New Zealand Law Society
Te Kāhui Ture o Aotearoa

Improving Arrangements for Surrogacy Bill 2022

20/7/2022

Submission on the Improving Arrangements for Surrogacy Bill

1 Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) recognises the need for reform of the law relating to surrogacy and is pleased to have the opportunity to comment on the Improving Arrangements for Surrogacy Bill (**the Bill**). The Law Society acknowledges the initiative and efforts of Tāmati Coffey MP, who has introduced the Bill. This response has been prepared by a working group established by the Law Society's Family Law Section. Members of that group actively practise in this area of law.

1.2 One of the key issues in surrogacy is legal parenthood. The aim is that the intending parents are in law the child's legal parents. This must be the starting point of any surrogacy legislation.

1.3 The Bill seeks to amend five Acts and two sets of regulations to simplify surrogacy arrangements. We consider that surrogacy is not something which can be simplified but is something which needs to be considered carefully.

1.4 The Ministry of Justice should instead be instructed to amend the Status of Children Act 1969 (SoC Act) and the Human Assisted Reproductive Technology Act 2002 (**HART Act**) based on the Law Commission's recommendations,[1] specifically recommendation 17. The Law Society's preference was initially for a stand-alone piece of legislation and if the legislation was appropriately drafted, this may attain the desired outcome. However, we accept the Law Commission's reasoning for amending existing legislation and note that any stand-alone piece of legislation would necessarily interface with the HART Act and SoC Act, in the same way that the Adoption Act 1955 interfaces with the SoC Act and HART Act.

1.5 We consider that the the Bill is well intentioned, but it should not proceed. The reasons for our view are set out further below.

1.6 The Law Society is only providing comment on some aspects of the Bill, including:

a. Why the bill should not proceed.

b. International arrangements.

c. Surrogacy arrangements.

d. Birth register.

e. Reasonable surrogacy costs.

f. Surrogacy register.

1.7 The Law Society **wishes to be heard** on this submission.

2 Why the Bill should not proceed

2.1 The Bill has been overtaken by two events:

[1] *Te Kōpū Whāngai: He Arotake | Review of Surrogacy* (R146, 2022).

(a) The first is the comprehensive and well-reasoned report recently published by the Law Commission.[2] In short, it covers a range of important issues that are not addressed in the Bill, in particular an administrative pathway for legal parenthood and better provision for surrogacy that takes place overseas. Aspects of the Law Commission's report are discussed throughout this response.

(b) The second is the publication of the Verona Principles.[3] These principles are regarded as the international gold standard for surrogacy and are designed to provide guidance on legislative, policy and practical reforms to uphold the rights of children born through surrogacy. New Zealand law should comply with these principles.

2.2 The sixth of the Verona Principles is the best interests of the child, which is explained in some detail in the text of the document. Principle 7 concerns the consent of the surrogate mother. While the Bill provides for the surrogate's consent in proposed new section 124C(2)[4] of the Care of Children Act 2004 (**CoCA**), it is unclear from this proposed amendment *when* consent occurs. The proposed amendment to section 22A[5] of the Status of Children Act 1969 appears to contemplate a pre-pregnancy consent, at the time the parties agree on the surrogacy arrangement. This contrasts with the Law Commission's proposed administrative pathway, which requires consent post-birth. The Law Society supports the Law Commission's recommendation, as this is consistent with the Verona Principles.

2.3 One of the crucial issues in surrogacy law is legal parenthood. The aim is that the intending parents are in law the child's legal parents: this must be the starting point of any surrogacy legislation. However, the Bill approaches this question from the incorrect starting point. The cornerstone of the Bill is a surrogacy order under CoCA. However, CoCA does not deal with legal parenthood. It deals with guardianship, day-to-day care, and contact. In addition, the language of "custody" used in the Bill is outdated and was deliberately not used in the 2004 Act in relation to the main body of the legislation. We consider that this is not 'simplifying the process at all.

2.4 Unless there is a stand-alone statute, the Status of Children Act 1969 should be amended to provide a clear pathway for legal parenthood. While the Bill amends the Status of Children Act 1969 in Part 3, this is dependent on an order under CoCA. In our view, this is not something which comfortably fits within CoCA and would more naturally fit in a stand-alone statute.

2.5 We consider that the SoC Act needs to be amended to properly cover legal parenthood following surrogacy. Other things such as guardianship and day-to-day care will then follow largely automatically. As the Law Commission foreshadows, the HART Act will require amendment, and there will be other consequential amendments required.

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2 *Ibid*.

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

4 Clause 17 of the Bill.

5 Clause 19 of the Bill.

Recommendation

In the Law Society's view, rather than proceeding with this Bill, the Ministry of Justice should be instructed to amend the Status of Children Act 1969 and the HART Act based on the Law Commission's recommendations.

3 International arrangements

3.1 The Law Society is conscious of the importance of ensuring that any regulation of parenthood following domestic surrogacy arrangements will be recognised in other jurisdictions. The current method of re-establishing parenthood is by adoption, and those adoption orders are accepted as a legitimate method of establishing parenthood by other countries, even where that country does not itself provide for domestic surrogacy arrangements. It is important that any new legislation does not place intended parents in a weaker position than they would otherwise be without those reforms. That is, any reform of surrogacy law must ultimately result in a process that is safeguarded in such a way as to enable international recognition of legal parenthood.

3.2 The Verona Principles and the ongoing work of the Hague Conference on parentage and surrogacy makes it clear that certain pre-conditions or safeguards will need to be present for other countries to recognise parenthood following both domestic and international surrogacy cases. It is clear from the Verona Principles and the Hague Conference discussions that laws that automatically recognise the legal status of intending parents without providing for some kind of post-birth consent process for the surrogate are likely to be challenging for a number of jurisdictions. The Bill is therefore unlikely to offer future certainty for intended parents. Knowing that their parentage will be recognised and accepted wherever they choose to live or travel must be an essential consideration in any reforms of domestic surrogacy legislation and the birth certificates that result. The Bill does not offer that certainty.

4 Surrogacy arrangements

4.1 In the Law Society's view, the Bill is too narrow in the surrogacy arrangements it captures. As such, the opportunity is missed to comprehensively reform the law in this area.

4.2 The Bill[6] envisages that surrogacy orders may be made only where:

(a) *Both the surrogate and the intending parents' consent to be legally bound by the surrogacy arrangements:*

(b) *Either –*

(i) *The ethics committee has provided approval in writing under section 23A(2) of the Human Assisted Reproductive Technology Act 2004 for the surrogacy arrangements; or*

(ii) *If the surrogacy arrangement involves an assisted reproductive procedure performed by an overseas provider of fertility services, an entity in that overseas country that performs equivalent functions to the ethics committee has provided written notice that it is satisfied that each of the requirements*

[6] Clause 17 of the Bill – proposed new section 124C(2)(a) and (b) of the Care of Children Act 2004.

described in section 23A(2) of the Human Assisted Reproductive Technology Act 2004 have been met.

4.3 If enacted, surrogacy orders could only be made in cases of:

a. Domestic surrogacies where there is Ethics Committee on Assisted Reproductive Technology (ECART) approval, and consent.

b. Overseas surrogacies where there is consent and written confirmation of compliance with section 23A(2) of the HART Act from an equivalent of ECART in that country.

4.4 Under the Bill, a surrogacy order could *not* be made in a number of situations, such as:

a. Where consent is not given, or able to be given, by a party to the arrangement (such as where one party has died).

b. Traditional surrogacy arrangements where ECART approval has not been sought.

c. Where the surrogacy takes place overseas and the requisite notice has not been sought or able to be given, due to the lack of access to an ECART equivalent, or reluctance by such a body to confirm compliance with foreign legislation.

4.5 The Bill recognises that not all surrogacy arrangements will be the subject of a surrogacy order by creating an obligation on intending parents in such cases to make notification of the birth to the Registrar of Births, Deaths and Marriages.[7] However, the Bill does not provide a clear pathway to legal parenthood in cases where a surrogacy order cannot be made, and is silent as to how legal parenthood is achieved by intending parents in such cases. Presumably, that omission leaves affected surrogates and intended parents in the unsatisfactory position of having to resort to adoption to achieve the desired legal parenthood arrangement. This is the very situation the Bill sets out to change.

4.6 The Law Society supports the Law Commission's recommended framework for determining legal parenthood and considers that this should be the basis of any proposed legislation, as it provides pathways that cover the diverse nature of surrogacy arrangements. The Commission's proposed administrative pathway provides for legal parenthood in circumstances where there has been ECART approval and post-birth consent by the surrogate and provides a court pathway for those cases that do not fall within the administrative pathway. It is important that such cases are not left with adoption as the default, as would occur with the Bill in the current form.

5 Birth register

5.1 The Law Society supports the principle that a child born of surrogacy is entitled to information about the circumstances of their conception and birth. This is consistent with the Verona Principles, and New Zealand's obligations under the United Nations Convention on the Rights of the Child.

5.2 The Law Society's concern with Parts 5 and 6 of the Bill relating to birth registration, is that the focus is too narrow. For example, the Bill provides for additional information to be registered with Births, Deaths and Marriages only in the circumstance where a child is born

[7] Clause 24 of the Bill, proposed new sections 1A and 1B of the Births, Deaths, Marriages and Relationships Registration Act 1995.

of surrogacy. This excludes a number of groups such as children born using a donor but not a surrogate, adopted children, or children raised under whāngai.

5.3 Rather than amend one aspect of the Births, Deaths, Marriages, and Relationships Registration Act 1995 the Law Society supports the Law Commission's recommendation[8] that there should be a comprehensive review of the birth registration system to ensure a coherent and consistent approach is taken to the different circumstances of conception, birth, and legal parenthood.

5.4 In the absence of a comprehensive review of the birth registration system, the Law Society supports the Law Commission's recommendation[9] that the HART Act be amended to establish a national surrogacy birth register that includes information relating to the surrogate (gestational and traditional) and donor. This would ensure that surrogate-born people have the same entitlement to information as donor-born people.

5.5 Part 6 of the Bill does not require information to be obtained about appearance and medical history of a surrogate, as is required for donors in the HART Act. That information would be relevant from a traditional surrogate, but Part 6 of the Bill makes no distinction between a traditional and gestational surrogate.

6 Reasonable surrogacy costs

6.1 Clauses 5 and 6 of the Bill amend sections 13 and 14 of the HART Act. The amendments make it clear that although it remains an offence to give or receive valuable consideration for the supply of a human embryo or human gamete, or for participation in a surrogacy arrangement, that does not include payments for the actual and reasonable expenses incurred in doing those things. The Bill then inserts new sections 13(3) and 14(4), which list specific expenses that can be paid for when incurred in the supply of a human embryo or human gamete under a surrogacy arrangement.

6.2 The Law Society supports legislative amendment to ensure proper financial support to surrogates. In prohibiting the exchange of "valuable consideration" in surrogacy arrangements, the current law fails to adequately compensate surrogates and often leaves them financially disadvantaged. It is recognised that this often creates uncertainly and additional stress for both the intending parents and the surrogate.

6.3 The Bill makes a good start but the Law Society's view is that that the list of permitted "reasonable surrogacy costs" proposed in the Law Commission's report[10] is more comprehensive, ensuring better protection for the surrogate and greater clarity in respect of compensation payable.

7 Surrogacy Register

7.1 Clause 9 of the Bill inserts new sections 66A to 66E to the HART Act, which provides for the appointment of a surrogacy registrar. The registrar's primary function is to establish and maintain a surrogacy register for the purpose of facilitating surrogacy arrangements by enabling women who are willing to become surrogates to be matched with intending parents.

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8 Above, n 1, recommendation 39.

9 Above, n 1, recommendation 40.

10 Above, n 1, recommendation 47.

7.2 The Law Society does not support these proposed amendments. We do not consider it is the role of the state to be engaged in this type of matching service, and agree with the Law Commission's view[11] that:

> *The state's role should be to provide a safe and effective regulatory framework for surrogacy arrangements – actively facilitating individual surrogacy arrangements through a surrogacy register and matching service would extend significantly beyond this.*

7.3 The Law Society assumes this amendment is aimed at improving access to surrogacy, which we agree is an issue. This is a subject covered in the Law Commission's report. The Law Commission's view is that barriers can be reduced for women considering becoming a surrogate by taking steps such as clarifying financial support, improving the availability of information, and allowing paid advertising in respect of lawful surrogacy arrangements.[12]

7.4 For completeness we have **enclosed** the submissions of Law Society to the Law Commission in which we recommended the publication of comprehensive guidance, such as that published in 2018 by the United Kingdom Government through the Department of Health and Social Care. This would reduce information access barriers, particularly if it is updated regularly.[13] This guidance should sit within the Ministry of Health as it does in the United Kingdom. The Law Commission has agreed with this recommendation.[14]

Ataga'i Esera
Vice President

11 Above, n 1, paragraph 50 of the Executive Summary.

12 Above, n 1. Recommendations 46 to 50 (financial support), 58 (availability of information), 59 (paid advertisements).

13 Law Society's submission, 1 October 2021 (paras 10.3 to 10.6).

14 Above, n 1. Recommendation 46 of the Executive Summary.

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1 October 2021

Helen McQueen
Tumu Whakarae Tuarua | Deputy President
Te Aka Matua o te Ture | Law Commission
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By email: surrogacy@lawcom.govt.nz

Re: Law Commission IP47 Te Kōpū Whāngai: He Arotake | Review of Surrogacy

1. Introduction

1.1. The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide comment on the Law Commission's Issues Paper (**Issues Paper**) *Te Kōpū Whāngai: He Arotake – Review of Surrogacy*.[1] We congratulate the Commission on its paper, which is a comprehensive and measured review that accurately summarises and identifies the key issues associated with regulating surrogacy.

1.2. This response has been prepared by a working group established by the Family Law Section (**FLS**). Members of that group actively practise in this area of law. The Law Society supports many of the Commission's proposed options, and in particular the guiding principles for surrogacy law reform that emphasise the importance of a child-centred approach, where the best interests of the child are at the forefront of surrogacy process.

2. A stand-alone statute to regulate surrogacy

2.1. In the Law Society's view, any reform to surrogacy law should be in the form of a stand-alone statute governing this area of law (for example the Tasmanian Surrogacy Act 2012), rather than amendments to legislation such as the Status of Children Act, the Care of Children Act, or the amendments proposed in the Improving Arrangements for Surrogacy Bill. For any regulation of surrogacy processes to be effective and efficient, it needs to be user friendly. Stand-alone legislation would enable those seeking information about the surrogacy process to access one piece of legislation that sets out all the legal requirements of surrogacy in New Zealand, rather than having to navigate through a tapestry of legislation. A Surrogacy Act would be clear, easily discoverable by interested parties and form a separate foundation for the development of case law.

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1 Te Kōpū Whāngai: He Arotake – Review of Surrogacy, He Puka Kaupapa | Issues Paper 47, Law Commission, July 2021.

3. Chapter 3 - Guiding principles for surrogacy law reform

Q1 Do you agree with our six guiding principles for surrogacy law reform? If not, what changes should we make?

3.1. The Commission set out six guiding principles for surrogacy law reform:[2]

i. The best interests of the surrogate-born child should be paramount.

ii. Surrogacy law should respect the autonomy of consenting adults in their private lives.

iii. Effective regulatory safeguards must be in place.

iv. Parties should have early clarity and certainty about their rights and obligations.

v. Intended parents should be supported to enter surrogacy arrangements in Aotearoa New Zealand rather than offshore.

vi. Surrogacy law should enable Māori to act in accordance with tikanga and promotes responsible kāwanatanga that facilitates tino rangatiratanga.

3.2. The Law Society supports the view that surrogacy law should protect and promote the rights and interests of people involved in surrogacy arrangements and meet the needs and expectations of New Zealanders. The six principles articulated by the Commission generally provide a sound foundation for the development of policy. However, the Law Society encourages the Commission to also consider those principles which might be included in future legislation with particular reference to the principles set out in section 4 of the Human Assisted Reproductive Technology Act 2004 (**HART Act**). As in section 4(e) of the HART Act, we recommend there be a separate principle about awareness of genetic origins and access to information for surrogate-born children. This could include awareness of whakapapa, or that could be spelt out as a separate paragraph, linked to principle 6 above.

3.3. Furthermore, the Law Society supports additional (or substitute) principles that focus on the need for surrogacy law to respect the human dignity and mana of all the parties to the surrogacy, and the necessity for informed consent at all stages of the surrogacy process.

3.4. In addition, the privacy of surrogate-born children is not an issue that has been identified. We discuss below (Q32) our concerns about the publicity of, and compensation received for, surrogacy stories and the impact on these children at the time of publication and well into the future. The privacy of children and the protection of them, in terms of the commercialisation of surrogacy stories, should be included as a principle in any new surrogacy legislation.

Comments on specific principles

Principle 1: The best interests of the surrogate-born child should be paramount

3.5. The Law Society supports future legislation including this principle as a statement, with a further section setting out principles that relate to the child's best interests (in the same way that the Care of Children Act 2004 does through sections 4 and 5). In this way, the rights

[2] See page 27 of the Issues Paper.

articulated by the Commission as being particularly relevant to the paramountcy principle in the surrogacy context – the right to identity, nationality, family life, health, freedom from discrimination and protection from abuse, exploitation and sale – are all important and can be neatly accommodated in any new legislation.

Right to identity

3.6. Of the rights articulated by the Commission, the Law Society acknowledges that the right to identity is a central issue that has arisen in many surrogacy cases (and in legislation involved in such cases) as the right of a child to know their genetic origins. This includes the right of surrogate-born children to access information about their heritage and origin. This concept is likely to present challenges in finding a balance between the ability to access donors and ensuring surrogacy born children are afforded the greatest opportunity to have information on their identity. Nevertheless, as noted above, it is a central principle of the HART Act, and is embedded in that Act and others such as the Adult Adoption Information Act 1985. It reflects the emphasis in Aotearoa New Zealand on whakapapa as a primary cultural principle for Māori.

Right to health

3.7. The Commission has indicated that a child who is stateless may encounter barriers when attempting to access health care. The experience of lawyers working with intended parents is that limitations have not been experienced on the basis of a child being stateless, but rather on the ability to demonstrate a genetic link to the parent who has New Zealand citizenship or residency.

Rights to protection from abuse, exploitation and sale

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

Principle 2: Surrogacy law should respect the autonomy of consenting adults in their private lives

3.9. The Law Society acknowledges the competing elements of public interest and autonomy in an area where more than just the consenting adults are involved. The concept of "autonomy" is important in health and other contexts. However, given New Zealand's opposition to commercial surrogacy and emphasis on other values such as those within te ao Māori, it can be misleading and needs to be qualified.

3.10. The Law Society encourages the Commission to explore this principle through the lens of recognising human dignity and mana rather than 'autonomy'. This viewpoint would more accurately acknowledge the necessary removal of full autonomy consequent upon the

inclusion of Principle 1, while acknowledging the rights of surrogate and intended parents to make decisions about family formation on their terms.

3.11. Central to this concept, however, must be the principle of informed consent. As noted above, the Law Commission may wish to consider this issue being elevated to a separate principle (as in section 4(d) of the HART Act).

Principles 3 to 6

3.12. The Law Society agrees with these principles.

4. Chapter 4 – Māori and surrogacy

Q2 Do you have any views on the matters of particular concern to Māori we have identified?

4.1. The Law Society agrees with the Law Commission in respect of the potential reasons why there is a low surrogacy participation by Māori.[3]

4.2. It is vital that a child's culture be taken into consideration in the surrogacy process. Surrogate-born children should be provided with as much information about who they are as possible. Intended parents must be encouraged to have some type of connection to a child's heritage and language, and to be able to nurture the child's cultural identity.

Q3 Do you think our proposals to address access to surrogacy elsewhere in this Issues Paper adequately address access to surrogacy by Māori?

4.3. The Law Society agrees with the proposals listed at paragraph 4.46 to reduce the barriers for women and the cost of surrogacy. The proposals are likely to address the uptake of surrogacy by Māori for those who chose that pathway (rather than whāngai).

Q4 Do you agree that surrogacy law and regulation should enable Māori to act in accordance with tikanga if they wish to do so? If so, do you think any of the options for reform we have identified, or any other option, should be adopted to improve the current position?

4.4. The Law Society agrees that surrogacy law should enable Māori to act in accordance with tikanga if they wish to do so and agrees with the options at paragraphs 4.53 (a) to (c) of the Issues Paper in terms of improving the current position in this respect.

4.5. There are differences in practice of tikanga between various whānau, iwi and hapu throughout the country. It is therefore important to note that there is "no one size fits all" tikanga approach to surrogacy.

Q5 Do you think that the options for reform in Chapter 8 to ensure information about a surrogate-born child's genetic and gestational origins is collected and recorded by the state are sufficient to enable surrogate-born Māori children to access information about their whakapapa?

4.6. The Law Society agrees with the options in Chapter 8 to ensure information about a surrogate-born child's genetic and gestational origins is collected and recorded by the state. We also agree with the recommendation of having a surrogacy agreement completed. Such

[3] See paragraph 4.43 of the Issues Paper.

an agreement could contain provision for the completion of iwi registration where the surrogate is genetically related to the child. This should strengthen the ability for Māori children to access information about their whakapapa and maintain iwi relationships.

Q6 Do you agree that the law should clarify that a Māori child's whakapapa is not affected by the allocation of legal parenthood in a surrogacy arrangement?

4.7. The Law Society agrees the law should clarify that a Māori child's whakapapa is not affected by the allocation of legal parenthood in a surrogacy arrangement.

Q7 Do you think that the lack of legal recognition of whāngai arrangements is a particular matter of concern in the surrogacy context?

4.8. Whāngai is a concept within Te Ao Māori that has been around since time immemorial. The whāngai system is generally open and is done with the full knowledge of the whānau, hapū and iwi. The child knows both their birth parents and whāngai parents. Rather than being the sole decision of the mother or parents, a wider community is involved in the decision. Whāngai does not sever the relationship between the child and the parents and members of the wider family but allows for ongoing contact between them. Any disagreements are traditionally resolved by members of the child's whānau. This ensures that a child remains in the family, thus retaining his or her whakapapa and tribal identity.

4.9. Because of the importance of descent in establishing personal identity and group membership, it is vital that individuals know their true whakapapa and connections. The Māori view of the parental role is not an exclusive one but allows for the involvement of other relatives.

4.10. Whāngai is a customary practice and the particulars of whāngai arrangements vary between whānau, hapū or iwi. The Law Society accepts that there are divergent views within Māoridom, therefore, there should be extensive consultation with Māori on this issue.

Q8 Do you think that Māori representation on ACART and/or ECART should be improved?

4.11. The Law Society supports a diverse representation of our multi-cultural society on ACART and/or ECART. While we agree with the statement of a Māori academic at paragraph 4.82 of the Issues Paper, who says that one Māori person cannot represent the diversity of Māori views and perspectives, the same can be said about the other members of the committee representing other parts of our community.

4.12. If there is such a low uptake of surrogacy by Māori (perhaps as whāngai may be used rather than surrogacy arrangements), the Law Society suggests considering whether there is a need for increased Māori representation on ACART or ECART, beyond what is already provided. We also agree with the statement by the second Māori academic at paragraph 4.82, who notes that the one Māori representative on ACART is suitable in terms of the size of the committee, but there are vast aspects of society that are not represented including Asian, Indian and LGBTQ communities.

5. Chapter 5 – Approving surrogacy arrangements

5.1. We answer the specific questions posed at the end of this chapter, but first make some comments on the commentary.

General comments

ECART process is slow and involves a very detailed process (paragraphs 5.29 to 5.30)

5.2. We consider that while the timeframe involved when making an application to ECART can be an important part of the process, as it provides time for reflection and further consideration, it should not extend beyond 12 months.

Some surrogacy arrangements lack safeguards (paragraph 5.47)

5.3. The Issues Paper states that the lack of regulation of some surrogacy arrangements has been identified as a problem.[4] We consider clinic assisted surrogacies should continue to be part of the ECART approval process, as it provides important checks and balances.

Should ECART continue to have this approval function (paragraph 5.52)

5.4. In our view, ECART is a functional, independent body and it should continue to be responsible for approving surrogacy arrangements. In our experience, a pre-approval court process would likely be slower and more cumbersome than the ECART approval process. It would not be within the expertise of a judge given the applications involve not only legal and psychological reporting but also medical information and evaluations.

Q9 Do you agree with the issues we have identified with the approval process for surrogacy arrangements? Are there any other issues we should consider?

5.5. The Law Society agrees with the issues identified by the Commission. We do not think there are any other significant issues that should be considered.

5.6. We agree with the approval process for surrogacy arrangements and see an independent body as being an important part of such a process. Overall, we consider the ECART process is a sound one that is more than capable of balancing difficult issues that can and have arisen.

Q10 Do you agree with our preliminary view that gestational surrogacy arrangements should continue to require ECART approval? If not, please explain your views?

5.7. We support the Law Commission's preliminary view that surrogacy arrangements continue to require prior independent approval. We also agree with the reasons for that view set out in the Issues Paper at paragraphs 5.50(a) to (e).

Q11 Which options to improve the ECART process do you prefer? Are there other changes that should be made?

5.8. The Law Society supports the following various options that have been proposed by the Commission for improving the ECART process:

Increasing ECART's capacity to consider surrogacy applications:

5.9. The Law Society considers that one way to increase ECART's capacity might be the establishment of alternate committees. This would enable a meeting to be convened every month, and would alternate committee members to reduce the onus on individual members.

[4] Paragraph 5.47 of the Issues Paper.

More frequent meetings of this nature can mitigate the risk of conflicts, allow sharing of the workload, and will give greater opportunity for diversity of membership. The use of ad hoc committee members to bring their specialist cultural knowledge or expertise to applications requiring it will also enable a capacity increase.

Reconsidering the parental suitability assessment in surrogacy arrangements:

5.10. Some form of parental assessment should continue to be a requirement. However, as discussed below and further on in our submission, the scope of this enquiry can be refined, and we do not believe this role should continue to be performed by Oranga Tamariki. Our views on Oranga Tamariki's role in the surrogacy process is discussed in further detail below.

5.11. We observe that with gestational surrogacies any assessment requirement that involves a social setting or home assessment, financial disclosure, or detailed family histories for birth parents, is not as relevant as the intended parents' plan for sharing their birth story with their child, their relationship with the surrogate and their plans for, and preparation to, parent a child created through surrogacy rather than their own pregnancy. We suggest consideration should also be given to a more circumscribed and relevant assessment of gestational surrogates as well. This is not an enquiry that therefore needs to be conducted by an Oranga Tamariki social worker. Other experts with a background in fertility issues, parenting and attachment could be used for this assessment process and are likely to be less confronting for the parties to the planned surrogacy than an Oranga Tamariki social worker.

Extending time for approvals:

5.12. In the Law Society's view, the ECART approval should be extended to a five-year process as proposed by the Commission, provided there are no significant changes to circumstances in that period. This extension would allow for the fact that there can be delays in the surrogacy process.

Requiring surrogacy arrangements to be recorded in writing and signed by the parties:

5.13. The Law Society supports a mandatory requirement for a written surrogacy agreements to be signed by the parties and witnessed by their lawyers. In keeping with the Law Society's recommendation that informed consent be included within the principles, a lawyer should certify that they have provided a party with independent legal advice and explained the effects and implications of the agreement. While the agreement is not enforceable, it does set out the intention of the parties and this may become a form of evidence should a dispute arise requiring proceedings in the Family Court.

5.14. As discussed below (Q 15), one exception to the unenforceable nature of a surrogacy agreement would be that agreements to reimburse a surrogate for her costs should generally be enforceable.

5.15. The creation of a surrogacy agreement would not add significantly to the process as the Legal and Counselling reports (provided to ECART) already document many of the issues that would be recorded in an agreement. Many other jurisdictions have such documents, and it enables a record to be kept in a single document of the parties' key expectations and understandings. Lawyers do report that many clients often express surprise there is no

written agreement recording the surrogacy plans and some even draft their own as an adjunct to the ECART process.

5.16. One suggestion could be the establishment of a list of considerations to be included in any surrogacy agreement, akin to parenting plans in Care of Children Act matters, with the clear indication that any agreement is not binding but may be evidence that may later be considered by a court. How cultural and identity information will be provided to, and fostered with, a child should be included in the Agreement. In our experience, counsellors do follow a checklist of key issues, so this may be useful in compiling a list of considerations for any such agreements.

Improving counselling requirements

5.17. The Law Society considers there should be an opportunity for additional counselling to take place once the pregnancy has been established (for example at the 25-week mark) and to consider the birth and post-birth planning. Such counselling should not be mandatory, but those involved, including the surrogate, should be advised that the opportunity is available. Such counselling would also enable the child's position and interests to be considered, which is consistent with Articles 7 and 8 of the United Nations Convention of the Rights of the Child (**UNCROC**): the right of a child to know his or her parents and the right to identity, and the guiding principles for the reform of surrogacy law as discussed in Chapter 3 of the Issues Paper.

5.18. Post-birth counselling could also be a good opportunity to re-address any issues that have become increasingly relevant or important. For example, a surrogate may have had medical issues, such as a caesarean, and needs further time, or she may wish her own children to have an opportunity to meet and say goodbye to the child that they have been associated with throughout pregnancy, especially where the parties live in different towns. Even well-meaning intended parents can become insensitive to the surrogate's own needs and family situation once they have the new-born baby to focus on. Family lawyers practising in this area of law have experienced cases where surrogates have suffered considerable physical difficulties during pregnancy, at birth or following birth and are left feeling somewhat abandoned as the focus moves to the baby and intended parents.

Modifying the membership of ECART

5.19. In our view, the membership of ECART should be modified to include a mandatory member of the committee with the ability to articulate the interests of the child, (since this has been identified as a paramount principle in the reform of surrogacy law at Chapter 3 of the Issues Paper) such as a nominee of the Children's Commissioner.

5.20. Surrogacy also has an important cultural dimension. Appropriate membership to bring that cultural component to determinations made by ECART is vital. In this regard, it may be appropriate to have a range of cultural experts who are brought in as members of the committee to consider those applications requiring their specific cultural knowledge or expertise.

Improving monitoring and reporting on outcomes

5.21. In our view, it would be beneficial for ECART to have an ongoing role in monitoring and reporting on outcomes. ECART could ask for feedback on the experiences of both intending parents and surrogates. This information could be used to improve its processes, be published annually as part of ECART's annual reports, and made available on the ECART website. However, we do note that the last annual report published on the website is for the year 2014/15.

Q12 Do you agree with our preliminary view that parties to a traditional surrogacy arrangement should be able to access the same ECART process as parties to a gestational surrogacy arrangement?

5.22. We believe that traditional surrogacy arrangements should have access to the ECART process if they want to. Requiring completion of the ECART Process may create other difficulties. Traditional surrogacy participants may go under the radar if they are not willing to engage in the ECART process, particularly due to the time and expense involved. The Law Society supports incentivising completion of the ECART process by providing applicants who do so with a fast-track, more streamlined process to transfer parentage after the birth.

Q13 Do you prefer Option 1 or Option 2 to enable parties to a traditional surrogacy arrangement to access the ECART process, or is there another option we should consider?

5.23. The Issues Paper sets out two options:[5]

a. Option 1: Requiring all clinic assisted surrogacy arrangements to obtain ECART approval.

b. Option 2: Enabling people to apply directly to ECART.

5.24. The Law Society supports Option 1.

5.25. We do not support Option 2. Our concerns relate primarily to timing and that there is a false economy in the expected costs saving.

5.26. If people can apply directly to ECART there is unlikely be a cost saving or time saving and, as the Commission has identified, it will significantly increase ECART's workload. We also expect that in terms of administration ECART may need to introduce a filing fee to cover the increased administration costs, which will again increase intended parents' costs and defeat the purpose of a direct application.

5.27. We also expect that it will transfer the costs to another agency or entity which is likely to take the place of a fertility clinic. We are concerned that it could result in an agent filling the void with a less ethical framework than is currently available through fertility clinics. We acknowledge the risk of "patch protection" by clinics, but in our experience their professionalism and ethics counters against this. We believe people would struggle to navigate the process on their own given the specialist nature of the information needed. This includes the counselling, which is specialist counselling and an important part of the process, as well as the targeted and specialist legal advice. We also note that delays are already

[5] Paragraphs 5.67 to 5.72 of the Issues Paper.

experienced in the current system and changes should expedite, not delay, an already slow system.

6. Chapter 6 – Financial support for surrogates

Q14 Do you agree with the issues we have identified with financial support for surrogates? Are there other issues we should consider?

6.1. The Law Society agrees with the issues identified in terms of financial support for surrogates and considers there is benefit to both intending parents and surrogates in having a clear schedule of prescribed allowed costs.

Q15 Do you agree with Option 1 to clarify and expand the list of permitted costs that can be paid in a surrogacy arrangement? If so, do you agree with our proposed list of permitted costs? Are there other costs you would include in this list?

6.2. The Law Society agrees with option 1 and with the list of permitted costs proposed at paragraph 6.43 of the Issues Paper.

6.3. We note with approval that the Canadian legislation, the *Assisted Human Reproduction Act S.C 2004* provides at section 12 specific requirements around all reimbursements, including the production of receipts.

6.4. The more recent Assisted Human Reproduction Regulations (SC 2019-193) provides prescribed categories of expenditure reimbursable under section 12(1), as set out at regulation 4:

- travel including transportation, parking, meals and accommodation;
- care of dependants or pets;
- counselling services;
- legal services and disbursements;
- obtaining any *drug* or *device* as defined in section 2 of the Food and Drugs Act;[6]
- obtaining products or services that are provided or recommended in writing by a person authorised under the laws of a province to assess, monitor and provide health care to a woman during her pregnancy, delivery or the postpartum period;
- obtaining a written recommendation referred to in paragraph (f);
- services of a midwife or doula;
- groceries, excluding non-food items;
- maternity clothes;
- telecommunications;
- pre-natal exercise classes;

[6] Available here: https://laws-lois.justice.gc.ca/eng/acts/F-27.

- expenditures related to the delivery;
- health, disability, travel or life insurance coverage; and
- obtaining or confirming medical or other records.

6.5. Loss of work-related income is specifically provided for in the Act and will be reimbursed only with certification by a medical professional (see section 12(3)).

6.6. We consider that any prescribed categories of allowable costs should be broad, with the inclusion of "other reasonable costs associated with the surrogacy arrangement".

6.7. Closer to home, in Tasmania, section 9 of the Surrogacy Act 2012 defines the meaning of 'birth mother's surrogacy costs.' Pursuant to section 9(3)(f), lost earnings are provided for a period of no more than two months around the birth and at other times during or after the pregnancy, when the mother is unable to work on medical grounds associated with the pregnancy or the end of the pregnancy.

6.8. The Law Society sees benefit in limiting the intending parents' responsibility to meet the costs of the surrogate's actual lost earnings to two months but supports being able to extend this if medical issues mean the surrogate is unable to work during the pregnancy.

6.9. Section 9(3)(h) of the Surrogacy Act 2012 provides that "another reasonable cost associated with the surrogacy" may also be payable, leaving some discretion. The Law Society supports the inclusion of a similar clause allowing for some flexibility between intending parents and surrogates.

6.10. The Law Society supports agreements to reimburse the surrogate for her costs being enforceable, provided all agreements as to financial obligations are recorded prior to the commencement of the pregnancy, with each party receiving independent legal advice (as discussed above at Chapter 5). We consider that there should also be provision for certain limited circumstances where the surrogate's costs are not enforceable. This would include where the surrogate refuses to relinquish the child or refuses to consent to the transfer of parenthood.

Q16 Do you agree with Option 2 to clarify the law with respect to surrogates' entitlements to post-birth recovery leave and payments? If so, what should be the length of time surrogates are entitled to receive leave and payments?

6.11. The Law Society agrees that a surrogate's entitlement to post birth recovery leave must be clarified. We understand there may be some existing informal internal protocols around this issue but consider it would be advantageous to address this clearly in any new legislation.

6.12. The current situation is confusing and challenging for all parties to navigate. The Parental Leave and Employment Act 1987 sets out at section 1B an intention to provide for the primary caregiver of a child to access leave. In a surrogacy arrangement this would not be applicable to the surrogate.

6.13. We consider that there should be provision for recovery leave for a surrogate, for a period aligned with recovery from childbirth: medical guidance is often six weeks in the event of a caesarean section. This would align with the existing legislation around live organ donation (also based on medical guidelines for recovery from surgery). We consider that in the event

of an unexpected birth complication, this birth recovery leave could be extended by agreement between intending parents and the surrogate, or on the advice of a medical professional, with costs met by the intending parents.

6.14. There may be a fiscal objection to the State paying leave for two people for the same child, and a principled objection on the basis that the intent of the parental leave legislation is to benefit the person caring for the child. The costs implications of providing leave to surrogates are very limited given the small numbers of surrogacies. The Law Society considers that any objections are outweighed by the benefits of reducing the potential for conflict and uncertainty and reflects the reality that for surrogacies, there are in fact two sets of parents affected by way the child was created. Given the guiding principle that domestic surrogacies are to be encouraged, the clear provision of leave to surrogates mitigates, in a small way, one potential obstacle to being a surrogate.

Q17 Do you think that intended parents should be permitted to pay surrogates a fee for their participation in a surrogacy arrangement (in addition to paying a surrogate's reasonable costs under Option 1)?

6.15. The Law Society does not agree that intended parents should be permitted to pay surrogates a fee for their participation in a surrogacy arrangement. Payments made to surrogates should be purely compensatory. The costs paid to the surrogate are simply to ensure the surrogate is not financially disadvantaged for her role in the surrogacy arrangement, in other words that she is placed back in the same position "but for" the surrogacy.

6.16. Payment of any additional fee raises the spectre of profit or commercialisation of childbirth and children. This is the reported experience of New Zealand family lawyers and also is a significant global concern. This is not what the parties involved want or expect. Allowing for a compensation of expenses will not impact on recognition of any parenthood orders in other jurisdictions. A profit based or commercial surrogacy may not be as easily accepted in a cross-border situation.

7. Chapter 7 – Legal parenthood

Q18 Do you agree with the issues we have identified with the process for establishing legal parenthood in surrogacy arrangements? Are there other issues we should consider?

7.1. This Issues Paper sets out two broad problems with the current law (at paragraph 7.17):

a. First, the legal parenthood laws fail to reflect the reality of surrogacy arrangements.

b. Second, the adoption process is inappropriate for establishing intended parents' legal parenthood even if it is modernised as a result of the Government's current review.

7.2. The Law Society agrees that the current regime, using the Adoption Act 1955 to establish legal parenthood in surrogacy arrangements, is inappropriate and not fit for purpose for all the reasons set out in the Issues Paper.[7]

[7] See paragraphs 7.21 to 7.50 of the Issues Paper.

7.3. The Law Society does not agree, however, that the current adoption pathway is deterring parents from formalising the parent child relationship.[8] We have seen no evidence in practice of this and do not agree that there is a significant disparity between the number of surrogate-born children and those who have a legally recognised relationship.[9] The experience of lawyers who work in this area suggests that while there are objections to the adoption pathway as a process to follow, parents accept that it is the only legal pathway currently available. Given the time, effort and emotional energy expended on becoming parents, there were no reports of parents refusing to engage with the adoption pathway because they object on principle to the process. The Law Society observes that the parties who proceed through the ECART gateway are aware of the need for adoption. In addition, the birth registration form itself makes it clear that when Assisted Reproductive Technology (**ART**) is involved it is not possible to ignore the legislative presumptions and to self-determine parentage.

7.4. Additional issues we highlight are:

a. ensuring that any parenthood process established is capable of cross border recognition. An administrative process that establishes parentage by operation of law will need to explicitly state in the legislation what the safeguards are and ensure they synchronise with international best practice principles. Keeping informed about the work of the Experts Group will be essential.

b. If adoption as a pathway is being replaced, then under any new regime the child should not be in a worse position. For example, currently the effect of an adoption order is to confer citizenship by birth on the child. So, a child born via a surrogacy arrangement in Los Angeles will become a citizen by birth after an adoption order. These positions should be preserved under any new pathway.

c. Consideration should be given to ensuring that parenting orders can be obtained by parents who choose to co-parent but who do not have a domestic relationship, for example, those who create a child with the intention of co-parenting collaboratively but not as a couple.

d. We are pleased that the Commission has identified the issue of pre-birth death of an intended parent. Similarly, there should also be regulation where the intended parents separate.

Q19 Do you agree with the proposed Pathway 1 to replace the adoption process with recognition of the intended parents as the child's legal parents by operation of law when a surrogacy arrangement receives ECART approval and the surrogate consents?

7.5. The Issues Paper sets out three options for reform:[10]

a. Pre-birth judicial model;

b. Administration model; and

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8 See paragraph 7.51 of the Issues Paper.

9 See the discussion from paragraph 7.51 and forward of the Issues Paper.

10 Paragraph 7.58 of the Issues Paper.

c. Post-birth judicial model.

7.6. The Law Society agrees with proposed Pathway 1, which uses an administrative model to establish the intended parents' parenthood by operation of law.

7.7. In terms of options for obtaining consent, the only difference between Option A and Option B is where legal parenthood rests in the interim period between birth and the surrogate confirming consent. We acknowledge there are advantages and disadvantages of both options.

7.8. Within the administrative model, the Law Society supports the use of Option A which would see the surrogate being the legal parent at birth with an opportunity to confirm her consent before legal parenthood transfers to the intended parents. However, the support for Option A is based on the Law Society's view that the role of the surrogate and her rights must be respected. It recognises that in practice surrogates themselves may prefer Option B as long as they are able to withdraw their consent and challenge the presumption that the intended parents have initial legal parenthood within a limited period of time post-birth.

7.9. We appreciate that there may be concerns as to the international acceptance of the administrative model which confers parenthood by operation of law but believe this can be addressed if the safeguards are identified in the legislation and incorporated into the written surrogacy agreement.

7.10. If a pre-birth judicial model was to be introduced, in the Law Society's view, that model could be streamlined so that the applications are dealt with by a single (or two) designated Family Court registry. The process could be based on the emergency protocol[11] established by the Principal Family Court Judge during the COVID-19 lockdown, which established two designated registries: two judges with targeted team members at Births, Deaths and Marriages and the Department of Internal Affairs. The ability to file electronically and have a hearing via AVL made the process much faster and took less court time.

7.11. Paragraph 7.97 of the Issues Paper suggests that a lawyer for child is appointed to independently represent the child in every case or when ordered by the court. If the streamlined process we have proposed above is accepted, there would be no need to appoint a lawyer for child in every case. There may be rare cases where the surrogate changes her mind or refuses to consent, or another issue arises. In these cases, a lawyer for child should be appointed when ordered by the court.

Q20 Do you prefer Option A or Option B to confirm the surrogate's consent under Pathway 1, or is there another option we should consider?

7.12. For the reasons above, the Law Society prefers Option A but can see merit in Option B.

Q21 Do you agree with proposed Pathway 2, which introduces a Family Court process for establishing legal parenthood when the conditions under Pathway 1 have not been met?

7.13. In cases where Pathway 1 does not apply, for example in cases of traditional surrogacy, the Law Society agrees there should be a Family Court determination. Legal parenthood would

[11] Covid 19 Protocol for the Adoption of New Zealand surrogate babies born overseas (extended to 23 March 2022 by the Principal Family Court Judge on 22 September 2021).

reside with the surrogate in cases on this pathway. This is on the assumption that the court pathway is centralised, faster, and with designated specialist Family Court judges as outlined above.

Q22 Do you agree with our proposed list of relevant considerations the Family Court should have regard to when determining the legal parenthood of a surrogate-born child? Are there any other considerations you would include in this list?

7.14. The Law Society agrees to the proposed list of relevant considerations the Family Court should have regard to when determining the legal parenthood of a surrogate-born child.[12] In our view, a further consideration should be the access to information about the child's identity and how and when the parents plan to discuss this with the child and any other siblings in the family.

7.15. Many donor-born surrogate children may not be told their genetic story by their parents. In these cases, the pre-court order stage is the point when parents are most open to being educated about the benefits of openness for their child. At the pre-conception stage it may not feel "real enough" for many intended parents, especially when there are competing concerns and demands around this time.

Q23 Do you agree that the Family Court should seek a social worker's report when determining the legal parenthood of a surrogate-born child?

7.16. As part of the Pathway 2, the Family Court should request an independent report to assist in determining the legal parenthood of a surrogate-born child. In our view, this should not be Oranga Tamariki for the reasons set out below.

7.17. To align with international legislation (for example in Tasmania, section 18 of the Surrogacy Act 2012 states that the court *may* request a report from an independent counsellor) an independent report should be obtained unless the court considers that such a report is unnecessary. In our view, it would also be helpful for the legislation to specify what matters the report writer is to address.[13] A detailed report by an independent report writer that addresses all relevant matters required by the court to make a determination, would reduce the volume of evidence an applicant(s) would need to include in their application. This would make the application process more tailored, user-friendly and reduce legal costs. Having an independent report would also ensure that New Zealand orders are well recognised overseas.

Q24 Do you agree that the surrogate's partner should not be a legal parent of a surrogate-born child at birth?

7.18. In general, a partner should not be a legal parent based on his or her knowledge or consent to the surrogacy arrangement. This is an unnecessary and onerous presumption. While it is the experience of family lawyers practising in this area of law that the surrogate's partner would rarely want to be the legal parent of a surrogate-born child, there may be instances where this is appropriate or what all parties want. For example, in a surrogacy involving

12 See para 7.93 of the Issues Paper.

13 For example, see section 17 of the Surrogacy Act 2010 (NSW).

extended family, a surrogate's partner may feel some familial connection to the child and is highly likely to have been part of the surrogacy and pregnancy process in terms of support for the surrogate. In such situations, becoming a legal parent of a surrogate-born child at birth may recognise the partner's role in the process. It may also be more important in those instances involving traditional surrogacy arrangements.

7.19. The Law Society considers this could be addressed by allowing for the partner to "opt-in" as the initial legal parent of a surrogate-born child at birth. The exercise of opting in would be recorded in the written agreement. The Law Society sees the "opt in" option being exercised in the rare situation where a partner seeks recognition of a shared decision to enter the surrogacy arrangement.

7.20. If the surrogate was to die during childbirth, she would still be registered on the birth certificate as the legal parent. In this scenario, there may be an issue with consent. The ability to confirm consent to the transfer of parentage could pass to the surviving partner.

8. Chapter 8 – Children's rights to identity and access to information

Q25 Do you agree with the issues we have identified with children's access to information in surrogacy arrangements? Are there other issues we should consider?

8.1. The Law Society agrees with the issues identified by the Law Commission in its Issues Paper in respect of access to information in surrogacy agreements. At para 8.38, Option 1 sets out three different ways of recording more information about the circumstances of a person's conception and birth in the birth register and on birth certificates. These are:

a. The information recorded on a birth certificate could indicate that a child was born as a result of a surrogacy arrangement (long-form birth certificate).

b. All birth certificates could be annotated with a statement that alerts the reader to the fact that more information about the circumstances of the child's birth may be held on the birth register (short-form birth certificate).

c. A two-certificate system could be introduced.

8.2. The Law Society supports a two-certificate system. The long form would contain all the key birth story information. This is the child's family history document. It will record the identity of the surrogate, a reference to use of any donated gametes and possibly the date of any parenthood order. The document's primary purpose is to provide information for the child. It is the child's documentation. For everyday use and administrative purposes, the Law Society supports the availability of a short-form birth certificate for general identification. It would record the name and date of birth of the child and the legal parents. However, we believe that a short-term certificate should be neutral: it should not be annotated with a statement that alerts the reader to the fact that more information about the circumstances of the child's birth may be held on the birth register. This is to protect the child's right to privacy and as the person entitled to share their story.

8.3. A New Zealand surrogate-born child should be able to apply for a long-form birth certificate at any age. The Law Society does not believe this is a guardianship decision but the child's autonomous right to all of the information contained in the long-form certificate.

Q26 Do you prefer Option 1 or Option 2 to ensure that surrogate-born children can have the opportunity to access information about their genetic and gestational origins?

8.4. The Law Society agrees that there should be an easy way for surrogate-born children to access their genetic and gestational information. Who collects, holds and releases the information will be key. One body or agency being responsible for all three tasks would make it easier for processes to align with Official Information Act and Privacy Act type requests and also remove the need for a person to request information from three different registers. This is based on an assumption that in New Zealand, health clinics and medical professionals are involved in all surrogacy cases. The responsible body for collection, holding and release of the information can run alongside a health register being kept by clinics and/or health professionals providing surrogacy services.

8.5. It is assumed that for all children born of surrogacy the details will be captured by a long-form birth certificate. However, it is acknowledged that for those born through private surrogacy arrangements where medical clinics or professionals are *not* used it may be difficult to "look behind" the birth certificate.

9. Chapter 9 – International surrogacy

Q27 Do you agree with the issues we have identified with international surrogacy? Are there other issues we should consider?

9.1. The Law Society agrees with the issues the Commission has identified. However, the question of how informed consents are obtained where the surrogate is in a foreign jurisdiction should be addressed in the legislation. The advice provided to the surrogate should be provided by a New Zealand lawyer and there will need to be provision in the legislation for witnessing and certification to take place via AVL and for electronic documents to be accepted by the court.

Q28 Do you agree with our proposal that Pathway 2 (Family Court determination of legal parenthood) should be available to intended New Zealand parents in international surrogacy arrangements?

9.2. The Law Society supports the proposal that the Family Court be involved in the determination of legal parenthood for *all* New Zealand resident intended parents in international surrogacy.

9.3. International surrogacy arrangements involve greater complexity because of the cross-border legal issues that arise. Even where New Zealand legislation is able to specifically provide procedural and substantive law on international surrogacy, the international variability of process and practices warrants judicial oversight. Through this process, the concerns around surrogacy identified in the Verona Principles – such as child trafficking and international exploitation – should be minimised to the greatest extent possible. This will have the effect of ensuring a robust system that is both recognised and respected internationally.

9.4. It is desirable that there is a New Zealand court process for international surrogacy cases because these are the cases that are most likely to need to be recognised in other jurisdictions. A court order will be the best method for ensuring recognition in another jurisdiction. A court process is a familiar concept in most countries, and more easily explained to foreign lawyers and clinics by New Zealand citizen parents who are investigating

surrogacy options in a foreign jurisdiction. The current adoption process that must be undertaken by both parents is something many overseas clinics, lawyers and surrogates struggle to comprehend.

Q29 Do you prefer Option A or Option B in relation to the timing of applications under Pathway 2 in international surrogacy arrangements, or is there another option we should consider?

9.5. The Law Society acknowledges there are merits associated with both Option A and Option B.

9.6. As the Commission has identified, many intended parents find the process overwhelming and costly when it takes place post-birth, at a time when they would prefer to be focused on their new-born (and for many, first time parenthood). While the Law Society acknowledges that international best practice necessitates an element of post-birth oversight, a substantial amount of the legal process could be moved pre-birth.

9.7. The more front-ended the process is, the easier the process is on those involved. As discussed above, the Law Society supports a process that mirrors the COVID-19 Protocol for the Adoption of New Zealand Surrogate Babies Born Overseas. Lawyers working with these cases over the past year have reported a high degree of satisfaction and efficiency with that process. In our view, the process has been easily modified without compromising the integrity of the families involved, and in particular, the surrogate-born child.

9.8. Although the international cases will involve a judicial process and some delay, it is nevertheless a clear pathway and the potential to front load the process will give those parties an incentive to engage early on with the appropriate authorities in New Zealand. Education will be pivotal to ensure that those who wish to engage in cross-border fertility treatment have information early on in the process and that the information is easily accessible.

Q30 Do you think Aotearoa New Zealand should recognise a determination of legal parenthood made in an overseas jurisdiction if that country has similar regulation of surrogacy arrangements?

9.9. The Law Society agrees that New Zealand should recognise a determination of legal parenthood made in an overseas jurisdiction if that country has similar regulation of surrogacy arrangements.

9.10. The Law Society believes there should be a conflicts of law provision that would allow for a clear process for recognition, similar to the conflicts provision in section 17 of the Adoption Act 1955. This should be drafted bearing in mind the ongoing work of the Hague Conference.

9.11. In the interim, and anticipating that finalising a Convention on these issues may take some years, any reform of the law should enable some recognition process. It may be preferable to have different categories of cases for recognition. For example, there could be streamlined recognition processes for surrogate-born children where the parents:

a. Are habitually resident (or long-term residents) in the country of birth.

b. Have obtained a post-birth parentage order or judgment from certain specified countries. This will be an evolving list as countries throughout the world start to reform their domestic surrogacy arrangement. At this stage, countries such as England, some Australian States, South Africa, Vietnam and Canada have statutory

regimes that may have the kind of safeguards in place that would enable recognition by New Zealand

9.12. For category (a) parents, these typically would be New Zealand citizen parents who are habitually resident in a foreign jurisdiction and who may have acquired their parentage through a regulatory process in that jurisdiction that differs from New Zealand. For example, in a number of States in the USA, parentage follows a pre-birth court order that, with all parties' consent, directs that the birth register record the intended parents as the parents on the surrogate born child's birth certificate. This category of parents may hold dual citizenship or include a New Zealand citizen in a domestic relationship with a citizen of the country in which their child is born. It is expensive and time-consuming, as well as being logistically demanding, for these parents to undertake an adoption or a similar kind of parentage pathway in order for the child to obtain the benefit of New Zealand citizenship. For these parents, the Law Society would support a recognition pathway that would enable recognition of legal parenthood and citizenship by descent.

9.13. We would distinguish these cases from those where the overseas jurisdiction has only been accessed by the intending parents for a limited period of time and for the sole purpose of surrogacy. Within this group, some of those parents may fall into category (b) where the jurisdiction has a similar regulatory regime to New Zealand. In our view, there is little to be gained by repeating a parenthood process in New Zealand. Tasmania and England are countries where post-birth parentage orders are currently being recognised on a case-by-case basis by the Department of Internal Affairs.

Future work of the Hague Conference

9.14. The Law Society agrees that the work the Hague Conference is undertaking to establish a recognition regime in relation to international surrogacy arrangements should not be undermined and should be supported. It is also important that if the Hague Conference's work focuses, as it does, on recognition of parentage and/or judgments, that families have the option of obtaining a New Zealand judgment that will have cross-border effectiveness. A pathway, particularly in relation to international surrogacy cases that results in a Family Court judgment, will be an important option for some families. There may be families where there has been a domestic surrogacy arrangement that may also see some benefit in having a judgement for precisely the same reasons.

9.15. Any reforms to the law of surrogacy must therefore be flexible enough to accommodate the anticipated recognition provisions that will form part of a future Convention.

Q31 Do you think that Oranga Tamariki should have a clearer role, such as running educational initiatives for people contemplating international surrogacy or involving social workers earlier in the international surrogacy process?

9.16. The Law Society does not accept the premise that Oranga Tamariki should have an extensive role in international surrogacy matters. Oranga Tamariki's present role arises out of the current requirement that a social worker's report be received by the court as part of the adoption process. Given it is accepted that legal parenthood should be determined and achieved through a means other than adoption, the opportunity exists to create new, refined methods for obtaining and providing tailored information the court may require.

9.17. Presently, the experience of intended parents is that they are subjected to enquiries by Oranga Tamariki that are inappropriately exhaustive and intrusive.[14] There likely exist issues of how intended parents and surrogates approach their engagement with Oranga Tamariki. Sectors of the public hold negative and, sometimes, distrusting perceptions of Oranga Tamariki's role being solely concerned with mistreated or abused children and the removal of children from whānau and family. Even if erroneous, such perceptions do not align well with a role in international surrogacy situations and the need for a trusting, open and transparent exchange of information.

9.18. The Law Society supports the gathering of assessment information for the court that is tailored to the circumstances of surrogacy. Such assessment information is limited to two key aspects:

a. the child's safety with the intended parents, which includes obtaining criminal record checks; and

b. information as to how the intended parents plan to share information with the child as to their identity and surrogacy.

9.19. The Law Society supports the early obtaining and consideration of this information, ideally pre-conception.

9.20. A distinction should be made between assessment enquiries that are largely administrative in nature and those requiring specialist assistance. The scope of enquiry requiring specialist assistance is narrowly confined to the intended parents' plan for how information will be shared with the child about their identity and the surrogacy. This task need not and, for reasons earlier stated, should not sit with Oranga Tamariki. The Law Society notes that currently this information is routinely provided to the court through the intended parents' affidavit evidence, and this can continue to be the case. However, there is merit in this information being confirmed by:

a. the provision of a certificate that the intended parents have completed an educative program about the international surrogacy process and identity and information issues; and

b. confirmation by a suitably qualified expert of the intended parents' plan around sharing information with the child.

9.21. Given the proposed pathway to legal parenthood occurs within the justice sector, one option is that both be provided under the umbrella of the Ministry of Justice. In much the same way as "Parenting through Separation" education is provided, an education program could be delivered by approved education providers contracted for this purpose. Such education should be readily accessible and available online. The confirmation as to the intended parents' information sharing plan can be provided by a report writer for the court who may be a private counsellor or social worker with specialist experience in the field of fertility matters.

[14] This applies to both domestic and international cases.

9.22. The task of obtaining and compiling assessment information to be provided to the court, such as the certificate as to completion of education and checks as to criminal background and any prior notification of an intended parent to Oranga Tamariki, can be treated as a largely administrative function. It is for the court alone to make conclusions from the information provided.

10. Chapter 10 – Access to surrogacy

Q32 Do you agree with the issues we have identified with access to surrogacy in Aotearoa New Zealand? Are there other issues we should consider?

10.1. The Law Society agrees with all but one of the identified issues: we do not agree that there is a lack of legal expertise in New Zealand. The numbers of surrogacy cases would not justify large numbers of lawyers having the requisite specialist knowledge. We believe that the real issue is identifying genuinely knowledgeable lawyers in this area of law. We know that for couples investigating surrogacy they already connect and meet with intended parents, donors, and surrogates throughout New Zealand and internationally. Given this, accessing a lawyer with the necessary legal expertise should not be difficult. How to identify those lawyers is the key.

10.2. In our view the issues that have *not* been identified are:

a. For those parties wishing to undertake an IVF Gestational Surrogacy in New Zealand, their timelines are influenced by the number of ECART meetings that are held each year. If there were more meetings, then there would be a greater ability to progress surrogacy plans faster than currently occurs. We refer the Commission to the discussion above at Chapter Five.

b. The privacy of children created as a result of surrogacy is not an issue that has been previously identified. We have concerns about publication of surrogacy stories and compensation received for such stories. Such public information is preserved and accessible well into the future and, potentially, forever alters a child's story and public persona, particularly given New Zealand's small population. Publication of such stories may be a necessary consequence of a couple publicising their surrogacy search or egg donor search, but we believe that having other ways of connecting parties would prevent the need for such publicity in the first place.

Q33 What option(s) to improve availability of information on and public awareness do you prefer? Are there other options we should consider?

10.3. We refer the Commission to the comprehensive guidance that was published in 2018 by the United Kingdom (UK) Government through the Department of Health and Social Care.[15]

10.4. The guidance comprises two documents: one for parents and surrogates who are considering a domestic surrogacy arrangement in the UK, and the other for the health care workers who care for them. It was published at a time when the UK Law Commission was undertaking its

[15] Guidance: The Surrogacy Pathway: Surrogacy and the legal process for intended parents and surrogates in England and Wales, 2018.

review but was published in recognition of the fact that it would be a number of years before any of the Law Commission's recommendations would come into effect.

10.5. The purpose of the guidance was to give clearer public information about UK surrogacy law and practice and to support those entering surrogacy arrangements. The guidance provides clear information about the law process and best practice. In issuing the guidance, the UK Government recognised that the numbers of people using surrogacy to become legal parents had significantly increased. To write the guidance, the UK Government worked closely with three non-profit surrogacy organisations and drew on the experience of surrogates, parents and the professionals involved in the surrogacy process, including lawyers. As a consequence, the guidance provides an accurate and reality-based resource. Publication of similar guidance in New Zealand would be helpful. It would provide clarity for those involved when they are trying to decide if surrogacy is an option for them, and could become a single trusted source for advice and information.

10.6. The information should be published in multiple languages, disseminated within multiple communities and able to be accessed through several potential gateways. For example, social media platforms, numerous government agencies and a range of cultural communities, particularly those such as the Chinese community where surrogacy is popular. All types of media formats should be used to increase awareness and such resources should be accompanied with details for culturally appropriate contacts.

Q34 What government agency do you think is best suited to provide information on and raise public awareness of surrogacy?

10.7. In our view this guidance should sit within the Ministry of Health as it does in the UK. We believe it should be removed from Oranga Tamariki because historically, Oranga Tamariki comes from a child protection perspective. ART and surrogacy are not a response to a child protection issue but a response to medical and social fertility issues. In the current pathway, acquiring legal parenthood via adoption is often criticised by parties involved because they react negatively to the involvement of Oranga Tamariki. Many clients struggle with engaging with Oranga Tamariki (even if it is an adoption caseworker) because of the perception that the function of Oranga Tamariki is primarily to protect children and address "poor parenting". It is important that the guidance is regularly updated. We note that the most recent update on the UK guidance was 23 July 2021.[16]

Q35 Should advertisers be able to receive payment for publishing advertisements in relation to lawful surrogacy arrangements?

10.8. In the Law Society's view, any commercialisation of surrogacy arrangements should be avoided. However, while the ideal scenario is one where surrogacy arrangements occur within family and friendship networks, the reality is that for a significant number of couples this is just not an option There is already a prevalent use of online forums and social media to connect people and that will always be difficult to regulate. We would support non-profit

[16] See here: https://www.gov.uk/government/publications/having-a-child-through-surrogacy/the-surrogacy-pathway-surrogacy-and-the-legal-process-for-intended-parents-and-surrogates-in-england-and-wales.

surrogacy organisations being able to advertise, although there should be guidelines provided in relation to such advertisements. There should be an absolute prohibition on advertisements involving existing children of the families involved, or any children that may result from a previous successful surrogacy arrangement.

Q36 Do you think additional steps should be taken to reduce the barriers intended parents face connecting with surrogates? If so which option do you prefer?

10.9. In the Law Society's view, the publication of guidance as identified above would reduce information access barriers, particularly if it is updated regularly.

10.10. Non-profit surrogacy organisations that endorse altruistic surrogacy and ethical practices should be supported. Currently, there is a lack of clarity in relation to whether any role they have is legal. In addition, it is difficult to operate in an environment where the current pathways do not send a message that surrogacy can be a positive option for those seeking to start a family through assisted reproduction. In an environment where there is clear surrogacy legislation, non-profit surrogacy organisations should be able to be established and have a greater public profile. In our view, such organisations would start to assume a similar role and place in the process as ICANZ does currently with inter-country adoptions.

10.11. If the goal is to encourage domestic surrogacies, then there need to be organisations that support the matching of families and provide early information. Otherwise, overseas surrogacy agencies will continue to make inroads into the New Zealand surrogacy scene. The single source of information that they provide is appealing and attractive.

Q37 What steps do you think should be taken to address concerns about the limited number of lawyers with experience advising on surrogacy arrangements?

10.12. The Law Society does not believe that there are too few lawyers with experience advising on surrogacy arrangements. To the best of our knowledge no party who has identified a lawyer experienced in surrogacy issues has ever been turned away because of case load issues. The real issue is identifying those experienced lawyers and ensuring that their information is publicly available.

10.13. As noted above, geographical proximity is not essential in times where the parties themselves often initially meet one another and form relationships remotely. Currently, experienced counsel in this area of law frequently conduct their meetings and interviews remotely. As we have seen during the pandemic, parties, social workers, lawyers and judges have all been able to work with court hearings conducted via Audio Visual Link (AVL). We recommend that in any proposed changes to surrogacy law it is important that documentation that requires witnessing and/or certification by lawyers should be able to be completed electronically.

10.14. The Law Society's FLS could proactively identify those lawyers with surrogacy expertise as well as formalising a mentoring system for those lawyers interested in acquiring experience. The lawyers we spoke to with experience in this area advise that this occurs on an informal basis already.

Q38-39 Do you think that the Government should conduct a review of how it funds surrogacy, with a view to making surrogacy in Aotearoa New Zealand more accessible for New Zealanders? Do you think that the Government should investigate the supply of donor gametes in Aotearoa New Zealand, including whether donors ought to be compensated for reasonable expenses incurred and whether the restrictions on importing gametes and embryos into Aotearoa New Zealand should be relaxed in certain limited circumstances?

10.15. Lawyers report receiving enquiries in relation to the import of gametes. The Law Society agrees that the limited availability of donor gametes is a key driver to New Zealanders seeking fertility treatment offshore where donor gametes are more readily available. The Law Society would support a review of the regulation around the importation of gametes and embryos created from commercially sourced gametes. From a child's perspective, however, ensuring access to identifying information consistent with the HART rules remains an important safeguard.

10.16. However, where there is already one child born as a result of embryos created using commercially sourced gametes (perhaps during a time when the parents resided in another country, for example) then consideration should be given to existing frozen embryos being allowed to be imported to New Zealand. Consideration should also be given to exceptions being made during times of global emergencies such as the one we are currently experiencing. Families who may well have travelled to a clinic in the United States for IVF treatment using donor gametes and have one child, may be reluctant to travel back to the foreign jurisdiction during pandemic times. Exceptions could be made for importing embryos in circumstances such as these.

10.17. Thank you for providing the opportunity for the Law Society to provide comments on the Commission's review of surrogacy law. We hope you find these comments useful. If you have any questions, please direct these in the first instance to the FLS Manager, Kath Moran, at kath.moran@lawsociety.org.nz or by phone 021 605 9932.

Nāku noa, nā

Herman Visagie
Vice President