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**Securing Informed Consent: The Rights of Surrogates in
Home-Based and International Surrogacy Arrangements in
Aotearoa**

**LLB (HONOURS) RESEARCH PAPER
LAWS 489: RESEARCH ESSAY**

FACULTY OF LAW



2023

Contents

| | |
|--------------------|---|
| Contents | 2 |
| Abstract | 4 |
| Word length | 4 |
| I | INTRODUCTION..... 5 |
| II | SCOPE OF THE ESSAY 6 |
| III | VALUES AND STANDARDS 7 |
| A | Informed Consent 7 |
| B | Human Rights..... 11 |
| C | Verona Principles..... 11 |
| IV | HISTORY 12 |
| V | SURROGACY ARRANGEMENTS IN AOTEAROA 13 |
| A | Home-based Surrogacy..... 13 |
| B | Clinic-based Surrogacy..... 14 |
| C | Adoption Process for Domestic Surrogacy 16 |
| D | International Surrogacy 16 |
| VI | ISSUES..... 17 |
| A | Non-clinic Based..... 17 |
| B | International..... 20 |
| VII | OPTIONS OF REFORM 22 |
| A | General 22 |
| B | Home-Based Surrogacy 22 |
| 1 | PROHIBITION..... 22 |
| 2 | ECART REQUIREMENT..... 23 |
| 3 | ECART INCENTIVE..... 24 |
| 4 | SURROGACY AGREEMENTS 25 |
| C | International Surrogacy 27 |
| 1 | PROHIBITION..... 27 |
| 2 | ECART ACCESS 27 |
| 3 | PARENTHOOD PATHWAY..... 28 |
| 4 | RECOGNISING FOREIGN PARENTHOOD. 29 |
| VIII | CONCLUSION..... 30 |

Abstract

Surrogacy arrangements involve a complex web of ethical considerations, including ensuring informed consent from the surrogate. Informed consent is emphasised in the Verona Principles, the gold standard for surrogacy regulations. While New Zealand has a robust process to consider clinic-based arrangements, home-based and international surrogacy arrangements can avoid ethical consideration and allow for a lack of informed consent. As New Zealand is at a stage of overlapping reform discussions, including the Law Commission report and the Improving Arrangements for Surrogacy Bill, this essay considers different reform options to ensure informed consent for surrogates in home-based and international arrangements. While international arrangements would benefit from a widely adopted international instrument, both avenues should be incentivising pre-conception approvals by providing easier access to legal parenthood.

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 8066 words.

Subjects and Topics

Surrogacy-Informed Consent-Human Assisted Reproductive Technologies Act 2004.

I Introduction

New Zealand faces imminent reform of surrogacy regulations. While surrogacy is becoming a more common pathway to building a family, the law does not reflect this development. Following the presentation of a petition to Parliament in 2019 seeking reform, the Law Commission has recently released *Te Kōpū Whāngai: He Arotake | Review of Surrogacy*. The report makes recommendations on a range of surrogacy issues. The complex procedures surrogacy arrangements can require were highlighted during the COVID-19 pandemic, leading the Family Court to create a new protocol for the adoption of surrogate babies born overseas. Separate from the development of the Law Commission report, Tāmami Coffey’s Member’s Bill reforming surrogacy laws was drawn from the ballot. The Improving Arrangements for Surrogacy Bill has since been adopted by the current Labour Government. At the time of writing, the Bill is being considered by the Health Committee which has released two interim reports, the second recommending substantial changes.

While reform is needed, it is not simple. Surrogacy involves a complex web of interests and rights – of the resulting child, the intended parents and the surrogate mother. As the gestational and sometimes biological mother of the resulting child the surrogate mother must have full and free informed consent. She must give informed consent at all stages of the arrangement – to conception, to the medical processes in pregnancy and birth, and to the transfer of legal parenthood. The importance of informed consent can be seen in New Zealand history stemming from the Cartwright Inquiry and the subsequent office of the Health and Disability Commissioner. Informed consent is featured throughout the Verona Principles – the gold standard of surrogacy regulations.

Surrogacy started to become relevant in New Zealand legal discussion in the late 20th Century. This reflects technological developments, particularly in vitro fertilisation, as well as increasing social acceptance of new ways of family-building. Currently all surrogacy arrangements have to go through an adoption process for the intending parents to gain legal parenthood of the resulting child. Until the process is complete the surrogate mother remains the child’s legal mother, regardless of any the parties’ shared intentions or biological connections.

New Zealand has a robust system to ensure informed consent pre-conception for surrogate mothers in clinic-based, gestational arrangements. These arrangements require approval by the Ethics Committee on Assisted Reproductive Technologies (ECART). The system does not ensure the informed consent of all surrogate mothers. A surrogate mother in a home-

based arrangement can become pregnant with no medical, legal or ethical advice. A surrogate mother in an international arrangement is only subject to her birthing country's regulations which may not assess informed consent. The consent of surrogate mothers in these arrangements is assessed domestically post-birth in the adoption or immigration process.

The surrogacy arrangements that fall outside of the scope of New Zealand's ethical regulations have unique ethical complexities. For home-based arrangements, the surrogate mother will always be relinquishing her biological child. For international arrangements, these are often commercial – raising concerns of exploitation and commodification. This essay identifies issues for the surrogate mother's informed consent in these arrangements and explores options for reform. For domestic arrangements, informed consent can be promoted best by allowing access to the ECART ethical approval system. An administrative pathway to legal parenthood can require ECART approval, incentivising the intended parents to go through the pre-conception assessment of the surrogate mother's informed consent. Protecting informed consent for international surrogate mothers is more complex. In the absence of a binding international instrument, the surrogate mother's informed consent could be protected by allowing access to an easier pathway to legal parenthood within New Zealand if the intended parents have gained pre-conception approval within a framework compliant with the Verona Principles.

II Scope of the Essay

This paper is focused on ensuring informed consent for the surrogate in domestic and international surrogacy, particularly through pre-conception approvals for surrogacy arrangements.¹ Domestically, this is particularly important for home-based surrogacy arrangements.²

New Zealand has an existing prohibition on commercial surrogacy which is not proposed to change in the near future. Concerns regarding commercial surrogacy will be relevant to the assessment of the surrogate's rights and informed consent in the international arrangements.

1 The rights of donors providing human reproductive material (outside of intending parents or the surrogate) are not considered in this essay.

2 The term home-based is used throughout this essay to refer to non-clinic assisted surrogacy arrangements.

This paper is not focused on providing ethical guidance for whāngai arrangements or surrogacy in relation to Tikanga and Te Ao Māori. These are issues that need to be explored further with Māori voices at the forefront.³

III Values and Standards

A Informed Consent

Informed consent is a key principle in medical decision-making. While the concept has a range of definitions and interpretations, they have mutual key elements. The patient must be capable of making the decision, they must be free from influence or coercion, they must have the relevant information to make the decision and it must be made voluntarily.⁴ Informed consent is vital to ensure autonomy, self-determination and wellbeing of a medical patient.⁵

The requirement of informed consent can be seen developing internationally in the 1947 Nuremberg Code which stated “the voluntary consent of the human subject is absolutely essential”.⁶ This involved legal capacity to consent, freedom to choose, sufficient comprehension and information and a duty imposed on the controlling party. While first limited to non-therapeutic research, the significance of the doctrine continued to evolve, as seen in the 1964 Helsinki Declaration code of ethics.⁷

In New Zealand informed consent came to the forefront through The Inquiry into the Allegations Concerning the Treatment of Cervical Cancer at National Women’s Hospital in 1987 and 1988 (The Cartwright Inquiry). The inquiry looked at an unethical study of women with major cervical abnormalities, some not receiving treatment, without their full knowledge or informed consent.⁸

3 While this work has been started in the Law Commission report, the possibility of regulation through legislation needs careful consideration as whāngai is practised in accordance with tikanga.

4 Angus Dawson “Informed Consent: Bioethical Ideal and Empirical Reality” Matti Häyry, Tuija Takala, and Peter Herissone-Kelly *Bioethics and Social Reality* (Brill, Leiden (NL), 2005) at 94.

5 At 97.

6 Committee of Inquiry into Allegations Concerning the Treatment of Cervical Cancer at National Women's Hospital and into Other Related Matters *The Report of the Cervical Cancer Inquiry* (Government Printing Office, Auckland, 1988) at 132.

7 At 132.

8 At Chapter 11.

The inquiry led to the formation of the Health and Disability Commissioner, a system of ethical review for health and disability services and became the blueprint for the patient code of rights in Aotearoa. The code ensures the patient's right to autonomy and self-determination and emphasises the trust patients must be able to have in medical staff to have one overriding goal – the patient's health and welfare.⁹ This is through the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996. It includes the right to be fully informed, the right to make an informed choice and give informed consent.¹⁰

Section 11 of the New Zealand Bill of Rights Act ensures everyone the right to refuse to undergo medical treatment. This extends to a surrogate who has the right to refuse medical treatments in birth and pregnancy. This includes termination, antenatal screening tests and medication in birth. This fundamental right can only be limited in law if it is demonstrably justified in a free and democratic society.¹¹

Medical ethics and law have a complex relationship; what is unethical and what is illegal do not always correspond. The relationship between medical ethics and medical law is a mirror of the moral intuitions of our community while also continuing laws inherited from previous social ages.¹² As our intuition evolves, so do medical ethics and so should the laws. This can be applied to the need for reform as our society continues to accept surrogacy arrangements. Law imparts duties on medical practitioners, such as the patient's informed consent. This must be in the light of real clinical practice. What information is necessary might vary (beyond the minimum requirements).¹³ Ensuring informed consent or an informed choice is not achieved by a cast-iron contract but through a partnership model.¹⁴ This requires the patient-doctor relationship to have trust, honesty and objectivity.

The pregnancy process is a complex and dangerous experience for some women. Informed consent is not only about the medical practice of conception but also about the ongoing pregnancy, the birth and the postnatal experience. In surrogacy the intended parents are

9 At Chapter 11.

10 Right 6 and Right 7.

11 Section 5.

12 Alastair Campbell, Grant Gillet and Gareth Jones *Medical Ethics* (4th ed, Oxford University Press, Melbourne, 2005) at 269.

13 At 24.

14 At 26.

invested in the outcome of the pregnancy, which can cause express or implicit coercion over the decisions of pregnant women.

Informed consent from the surrogate is required before any medical procedure. At a minimum, the Verona principles requires her informed consent to involve:¹⁵

- a. effective access to independent medical advice and/ or a second opinion;
- b. informed consent for each procedure that is free from all forms of coercion and fraud
- c. the provision of information and education about the medical procedure, lifestyle restrictions and short- and long-term risks, as well as possible complications in a language the surrogate mother understands and in a way that she understands;
- d. the number of embryos implanted and donor information;
- e. the right to maintain control over her own body including to refuse, restrict or request a medical procedure;
- f. the right to decide on birth conditions including labour, delivery and persons to be present; and
- g. information on post-birth implications related to the surrogate mother's future health and on subsequent births.

Ensuring informed consent and the birthing woman's involvement in decision-making is positively correlated with physical and mental benefits. It improves the patient-doctor relationship and trust in the health system.¹⁶ Participation provides better clinical outcomes and quality of life for the patient, including self-esteem.¹⁷ Involvement in childbirth decisions has implied less fear and depressive feeling after birth as well as shorter recovery periods.¹⁸

Depression and anxiety are some of the most common complications of pregnancy and postpartum.¹⁹ In New Zealand, surrogates assessed by the ECART process have gone through a pregnancy and live birth before and the pregnancy's impact on their mental health

15 International Social Service *Principles for the protection of the rights of the child born through surrogacy (Verona Principles)* (Geneva, 2021) at [7.4] (Referred to as Verona Principles).

16 Holly Goldberg "Informed decision making in maternity care" (2009) *J Perinat Educ* 32 at 35.

17 At 35.

18 At 35.

19 Pre-Conception Health Special Interest Group "Effects of mental illness and its treatment on fertility and pregnancy health" (April 2021) The Fertility Society of Australia <https://www.fertilitysociety.com.au/wp-content/uploads/FSANZ-Effects-of-mental-illness-and-its-treatment-on-fertility-and-pregnancy-health-April-2021.pdf> at 2.

is taken into account.²⁰ This does not remove the risk but makes the surrogate informed about how her experience is likely to go. If mental health issues arise during a pregnancy this is complicated by the risks of treatment weighed against the risk of non-treatment to both the surrogate and child.²¹ Surrogacy also involves the mental impact of relinquishing the child after birth. Lawyers experienced in surrogacy arrangements have seen cases where the surrogates are left feeling somewhat abandoned after facing serious difficulties during the pregnancy or birth as the focus shifts to the intended parents and resulting child.²²

Many concerns of exploitation or lack of informed consent in surrogacy arrangements are linked to commercial practices, but it cannot be assumed that altruistic surrogacy is not also at risk of exploitation and undue influence.²³ Altruistic arrangements are often made within families or close personal relationships. This can lead to, intentional or not, emotional pressure on the woman who agreed to be the surrogate. Where there are these close relationships, care must be taken to ensure the consent is made freely.

The importance of informed consent arose in Aotearoa due to the disregard of women's rights over their reproductive health. When there is any discussion of the medical processes of women's reproductive health, her individual informed consent must remain a priority. Feminist ethics in medicine recognise the dominance of men in the development in healthcare and the absence of women's voices in medical literature.²⁴ This includes a paternalistic attitude in medicine devaluing women's ability to make their own healthcare decisions.²⁵ Feminist medical ethics require critical understanding and care for rights and lives of female patients.²⁶

20 See ECART “Minutes of the Ninety-ninth Meeting of the Ethics Committee on Assisted Reproductive Technology” (24 February 2023) <https://ecart.health.govt.nz/assets/ECART-24-February-2023-final-minutes.pdf>.

21 Pre-Conception Health Special Interest Group, above n 19, at 3.

22 Te Aka Matua o te Ture | Law Commission *Kōpū Whāngai: He Arotake | Review of Surrogacy* (NZLC R146 2022) at [5.58].

23 Debra Wilson “Avoiding the Public Policy and Human Rights Conflict in Regulating Surrogacy: The Potential Role of Ethics Committees in Determining Surrogacy Applications” (2017) 7 UC Irvine L Rev 653 at 656–657.

24 Campbell, Gillet and Jones, above n 6, at 15.

25 Goldberg, above n 16, at 34.

26 Campbell, Gillet and Jones, above n 6, at 15.

B Human Rights

Surrogacy arrangements relate to the human rights of the surrogate, the resulting child and the intending parents. The Law Commission recognised the need for any reform in surrogacy law to protect and promote surrogates' rights, including the right to personal autonomy, bodily integrity, and reproductive freedom.²⁷ In order to protect these rights, the surrogate must be able to make free and informed decisions throughout the process.

While there is not a specific international treaty that addresses a surrogate's rights, the arrangement invokes consideration of the right to health, the right to privacy and the right to employment.²⁸

Although it is not a binding instrument, the Verona Principles aim to fill in the gap by providing guidance for countries to ensure the rights of the child, the intending parents and the surrogate are protected.²⁹

New Zealand ratified the right to health in The United Nations Declaration on Human Rights.³⁰ New Zealand has also ratified the Convention on the Elimination of All Forms of Discrimination Against Women. The convention requires states to take all appropriate measures to eliminate discrimination against women in healthcare and ensure women have appropriate services connected to both pregnancy and birth. This right includes the right to reproductive freedom and right from unwanted medical treatment.

C Verona Principles

The Verona Principles are seen as the gold standard for surrogacy regulations.³¹ They were developed by a group of experts in international law and human rights.³²

The Principles aim to provide guidance for legislative and regulatory reform around surrogacy.³³ While surrogacy can involve conflicting interests between the parties

27 Law Commission, above n 22, at [3.62].

28 Rhonda Powell and Natalie Baird *Te Kohuki Ture Kopu Whangai: Surrogacy and Human Rights in New Zealand* (University of Canterbury, Christchurch, May 2020).

29 Verona Principles, above n 15.

30 Article 25.

31 New Zealand Law Society "Submission on the Improving Arrangements for Surrogacy Bill" (20 July 2022) at [2.1].

32 Verona Principles, above n 15, at 5.

33 At 5.

involved, the resulting child's interests must always be paramount and the determining factor for decision-making in a surrogacy arrangement.³⁴

The Principles require an established framework for pre-surrogacy protections.³⁵ This includes informed consent from the parties. The review should be conducted by independent professionals and come without cost to the surrogate.³⁶ This should include independent legal advice for the surrogate and a record of the parties' intentions.³⁷ The guidance for counselling given to the surrogate includes confirming a lack of coercion or exploitation in her decision, and ensuring she understands the arrangement completely and agrees freely.³⁸

Consent of the surrogate in all legal, social, financial and medical matters needs to happen at the pre-approval stage, during, and after the pregnancy in order to have confidence in the arrangement.³⁹ Principle seven of the Verona report details requirements for ensuring this consent, including a requirement that the surrogate receives information on all medical procedures and risks and has the right to maintain control over her body (such as in medical procedures and birthing conditions).

IV History

Surrogacy and its ethical ramifications are not new ideas in New Zealand or the world. The book of Genesis tells the story of Abraham and Sarah, and their handmaid Hagar who became pregnant with Ishmael for the couple.⁴⁰ The Code of Hammurabi in 1780BC is likely the first legal document relating to surrogacy arrangements.⁴¹

The development of artificial reproductive technology, including in vitro fertilisation, meant surrogacy was divided into two umbrella categories. In a gestational arrangement the surrogate carries the child but is not the biological mother. In traditional surrogacy the surrogate acts as both the gestational and biological mother. Surrogacy has increasing recognition as a viable pathway to build a family. It has seen increasing social acceptance,

34 At [6.1].

35 At [5.1].

36 At [5.2].

37 At [5.3].

38 At [5.4].

39 At [7.2].

40 K Svitnev "Legal control of surrogacy – international perspectives" in Joseph G Schenker *Ethical Dilemmas in Assisted Reproductive Technologies* (De Gruyter, Berlin, 2011) 149 at 149.

41 At 149.

allows LGBT+ couples more opportunities for reproduction, accommodates the global increase of infertility and the social trend of women starting families later in life.⁴²

While surrogacy was not legally regulated in New Zealand, there was no doubt it was occurring through informal processes.⁴³ Early applications by fertility clinics for surrogacy arrangements stalled. The Interim National Ethics Committee on Assisted Reproductive Technologies rejected an application for IVF surrogacy after its formation in 1993.⁴⁴ The lack of regulation does not reflect the lack of legal discussion on surrogacy. In 1985 the Department of Justice called for public submissions to stimulate discussion on new birth technologies.⁴⁵ They received 99 submissions on surrogacy, with 45 opposed to the process outright. This is compared to the 223 submissions received by the Law Commission for its 2022 Report, with only 30 opposing the process in all forms.⁴⁶

The current framework for surrogacy applications came in 2004 with the Human Assisted Reproductive Technology (HART) Act. This statute created the Advisory Committee on Assisted Reproductive Technology (ACART) to guide and ECART to assess gestational surrogacy applications, alongside other assisted reproductive practices. ECART has considered an increasing number of applications since its formation, with 42 applications reviewed in the 2021/22 year.⁴⁷ Only one of these applications was declined. Since 2005, there has been 150 live births resulting from ECART approved surrogacy arrangements.⁴⁸

V Surrogacy Arrangements in Aotearoa

A Home-based Surrogacy

A traditional arrangement, with either the intending father, a known donor or the surrogate's partner providing sperm, can be achieved without clinic assistance. The ECART process is not open for home-based surrogacy arrangements. This takes away much of the cost, bureaucracy and potential time delays faced by gestational arrangements.

42 Law Commission, above n 22, at [2.22].

43 Law Reform Division *New Birth Technologies: A summary of submissions received on the issues paper* (Department of Justice, 1986) at 40.

44 Bill Atkin and Paparangi Reid *Assisted Human Reproduction: Navigating Our Future | Report of the Ministerial Committee on Assisted Reproductive Technologies* (Tribunals Division, July 1994) at 103.

45 Law Reform Division, above n 47, at 42.

46 Law Commission, above n 22, at [2.35]

47 ECART *Ethics Committee on Assisted Reproductive Technology Annual Report 2021/2022* (May 2023) at 15.

48 At 15.

It also means there are no requirements for legal advice or counselling. This allows exploitation, coercion or a lack of informed consent. A home-based arrangement will always mean it is a traditional arrangement. The surrogate will be relinquishing her biological child.

Home-based surrogacy has been a more accessible route for those who may have been discriminated against in the current or previous ECART guidelines. This includes queer couples, single people, someone without the ability to have a biological link, Māori and Pasifika people who faced institutionalised racism and people with non-medical reasons to avoid pregnancy.⁴⁹ Home-based surrogacy allows more privacy for the arrangements while clinical surrogacy faces guidelines some view as unnecessarily burdensome. It can be seen as the law deciding who can reproduce, while natural reproduction does not involve the same scrutiny.⁵⁰

B Clinic-based Surrogacy

ECART's role is to assess applications for all assisted reproductive procedures outside of the "established procedures".⁵¹ While surrogacy itself is not included in the statutory definition of an assisted reproductive procedure, a gestational surrogacy arrangement requires the clinic to use such procedures, such as the creation of an in vitro human embryo. If a gestational surrogacy arrangement goes ahead without ECART approval, the person performing the procedure commits an offence.⁵²

While it is not a strict legal requirement, the practical application of the HART Act requires the fertility clinic to apply to ECART for the intending parents.⁵³ Traditional surrogacy arrangements can apply to ECART if a fertility clinic involved, but only for non-binding ethical advice rather than approval.⁵⁴

The committee decides on the applications on a case-by-case basis, guided by the principles of the HART Act and the guidelines delegated to it from ACART. The principles of the Act acknowledge the need to protect women's health and wellbeing in assisted

49 Law Commission, above n 28, at [2.22] and [2.28].

50 At [4.27].

51 HART Act 2004, S 5.

52 S 16(1).

53 Law Commission, above n 22, at [4.14].

54 Law Commission, above n 22, at [4.5].

reproduction procedures.⁵⁵ They also identify the requirement for informed choice and informed consent from the participants of assisted reproductive procedures.

The guidelines from ACART have flexibility to develop as needed as seen in removing the requirement of a biological link between the intended parents and child.⁵⁶ The guidelines provide ECART with a comprehensive and robust list of requirements.

ECART must be satisfied that the risks associated with surrogacy are justified. This includes risks particular to the surrogate's health and wellbeing. This includes health impacts from pregnancy and childbirth, the possibility the intending parents changing their minds and any impact on the surrogate's future reproductive capacity after the process. Both the intending parents and surrogate must have received joint and individual counselling. The counsellor certifies that the parties understand each other's intentions, understand any specific issues relevant to their arrangement and that the wellbeing of the surrogate is adequately safeguarded. The surrogate must have received independent legal and medical advice, with the lawyer reporting that the parties have understood the legal consequences, issues, and advice.

The process of consideration can be seen in the minutes of the ECART meetings, publicly available on the Committee's website. The most recently available minutes show the Committee considering the surrogate's and intending parents' mental health, parties' cultural factors, counsellors' reports, the health risks for the surrogate and the relationship between the parties.⁵⁷ The Committee can approve the application, approve with recommendations or conditions, defer or decline.

Aotearoa has only three fertility clinics that facilitate gestational surrogacy: Fertility Associates, Fertility Plus and Repromed. The counselling required by ECART must be provided by an Australian and New Zealand Infertility Counsellors Association (ANZICA) approved counsellor. This means the counsellors are usually employed by the fertility clinics. As health services, in addition to the ECART requirement the clinics must abide by the Health and Disability Services Standards and the Code of Patient Rights. This adds a further layer of safeguarding the rights and consent of the surrogate throughout the arrangement.

55 HART Act 2004, s 4(c).

56 Law Commission, above n 22, at [4.13].

57 ECART, above n 20.

New Zealand conforms to the Verona Principles for surrogates in clinic-based, gestational arrangements. The women are given independent legal and medical advice. There is an independent pre-conception framework. They are given counselling alone, and the counsellor must report that the surrogate has understood and freely agreed to all elements. They provide consent pre-conception and after birth in regards to legal parenthood. ECART is an effective safeguard for the arrangements its scope captures.

C Adoption Process for Domestic Surrogacy

Currently in Aotearoa New Zealand, legal parenthood after birth resides with the surrogate and her partner if applicable.⁵⁸ The intending parent must apply to adopt the child through the Family Court. This includes if the child is genetically the intending parents' biological child and/or is unrelated to the surrogate. The adoption process requires the surrogate's consent and a report from Oranga Tamariki on the intending parents' suitability. This is due to change in the Improving Arrangements for Surrogacy Bill.⁵⁹ The Bill has been adopted by the Labour Government to fast-track the reform.⁶⁰

D International Surrogacy

International surrogacy arrangements are not regulated through New Zealand legislation. While the Verona Principles aim to provide guidance across jurisdictions, there is no international agreement to regulate cross-border surrogacy arrangements. The regulation of any pre-conception approvals and the execution of the arrangement are determined by the country the surrogate is residing in. This can accommodate commercial surrogacy without ensuring informed consent. The main destination for New Zealanders engaging in international surrogacy is the United States, with differing laws and regulations between states.⁶¹

In New Zealand the same legal parenthood rules apply if the surrogate child is born outside of New Zealand.⁶² The most common way for the intending parents to obtain legal parenthood is through adoption. A surrogate's consent is assessed post-birth in applications for immigration and adoption. Intended parents are advised to contact Oranga Tamariki,

58 Status of Children Act 1969, s 17 and s 18.

59 Improving Arrangements for Surrogacy Bill 2021 (72—1).

60 Kiritapu Allan "Next steps to reform outdated surrogacy law" (30 May 2023) The Beehive <https://www.beehive.govt.nz/release/next-steps-reform-outdated-surrogacy-law>

61 Law Commission, above n 22, at [2.16].

62 Status of Children Act 1969 s 16.

the Department of Internal Affairs, and Immigration New Zealand before beginning the process.⁶³

Due to the COVID-19 pandemic the Family Court adopted a new protocol for children born to New Zealand intended parents in international surrogacy arrangements. Following the Law Commission's recommendation, the Family Court has continued the protocol with annual review.⁶⁴ The protocols allow the intending parents to apply for adoption from the country of birth. This allows the child to be adopted and gain a New Zealand passport before they travel. Conditions for the protocol include recognition a legal parent-child relationship between the intending parents and resulting child in the birth country and an Oranga Tamariki assessment.⁶⁵ This can be completed over audio-visual link and includes proof of consent from the surrogate mother regarding adoption and travel of the child.⁶⁶

If the protocol does not apply, the pre-existing process is for the child to obtain a New Zealand visitor's visa issued by the Ministry of Immigration.⁶⁷ The intending parents then apply through the domestic adoption process, with the final order transferring legal parenthood. This is usually six to nine months after arrival in New Zealand.⁶⁸

VI Issues

A Non-clinic Based

Home-based surrogacy is always a traditional arrangement. The arrangement can have added complexities from the biological father – it could be a donor father, the intending father or the surrogate's partner. While the current New Zealand law allocates legal parenthood to the surrogate's partner if they consented,⁶⁹ it is unclear how often the resulting child is biologically related to both surrogate parents. This may raise extra ethical considerations. The child is relinquished from a biological mother, a biological father and potentially full biological siblings. Verona states may consider the possible impact on the

63 Oranga Tamariki - Ministry for Children *Information Fact Sheet: International Surrogacy* (August 2022).

64 Principal Judge Moran "Family Court Protocol for the Adoption of New Zealand Surrogate Babies Born Overseas" (9th August 2023) at 3.

65 At 2.

66 At 2.

67 Debra Wilson "Surrogacy During COVID-19 Times : The New Zealand Experience" (2021) 28 *CanterLawRw* 51 at 53.

68 At 53.

69 Status of Children Act 1929, s 18.

resulting child's dignity throughout life with no genetic link to the intending parents and if separated from genetic parents, siblings, and extended family.⁷⁰ These extra ethical considerations are left unregulated.

While surrogacy itself raises questions of women's bodily autonomy and reproductive health, this is amplified when the child is biologically hers. Traditional surrogacy is prohibited in other jurisdictions which still allow gestational arrangements.⁷¹

Surrogacy complicates the decision of legal parenthood as it can separate the genetic, gestational and social factors. In traditional arrangements, the surrogate is the gestational and genetic mother. This contrasts with the one factor fulfilled in a gestational arrangement. The concept of relinquishing a child might be more digestible for critics of surrogacy if the child is not biologically the surrogate's. Cases where the surrogate is the biological mother can be the most challenging and risky arrangements, yet they can operate without oversight.⁷²

A home-based arrangement has no pre-conception oversight. There is no objective consideration of the surrogate's role: whether she is fully informed, free of undue pressure or coercion. There is no assessment of her relationship to the parties. She may not receive independent legal advice or medical checks. She may not receive counselling. There could be a significant power imbalance between the surrogate and intending parents. It is not certain the surrogate fully understands the medical, legal and ethical risks she faces when entering into the arrangement. There is not a consistent use of the Verona Principles due to surrogates in home-based arrangements falling through the gaps.

Without a pre-conception framework, a home-based surrogate's consent is only assessed post-birth in the context of legal parenthood. There is no scrutinising the information given to her before any medical process began. Free and informed consent of the surrogate should be secured in all medical, legal, social and financial matters. This must be before, during and after birth.

70 Verona Principles, above n 15, at [1.6](d).

71 This includes Hong Kong, Greece, Israel, The Australian Capital Territory and Russia. In Victoria (Australia) a surrogacy arrangement will not be approved if the surrogate is the genetic mother. Jens M Scherpe, Claire Fenton-Glynn and Terry Kaan *Eastern and Western Perspectives on Surrogacy* (Intersentia, Cambridge, 2019).

72 Law Commission, above n 22, at [4.24].

Under current New Zealand law, the surrogate will be the legal mother of the resulting child, and possibly her partner will be the legal father. This installs continuing legal responsibilities on her until legal parenthood is transferred. This creates the risk of the intending parents refusing to honour their intention of adopting the child. To transfer the legal parenthood the surrogate will be part of a court process in order for the intending parents to adopt the resulting child. The Verona Principles recommend minimising the risks of disagreement on legal parenthood through pre-conception arrangements, such as requiring independent legal advice for the surrogate.⁷³

Home-based surrogacy can be achieved by using donor sperm. This can avoid the complicated process of using a clinic and possible delays as New Zealand faces a shortage of donor sperm.⁷⁴ The drought has been extending as it becomes more common for single women and same-sex couples to build families using donated sperm. Some women are turning to online forums to find sperm donors.⁷⁵ In cases going through a clinic, donated sperm is tested for genetic and medical issues, including sexually transmitted diseases.⁷⁶ Informally donated sperm has not gone through that rigorous testing, women in home-based arrangements must be aware of the risk this can pose.

Fertility clinics are limited to one donor being able to donate to a maximum of ten families, with some clinics own rules being more conservative at five.⁷⁷ The HART Act requires clinics to obtain information about a sperm donor's identity.⁷⁸ In an informal donation the donor can deceive or avoid contact. The donor could father any number of children through artificial insemination. An example of these risks is Tauranga Tony (aka Tony Ross). Ross lied to the women he donated to about how many children he had fathered, his family health history and his intentions regarding future contact with the resulting children.⁷⁹ While his

73 Verona Principles, above n 19, at [5.3].

74 Law Commission, above n 28, at [10.177], n66.

75 Amy Nemes Bissett "Inside New Zealand's unregulated sperm donor network" (7 November 2018) Radio New Zealand <<https://www.rnz.co.nz/news/in-depth/370295/inside-new-zealand-s-unregulated-sperm-donor-network>>.

76 Australia and New Zealand Infertility Counsellors Association "Home insemination using donor sperm" (7 June 2021) Fertility Associates <https://www.fertilityassociates.co.nz/media/1871/home-insemination-final-version.pdf>.

77 Colin Gavaghan "The problem with DIY sperm donations" (9 May 2019) The Spinoff <https://thespinoff.co.nz/society/09-05-2019/the-problem-with-diy-sperm-donations>.

78 Section 47 and section 50.

79 Gavaghan, above n 77.

actions were not illegal, a member of ACART called them “morally reprehensible”.⁸⁰ The potential deception could inhibit how fully informed the surrogate’s consent is to all aspects of the home-based arrangement.

B International

Consistency in how surrogacy arrangements are treated in Aotearoa extends the need for informed consent into international arrangements. While the surrogates are not based in New Zealand, the intending parents and resulting child are. As the women are subject to New Zealand laws of legal parenthood, they should also receive a duty of care under surrogacy laws. The same risks and possible further issues apply to the surrogates in an international arrangement.

International surrogacy arrangements are becoming more common for intending parents in New Zealand. Many of these are commercial arrangements, with the most popular destinations being in the United States, Asia and Eastern Europe.⁸¹ Ethical issues in international commercial surrogacy have been recognised by states where reproductive tourism was common, such as India which now prohibits the practice.⁸²

Beyond the established ethical questions raised by any surrogacy, these international arrangements are usually commercial. This sparks the need for further consideration of any exploitation of the surrogate. A common opposition to commercial surrogacy is the view that it commodifies children and women’s reproductive health. It may pose a further barrier to freely consenting if there is financial need or financial pressure exerted on the surrogate. It is difficult to avoid a conclusion of female commodification in states where surrogacy has become a lucrative industry, such as California, or where women in poverty act as surrogates without informed consent, as previously occurred in India.⁸³ Although it may be specific terms of an agreement that is exploitative rather than commercial surrogacy in general.⁸⁴

80 Gavaghan, above n 77.

81 Law Commission, above n 22, at [2.16].

82 Patta Radhakrishna, Vidya Mohanrammagnus and Jayaraj Mansard “What does the new law on surrogacy say? (9 March 2023) The Hindu Bussiness Line <https://www.thehindubusinessline.com/blexpainer/explainer-what-does-the-new-law-on-surrogacy-say/article66570771.ece>

83 See Malene Tanderup and others “Informed consent in medical decision-making in commercial gestational surrogacy: a mixed methods study in New Delhi, India” (2015) 94 Acta Obstet Gynecol Scand 465–472.

84 Wilson, above n 23, at 662.

Some view commercial surrogacies as constituting the sale of a child. This could be inconsistent with New Zealand's international obligations under the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.⁸⁵

In New Zealand, the only domestic assessment of these arrangements is post-birth in an immigration or adoption context. The surrogate's consent is to the transfer of legal parenthood. There is no active consideration of her informed consent to conception and pregnancy. Even under the updated protocol for international surrogacy adopted by the Family Court, the consent of the surrogate relates to the adoption application and the child's travel to New Zealand.⁸⁶ The lack of pre-conception regulations does not align with the Verona Principles.

The surrogate has the same legal risks identified for traditional surrogates due to the application of New Zealand law. She remains the legal parent of the resulting child in New Zealand even if legal parenthood has transferred in the country of birth.

International surrogacy arrangements cases reflect the balancing act a court performs between a requirement for consent and the best interests of the child. In England and Wales, the consent of an Indian surrogate was invalid at law when the intending parents applied to the courts for a parental order.⁸⁷ The surrogate could not be found and the judge dispensed with the requirement for her consent. A similar case in New Zealand proceeded without consent where a surrogate in Ukraine could not be contacted to provide consent, although she had signed a surrogacy agreement and declaration after birth.⁸⁸ These cases raise concern for the ability to dispense with informed consent, and the risk of international surrogacy agencies hiding surrogates to avoid any scrutiny of her informed consent.

85 Law Commission, above n 22, at [1.25].

86 Principal Judge Moran, above n 64, at 2.

87 *Re D and L (Minors) (Surrogacy)* [2012] EWHC 2631 (Fam) in Scherpe, Fenton-Glynn and Kaan, above n 71, at 127.

88 *Re Witt* [2019] NZFC 2482, [2019] NZFLR 91.

VII Options of Reform

A General

While there are specific reforms aiming for informed consent in home-based and international surrogacy, there are general recommendations from the Law Commission that can assist in this goal. This includes improving the provision of information.⁸⁹ Currently information about surrogacy is fragmented across different government sources. Informed consent requires accessible and clear information.

The Law Commission also recommends increased lawyer training on surrogacy and improving access to ANZICA certified counsellors. This accounts for an increasing presence of surrogacy and can allow parties in surrogacy arrangements to access resources that help promote informed consent, without mandating the use of a private clinic.⁹⁰

B Home-Based Surrogacy

1 PROHIBITION

As previously noted, traditional surrogacy is prohibited in some states that have regulatory systems, such as Israel and Greece.⁹¹ This is in recognition of the added ethical dilemma of the surrogate relinquishing her own biological child. New Zealand could consider prohibition outside of a clinic-based arrangement.

A prohibition of home-based surrogacy does not recognise the agency of the or the changing attitudes towards surrogacy in New Zealand. A prohibition on home-based surrogacy arrangements would only further drive the practice underground.⁹² Parties may enter an arrangement not knowing of the prohibition or know and engage in the arrangement anyways. Intending parents may avoid applying for adoption or any parental rights out of fear of punishment or removal of the child. It is unlikely New Zealand would support criminalising the parties in an arrangement. This could leave a child with guardians who do not have the legal right to make significant decisions for them. It obscures the use of surrogacy in New Zealand and does not allow the government to track the practice. Prohibition would likely further exasperate the concerns of home-based arrangements

89 Law Commission, above n 22, at R58.

90 Most work for fertility clinics. While some are in private practice, the list available online from the Fertility Society of Australia and New Zealand is currently being updated.

91 Scherpe, Fenton-Glynn and Kaan, above n 71.

92 Law Commission, above n 22, [1.19].

slipping through the gaps. Surrogates may not want to expose the arrangement to doctors, counsellors or lawyers, thereby avoiding mechanisms that can assist in informed consent.

2 ECART REQUIREMENT

As the ECART process is a robust safeguard to protect the surrogate's interests, the mandatory process could be extended to all domestic surrogacy arrangements. This would ensure all surrogates receive independent legal advice, meet the requirements of the ECART regulations, receive counselling and are reported to have fully consented. This would help ensure full and informed pre-conception consent rather than only assessing post-birth. The reform would require changes to ECART's processes and resourcing. Intending parents would need to be able to apply directly to the Committee. Requiring them to employ a fertility clinic would create unequal access to creating a family inconsistent with intending parents' rights.

While the arrangement can be done at home, the requirement can be enforced in the post-birth legal parenthood pathway. Currently in New Zealand, this would be a consideration for the Court in an adoption application. A similar requirement can be seen in Western Australia, requiring pre-conception approval for both gestational and traditional surrogacy.⁹³ The intending parents must have a written surrogacy agreement approved in writing by the Western Australian Reproductive Technology Council when applying to the state Family Court for a parentage order.⁹⁴ The intending parents and surrogate must have undergone counselling and received independent legal advice.

There is an issue of enforceability of the requirement. Criminalisation of a surrogacy arrangement (rather than certain actions like remuneration) is not a realistic proposal. The issues of an outright ban on traditional surrogacy rise again. It also creates inequality in the creation of a family, favouring intending parents with more financial resources. It criminalises a form of family building legitimate in the past and in other cultures. It does not recognise a woman's autonomy to make her own decisions in becoming a surrogate. It is a high level of interference on private lives, creating a severely different standard for all surrogacies compared to consensual, natural reproduction.

93 Mary Keyes "Western Australia" in Katarina Trimmings and Paul Beaumont (eds) *International Surrogacy Arrangements : Legal Regulation at the International Level* (Bloomsbury Publishing Plc, London, 2013) at 28.

94 Intending parents can apply to a Federal Court for a parenting order or go through the adoption process if they do not meet the surrogacy path requirements.

The requirement could lead to intending parents not applying for adoption, creating a situation outside of the best interests of the child. If enforced strictly in the courts the requirement could result in the intentions of both parties being ignored. A surrogate could remain the legal parent for a child she does not intend to raise, and the intending parents without a legal connection to the child they view as their own. The paramount consideration of the Verona Principles is the best interests of the child and in the Adoption Act the interests of the child should be promoted.⁹⁵ This could result in a court finding a way to work an ECART requirement to promote the interests of the child, making it ineffective as a mandatory step.

3 *ECART INCENTIVE*

Instead of a requirement of using ECART, the safeguard could become an option for home-based arrangements. The Law Commission recommends allowing ECART to consider the arrangements and incentivising traditional surrogacy to engage with the process.

The Law Commission proposed that obtaining the ECART approval at pre-conception can be used as part of an administrative pathway allowing easier access for intending parents to become the legal parents of the resulting child.⁹⁶ This requires ECART to be open to application directly from the parties for a home-based arrangement and the intending parents to bear the cost of ECART. The administrative pathway recommended by the Law Commission retains the surrogate as the legal parent at birth. A week after the birth she can sign a statutory declaration confirming her consent to relinquishing parental rights to the resulting child. At this point the intending parents become the legal parents. Before the declaration, the intending parents would be regarded as additional legal guardians.⁹⁷ The use of a statutory declaration requires the surrogate to have a lawyer to witness the signature and certify they have explained the effect of the declaration to the surrogate.⁹⁸ As this is only available with ECART approval and takes away the bureaucratic toll of a court process, it likely will be a strong incentive for all traditional surrogacy arrangements. It would be available alongside a court pathway alternative if the administrative requirements are not met.⁹⁹

95 Verona Principles, at [6.1] and The Adoption Act 1955, at Section 11 (a).

96 Law Commission, above n 22, at [28].

97 At [R21].

98 At [R23].

99 At [29].

This option is a faster process to legal parenthood and recognises the intending parents having a role in the child's life without allowing the surrogate to waive her right to consent post-birth. The Verona Principles of free and informed decision making in legal matters post-birth, retaining the right to consent, pre-surrogacy protections and valuing the surrogate's autonomy are protected in this option.¹⁰⁰

This access to ECART will require allocation of more resourcing to the committee and requires more ANZIC approved counsellors to be available to the parties directly. This need to increase resourcing for ECART is noted by the Law Commission, particularly with the increased demand the operation of the administrative pathway may cause.¹⁰¹ As an incentive and not a requirement, this reform does not ensure informed consent in all home-based arrangements. It still allows surrogates to enter arrangements without legal advice or counselling, with their consent only assessed in the post-birth pathway to legal parenthood. In a balance of interests and the risks posed by prohibition or mandatory ECART use, this is likely the most effective route to ensuring informed consent.

4 SURROGACY AGREEMENTS

With a focus on ensuring pre-conception informed consent, another incentive is the allocation of legal parenthood with pre-conception approval. This could be through an approved surrogacy agreement. Currently under s 14 of the HART Act a surrogacy arrangement is legal but not enforceable. The Law Commission is against legal parenthood being determined by private contract.¹⁰²

A surrogacy plan between the parties could be encouraged or required by ECART in order to access the administrative pathway. While not enforceable, this plan could help clarify the intentions of the party and ensure full understanding and informed consent of the surrogate mother to the legal and health implications.¹⁰³

Enforceable surrogacy contracts are available in other jurisdictions. In California, pre-birth parentage orders can be approved by the Court. If the order is granted it is legally enforceable against the parties, meaning the surrogate will not be able to change her mind

100 Principle 7, Principle 10 and Principle 5.

101 Law Commission, above n 28, at [4.72] and [4.73].

102 At [6.119].

103 At [5.38].

on consenting to transferring legal parentage. This raises significant issues of informed consent.¹⁰⁴

Under the contract, the natural mother is irrevocably committed before she knows the strength of her bond with her child. She never makes a totally voluntary, informed decision, for quite clearly any decision prior to the baby's birth is, in the most important sense, uninformed, and any decision after that, compelled by a pre-existing contractual commitment, the threat of a lawsuit, and the inducement of a \$10,000 payment, is less than totally voluntary.

The Verona Principles do not allow contractual provisions to irrevocably determine legal parentage. This both protects the requirement of a surrogate's consent and avoids a sale of the child. An enforceable contract does not allow the surrogate to have autonomy over her body.

In South Africa the differing ethical questions raised by traditional rather than gestational arrangements are reflected in the pathway to legal parenthood. In a gestational arrangement, if the surrogate motherhood agreement is approved by the court it will confer full parental rights on the intending parents from the moment of birth.¹⁰⁵ In a traditional arrangement, the full parental rights are not transferred till there has been a 60-day cooling-off period in which the surrogate has the right to terminate the agreement.¹⁰⁶ It recognises that women cannot sign away the right to consent to relinquish a biological child.

An enforceable surrogacy agreement is not the best security of informed consent even if it includes a right to revoke consent. In the alternate option for the administrative pathway proposed by the Law Commission, the right to revoke was not preferred over the requirement of proactive consent – even without the added complication of involving private contract law. While the Option B pathway is also compliant with the Verona Principles, Option A was preferred due to consistency, certainty and respecting the surrogate's role.¹⁰⁷

104 Martha Ertman and Joan Williams *Rethinking Commodification: Cases and Readings in Law and Culture* (New York University Press, New York, 2005) cited in Mark Heneghan and Jennifer Wademan "International Surrogacy – Worldwide Approaches" (NZLS CLE Webinar, April 2014).

105 Melodie Slabbert and Christa Roodt "South Africa" in Trimmings and Beaumont, above n 93, at 329.

106 At 329.

107 The Law Commission, above n 22, at [6.111].

The most realistic and effective route to promoting informed consent for home-based surrogacy arrangements is through opening and incentivising access to ECART approval in addition to a post-birth consent requirement to transfer legal parenthood. While the current adoption process can be used in tandem with prior ECART approval, the Law Commission's recommendation to create two distinct pathways will better encourage the application to ECART. It does not create the burden of mandatory ECART approval, but incentivises parties in home-based arrangements by allowing the use of the administrative pathway.

C International Surrogacy

1 PROHIBITION

While commercial surrogacy is prohibited in New Zealand, there is no prohibition against intending parents going overseas to enter commercial surrogacy arrangements. It is likely even with a prohibition on international surrogacy there would have to be some way of having the child adopted in New Zealand. The Verona Principles dictate that a child cannot be left stateless. This can be seen in the *Menneson* and *Labassee* cases in France.¹⁰⁸ The European Court of Human Rights found that, where a child has a genetic connection to one of the intending parents, their right to private life requires the legal parenthood of the intending parents to be recognised even where surrogacy was prohibited.¹⁰⁹

International surrogacy arrangements are a reality that a prohibitive approach has failed to address in other countries. In Australian states where criminalisation of commercial surrogacy has an extra-territorial application parentage orders were still granted.¹¹⁰ While the illegality of the intended parents' acts may be noted, it is usually irrelevant to the decision on parenting orders where the child's best interest was paramount.¹¹¹

2 ECART ACCESS

As ECART is a robust safeguard to encourage informed consent, a reform option is allowing international surrogacy arrangements to apply for pre-approval. This is could be incentivised with a pathway to legal parenthood as proposed for traditional arrangements.

108 Scherpe, Fenton-Glynn and Kaan, above n 71, at 562.

109 *Menneson v France* [2014] ECHR no. 65192/11 and *Labassee V. France* [2014] no. 65941/11.

110 John Pascoe "A View From the Bench in Australia" in Scherpe, Fenton-Glynn and Kaan, above n 79 at 106.

111 Keyes in Trimmings and Beaumont, above n 93, at 46.

There are clear logistical issues with this option. This includes how officials can accurately communicate with the surrogate, how to ensure she is free from coercion and how to provide the legal and counselling services required. While the COVID-19 pandemic has made online consultations services like counselling more accessible it would be hard to ensure the continuation of the high level of safeguard ECART provides with these issues.

3 PARENTHOOD PATHWAY

Evidence of pre-conception informed consent could be encouraged through access to an easier pathway to legal parenthood, such as a parental order or using the administrative pathway. If intending parents can show evidence of the surrogate receiving independent legal advice prior to conception as well as counselling, this could provide access to a timelier and less intrusive process.

While the new protocol of adoption for international surrogacy is already an improved process, there could be a stronger requirement of pre-conception consent. For intending parents, this proof of consent may already be part of the process they deal with through their international surrogacy agency. This would also encourage intending parents going overseas to choose jurisdictions or agencies that have stronger ethical regulations, or to provide the resources to meet the requirements themselves.

In the Improving Arrangements for Surrogacy Bill, intending parents in a gestational international surrogacy arrangement can apply to the court for the administrative pathway to legal parenthood. The court can make this surrogacy order if both the surrogate and intending parents consent to be legally bound by their arrangement and an entity in the overseas jurisdiction that performs equivalent functions to the ethics committee provides written notice that it is satisfied the requirements added to the HART Act by the Bill are met.¹¹² These requirements include independent legal advice and counselling. While this is a valuable tool for international surrogacies in places with an ethical approval committee, such as some Australian states, it may not address the informed consent in jurisdictions with looser regulations, particularly where commercial surrogacy is involved. The Bill does not provide certainty to parents that their legal parenthood will be recognised in any jurisdiction.¹¹³

An alternate pathway to parenthood should require proof of pre-conception informed consent in order to be stronger than the current adoption protocol, but must also include

112 Section 124(c)(1)(b)(ii).

113 The Law Society, above n 22, at 3.2.

the right to revoke consent post-birth in order to comply with the Verona Principles and be recognised internationally.

4 RECOGNISING FOREIGN PARENTHOOD.

New Zealand could consider recognising the foreign jurisdiction's parenthood where the country has adequate regulations, where it conforms to the Verona Principles and promotes informed consent for the surrogate. At the moment, a legal parent-child relationship must exist between the intended parent and resulting child in the birth country in order to access the protocol for adoption international surrogacy children.¹¹⁴ This helps access an easier pathway but still requires a submission to a court. By creating an automatic recognition, intending parents are incentivised to form their arrangements in countries with ethical regulations.

The issue is the reality of international surrogacy arrangements. While this could create an easier pathway for international surrogacy in some jurisdictions, such as Western Australia or Israel, but these do not allow commercial surrogacy.¹¹⁵ International surrogacy arrangements are often in countries without similar regulatory frameworks which offer commercial surrogacy. In line with the Verona Principles the state must have informed consent pre-conception and positive consent or the right to revoke post birth.¹¹⁶ The scope of recognising international legal parenthood cannot be overly broad without risking encouraging international surrogacy, particularly if it allowed an easier process in under-regulated jurisdictions. There needs to be a balance between encouraging informed consent without promoting reproductive tourism.

There is not a clear solution. Incentivising a pre-conception counsellor and independent legal advice is helpful but may be difficult to assist for the states most commonly used for international surrogacy. The best answer would be an international instrument in line with the Verona Principles. While the Principles are not a binding international instrument, they can be used as guidance for assessing other jurisdictions and potentially a path forwards to recognising foreign legal parenthood.

114 Principal Judge Moran, above n 64, at 2.

115 See Rhona Shuz "Surrogacy in Israel" and Mary Keyes "Surrogacy in Australia" in Scherpe, Fenton-Glynn and Kaan, above n 71.

116 Principles 7 and 10.

VIII Conclusion

The law must recognise the development and need for surrogacy while protecting the parties involved. There are the interests of the child, the intending parents and the surrogate. Surrogates should be protected while their autonomy and self-determination are upheld. Informed consent should be promoted for all surrogates, but the laws cannot be so strict as to drive the arrangements underground. The law should not encourage international surrogacy but cannot realistically prohibit it. In light of imminent reforms, surrogacy law should aim to secure informed consent for all surrogates.

Some of the most complex surrogacy arrangements can avoid ethical scrutiny in New Zealand. Home-based and international arrangement provide a unique set of considerations which are not adequately addressed in a post-birth legal parenthood assessment. In order to have all surrogacy arrangements in New Zealand meet the Verona Principles the surrogate must provide informed consent pre-conception, throughout the pregnancy and post-birth. While it cannot be mandatory it can be incentivised. For home-based arrangements this can be achieved through the administrative pathway recommended by the Law Commission and allowing traditional arrangements to apply directly to ECART. For international arrangements, there should be an incentive to provide evidence of pre-conception independent advice and counselling. While this may not address the most common destinations for international surrogacy, it can be a step towards consistent protection. Informed consent in international arrangements would be best achieved if an international instrument complying with the Verona Principles is soon developed.

WORD COUNT: 8066.

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APPENDIX A

| | |
|-------------------------|---|
| Altruistic surrogacy | A surrogacy arrangement where the surrogate agrees to become pregnant without financial compensation (above what is permitted by the HART Act). This is the form of surrogacy legal in New Zealand. |
| Commercial surrogacy | This is a surrogacy arrangement where the surrogate agrees in exchange for financial compensation or other consideration. While reasonable expenses are allowed in New Zealand, commercial surrogacy is expressly forbidden. |
| Gestational Surrogacy | A surrogacy arrangement using IVF. The embryo comes from the intended parents or donors and is not genetically related to the surrogate. This process requires ECART approval in New Zealand. |
| Intended Parents | A surrogacy arrangement where the surrogate's ovum is used in conception, meaning she is the child's genetic mother. Pregnancy is usually achieved by artificial reproduction using the sperm of an intended parent or a donor. As in the Law Commission Report, this term will be used throughout the paper to represent plural or singular. |
| International Surrogacy | A surrogacy agreement where the surrogate and intended parents live in different countries. This can be either traditional or gestational arrangements. |
| Surrogacy agreement | A written contract detailing the surrogacy arrangement, showing the parties intention and what they have agreed to. These are not |

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|-----------------------|---|
| | illegal but are unenforceable in New Zealand. |
| Surrogacy arrangement | An arrangement between a surrogate and intended parents where the surrogate agrees to become pregnant and carries and gives birth to a child for the intended parents to raise as their own. |
| Surrogate | The surrogate is the person who agrees to become pregnant and give birth to the child for the intended parents in the surrogacy arrangement. While the term 'surrogate mother' is often used surrogate serves to reflect a shift towards more inclusive language. |
| Traditional Surrogacy | A surrogacy arrangement where the surrogate's ovum is used in conception, meaning she is the child's genetic mother. Pregnancy is usually achieved by artificial insemination using the sperm of an intended parent or a donor. This can be achieved outside of a fertility clinic. |