the surrogate, their partner, and the intended parents. A submission from an intended parent noted that it seemed ridiculous that the surrogate's husband, who did not have a genetic link to the child and was not physically carrying the child, would be listed as the legal parent at birth.

197. Another submission considered that the Bill would mean that the child could be with the intended parents sooner. They considered that this would create a smoother pathway and lessen the complexities around the surrogate or her partner having parental rights when they have no genetic attachment to the child.

198. The New Zealand Law Society noted that in rare cases a surrogate's partner may feel a familial connection to the child and have been part of the surrogacy process. In these cases parental status may recognise their role in the surrogacy process.

Officials' recommendation 22:

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.

(Law Commission R31)

Legal parenthood where the surrogate dies, is unable to give informed consent or cannot be located

Law Commission R32

199. The Commission recommended that if the surrogate dies before giving consent under the administrative pathway in Law Commission 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.

How the Bill deals with this

200. The Bill provides that if a child is born as a result of surrogacy arrangement that is subject to a 'surrogacy order,' the intending parents automatically become the parents of the child from the child's birth.

Submissions

201. Family First New Zealand's submission noted that it understood the Bill to provide that if a surrogate or intended parents died, the Bill would automatically permit the personal representatives of the intended parents to become the parent of the child provided a surrogacy order was obtained, as the order can be obtained prior to the birth of the child.

Officials' recommendation 23:

If the surrogate dies before giving consent under the administrative pathway in officials' R9, 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.

(Law Commission R32)

Legal parenthood in the event of the death of the surrogate-born child

Law Commission R33

202. The Commission recommended that the administrative pathway and the court pathway should be available if the surrogate-born child was still-born or died soon after birth.

How the Bill deals with this

203. The Bill provides for the automatic transfer of legal parenthood to the intended parents if the surrogacy arrangement is the subject of a surrogacy order, and the pregnancy results in the birth of a living child.

204. The Bill does not appear to deal with legal parenthood if the surrogate-born child was still-born.

Submissions

205. Family First New Zealand's submission noted that the Bill does not specifically consider how a surrogacy arrangement may be affected in the instance of the death of the surrogate-child. It considered that the intended parents would not be able to obtain a surrogacy order in this instance.

Officials' recommendation 24:

The administrative pathway and the court pathway should be available if the surrogate-born child was still-born or died soon after birth.

(Law Commission R33)

Legal parenthood in the event of the death of one or both intended parents

Law Commission R34

206. The Commission recommended that 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.

How the Bill deals with this

207. The Bill does not directly deal with this circumstance. Officials understand the Bill is intended to enable the intended parents to still be recognised as the legal parents if a surrogacy order had been obtained.[15]

Submissions

208. Family First New Zealand considered in its submission that if the intended parents died, the Bill would automatically permit the personal representatives of the intended parents to become the parent of the child provided a surrogacy order was obtained.

209. The Equal Justice Project recommended that a provision be inserted into the Bill clarifying the course of action for parties if one or both intended parents die before the surrogate-born child's death. It considered the Bill was unclear as to whether the intended parents would be substituted by a delegated replacement or if the surrogacy order would be dissolved.

[15] First reading speech of Mr Coffey, 13 April 2022, Hansard, Improving Arrangements for Surrogacy Bill — First Reading - New Zealand Parliament (www.parliament.nz).

Officials' recommendation 25:

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.

(Law Commission R34)

Comment

210. The Law Commission's recommendation is intended to enable the administrative pathway to continue to be used if one of two original intended parents has died. The remaining intended parent would be able to continue the administrative pathway process on behalf of both intended parents.

211. If there are two intended parents and one or both have died, or there is one intended parent who has died, the court pathway would be available. Any remaining intended parent could apply to the court on behalf of both intended parents as their personal representative. We additionally propose that the deceased intended parent's personal representative could encompass people who fall within the definition of 'personal representative' used in the Wills Act 2007 (administrator, executor, or trustee) or if no such person exists, a person in a close relationship with the intended parent at the time of the intended parent's death, or a relative, or longstanding friend.

Transitional arrangements

Law Commission R35

212. The Commission recommended that 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 Law Commission 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.

How the Bill deals with this

213. The Bill does not contain transitional provisions.

Submissions

214. No submissions directly addressed this matter.

Officials' recommendation 26:

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 officials' R16–R21. 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.

(Law Commission R35)

In addition, the Status of Children Act 1969 should additionally provide te Kōti Whānau | Family Court discretion not to appoint a parentage order reporter if a surrogate-born person is an adult and Court is satisfied the information that the report will provide is not needed for the proper disposition of the application

Comment

215. Law Commission R35 would enable a parentage order to be made in relation to a surrogate-born person who is born before the new surrogacy laws were in place. This would enable people who have not formalised their relationship by adoption to use the surrogacy court pathway. This would give the surrogate-born person a complete legal record of their birth origins and enable legal rights and entitlements associated with a legal parent-child relationship to operate (eg, under inheritance law).

216. The Commission recommended that in these cases the Family Court would have discretion to determine not to appoint a parentage order reporter to streamline and simply the process.

217. Officials' additional recommendation would extend this discretion to any case in which the surrogate-born person was an adult.

Transitional arrangements - availability of administrative pathway

Law Commission R36

218. The Commission recommended that 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 Law Commission R18–R24.

How the Bill deals with this

219. The Bill does not contain transitional provisions.

Submissions

220. No submissions directly addressed this matter.

Officials' recommendation 27:

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 officials' R9–R15.

(Law Commission R36)

III. Preserving access to identity information

221. Every person has rights relating to identity, including the right to access information about their origins.[16] The Law Commission's consultation suggested that many intended parents are, or plan to be, open with their children about surrogacy arrangements.[17] The Commission recommended that counselling, which is an integral part of the ECART process, should address children's identity rights and the parties' plans for sharing identity information with the child.

222. The Commission and submitters on the Bill noted, however, that there may still be some instances where children are not aware that they were born as the result of a surrogacy arrangement. The Commission stated that the state has a duty to preserve access to such information.[18]

223. Currently there is no requirement for the state to record that a child was born via surrogacy. The transfer of legal parenthood via adoption can obscure genetic and gestational origins and whakapapa. There are gaps in the information that is recorded by the state and limited support available to surrogate-born people seeking to access such information.

224. The birth register and HART Register of donor-conceived people do not record that a child was born as the result of a surrogacy arrangement and do not capture information about surrogates. Only limited information may be available about their adoption.

225. Currently at birth, the surrogate (and any partner) will be the child's legal parent(s) and responsible for registering the birth. A birth certificate issued ahead of adoption will therefore record the surrogate (and any partner) as the child's parents and will not contain any information about the intended parents. The birth certificate issued after the adoption will record the intended/adoptive parents as the parents as if they have been the legal parents from birth. There is provision for the birth certificate to note the parents are adoptive parents, but only on request of the adoptive parents or adopted person (once they turn 18).

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[16] This is discussed in Law Commission report 146 at 7.1 and footnote to 7.1: 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.
[17] Law Commission report 146, at 7.27.
[18] Law Commission report 146, at 7.27.

226. Once they turn 20, adopted people, including surrogate-born people who have been adopted by their intended parents, can request a copy of their original birth certificate under the Adult Adoption Information Act 1985. If the person was adopted after 28 February 1986, the Registrar-General must notify the person of the counselling services available; send the original birth certificate to the relevant counselling provider if the adopted person indicates that they desire counselling; and if no indication is given by the adopted person within 28 days, hold the birth certificate on their behalf until they request it. Once an adopted person has received a copy of their original birth certificate, they can apply for information about their birth parents and themselves under the Privacy Act 2020. They can request the current name and contact details for any birth parent named on their original birth certificate. Adopted people can also request the assistance of a social worker to contact a birth parent on their behalf.

227. If a surrogate-born person was conceived using donated gametes and they were born after August 2005, they can access information from the HART Register about the donor(s), including their name, and their date and place of birth. Anonymous gamete donations are not permitted under the HART Act, so all people born as a result of clinic-assisted gamete donations in New Zealand will be included on this register. A donor-conceived person accessing information on the HART Register must be advised of the desirability of counselling.[19]

228. The Law Commission made several recommendations relating to preserving access to identity information. The legislative recommendations are discussed below.

Giving effect to the identity rights of surrogate-born people

Law Commission R37

229. The Commission recommended that s 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.

How the Bill deals with this

230. The Bill does not include a 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.

Submissions

231. The Committee received several submissions relating to surrogate-born people's rights to identity information. Submissions highlighted the importance of an individual knowing their origins and whakapapa and supported the preservation of and provision of access to such information. Several submissions noted that this was a child-centred approach and consistent with the Verona Principles and the United Nations Convention on the

[19] Sections 50(5) and 57(4) HART Act.

Rights of the Child. Several submitters noted the particular importance of whakapapa information to Māori identity. Some submitters, including Donor Conceived Aotearoa, raised concerns that surrogate-born people currently may never learn about their origins and whakapapa, noting that some parents continue to maintain secrecy around their use of donor conception. They noted the negative impact on adopted people who do not have access to identity information.

232. A number of these submissions supported an extension of the Bill's provisions dealing with identity information. Many of these submissions supported the Law Commission's recommendations in this area, in particular the recommendations for a register of surrogate-born children and a wider review of the birth registration system. Several submissions proposed the Bill should provide for more identity information to be recorded on surrogate-born people's birth certificates.

Officials' recommendation 28:

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.

(Law Commission R37)

Register of surrogate-born people

Law Commission R38

233. The Commission recommended that 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.

How the Bill deals with this

234. The Bill does not create a separate register for surrogate-born people. Instead, the Bill amends the Births, Deaths, Marriages and Relationships Registration Act 1995 (the BDMRR Act 1995) and the Births, Deaths, Marriages, and Relationships Registration (Prescribed Information) Regulations 1995 (the BDMRR Information Regulations) to require information about surrogates and donors to be recorded, if the information is provided to the Registrar, including:

- the surrogate or donor's address,

- whether or not the surrogate or donor is a Māori descendant,
- the surrogate or donor's ethnic group or groups,
- the surrogate or donor's citizenship or residency status,
- the date, place and country of their birth,
- the type of cells donated.

Submissions

235. The New Zealand Law Society and the Office of the Privacy Commissioner submitted that they supported the Law Commission's recommendation that the HART Act be amended to establish a national surrogacy birth register that includes information relating to the surrogate (gestational and traditional) and the donor. However, they noted their view that a comprehensive review of the birth registration system is required and preferable to reform of individual areas in isolation.

236. One submission stated that introducing a national surrogacy register, where the child could gain information on the genetics, ethnicity, and cultural affiliation of their biological donor, would be in the best interests of the child.

237. The National Council of Women, the Humanist Society of New Zealand, the New Zealand Council of Christian Social Services and several individuals also submitted in support of the establishment of a national surrogacy register.

238. The Humanist Society of New Zealand considered that the registry of births is the best place to record identity information, rather than being split between different registries. It submitted that the information should be retained and be available to surrogate-born children, and that after the lapse of a suitable period, it should be available to the public.

Officials' recommendation 29:

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.

(Law Commission R38)

In addition, the Human Assisted Reproductive Technology Act 2004 should be amended to require the Registrar-General to record information about a surrogacy arrangement on the surrogacy birth register when notified of a birth resulting from a surrogacy arrangement by a provider of fertility services.

Comment

239. The Law Commission noted that it did not express a view on whether fertility clinics should have the task of passing relevant information directly to the Registrar-General. The Commission stated that this would duplicate information provided as part of the birth registration process and notification of parentage orders.

240. Officials recommend including a requirement for providers of fertility services to provide information about surrogates and any donors involved in surrogacy arrangements to the Registrar-General when notifying the Registrar-General of a birth resulting from a surrogacy arrangement.

241. Providers of fertility services are already required by the HART Act to collect donor information at the time of donation (s 47) and provide information about donors to the Registrar-General when notifying the Registrar-General of donor-offspring births (s 53). While information about a surrogate might be readily accessed and provided following the birth of a child, the role of the donor may have ceased years prior to birth. It is logical for clinics to provide information to the Registrar-General for the surrogacy birth register at the same time as providing information to the Registrar-General for the HART Register of donor-conceived people.

242. The Committee may wish to consider seeking the views of providers of fertility services in deciding whether to include this requirement, as fertility service providers have not had the opportunity to comment on this.

Information to be recorded on the surrogacy birth register

Law Commission R40

243. The Commission recommended that 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.

How the Bill deals with this

244. The Bill does not create a separate surrogacy birth register. Instead, the Bill amends the BDMRR Act 1995 and the BDMRR Information Regulations to require information

about surrogates and donors to be recorded, if the information is provided to the Registrar, including:

- the surrogate or donor's address,
- whether or not the surrogate or donor is a descendant of a New Zealand Māori,
- the surrogate or donor's ethnic group or groups,
- the surrogate or donor's citizenship or residency status,
- the date, place and country of the surrogate or donor's birth,
- the type of cells donated.

Submissions

245. As noted above, several submissions highlighted the importance of an individual knowing their origins and whakapapa and supporting the preservation of and provision of access to such information.

246. One submission commented on the importance of a national surrogacy register where the child can gain information on the genetics, ethnicity and cultural affiliation of their biological donors. The New Zealand College of Midwives submitted that information about surrogacy arrangements should be preserved and accessible to the child in the future. The Office of the Privacy Commissioner submitted that the Law Commission's recommendations in relation to a surrogacy birth register should be adopted.

247. The Nurses Society of New Zealand considered that the requirements of registering the details of the donor's cells and embryos would be beneficial to surrogate-born children as it recognises their right to know their genetic background, in particular, if they are of Māori descent, as this recognises the value and importance of whakapapa and connection to Māori identity.

248. The Humanist Society of New Zealand submitted that the register should require information about the identity of the surrogate and any person who donated an embryo or cells for the pregnancy.

249. The New Zealand Council of Christian Social Services supported a provision that would ensure that more comprehensive information is recorded about intended parents, surrogates, and donors involved in surrogacy arrangements.

250. Donor Conceived New Zealand considered that it was not enough to record the details of the surrogate and gamete donor on a register. It noted that those who are not told about the circumstances of their conception may never learn about their genetic and gestational origins and whakapapa.

251. The New Zealand Council of Christian Social Services queried whether thought had been given to having a mechanism for proactively disclosing surrogacy information to a child at a certain point.

Officials' recommendation 30:

The Human Assisted Reproductive Technology Act 2004 should be amended to state that Registrar-General should keep information on the surrogacy birth register that promotes the surrogate-born child's rights to identity, including, to the extent the information is known:

- 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, in the case of a Māori surrogate, the surrogate's hapū and iwi affiliations (if known), and the surrogate's reasons for acting as a surrogate;
- where the surrogate's ovum is used in conception, additional information about the surrogate – the surrogate's height, eye and hair colour, and any aspects considered significant of the medical history of the surrogate, their parents and grandparents, and their children and siblings (if any); and
- if the surrogacy arrangement involved the use of a donor or donors, information about the donor or donors as is required in relation to donors under section 47 of the Human Assisted Reproductive Technology Act 2004, with the replacement of the requirement for "gender" with "the type of gametes or cells donated".

(Law Commission R40 with modification)

Comment

252. Officials recommend th qualifier "to the extent the information is known" should apply to all surrogate and donor information, not only donor information. This is to acknowledge that there may be situations where the listed information is not known and this should not prevent the provision being fulfilled.

253. In all cases, the surrogate's reasons for acting as a surrogates should be required. This information is relevant in gestational surrogacies, just as it is in cases where the surrogate's own ovum is used in conception to enable the surrogate-born person to understand their genetic and gestational origins.

254. The wording should be modified to specify the situation in which additional information about the surrogate is required – that is, where the surrogate's ovum is used in conception – to align with the information required in relation to donors, in acknowledgement of the genetic connection with the surrogate-born child.

255. The language used should reflect that surrogacies may involve more than one donor.

256. Section 47(b) of the HART Act requires the donor's gender. It is not necessary to require this for surrogates (Law Commission R40b refers to s 47 of the HART Act). In relation to donors involved in surrogacy arrangements, the requirement for the gender of a donor should be replaced with a requirement for "the type of gametes or cells donated" – as this is what is most relevant to the surrogate-born person from a whakapapa/genetic origin perspective, in line with the new principle proposed above in R37.

Information from the register must be provided to surrogate-born people

Law Commission R41

257. The Commission recommended that 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.

How the Bill deals with this

258. The Bill does not amend current settings relating to access to information.

Submissions

259. As noted, many submitters commented on the importance of access to identity information for surrogate-born people. Stewart Dalley recommended that specific consideration be given to the way the information is released to those seeking access.

260. The New Zealand Council of Christian Social Services considered that the Bill was unclear as to when and how identity information could be accessed by a child and whether counselling would be made available to them. It questioned whether any consideration had been given to a mechanism which discloses surrogacy information to a surrogate-born person at a particular point in their lifespan, which they stated would align with article 8.2 of the United Nations Convention on the Rights of the Child.

Officials' recommendation 31:

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.

(Law Commission R41)

Registrar-General may refuse access to register on certain grounds

Law Commission R42

261. The Commission recommended that 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.

How the Bill deals with this

262. The Bill does not amend current settings relating to access to information.

Submissions

263. There are no submissions that directly address this issue.

Officials' recommendation 32:

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.

(Law Commission R42)

Comment

264. Section 49 of the Privacy Act 2020 sets out grounds for refusing access to personal information:

An agency may refuse access to any personal information requested if—

(a) the disclosure of the information would—

(i) be likely to pose a serious threat to the life, health, or safety of any individual, or to public health or public safety; or

(ii) create a significant likelihood of serious harassment of an individual; or

(iii) include disclosure of information about another person who—

(A) is the victim of an offence or alleged offence; and

(B) would be caused significant distress, loss of dignity, or injury to feelings by the disclosure of the information; or

(b) after consultation is undertaken (where practicable) by or on behalf of the agency with the health practitioner of the individual concerned, the agency is satisfied that—

(i) the information relates to the individual concerned; and

(ii) the disclosure of the information (being information that relates to the physical or mental health of the requestor) would be likely to prejudice the health of the individual concerned; or

(c) the individual concerned is under the age of 16 and the disclosure of the information would be contrary to the interests of the individual concerned; or

(d) the disclosure of the information (being information in respect of the individual concerned who has been convicted of an offence or is or has been detained in custody) would be likely to prejudice the safe custody or the rehabilitation of the individual concerned.

265. In its Issues Paper, the Law Commission noted that aligning the grounds for refusal with the Privacy Act would mean that a child under the age of 16 may be refused access if that is contrary to their interests but that the grounds for refusal for children over 16 would be limited to concerns about serious risks to health and safety.

Consider ways to support people accessing identity information

Law Commission R43

266. The Commission recommended that 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.

How the Bill deals with this

267. The Bill does touch on support for people accessing identity information.

Submissions

268. Donor Conceived Aotearoa noted that parents need information and support on how to share genetic and birth origins with their children.

269. The New Zealand Council of Christian Social Services submitted that the Bill is unclear whether counselling would be made available to a child accessing identity information.

270. Stewart Dalley submitted that specific consideration should be given to the way information is released. Practical assistance such as that provided under the adult adoption process and the potential provision of counselling should also be considered.

Officials' recommendation 33:

The Human Assisted Reproductive Technology Act 2004 should be amended to require that people accessing information must be advised of the desirability of counselling.

(In order to progress Law Commission R43)

Comment

271. This recommendation aligns with the HART Act requirements to inform donor-conceived people accessing identify information of the desirability of counselling.

Consider ways to improve access to information by adopted surrogate-born people

Law Commission R45

272. The Commission recommended that 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.

How the Bill deals with this

273. The Bill does not amend current settings relating to access to information.

Submissions

274. While several submissions highlighted the importance of an individual knowing their origins and whakapapa and the provision of access to such information, they did not specifically comment on access to surrogacy information by adopted surrogate-born people.

Comment

275. Officials agree with the Law Commission's recommendation. However, options to progress the recommendation can be considered as part of adoption law reform, rather than through the Bill.

IV. Financial support for surrogates in domestic surrogacy arrangements

276. The HART Act makes it an offence to give or receive "valuable consideration" for participation in a surrogacy arrangement. The offence is punishable by imprisonment, a fine, or both.

277. Valuable consideration is not comprehensively defined in the HART Act. It is unclear what it includes. Expressly permitted costs are payments to medical providers and legal advisers for a narrow range of costs relating to fertility treatment, counselling, and legal advice (many of these services must be sought in order to submit an application to ECART). There is no express provision for payments to a surrogate.

278. Being a surrogate comes with costs, but the Law Commission found the current law is unclear as to what, if any, financial support can be provided to surrogates. It noted this legal uncertainty can:

- leave surrogates bearing the costs of the pregnancy
- place stress on the relationship between participants, as intended parents may consider they must be conservative in their approach to covering expenses and the surrogate may be uncomfortable asking intended parents to cover her costs, and
- create barriers for women considering becoming surrogates. This in turn may encourage intended parents to resort to international arrangements that involve fewer safeguards for those involved.

Reasonable costs may be paid to surrogates

Law Commission R46

279. The Law Commission recommended that 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.

How the Bill deals with this

280. The Bill amends the HART Act to enable 'actual and reasonable costs' to be paid for expenses incurred in supplying gametes (ovum or sperm) or embryos, or undertaking a surrogacy arrangement.

Submissions

281. Most of the submitters who addressed this topic supported reasonable costs being paid to surrogates, some with qualifications.

282. ACART and ECART considered that it is appropriate for the HART Act to be amended to allow for the reimbursement of reasonable costs.

283. The Nurses Society of New Zealand said that the provision for payment for additional and reasonable expenses is appropriate and recognises a broader range of direct costs associated with the process.

284. Fertility New Zealand supported the Bill's intention to formalise payments.

285. A submission from an individual supported the Bill's intention to formalise payment arrangements so surrogates can be compensated for incidental costs that are not covered by the public health system or other support that is needed.

286. The Equal Justice Project submitted that the amendments to the HART Act to enable payments for actual and reasonable expenses for donor and surrogates will improve the accessibility of surrogacy and the welfare of surrogates.

287. The Wellington Community Justice Project said that the law needs to ensure surrogates are receiving adequate financial care in recognition of the significant risk they are undertaking, or that if they choose to forgo such support their decision was made without pressure or coercion.

288. The New Zealand Council of Christian Social Services suggested the reimbursement outlined in the Bill should include other reasonable costs in line with the Law Commission.

289. The New Zealand Law Society noted that the Law Commission supports a legislative amendment to ensure proper financial support to surrogates.

290. A submission from an individual outlined their concern about having appropriate safeguards in place to ensure compensation is for expenses actually incurred.

Officials' recommendation 34:

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.

(Law Commission R46)

What constitutes "reasonable surrogacy costs"

Law Commission R47

291. The Law Commission recommended that the HART Act should be amended to provide guidance on what "reasonable surrogacy costs" can include. It recommends the provision should explain that these costs include:

    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.

How the Bill deals with this

292. The Bill provides for the payment of the actual and reasonable costs of making a surrogacy arrangement, treatments to become pregnant, or incurred as a result of a pregnancy to be paid to the surrogate, including:

    a. payments to a provider of fertility treatment (including counselling related to a surrogacy arrangement or pregnancy)

    b. payments for legal advice to the woman who is, or who might become, pregnant under the surrogacy arrangement

    c. the costs of travel, and

    d. the reimbursement of lost wages or salary.

Submissions

293. Submitters supported a list of what constitutes reasonable costs. Many submitters felt that the Law Commission's recommendation was more substantive and thorough than the Bill. One submitter expressed concern about who is covered by the Bill and how financial compensation would apply to self-employed and unpaid workers.

294. In their joint submission, ECART and ACART suggested that the Bill proposes sensible amendments to HART Act to clarify what might constitute reasonable costs, which are largely consistent with the Law Commission's recommendations. However, the Committees submitted that the Law Commission's report provides a more comprehensive discussion on how surrogates should be reimbursed, which ought to be considered.

295. The New Zealand Law Society, in its submission to the Law Commission, which was attached to its submission on the Bill, considered that there is benefit to parties having a clear schedule of prescribed allowed costs. It said that the Bill makes a good start but the list in the Law Commission report is more comprehensive.

296. Stewart Dalley commented that a more expansive approach to reimbursing surrogates in line with the Law Commission recommendations is required, and suggested that the Committee consider the need to place a cap on the amount or timeframe when it comes to the inclusion of reimbursement for loss of wages or salary.

297. Family First New Zealand noted that the Bill, in comparison to the Law Commission report, fails to outline the detail of what reasonable costs can be compensated under surrogacy arrangements. Family First called for the Bill to be withdrawn and for it to be replaced with a Bill that deals with issues raised by the Law Commission.

Officials' recommendation 35:

The Human Assisted Reproductive Technology Act 2004 should be amended to provide guidance on what "reasonable surrogacy costs" can include. It recommends the provision should explain that these costs include:

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.

(Law Commission R47)

In addition, the Human Assisted Reproductive Technology Act 2004 should be amended to provide that references to the surrogate's partner additionally refer to the surrogate's support person.

Comment

298. Officials recommend a small extension to Law Commission R47 so that the legislative guidance provides that reasonable costs include those associated with the surrogate's partner *or support person*, in each place in which the Law Commission recommends that costs associated with a partner is a reasonable cost. This would avoid discrimination against single surrogates and enable the surrogate to have a support person of their own choosing.

Additional recommendation

Officials' recommendation 36:

The Income Tax Act 2007 should be amended to clarify how payments of reasonable surrogacy costs to surrogates interact with income tax liabilities and Working for Families tax credit entitlement by providing that only the reimbursement of a surrogate's loss of wages are taxable or considered family scheme income.

(To support Law Commission R46 and R47)

299. For clarity, officials recommend amending the Income Tax Act 2007 to clarify how payments to surrogates interact with income tax liabilities and Working for Families tax credit entitlement, by providing that only the reimbursement of a surrogate's loss of wages are taxable or family scheme income.

Surrogacy costs are enforceable

Law Commission R48

300. The Law Commission recommended that 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.

How the Bill deals with this

301. The Bill does not make agreements as to costs enforceable.

Submissions

302. Family First New Zealand noted that the Bill did not provide guidance on what costs can be compensated under a surrogacy arrangement and whether they are enforceable, meaning there is greater scope for unintended commercialisation of surrogacy. It called for the Bill to be withdrawn and for it to be replaced with a Bill that deals with issues raised by the Law Commission.

303. The Wellington Community Justice Project submitted that it is important that any agreement of financial care made prior to the undertaking of the surrogacy be legally enforceable regardless of the outcome of the pregnancy. This would ensure that if there are complications in the pregnancy or the intended parents' financial situation changes, the surrogate is protected from any possible financial hardship that could result from the surrogacy arrangement.

304. In its submission to the Law Commission, which was attached to its submission on the Bill, the New Zealand Law Society said that the exception to the unenforceable nature of a surrogacy arrangement would be reimbursing a surrogate for costs.

Officials' recommendation 37:

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.

(Law Commission R48)

Interaction between the payment of reasonable surrogacy costs, benefits and work obligations

Law Commission R50

305. The Law Commission recommended that 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).

Law Commission R51

306. The Law Commission recommended that surrogates who receive a benefit should be exempted from work-preparation and work-test obligations under the Social Security Act 2018 for a specified period of time after they have given birth.

How the Bill deals with this

307. The Bill provides that a surrogate who is a beneficiary may apply for an exemption from work preparation and work test obligations if she is at least 27 weeks pregnant or suffering from pregnancy complications.[20]

308. The Social Security Regulations 2018 already provide for exemptions from work-preparation and work-test obligations due to pregnancy.[21]

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[20] Clause 29 Improving Arrangements for Surrogacy Bill (new regulation 3A(2)(d) Social Security (Exemptions under Section 105) Regulations 1998). The Bill proposes making changes to the Social Security (Exemptions under Section 105) Regulations 1998, which have since been replaced with the Social Security Regulations 2018.

[21] Section 158(2) of the Social Security Act states that the Ministry of Social Development may grant the exemption for a period set by the Ministry of Social Development and may make the exemption subject to conditions set by the Ministry of Social Development. Health condition as defined in Schedule 2 of the Social Security Act 2018 includes pregnancy after the 26th week.
Currently, the Regulations provide that:

- a person may be exempted from their work preparation obligations if they have a health condition (regulation 100(2)(d))
- a person's work test obligations may be deferred if they receive jobseeker support, have a health condition and do not have capacity for work (regulation 76)

Submissions

309. The National Council of Women of New Zealand welcomed the removal of work obligations and testing for surrogates. It considered it essential that information is clear and widely available and includes rights to antenatal care, maternity leave, pay, and bereavement leave where there is a stillbirth or miscarriage.

Comment

310. Officials agree with the intent of the Law Commission R50 and R51. However, as they can be achieved via regulations, no change is required to primary legislation.

V. Accommodating international and overseas surrogacy arrangements

311. There is no international instrument governing surrogacy. Countries regulate surrogacy and legal parenthood very differently. Some international surrogacy arrangements may lack safeguards to protect the rights of the child, the surrogate, and the intended parents. For example, almost half of international arrangements in recent years have involved donated gametes, meaning surrogate-born people are unable to access information about their genetic origins.[22] Arrangements risk being viewed as the sale of a child if a contract provides for the transfer of a child to intended parents conditional on the payment of a fee to the surrogate.

312. International surrogacy is not provided for in New Zealand law. Where a child has been born as a result of a surrogacy arrangement overseas, the legal parenthood of the intended parents generally needs be determined through the New Zealand adoption process. This is because the Status of Children Act recognises the surrogate as the legal parent regardless of where the child was born, even if the intended parents are legal parents in the child's country of birth. An overseas legal parenthood determination can be recognised as an overseas adoption under New Zealand law if it meets the requirements of section 17 of the Adoption Act. However, the Law Commission notes that the overseas adoption pathway is rarely used in the context of international surrogacy.

313. A process developed in response to international surrogacy arrangements under which intended parents can make adoption applications to the New Zealand Family Court. It enables an application to be made for a visitor visa for the surrogate-born child despite the absence of legal parent-child relationship between the child and intended parents under New Zealand law. If the visa is granted, the intended parents and the child can

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- A work-tested partner or spouse or a work-tested sole parent beneficiary may be granted an exemption from work-test obligations if they are 27 weeks pregnant, or less than 27 weeks and suffering from complications arising from the pregnancy (regulations 102(f) and 104(2)(b)).

[22] 48 of 98 arrangements over the past six years involved the use of anonymously donated gametes: Law Commission, Law Commission report 146, at 2.17.

travel to New Zealand, and the intended parents can then apply for an adoption order in the New Zealand Family Court.

314. Government agencies engage with the family as early as possible and provide a briefing to the Minister of Immigration seeking a decision as to the grant of a temporary visitor visa for the surrogate-born child. If granted, visitor visas are usually valid for 12 months to allow the adoption application to be made. In determining whether to exercise their discretion to issue a visa, the Minister of Immigration takes account of Cabinet-endorsed non-binding guidelines (the non-binding guidelines).[23]

315. A child must travel to New Zealand on the passport issued in their country of birth. However, some countries do not recognise surrogate-born children as citizens. In these situations, the Department of Internal Affairs can issue a certificate of identity travel document to enable a child to travel to New Zealand. However, countries do not always recognise a certificate of identity as a valid travel document resulting in families needing to take complex routes to return to New Zealand.

316. A second process operated for a period in response to COVID-19 under which intended parents could make adoption applications to the New Zealand Family Court from other countries. COVID-19 led to problems obtaining passports for some children in their countries of birth. In response, the Principal Family Court Judge issued the Family Court COVID-19 Protocol for the Adoption of New Zealand Surrogate Babies Born Overseas (the COVID-19 Protocol).

317. The COVID-19 Protocol enabled the Family Court to consider adoption applications remotely, while the intended parents and the child were not physically in New Zealand.

318. The Law Commission identified a number of issues with current law and practice:

- some international surrogacy arrangements lack appropriate protections
- the complexity of the process
- duplication in processes
- the domestic adoption process that is used is not appropriate for surrogacy.
- as the Family Court makes its decision about an adoption application after an immigration process, there is a risk the Court's determination approaches a fait accompli. This is because the child will have left their country of birth and will have been in the intended parents' care for some time when an adoption application is made. The determination of the intended parents' parenthood is therefore usually going to be in the child's best interests.

[23] 2020-Information-Fact-Sheet-International-Surrogacy.pdf (orangatamariki.govt.nz)

Accommodating international surrogacy arrangements in the proposed legislative framework

Law Commission R52

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

How the Bill deals with this

320. The Bill allows the Family Court to make a surrogacy order relating to a child born as a result of an international surrogacy arrangement if it is satisfied:

- the surrogate and the intending parents consent to be legally bound by the surrogacy arrangement, and
- an overseas entity equivalent to ECART has provided written notice that it is satisfied that a range of requirements are met. The requirements are:

  a) The surrogate will not be the genetic parent of the surrogate-born child

  b) The surrogate and intending parents have each received medical advice

  c) Any health risks to the parties and child are justified

  d) The surrogate and intending parents have each received independent legal advice and clearly understand the legal consequences of a surrogacy order

  e) The surrogate and intending parents have each received counselling

  f) The surrogate and intending parents have agreed to when and how custody will be transferred, and how the surrogate will communicate information about the pregnancy to the intending parents.

  g) The risks that either party will change their mind about a transfer of custody have been considered by all parties and are small.

321. It is not clear whether the HART Act's prohibition on commercial surrogacy arrangements would prevent a surrogacy order from being granted under the Bill if a child was born as a result of a commercial international surrogacy arrangement.

Submissions

322. In its submission to the Law Commission, which was attached to its submission on the Bill, the New Zealand Law Society supported New Zealand having a process to recognise an overseas determination of legal parenthood if the determination was made in a jurisdiction that regulated surrogacy in a way similar to New Zealand. It also supported the Family Court being involved in the determination of legal parenthood for all New Zealand resident intended parents involved in international surrogacies. One

submission from an individual proposed that New Zealand should recognise the legal effect of surrogacy arrangements undertaken outside New Zealand.

323. Stewart Dalley suggested the Bill would not be effective because there are no countries in which New Zealanders can undertake surrogacy that regulate surrogacy in a way that would meet the requirements of the Bill.

324. The Disabled Persons Assembly NZ advocated for a process with a Hague Convention-level of safeguarding for adopted children, in order to protect the rights of disabled children born through surrogacy. The Equal Justice Project noted international surrogacy is an area in need of reform.

Officials' recommendation 38:

Te Kōti Whānau | Family Court should have jurisdiction to make a parentage order under the court pathway in officials' R16–R21 whether or not the surrogate-born child was born in Aotearoa New Zealand.

In addition, the Status of Children Act 1969 should provide that when the Family Court is assessing whether a parentage order is the best interests of a child born as a result of an international surrogacy arrangement, the Court may consider the following in addition to considerations outlined in officials' recommendation 18:

a. the steps the intended parents have taken to secure legal parenthood of the surrogate-born person in the surrogate-born person's place of birth if they were born outside New Zealand

b. whether the surrogacy agreement was legally valid in the place in which it was carried out, if it occurred outside New Zealand

c. evidence of the following consents:

    i. consent of any gamete donor to the use of their gamete in the surrogacy arrangement, if the surrogate-born person was conceived outside New Zealand

    ii. consent of the surrogate's partner to relinquish legal parenthood and to the intended parents becoming legal parents, if the surrogate-born person was born outside New Zealand and the partner is considered a legal parent under the law of the place in which the birth occurred

    iii. consent of the surrogate to the surrogate-born person leaving the place of birth, if the surrogate-born person was born outside New Zealand; and

    iv. consent of the surrogate's partner to the surrogate-born person leaving the country of birth, if the surrogate-born person was born outside New Zealand and the surrogate's partner is considered a legal parent under the law of the jurisdiction in which the birth occurred.

(Law Commission R52 with additions and modifications)

Comment

325. Consistent with the Law Commission R52, officials agree that accommodating international surrogacy within the domestic court pathway for determining legal parenthood is necessary to protect child's best interests.

326. Officials additionally recommend that legislation provides that when the Court is determining whether to make a parentage order in a case involving international surrogacy, it may take account of additional considerations. The proposed additional considerations relate to:

- a surrogacy arrangement's compliance with the law of the jurisdiction in which the surrogate-born person was born, and
- whether appropriate consents have been provided to the use of donor material, changes in parenthood, and the surrogate-born person's departure from their place of birth.

327. These additional considerations reflect risks that may be associated with some international surrogacy arrangements. They are based on considerations included in the current non-binding guidelines. The guidelines are used to determine whether a visa should be issued to a child born as a result of an international surrogacy arrangement to enable them to enter New Zealand. They can then have their parenthood determined by the New Zealand Family Court (discussed further above).

328. The Status of Children Act may need to address how Court process operates when an international surrogacy is involved and the intended parents and child are not in New Zealand. Officials are undertaking consultation with the judiciary about this, as permitted by the Health Committee in February 2023. Officials will provide further advice to the Committee when this consultation is complete.

Citizenship and parentage orders

Law Commission R56

329. The Commission recommended that 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.

How the Bill deals with this

330. The Bill does not propose any changes to citizenship law.

Submissions

331. The New Zealand Law Society supported children born through international surrogacy to New Zealand intended parents having New Zealand citizenship. The New Zealand Law Society supported an entitlement to citizenship by birth in these circumstances.

Officials' recommendation 39:

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.

(Law Commission R56)

Accommodating overseas surrogacy arrangements in the proposed legislative framework

332. Overseas surrogacies are arrangements in which intended parents and the surrogate live in an overseas country at the time the surrogacy arrangement occurs. This is different from international surrogacy, where intended parents who live in New Zealand engage in a surrogacy arrangement overseas and bring that surrogate-born child back to live with them in New Zealand.

333. New Zealand may need to verify the legal relationship between an intended parent and person who was born via an overseas surrogacy arrangement. For example, this may be necessary in order to determine a surrogate-born person's entitlement to New Zealand citizenship.

334. Current processes that are used for recognising legal parenthood in overseas surrogacy cases are:

- intended parents can adopt the child through the New Zealand courts, or
- an overseas adoption or foreign court order transferring legal parenthood can be recognised under section 17 of the Adoption Act 1955 through an administrative process, or via a High Court declaration.

Law Commission R57

335. The Commission recommended that 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.

How the Bill deals with this

336. The Bill does not propose any directly equivalent provisions. As discussed in relation to Law Commission R52 above, the Bill allows the Family Court to make a surrogacy order relating to a child born as a result of an international surrogacy arrangement if it is

satisfied an overseas entity equivalent to ECART has provided written notice that it is satisfied that a range of requirements are met.

Submissions

337. In its submission to the Law Commission, which was attached to its submission on the Bill, the New Zealand Law Society supported a clear process for recognising overseas determinations of legal parenthood, similar to that provided for in section 17 of the Adoption Act.

Officials' recommendation 40:

The Status of Children Act should provide that an overseas determination that a surrogate-born person is the legal child of the intended parents will have the same legal effect in New Zealand as a parentage order or a transfer of parenthood that has occurred in under the administrative parenthood pathway under the Status of Children Act 1969, if the overseas determination meets certain criteria.

The criteria are:

- the parents and child were not habitually resident in New Zealand when the surrogacy was undertaken
- the overseas legal parenthood determination established a legal parent-child relationship between the intended parent and surrogate-born child, and the determination is final and legally valid according to the law of the place in which the determination was made; and
- there is evidence of relevant consents to the intended parents' legal parenthood.

The Status of Children Act 1969 should provide that the recognition of the overseas determination can occur through an administrative process.

The Status of Children Act 1969 should require the Registrar-General to record information, to the extent available, on the surrogacy birth register where the Department of Internal Affairs has recognised the overseas legal parenthood determination. The 'relevant information' should as far as possible be consistent with that recorded for other people in the surrogacy birth register.

The Status of Children Act 1969 should provide that the above administrative recognition pathway should apply to all cases in which a child was born via overseas surrogacy.

(In order to progress Law Commission R57)

Comment

338. Officials recommend a new legislative process to enable the recognition of the legal parenthood of people born as a result of an overseas surrogacy arrangement through an administrative, rather than court, process. This would give effect to the Law Commission's view that it is unnecessary to require intended parents in overseas surrogacy arrangements to apply to the New Zealand Family Court for a parentage order in order to establish their legal parenthood. The Law Commission distinguished

overseas surrogacy arrangements from arrangements that it considers do require a full process to determine parenthood. It noted the intended parents in these arrangements are not habitually resident in New Zealand, did not travel offshore solely for the purposes of the surrogacy arrangement, and did not have the intention to reside in New Zealand immediately after the child's birth. They will also have completed a legal process offshore and may be seeking to verify their parental status several years after the child's birth.

339. The Commission therefore concluded requiring a parentage order in these circumstances was not required to realise the child's best interests or to fulfil our international obligations (for example, to ensure people habitually resident in New Zealand do not seek to bypass our surrogacy laws or engage in poor practice overseas). An administrative recognition pathway would also be less burdensome for applicants than seeking a parentage order. Once an overseas determination had been recognised, existing eligibility rules would be used to determine a surrogate-born person's entitlement to citizenship or to any other government services or processes that depend on the existence of a child-parent relationship.

340. Consistent with the Law Commission's intent, officials' recommended criteria for the pathway would aim to:

- safeguard interests of surrogate-born people and parties to surrogacy arrangements, and
- avoid intruding on the autonomy of individuals living in other jurisdictions and the legal frameworks of those jurisdictions.

341. The 'habitual residence' requirement would be a preliminary filter to distinguish overseas surrogacy from international surrogacy arrangements, to ensure that each type of surrogacy follows the appropriate process with suitable safeguards. It would not be defined, to allow a factual inquiry into the specific circumstances of each case.

342. The Law Commission recommendation focused on verifying legal parenthood for the purposes of establishing eligibility for citizenship. Officials do not propose that the pathway is limited to verifying legal parenthood to this situation. While in practice this is likely to be a common use, the provision may also be relevant in areas like immigration, for the purposes of determining entitlements to visas.

343. In addition to using officials' recommended administrative recognition process, applicants would continue to be able to seek a declaratory judgement through the High Court.

344. As part of recognising surrogacy arrangements for citizenship purposes, there is an opportunity to preserve relevant information on the proposed surrogacy birth register. This would help preserve identity information of surrogate-born people who are New Zealand citizens. The Law Commission did not make a recommendation about this. Officials recommend requiring the Registrar-General to record relevant information (if any) provided through the administrative recognition pathway in the surrogacy birth register. Relevant information would be information consistent with that provided for in Law Commission R40 above.

345. Officials recommend that the Status of Children Act should provide that the administrative recognition pathway should apply to all cases in which a child was born via surrogacy, regardless of the method by which legal parenthood was determined overseas. This would ensure that all children born as a result of a surrogacy arrangement are subject to these new provisions and surrogacy-specific safeguards, rather than the adoption equivalent.

VI. Improving access to domestic surrogacy arrangements

346. In submissions to the Law Commission, people reported that it can be hard:

- to understand how to go about forming a surrogacy arrangement
- for intended parents to find potential surrogates, and
- to progress arrangements due to cost and the limited availability of gametes.

347. We do not have good evidence about the drivers for the difficulties intended parents experience. In particular, we do not know the extent to which the difficulties are caused by barriers to matching with a potential surrogate, or by the relatively small number of people likely to be willing to be surrogates. The limited available research suggests the pool of potential surrogates is likely to be very small.[24]

348. In practice about half of arrangements that go through ECART involve a surrogate who is a family member or friend. The remaining half involve participants who have met through social networking platforms.[25]

Advertising surrogacy arrangements

349. The HART Act makes it an offence to give or receive valuable consideration for participating, or arranging another's participation, in a surrogacy arrangement. This prohibits people entering commercial arrangements, and intermediaries being paid to facilitate the matching of intended parents and surrogates.

350. The provision can be interpreted as prohibiting any paid advertising for a surrogacy arrangement, with breaches of the law a criminal offence. Submissions to the Law Commission note this restricts intended parents' ability to reach people beyond their existing networks. Others noted the growth of social media makes a legal distinction between paid advertising and posts on unpaid online platforms obsolete.

[24] Research undertaken in the UK: Poote AE and van den Akker OBA (2009) 'British women's attitudes to surrogacy' *Human Reproduction* vol 24(1), pages 139 – 145.
[25] ECART estimate for the 2020 year provided in a submission to the Law Commission, Law Commission report 146, at 10.34.

Law Commission R59

351. The Commission recommended that the list of permitted payments in section 14(4) of the Human Assisted Reproductive Technology Act should be amended to include payment for advertisements in relation to lawful surrogacy arrangements.

How the Bill deals with this

352. The Bill does not deal with advertising of surrogacy arrangements.

Submissions

353. Aotearoa New Zealand Association of Social Workers noted the Law Commission's recommendation to relax the prohibition on advertising. It agreed the prohibition is increasingly irrelevant in a digital world. It considered allowing online activity that facilitates matching would increase access.

Officials' recommendation 41:

The list of permitted payments in section 14(4) of the Human Assisted Reproductive Technology Act should be amended to include payment for advertisements in relation to lawful surrogacy arrangements.

(Law Commission R59)

VII. Further minor amendment recommended

Use of gametes by an adult who had gametes extracted as a minor

354. Officials recommend one further minor amendment to the HART Act that was not part of the Law Commission's report or the Bill, and was not addressed in submissions. This would clarify the ability of an adult to use genetic material where the material was removed from them when they were a minor.

355. It is an offence under the HART Act to obtain or use sperm or eggs (gametes) from a person aged under 16, unless obtained in order to preserve the gamete or to bring about the birth of a child who will be raised by the person from whom the gamete came. This provision is usually used when a young person is about to go through cancer treatment that may harm their reproductive capacity.

356. The law does not provide scope for the person to consent to the genetic material being used for another purpose, for example in a surrogacy arrangement where the child will be raised by another person. This is the case even if the consent is given once the person is an adult. This means that adults from whom gametes were extracted when underage have less autonomy over their gametes than someone who has them

extracted as an adult. We are aware of one instance of this issue emerging (though other contextual factors also affected the legality of the use of the gamete in that case).

357. ACART supports this clarification to the law.

How the Bill deals with this

358. The Bill does not deal with this policy matter.

Officials' recommendation 42:

Subject to scope advice, the Human Assisted Reproductive Technology Act should be amended to enable an adult who had gametes extracted when they were a minor to use the gametes for any legal purpose in the manner that any other person could if the extraction had occurred when they were an adult.

(In addition to Law Commission recommendations)

Comment

359. If the Committee wishes to progress the amendment it may wish to seek scope advice as to whether it is possible to progress this change through this Bill.

Part C: Clause-by-clause analysis

360. This part of the report sets out the clauses in the Bill, what submissions said about them, and officials' recommendations for amendments to align the Bill with the Law Commission's findings.

361. As noted, the Law Commission took a different approach to the Bill on some issues and considered a wider range of policy matters. The Bill will need to be substantially redrafted in order to align with the Law Commission recommendations.

Summary of recommended changes to Bill

362. The table below summarises the changes that would be required to the Bill in order to incorporate the Law Commission's recommendations for legislative change.

Clause	Matter and para ref	Recommendation
1	Title	The title of the legislation should be updated by the Parliamentary Counsel Office as required.
2	Commencement	The Bill should come into force a year after the date of Royal Assent, apart from amendments relating to officials' recommendations 6, 7 and 42 which should come into force immediately.
Part 1: Amendments to the HART Act 2004		
4	Interpretation of key terms	Remove clause 4 and – subject to the PCO advice on wording – replace with: **Intended parent** means people who enter a surrogacy arrangement with the intention of becoming parents to a surrogate-born person and raising that person from birth **Surrogate** means a person who agrees to become pregnant and carries and gives birth to a child for the intended parents under a surrogacy agreement

Clause	Matter and para ref	Recommendation
		Surrogacy arrangement means an agreement between a surrogate and intended parents where the surrogate agrees to become pregnant and carries and gives birth to a child for the intended parents to raise as their own **Surrogate-born person** means a person born as the result of a surrogacy arrangement.
5	Payment of actual and reasonable expenses incurred in supplying embryo or gamete	Remove clauses 5 and 6 and replace with officials' recommendations 34-37 in relation to financial support for surrogates.
6	Enforcement of surrogacy orders, payment of actual and reasonable expenses of making surrogacy arrangement	
7	Ethics committee approval process	Remove clauses 7 and 8 and replace with officials' recommendations 1-7 in relation to the ethics committee approval process and oversight.
8	Functions of the ethics committee	
9	Appointment of Surrogacy Registrar and establishment of surrogacy register	Remove clause 9.
10	Regulations – fees for surrogacy register	Remove clause 10.
	Extending requirements for ECART approval	Amend the Human Assisted Reproductive Technology Act 2004 and/or the Human Assisted Reproductive Technology Order 2005 as needed so that all clinic-assisted surrogacy arrangements require prior approval of the Ethics Committee on

Clause	Matter and para ref	Recommendation
		Assisted Reproductive Technology (officials' recommendation 1).
	Access to identity information by surrogate-born people	Include new provisions in the Bill in relation to access to identity information by surrogate-born people, including the establishment of a surrogacy birth register to collect information relating to a surrogate-born child's identity (officials' recommendations 28-33).
	Paid advertisements for lawful surrogacy arrangements	Include a new provision in the Bill to provide that payment for advertisements in relation to lawful surrogacy arrangements is permissible (officials' recommendation 41).
	Use of gametes by adults that were extracted when they were a minor	Include a new provision in the Bill to clarify the ability of an adult to use genetic material where the material was removed from them when they were a minor (officials' recommendation 42).
Part 2: Amendments to Care of Children Act 2004		
11-17	PART 2: Amendments to Care of Children Act 2004 to provide a mechanism for enforcing certain surrogacy arrangements and te Kōti Whānau | Family Court's ability to make surrogacy orders in relation to certain surrogacy arrangements, including certain international arrangements.	Remove Part 2. See officials' recommendations 8-27 in relation to legal parenthood.
Part 3: Amendments to Status of Children Act 1969		
19	Inserts new section 22A into the Status of Children Act 1969 relating to legal	Remove clause 19. Replace with officials' recommendations 8-27 and 38 in relation to matters of legal parenthood.

Clause	Matter and para ref	Recommendation
	parenthood of surrogate-born children.	
Part 4: Amendments to Child Support Act 1991		
20-21	PART 4: Amendments to Child Support Act 1991	Remove Part 4. If the Bill is amended consistent with officials' recommendations in relation to matters of legal parenthood, intended parents who become a surrogate-born child's legal parents would be liable for child support without any amendments being required to the Child Support Act.
Part 5: Amendments to Births, Deaths, Marriages, and Relationships Registration Act 1995		
22-25	PART 5: Amendments to Births, Deaths, Marriages, and Relationships Registration Act 1995 to require intended parents to notify the birth of a child born as a result of a surrogacy arrangement that is not subject to a surrogacy order, and to require the Registrar to record information about the surrogate and any donors	Remove Part 5. Replace with officials' recommendations 13 and 21 in relation to the provision of information to the Registrar-General. See also officials' recommendations 28-33 in relation to access to identity information by surrogate-born people, including the establishment of a surrogacy birth register to collect information relating to a surrogate-born child's identity.
PART 6: Amendments to Births, Deaths, Marriages, and Relationships Registration (Prescribed Information) Regulations 1995		
26-28	PART 6: Amendments to Births, Deaths, Marriages, and Relationships Registration (Prescribed Information) Regulations 1995 to prescribe the information that must be	Remove Part 6. See officials' recommendations 28-33 in relation to access to identity information by surrogate-born people, including the establishment of a surrogacy birth register to collect information relating to a surrogate-born child's identity.

Clause	Matter and para ref	Recommendation
	provided when notifying a surrogate-born person's birth to the Registrar	
PART 7: Amendments to Social Security (Exemptions under Section 105) Regulations 1998		
29-32	PART 7: Amendments to Social Security (Exemptions under Section 105) Regulations 1998 to enable a surrogate to apply for an exemption from work-test and preparation obligations if they are at least 27 weeks pregnant or suffering from complications arising from the pregnancy.	Remove Part 7. See discussion in relation to work-preparation and work-test obligations (Law Commission R50-51). Note that the Social Security (Exemptions under Section 105) Regulations have been revoked and the relevant provisions are now in the Social Services Act 2018 and the Social Services Regulations 2018.
New PART 8: Amendments to the Income Tax Act 2007		
N/A	The Bill does not currently amend this Act	The Income Tax Act 2007 should be amended to clarify how payments of reasonable surrogacy costs to surrogates interact with income tax liabilities and Working for Families tax credit entitlement by providing that only the reimbursement of a surrogate's loss of wages are taxable or family scheme income (officials' recommendation 58).
New PART 9: Amendments to the Citizenship Act 1977		
N/A	The Bill does not currently amend this Act	The Citizenship Act 1977 should be amended to ensure surrogate-born people have a pathway to citizenship and that they are treated the same as adopted people (officials' recommendation 59).

Clause 1: Title

363. Clause 1 states that the title of the legislation will be the Improving Arrangements for Surrogacy Act 2021.

Officials' recommendation 43:

The title of the legislation should be updated by the Parliamentary Counsel Office as required.

Clause 2: Commencement

364. Clause 2 provides that the Bill comes into force the day after the date of Royal Assent.

Comment

365. A delay in provisions coming into force is necessary for almost all the recommended amendments to enable time to implement new systems and processes recommended by the Law Commission. Where provisions are able to come into force immediately, we recommend this occur.

Officials' recommendation 44:

The Bill should come into force a year after the date of Royal Assent, apart from amendments relating to officials' recommendation 6 (Law Commission R15) and officials' recommendation 7 (Law Commission R16) (amendments to the HART Act to require annual reporting by ECART) and officials' recommendation 42 (amendment to the HART Act in relation to an adult's use of gametes extracted when they were a minor) which should come into force immediately.

PART 1: Amendments to Human Assisted Reproductive Technology Act 2004

366. Clauses 4-10 of the Bill amend the HART Act in relation to interpretation of key terms, financial support for the surrogate, the functions of the ethics committee, and the appointment of a Surrogacy Registrar to establish a register to facilitate matching of women who are willing to become surrogates with intended parents.

Comment

367. The Law Commission considered a wider range of policy issues and recommended several more and different amendments to the HART Act in relation to the ethics

committee approval process and oversight (Law Commission R2, R3, R5, R12, R13, R15), access to identity information by surrogate-born people (Law Commission R37-R45), financial support for surrogates (Law Commission R46-R48), and paid advertisements for lawful surrogacy arrangements (Law Commission R59).

368. The Law Commission considered but did not recommend a matching register for potential surrogates and intended parents. It instead recommended enabling paid advertisements for lawful surrogacy arrangements and several non-legislative measures aimed at improving access to surrogacy, including the publication by the government of comprehensive and clear information about surrogacy law and practice, professional development for lawyers specialising in surrogacy law and a government review of surrogacy funding and supply of donor gametes.

369. As below, to incorporate the Law Commission's legislative recommendations, cls 4-10 of the Bill need to be replaced. Officials' recommendations for amendments to the HART Act in line with the Law Commission report are set out in more detail in Part B.

Clause 3: Amendments to Human Assisted Reproductive Technology Act 2004

370. Clause 3 states that Part 1 of the Bill amends the Human Assisted Reproductive Technology Act 2004 (the HART Act).

Officials' recommendation 45:

No changes are recommended to clause 3.

Clause 4: Section 5 amended (Interpretation)

371. Clause 4 amends the HART Act and defines key terms in the Bill:

intending parent means a person to whom custody of a child born as a result of a surrogacy arrangement will be transferred

surrogacy order means an order made under **section 124C** of the Care of Children Act 2004

surrogacy register means the register established under **section 66B** of this Act

Surrogacy Registrar means the person, organisation, or department appointed under **section 66A** of this Act

surrogate means a woman who becomes pregnant for the purpose of transferring custody under a surrogacy arrangement of a child born as a result of the pregnancy

Amends the definition of **surrogacy arrangement** to replace "surrendering custody of a child born as a result of the pregnancy" with "transferring custody of a child born as a result of the pregnancy to the intending parents"

Submissions

372. Nine submissions commented on cl 4 and/or specific terminology used in the Bill.

373. Three submissions suggested amending the definition of "surrogate" to acknowledge gender diverse and transgender surrogates. Family Planning New Zealand specifically recommended that the definition be changed to read a "person who becomes pregnant for the purpose of transferring custody under a surrogacy arrangement of a child born as a result of the pregnancy". The Aotearoa New Zealand Association of Social Workers submitted that all references to "woman" in the Bill should be amended to "person" to better reflect gender diversity in Aotearoa.

374. The New Zealand College of Midwives supported the continuation of the term "surrogate" in the Act. It emphasised it would oppose any recommendation to change the term to "gestational carrier", something it noted was being used in some policies, which it submitted is dehumanising. The College also submitted that it would not support the removal of the word "woman" from the Bill, but that the "additive use" approach described in the Brighton and Sussex University Hospital guidance is preferable, where necessary.

375. The National Council of Women proposed that the term "surrogate mother" be used throughout the HART Act to better reflect the fundamental and altruistic role women play throughout the surrogacy. Another submission stated that the term "surrogate" diminished the role played throughout the surrogacy. This submission emphasised the importance of not marginalising women who gestate and give birth to children in surrogacy arrangements. It opposed any removal of "sexed terms" like "women" and warned against using dehumanising language in the Bill.

376. Stewart Dalley noted that cl 4 refers to transferring custody following the issuing of a surrogacy order but does not define what rights are obtained by intended parents when custody is transferred. He suggested that a definition should be included to prevent confusion.

377. The New Zealand Law Society noted in its oral submission that the use of "custody" in the HART Act currently and in the Bill's definition of "surrogacy arrangement" is outdated.

Comment

378. Amended definitions will need to be reflected or referenced where relevant in the HART Act, the Status of Children Act, the Income Tax Act, Family Court Rules, and in other consequential amendments to other legislation. Drafting of the definitions will be subject to the PCO advice on wording.

Officials' recommendation 46:

Remove clause 4 and – subject to the PCO advice on wording – replace with:

Intended parent means people who enter a surrogacy arrangement with the intention of becoming parents to a surrogate-born person and raising that person from birth

Surrogate means a person who agrees to become pregnant and carries and gives birth to a child for the intended parents under a surrogacy agreement

Surrogacy arrangement means an agreement between a surrogate and intended parents where the surrogate agrees to become pregnant and carries and gives birth to a child for the intended parents to raise as their own

Surrogate-born person means a person born as the result of a surrogacy arrangement

Clause 5: Section 13 amended (Commercial supply of human embryos of human gametes prohibited)

379. Clause 5 allows payment for the actual and reasonable expenses incurred in the supply of a human embryo or human gamete, including costs of counselling and travel, and reimbursement for lost wages or salary.

Submissions

380. Two submissions referred to cl 5 in conjunction with cl 6 below. The joint submission from ACART and ECART supported cls 5 and 6 as an interim measure pending the introduction of a Government bill that reflects the outcome of the Law Commission's review.

381. Stewart Dalley submitted that there is need for wider reform than provided for in the Bill, preferring the Bill to be held in abeyance until such time as the Government formally announces the legislative amendments it intends to make following the recommendations by the Law Commission. However, Stewart Dalley noted that should the Bill proceed, the Committee should consider the need to place a cap on the amount or timeframe for reimbursing for loss of wages or salary.

Clause 6: Section 14 amended (Status of surrogacy arrangements and prohibition of commercial surrogacy arrangements)

382. Clause 6 inserts an avoidance of doubt clause, stating that a surrogacy order (under new section 124C of the Care of Children Act 2004) may, so far as it relates to custody of the child, be enforced.

383. Clause 6 also expands the range of expenses for which payment may be made to include any actual and reasonable expenses arising from the surrogacy or pregnancy, including costs of travel, and reimbursement of lost wages or salary.

Submissions

Payment of actual and reasonable expenses

384. Most submitters supported the intent of cl 6 and agreed that expanding the range of expenses for which payments may be made was appropriate given the broad range of costs associated with surrogacy arrangements. The Nurses Society of New Zealand said that the provision for payment for additional and reasonable expenses is appropriate and recognises a broader range of direct costs associated with the process. The Equal Justice Project submitted that the payment of actual and reasonable expenses for surrogates would improve the accessibility of surrogacy and the welfare of surrogates.

385. A number of submissions agreed that surrogacy laws should ensure surrogates are adequately compensated but that the Law Commission's report provided more comprehensive recommendations about how surrogates should be reimbursed, including prescribing limits on the categories of permissible compensation.

386. Stewart Dalley suggested that the Committee consider the need to place a cap on the amount or period for reimbursing for loss of wages or salary.

387. A common submission was that cl 6 should allow for incidental costs relating to the pregnancy and surrogacy arrangement. Suggestions included extending reasonable costs to allow for payment for the care of a surrogate's dependents, costs for pregnancy clothing, and costs not covered by the public health system. The New Zealand Council of Christian Social Services also encouraged the Government to consider the rights of surrogates to special care and assistance, including ongoing care for the surrogate beyond what is provided by a midwife six weeks after birth.

388. Other submissions raised concerns about how the clause would work in practice. For example, one submission raised concerns about the adequacy of safeguards in place to ensure that compensation does not act as financial coercion for vulnerable women. Family First New Zealand noted there may be more scope for unintended commercialisation of surrogacy and greater commercial benefits for surrogates under the Bill. One submission agreed with the Bill's intention to allow compensation for lost wages and salary, but raised questions about how the parameters of this would be set, including what comprises "valid time off" and privacy issues around the surrogate needing to disclose their salary in order to be reimbursed.

389. Another submission raised asked whether the information about a surrogate's salary would be kept private and whether self-employed or unpaid workers would be covered by this section. The submission suggested that under the Bill it would be unlikely that lawyers or CEOs would be used as surrogates because of the financial liability intended parents would incur if they are required to cover the surrogate's income. It suggested an allowance for incidental pregnancy costs between $2,000-$10,000 could be used in addition to or as an alternative to the salary and wage compensation. The submission

considered that this bright line test would be simple for both parties and would not require surrogates to divulge their financial information to intended parents.

Enforceability of a surrogate's surrogacy costs

390. Some submitters questioned what mechanism would be in place to ensure that an amended s 14(4) of the HART Act was adhered to given there is no provision in the Bill setting out how financial support may be enforced.

391. Some submitters supported the recommendation to encourage the reimbursement of expenses to be agreed to upfront so as to minimise the risk of coercion from either party during the surrogacy arrangement. The Wellington Community Justice Project submitted that any agreement of financial care made prior to the surrogacy should be legally enforceable regardless of the outcome of the pregnancy. It thought this would ensure the surrogate is protected from financial hardship. It considered that automatic parentage upon birth (under clause 19) posed a serious risk of exploitation where there were no regulations in place to ensure that intended parents uphold their financial obligations to the surrogate following pregnancy.

392. Another submission raised concerns about what punitive measures could take place in relation to costs not being met.

Drafting of provision

393. Two submissions commented on the drafting of cl 6 (an amended s 14 of the HART Act). One submitter stated that s 14(1A) was unclear on matters of enforcement and withdrawal of consent. The Equal Justice Project also noted that there was some ambiguity in the wording of an amended s 14(4) and recommended that the overarching test should be amended to include people considering making a surrogacy arrangement, as referred to an amended s 14(4)(b).

Commercial surrogacy

394. Two submissions expressed support for permitting commercial surrogacy arrangements, with altruistic surrogacy and whāngai remaining as options. One submission considered that commercial surrogacy would make more women motivated to volunteer as surrogates, and therefore, considered it would be more likely that surrogacies could occur in Aotearoa New Zealand.

Officials' recommendation 47:

Remove clauses 5 and 6 and replace with officials' recommendations 34-37 in relation to financial support for surrogates (Law Commission R46, R47, R48).

Clause 7: New section 23A and cross-heading inserted

395. Clause 7 inserts new section 23A into the HART Act.

396. New section 23A states that the Ethics Committee may receive written applications for approval of a surrogacy arrangement for the purposes of obtaining a surrogacy order under Part 2A of the Care of Children Act 2004.

397. The Ethics Committee may approve the surrogacy arrangement if it is satisfied of each of the following requirements:

- The surrogate will not be the genetic parent
- The surrogate and intending parents have each received medical advice
- Any health risks to the parties and resulting child are justified
- The surrogate and intending parents have each received independent legal advice and clearly understand the legal consequences of a surrogacy order
- The surrogate and intending parents have each received counselling
- The surrogate and intending parents have agreed to when and how custody will be transferred, and how information about the pregnancy will be communicated to the intending parents
- The risks that either party will change their mind have been considered by all parties and are small.

Submissions

398. A few submissions agreed that ECART should approve surrogacy arrangements based on the requirements set out in cl 7. One submitter recommended that the parties should indicate and confirm that they are applying for a surrogacy order when applying for a surrogacy arrangement.

399. Many of the submissions included recommendations relating to the scope and detail of the proposed new s 23A of the HART Act. Others expressed clear opposition to proposed new section 23A.

Scope of surrogacy arrangements within the Bill's ambit

400. Some submissions noted that cl 7 only applied to gestational surrogacies, not traditional surrogacies. Stewart Dalley stated that the Bill was too narrowly focused on gestational surrogacies and believed that the Bill should also allow people engaging in traditional arrangements to apply to ECART. The National Council of Women of New Zealand submitted that all clinic-assisted surrogacies should be required to obtain ECART approval, including traditional surrogacy arrangements. They suggested the government consider ways to encourage parties to traditional surrogacy arrangements to participate in the ECART process.

401. Clause 19 below further discusses submissions on the scope of surrogacy arrangements that would be regulated by the Bill.

List of ethics committee considerations in new s 23A(2) of the HART Act

402. The Nurses Society of New Zealand considered the criteria for ECART approval of a surrogacy arrangement appear sound and comprehensive.

403. Some submissions made recommendations to expand and provide more detail in new s 23A(2) of the HART Act. Both the Aotearoa New Zealand Association of Social Workers and the Equal Justice Project recommended that the best interests of the child be considered as part of ECART approval, with the Equal Justice project suggesting that a provision similar to s 5 of the Oranga Tamariki Act be inserted into new s 23A(2). The Aotearoa New Zealand Association of Social Workers emphasised that the competing rights of surrogates and intended parents should also be carefully balanced.

404. The Wellington Community Justice Project raised concerns about the lack of safeguards in place for surrogates under s 23A. It highlighted that s 23A does not require ECART to review whether any agreement had been made in relation to the financial care of surrogates by the intended parents, and instead focuses heavily on the surrogate's obligations to the intended parents (e.g. focussing on the information that the surrogate will share throughout the pregnancy, and the circumstances of custody transfer).

405. The Wellington Community Justice Project recommended the inclusion of an additional requirement in s 23(2)(f) which involves ECART considering whether parties have agreed to and settled on a financial care arrangement. They emphasised that this additional requirement would not involve considering the nature of the financial care agreed upon but simply that an agreement had been settled. The Wellington Community Justice Project considered that a minimum, rebuttable standard is important to provide protection to the surrogate during the surrogacy process. It also noted that a rebuttable standard of financial care would allow ECART to take into consideration te ao Māori and other cultural arrangements (where family ties may mean that a lower level of financial care is needed, or alternative arrangements have been agreed upon).

406. The National Council of Women of New Zealand recommended that s 23A(2)(c) be expanded to include effective access to independent medical advice and/or a second opinion, the provision of information about the medical procedure, lifestyle restrictions, and short and long-term risks and complications. It emphasised the importance of providing this in language that the surrogate understands.

407. The Disabled Persons Assembly NZ supported a process that provided disabled children born through international surrogacy with Hague Convention-level safeguards.

408. Family First New Zealand noted some other differences between the Bill and the Law Commission's report. It highlighted that both the Bill and the Law Commission's recommendations require ECART to consider the health of the child in its assessment, however the Law Commission's recommendations described how the assessment of health risks is to be conducted. It noted that the Bill does not contemplate time limits for approval given to a surrogacy arrangement by ECART, whereas the Law Commission

recommends that the Advisory Committee should provide guidance to ECART on time limits for its approval.

Functions of ECART

409. The Aotearoa New Zealand Association of Social Workers said that it supported ECART retaining responsibility for approving and granting surrogacy arrangements as per clause 7 of the Bill.

410. The joint submission of the ACART and ECART opposed clause 7. The Committees did not support the Bill's proposed new function for ECART, which includes providing approval for surrogacy arrangements for the purpose of obtaining a surrogacy order under the Care of Children Act 2004. The Committees noted that the Bill describes this as separate from and additional to the ECART approval currently needed for fertility treatments for a surrogacy arrangement. The Committees considered this new function to be a significant deviation from ECART's current role of determining applications for surrogacy, and would involve it in determining the legal parentage of a child.

411. The Committees also opposed the incorporation of guidelines for ECART to consider (see new s 23A(2)) in legislation, considering that this would fundamentally undermine the functions of ACART in pt 2, sub-pt 3 of the HART Act, and make it difficult to ensure considerations relating to surrogacy arrangements remain up to date with technological advances and societal expectations.

412. Three submissions commented on the funding of ECART, with two submissions stating that its funding should be considered as a matter of priority. One submitter stated that the funding needs to reflect the demand for surrogacy to ensure that gaining ECART approval is not an unduly long process.

413. Another submitter raised concerns that there is no donor-conceived person amongst ECART and ACART members. Others noted the very thorough and comprehensive nature of ECART checks, and recommended that these checks should not be expanded. Another individual submission outlined experience with the process and stated that the ECART process was invasive and disempowering. The submission noted that they felt they had to do a lot to justify that they needed to use surrogacy.

Role of Oranga Tamariki

414. Several submissions supported the Bill's intention to remove Oranga Tamariki—Ministry for Children's involvement in the surrogacy process. One submitter expressed how difficult and traumatic it was to talk to social workers, all while being unsure whether their ethics applications would be approved, or their fertility treatment would be successful. One submission supported Oranga Tamariki—Ministry for Children's role in safeguarding children at risk, but said that it is not appropriate in surrogacy arrangements.

415. Aotearoa New Zealand Association of Social Workers noted that the current requirements for a social worker assessment after ECART approval places additional pressure on adoption team resources and stigmatises certain whānau types by formally assessing their 'fitness to parent'.

416. The New Zealand Council of Christian Social Services supported the Bill's simplification of the process, but recognised the role of the state in providing some level of oversight for ensuring the safety of surrogate-born children in respect to their intended parents. It stated that it failed to see where this would take place within the proposed Bill and sought clarity as to whether there remains a requirement for Oranga Tamariki—Ministry for Children or for another government agency.

417. In its submission to the Law Commission, which was provided to the Committee as part of its submission on the Bill, the New Zealand Law Society supported some form of parental assessment, but suggested that there are professionals other than Oranga Tamariki—Ministry for Children social workers who could undertake the assessment.

Clause 8: Section 28 amended (Functions of ethics committee)

418. Clause 8 provides that it will be a function of the Ethics Committee to consider and determine whether to provide approval of a surrogacy arrangement.

Submissions

419. See relevant submissions in relation to cl 7, detailed above.

Officials' recommendation 48:

Remove clauses 7 and 8 and replace with officials' recommendations 2-7 in relation to the ethics committee approval process and oversight (Law Commission R3, R5, R12, R13, R15, R16).

Clause 9: New section 66A and cross heading inserted

420. Clause 9 inserts new sections 66A to 66E into the HART Act.

- New section 66A enables the Minister to appoint a Surrogacy Registrar under the HART Act.
- New section 66B provides that the functions of the Surrogacy Registrar are to establish a surrogacy register for facilitating surrogacy arrangements by enabling potential surrogates and intending parents to be matched.
- New section 66C provides that the Surrogacy Registrar may charge the prescribed fee to any intending parent applying for registration on the surrogacy register.
- New section 66D provides conditions for the Surrogacy Registrar to delegate their functions, powers, and duties
- New section 66E provides that no civil action may be taken against the Surrogacy Registrar, a delegate of the Surrogacy Registrar, or any employee of the Registrar

for any act done or omitted in good faith in the performance of their duties of the Surrogacy Registrar. However, this does not prevent a person from filing for judicial review under the Judicial Review Procedure Act 2016.

Submissions

421. Submissions on the Bill expressed mixed views on the proposed register. Nineteen submissions commented on the surrogacy matching register: eight (42%) supported the creation of the register, five opposed it (26%), and the remaining six (32%) were unclear as to whether they supported the register.

422. Some submissions supported the register as they consider it would make it easier for intended parents and surrogates to connect with each another.

423. Several submissions supported the intent of the register but sought clarity as to how it would function. For example, they questioned how the register would be regulated and funded, how and what personal information would be stored, and how intended parents or surrogates would qualify for the register. Many of these submissions supported further work being done on the register to ensure it was robust and effective.

424. Other submissions opposed the register and considered it would be an inappropriate mechanism for improving access to surrogacy. Some argued that the state should not be engaged in a surrogacy matching service. Some submissions considered there to be alternative ways to increase access to surrogacy. Several noted the creation of a register was not recommended by the Law Commission.

Comment

425. The Law Commission considered but did not recommend amending the law to require the government to establish a register that contains details of potential surrogates and intended parents. It concluded this would be an unusual extension of the state's role into private arrangements. It considered the government's role is to provide a safe regulatory framework to protect the rights of parties who chose to engage in surrogacy arrangements but does not extend to actively facilitating individual surrogacy arrangements.

426. It also noted:

- the risk that a register creates a more transactional rather than relationship-based approach to surrogacy, which may not be in the best interests of the future child
- a register may not be effective. Surrogates may be unlikely to sign up for a register, particularly as it involves giving up control over who they match with
- a register would require a duplication of the regulatory safeguards that would exist in the reformed ECART process, to ensure the matching register provides a safer matching environment
- there was a lack of support for a surrogacy matching register in the Law Commission's consultation process. Only 29% of submitters supported the option, and

- other measures recommended by the Law Commission would reduce barriers to surrogacy and to intended parents finding potential surrogates. These include government-produced information about surrogacy, allowing surrogates to be paid for costs incurred, and permitting paid advertising for lawful arrangements.

427. We agree with the Commission's conclusion that a register should not be established. It would be an unusual extension of the state's role into private arrangements and is unlikely to achieve its policy intent.

Officials' recommendation 49:

Remove clause 9.

Clause 10: Section 76 amended (Regulations)

428. Clause 10 provides that regulations may include prescription of fees to be paid by intending parents applying to register their details on the surrogacy register.

Officials' recommendation 50:

Remove clause 10.

Additional HART Act amendments required

429. As detailed in Part B, officials recommend additional amendments to the HART Act:

- Extending requirements for ECART approval (officials' recommendation 1) (to help achieve Law Commission R2)
- Accessing identity information by surrogate-born people (officials' recommendations 28-33) (Law Commission R37, R38, R40, R41, R42, R43)
- Paid advertisements for lawful surrogacy arrangements (officials' recommendation 41) (Law Commission R59).
- Use of gametes by adults that were extracted when they were a minor (officials' recommendation 42).

PART 2: Amendments to Care of Children Act 2004

430. Part 2 of the Bill amends the Care of Children Act 2004 to provide for the making of surrogacy orders and a mechanism for enforcing certain surrogacy arrangements.

Clause 11: Amendments to Care of Children Act 2004

431. Clause 11 sets out that Part 2 of the Bill amends the Care of Children Act 2004.

Submissions

432. Two submitters made general comments in support of Part 2 of the Bill. One submitter stated that the amendments to the Care of Children Act 2004 would allow children to be with their intended parents sooner and reduce the complexities relating to legal parenthood in gestational surrogacies.

Clause 12: Section 8 amended (Interpretation)

433. Clause 12 defines a surrogacy order as an order made under section 124C of the Care of Children Act 2004.

Clause 13: Section 77 amended (Preventing removal of child from New Zealand)

434. Section 77 enables an authority to exercise powers to prevent the removal of a child from New Zealand if the removal would be likely to defeat a claim for day-to-day care or contact with the child, or prevent a court order from being complied with.

435. Clause 13 enables these powers to be used where the removal would prevent a surrogacy order from being complied with.

Clause 14: Section 77B amended (Orders under section 77(3)(c) may be suspended for specified period)

436. Clause 14 prevents suspension of orders that a child not be removed from New Zealand, if the order made under section 77(3)(c) was made to prevent the non-compliance with a surrogacy order.

Clause 15: Section 78 amended (Contravening parenting or guardianship order)

437. Clause 15 makes it an offence to contravene or prevent compliance with a surrogacy order, in the same way as contravening a parenting order or guardianship order.

Clause 16: Section 80 amended (Taking child from New Zealand)

438. Clause 16 makes it an offence to take or attempt to take any child out of New Zealand with intent to prevent a surrogacy order from being complied with.

Clause 17: New Part 2A inserted

439. Clause 17 inserts new Part 2A (new sections 124A to 124D) relating to surrogacy orders.

- New section 124A states that 'intending parent,' 'surrogacy arrangement,' and 'surrogate' have the same meanings as section 5 of the Human Assisted Reproductive Technology Act 2004.
- New section 124B states that surrogacy arrangements cannot be enforced under the Care of Children Act 2004, but a party may seek to have the custody elements of the arrangement embodied in an order made under new section 124C. Surrogacy orders under 124C, so far as it relates to custody of the child, may be enforced as if they were parenting orders.
- New section 124C states that the Family Court may make a surrogacy order determining that custody of a child resulting from a surrogacy arrangement must transfer from the surrogate to the intending parents within 10 days of birth. The Court may only make the order if it is satisfied that both the surrogate and the intending parents consent to be legally bound by the surrogacy arrangement, and the arrangement has been approved by ECART or an overseas equivalent.
- New section 124D states that a surrogacy order must contain an explanation of the effect of the order and the consequences that may follow if the order is not complied with. A lawyer acting for a party to an order must explain the effect of the order to them, in a manner and in language that they understand.

Submissions

440. Submissions expressed mixed views on the Bill's provisions relating to surrogacy orders (clause 17) and legal parenthood (clauses 17 and 19). Submissions on both clauses 17 and 19 consistently noted the desirability of removing the requirement that intended parents adopt a surrogate-born child in order to obtain legal parenthood in place of the surrogate. None supported the current law. Submissions suggested the status quo is not consistent with the intentions of the intended parents or surrogate, does not recognise surrogacy as a legitimate way for forming a whānau, and does not provide certainty for the surrogate-born child.

441. A number of submissions noted the pathways to legal parenthood recommended by the Law Commission and submitted that they provided a more appropriate framework than the Bill. The joint submission from ACART and ECART opposed the Bill's proposed pathway to legal parenthood. The submission considered that the provisions relating to legal parenthood were unclear, and the effect of a surrogacy order is unclear.

442. One submitter queried whether the role of the court was required if the arrangement had been approved by ECART.

Pre-birth model of consent

443. The Aotearoa New Zealand Association of Social Workers, the Humanist Society of New Zealand, the New Zealand Council of Christian Social Services, and some

individual submitters supported intended parents being legal parents of the surrogate-born child from birth, if certain conditions are met. Some of these submissions considered this would provide more certainty and stability for the child and was consistent with the intention of the parties to the surrogacy arrangement.

444. A number of submissions raised strong concerns about the Bill's pre-birth model of consent.[26] For instance, the New Zealand Law Society stated that while the Bill provides for a surrogate's consent in new s 124C(2) of the Care of Children Act 2004, it is unclear when this consent occurs. It noted that the proposed amendment to s 22A of the Status of Children Act 1969 appears to contemplate pre-birth consent. The Law Society noted it preferred the Law Commission's recommendation of post-birth consent as it was more consistent with the Verona Principles.

445. Many submissions considered that the Law Commission's recommendation that legal parenthood be transferred to the intended parents after the completion of pre- and post-birth steps, which is intended to safeguard the interests of those involved and retain the surrogate's right to post-birth consent, was more appropriate.

446. The New Zealand College of Midwives and Family Planning New Zealand strongly opposed a pre-birth consent model and argued that it does not support surrogates' human rights, such as rights to bodily autonomy and privacy and reproductive rights. The College of Midwives noted the Law Commission's proposal of post-birth consent was preferable.

447. Family Planning New Zealand considered that pre-birth consent is inconsistent with international law and could effectively turn both reproduction and children into a commodity. Another submitter cited the 2019 recommendations on surrogacy of the United Nations Special Rapporteur on the sale and sexual exploitation of children,[27] and also opposed the creation of enforceable contracts that require mandatory handing over of a child, especially if a surrogate's consent has changed or been withdrawn.

448. The National Council of Women of New Zealand noted that most overseas jurisdictions require post-birth consent from surrogates. It considered that the Bill did not clearly state that the surrogate has the right to maintain control over their own body, including to refuse, restrict or request a medical procedure including termination, and the right to decide on birth conditions including labour, delivery and persons present. It also raised

[26] In clause 17, new s 124C of the Care of Children Act states that the Family Court may make a surrogacy order determining that custody of the child must be transferred from the surrogate to the intending parents within ten days of the birth of the child. The court may only make the order if it is satisfied that the surrogate and intending parents consent to be legally bound by the surrogacy arrangement, and written approval for the surrogacy arrangement has been given by ECART. In clause 19, new s 22A of the Status of Children Act 1969 provides for intended parents to be a surrogate-born child's legal parents from birth if the Family Court has made a surrogacy order in relation to the surrogacy arrangement. In this scenario, the surrogate would no longer have any parental rights or responsibilities.

[27] The thematic study contains an analysis of the international legal framework and specific violations to the rights to identity, access to origins and to a family environment, and proposes a set of safeguards for the protection of the rights of children born from surrogacy arrangements. See A/74/162: Sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material - Note by the Secretary-General | OHCHR.

concerns over the Bill's silence on complications resulting from the pregnancy or situations where a surrogate may change their mind.

Scope and content of surrogacy orders

449. Stewart Dalley considered that the inclusion of s 124C(b)(ii), which concerns a surrogacy arrangement involving assisted reproductive procedures occurring overseas, would be ineffective as there would be no countries which would meet these requirements.

450. The Ministry of Men's Affairs considered that under proposed Part 2A, intended parents should have to include a father for any surrogacy order to be made.

451. The Equal Justice Project recommended that proposed s 124D(4) of the Care of Children Act be removed to better protect surrogates and ensure the process for creating a surrogacy order is carried out with the utmost of care. The subsection provides that a failure to comply with a requirement relating to the content of a surrogacy order does not affect the validity of the order concerned.

Enforceability of surrogacy order (so far as it relates to transferring custody of the child)

452. Several submissions noted their support for the Bill's provision for the enforcement of arrangements. One noted this would provide additional security for the parties to an arrangement and the child. The Disabled Persons Assembly NZ the legislation needed to prevent intended parents from not taking a child from the surrogate because the child is disabled.

453. Some submissions raised concerns that the Bill's provision for the order to be enforced could place undue burden on surrogates, particularly if they decided they did not wish to continue with aspects of a surrogacy agreement. There was also concern the provision may not be in the best interests of the child.

Comment

454. The Law Commission did not recommend changes to the Care of Children Act 2004, instead proposing amendments to the Status of Children Act 1969 to address matters of legal parenthood. It proposed establishing:

- an administrative pathway under which a surrogate-born child becomes the legal child of the intended parents, in place of the surrogate, by operation of law without the involvement of the courts if certain conditions are met, and
- a court pathway under which te Kōti Whānau | Family Court can make a parentage order under which a surrogate-born child becomes the legal child of the intended parents, in place of the surrogate, if such an order is in the child's best interests. The order is made after the child's birth, and can be made in relation to children born via an international surrogacy arrangement.

455. To incorporate the Law Commission recommendations, Part 2 of the Bill will need to be removed.

Officials' recommendation 51:

Remove Part 2 of the Bill (clauses 11-17). See officials' recommendations 8-27 in relation to legal parenthood (Law Commission R17-R36; R52).

PART 3: Amendments to Status of Children Act 1969

456. Part 3 of the Bill amends the Status of Children Act 1969 to provide that if a child born as a result of a surrogacy arrangement that is subject to a surrogacy order under the Care of Children Act, the intended parents automatically become the legal parents of the child in place of the surrogate.

Clause 18: Amendments to Status of Children Act 1969

457. Clause 18 sets out that Part 3 of the Bill amends the Status of Children Act 1969.

Officials' recommendation 52:

No changes are recommended to clause 18.

Clause 19: New section 22A and cross-heading inserted

458. Clause 19 inserts new section 22A into the Status of Children Act 1969.

459. New section 22A states that if a child is born as the result of a surrogacy arrangement, and there is a surrogacy order in place under section 124C of the Care of Children Act 2004, the intending parents are, for every purpose, the parents of the child. The surrogate and any partner of the surrogate are not, for any purpose, parents of the child and no longer have the rights and liabilities of parents of the child.

Submissions

460. See the discussion of submissions in relation not cl 17 above, which also deals with surrogacy orders and legal parenthood. In addition to the submissions discussed there, one submission made a general comment in support of Part 3 of the Bill. It considered that the amendments in this Part were the most important, especially the ability for intended parents to be recognised as parents on the birth of their child.

Timing of legal parenthood

461. As noted above, some submissions supported intended parents being legal parents of the surrogate-born child from birth, but a number of submissions raised strong concerns about the implications of this approach for the rights of surrogates.

462. In addition to the submissions above, the Wellington Community Justice Project considered that automatic parentage poses a serious risk of exploitation where there are no subsequent regulations to ensure intended parents uphold their obligations of financial care following the pregnancy.

463. The New Zealand Law Society and Margaret Casey KC noted that a requirement for post-birth consent, rather than pre-birth consent as proposed by the Bill, would align with international best practice. The absence of such a requirement would create a risk that other jurisdictions would not recognise legal parenthood established under the Bill. The Law Society suggested the Bill was therefore unlikely to offer future certainty for intended parents.

464. Stewart Dalley recommended the Bill be amended to make it explicit when a surrogacy order can be applied for and issued, as he considered the Bill to be unclear. Mr Dalley suggested removing Bill's provision for a 10-day period after the child's birth within which custody of the child must be transferred to the intended parents. He considered this was unnecessary given parenthood would sit with the intended parents from the child's birth.

Scope of pathway to legal parenthood

465. Several submissions noted that the Bill only provides a pathway for parenthood for a only a subsection of surrogacy cases (as the Bill only applies to gestational surrogacy and some types of international surrogacy). The New Zealand Law Society noted that this appeared to require a proportion of surrogates and intended parents to continue to use adoption to achieve the desired legal parenthood arrangement, which is what the Bill sets out to change. Two submissions recommended more work be done so that the Bill ensures parents entering into traditional surrogacy arrangements are supported too.

466. Several submissions referred to the importance of the Bill dealing comprehensively with international surrogacy. A submission from an individual recommended that international arrangements should have full legal effect in New Zealand even if they were not undertaken in a similar regulatory system. It noted New Zealand accepts other jurisdictions' determinations of legal status in other situations, such as marriage. Stewart Dalley suggested the Bill's provision for surrogacy orders for international surrogacies was ineffective as no countries in which New Zealanders undertake surrogacy would meet the requirements.

467. Some submissions noted support for the Law Commission's recommended framework. The New Zealand Law Society emphasised that the Commission's framework covered the diverse nature of surrogacy arrangements. The Equal Justice Project supported the Law Commission's recommended approach to international surrogacy arrangements.

Legislative mechanism for the reform

468. The New Zealand Law Society considered the Bill approaches the question of legal parenthood from the incorrect starting point and therefore does not simplify the law as intended. It noted that the cornerstone of the Bill is a surrogacy order under the Care of Children Act 2004, but that this Act does not deal with legal parenthood (instead it deals with guardianship, day-to-day care, and contact). It considered that the Status of Children Act 1969 should be amended to provide a clear pathway for legal parenthood. The Law Society noted that the Bill amends the Status of Children Act 1969 in Part 3, but this is dependent on an order under the Care of Children Act, which it did not consider fits comfortably under the Care of Children Act.

469. For similar reasons, the Wellington Community Justice Project considered that the implementation of surrogacy orders should be through the Status of Children Act rather than through the Care of Children Act.

Comment

470. The Law Commission also proposed amendments to the Status of Children Act to address matters of legal parenthood, but proposed a different approach to determining legal parenthood. It recommended two alternative pathways for determining legal parenthood, including in relation to international surrogacy arrangements (R17-R36, 52, 54). Both pathways would have the same legal effect: the child would become the legal child of the intended parents after the completion of pre- and post-birth process steps that are intended to safeguard interests of those involved:

- Under the administrative pathway, legal parenthood could be transferred through the operation of law without a court order being needed, provided certain conditions are met. The conditions are that the surrogacy arrangement was approved by ECART, Oranga Tamariki has undertaken a limited safety assessment of intended parents, the surrogate has consented to the transfer of parenthood after the child is born, and the intended parents have taken the child into their care.
- Under the court pathway, parties could seek a Family Court determination of legal parenthood in cases where the above conditions are not met (eg, the intended parents have died), there are disputes, or parties choose this pathway. The court would determine parenthood based on a child's best interests, informed by a social worker's report.

Officials' recommendation 53:

Remove clause 19. See officials' recommendations 8-27 in relation to legal parenthood (Law Commission R17-R36; R52).

PART 4: Amendments to Child Support Act 1991

471. Part 4 of the Bill amends the Child Support Act to provide that an intended parent may be liable to pay child support.

Clause 20: Amendments to Child Support Act 1991

472. Clause 20 sets out that Part 4 of the Bill amends the Child Support Act 1991.

Clause 21: Section 7 amended (Meaning of parent)

473. Clause 21 amends the definition of 'parent' to include intended parent under a surrogacy order made under section 124C of the Care of Children Act 2004. The purpose of the change is to make an intended parent liable for child support.

Submissions

474. Most submissions that commented on clause 21 supported its intent and agreed that it is sensible for intended parents to be liable for child support, with one considering that this amendment would support the wellbeing of children.

475. The National Council of Women of New Zealand noted that the amendments in Part 4 may make intended parents liable for child support payments but considered that the Bill was not clear how this would happen. One submission asked whether intended parents would be financially responsible for the child if they refused to take custody up until the child reached a defined age.

Comment

476. The Law Commission did not recommend changes to the Child Support Act. Liability for child support flows from parenthood status. If the Bill is amended in the manner recommended by officials, intended parents who become a surrogate-born child's legal parents would be liable for child support without any amendments being required to the Child Support Act.

477. To incorporate the Law Commission recommendations, Part 4 of the Bill will need to be removed.

Officials' recommendation 54:

Remove Part 4 of the Bill (clauses 20 and 21). If the Bill is amended consistent with officials' recommendations in relation to matters of legal parenthood, intended parents who become a surrogate-born child's legal parents would be liable for child support without any amendments being required to the Child Support Act.

PART 5: Amendments to Births, Deaths, Marriages, and Relationships Registration Act 1995

478. Part 5 of the Bill amends the Births, Deaths, Marriages, and Relationships Registration Act 1995 to require intended parents to notify the birth of a child born as a result of a surrogacy arrangement that is not subject to a surrogacy order, and to require the Registrar to record information about the surrogate and any donors.

Clause 22: Amendments to Births, Deaths, Marriages, and Relationships Registration Act 1995

479. Clause 22 sets out that Part 5 of the Bill amends the Births, Deaths, Marriages, and Relationships Registration Act 1995.

Clause 23: Section 2 amended (Interpretation)

480. Clause 23 states that 'intending parent,' 'surrogacy arrangement,' and 'surrogate' have the same meaning as in section 5 of the Human Assisted Reproductive Technology Act 2004.

Clause 24: Section 9 amended (Parents primarily responsible for notifying birth)

481. Clause 24 amends responsibilities for notifying the Registrar of a child's birth. It provides that intended parents must jointly notify a child's birth if a child is born as a result of a surrogacy arrangement that is not subject to a surrogacy order, and the intended parents have taken custody of the child within 10 days of the child's birth. Where a child is born as a result of a surrogacy arrangement that is subject to a surrogacy order, intended parents would be required to notify the child's birth under the existing parental notification requirements as a consequence of other provisions of the Bill making the intended parents the legal parents at the child's birth.

482. The clause additionally provides that for the purposes of the duty to notify, a child will be treated as having only one legal parent if there is only one intended parent and the ovum, semen or embryo donor does not become the partner of the intended parent before the birth is notified for registration.

Clause 25: New section 15AA inserted (Registration of details of donors of embryos or cells in surrogacy arrangements)

483. Clause 25 provides that if a child is born from a surrogacy arrangement that used donated embryo or donated cells, a Registrar must record, as part of the birth information of a child, any information provided about the identity of the surrogate and any embryo, ovum or semen donor.

Submissions

484. Sixteen submissions related to surrogate-born children's access to identity information. Some submissions supported the amendments in the Bill, some made recommendations and some asked how information would be accessed under the Bill. Many of these submissions also supported extending the Bill's provisions dealing with identify information. Many of these supported the Law Commission's recommendations in this area, in particular the recommendations for a register of surrogate-born children and a wider review of the birth registration system.

485. Nearly all submissions that commented on the clause of the Bill dealing with identity information highlighted the importance of knowing a person's origins and whakapapa. They considered that information about surrogacy arrangements should be preserved and made accessible to surrogate-born children and people. Several submissions noted that this was a child-centred approach and consistent with the Verona Principles and the United Nations Convention on the Rights of the Child.

486. Donor Conceived Aotearoa stated that surrogate-born people deserve preservation of their genetic and gestational origins and whakapapa. It stated many donor-conceived people are unaware of the circumstances of their conception. It suggested this could be because parents lack adequate information about the importance of early disclosure. It also noted the absence of legal mechanisms to preserve identity information where families use gamete donations outside fertility clinics. Other submissions likewise raised concerns that surrogate-born people who are not told they were born via surrogacy may never learn about their origins and whakapapa.

487. The Nurses Society of New Zealand said recording details of surrogates and donors was particularly important if surrogate-born children are of Māori descent.

488. The Humanist Society of New Zealand considered the Bill would go a long way to achieving the objective that children know their genetic origins. It supported the Bill's proposal to record identity information about the surrogate as part of the birth notification process under the Birth, Deaths, Marriages, and Relationships Registration Act, as opposed to information being split across different registries. It also supported the information being available to the child, and to the public after 100 years.

489. The New Zealand Council of Christian Social Services supported recording more comprehensive information about intended parents, surrogates, and donors involved in surrogacy arrangements. However, it considered the Bill was unclear as to when and how this information could be accessed, and whether any counselling would be

available to surrogate-born children accessing this information. Stewart Dalley supported further consideration of the support available to people accessing the information that the Bill proposed should be recorded.

490. The New Zealand Council of Christian Social Services also asked whether there had been any consideration of a mechanism that would disclose surrogacy information to a surrogate-born person at a particular point in their life. It considered that this would align with article 8.2 of the United Nations Convention on the Right of the Child.[28]

491. A number of the submissions compared the Bill and the Law Commission's recommendations about identity information. Family First New Zealand noted the Law Commission's recommendations required more information to be captured than the Bill. It noted that the Bill does not expressly recognise a right to access identity information.

492. The New Zealand Law Society considered that Parts 5 and 6 of the Bill were too narrow insofar as they provided for people born via surrogacy, such as people born using a donor but not a surrogate, adopted children, or children raised in a whāngai arrangement. Instead, the Law Society, alongside some other submissions, supported the Law Commission's recommendation that there be a comprehensive review of the birth register. Family First New Zealand noted that amending the birth registration system could better align Aotearoa New Zealand with article 7 of the United Nations Convention on the Rights of the Child.[29]

493. In the absence of a review, the Law Society and the Office of the Privacy Commissioner supported the Law Commission's recommendation that the HART Act be amended to establish a national surrogacy birth register that records information relating to the surrogate (gestational and traditional) and the donor. The National Council of Women, the Humanist Society of new Zealand, the New Zealand Council of Christian Social Services and several individuals also submitted in support of a national surrogacy register.

494. Several submissions proposed the Bill should provide for more identity information to be recorded on surrogate-born people's birth certificates. Donor Conceived Aotearoa supported information being recorded on birth certificates, as this would be accessible to all surrogate-born/donor-conceived people and act as an impetus for parents to disclose. It considered current birth registrations are deceptive about people's origins. It noted information on a register is not sufficient as the information is only accessible to a surrogate-born/donor-conceived person who knows how they were conceived.

[28] Article 8.2 of the United Nations Convention on the Rights of the Child states that where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.
[29] Article 7.1 of the United Nations Convention on the Rights of the Child states that the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents. Article 7.2 states that States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

495. The Nurses Society of New Zealand considered that a requirement for donor and surrogate information to be recorded on birth certificates would align with a surrogate-born person's right to know their genetic background.

496. The Office of the Privacy Commissioner supported the rights of surrogate born children to access information about their genetic and gestational origins. However, it did not support any changes resulting in information on a birth certificate indicating that someone was born via a surrogacy arrangement, as surrogate-born people may not wish to disclose the circumstances of their birth when providing evidence of identity. Instead, it suggested that a system or short-form and long-form birth certificates could be introduced, which would allow more information about the surrogacy to be recorded while still protecting privacy. The New Zealand Council of Social Services and the Humanist Society of New Zealand also supported this suggestion.

497. The National Council of Women of New Zealand commented on the drafting of clause 25 and considered that the definition of cell should be clarified.

Comment

498. The Law Commission did not recommend changes to the Births, Deaths, Marriages, and Relationships Registration Act 1995. It instead recommended a review of the birth registration system, along with amendments to the HART Act to establish a surrogacy birth register to collect information relating to a surrogate-born child's identity. These recommendations are detailed in Part B.

499. To incorporate the Law Commission recommendations, Part 5 of the Bill will need to be removed.

Officials' recommendation 55:

Remove Part 5 (clauses 22-25). Replace with officials' recommendations 13 and 21 in relation to the provision of information to the Registrar-General (Law Commission R22 and R30).

See also officials' recommendations 28-33 in relation to access to identity information by surrogate-born people, including the establishment of a surrogacy birth register to collect information relating to a surrogate-born child's identity (Law Commission R37, R38, R40-R43).

PART 6: Amendments to Births, Deaths, Marriages, and Relationships Registration (Prescribed Information) Regulations 1995

500. Part 6 of the Bill amends the Births, Deaths, Marriages, and Relationships Registration (Prescribed Information) Regulations 1995 to prescribe information about a surrogate and donor of gametes that must be provided to the Registrar as part of the notification of a surrogate-born person's birth.

Clause 26: Amendments to Births, Deaths, Marriages, and Relationships Registration (Prescribed Information) Regulations 1995

501. Clause 26 sets out that Part 6 amends the Births, Deaths, Marriages, and Relationships Registration (Prescribed Information) Regulations 1995.

Clause 27: Regulation 2 amended (Interpretation)

502. Clause 27 states that 'donor,' 'surrogacy arrangement,' and 'surrogate' have the same meaning as in section 5 of the Human Assisted Reproductive Technology Act 2004.

Clause 28: Regulation 3A amended (Notification of birth for registration)

503. Clause 28 provides that a notification of birth must include the surrogate or donor's address, whether or not they are a Māori descendant, their ethnic group or groups, their citizenship or residency status, the date, place and country of their birth, and the type of cells donated.

Submissions

504. Please see the discussion of submissions on cl 25 above.

Comment

505. The Law Commission did not recommend changes to the Births, Deaths, Marriages, and Relationships Registration (Prescribed Information) Regulations 1995. It instead recommended a review of the birth registration system, along with amendments to the HART Act to establish a surrogacy birth register to collect information relating to a surrogate-born child's identity. These recommendations are detailed in Part B.

506. To incorporate the Law Commission recommendations, Part 6 of the Bill will need to be removed.

Officials' recommendation 56:

> Remove Part 6 (clauses 26-28). See officials' recommendations 28-33 in relation to access to identity information by surrogate-born people, including the establishment of a surrogacy birth register to collect information relating to a surrogate-born child's identity (Law Commission R37, R38, R40-R43).

PART 7: Amendments to Social Security (Exemptions under Section 105) Regulations 1998

507. Part 7 of the Bill amends the Social Security (Exemptions under Section 105) Regulations 1998 to enable a surrogate to apply for an exemption from work-test obligations and preparation for employment obligations if they are at least 27 weeks pregnant or suffering from complications arising from the pregnancy. The Social Security (Exemptions under Section 105) Regulations have been revoked and the relevant provisions are now in the Social Services Act 2018 and the Social Services Regulations 2018.

Clause 29: Social Security (Exemptions under Section 105) Regulations 1998 amended

508. Clause 29 sets out that Part 7 of the Bill amends the Social Security (Exemptions under Section 105) Regulations 1998.

Clause 30: Regulation 2 amended (Interpretation)

509. Clause 30 states that 'surrogate' has the same meaning as in section 5 of the Human Assisted Reproductive Technology Act 2004.

Clause 31: Regulation 3A amended (Exemption from obligations under section 60Q)

510. Clause 31 sets out that surrogates may be exempt from section 60Q requirements for social welfare benefits if they are at least 27 weeks pregnant, or suffering from complications arising from the pregnancy.

Clause 32: Regulation 4 amended (Exemption from work test obligations: all work-tested beneficiaries)

511. Clause 32 sets out that surrogates may be exempt from work-testing requirements for social welfare benefits if they are at least 27 weeks pregnant, or suffering from complications arising from the pregnancy.

Submissions

512. Four submissions included comments on Part 7. Three of these were in clear support of removing work-test obligations for surrogates and the remaining submission simply made recommendations.

513. The National Council of Women of New Zealand welcomed the removal of work obligations and testing for surrogate mothers. It considered it essential that information is clear and widely available and includes rights to antenatal care, maternity leave, pay, and bereavement leave where there is a stillbirth or miscarriage.

514. Two submissions recommended that the Bill should expressly entitle surrogates and intended parents to paid parental leave, with one recommending that consideration should be given to explicit amendments to the Parental Leave and Employment Protection Act 1987.

Comment

515. The Social Security Regulations 2018 already provide for exemptions from work-preparation and work-test obligations due to pregnancy.[30]

516. The Law Commission did not recommend changes to the Social Security (Exemptions under Section 105) Regulations 1998. It instead recommended amendments to the Social Security Act 2018 to clarify that payments to a surrogate for any reasonable surrogacy costs incurred in relation to the surrogacy arrangement should not be treated as income for the purposes of the Social Security Act. It also recommended amendments to enable a surrogate who is on a benefit to apply for exemptions from work-test obligations and preparation for employment obligations for a period of time after they have given birth.[31]

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[30] Section 158(2) of the Social Security Act states that the Ministry of Social Development may grant the exemption for a period set by the Ministry of Social Development and may make the exemption subject to conditions set by the Ministry of Social Development. Health condition as defined in Schedule 2 of the Social Security Act 2018 includes pregnancy after the 26th week.
Currently, the Regulations provide that:

- a person may be exempted from their work preparation obligations if they have a health condition (regulation 100(2)(d))
- a person's work test obligations may be deferred if they receive jobseeker support, have a health condition and do not have capacity for work (regulation 76)
- a work-tested partner or spouse or a work-tested sole parent beneficiary may be granted an exemption from work-test obligations if they are 27 weeks pregnant, or less than 27 weeks and suffering from complications arising from the pregnancy (regulations 102(f) and 104(2)(b)).

[31] Exemptions and deferrals of these obligations are already available during pregnancy.

517. To incorporate the Law Commission recommendations, Part 7 of the Bill will need to be removed. Officials' recommendations for amendments to achieve the Law Commission's recommendations are set out in Part B. The recommendations can be achieved through amendments to regulations that would progress outside the Bill.

Officials' recommendation 57:

Remove Part 7 (clauses 29-32).

See discussion in relation to work-preparation and work-test obligations (Law Commission R50-R51).

New Part 8: Amendments to the Income Tax Act 2007

518. As detailed in Part B, in order to incorporate officials' recommendations, a new Part 8 will need to be added to the Bill to amend the Income Tax Act 2007 to clarify how payments of reasonable surrogacy costs to surrogates interact with income tax liabilities and Working for Families tax credit entitlement by providing that only the reimbursement of a surrogate's loss of wages are taxable or family scheme income.

Officials' recommendation 58:

Add a New Part 8 to the Bill to amend the Income Tax Act 2007 to clarify how payments of reasonable surrogacy costs to surrogates interact with income tax liabilities and Working for Families tax credit entitlement.

See officials' recommendation 36 (to support Law Commission R46 and R47).

New Part 9: Amendments to the Citizenship Act 1977

519. As detailed in Part B, in order to incorporate officials' recommendations, a new Part 9 will need to be added to the Bill to amend the Citizenship Act 1977 to ensure surrogate-born people have a pathway to citizenship and that they are treated the same as adopted people.

Officials' recommendation 59:

Add a New Part 9 to the Bill to amend the Citizenship Act 1977 to ensure surrogate-born people have a pathway to citizenship and that they are treated the same as adopted people.

See officials' recommendation 39 (Law Commission R56)

Part D: Appendix

Submitters

Organisational and institutional submitters

1. ECART/ACART
2. Aotearoa New Zealand Association of Social Workers
3. Disabled Persons Assembly NZ
4. Family Planning New Zealand
5. Ministry of Men's Affairs (A community group)
6. New Zealand College of Midwives
7. New Zealand Council of Christian Social Services
8. Office of the Privacy Commissioner
9. Nurses Society of New Zealand
10. Donor Conceived Aotearoa
11. Fertility New Zealand
12. Humanist Society of New Zealand Incorporated
13. Family First New Zealand
14. New Zealand Law Society
15. National Council of Women of New Zealand
16. Equal Justice Project
17. Wellington Community Justice Project

Individual submitters

1. Anonymous I
2. Anonymous H
3. O'Connell, C
4. Hopkins, D
5. Kerr, E
6. O'Malley, C
7. Jones, R
8. Winata, V
9. Ooink, V
10. Dudley, J
11. Dyer, G
12. Casey, M
13. Smith, N
14. Williams, R
15. Dalley, S
16. Lawton, Z
17. Gribble, K

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New Zealand Government

Supplementary advice for the Health Committee

Improving Arrangements for Surrogacy Bill

10 August 2023

Contents

Terminology[1]

ECART: the Ethics Committee on Assisted Reproductive Technology, which assesses applications to undertake assisted reproductive procedures and research against ethical guidelines. ECART is established under the HART Act.

International surrogacy: a surrogacy arrangement where the intended parents and surrogate do not live in the same country.

Intended parents: people who enter a surrogacy arrangement with the intention of becoming parents to a surrogate-born child and raising that child from birth. The term intended parents is used in this report to refer to situations where there are two intended parents or where there is only one intended parent.

Parentage order: an order from the Family Court that has the effect of making the intended parent(s) the legal parents of the surrogate-born person in place of the surrogate. The Health Committee agreed parentage orders should form part of a new regulatory system for surrogacy via its decisions on officials' departmental report.

Surrogacy arrangement: an agreement between a surrogate and intended parents where the surrogate agrees to become pregnant and carries and gives birth to a child for the intended parents to raise as their own.

Surrogate: a person who agrees to become pregnant and carries and gives birth to a child for intended parents under a surrogacy arrangement.

Surrogate-born child or person: terms to refer to a person born as a result of a surrogacy arrangement. 'Surrogate-born person' is generally used in this advice because the advice recommends a framework for legal parenthood that would apply to surrogate-born people regardless of their age.

[1] These definitions are largely taken from the Law Commission's glossary in *Te Kōpū Whāngai: He Arotake Review of Surrogacy*, report 146.

Introduction

1. This paper provides supplementary advice on the Improving Arrangements for Surrogacy Bill (the Bill). The Bill was introduced as a member's bill in September 2021 and was adopted by the Government in early May 2023. Officials presented the departmental report on the Bill on 7 June 2023. The Health Committee (the Committee) agreed to the departmental report's 63 recommendations.

2. This paper provides:

   - supplementary advice about how the Bill could be amended to incorporate the Law Commission's recommendations, and
   - information requested by the Committee.

Supplementary advice on the Bill

2. This section provides advice about how the Bill could be amended to incorporate the Law Commission's recommendations.

3. In the departmental report presented to the Committee on 7 June, officials noted we would provide further advice on several elements of the Law Commission's recommendations that relate to the Family Court, after we had completed judicial consultation. This consultation has now been completed.

4. This section sets out:

- a summary of officials' recommendations, and
- analysis of each recommendation.

Summary of officials' recommendations

5. The table below summarises officials' further recommendations for aligning the Bill with the Law Commission's findings.

Officials' recommendation		Para
64	*When the Family Court has jurisdiction* The Family Court should have jurisdiction to determine applications for parentage orders in domestic and international surrogacy arrangements where either: a) one of the participants in the surrogacy arrangement (that is, an intended parent or the surrogate) is habitually resident in New Zealand at the commencement of the application, or b) the Court has given leave to apply to any participant in the surrogacy arrangement. The Court would be able to grant leave if it is satisfied that a New Zealand court is the most appropriate forum to determine the matter and that granting leave would be in the best interests of the surrogate-born person. (To help achieve Law Commission R25)	[6]
65	*Who can participate in court proceedings* Legislation should provide for: a) an application for a parentage order to be served on an intended parent if they are not an applicant, the surrogate if they are not an applicant, and any other person specified by the Court b) the applicant, and any person served, to be entitled to attend a hearing and be heard as a party to the proceedings unless a judge determines the latter (any person served) should be excluded as they pose a serious risk of physical, psychological or emotional harm to a surrogate-born person c) the following people to also be entitled to attend a hearing, subject to the judicial discretion and clarifications as provided in section 11A of the Family Court Act 1980: a. officers of the court	[15]

Officials' recommendation		Para
	b. lawyers representing the parties c. accredited news media reporters d. support people for a party on request, and e. any other person the judge permits to be present. (To help achieve Law Commission R25)	
66	*Remote initiation and participation in court proceedings relating to international surrogacy arrangements* Officials should work with the Parliamentary Counsel Office to ensure the court rule-making power, agreed by the Health Committee through officials' recommendation 16, enables court rules to be made that could encompass: a) the matters set out in Law Commission recommendation 54 that are appropriate for court rules, and b) a requirement that when the Family Court is deciding whether to permit a person in another jurisdiction to remotely commence a proceeding and/or remotely participate in a proceeding relating to an international surrogacy arrangement where the surrogate-born person is outside New Zealand, it should consider whether a legal parent-child relationship exists between the intended parent and surrogate-born person in the country in which the surrogate-born person was born. (To help achieve Law Commission R52 and R54)	[21]
67	Recommendations 64 – 66 in this advice and the final wording of any amendments agreed in this report are subject to advice from the Parliamentary Counsel Office about the best approach to drafting the amendments.	-

When the Family Court has jurisdiction

6. As outlined in the departmental report, 'legal parenthood' refers to the parent-child relationship established in law. When the departmental report was presented on 7 June, the Committee agreed to officials' recommendations to introduce new legal processes, in place of adoption, for determining a surrogate-born child's legal parents. This included agreeing to officials' recommendation 16 to give the Family Court jurisdiction to make parentage orders (this will give effect to Law Commission recommendation 25). Parentage orders would make the intended parents the legal parents of the surrogate-born child in place of the surrogate.

7. The departmental report noted that officials would provide further advice about when the Court would have jurisdiction to make a parentage order. This further advice is set out below.

Current approach to jurisdiction

8. Currently the Family Court has very broad jurisdiction to make an adoption order, including in respect of a surrogate-born child. An application to the Court can be made by a person domiciled anywhere in the world, in respect of a child domiciled anywhere in the world.

The Law Commission's approach

9. The Law Commission's recommendations do not address the Court's proposed jurisdiction in detail. However, the Commission's report noted the importance of the Court having a broad jurisdiction to best accommodate the range of circumstances in which a child's parenthood status could be relevant for the purposes of New Zealand law. A broad approach would avoid the risk a surrogate-born person is left with a default parenthood status (as child of the surrogate) that does not align with the child's best interests or parties' intentions. The Commission noted as an example that the jurisdiction of the Court should accommodate situations where the intended parents are based overseas but the child is born in New Zealand and the surrogate does not want to retain legal parenthood under New Zealand law. The Commission noted that it did not propose limiting eligibility to apply to the Court to New Zealand citizens or residents.

Recommended approach

10. Officials recommend the Family Court should have jurisdiction to determine applications for parentage orders in domestic and international surrogacy arrangements where either:

    - at least one of the participants in the surrogacy arrangement (an intended parent or surrogate) is habitually resident in New Zealand at the time of the application, or
    - the Court has granted leave to the applicant to apply to the Court.

11. This recommendation seeks to ensure the following:

    - the Family Court has a broad jurisdiction to accommodate the range of circumstances in which a child's parenthood status could be relevant for the purposes of New Zealand law, consistent with the Law Commission's report, and
    - the Court only determines parenthood in cases that have a connection to New Zealand. This ensures the jurisdiction of the Court is not so wide that it intrudes on parenthood matters more properly dealt with by another jurisdiction's legal processes.

12. The core requirement for a person to be eligible to apply to the Court would be that they are an intended parent or surrogate who is habitually resident in New Zealand at the time of the application. This would mean parties who live in New Zealand are able to apply for a parenthood determination for the purposes of New Zealand law, consistent with the child's best interests and parties' interests.

13. The habitual residence requirement also helps to ensure the Court is the appropriate forum for hearing the case. The Court would be making decisions about people with a substantial connection to New Zealand. This means the Court could not be used by people living overseas to bypass the laws of another country. It also helps the Court to access relevant information to inform its decision-making and to enforce its decisions. For example, the parentage order report prepared by a social worker is likely to be more comprehensive if some or all participants in the arrangement live in New Zealand.

14. The Court would have discretion to permit a person to apply to the Court where the habitual residence requirement was not met. In these cases, a reasonably high threshold would need to be satisfied. The Court would need to be satisfied:

- that it is the appropriate forum to determine the matter. This aims to enable the Court to consider the strength of the application's connection to New Zealand and the appropriateness of the New Zealand court determining the case, and
- that hearing the case would be in the best interests of the surrogate-born person. This would enable the Court to consider matters such as the potential risks to the child of the Court not hearing the case.

Officials' recommendation 64:

The Family Court should have jurisdiction to determine applications for parentage orders in domestic and international surrogacy arrangements where either:

a) one of the participants in the surrogacy arrangement (that is, an intended parent or the surrogate) is habitually resident in New Zealand at the commencement of the application, or

b) the Court has given leave to apply to any participant in the surrogacy arrangement. The Court would be able to grant leave if it is satisfied that a New Zealand court is the most appropriate forum to determine the matter and that granting leave would be in the best interests of the surrogate-born person.

(To help achieve Law Commission R25)

Who can participate in court proceedings

15. The departmental report noted that officials would provide further advice about who should be able to participate in court proceedings relating to an application for a parentage order. This further advice is set out below.

16. The Law Commission did not make a recommendation about this matter.

Recommended approach

17. Officials recommend the legislation provides for people to be involved in proceedings if they have played a significant role in the surrogacy process, have a significant interest in the Court's determination, and/or have a role providing information that could be relevant to the Family Court's decision.

18. Paragraphs (a) and (b) of the recommendation below would provide an opportunity for all participants in a surrogacy arrangement to be fully informed and have an opportunity to participate in the court process.

19. We recommend additionally providing for service on and participation by any other person specified by the court. For example, this might include a surrogate-born person,[2] a donor of genetic material, or a partner of a surrogate (noting we expect these scenarios would be rare).

20. Officials will work with the Parliamentary Counsel Office to determine whether the provisions are best reflected in primary or secondary legislation.

[2] The recommendation recognises that there may be cases in which a surrogate-born person will have capacity to express a view: they won't always be an infant.

Officials' recommendation 65:

Legislation should provide for:

a) an application for a parentage order to be served on an intended parent if they are not an applicant, the surrogate if they are not an applicant, and any other person specified by the Court

b) the applicant, and any person served, to be entitled to attend a hearing and be heard as a party to the proceedings unless a judge determines the latter (any person served) should be excluded as they pose a serious risk of physical, psychological or emotional harm to a surrogate-born person

c) the following people to also be entitled to attend a hearing, subject to the judicial discretion and clarifications as provided in section 11A of the Family Court Act 1980:

   a. officers of the court

   b. lawyers representing the parties

   c. accredited news media reporters

   d. support people for a party on request, and

   e. any other person the judge permits to be present.

(To help achieve Law Commission R25)

Remote initiation and participation in court proceedings relating to international surrogacy arrangements

21. When the departmental report was presented on 7 June, the Committee agreed to officials' recommendation 38. This recommendation will give effect to Law Commission recommendation 52 by giving the Family Court jurisdiction to make parentage orders relating to people born as a result of an international surrogacy arrangement.

22. The departmental report noted that the statute may also need to address how the Court process operates when an international surrogacy arrangement is involved and the intended parents and child are not in New Zealand. It noted officials would provide further advice. The advice below addresses this matter.

Current approach to international surrogacy

23. As noted in the departmental report, international surrogacy arrangements are arrangements where the intended parents and surrogate do not live in the same country. In a New Zealand context, it tends to involve intended parents who live in New Zealand engaging in a surrogacy arrangement overseas and bringing the surrogate-born child back to New Zealand to live with them.

24. As noted in the departmental report, when a child is born as a result of an international surrogacy arrangement, the Status of Children Act 1969 recognises the surrogate as the child's legal parent. Under current law the intended parents must adopt the child through the New Zealand Family Court in order to be recognised as legal parents under New Zealand law.

25. However, ahead of any adoption, New Zealand law does not recognise any parental link between the surrogate-born child and the intended parents, including for the purposes of immigration and citizenship law. This affects the child's ability to enter

New Zealand. An arrangement is in place under which an intended parent can seek a visitor visa for the child, enabling the child to enter New Zealand and for an adoption order to then be sought. The Minister of Immigration will determine whether to exercise their discretion to issue a visa taking into account Cabinet-endorsed guidelines. The guidelines cover matters relevant to the child's best interests and to preventing the irregular movement of children between countries.[3]

26. If a visa is issued, the child can travel to New Zealand on the passport issued in their country of birth if they are entitled to a passport. However, some countries do not recognise surrogate-born children as citizens. In these situations, the Department of Internal Affairs can issue a 'certificate of identity' travel document to enable a child to travel to New Zealand. Countries do not always recognise a certificate of identity as a valid travel document, resulting in families taking complex routes to travel to New Zealand.

27. For a period during COVID-19, a second approach was in place. It enabled an adoption application to be made to the New Zealand Family Court from outside New Zealand. COVID-19 led to problems obtaining passports for some children in their countries of birth. In response, the Principal Family Court Judge issued the Family Court COVID-19 Protocol for the Adoption of New Zealand Surrogate Babies Born Overseas (the COVID-19 protocol). If the protocol applied, intended parents could participate remotely in the court process from another country. If the Court made an adoption order, a child could then be entitled to a New Zealand passport enabling their entry to New Zealand without a visa (depending on the nature of the intended parents' connections to New Zealand).

The Law Commission's recommendation

28. Law Commission recommendation 54 proposes that the Family Court should use special court processes based on the COVID-19 protocol in international surrogacy cases.[4] It envisaged a new judicial protocol would include expedited processes and enable an applicant to remotely initiate, and participate in, a court proceeding relating to a parentage order. These processes would include remote appearances by an applicant and the remote witnessing of documents. The processes would allow an

[3] 2020-Information-Fact-Sheet-International-Surrogacy.pdf (orangatamariki.govt.nz)

[4] Law Commission recommendation 54 provides: 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.

application for a parentage order to be made while the intended parents and surrogate-born person are overseas.

29. The Principal Family Court Judge can issue judicial protocols under powers to ensure the orderly and efficient conduct of the Family Court.

30. The Commission noted that its recommendation would enable intended parents to secure legal parenthood at the earliest opportunity. It noted the special court processes would:

- enable the surrogate-born person's best interests to be assessed by the specialist Family Court in the first (and only) instance, rather than this occurring after an immigration process
- avoid two decision-making processes (the Minister of Immigration in relation to visas and Family Court in relation to a parentage order), and
- had been demonstrated to be practically feasible, through experience with the COVID-19 protocol.

Recommended approach

31. Officials support the Law Commission's recommendation that the Family Court should be able to use special processes for international surrogacy cases. We note these processes would affect how an application is made and heard but would not affect whether a person was eligible to apply to the Court. Eligibility to apply is determined by jurisdictional requirements, which are discussed earlier in this advice.

32. If the special court processes enable remote participation, they may need to include safeguards to reduce any risk that other jurisdictions could view New Zealand's decision-making as overreaching into parenthood matters that are more properly dealt with by those jurisdictions. This risk could arise because remote participation would enable the New Zealand court to make decisions about a surrogate-born person while the person is in another jurisdiction (rather than physically present in the New Zealand court). The New Zealand court's determination could have the effect of facilitating the surrogate-born person's departure from that jurisdiction, as it could entitle them to a New Zealand passport.

33. We consider the risk could be managed through:

- our recommendation for the Court's jurisdiction, and
- through a new procedural safeguard in court rules and/or a judicial protocol. This safeguard was not part of the COVID-19 protocol.

34. Our recommended approach to the Family Court's jurisdiction, set out above in officials' recommendation 64, is expected to significantly reduce the risk as it will ensure that all applications have a connection to New Zealand.

35. An additional safeguard could further mitigate the risk, but we consider this would not need to be set through primary legislation. It could instead be reflected in court rules and/or a judicial protocol, if the Principal Family Court Judge determined to issue one. This would reflect the safeguard's procedural nature and provide some flexibility to adjust the requirement in the future. We therefore do not consider any additional primary legislative changes are required, except as required to ensure there is sufficient legislative power to make relevant rules.

36. The additional safeguard could set a condition that would apply when the Family Court is considering whether to permit a person to remotely initiate and/or remotely participate in a proceeding relating to an international surrogacy arrangement, where the person and the surrogate-born person are outside New Zealand. The safeguard could provide that the Court should consider whether a legal parent-child relationship exists between the intended parent and surrogate-born person in the country in which the surrogate-born person was born. This would create an expectation that such a relationship exists before the Court allows a person to remotely participate in these circumstances. For example, such a condition would apply where a New Zealand-based couple have undertaken a surrogacy arrangement in California and they wish to appear in the Family Court via video link from California to seek a New Zealand parentage order.

37. Evidence of a legal parent-child relationship could be documentation such as a court order or birth certificate.

38. A safeguard of this kind could help make it clear that New Zealand's determination of parenthood is a decision for the purposes of New Zealand law only and is additional to the decision-making that has occurred in the other jurisdiction. It would also create incentives to undertake arrangements in jurisdictions in which surrogacy is regulated, and consistently with the law of the jurisdiction. As with the matters in Law Commission recommendation 54, the safeguard would help determine how a person commences and participates in a proceeding. It would not affect whether a person was eligible to apply to the court.

39. The large majority of international surrogacy arrangements engaged in by New Zealand-based intended parents would currently be consistent with this safeguard. This means the large majority are likely to have the option to initiate and participate remotely (subject to the Family Court being satisfied of other matters that currently determine the availability of remoted participation, such as the quality of technology). Where an applicant was not able to remotely commence the proceeding or remotely participate, they would need to apply for a visa for the surrogate-born person and return to New Zealand to make the application for the parentage order.

40. Officials therefore recommend the Committee agrees to us working with the Parliamentary Counsel Office to identify any legislative amendments required to ensure that court rules can be made reflecting a safeguard of this nature and the types of special processes identified in Law Commission recommendation 54.

Officials' recommendation 66:

Officials should work with the Parliamentary Counsel Office to ensure the court rule-making power, agreed by the Health Committee through officials' recommendation 16, enables court rules to be made that could encompass:

a) the matters set out in Law Commission recommendation 54 that are appropriate for court rules, and

b) a requirement that when the Family Court is deciding whether to permit a person in another jurisdiction to remotely commence a proceeding and/or remotely participate in a proceeding relating to an international surrogacy arrangement where the surrogate-born person is outside New Zealand, it should consider whether a legal parent-child relationship exists between the intended parent and surrogate-born person in the country in which the surrogate-born person was born.

(To help achieve Law Commission R52 and R54)

Responses to Health Committee requests

41. This section responds to the Committee's 7 June request for information about:

- the costs associated with surrogacy, and
- the age restriction on obtaining gametes in New Zealand.

Current costs for intended parents relating to surrogacy

42. The costs incurred by intended parents will depend on the circumstances of individual surrogacy arrangements. The costs of undertaking a surrogacy arrangement are split across different step of the surrogacy process and intended parents may not need to participate in each step. Intended parents may face costs associated with gathering the information required to seek approval from the Ethics Committee on Assisted Reproductive Technology (ECART), for medical costs, for the legal costs to transfer legal parenthood, and for other costs where an arrangement is an international surrogacy, such as compensating the surrogate.

43. Costs are almost all associated with services provided by private businesses, so there will be variance in costs and costs may change. Estimates of legal fees are based on anecdotal information from experts in the area. Fertility treatment providers' costs are based on advertised costs by some of the major providers.

Domestic surrogacies

Application to ECART

44. Some surrogacy arrangements require ECART approval and, rarely, some arrangements seek ECART advice voluntarily. ECART itself does not charge a fee, but costs to the intended parents of approximately $6,000 to 7,000 are associated with gathering the information required to make an application for ECART approval. These costs arise from:

- fertility treatment providers making the application to ECART. They tend to charge intended parents a fee of between $3,000 to $4,000 for preparing reports, compiling documents, counselling, and guiding applicants through the process.
- intended parents and the surrogate obtaining independent legal advice. Costs of legal advice vary but can be approximately $3,000 total.

Medical costs

45. The cost of fertility treatment will depend on the medical requirements of particular arrangements and the extent of public funding available. The cost of one privately funded cycle of IVF is between $11,500 and $17,000. The number of IVF cycles that may be required varies case-by-case. If intended parents qualify for public funding following an assessment of their clinical priority, public funding covers up to two packages of treatment, such as two IVF cycles.

Application to change legal parenthood

46. Applications for adoption orders to transfer legal parenthood cost approximately $3,000 to $10,000 in legal fees. There are no court filing fees.

International surrogacies

Costs overseas

47. Costs incurred by intended parents in international arrangements vary depending on the circumstances of the arrangement and the jurisdiction in which the arrangement takes place. Common costs directly associated with the arrangement include medical costs (including the cost of donor material), legal costs, and compensation and fees for surrogates.

48. In California, USA, where most New Zealanders undertaking international surrogacy arrangements go, the overall costs for surrogacy could be in the low hundreds of thousands. Costs in other countries tend to be lower.

Costs in New Zealand

49. To be recognised in New Zealand as the legal parents of a child born as a result of an international surrogacy arrangement, intended parents must adopt the child in New Zealand. Anecdotally we understand that legal fees associated with the adoption order are approximately $15,000 to $20,000. Legal fees tend to be higher than in domestic cases as international cases can be more complex and can involve greater urgency. There are no court filing fees.

How the reform could affect the costs for intended parents

50. This section provides rough estimates for the potential costs to intended parents if the regulation of surrogacy is reformed. Our estimates are informed by the degree of similarity between an existing service or process and a reformed one. As noted above, we have estimated the costs of existing services drawing on anecdotal information and advertised costs from some of the major fertility treatment providers. As most of the pricing of services will be determined by private businesses once the reforms have occurred, these estimates are uncertain.

51. **Images 1 and 2** below summarise the content below. They show the different pathways through the reformed surrogacy process in domestic and international surrogacy arrangements, and the estimated costs at each step.

Domestic surrogacies

New, discretionary costs for surrogacy

52. Advertising for a surrogacy arrangement and the payment of a surrogate's reasonable surrogacy-related costs will be permitted (but not required) by the reforms. The cost will depend on the circumstances of the specific arrangement. Please refer to page 86 of the departmental report for an outline of the types of surrogacy-related costs that could be agreed between the surrogate and intended parents.

Application to ECART

53. Costs for gathering the information required to apply to ECART via a fertility clinic are expected to be similar to the current cost - approximately $6,000 to 7,000 - as ECART application requirements (including counselling and legal advice) will be similar or

enhanced. Costs for applying to ECART outside of a fertility clinic (non-clinic assisted traditional surrogacies) will include counselling and medical costs, and legal fees. It is unclear whether a processing fee, as charged by fertility clinics, will be applied in these cases.

Medical costs

54. The legislative reforms will not affect medical costs.

Application to change legal parenthood

55. The creation of the administrative parenthood pathway means that qualifying arrangements will no longer be required to go through the Family Court to transfer legal parenthood.[5] Therefore most costs associated with applying to the Court will not apply. However, lawyers' fees for processes after the surrogate-born person's birth – in particular, obtaining the surrogate's consent to the change in legal parenthood – will be required. A rough estimate of this cost is $1,000.

56. If the conditions for the administrative pathway are not met, the parties will need to go through the court process to seek a transfer of legal parenthood. This means intended parents will incur legal fees similar to those currently associated with applications for adoption orders (approximately $3,000 to $10,000). There is no plan to introduce court filing fees for applications for parentage orders.

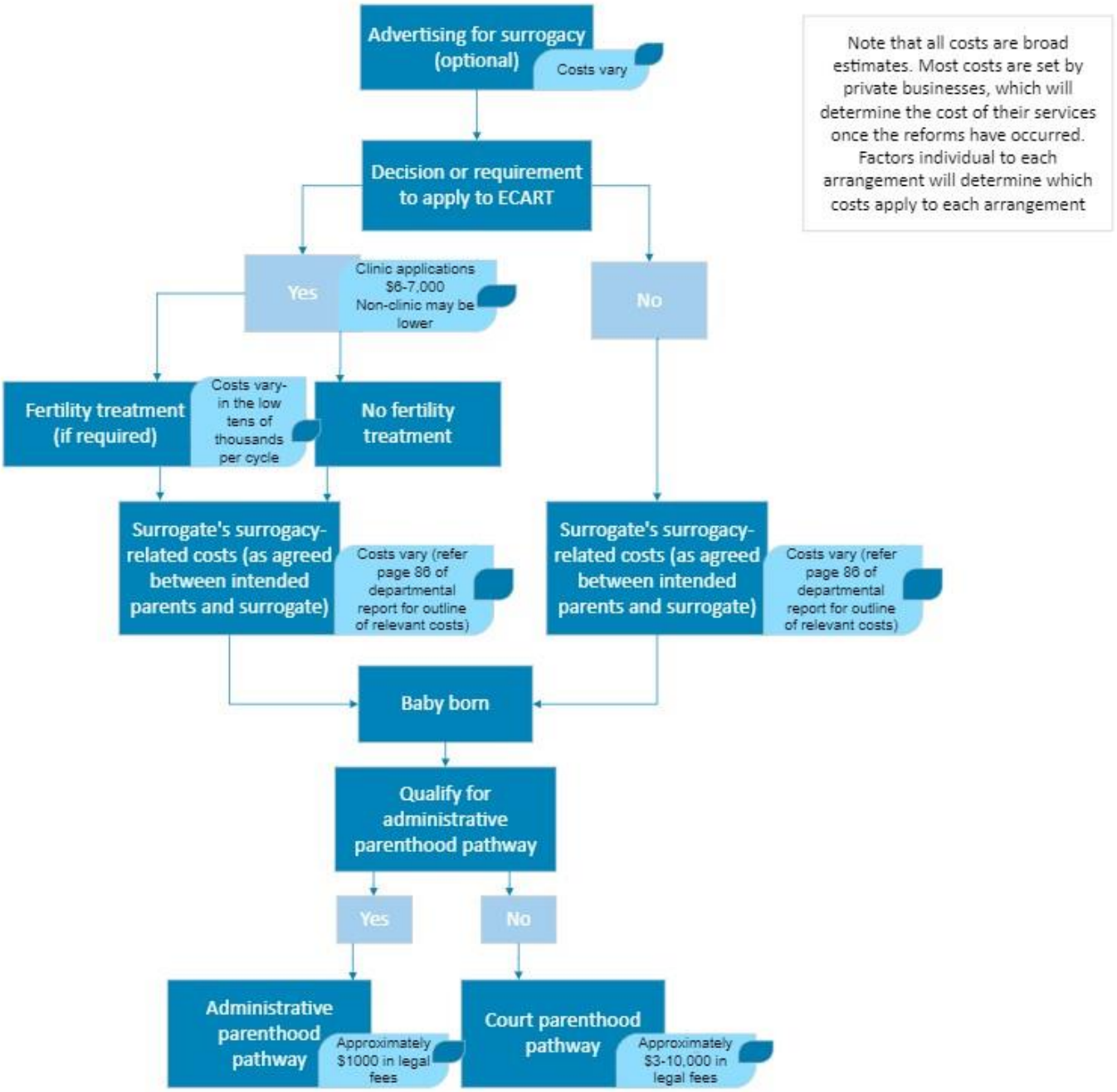
Non-legislative Law Commission recommendations relating to domestic surrogacy costs

57. The Law Commission made non-legislative recommendations relevant to the costs of surrogacy. It recommended reviews of the government funding of surrogacy and the supply of donor gametes. The Ministry of Health and Te Whatu Ora will review these in due course.

[5] A surrogacy arrangement will be able to use the administrative pathway to transfer legal parenthood if the following conditions are met:

- The arrangement has received prior approval from ECART
- The surrogate-born child is in the care of the intended parents
- The surrogate has provided consent to the transfer of legal parenthood

Image 1: Potential costs involved in the reformed domestic surrogacy process



International surrogacies

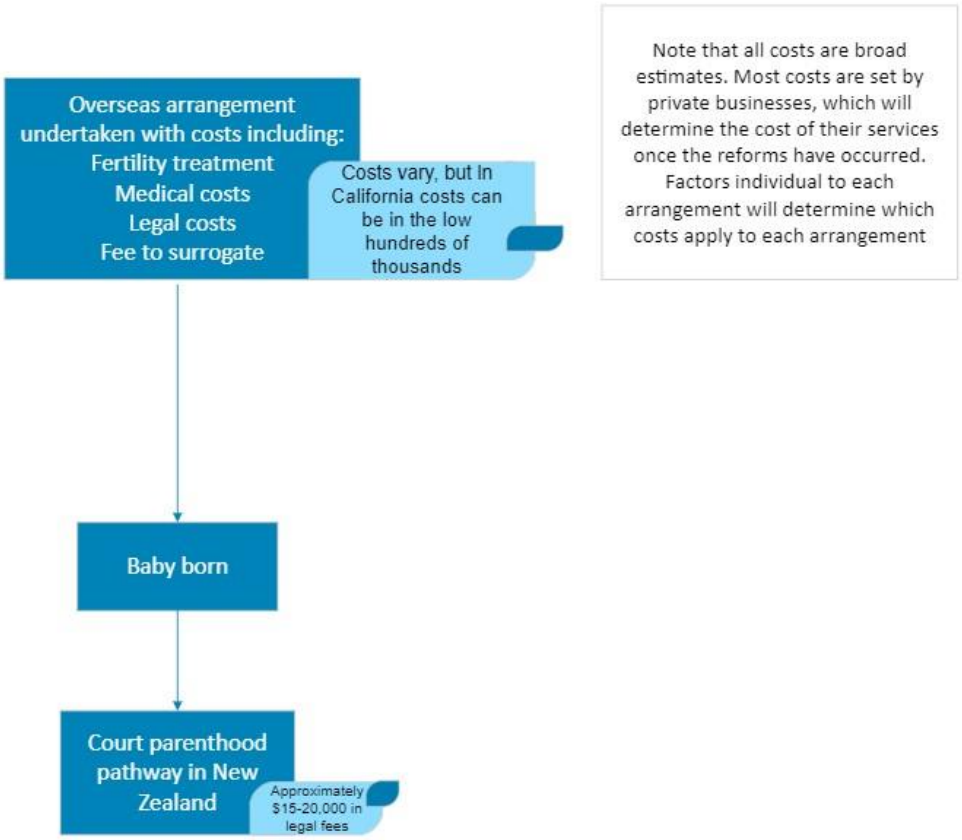
Costs overseas

58. The legislative reforms will not affect the costs for undertaking a surrogacy arrangement that are determined overseas.

Costs in New Zealand

59. Legal fees will be required for the application to the New Zealand Family Court to transfer legal parenthood. We expect this cost to be similar to fees charged currently for applications for adoption orders in relation to international surrogacy arrangements - about $15,000 to $20,000. We understand that the COVID-19 protocol process, which is the basis for the special court process recommended elsewhere in this advice, did not make much of a difference to legal fees.

Image 2: Potential costs involved in the reformed international surrogacy process



The age restriction on obtaining gametes in New Zealand

60. Section 12 of the Human Assisted Reproductive Technology Act 2004 sets the age restriction on obtaining gametes from minors at 16 years old. During the development of the legislation, the Ministry of Justice provided advice on the age restriction. The Ministry considered that there were not sufficient grounds to limit the donation or collection of donated materials to people over 18 years old. It advised an age restriction at 16 would be consistent with the Bill of Rights Act.

61. The 16 year age restriction is also consistent with the age of consent to medical procedures, which is set at 16 years in the Care of Children Act 2004.[6] Before the Care of Children Act, the Guardianship Act 1968 also set the age of consent to medical procedures at 16 years.

[6] Section 36 of the Care of Children Act 2004: Consent to procedures generally. Care of Children Act 2004 No 90 (as at 15 June 2023), Public Act Consent to medical procedures – New Zealand Legislation