New Zealand Law Society
Te Kāhui Ture o Aotearoa

Improving Arrangements for Surrogacy Bill

Submission of the New Zealand Law Society Te Kāhui Ture o Aotearoa

18 September 2024

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) recognises the need for reform of the law relating to surrogacy, and welcomes the opportunity to comment on the Improving Arrangements for Surrogacy Bill (**Bill**).

1.2 The Law Society is pleased the Bill has been redrafted to incorporate many of the recommendations in the Law Commission's report *Te kōpū whāngai: He arotake, Review of surrogacy.*

1.3 This submission has been prepared by the Law Society's Family Law Section, members of which actively practise in this area of law. It answers the 15 questions raised by the Select Committee and recommends amendments to some clauses in the Bill.

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

2 General comments

Consistency of language

2.1 It is important that the language used in definitions throughout the bill is consistent. We have suggested amendments throughout this submission to ensure that consistency.

2.2 In particular, the Law Society considers the phrase "surrogate-born child" should be "surrogate-born person" because this legislation will have application to both surrogate-born children and adults. If "surrogate-born person" is adopted, there will need to be consequential amendments to other relevant legislation that include reference to "surrogate-born child." If the phrase "surrogate-born person" is not adopted, consideration needs to be given to consistent use of the definition of "surrogate-born child" (see our comments in respect of question five).

Adoption law reform

2.3 The Bill is based on a two-parent model of parenthood. It is not possible to have multiple legal parents. The Ministry of Justice has proposed a new adoption law that would provide for legal parenthood to be shared between the birth parents and the adoptive parents. In the surrogacy context, for example, this may be desired by the surrogate and a male couple who are the intended parents, where the surrogate will play a major part in the child's life. If the adoption reform proceeds as foreshadowed, the surrogacy law may need to be revisited in this respect.

3 Amendments to the Human Assisted Reproductive Technology Act 2004

Q1: Do you agree with the requirement in new section 23E – or have any other views about the nature or level of a provider's assistance with a surrogacy arrangement that should trigger the requirement for the arrangement to be approved by the ethics committee?

3.1 The Law Society agrees with the requirement in new section 23E, that a surrogacy arrangement involving the assistance of a provider performing an established procedure requires approval by the ethics committee. If the surrogacy involves an assisted reproductive procedure that is not an established procedure, then approval for that

assisted reproductive procedure is also required. This is a sensible safeguard that is not unduly onerous given the provider's familiarity with the ECART process.

3.2 We recommend that the order of subsections 23E(2) and (3) is reversed[1] and section 23E(3) is amended to read "if subsection (2) does not apply then prior written approval from the ethics committee must be obtained for the surrogacy arrangement and the assisted reproductive procedure." The Law Society considers this would more accurately reflect that current practice would primarily involve surrogacy arrangements with an established procedure, as is envisaged by proposed subsection (3).

3.3 In addition, the phrases "established procedure" and "assisted reproductive procedure" are specific. We recommend that this part of the legislation include a clear explanation of the intent of the section and the arrangements for when approval is sought.

Q4: How may applications made by a surrogate and intended parents under new section 23G operate in an easy and cost-effective way?

3.4 The Law Society considers that the current application process (now undertaken by the provider), using the forms that remain available on the ECART website, is easy and cost-effective. It would be useful if guidelines were provided to accompany the completion of these forms together with a checklist and FAQs. In respect of counselling, it would be useful to have a list of approved counsellors who undertake or have the experience to undertake the counselling and complete the report.

Q3: Should the cancellation of an approval of a surrogacy arrangement or an assisted reproductive procedure proposed to be undertaken in connection with a surrogacy arrangement only be able to be made before a particular step or stage of the surrogacy process? If so, what should that step or stage be?

3.5 We consider that cancellation of the approval of a surrogacy arrangement can take place up until the embryo is placed into the surrogate's uterus. This mirrors the position regarding a donor's right to withdraw consent to the use of any embryo at any time until the embryo is placed in the recipient's (donee's) uterus.

3.6 While there may be circumstances where the safety of the surrogate and/or the unborn surrogate child could justify a cancellation after this point, it would not be appropriate for that cancellation to be made by the ethics committee. Such situations would be extremely rare and may, for example, relate to information coming to light regarding the intended parent's criminal history or concerns for child trafficking that had not been uncovered by the social worker as part of the approval process. It may be that the ethics committee then makes a notification to Oranga Tamariki.

3.7 In those circumstances, we are of the view that parentage should still be transferred, provided the surrogate's consent is still given and all other requirements are met. Any orders relating to the care and/or protection of the child can then be determined by the Family Court under either the Care of Children Act 2004 or the Oranga Tamariki Act 1989.

[1] I.e., section 23E(3), as currently drafted, should be section 23E(2).

Q4: Should there be a provision for a review panel to review the decisions of the ethics committee in relation to applications for approval of surrogacy arrangements and assisted reproductive procedures, or is the ability of the ethics committee to reconsider applications sufficient?

3.8 The Law Society supports the provision of a review panel to review decisions of the ethics committee. While there is a place for the ethics committee to reconsider applications when there is new evidence, there needs to be a body that is, and is seen to be, independent of the ethics committee.

3.9 Providers well understand the process and what is required when making an application to the ethics committee, and there is likely to be a degree of providers "weeding out" unsuitable applications before they are made. If there is going to be provision for parties to directly access the ECART process, that is likely to lead to more decisions being challenged. Judicial review applications are costly and time consuming. A review panel would need to be easily accessible and able to deliver decisions in a timely manner.

Q5: Do you have any views on what information should be collected about surrogates and donors, including whether surrogates' and donors' hapū and iwi should be collected separately from their ethnicity and cultural affiliations?

3.10 The Law Society continues to support the principle that a surrogate-born person is entitled to information about the circumstances of their conception and birth. This ensures consistency with the Verona Principles,[2] and New Zealand's obligations under the United Nations Convention on the Rights of the Child (**UNCROC**).

3.11 The Law Society supports amendment of the Human Assisted Reproductive Technology Act (**HART Act**) to establish a National Surrogacy (restricted) Birth Register that includes information relating to the surrogate (gestational and traditional) and donor. This will ensure that surrogate-born people have the same entitlement to information as donor-born people.

3.12 For administrative purposes, the Law Society considers it is important that there is one body administering the information collection, retention and provision. We support the appointment of the Registrar-General of Births, Deaths, Marriages and Relationships as the central agency to undertake the collection and administration of surrogacy information.

3.13 In relation to tamariki Māori, the Law Society considers surrogate-born people should be provided with as much information about who they are as possible. It is important to ensure information about the surrogate-born person's genetic, gestational and ethnic origins is collected and recorded by the State. We consider that collection of the surrogate and donor's hapū and iwi via the information to be provided to the Registrar-General is sufficient. The Law Society does not consider that this needs to be collected separately from their ethnicity and cultural affiliations.

3.14 We note that new section 10D amends section 5 of the HART Act to define "surrogate-born child" as a child born as a result of a surrogacy arrangement. The proposed

[2] International Social Service Principles for the protection of the rights of the child born through surrogacy (Verona principles) (Geneva, 2021).

amendments to section 2 of the Citizenship Act 1977 and new section 25C of the Births, Deaths, Marriages, and Relationships Registration Act (**BDMRR Act**), will have the definition. However, new section 29 the Status of Children Act 1969 (**SoCA**) proposes an extended definition of "surrogate-born child" as including a child born inside or outside New Zealand and a still-born child or child who died shortly after birth.

3.15 The proposed amendment to the Adoption Act 1955 (new section 4A) then refers to "a child born as a result of a surrogacy arrangement". It does not use the term "surrogate-born child." For consistency, it is suggested that all amendments use the term "surrogate-born child" and reference (or reflect) the new section 5 HART Act definition.

4 Amendments to the Status of Children Act 1969

Q6: Should there be an upper time limit for the initiation or completion of a transfer of parentage by operation of law or by a parentage order? If so, what should the time limit be? Should an older surrogate-born child be able to apply for a parentage order, or have an exclusive right to apply for a parentage order?

4.1 In respect of time limits, it is the Law Society's view that there should be no unnecessary barriers to determining legal parenthood on an appropriate basis, and therefore no legislative time limit. It is too serious a question for individuals to be subject to unnecessary technical hurdles.

4.2 Compare, for example, section 10 of the SoCA, which provides for declarations of paternity. There is no time limit (for example the putative father may have died) and a wide range of persons can apply if they have a proper interest. This highlights how, for example, a surrogate-born person may find late in life that their legal parenthood has not been clarified. This includes someone born well before the Bill comes into force; proposed new Schedule 1, Part 1 will allow for a parentage order to be sought in relation to a surrogate-born person born before the Act's commencement date.

4.3 In the Law Society's view:

(a) The parties to a surrogacy arrangement should be able to activate the transfer of parentage by operation of law at any time. Given the procedures, including ethics approval, that the parties will have been through, it is highly unlikely that anyone will be seeking parentage by operation of law long after the birth unless there has been some unfortunate technical issue.

(b) There should be no time limit on an application for a parentage order. This will avoid barriers for both past and future surrogacy arrangements. It could be especially important for surrogate births that were not assisted by a provider.

(c) Most importantly, the surrogate-born person should be able to apply. This would bring new section 48 into line with new section 45(2)(c) (an order for recording transfer by operation of law). The surrogate-born person should be able to apply as of right and should not have to obtain leave (new section 46).

4.4 The inter-relationship between new sections 46 to 48 is confusing. Section 48 restricts applications for a parentage order to intended parents and the surrogate. Section 46 adds that one of the parties must be habitually resident in New Zealand or otherwise

obtain leave to apply. Section 47, however, then enables the court to grant leave for a party to apply a parentage order. On one reading, this would allow anyone, including the surrogate-born person, to seek leave. On another reading, section 47 is simply about jurisdiction in a private international law sense, "a party" meaning not any person but only a party to a surrogacy arrangement. We assume the latter is intended, and this requires clarification. It does, however, reinforce the need to remedy the lacuna in these sections in relation to applications by surrogate-born persons.

4.5 The Law Society is also of the view that new sections 46 to 48 require amendment, including to the order in which they appear in the SoCA. Currently, new section 46 provides for when an application for a parenting order may be made. New section 47 sets out considerations the court must take into account when determining whether to grant leave for a person to apply for a parentage order, and section 48 sets out who can apply for a parentage order.

4.6 The Law Society recommends the order of provisions is as follows, with additional amendments:

(a) New section 46 should relate to who can apply for a parentage order (currently section 48). This section should be amended to include that an application for a parentage order may be made by the surrogate-born person, and any person granted leave pursuant to section 47.

(b) New section 47 should remain section 47, amended by deleting the word "party" and replacing it with "person."

(c) New section 48 should pertain to when an application of a parenting order may be made (currently section 46). Subsection (1) should be amended to include the phrase "surrogate-born person" following the phrase "surrogacy arrangement."

4.7 The Law Society also recommends that the legislation is future proofed to accommodate situations that may arise given the pace of the development of assisted reproduction technology. This could be achieved by giving the court the power to grant leave to those with a proper interest, in exceptional cases, under new section 48.

Q7: After a surrogate-born persons parentage has transferred to the intended parents, in what circumstances should a marriage or civil union be prohibited between the surrogate-born person' and the surrogate or a member of the surrogate's family? Is the approach in new section 36 appropriate, or could a less restrictive approach be appropriate? For example, should a surrogate-born person who has no genetic connection to their surrogate and whose parentage has been transferred be able to enter into a civil union or marriage with a person who is a child of the surrogate?

4.8 In the Law Society's view, the rules relating to marriage should reflect those in the Adoption Act 1955[3] and the Marriage Act 1955. We therefore support the approach in new section 36 of SoCA. However, the Family Court should also be empowered to

[3] Section 16(2)(b) proviso.

approve marriages and civil unions where the relationship in question is one of affinity and not consanguinity. The model for this is found in section 15(2) of the Marriage Act:

> *Any persons who are not within the degrees of consanguinity but are within the degrees of affinity prohibited by Schedule 2 may apply to the High Court for its consent to their marriage, and the court, if it is satisfied that neither party to the intended marriage has by his or her conduct caused or contributed to the cause of the termination of any previous marriage of the other party, may make an order dispensing with the prohibition contained in Schedule 2 so far as it relates to the parties to the application and, if such an order is made, that prohibition shall cease to apply to the parties.*

4.9 While section 15 refers to the High Court, in our view it is appropriate that the Family Court has this jurisdiction.

Q8: Should a transfer of parentage have any other legal effects beyond those outlined in new sections 35-37?

4.10 In the Law Society's view, a transfer of parentage should have no other legal effects beyond those outlined in new sections 35 to 37, as section 35 includes the words "shall have effect for all purposes." Reference to the provisions in a will is a useful addition based on section 40 of the New South Wales Act and supports the testamentary freedom of the surrogate.

Q9: Do you agree that the transfer of parentage by operation of law should take effect when the intended parents receive the surrogate's signed declaration? Or should the transfer of parentage by operation of law take effect on the date that the surrogate signs the declaration, or at some other time?

4.11 The Law Society supports the transfer of parentage as being when the intended parents receive the surrogate's signed declaration. This ensures that all parties are aware of when the transfer of legal rights and responsibilities has occurred.

4.12 The Law Society notes that the statutory declaration cannot be made any earlier than seven days after the birth of the child and the legislation should be clear that this excludes the date of the declaration (which is consistent with the practice for adoption consents), so the transfer of parentage by operation of law will not take effect any earlier than that. Receipt can be by electronic submission of documents, as recommended, to constitute receipt of the declaration. Both sides are then aware of the timing of transfer of parentage.

4.13 We also note that new section 42(3) does not specify that it should be an *independent* lawyer before whom the declaration is made, and it should be amended to include this. We set out additional comments on this subject, at paragraphs 5.1 to 5.4, below.

Q10: Should a transfer of parentage by operation of law only be available in respect of a surrogate-born child who is born in New Zealand?

4.14 The Law Society does not consider that the determining factor around whether transfer of parentage should occur by operation of law should be whether the surrogate-born person is born in New Zealand.

4.15 The Law Society acknowledges that most cases to which the SoCA amendments will apply will involve persons born in New Zealand. However, there are also many cases where, despite the surrogate-born person being born outside of New Zealand, transfer of parentage by operation of law should be available to them and their intending parents.

4.16 For example, given the unique immigration relationship between New Zealand and Australia, the Law Society is aware of numerous cases where intending parents are habitually resident in New Zealand, go through the ECART process and the assisted human reproduction process in New Zealand, but the surrogate mother (either a relative or close friend) is resident in Australia. While the surrogate mother will travel to New Zealand for the assisted human reproduction procedure, as her family and life is in Australia, she returns there for pregnancy and birth. The Law Society is aware of similar circumstances involving other countries such as Canada and the United States.

4.17 The Law Society believes that where the surrogacy arrangement has been approved by the ethics committee or the intended review panel (in New Zealand), where the surrogate-born person is in the care of the intended parents, and where the surrogate has made a statutory declaration in accordance with proposed section 42, then no matter where the surrogate-born person is born, transfer of parentage by operation of law should be available.

4.18 Given the prevalence of cases involving Australia, and the close relationships between fertility providers, the Select Committee may wish to consider specific trans-Tasman regulations to further enable transfer of parentage by operation of law where ethics committee approval takes place in Australia. Further, in order to future proof the legislation, the Law Society considers it may be advantageous to include a provision whereby transfer of parentage of operation of law could also occur for designated countries (which could be determined by regulation in the future).

4.19 The Law Society adds one caveat to the above, based on experience of consent-taking in international surrogacy cases at present. The statutory declaration by the surrogate should be taken by a New Zealand lawyer (who has not advised the intending parents at any stage of the process). That process can easily be conducted via audio-visual calls, and will ensure that a robust process, by someone familiar with the requirements of surrogacy law in New Zealand and the effects of the surrogate relinquishing the parentage and guardianship of the child, takes the statutory declaration.

4.20 In summary, whether transfer of legal parentage happens by operation of law should not be based on location of the surrogate-born person's birth, but on the grounds set out in proposed section 41.

Q11: Are declarations of parentage needed and, if so, in what circumstances might an application for a declaration of parentage be made? Or should the provisions of subpart 4 of new Part 3 be removed from the Bill?

4.21 The Law Society is of the view that subpart 4 of new Part 3 should not be removed from the Bill. A range of options and flexibility is warranted to ensure remedies are available to surrogates and their partners in different situations.

4.22 Partners of a surrogate are excluded from the parentage provisions of the proposed legislation and are excluded from being able to apply for a parentage order. If a partner of a surrogate has a need to legally establish or confirm their parentage, they should not be excluded from being able to do so.

4.23 We can envisage circumstances, albeit rare, where a surrogate's partner may choose or need to "opt in" to acquire parentage of a surrogate-born person. A declaration of parentage provides a vehicle for achieving this. Some circumstances we can foresee this being used are:

(a) if the surrogacy arrangement has collapsed and the surrogate's partner wishes to acquire parentage of the child;

(b) the surrogate dies or is rendered incapacitated before being able to consent to an adoption by the intended parents. The surrogate's partner is left with an option to "opt in" to acquire parentage status to enable them to then consent to an adoption; or

(c) if the surrogacy arrangement collapses, the child is raised by both the surrogate and the surrogate's partner who later separate and the surrogate's partner wishes to seek parentage status in respect of the child they have been raising.

4.24 The legislation should also make provision for seeking and taking into consideration the views of the surrogate-born person, and their participation, when a declaration is sought. This would be consistent with section 6 of the Care of Children Act 2004 and section 11 of the Oranga Tamariki Act 1989.

4.25 Legal representation for the minor child should also be provided for in the legislation.

Application by a surrogate-born person

4.26 As drafted, the Bill does not give a surrogate-born person the right to apply for a declaration of parentage. The Law Society is of the view that a surrogate-born person should be able to apply for a parentage declaration, without age limit, and without having to seek leave from the court.

4.27 Aside from a person's right to their identity, there may also be practical and legal reasons for a surrogate-born person to need legal recognition of the existence of a parent-child relationship between them and the surrogate's partner, including for inheritance reasons. An example might be a situation where a surrogacy arrangement collapses and the child is raised by the surrogate's partner as their child, but in the absence of legal recognition of a parentage relationship, is left without inheritance rights.

When application may be made

4.28 Under new section 62, a declaration application may only be made if a parentage order has been declined. This limits the efficacy of the parentage declaration provisions. A surrogate's partner would be unable to seek a declaration in circumstances where, for some reason which may include the death or incapacity of one or more of them, neither the surrogate nor intended parents had applied for a parentage order. New section 62 should be amended to indicate an application may also be made in circumstances where a parentage order has not been applied for.

Parentage tests

4.29 The application of the Family Proceedings Act 1980 provisions regarding parentage tests[4] creates ambiguity about whether a declaration of parentage may only be made in circumstances where a biological relationship between the surrogate's partner and the child exists. If that is the intention, the efficacy of declarations of parentage will be minimal as it would be highly unusual in surrogacy situations for the surrogate's partner to share a biological relationship with the child. The Law Society's view is that it should be explicitly stated that a lack of biological or genetic relationship between the surrogate's partner and the child does not preclude the making of a declaration as to parentage.

Q12: Are there any other circumstances beyond those outlined in new section 66 in which an overseas parentage determination should be recognised in New Zealand?

4.30 The Hague Conference's Working Group on Parentage/Surrogacy is currently undertaking work on the recognition of foreign parentage and considering draft provisions for a new convention. While that work is not yet complete, it will be important that the New Zealand legislation mirrors the protections that are expected to be included in a potential convention.

4.31 New section 66 should therefore be amended to include a subsection that contains grounds for where recognition of foreign parentage may be refused.

4.32 Those grounds could include:

(a) Where recognition would be manifestly contrary to public policy, taking into account the rights of the child, including the best interest of the child.

(b) Where the surrogate, or where it is required, the surrogate's partner has not given their free and informed consent to relinquish legal parentage, or has withdrawn it.

(c) The determination was obtained by fraud.

Q13: Are there any other circumstances beyond those outlined in new section 67 in which an overseas parentage determination should be recognised in New Zealand?

4.33 The Law Society supports collection of information as set out in new section 67.

4.34 New section 67 provides for the Secretary of Internal Affairs to give the Registrar-General information relating to surrogate-born persons whose parentage has been determined overseas and recognised in New Zealand for purposes of citizenship or New Zealand travel documents. This information includes details of the surrogate and donor. This ensures that surrogate-born children of overseas parentage will still have access to restricted surrogacy information via the Registrar-General. The Law Society considers it is important for a child to have access to this information, regardless of where their parentage is determined.

[4] via new section 63.

4.35 This information should not be available in the birth certificate used for general identification, which should only record the name and date of birth of the child and the legal parents. The additional information, including details about the surrogate and donor (restricted surrogacy information) should be the surrogate-born person's information.

4.36 As noted above at Q5, the Law Society supports one agency being responsible for holding information about genetic and gestational information in relation to surrogate-born children. We note that those born through private surrogacy arrangements, where medical clinics or professionals are not used, may not be able to avail themselves of this long form information.

4.37 We note that for the purposes of Part 3, new section 29 defines "child" as referring to the status of a person in a relationship of a parent and a child, even after the person has reached the age of 18 years. "Surrogate-born child" is then defined in new section 29 as meaning a child who is born inside or outside New Zealand as a result of a surrogacy arrangement. We draw the committee's attention to our comments under Q5 on the definition of "surrogate-born child".

5 Additional comments on new Part 3 (clause 19I)

New section 42: Statutory declaration of surrogate

Independent advice

5.1 New section 42(3) requires that the statutory declaration of a surrogate must be made before a lawyer who certifies that, before the declaration was made, the lawyer explained to the surrogate the effect and implications of the declaration.

5.2 The Adoption Act 1955 has a similar requirement. Section 7 requires that before a birth parent signs a consent to adoption, the effect and implications of their consent must be explained to them by the witness who certifies that the explanation has been given. However, there is also a requirement that the lawyer for the birth parent is independent. Regulation 9(2) of the Adoption Regulations 1959 provides that the solicitor acting for the applicants may not witness and certify the consent, and therefore cannot provide the required explanation to the birth parent.

5.3 No such requirement of independence is included in the Bill. It is a conflict of interest for the intended parents' lawyer to explain the effect and implications of the declaration to the surrogate and to witness the signing of the declaration, yet this is a possibility under the Bill as drafted. This raises a risk that the advice provided to the surrogate is in fact partial to the intended parents. This risk is heightened by the fact the lawyers' costs in the process are usually being paid for by the intended parents.

5.4 The Law Society recommends the Bill is amended to explicitly require that a lawyer witnessing the declaration must be independent.

Who may witness a statutory declaration

5.5 New section 42 only allows a lawyer to witness and certify the surrogate's declaration. This is limited to being someone entitled to practise law in New Zealand,[5] which presumes the surrogate is in New Zealand or has ready access to a qualifying lawyer.

5.6 The experience with witnessing and certifying adoption consents given overseas using Notary Public or Commonwealth representatives has proved to be unsatisfactory and complex, particularly given the constraints of overseas Notaries Public who are often unable to provide certification. It would be preferable if the process of electronic witnessing referred to below is adopted. This will ensure that New Zealand lawyers are providing the necessary advice in respect of New Zealand law and avoiding potentially costly arrangements where a surrogate is located overseas. This will enable easier compliance with the 7-day timeframe envisaged by the declaration provisions.

How a statutory declaration may be witnessed

5.7 The proposed legislation is silent as to how a surrogate's statutory declaration may be taken and witnessed. The Covid-19 pandemic brought home the impracticalities of in-person witnessing and the possibilities for effective use of audio-visual conferencing technology.

5.8 Geographic distance between a surrogate and their chosen lawyer means in-person witnessing can be inefficient and costly, both where the surrogate is located outside New Zealand, or where the surrogate and their lawyer are in different locations within New Zealand. A requirement for in-person witnessing can mean a surrogate is unable to use their first choice of lawyer, if that lawyer is located elsewhere in New Zealand.

5.9 For certainty, the proposed legislation should be about whether witnessing in-person is required or whether witnessing by audio- explicit visual conference is permissible. The Law Society recommends allowing the use of witnessing by audio-visual conference, perhaps requiring that:

(a) During the video call: if, following the required explanation of the effect of an adoption order, the lawyer is satisfied that the surrogate appears to fully understand the effect of the adoption orders and that she wishes to consent to an order being made, the lawyer will:

(i) require the surrogate to show the lawyer the forms that she proposes to sign so that the lawyer is confident they are the same as the lawyer has in front of them.

(ii) require the video camera at the surrogate's end to be angled such that the lawyer can see the surrogate signing the consent document.

(b) The lawyer will then require the surrogate to send an image of the signed document to them electronically and will then complete the consent document in the usual fashion.

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[5] "Lawyer" is defined in new section 29 as "a person who holds a current practising certificate as a barrister or barrister and solicitor under the Lawyers and Conveyancers Act 2006".

(c) The lawyer will file an affidavit confirming:

(i) The quality of the video call was sufficient to enable the documents in the surrogates' possession and the surrogate to be clearly seen.

(ii) Who else, beyond the surrogate, was on the video call (for example the interpreter).

(iii) The process by which they received a copy of the signed consent from the surrogate (for example, by email) and that they are satisfied that the document they received was the document they witnessed being signed by AVL.

5.10 Any process for electronic witnessing of statutory declarations would ideally be set out in the Oaths and Declarations Act 1957, and the Select Committee may wish to consider whether enabling the use of witnessing by audio-visual conference is best achieved by amending that act.

How a statutory declaration may be transmitted

5.11 New section 41(2) provides that parentage of the surrogate-born child is transferred from the surrogate to the intended parents immediately upon the intended parents receiving the surrogate's declaration. The proposed legislation is silent as to how the statutory declaration may be transmitted to the intended parents and whether the document transmitted needs to be an original of the declaration.

5.12 Ideally, an original of the signed declaration will be delivered to the intended parents. However, this may not always be able to occur in a timely manner when there is geographic distance or other restrictions that delay delivery. To avoid unnecessary delays in the transfer of parentage, we recommend that the Bill clearly provide for the delivery of the declaration to the intended parents to include transmission of the declaration to the intended parents by electronic means.

New section 50: Parentage report

5.13 We note that new section 50(3)(a) refers to a surrogate-born child "over the age of 18 years." For consistency with the definition of "child" in new section 29 (and indeed with the Oranga Tamariki Act and Care of Children Act), we suggest this is amended to read "over the age of 17 years" or "of or over the age of 18."

6 Amendments to the Births, Deaths, Marriages, and Relationship Registration Act 2021

Q14: Should there be a mechanism to alert surrogate-born people to the existence of their restricted information? If so, is the notification mechanism proposed in new section 92A appropriate? Or is there an alternative mechanism that would better balance the right to identity information and the right to privacy of personal information?

6.1 New section 30B relates to parentage transferred by operation of law in non-provider-assisted surrogacy arrangements. It provides that the parents of the child are obliged to notify both the birth of the child and information about the surrogate and donor. We

consider it is appropriate that at the same time the surrogate's statutory declaration is made in accordance with new section 42 of SoCA, they should provide the information set out in new section 30B of the BDMRR Act.[6] This will include recording the surrogate's and donor's hapū and iwi (if known). The Law Society considers this information is appropriate for the surrogate-child to understand their story, background and whakapapa.

6.2 New section 30F requires the Registrar-General to register identity information relating to surrogate-born children. This restricted information does not form part of the child's birth records. We consider this to be an appropriate balance between access to information and rights to privacy.

6.3 New section 30H requires the Registrar-General to accept updated information from either the surrogate (or their personal representative) or the donor. We agree it is appropriate that both the surrogate and donor can contribute to the collected information, so that all available information about genetics and ethnicity can be recorded. Surrogates and donors may wish to update that information later, for example if they become aware of their hapū and iwi links after the transfer of parentage.

6.4 New section 92A requires the Registrar-General to notify certain persons that there is restricted surrogacy information registered or recorded in the register alongside their birth record, and how they may access the information. It is therefore mandatory that the Registrar-General advises the person of their restricted surrogacy information.

6.5 However, it is not mandatory that this information is then provided to the surrogate-born child. Under new section 106A(1), the Registrar-General "may" provide access to restricted surrogacy information. In the Law Society's view, and consistent with the Verona Principles and UNCROC, this should not be discretionary. We recommend new section 106A(1) is amended so that the Registrar-General "must" provide the information to a surrogate-born person, ensuring they have an absolute right to their personal information.

6.6 New sections 106A(2) and (3) should remain discretionary, as drafted. The Registrar-General may also provide any other person with access to restricted surrogacy information pursuant to new section 106A(4). The Law Society supports this.

6.7 We note that new section 106A(4)(c) excludes the provision of information to an adopted person (which is provided for in section 95(b) of the BDMRR Act). This will exclude people who have currently been adopted following a surrogacy arrangement. The Law Society does not agree with this restriction and recommends that section 95(b) of the BDMRR Act is amended to allow the provision of information to a person adopted as a result of surrogacy. We acknowledge that the Registrar-General may not have the same level of information as is anticipated under this legislation. Nevertheless, the legislation should be amended to make provision for those who have been adopted historically following a surrogacy, to ensure they will be provided with any information held by the Registrar-General.

6 As required by new section 43 SoCA.

7 Amendments to the Adoption Act 1955

Q15: Do you agree with new section 4A proposed to be inserted in the Adoption Act 1955? Or do you have any other views on when a surrogate-born child should be able to be adopted?

7.1 The Law Society agrees there should be restrictions on the ability of people to adopt a child when the new surrogacy legislation applies or can apply. We therefore support new section 4A(2). This means that the parties to a surrogacy arrangement can seek an adoption only when parentage cannot be determined by operation of law or a parentage order. Presumably however, new section 4A(2) is subject to the existing restrictions in sections 3 and 4. This should be clarified.

7.2 New section 4A(3) allows people other than parties to a surrogacy arrangement to apply for adoption. An example of this could be where no one has invoked the new law, and the child's care has moved from the intended parents to another couple, perhaps when the child is a bit older. This could be a whāngai situation but need not be. The couple would be able to apply for adoption, the outcome of which would turn on the criteria in the Adoption Act, especially section 11.

7.3 However, we are concerned about a range of other situations where adoption may be barred. For example:

(a) Parentage passed to the intended parents by operation of law or parentage order. The parenting arrangement does not work out and the child is now in the care of a third-party couple who wish to adopt. This scenario does not fit into subsection (2) and therefore there is no jurisdiction for an adoption.

(b) As in (a) above, but the intended parents' relationship breaks down. One of the intended parents wishes to adopt the child with a new partner, i.e. a partner who does not fit into subpart 4 of new Part 3 of the SoCA. The intended parent could not be a party to a stepparent adoption because of the restriction in subsection (2). There is no jurisdiction for an adoption by the parent and stepparent jointly.

(c) As in (b) above, except that there was only one intended parent, who subsequently has a spouse or partner. There is no jurisdiction for an adoption.

(d) Parentage passed to the intended parents by operation of law or parentage order. The couple plan to move overseas. The overseas country does not recognise New Zealand's new surrogacy laws on parentage but does recognise adoptions. There is no jurisdiction for an adoption.

7.4 We believe that many other situations may arise in the future, especially with cross-border complications and developments in medical science.

7.5 In the Law Society's view, the law should be based primarily on the welfare and best interests of the child. It should be flexible enough to provide for cases that might otherwise fall through the cracks. There must be mechanisms to ensure that the child's legal parenthood is appropriately established when not covered by the new law. The most straightforward way of resolving these problems would be to give the Family Court power to grant leave, in exceptional circumstances, for adoption applications to be made despite subsections (2) and (3).

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