LAWS582 – Payment and Reciprocity in Surrogacy Arrangements

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New Zealand's surrogacy regime is currently subject to reform, some 20 years since the enactment of the Human Assisted Reproductive Technology Act 2003. Section 14, which imposes a broad but unclear restriction on payments in surrogacy arrangements intended to codify New Zealand's position against commercial surrogacy, is being considered amongst these reforms. Under the current section 14, the broad scope of criminalisation creates a presumption that costs associated with a pregnancy ought to fall where they lie, and as a result surrogates risk material disadvantage by entering into a surrogacy arrangement. This paper considers the policy rationale for section 14 at its time of drafting, and how altruistic surrogacy and commercial surrogacy, have and continue to be understood (at both a policy and layperson level). Understanding these is necessary to provide insight into how section 14 has been interpreted and adhered to, and what measures might be necessary in reforming this to ensure support is actually made available to a surrogate.

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I. Introduction

The Human Assisted Reproductive Technology Act 2004 (**HART Act**) was enacted nearly 20 years ago. This followed a protracted process, despite the legislature's awareness in 1997 that New Zealand was "probably one of the last Western jurisdictions to develop our own law in respect of human-assisted reproductive technology, and in that respect we have a significant gap".[1] The first "test tube baby" was born in 1978,[2] the first successful cloning of livestock occurred in 1996,[3] and more locally, in 1984 the first New Zealand child was born via in vitro fertilisation.[4] In light of this, the HART Act would not generally be considered proactive in codifying a framework for use of assisted reproductive technologies.

The HART Act contains several explicit purposes. In addition to providing a "robust and flexible framework for regulating and guiding the performance of assisted reproductive procedures",[5] the HART Act contains an explicit prohibition on "certain commercial transactions relating to human reproduction".[6] This prohibition operates through sections 13 and 14, which relate to the commercial supply of human gametes or embryos, and commercial surrogacy respectively.

This paper focuses on the latter. Section 14 creates an offence for a person to give or receive, or agree to give or receive, valuable consideration either for their, or the facilitation of any other person's participation in a surrogacy arrangement.[7] Notwithstanding specific carve outs for payments by intending parents to providers of services relevant to the surrogate's

[1] (23 April 1997) 559 NZPD 1228.
[2] Compare Mark Henaghan, Ken Daniels and John Caldwell "Family law policy and assisted human reproduction" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 237 at [6.1].
[3] The Roslin Institute at the University of Edinburgh "The Life of Dolly" Dolly the Sheep @ 20 < https://dolly.roslin.ed.ac.uk/facts/the-life-of-dolly/index.html>.
[4] Georgina M Chambers, Paul Lancaster and Peter Illingworth "ART Surveillance in Australia and New Zealand" in Dmitry M Kissin (ed) *Assisted Reproductive Surveillance* (Cambridge University Press, Cambridge, 2019) 142 at 142; see also Michael Legge and Ruth Fitzgerald "Does the Human Assisted Reproductive Technology Act 2004 need a review" (2021) 17 PQ 79.
[5] Section 3(d).
[6] Section 3(c).
[7] Section 14(3).

pregnancy (including payment for legal advice to a surrogate),[8] in practice section 14 has largely resulted in uncertainty on what may or may not be paid for.[9]

In the context of a growing push to review the regulatory framework for surrogacy[10] and calls from inside the House placing this on the policy agenda,[11] this paper focuses on payments within a surrogacy arrangement. I seek to present a compelling and coherent policy rooted in the perspective, that where there is inevitably a cost to pregnancy, these losses should not be surrogates' to assume. To this end, the law must not only allow for costs to be met by intending parents, but advocate for as necessary within the context of a surrogacy arrangement. In making this point, I consider the development of the current regulatory system, its reception, and how these factors have been impacted by gendered expectations of surrogates to act selfless and potentially to their detriment. From here, I consider recent policy proposals, their ability to give effect to our international obligations and creating a sustainable framework that would not risk codifying a tolerance for disadvantaging surrogates.

II. The cost of pregnancy

This paper's approach rests on the proposition that there is benefit derived from any wanted pregnancy, which in turn comes at a cost to the person bearing the pregnancy. While this statement may seem so obvious it goes without saying, it is not a value neutral proposition. There is a fraught history of devaluing socially feminised labour and contributions generally perceived as "women's work".[12]

[8] Section 14(4).
[9] Law Commission *Te Kōpū Whāngai | Review of Surrogacy* (NZLCR 146, 2022) at [6.18] and following; Rhonda M Shaw and Hannah Gibson "Kelly Needs a New Coat: Views on Compensating Altruistic Surrogacy in Aotearoa New Zealand" (2022) Social Res Online 1 at 7.
[10] See Law Commission above n 9; see also Debra Wilson, Annick Masselot and Martha Ceballos "Who are my parents? Why New Zealand's 'creaky' surrogacy laws are overdue for major reform" *The Conversation* (online ed, Christchurch, 10 September 2021); compare Johnny Blades "Parliament comes together to address an injustice" *Radio New Zealand* (online ed, New Zealand, 27 February 2022) discussing the need for Parliament to pass an Act to remedy issues arising from the adoption process required in surrogacy arrangements.
[11] See Improving Arrangements for Surrogacy Bill 2021 (72-1).
[12] See Jane Parker and Noelle Donnelly "The revival and refashioning of gender pay equity in New Zealand" 62 J Ind Relat 560; compare New Zealand government recognition of this in the Equal Pay Amendment Bill (103-2) (select committee report).

From this perspective, the context of a surrogacy arrangement raises two key inter-related questions. One, how far the costs associated with pregnancy extend; and two, which of these costs a surrogate should be left to absorb, by virtue of the fact that they bear that pregnancy. Both of these factors are influential on how the relationship between parties to a surrogacy arrangement is understood, and what obligations could be seen to arise from this. This further impacts the question of what costs intending parents could be "reasonably" [13] requested and expected to meet.

A. How far do these costs extend?

Historically here pregnancy has been seen by some as a "biological truth" of womanhood and a natural part of life, there has been some reluctance to acknowledge the cost it comes at.[14] The impact of this is significant in surrogacy where some of these costs are likely to be displaced from intending parents and met out-of-pocket by a surrogate. There are costs that are clearly incurred and monetarily quantified at the point of expenditure for the purpose of reimbursement by intending parents. However, even recognising the scope of what arises from a pregnancy can be a contentious matter. Further complicating things are the broader losses experienced, but are not incurred as expenses and therefore capable of reimbursement. For example, lost earnings and lost *potential* earnings that are not so easily quantified or considered.

This section aims to consider some of the costs (incurred and as opportunity cost) that may fall to a surrogate pursuant to a surrogacy arrangement. This is important to illustrate the extent of disadvantage allowed for under the current section 14 and contextualise the need for reform.

[13] See HART Act, section 14; compare the definition given under International Social Services *Principles of the protection of the rights of the child born through surrogacy (Verona Principles)*, Geneva, 2021 at 7.
[14] See Kate Galloway "Theoretical Approaches to Human Dignity, Human Rights and Surrogacy" in Katie O'Byrne and Paula Gerber (eds) *Surrogacy, Law and Human Rights* (Ashgate Publishing, Surrey, 2015) 13 at 20 and following.

1. Costs *incurred*

Inarguably, pregnancy carries incurs expenses. This is a medical event, and while New Zealand has a degree of free or subsidised maternity related services, these are not universally available nor do they cover all aspects. For instance, ultrasound scans are excluded from public funding.[15] Should private maternity care be pursued, this comes as a further expense. Additionally, there is the cost of maternity healthcare services, day to day expenses such as maternity clothes, neonatal vitamins and special groceries. These have been giving varying legal recognition in comparable as permitted costs for reimbursement arising from surrogacy arrangements. Canada recognises each of these costs as resulting from pregnancy in a surrogacy arrangement.[16] In contrast, no Australian state permits (and therefore accounts for the causal effect) the costs for groceries or maternity clothes to be reimbursed by intending parents.[17]

Further to the expenses associated with *any* pregnancy, where a surrogacy may require AHR, this cost also becomes relevant (to the extent public funding is unavailable).[18] A surrogacy arrangement may also be subject to legal fees. There is the cost of legal assistance both in facilitating the change in legal parenthood through adoption, which arises in any surrogacy arrangement. Additionally, there is the cost of both surrogates and intending parents receiving legal advice, which is a required pre-cursor to the use of AHR being approved for surrogacy.[19]

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[15] Ministry of Health: Manatū Hauora "Pregnancy services" (2 August 2018) < https://www.health.govt.nz/new-zealand-health-system/publicly-funded-health-and-disability-services/pregnancy-services>.

[16] Compare Assisted Human Reproduction Act SC 2004 (Canada), section 12; see also Reimbursement Related to Assisted Human Reproduction Regulations SOR/2019-193 (Canada), reg 4; see also Health Canada *Guidance Document: Reimbursement Related to Assisted Human Reproduction Regulations* (30 August 2019).

[17] See Law Commission *He Puka Kaupapa | Issues Paper 47: Te Kōpū Whāngai: He Arotake | Review of Surrogacy* (2021) at [6.42]; see also Surrogacy Act 2010 (NSW), section 7; see also Assisted Reproductive Treatment Regulations 2019 (Victoria), regulation 11; see also Surrogacy Act 2010 (Queensland), section 11; see also Surrogacy Act 2012 (Tasmania), section 9.

[18] Compare Te Whatu Ora Health New Zealand | Te Toka Tumai Auckland "Fertility Plus: Public Funding" (2022) <https://nationalwomenshealth.adhb.govt.nz/our-services/fertility/public-funding/>.

[19] Advisory Committee on Assisted Reproductive Technology *Guidelines for family gamete donation, embryo donation, the use of donated eggs with donated sperm and clinic assisted surrogacy* (Wellington, September 2020) at [D].

2. Costs *realised* but not incurred

Pregnancy also gives rise to lost earnings, both before and after birth. While New Zealand's Parental Leave and Employment Protection Act 1987 (**PLEP Act**) provides for a degree of support and job security, its effectiveness in a surrogacy arrangement is uncertain.

The PLEP Act provides for ten days' unpaid special leave available to pregnant employees.[20] This is available for "reasons connected with her pregnancy".[21] Should additional time off work be required or wanted so a pregnant person is not obliged to work until delivery, the PLEP Act does not reserve any further leave, whether paid or unpaid. Accordingly, someone's entitlement to further relief would be dependent on her employer's parental leave policies and whether they have added to the statutory entitlements.

Following delivery of a child, the PLEP Act provides for primary carer leave (previously "maternity leave").[22] It is understandable that the bulk of support is available only following birth: this reflects the underlying purpose that parental leave addresses both post-delivery recovery (both physiologically and psychologically), and childcare.[23] Primary carer leave is available broadly to the woman who has given birth, her spouse or partner, or whoever (other than these people) has assumed responsibility for "permanent primary responsibility for the care, development, and upbringing of a child".[24] Despite the broad classification of *who* may access parental leave, a single primary carer who will be entitled to primary carer leave and parental leave payments must be nominated despite multiple people qualifying for this.[25]

Despite the broad ambit of what constitutes a "primary carer", whether a surrogate who is not taking time off work for the purpose of childcare can access parental leave, carries uncertainty.[26] Assuming parental leave is theoretically available to surrogates, the need to

[20] Section 15.
[21] Ibid.
[22] See the Parental Leave and Employment Protection Amendment Act 2016, section 16 repealing the "maternity leave" provisions limited by gender and replacing them with the broader "primary carer" provisions.
[23] See Paul Callister and Judith Galtry "Paid parental leave in New Zealand: a short history and future policy options" (2006) 2(1) Policy Quarterly 38.
[24] PLEP Act, section 7(1).
[25] Ibid. section 7(2).
[26] See Law Commission above n 9 at [8.7] for discussion on this point.

nominate a single primary carer means there is a restriction on intending parents and surrogates receiving parental leave payments concurrently. This restriction on double payments has been critiqued as it leaves a surrogate's access to PLEP Act entitlements dependent on reaching an agreement with intending parents.[27] Presuming childcare would be prioritised over rest and recuperation, a surrogate is assumedly required to draw on sick leave, ACC cover (if available at all),[28] or other reserves of leave where unable to work after delivery. However, should this be relied on then full extent of protections under the PLEP Act are not accessible. Namely, there is no presumption of job security available to a surrogate.[29]

3. Costs in *future*

Further complicating things is the question of what extent time off work may have on vertical mobility and future earning potential. It is already understood that time off for ongoing child care does impact this, where the broadening availability of parental leave has been considered as a means to mitigate the gender pay gap.[30] In light of this, it seems inconsistent to not consider pregnancy to have a similar impact on someone's future earnings. Pregnancy is a significant medical event generally requiring time off from work (noting that publicly funded maternity care is available for six weeks following delivery).[31] If there were complications with the pregnancy or birth necessitating further time off, this adds to that impact.

4. Priceless costs

This paper does not attempt to quantify the broader impact (such as the physical and emotional cost) a surrogacy may have on a surrogate, and undertaking this endeavour may

[27] Annick Masselot and Ira Schelp "Parental Leave and Surrogacy: Caring is Everything" in Annick Masselot and Rhonda Powell (eds) *Perspectives on Commercial Surrogacy in New Zealand: Ethics, Law, Policy and Rights* (Centre for Commercial and & Corporate Law, Te Whare Wānanga o Waitaha | University of Canterbury, Christchurch, 2019) 137 at 147 and following.

[28] See Accident Compensation (Maternal Birth Injury and Other Matters) Amendment Act 2022 amending the definition of "accident" pursuant to section 25 of the Accident Compensation Act 2001 to include certain injuries incurred during birth that previously were excluded; but see Simon Connell "ACC birth injury changes cause for pause" *Newsroom* (online ed, New Zealand, 29 September 2022) raising the question of whether the extended definition goes far enough the expanded definition is still limited to discrete injury types.

[29] PLEP Act, section 40 and following.

[30] See Callister and Galtry above n 23 at 44.

[31] See Ministry of Health "Maternity care" (12 January 2021) < https://www.health.govt.nz/your-health/pregnancy-and-kids/services-and-support-during-pregnancy/maternity-care>.

not be appropriate where it straddles the boundary of between altruistic and commercial surrogacy.[32] Notwithstanding this, is necessary to acknowledge and address that surrogates do take on a significant burden for intending parents.

Clearly there has been regard for the significant psychological cost that may accompany surrogacy. The existing legislation provides for the cost of counselling[33] and the current guidelines for surrogacy approvals require this counselling to have been received by the parties involved.[34] Considering this, while there has been concern that a loosening of restrictions would incentivise surrogacy as a form of passive income, [35] arguably this cannot reasonably be held. Though minimising the loss or out-of-pocket costs a surrogate might bear may mitigate any economic disadvantage experienced, this is not the same as turning a profit. Perceiving a change to allow for support as enough to entice someone to act as a surrogate who may not have considered it otherwise overlooks the broader impacts of surrogacy that undoubtedly bear into decision making.

In contrast, the surrogacy regime in Israel specifically recognises "pain and suffering" as a compensable category (alongside reimbursement of expenses incurred from a surrogacy), subject to authorisation by a statutory committee.[36] These payments present a point of tension in considering commercial and altruistic surrogacy. The Hague Conference's preliminary report on issues arising from international surrogacy arrangements, it was suggested that compensation for "pain and suffering" could be a fee for gestational services in disguise.[37]

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[32] See Hague Convention on Private International Law above n 36 at [i].
[33] See HART Act, section 14(4)(a)(ii).
[34] See generally Advisory Committee on Assisted Reproductive Technologies *ACART Advice and Guidelines for Gametes and Embryo Donation and Surrogacy* (Wellington, June 2021); see also Advisory Committee on Assisted Reproductive Technologies above n 19 at [I].
[35] Compare Margaret Brazier, Alastair Campbell and Susan Golombok *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation* (Department of Health and Social Care, 1 October 1998) at [4.19].
[36] Embryo Carrying Agreement Act (Agreement Authorization & Status of the Newborn Child), 5756-1996 (Israel), section 6 cited in Sharon Shakargy "Israel" in Katarina Trimmings and Paul Beaumont (eds) *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing, Oxford, 2013) 231 at 238; see also Hague Convention on Private International Law Preliminary Document No 10 of March 2012 for the attention of the Council of April 2012 on General Affairs and Policy of the Conference "A Preliminary Report on the Issues Arising from International Surrogacy Arrangements" at 18.
[37] Hague Convention on Private International Law above n 36 at [i].

B. Who should bear the costs?

Where intending parents do not directly the costs discussed above, there is then a question of who should be absorbing them and what role policy has in effecting this. This is especially relevant where the current standard is one of "reasonableness": what is reasonable in the eyes of the law is engendered by contemporary norms and inherently ideological.[38]

Acknowledging this, I contend the question of who should bear the cost is impacted by various significant factors. These are:

(a) that pregnancy is regarded as a natural part of women's work (to the exclusion of recognising its significant cost[39] and such naturalisation engenders reluctance to address resulting inequalities; and

(b) the binary way in which surrogacies are described as either "altruistic" or "commercial",[40] which does not adequately reflect the interpersonal relationships existing within and underpinning any surrogacy arrangement.[41]

1. Legally requiring redistribution of costs

Policy that would require, or even request, the costs of "womens' work" to be accounted for risks hugely disrupting entrenched inequality. Given the inequitable outcomes may not be universally perceived, such large changes may not be considered necessary and therefore not politically popular. Without political buy in for change, issues may continue and tolerance for inequality risks becoming entrenched.

[38] See generally Joanne Conaghan "Gender and the Jurisprudential Imagination" in *Law and Gender* (Oxford University Press, Oxford, 2013) 155.
[39] Anca Gheaus "The normative importance of pregnancy in surrogacy contracts" (2016) 6 Analize Journal of Gender and Feminist Studies 20.
[40] See generally Sigrid Vertommen and Camille Barbagallo "The in/visible wombs of the market: the dialectics of waged and unwaged reproductive labour in the global surrogacy industry" (2021) ahead-of-print RIPE 1.
[41] See Jenny Gunnarsson Payne, Elzbieta Koroklczuk and Signe Mezinka "Surrogacy relationships: a critical interpretive review" (2020) 125 Upsala Journal of Medical Sciences 183.

As an example of this, consider how it was not until 2020 that the Equal Pay Act 1972 was amended to provide a pathway for pay equity claims on a macro level (in respect of undervaluation of female dominated professions) rather than on a micro level (to individuals).[42] This policy intervention came several years following the Court of Appeal's landmark affirmation that considering "equal pay" requires having regard to "any systemic undervaluation of the work derived from current or historical or structural gender discrimination".[43]

More recently, the accident compensation scheme was amended only in 2022 to allow for a range of birth injuries to be considered "accidents" for the purposes of cover.[44] This would help bridge a $1,000,000,000 annual pay-out gap between the genders through addressing the exclusion of cover in an area primarily negatively affecting women.[45]

I consider that the redistribution of costs in surrogacy is equally affected by the slow pace at which reform for gendered inequity moves. Fortunately, the recency of the reforms referenced above is promising for the purposes of any proposal that costs be shifted from a surrogate to intending parents, or met by other means. There appears to be a shift in social appetite towards recognising and accounting for gaps in the system to allow for a fairer outcome.

2. The "*altruistic*" / "*commercial*" dichotomy

Surrogacy arrangements are generally understood as either "altruistic" or "commercial".[46] Internationally these terms have been given the following definitions:[47]

[42] See Equal Pay Amendment Act 2020.
[43] See *Terranova Homes and Care Ltd v Service and Food Workers Union Nga Ringa Tata Inc* [2014] NZCA 516 affirming *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd* [2013] NZEmpC 51.
[44] See Accident Compensation (Maternal Birth Injury and Other Matters) Amendment Act 2022 extending the definition of "accident" under the Accident Compensation Act 2001 to cover injuries from an internal source.
[45] Accident Compensation (Maternal Birth Injury and Other Matters) Amendment Bill 2021 (103-2) (select committee report) at 6.
[46] See generally Law Commission above n 9; see also International Social Services *Principles of the protection of the rights of the child born through surrogacy (Verona Principles)*, Geneva, 2021.
[47] International Social Services above n 46 at page 7.

Altruistic surrogacy	A surrogacy arrangement is where there is no payment to the surrogate mother or, if there is payment, it is only for reasonable expenses associated with the surrogacy.
Commercial surrogacy	Commercial (or for profit) surrogacy exists where the surrogate mother agrees to provide gestational services and/or to legally and physically transfer the child, in exchange for remuneration or other consideration. One indication of commercial surrogacy is the involvement of for-profit intermediaries.

These understandings are accepted in New Zealand at an academic level, with the Law Commission's recent report on surrogacy (**Surrogacy Report**) adopting definitions to the same effect.[48] While the definitions above are generally accepted at an international and policy guidance level, the words themselves bear moral connotations capable of superseding their actual technical meanings. In practice and under the layperson's commonly held understanding of those terms, arguably the two terms seem diametrically opposed and bearing differences greater than the profiteering aspect. Where "altruism" is synonymous with selflessness and benevolence and seen as *good*, in contrast commercial surrogacy bears *bad* associations, these moral connotations drive understandings of each form of surrogacy further apart and incapable of reconciliation.[49]

The juxtaposition created by framing non-commercial surrogacy as "altruistic" inherently creates an that association that something is done selflessly and significantly, and is a *gift* to intending parents.[50] Despite the development of a special meaning for contemporary purposes, early United Kingdom policy guidance on payments in surrogacy arrangements advocated for surrogacies to be underpinned by a "gift relationship".[51] The importance of this cannot be overstated. While the operation of gifts, as a mode of shaping social and family life has been considered in surrogacy where researched from an anthropological

[48] See generally Law Commission above n 10.
[49] See Heléna Ragoné "The Gift of Life: Surrogate Motherhood, Gamete Donation and Constructions of Altruism" in Rachel Cook, Shelley Day Sclater and Felicity Kanagas (eds) *Surrogate Motherhood: International Perspectives* 209 (Hart Publishing, London, 2003) at 215 and following.
[50] See generally Janice G Raymond *Women as Wombs: Reproductive Technologies and the Battle over Women's Freedom* (Spinifex Press, Wellington, 1993).
[51] See Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework* (NZLC R65, 2000) at 569, citing Brazier et al above n 35 at 38.

perspective,[52] arguably the underlying principle of reciprocity is lost where hard altruism takes hold.[53] An example of this can be seen where altruistic surrogacy has been critiqued where it may encourage "emotional coercion".[54] Altruistic surrogacy has also been perceived as relying on and reinforcing gendered norms of self-sacrifice, such that a woman may feel morally obliged to act as a surrogate without asking for financial support from intending parents.[55] This moral criticism is also magnified where requests for assistance risks conflation with commercial surrogacy, which in turn attracts concerns of human trafficking.[56]

Victoria University academics have distinguished altruistic surrogacy into "soft" and "hard" altruism.[57] The former focuses on a reciprocated and context reliant relationship, noting that soft altruism is "characterised by moral behaviours that are self- *and* other-oriented". The latter reflects an understanding that is "ego-less, self-sacrificial, and unconditional… motivated by the absence of external reward or reciprocation". It is under this understanding that the criticisms of altruistic surrogacy can be more readily aligned. For convenience, this paper draws from these distinctions. It also seeks to add to the discussion around how hard altruism has super-ceded soft altruism in policy discussions, and how soft altruism may be reverted back to.

So, while there is not complete prohibition on payments under law, social mores and a lack of clarification have a restrictive impact. The altruistic/commercial division and accompanying strong moral connotations have two effects. Firstly, in practice the hard altruism understanding negatively impacts what payments may be requested or approved by parties to a surrogacy arrangement for fear of being construed as commercial and therefore bad (despite some being acceptable under the terms' technical definitions).[58] Secondly, the

[52] Compare Maya Unnithan "Surrogacy" in Hilary Callan (ed) *The International Encyclopedia of Anthropology* (online ed, John Wiley & Sons) at 4; see generally Soumhya Venkatesan "The social life of a 'free' gift" (2011) 38 American Ethnologist 47.
[53] Raymond above n 50 at 54.
[54] Rosalie Ber "Ethical Issues in Gestational Surrogacy" (2000) 21(2) *Theoretical medicine and bioethics* 153 at 159.
[55] Raymond above n 50 at 50 and following; compare Sharyn L Roach Anleu "Reinforcing Gender Norms: Commercial and Altruistic Surrogacy" (1990) 33 Acta Sociologica 63 at 69 and following.
[56] See International Social Services above n 13.
[57] Shaw and Gibson above n 9 at 5.
[58] Vertommen and Barbagallo above n 40; compare Diana Clement "Why surrogacy laws need reform" *ADLS Law News* (online ed, New Zealand, 17 September 2021).

gendered moral overlay reifies hard altruism, subsequently limiting the development of effective and equitable policies for navigating payments in surrogacy arrangements.

For any successful reform to be implemented, it is therefore necessary to address and reconcile amongst the public consciousness that certain support is available under a true altruistic surrogacy arrangement. Doing so increases the likelihood of any permissive payment reform actually being acted on by avoiding the vilification that accompanies associations with commercial surrogacy. Further, this may implicitly create a presumption that such support *should* be provided by intending parents without the onus falling to a surrogate to seek this.

III. The Verona Principles

This paper benefits from the International Social Services' (**ISS**) recent publication of the *Principles for the protection of the rights of the child born through surrogacy* (**Verona Principles**).[59] The Verona Principles are 18 principles identifying and introducing safeguards to issues that arise from surrogacy arrangements. Each principle comprises various subprinciples detailing how the principle may be invoked in a surrogacy arrangement. The Verona Principles also provide the definitions of "altruistic" and "commercial" surrogacy used throughout this paper.

The Verona Principles have been "designed to inspire and provide guidance on legislative, policy and practical reforms on the upholding [of] children's rights born through surrogacy".[60] These are explicitly intended to provide guidance to legislators[61] and have been described as the "gold standard",[62] by the New Zealand Law Society. I agree with this sentiment.

[59] International Social Services above n 46; compare Gibson and Shaw above n 9 at 922, noting a surrogate compared requesting a payment to feeling like "[she] was selling a child"; compare Debra Wilson *Part 3 Empirical Research on Surrogacy in New Zealand: Rethinking Surrogacy Laws Te Kohuki Ture Kopu Whāngai* (University of Canterbury, Christchurch, May 2020) at 73.
[60] International Social Services "International Social Services works to improve protections for children born through surrogacy" ISS General Secretariat < https://www.iss-ssi.org/index.php/en/what-we-do-en/surrogacy >.
[61] International Social Services above n 46 at 4.
[62] New Zealand Law Society "Submission to the Health Committee on the Improving Arrangements for Surrogacy Bill 2021" at [2.1(b)].

The Verona Principles were developed with the support of the United Nations Committee on the Rights of the Child[63] and as part of the ISS' ongoing surrogacy advocacy efforts. Accordingly, they are drafted with an explicit focus on the resulting child and consider that in balancing the interests of those involved, the best interests of the child should take primacy in validating decisions concerning that child.[64] The Verona Principles do not explicitly condemn commercial surrogacy. Despite this, where the guidance indicates a certain degree of restrictions and transparency in payments is necessary to safeguarding the rights of the child, it is clear these would not be achievable were surrogacy arrangements fully commercialised and subject to free market capitalism.

Following this, there is no outright prohibition on payments within a surrogacy arrangement. Rather, it is understood that payments do not inherently exacerbate risks harming a child's rights; instead it is a matter of what the payment is for and how these are actioned. Therefore, it is possible for payments addressing the costs of pregnancy can be consistent with the objectives of and guidance provided by the Verona Principles.

The Verona Principles must be considered in their entirety and influence surrogacy policy development. Nevertheless, certain principles provide more relevant guidance to addressing the question of payment. These are explored in more detail in the following sections.

A. Principle 1: Human dignity

Principle 1: Human dignity requires that legal regulations must be consistent with human rights and norms on the protection of human dignity.[65] This means recognising that each party to a surrogacy arrangement has particular vulnerabilities and exploitation risks, noting that "approaches to surrogacy should be based on a human rights framework to ensure the human rights of children and all parties involved and to prevent exploitative practices and

[63] See International Social Services above n 46 at 3.
[64] See ibid. at 3 and 8.
[65] At [1.1].

provide effective remedies."[66] There is also recognition that surrogacy arrangements risk creating false expectations in intending parents of a right to a child.[67]

Giving effect to Principle One implicitly means conforming with New Zealand's international obligations under various soft law instruments. These include various United Nations instruments New Zealand has signed on to, such as the:

1. Convention on the Rights of the Child;[68]
2. Convention on the Elimination of all Forms of Discrimination Against Women;[69] and
3. Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.[70]

B. Principle 7: Consent of the surrogate mother

Principle 7: Consent of the surrogate mother emphasises that a surrogate should "be in a position to make independent and informed decisions free from exploitation or coercion".[71] These decisions include legal and medical matters, and the subprinciples include minimum requirements to support a surrogate's decision making.[72] Implicit in this, is that a surrogate should have access to sufficient medical and legal information to make any decision fully appraised of potential risks or consequences.

Additionally, subprinciple 7.5 relates to agencies and/or clinics facilitating AHR. This would provide an additional layer of protection where the consequences of consent and a surrogate arrangement must be clearly set out as they relate to various aspects. This subprinciple addresses concerns that "[surrogates'] consent for various procedures is taken for granted

[66] At [1.4].
[67] At [1.7].
[68] GA Res 44/25 (1989).
[69] GA Res 34/180 (1979).
[70] GA Res 55/25 (2000).
[71] At [7.1].
[72] At [7.3] and [7.4].

once [surrogates] commit to be surrogates".[73] While this issue was raised in the specific context of commercial surrogacy, considering the analysis above regarding the framing of altruistic surrogacy as a "gift" then this concern is still validly held.

Principle Seven also requires that consent is given "free from all forms of coercion",[74] implicitly including financial coercion. For the avoidance of doubt, I do not consider that the allowance of payments that meet the costs associated with pregnancy inherently amounts to financial coercion. "Financial coercion" needs to be considered in light of the context and purpose for which the Verona Principles were drafted. These serve as state guidance to a range of jurisdictions, including ones where commercial surrogacy is already in practice. Considering this, arguably "financial coercion" is intended to address where consent to a commercial surrogacy arrangement is vitiated by virtue of a surrogate's vulnerable socio-economic position[75] or a financial incentive overshadows and understates the risks a surrogacy carries, and therefore induces participation in that way.[76]

C. Principle 14: Prevention and prohibition of the sale, exploitation and trafficking in children

Where a surrogacy arrangement (taken to its logical conclusion) results in the transfer of a child, involving payments raises the risk of trafficking. Thus, Principle 14: Prevention and prohibition of the sale, exploitation and trafficking in children provides guidance on the boundary line between what is an acceptable payment and where such payments are made for the transfer of a child (or rather, the transfer of parental responsibility and legal parenthood that facilitates this).[77]

[73] Malene Tanderup, Sunita Reddy, Tulsi Patel and Birgette Bruun Nielsen "Informed consent in medical decision-making in commercial gestational surrogacy: a mixed methods study in New Delhi, India" (2015) 94(5) ACT obstetrcia et gynecologica Scandinavica 465 at 470.
[74] At [7.3].
[75] See Franziska Krause "Caring Relationships: Commercial Surrogacy and the Ethical Relevance of the Other" in Franziska Krause and Jachim Boldt (eds) *Care in Healthcare: Reflections on Theory and Practice* (Palgrave Macmillan, Cham, 2018) 87 for discussion of the ethics of commercial surrogacy and risk of exploitation where there is a financial incentive.
[76] See Margaret Brazier et al above n 35 at [4.25].
[77] At [14.7].

Principle Fourteen is largely focused on commercial surrogacy. However, as altruistic surrogacy allows for certain payments, these too must be scrutinised. Payments without a rational connection to an economic cost of a pregnancy may reveal an arrangement that is more akin to a commercial surrogacy and otherwise raise the risk of a sale of children.[78] Accordingly, any argument for an extended understanding of what payments relating to a pregnancy should be socially and legally acceptable under a surrogacy arrangement must be considered in light of Principle Fourteen guidance.

D. Principle 15: Transparency in financial matters

Principle 15: Transparency in financial matters is necessarily invoked in any discussion of allowing payments in a surrogacy arrangement and is closely related to Principle Fourteen. Under Principle Fifteen States are obliged to prevent improper financial or other gain in connection with a surrogacy, by taking all appropriate measures.[79] This reiterates an obligation found in the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption,[80] which New Zealand is a signatory to.

Principle Fifteen provides examples of some such appropriate measures: states should allow for each payment made to be rationalised, by requiring records itemising each fee or cost incurred in respect of the surrogacy arrangement.[81]

This is further reflected in respect of intermediaries and service providers. Remuneration is allowed for services provided, so long as the service is not "unreasonably high… according to the standards of comparable work done where the work is performed".[82] This effectively disallows any premium arising by virtue of services occurring as part of a surrogacy.

IV. The status quo ante of regulating surrogacy arrangements

[78] At [14.8].
[79] At [15.1].
[80] (1993), article 8.
[81] At [15.2].
[82] At [15.3].

Understanding the historical context behind the enactment of the current system is critical to the development of any acceptable policy moving forward. This involves considering both the pathway to accessing AHR and to transferring parenthood through adoption.

A. The National Ethics Committee on AHR (NECAHR)

At the time AHR legislation was drafted, gestational surrogacy arrangements had been regulated by the National Ethics Committee on AHR (**NECAHR**) since 1995. NECAHR was the continuance of an earlier, temporary committee, the Interim National Ethics Committee on Assisted Reproductive Technology (**INECART**), established in 1993 by the Department of Health[83] under the Health and Disability Services Act 1993.[84] This came following reports that local ethics committees were concerned with inconsistency with ART decision making regarding protocols and proposals.[85] When the Health and Disability Services Act 1993 was repealed, NECAHR was reconstituted pursuant to the (now repealed) New Zealand Public Health and Disability Act 2000.[86]

In the year preceding the HART Bill's recommittal to the House, NECAHR's terms of reference included the following functions:[87]

(a) reviewing AHR proposals "to determine whether they are ethical", and whether the rights of those involved will be protected and the ethical perspectives of Māori and other cultural, religious, ethnic and social groups are given "proper account"; and

(b) developing protocols and guidelines relating to AHR procedures and techniques to providers.

[83] Ministerial Committee on Assisted Reproductive Technologies *Assisted Human Reproduction: Navigating Our Future* (July 1994) at 13.
[84] At section 46.
[85] Ministerial Committee on Assisted Reproductive Technologies above n 83 at 2; see also Ken R Daniels "Assisted human reproduction in New Zealand: The contribution of ethics" (1998) 8 EJIAB 79.
[86] See sections 11 and 16(3).
[87] NECAHR *Annual Report to the Minister of Health for the year ending 31 December 2003* (Ministry of Health, May 2004) at Appendix 1.

The first instance of NECAHR approving a gestational surrogacy arrangement occurred in July 1997, when NECAHR agreed in principle to give ethical approval for "non-commercial altruistic surrogacy" on a case by case basis.[88] This year NECAHR also issued the *Draft guidelines for non-commercial altruistic surrogacy using IVF as treatment*[89] (**Draft Guidelines**).

Prior to 1997, non-commercial surrogacy had been refused by INECART.[90] This had been in part reliance on the absence of legal protections and various ethical issues, including those relating to the autonomy of the surrogate, potential emotional trauma from giving up a child, and medical and emotional risks. This stance was criticised at the time; the Ministerial Committee on Assisted Reproductive Technology (**MCART**) noted that "IVF compassionate surrogacy is at the end of the spectrum which raises fewest qualms about commercialisation, exploitation and harm to the participants, including the child".[91]

Reflecting the requirement that each application for gestational surrogacy is assessed on an individual basis, the Draft Guidelines refer to what "should" (rather than what must) be present in a surrogacy arrangement in addition to procedural requirements that must be met by the relevant fertility clinic.[92] Further, NECAHR "[was] prepared to consider an application deviating from the proposed guidelines" subject to the reasoning for this being specified in the application.[93] Particular care was taken to emphasise that the language was specifically utilised to allow NECAHR to negotiate on the broad basis of shared ethical values.[94] Despite this, these "shoulds" were understood to be "key requirements" by the Law Commission in its 2004 report *New Issues in Legal Parenthood*.[95] The Draft Guidelines not only stated how

[88] NECAHR *Annual Report to the Minister of Health for the year ending 31 December 2002* (Ministry of Health, June 2003) at 5.
[89] Alison Douglass and Michael Legge "Regulating Surrogacy in New Zealand: Evolving Policy and Cautious Liberalism under the HART Act" in Annick Masselot and Rhonda Powell (eds) *Perspectives on Commercial Surrogacy in New Zealand: Ethics, Law, Policy and Rights* (Centre for Commercial and & Corporate Law, Te Whare Wānanga o Waitaha | University of Canterbury, Christchurch, 2019) 1 at 10.
[90] INECART *Non-Commercial Surrogacy by Means of In Vitro Fertilisation: Report of the Interim National Ethics Committee on Assisted Reproductive Technologies* (Ministry of Health, 15 December 1995) cited in Douglass and Legge above n 89 at 9.
[91] Ministerial Committee on Assisted Reproductive Technologies above n 83 at 112.
[92] See Draft Guidelines in NECAHR above n 88 at Appendix 4.
[93] See Draft Guidelines in NECAHR above n 88 at Appendix 4, clause 6.1.
[94] See NECAHR above n 88 at page 23.
[95] (NZLC R88, 2004) at [7.14].

things should be from an ethical perspective, but in acting in practice as prerequisites to AHR have the tangible impact of shaping *who* could have a family, and *how*.

With that in mind, the Draft Guidelines indicated surrogacy arrangements should be where:[96]

1. at least one commissioning parent is the genetic parent of the potential child;
2. there is a medical reason preventing the commissioning parents from carrying a pregnancy;
3. preferably, the surrogate is family member or close friend of the commissioning parent; and
4. payment is limited to recompense for expenses relating to childbirth and pregnancy, but not in lieu of employment.

Interestingly, despite the clear indication that for surrogacy to be ethical it must be non-commercial, the language of "commissioning parents" pervades the Draft Guidelines and some contemporaneous material.[97] This transactional language is not easily reconciled with the expectations by NECAHR set for ethical surrogacy arrangements.

Between 1997 and 2003, NECAHR considered 34 applications for gestational surrogacy, approved 19, deferred 13 and declined three (one of which was later approved in a varied form.[98] There are no records of commercial surrogacy arrangements ever having been approved by NECAHR.[99] As is today, traditional surrogacy arrangements (not requiring AHR) were not subject to NECAHR regulations.[100]

B. The Adoption Act

Legal parenthood was (and continues to be) determined by who gives birth to a child pursuant to the Status of Children Act 1969 regardless of genetic relation, or lack thereof.[101] As a result,

[96] See Draft Guidelines in NECAHR above n 88 at Appendix 4, clause 2.
[97] Compare Law Commission above n 51.
[98] NECAHR above n 88 at 5.
[99] Human Assisted Reproductive Technology Bill 1996 (195-2) (select committee report) at 12.
[100] See Law Commission above n 95 at [7.12].
[101] Section 5.

the Adoption Act 1955 (**Adoption Act**) is invoked to adoption is necessary to the transfer of legal parenthood from a surrogate to intending parents. Prior to the HART Act, this served as the only statutory hurdle in a surrogacy arrangement.

Disregarding questions of whether adoption is an appropriate avenue of transferring legal parenthood[102] given the "conceptual mismatch" between surrogacy and adoption,[103] the granting of an adoption order is a necessary consideration of a surrogacy arrangement. Before an adoption order will be granted, the Family Court must be satisfied three factors have been met. These factors include "that every person who is applying for the order is a fit and proper person to have the role of providing day-to-day care for the child and of sufficient ability to bring up, maintain, and educate the child".[104] Payments under a surrogacy arrangement are a factor of this, and the Adoption Act's section 25(1) provides that:

> Except with the consent of the court, it shall not be lawful for any person to give or receive or agree to give or receive any payment or reward in consideration of the adoption or proposed adoption of a child or in consideration of the making of arrangements for an adoption or proposed adoption

The legal risks attaching to contravening section 25 are two-fold. Firstly, on conviction someone could be liable for a fine of up to $15,000 and/or imprisonment for a term of up to three months.[105] Secondly, while not directly disallowing an order to be granted, a finding of a breach could mean intending parents are not fit and proper.

Unlike section 14, this payment prohibition applies *after* the fact of a surrogacy. In making an application for an adoption order, the intending parents must file an affidavit with a statement to the effect that section 25 has been complied with.[106] In this sense, section 25

[102] See Law Commission above n 9 at [7.1] and following; compare Patrick Gower "Jacinda Ardern vows law change after successful push for surrogate baby Paige's dead mother to be recorded on birth certificate" *Newshub* (online ed, New Zealand, 16 March 2022); compare acknowledgment of this in Ministry of Justice *A new adoption system for Aotearoa New Zealand: Discussion Document* (June 2022) at 9.
[103] Henaghan, Daniels and Caldwell above n 2 at [6.6.3].
[104] Section 11(a).
[105] Adoption Act, section 27.
[106] Adoption Regulations 1959, clause 8(g).

can only deter contravention, and is not preventative in the way section 14 seeks to create a barrier to entry for AHR surrogacies.

1. *Re P*

The first known surrogacy (and only one considering payments within a surrogacy arrangement) [107] case prior to the HART Act is *Re P (adoption: surrogacy*).[108] Here, weekly $375 payments (totaling $15,000) were made from intending parents to a surrogate. Under the surrogacy arrangement, the surrogate would not be liable for any maintenance of the resulting child, would agree to transfer custody to the intending parents upon a doctor's certification the child's physical wellbeing would not be harmed as a result of this, and that the payments were for legal and birth expenses. There was no reference to the possibility of adoption.

In light of these factors, the judge considered "one could not say there was an element of 'profit' in the payment",[109] the payments did not indicate the intending parents were unfit adoptive parents in any way. An interim adoption order was granted. While this decision was reached despite the judge's view that the matter was for Parliament to consider,[110] *Re P* is understood to show that section 25 will "pose little hindrance to applications to adopt children born of surrogacy arrangements".[111]

2. *Re G*

Re G[112] considered where $12,000 was paid to the surrogate, who did not work during the pregnancy. Where adoption had been considered, it is apparent the intending parents had understood any adoption would only need be by the intending mother (who bore no genetic connection to the child) as a matter of course.[113] Here, payments were seen as attaching the surrogacy, and there was no breach.

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[107] But see *WW, Re application by* (1993) 11 FRNZ 170.
[108] *Re P (adoption: surrogacy)* [1990] NZFLR 385.
[109] At 387, in consideration of the UK case *Re an application for adoption (surrogacy)* [1987] 2 All ER 826.
[110] At 388.
[111] See S Burnhill *Adoption – Family Law Service (NZ)* (online looseleaf ed, LexisNexis NZ) at [6.701H].
[112] DC Invercargill Adopt 6/92, 3 February 1993.
[113] At 6.

Judge Neal further considered that any breaches of the Adoption Act would be "weighed along with the other information before the court".[114] An interim adoption order was granted. Echoing the sentiments raised in *Re P*, the judge also noted that the "morality and ethics" regarding surrogacy were for Parliament to determine.[115]

V. Policy development

The Human Assisted Reproductive Technologies Bill was lodged in 1994 and drawn in 1996. (**HART Bill**). By Dianne Yates' own admission, it was "very much a cut and paste version of the United Kingdom Act [the Human Fertilisation and Embryology Act 1990]".[116] To keep step with continuing AHR advances, in 1998 the Government introduced the Assisted Human Reproduction Bill (**AHR Bill**).[117] This benefit from MCART's 1994 report, *Assisted human reproduction: navigating our future*; submissions to a government consultation document on AHR regulation released shortly after;[118] and the regulations that followed this.[119] Neither the HART Bill nor the AHR Bill progressed past the Second Reading before being shelved until they were recommitted to the Health Committee[120] to be considered alongside the supplementary order paper to the HART Bill that was introduced in 2003[121] (**SOP**). The SOP would have benefit from the United Kingdom's 1998 Brazier Report,[122] which was prepared in review of the contemporary legislation and practices "to ensure that the law continued to meet public concerns" and contained surrogacy regulation recommendations.

[114] At 5.
[115] At 7.
[116] Dianne Yates, Rhonda Shaw, George Parker, Liezl Van Zyl and Ruth Walker "DIALOGUE: Proposed changes to the Human Assisted Reproductive Technology Act (2004)" (2015) 29 Women's Studies Journal 34 at 34.
[117] 1998 (227-1).
[118] Ministry of Justice *Assisted Human Reproduction – A Commentary on the Report of the Ministerial Committee on Assisted Reproductive Technologies* (Consultation Document, September 1994).
[119] See AHR Bill at explanatory Note; see also (17 November 1998) 573 NZPD 13227.
[120] Human Assisted Reproductive Technology Bill 2004 (195-2) (select committee report).
[121] Supplementary Order Paper 2003 (80) Human Assisted Reproductive Technologies Bill 1996 (195-2).
[122]Brazier et al above n 35.

The SOP substantially altered the HART Bill by removing the initially proposed licensing scheme for AHR providers.[123] This licensing scheme would have been comparable to the United Kingdom's Human Fertilisation and Embryology Act 1990.[124] The SOP additionally provided for the establishment of a ministerial advisory committee tasked with providing AHR advice, the development of guidelines and monitoring established practices.[125] Ultimately, the Health Committee recommended the AHR Bill not progress[126] and the HART Bill only progress with amendments.[127]

One parliamentarian, who noted the lengthy legislative process was beneficial where "our understanding of what can be done and what is acceptable, has moved a great deal as developments have occurred".[128] Where surrogacy arrangements could continue without (in the case of traditional surrogacies), or with limited regulations (in the case of gestational surrogacies subject to NECAHR approvals) norms and understandings of morally acceptable conduct developed.

In light of this, this section explores the consideration given to section 14 in the legislative process, including contemporary public perceptions, and how it is understood today.

A. The policy options considered

The HART Bill, AHR Bill and the SOP all intended that commercial surrogacy not be available in New Zealand. However, each instrument sought to achieve this through different policies.

The HART Bill would have made it unlawful for "any person to give or receive, or agree to give or receive, any payment or reward in consideration of" inter alia, "any surrogacy arrangement

[123] Supplementary Order Paper 2003 (80) Human Assisted Reproductive Technologies Bill 1996 (195-2) (explanatory note) at 35.
[124] Compare (23 April 1997) 559 NZPD 1227; see also Henaghan, Daniels and Caldwell above n 2 at [6.3].
[125] Letter from Victoria Crawford (Senior Policy Adviser, Ministry of Justice) to the Chairperson of the Health Committee regarding the Supplementary Order Paper to the Human Assisted Reproductive Technology Bill (6 August 2003) at 1, Appendix 4; see Supplementary Order Paper 2003 (80) Human Assisted Reproductive Technologies Bill 1996 (195-2) at clause 31; compare HART Act 2004, section 32.
[126] Assisted Human Reproduction Bill 1998 (227-1) (select committee report).
[127] Human Assisted Reproductive Technology Bill 1996 (195-2) (select committee report) at 1; compare Henaghan, Daniels and Caldwell above n 2 at [6.2].
[128] (6 October 2004) 620 NZPD 15899 per Dr Lynda Scott.

any use of any human assisted reproductive technology to enable a surrogacy arrangement."[129] Conviction risked a fine not exceeding $100,000, or imprisonment for a maximum of ten years.[130] In contrast, the AHR Bill did not explicitly address commercial surrogacy;[131] preventing commercialisation was considered best deal with by NECAHR.[132]

The SOP introduced the section 14 in place today, through inserting a new clause 12 to the HART Bill.[133] Notwithstanding that submissions did not alter the drafting of clause 12, these submissions indicate how people felt payments should have been dealt with. This can be contrasted not only with the issues in developing policy for allocating costs identified earlier, but also how section 14 has ultimately been received.

For clarity, further use of the term "HART Bill" refer to the HART Bill as altered by the SOP.

B. Submissions to clause 12

The HART Bill had a dual purpose of regulating techniques used for research purposes, and AHR techniques.[134] The submissions reflect this and a number of submissions were limited to perceived issues arising from research.[135]

Submissions specifically addressing surrogacy generally supported prohibiting commercial surrogacy in theory.[136] Particular criticisms attached to how clause 12 sought this. These critiques included, inter alia:

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[129] Human Assisted Reproductive Technology Bill 1996 (195-1), cl 9.
[130] Human Assisted Reproductive Technology Bill 1996 (195-1), cl 28.
[131] See (17 November 1998) 573 NZPD 13229.
[132] (17 November 1998) 573 NZPD 13231.
[133] See Ministry of Justice *Supplementary Order Paper 80 to the Human Assisted Reproductive Technology Bill Departmental Report* (HART/MOJ/8, October 2003) at 23 and following; compare HART Act, section 14.
[134] Letter from Victoria Crawford above n 125 at 2.
[135] See Jason Leppens "Submission to the Health Committee on the Assisted Human Reproduction Bill, Supplementary Order Paper 80 and Human Assisted Reproductive Technology Bill 2003"; see also Friends of the Earth NZ Limited "Submission to the Health Committee on the Assisted Human Reproduction Bill, Supplementary Order Paper 80 and Human Assisted Reproductive Technology Bill 2003"; see also Lance Huxford "Submission to the Health Committee on the Assisted Human Reproduction Bill, Supplementary Order Paper 80 and Human Assisted Reproductive Technology Bill 2003".
[136] But see Mark Blackham "Submission to the Health Committee on the Assisted Human Reproduction Bill, Supplementary Order Paper 80 and Human Assisted Reproductive Technology Bill 2003".

1. concerns over the narrow breadth of allowable payments, which disregarded the range of costs arising from a surrogacy arrangement; and
2. that surrogacy should be addressed through bespoke legislation.

1. The scope of prohibitions

Both individual and organisation submissions raised concerns that clause 12 was unnecessarily restrictive and would exclude intending parents from meeting reasonable costs arising from a surrogacy arrangement.[137] Amongst these submissions, fertilityNZ's (made in consultation with its members), indicated a significant representation of intending parents shared the view that this ought to be possible.[138]

Concerns over the narrow scope were supported by the view that harm would inevitably arise from clause 12. One submitter noted:[139]

> *The clause proceeds on the basis that any kind of payment made to any person for participation in a surrogacy arrangement is by implication commercial surrogacy and therefore criminal.*
>
> *…*
>
> *Harm of two kinds is likely to flow from the prohibition on the reimbursement of costs. First, some altruistic surrogacy may be deterred even though there is no ethical or other objection*

[137] See Janice Lowe "Submission to the Health Committee on the Assisted Human Reproduction Bill, Supplementary Order Paper 80 and Human Assisted Reproductive Technology Bill 2003"; see also Maewa Kaihau "Submission to the Health Committee on the Assisted Human Reproduction Bill, Supplementary Order Paper 80 and Human Assisted Reproductive Technology Bill 2003"; see also Zonta Club of Wellington "Submission to the Health Select Committee on Supplementary Order Paper 80 and the Human Assisted Reproductive Technology Bill 2003" ; see also New Zealand Fertility Clinics "Submission to the Health Select Committee on Supplementary Order Paper 80 and the Human Assisted Reproductive Technology Bill 2003"; see also fertilityNZ "Submission to the Health Select Committee on Supplementary Order Paper 80 and the Human Assisted Reproductive Technology Bill 2003"; see also Family Planning Association "Submission to the Health Select Committee on Supplementary Order Paper 80 and the Human Assisted Reproductive Technology Bill 2003".

[138] fertilityNZ above n 137 at 13.

[139] Janice Lowe above n 137.

to it in the particular case. Second, determined couples may be forced into breaking the law in order to pursue their goal of parenthood.

Another focused on the need to protect those who may be vulnerable in a surrogacy arrangement, stating that surrogates should not be "out of pocket".[140] A lack of financial support was also seen as connected to a surrogate's agency and control over their bodies.[141]

The majority of submissions advocating for a wider range of payments to be allowed made no conceptual distinction between reimbursement payments and opportunity cost. Few submissions acknowledged the two may attract different treatment. Auckland Infertility Society Incorporated noted that its recommendation to allow for payment for legitimate expenses "leaves aside the issue of payment for opportunity cost, or lost income – which we leave for other to make submission on".[142] The Family Planning Association's call for the definition of "commercial" utilised by NECAHR (which aligned with the concept of soft altruism) to be revisited to allow recompense *or* payment to a surrogate who forewent employment due to pregnancy or childbirth.[143] While not explicitly referring to opportunity cost, many submissions viewed this as expense arising from a surrogacy arrangement despite it not being expended or reimbursable.[144]

Many submitters concurrently held the view commercial surrogacy ought to be prohibited (with a minority advocating for commercial surrogacy to be permitted).[145] Implicit to this is that costs arising from the surrogacy arrangement were seen as separate from commercial surrogacy. This indicated that amongst submitters at least, soft altruism in surrogacy was not only acceptable, but the preferred policy model. While the submissions did not have the Verona Principles to draw from, there is a clear intention to adhere to Principle 14 and Principle 15.

[140] fertilityNZ above n 137 at 20.
[141] Zonta Club of Wellington above n 137.
[142] Auckland Infertility Society Inc. "Submission to the Health Committee on the Assisted Human Reproduction Bill, Supplementary Order Paper 80 and Human Assisted Reproductive Technology Bill 2003" at 2.
[143] Family Planning Association above n 137.
[144] See Janice Lowe above n 137; fertilityNZ above n 137; Family Planning Association above n 137.
[145] Compare Maewa Kaihau above n 137 at 1; compare Blackham above n 136.

Despite this, the Departmental Report (prepared by the Ministry of Justice in consultation with the Ministry of Health and Ministry of Research, Science and Technology)[146] presented to the Health Committee (**Departmental Report**) dismissed amending clause 12. Instead, it stated "It is difficult to separate the reimbursement of expenses incurred by the surrogate mother from payment for a child, and once any payment is permitted, it is easy for other payments to the surrogate to be considered as well".[147] This was a significant U-turn from the Ministry of Health, which as recently as 2002 had confirmed that under proposed AHR legislation intending parents ought be able to continue to meet "necessary expenses" relating to surrogacy.[148] The Departmental Report's position was also contra the Brazier Report's recommendations that payments be allowed for "genuine expenses associated with the pregnancy". The Brazier Report qualified genuine expenses including maternity clothing, counselling fees, overnight accommodation, domestic help, healthy food and travel to and from the hospital or clinic.[149] While the Brazier Report also recommended measures to ensure transparency and payments in excess of genuine expenses be prohibited to ensure there was not a financial incentive for surrogacy thus avoiding the Departmental Report's 'slippery slope' concern, this does not appear to have been considered.

The Departmental Report further revealed the policy stance that payment not specified under subsection (4) would be a "commercial transaction" and that that commercial surrogacy is inconsistent with the UNCROC obligation to prevent the sale or trafficking in children.[150] Considered together, the logical conclusion is that the Government position was that any payment not explicitly authorised was commercial, and therefore in breach of New Zealand's UNCROC obligations.

[146] Ministry of Justice above n 133.
[147] At 24.
[148] See Law Commission above n 9 at 6.9, citing Ministries of Justice and Health briefing to Minister of Health "Policy Decisions Required for HART SOP" (1 November 2002) at (j) including annotations by Minister of Health (Obtained under Official Information Act 1982 Request to the Ministry of Justice) as cited in Betty-Ann Kelly "Compensation for Surrogates: Doing Public Policy" in Annick Masselot and Rhonda Powell (eds) *Perspectives on Commercial Surrogacy in New Zealand: Ethics, Law, Policy and Rights* (Centre for Commercial and & Corporate Law, Te Whare Wānanga o Waitaha | University of Canterbury, Christchurch, 2019) 25 at 32.
[149] Brazier et al above n 35 at [5.24] and following.
[150] Ministry of Justice above n 133 at 24 and following

With the benefit of hindsight, the justification given for section 14 is inconsistent with the Verona Principles. The payment restriction does not hold up to the distinctions between altruistic or commercial surrogacy. Rather, it indicates that policymakers considered the only legally acceptable form of surrogacy would be underpinned by hard altruism. This would then be entrenched in law despite contradicting contemporary public sentiment. This view does not engage with the nuance necessary to give effect to Principle 14 and Principle 15.[151]

2. The need for bespoke legislation

Many submissions also advocated for dedicated surrogacy regulation. For example, counsellors from various Fertility Associates' clinics recommended legislation "be designed specifically to address the complexities of surrogacy."[152] They further advocated for surrogacy regulation to sit apart from legislating the use of donor gametes, which had implications vastly different from the implications and consequences experienced by parties to a surrogacy arrangement.[153] In a similar vein, the since disestablished Toi te Taiao: The Bioethics Council recommended further public consultation on the issue.[154]

Others referred to the Law Commission's 2000 report *Adoption and its Alternatives* (**Adoption Report**). The Adoption Report questioned surrogacy regulation, inviting the government to consider the matter further.[155] The Maxim Institute highlighted that none of the Adoption Report's suggested controls were incorporated into the HART Bill.[156] This was reiterated by New Zealand Fertility Clinics, who noted it was inappropriate for surrogacy (as something still being considered by the Law Commission) to be juxtaposed with cloning and animal-human hybrids restrictions.[157] While the Departmental Report conceded the Adoption Report

[151] International Social Services above n 13.
[152] Joi Ellis, Elisabeth Money, Winnie Duggan, Margaret Stanley-Hunt, Paul Willoughby and Sue Sanders "Submission to the Health Committee on the Assisted Human Reproduction Bill, Supplementary Order Paper 80 and Human Assisted Reproductive Technology Bill 2003" at 2.
[153] Ibid.
[154] Toi te Taiao: The Bioethics Council "Submission to the Health Committee on the Assisted Human Reproduction Bill, Supplementary Order Paper 80 and Human Assisted Reproductive Technology Bill" at 4.
[155] See Law Commission above n 51 at [515].
[156] The Maxim Institute "Submission to the Health Committee on the Assisted Human Reproduction Bill, Supplementary Order Paper 80 and Human Assisted Reproductive Technology Bill 2003" at 3.6.
[157] New Zealand Fertility Clinics above n 137 at 1.

emphasised a need for further consultation and research,[158] further research or consultation was not recommended.

C. The degree of penalty

Clause 12 accompanies the significant maximum penalty of a fine of $100,000 and/or imprisonment.[159] In developing this penalty, the Heath Committee was advised that (in accordance with the contemporary guidelines set by the Legislation Advisory Committee) imprisonment is reserved for serious offences requiring mens rea to be proven and the prohibition penalty was intended as a "strong commercial deterrent".[160]

Where intending parents and surrogates could fell in to the scope of liabilty for clause 12, a risk of a child's welfare being harmed was identified.[161] In response, the Departmental Report noted the offence provided *maximum* liabilities.[162] Notwithstanding the limited application the Adoption Act was given by the Courts in respect of surrogacy payments, it further noted "the commissioning parents would still need to go through formal adoption processes, and any payments made in relation to adoptions are illegal".[163] Implicit in this is the view that even if clause 12 excluded liability, surrogacy related payments would be captured by Adoption Act's section 25.

Building on this, offending under section 25 was noted as a comparable activity.[164] Despite this assertion, section 25 only risks a maximum of three months' imprisonment or a fine not exceeding $15,000[165] and there was no indication of why the clause 12 penalty far exceeded this.

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[158] Ministry of Justice above n 146 at 24.
[159] See HART Act, section 14(5).
[160] Letter from Victoria Crawford (Senior Advisor, Ministry of Justice) to the Chairperson of the Health Committee regarding the Penalty Regime in HART SOP (10 May 2004) at 1 and following.
[161] Victoria University of Wellington "Submission to the Health Committee on the Assisted Human Reproduction Bill, Supplementary Order Paper 80 and Human Assisted Reproductive Technology Bill" at IV(v).
[162] Ministry of Justice above n 146 at 25.
[163] Ibid.
[164] See letter from Victoria Crawford above n 160 at 8.
[165] Adoption Act 1955, section 27.

VI. Policy in practice

The HART Act divided NECAHR's role amongst the Ethics Committee on Assisted Reproductive Technology (**ECART**) and the Advisory Committee on Assisted Reproductive Technology (**ACART**) in July 2004.[166]

The framework enacted has been described as "a four-tiered model of regulation"[167] and imposed three broad categories of treatments. These are established procedures, routinely done in AHR and specified by Order in Council by the Minister of Health;[168] prohibited actions, specified in Schedule 1 of the Act and incur an offence;[169] and procedures falling into neither category, subject to written approval on a case-by-case basis.[170] This final category includes AHR procedures and all gestational surrogacies.[171]

This approval must be given by ECART, in accordance with section 14 and section 19. Under section 19, ECART may only approve an AHR procedure application where "satisfied that the activity proposed be undertaken under the approval is consistent with relevant guidelines or relevant advice issued or given by [ACART]". Since inheriting the Draft Guidelines, ACART has published substantive guidance on surrogacy. In December 2013, the prevailing vocabulary shifted from "commissioning" to "intending" parents.[172]

A. How section 14 has been understood

In considering how section 14 has been received, this paper has the benefit of the recent Surrogacy Report and the University of Canterbury's cross faculty *Rethinking Surrogacy Laws*

[166] See Law Commission above n 95 at footnote 48.
[167] Henaghan, Daniels and Caldwell above n 2 at 6.2.
[168] Section 6; compare Human Assisted Reproductive Technology Order 2005.
[169] Section 8.
[170] Subpart 2.
[171] Section 16.
[172] See NECAHR *Draft Guidelines for Non-commercial Altruistic Surrogacy using IVF as Treatment* (Ministry of Health, May 2001) (Obtained under Official Information Act 1982 Request to Manatū Hauora: Ministry of Health); compare ACART *Guidelines on Surrogacy Involving Assisted Reproductive Procedures and Guidelines on Donations of Eggs or Sperm between Certain Family Members* (Ministry of Health, December 2013)(Obtained under Official Information Act 1982 Request to Manatū Hauora: Ministry of Health).

project (**UC Project**). The UC Project was undertaken between 2015 and 2018, and included surveys of solicitors practicing in relevant fields and the public. This paper also draws from a recent study carried out by the Victoria University of Wellington's School of Social and Cultural Studies. In this, qualitative data was collected from interviews with surrogates, intending parents and AHR experts.[173] This final study gives rise to the hard and soft altruism distinction used throughout this paper.

Consistent across each study is the uncertainty arising from section 14: it has given rise to considerable confusion not only over what payments are allowed, but why the prohibition exists. This extends across various stakeholders: surrogates, intending parents[174] and solicitors working in the family law and surrogacy fields.[175]

In this section, I pose the prevailing understanding (or lack thereof) stems from not only the specific wording of section 14 and consider the impact of the disconnect in perception of hard and soft altruism held by the public and policymakers on this ambiguity.

1. Ambiguity in drafting

Despite the policy intention conveyed in the Departmental Report that in section 14, subsection (4) provides the extent of allowable payments, section 14 does appear to actually achieve this outcome. The prohibition contained in subsection (3) applies only to the accepting to give or receive, or actual giving or receipt of "valuable consideration". In turn, "valuable consideration" is not conclusively defined, but expansively "includes an inducement, discount or priority in the provision of a service".[176]

The subsequent inclusion of subsection (4) arguably then only provides clarification by excluding individuals involved in a surrogacy arrangement by virtue of their roles as either AHR service providers or providers of legal advice. Such transactions would constitute a third

[173] See generally Shaw and Gibson above n 9.
[174] See generally Shaw and Gibson above n 9; see also Debra Wilson above n 59.
[175] See Debra Wilson *Part 1 Empirical Research on Surrogacy in New Zealand: Rethinking Surrogacy Laws Te Kohuki Ture Kopu Whāngai* (University of Canterbury, May 2020).
[176] HART Act, section 5.

party's "participation" in a surrogacy arrangement in accordance with subsection (3), and unmistakably do have an element of valuable consideration arising from their respective contract for services. This is clear in how subsection (4) does not refer to the nature of allowable payments themselves, but rather to *who* they may be made. It is somewhat arbitrary that under the strict letter of the law, a solicitor may be paid directly by intending parents for the provision, but a surrogate who meets this cost directly may not receive reimbursement for this.

The choice to use the contractual language of valuable "consideration" is understandable in broader context of the section. In addition to outlawing commercial surrogacy, section 14 provides that a surrogacy arrangement will not be enforceable by or against any person.[177] In broadly defining "valuable consideration" and then essentially removing it from the surrogacy arrangement equation through its attachment to a criminal offence, section 14 provides that surrogacy arrangements are not only rendered unenforceable under the law, but further fail to meet the requirements for enforceability in the common law.[178]

However, the use of contractual language to achieve one purpose of section 14 arguably comes at the cost of the other. Despite the prevalence of policy statements that surrogacy arrangements ought to be non-commercial nature, the drafting of the HART Act and section 14 does not easily lead to this conclusion where there is muddled use of contractual, transactional language. For example, a surrogacy arrangement is defined as "an arrangement under which a woman agrees to become pregnant for the purpose of surrendering custody of a child born as a result of the pregnancy",[179] clearly reflecting an intention that a surrogacy arrangement is not transactional. Rather, this definition draws from the relationship between a surrogate, intending parent or parents, and the resulting child. In contrast, "valuable consideration" refers to "the provision of a service".[180] Read within section 14, "valuable consideration" frames a surrogate's participation in a surrogacy arrangement to one based in the provision of gestational services to intending parents.

[177] HART Act, section 14(1).
[178] Compare John Burrows "Consideration" in John Burrows, Jeremy Finn and Stephen Todd (eds) *Law of Contract in New Zealand* (5th ed, LexisNexis, Wellington, 2016) at 4.1.
[179] HART Act, section 5.
[180] HART Act, section 5.

While this incongruity may have been remedied had section 14 and "valuable consideration" been clarified with reference to commercial surrogacy as a profit based endeavour (notwithstanding the question of whether profit is truly capable given the unknown and unquantifiable costs of pregnancy), it was not. Instead, the HART Act simultaneously both advocates for surrogacy to be non-commercial and rooted in the relationship between parties, but couches surrogacy in a transactional context in an attempt to achieve this.

2. The interaction between diverging views on altruism and section 14

Given the equivocal nature of section 14, there is room for varying interpretations reflecting both hard and soft altruistic perspectives. This in turn impacts adherence, and tangibly, what support intending parents believe they should provide, either under section 14 or despite it.

For example, where ACART and ECART would be considered a source of guidance, over the years neither committee has held consistent views on the scope of section 14.[181] Recently, the UC Project reported that "ECART terrify [intending parents] about payment and most don't pay, some pay costs, including, time off work at end of pregnancy/big gift including flowers for surrogate".[182] Despite this, many of the solicitors responding to the UC Project appear to understand "expenses", "direct expenses" and "medical expenses" to be allowable and advised clients accordingly.[183] Subsequently, uncertainty over allowable payments extends to intending parents.[184]

Despite the uncertainty, and that some intending parents and surrogates note the provision of money or gifts is illegal, some do so anyway.[185] The provision of support, financial or otherwise, has been noted by intending parents as necessary to ensuring a surrogate is not left "out-of-pocket" or disadvantaged by the process,[186] as part of an intending parent's

[181] Law Commission above n 9 at [8.12 (b)] and following.
[182] Debra Wilson above n 175 at 107; but see IP47.223 Ethics Committee on Assisted Reproductive Technology "Submission to the Law Commission on Te Kōpū Whāngai: He Arotake | Review of Surrogacy".
[183] Ibid. at 106.
[184] Gibson and Shaw above n 9 at 7.
[185] Ibid.
[186] See Gibson and Shaw above n 9 at 8; Law Commission above n 9 at [8.22]; compare IP47.199 Personal Submission "Submission to the Law Commission on Te Kōpū Whāngai: He Arotake | Review of Surrogacy"; see

obligations,[187] and as a measure contributing to the health of the resulting child.[188] In addition to providing support through payments, parties have also discussed other, non-financial ways intending parents have offered support to surrogates throughout the process.[189]

These views of reciprocity are not universally held though. Where section 14 attempts to entrench the strict altruistic perspective, surrogates are at risk of material disadvantage if intending parents do not feel they should be meeting pregnancy related costs.[190] Without referring to what payments are possible, the law does not advocate for a surrogate's entitlement to financial support. Nor does it impose an obligation on intending parents to provide this. Instead, receiving support in practice seems dependent on an intending parent's willingness to break the law, and a surrogate's comfort in asking for this.[191] The degree of support available is further dependent on what is understood to be reasonable in the circumstances. Intending parents' financial capabilities,[192] perception of what the scope of pregnancy related costs is,[193] views on altruism[194] and self-interest[195] are all factors in assessing "reasonableness". This much is clear from various submissions to the Surrogacy

[187] See generally Gibson and Shaw above n 9; see IP 47.053 Personal Submission "Submission to the Law Commission on Te Kōpū Whāngai: He Arotake | Review of Surrogacy" at [7]; see IP47.127 Personal Submission "Submission to the Law Commission on Te Kōpū Whāngai: He Arotake | Review of Surrogacy"; see IP47.175 Personal Submission "Submission to the Law Commission on Te Kōpū Whāngai: He Arotake | Review of Surrogacy" at 4 and following;

[188] Law Commission above n 9 at [8.24].

[189] See IP47. 005 Personal Submission "Submission to the Law Commission on Te Kōpū Whāngai: He Arotake | Review of Surrogacy".

[190] See Law Commission above n 9 at [1.34]; see generally Gibson and Shaw above n 9.

[191] See Gibson and Shaw above n 9 at 8.

[192] See IP47.007 Personal Submission "Submission to the Law Commission on Te Kōpū Whāngai: He Arotake | Review of Surrogacy"; see IP47.018 Professor Mark Henaghan "Submission to the Law Commission on Te Kōpū Whāngai: He Arotake | Review of Surrogacy"; see IP47.090 Personal Submission "Submission to the Law Commission on Te Kōpū Whāngai: He Arotake | Review of Surrogacy" at [9].

[193] See IP487.031 Personal Submission "Submission to the Law Commission on Te Kōpū Whāngai: He Arotake | Review of Surrogacy"; see IP47.037 Personal Submission "Submission to the Law Commission on Te Kōpū Whāngai: He Arotake | Review of Surrogacy"; see IP47.171 National Council of Women "Submission to the Law Commission on Te Kōpū Whāngai: He Arotake | Review of Surrogacy" at [40].

[194] See Gibson and Shaw above n 9 at 10 and following; see IP47.096 Personal Submission "Submission to the Law Commission on Te Kōpū Whāngai: He Arotake | Review of Surrogacy"; see IP47.125 Personal Submission "Submission to the Law Commission on Te Kōpū Whāngai: He Arotake | Review of Surrogacy"; contrast IP47.175 Personal Submission "above n 187; contrast IP47.202 Personal Submission "Submission to the Law Commission on Te Kōpū Whāngai: He Arotake | Review of Surrogacy".

[195] See IP47.006 Personal Submission "Submission to the Law Commission on Te Kōpū Whāngai: He Arotake | Review of Surrogacy"; see IP47.054 Personal Submission "Submission to the Law Commission on Te Kōpū Whāngai: He Arotake | Review of Surrogacy" at [7].

Report, with one submission suggesting that "if a list of expected costs to be covered is released other arrangements may be set aside – for example, our surrogate requested help with cleaning".[196] Understandings of altruism were also reflected where some responses refocused the provision of financial support to surrogates, to address a perceived risk of intending parents being taken advantage of by a surrogate.[197] Arguably, this concern exemplifies critiques of altruistic surrogacy for relying on gendered norms of womens' selflessness.[198] Perceived deviation from becomes inherently self-serving and exploitative to some, without the possibility of equitably balanced interests.

For completeness, I note the UC Project's public perceptions survey of (approximately 2,800 people from the electoral roll) showed only a small percentage of respondents believed a surrogate "cannot receive any money whatsoever" or were unsure of what the law allowed.[199] The remainder of responses indicated a prevalent belief that payments of various types were allowable. Presumably, these views were not formed with regard to the specifics of the HART Act and instead reveal a view of how the public thinks thing *ought* to be.

A. Enforcement of section 14

As at 2022, no one has been prosecuted under section 14.[200] This runs counter to the *Legislation Guidelines* published by the Legislative Design and Advisory Committee (**LDAC**), both current and contemporary to policy development.

The 2001 LDAC guidance explicitly highlighted the risk of bringing the law into disrepute in such circumstances, which further raises the question of whether criminalisation is truly warranted.[201] The 2021 edition of LDAC guidelines reiterate this, adding that "if material does not have a legal effect is enacted in legislation, possible risks to the clarity or certainty of the

[196] See IP47.006 Personal Submission above n 195.
[197] See Ibid.; see IP47.054 above n 195 at [8]; see IP47.055 Personal Submission "Submission to the Law Commission on Te Kōpū Whāngai: He Arotake | Review of Surrogacy" at [8].
[198] Compare Raymond above n 50 at 50 and following.
[199] Debra Wilson at above n 59 at 15.
[200] Law Commission above n 9 at [6.6].
[201] Legislative Design and Advisory Committee *Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation 2001 edition and amendments* (May 2001) at [12.1.3].

legislation should be identified and considered. For example, is there a risk that a court may subsequently read in a legal effect to the provision that was not contemplated by the law maker".[202] While the lack of prosecutions has ensured the unintended consequence of judicial activism has never come to light, the tradeoff for this is a lack of explicit guidance on section 14's interpretation from the judiciary.

This lack of prosecution is unsurprising given the context and the principles underpinning the legislation. Imposing the penalties available on conviction would hardly be conducive to the health and well-being of a child born as the result of that AHR procedure.[203] Enforcing section 14 against a surrogate poses a significant risk to the health and well-being of women involved in AHR procedures, which ironically, is the only principle framed as a requirement under the HART Act.[204]

Considering this, there appears to be tacit acceptance by the Crown that it is not in the public interest to enforce section 14, and so prosecutions *should not* be brought.

B. Post HART Act Adoptions

Since HART Act came into force, surrogacy cases decided under the Adoption Act's section 25 have been limited. This is unsurprising given disclosure for the purpose of adoption would attract scrutiny under section 14. Post-HART Act decisions are still worth considering, however. They indicate the interaction of the Adoption Act were certain payments decriminalized.

In 2011, *Re an application by BWS to adopt a child* directly addressed the question of whether payments for surrogacy breached section 25. Here, Judge Walker noted "it is somewhat contrived to say that payment was made in consideration of the adoption of the children, as opposed to the surrogacy and the costs associated with pregnancy".[205]

[202] Legislative Design and Advisory Committee *Legislation Guidelines: 2021 Edition* (September 2021) at [2.3].
[203] Compare HART Act, section 4(a).
[204] See Henaghan, Daniels and Caldwell above n 2 at [6.4]; compare HART Act, section 4(c).
[205] *Re an application by BWS to adopt a child* [2011] NZFLR 621 at [65].

In 2014, *Re Kennedy* concerned an arrangement that took place in California and allowed $25,000 in payments to the surrogate, attributed to general expenses, and "pain and suffering and inconvenience of birth".[206] In this instance, the need for an adoption order was an unexpected consequence of the child's immigration status.[207] In consideration of the relevant surrogacy agreement which was in part conditional on aspects of the pregnancy (and may have been caught by section 14, had it occurred in New Zealand),[208] "it could not be said that such payments were either an inducement or commercial in nature and the Court finds accordingly".[209]

A 2016 reserved judgment, *Re Clifford*, related to another Californian surrogacy arrangement. A clause of the relevant agreement warranted that "in no manner constitutes payment for genetic material, a child, or relinquishment of a child, or payment for any consents of any kind related to the finalization of parental rights or adoption".[210] Further, the payments were not within the section 25 disqualifying category where they were specified as solely to "reimburse her [the surrogate mother] pain and suffering and pre-birth child support and living expenses incurred by herself and her family".[211]

More recently, in 2019, compensatory payments relating to costs incurred were held to not commercialise adoption.[212]

These cases continue the implication set by *Re P* and *Re G*, that section 25 (and the subsequent provision relating to advertisement) are given a "strained interpretation" to ensure this would not be determinative in declining an order where there is no dispute between parties.[213] This has been followed even where the surrogacy arrangement was arguably commercial in nature, allowing for payments without a clearly quantifiable cost.[214]

[206] *Re Kennedy* [2014] NZFC 2526 at [8].
[207] At [12].
[208] At [37].
[209] At [36].
[210] [2016] NZFC 1666 at [23].
[211] At [24].
[212] *Cheng v Cheng* [2019] NZFC 10638 at [7].
[213] Henaghan, Daniels and Caldwell above n 2 at [6.6.3.2].
[214] Hague Convention on Private International Law above n 36 at [i].

This does not bear out the view held during policy development that section 25 may provide some legislative backstop to commercialisation.

VII. Creating future policy

Given the issues arising from section 14, it is my contention that successfully reforming this requires more than just drafting unequivocal provisions. Law reform must sit amongst additional actions to acknowledge the relationship underlying the payments. This is necessary to ensure support is actually provided in practice under more permissive legislation, rather than this being denied in the name of altruism in its strict sense.

In this section, I consider how payments within a surrogacy arrangement are reconciled within New Zealand's appetite for an altruistic framework. Having set this scene, I consider various policy options that have been proposed.

A. The surrogacy relationship context

Contextualising economic relationships within interpersonal relationships is not a novel concept, and has even been considered in the existing New Zealand surrogacy context.[215] Doing so allows for exchanges that may otherwise appear "transactional", in the strictest sense, to be rationalised and reconciled as remaining within the ambit of altruistic surrogacy.

Acknowledgment of that context of the relationship between intending parents and surrogates, as one imbued with a sense of mutual obligation and reciprocity, is implicitly understood in a soft altruistic perspective. Providing legitimacy to this understanding and normalising this sense of obligation (either through legislation or regulatory guidance) is a necessary step in reform. Without signaling this and setting an expectation of support there is a risk that, despite creating a more permissive system, in practice the provision of support may not actually be realised after 20 years of the current regime. Rather, this would be limited

[215] Viviana A Zelizer "How I Became a Relational Economic Sociologist and What Does That Mean?" (2012) 49 Politics & Society 145, cited Shaw and Gibson above n 9 at 3.

by whether an intended parent believes they should reasonably be responsible for, and therefore have an obligation of support, to a surrogate in an altruistic surrogacy arrangement. Approaching compensation in surrogacy this way is not inconsistent with the Verona Principle 15's requirements for transparency in financial matters. Requiring transparency in the transactions that do occur provides guidance on what the boundaries of an acceptable transaction in a surrogacy relationship would be, and give effect to the Verona Principle 14's anti-trafficking requirements.

Emphasising the interpersonal relationships in a surrogacy arrangement may further aid in responding to the question of enforceability of a surrogacy arrangement that section 14 also sought to address. This paper does not seek to consider enforceability beyond noting that Verona principle 1.7 observes "the practice of surrogacy may create false expectations that adults have a right to a child".[216] However, arguably where the consequence of reneging is understood more broadly than just a refusal to fulfil one's side of a surrogacy agreement (that would otherwise already be coming to an end)[217] this could lend itself to limiting the likelihood of surrogates backing out of an arrangement. Similarly, the degree of involvement inherent to this approach may also mitigate any risk of intending parents backing out.

B. Legislative options

Currently, the Improving Arrangements for Surrogacy Bill 2021[218] (IAS Bill) is before Parliament's Health Committee. The IAS Bill contemplates a number of amendments to the HART Act and related legislation "to simplify surrogacy arrangements, ensure completeness of information recorded on birth certificates, and provide a mechanism for the enforcement of surrogacy arrangements",[219] to ensure surrogacy is a mana enhancing process for all of those involved.[220] In the IAS Bill's first reading, the MP responsible for its introduction noted it was not drafted with the intention of addressing every aspect of surrogacy.[221] Noting this,

[216] International Social Services above n 13.
[217] See Gibson and Shaw above n 9 at 12.
[218] Above n 11.
[219] Improving Arrangements for Surrogacy Bill 2021 (72-1) at Explanatory Note.
[220] (13 April 2022) 758 NZPD 8989.
[221] Ibid.

clearly the primary beneficiaries to resulting legislative changes have been contemplated as intending parents. In contrast, both the Verona Principles and the Law Commission's Surrogacy Report seek more balance between the policy impacts on all parties. Where the release of these has been described as having "overtaken" the IAS Bill,[222] it is no surprise that the Health Committee is now considering how the Surrogacy Report's recommendations may be incorporated.[223]

In light of this, while the Health Committee is yet to release its final report on the IAS Bill, I have elected to place a high level of weight on the range of Surrogacy Report recommendations. This is both in respect of section 14 recommendations, but also recommendations which impact how accessible financial support under section 14 support may be and would therefore contribute to ensuring surrogates are not economically disadvantaged. These recommendations may be contrasted with the IAS Bill provisions in respect of financial support for surrogates.

Neither the AHR Bill nor the Surrogacy Report suggest enacting bespoke surrogacy legislation, but instead through amendments to the various acts that currently regulate surrogacy . Accordingly, the regulation of payments would remain under the HART Act.[224]

1. The cost of AHR

Gestational surrogacy arrangements have the additional financial pressure of significant AHR costs and form the backdrop in which any changes to payments must be considered. The cost undoubtedly impacts whether support is practically made available to surrogates following reforming section 14. However, while considering how AHR is funded goes beyond the scope of this paper, it is noted that the Surrogacy Report recommends the Government review surrogacy funding methods (including AHR and ECART associated costs).[225] As this is relevant to intending parents' financial capabilities, this is relevant considering the likelihood of support actually being provided by pursuant to any legislative change. Were AHR made more

[222] New Zealand Law Society above n 62 at [2.1].
[223] Improving Arrangements for Surrogacy Bill 2021 (72-1) (interim select committee report).
[224] But see New Zealand Law Society above n 62 at [1.4].
[225] At R62.

accessible following the Law Commission's recommendations, the removal of a significant financial barrier is likely to ensure a balance surrogates' and intending parents' interests is more easily reached.

Despite the IAS Bill's name, the accessibility sought is not financial.

2. Expanding allowable payments

Most significantly, the IAS Bill proposes limiting the scope of criminal liability for payments under section 14 of the HART Act by replacing the existing subsection (4) with the following:[226]

> Subsection (3) does not apply to a payment for the actual and reasonable expenses of making a surrogacy arrangement, treatments to become pregnant, or incurred as a result of pregnancy arising under a surrogacy arrangement, including the following:
>
> (a) payments to a provider of fertility treatment (including counselling related to a surrogacy arrangement or pregnancy):
>
> (b) payments for legal advice to the woman who is, or who might become, pregnant under the surrogacy arrangement:
>
> (c) the costs of travel:
>
> (d) the reimbursement of lost wages or salary.

Reading the examples listed in this new section 14 together, they largely relate to the costs of facilitating a surrogacy arrangement. So, despite the assurance that "actual and reasonable expenses… incurred as a result of pregnancy arising under a surrogacy arrangement" escape criminalisation, what these would be in practice remains unclear. Rather, there is room for these costs to be agreed (if at all) between intending parents and surrogates, either in advance or as they arise. In the latter case, without the certainty of how a surrogate may be economically impacted, arguably this detracts from a surrogate's ability to provide her fully informed consent in line with the Verona Principle's principle 7.

[226] IAS Bill 2021 (72-1), clause 6.

Whether this new section 14 would allow for sufficient support is questionable. The inherent power imbalance that impacts how reasonable support or payments are agreed has not been acknowledged. Further, despite "reasonable" being intended as an objective measure, it is clear there are currently various perspectives of what would be reasonable in the circumstances is. This is understandable: where section 14 could be said to have outlawed any at all for almost two decades, establishing a normative standard of reasonableness in the context of illegality is difficult. The inconsistencies in understandings are visible in the responses to the Surrogacy Report's proposed list of allowable expenses.[227] For example, some submitters considered the inclusion of groceries to be unnecessary as these would be required regardless.[228] Imposing parameters would be necessary to give direction.[229] Without addressing these factors, arguably discussions of support risk turning into processes of negotiating resources that are taken out of the context of the specific relationship and obligations owed between intending parents and surrogates.

In contrast, the Surrogacy Report recommendation advocates for "reasonable surrogacy costs actually incurred" to be allowed, but goes further to comprehensively illustrate these.[230] In addition to those included under the IAS Bill, they include inter alia, reasonable costs relating to the care of dependents, health provider recommended products and services, maternity clothes, groceries, housework services and life insurance premiums.[231] These changes would bring New Zealand's framework into alignment with the systems used in various other jurisdictions, including Canada, Australia and the United Kingdom.[232] This added guidance would also be significant in setting parameters for accessing support. Illustrating what is "reasonable" under law in a surrogacy relationship sets expectations and understandings:

[227] See generally Law Commission n 9 at [8.28].
[228] Compare IP47.198 Personal Submission "Submission to the Law Commission on Te Kōpū Whāngai: He Arotake | Review of Surrogacy"; IP47.37 Personal Submission "Submission to the Law Commission on Te Kōpū Whāngai: He Arotake | Review of Surrogacy"; IP47.054 Personal Submission "Submission to the Law Commission on Te Kōpū Whāngai: He Arotake | Review of Surrogacy"
[229] Law Commission above n 9 at [8.25] and following
[230] Law Commission above n 9 at [R46] and following.
[231] Ibid. at [R47].
[232] Ibid. at [8.46] citing the Surrogacy Act 2010 (NSW); Assisted Reproductive Treatment Regulations 2019 (Victoria), reg 11; Surrogacy Act 2010 (Queensland), section 11; Surrogacy Act 2008 (Western Australia), section 6; Surrogacy Act 2019 (South Australia), section 11; Surrogacy Act 2012 (Tasmania), section 9; Human Fertilisation and Embryology Act 2008 (United Kingdom), sections 54(8) and 54A(7); An Bille Sláinte (Atáirgeadh Daonna Cuidithe) | Health Assisted Human Reproduction Bill 2002 (29) Ireland; and Assisted Human Reproduction Act SC 2004 c 2 (Canada), section 12(c).

both in what support a surrogate might feel entitled to ask for within the realm of altruistic surrogacy, and what an intending parent might feel obliged to meet.[233]

The Surrogacy Report further recommends that obligations on intending parents to provide support are enforceable in certain circumstances. Specifically, it is recommended that a new section 14 should provide that "notwithstanding section 14(1), an obligation under a surrogacy arrangement entered pre-conception to pay or reimburse the surrogate's reasonable surrogacy costs is enforceable".[234] This is underpinned by the promotion of a surrogate's rights to financial support, and subsequently benefit from the accessibility of surrogacy where more people are able to feasibly act as surrogates.[235] I agree that allowing a surrogate to enforce an obligation for support is necessary.

3. Parental leave availability

The IAS Bill contains no dedicated provisions to ensure the availability of parental leave to surrogates, such as by amending the PLEP Act to provide additional parental leave in surrogacy arrangements. The status quo for addressing parental leave by agreement would remain, or intending parents may elect to provide financial support to a surrogate pursuant to the proposed section 14(4)(d). Where financial recompense is agreed, the duration of this would be a term for negotiation and therefore dependent on financial capabilities and perceptions of what a reasonable duration would be. Intending parents cannot provide the presumption of job security that accompanies parental leave,[236] and so the issue of there being a long term, unquantifiable cost in future would remain. Significantly, addressing lost income this way raises concerns under the Verona Principles, which only allows for payment attaching to reasonable expenses and not opportunity cost in altruistic arrangements.[237]

The Surrogacy Report's recommends the Government clarify the PLEP Act's applicability to surrogates, in a way that does not affect intending parents' entitlements.[238] This approach

[233] See generally Gibson and Shaw above n 9.
[234] Law Commission above n 9 at [R48].
[235] See [8.45].
[236] Compare Parental Leave and Employment Act 1987, sections 40 and 41.
[237] International Social Services above n 13 at 7.
[238] At R49, [8.65] and following.

aligns with how surrogate parental leave eligibility is treated in Australia,[239] England and Wales.[240] Given the Law Commission estimates there are only around 50 children born through surrogacy, whether gestational or traditional[241] (a nominal figure compared to the 58,749 live births recorded for the year ended September 2022),[242] this is considered to have limited cost implications.[243]

Interestingly, there was no consistent view of how many weeks of post-birth paid leave ought to be available to a surrogate, and the largest proportion of submitters supported parental leave for 12 weeks.[244] While significantly less than the 26-week entitlement under the PLEP Act,[245] some submitters distinguished that as a surrogate would only need leave for post-birth recovery and not also childcare and focused only on the physical impact[246] a shorter period of leave was sufficient.[247] That intending parents would only require parental leave for one of its dual purposes did not appear to be influential in any argument that primary carer leave should be distributed across surrogates and intending parents. Notwithstanding the above, the Surrogacy Report does not advocate for differential treatment for surrogates.

[239] Paid Parental Leave Rules (Cth), section 13; Australian Government *Paid Parental Leave Guide (Version 1.70)* (10 May 2021) at [1.1.S.100 Surrogacy arrangement] cited in Law Commission above n 9 at footnote 106.
[240] Law Commission of England and Wales and Scottish Law Commission *Building families through surrogacy: a new law – a joint consultation paper* (CP244/DP167) at [17.6] cited in Law Commission above n 9 at footnote 107.
[241] Law Commission above n 9 at Executive Summary.
[242] Stats NZ | Tatauranga Aotearoa "Births and deaths: Year ended September 2022" (17 November 2022) <https://www.stats.govt.nz/information-releases/births-and-deaths-year-ended-september-2022/>.
[243] Law Commission above n 9 at [8.65].
[244] Law Commission above n 9 at [8.38].
[245] PLEP Act, section 26.
[246] See generally Callister and Galtry above n 23.
[247] IP47.003 Personal Submission "Submission to the Law Commission on Te Kōpū Whāngai: He Arotake | Review of Surrogacy"; IP47.037 Personal Submission "Submission to the Law Commission on Te Kōpū Whāngai: He Arotake | Review of Surrogacy"; IP47.052 Personal Submission "Submission to the Law Commission on Te Kōpū Whāngai: He Arotake | Review of Surrogacy"; IP47.095 Personal Submission "Submission to the Law Commission on Te Kōpū Whāngai: He Arotake | Review of Surrogacy"; IP47.098 Personal Submission "Submission to the Law Commission on Te Kōpū Whāngai: He Arotake | Review of Surrogacy"; IP47.101 Personal Submission "Submission to the Law Commission on Te Kōpū Whāngai: He Arotake | Review of Surrogacy"; IP47.127 Personal Submission above n 186; IP47.181 Personal Submission "Submission to the Law Commission on Te Kōpū Whāngai: He Arotake | Review of Surrogacy"; IP47.168 Personal Submission "Submission to the Law Commission on Te Kōpū Whāngai: He Arotake | Review of Surrogacy"; IP47.198 Personal Submission "Submission to the Law Commission on Te Kōpū Whāngai: He Arotake | Review of Surrogacy"; IP47.198 Personal Submission above n 228; IP47.210 Personal Submission "Submission to the Law Commission on Te Kōpū Whāngai: He Arotake | Review of Surrogacy".

As an observation, legislation implementing the Surrogacy Report's parental leave recommendation is likely to contribute to understanding the prevalence of traditional surrogacy in New Zealand as more surrogates and intending parents may apply for parental leave through Inland Revenue.

VIII. Conclusion

Reforming section 14 will provide some much needed clarity on the government's position on altruistic surrogacy. This has shifted since the HART Act came into force, from one of hard altruism and strict restrictions on payments, to one reflecting altruistic surrogacy as it is understood and accepted internationally.

Despite it appearing certain section 14 will be amended shortly, the scope of these amendments and for who they are intended to serve are all important considerations. Merely allowing for a permissive system that removes the risk of criminalisation to say that payments and support *could* be provided by intending parents, does not address whether this *would* be provided or not. Instead, this may become a matter for negotiation in each individual surrogacy arrangement, and subject to the trading off of intending parents' and surrogates' potentially competing interests. Given how these have been negotiated despite section 14, and that in New Zealand there is no consensus on what reasonable support would be where this has never been legally established, whether an agreement would be sufficient to not disadvantage a surrogate is questionable.

In light of the long shadow cast by 20 years of the current regime, for any reform to be sustainable and successful in ensuring surrogates are not disadvantaged, it must shed light on certain aspects of payments. Providing guidance on what the reasonable costs from a pregnancy are and who *ought* to be responsible for these by virtue of the surrogacy relationship are both necessary steps. In addition to addressing a willingness to agree to meet costs of a surrogacy arrangement, ensuring the accessibility of this by addressing the costs that intending parents may incur above and beyond those of a natural pregnancy impact the

feasibility of providing support to a surrogate. Fortunately, the Surrogacy Report's recommendations provide for each of these measures.

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