

ISSUE PAPER 14

Adoption and Assisted Reproductive Technology, including Surrogacy

Should changes be made to adoption and ART legislation, including the HART Act 2004 and the Status of Children Amendment Act 2004, to:

- clarify the legal parenthood and status of children conceived and/or born as a result of the use of assisted reproductive technology (ART), including surrogacy arrangements, and
- address other related issues, such as contracts, advertising, payment, fully informed consent, recording of information, access to information, and future contact; and
- specifically address the issue of how New Zealand courts should deal with donation and/or surrogacy arrangements commissioned by New Zealand intending parent/s from commercial providers overseas?

Important legal issues related to parenthood and identity arise from the increasing use by New Zealand citizens of ART involving donation and/or surrogacy, both in New Zealand and in other countries. By 2021 about 5-10% of all clinic fertility treatment involved donor sperm, donor eggs, donor embryos and/or surrogacy.

Commercial provision of gametes and surrogacy services are banned in New Zealand, as are the use of advertising and brokers.

The woman who bears a child for others through surrogacy (in some cases by using her own egg) is not defined as a donor under the Human Assisted Reproductive Technology (HART) Act 2004. She therefore does not have the same rights with regard to the recording of identity, information, and contact specified for donors and offspring of donors.

Unlike gametes donors, she becomes the child's legal parent at the birth, and her male partner, if she has one and he consents to the procedure, becomes the child's legal father. Currently, the transfer of legal parenthood to the intending parent/s is enacted through adoption. This permanently severs the entire birth family's legal connections with the child. The birth mother's identity is recorded, and this information will be accessible to the adopted person in future (providing they know they are adopted) through the provisions of the Adult Adoption Information Act 1985 (although these are more restricted than the provisions for donors and donor offspring). Adoption severs the surrogacy-born child's legal relationship to the entire birth family.

Adoption Action

Adoption Law Reform

June 2021

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There is general agreement that the law relating to children born to women who give birth as a result of donated embryos, eggs or sperm in order for others to become parents, is in need of reform. Donor legislation also needs to be reassessed. For example, at present the intending parents are classified as donors if their own gametes are used.

There are arguments both for and against these situations being dealt with under:

- a new Adoption Act;
- a revised Human Assisted Reproductive Technology (HART) Act;
- a comprehensive new Care of Children Act.

Previous reports, bills and legislation

Law Commission Report *Adoption and its Alternatives* 2000

This report was written before the passing of the HART Act 2004 and before legalisation enabling two persons of the same sex to marry was enacted in 2013. At the time, surrogacy facilitated by fertility clinics was legal when ethically approved, but uncommon.

The report includes a discussion of the complex legal and ethical issues involved. It indicates a need to provide an adequate legal structure to regulate arrangements and to confer legal status in respect of the parent-child relationships created as a result of surrogacy arrangements: para 509. There is interesting discussion and recommendations in respect of some of the complex issues that arise, and a proposal that these issues be included in a new composite Care of Children Act encompassing a broad range of issues relating to the parentage, guardianship, and care and protection of children.

Human Assisted Reproductive Technology (HART) Act 2004

The HART Act contains detailed provisions regarding the legal parenthood and status of children conceived with donated eggs, sperm or embryos, as well as provisions regarding donor information and access to it. The Act established a register, maintained by the Register-General, for the compulsory recording of information about donors. The Act also provides for a voluntary register of donor information for donations before the implementation of the HART Act.

The Act includes a definition of a surrogacy arrangement: “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”.

Section 14 of the Act addresses the status of surrogacy arrangements and prohibits commercial arrangements. Section 15 prohibits advertising regarding prohibited actions, including commercial surrogacy arrangements.

The Act does not contain any provisions dealing with legal parenthood or its transfer in relation to surrogacy arrangements.

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Part 2 of this Act deals with the status of children conceived as a result of HART procedures: s 14(1) provides that a surrogacy arrangement is not illegal but is not enforceable against any person, and s 14(3) makes it an offence to give or receive payment or other valuable consideration for their, or another person's, participation in (or arrangement for another person's participation in) a surrogacy arrangement. Certain payments are permitted to the provider concerned, i.e. reasonable expenses for (i) collecting, storing, transporting, or using a human embryo or human gamete; (ii) counselling for any party in relation to the surrogacy agreement; (iii) costs of insemination or in vitro fertilisation; (iv) ovulation or pregnancy tests; (v) independent legal advice to the woman who is, or who might become, pregnant under the surrogacy arrangement.

Status of Children Act 1969 as amended 2004

Sections 17 & 18(1)(d) provide that a woman who becomes pregnant is the legal mother of the child she bears, regardless of who has provided the embryo or ovum or why they have done so (e.g. with the intention of becoming the legal parents of the child after the birth). Sections 18 & 19 provide that if a partnered woman becomes pregnant via an ART procedure involving a donor who is not her partner, the partner's consent is assumed and that partner, not the donor, is for all purposes a parent of the child, without the need for any legal transfer of parenthood to take place. Section 20 states that where an unpartnered woman becomes pregnant via a HART procedure involving donated gametes (or embryo), the donor is not for any purpose a parent of the child, unless he or she subsequently becomes the woman's partner.

Care of Children Act 2004

This Act did not include adoption, child protection or ART issues in a single comprehensive statute, as recommended by the Law Commission in 2000.

Law Commission Report *New Issues in Legal Parenthood* 2005

This report was issued shortly before the HART Act came into effect, and thus could not reflect the impacts and outcomes of the new legislation. The report made a number of recommendations about matters the Status of Children Act should cover, proposing that there be a new section in that Act enabling the Court to make an interim parental order before birth of the child transferring parenthood to the intending parents if the child would be the genetic child of one or both of them and various other conditions were fulfilled. Twenty-one days after birth the Court could make a final parental order if specified conditions were met: para R15. It is noteworthy that the Commission did not propose changes to the Adoption Act to effect the change in parenthood.

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Government’s 2006 response to Law Commission Report 2005

In its response to *New Issues in Legal Parenthood*, the government of the day agreed with the Law Commission recommendations on: extending the presumption of paternity; enacting a minimum framework for formalising consent requirements for DNA parentage testing; making court parentage orders enforceable; and transferring parentage to implement surrogacy arrangements. It argued that further consultation and policy work was needed before any final decisions were made.

Ministry of Justice Draft Bill 2007

This Bill contained no provisions re assisted human reproduction or surrogacy.

Ministry of Justice Cabinet Paper 2007

This Paper contained no proposals in relation to assisted human reproduction or surrogacy.

Kevin Hague Bill 2016

The purpose of this Bill is stated to be to reform both adoption and surrogacy law in New Zealand. It included detailed provisions dealing with surrogacy arrangements, including the requirement that legal parentage was to be transferred from the legal mother to the commissioning parents through adoption (according to the revised adoption law provisions in the Bill).

2020 Government asks Law Commission to undertake review of surrogacy law

<https://www.lawcom.govt.nz/our-projects/review-of-surrogacy>