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Avoiding the Public Policy and Human Rights Conflict in Regulating Surrogacy: The Potential Role of Ethics Committees in Determining Surrogacy Applications

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# Avoiding the Public Policy and Human Rights Conflict in Regulating Surrogacy: The Potential Role of Ethics Committees in Determining Surrogacy Applications

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*Effective regulation of surrogacy arrangements requires the consideration of multiple factors, including law, public policy, ethics, societal values, and religious and cultural beliefs. Such regulation is made more difficult due to the lack of accurate information relating to the number of surrogacy arrangements being entered into and the amount of children born as a result. While it is vital to provide appropriate protection for the vulnerable parties in a surrogacy arrangement, most notably the surrogate and the child, their voices are often left unheard. Through reference to court decisions in the United Kingdom, Australia, and New Zealand, it will be argued that post-birth transfer of parentage, the most common method of legal regulation, is ill-equipped to address the complex social and ethical issues prevalent in surrogacy. Instead, the most appropriate means of regulation is a pre-conception model, which would allow all voices to be heard. Using New Zealand's method of domestic altruistic surrogacy regulation, this paper will discuss the advantages and disadvantages of a pre-conception regulatory model and ask whether such a model could (and should) extend to cover domestic commercial and international surrogacy.*

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Introduction .....	654
I. The ‘Missing Pieces’ of Surrogacy Regulation.....	656
II. The Validity of the Justifications for a Prohibition on Commercial Surrogacy .....	659
A. Exploitation of the Surrogate.....	660
B. Commodification of the Child .....	662
C. The Importance of Recognising the Potential Vulnerability of the Intended Parents .....	663
D. The Lack of a Clear Distinction Between Commercial and Altruistic Arrangements .....	664
E. The Conflicting Policies Dilemma .....	665
F. Conclusion.....	665
III. An Alternative Form of Regulation: Is Pre-Birth Regulation Through Ethics Committees Possible? .....	666
A. The New Zealand Framework .....	666
B. The Surrogacy Guidelines .....	668
C. Applications to ECART for Surrogacy .....	670
D. The Other Functions of ECART .....	671
E. Conclusion .....	672
IV. Could the Pre-Conception Approval Model Be Extended to Commercial and International Surrogacy?.....	672
A. Extending the Model to Include Domestic Commercial Surrogacy Cases .....	673
B. International Surrogacy.....	674
C. Practical Considerations .....	675
D. Conclusion.....	676
Conclusion.....	676

#### INTRODUCTION

Designing an appropriate and effective legal framework for the regulation of artificial reproduction can be compared to completing a jigsaw puzzle. It requires the interaction of multiple factors including law, public policy, ethics, societal values, and religious and cultural beliefs. It is only when a way is found to incorporate all of these into the framework that we can consider the task to have been completed with some level of success. Designing a legal framework for the specific example of surrogacy adds a further level of complexity because many of the pieces needed are missing. There are no edges to define the size or limits of the jigsaw puzzle, since there is no accurate information on how many people are entering into surrogacy agreements and how many children are born as a result. There are few, if any, pieces to represent the surrogate, who often has no voice in court hearings which legalise the relationship between the resulting child and the intended parents. Nor are there sufficient pieces representing the child. We cannot know yet the long-term

psychological and social consequences of being surrogate-born. Despite this lack of information, it is clear that the practice of surrogacy is increasing rapidly, to the point where it is now recognised as “a booming, global business.”<sup>1</sup> Regulation is needed as a matter of urgency to protect and clarify the rights of all parties. The fact that there are missing pieces should not delay this process. It is important, however, to recognise the importance of these missing pieces to the overall picture, and to try and imagine what they might look like, and how they might add to the overall picture.

Arguably, the current method of post-birth regulation used by many states to transfer legal parentage from the surrogate to the intended parents is no longer appropriate.<sup>2</sup> Requiring a court order to transfer legal parentage is problematic and provides insufficient protection for all parties. Once the child is born (and in cases of international surrogacy arrangements, is brought into the intended parents’ country of residence), it is highly likely that a transfer of legal parentage will be ordered, despite public policy against commercialising reproduction and despite risk factors to the surrogate and to the child’s future psychological well-being. By the time such a case reaches the courtroom, the time for effective consideration of these elements has passed. In fact, in terms of international surrogacy, it is probably the case that the time has passed once the child has entered the intended parents’ country.

Discussions about public policy implications and risk factors in surrogacy need to occur as early in the process as possible, and for this reason it is suggested that some form of pre-conception or pre-birth regulation is desirable. An example of such a system can be seen in New Zealand, where domestic altruistic surrogacy arrangements must be approved by a designated ethics committee before fertility clinics are permitted to carry out any artificial reproductive procedure involved.<sup>3</sup> This paper will consider whether such a process could be modified for application to commercial and/or to international surrogacy cases. It will begin by considering the validity of the justifications for the distinction drawn between altruistic and commercial surrogacy. It will next consider the effectiveness of the current New Zealand system in relation to altruistic surrogacy, and then ask whether it would be effective and desirable to expand the New Zealand system in cases of commercial and/or international surrogacy.

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1. *The Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements*, HAGUE CONFERENCE ON PRIVATE INT’L LAW, <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy> (last visited Feb. 9, 2018).

2. Many countries define legal parentage by reference to the Latin maxim *mater certa semper est*, also known as a gestational model. Under this model, the woman who gives birth is the legal mother, and her partner, if any, becomes the child’s other legal parent. Intended parents are, therefore, not automatically the legal parents of the child, even if there is a genetic relationship.

3. Human Assisted Reproductive Technology Act 2004, s 16 (N.Z.). The relevant committee is the ethics committee, designated as such under section 27.

## I. THE 'MISSING PIECES' OF SURROGACY REGULATION

The primary piece of missing information on surrogacy is the extent to which the practice is occurring. Unfortunately, the Hague Convention has commented that this information is “impossible to determine.”<sup>4</sup> In countries like New Zealand, which define parentage based on a gestational model, the surrogate and her partner are considered to be the legal parents of the child, and the intended parents must apply to the court for an order<sup>5</sup> to transfer legal parentage to themselves.<sup>6</sup> These applications are, therefore, the primary source of information as to the prevalence of surrogacy in New Zealand. It is clear, however, that the number of applications made each year for such an order are less than the number of domestic, altruistic surrogacy cases approved by the ethics committee and, therefore, significantly less than the total number of surrogate-born children in New Zealand.<sup>7</sup> Anecdotal evidence (in the form of discussions with lawyers as to their familiarity with surrogacy cases) also suggests a significant disparity between the number of surrogate-born children in New Zealand and the number that have a legally recognised relationship to the people they call their parents. The same is true in other countries. In Australia, the Department of Immigration and Citizenship reported approximately 430 “incoming” international surrogacy cases between 2009 and 2012.<sup>8</sup> There were twenty-five reported applications for parentage orders in that same period.<sup>9</sup> Further, following the Baby Gammy case, 150 couples with pregnant Thai surrogates approached the Australian Government for help,<sup>10</sup> and after Nepal prohibited surrogacy in late 2015, another sixty to eighty Australian couples were reportedly affected.<sup>11</sup> Again, only a fraction of these appear to have sought parentage orders.<sup>12</sup> In the United Kingdom “it is estimated that between

4. Permanent Bureau of the Hague Conference on Private Int'l Law, *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements*, at 8, Prel. Doc. No. 10 (Mar. 2012), <https://assets.hcch.net/docs/d4ff8ecd-f747-46da-86c3-61074e9b17fe.pdf>.

5. This order can take a variety of forms. For example, in New Zealand, this occurs through adoption. In the United Kingdom, a surrogacy-specific parental order is used.

6. In New Zealand, see Adoption Act 1955, s 3 (N.Z.). In the United Kingdom, see Human Fertilisation and Embryology Act 2008, c. 22, § 54 (UK).

7. The ethics committee only hears cases in which a New Zealand fertility clinic is involved. This means that those cases involving “private” domestic surrogacy arrangements in which a clinic is not involved, and those entering into international surrogacy arrangements, will not come before the committee.

8. Permanent Bureau of the Hague Conference on Private Int'l Law, *A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements*, at 56, Prel. Doc. No. 3C (Mar. 2014), [https://assets.hcch.net/upload/wop/gap2014pd03c\\_en.pdf](https://assets.hcch.net/upload/wop/gap2014pd03c_en.pdf).

9. This is based on a search of Australian Legal Databases FirstPoint and AustLII.

10. Lindsay Murdoch, *Australian Couples Caught in Thailand's Surrogacy Crackdown*, SYDNEY MORNING HERALD, Sept. 14, 2014, <http://www.smh.com.au/business/world-business/australian-couples-caught-in-thailands-surrogacy-crackdown-20140913-10gess.html>.

11. Lauren Wilson, *Australian Families [sic] in Limbo as Nepal Joins India and Thailand in Banning Commercial Surrogacy*, NEWS CORP AUSTRALIAN NETWORK, Sept. 1, 2015, <http://www.news.com.au/lifestyle/parenting/kids/australian-families-in-limbo-as-nepal-joins-india-and-thailand-in-banning-commercial-surrogacy/news-story/1135c51937c27545bdcf3e09ddd54c25>.

12. Only four such cases appear on the FirstPoint or AustLII databases.

1,000 and 2,000 children are born through surrogacy each year.”<sup>13</sup> Again, numbers of applications for parental orders appear to be only a small fraction of this estimate.<sup>14</sup>

There appear to be several reasons for this disparity in numbers. First, despite the increasing publicity of surrogacy cases in the media, some intended parents remain unaware that they are not the legal parents of their children. Second, some intended parents feel insulted or offended by the idea that they must adopt “their child,” particularly if there is a genetic link between the child and one or both of the intended parents, and therefore refuse to go through the legal process. Finally, and likely most significantly, the prohibition on commercial surrogacy and its consequent criminal sanctions in the three countries discussed above appears to act as a pretty effective deterrent to publicising the circumstances of the child’s gestation through an application to the court.<sup>15</sup> One would expect the numbers in the first category to decrease in the future as the legal situation becomes more commonly understood, but the second and third categories refer to problems which appear to be inherent in the current regulatory environment.

The second piece of missing information is information about the surrogate. One might expect information on the surrogate to be an important part of any subsequent court proceedings. The public policy justification for the prohibition on commercial surrogacy is in part based on concerns that a surrogate may be the subject of exploitation. Further, as she is often deemed by legislation to be the legal parent of the child, her consent is required for the transfer of legal parentage to the intended parents. Despite these two factors, her voice is frequently missing from court proceedings, particularly in international surrogacy cases. This omission may be the result of necessity: those intended parents working with surrogacy agencies overseas in countries like India or Thailand often report that their communication with the surrogate during the pregnancy is through the clinic as an intermediary.<sup>16</sup> Following the birth, it is not unusual for intended parents to be unable to contact the surrogate,<sup>17</sup> which creates obvious problems for obtaining her consent to the transfer of parentage.<sup>18</sup> In other cases the surrogate’s signature or mark appears on a document indicating her consent, but the court has real doubts as to her

13. 586 Parl Deb HC (6th ser.) (2014) col. 1WH (UK).

14. The Family Law Reports database shows only four cases in 2013, two in 2014, two in 2015, and three in 2016.

15. This will be discussed further in the next Section.

16. This was noticeable in Nepal, when following the earthquake many Australian intended parents reported losing track of the surrogate when the clinic shut down. This information is based on conversations the author has had with intended parents, lawyers, and surrogacy support groups.

17. Often, the surrogate has given a false name or address, in an attempt to avoid the stigma associated with being a surrogate from their neighbours.

18. See, e.g., *Re ALH* FC NSD FAM-2011-044-000371, 11 August 2011 (N.Z.) (surrogate’s husband refused consent to adoption purely because he did not consider himself a legal parent).

understanding of the document and, therefore, her capacity to provide this consent.<sup>19</sup> Despite this doubt, the parental orders sought are generally granted.

The third piece of missing information is the psychological impact on the child. While “best interests of the child” is generally considered to be the paramount consideration in a family court, and, therefore, for an application for transfer of parentage,<sup>20</sup> any long-term effects of the circumstances leading to the child’s birth are unknown. Empirical work focussing on the long-term psychological impact of being adopted may provide some insight, but this can only be of limited value at this point in time because most surrogate-born children are still too young for the long-term impact to be fully understood. Similar research is also beginning to occur in relation to children born as a result of embryo donation.<sup>21</sup> Empirical research into embryo donation may be a useful indicator of psychological impact (since both surrogacy and embryo donation involves the gestation of an embryo by a woman who is not genetically related to that embryo), but this research is currently also only in its early stages, with limited numbers of participants. With the majority of surrogate-born children being born in the last five years,<sup>22</sup> and with the high number of these children remaining unidentifiable,<sup>23</sup> it might be years before substantial surrogacy-specific empirical research is generated and decades before the long-term implications can be fairly considered. For this reason, considerations of the child’s best interests are generally evaluated by the courts by reference to the child’s immediate welfare and best interests. As one United Kingdom judge commented:

[I]t is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child . . . would not be gravely compromised (at the very least) by a refusal to make an order . . . . If public policy is truly to be upheld, it would need to be enforced at a much earlier stage . . . .<sup>24</sup>

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19. See, e.g., *Re Application by KR* [2011] NZFLR 429 (N.Z.) (judge recognized an issue about the validity of the surrogate’s consent due to the lack of evidence surrounding her understanding of English, and the judge relied on further evidence provided by consular officer that surrogate understood what she was consenting to); see also *Mason & Mason and Anor* [2013] FamCA 424 (N.Z.) (surrogate’s thumb print appeared on twenty-nine-page document written in English and there was no evidence that surrogate was literate, that she had any understanding of English, or that the document had been translated into her native Hindi, and judge invited further information from the applicant on the issue of parentage).

20. JOINT WORKING GRP., STANDING COMM. OF ATTORNEYS-GEN., AUSTRALIAN HEALTH MINISTERS’ CONFERENCE, CMTY. AND DISABILITY SERVS. MINISTERS’ CONFERENCE, A PROPOSAL FOR A NATIONAL MODEL TO HARMONISE REGULATION OF SURROGACY, at 2 (2009).

21. See, e.g., S. Goedeke et al., *Building Extended Families Through Embryo Donation: The Experiences of Donors and Recipients*, 30 HUM. REPROD. 2340 (2015).

22. This is based on the increase in numbers reported in “Key documents” available at HAGUE CONFERENCE ON PRIVATE INT’L LAW, *supra* note 1.

23. This is based on the low numbers of reported cases for parental orders in Australia or parentage orders in the United Kingdom. See *supra* text accompanying notes 8–14.

24. *Re X and Y* [2008] EWHC (Fam) 3030 [24] (Eng.).

It is also important to note that court hearings generally lack the input of someone designated to speak for the child.<sup>25</sup>

None of the preceding discussion should be taken as being critical of any of the individual governmental or judicial workers involved in surrogacy cases who appear dedicated to acting in the best interests of all parties to the extent that this is possible. The issues discussed above arise as a result of uncertainty due to the unique and difficult legal issues presented by surrogacy.

## II. THE VALIDITY OF THE JUSTIFICATIONS FOR A PROHIBITION ON COMMERCIAL SURROGACY

Many countries adopt the regulatory model of permitting altruistic surrogacy but prohibiting commercial surrogacy. In New Zealand, for example, s14 of the Human Assisted Reproductive Technology Act 2004 (HART Act) states that:

### **14 Status of surrogacy arrangements and prohibition of commercial surrogacy arrangements**

(1) A surrogacy arrangement is not of itself illegal, but is not enforceable by or against any person.

...

(3) Every person commits an offence who gives or receives, or agrees to give or receive, valuable consideration for his or her participation, or for any other person's participation, or for arranging any other person's participation, in a surrogacy arrangement.<sup>26</sup>

Any person who commits an offence under subsection 14(3) is liable for a term of imprisonment not exceeding one year, a fine not exceeding \$100,000, or both.<sup>27</sup> In the United Kingdom, similar provisions are found in section two of the Surrogacy Arrangements Act of 1985. In Australia, where surrogacy is regulated at the state level, all six states and the Australian Capital Territory prohibit commercial surrogacy.<sup>28</sup> The meaning of "commercial surrogacy," however, is unclear, with the phrase usually remaining undefined. In New Zealand there is some guidance in section 14(4), which permits payment of expenses relating to the medical process, counselling, and legal advice, provided that these expenses are paid directly to the relevant providers and, therefore, that no money passes to the surrogate.<sup>29</sup> In the United Kingdom, "reasonable expenses" may be paid to the surrogate herself

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25. This is most noticeable in *Paradiso & Campanelli v. Italy*, 65 Eur. Ct. H.R. 22 (2015) (discussed below).

26. Human Assisted Reproductive Technology Act 2004, s 14 (N.Z.).

27. *Id.* at s 14(5).

28. *Family Relationships Act 1975* (SA) s 10HA(2)(b)(ix); *Parentage Act 2004* (ACT) s 24(c); *Status of Children Act 1974* (Vic) s 22(1)(d); *Surrogacy Act 2010* (NSW) s 23; *Surrogacy Act 2010* (Qld) s 22(2)(e)(vi); *Surrogacy Act 2012* (Tas) s 16(2)(a)(ii); *Surrogacy Act 2008* (WA) s 8. There is no legislation in the Northern Territory.

29. Human Assisted Reproductive Technology Act 2004, s 14(4) (N.Z.).



without the arrangement being considered commercial.<sup>30</sup> Again, the term “reasonable expenses” is not defined.<sup>31</sup>

It is generally recognised that the rise in international surrogacy cases can be at least partially attributed to this prohibition on commercial surrogacy.<sup>32</sup> If intended parents are not permitted by law to pay a surrogate in their home country, and cannot find someone to be an altruistic surrogate, paying a surrogate overseas becomes an obvious option. Entering into an international surrogacy agreement is not generally prohibited by law. None of the legislative provisions discussed above (with the exception of those enacted in three states in Australia, which will be discussed further below) have extraterritorial effect,<sup>33</sup> meaning no criminal sanctions can be imposed if the surrogacy arrangement takes place overseas. As was commented in the New Zealand case *Re SCR*:

[W]hile the United Kingdom did not allow “commercial surrogacy at home”, the Court was prepared to endorse arrangements abroad provided the Court was satisfied the surrogate consented, had not been exploited and the arrangement was not one involving a circumvention of child protection laws by unsuitable parents.<sup>34</sup>

The public policy justifications for prohibiting commercial surrogacy are generally recognised as being two-fold: first, to protect the surrogate from exploitation, and second, to protect the child from commodification. The validity of these justifications will be discussed below, as will the importance of recognising the vulnerability of the intended parents in discussions on the appropriate form of regulation of surrogacy.

#### *A. Exploitation of the Surrogate*

While the prohibition on commercial surrogacy was partially motivated by a need to protect the surrogate from exploitation, it may in fact have the unintended consequence of leaving the surrogate in a vulnerable position. One example of this can be seen in the 2014 Baby Gammy story.<sup>35</sup> An Australian couple entered into an agreement with a Thai surrogate. After the birth of twins, the media reported that

30. Arguably, this “reasonable expenses” test has been adopted into New Zealand law, despite the language of section 14. *See, e.g., Re SCR* [2012] NZFC 5466 (N.Z.).

31. Human Fertilisation and Embryology Act 2008, c. 22, § 54(8) (UK).

32. In the New Zealand Parliamentary Debates, for example, Stephen Franks, MP, predicted “[i]t will happen. New Zealanders will do it. They will go to the United States, China, or some Pacific Island country—somewhere where someone will carry a child for them—and they will pay the women handsomely.” (6 October 2004) 620 NZPD 15917.

33. Although note the New Zealand Adoption Act 1955, s 25, which prohibits “any payment or reward in consideration of the adoption,” and the UK Human Fertilisation and Embryology Act 2008, § 54, which permits the making of a parental order provided certain conditions are met, including that “no money or other benefit (other than for expenses reasonably incurred) has been given or received . . . unless authorised by the court.”

34. *Re SCR* [2012] NZFC 5466 at [57] (emphasis omitted).

35. *See* Leslie R. Schover, *Cross-Border Surrogacy: The Case of Baby Gammy Highlights the Need for Global Agreement on Protections for All Parties*, 102 FERTILITY & STERILITY 1258, 1258 (2014).

the Australian couple took custody of the female child, but refused to take the boy, who had Down Syndrome and suffered from other medical conditions. The surrogate was, therefore, left with the ethical dilemma of raising the boy (when she did not have the financial means to do so) or abandoning him in an orphanage.<sup>36</sup> In this kind of situation, accepting the legality of a commercial surrogacy agreement might have operated to impose legal or financial responsibility on the intended parents, particularly since the intended father was the genetic father of the boy.

Another example can be seen in three cases from the U.S. and Canada, reported by the media in 2015.<sup>37</sup> In each case, the surrogate became pregnant with triplets, and the intended parents threatened to withhold the payment due under the contract unless the surrogate agreed to reduce the pregnancy. In these cases, acceptance of the legality of the contract might have prevented the intended parents from attempting to interfere with the reproductive autonomy of the surrogate during pregnancy by means of a threat to withhold payment.<sup>38</sup>

The idea that a prohibition on commercial surrogacy is required to protect the surrogate from exploitation is arguably flawed. First, it assumes that money is the sole reason for a woman to agree to act as a surrogate, and that payment prevents a woman from making a free decision to do so. In many cases this is an inaccurate assumption, and ignores the reality that many surrogates are motivated by altruistic reasons. This desire to help others have children is not automatically diminished by the fact that the surrogate receives payment for her time and services as well as compensation for the pain, discomfort, risk, and inconvenience of pregnancy and childbirth. For some surrogates, the payment will be the dominant motivation for carrying the child. However, this by itself is not necessarily exploitative. A woman who needs to earn money to provide for her family must find some form of employment. While none of the options available to her might be optimal, she still has a choice as to which option she prefers to undertake. To say that she is not entitled to make that decision for herself limits her autonomy and demeans her as a person. It is not surrogacy, per se, that should be considered exploitative, but some of the potential terms of the surrogacy arrangement. The appropriate focus of regulation should, therefore, be on addressing these concerns rather than prohibiting surrogacy altogether.

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36. *Id.* But see *Farnell & Anor and Chanbua* [2016] FCWA 17 (Austl.), in which the surrogate sought custody of the girl, Pipah, following the revelation that Mr. Farnell is a convicted child sex offender. In this judgment, a very different version of the facts (in which the surrogate refused to hand over Gammy) was accepted by the court as accurate.

37. Tom Blackwell, *Canadian Surrogate Eliminated Baby from Triplet Pregnancy at Urging of Overseas Couple*, NAT'L POST, Sept. 9, 2015, <http://news.nationalpost.com/health/canadian-surrogate-pressured-to-eliminate-baby-from-triplet-pregnancy-by-couple>; Carl Campanile, *Dad Demands Abortion After Surrogate Learns She's Having Triplets*, N.Y. POST, Nov. 25, 2015, <http://nypost.com/2015/11/25/surrogate-carrying-triplets-says-dad-demanding-she-abort-one/>; Carl Campanile, *Surrogate Defies Biological Parents' Abortion Demand*, N.Y. POST, Dec. 14, 2015, <http://nypost.com/2015/12/14/surrogate-defying-birth-parents-abortion-demand/>.

38. It would not, however, have prevented the situation where reduction in the case of triplets was a term in the contract. This was the situation in one of these stories.

Second, a prohibition on commercial surrogacy justified on the basis of exploitation suggests that altruistic surrogacy can never be exploitative. This is not necessarily a fair assumption. Although money does not change hands, one wonders about the level of emotional pressure (albeit perhaps unintentionally) that occurs when a family member or close friend is asked to act as a surrogate. Indeed, some intended parents have commented that they preferred the idea of international surrogacy because they felt less like they were exploiting the surrogate if they were able to pay her for her services.<sup>39</sup> Commercial surrogacy arrangements should not, therefore, be automatically considered exploitative. Exploitation occurs as a result of specific terms of an agreement, and can exist whether the agreement is commercial or altruistic. Using exploitation to justify a prohibition on commercial surrogacy should not, therefore, be considered a valid approach.

### B. *Commodification of the Child*

The second justification for the prohibition of commercial surrogacy is to protect the child from being treated merely as a commodity. Again, however, this justification might be unintentionally placing the child in a vulnerable position. The prohibition may act as a disincentive for the intended parents to apply to the courts for recognition of a legal relationship. The consequences of not making such an application include that the child can be left without legal parents and without citizenship of the country he calls home (and perhaps even completely stateless). In cases where the intended parents do decide to make an application to the court, the judge might enforce the prohibition by declining to grant the order.<sup>40</sup> Again, the child is left potentially parentless and stateless. Further, more seriously, the judge might attempt to enforce the criminal sanctions against the intended parents for engaging in commercial arrangements. An example of this occurred in 2011 in Australia. Justice Watts declined applications from two Australian couples for parenting orders because “[a]pplicable [s]tate law made what he did illegal . . .”<sup>41</sup> His Honour then directed the Registrar to send a copy of his judgment to the Public Prosecutions Office “for consideration of whether a prosecution should be instituted . . .”<sup>42</sup> Should such a prosecution be successful, not only might the child

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39. This has been highlighted in personal interviews with intended parents, conducted by the author.

40. As an example of this, see *Case of Mennesson v. France* [Extracts], App. No. 65192/11, 2014-III Eur. Ct. H.R., available online at <http://hudoc.echr.coe.int/eng?i=001-145389>. In *Mennesson*, the intended parents were appealing against a governmental decision not to recognise their surrogate-born twins as French citizens. Recognition was finally granted in 2015, when the twins were fifteen years old. They had previously been warned that their lack of status as French citizens would mean they would have to leave France when they turned eighteen.

41. *Dudley and Anor & Chedi* [2011] FamCA 502 (Austl.); *Findlay and Anor & Punyawong* [2011] FamCA 503 (Austl.). Similar comments were made by Justice Watts in *Hubert and Anor & Juntasa* [2011] FamCA 504 (Austl.); and *Johnson and Anor & Chompunut* [2011] FamCA 505 (Austl.), but in these two cases the applications were granted.

42. *Dudley and Anor & Chedi* [2011] FamCA 502 ¶ 44. Following these cases there was a notable decline in applications by intended parents. Some applications clearly indicated that the

miss out on one or both parents for the duration of any sentence of imprisonment imposed, there will likely be a psychological impact when the child realises that this sentence was imposed because of the circumstances surrounding his or her creation.

There is also the potential risk of governmental interference with the new family. It might be felt that intended parents who enter into illegal domestic surrogacy agreements, or who avoid the law by entering into an international surrogacy agreement, have demonstrated a lack of fitness to parent and that it would, therefore, be in the child's best interests to be removed from that environment. In the case of *Paradiso & Campanelli v. Italy*,<sup>43</sup> for example, the Italian authorities charged the applicants with, inter alia, misrepresentation of the civil status of their surrogate-born son. The boy was subsequently removed from their custody, treated as being of *unknown* parentage and adopted by a new family. The applicants appealed to the European Court of Human Rights, seeking the return of the child to their custody. They argued that his removal was a breach of their right to family life under the European Convention on Human Rights. The European Court found that there had been a breach of the applicants' human rights, but declined an order to return the child to their custody as he was now settled in his new home. Sadly in this case, there was no one in the court to speak for the interests of the child himself. While the applicants also claimed that his human rights had been breached, the European Court determined that they did not have the authority to bring an action on his behalf since they were not his legal parents.

### *C. The Importance of Recognising the Potential Vulnerability of the Intended Parents*

While the focus of much discussion is on the surrogate and child, it should also be recognised that the intended parents are also in a vulnerable situation, often having come to surrogacy as a last resort after a long period of infertility and multiple failed in vitro fertilization attempts. Stories have emerged in recent years of surrogacy agencies defrauding intended parents out of significant amounts of money.<sup>44</sup> One way in which this occurs is through clinics advising intended parents of successful pregnancies (whether or not a pregnancy has occurred) and then asking for additional payments.<sup>45</sup> Another way occurs through private arrangements, where pregnant surrogates have demanded additional payments, which the intended parents have felt obliged (or more correctly coerced) into

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applicants were either concealing information or fabricating it. See *Ellison and Anor & Karnchanit* [2012] FamCA 602; *Case 1200079* [2012] MRTA 3473.

43. *Paradiso & Campanelli v. Italy*, 65 Eur. Ct. H.R. 22 (2015); see also European Court of Human Rights, *Questions and Answers on the Paradiso and Campanelli v. Italy Judgment* (2015), [http://www.echr.coe.int/Documents/Press\\_Q\\_A\\_Paradiso\\_and\\_Campanelli\\_ENG.pdf](http://www.echr.coe.int/Documents/Press_Q_A_Paradiso_and_Campanelli_ENG.pdf).

44. FED. BUREAU OF INVESTIGATION, *MODESTO SURROGATE PARENTING AGENCY OWNER PLEADS GUILTY IN \$2 MILLION FRAUD SCHEME* (2013); FED. BUREAU OF INVESTIGATION, *OWNER OF SAN GABRIEL VALLEY SURROGACY AGENCY PLEADS GUILTY TO RIPPING OFF WOULD-BE PARENTS WHO PAID FOR EGG DONATIONS* (2015).

45. This has been suggested in conversations the author has had with intended parents, lawyers, and surrogacy support groups. The money is often claimed to be in relation to loss of income or additional medical expenses.

paying. A final example might be where the surrogate refuses to relinquish her parental rights, but then receives a court order requiring the intended (genetic) father to make child support payments.<sup>46</sup>

*D. The Lack of a Clear Distinction Between Commercial and Altruistic Arrangements*

A prohibition on commercial surrogacy might be seen as an appropriate means of protecting the vulnerable parties in a surrogacy arrangement. It must be recognised, however, that any theoretical distinction drawn between altruistic and commercial arrangements is, in practice, an illusory one. In the United Kingdom, this can be demonstrated through the retrospective authorisation of “expenses reasonably incurred.”<sup>47</sup> Provided that a payment to the surrogate is classified by the court as a reasonable expense, the arrangement remains altruistic. Absent this classification, the arrangement is to be considered commercial. The United Kingdom courts have struggled with defining this distinction, and have gradually increased the scope of what can be classified as reasonable expenses to the point where it now authorises amounts that are clearly neither expenses nor reasonable. It appears at present that any payment will be authorised as a reasonable expense provided there is no moral taint or concealment associated with the transaction, and provided that the amount of the payment is consistent with amounts authorised in other cases. As an example of this, in 2008 in the United Kingdom case of *Re: X & Y*, Justice Hedley’s judgment clearly considered payments of €235 per month throughout the pregnancy and a lump sum of €25,000 following the birth to “significantly exceed[] ‘expenses reasonably incurred,’” but nevertheless authorised the payment as being in the basis of best interests of the child.<sup>48</sup> By 2013, Mrs. Justice Theis simply accepted the “reality [that there] is a legal commercial framework”<sup>49</sup> in relation to surrogacy.

In New Zealand, the response of the judiciary in relation to commercial surrogacy has been one of avoidance of the issue. Only two cases actually refer to the prohibition on commercial surrogacy,<sup>50</sup> even though a significant number of cases appear to involve a commercial element. The other cases often comment that since the application before the court is for an adoption order, the relevant

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46. See Louise Eccles, *Couple are Ordered to Pay Surrogate Mother £568 a Month for the Baby They Will Never See*, DAILY MAIL, Apr. 12, 2011, <http://www.dailymail.co.uk/news/article-1375861/Child-custody-Couple-ordered-pay-surrogate-mother-monthly-baby-wont-meet.html>. In this case the intended father commented that he believed that she had always intended to keep the child, and that her goal had been to obtain a continuous source of income through child support payments.

47. Human Fertilisation and Embryology Act 2008, c. 22 § 54(8) (UK).

48. *Re: X & Y* [2008] EWHC 3030 (Fam) [18] (Eng.).

49. *Re: P-M* [2013] EWHC 2328 (Fam) [19] (Eng.).

50. *Re Georgina Kennedy* [2014] NZFLR 367 at [34] (N.Z.); *Re SCR* [2012] NZFC 5466 at [57] (N.Z.).

provisions are those found in the Adoption Act only.<sup>51</sup> In one case, *Re SCR*,<sup>52</sup> the court adopted the United Kingdom's reasonable expenses approach in order to justify a payment (despite the fact that this wording is not found in the New Zealand legislation), and a later case drew an interesting distinction between *commercial* and *paid* surrogacy, finding the latter to not be prohibited.<sup>53</sup>

#### *E. The Conflicting Policies Dilemma*

Judges often comment in cases involving surrogacy that they find themselves faced with competing policy objectives. On the one hand, the legislation contains a clear policy directive against commercial surrogacy. On the other hand, as a family court, judges are directed to take the best interests of the child into account as a primary or paramount consideration.

It is generally accepted that these competing policy objectives are in direct conflict with each other, and one must, therefore, be given priority. With the exception of the Australian decisions of Justice Watts discussed above, judges in New Zealand, Australia, and the United Kingdom have all shown a tendency to prioritise the best interests of the child over public policy objectives wherever possible. In 2010 the United Kingdom regulations were amended to provide that the best interests of the child were the primary consideration for the courts, thus prioritising this over the public policy considerations.<sup>54</sup> The following year, Justice Hedley stated, “[i]f public policy is truly to be upheld, it would need to be enforced at a much earlier stage [than a hearing for a parental order].”<sup>55</sup>

Similarly in New Zealand, it has been commented that “these are policy considerations that are not within the role of this Court to impose. It is for the Parliament in consultation with the appropriate government agencies [to enforce] . . . . My role is to determine this particular application [for adoption].”<sup>56</sup>

#### *F. Conclusion*

The above discussion has identified significant challenges in the current regulatory framework. These challenges result from the justifications for the prohibition on commercial surrogacy as well as from the application of this prohibition in the courts. While it has been argued that any distinction between altruistic and commercial surrogacy is itself an illusory one, such a distinction

51. See, e.g., *Re KR and DGR* [2011] NZFLR 429 at [20] (N.Z.) (“[T]hese are policy considerations that are not within the role of this Court to impose. It is for the Parliament in consultation with the appropriate government agencies . . . . My role is to determine this particular application [for adoption] . . . .”).

52. *Re SCR* [2012] NZFC 5466 at [57], [63] (N.Z.).

53. *Re Georgina Kennedy* [2014] NZFLR 367 at [36] (N.Z.).

54. The Human Fertilisation and Embryology (Parental Orders) Regulations 2010, SI 2010/985 (providing that the court may not make an order “unless it considers that making the order would be better for the child than not doing so”).

55. *Re: X & Y* [2008] EWHC 3030 (Fam) [24] (Eng.).

56. *Re KR and DGR* [2011] NZFLR 429 at [20].

becomes nearly impossible to enforce once there is a child in existence, whose best interests must take priority. The obvious conclusion is, therefore, that post-birth regulation must be regarded as being limited in its ability to protect the vulnerable people in a surrogacy arrangement. For this protection to be most effective, regulation ought to occur before any surrogacy arrangement is authorised and a pregnancy results. The next Section will consider one way in which such pre-conception regulation might occur.

### III. AN ALTERNATIVE FORM OF REGULATION: IS PRE-BIRTH REGULATION THROUGH ETHICS COMMITTEES POSSIBLE?

When reading New Zealand cases there is a notable difference in tone (and length) between cases involving international surrogacy and those involving domestic surrogacy. The sense of judicial discomfort with applying conflicting policies, which is so noticeably present in the international cases, is just as noticeably absent from the domestic cases.<sup>57</sup> While this difference can in part be explained by the fact that none of the domestic cases appear to have involved a commercial element, the most logical explanation lies in the fact that the domestic cases have all received prior approval from an ethics committee, which has already weighed the interests of the intended parents (and their families), the surrogate and her partner, and the resulting child. The involvement of an ethics committee which considers individual applications is limited to only a few jurisdictions,<sup>58</sup> but is clearly an approach worth considering.

#### *A. The New Zealand Framework*

The Human Assisted Reproductive Technology Act 2004 establishes the Advisory Committee on Artificial Reproductive Technology (ACART)<sup>59</sup> and the Ethics Committee on Assisted Reproductive Technology (ECART).<sup>60</sup> Under section 16 of the Act, it is an offense for a fertility clinic to perform an “assisted reproductive procedure” without prior approval in writing from ECART.<sup>61</sup> In deciding whether to grant approval, ECART must act in accordance with any general guidelines issued, or specific advice given, by ACART.<sup>62</sup>

57. Compare, for example, the lengthy judgment in *Re SCR* [2012] NZFC 5466 (an international surrogacy case) with the judgments in *Re Henwood* [2015] NZFC 1541 or *Kirkpatrick v. Laurich* [2015] NZFC 1053 (both domestic surrogacy cases).

58. Israel and some states in Australia being the other notable examples. While the United Kingdom has the Human Fertilisation and Embryology Authority, this body does not hear individual cases, but merely provides guidance and policy.

59. Human Assisted Reproductive Technology Act 2004, s 32 (N.Z.).

60. *Id.* at s 27. The Act permits the Minister of Health to either establish a new ethics committee, or designate an existing ethics committee to be renamed as ECART and to fulfil this role. The Minister chose to designate the National Ethics Committee on Assisted Human Reproduction (NECAHR) to fulfil this role.

61. *Id.* at s 16.

62. *Id.* at s 29.

For the purposes of this Act, an “assisted reproductive procedure” is defined as a procedure performed for the purpose of assisting human reproduction, but does not include anything designated by the Governor-General on the advice of ACART as an “established procedure.”<sup>63</sup> Certain procedures designated “[p]rohibited actions” are also excluded from this definition.<sup>64</sup> Surrogacy is designated neither as an established procedure nor as a prohibited action, and, therefore, ECART approval is required before in vitro fertilization surrogacy can take place.<sup>65</sup>

ECART is designed to be a representative committee. It must have between eight and twelve members at a time, of which half must be lay members.<sup>66</sup> The lay members must include: one member to provide a consumer perspective, one to provide a disability perspective, one expert in ethics, and one expert in law.<sup>67</sup> The non-lay members must include one expert in assisted reproductive procedures and one expert in human reproductive research. At least two members must have a recognised awareness of *tikanga Māori*,<sup>68</sup> and of *te reo Māori*.<sup>69</sup>

ACART is also designed as a representative committee. As with ECART, it is to have eight to twelve members, with half of the members being lay members.<sup>70</sup> Members must include one or more experts in the following fields: assisted reproductive procedures, human reproductive research, ethics, Māori customary values and practice, and law. There must also be members who can articulate issues from a consumer perspective and from a disability perspective. Finally, one member must be able to represent the interests of the child. All members are expected to have an understanding of how the health sector responds to Māori issues.

Applications are made to ECART by a fertility clinic on behalf of the prospective intended parents. The application process requires the submission of reports prepared by specified persons.<sup>71</sup> These include: the medical specialist for

63. As found in Human Assisted Reproductive Technology Order 2005 (N.Z.).

64. These “[p]rohibited actions” are found in Human Assisted Reproductive Technology Act 2004, sch 1.

65. ETHICS COMMITTEE ON ASSISTED REPRODUCTIVE TECH., TERMS OF REFERENCE 2 n.1.

66. A lay person is defined as someone who, at no time during the person’s membership of ECART or in the three years before becoming a member of ECART, is a health practitioner, is involved in health research, or is employed by, associated with, or has a pecuniary interest in a health care provider. *Id.*

67. *Id.*

68. *Id.* at 5. *Tikanga Māori* can be translated as the customs and beliefs of the Māori people, New Zealand’s indigenous population. See HIRINI MOKO MEAD, *TIKANGA MĀORI: LIVING BY MĀORI VALUES* xi (2003).

69. See ETHICS COMMITTEE ON ASSISTED REPRODUCTIVE TECH., *supra* note 65, at 5. *Te reo Māori* is the Māori language, one of the official languages of New Zealand. *Māori Culture*, NEW ZEALAND NOW, <https://www.newzealandnow.govt.nz/living-in-nz/settling-in/maori-culture> (last visited Feb. 9, 2018).

70. *Terms of Reference*, ADVISORY COMMITTEE ON ASSISTED REPRODUCTIVE TECH., <http://ecart.health.govt.nz/about-us/terms-reference> (last updated Oct. 29, 2015).

71. See *Application Forms*, ETHICS COMMITTEE ON ASSISTED REPRODUCTIVE TECH., <http://ecart.health.govt.nz/publications-and-resources/application-forms> (last updated Dec. 5, 2016).



the intended parents, the medical specialist for the birth parent(s), a counsellor for the intended parents, a counsellor for the recipient, a counsellor from a joint counselling session, a legal advisor for the intended parents, and a legal advisor for the birth parents. In addition, letters from other medical specialists, the intended parents, the birth parents, and any other person may be included. Decisions are made on the papers, without the intended parents being present.

In making its decision, ECART must act in accordance with the Purposes<sup>72</sup> and Principles<sup>73</sup> of the Act, and must also consider any guidelines issued, or advice provided, by ACART.<sup>74</sup> If ECART approves the application, the fertility clinic may carry out the procedure.<sup>75</sup>

### B. *The Surrogacy Guidelines*

The current ACART guidelines for surrogacy are the “Guidelines on Surrogacy Arrangements involving Assisted Reproductive Procedures (2013).”<sup>76</sup> The relevant provisions are:

#### **2. When considering an application for surrogacy involving an assisted reproductive procedure:**

(a) ECART must determine that:

- (i) where there is one intending parent, he or she will be a genetic parent of any resulting child, or
  - (ii) where there are two intending parents, at least one will be a genetic parent of any resulting child;
- and
- (iii) there has been discussion, understanding, and declared intentions between the parties about the day-to-day care, guardianship, and adoption of any resulting child, and any ongoing contact; and

72. Human Assisted Reproductive Technology Act 2004, s 3 (N.Z.). Relevant here is Purpose (a): “to secure the benefits of assisted reproductive procedures, established procedures, and human reproductive research for individuals and for society in general by taking appropriate measures for the protection and promotion of the health, safety, dignity, and rights of all individuals, but particularly those of women and children, in the use of these procedures and research . . .” *Id.*

73. *Id.* at s 4. Relevant here are Principle (a): “the health and well-being of children born as a result of the performance of an assisted reproductive procedure or an established procedure should be an important consideration in all decisions about that procedure”; and Principle (c): “while all persons are affected by assisted reproductive procedures and established procedures, women, more than men, are directly and significantly affected by their application, and the health and well-being of women must be protected in the use of these procedures . . .” *Id.*

74. See ETHICS COMMITTEE ON ASSISTED REPRODUCTIVE TECH., *supra* note 65, at 3.

75. ECART’s approval expires on the earliest of the following dates: three years after the date of the letter; or if surrogate or intended mother has a birth; or if either intended parents or surrogate develop or have a significant change in relation to a major medical condition or social condition (for example, permanent separation from partner, death of someone important to the surrogacy arrangement, or change of country of residence). Lynley Anderson et al., *The Practice of Surrogacy in New Zealand*, 52 AUSTL. AND N.Z. J. OBSTETRICS & GYNAECOLOGY 253, 255 (2012).

76. These replace the previous Guidelines on Surrogacy Arrangements involving Providers of Fertility Services (2011).

- (iv) each party has received independent medical advice; and
  - (v) each party has received independent legal advice; and
  - (vi) each party has received counselling in accord with the current Fertility Services Standard;
- (b) ECART must be satisfied that:
- (i) the proposed surrogacy is the best or only opportunity for an intending parent, or at least one intending parent in a couple, to be the genetic parent of a child because, for example, an intending parent is:
    - unable to gestate a pregnancy; or
    - unable to conceive a child for medical reasons; or
    - unlikely to survive a pregnancy or birth; or
    - likely to have her physical or psychological health and wellbeing significantly affected by a pregnancy or birth; or
    - likely to conceive a child who is unlikely to survive the pregnancy or birth or whose health would be significantly affected by the pregnancy or birth; and
  - (ii) the surrogacy is not for reasons of personal or social convenience; and
  - (iii) the risks associated with a surrogacy for the adult parties and any resulting child are justified in the proposal. These risks are:
    - risks to the health and wellbeing of the intending surrogate, including
      - risks associated with pregnancy, childbirth and relinquishment of a resulting child to the intending parent(s);
      - the risk that the intending parent(s) may change their mind about parenting a resulting child;
    - risks to the health and wellbeing of the intending parent(s), including that the surrogate may change her mind about relinquishing a resulting child; and
    - risks to the health and wellbeing of a resulting child, including becoming the subject of a dispute if the relationship between the surrogate and intending parents breaks down.
- (c) In addition to the risks identified in (b)(iii) above, ECART must take into account the following relevant factors:
- (i) whether the intending surrogate has completed her family;
  - (ii) whether the relationship between the intending parent(s) and the intending surrogate safeguards the wellbeing of all parties and especially any resulting child;
  - (iii) whether legal reports indicate that the parties clearly understand the legal issues associated with surrogacies;

- (iv) whether counselling has:
  - included implications counselling for all parties
  - included joint counselling for all parties
  - been culturally appropriate
  - provided for whānau/extended family involvement
  - provided for the inclusion of any children of the parties;
- (v) whether counselling will be accessible to all parties before and after pregnancy is achieved; and
- (vi) whether the residency of the parties safeguards the wellbeing of all parties and especially any resulting child.<sup>77</sup>

### *C. Applications to ECART for Surrogacy*

In 1997, the National Ethics Committee of Assisted Human Reproduction (NECAHR), the forerunner to the current Ethics Committee on Assisted Reproductive Technology (ECART), approved its first application for surrogacy.<sup>78</sup> From 1998 to 2004, it considered an average of seven to eight applications per year (with the exception of only four in 2002). In the first half of 2005, it considered ten applications. In July 2005, NECAHR became ECART, as the new Act came into force.<sup>79</sup> ECART heard fifteen surrogacy applications from mid-2005 to mid-2006 (out of nineteen total applications for assisted reproductive procedures). This decreased to thirteen in 2006–2007 (out of nineteen total applications), and then increased to fifteen in 2007–2008 (out of thirty-four total applications), to eighteen in 2008–2009, and then to twenty-five in 2010–2011.<sup>80</sup> In 2011–2012, there were only eight applications, but the number rose to twenty-five in 2012–2013. In 2013–2014, numbers dropped again to twelve applications (out of twenty-nine total).<sup>81</sup>

It is worth explaining the notable decreases in numbers in 2011–2012 and 2013–2014. The Australian decisions of Justice Watts, referring cases to the Director of Public Prosecutions for possible criminal prosecution,<sup>82</sup> occurred a few months before the 2011–2012 period began, and it is not unreasonable to interpret the rapid drop in applications to be a consequence of this. A similar trend was also

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77. ADVISORY COMMITTEE ON ASSISTED REPRODUCTIVE TECH., GUIDELINES ON SURGACY ARRANGEMENTS INVOLVING ASSISTED REPRODUCTIVE PROCEDURES 4–5 (2013) [hereinafter ACART GUIDELINES].

78. ADVISORY COMMITTEE ON ASSISTED REPRODUCTIVE TECH., ANN. REP. 2006–2007 16 (2007).

79. Human Assisted Reproductive Technology Act 2004, s 2 (N.Z.).

80. ETHICS COMMITTEE ON ASSISTED REPRODUCTIVE TECH., ANN. REP. 2011/12 9 (2012).

81. ADVISORY COMMITTEE ON ASSISTED REPRODUCTIVE TECH., ANN. REP. 2013/14 10 (2015).

82. See *Dudley and Anor & Chedi* [2011] FamCA 502 ¶ 44; *Ellison and Anor & Karnchanit* [2012] FamCA 602; *Case 1200079* [2012] MRTA 3473; *supra* text accompanying note 42.

noticeable in Australia in the same period. In 2013–2014, the drop can be attributed to an increase in other applications to ECART.<sup>83</sup>

#### *D. The Other Functions of ECART*

While primarily intended to be a decision-making body, ECART also plays an important role in initiating reviews of relevant guidelines and laws. Because ECART hears individual applications, it is well suited to identifying specific issues which are not being appropriately addressed in the current policy. In 2005, for example, it reported to ACART that the then-applicable guidelines on surrogacy contained inadequate recognition of the variety of family types found in our society.<sup>84</sup> This issue had not been addressed by 2011 when a complaint was made by a male couple to the Human Rights Commission that the guidelines were discriminatory to homosexual couples in their use of language such as “intending mother.”<sup>85</sup> ACART agreed, and the new 2013 guidelines contained gender-neutral language.<sup>86</sup> In 2011, ECART identified the need for guidelines or advice for situations where an application falls under more than one guideline. This resulted in advice on “Applications that fall under more than one of the guidelines issued by the Advisory Committee on Assisted Reproductive Technology” being issued in 2013.<sup>87</sup> In 2015, ECART’s identification of the need to investigate the evidence base for the requirement of a biological link between child and intended parents led to ACART requesting that the Minister permit this to be added to its 2015 Work Programme.<sup>88</sup> It is likely that this investigation will occur in 2016–2017.

Another role increasingly played by ECART is the provision of general advice to fertility clinics in relation to guidelines. In 2013, the Minister of Health extended ECART’s functions to include the provision of advice on request in relation to “established procedures.”<sup>89</sup>

Finally, it also acts as the appropriate body to consider feedback on the guidelines from the fertility clinics. Following a suggestion from one clinic that an

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83. In 2014, the ten-year maximum period for storage of frozen embryos under the HART Act was to expire. Human Assisted Reproductive Technology Act 2004, s 10 (N.Z.). Embryos would, therefore, be discarded unless an extension was granted by ECART. *Id.* There were forty-nine applications for extensions heard by ECART as a matter of urgency in that year, and it is therefore likely that other, non-urgent applications were postponed. ADVISORY COMMITTEE ON ASSISTED REPRODUCTIVE TECH., ANN. REP. 2014/15 10 (2016).

84. ADVISORY COMMITTEE ON ASSISTED REPRODUCTIVE TECH., ANN. REP. 2005–2006 29 (2007).

85. ADVISORY COMMITTEE ON ASSISTED REPRODUCTIVE TECH., ANN. REP. 2011/12 (2012).

86. ACART GUIDELINES, *supra* note 77.

87. ADVISORY COMMITTEE ON ASSISTED REPRODUCTIVE TECH., ADVICE GIVEN 16 DECEMBER 2013 TO THE ETHICS COMMITTEE ON ASSISTED REPRODUCTIVE TECHNOLOGY UNDER THE HUMAN ASSISTED REPRODUCTIVE TECHNOLOGY ACT 2004 (2013).

88. ADVISORY COMMITTEE ON ASSISTED REPRODUCTIVE TECH., ANN. REP. 2014/15 iv (2016).

89. ADVISORY COMMITTEE ON ASSISTED REPRODUCTIVE TECH., ANN. REP. 2013/14 (2015).

approval have a clear expiry date, ECART consulted with other clinics and amended its application form to include this.<sup>90</sup>

#### *E. Conclusion*

ECART is widely regarded as playing an important and successful role in regulating assisted reproduction in New Zealand. Its representative nature allows for the consideration of multiple perspectives, including not only the perspectives of the vulnerable parties in surrogacy arrangements but also the perspectives of wider society and of the health practitioners involved. While ECART does not hear from the intended parents or surrogate in person, it will read letters written by them. Surrogacy applications currently form the bulk of ECART's work, and while it does not approve every application there have been only two complaints about its processes.<sup>91</sup> Its additional roles of informing ACART of emerging or potential issues and of providing advice to fertility clinics clearly add to its value. While the requirement of obtaining ECART approval inserts an additional step in the process for intended parents, this approval does appear to result in the post-birth adoption process being an easier hurdle to overcome.

#### IV. COULD THE PRE-CONCEPTION APPROVAL MODEL BE EXTENDED TO COMMERCIAL AND INTERNATIONAL SURROGACY?

It is interesting to consider whether the perceived success of ECART could continue if its jurisdiction was increased to hear commercial or international surrogacy cases. One obvious advantage of increasing ECART's jurisdiction is to address the increasing number of surrogate-born children who will be living in New Zealand, but will not have a legal relationship to the people they call their parents, and will not, therefore, be considered New Zealand citizens. This situation raises all kinds of legal issues, many of which will not become apparent until the child requires medical treatment (which can only be consented to by a legal guardian) or needs his or her birth certificate (for school, driver's license, employment, tax codes, voting) or proof of citizenship. It is far more efficient to address these issues now than to wait until the estimated large amounts of surrogate-born children currently in their infancy reach adulthood, when lack of citizenship becomes problematic in terms of the ability to remain in the country and to work. Allowing those people intending to enter into international or commercial arrangements to obtain ECART approval first might give these intended parents a level of security in their position. This in turn might result in an increase in applications for transfer of parentage post-birth. Most importantly, the ECART approval process will involve a consideration of the rights of the vulnerable parties in the arrangement.

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90. ETHICS COMMITTEE ON ASSISTED REPRODUCTIVE TECH., EXTENDING STORAGE APPLICATION FORM (2016).

91. One complaint occurred in 2005–2006, in relation to an application being declined. ETHICS COMMITTEE ON ASSISTED REPRODUCTIVE TECH., ANN. REP. 2005–2006 30 (2007).

*A. Extending the Model to Include Domestic Commercial Surrogacy Cases*

As identified above, the two main policy justifications for the prohibition on commercial surrogacy are exploitation and commodification. Instead of the current approach of a blanket prohibition, ECART could be permitted to consider individual applications for commercial surrogacy in order to determine the potential for these agreements to lead to exploitation, based on Guidelines provided by ACART. Obviously, implementing this would first require the repeal of the prohibition on commercial surrogacy in the HART Act.

The clear advantage of allowing these applications to be considered by an ethics committee would be that each application is treated as an individual case. This would mean that the issue of whether exploitation or commodification is likely to occur would, therefore, fall to be determined according to each specific situation. Following its current processes, ECART would have a certain amount of information available to it in order to make such an assessment, for example, reports from counsellors for both the intended parents and the surrogate, and letters from each of the parties. ACART could formulate new guidelines in relation to the kinds of expenses that might be permitted or considered reasonable to compensate the surrogate for her time, effort, pain, and discomfort, and whether a reasonable “gift” after the birth might be permitted. Guidance as to these amounts could take the form of a specified maximum amount, or could be based on the financial circumstances of the surrogate.

The report from the joint counselling session would provide guidance as to the relationship between the intended parents and the surrogate, to enable a determination as to whether all parties have considered the potential risks to the child or the surrogate during the pregnancy, and how decisions will be made in relation to this. It would also identify any specific dietary, health, or other conditions the intended parents would like to request that the surrogate comply with, and any needs the surrogate might have before, during, or after the pregnancy. If these, and other matters, are discussed and agreed upon before the pregnancy occurs there is less chance of one party feeling exploited as a result of the arrangement.

In relation to concerns about commodification, the counselling reports and the personal letters of the intended parents and their families would provide a vital insight into the minds of the intended parents and their reasons for considering surrogacy.

In addition to these considerations, the ECART process would allow for wider perspectives to be considered, for example societal or cultural implications of the surrogacy. Acceptance of the child into not just the immediate family, but into the wider community and as part of a specific culture, is a prerequisite for that child’s ability to thrive and to understand his or her identity and place in society. This child will likely be raised according to the culture of the intended parents, but may also feel a link to the culture of the surrogate (if this is different). Implications of this, and how these cultural needs might best be addressed, should also be considered.

It is important to also consider potential disadvantages of a proposal to allow commercial surrogacy to be considered by ECART. The obvious disadvantage is that the prohibition serves an important moral and educative role for society as a whole. It informs society that commercialisation of life or the use of women merely as reproductive labour is not acceptable. A rich person paying a poorer woman to carry a child for her or him (“surrogacy for convenience”) should not be permitted, and repealing the prohibition means that this lesson loses its clear presence in the law. In other words, while the ECART approach would focus on individual interests, the current prohibition is focussed on the protection of all members of society and on creating standards for acceptable conduct for that society. This is a valuable and desirable focus, and its removal requires careful consideration.

Another potential disadvantage is that the ECART process might not be any more effective than the current system in preventing exploitation or commodification. An exploited surrogate can be coached into what to say in the counselling sessions or in their personal letter. Intended parents might not be honest in explaining their desire for a child, and their hopes for that child’s future. Not all opportunities for potential issues might be raised in the counselling session, or parties may conceal their true feelings in order to simply get the counselling approval signed off.

### *B. International Surrogacy*

It has been suggested above that the prohibition on commercial surrogacy domestically is a key driver for international surrogacy. If commercial surrogacy was permitted domestically, subject to ECART approval, would there still be a need or market for international surrogacy?

Even if commercial surrogacy was permitted domestically, it is clear that many intended parents will still prefer to go overseas. In the United States, for example, even in states where commercial surrogacy is permitted, there is a high rate of surrogacy tourism. There are two immediately obvious reasons for this. First, commercial surrogacy is substantially cheaper overseas. Second, overseas clinics might offer additional benefits or options that are not available domestically. As examples, overseas clinics might implant more embryos, which will increase the chance of a successful pregnancy, than are permitted to be implanted domestically, or they might offer genetic testing or sex selection which are unavailable domestically.

Other intended parents, however, will prefer domestic commercial surrogacy, given the option. Intended parents are gaining increasing access to “insider information” from surrogacy support groups and are, therefore, becoming increasingly more educated as to the actual costs of international surrogacy. There is a developing understanding, for example, that the clinic fee advertised represents only a small part of the overall cost of surrogacy. The intended parents must also plan to stay in the foreign country for several months while visa issues are sorted out. One or both may have to travel back and forth for work purposes during this

time. They will need a lawyer in their home country, as well as one in the destination country. There will be costs in relation to the visa or passport application. Once these additional expenses are taken into account, international surrogacy may not be any cheaper than domestic surrogacy. In addition, domestic surrogacy has the advantage of being potentially less stressful than international surrogacy. The intended parents and child are at least in their familiar country, with support networks in place, while the legal issue of parentage is resolved by the courts. These are strong incentives in favour of domestic arrangements.

Those intended parents choosing to remain in New Zealand would be required to go through the ECART process. Those intending overseas surrogacy might still find it beneficial. ECART pre-approval of the arrangement will provide an educative function, ensuring the intended parents understand all of the steps to be taken following the birth of the child. It might also make the process of obtaining a temporary visa from Immigration New Zealand to allow the child to enter New Zealand an easier one. Applications for adoption seem to progress more smoothly when ECART approval has been granted, perhaps because the judges feel that certain matters like the welfare of the child, suitability of the intended parents, and the interests of the surrogate have already been considered. A reduction in stress during the post-birth process might be a compelling reason to seek pre-approval.

One reason to not seek pre-approval might be the difficulty in meeting ECART's requirements, particularly in relation to the surrogate. The intended parents would have to arrange for the surrogate to receive legal advice and counselling, and for reports to be provided for each. Further, ECART requires a joint counselling session,<sup>92</sup> which could present difficulties when the parties are resident in different countries. Even if these reports could be obtained, they may not be regarded by ECART as reliable, particularly as it is likely that the relevant professionals for the surrogate will be supplied by (and paid for by) the surrogacy clinic, which has a clear financial stake in the application being approved.

### *C. Practical Considerations*

Clearly, an increase in jurisdiction will lead to a corresponding need for an increase in resources. It was seen in 2014 that an increase in the number of applications led to ECART hearing a record number of applications in that year, and undoubtedly reserving some until the following year.<sup>93</sup> At present, ECART meets every two months and hears an average of twenty surrogacy cases a year.<sup>94</sup>

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92. ETHICS COMMITTEE ON ASSISTED REPRODUCTIVE TECH., APPLICATION FORM FOR ETHICS APPROVAL OF SURROGACY ARRANGEMENTS INVOLVING PROVIDERS OF FERTILITY SERVICES 2.

93. There were 39 applications in 2013, and then 89 applications in 2014. *See Meetings*, ETHICS COMMITTEE ON ASSISTED REPRODUCTIVE TECH., <https://ecart.health.govt.nz/meetings> (last updated Jan. 12, 2018) for the minutes for ECART's meetings; *see also supra* text accompanying note 83 for an explanation for this increase.

94. *See Meetings*, ETHICS COMMITTEE ON ASSISTED REPRODUCTIVE TECH., <http://ecart.health.govt.nz/meetings> (last updated Jan. 12, 2018).



There will likely be a substantial increase in cases should either commercial or international surrogacy move under their jurisdiction. This will likely require ECART to meet more regularly, or to appoint more members and divide into a specialised surrogacy team and a general assisted reproduction team.

Additional specialised members might also need to be appointed. One obvious new position might be someone to speak for the child. ACART has a member appointed for this purpose when drafting guidelines, but ECART currently does not appoint a member to speak for the future child when considering applications. It might also be useful to have a member who can inform as to the culture of countries commonly used as surrogacy destinations by New Zealanders. This could provide insight as to warning signs of exploitation in a particular country or in relation to the specific surrogate, based on information provided.

Whether these changes would be considered cost-effective is difficult to determine. There are clearly resource implications for the government and for ECART, but these may be balanced out by a smoother process for the intended parents once approval is given, particularly in relation to the adoption applications, and the unquantifiable benefits of addressing some of the potential issues for surrogate-born children before they arise.

There would also be a procedural amendment needed in relation to international surrogacy cases. At present, applications must be made by a fertility clinic. For international surrogacy cases the relevant clinic will be based overseas, and, therefore, it might be more appropriate to allow the intended parents' lawyer to make the application.

#### *D. Conclusion*

The above discussion has identified some advantages and disadvantages with increasing the jurisdiction of ECART to include commercial and international cases. The main advantage is that the composition of ECART and its processes would allow for a consideration of the interests of all potentially vulnerable parties. The important disadvantages include the prioritisation of individual needs over societal needs, and the increased resourcing potentially required. Other disadvantages like the difficulty of assessing the interests of the surrogate in international cases are also present in the current system, and are likely an inherent risk in surrogacy that can only ever be minimised, and not completely eradicated. On balance, the advantages suggest that this is a potentially workable model worthy of further exploration and consideration.

#### CONCLUSION

Surrogacy is becoming an increasingly prevalent practice, and the legal and ethical issues involved require careful consideration. It has been argued here that a post-birth regulatory model suffers from major disadvantages, leaving judges in the difficult position of needing to decide between two competing policies, and resulting in a high level of uncertainty and stress for the intended parents at a time

when they should be bonding with their new child. Such a model is also arguably not in the best interests of the child, who should be able to start his or her life in a secure, loving, environment and with a clear and identifiable place in his or her family and wider community. The current use of ECART to determine applications for domestic, altruistic surrogacy can be considered a successful approach that considers both the interest of the parties to the agreement, and the wider cultural and societal implications of surrogacy. While slight adjustments have been made to the surrogacy guidelines, they are generally regarded as appropriate and fair. The fact that there is a system in place through which issues with the guidelines can be referred to ACART or the Minister of Health, and that the guidelines can be amended in response to identified issues in a relatively short period of time is a positive attribute of the use of guidelines as opposed to legislation. Whether the level of success of the current model can continue if ECART's jurisdiction is increased to include commercial and international surrogacy is unclear, but it could be argued that the membership of ECART, and its decision-making processes, are well-suited to also consider these additional cases.

Intuitively, but also on deeper reflection, a pre-conception ethics committee-based approval model appears more likely than a post-birth judicial-based model to effectively address the ethical concerns in relation to surrogacy. While only a few countries or states currently use such a model, other countries have used a pre-conception judicial-based model, and also appear to see a benefit in relation to this. As judges in both New Zealand and the United Kingdom have commented, policy issues need to be addressed before an application for transfer of parentage reaches their courtroom. The ECART model addresses these policy issues, and also other issues, at the earliest possible stage of a surrogacy journey, and for this reason expanding its jurisdiction to consider commercial or international agreements is deserving of further consideration.

