Regulatory Impact Statement: Surrogacy Law Reform

Coversheet

Purpose of Document	
Decision sought:	The RIS provides analysis of the Law Commission's recommended reforms to surrogacy law, to support Cabinet decisions on the government response to the Law Commission's report. Cabinet will also be asked to agree to related policy where the Law Commission did not make detailed recommendations.
Advising agencies:	Ministry of Justice
Proposing Ministers:	Minister of Justice
Date finalised:	26 April 2023

Problem Definition

The Law Commission has concluded that there is a pressing need for surrogacy reform as the current law fails to meet the reasonable expectations of New Zealanders.

Laws about legal parenthood do not recognise surrogacy as a distinct way of building families, with intended parents having to adopt surrogate-born children. There are opportunities to strengthen protections for participants, particularly surrogate-born people's rights to know about their genetic and gestational origins. Participants involved in surrogacy arrangements have also expressed frustration at delays, difficulties finding a surrogate, and a lack of clarity about the financial support surrogates can receive.

Executive Summary

Surrogacy is an arrangement where an individual (a surrogate) agrees to become pregnant, carry and deliver a child for another person or persons (intended parents), who intend to raise the child from birth. Available evidence suggests altruistic surrogacy produces largely positive outcomes for surrogate-born children, their families, and surrogates.

In July 2020, the Minister of Justice referred a review of surrogacy laws to the Law Commission. The Law Commission completed its report in April 2022. It recommended a comprehensive, bespoke regime to regulate surrogacy. Recommendations covered legislation, operational practice, and resourcing.

This RIS's approach to options analysis has been influenced by the extensive analysis undertaken by the Law Commission. In recognition of this work, the options analysis focuses on:

- The key process steps involved in surrogacy, and
- Three broad system design options for each step.

The key process steps covered in this RIS are:

- Access to surrogacy
- Oversight of surrogacy arrangements
- Determining legal parenthood
- Access to identity information
- Financial support for surrogates, and
- Accommodating international and overseas surrogacy

A breakdown of the recommended approach

The vast majority of the Law Commission's recommendations are the preferred options. In the few cases in which we recommend modifications, we are generally proposing revisions that would help support the options' implementation or manage interactions with other regulation while still achieving the Law Commission's intended outcome.

Key process step	Recommended approach
Access to surrogacy: considers how barriers to intended parents and potential surrogates finding each other can be reduced (pages 21-26)	Provide that paid advertising is permitted for lawful surrogacy arrangements (consistent with the Law Commission's recommendation 59)
Oversight of surrogacy arrangements: considers which types of surrogacy arrangement should be subject to ethics committee approval, what pre-conception checks intended parents should undergo before a surrogacy arrangement can proceed through the ethics process, and how the expertise on ethics committees can further be strengthened (pages 27-48)	• Make the ethics approval process available for all types of surrogacy (traditional and gestational). Ethics committee approval should be required for all clinic-assisted surrogacies (consistent with the Law Commission's recommendations 2 and 3) • Provide that Oranga Tamariki should prepare a report for the ethics committee advising whether it has identified any concerns that intended parents pose a risk of serious harm to any future child. The extent of Oranga Tamariki assessment would depend on the outcome of an initial basic background check (consistent with the Law Commission's recommendations 5 and 6) • Require ethics committees to have two members able to articulate the interests of children; require the appointing Minister to have regard to prospective appointees' knowledge and experience of mātauranga Māori (modified approach to the Law Commission's suggested model in recommendation 13)
Determining legal parenthood: considers how the process for	Create two new bespoke pathways for determining legal parenthood in surrogacy arrangements:

determining legal parenthood can be improved (pages 49-59)	o an administrative pathway where legal parenthood is transferred from a surrogate to the intended parents through the operation of law provided certain conditions are met, and o a court pathway under which participants could seek a court determination of legal parenthood in cases if the conditions of the administrative pathway are not met. The court would make a determination of parenthood based on the child's best interests. (Consistent with the Law Commission's recommendations 17-30, 32-36)
Access to identity information: considers how surrogate-born people's identity information can be more fully collected and accessible (pages 60-69)	• Record information about surrogates and any donors involved in a state register and make it available to surrogate-born people subject to limited exceptions • Provide that surrogate-born people accessing information must be informed that counselling may be desirable, and explore options for support services for people accessing information recorded under the Human Assisted Reproductive Technology Act 2004 • Add a new principle to the Human Assisted Reproductive Technology Act requiring that people exercising powers under the Act must be guided by the principle that surrogate-born people should be aware of their genetic and gestational origins and whakapapa and be able to access information about those origins (Consistent with the Law Commission's recommendations 37, 38, 40-43)
Financial support for surrogates: considers how the law about the payment of surrogacy-related costs can be clarified (pages 70-73)	Extend the legislated list of expressly permitted payments to enable surrogates to be paid 'reasonable surrogacy costs' incurred. Make the payment of these costs enforceable (consistent with the Law Commission's recommendations 46 - 48)
Accommodating international and recognising overseas surrogacy: considers how New Zealand can accommodate international surrogacy arrangements within the law, and how overseas surrogacies can be recognised for the	• Create a court pathway for determining legal parenthood in international surrogacy arrangements (consistent with the Law Commission's recommendation 52) • Enable recognition of legal parenthood in overseas surrogacy cases through an administrative recognition pathway (the Law Commission's recommendation 57 recommended addressing citizenship in overseas surrogacy but did not make a detailed recommendation about a particular approach)

purposes of New Zealand law (pages 74-97)	
Additional policy changes that would support wider reform (pages 100-101)	• Provide a right of review for any decision made in relation to a surrogacy arrangement by the ethics committee (consistent with the Law Commission's recommendation 12) • Require the ethics committee to prepare an annual report (consistent with the Law Commission's recommendation 15) • Remove the current presumption that a partner of a surrogate is a surrogate-born child's legal parent (consistent with the Law Commission's recommendation 31) • Clarify how the payment of reasonable surrogacy costs interacts with surrogates' benefit entitlements and create an exemption from work obligations for those that have just given birth, to avoid a surrogate being financially disadvantaged by participation in a surrogacy arrangement and to give a reasonable period of recovery from childbirth before being subject to work obligations (consistent with the Law Commission's recommendations 50 and 51). Additionally, extend the scope of amendments to ensure payments for surrogacy-related costs do not affect financial assistance administered by the Ministry of Social Development on behalf of other agencies, and to apply aspects of the changes to groups in a situation similar to surrogates.

Operational responsibility for the new arrangements will sit with a number of government agencies, including the Ministry of Health, Department of Internal Affairs, Oranga Tamariki, and Immigration New Zealand.

No formal evaluation of the recommended new surrogacy regime is planned. However, a range of measures will help identify whether the reform objectives are being achieved.

Limitations and Constraints on Analysis

The Law Commission's review of surrogacy law has affected the approach to analysis in this RIS. In recognition of the Commission's extensive and recent research, consultation and analysis,[1] analysis in this RIS is lighter touch than a typical RIS:

[1] The Law Commission produced an issues paper and final report that set out problems with current settings, objectives, criteria, options, and options analysis against the criteria. In each of these steps (identification of problems, criteria, options etc), the Law Commission's work was informed by research into matters such as current practice domestically and internationally, applicable tikanga Māori, international legal developments, outcomes for regulated people, and public attitudes. Its work was also informed by consultation with a range of

- The RIS largely focuses on the problems and proposals identified by the Law Commission.
- In areas where the Law Commission has considered an issue and provided detailed recommendations, RIS analysis focuses on the key process steps that make up a surrogacy system, rather than individually assessing each discrete feature of a system.
- More traditional, detailed analysis is provided on issues on which the Law Commission recommended further work and did not make final or detailed recommendations.

The analysis in this RIS has been constrained by:

- **Limited available research:** The Law Commission noted that research into surrogacy is limited. The limitations noted by the Law Commission include:
  - the lack of research about the impact of specific aspects of New Zealand's regulation of surrogacy on surrogate-born people, surrogates, and intended parents
  - the lack of research about the long-term impacts of surrogacy on surrogate-born people, as surrogacy is a relatively new form of family building
  - the lack of research on Māori participation in surrogacy, Māori perspectives on surrogacy, and tikanga Māori and surrogacy, and
  - research into surrogacy is typically limited to domestic and altruistic arrangements and involves only a small number of participants.

  The Commission suggests these limitations indicate a cautious approach to regulation is required to protect the rights and interests of surrogate-born children, surrogates, and intended parents, including as understood in te ao Māori.
- **Relatively limited information about the perspectives of surrogate-born people:** Information about the experience and perspectives of surrogate-born people is limited. It is also unclear the extent to which submissions to the Law Commission and on the Improving Arrangements for Surrogacy Member's Bill[2] included the views of surrogate-born people. The Law Commission's report – and analysis in this RIS – is therefore informed by research about the experiences of people with related experiences, particularly donor-conceived and adopted people.
- **The scope of the review is limited in some areas:** Some policy issues have not been explored in depth because they involve significant policy questions that would benefit from being explored in the context of a much wider consideration of family law, such as whether the law should facilitate more than two people being recognised as a surrogate-born child's legal parents.

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domestic and international experts, and consultation with the public. Law Commission report 146, *Te Kōpū Whāngai: He Arotake Review of Surrogacy*, April 2022.

[2] This is a member's bill that was referred to the Health Committee in May 2022.

Responsible Manager(s) (completed by relevant manager)	
Helen McDonald Policy Manager, Access to Justice Ministry of Justice 26 April 2023	
Quality Assurance (completed by QA panel)	
Reviewing Agency:	Ministry of Justice
Panel Assessment & Comment:	A Regulatory Impact Analysis Quality Assurance Panel from the Ministry of Justice has reviewed the Regulatory Impact Assessment (RIA) prepared by the Ministry of Justice and considers the information and analysis partially meets quality assurance criteria. The proposal is for legislative reform to surrogacy law in response to recommendations from the Law Commission. Because surrogacy requires the involvement of a surrogate who agrees to become pregnant, carry, and give birth to a child for the intended parents, regulation must balance complex ethical, cultural, legal, and medical considerations. It must also protect the rights of participants, particularly surrogate-born children. The RIA provides a comprehensive assessment of the issues involved in regulating surrogacy arrangements as identified by the Law Commission. The RIA notes that while evidence suggests altruistic surrogacy produces largely positive outcomes for surrogate-born children, their families, and surrogates, it is still a relatively new and developing field. There is limited information on some aspects of surrogacy, especially the experiences of people born through surrogacy arrangements and experiences of Māori participation in surrogacy arrangements. Within the constraints clearly outlined in the RIA, the analysis in the RIA can be relied on for decision making.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

Surrogacy is a form of family building

1. Surrogacy is an arrangement where an individual (a surrogate) agrees to become pregnant, carry, and deliver a child for another person or persons (intended parents), who intend to raise the child from birth.[3] Intended parents are generally people who

[3] This RIS uses the term "surrogate" to refer to the person who agrees to become pregnant, carry and deliver a child in a surrogacy arrangement. Surrogates appear to predominantly identify as women, but people who do not identify as women may act as surrogates: Law Commission report 146, page 37.

experience infertility (such as heterosexual couples and single women), or people who lack the sex characteristics to become pregnant (including male couples, single men, and some trans and intersex people).

2. There are two types of surrogacy arrangements, traditional and gestational:

    - In a traditional surrogacy arrangement, the surrogate's ovum is used in conception. Traditional surrogacy is present in many cultures. This type of surrogacy is thought to make up about a quarter[4] to half[5] of surrogacy arrangements undertaken in New Zealand.

    - In a gestational surrogacy arrangement, an embryo is created using an ovum and sperm from the intended parents or donors. This has been made possible by the developments in in-vitro fertilisation technology.

New Zealanders' use of surrogacy is increasing

3. About 50 children are estimated to be born each year as a result of a surrogacy arrangement involving intended parents who live in New Zealand. However, there is no single comprehensive source of information about the number of arrangements or children born, so this number is a broad estimate.[6] The figure includes gestational and traditional surrogacy arrangements undertaken in New Zealand (domestic surrogacy arrangements) and arrangements undertaken overseas by New Zealand-based intended parents (international surrogacy arrangements).

4. The number of domestic and international surrogacy arrangements is steadily increasing.[7] The increase in domestic surrogacy arrangements is likely to be driven by:[8]

    - increasing acceptance of diverse family forms[9]

    - declining rates of adoption as fewer children are placed for adoption

    - growing rates of infertility as women wait until later in life to have children

    - advances in assisted reproductive technology, and

    - an increasing focus on fertility preservation.

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[4] A manual review of Oranga Tamariki's records for the year ended 30 June 2019 showed it prepared 37 reports for adoption applications involving domestic surrogacy in that time. Of these, 28 related to gestational surrogacy and nine related to traditional surrogacy: Law Commission report 146, page 41.

[5] In the year ended 30 June 2021, 10 of the 22 social worker' reports prepared for the Family Court in relation to domestic surrogacy arrangements were for traditional surrogacy arrangements: Law Commission report 146, footnote 47, page 104.

[6] Law Commission report 146, page 39.

[7] Law Commission report 146, pages 42 – 47.

[8] Law Commission report 146, pages 45 – 46.

[9] A survey undertaken in 2017 – 2018 suggested 84% of New Zealanders either approve (54%) or do not object (30%) to surrogacy: Debra Wilson *Understanding the Experience and Perceptions of Surrogacy through Empirical Research: Public Perceptions Survey* (University of Canterbury 2020). Feedback on the Law Commission's issues paper showed similar attitudes to surrogacy.

5. The increase in international surrogacy arrangements appears to be driven by:[10]

    - the challenges of finding a surrogate in New Zealand
    - availability of donated gametes overseas
    - the availability of commercial surrogacy overseas. This may be favoured as it enables payments to the surrogate, a contractual arrangement that may be enforceable, and use of an intermediary to manage the arrangement
    - higher success rates and greater reproductive choices overseas, and
    - increasing cultural diversity in New Zealand.

6. Research on the outcomes of surrogacy is limited. It suggests altruistic surrogacy arrangements produce largely positive outcomes for surrogate-born children, their families, and surrogates.[11]

Domestic surrogacy arrangements are regulated via three key pieces of legislation and ethics committees

Surrogacy is regulated by three pieces of legislation

7. Three key Acts regulate surrogacy arrangements:

    - The Human Assisted Reproductive Technology Act 2004 (HART Act) establishes the regulatory framework for assisted reproductive procedures, including those involved in surrogacy. It seeks to balance the ethical, medical, and cultural complexities involved in assisted reproductive technology
    - The Status of Children Act 1969 – along with the common law - sets rules for attributing the legal parenthood of a child. At birth the legal parents of a surrogate-born child is the surrogate and generally their partner (if they have one)
    - The Adoption Act 1955 provides the mechanism to transfer legal parenthood of a surrogate-born child from the surrogate (and any partner) to the intended parents.

Only altruistic surrogacies are lawful, and surrogacies cannot be enforced

8. Under the HART Act, surrogacy arrangements must be altruistic, meaning that the surrogate cannot be paid a fee for participating in the arrangement. Payments only appear to be permissible for expenses relating to certain medical procedures, counselling, and legal advice.

9. The HART Act makes surrogacy arrangements unenforceable. This means a court will not enforce an arrangement if a participant decides not to comply with a previously agreed aspect of an arrangement.

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[10] Law Commission report 146, pages 46 – 47.

[11] Law Commission report 146, pages 50 – 54. The Commission notes that the research has limitations: there is limited research about Māori participation in and perspectives on surrogacy, and research involves relatively small samples, tends to focus on domestic, altruistic arrangements and has not yet been able to consider long-term impacts on surrogate-born children.

Some surrogacies need ethics approval before they can occur

10. The HART Act establishes two committees that develop and implement detailed policy relating to surrogacy, other assisted reproductive procedures, and human productive research: the Advisory Committee for Assisted Reproductive Procedures (ACART) and the Ethics Committee for Assisted Reproductive Procedures (ECART).

11. ACART develops ethical guidelines that touch on health, ethical, legal, psychological, and cultural aspects of surrogacy arrangements. They require that prospective participant in a gestational surrogacy arrangement receive counselling about the implications of the arrangement, and legal and medical advice. They also set requirements relating to matters such as the reasons for the arrangement, consent, that participants discuss future care arrangements for the surrogate-born child, and other matters intended to safeguard participants and any future child.

12. ECART assesses applications to undertake assisted reproductive procedures against the ACART guidelines, including applicants to undertake a surrogacy arrangement involving assisted reproductive procedures. ECART also requires intended parents to have obtained a positive assessment from Oranga Tamariki of their suitability to adopt.[12]

13. Gestational surrogacies are required to receive ECART approval before they can proceed. Traditional surrogacies are not required to be approved by ECART, but participants can choose to voluntarily engage with ECART (via a fertility clinic) to receive non-binding ethical advice.

14. There is no fee for making an application to ECART, but there are costs associated with the process, including fees to fertility clinics for compiling the application, costs for counselling, and legal fees.

15. Further information about ECART can be found from page 27.

Intended parents must adopt a surrogate-born child to become their legal parent

16. Because a surrogate-born child is legally the child of the surrogate, adoption must be used to transfer legal parenthood from the surrogate to the intended parents. The Family Court considers all adoption applications, including surrogacy adoptions. There are no court filing fees for adoption applications, but legal fees are required during the court process. Further information about the transfer of legal parenthood can be found from page 49.

[12] This assessment indicates Oranga Tamariki's in-principle approval to the intended parents adopting the child. This helps to safeguard children's interests by ensuring there will be no impediments to the intended parents adopting the planned child later down the track (as intended parents must adopt a surrogate-born child to become the child's legal parents). A social worker's report from Oranga Tamariki is required as part of the adoption process.

International surrogacy is not directly recognised in New Zealand law, but is accommodated

17. International surrogacies (where the intended parents and surrogate do not live in the same country) make up about 40% of surrogacy arrangements entered into by New Zealand-based intended parents.

18. Intended parents pursuing surrogacy offshore are not required to seek prior approval to the arrangement in New Zealand and prohibitions on commercial surrogacy do not apply. The government has established processes that mean a surrogate-born child may be able to enter New Zealand with intended parents, who may then seek a domestic adoption. The process is subject to checks and balances focused on the child's interests. The process recognises that other countries allow commercial surrogacy and the reality that some New Zealanders will use these options and seek to bring the child back to New Zealand. However, it means New Zealanders may engage in surrogacy processes overseas that would not be allowed in New Zealand.

19. A separate pathway was developed to manage the impact of COVID-19 on intended parents' ability to access travel documents for a surrogate-born child in the child's country of birth. This enabled adoption applications to be considered by the Family Court when the intended parents and child were not physically in New Zealand. Surrogate-born children were then able to receive New Zealand citizenship and a New Zealand passport before travelling to New Zealand.

20. Further information about the international surrogacy process can be found from page 74.

Some surrogacy-related identity information is recorded and accessible

21. The HART Act requires fertility service providers to collect and retain information about donors of ova and sperm. There is no legal requirement for the state to record that a child was born via surrogacy or details about the surrogate.

22. A birth certificate issued ahead of an adoption of a surrogate-born child will record the surrogate and their partner as the surrogate-born person's legal parents. A certificate issued after adoption will record the intended parents as the person's parents. There is provision to note the parents are adoptive, but only on request of the intended parents or the adopted surrogate-born person.

23. People conceived from donated sperm or ova and adopted people can access some information about the circumstances of their conception or adoption once they reach 18 or 20 respectively, subject to certain exceptions.

24. Further information about the collection and accessibility of identity information for surrogate-born people can be found from page 60.

Many government and non-government bodies are involved during the surrogacy process

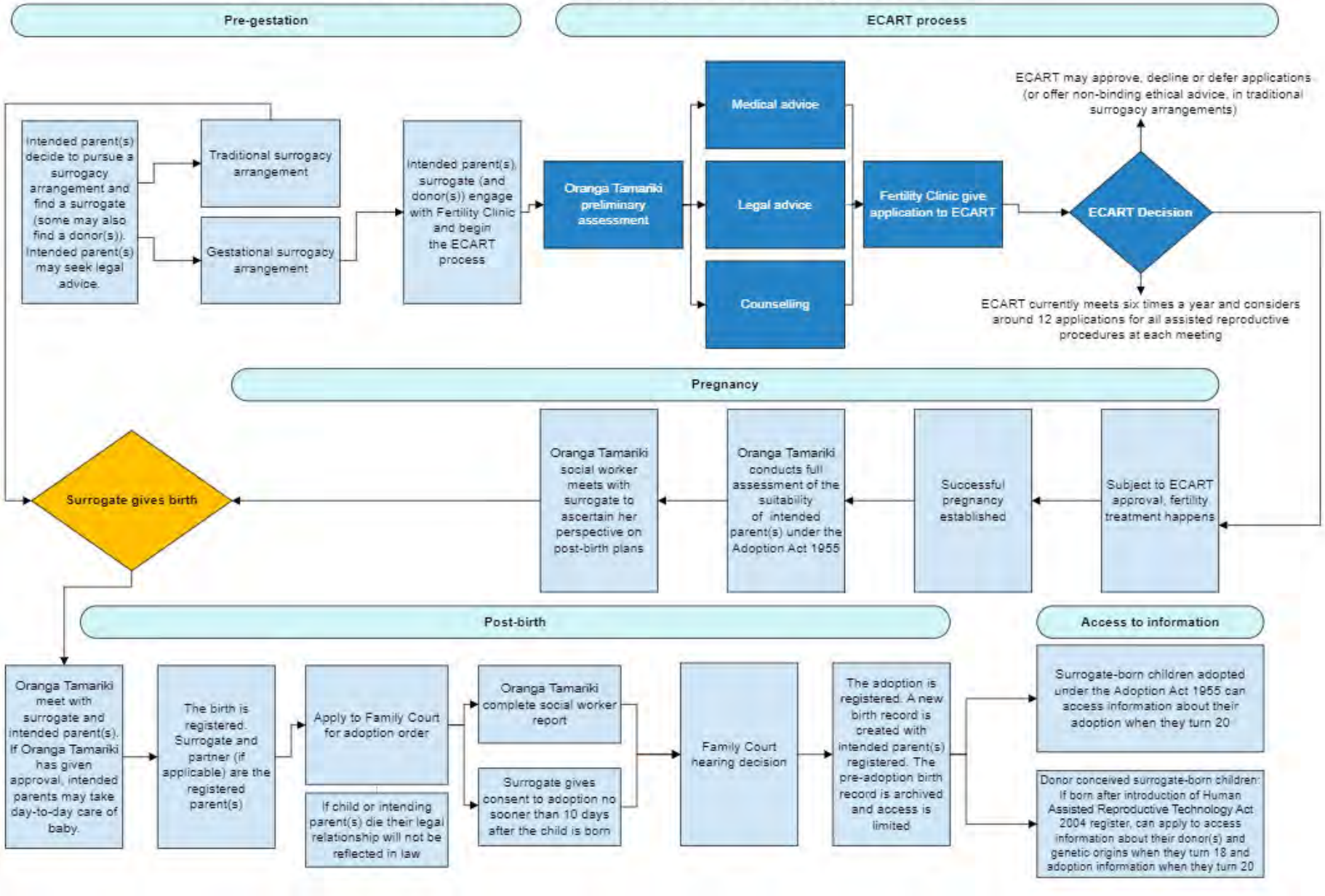
25. A number of agencies are involved in surrogacy arrangements, as outlined in the journey maps on the following pages.

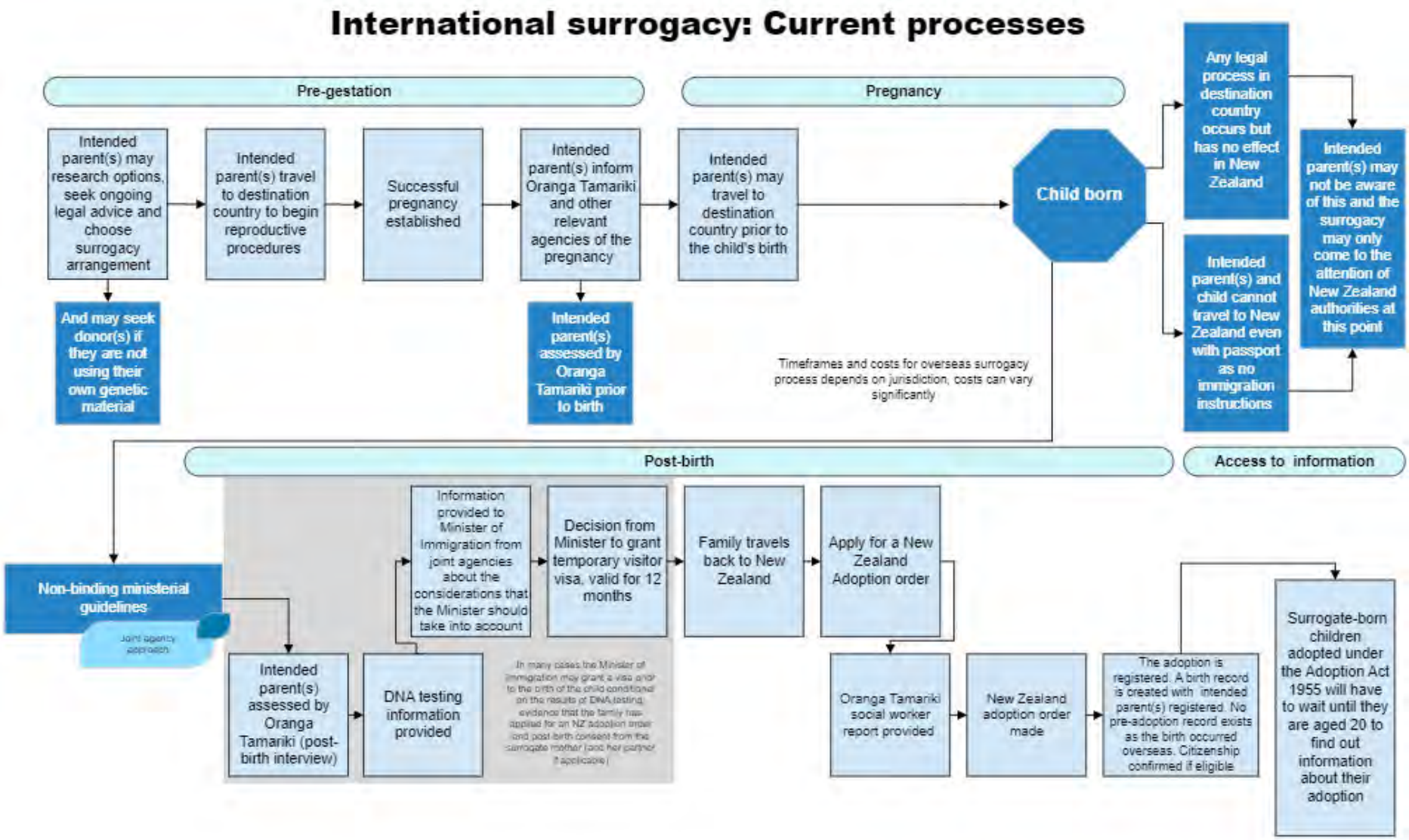
The Government has made a commitment to reform surrogacy law

26. The Labour Party's 2020 election manifesto included a commitment to review surrogacy and adoption policies and legislation with a view to removing discriminatory practices.

27. The Government has begun work on options to reform adoption law. Surrogacy and adoption involve a number of interrelated issues as they both involve methods of family building that involve third parties, require a method to transfer legal parentage, and involve questions about how best to safeguard a child's interests in the process. Additionally, as outlined above, the same law currently regulates elements of both processes.

Domestic surrogacy: current processes




International surrogacy: Current processes
Pre-gestation
Pregnancy
Intended parent(s) may research options, seek ongoing legal advice and choose surrogacy arrangement
Intended parent(s) travel to destination country to begin reproductive procedures
Successful pregnancy established
Intended parent(s) inform Oranga Tamariki and other relevant agencies of the pregnancy
Intended parent(s) may travel to destination country prior to the child's birth
Child born
And may seek donor(s) if they are not using their own genetic material
Intended parent(s) assessed by Oranga Tamariki prior to birth
Timeframes and costs for overseas surrogacy process depends on jurisdiction, costs can vary significantly
Any legal process in destination country occurs but has no effect in New Zealand
Intended parent(s) and child cannot travel to New Zealand even with passport as no immigration instructions
Intended parent(s) may not be aware of this and the surrogacy may only come to the attention of New Zealand authorities at this point
Post-birth
Access to information
Non-binding ministerial guidelines
Joint agency approach
Intended parent(s) assessed by Oranga Tamariki (post-birth interview)
DNA testing information provided
Information provided to Minister of Immigration from joint agencies about the considerations that the Minister should take into account
Decision from Minister to grant temporary visitor visa, valid for 12 months
In many cases the Minister of Immigration may grant a visa prior to the birth of the child conditional on the results of DNA testing, evidence that the family has applied for an NZ adoption order and post birth consent from the surrogate mother (and her partner if applicable)
Family travels back to New Zealand
Apply for a New Zealand Adoption order
Oranga Tamariki social worker report provided
New Zealand adoption order made
The adoption is registered. A birth record is created with intended parent(s) registered. No pre-adoption record exists as the birth occurred overseas. Citizenship confirmed if eligible
Surrogate-born children adopted under the Adoption Act 1955 will have to wait until they are aged 20 to find out information about their adoption

The Law Commission has twice recommended reforms to surrogacy law

28. In 2005, the Law Commission examined aspects of surrogacy law and found adoption rules are inappropriate for surrogacy arrangements. It said there was an urgent need for reform.[13]

29. In July 2020, the Minister of Justice referred a review of surrogacy laws to the Law Commission.[14] The Commission released an issues paper and undertook public consultation in 2021 seeking feedback on options for a new legal framework for surrogacy.[15]

30. The Law Commission completed its report in April 2022. Its report reflects submissions on the issues paper,[16] local and international research and expertise, including from an ao Māori perspective, and insights from reform in comparable jurisdictions.[17]

31. The Law Commission made 63 recommendations for a bespoke regime to regulate surrogacy. Recommendations covered legislation, operational practice, and resourcing. This RIS is intended to inform the Government's consideration of its response to the report's recommendations.

A petition, members' bills, and public feedback have advocated for reform

32. In 2019 a petition signed by 32,000 people called for simplification of adoption and surrogacy laws.[18] Three members' bills have also proposed reform to the law, including a member's bill currently before the Health Committee.[19]

33. Submissions to the Law Commission and a survey of public opinion have also suggested that the law is in need of reform.[20]

International developments are highlighting children's rights in surrogacy arrangements

34. The *Principles for the protection of the rights of the child born through surrogacy* (the Verona Principles) were published in 2021. They aim to set best practice principles for

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[13] Law Commission report 88, *New Issues in Legal* Parenthood, April 2005, pages xix, 89.

[14] Law Commission report 146 Terms of Reference. Report (lawcom.govt.nz) (accessed 28/09/2022)

[15] Law Commission issues paper 47 *Te Kōpū Whāngai: He Arotake Review of Surrogacy*, July 2021.

[16] 223 submissions were received, 183 from individuals submitting in a personal capacity, 31 from organisations, eight from individuals submitting from an academic perspective, and comments from Judges of the Family Court (Law Commission report 146, page 30).

[17] Law Commission report 146, page 30.

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

[19] Tāmati Coffey MP's Improving Arrangements for Surrogacy Bill 2021 (72-1); Kevin Hague MP's Care of Children (Adoption and Surrogacy Law Reform) Amendment Bill 2012 (undrawn Member's Bill); and Jacinda Ardern MP's Care of Children Law Reform Bill 2012 (62-1).

[20] There was majority support for the Government reconsidering 'surrogacy legislation' among 557 respondents to a survey of a representative sample of the New Zealand public: University of Canterbury (n.y) Part Two: Understanding the Experience and Perceptions of Surrogacy through Empirical Research 3, Christchurch, May 2020). https://www.canterbury.ac.nz/media/documents/business-school/law-documents/EmpiricaResearchFinalPart3.pdf (accessed 30/09/2022)

surrogacy policy that protects the rights of surrogate-born children and other participants in surrogacy arrangements, in the context of varying regulatory approaches to surrogacy around the world.[21] They draw on the UN Convention on the Rights of the Child[22] (the Children's Convention) and influenced the Law Commission's report.

35. Internationally New Zealand is participating in surrogacy-related multilateral discussions at the Hague Conference on Private International Law (the Hague Conference). These discussions are considering a potential future international minimum safeguards for legal parenthood established as a result of international surrogacy arrangements. We expect a completed instrument is some years away.[23]

What is the policy problem or opportunity?

36. The Law Commission concluded there is a pressing need for reform as the current law fails to meet the reasonable expectations of New Zealanders. It found:

    - laws about legal parenthood do not recognise surrogacy as a distinct way of building families. Some aspects of the current law, such as the Adoption Act, were designed prior to surrogacy becoming an increasingly common method of family building and did not contemplate the modern practice of surrogacy.
    - there are opportunities to improve protections for participants, particularly surrogate-born people's rights to know about their genetic and gestational origins and whakapapa.
    - aspects of law and practice are unclear and inaccessible.

37. Many of the participants involved in surrogacy arrangements have expressed frustration at long delays, difficulty at finding a surrogate, and a lack of clarity about what costs surrogates can receive.

38. More detail about these issues is in section two.

The problems with the status quo affect many population groups

Children

39. The manner of surrogate-born children's conception, gestation, and birth affects a number of their rights, including rights to identity, family life, nationality, health, freedom

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[21] They were developed by the International Social Service, a network of national entities involved in cross-border family law issues VeronaPrinciples_25February2021.pdf (bettercarenetwork.org)

[22] The Children's Convention sets out a number of Articles outlining the rights of children. While there are no surrogacy-specific rights in the Children's Convention, Article 21 does outline that states that permit the system of adoption shall ensure that the best interests of the child are the paramount consideration. The Children's Convention also states that all actions concerning children should make the best interests of the child a primary consideration (Article 3), that children have the right to know and be cared for by their parents (Article 7) and asserts the right to identity (Article 8). New Zealand ratified the Children's Convention in 1993. https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child (accessed 28/09/2022)

[23] The Hague Conference Parentage/surrogacy Experts' Group submitted its final report in November 2022 recommending a working group be established to develop one or more international instruments: 'The Feasibility of one or more private international law instruments on legal parentage'.

from discrimination, and protection from abuse and sale. Current regulatory problems have particular impacts on their rights to identity.

40. Legal parenthood of surrogate-born children can be transferred to intended parents by adoption. In combination with the state's limited collection of information about the circumstances of a surrogate-born person's birth, this can lead to aspects of a surrogate-born person's identity being obscured.

41. International surrogacy arrangements involve additional issues, particularly if they occur in a jurisdiction with fewer safeguards than exist in New Zealand or where surrogacy is prohibited. For example, a child's rights to identity are affected if they are conceived with anonymous gamete donation. If surrogacy is prohibited, there may be no pathway for formalising their parenthood or citizenship status or accessing entitlements that are dependent on these.

Women

42. Surrogates are most commonly women, and surrogacy often raises questions about bodily autonomy and risks of exploitation. Surrogates have rights to health, bodily integrity and reproductive freedom, and to make free and informed decisions about those rights during pregnancy and birth. Risks of exploitation of surrogates are more commonly linked to commercial arrangements (which many international arrangements involve), as power imbalances may be more pronounced. However, altruistic surrogacies also present the potential for exploitation.

Māori

43. Māori participation in surrogacy is low. There is a knowledge gap about how Māori engage in surrogacy. Tikanga about surrogacy practices and data about reasons behind Māori participation (and non-participation) in surrogacy arrangements is under-researched.

44. Adoption laws, which apply to surrogacy arrangements under the status quo, are considered antithetical to tikanga Māori as they legally sever a surrogate-born child's connection to tūrangawaewae and whakapapa.

Intended parents

45. Intended parents have rights to have a family[24] and to private and family life, and to enjoy these rights without discrimination on grounds including sex, marital status, sexual orientation, and disability. Surrogacy may be the only opportunity for some single men, male couples, trans, intersex and disabled people to have a child who is genetically related to them. However, because of the involvement in surrogacy of other rights-holders – children, surrogates, and potentially donors – there is no unqualified right to have a child by surrogacy.

46. Submissions to the Law Commission and on the Improving Arrangements for Surrogacy Bill indicate intended parents experience particular frustrations with delays in the

[24] The United Nations Universal Declaration of Human Rights refers to the right to "found a family" (Article 16). https://www.un.org/en/about-us/universal-declaration-of-human-rights This RIS uses the plain-English phrase 'have a family' to refer to this right.

surrogacy approval process, the breadth of the Oranga Tamariki assessment, and the need to adopt a surrogate-born child to become the child's legal parent.

47. Intended parents may be vulnerable in international surrogacy arrangements where access to information and advice can be difficult, and where there may be fewer safeguards.

What objectives are sought in relation to the policy problem?

48. The Law Commission was guided by six principles that can be distilled into the following objectives:

    - intended parents and surrogates have clearer and more certain process for building a family via surrogacy
    - the rights and interests of people involved are protected, particularly those of surrogate-born people, and
    - surrogacy law supports the Crown to uphold its obligations under te Tiriti o Waitangi.[25]

Section 2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the status quo?

49. The criteria used to assess options against the status quo are:

    - *Upholds children's rights, interests, and dignity as paramount*

      This criterion helps to assess if an option is consistent with New Zealand's international obligations (such as the Children's Convention), international best practice, tikanga Māori, and evidence, as they apply to children. Key considerations include children's rights to identity, nationality, health, and freedom from discrimination, abuse and sale, and recognising children are taonga. This criterion encompasses the rights and interests of surrogate-born people when they are children and when they are adults (as some steps in the surrogacy process may involve surrogate-born people who are adults, such as accessing identity information).

    - *Upholds rights, interests, and dignity of other participants*

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[25] The Law Commission's guiding principles, which underpin the recommendations in the final report, were:
- Surrogacy law should reflect the Crown's obligations under te Tiriti o Waitangi to exercise kāwanatanga in a responsible manner, including facilitating the exercise of tino rangatiratanga by Māori in the context of surrogacy.
- The best interests of the surrogate-born child should be paramount. Children have rights under the United Nations Convention on the Rights of the Child (Children's Convention) that must be protected in the surrogacy context.
- Surrogacy law should support surrogates and intended parents to enter surrogacy arrangements that protect and promote their health, safety, dignity and human rights.
- Parties to a surrogacy arrangement should have early clarity and certainty about their rights and obligations.
- New Zealand intended parents should be supported to enter surrogacy arrangements in Aotearoa New Zealand rather than offshore. (Law Commission report 146, page 7).

This criterion helps to assess if an option is consistent with New Zealand's international obligations (such as the Declaration of Human Rights and the Convention on the Elimination of All Forms of Discrimination Against Women), international best practice, tikanga Māori, and evidence as they relate to surrogates and intended parents. Key considerations include the protection of the mana of surrogates and their rights to freedom from exploitation and their right to personal autonomy, and the right of intended parents to found a family, and freedom from discrimination on the basis of sex, marital status, sexual orientation, or disability. This criterion also encompasses participants having early certainty about their rights and obligations, in particular about legal parenthood.

- *Consistent with good regulatory practice*

  This criterion helps to assess if an option is consistent with the Government Expectations for Regulation,[26] and includes consideration of timeliness, proportionality of regulation, use of resources, clarity of legal rights and responsibilities, accessibility and clarity of process, flexibility, compliance with Treaty of Waitangi obligations, implementation feasibility, and alignment with existing regulatory requirements.

50. There may at times be a tension between what upholds the interests of surrogate-born people and what upholds the interests of surrogates and intended parents. The rights and interests of surrogate-born people have been considered paramount in these cases. Likewise, there may be tensions between the interests of different types of participants (such as surrogates and intended parents) within the second criterion. The analysis below identifies where these arise.

What scope will options be considered within?

51. As indicated on page 4, this RIS's approach to options analysis has been influenced by the extensive recent analysis undertaken by the Law Commission. In recognition of this work, the options analysis below focuses on:

    - the key process steps involved in surrogacy, and
    - three broad system design options for each step.

52. The three options analysed are:

    - the status quo
    - the Law Commission's recommended system design, under which an altruistic system is maintained with enhanced protections for participants and clearer and more certain processes, and
    - a model involving limited state intervention. This involves a less regulated approach than the status quo and the Law Commission's recommendations, with a focus on improving protections for intended parents and more efficient processes. This does not go as far as a minimally regulated model, described below.

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[26] Government Expectations for Good Regulatory Practice (treasury.govt.nz)

53. Alternative system design options were ruled out:

- prohibition, where no forms of surrogacy are permitted. This option would not be consistent with public expectations or children's interests. The Law Commission concluded that surrogacy has become a legitimate and established method of family building in New Zealand. Research indicates that surrogacy results in largely positive outcomes for surrogate-born children, their families, and surrogates. Additionally, there are practical difficulties in prohibiting surrogacy: prohibitions are very challenging to enforce, with experience showing that jurisdictions that seek to prohibit surrogacy continue to be confronted with arrangements carried out overseas. Children could be left without clear legal status or parents to care for them if there was no legal process to recognise them.
- a minimally regulated (or highly commercial) model, under which the relationship between intended parents and surrogates tends to be contractual, the surrogate can receive a fee, and for-profit intermediaries operate. The Law Commission examined each element of surrogacy law and regulation and concluded that its recommendations affirm the current prohibition on commercial surrogacy.[27]

54. Fuller analysis of options has been provided in areas where the Law Commission did not provide detailed recommendations. These are in the sections dealing with access to surrogacy, access to identity information, and accommodation of international surrogacy.

55. The options will be assessed and assigned one of the following ratings:

Key:	
++	much better than doing nothing/the status quo/counterfactual
+	better than doing nothing/the status quo/counterfactual
0	about the same as doing nothing/the status quo/counterfactual
-	worse than doing nothing/the status quo/counterfactual
- -	much worse than doing nothing/the status quo/counterfactual

57. The RIS treats each of the following sections in turn:

- **Access to surrogacy** considers how barriers to potential intended parents and surrogates finding each other can be reduced
- **Oversight of surrogacy arrangements** considers which types of surrogacy arrangement should be subject to ethics committee approval, what type of pre-conception checks intended parents should undergo before a surrogacy arrangement

[27] Law Commission report 146, page 35.

can proceed through the ethics process, and how the expertise on ethics committees can further be strengthened

- **Attributing legal parenthood** considers how the process for determining legal parenthood can be improved
- **Access to identity information** considers how surrogate-born people's identity information can be more fully collected and accessible
- **Financial support for surrogates** considers how the law about the payment of surrogacy-related costs can be clarified
- **Accommodating international and overseas surrogacy** considers how New Zealand can accommodate international surrogacy arrangements within the law, and how overseas surrogacies can be recognised for the purposes of New Zealand law
- **Additional policy changes that would support wider reform** considers whether there should be a right of review of ethics committee decisions, an annual reporting requirement for the ethics committee, the legal status of a surrogate's partner, how surrogacy-related payments to surrogates should be treated under social security laws, and an exemption from work obligations for those that have just given birth.

Access to surrogacy

58. There are barriers to accessing surrogacy in New Zealand.[28] People report 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 to the limited availability of gametes.

59. These difficulties appear to affect the ability of some people to build their families in New Zealand. They can result in intended parents choosing to enter into international arrangements that may involve fewer safeguards for participants, especially children.[29]

60. Anecdotal evidence suggests a lack of access is a common problem for intended parents.[30] There is no data indicating the number of people who are unable to form an arrangement or who are unable to do so in a timely manner (noting age affects fertility and therefore the potential success of an arrangement involving the intended parents' genetic material).

61. Māori may be particularly affected by barriers. Māori participation in surrogacy is low, particularly as intended parents, and this may in part be due to cost barriers, difficulty finding a surrogate, and clinics not being well equipped to deal with whānau Māori.[31]

Reducing barriers to intended parents and potential surrogates finding one another

62. This part of the RIS focuses on the second problem noted in the bullet points above: difficulties intended parents encounter in finding a surrogate. The Law Commission identified legislative barriers may contribute to this problem. The Government is considering non-legislative responses to the other aspects of the problem as part of its wider response to the Law Commission's report (for example, the Law Commission's recommendation that the government provides comprehensive and clear information about surrogacy).

63. 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

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[28] See, for example, submissions to the Law Commission on its issues paper, submissions to the Health Committee on the Improving Surrogacy Arrangements Bill, and media reports.

[29] Law Commission report 146, page 308.

[30] See, for example, submissions to the Law Commission on its issues paper, submissions to the Health Committee on the Improving Surrogacy Arrangements Bill, and media reports.

[31] Law Commission report 146, pages 47-48 and 303. Other factors may include high fertility rates historically reducing the need for surrogacy, a preference for whāngai arrangements, geographical inaccessibility of fertility treatment: Law Commission report 146, pages 47-48, quoting Annabel Ahuriri-Driscoll "Adoption and surrogacy — Māori perspectives" (seminar presented to Redefining Family Conference — Growing families through adoption, donor-conception and surrogacy, Te Wānanga Aronui o Tāmaki Makau Rau | Auckland University of Technology, 13–14 January 2016) (unpublished informal notes to accompany presentation); Leonie Pihama "Experiences of Whānau Māori within Fertility Clinics" in Paul Reynolds and Cherryl Smith (eds) *The Gift of Children: Māori and Infertility* (Huia Publishers, Wellington, 2012) 203 at 234, and Donna Cormack "He Kākano: Māori Views and Experiences of Fertility, Reproduction and Assisted Reproductive Technology — A Review of Epidemiological and Statistical Data" in Paul Reynolds and Cherryl Smith (eds) *The Gift of Children: Māori and Infertility* (Huia Publishers, Wellington, 2012) 41 at 50.

barriers to matching with a potential surrogate, or by the relatively small number of people likely to be willing to be a surrogate. The limited available research suggests the pool of potential surrogates is likely to be very small.[32]

64. In practice about half of arrangements that go through ECART are estimated to involve a surrogate who is a family member or friend of the intended parents. The remaining half involves participants who have met through social networking platforms.[33]

65. Aspects of the current law appear to create a barrier to intended parents and potential surrogates matching. 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.

66. Some also interpret the law as prohibiting any paid advertising for a surrogacy arrangement, with breaches of the law a criminal offence.[34] 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 unpaid posts on online platforms obsolete.[35]

67. The options discussed in the section of this RIS dealing with financial support for surrogates could also have an impact on people's willingness to be a surrogate.

Options analysis: Barriers to intended parents and potential surrogates finding one another

Option 1 - Status quo – private intermediaries are not permitted, and the law is unclear as to permissibility of paid advertising for lawful arrangements.

Option 2 - Law Commission recommendation – clarify that paid advertising for lawful surrogacy arrangements is permitted.

Option 3 – More limited state intervention and state facilitation – this option combines initiatives that could facilitate intended parents and potential surrogates being brought together. It would clarify that paid advertising is permitted for lawful surrogacy arrangements, stablish a state-run matching register to support the matching of intended parents and potential surrogates, and allow private intermediaries to operate on a non-profit basis.

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[32] Research undertaken in the UK: Poote AE and van den Akker OBA (2009) 'British women's attitudes to surrogacy' *Human Reproduction* vol 24(1), PAGE 139 – 145.

[33] ECART estimate for the 2020 year provided in submission to the Law Commission, Law Commission report page 309.

[34] Sections 14 and 15 HART Act. Law Commission report 146, page 311.

[35] Law Commission report 146, page 311.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
Option 1 - Status quo - private intermediaries are not permitted and law is unclear as to permissibility of paid advertising for lawful arrangements.	0 Research suggests the relationship between an intended parent and surrogate is positively associated with the level of post-birth contact between the surrogate and surrogate-born child's family.[36] Current settings encourage arrangements within intended parents' family, friend, and online networks.[37] This helps to support a post-birth relationship between the surrogate-born child and surrogate, which surrogate-born children appear to value and which can support their sense of identity.[38]	0 Intended parents report finding it challenging to find potential surrogates. Arrangements are more likely to occur in the context of an existing relationship between the surrogate and intended parents, supporting a strong relationship between the intended parents, surrogate-born child and surrogate, which surrogates value.[39]	0 Supports New Zealand's obligations under the Children's Convention prohibiting the sale of children.[40] However, advertising law is unclear and appears to create a distinction between free and paid advertising that is increasingly irrelevant with the emergence of social media. There does not appear to be a strong rationale for prohibiting paid advertising for a lawful activity.

[36] Jadva V et al (2012) Surrogacy families 10 years on: relationship with the surrogate, decisions over disclosure and children's understanding of their surrogacy origins, Human Reproduction, vol 27(10), pages 3008-3014, at 3012.

[37] About half of arrangements that go through ECART involve a surrogate who is a family member or friend, and half involve participants who have met through social network platforms: ECART estimate for the 2020 year provided in submission to the Law Commission, Law Commission report 146, page 309.

[38] A longitudinal UK study of surrogacy arrangements over a 10-year period found that the contact was most often maintained between members of surrogacy arrangements who were intended mothers and surrogates who were family or friends before the arrangement was formed. The study noted 'It is perhaps unsurprising that the most regular contact was maintained with surrogates who were relatives and friends as they may live in close proximity to the family and these relationships were well established before the surrogacy took place.': Jadva V et al (2012) Surrogacy families 10 years on: relationship with the surrogate, decisions over disclosure and children's understanding of their surrogacy origins, Human Reproduction, vol 27(10), pages 3008-3014, at 3012.

[39] Surrogates' satisfaction with their surrogacy experience is largely determined by the quality of relationship with the intended parents: Imrie S and Jadva V (2014) The long-term experiences of surrogates: relationship and contact with surrogacy families in genetic and gestational surrogacy arrangements. Reprod Biomed Online; 29:424–35.

[40] Article 35, Children's Convention.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
	Reinforces prohibition on commercial arrangements, which helps protect against exploitation.		
Option 2 - Law Commission recommendation - clarify that paid advertising is permitted for lawful surrogacy arrangements.	0 Likely to lead to more advertising for surrogates, which will increase the reach of intended parents' search. This could thereby increase the number of arrangements being formed outside intended parents' existing networks with surrogates with whom they do not have an established relationship. However, other system settings, particularly ECART's expectation of a pre-birth relationship between the surrogate and intended parents, will continue to encourage post-birth contact that is beneficial to surrogate-born children.	+ Supports surrogates and intended parents to connect with people who are not already known to them.	+ Makes the law clearer.
Option 3 – Limited state intervention and state facilitation - clarify that paid advertising is permitted for lawful surrogacy arrangements; establish a state-run register that would	- Provides less of a foundation for post-birth contact between the surrogate-born child and surrogate as more arrangements are likely to occur outside intended parents' immediate networks. As noted above, post-birth contact between a surrogate-born child and surrogate appears to be valued by surrogate-born children, and the level of post-birth contact	0 Supports surrogates and intended parents to match. If participants are willing to use the register, it could provide them with a clear pathway and secure environment for matching. A register and intermediaries could provide benefit to those groups who experience particular barriers to finding a surrogate within their own networks (e.g.,	- - A register would extend the state's role in private arrangements from providing a safe regulatory environment to actively facilitating individual arrangements, which appears inappropriate. As noted at left, it is unclear if a register would achieve its objective as it may not be used.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
allow for the matching of intended parents and potential surrogates; permit private intermediaries to operate - allowing intermediaries to operate on a non-profit basis within New Zealand to connect intended parents and potential surrogates.	between the surrogate and surrogate-born child's family appears to be associated with the strength of the relationship between intended parents and the surrogate. Submissions to New Zealand and South Australian law reform commissions highlighted the risk that a register would produce more transactional relationships.[41] However, other system settings, such as ECART expectation of a pre-birth relationship between the surrogate and intended parents, will continue to encourage such relationships. The Verona Principles, overseas reform processes, and a UN Special Rapporteur have highlighted potential risks associated with intermediaries (particularly for-profit	because surrogacy may be proscribed within their community).[44] However, surrogates may be unwilling to join a register involving an application process, likely some form of assessment,[45] and loss of control over who they match with (particularly when online forums are available that provide greater control over matching and the opportunity for a less transactional relationship with intended parents[46]) Intermediaries could increase the cost of surrogacy substantially, even when operating on a non-profit basis.[47]	The state may need to assume responsibility for undertaking baseline checks of those seeking to join the register, to ensure it was facilitating safe arrangements. This would duplicate some existing regulatory safeguards in the ECART process. The state may also need to assume liability if an arrangement goes wrong. In South Australia, legislation to establish a surrogacy register was repealed before the register was set up due to "significant and ongoing concerns" focused on policy and practical issues of the nature highlighted above and at left.[48] Careful regulation of intermediaries' financial arrangements, competency, and ethical standards would be needed to safeguard

41 South Australia Law Reform Institute *Surrogacy: A Legislative Framework — A Review of Part 2B of the Family Relationships Act 1975*. Law Commission report 146, page 314.

44 Some submissions to the Law Commission highlighted this: Law Commission report 146, page 313.

45 An assessment is likely to be needed to ensure the state is facilitating safe arrangements and to avoid the risk of people being matched with someone who would not be approved by ECART.

46 See South Australia Law Reform Institute *Surrogacy: A Legislative Framework — A Review of Part 2B of the Family Relationships Act 1975 (SA)* (Report 12, 2018).

47 Non-profit intermediaries are reported to charge more than $29,000 for their services: Law Commission of England and Laws and Scottish Law Commission *Building Families through surrogacy: a new law – A joint consultation paper* (CP244/DP, 2019) quoted in the Law Commission report 146, page 319.

48 See South Australia Law Reform Institute *Surrogacy: A Legislative Framework — A Review of Part 2B of the Family Relationships Act 1975 (SA)* (Report 12, 2018).

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
	intermediaries). Issues highlighted include that: • intermediaries' guiding motive may be the completion of a surrogacy arrangement rather than safeguarding the rights of those involved,[42] and • in jurisdictions where non-profit intermediaries are permitted, community-based organisations may not have the professional expertise and funds needed to effectively operate within complex family and surrogacy law.[43]		participants' rights. This is likely to be difficult, particularly where intermediaries operate online.[49]

Recommended approach

68. We recommend Option 2: clarifying that paid advertising for lawful surrogacy arrangements is permitted, as recommended by the Law Commission. It would improve access to surrogacy arrangements by better enabling intended parents to contact potential surrogates who are not already known to them, while having a neutral impact on children's rights and interests.

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[42] 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); Principle 16 of the Verona Principles.

[43] South Australia Law Reform Institute *Surrogacy: A Legislative Framework — A Review of Part 2B of the Family Relationships Act 1975 (SA)* (Report 12, 2018), quoting experiences in the United Kingdom.

[49] Principle 16 of the Verona Principles, Law Commission report 146, page 319.

Oversight of surrogacy arrangements

Context

Advisory and Ethics committees develop and implement detailed surrogacy policy

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

    - ACART, which:
        - provides independent advice to the Minister of Health, including on whether a procedure should be an "established procedure" (explained below), and
        - issues guidelines and provide advice to ECART on procedures and research requiring case-by-case ethical approval.
    - ECART, which assesses applications to undertake assisted reproductive procedures and research against the ACART guidelines.

Some surrogacy arrangements require approval

70. 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 those involving both donated ovum and sperm, they must be assessed by ECART.

71. As traditional surrogacy involves the use of the surrogate's own ovum, this type of arrangement does not require ECART approval unless some other assisted reproductive procedure is involved.

72. 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 ethical advice.

73. ECART considered 44 applications relating to surrogacy in 2021. About two per cent of surrogacy arrangements currently considered by ECART are traditional arrangements.[50]

74. The ACART guidelines require all participants in a surrogacy arrangement to have received:[51]

    - Counselling. Affected participants must have received joint and individual counselling. The counsellors must provide a report to ECART addressing matters outlined in the ACART guidelines.
    - Legal advice. Each participant must receive independent legal advice. The lawyer must report to ECART that the participants understand the legal implications of the

[50] Law Commission Issues Paper 47, page 74.

[51] Law Commission report 146, pages 99-100.

procedure, including who will be recorded as parents on the surrogate-born child's birth certificate, who will be the child's legal parents on birth, the adoption process, the unenforceability of the surrogacy arrangement, the surrogate's right to terminate the pregnancy and the need for payment of costs to comply with the HART Act. Legal advice might also be given on matters such as what name can be recorded for the child on their birth certificate, making provision for testamentary guardianship, updating wills, arranging life insurance, parental leave entitlements, the participants' plans for future contact arrangements and the importance of preserving the child's rights to identity.

- Medical advice. Parties must receive an independent medical assessment and advice. Health reports to ECART must show the participants understand the health implications of procedures.

75. In addition, ECART requires intended parents to obtain in-principle approval from Oranga Tamariki 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 (discussed further from page 49). As part of the adoption process Oranga Tamariki must provide a report to the Family Court that addresses whether the intended parents are "fit and proper" to care for and raise the child, and whether the welfare and interests of the child will be promoted by the adoption. In recognition of this, ECART requires prior in-principle approval to ensure there are no barriers to a future adoption.

76. Before giving in-principle approval, a social worker meets the applicants in their home and makes an assessment against set criteria. The applicants need to provide references and information about any criminal offences and give permission for Oranga Tamariki to check police records and its child protection database. In recognition of the life-long impacts that gestational and genetic origins can have on a surrogate-person's life, the social worker's assessment has an 'education' component. This considers what information will be accessible to the child about their genetic history and birth story. It also addresses other areas of interest to intended parents including attachment theory and the importance of relationships with the surrogate and any donors.

Problem definition

77. While submissions to the Law Commission indicated broad support for an ECART approval process to continue,[52] there is scope for the process to improve. Two problems are outlined below, followed by options analysis.

Problem 1: Some arrangements that are not approved by ECART lack safeguards

78. Traditional surrogacy arrangements do not need to be approved by ECART. This means the requirements for counselling, independent legal advice, and medical advice do not apply to some domestic surrogacy arrangements.[53] However, traditional surrogacy

[52] 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, page 106.

[53] Traditional surrogacy appears to account for approximately 25-45% of domestic cases. Prior to July 2020, Oranga Tamariki did not distinguish between the different categories of social worker's reports submitted on

arrangements have the potential to raise complex ethical issues, given the surrogate is genetically related to the child. In 2019 advice to the Minister of Health, ACART recommended requiring all clinic-assisted surrogacies to be approved by ECART.[54]

79. Additionally, a small subset of gestational surrogacies do not require ECART approval - those involving a surrogate's partner donating the sperm. This appears to be an unintended consequence of legislative drafting. However, as these arrangements involve a genetic link between the surrogate's partner and the child, they are also ethically complex.

Problem 2: The ECART process feels invasive to some participants

80. Consistent with rights to have a family and to private and family life, people intending to have children are usually not subject to state intervention.

81. Where a family is established through surrogacy, the state has a role in regulating arrangements and the transfer of legal parenthood. This reflects the significant public policy matters involved (the creation of a child) and the involvement of multiple participants whose rights can be in conflict. Regulating these processes is consistent with family law generally, which provides for some state oversight of personal relations within families, in recognition of the need to protect the rights of more vulnerable participants. It is also consistent with international best practice, which stipulates a state role in surrogacy to safeguard the interests of children.[55]

82. Personal submitters to the Law Commission often mentioned the emotional and financial cost of surrogacy and the length, complexity, and intrusiveness of aspects of the process. Some felt the adoption process for assessing intended parents' suitability is invasive and disproportionate to the risk of harm. They also suggested there is a distinct difference between surrogacy arrangements and adoptions because a surrogate-born child is often genetically linked to intended parents and conceived with the specific intent that the intended parents raise the child.

83. Data is not collated about how often Oranga Tamariki's assessment finds the intended parents not to be suitable to adopt a surrogate-born child. However, Oranga Tamariki considers it would be quite rare.[56] The types of issues that could influence Oranga Tamariki to view intended parents as unsuitable to adopt include:

    - conviction history (particularly convictions for violent or sexual offending)
    - child protection history, and/or

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adoption applications to the Family Court. However, a previous manual review of Oranga Tamariki's records for the year ended 30 June 2019 revealed that 37 reports were written for adoption applications involving domestic surrogacy in that time. Of these, 28 related to gestational surrogacy and nine related to traditional surrogacy. Traditional surrogacies accounted for just under half of known domestic cases in 2020-2021- 10 of the 22 cases: Law Commission report 146, page 104.

[54] ACART submission to the Law Commission page 4.

[55] Paragraph 5.1 Verona Principles.

[56] Note Oranga Tamariki may engage with applicants to discuss the process for assessing suitability before the intended parents apply for a preliminary assessment for their application to ECART. This may result in a very small number of intended parents choosing not to continue with an application.

- issues raised in a medical report (such as significant or chronic mental health issues or drug or alcohol dependency).

84. Where issues have been raised, these have typically been in relation to life-limiting medical issues.[57]

Options analysis: Problem 1 - Role of Ethics Committee on Assisted Reproductive Technology

Option 1 - Status quo and limited state intervention model - ECART approval required for gestational surrogacies. Traditional surrogacies (including clinic-assisted ones) do not require ECART approval, but ECART can provide non-binding ethical advice in relation to clinic-assisted traditional surrogacies.

Option 2 - Law Commission recommendation – Make the ECART process available to all types of surrogacy (traditional and gestational). ECART approval required for all clinic-assisted (traditional and gestational) surrogacies.

[57] Oranga Tamariki submission to the Law Commission.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
Option 1 - Status quo and limited state intervention model - ECART approval required for gestational surrogacies. Traditional surrogacies do not require ECART approval, but ECART can provide non-binding ethical advice to clinic-assisted traditional surrogacies.	0 Upholds children's rights by ensuring some arrangements have a robust oversight process to protect the interests of the child.[58] However, traditional arrangements that do not require ECART approval lack oversight, which may create risks to children's interests in some cases.	0 Traditional surrogacy arrangements have the potential to raise complex ethical issues given the surrogate is genetically related to the child. There is potential for conflicting interests between child, intended parent and surrogate. In practice issues appear to be rare but consequential.[59]	0 Only partially consistent with international best practice affirmed by principle 5 of the Verona Principles, which promotes a multi-disciplinary approval process for surrogacy arrangements.
Option 2 - Law Commission recommendation - Make ECART process available to all types of surrogacy (traditional and gestational). ECART approval required for all clinic-assisted surrogacies (traditional and gestational).	+ Requiring clinic-assisted surrogacies to participate in the ECART process, and enabling other traditional surrogacies to participate, may increase the number of intended parents and surrogates who receive professional advice and make plans that promote children's interests	+ Requiring or enabling participation in the ECART process would safeguard the rights of the surrogate (including to health, bodily integrity, reproductive freedom) and the rights of intended parents (including to freedom from exploitation), as it may increase the number of intended parents and surrogates who receive	+ Requiring more surrogacy arrangements to obtain prior approval would be consistent with the Verona Principles. Section (9)(2)(f)(iv) [redacted]

[58] For example, ECART must be satisfied that counselling has included implications counselling for all participants and that participants have considered and understood the rights of offspring, including their rights to obtain identifying information about the donor and each other's attitudes to openness about donation, especially with the offspring. *ACART guidelines for family gamete donation, embryo donation, the use of donated eggs with donated sperm and clinic assisted surrogacy* pages 3 & 4.

[59] The Law Commission noted an instance reported in the media of a surrogate involved in a private traditional arrangement who wished to keep a child: Law Commission report 146, page 104.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
	(e.g., for sharing information about the child's gestational origins). Risk could increase uptake of international surrogacy or traditional surrogacy conducted outside a clinic setting if the ECART process is considered too lengthy, complex, or costly, potentially impinging on the rights of the child (and other participants).	professional advice (e.g. as it requires that counselling, medical, and legal advice be obtained). Would better ensure that surrogates and intended parents understand their legal rights and obligations, reducing the risk of disputes arising during pregnancy or post-birth. Enabling participation would allow participants to benefit from a more efficient parenthood process for transferring legal parenthood, should the parenthood reforms discussed later in the RIS proceed. Risk could increase uptake of international surrogacy or traditional surrogacies conducted outside a clinic setting if the ECART process is considered too costly, lengthy, or complex, which could potentially impinge on rights of the participants.	Section (9)(2)(f)(iv) [redacted]

[60] The number of applications ECART can consider each year is limited. ECART meets six times a year and considers around 12 applications for all assisted reproductive procedures at each meeting.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
		May impinge on intended parents' right to family life if ECART declines an application for clinic-assisted surrogacy that could otherwise have proceeded without need for ECART's approval. Would create new costs for intended parents in surrogacy arrangements that are newly required to receive ECART approval. However, the additional cost is likely to be relatively small in the context of surrogacy, and the process could entitle the intended parents to use an administrative rather than court pathway for determining legal parenthood, which may outweigh the additional cost.	

Recommended approach

85. We recommend Option 2, consistent with the Law Commission's recommendation to extend the availability of the ECART process to traditional surrogacies and require all clinic-assisted surrogacies to be approved by ECART. This provides a robust process with safeguards for the rights of all participants involved in all surrogacy arrangements, although some traditional arrangements may continue to occur without ECART oversight. The effectiveness of this reform will be dependent on sufficient resourcing being available to enable timely decision-making if volumes increase.

Options analysis: Problem 2: Nature of assessment of intended parents

Option 1 - Status quo – Oranga Tamariki assesses prospective intended parents to confirm they are “fit and proper” to adopt under the Adoption Act.

Option 2 - Law Commission recommendation – Oranga Tamariki prepares a report for ECART advising whether it has identified any concerns of a risk of serious harm to any child resulting from the surrogacy arrangement. The report would reflect the first or both of the following steps:

- Step 1: basic desk-based assessment based on background checks (such as criminal background and child protection checks).
- Step 2: advanced investigation if basic background checks identify information that raises a concern about a risk of serious harm.

Option 3 – limited state intervention – No risk assessment of intended parents. Oranga Tamariki does not have a role in the pre-birth surrogacy process.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
Option 1 - Status quo - Oranga Tamariki assesses prospective intended parents to confirm that the intended parents are "fit and proper" under the Adoption Act.	0 Upholds the best interests of the future child by seeking to determine that their intended parents will be suitable before the child is conceived, providing a potential early intervention pathway if there is a lot of risk involved. However, to date issues are in practice very rarely identified. The assessment also provides opportunities for Oranga Tamariki and intended parents to discuss the short- and long-term rights and interests of the child, including identity rights, and core issues related to parenting a surrogate-born child.	0 Could be considered discrimination given that parents conceiving children in other ways do not have to go through this process. Both intended parents and surrogates have criticised the status quo for being invasive. Oranga Tamariki noted in its submission to the Law Commission that intended parents to date have nearly always been found to be fit and proper. In instances where they haven't it has typically been in relation to life-limiting medical issues, and these have been uncommon. This suggests this level of assessment is not proportionate to the risk that is present.	0 In establishing a regulatory process for surrogacy, the state has a responsibility to ensure children's interests are the primary consideration and to take measures to protect children from harm. The Children's Convention contains state obligations to ensure all appropriate measures are taken to protect children from future risk and harm. Principle 5.5 of the Verona Principles states that "pre-surrogacy arrangements for intended parent(s) should include a psycho-social suitability assessment" including an "independent assessment of capacities to ensure the child's social, physical, emotional and educational well-being and development, and protection from harm". However, as Oranga Tamariki noted in its submission to the Law Commission, state involvement should not be to police people's ability to have children, which is how

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
			some perceive the current process to operate. Issues are rarely identified. The current process appears disproportionate to the risk that it is addressing. The Law Commission notes that there is no concern that people who engage in surrogacy present any greater risk than other parents.[61] Court reports produced by an Oranga Tamariki social worker may consider te Tiriti obligations, mana tamaiti, whakapapa and whanaungatanga. However, oversight to this degree about family building may be a barrier to exercising tino rangatiratanga. Māori may feel uncomfortable engaging with Oranga Tamariki with a level of distrust with Oranga Tamariki as the care and protection agency.[62]

[61] Law Commission report 146, page 127.

[62] WAI2195 He Pāharakeke, He Rito Whakakīkīnga Whāruarua Oranga Tamariki Urgent Inquiry.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
			A pre-conception check is consistent with the Verona Principles, which could help ensure New Zealand's system aligns with any future international instrument (which is likely to include such a process). This is necessary for New Zealanders who move internationally
Option 2 - Law Commission recommendation - Oranga Tamariki prepares a report for ECART advising whether it has identified any concerns of a risk of serious harm.	0 This option seeks to protect children from potential harm, which supports their right to safety, but does not go as far as to check whether the wider and longer-term welfare and best interests of the child are assured (because this option would constitute a check for safety risks rather than provision for the longer-term wellbeing of the child).	+ Provides a stream-lined and less invasive process. This respects that surrogacy may be one of the only ways for some people to have children, and that other parents do not have to take any steps to determine fitness to parent before creating a baby. It also recognises that surrogacy arrangements require some oversight and safety considerations.	+ Reduces state oversight to a level more proportionate to the risks involved, and to a level more similar to care and contact matters considered by the Family Court.[63] Oranga Tamariki's submission to the Law Commission noted that "state involvement should be around supporting parents to safely care for their children thus preventing harm to

[63] To support the Family Court's decision-making about guardianship and childcare arrangements, section 131A of the Care of Children Act provides for a social worker's advice to be provided for the court. The advice is a record of the participants' involvement with Oranga Tamariki, any investigation or intervention, and the outcome. The Court also has a power under section 132 of that Act for a more comprehensive social worker report addressing matters the court highlights.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
	The practical impact of the change is expected to be limited given issues are currently very rarely identified. The educational component of social workers' engagement with intended parents would be reduced or removed. However, other reforms being considered by the Government would provide for continued emphasis on children's interests. These include: • provision for ECART and ACART members able to articulate the interests of children • a new principle in the HART Act requiring ECART and ACART (and other decision-makers under the HART Act) to take account of the principle that surrogate-born people should be aware of their genetic and gestational origins and whakapapa and be able to	May still be viewed by intended parents as discrimination, as they would be subject to checks that do not apply to parents generally. Criminal records check may disproportionately affect Māori.	children, rather than policing their ability to have children". Oversight to this degree about private, family making decisions may be a barrier to recognising tino rangatiratanga. Intended parents may feel uncomfortable engaging with Oranga Tamariki with a level of distrust with Oranga Tamariki as the care and protection agency.[64] However, the level of Oranga Tamariki involvement is expected to be much more limited in most cases.

64 WAI2195 He Pāharakeke, He Rito Whakakīkīnga Whāruarua Oranga Tamariki Urgent Inquiry.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
	access information about those origins • improving the focus of counselling on children's rights to identity, and • improving public information about surrogacy, including best interests of the child.		
Option 3 – limited state intervention - No risk assessment of intended parents. Oranga Tamariki does not have a role in the pre-birth surrogacy process.	- - This option would remove state oversight of the welfare and best interests of the child, and would have inadequate safeguards against risks to the child. It would also remove the educational component of social worker engagement with intended parents. This option is inconsistent with the findings of the Law Commission report and the Verona Principles, which provide for a pre-conception check.	+ Respects the autonomy of consenting adults in their private lives. Treats equally intended parents and parents who conceive children in other ways, in that their fitness to be a parent is not assessed pre-pregnancy. Potentially places the surrogate in an uncomfortable position if problems are identified during or after the process, and these result in a dispute over the child or care and protection proceedings.	- In providing a regulatory framework to enable surrogacy arrangements, the state has obligations under the Children's Convention to ensure that the best interests of the child are a primary consideration and to take all appropriate measures to protect children from future risk and harm. This option would not provide for this. The option is inconsistent with 5.5 of the Verona Principles, which state that "pre-surrogacy arrangements for intended parent(s) should include a psycho-social suitability assessment" including an "independent assessment of capacities to ensure the child's social, physical, emotional

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
			and educational well-being and development, and protection from harm". Likely to be inconsistent with any Hague Conference-agreed instrument (which is likely to include such a process), which could make it harder for surrogate-born children to move internationally. Simple to implement. More likely to recognise tino rangatiratanga, but less consistent with view of children as taonga.

Recommended approach

86. We recommend Option 2, the Law Commission's recommended approach. This option provides an opportunity to assess whether there are any indications of risk to the child and allows for a more thorough investigation if there are any concerns. Although this may be seen as inconsistent treatment of intended parents relative to parents who conceive a child in other ways, the state's role in regulating surrogacy creates a responsibility to design a system that provides safeguards for children's safety, consistent with international human rights obligations.

Membership of ECART and ACART

87. The Law Commission recommended a review of the membership requirements for ECART and ACART. It did not make final recommendations but suggested a potential model that could strengthen the committees' expertise. This options analysis therefore provides more detailed analysis of this aspect of the surrogacy system.

88. The HART Act and the committees' non-legislative terms of reference provide for multidisciplinary membership. This supports them to make decisions taking account 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[65] with an ability to articulate the interests of children.
ECART	Membership must include: • at least one member with expertise in assisted reproductive procedures, and • 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, of which there must be at least two Māori members. It does not include express requirements for members able to articulate the interests of children.

89. If other reforms outlined in this RIS are progressed, ACART and ECART would play three critical roles in a reformed surrogacy system:[66]

- ACART would continue to develop ethical guidelines for ECART on the matters ECART must take account of when considering an application to undertake a surrogacy arrangement
- ECART would continue to determine whether certain surrogacy arrangements can occur by assessing applications against ACART guidelines, and

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65 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.'

66 As well as these surrogacy-related roles, after any reforms ACART would continue to develop other types of ethical guidelines, and ECART would continue to assess applications to undertake other assisted reproductive procedures and research against the ACART guidelines.

- ECART's approval of a surrogacy arrangement could become one of the conditions that could permit legal parenthood to be transferred from a surrogate to intended parents without the need for a court process.

Problem definition

90. The Law Commission suggested that the committees' decision-making in a reformed system could be supported through changes to strengthen:

    - expertise in te ao Māori. Some submitters noted concerns current requirements may not be sufficient to enable representation of the diversity of Māori perspectives or allow consistent representation across meetings
    - representation of children's interests, given the centrality of their interests and ECART's potential new role in the determination of legal parenthood, and
    - medical expertise. Some submitters noted the medically complex nature of ECART's work and the need for sufficient expertise to enable conflicts of interest to be managed.

Options analysis: Membership of ECART and ACART

Option 1 - Status quo - Membership is set by legislation and by non-legislative terms of reference, as outlined in the table above.

Option 2 - model Law Commission suggested but did not formally recommend – In addition to the requirements in the status quo, HART Act requirements are extended to require:

- ACART and ECART to have at least two members able to articulate the interests of children
- ACART to have a least one additional Māori member (for a total minimum of two)
- ECART to have at least two Māori members, and
- ECART to have at least one additional member with expertise in assisted reproductive procedures (for a total minimum of two).

Option 3 - modified Law Commission model - In addition to the requirements in the status quo:

- the HART Act requires ACART and ECART to have a minimum of two members able to articulate the interests of children, and
- the HART Act requires the appointing Minister to have regard to prospective ACART and ECART appointees' knowledge and experience of mātauranga Māori, but does not specify a minimum number of additional Māori members or medical members.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
Option 1 - Status quo - Membership set by legislation and non-legislative terms of reference. Current legislative requirements provide that ACART must include at least one member with expertise in assisted reproductive procedures, one who is Māori with expertise in Māori customary values and one who is the Children's Commissioner or a representative of the Commissioner with an ability to articulate the interests of children. ECART membership must include at least one member with expertise in assisted reproductive procedures.	0 While the HART Act requires the health and wellbeing of surrogate-born children to be an important consideration in all members' decision-making,[67] only one member of ACART is specifically required to be able to articulate the interests of children. The limited nature of membership requirements creates a risk that decisions will be made without the benefit of medical expertise, mātauranga Māori, or expertise in children's interests that is relevant to a potential surrogate-born child's interests.	0 The HART Act requires all members to consider the needs, values, and beliefs of Māori in decision-making.[68] While Māori membership currently meets or exceeds the Law Commission's suggested approach, the limited nature of current membership requirements creates a risk that future decisions could be made without taking into account relevant mātauranga Māori if a member is unable to attend at each meeting. The limited requirements likewise create a risk with respect to medical expertise. All recent ECART decisions to decline applications have been due in part to concerns about the surrogates' health, indicating critical relevance of	0 The limited number of fertility clinics operating in New Zealand means committee members with medical expertise may have an association with a fertility clinic making an application to the committee. Where a risk of a conflict arises, the member recuses themselves. If there is only one medical member there is a risk that medical perspectives will not be represented.[69]

[67] Section 4(a) of the Human Assisted Reproductive Technology Act.

[68] Section 4(f) of the Human Assisted Reproductive Technology Act.

[69] Law Commission report 146, page 156.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
		medical expertise to participants' interests.	
Option 2 - model Law Commission suggested but did not formally recommend – Current legislative requirements extended to require: • ACART and ECART to have two members able to articulate the interests of children • ACART to have a least one additional Māori member (for a total minimum of two) • ECART to have at least two Māori members • ECART to have at least one additional member with expertise in assisted reproductive procedures (for a total minimum of two).	++ Strengthening representation of children's interests would be consistent with international obligations with respect to children's rights, international best practice with respect to surrogacy regulation, and domestic legislation dealing with care and upbringing of children. These sources provide that children's best interests should be paramount in decision-making about them. Children's interests are significantly affected by both committees, ACART in setting surrogacy guidelines and ECART in weighing if any risks to a child are justified. Strengthening committees' expertise in this area is especially important if ECART approval becomes a condition for the transfer of a surrogate-born child's	+/0 Theoretically – and often in practice – the changes could: • encourage greater attention to the proportionately low uptake of surrogacy and other forms of assisted reproductive technology by Māori, and • support ECART's consideration of medically complex issues, including risks to surrogates. As medical members are often associated with a fertility clinic, a greater number of expert members would make it easier to manage conflicts of interest. However, the Ministry of Health advises that it faces challenges recruiting Māori and medical	- The option would provide a strong legislative affirmation of the importance of the additional expertise. Theoretically – and often in practice – the changes could support: • better representation of the diversity of Māori perspectives on surrogacy and other assisted reproductive issues and ensure continuity of representation at each meeting • easier management of conflicts of interest, and • stronger articulation of children's interests. However, as noted at left, the Ministry of Health faces challenges recruiting

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
	parenthood under the proposed administrative pathway. If sufficient Māori and medical expertise requirements can be recruited this could reduce the risk that decisions are made without the benefit of medical expertise or mātauranga Māori relevant to a potential surrogate-born child's interest. However, the Ministry of Health, which has operational responsibility for the committees, advises that it faces challenges recruiting Māori and medical expertise to the committees.[70] If the membership requirements were unable to be met, the committees would not legally perform their functions.	expertise to the committees.[71] If the membership requirements were unable to be met, participants would be unable to get approval of their arrangements, preventing them from accessing assisted reproductive procedures including those required for gestational surrogacy.	Māori and medical expertise to the committees. If the membership requirements were unable to be met, 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.

[70] To meet current membership requirements, the Ministry of Health uses a range of recruitment strategies and recently updates its approach to recruitment advertising. ECART members' pay was increased in 2021 in recognition of the complexity and media interest in their work.

[71] Ibid.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
Option 3 - modified Law Commission model - In addition to the requirements in the status quo: • the HART Act requires ACART and ECART to have at least two members able to articulate the interests of children, and • the HART Act requires the appointing Minister to have regard to prospective ACART and ECART appointees' knowledge and experience of mātauranga Māori.	+ As above. However, the risk that the committees are unable to operate is addressed through the modified approach to the legislative requirements.	+ As with the option above, the changes could: • encourage greater attention to the proportionately low uptake of surrogacy and other forms of assisted reproductive technology by Māori, and • support ECART's consideration of medically complex issues, including the suitability of and risks to surrogates. As medical members are often associated with a fertility clinic, a greater number of expert members would better enable conflicts to be managed. However, as noted at left, the risk that the committees are unable to operate is addressed.	+ As with the option above, this option should strengthen expertise available to the committee. However, as noted at left, the risk that the committees are unable to operate is addressed.

Recommended approach

91. We recommend Option 3, a modification of the Law Commission's suggested approach. While we agree with the Law Commission that legislative requirements would provide the strongest affirmation of expertise, there is risk in this approach. The Ministry of Health has experienced challenges recruiting expertise to the committees. If the membership requirements were unable to be met because of recruitment difficulties, the committees could not legally perform their functions under the HART Act. Prescriptive qualification requirements

are often avoided in legislative regimes because of this risk. We therefore recommend Option 3, to achieve the intent of the Law Commission's proposed model while avoiding the risk that the committees may be unable to function.

Legal parenthood of surrogate-born people in domestic arrangements

Problem

92. The law for determining the legal parents of a surrogate-born child is unsuitable for surrogacy arrangements.

93. The legal parents of a surrogate-born child are determined by a common law rule and provisions in the Status of Children Act that were developed for donor gamete conception. These provide that the surrogate is the legal parent of the surrogate-born child. The surrogate's partner (if they have one) is also a legal parent, unless there is evidence the partner did not consent to any assisted human reproduction procedure.[72]

94. There are no laws that deal specifically with the transfer of legal parenthood in surrogacy arrangements. Intended parents must apply to the Family Court to adopt the surrogate-born child to transfer legal parenthood from the surrogate (and any partner) to them. 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.[73]

95. Alternatives to adoption are available to intended parents, such as caring informally for the child or applying for guardianship of the child. However, these do not produce rights and responsibilities equivalent to those that flow from the legal parent-child relationship, such as entitlements to a parent's estate under succession law,[74] child support obligations,[75] or entitlements to citizenship.[76]

96. The Adoption Act is dated and the Government has begun a review of it. The Act was not designed to deal with parenthood in surrogacy arrangements. However, even if modernised, adoption law is unlikely to be suited to surrogacy arrangements. Adoption and surrogacy are conceptually different. Adoption is generally regarded as serving to provide a permanent family relationship for a child whose parents are unable or unwilling to care for them.[77] Surrogacy creates a child specifically for the intended parents to care for, and the child will often be genetically related to at least one of the intended parents.

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[72] Sections 17, 18 and 27 of the Status of Children Act. Traditional surrogacy is not addressed by the Status of Children Act, and the common law rules therefore apply.

[73] Section 11 Adoption Act 1955.

[74] Children automatically benefit from a parent's estate if a parent dies without a will under section 77 of the Administration Act 1969, and a child can make a claim for provision from the estate where a parent has died and the terms of their will do not make adequate provision for their maintenance and support under section 4 of the Family Protection Act 1955.

[75] Obligations to provide financial support flow from parenthood, not guardianship status: section 6, Child Support Act 1991.

[76] A person acquires New Zealand citizenship by birth if they are born in New Zealand and one of their parents is a New Zealand citizen or entitled to be in New Zealand indefinitely: section 6 Citizenship Act 1977. A person can also acquire citizenship by descent if they are not born in New Zealand but their mother or father is a New Zealand citizen: section 7 Citizenship Act 1977.

[77] Note that the purpose of adoption is not legislatively set: see "A new adoption system for Aotearoa New Zealand: Discussion Document" Ministry of Justice June 2022.

97. Current adoption law is inappropriate for dealing with surrogacy cases because:

- *It does not promote the child's best interests, particularly the right to identity and whakapapa:* The Adoption Act does not sufficiently consider the best interests of the child. The Act does not specify that the best interests of the child should be the paramount consideration in parenthood determinations, although Oranga Tamariki social workers and the Family Court take account of international obligations such as the Children's Convention.[78] The adoption process, where an adoption order treats the child 'as if born to' the intended parents, obscures the child's gestational origins and, in some cases, their genetic origins and whakapapa. This is contrary to the child's rights and best interests, particularly rights to identity, health, cultural rights, and potentially certain entitlements (such as entitlement to resources determined by whakapapa[79]). It is inconsistent with the Children's Convention,[80] the Verona Principles,[81] and tikanga Māori.[82]

- *It does not adequately provide for care of, or a focus on, the surrogate-born child*: Post-birth legal processes are a distraction from the child at a time when the intended parents wish to focus on looking after the new-born baby and the surrogate is recovering from giving birth. The adoption process is costly and can take time. During this period the intended parents have no legal relationship with the child, which influences their ability to exercise responsibilities with respect to the child. In particular, it is unlawful for intended parents to care for the child in their home before an interim adoption order is in force unless they have received prior approval from an Oranga Tamariki social worker.

- *It does not respect participants' wishes:* The law does not respect the intent of the participants given the pregnancy has been entered into with the intent that the intended parents raise the child and are the child's parents. Additionally, under the current law, the partner of a surrogate is generally the child's legal parent (discussed further from page 100).

  It does not account for all scenarios: A recent case[83] highlights that adoption law is unable to recognise parenthood in surrogacy cases if an intended parent or the child dies before the surrogacy process is completed. This can be distressing for those involved and may mean a child's birth certificate will not record the intended parents as the child's legal parents and which may affect the child's entitlement to inherit or to citizenship.

  Additionally, there is no avenue to resolve disputes as the adoption process is reliant on a surrogate and intended parents consenting to the adoption. If the surrogate does not consent to the transfer of legal parenthood, the intended parents cannot become legal parents. They can only seek to be appointed as guardians. If the

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78 *T v J* [2000] 2 NZLR 236; *R v M* [2011] NZCA 582

79 As per Law Commission report 146, page 167.

80 Article 8 of the United Nations Convention on the Rights of the Child. https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child

81 Principle 11 of the Verona Principles: Protection of identity and access to origins

82 Law Commission report 146, page 167.

83 Paige Harris Birth Registration Act 2022.

intended parents chose not to apply for an adoption order the surrogate will remain a legal parent with all of the associated rights and responsibilities.

98. The adoption process may also prevent arrangements that accord with tikanga Māori. Adoption law is not compatible with tikanga Māori, meaning some intended parents may not wish to pursue a legal adoption of a surrogate-born child. ECART has been reluctant to approve surrogacy arrangements where a whāngai arrangement rather than adoption is planned, because of concerns about the possible legal instability of the relationships created and absence of Oranga Tamariki checks (which would not be undertaken if an adoption process was not anticipated).[84]

99. The following analysis focuses on the process for determining legal parenthood in domestic arrangements. The ECART ethics approval process is analysed in the 'oversight' section from page 27. International surrogacy arrangements are discussed in the 'International surrogacy' section from page 74.

Options analysis: Process to determine legal parenthood

Option 1 - Status quo - Adoption used to seek a transfer of legal parenthood, if the Court 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. Consent to transfer of legal parenthood required from the surrogate at least 10 days post-birth.

Option 2 - Law Commission recommendation - Two new bespoke pathways for determining legal parenthood in domestic surrogacy arrangements. These would be:

- an administrative pathway where legal parenthood is transferred by operation of law, provided certain conditions are met. The conditions are that the surrogacy arrangement was approved by ECART (with that approval informed by an Oranga Tamariki safety assessment of intended parents), the surrogate consented to the transfer of legal parenthood at least seven days after the child was born, and the intended parents have taken the child into their care. Intended parents are additional guardians until consent to the transfer of legal parenthood is provided.
- a court pathway under which participants could seek a court determination of legal parenthood in cases where the conditions for the administrative pathway are not met (e.g., because the arrangement does not have prior ECART approval). The Family Court would make a determination of parenthood based on the child's best interests, informed by a social worker's report. The Court would be required to take account of the following considerations when determining the child's best interests:

  a) the participants' intentions when entering into the surrogacy arrangement

  b) the child's genetic and gestational links to each of the participants in the surrogacy arrangement

  c) all sibling relationships of the child

[84] Law Commission report 146, pages 170 – 171.

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[85] 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.

Option 3 – Limited state intervention - Legal parenthood is transferred by operation of law if ethics approval to the surrogacy arrangement is given and the surrogate consents to the transfer of legal parenthood pre-birth. The intended parents are the child's legal parents from the child's birth. Surrogacy agreements are enforceable.

[85] The Law Commission proposes the term 'parentage order' for the order that would confer legal parenthood status. This is distinct from a parenting order, which is about contact and care.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
Option 1 - Status quo - Adoption used to seek the transfer of legal parenthood, and consent required from the surrogate post-birth.	0 Provides a process to recognise the intended parents of the child as legal parents, which is usually in the child's best interests. However, there is no legal relationship between the child and intended parents with the intended parents until adoption is finalised. This leaves the child's only legal relationship with the surrogate and the surrogate's partner, who have no intention to raise or care for the child, which is not usually in the child's best interests. Adoption can obscure the child's genetic and gestational origins and whakapapa. Requiring the surrogate's consent post-birth promotes the child's best interests by providing confidence in the integrity of the surrogacy arrangement.	0 The law does not respect the autonomy of the participants. It does not recognise the participants' intention that the child should be raised from birth by the intended parents. Intended parents may feel that having to adopt the child, who is often genetically related to them, is offensive.[86] It can prevent Māori acting in accordance with tikanga. The process can also be lengthy, costly and feel duplicative. There is some legal insecurity for the intended parents and surrogate during the time between the birth and an adoption order being granted, even if the intended parents are providing interim care. The adoption process leaves participants with no way to resolve disputes over legal parenthood. Post-birth consent requirements allow time for the surrogate to rest and begin recovering from the immediate effects of birth and	0 The law does not produce the legal and social result intended. Using adoption fails to reflect the planned nature of surrogacy arrangements. A reformed adoption process is also unlikely to be suitable due to different purposes of adoption and surrogacy. The law does not account for all scenarios (such as an intended parent's death). May prevent Māori acting in accordance with tikanga. Consistent with international best practice in requiring a surrogate to give consent post-birth.[88] However, the lack of emphasis on children's interests in the adoption process has been criticised internationally and is not in keeping with other New Zealand proceedings involving the care of children. The legal position that the surrogate is the child's legal parent at birth is consistent with existing rules of legal parenthood more

[86] Law Commission report 146, page 123.

[88] Verona Principles 10.4-6: Determination of legal parentage at birth, by operation of law.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
		provide fully informed consent. Surrogates in particular may feel this provides a sense of closure.[87]	generally in making the person who gives birth the legal parent.
Option 2 - Law Commission recommendation - Bespoke process with two pathways: • An administrative pathway where the intended parents become legal parents soon after birth by operation of law if certain conditions are met. • A court pathway where parenthood is determined	+ The administrative pathway allows for legal parenthood to be confirmed as soon as possible, with guardianship rights for intended parents in the interim. This enables intended parents to care and make decisions for the child at the earliest opportunity.[89] Having this connection will almost always be in the child's best interests, rather than maintaining a connection with the surrogate who has no intended role in their care. The court pathway provides an avenue for other cases. Both pathways involve consideration of children's interests. This provides an important safeguard for children in the transfer of legal parenthood. It is consistent	+ Streamlined recognition of legal parenthood by operation of law under the administrative pathway creates a clear incentive to use the ethics approval process. This may reduce the risk of problems arising in a surrogacy arrangement during and after the pregnancy. Intended parents and surrogates would be counselled during the ethics approval process and discuss how important issues will be managed before entering into arrangements. The administrative pathway is more streamlined than the current adoption court process and therefore may be viewed more positively by intended parents. It enables intended parents to focus on caring for the	+ Reflects the reality of surrogacy arrangements. Consistent with international best practice. The Verona Principles stipulate: • a framework for pre-surrogacy arrangements involving a multi-disciplinary assessment and informed consent, to promote the rights of children and minimise risks of disagreement about legal parentage at birth, and • a post-birth 'best interests of the child' determination in proceedings concerning legal parentage where there have not been adequate pre-surrogacy arrangements.[95]

[87] Law Commission report 146, page 177.

[89] Oranga Tamariki submission to the Law Commission, as referenced in Law Commission report 146, page 175.

[95] Principle 5: Pre-surrogacy protections, Verona Principles.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
based on a child's best interests.	with the Verona Principles.[90] Criteria the Court considers when making a parentage order under the court pathway (supported by a social worker's report) focus on factors that protect the child's best interests and wellbeing, consistent with children as taonga and upholding children's rights. These include rights to identity, family, to be free from harm and to have their perspective considered. There would also be judicial discretion to consider other matters relating to the best interests of the child. Decision-makers in the ECART process (a step in the administrative pathway) are guided by principles in the HART Act. These provide the health and well-being of children are an 'important consideration'[91] (but not a paramount consideration). Other potential changes discussed in this RIS (such as new	child and the surrogate to focus on healing after childbirth.[92] In the administrative pathway, post-birth consent protects the surrogate's rights, particularly to bodily autonomy during the pregnancy. As noted above, the minimum period of seven days before a surrogate can provide consent allows time for the surrogate to rest and begin recovering from the immediate effects of birth and provide fully informed consent.[93] Surrogates in particular feel this may provide a sense of closure.[94] Providing intended parents guardianship rights enables them to care for and make decisions about the child in this interim period. Requiring post-birth consent may lead to some uncertainty for intended parents, and	Also consistent with: • principle 10, which provides that the surrogate is required to confirm or revoke consent post-birth.[96] • principle 17, which states that systems should be able to respond to sudden developments[97] (i.e. the court pathway is available in case of dispute or if intended parents do not or are unable to take the child into their care, for example). The approach to the child's parenthood at birth is consistent with existing rules of legal parenthood. It provides a process for transfer rather than changing how legal parenthood is attributed at birth.

[90] Principle 6: Best interests of the child.

[91] Section 4(a) Human Assisted Reproductive Technology Act.

[92] Submission of the Office of the Children's Commissioner to the Law Commission as referenced in Law Commission report 146, page 175.

[93] The New Zealand College of midwives highlight that the period immediately after birth is inappropriate for important decision-making. The surrogate should have time to rest and begin recovery from the birth before giving their consent. As referenced by Law Commission report 146, page 202.

[94] Law Commission report 146, page 177.

[96] Verona Principles 10.4-6: Determination of legal parentage at birth, by operation of law.

[97] Principle 17: Responding to unexpected developments in surrogacy arrangements.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
	ECART members focused on children's interests and a new HART Act principle focused on surrogate-born people's identity rights) would support ECART's focus on children's rights. Requiring the surrogate's consent post-birth promotes the child's best interests by providing confidence in the integrity of the surrogacy arrangement.	the process may continue to be perceived as an intrusion on parental responsibilities and the right to family life. However, this results from a balancing of the rights of participants involved. The court pathway provides an avenue if disputes or unanticipated issues arise. As part of its decision-making on legal parenthood, the court will take account of participants' intentions when entering the arrangement and any changes in circumstance after an arrangement is made.	Criteria that are considered when making a parentage order under the court pathway align law with other child-focused legislation and with international obligations.[98] The ethics approval process is well regarded by surrogates, intended parents, and professionals. There is no history of disputes where arrangements have been through this process.[99] The administrative pathway reduces duplication by enabling the ethics approval process to have a subsequent downstream effect on legal parenthood. The Family Court can provide an appropriate escalation pathway to consider the case with the most comprehensive information available. Family Court judges are experienced in making decisions in the best interests of a child. Provides for all scenarios that could arise in surrogacy arrangements, such as the death of

[98] As per Law Commission report 146, page 206: This list draws on the Verona Principles, the Commission's recommendations in 2005, the principles that guide decision-making under other child-centred legislation and approaches in other jurisdictions.

[99] Law Commission report 146, page 191.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
			an intended parent, surrogate, or child during an arrangement.
Option 3 - limited state intervention - Legal parenthood is transferred by way of law if ethics approval is received and the surrogate consents pre-birth to the transfer of legal parenthood. Agreements are enforceable.	- Supports children's best interests by allowing intended parents who are expecting to raise the child to be legal parents from birth. However, this approach does not provide a mechanism to resolve disputes or changes in circumstances after an arrangement is made. In such situations, the Family Court would not be able to intervene to make a determination in the child's best interests. Could be considered to amount to the sale of a child if reimbursement is also provided to the surrogate (even if this does not go beyond reimbursement of costs). The absence of a requirement for the surrogate's consent post-birth gives less	- - Provides certainty for all participants involved and requires no further action after birth. The ability to provide consent pre-birth reflects the intentions of the participants in entering a surrogacy arrangements. However, it does not protect the rights or mana of the surrogate, including to bodily autonomy during the pregnancy and postpartum.	- More light-touch approach unlikely to be sufficient to manage risks to participants involved. It is inconsistent with the general family law approach under which the state has an oversight role in determining core family relationships (like legal parenthood), in recognition of potential vulnerabilities of people involved. Does not align with international obligations or best practice. The Verona Principles state that the law should not allow contractual provisions to irrevocably determine legal parentage.[100] Significant concern has been raised internationally about the ability to decide parenthood on a contractual basis before the child is born.[101] May prevent New Zealand

[100] Principle 1.5: Consistent with the human dignity of the child, States should ensure that the law does not allow contractual provisions to irrevocably determine legal parentage or any other decisions regarding the status and/or care of a child in surrogacy

[101] As per Law Commission report 146, page 200: Committee on the Rights of the Child Concluding observations on the combined third and fourth reports submitted by the United States of America under article 12 (1) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography UN Doc CRC/C/OPSC/USA/CO/3–4 (12 July 2017) at [24]; Maud de Boer-Buquicchio Report of the Special Rapporteur on the sale and sexual exploitation of children, including prostitution, child pornography and other child sexual abuse material UN Doc A/HRC/37/60 (15 January 2018) at [68]; and UNICEF and Child Identity Protection Key Considerations: Children's Rights & Surrogacy (Briefing Note, February 2022) at 2.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
	assurance of the integrity of the surrogacy arrangement.		orders being recognised in other jurisdictions.

Recommended approach

100. We recommend Option 2. We agree with the Law Commission's recommendation that a bespoke regime for surrogacy is needed. Adoption law, even if modernised through the current review, is not fit-for-purpose for determining legal parenthood in surrogacy arrangements.

101. The two pathways are consistent with international obligations and best practice, in particular the Children's Convention and the Verona Principles. Allowing an administrative pathway to determine legal parenthood, where pre-conception checks have been completed, respects participants' intentions while providing important protections for participants' rights. This would reduce costs, delay, and duplication, and allow children to have a legal relationship with the intended parents earlier. It also allows intended parents to focus on bonding with the child and for the surrogate to focus on healing after childbirth. A post-birth consent requirement is consistent with protecting surrogates' rights and a child's best interests. The ethics approval process through ECART is robust and well regarded, with no history of disputes emerging from cases that have been through this process.

102. The Family Court process would be available in cases that do not meet requirements for the administrative pathway. This is consistent with family law approaches and international best practice which stipulate a 'best interests' assessment by a competent authority is required.[102] This pathway ensures there is oversight by the Family Court if there are significant changes in plans to care for the child. Family Court judges are well placed to consider these cases and determine the best interests of the child, supported by a social worker's report (discussed in the oversight section from page 27).

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[102] Verona Principles 10.7: 7A court or other competent authority of the State of birth shall, at a minimum, expeditiously conduct a post-birth best interests of the child determination in proceedings concerning legal parentage and/or parental responsibility or where child protection measures are being considered in domestic and international surrogacy arrangements where: a. there have not been adequate pre-surrogacy arrangements; or b. there is a conflict between the surrogate mother and intended parents(s) or between the intending parents after birth in regard to legal parentage or parental responsibility; or c. there are unforeseen developments, particularly where neither the surrogate mother nor intending parents are able or willing to care for the child, or information has subsequently come to light that may affect the child's well-being, such as indications of sale, exploitation and trafficking or other illicit activity.

103. We agree with the Law Commission's recommendations for how the provisions could operate if the child, intended parent, or surrogate dies before legal parenthood arrangements are finalised.[103] Allowing for legal parenthood to be transferred in cases where participants die before the surrogacy is finalised protects the intentions of participants. It also provides for the social significance of parental relationships to be recognised, and the benefits of a legal connection for genealogy and whakapapa to be recorded accurately. Such a change would address issues that resulted in the Paige Harris Birth Registration Act 2022[104] and support children's rights to identity.[105]

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[103] Law Commission report 146, recommendations 32 - 34.

[104] Paige Harris is a surrogate-born child whose intended mother died before she was born. Under the current law, her intended mother's name was unable to be recorded on her birth certificate as she had died prior to an adoption order being made. A private Act titled the Paige Harris Birth Registration Act 2022 was passed to add her mother's name to her birth certificate.

[105] Law Commission report 146, page 191.

Access to identity information

Surrogate-born people's access to identity information

Problem

104. As noted in an earlier section of this RIS, there is no single, centralised system that records information about surrogate-born people and their genetic and gestational origins and whakapapa. There are also gaps in the information that is recorded.

105. There is no legal requirement to record in the birth register that a child was born via surrogacy. A birth certificate issued ahead of adoption will record the surrogate and their partner as the surrogate-born child's parents. The birth certificate issued after the adoption will record the adoptive parents as the parents. There is provision for the birth certificate to note the parents are adoptive parents, but only on request of the adoptive parents or surrogate-born person.

106. Adopted people, including surrogate-born people who have been adopted by their intended parents, can access some information about the adoption under the Adult Adoption Information Act 1985. Once they are aged 20 or older, they can request a copy of their original birth certificate. Once an adopted person has received a copy of their original birth certificate, they can then apply to Oranga Tamariki for information about their birth parents. The Adult Adoption Information Act 1985 provides a statutory entitlement to searching and support for contacting other participants involved.

107. 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 gamete donor(s), including their name, and their date and place of birth. They may also be able to access information from a fertility clinic about the donor's ethnicity, any iwi affiliation, physical characteristics, personal and family medical history, and any genetic siblings if those siblings or their guardians give consent. Anonymous gamete donations are not permitted. A donor-conceived person accessing information must be advised of the desirability of counselling.

108. Every surrogate-born person has rights relating to identity, including the right to access information about their origins.[106] Elements of the law are inconsistent with these rights:

- the transfer of legal parenthood via adoption can obscure genetic and gestational origins and whakapapa.
- the state does not record comprehensive information about a surrogate-born person's origins. The birth register and HART Register do not record that a child was born as a result of a surrogacy arrangement and do not capture information

[106] See, for example, rights under the United Nations Convention on the Rights of the Child.

about the surrogate.[107] Only limited information may be available about their adoption.

- even if relevant information is available, a surrogate-born person can only access that information under the Adult Adoption Information Act once they turn 20. Information under the HART Act is available once they turn 18 (or from age 16 if the Family Court allows it). The Human Rights Review Tribunal has found the former age limit to be discriminatory and the Law Commission has criticised the latter as appearing to lack justification.[108]

Options analysis – surrogate-born people's access to identity information

Option 1 - Status quo and limited state intervention model – the state records information about donors and some information about adoption, and access to information is restricted by age.

Option 2 - Law Commission recommendation – information about surrogates is recorded in a state register and made available to surrogate-born people subject to limited exceptions under section 49 of the Privacy Act 2020 relating to a person's physical or mental health. This would mean information is recorded about domestic surrogacies occurring under the administrative pathway for determining legal parenthood and about domestic and international arrangements under the court pathway for determining legal parenthood. Additionally, a new principle is added to the HART Act requiring people exercising powers under the Act (including ECART and ACART) to be guided by the principle that surrogate-born people should be aware of their genetic and gestational origins and whakapapa, and be able to access information about those origins.

Options to deal with identity information in overseas surrogacy arrangements are discussed further from page 97.

The Law Commission also recommended a review of the birth registration system. It suggested one of the questions the review should consider is what information the birth register should provide about a child's origins. This RIS does not contain analysis of that recommendation as it relates to legislation administered by another agency (the Department of Internal Affairs).

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[107] If a surrogate undertakes a gestational surrogacy, they will not use their own ovum and would not be considered a donor and therefore would not be recorded in the HART Register. Where a surrogate uses their ovum, they would not be considered a donor because the HART Act defines a donor as a person from whose cells a donated embryo is formed or from whose body a donated cell is derived, and a donated cell is defined as an invitro human gamete.

[108] Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) .

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
Option 1 - Status quo and limited state intervention model - information about donors and some information about adoption recorded, and access to information is restricted by age.	0 The Law Commission's consultation suggested that many intended parents are, or plan to be, open with their children about surrogacy arrangements. Further, the Commission recommended that counselling, which is an integral part of the ECART, should address children's identity rights and the participants' plans for sharing identity information with the child. 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. Therefore some surrogate-born people may not know the full extent of their identity or whakapapa. In cases where a surrogate-born person has a genetic link to the surrogate, they may not have access to information relevant to their family medical history. This has the potential to affect their health and wellbeing and reduce their opportunities for any post-birth contact with the surrogate. It appears inconsistent with the Children's Convention, which imposes a duty on states to ensure that all children (including those	0 Identity records do not recognise a surrogate's role in the creation of the surrogate-born child, potentially diminishing their mana. Gives intended parents autonomy to determine what information is shared with their child.	0 The current law means that surrogate-born people and non-surrogate-born people may not have equal access to information about their gestational and genetic origins. Age restrictions on information access are inconsistent with domestic privacy settings, which provide rights to personal information subject to limited exceptions.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
	born through surrogacy) have access to all aspects of their origins.[109]		
Option 2 - Law Commission recommendation - information about surrogates recorded and available to surrogate-born people with limited restrictions, and new identity principle is added to the HART Act.	++ The state would record more gestational information to which surrogate-born people would have access, enabling a surrogate-born person wider access to information about their origins and whakapapa. This is likely to support their rights to identity under the Children's Convention. Where a surrogate-born person is genetically related to their surrogate, they will be able to access information about their surrogate's medical history and biological characteristics, to support informed medical decision-making and have a more tangible sense of their genetic history. A limitation is that surrogate-born people will still need to be aware of their birth origin to access the information, though the new principle and other proposed reforms should	+ Upholds the interests of the surrogate by recognising their role in the creation of the surrogate-born person. The proposed principle emphasises the importance of whanaungatanga and is mana-enhancing for all participants involved in the surrogacy.	++ Addresses gaps that exist within the HART Register. More consistent with the New Zealand Bill of Rights Act 1990, Te Tiriti, and international best practice, including the Verona Principles. Meets the needs and expectations of surrogate-born people as articulated in the International Principles for Donor Conception and Surrogacy.[111]

[109] Article 8, Children's Convention.

[111] International Principles for Donor Conception and Surrogacy (November 2019), principles 8–10. These principles were developed by a group of donor-conceived and surrogate-born people and presented to the United Nations.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
	encourage intended parents' to be open with their child about the child's origins.[110]		

Recommended approach

109. Consistent with the Law Commission's recommendations, we recommend Option 2. This would help reduce barriers to surrogate-born people accessing information integral to their identity and potentially to their long-term wellbeing. However, surrogate-born people will still need some awareness of their birth origin in order to know the register exists.

[110] For example, the new considerations that are proposed to apply under the court pathway include principles relating to a child's origins.

Support for surrogate-born people accessing identity information

Problem

110. The Law Commission recommended that the Government should consider ways to support people accessing information in its proposed surrogacy register. This section of the RIS provides detailed analysis of options considered to address this recommendation.

111. As noted above, there is limited state-recorded information available to surrogate-born people about their gestational and genetic origins. Should more information be recorded and made accessible by the state, the Government will also need to determine the nature of any support available to people accessing it.

112. Regulatory systems take differing approaches to support for people accessing identity information:

- The HART Act requires the Registrar-General to advise people accessing donor-related information of the desirability of counselling. There are no government-provided support services specifically provided for people accessing identity information relating to donor conception.
- The Adult Adoption Information Act makes more provision for support. Depending on the applicants' circumstances, the Act requires the Registrar-General to inform applicants of available counselling, to make access to information conditional on the applicants' receipt of counselling, or to offer to send relevant information to a nominated counsellor. Searching and support services, as well as counselling for accessing an original birth certificate, are provided by Oranga Tamariki. Government funding is also provided to access these services through community-based counsellors.

113. Research into the experiences of surrogate-born people is limited. However, counselling is widely understood to be a helpful support mechanism for some donor-conceived and adopted people seeking identity information. It is also consistent with the Verona Principles.

Options – support for surrogate-born people accessing identity information

Option 1 – Status quo – No legislative or government provision for support services for surrogate-born people accessing support

Option 2 - Amend the HART Act to provide that surrogate-born people accessing information must be informed that counselling may be desirable

Option 3 – Add a principle to the HART Act providing that support should be available for surrogate-born people accessing information

Option 4 – Amend the HART Act to require counselling to be undertaken before a person accesses identity information

Option 5 – Section (9)(2)(f)(iv) [redacted]

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
Option 1 – Status quo - No legislative or government provision for support services for surrogate-born people accessing information.	0 The lack of provision for age-appropriate services for surrogate-born people could impair their ability to realise their right to identity and understand whakapapa.	0 Absence of formal support could mean intended parents may need to play a greater role in providing support to surrogate-born people accessing information. It may also affect the likelihood of a surrogate-born person making contact with a surrogate.	0 International best practice is to provide support. The Verona Principles provide that states should ensure that a child born through surrogacy, or their representative, has access to identity information with appropriate guidance and counselling in accordance with his or her age and maturity. The absence of support is likely inconsistent with kaitiakitanga and manaakitanga in stewardship of the information. Inconsistent with similar regulatory regimes, which make legislative reference to support services for donor-conceived and adopted people.
Option 2 - Amend the HART Act to provide that surrogate-born people accessing information must be informed that counselling may be desirable.	+ Counselling is widely understood to be a helpful support mechanism for some donor-conceived and adopted people seeking identity information. The option would signal the potential value of counselling without mandating it, respecting the autonomy of surrogate-born people to choose whether they would like support.	0/+ May lead to a small reduction in the level of support intended parents may play in supporting surrogate-born people accessing information. It may marginally increase the likelihood of a surrogate-born person making contact with a surrogate.	+ More consistent with international best practice, as well as concepts of kaitiakitanga, manaakitanga. Would mirror an existing provision applying to donor-conceived people accessing information. The existing provision has not yet been used because there is only recently a cohort old enough to access the donor

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
	However, the option would not have any direct impact on the availability or accessibility of counselling.		register, so we do not know about the effect of the provision.
Option 3 – Add a principle to the HART Act that support should be available for surrogate-born people accessing information.	0/+ The option would require people exercising powers under the HART Act to take account of this principle. Lack of specificity may lead to inadequate or inconsistent support being provided.	0/+ May lead to a marginal reduction in the level of support intended parents may play in supporting surrogate-born people accessing information.	0 The principle would strongly communicate the significance of support, consistent with international best practice, kaitiakitanga, and manaakitanga. It would extend the Law Commission's recommendation that a principle be added to the Act stating that surrogate-born people should be aware of their origins and able to access identity information. However, the breadth of the provision means it could have an uncertain impact. It would apply to all people exercising powers under the Act and across the full scope of the surrogacy process, rather than specifically to the Registrar-General exercising powers with respect to identity information. Inconsistent with similar regulatory regimes, which make legislative reference to support services for donor-conceived and adopted people.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
Option 4 – Amend the HART Act to require that counselling must be undertaken before a person accesses identity information.	- As noted above, counselling is widely understood to be a helpful support for some people seeking identity information. However, this option is inflexible to individual circumstances and needs (compelling people to use a service in order to exercise their right to access information about themselves, regardless of their desire for the service), and to broader changes over time (e.g., as to the nature of support that is appropriate for people accessing information). Similar provisions in the Adult Adoption Information Act have been criticised.	0/+ May lead to a small reduction in the level of support intended parents play in supporting surrogate-born people accessing information, either because support services are accessed or a person chooses not to access information because of the counselling requirement.	- - An emphasis on counselling reflects best practice, but mandating counselling does not. There is a shortage of trained counsellors, and this requirement could lead to resources being diverted from areas of greater need.
Option 5 - Section (9)(2)(f)(iv) [redacted]	+ Section (9)(2)(f)(iv) [redacted]	+ Section (9)(2)(f)(iv) [redacted]	+ Section (9)(2)(f)(iv) [redacted]

Recommended approach

114. We recommend Options 2 and 5. This would complement the Law Commission's separate recommendations for fuller recording of information about surrogacy arrangements and allowing surrogate-born people to access that information with limited exceptions. These options recognise the utility of counselling as a support mechanism without mandating it. They would mean the two information regimes in the HART Act (for surrogate-born and donor-conceived people) would be consistent.

Financial support for surrogates

115. 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.

116. 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.

117. Being a surrogate comes with costs, but the law is unclear as to what, if any, financial support can be provided to them. 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 their costs, and
    - create barriers for people considering becoming surrogates. This risks in turn encouraging intended parents to use international arrangements.[112]

118. Some intended parents choose to cover some costs for their surrogate, but there is a risk that they may be in breach of section 14.[113] There do not appear to have been any prosecutions under the HART Act.

Options analysis

Option 1 - Status quo – 'Valuable consideration' is prohibited. Payments are expressly permitted to medical providers and legal advisers for a narrow range of costs.

Option 2 - Law Commission recommendation – 'Valuable consideration' continues to be prohibited. Extend the expressly permitted payments to include 'reasonable surrogacy costs' incurred. Additionally, provide a non-exhaustive list of permissible costs. The payment of costs would be enforceable, meaning a court can be asked to require participants to abide by any agreement between the participants to pay surrogacy costs.

Option 3 – Limited state intervention - Remove the prohibition on valuable consideration. Permit the payment of reasonable surrogacy costs incurred in relation to the surrogacy arrangement and additional payments to the surrogate over and above those costs. Make the payment of costs enforceable.

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112 Rhonda Powell "Exploitation of Surrogate Mothers in New Zealand" in Annick Masselot and Rhonda Powell (eds) *Perspectives on Commercial Surrogacy in New Zealand: Ethics, Law, Policy and Rights* (Centre for Commercial & Corporate Law, Te Whare Wānanga o Waitaha | University of Canterbury, Christchurch, 2019) 57 at 73–74. See also Debra Wilson and Julia Carrington "Commercialising Reproduction: In Search of a Logical Distinction between Commercial, Compensated, and Paid Surrogacy Arrangements" (2015) 21 NZBLQ 178 at 182, referenced in the Law Commission report, page 243.

113 Law Commission report 146, pages 241 – 242.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
Option 1 - Status quo – 'Valuable consideration' prohibited. Payments are permitted to medical providers and legal advisers for a narrow range of costs.	0 Restrictive approach to the payment of costs removes any risk an arrangement could constitute the sale of children under international human rights law and respects the child as taonga. May prevent the surrogate being compensated for resources that could benefit the child in gestation (eg, services recommended by a healthcare provider). People may be less willing to consider being a surrogate, meaning some intended parents may use overseas arrangements that have fewer safeguards for children's interests.	0 Creates uncertainty and stress for both intended parents and surrogates. Intended parents may take a conservative approach to reimbursing expenses, potentially leaving surrogates out of pocket. Potentially deters people from being a surrogate. Not allowing surrogates to be paid a fee reduces risks of exploitation, particularly of economically disadvantaged women. However, some view the prohibition as not respecting women's rights to bodily autonomy and to receive recompense for their role and the risks involved.	0 Law is unclear. Consistent with principle 15 of the Verona Principles, which states that states should prevent improper financial gain in connection with surrogacy.
Option 2 - Law Commission recommendation - 'Valuable consideration' prohibited. Expressly permitted payments include reasonable surrogacy costs incurred in relation to the arrangement. Costs enforceable.	+ Allows the surrogate to be compensated for products and services that could benefit the child in gestation. Could reduce stress on the surrogate, which would benefit the child.	+ Upholds rights and mana of surrogate by better ensuring they are not left out of pocket. Could reduce stress on the surrogate. Provides participants greater flexibility to agree arrangements that suit their particular circumstances. Better enables them to act in accordance with whanaungatanga and manaakitanga. Intended parents may feel more actively involved in the pregnancy.	+ Makes the law much more certain. Consistent with principle 14 of the Verona Principles, which provides that payments to surrogates must be regulated, non-excessive, and separated from the transfer of legal parenthood. Enforceability promotes the benefit of a written surrogacy plan being prepared early in a surrogacy arrangement, enhancing the certainty of arrangements.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
		People are likely to be more willing to be a surrogate, making it easier for intended parents to form surrogacy arrangements. Intended parents may face additional costs (noting many of the costs would be incurred by parents in a pregnancy that did not involve a surrogate).	While wider regulatory design supports strong pre-conception relationships and reduces the risk of non-payment, enforceability is likely to further reduce the risk that intended parents do not pay agreed costs.
Option 3 – Limited state intervention - Permit the payment of valuable consideration, including reasonable surrogacy costs incurred in relation to the arrangement and additional payments to the surrogate over and above those costs. Make costs enforceable.	- Allows the surrogate to be compensated for resources that could benefit the child in gestation. There is a risk that payments over and above reasonable costs are considered the sale of children under international human rights law, though this view is not universal. May be inconsistent with the view of children as taonga. Research is unclear as to the long-term impacts on children's wellbeing of commercial arrangements. May increase number of arrangements occurring outside intended parents' existing networks. This could reduce the likelihood of post-birth contact between the child and surrogate. However, wider regulatory design would continue to encourage a relationship being established between the intended	- Payment of reasonable costs upholds rights and mana of surrogate by better ensuring they will be reimbursed for their costs. Provides participants greater flexibility to agree arrangements that suit their particular circumstances, including to act in accordance with whanaungatanga and manaakitanga. Enforceability is likely to reduce any risk that intended parents do not pay agreed costs. The payment of additional costs risks commodifying surrogates and being exploitative, particularly for low-income groups. It may be considered inconsistent with their mana. Conversely, the payments may be viewed as consistent with a surrogate's autonomy to determine the use of their own body, and would provide fuller recompense for a valuable service, the medical risks, and impacts on their life.	- Would commercialise surrogacy and therefore constitute a radical change in public policy. More light-touch approach to regulation would not reflect the risks to participants' interests. Risks being inconsistent with the Children's Convention and Verona Principles. Could risk cross-border recognition of New Zealand's legal parenthood determinations.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
	parents and surrogate (e.g., ECART's expectations about a pre-birth relationship).[114]	Supports intended parents' ability to build a family as it is usually easier to find a surrogate in jurisdictions where valuable consideration is legal. Intended parents likely to face additional costs that may be prohibitive.	

Recommended approach

119. We recommend Option 2, consistent with the Law Commission's recommendations. This would remove one of the barriers to surrogacy arrangements and better safeguard participants' interests by ensuring surrogates are reimbursed for the costs they face. Enforceability is likely to reduce the (likely small) risk that intended parents do not pay the agreed costs.

[114] The level of contact between a surrogate-born child and a surrogate is largely dependent on the strength of the relationship between the surrogate and intended parents during pregnancy: Imrie S and Jadva V (2014) The long-term experiences of surrogates: relationship and contact with surrogacy families in genetic and gestational surrogacy arrangements. Reprod Biomed Online; 29:424–35.

International surrogacy

Problem

120. New Zealanders are increasingly entering surrogacy arrangements in other countries. This is driven by a range of factors, including greater availability of surrogates and donor material overseas. The Law Commission estimates that about 40% of surrogacies undertaken by New Zealand-based intended parents are international surrogacies. The most popular international surrogacy destination is the United States of America (specifically California).

121. There is no international instrument governing surrogacy, and countries regulate surrogacy and legal parenthood very differently. This can create problems when intended parents attempt to bring a surrogate-born child to New Zealand, as New Zealand may not recognise any legal relationship between the intended parents and surrogate-born child. Some international surrogacy arrangements may lack safeguards to protect the rights of the child, the surrogate, and the intended parents.

122. International surrogacy is not provided for in New Zealand law. Where a child has been born as a result of a surrogacy arrangement overseas, legal parenthood of the intended parents generally needs be determined through the adoption process. This is because the Status of Children Act recognises the surrogate as the legal parent, even if the intended parents are legal parents in the child's country of birth.[115]

123. A joint government agency approach has developed to enable parenthood to be determined where a child is born as a result of an international surrogacy arrangement. Government agencies engage with the family as early as possible and provide a briefing to the Minister of Immigration providing advice on the grant of a temporary visitor visa for the surrogate-born child. If granted, the parents and child can enter New Zealand. They can then apply for an adoption in the New Zealand Family Court. Visitor visas are usually valid for 12 months to allow the adoption application to be made.

124. 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). These include the following factors:

    (a) whether there is a genetic link between at least one of the intended parents and the child

    (b) the outcome that is in the best interests of the child

    (c) New Zealand's international obligations

    (d) the nature of the surrogacy arrangement (whether it is altruistic or commercial)

    (e) whether the intended parents intend to or have taken steps to secure legal parenthood or other legal rights in respect of the child in Aotearoa New Zealand

    (f) what the intended parents have done in the child's country of birth to secure legal parenthood or other legal rights in respect of the child

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[115] Sections 17–22 Status of Children Act 1969. The surrogate's partner will not be a legal parent if there is evidence that establishes that they did not consent to the assisted human reproductive procedure: sections 18 and 27.

(g) whether the applicants have demonstrated respect for the laws of the jurisdiction in which the surrogacy was carried out

(h) whether there is satisfactory evidence of informed consent from: (i) any gamete donors; (ii) the surrogate, for the surrogacy arrangement to take place; (iii) the surrogate and any partner, for the child to depart the country of birth and enter Aotearoa New Zealand; and (iv) the surrogate and any partner, for the child's adoption

(i) steps taken by the intended parents to preserve the child's identity

(j) whether the recognised authority of the birth country has agreed or objects to the child leaving the country permanently, and

(k) any other considerations that the Minister wishes to take into account.

125. A temporary second approach was created in response to COVID-19 (before expiring in late 2022). COVID-19 led to problems obtaining a passport for a child in their country of birth that would enable them to travel to New Zealand. 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).

126. The COVID-19 Protocol enabled the Family Court to consider adoption applications remotely. It also set out changes in the way social workers performed adoption assessments. For example, it allowed social workers to conduct interviews via audio visual link and stated that social workers' reports for the Court must cover the factors contained in the non-binding guidelines.

127. A number of issues have been highlighted with current law and practice:

- *Some international surrogacy arrangements may lack appropriate protections* for the child, the surrogate, and the intended parents. Children born as a result of an international surrogacy arrangement are at risk of a number of their rights not being met, including rights to identity, nationality, family life, health, freedom from discrimination and protection from abuse, exploitation, and sale. The Law Commission noted most of the international surrogacy arrangements over the past six years involved the use of donated gametes (79 out of 98), and in just under half of arrangements (48) the gamete donor was anonymous.[116] International arrangements may also involve greater risks for surrogates and intended parents.
- *Difficulty travelling to New Zealand* – As no legal parent-child relationship is recognised under New Zealand law until a child is adopted in New Zealand, citizenship cannot be confirmed for a surrogate-born child (unless the surrogate or their partner are New Zealand citizens). The 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, which can leave the child stateless. In these situations, the Department of Internal Affairs can use discretion to issue a Certificate of Identity (COI) to enable a child to travel to New Zealand. However, countries do not always recognise a COI as a valid travel document, resulting in families needing to take complex routes to New Zealand. Intended parents may face delays in

116 Law Commission report 146, page 43.

returning to New Zealand with the child if they do not start processes as early as possible. This may mean families need to remain overseas without family support.

- *The process to enable surrogate-born children to enter New Zealand risks blurring immigration and legal parenthood processes*. The Family Court makes its decision about an adoption application after an immigration process. This risks the Court's determination approaching 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 by the time an adoption application is made. A determination that the intended parents and the child's legal parents is therefore usually going be in the child's best interests.
- *Duplication in legal processes* – To establish a surrogate-born child's legal parenthood, intended parents may need to go through legal processes in the surrogate-born child's country of birth and in New Zealand. In some countries the process is similar to the adoption process in New Zealand.
- *The domestic adoption process that is used is not appropriate for surrogacy arrangements* (see the discussion of legal parenthood from page 49).

Options analysis: Accommodating international surrogacy arrangements

128. Most of the Law Commission's recommendations are designed to support intended parents to enter domestic surrogacy arrangements. However, some New Zealanders will continue to pursue international surrogacy, especially if they have a connection to another country, are unable to find a surrogate or gametes in New Zealand, or prefer a commercial surrogacy contract. The options below consider options for the law to respond to international surrogacy.

Option 1 - Status quo - keep using adoption under the Adoption Act

Option 2 - Law commission recommendation - accommodate international surrogacy within New Zealand law. The Family Court would determine the legal parents of the surrogate-born child under New Zealand law according to a determination of the child's best interests. This would involve the use of the court pathway that is recommended for use in domestic surrogacies (when the administrative pathway does not apply). This would replace the need for intended parents to adopt the child under New Zealand law.

Processes similar to those in the COVID-19 Protocol would be made permanent. This could involve expedited and remote processes before the surrogate-born child and intended parents return to New Zealand (e.g., priority scheduling, streamlined registry processes, remote witnessing of affidavits, and remote hearings).

Option 3 – Limited state intervention - automatically recognise legal parent-child relationships established in the surrogate-born children's countries of birth.

We considered but dismissed other options. New Zealand domestic law could go further to make it more desirable to engage in domestic arrangements. However, to do so could undermine the core ethical settings the New Zealand system is built on. The option of prohibiting international arrangements is unlikely to be effective in practice. In particular, prohibitions are very challenging to enforce, with experience indicating arrangements tend to continue to be unlawfully carried out overseas, with resulting issues about a child's rights to identity, family, and citizenship.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
Option 1 - Status quo - Keep using adoption under the Adoption Act.	0 The existing adoption process does not operate in the best interests of the child and is unsuited to surrogacy cases. However, some aspects uphold children's rights, including social workers providing an independent assessment of the intended parents. Social workers may also support intended parents' knowledge about children's rights to identity. The temporary nature of travel documentation can pose challenges crossing borders when intended parents seek to travel to New Zealand with a surrogate-born child.	0 Intended parents find the process unclear and uncertain.[117] Intended parents may face expense, delay, and stress engaging in similar legal processes in two jurisdictions. However, the process recognises that some international arrangements may lack adequate protections for the surrogate and the intended parents. The risks are likely to be greater in jurisdictions where surrogacy is not regulated or where safeguards are minimal.	0 The law does not produce the legal and social result intended in the case of surrogacy. Adoption fails to reflect the planned nature of surrogacy arrangements. The outcome of the adoption process risks becoming a foregone conclusion, as a child's best interests will almost always lead to the adoption order to be approved. The alternatives, such as returning the child to their country of birth, are unlikely to be in their best interests.[118] The process is complicated and takes time, requiring two decision-making processes: one to travel to New Zealand with the child and one to recognise legal parenthood once in New Zealand. However, this does provide intended parents a pathway to enter New Zealand with the surrogate-born child and seek a legal parenthood determination under New

[117] As cited in law Commission report 146, page 279.

[118] Law Commission report 146 page 278 and the Family Court Judges' submission to the Law Commission as cited by the Law Commission report 146, page 281.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
			Zealand law. The government can exercise an oversight role to mitigate, as much as possible, the risks international surrogacy poses to the child's rights in the absence of an international instrument.
Option 2 - Law Commission recommendation - Court pathway for determining legal parenthood in international surrogacy arrangements, with a special court process similar to the COVID-19 surrogacy protocol.	+ Family Court would have the opportunity to enquire into the circumstances of the surrogacy arrangement to protect children's best interests. This is necessary in an international context where some arrangements may lack adequate protections and place children at risk of exploitation.[119] The special court process could enable surrogate-born children to obtain New Zealand citizenship and enter New Zealand with intended parents shortly after birth, which promotes child's best	+ More expressly accommodates a pathway to legal parenthood for intended parents involved in an international surrogacy arrangement. Provides an opportunity for the Family Court to inquire into the circumstances and matters relevant to the interests of the intended parents and surrogate, including relevant consents. As with the option above, intended parents may face expense, delay, and stress engaging in similar legal processes in New Zealand as well as in the country of birth. However, the	+ Provides a clear process for a legal parent-child relationship to be determined through a New Zealand legal process at the earliest opportunity. Sets safeguards in accordance with international best practice by providing an opportunity to determine legal parenthood based on the child's best interest.[120] The complexity of legal issues arising from international surrogacy and the variability of the processes and practices warrant judicial scrutiny.[121] International best

[119] UNICEF and Child Identity Protection Key Considerations: Children's Rights & Surrogacy (Briefing Note, February 2022) as cited by Law Commission report 146 page 295.

[120] As noted by the Judges of the Family Court in their submission to the Law Commission, cited by Law Commission report 146 page 287.

[121] As highlighted by the New Zealand Law Society submission to the Law Commission, as cited by the Law Commission report 146, page 284.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
	interests and rights to identity, family life, nationality, and health. Alongside the Law Commission's other recommendations, a court process would allow for information to be preserved on the surrogacy birth register for the surrogate-born person, to the extent that information is known. Would simplify the process to determine legal parenthood in most international surrogacy arrangements. This would include ones that have features that pose risks to child's best interest e.g. use of anonymous donor material.	process recognises that some international arrangements may lack adequate protections for the surrogate and the intended parents. Continuing to enable families to engage with Oranga Tamariki prior to the child being born may limit any periods of delay. Intended parents and the surrogate may face delays if they do not begin the process early in the surrogacy.	practice necessitates an element of post-birth oversight. The approach reduces the risk a judicial decision is considered a fait accompli. A special court process enabling remote decision-making would mean the Family Court is the first decision-maker (rather than following an immigration decision). Criteria considered by the court in making its determination is suitably flexible to accommodate considerations relevant to an international context. Likely to be relatively fast and efficient. Assignment of social worker pre-birth is likely to improve efficiency by enabling information to be gathered before the child is born and reduce delay in the post-birth process. Judges have expressed a high level of confidence in Oranga Tamariki's involvement in international surrogacy and the value of the report provided as well as early intervention by social workers in reducing legal matters that would otherwise come before the court for determination.[122]

[122] Law Commission report 146, page 293.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
			A special court process would support streamlined consideration of international surrogacy arrangements. Process is well-regarded by those involved in the process including judges, participants, academics, and professionals.[123] Intensity of work undertaken in a short period requires resourcing from agencies to prioritise and support the special court process. Quality of evidence available from some jurisdictions may make determinations difficult in some circumstances. Remains a risk that courts are likely to need to make orders in a child's best interests even in the presence of other concerning aspects of an arrangement.[124] A special court process involving remote decision-making before a child returns to New Zealand could risk being perceived as overreach by New Zealand into another jurisdiction. The Family Court would be

[123] The Law Commission report 146, pages 287 and 299, which cites Margaret Casey "Changing practice in response to Covid-19: An evaluation of the temporary return pathway to New Zealand for international surrogate born babies" (2021) 23 The Family Advocate 26. A survey of members of the Family Law Section of Te Kāhui Ture o Aotearoa | New Zealand Law Society reported positively on the operation of the Covid-19 Protocol: Debra Wilson Survey of Lawyers on Their Experience with Surrogacy Arrangements During Covid (Te Whare Wānanga o Waitaha | University of Canterbury, 2021).

[124] Concern raised by some academic submitters as cited by Law Commission report 146, page 284.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
			making decisions about events outside New Zealand, about a surrogate-born child who is not connected to New Zealand under New Zealand law and who may not be connected to New Zealand under the law of the child's place of birth. Conversely, the Family Court would be enabling recognition in New Zealand of legal parenthood for the purposes of New Zealand law only. It would not change the child's status under other countries' laws.
Option 3 – Limited state intervention - Automatically recognise legal parent-child relationships established in surrogate-born children's countries of birth.	- Differences in regulation of surrogacy worldwide mean that some international arrangements may lack protections for the child, putting children at risk of a number of their rights not being met. This includes rights to identity, nationality, family life, health, freedom from discrimination, and protection from abuse, exploitation, and sale.[125] Having a simplified process for jurisdictions with similar regulatory	- Differences in regulation of surrogacy worldwide mean that some international arrangements may lack protections for the surrogate and the intended parents. An automatic process would provide greater clarity and assurance for intended parents (and the surrogate) that legal parenthood will be recognised. This could reduce stress and uncertainty for participants involved.[126]	- Automatic recognition would be unlikely to fulfil New Zealand's obligations under: • international human rights law, including to take appropriate measures to protect children from abuse and exploitation, and • the Verona Principles, which state that in international surrogacy arrangements where at least one state does not permit the specific arrangement, a 'best interests of the

[125] As highlighted by the Office of the Children's Commissioner and ACART submissions to the Law Commission: Law Commission report 146, page 284.
[126] Submission to the Law Commission as cited by Law Commission report 146, page 283.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
	regimes to New Zealand could encourage people to choose destinations that have a similar framework to New Zealand. However most New Zealanders who engage in international surrogacy do so in jurisdictions that are not comparable as surrogacy is more accessible elsewhere (eg, because commercial surrogacy is available elsewhere). There are few jurisdictions with similar regulatory regimes.	Intended parents would only need to go through one legal process to establish legal parenthood. As noted at left, a simplified process for jurisdictions with similar regulatory regimes to New Zealand could encourage people to choose destinations that have a similar framework to New Zealand. However most New Zealanders who engage in international surrogacy do so in jurisdictions that are not comparable as surrogacy is more accessible elsewhere (eg, because commercial surrogacy is available elsewhere). There are few jurisdictions with similar regulatory regimes.	child' determination should be conducted by a court or other competent authority of the state where the intended parents intend to reside with the child.[127] Recognising orders from some countries may be an appropriate step after an international instrument is developed.

Recommended approach

129. We recommend Option 2. This would mean that New Zealand accommodates international surrogacy within the court pathway the Law Commission has proposed for determining legal parenthood in domestic surrogacy cases. This ensures there is a process by which the legal parenthood of the child can be assessed, which is in a child's best interests. Judicial oversight provides the opportunity to inquire into the circumstances of the surrogacy arrangement on a case-by-case basis. This is consistent with international obligations and best practice.

[127] As highlighted by the Family Court Judges submission to the Law Commission: Law Commission report 146, page 284.

130. We agree with the Law Commission that adoption is not a suitable process for establishing legal parenthood in surrogacy arrangements, even if adoption law were reformed. We also agree that automatic recognition of other jurisdictions' legal parenthood orders would not be consistent with our international obligations, given the:

    - differences in regulation of surrogacy overseas, and
    - the importance of considering the best interests of the child and safeguards to protect against exploitation and commodification.

131. We see value in considering the outcome of the Hague Convention work (discussed at paragraph 35), but this is likely some years away. An international instrument could help set uniform minimum requirements for the regulation of surrogacy and recognition of legal parenthood to protect children, surrogate and intended parents' rights. This could provide confidence that recognising the legal relationship is in the child's best interests.

132. A special court process similar to the COVID-19 Protocol could provide a more streamlined process and more certainty for intended parents, and for best interests to be determined more quickly after the child is born. The COVID-19 Protocol is well-regarded by participants in surrogacy arrangements, judges, academics, and the legal profession as an efficient and workable process. Conducting as much of the process as possible pre-birth helps to improve efficiency of the post-birth process.

133. We agree with the value of using the COVID-19 Protocol as a base for the hearing process. The design of the process would need to take account of any risk other jurisdictions may perceive remote decision-making as overreach.

134. A few matters listed in the non-binding guidelines and the COVID-19 Protocol are not expressly reflected in the Law Commission's list of considerations that the Family Court should take account of when making a surrogacy order (recommendation 27, described in the legal parenthood section from page 49). We recommend these would sit better within the primary legislation, to be considered specifically for international cases.

Overseas surrogacy

135. The Law Commission recommended that further work be conducted on the recognition of legal parenthood in overseas surrogacy cases. This section of the RIS provides detailed analysis of options to do this.

Problem

136. Overseas surrogacies are surrogacies that occur outside New Zealand and that are undertaken by intended parent(s) who live overseas at the time the arrangement occurs. They differ from international surrogacy arrangements, under which intended parents live in New Zealand, engage in a surrogacy arrangement overseas, and bring that surrogate-born child back to live with them in New Zealand after the arrangement is concluded.

137. Legal recognition of a parent-child relationships brings a set of associated rights, duties and responsibilities under New Zealand law, which may include entitlements to citizenship or immigration status. New Zealand needs a process to verify the legal relationship between a parent and child in an overseas surrogacy case to determine a child's rights under New Zealand law. This will ensure the rigour of New Zealand law and ensure that surrogate-born people have the same rights as people born in other ways.

138. There are no specific laws determining how New Zealand authorities should treat foreign parentage orders or other legal parenthood documentation for surrogate-born people living overseas.[128] The processes used in practice are for the intended parents to adopt the child through the New Zealand courts, or for an overseas adoption or foreign court order determining legal parenthood to be recognised under section 17 of the Adoption Act.[129]

139. The Law Commission noted that requiring the intended parents to undergo a court process in New Zealand is not required to realise the child's best interests or fulfil international obligations (in terms of ensuring people habitually resident in New Zealand do not seek to bypass our laws or engage in poor practice overseas). In these cases, the intended parents have not travelled offshore for the surrogacy, do not intend to reside in New Zealand immediately after the child's birth, and have completed a legal process offshore. The application may be made years after the child's birth.

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[128] The Status of Children Act provides that the woman who gives birth to a child (and their partner if they have one) is the legal parent of that child, and that this is the case even if the intended parents are recognised as the child's legal parents in the country of birth. We understand this was intended to apply in situations where New Zealanders were travelling overseas to engage in artificial reproductive technology and surrogacy. It does not apply to children born overseas to parents who are habitually resident overseas and who are not New Zealand citizens (this would be inconsistent with international law principles and likely to be perceived as an intrusion into other jurisdictions). However, it is unclear if the law extends to overseas surrogacy cases involving intended parents who are New Zealand citizens.

[129] Most commonly these orders are recognised by Department of Internal Affairs to establish citizenship by descent. An application can also be made to the High Court for a declaration that an overseas adoption meets the requirements under section 17 of the Adoption Act, although we are not aware of this process being used.
An overseas adoption can also be recognised if it meets the requirements of section 17 of the Adoption Act 1955, if the adoption:

- is legally valid in the country it was made
- gives the adoptive parents greater responsibility for the child's day-to-day care than the birth parents, and
- is made in certain countries or gives the adoptive parents the same or greater inheritance rights than the birth parents.

Options for recognition process

Option 1 - Status quo – Administratively recognise legal parenthood arising from an overseas order under section 17 of the Adoption Act. A High Court determination is also available.

Option 2 - Recognise legal parenthood arising from an overseas order via an administrative process if (1) the intended parents were not habitually resident in New Zealand at the time of the arrangement and (2) appropriate overseas documentation is provided to evidence legal parenthood e.g. birth certificate, overseas court order.

Option 3 – Require a legal parenthood determination via the Family Court, with the process equivalent to the court pathway recommended above for legal parenthood determinations in domestic surrogacy arrangements.

Option 4 - Recognise legal parenthood arising from an overseas order through an administrative process guided by set criteria.

Potential criteria, which could be used in combination with the administrative options above:

- 4A The surrogacy arrangement is in the child's best interest
- 4B Recognise orders from comparable jurisdictions or prevent recognition of an order from specified countries (e.g., those with a lack of regulation)
- 4C Overseas legal parenthood documentation is final and legally valid in the jurisdiction where it was issued
- 4D The child does not have a legal parent-child relationship with the surrogate
- 4E Relevant consents were obtained
- 4F A genuine parent-child legal relationship (as per New Zealand's definition) was created between surrogate-born child and intended parent, and day-to-day care sits with the legal parents and has from birth (or soon after)
- 4G The child has a genetic link to parents or there is proof donor material was legally provided
- 4H Evidence of satisfactory police and child protection checks from the child's country of birth
- 4I The parents and child were not habitually resident in New Zealand when the arrangement was undertaken.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
Option 1 - Status quo – administratively recognise orders under section 17 of Adoption Act. A High Court determination is also available.	0 Adoption is unsuitable for surrogacy cases for a range of reasons explored in other options analysis in this RIS. A little uncertain for children. Risks being discriminatory towards some children on the basis of where they were born.	0 Lower stress for intended parents, as the criteria appears to be a low bar and simple to understand. The process does not provide safeguards, eg in relation to consents. Arguably a little uncertain for intended parents who may enter the process unsure of whether their legal parenthood will be recognised.	0 The process is flexible and accommodating of different or changing circumstances. However, adoption is unsuitable to manage surrogacy cases for reasons explored in other options analysis. Law Commission noted the overseas adoption pathway is rarely used in the context of overseas surrogacy. The Law Commission is not aware of the High Court process ever being followed, suggesting it may not be appropriate or feasible as a pathway.
Option 2 - Recognise legal parenthood through an administrative process if (1) intended the parents were not habitually resident in New Zealand at the time of the arrangement, and (2) appropriate documentation is	- A risk to child safety if the surrogacy or transfer of legal parenthood has not had central oversight or lacked comprehensive safeguards. Potential for child exploitation and trafficking.	0 Recognises parenthood orders without administrative barriers that can be burdensome for intended parents. Does not provide any protection for surrogate.	- Inconsistent with international best practice. A 'habitual residence' test would help distinguish between overseas surrogacy and international surrogacy arrangements.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
provided to evidence legal parenthood.			
Option 3 - Court process: require legal parenthood determination via Family Court.	+ Oversight and scrutiny by the court can be a protective factor for a child's safety and be in the welfare and best interests of the child. However, level of risk present may not justify judicial oversight and be unsettling for children (who face a court process to confirm their only known parental relationship).	0 Court process can be lengthy, which is likely to be a frustrating and duplicative process for intended parents with entirely legitimate arrangements (particularly if the child was born years before). May be challenging for New Zealand citizens habitually resident overseas to navigate the court system. Supports rights of surrogates by ensuring scrutiny of the arrangement i.e. that the child has not been trafficked from them, though potentially to be unsettling if the Court does not determine the intended parents to be legal parents.	0/- The Family Court is well practised at looking at such cases and is seen as a legitimate process by many. However, agencies – like the Department of Internal Affairs - have established processes for managing such cases. May create additional and unnecessary costs for parents to undertake this process and create a barrier to citizenship. An additional level of scrutiny may be appropriate in more difficult cases where information may be lacking for an administrative process. A best interests determination would be consistent with the Verona Principles. Practical difficulties in historical cases with gaining information after the passage of time.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
			Routinely applying this level of scrutiny to legal relationships recognised by another jurisdiction, where the participants are habitually resident in that jurisdiction, could be considered inappropriate and unnecessary, and overreach by New Zealand.
Option 4: An administrative pathway that allows overseas surrogacies to be recognised where specified criteria are met.	+ Ensures that the applicants complied with the rules in the overseas country and that the overseas country was satisfied that the applicants were suitable to become the child's legal parents. This is an important requirement to ensure that New Zealand does not recognise illegal arrangements or facilitate the abduction or trafficking of children.	+ Administrative processes may be a lower-stress option for intended parents.	+ Better reflects the realities of surrogacy arrangements. A 'habitual residence' test would help distinguish between overseas surrogacy and international surrogacy arrangements. Provides for verification of circumstances of surrogacy arrangement to help protect against trafficking, without requiring scrutiny of other jurisdictions' decisions about their residents sometimes years after the fact.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
			Administrative processes will need to be undertaken by an agency with resource and expertise.
Option 4 potential criteria:			
4A Consideration of whether the surrogacy arrangement is in the child's best interest.	0 Protects children's rights and interests because it is an explicit safeguard/consideration of what is best for them. However, it may not be a necessary or practical assessment. May undermine children's rights to citizenship if New Zealand refuses to recognise the child's relationship with their (often genetic) intended parents.	0 Risks being considered discriminatory treatment without evidence to justify the level of scrutiny.	- Arguably unnecessary given the surrogacy occurred when the participants did not have a connection to New Zealand and may have occurred some years ago. Likely to have limited utility as it is likely that it will always be found that it is in the child's best interest to have their relationship with the intended parents recognised. It would be an inappropriate intrusion into other jurisdictions' (often historical) decision-making and would also be practically difficult to administer. May affect international relations if New Zealand is seen to be scrutinising decisions of other jurisdictions particularly in this way.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
			Level of risk may not justify the level of intrusion. Common assessment used domestically. However, would be a very difficult criterion to use in an administrative process.
4B Recognise orders from certain jurisdictions.	+ Could be a protective factor for children who are being trafficked from countries known for such occurrences. However, the lack of an international instrument may mean it is challenging to identify which jurisdictions' orders should be recognised as containing safeguards in the best interests of children.	+ Lack of international instrument may mean it is challenging to identify which jurisdictions' orders should be recognised as containing safeguards for participants. Could provide a straightforward and certain process for intended parents with orders obtained in recognised countries. Where jurisdictions' orders are not recognised, a court process would be required which would appropriately provide a greater level of scrutiny. Could be discriminatory towards people living in different countries.	- Administrative ease and a degree of certainty. Possibly inflexible with inconsistent regulation. Would require frequent review to ensure accurately reflects regulatory conditions overseas. May have an effect on international relations. May be something to consider when an international instrument is developed.
4C The legal parenthood documentation is final and legally valid in the jurisdiction where it was issued.	+ Good safeguard for trafficking.	+ Simple criterion for intended parents to understand. Same requirement as applies to other people seeking to verify	+ Provides a level of scrutiny to assure the validity of documentation.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
		parenthood relationships eg, in citizenship applications. It may not be possible to determine parenthood if arrangements were undertaken in jurisdictions where surrogacy is not encouraged/permitted. However this would mean a court process (if available) would be required which would appropriately provide a greater level of scrutiny. May not be sufficiently protective of rights due to lack of consistency in regulation of surrogacy overseas.	Could be practical difficulties determining in some cases, particularly if relying on historical documentation.
4D Child does not have legal parent-child relationship with surrogate.	- May not be culturally appropriate in cases where a surrogate may have an ongoing role in a child's life.	- Element of protection for both surrogates and intended parents as the legal relationship is clear. The intended parents' parenthood will not be recognised, to the detriment of the surrogate. May be difficult to prove in some situations (e.g. if child is never a child of the surrogate, child's relationship to surrogate won't be terminated by an overseas court). Could be difficult if the child is born in a	0 May be difficult to determine depending on the regulation of surrogacy in the relevant jurisdiction.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
		country that does not sever the legal relationship with the surrogate.	
4E Relevant consents were obtained	+ Protects the child against exploitation and trafficking by ensuring the appropriate consents were obtained to the arrangement and to recognise the intended parents' legal parenthood.	+ Protects both the surrogate and the intended parents with a record of official processes to engage in the relationship and relinquish parenthood of the child. However, may be difficult to determine the validity in some circumstances and could be distressing for both intended parents and surrogates to have their consents questioned possibly many years later. Would be an additional level of intrusion into the legal documentation about the surrogacy.	+ Good if the documents are available, but a more difficult criterion to meet over time. Could be difficult to determine validity in some cases.
4F Genuine parent-child legal relationship (as per New Zealand's definition) created between surrogate born child and intended parent and that day-to-day care rights sit with the legal parents and have from birth (or soon after).	+ Provides assurance of the child's legal parenthood connections, which is in their best interests.	0 Element of protection for both surrogates and intended parents as the legal relationship is clear. Similar requirement as applies to other people seeking citizenship. However, it could require a more extensive assessment that could make it more difficult for families with surrogate-born children to use citizenship and immigration pathways, when	- Good safeguard created. May be difficult to prove in situations where countries do not allow surrogacy. May be seen as looking behind the decision-making of the overseas jurisdiction.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
		compared to children born via other means. May be difficult to prove in situations where countries do not allow surrogacy.	Would be challenging to administer.
4G Child has genetic link to parents or proof donor material was legally provided.	0 Safeguard against trafficking. Requiring (and preserving) evidence of a child's biological connections could also be consistent with meeting the child's identity rights. However, would treat surrogate-born children differently by requiring assessment of their biological connections to intended parents.	- Intended parents may feel like the legitimacy of their relationship is being questioned if there is a lack of a biological connection. May be an additional cost if this information is not already available and verifiable. Does not appear to be justifiable to prevent against trafficking.	0 Creates a burden to provide evidence that may not be justified. Intended parents may not have access to sufficient evidence to meet this criterion. May be particularly difficult to locate for historical cases.
4H Satisfactory police and child protection checks from country of origin.	0/- Would breach children's rights to citizenship if confirming citizenship was contingent on this requirement. Children are entitled to New Zealand citizenship regardless of the behaviour of their parents. Could uphold children's rights to be free from harm, but there is no evidence to suggest this level of intervention is justified.	- Intended parents likely find this invasive and discriminatory without evidence to justify the requirement. Likely to create additional costs for parents to obtain this information.	- Likely to be difficult and time-consuming to gather the information. It would be practically difficult to assess and there would be limited avenues to act on any concerns should they be identified. May not align with the New Zealand Bill of Rights Act.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
4I The parents and child were not habitually resident in New Zealand.	+ Important to distinguish between international surrogacy and overseas surrogacy to ensure correct pathways are followed with appropriate safeguards for children being applied.	0 Requires more scrutiny of the background of the intended parents than currently applies. However, this is justifiable to ensure appropriate pathways (and their relevant safeguards) are followed. Provides less certainty for intended parents as to what pathway they'll need to go down. Operational guidance is therefore an important mechanism to provide clarity for intended parents (as well as for the agency making decisions).	+ Allows for a broad factual inquiry into the specific circumstances of each case, which provides flexibility in determining the intended parent(s)' genuine home. 'Habitual residence' is a well-established term used by New Zealand courts. More feasible to assess whether the intended parent(s) are not habitually resident in New Zealand, rather than determining where they are habitually resident overseas. This reflects the practical difficulties involved in accessing overseas information. For the purposes of distinguishing between overseas and international surrogacy arrangements, there is little value in distinguishing where the intended parent(s) resided overseas as it would be inconsequential if they were transient when they were overseas.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
			Would require operational guidance to support the application of the consideration

Recommended approach

140. We recommend options 4 (C, E, I) and 3:

- An initial assessment of whether the parents and child were *not* habitually resident in New Zealand when the arrangement was undertaken
- If they are confirmed *not* to have been habitually resident, the administrative pathway would allow overseas surrogacies to be recognised where:

  i. the legal parenthood documentation is final and legally valid in country where it was issued, and

  ii. relevant consents were obtained at the time of the surrogacy.

141. There would be options to seek a declaratory judgment or a parentage order through the courts (if the matter is within the court's jurisdiction) when arrangements are unable to be recognised through administrative process

142. We recommend using a ‘habitual residence’ test as an initial filter to distinguish between overseas surrogacy and international surrogacy arrangements for citizenship purposes, to ensure that each type of surrogacy follows the appropriate process with suitable safeguards.

143. An administrative pathway is well suited to the majority of these cases. It would provide assurance of the integrity of the arrangement, while recognising the autonomy of individuals living in different jurisdictions and respecting the legal framework of those jurisdictions.

144. The option of a determination provides an escalation pathway should the criteria for an administrative pathway not be met. This allows for greater scrutiny in cases where there may be concerns about the legality or authenticity of the arrangement. However, it would also be more time intensive and costly and may be considered intrusive by the family. This is justified to protect children’s rights, welfare, and best interests.

145. If an international instrument is developed as part of the Hague Conference’s work on legal parenthood, further consideration should be given to how overseas legal parenthood determinations can be recognised in the future.

Identity information captured through the recognition of overseas surrogacy

Problem

146. As part of recognising surrogacy arrangements for citizenship purposes, there is an opportunity to preserve relevant information on the surrogacy birth register. This would help protect surrogate-born people's rights to know their gestational and genetic origins. This type of information currently is not recorded.

147. The options do not include a status quo option as there is no current comparable mechanism for recording this type of information.

Options analysis: Capturing identity information provided through the process for recognition of overseas surrogacy for citizenship purposes

Option 1 – Record information (to the extent it is known) where it is provided through the administrative recognition pathway

Option 2 - Actively collect information such that recorded information is equivalent to that recorded in relation to surrogacies in which legal parenthood is determined through the New Zealand administrative and court pathways.

Option 3 - Additional information invited to be provided on a voluntary basis.

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
Option 1 – Record information (to the extent it is known) that is provided through the administrative recognition pathway	+ Upholds children's rights to identity by recording information about their genetic and gestational origins to the extent known (only limited information may be provided).	0 Limited information would be available through the administrative recognition pathway, potentially only the name of the surrogate through the proof of consent. May be viewed as an overreach by the state into the private affairs of individuals who were living overseas.	0 Cannot be assured of accuracy of information, meaning some caveats would attach to the information. Assessment via the administrative recognition pathway is focused on verifying the legal parenthood relationship, not on ensuring some of the detailed information that may be present in documents is accurate (e.g. surrogate's hair colour).
Option 2 - Actively collect information such that recorded information is equivalent to that recorded in relation to surrogacies in which legal parenthood is determined through the New Zealand administrative and court pathways.	+ Upholds children's rights to identity by actively seeking and recording information about their genetic and gestational origins. However, unclear how effective this would be in practice as limited information may be available and may be difficult to find.	- Intended parents and surrogates likely to feel gathering information for this purpose is unnecessary for the primary purpose of recognition of parenthood.	- Likely to be very difficult and resource intensive to inquire into arrangements to gather information particularly in historical cases. Cannot be assured of accuracy of information.
Option 3 - Additional information invited to be provided on a voluntary basis.	+ Upholds children's rights by providing an opportunity for further information about their genetic and gestational origins to be collected and stored.	0/+ Some intended parents may welcome the opportunity to record information for their child, particularly in the case that they pass away before being able to provide all the	0 Not necessary for the primary purpose of recognising the relationship for citizenship purposes, but allowing for it on a

	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
		information to their child. However, unclear if there would be much uptake.	voluntary basis helps to link identity provisions. Cannot be assured of accuracy of information.

Recommended approach

148. We recommend Option 1, requiring information be recorded (to the extent it is known) where it is provided through the administrative recognition pathway.

149. We recognise that this could be an opportunity to preserve further relevant information, to align with the rights of surrogate-born children in New Zealand. However, any additional requirements to gather information through this process would be unnecessary for the primary purpose of recognising legal parenthood, be very difficult and resource intensive to attempt to gather, could be considered invasive and to intrude on regulatory arrangements in other jurisdictions.

Additional policy changes that would support wider reform

150. The Law Commission recommended additional changes that could be progressed under either of the alternative system design options discussed in this RIS. This options analysis table briefly assesses each of these options.

Law Commission recommendation	Upholds children's rights, interests, and dignity as paramount	Upholds rights, interests, and dignity of other participants	Consistent with good regulatory practice
Oversight of surrogacy arrangements			
ECART review – provide a right of review for any decision by ECART in relation to a surrogacy arrangement.	0 May produce a very small increase in the proportion of New Zealand parents pursuing domestic rather than international arrangements, which may protect children's rights	+ Facilitates the ability of intended parents to pursue opportunity to have a family through domestic surrogacy. May produce a very small increase in proportion of New Zealand parents pursuing domestic rather than international arrangements, which may protect participants' rights	+ Consistent with principle that when legislation provides for decisions that significantly affect individual interests there should generally be an opportunity to review decisions. This enables errors to be corrected and helps maintain public confidence in decision-making. ECART's decisions meet this criterion as they may end a person's pathway to having children.
ECART annual report – ECART should prepare an annual report on its operations.	+ Greater transparency helps maintain public confidence in the ethics approval process and assists with research and evaluation, supporting longer-term process improvements.		
Determining legal parenthood			
Status of surrogate's partner - remove the current presumption that a partner of a surrogate is a surrogate-born child's legal	+ It is not in the child's best interests that one of their only legal relationships is with the partner of a	+ Removes a presumption that is not consistent with intentions of participants in surrogacy arrangements	+ The change will reframe the law so that it better achieves its original intent. The law was designed to clarify legal parenthood in

parent. Under the Status of Children Act, the surrogate's partner (if they have one) is a legal parent of a surrogate-born child unless there is evidence that they did not consent to an assisted human reproductive procedure.	surrogate, who has no intention to raise the child themselves		situations involving donor gamete conception, not surrogacy. It will make the law clearer. There are examples of the law being misapplied, with intended fathers, rather than the surrogate's partner, being recorded on the child's birth certificate as the child's legal father ahead of any transfer of legal parenthood.
Financial support for surrogates			
With the exception of reimbursement for lost earnings, payments to the surrogate for reasonable surrogacy costs should not be treated as income for the purposes of social security entitlements. Surrogates should be exempt from work-preparation and work-test obligations after birth.	+ Allows the surrogate to be compensated for further resources without affecting any entitlements. This could benefit the child if it meant the surrogate was more comfortable accepting financial support for things that would benefit the child (eg, nutritional support, additional care)	+ Allows the surrogate to be compensated for further resources without affecting any entitlements. This could benefit the child in gestation. Provides for period of recovery after birth. People may be more willing to be a surrogate, making it easier for intended parents to form surrogacy arrangements.	+ Provides clarity as to the interaction of laws. Consistent with principle 14 of the Verona Principles, which provides that payments to surrogates must be regulated. Opportunities to extend the scope of amendments to ensure consistency in approach to similar entitlements and similar groups, and to further clarify the law, as noted below.

151. In support of the final proposal in the above table, we consider it would be helpful, for consistency, to additionally provide that:

- payments for surrogacy-related costs do not affect financial assistance the Ministry for Social Development administers on behalf of other agencies and to apply aspects of the changes to groups in a situation similar to surrogates, and
- exempt people who have just given birth (both surrogates and others) from work-preparation and work-test obligations for a specified period.

What are the marginal costs and benefits of the option?

Affected groups	Comment *Nature of cost or benefit (e.g., ongoing, one-off), evidence and assumption (e.g., compliance rates), risks.*	Impact *$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts.*	Evidence Certainty *High, medium, or low, and explain reasoning in comment column.*
Additional costs of the preferred option compared to taking no action			
Regulated groups: a. Surrogates b. Intended parents	a. More surrogates are likely to enter the ECART process, with associated time commitment and process requirements (the costs are usually covered by intended parents). However, going through ECART will usually mean not engaging with the court process to seek the transfer of legal parenthood. Some surrogates may object to identifying information being added to the surrogacy register (although this is not expected to be a common response). b. Increase in costs, time commitment and process requirements pre-conception for intended parents using ECART who wouldn't have under the current law. However, as noted above, going through ECART will usually mean a court process is not needed to seek the transfer of legal parenthood. There will be costs to the intended parents to advertise, however this is voluntary. The clarification of costs that can be paid to the surrogate may result in more being paid to the surrogate, although the costs would be mutually agreed by the intended parents and surrogate and are not a requirement.	Low-medium. Costs to intended parents are likely to largely balance out, with most arrangements going through either the ECART or court process which are expected to be broadly similar in cost. Intended parents are likely to have costs in the following ranges: Completing ECART process: approximately $5,000[130] Completing court process for determining legal parenthood: to be confirmed.	Medium/high certainty. Options development was based on a thorough Law Commission review, including potential impacts on regulated groups (noting the constraints on analysis mentioned from page 4)

[130] This figure is reached by adding the approximate cost in legal fees ($1,400 to $2,000) and the administration cost of $3,400 for processes undertaken ahead of applying to ECART. ECART itself does not charge a fee.

Affected groups	Comment *Nature of cost or benefit (e.g., ongoing, one-off), evidence and assumption (e.g., compliance rates), risks.*	Impact *$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts.*	Evidence Certainty *High, medium, or low, and explain reasoning in comment column.*
		May be comparable to the current adoption process, which costs approximately $3,000 - $10,000[131] Financial support for the surrogates will vary from case to case, but has the potential to be high (e.g. it could include reimbursing up to three months in wages lost as a result of taking leave for medical reasons associated with the pregnancy and/or for the birth).	
Regulators (including Oranga Tamariki, the Department of Internal Affairs, etc) and the Family Court	Expenses in regulating surrogacy agreements are likely to decrease in some areas and increase in others. Potential for increased costs for ECART due to the new responsibilities and the potential for higher caseloads.	Family Court and ECART: small change in costs. Oranga Tamariki: low. The preferred option will reframe	Medium. Similar existing agency functions provide a reasonably strong evidence base for

[131] Reflecting legal fees. Figures based on anecdotal figures from legal practitioners. There would not be a court fee for these applications.

Affected groups	Comment *Nature of cost or benefit (e.g., ongoing, one-off), evidence and assumption (e.g., compliance rates), risks.*	Impact *$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts.*	Evidence Certainty *High, medium, or low, and explain reasoning in comment column.*
	Assuming that most domestic surrogacy arrangements meet the conditions for the administrative pathway, a decrease in Family Court caseload – and therefore costs - is expected. However, the Family Court will gain the ability to use more tools, including court-appointed experts and an expanded range of specialist reports. These are expected to be used infrequently. Oranga Tamariki will have reframed responsibilities as a result of legislative changes. Any new costs are expected to be met within baselines. Section (9)(2)(f)(iv) [redacted]	its responsibilities and costs will be met within baseline. Section (9)(2)(f)(iv) [redacted]	estimating impacts of the changes. While surrogacy use is trending upwards, the increase is not consistent, making calculating costs somewhat uncertain. There are also challenges forecasting the proportion of participants likely to use the ECART vs the Family Court pathway for legal parenthood, which also creates some uncertainty about where costs will fall.
Others (e.g., wider govt, consumers, etc.)	If more surrogacy arrangements volunteer to apply to ECART, the increased caseload may slow down the ECART process for other assisted reproductive procedures.	Low (quantifiable, non-monetisable at this stage). Scale of impact will depend on resourcing decisions.	Low. There are a large number of interacting factors that will influence the actual outcome.

Affected groups	Comment *Nature of cost or benefit (e.g., ongoing, one-off), evidence and assumption (e.g., compliance rates), risks.*	Impact *$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts.*	Evidence Certainty *High, medium, or low, and explain reasoning in comment column.*
Additional benefits of the preferred option compared to taking no action			
Regulated groups: a. Surrogate-born people b. Surrogates c. Intended parents d. All	a. Processes have been designed to prioritise the best interests of children, including in arrangements for their conception and post-birth arrangements, the protection of their identity information, and a clear and more certain pathway for their legal parenthood to be determined. b. People who want to be surrogates will have a clearer path to becoming one. For surrogates in traditional surrogacy arrangements who are newly part of the ECART process, the ECART process will help identify and manage any risks to them in the process. Intended parents' clearer understanding of their financial entitlements may result in them feeling more confident to contribute to surrogates' costs. The process for determining parenthood will be more certain and simpler, and better align with surrogates' expectations. Using the administrative parenthood pathway will mean avoiding the Family Court. There is a slightly greater potential for contact with the surrogate-born person if information about the surrogate is included in the surrogacy register. c. Being able to pay for advertising may increase the likelihood of finding a surrogate. Intended parents can more confidently contribute financially to the surrogate. Assuming that most domestic surrogacy arrangements meet the conditions for the administrative parenthood pathway, there could be a decrease in the time and stress currently associated with the court process for determining legal parenthood. In the administrative pathway a new safety check will replace the suitability assessment, and the process will better reflect the intention of the participants with intended parents being guardians	Medium/high (non-monetisable and unquantifiable)	Medium/high certainty. Options development was based on a thorough review, including potential impacts on regulated groups (noting the constraints on analysis mentioned in from page 4)

Affected groups	Comment *Nature of cost or benefit (e.g., ongoing, one-off), evidence and assumption (e.g., compliance rates), risks.*	Impact *$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts.*	Evidence Certainty *High, medium, or low, and explain reasoning in comment column.*
	of the child after birth. There will be a clearer and more efficient process for international surrogacy. d. May be greater public confidence in the surrogacy process. May increase societal acceptance of surrogacy as a form of family building.		
Regulators (including Oranga Tamariki, the Department of Internal Affairs, etc). and the Family Court	Assuming that most domestic surrogacy arrangements meet the conditions for the administrative parenthood pathway, a decrease in Family Court caseload – and therefore costs - is expected. However, the Family Court will gain the ability to use more tools, including court-appointed experts and an expanded range of reports. These are expected to be used infrequently. Reduced responsibilities for key agencies in international cases could reduce their costs. Oranga Tamariki responsibilities will continue, as it will still be preparing reports for the Family Court and managing referrals as it does under the status quo.	Low. It is expected that the change in costs will be small.	Medium. Reasonably strong evidence base for estimating impacts, noting there is some uncertainty due to challenges forecasting the proportion of participants likely to use the ECART vs the Family Court pathway for legal parenthood While surrogacy use is trending upwards the increase is not consistent, making calculating costs somewhat uncertain.
Others (e.g., wider govt, consumers, etc.)	The status of the surrogate's partner will be clearer and better reflects that they do not have a central role in the arrangement.	Status of surrogate's partner: high, from a legal perspective as this removes a legal	Partner: High. The views reflected in the Law Commission's report are

Affected groups	Comment *Nature of cost or benefit (e.g., ongoing, one-off), evidence and assumption (e.g., compliance rates), risks.*	Impact *$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts.*	Evidence Certainty *High, medium, or low, and explain reasoning in comment column.*
	The law will be consistent with the reasonable expectations of New Zealanders regarding the regulation of surrogacy	status that they generally do not appear to want. Expectations of New Zealanders: low. Not a system many engage with, but feedback suggests support for reform.	from engaged groups, but consensus was quite clear that the status quo needs to change. Expectations of New Zealanders: Medium, evident from survey results and submissions to the Law Commission.[132]

[132] Canterbury University: Part two: Understanding the experience and perceptions of surrogacy through empirical research 3. EmpiricaResearchFinalPart3.pdf (canterbury.ac.nz)

Section 3: Delivering an option

How will the new arrangements be implemented?

Access to surrogacy

152. The Ministry of Health will administer a government website that is a centralised, official and up-to-date source of information for those considering entering a surrogacy arrangement. Other agencies – particularly Oranga Tamariki, DIA and the Ministry of Justice – are expecting to contribute content.

Oversight

153. The Ministry of Health will:

- provide secretariat support to ACART and ECART and support ECART in its expanded role
- provide administrative support to any panels set up to review an ECART decision
- manage any recruitment required to meet new membership requirements and to resource the review panels, and
- support the review and updating of ACART surrogacy guidelines.

Determining legal parenthood

154. The Ministry of Health will support the ACART and ECART changes necessary for the new administrative pathway for legal parenthood, as outlined above. The Department of Internal Affairs will be responsible for developing the statutory declaration of surrogate consent to support the administrative pathway.

155. The Family Court is responsible for determining legal parenthood under the court pathway. Oranga Tamariki will support the Court by preparing social worker reports. This will involve a reframing of the existing social worker input into the court process for adoptions.

156. The Department of Internal Affairs will be responsible for enabling the recording any changes in legal parenthood in the birth register.

Identity information

157. The Department of Internal Affairs will be responsible for establishing systems to record surrogacy information, release information in response to requests, and publish information about the number of surrogacy arrangements recorded on the surrogacy register and the number of requests for access to the register. ACART, ECART and the Registrar-General will need to take account of the principle that surrogate-born people should be made aware of their origins as part of their decision-making.

Financial support

158. The Ministry of Business, Innovation and Employment and the Inland Revenue Department are publishing guidance clarifying that surrogates are entitled to paid parental leave on the same basis as other pregnant people.

159. The Ministry of Social Development will be required to make changes to its IT system to implement amendments to social security entitlements in cases where financial support is provided.

International surrogacy and overseas surrogacy

160. Oranga Tamariki will continue to prepare reports for the Family Court and manage referrals.

161. The Department of Internal Affairs will continue to use processes that expedite the creation of a child's passport after a parentage order is issued in international surrogacy arrangements.

162. The Department of Internal Affairs and Immigration New Zealand will have roles under the proposed administrative process for recognising legal parenthood in overseas surrogacy arrangements. They may use the process when determining a surrogate-born person's eligibility for New Zealand citizenship or whether parents have permission to bring a surrogate-born child to New Zealand.

Timing

163. Implementation will be phased in and transitional arrangements can be created where necessary. We expect a 12-month implementation period will be required before the bulk of legislative changes come into force.

Implementation dependencies and risks

164. Dependencies and risks associated with the preferred approach include:

- The success of some legislative changes is dependent on resourcing (for example, to manage any increase in volumes in the ECART process)
- It is hard to judge how many people will use the ECART and court pathways (in particular, how many arrangements will voluntarily go through ECART, and how many will go through ECART and also use the court for a parenthood determination). Additionally, while surrogacy use is trending upwards, the increase is not consistent. Implementation planning has used the upper end of volume estimates to determine the future system capacity that may be required.
- It may be difficult to recruit members with relevant expertise to the ethics committees and proposed review panels. Experience indicates the required expertise is challenging to recruit. As discussed above, the recommended legislative design will avoid the risk that recruitment challenges prevent the committees operating. However, there will be a risk (which also exists currently) that committees may lack some of the expertise that would support multidisciplinary decision-making about assisted reproductive procedures and research.

How will the new arrangements be monitored, evaluated, and reviewed?

165. Objectives for reform are:

- intended parents and surrogates have a clearer and more certain process for building a family via surrogacy
- the rights and interests of people involved are protected, particularly those of surrogate-born people, and
- surrogacy law supports the Crown to uphold its obligations under te Tiriti o Waitangi.

166. There are no plans for a formal evaluation of the new surrogacy regime after enactment. However, we consider the following measures will help identify whether the objectives of the reform are being achieved. Some of these measures are likely to signal a need for closer examination, rather than providing direct evidence of problems or that objectives are being achieved.

***Objective one**: intended parents and surrogates have a clearer and more certain process for building a family via surrogacy*

167. The following data collection and reporting systems will be able to give an indication of the success of the amended surrogacy regime in creating a clearer and more certain process for participants.

- Timeliness
    - Wait times for ECART decisions
    - Data about court disposal timeframes
- Process is easy to understand
    - Engagement with government website containing surrogacy information
    - Early engagement between intended parents and regulating agencies in international surrogacy arrangements
- Ease of forming arrangements
    - A change in the proportion of surrogacy arrangements being formed with family and friends versus being formed with surrogates who were not known to them before the arrangement may indicate the impact of advertising changes
- Satisfaction with the process
    - Content of ECART complaints and feedback
    - Use of the proposed ECART review process
    - Rates of voluntary engagement with ECART by non-clinic assisted traditional surrogacy arrangements
    - Feedback to Oranga Tamariki via its compliments, complaints and suggestions process.

***Objective two**: the rights and interests of people involved are protected, particularly those of surrogate-born people*

168. The following data collection and reporting systems will be able to give an indication of the success of the amended surrogacy regime in protecting the rights and interests of people involved in surrogacy arrangements. However, some information is likely to be anecdotal evidence from regulators.

- Participants generally (surrogate-born people, surrogates, and intended parents)
    - Minutes from ECART meetings indicating decisions to decline or defer due to risks in proposed arrangements
    - Rates of ECART accepting, deferring, or declining cases

- Content of ECART complaints and feedback
- The proportions of arrangements going through the court pathway and the administrative pathway to establish legal parenthood
- Rates of voluntary engagement with ECART by non-clinic assisted traditional surrogacy arrangements
- Parties going to court to enforce payments to the surrogate
- Prosecutions for payments in surrogacy arrangements
- Whether ACART and ECART have updated their non-legislative terms of reference in respect of Māori and medical membership

- Surrogate-born people
  - Numbers of requests for identity information
  - Oranga Tamariki's use of the second stage of the ECART assessment.

***Objective three**: surrogacy law supports the Crown to uphold its obligations under te Tiriti o Waitangi*

169. The following data collection and reporting systems will be able to give an indication of the success of the amended surrogacy regime in terms of honouring te Tiriti and accommodating Māori participation in surrogacy.

- Whāngai arrangements coming through ECART and being approved
- Whether ACART and ECART have updated their non-legislative terms of reference in respect of Māori membership
- Numbers of requests for identity information.