

**QUESTIONNAIRE SUR LES QUESTIONS DE DROIT INTERNATIONAL PRIVÉ RELATIVES AU
STATUT DES ENFANTS, NOTAMMENT CELLES DÉCOULANT DES CONVENTIONS DE
MATERNITÉ DE SUBSTITUTION À CARACTÈRE INTERNATIONAL**

établi par le Bureau Permanent

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**QUESTIONNAIRE ON THE PRIVATE INTERNATIONAL LAW ISSUES
SURROUNDING THE STATUS OF CHILDREN, INCLUDING ISSUES ARISING FROM
INTERNATIONAL SURROGACY ARRANGEMENTS**

drawn up by the Permanent Bureau

*Document préliminaire No 3 d'avril 2013 à l'attention
du Conseil d'avril 2014 sur les affaires générales et la politique de la Conférence*

*Preliminary Document No 3 of April 2013 for the attention
of the Council of April 2014 on General Affairs and Policy of the Conference*

**QUESTIONNAIRE SUR LES QUESTIONS DE DROIT INTERNATIONAL PRIVÉ RELATIVES
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INTRODUCTION

This Questionnaire is addressed to Members of the Hague Conference and other interested States in fulfilment of the mandate provided by the Council on General Affairs and Policy of the Conference ("the Council") in April 2012, following consideration of Preliminary Document No 10 of March 2012.¹ The Council requested that the Permanent Bureau "continue the current work under the 2011 Council mandate and further prepare and distribute a Questionnaire in order to obtain more detailed information regarding the extent and nature of the private international law issues being encountered in relation to international surrogacy arrangements, as well as in relation to legal parentage or "filiation" more broadly. The Questionnaire shall seek views on the needs to be addressed and approaches to be taken. The Permanent Bureau is invited to present its final Report to the Council in 2014".²

A detailed chronology of the background to this project is available on the website of the Hague Conference < www.hcch.net >, under "The Parentage / Surrogacy Project", then "Chronology of the Project (including relevant documentation)".

This Questionnaire has **five parts**:

- **Part I** contains questions on the internal law concerning the establishment and contestation of legal parentage in Member and interested States;
- **Part II** looks to the private international law ("PIL") and co-operation rules concerning birth registration and the establishment, recognition and contestation of legal parentage;
- **Part III** addresses the particular challenges concerning International Surrogacy Arrangements³ ("ISAs");
- **Part IV** considers the current bilateral or multilateral instruments in the field; and
- **Part V** asks for thoughts on possible future work in this area.

Please note that the Permanent Bureau has used the same terminology in this Questionnaire as that which was used in the **Glossary** annexed to Preliminary Document No 10 of March 2012. This Glossary is accessible on the webpage of the project, "The Parentage / Surrogacy Project", then "Chronology of the Project (including relevant documentation)" and then "2011 - 2013".

The Permanent Bureau invites responses to the Questionnaire (in either English or French) by no later than **1 August 2013** in order to allow the Permanent Bureau sufficient time to consider the responses and to prepare the final Report requested by Members for the Council of 2014. Answers should be sent by e-mail to < secretariat@hcch.net > with the following heading and indication in the subject field: "Questionnaire - Parentage / Surrogacy - [name of Member, State or territorial unit, where applicable]".

It is acknowledged that this is a detailed Questionnaire and that, due to the legal position in some States, it may not be possible for Members and interested States to respond to all of the questions. The Permanent Bureau is extremely grateful for any information which may be provided. It is also hoped that the detailed information in the responses to this Questionnaire may be of use to Members beyond this project: for example, where consideration is being given, now or in the future, to domestic legislation in any of the areas considered below.

¹ Prel. Doc. No 10 of March 2012, "A Preliminary Report on the issues arising from international surrogacy arrangements", drawn up by the Permanent Bureau. See also the earlier Prel. Doc. No 11 of March 2011, "Private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements", also drawn up by the Permanent Bureau.

² Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference, 17-20 April 2012, para. 21. The "2011 Council mandate" referred to therein can be found at paras 17 to 20 of the Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference, 5-7 April 2011.

³ See the **Glossary** annexed to Prel. Doc. No 10 of March 2012 (see note 1) for the definition of the terms used in this paper.

Please note: the Permanent Bureau intends, except where expressly asked not to do so, to place replies to this Questionnaire on the website of the Hague Conference.

Identification

Name of State (or territorial unit, where applicable): **New Zealand**

Information for follow-up purposes

Name and title of contact person: Melinda Geary, Principal Advisor

Name of Authority / Office: Ministry of Justice

Telephone number: 044949805

E-mail address: melinda.geary@justice.govt.nz

QUESTIONNAIRE

Note: wherever possible, please provide a copy of, or a web-link to, any legislation, rules or case law mentioned in your response, along with a translation into English or French.

Part I: Internal law concerning the establishment and contestation of legal parentage

A. Birth registration

1. Please indicate which authorities in your State are responsible for registering the birth of a child:

The Department of Internal Affairs (DIA) - (Births, Deaths and Marriages group).

Births, Deaths, Marriages, and Relationships Registration Act 1995:
http://www.legislation.govt.nz/act/public/1995/0016/latest/DLM359369.html?search=ts_act_births_rese&sr=1

2. Please briefly describe the procedure for birth registration in your State, indicating whether such registration is mandatory⁴ and providing details concerning any specific rules which must be complied with (e.g., within what timeframe must a birth be registered, who can register a birth and where must the birth be registered):

Birth registration is mandatory and is centralised.

Both parents must sign the form unless the Registrar-General is satisfied that:

- (a) the child has only 1 parent at law; or
- (b) the other parent is unavailable; or
- (c) it is not reasonably practicable to obtain the other parent's signature because—
 - (i) he or she is overseas; and
 - (ii) he or she cannot be contacted within a period of time that is reasonable in the circumstances; or
- (d) requiring the other parent to sign the form would cause unwarranted distress to either of the parents.

Section 9 - Births, Deaths, Marriages, and Relationships Registration Act 1995:
http://www.legislation.govt.nz/act/public/1995/0016/latest/DLM364101.html?search=ts_act_births_rese

Advice of a birth is provided to the Births, Deaths and Marriages group (DIA) from a hospital or midwife.

If no registration is submitted by parents reminder letters are system generated after 28 days from the date of birth and again after 42 days, if the birth registration form is still outstanding.

Registration of births after two years from the date of birth, need the approval of the Registrar-General

⁴ See Art. 7 of the United Nations *Convention on the Rights of the Child* ("UNCRC"), 20 November 1989, which states that, "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents."

3. Please explain what proof (evidence), if any, of legal *maternity* is required by the authorities in your State in order to register a putative⁵ legal mother:

Please tick all which apply:

- a) Hospital birth record (stating the name of the woman who gave birth to the child)
- b) Sworn statement by the putative legal mother stating that she gave birth to the child
- c) Signed statement by the putative legal mother stating that she gave birth to the child
- d) DNA test to prove a genetic link between the putative legal mother and child
- e) Other: please explain

Preliminary notice must be given by the occupier of premises where a birth takes place or where the mother is admitted immediately after the birth, if neither a doctor nor a midwife is present.

4. Please explain what proof (evidence), if any, of legal *paternity* is required by the authorities in your State in order to register a putative legal father:

Please tick all which apply:

- a) Formal acknowledgement⁶ by the putative legal father
- b) Formal acknowledgement by the putative legal father, with the legal mother and / or the child's evidenced consent: please specify

Both parents are required to sign the birth registration form unless one parent is dead, unknown, missing, of unsound mind, or unable to act by virtue of a medical condition, or the other parent is overseas and it is not possible to obtain their signature within a reasonable period of time (within 2 months of the birth) or requiring the other person to sign the form would cause unwarranted distress to either parent.

The other exception is when a child has been born as a result of a woman acting alone in an assisted human reproduction procedure.

- c) Judicial decision (court order) establishing or confirming legal paternity
- d) Sworn statement by the putative legal father stating that he is the genetic father
- e) Signed statement by the putative legal father stating that he is the genetic father
- f) Signed agreement between the legal mother and putative legal father
- g) DNA test to prove a genetic link between the putative legal father and child
- h) Other: please explain

c) and g) are requirements if the details of the father are to be added after the birth has been registered.

5. What are the legal consequences in the internal law of your State of registering persons in the State records⁷ as the parents of a child?

- a) Those persons are the legal parents of the child for all purposes, unless and until the record is contested, and all the legal consequences which flow from legal

⁵ "Putative" means "generally considered or reputed to be" and, in this document, is taken to mean the woman or man *claiming or claimed* (where it is not the individual him or herself making the assertion) to be the legal mother or father, respectively, of the child.

⁶ In some States, this is called a "recognition" of paternity: the term "acknowledgement" is used in this document to avoid confusion with the private international law concept of "recognition". See further **Questions 11 et seq.** below.

⁷ It is acknowledged that there are different methods of recording births (and therefore legal parentage) across States, as well as different rules concerning matters such as when birth certificates will be issued, what information should be contained within the certificate and their constitutive value. Where applicable, please provide information concerning the rules in your State.

parentage in your State will automatically follow (e.g., duty to provide maintenance, inheritance rules, naming rules, etc.):
 Section 71 of the Births, Deaths, Marriages and Relationships Registration Act 1995 states that a birth certificate shall in any proceedings be considered as the true record of the information it contains.

Section 71 - Births, Deaths, Marriages and Relationships Registration Act 1995:

http://www.legislation.govt.nz/act/public/1995/0016/latest/DLM364728.html?search=ts_act_births_resele

b) Other: please explain

6. Are there any penalties for failing to comply with the rules concerning birth registration in your State: for example, misrepresenting to the authorities who are / is the legal parent(s) of the child?

Yes - a fine not exceeding NZ\$1000.

Section 89 - Births, Deaths, Marriages and Relationships Registration Act 1995:

http://www.legislation.govt.nz/act/public/1995/0016/latest/DLM364771.html?search=ts_act_births_resele

7. Is it possible to give birth anonymously in your State?

- Yes
 No

If so, please explain any rules which apply to such an anonymous birth and state what will appear on the child's birth record and / or birth certificate:⁸

Foundlings (abandoned children) are reported to Police who then notify the Registrar-General. The birth is usually registered by the child welfare agency.

Section 7 - Births, Deaths, Marriages and Relationships Registration Act 1995:

http://www.legislation.govt.nz/act/public/1995/0016/latest/DLM364099.html?search=ts_act_births_resele.

B. Establishment of legal parentage

8. Who, upon the birth of a child, is the legal mother *by operation of law* in your State (*i.e.*, with no need for the woman to take any steps to establish her legal maternity)?

- a) The woman who gives birth to the child
 b) The genetic mother (*i.e.*, the woman whose gamete (egg) created the child)
 c) There is no legal mother *by operation of law*: please explain
 d) Other: please explain

9. Who, upon the birth of a child, is the legal father *by operation of law* in your State (*i.e.*, with no need for the man to take any steps to establish his legal paternity)?

- a) The husband of the woman who gave birth is *presumed* to be the legal father
 b) The male partner of the woman who gave birth is *presumed* to be the legal father – please provide any conditions (e.g., the couple must be cohabiting, etc.)

⁸ In this document, the "birth record" is taken to mean the information concerning the child's birth (including legal parentage) which is stored in the records of the relevant State authority (usually a registry). In contrast, the "birth certificate" is taken to mean the *extract* from this birth record which is usually given to the legal parent(s) to keep. In some States it may be that the information contained within the birth record is comprehensive (e.g., if the child has been adopted, the birth record will identify the birth parent(s)), whereas the birth certificate may provide only a limited part of this information. See also *ibid*.

The couple must have cohabited at any time during the period beginning with the conception of the child and ending with the birth of the child.

- c) The genetic father (*i.e.*, the man whose gamete (sperm) created the child)
 d) There is no legal father *by operation of law*: please explain
 e) Other: please explain

If legal presumptions operate in your State, please specify in what circumstances, if any, it is possible to "rebut" these presumptions:

The legal presumption is just that, a presumption. This can be rebutted if there is evidence to the contrary. Either the mother or the putative father can seek a declaration of paternity or non-paternity from the Family Court or High Court. The court must decide any question of fact that arises in relation to paternity on the balance of probabilities, following the procedure specified in law. The court can take into account all relevant evidence including DNA evidence and evidence of the parties' sexual relationship at the time of conception.

10. a) Is it possible in your State for a non-contentious (*i.e.*, unchallenged) application to be made to the relevant State authorities for a decision (sometimes called a "declaration") establishing or confirming the legal parentage of a child?

- Yes – go to **Question 10 b**).
 No – go to **Question 11**.

- b) Please explain to which State authorities such an application should be made:

- i. The authority responsible for birth registration (see **Question 1** above)
 ii. The judicial authorities (*i.e.*, the courts): please specify
 iii. Other State administrative authorities: please specify
 iv. Other: please explain

- c) Please explain who may bring such an application:

- i. Only the individuals currently considered to be the legal mother and / or father and / or the child
 ii. Any person claiming to be the legal mother and / or father of a child
 iii. Any person determined by the State authorities to have sufficient interest to bring a claim: please explain how the authorities determine this question:
 iv. Any person
 v. Other: please explain

- d) Is there a timeframe within which such an application must be made?

- Yes, please specify:
 No
 In certain situations: please explain

11. Is it possible in your State for a putative legal father to "voluntarily acknowledge"⁹ his legal paternity (if his legal paternity has not arisen by operation of law – see **Question 9** above)?

- Yes
 No

If so, please explain (1) if there are any restrictions placed upon who may undertake such an acknowledgement (*e.g.*, it must be the genetic father, the man must be over

⁹ See note 6 above.

a certain age, etc.), (2) the procedure for undertaking such an acknowledgement, and (3) whether the consent(s) of the mother and / or child are required:

A man who is not legally presumed to be the father can in multiple express and implied ways acknowledge parenthood, including by signing birth registration forms, or by making statements concerning his parenthood that can later be given in evidence in court.

In particular, please state whether it is possible for an individual to acknowledge legal paternity to representatives of your State authorities in another country (*e.g.*, usually to the consulate or embassy in that State). Please explain the procedure and whether there are any conditions which must be fulfilled:

New Zealand does not register foreign births of New Zealand citizens. In later establishing parenthood of a foreign-born child, New Zealand authorities may rely on the father's express or implied acknowledgement of parenthood through acts such as signing the birth registration form, applying for New Zealand citizenship or passport, or making other statements acknowledging parenthood.

12. Is it possible in your State for a putative legal mother to "voluntarily acknowledge" her legal maternity?

- Yes
 No
 Not applicable – legal maternity always arises by operation of law (see **Question 8** above).

If so, please explain (1) if there are any restrictions placed upon who may undertake such an acknowledgement (*e.g.*, it must be the genetic mother, the woman must be over a certain age, etc.), (2) the procedure for undertaking such an acknowledgement, and (3) whether the consent(s) of any others is / are required:

In particular, please state whether it is possible for an individual to acknowledge legal maternity to representatives of your State authorities in another country (*e.g.*, usually to the consulate or embassy in that State). Please explain the procedure and whether there are any conditions which must be fulfilled:

13. Please explain the legal consequences in your State of a "voluntary acknowledgement" of legal parentage:

- a) Once the acknowledgement is authenticated by the State authorities, the author of the acknowledgement is considered a legal parent of the child for all purposes
b) The acknowledgement is merely a declaration by the author that he / she is a legal parent and says nothing of the State's acceptance of that issue
c) Other: please specify
Any "voluntary acknowledgement" of parenthood by the father may later be relied upon by the authorities to establish legal parenthood. This may include applications to the Family Court in respect of parenting orders or appointing guardianship where the putative father is not deemed a 'natural guardian' (unless the mother disagrees and then evidence of the contrary may be required).

14. Is it possible for legal parentage to be established by agreement between the putative parents?

- Yes
 No

If so, please explain the procedure which must be undertaken and specify any restrictions which operate:

The woman who gives birth is always the legal mother. Certain presumptions operate as to who the legal father is, but there is ultimately nothing preventing any man (by agreement with the mother) from declaring himself to be the father and registering accordingly. Pursuant to the Births, Deaths, Marriages and Relationships Registration Act 1995 the father's name on the birth certificate means he is considered to be the father of the child (until, or unless, rebutted by the identification of someone else).

15. Is it possible in your State for two persons of the same-sex to be the legal parents of a child?

- Yes
 No

If so, please explain the legal mechanisms available in your State which enable this. Please tick all which apply and provide a brief explanation of the rule(s) and procedure. This may arise by:

- a) Operation of law:
 Where a woman gives birth to a child using assisted reproductive technology, her same-sex wife or partner is automatically a parent of the child also.
- b) Order of the court or other State authorities:
- c) Adoption:
 From 19 August 2013, two married people of the same-sex can legally adopt a child together.
- d) Other:

C. Establishment of legal parentage where assisted reproductive technology ("ART")¹⁰ has been used¹¹

16. Is ART permitted in your State?

- Yes, all forms of ART are permitted
 Yes, but there are certain restrictions on the services available and who may access these services: please specify
 Most procedures are permitted for all couples and individuals, but provision is heavily regulated. Providers have to be approved and are subject to ongoing regulation.

There are also prohibitions on certain types of procedures set out in the Human Assisted Reproductive Technology Act 2004 (HART Act) e.g. no commercial arrangements, no sex selection of human embryos.

¹⁰ In this document, "assisted reproductive technology" ("ART") is used in a broad sense to refer to any method used to achieve conception which involves artificial or partially artificial means and which is undertaken by a medical / health clinic or institution: e.g., two of the most common methods are artificial insemination and in-vitro fertilisation. Donated gametes (egg and sperm) may be used but will not always be necessary. In this document, ART does not refer to "do-it-yourself" or "DIY" methods of non-procreative conception: i.e., where medical third parties are not involved in the procedure.

¹¹ Please note: surrogacy arrangements are dealt with separately in **Section D** below.

The HART Act:

<http://www.legislation.govt.nz/act/public/2004/0092/latest/DLM319241.html?src=qs>

Some procedures performed for the purpose of assisting human reproduction require case by case ethical approval by the Ethics Advisory Committee on Assisted Reproductive Technology (ECART) using guidelines issued by the Advisory Committee on Assisted Reproductive Technology (ACART). ACART's website includes guidelines it has issued on procedures requiring ECART approval: www.acart.health.govt.nz. ECART's website (www.ecart.health.govt.nz) includes the application forms to be used in making applications to ECART.

Procedures which require case by case ethical approval include:

- IVF surrogacy
- Preimplantation genetic diagnosis with Human Leucocyte Antigen tissue typing (i.e. 'saviour sibling' situations)
- Combined assisted reproductive procedures (i.e. egg donation from a family member with a surrogacy arrangement)
- Creation and use of embryos created from donor sperm and donor eggs
- Donation of eggs and sperm between some family members
- Extending storage of sperm, eggs and embryos beyond the ten year limitation.

A list of declared procedures that do not require ethical approval by ECART can be found in the Human Assisted Reproductive Technology Order 2005 (HART Order): http://www.legislation.govt.nz/regulation/public/2005/0181/latest/DLM335192.html?search=ts_act%40bill%40regulation%40deemedreg_Human+Assisted+Reproductive+Technology+Order+2005_resel_25_a&p=1

- No, all forms of ART are completely prohibited – **please go to Section D.**
 Other: please explain

17. Is there regulation of the use of ART in your State?

- Yes, legislation regulates the use of ART: please briefly explain
 All ART is subject to the Human Assisted Reproductive Technology Act 2004 (HART Act) and subordinate regulations (HART Order 2005). This includes guidelines published to ECART by ACART.

There are also Fertility Services Standards 2007 (auditing standards for providers of fertility services)

- Yes, there are rules or "codes of practice" concerning the use of ART which emanate from the medical regulatory bodies: please briefly explain
 No, there are no rules at all – **go to Question 19**
 Other: please explain

18. If ART is regulated in your State, please state whether the legislation or rules specify the following matters (please tick all which apply and provide a brief explanation, where applicable):

- a) Who may access ART services (e.g., relationship status; age or health requirements; nationality / residency requirements, etc.):
 All persons for whom such services are medically appropriate and recommended.
 The HART Act does not specify access criteria or discriminate on the bases listed in the question. However ACART guidelines set various criteria for

certain types of procedures (surrogacy and embryo donation) and age or health may have a bearing on whether services are medically appropriate e.g. a medical test for one or both intending parents.

The current surrogacy guidelines exclude single men and male couples entering into surrogacy arrangements as intending parents.

ART services might not be state-funded for non-residents and citizens. New Zealand residents and citizens may receive a limited public subsidy.

- b) Who may perform ART services:
Providers of fertility services must meet obligations under the Health and Disability Services (Safety) Act 2001 which include:
- certification by the Director General to provide fertility services (fertility services is defined in s80(2) of the HART Act).
 - meet relevant service standards defined in the Health and Disability Services (Safety) Act 2001.
- c) The regulation of medical or other institutions which perform ART services (e.g., the licensing of clinics or hospitals):
Providers, including clinics, must be approved, as above, subject to the Fertility Services Standards 2007.
- d) Which ART services may be performed:
Some services are absolutely prohibited (eg, sex-selection of embryos, commercial surrogacy). Prohibitions are set out in the HART Act (Part 2, Subpart 1 and Schedule 1).

Others are subject to approval by the ethics committee. The ART procedures requiring ethical approval are set out in the HART Act. Procedures which require case by case ethical approval include:

- IVF surrogacy
- Preimplantation genetic diagnosis (for purposes other than the prevention or treatment of a genetic disorder or disease)
- Combined assisted reproductive procedures (i.e. egg donation from a family member with a surrogacy arrangement)
- Creation and use of embryos created from donor sperm and donor eggs
- Donation of eggs and sperm between some family members
- Extending storage of sperm, eggs and embryos beyond the ten year limitation.

Established procedures (procedures that do not require ethical approval) are listed in the HART order. These include:

- Artificial insemination
- Assisted hatching
- Blastocyst culture
- Collection of eggs for the purposes of donation
- Collection of sperm for the purposes of donation
- Egg cryopreservation (freezing)
- Embryo cryopreservation (freezing)
- Gamete intrafallopian transfer
- Intracytoplasmic sperm injection (ICSI)
- In vitro fertilisation (IVF)
- Ovarian tissue cryopreservation (freezing)
- Sperm cryopreservation (freezing)
- Preimplantation genetic diagnosis

Definitions of these procedures are included in the HART Order 2005:
<http://www.legislation.govt.nz/regulation/public/2005/0181/latest/DLM33601>

9.html?search=ts_act%40bill%40regulation%40deemedreg_human+assisted+_resel_25_a&p=1

- e) Whether egg donation is permitted and, if so, under which conditions:

It is permissible if:

1. It is an altruistic donation. Section 13 of the HART Act prohibits the commercial supply of human gametes. Although, commissioning parents may pay for reasonable and necessary medical expenses (paid to the Provider not the surrogate/donor). New Zealand clinics may offer reimbursement to gamete donors for travelling costs in some situations.

2. The donor agrees to provide information (applies only to donations made on or after 22 August 2005) including: general information (name, gender, address, height, eye colour), personal/cultural information (place and country of birth, ethnicity and cultural affiliation, whanau, iwi and hapu if Maori), medical history of donor's family (if the provider thinks it is necessary) and why the donor chose to donate. Offspring over the age of 18 are able to access the information.

Ethical approval from ECART is required for egg donation when:

- egg donation and collection occurs between some family members
- if the eggs will be used in conjunction with other donor gametes
- the donor is under 20 years of age
- the donor is dead or dies before the procedure is carried out.

ECART must not approve an application for donation where any resulting child would be formed by eggs and sperm from:

- Father and daughter
- Mother and son
- Brother and sister
- Grandfather and granddaughter
- Grandmother and grandson.

See:

- Guidelines on Donation of Eggs or Sperm between Certain Family Members 2007:
<http://acart.health.govt.nz/publications-and-resources/guidelines-and-advice-issued-ecart/guidelines-donation-eggs-or-spermand>
- HART Order 2005 (Schedule, Part 2):

<http://www.legislation.govt.nz/regulation/public/2005/0181/latest/DLM336019.html>

- f) Whether sperm donation is permitted and, if so, under which conditions:

This is permissible if:

1. It is an altruistic donation. Section 13 of the HART Act prohibits the commercial supply of human gametes. Although, commissioning parents may pay for reasonable and necessary medical expenses (paid to the Provider not the surrogate/donor). New Zealand clinics may offer reimbursement for travelling costs to gamete donors in some situations.

2. The donor agrees to provide information (applies only to donations made on or after 22 August 2005) including: general information (name, gender, address, height, eye colour), personal/cultural information (place and country of birth, ethnicity and cultural affiliation, whanau, iwi and hapu if Maori), medical history of donor's family (if the provider thinks its necessary) and why

the donor chose to donate. Offspring aged 18 years and older are able to access identifying information.

Note that ethical approval from ECART for sperm donation is only required in the following circumstances:

- collection and donation of sperm between some family members
- if the sperm will be used in conjunction with other donor gametes
- the donor is under 20 years of age
- the donor has since died or did not give consent to the specific use of the sperm before that person's death.

ECART must not approve an application for donation where any resulting child would be formed by eggs and sperm from:

- Father and daughter
- Mother and son
- Brother and sister
- Grandfather and granddaughter
- Grandmother and grandson.

See:

- Guidelines on Donation of Eggs or Sperm between Certain Family Members 2007:
<http://acart.health.govt.nz/publications-and-resources/guidelines-and-advice-issued-ecart/guidelines-donation-eggs-or-spermand>
- HART Order 2005 (Schedule, Part 2):

<http://www.legislation.govt.nz/regulation/public/2005/0181/latest/DLM336019.html>

- g) The costs of ART (including the amount paid to any gamete donors):

Donors may be refunded legitimate expenses only. Section 13 of the HART Act prohibits the commercial supply of gametes and embryos, other than providing reimbursement for "reasonable and necessary expenses" incurred by the donor e.g. travel costs.

Where people are funding their own treatment, they will pay the costs set by fertility services providers. Some people may qualify for public funding.

- h) The anonymity of gamete donors:

The HART Act provides that gamete donors must provide identifying information, but this only applies to donations made on or after 22 August 2005. See Part 3 HART Act:

<http://www.legislation.govt.nz/act/public/2004/0092/latest/DLM319241.html?src=qs>

- i) The right of the child to know his / her genetic or birth origins:

At age 18 a child can access identifying information about their donor by giving written notice to a fertility provider or the Registrar-General. See section 50 HART Act (only relevant for children born from donations after 2005):

<http://www.legislation.govt.nz/act/public/2004/0092/latest/DLM319371.html>

- j) The legal parentage of any child born as a result of ART (see also **Questions 19 to 22** below)
- k) Other: please explain

19. Please explain the consequences of ART for legal *maternity* arising *by operation of law*:

- a) The woman giving birth to the child will always be considered the legal mother of the child, irrespective of any ART which has led to the birth
 b) Other: please specify

Please explain whether the above position results from legislation, rules, case law or other source(s) of law:

This results from legislation - Status of Children Act 1969. Under the Act, a woman who becomes pregnant as a result of an AHR procedure (even if it was as a result of a donor embryo implantation procedure) is the mother of the child.

20. Please explain the consequences of ART for legal *paternity* arising *by operation of law*:

Please tick all boxes which apply:

- a) The husband of the woman giving birth following ART is the legal father of the child born: please state whether it is necessary for him to have formally consented to the treatment:
 The husband's consent to the ART procedure is necessary for the presumption of paternity to apply.
 b) The male partner of the woman giving birth following ART is the legal father of the child born: please state whether it is necessary for him to have formally consented to the treatment:
 The partner's consent to the ART procedure is necessary for the presumption of paternity to apply.
 c) The genetic father will always be the legal father:
 d) Other: please explain

Please explain whether the above position results from legislation, rules, case law or other source(s) of law:

This results from legislation - Status of Children Act 1969, section 18.

21. Please explain whether gamete donors are, in any situations, considered the legal parent(s) of a child born as a result of ART:

A person who gives an egg or sperm or persons who give an embryo in order to assist other(s) to conceive a child artificially are not considered the legal parent(s) of the resulting child. If a sperm donor later becomes the partner of the woman giving birth then that man can be considered the legal father of the resulting child.

22. If your State permits same-sex couples to access ART services, please specify the consequences concerning legal parentage for any child born to a same-sex couple who have used ART to conceive a child:

Where a woman gives birth to a child conceived using ART, her same sex wife or partner is automatically a parent of the child (provided the wife/partner consented to the procedure).

The current surrogacy guidelines require that there be an "intending mother" which excludes same-sex male couples from entering a surrogacy arrangement. ACART are developing amended guidelines which will be issued following completion of consultation with the Minister of Health. Same-sex male couples would still need to adopt the resulting child (and can only jointly adopt if they are married).

23. Is information available concerning how many ART procedures are undertaken in your State each year and how many children are born as a result?

Yes: please provide a copy of, or a link to, the information
Two types of information are available:

1. Number of applications to the Ethics Committee on Assisted Reproductive Technology (ECART) for procedures requiring ethical approval (e.g. surrogacy, embryo donation, donation of gametes by a family member, use of donated eggs with donated sperm). ECART's website includes its Annual Reports which give information about numbers. Available at <http://ecart.health.govt.nz/publications-and-resources/annual-reports>

2. Number of treatment cycles - ACART has begun contracting for New Zealand specific reports that draw on an Australian-New Zealand database. The report for 2009 ('Assisted Reproductive Technology in New Zealand 2009') is available on ACART's website at <http://acart.health.govt.nz/assisted-reproductive-technology-new-zealand-2009>, and reports that there were 5606 treatment cycles in New Zealand in 2009, with 1270 liveborn babies from procedures.

The most recent report (not yet published) states that there were 5,285 treatment cycles in 2010 and 1,273 liveborn babies from procedures.

These reports give comprehensive information about various aspects of ART procedures, but only report procedures in this country and where fertility clinics were involved. The report does not capture the use of fertility procedures overseas by New Zealanders, nor does it capture informal surrogacy or sperm donation arrangements outside fertility clinics.

No
 Other: please explain

D. Surrogacy arrangements

Regulation of surrogacy

24. Does your State permit surrogacy arrangements?

- a) Yes, *all* forms of surrogacy arrangements are permitted:
- i. As a result of express legislation or rules: please specify
 - ii. By default, because surrogacy is unregulated in internal law.
Go to **Question 26**.
- b) No, any form of surrogacy is expressly prohibited by law: please specify, including any sanctions for breach of this prohibition:
Go to **Question 26**.
- c) It depends upon the nature of surrogacy arrangement (e.g., commercial surrogacy arrangements are prohibited): please specify

Surrogacy arrangements in New Zealand are not illegal, but they are not enforceable (Section 14 HART Act).

Non-commercial surrogacy is subject to approval by the ethics committee (ECART) on a case by case basis if any ART is to be used. A purely private arrangement (for example, by using the "home method") is not explicitly regulated, except that it must not be commercial.

Commercial surrogacy is prohibited (Section 14(3) HART Act). Penalties include imprisonment up to one year or a fine not exceeding \$100,000, or both.

d) Other: please specify

Please provide any clarification, where necessary:

25. If your State has legislation or rules permitting certain or all forms of surrogacy arrangements:

a) Are the parties to the surrogacy arrangement required to obtain State approval of the arrangement *prior* to conception?

Yes, pre-approval by the relevant State authorities is required. Please explain the procedure:

Surrogacy arrangements through a fertility services provider must have case by case ethical approval from ECART before the arrangement takes place.

No, pre-approval is not required – the rules only regulate legal parentage following the birth of the child. Please explain the procedure:

Other: please specify

b) Please state whether the following aspects of the surrogacy arrangement are regulated in the rules / legislation:

Please tick all which apply:

i. Who may be intending parents¹² to an arrangement, including:

a. Nationality, domicile or residency requirements:¹³
please specify

There are no specific requirements. However the 'Guidelines on Surrogacy Arrangements involving Providers of Fertility Services' ("the Guidelines") require ECART to take into account (as a relevant factor but not determining factor) whether the residency safeguards the wellbeing of all parties and the resulting child.

b. Marital or other relationship status:

Single men and male couples are currently precluded because the Guidelines refer to an intending mother who must meet medical criteria.

c. Age requirements:

d. Health requirements:

One of the principles of the HART Act is that "the health and well-being of women must be protected" (see Section 4 HART Act).

The Guidelines require ECART to determine that the intending parents have received counselling and discussed the day-to-day

¹² Please note that, for simplicity, this document always refers to intending parents in the plural form. However, it is understood that, in some States and in certain circumstances, single persons may enter into a surrogacy arrangement. Please specify this, where relevant, in any response.

¹³ See **Parts II** and **III** below for questions concerning the private international law rules regarding legal parentage and international surrogacy arrangements, respectively.

care, guardianship and adoption of any resulting child, and the ongoing contact/relationship with the surrogate.

e. Psycho-social requirements:

f. Other:

Subject to case by case consideration by the ethics committee if any ART is to be used. The Guidelines require ECART to determine that at least one of the intending parents will be the genetic parent of any resultant child. ECART must also take into account the relationship between the intending parents and the intending surrogate.

ii. Who may be a surrogate mother, including:

a. Nationality, domicile or residency requirements:¹⁴
please specify:

There are no specific requirements. However the Guidelines require ECART to take into account, the relationship between the intending parents and the intending surrogate and whether the residency safeguards the wellbeing of all parties and the resulting child.

b. Marital or other relationship status:

c. Age requirements:

d. Health requirements:

e. Psycho-social requirements:

The guidelines require ECART to determine the surrogate has received counselling and discussed the day-to-day care, guardianship and adoption of any resulting child, and the ongoing contact/relationship with the intending parents.

f. The surrogate mother must already have her own children:

The Guidelines require ECART to take into account whether the surrogate has completed her own family.

g. Other:

Subject to case by case consideration by ECART if any ART is to be used.

ECART must take into account, the relationship between the intending parents and the intending surrogate.

iii. Which types of surrogacy arrangements are permitted, *e.g.*, traditional and / or gestational,¹⁵ etc.: please specify

Gestational surrogacy arrangements involving providers of fertility services require case by case ethical approval from ECART.

Informal arrangements that do not involve providers of fertility services are not unlawful.

iv. Which medical institutions or clinics may facilitate a surrogacy arrangement (where medical intervention is necessary for the type of surrogacy arrangement being undertaken) and the level of financial remuneration which may be paid for these services: please specify

Providers of fertility services must meet obligations under the Health and Disability Services (Safety) Act 2001 which include:

- certification by the Director General of Health to provide fertility services (fertility

¹⁴ See **Parts II** and **III** below for questions on the private international law rules concerning legal parentage and international surrogacy arrangements, respectively.

¹⁵ See the **Glossary** for the definition of the terms used in this paper.

services is defined in s80(2) of the HART Act).

- meet relevant service standards defined in the Health and Disability Services (Safety) Act 2001.

Financial remuneration is not regulated with the exception of providing information to donors (Human Assisted Reproductive Technology (Fees) Regulations 2005)

Fertility services providers are subject to licensing auditing under the Fertility Services Standard.

- v. Which other bodies or persons may facilitate a surrogacy arrangement (e.g., by acting as an intermediary and undertaking tasks such as advertising for surrogate mothers, "matching" surrogate mothers with intending parents, organising certain aspects of the arrangements for the intending parents, etc.) and whether such bodies or persons may receive financial compensation for their services: please specify
Providers are subject to regulation under the HART Act.

Intending parents often advertise for an altruistic surrogate on website forums such as <http://nz-surrogacy.com/> or 'Treasures' (<http://www.treasures.co.nz/community/forum/room/?roomid=17>). As per the HART Act, they are prohibited from advertising for illegal actions e.g. they cannot advertise for a commercial surrogate.

- vi. Whether financial remuneration can be paid to the surrogate mother:
- a. No financial remuneration at all is permitted
 - b. Only reasonable expenses may be paid: in which case please state whether the legislation or rules define what are such "reasonable expenses":

Section 14(3) of the HART Act states that it is an offence where someone 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.

Valuable consideration is defined in Section 5 of the HART Act as an inducement, discount or priority in the provision of a service.

However, Section 14(4) provides exception for related legal advice costs and "reasonable and necessary expenses incurred" for example, travel costs for the gamete donor.

- c. Compensation beyond reasonable expenses is permitted: please specify what exactly is permitted:
- vii. Whether the surrogacy arrangement is contractually enforceable: please specify
No. Surrogacy arrangements are not enforceable in New Zealand (Section 14(1) of the HART Act).
- viii. Who may make decisions concerning the pregnancy (e.g., whether an abortion should be undertaken in certain situations, what medical treatment should be undertaken if problems arise, etc.): please specify
New Zealand legislation does not specifically address this. In practice it is the surrogate mother as she is the recipient of relevant medical treatment and must give informed consent.

- ix. The legal parentage of the child following his / her birth (see further **Questions 26 to 30** below):
The woman giving birth is the legal mother regardless of who donated the gametes. A legal adoption of the child by the commissioning parent/s is necessary to extinguish her legal parenthood.
- x. Other: please specify
- c) Please explain any legal consequences, both criminal (*e.g.*, penal sanctions) and civil (*e.g.*, for the legal parentage of the child), if the requirements set down in the legislation or rules are not complied with:
A variety of offences exist in the HART Act. These mainly apply to ART providers. Prohibited acts include commercial supply of human gametes and embryos, sex-selection of human embryos, and advertising of prohibited activities. Participation by anyone in a surrogacy arrangement for gain or profit is a criminal offence, except by an authorised ART provider (who may receive legitimate expenses), or by a lawyer giving advice to the surrogate.
- Any person who participates in or arranges a commercial surrogacy is liable to imprisonment for a term not exceeding 1 year, or a fine not exceeding \$100,000, or both. This is set out under Section 14(5) of the HART Act.
- d) Please provide any additional information you think necessary concerning the nature of the regulation of surrogacy in your State:

Surrogacy and legal parentage

26. Upon the birth of a child following a surrogacy arrangement, who is / are the legal parent(s) *by operation of law* (*i.e.*, without any further steps being taken by any individuals) according to the internal law of your State?

Please explain, including whether this results from legislation, case law or other source(s) of law:

The woman giving birth is the legal mother, regardless of who donated the gametes. If she is married or has a partner, there may be a legal presumption that her husband, wife or partner is the other parent (s18 of the Status of Children Act). Adoption by the commissioning parent/s is necessary to extinguish the birth mother's (and father's/other partner's) legal parenthood (s16(2) of the Adoption Act 1955).

27. Where necessary, are there any legal mechanisms in your State to enable intending parents to establish their legal parentage?

Please tick all which apply:

- a) Yes, prior to the birth the intending parents can seek a court order declaring that they will be the parents of the child born to a surrogacy arrangement (a "pre-birth order").

Please specify any legal requirements to obtain such an order (including any nationality / domicile / residency requirements) and state whether this position arises from legislation, case law or other source(s) of law:

- b) Yes, *following* the birth the intending parents can seek a court order transferring legal parentage to them (in some States, known as a "parental order" or "parentage order").

Please specify any legal requirements to obtain such a transfer of legal parentage (including any nationality / domicile / residency requirements) and state whether this position arises from legislation, case law or other source(s) of law:

- c) No
- d) Other: please specify
Adoption by the commissioning parent/s is necessary to extinguish the birth mother's (and father's/other partner's) legal parenthood. Adoptions are governed by the Adoption Act 1955. Legislation does not specifically deal with establishing parentage in surrogacy arrangements.
- e) Such mechanisms are unnecessary – the surrogacy contract is sufficient to establish the legal parentage of the intending parents.
- f) Such mechanisms are unnecessary – the intending parents will be the legal parents upon the birth of the child by operation of law: see the response to **Question 26** above.

28. Where a surrogacy arrangement has been undertaken in your State, will the fact of the surrogacy arrangement be visible on the child's birth record and / or certificate?

- Yes: please describe exactly what will be on the record and / or certificate
- No: please explain

The birth will be initially registered as the child of the surrogate (not the intending mother). The intending parents must formally adopt the child, at which point a second birth registration occurs on receipt of a court adoption order. This registration is linked to the first with the first record becoming 'closed' and access is only available to the adopted child from 20 years of age. A certificate from the second record will show the details of the child and the adoptive parents.

29. Is information available concerning how many surrogacy arrangements take place in your State each year and how many children are born as a result?

- Yes: please provide a copy of, or a link to, the information
- No
- Other: please explain

ECART's Annual Reports contain information about applications, approvals and outcomes (<http://ecart.health.govt.nz/publications-and-resources/annual-reports>). There is no information available about the numbers of informal arrangements and the outcomes.

30. Are you aware of any illegal practices in your State concerning surrogacy arrangements?

- Yes – please state the practices of which you are aware and, if possible, how frequently they are occurring:
- No
- Other: please explain

E. Contestation of legal parentage

31. Which authority(ies) in your State may determine a dispute concerning legal parentage?

- a) The authority responsible for birth registration (see **Question 1** above)
- b) The judicial authorities (*i.e.*, the courts): please specify
The Family Court and the High Court.
- c) Other State administrative authorities: please specify
- d) Other: please explain

32. Who may bring an action to challenge legal parentage?

- a) Only the individuals currently considered to be the legal mother and / or father and / or the child
- b) Any person claiming to be the legal mother and / or father of a child
- c) Any person determined by the State authorities to have sufficient interest to bring a claim: please explain how the authorities determine this question Essentially the same arrangements as for establishment of legal parentage. Section 47 of the Family Proceedings Act 1980 (<http://www.legislation.govt.nz/act/public/1980/0094/latest/DLM40439.html>) specifies which persons may seek paternity orders/declarations. This is generally the mother, but may be a social worker; a guardian of the child where the mother is: dead, under 16 years of age, or has abandoned the child; or with leave of the Court, any person with sufficient interest.
- d) Any person
- e) Other: please explain

33. Is there a timeframe within which legal parentage must be challenged (*i.e.*, after which time, any challenge to legal parentage is effectively barred)?

- Yes, please specify:
Within 6 years of the birth of the child, unless the respondent has expressly or by implication admitted parenthood; or was within the preceding two years of any application married to the mother, or was in a civil union or a de facto relationship with her, or contributed child maintenance payments to her.
- No
- In certain situations: please explain

34. On what grounds may legal *maternity* be challenged before the authorities in your State?

- a) Only on the basis that the "mother" did not, in fact, give birth to the child
- b) Only on the basis that the "mother" is not, in fact, the genetic mother of the child (*i.e.*, the woman from whom the gamete (egg) came)
- c) Other: please explain

35. On what grounds may legal *paternity* be challenged before the authorities in your State?

- a) Only on the basis that the "father" is not, in fact, the genetic father of the child (*i.e.*, the man from whom the gamete (sperm) came)
- b) Other: please explain

36. What are the legal consequences of a successful challenge concerning legal parentage?

- a) The decision of the State authorities concerning legal parentage is binding *erga omnes* (*i.e.*, on all persons, for all purposes)
- b) The decision of the State authorities will only be binding for limited, specific purposes: please explain
- c) It depends upon the context in which the challenge has been made (*e.g.*, if in the context of a maintenance claim, it will be binding only as concerns the payment of maintenance): please explain
- d) Other: please explain

37. What happens to a child's birth record and / or birth certificate when legal parentage is successfully challenged?

- a) The birth record and / or certificate is revised and the old record and / or certificate will be permanently deleted
- b) The birth record and / or certificate is amended but the original record and / or certificate is retained
- c) Other: please explain

F. The acquisition of nationality by children

38. How may a child acquire the nationality of your State?

Please tick all which apply:

- a) By birth within the territory of the State
- b) By "descent", where one or both of his / her *legal* parents is / are a national of the State: please explain which law, in this context, will apply to the question of who is / are the child's *legal* parents for the purposes of determining nationality:
Status of Children Act 1969
- c) By "descent", where one or both of his / her *genetic* parents is / are a national of the State: please explain how the genetic link must be evidenced:
- d) If the child would otherwise be "stateless" (*i.e.*, without the nationality of any other State):¹⁶ please specify
By birth: every person born in New Zealand on or after 1 January 1978 is a New Zealand citizen by birth if the person would otherwise be stateless (section 6(3)(a) of the Citizenship Act 1977); by descent. Every person born outside New Zealand on or after 1 January 1978 is a New Zealand citizen by descent if, at the time of the person's birth, his or her mother or father was a New Zealand citizen by descent and the person would otherwise be stateless (section 7(1)(b) of the Citizenship Act 1977).
- e) Other: please specify
Grant of citizenship; adoption in a New Zealand court if at least one adoptive parent is a citizen or permanent resident (person adopted becomes a citizen otherwise than by descent); adoption in a court outside New Zealand if at least one adoptive parent is a citizen otherwise than by descent (person adopted becomes a citizen by descent).

NOTE - Option 'a' only applies if at least one parent is a citizen or permanent resident

G. Legal developments

39. Please state whether the law in your State concerning the matters covered in **Part I** above (*i.e.*, birth registration, establishment and contestation of legal parentage, ART, surrogacy and nationality concerning children) has changed in the past five years, or whether any initiatives are underway (*e.g.*, in government, before parliament or before the courts) to change the law in future:

The Marriage (Definition of Marriage) Amendment Act 2013 clarifies that a marriage is between two people regardless of their sex, sexual orientation, or gender identity.

¹⁶ As to which, see note 4 above, citing Art. 7 of the UNCRC.

This has the effect of allowing same-sex married couples to also jointly adopt children.

Section 4 - Marriage (Definition of Marriage) Amendment Act 2013:
http://www.legislation.govt.nz/act/public/2013/0020/latest/DLM4505009.html?search=ad_act%40bill_same+sex__2013__25_ac%40bc%40rn%40dn%40apub%40aloc%40apri%40apro%40aimp%40bgov%40bloc%40bpri%40bmem%40rpub%40rimp_ac%40bc%40ainf%40anif%40bcur%40rinf%40rnif_h_yw_se&p=1&sr=1.

In 2011 the Advisory Committee on Assisted Reproductive Technology received a complaint through the Human Rights Commission that the surrogacy guidelines discriminate on the basis of sex and sexual orientation, because the requirement that there will be an "intending mother" excludes single men and male couples from entering a surrogacy arrangement. ACART accepted that there was unjustified discrimination and have been developing amended guidelines which will be issued following completion of consultation with the Minister of Health.

40. Please provide any other information you consider relevant concerning cases (reported, or otherwise) or other developments which have occurred in your State in relation to the Questions appearing in **Part I** above.

Part II: Private international law ("PIL") and co-operation rules concerning birth registration and the establishment, recognition and contestation of legal parentage

A. PIL and co-operation rules concerning birth registration

41. Please explain when the relevant authorities in your State will assume (international) jurisdiction to register the birth of a child:

- a) Only when the child is born on the territory of the State
- b) When at least one of the putative *legal* parents is a national of the State, regardless of the place of birth of the child
- c) When at least one of the putative *genetic* parents is a national of the State, regardless of the place of birth of the child
- d) When the child is considered a national of the State,¹⁷ regardless of the place of birth of the child
- e) Other, please specify:
Children born overseas and adopted in New Zealand

42. When registering a child's birth, which law will the relevant authorities apply to the question of who is / are the legal parent(s) of the child *by operation of law*?¹⁸

- a) The *lex fori* (*i.e.*, the internal law of your State) is always applied by the relevant authorities
- b) If the situation has foreign elements (*e.g.*, the putative parent(s) or child are foreign nationals, or the child was born overseas, etc.), foreign law may, or must, be applied to this question. Please specify the applicable law rules:
- c) Other: please specify

43. Have your State authorities ever encountered difficulties resulting from a child's birth being registered in two (or more) States (*e.g.*, the child is registered in your State as

¹⁷ As to which, see **Question 38** above.

¹⁸ Please note that the applicable law rules identified in your response to this Question may be the same as the rules you identify in **Question 45** below.

the State of birth, and in the State of the parents' nationality and the registers conflict)?

- Yes: please explain the circumstances of the case(s) and the difficulties which arose:
 No

44. Are there any bilateral or multilateral¹⁹ agreements in force between your State and any other State such that:

a. When a child's birth is registered which involves foreign elements (*e.g.*, one or more foreign national parents), this information is communicated to the authorities in the other relevant State?

- Yes: please specify
 There are no formal agreements but this may happen in practice: please explain
 No

b. When there are changes to a child's legal parentage *subsequent to* birth registration as a result of steps taken in your State (*e.g.*, due to a subsequent voluntary acknowledgement of paternity in your State, or a contestation of legal parentage, etc.), this information is communicated to the relevant authorities in the State of the child's birth (where this is not your State)?

- Yes: please specify
 There are no formal agreements but this may happen in practice: please explain :
 No

B. PIL rules concerning the establishment of legal parentage

By operation of law or agreement

45. Does your State have rules specifying which law is applicable to the establishment of legal parentage by operation of law?²⁰

- Yes: please specify
 No: the *lex fori* (*i.e.*, the internal law of the State) will always be applied where a question of legal parentage arises

46. Does your State have rules specifying which law is applicable to the establishment of legal parentage by agreement?

- Yes: please specify
 No: the *lex fori* (*i.e.*, the internal law of the State) will always be applied where a question of legal parentage arises
 Not applicable: it is not possible to establish legal parentage by agreement

By voluntary acknowledgement

47. Please explain in which circumstances your State authorities will consider they have (international) jurisdiction to accept a voluntary acknowledgement of legal parentage by a putative parent:

¹⁹ *E.g.*, the *Conventions on the international exchange of information relating to civil status* of 4 September 1958 and of 12 September 1997 or the *Convention on the recognition and updating of civil status booklet*, 5 September 1990, all adopted under the aegis of the International Commission on Civil Status (< www.ciecl.org >).

²⁰ Please note that the applicable law rules identified in your response to this Question may be the same as the rules you identified in **Question 42** above.

Please tick all which apply:

- a) When the child is (habitually) resident in your State: please specify
- b) When the child is a national of your State
- c) When the individual acknowledging the child is (habitually) resident in your State: please specify
- d) When the individual acknowledging the child is a national of your State
- e) Other: please specify

Please specify whether these criteria (*i.e.*, the (habitual) residence / nationality of the individual(s) – depending upon the boxes ticked above) have to be fulfilled:

- i. At the time of the child's birth
- ii. At the time of the acknowledgement, or
- iii. At another time: please specify

48. Which law will be applied to determine: a) the formal validity of the acknowledgement; and b) the substantive validity of the acknowledgement, *i.e.*, whether it validly establishes legal parentage?

Please tick all which apply:

- a) For the formal validity of the acknowledgement:
 - i. The *lex fori* (*i.e.*, the internal law of your State)
 - ii. The law of the State of the child's nationality
 - iii. The law of the State of the (habitual) residence of the child: please specify
 - iv. The law of the State of the putative parent's nationality
 - v. The law of the State of the putative parent's (habitual) residence: please specify
 - vi. Other: please specify
- b) For the substantive validity of the acknowledgement:
 - i. The *lex fori* (*i.e.*, the internal law of your State)
 - ii. The law of the State of the child's nationality
 - iii. The law of the State of the (habitual) residence of the child: please specify
 - iv. The law of the State of the putative parent's nationality
 - v. The law of the State of the putative parent's (habitual) residence: please specify
 - vi. Other: please specify

Please state whether, in relation to a) and / or b), one or more of these laws will be applied (possibly in a "cascade"), with a view to favouring the establishment of legal parentage:

In the context of determining eligibility for NZ citizenship, the *lex fori* is the only option which applies (assuming the necessary documentation is provided).

Please specify, in relation to a) and b), whether these criteria (*i.e.*, the (habitual) residence / nationality of the individual(s) – depending upon the boxes ticked above) have to be fulfilled: (1) at the time of the child's birth; (2) at the time of the acknowledgement; or (3) at another time (in which case, please specify):

- a)
- b)

C. PIL rules concerning the recognition of legal parentage established abroad

Birth certificates

49. Please explain when, if ever, a birth certificate drawn up in another State will be recognised in your State *as validly establishing the legal parentage of those persons recorded within it (i.e., the recognition of the content of the certificate)*.²¹

Please explain in your answer:

- a) which authorities are responsible for determining whether the foreign birth certificate will be recognised;
- b) the procedure which must be undertaken for recognition;
- c) any conditions for recognition (*e.g.*, the birth certificate must be authenticated by way of legalisation or apostille²²); and
- d) any grounds of *non*-recognition.

The Department of Internal Affairs is responsible for determining if the foreign birth certificate will be recognised for citizenship purposes.

A birth certificate drawn up in another state will be recognised as validly establishing the legal parentage of the persons recorded within it unless there is evidence to the contrary.

Damaged documents and photocopies are not accepted; assessment is based on citizenship policy and familiarity with foreign documents; all information provided with application is assessed to determine the validity of the document; accepted as evidence that it is a genuine document unless the contrary is proved.

If public policy ("*ordre public*") is a ground for the non-recognition of a foreign birth certificate, please explain, with reference to case law where applicable, the interpretation of this concept in your State in this context:

Voluntary acknowledgements

50. Please explain when, if ever, a voluntary acknowledgement undertaken in another State will be recognised in your State *as validly establishing the legal parentage of the author of the acknowledgement (i.e., the recognition of the content of the acknowledgement)*.²³

Please explain in your answer:

- a) which authorities are responsible for determining whether the foreign acknowledgement will be recognised;
- b) the procedure which must be undertaken for recognition;
- c) any conditions for recognition; and
- d) any grounds of *non*-recognition.

A voluntary acknowledgement undertaken in another State would not be recognised as validly establishing the legal parentage of the author of the acknowledgement for citizenship purposes or for birth registration.

If public policy ("*ordre public*") is a ground for the non-recognition of a foreign acknowledgment of parentage, please explain, with reference to case law where applicable, the interpretation of this concept in your State in this context:

²¹ It is understood that, from time to time, this issue may arise in the course of other proceedings (*e.g.*, proceedings concerning succession or maintenance).

²² See, in this regard, the *Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents*, available on the Hague Conference website at < www.hcch.net > under "Apostille Section".

²³ It is understood that, from time to time, this issue may arise in the course of other proceedings (*e.g.*, proceedings concerning succession or maintenance).

Decisions of judicial authorities

51. Please explain when a decision of the relevant judicial authority of another State establishing a child's legal parentage (*i.e.*, a court judgment or order) will be recognised in your State as validly establishing legal parentage.²⁴

Please explain in your answer:

- a) which authorities are responsible for determining whether the foreign decision will be recognised;
- b) the procedure which must be undertaken for recognition;
- c) any conditions for recognition; and
- d) any grounds of *non*-recognition.

It depends on the issue for which recognition was applied for. In regards to a registration for citizenship, an adoption order from another state will be accepted for the purpose of registering citizenship by descent if the adoption meets the criteria of the Citizenship Act 1977 either -

by being a recognised overseas adoption. Under this category the person adopted must have been under 14 years old (unless the adoption took place before 18 November 1992) and:

- the adoption must be legally valid in the country in which it was made; and
- the adoptive parents must have greater day-to-day care rights than the birth parents; and
- the adoptive parents must have an equal or greater right to the inheritable property of the person than the birth parents.

or by being a Hague Convention adoption.

Authorities responsible for determining whether the foreign decision will be recognised:

If the Department of Internal Affairs is unable to determine if a non-Hague adoption meets the requirements of the Citizenship Act 1977, the applicant may seek a High Court Declaratory Judgement.

The procedure which must be undertaken for recognition:

An application to register citizenship by descent includes an application form, fee and supporting documents.

Conditions for recognition:

At least one of the adoptive parents must be a citizen otherwise than by descent at the time of adoption.

Grounds of non-recognition:

Neither of the adoptive parents is a citizen otherwise than by descent at the time of adoption.

Judgements of maternity and paternity (e.g. those issued by US courts) are not recognised by the Department of Internal Affairs as establishing legal parentage. Because they are issued before the birth of the child, they do not transfer legal parentage from the birth parent to the intending parent in the same way as an adoption order does, because the judgement allows the intending parents' names to be recorded on the birth certificate and not the birth mother's name.

If public policy ("*ordre public*") is a ground for the non-recognition of a foreign decision, please explain, with reference to case law where applicable, the interpretation of this concept in your State in this context:

²⁴ *Ibid.*

52. Please specify the *effects* of the recognition of the legal parentage established abroad (see **Questions 49** to **51** above) and which law(s) govern(s) these effects:

The effect of the recognition of legal parentage abroad is that the child may be able to prove they are a citizen by descent through a New Zealand-citizen parent (Citizenship Act 1977).

D. PIL rules concerning the contestation of legal parentage

53. Please explain when the relevant State authorities (which you identified in **Question 31** above) have (international) jurisdiction to determine a dispute concerning a child's legal parentage:

- a) When the child whose parentage is disputed is (habitually) resident in your State: please specify
- b) When the child whose parentage is disputed is a national of your State
- c) When a putative parent disputing legal parentage is (habitually) resident in your State: please specify
- d) When a putative parent disputing legal parentage is a national of your State
- e) Other: please specify

A dispute over legal parentage is most likely to arise in relation to paternity. In New Zealand, legal maternity is governed by operation of law and is the woman giving birth to the child.

Section 10 of the Status of Children Act 1969 allows an 'eligible person' to apply to the High Court for a declaration of paternity. An 'eligible person' is a woman alleging that a person is the father of her child, the person alleging there is a relationship of father and child between themselves and another person, or a person who wishes to have it determined whether a relationship of father and child exists between two named persons and has a proper interest in the result.

Section 10 does not mention the residence, domicile or nationality of the person seeking the declaration. In the case "Re P [2000] NZFLR 181" the New Zealand High Court held that section 10 gave it ample jurisdiction to consider an application from a person resident outside New Zealand (in Samoa), that a deceased NZ citizen was her father. The Court considered that the concepts of residence, domicile and nationality are irrelevant as far as the existence of jurisdiction is concerned.

The court then considered whether it was appropriate for it to exercise that jurisdiction - it stated that the court is "very careful to limit its exercise [of jurisdiction] to matters which are properly justiciable by the court in terms of its subject matter and location" (at 186). In the circumstances of the case, the court considered that there was a sufficient nexus with New Zealand to exercise jurisdiction (the applicant needed the declaration of paternity in order to apply for New Zealand citizenship).

If a dispute arises between parents, evidence is required to amend the birth record i.e. paternity/non paternity orders, DNA testing.

Please specify whether these criteria (*i.e.*, the (habitual) residence / nationality of the individual(s) – depending upon the boxes ticked above) have to be fulfilled:

- i. At the time of the child's birth
- ii At the time the relevant State authorities are seized with the dispute, or
- iii. At another time: please specify

54. In the context of a contestation of legal parentage, which law will the authorities apply to the question of who is / are the legal parent(s) of a child?

Please tick all which apply:

- a) The *lex fori* (*i.e.*, the internal law of your State)
- b) The law of the State of the child's nationality
- c) The law of the State of the (habitual) residence of the child:
please specify
- d) The law of the State of the putative parent's nationality
- e) The law of the State of the putative parent's (habitual) residence:
please specify
- f) Other: please specify

Please state whether one or more of these laws will be applied (possibly in a "cascade"), with a view to favouring the establishment of legal parentage:

It is not clear which law will be applied. In New Zealand, choice of law is governed by common law principles. Broadly speaking, family relationships are matters of 'status' that are governed by the law of a person's domicile. However, in the High Court case 'Re P', the court considered there was a sufficient nexus with New Zealand and applied New Zealand law to make a paternity order in relation to a foreign applicant and the putative deceased New Zealand father.

E. "Cross-border reproductive care"²⁵ and the consequences for legal parentage

55. If persons resident in your State access ART services in another State, are there any specific PIL rules concerning the establishment of the legal parentage of the child born as a result (*e.g.*, the law of the State in which the ART service was obtained will apply to the question of the child's legal parentage)?

- Yes: please explain
- No
- Other: please explain

Section 16 of the Status of Children Act 1969 deals generally with allocating legal parenthood for children born of a pregnancy resulting from an AHR procedure. These rules apply "whether or not the pregnancy resulted from a procedure in New Zealand" and "whether or not the child was born in New Zealand".

56. Are you aware of any cases, other than international surrogacy cases (see **Part III** below), where difficulties concerning the establishment or recognition of a child's legal parentage have arisen as a result of individuals resident in your State accessing ART services in another country, or individuals resident abroad accessing ART services in your State?

- Yes: please provide details
- No

F. Legal developments and practical challenges

²⁵ In this paper, "cross-border reproductive care" is taken to mean when person(s) who wish to access ART services cross a border to do so, for whatever reason (often it is linked with the restrictive rules in their "home" jurisdiction, lower costs or better success rates abroad).

57. Please state whether the law in your State concerning the matters covered in **Part II** above (*i.e.*, the PIL and co-operation rules concerning birth registration and the establishment, recognition and contestation of legal parentage) has changed in the past five years, or whether any initiatives are underway (*e.g.*, in government, before Parliament or before the courts) to change the law in future:

58. Other than cases involving international surrogacy arrangements (as to which see **Part III** below), are there any other cases of which you are aware where difficulties have arisen in your State in relation to establishing, contesting, or recognising a child's legal parentage as a result of the cross-border movement of the child and / or his / her putative parents?

(Some possible examples can be found at Part IV (b) of Prel. Doc. No 11 of March 2011.)

Please provide as much detail as possible concerning the situation which arose and the difficulties encountered:

There are no difficulties that we are aware of.

Part III: The particular challenges concerning International Surrogacy Arrangements²⁶ ("ISAs")

This Part asks for information regarding the experience of State authorities with ISAs. It is divided into two sections:²⁷

- **Section A** asks a number of questions concerning "**Incoming cases**" of ISA: *i.e.*, those cases in which your State was the State of residence of the intending parents, and the State to which it was sought to bring child(ren), born to a surrogate abroad, to live.
- **Section B** continues with questions concerning "**Outgoing cases**" of ISA: *i.e.*, those cases where your State was the State in which the surrogate mother gave birth and from which the child(ren) needed to leave to travel to the State of residence of the intending parents in order to live with them in that State.

A. Incoming cases²⁸

This Section is inapplicable – there have been no "Incoming cases" of ISA in this State. Go to Section B.

Basic empirical data

²⁶ See the **Glossary** for the definition of the terms used in this paper.

²⁷ Please note: it is understood that, in relation to both "Incoming" and "Outgoing" cases, there may be more than two States involved in a particular case: *e.g.*, the surrogate may be resident in a different State to the State in which she travelled (or, in some cases, was trafficked) to give birth; in other cases, a gamete donor may be resident in a third State etc. Please explain any such elements in your responses to the questions in this part.

²⁸ *I.e.*, those cases where your State was the State of residence of the intending parent(s), and the State to which it was sought to bring the child(ren), born to a surrogate abroad, to live.

59. Do you have any information concerning:

a) The number of **Incoming cases** of ISA which have required the assistance of your State authorities in recent years?

Yes – please provide any figures available:

Pre-2009

2009 4

2010 7

2011 6

2012 13

2013 3 children due in 2013 (so far)

No information is available

b) How many children have been born to surrogate mothers in another State as a result of ISAs involving intending parents resident in your State?

Yes – please provide any figures available:

Pre-2009

2009 4

2010 7

2011 6

2012 13

2013 3 children due in 2013 (so far)

No information is available

If you have provided any figures above, please comment upon whether you consider that these figures reflect the true number of Incoming cases of ISA involving your State²⁹ and, further, please provide a general comment concerning the prevalence of Incoming cases of ISAs and whether such cases have increased in the past five years: There appears to be a steady and increasing number of incoming cases of ISA involving New Zealand. There may be ISA cases in addition to the figures above that we are not aware of, but we estimate that this number would be low.

If you have not provided figures above, are you able to provide any comment concerning the prevalence of Incoming cases of ISAs involving your State and / or whether this has increased in the past five years:

60. Please list all the States in which intending parents resident in your State have engaged a surrogate mother (*i.e.*, entered into an ISA), insofar as you are aware:

Thailand, United States, India, Australia. A New Zealander residing in the United Arab Emirates has also commissioned a surrogacy there.

The procedure for Incoming cases of ISA

61. Please explain the procedure, including any immigration and legal processes, which intending parents resident in your State need to undertake (before leaving your State, before returning to your State or upon return to your State, as applicable) in order to:

²⁹ Since it is recognised that there may be many cases which do not come to the attention of the State authorities.

- a) Enter your State with a child born abroad as a result of an ISA:
Intending parents must apply for a visitor visa for the child to enter New Zealand. This is an exception to immigration policy and requires the Minister of Immigration to consider and grant or decline the visa. To support the visa application intending parents must provide DNA evidence of their genetic relationship with the child (if there is one), evidence of the ISA agreement, and evidence that intending parents have been assessed and approved by the statutory agency as fit and proper for the purpose of adoption. The assessment of intending parents is undertaken prior to them travelling overseas for the birth of the child. In cases where children are born stateless, intending parents need to obtain a Certificate of Identity from the New Zealand government to allow the child to travel to New Zealand.
- b) Reside permanently in your State with the child:
Intending parents need to be residents or citizens of New Zealand to permanently reside in New Zealand. If the intending parents are granted an adoption order in respect of the child, the child will gain New Zealand citizenship.
- c) Have their legal parentage recognised (or established) under the law of your State (*if* this is possible):
Under New Zealand law, the surrogate mother (and her partner if she has one) are the legal parents of the child. Intending parents therefore need to apply to the New Zealand Family Court to adopt the child, in order to establish legal parentage. This requires the intending parents to be assessed as fit and proper for the purposes of adoption. Consent for an adoption must be given by the surrogate and her partner (if she has one). It could be possible for intending parents to apply for guardianship of the child, rather than adoption, but this has not yet occurred. Guardianship will not enable the child to access publicly funded New Zealand health and education services.

Please include an estimate of the time it may take to complete each stage of this process:

- a) Approximately 2-3 months after an application is received.
b) This is dependent on an adoption order being granted.
c) Approximately 6 months for an interim adoption order and 12 months for a final adoption order.

If the answer to this question varies depending upon the factors set out below, please provide a brief explanation, including the impact the particular factor has on the procedure which must be undertaken and any timeframes.

Please tick all which apply:

- i. The country in which the child was born: please explain

Children who are born in, and hold passports issued by, countries which hold visa waiver status with New Zealand (e.g. USA) could attempt to use this visa waiver facility to enter New Zealand without applying for a visa before travelling.

As it is the intention for the child to remain in New Zealand indefinitely they are not eligible for visa waived travel and face the risk of being refused entry to the country.

Commissioning parents should work with Immigration New Zealand to seek the grant of a visitor's visa for the child for the express purpose of allowing them to enter New Zealand and undergo the required local adoption process.

We do not know how many children who were born as a result of an international surrogacy agreement may have entered New Zealand using the visa waiver facility either to bypass the correct process or due to the commissioning parents' lack of knowledge of the correct process.

- ii. The particular document(s) produced by the intending parents to establish their legal parentage (*e.g.*, a birth certificate, voluntary acknowledgement, court decision, etc.): please explain
If the documents required for any of the steps above are insufficient or fraudulent this will cause delays in the process.
- iii. Whether the child(ren) is / are genetically related to one or both of the intending parents: please explain
This is a factor considered by the Minister of Immigration when considering a visa application for the child(ren). Cases have occurred where the child is not genetically related to the parent(s), but so far the circumstances of these cases mean it has not been a barrier to the child being granted entry to New Zealand or the intending parents being granted an adoption order.
- iv. The nationality of the intending parents: please explain
- v. Any other factor: please explain

62. Have your State authorities engaged in cross-border administrative or judicial co-operation with the authorities in any other State in order to resolve an ISA case?

Yes – please specify:

- a) Which authorities in each State were involved:
'Child Youth and Family' at the Ministry of Social Development in New Zealand and the Child Adoption Center at the Thai Department of Social Development and Welfare (DSDW). In one case, which is not yet resolved, we have requested the services of Children and Families Across Borders to do an assessment of intending parents who are New Zealand citizens living in the UK.
- b) The nature of the co-operation:
In this case a mistake was made during the surrogacy medical procedures and the DNA tests showed that the child born through surrogacy was not genetically related to the intending parents, which was not the intention. The intending parents still wished to parent the child and this became an intercountry adoption case. We worked with DSDW to support the intending parents to be able to adopt the child.
- c) Whether the co-operation resulted from legislation, guidelines or practice:
Practice
- d) The result:
DSDW agreed to the adoption, the child was able to travel to New Zealand and an adoption order was finalised administratively under the Intercountry Adoption Convention.

No

63. In your experience, which documents are generally produced to your State authorities to substantiate the claim of the intending parents to an ISA to legal parentage?

Please tick all which apply:

- a) A birth certificate from the State of birth, including the name(s) of the intending parents: please state from which countries these birth certificates originate and any other details necessary:
We have received birth certificates from Thailand, the US and India.

- b) An amended birth certificate from the State of birth, including the name(s) of the intending parents: please state from which countries these amended certificates originate and any other details necessary:
We have received amended birth certificates from India. However, our understanding is that the surrogate mother should be on the birth certificate and that fertility clinics are arranging for the intending parents to be put on the birth certificate instead.
- c) A pre-birth court order from the State of birth: please state from which countries these orders originate and any other detail necessary:
The US (California) issues pre-birth court orders prior to the birth of the child.
- d) A post-birth court order from the State of birth (*i.e.*, transfer of parentage): please state from which countries these orders originate and any other details necessary:
The state of California in the US has issued parenting orders for intending parents from New Zealand.
- e) An adoption order from the State of birth: please state from which countries these orders originate and any other details necessary, including whether use of the 1993 Convention³⁰ was attempted by either State³¹:
- f) Other: please specify

If possible, please state (using the relevant letter) which of the above documents your authorities are presented with most frequently in these cases:
a), b), and d).

64. In general, what is the outcome of these cases in your State for the child:

Please tick all which apply and provide as much detail as possible:

- a) The child is able to travel to your State and reside there with the intending parents *and* the intending parents are recognised as the legal parents of the child.

Please explain how this is achieved:

This describes most incoming cases to New Zealand. Generally, intending parents have applied for a visitor visa for the child and the child has been able to travel to New Zealand. But at this stage the intending parents are not recognised as the legal parents of the child. In all known cases intending parents have applied to adopt the child in the New Zealand Family Court in order to establish legal parentage. No adoption applications have been declined yet.

- b) The child is able to travel to your State and reside there with the intending parents *but* one or both of the intending parents is not able to be recognised as the child's legal parents: please explain
As noted above, the intending parents are only recognised as the legal parents after an adoption is granted. Until recently, same-sex couples were not able to make a joint adoption application in New Zealand. In these cases, one of the intending parents usually applies to adopt the child, and the second parent applies for a guardianship order. From 19 August 2013, same-sex married couples have been eligible to jointly adopt children.
- c) The child is not able to travel to your State and has to remain in the State of his / her birth: please explain why and what has happened to the children in such cases

³⁰ Full title: the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (hereinafter, "1993 Convention"). For further information, please see < www.hcch.net >, under "Intercountry Adoption Section".

³¹ See the Conclusions and Recommendations of the Special Commission meeting on the practical operation of the 1993 Convention (17-25 June 2010), which concluded that use of the 1993 Convention in cases of international surrogacy arrangements was "inappropriate", paras 25-26.

- d) Other: please explain

If possible, please state which of the four outcomes above occurs most frequently in your State:

- a) and b)

The challenges encountered

65. In general, which of your State authorities are involved in assisting those who encounter difficulties as a result of Incoming cases of ISA?

Please tick all which apply and provide information concerning their particular role:

- a) The embassies / consulates in the State of the child's birth
 b) The immigration authorities
 c) The judicial authorities (*i.e.*, the courts): please specify which
 The New Zealand Family Court has made decisions to grant adoption orders with respect to international surrogacy cases.
 d) The Ministry of Justice (or equivalent)
 e) The Ministry of Foreign Affairs (or equivalent)
 f) The Ministry of Health (or equivalent)
 g) The Ministry of Social Affairs (or equivalent)
 h) Other: please explain
 The Department of Internal Affairs (registration of citizenship and issue of travel documents).

66. Please explain any legal problems your State has encountered in relation to Incoming cases of ISA.

Please tick all boxes which apply and provide explanations, including the other country(ies) involved in the ISA. Where reported cases are referred to please provide the full text of the judgment, including a translation into English or French where possible.

Problems relating to:

- a) The child being able to leave his / her State of birth:
 b) The child being able to enter your State:
 c) The child being able to reside in your State:
 d) The child's nationality:
 e) The child's legal parentage:
 In many cases when the child is born, there is a conflict of laws as to who the legal parents are. This leaves the child in a very vulnerable position.
 f) The behaviour of any party(ies) which is criminal according to international legal standards or according to the domestic rules of the countries involved (*e.g.*, trafficking, sale of children, exploitation of women, etc.):
 One case involved a New Zealander (living abroad) who commissioned a surrogacy in Thailand, and discovered that the organisation he used was charged for trafficking women from South East Asia to be surrogate mothers. The organisation was called Baby 101 and this was widely reported in the media.
 g) The treatment of the surrogate mother in any State (*e.g.*, whether her consent was free and informed, concerning the financial payments made to her, the medical care provided, etc.): please specify
 We are not aware of any specific problems, but we are not confident that there are not any issues in this area.

- h) The breakdown of the ISA: *e.g.*, due to either of the parties renegeing on the agreement, for example, due to the child's disability or ill health, the wish of the surrogate mother to keep the child, the relationship breakdown of the intending parents or the clinic using the wrong gametes or another reason, etc.: please explain

In one case in Thailand the wrong gametes were used and the DNA tests showed that the child born through surrogacy was not genetically related to the intended parents, which was not the intention. The intending parents went to great lengths to resolve the matter. It was not possible to identify the genetic parents of the child or to locate the missing gametes provided by the intending parents.

- i) Other: please explain

Please provide any further information you consider relevant concerning the above problems:

In one case in India the intending parents were recorded on the birth certificate and the surrogacy was not declared at the time when the intending parents applied for New Zealand citizenship for the child. The child entered New Zealand and was registered as a citizen by descent. This case was only discovered when the intending parents went to India again for a second ISA. To rectify this, the intending parents were required to adopt the child in the New Zealand Family Court.

67. Using the categories set out below, please provide any available information concerning the costs intending parents resident in your State have paid for an ISA. If, in your experience, costs have varied significantly depending upon the country in which the surrogate mother resided or gave birth, please specify per country.

Please tick all which apply and provide any known figures and a description of to whom the money was paid and for what service:

- a) Medical costs:

We were advised by one intending parent that 36,000NZD was paid for medical and hospital expenses in India, and this was approximately 1/4 of what it costs in the US.

- b) Legal costs:

We have no evidence of the legal expenses incurred.

- c) Fees or other costs paid to an intermediary: *e.g.*, a surrogacy agency:

We have no evidence of the costs paid to other agencies.

- d) Expenses and / or other costs paid to the surrogate mother:

In respect of a) above, we were advised by the intending parent that 11,000NZD (in addition to medical expenses in a) above) was paid to their surrogate mother in India, and that they had calculated that this was approximately 1/4 of what it costs in the US.

- e) Other: please explain

Areas of concern

68. Do any of the following areas give your State authorities cause for concern in these cases?

In each case, where possible, please specify your particular concerns in the field provided:

- a) The uncertainty of the legal status of children born to ISAs, in particular in terms of their legal parentage:

We are very concerned that children are born into a vulnerable situation, where there are conflicting laws about who the legal parents are and the child's legal status is uncertain.

- b) The nationality of children born to ISAs:
While nationality may be determined, we are concerned about the risk of the child not being able to establish his/her ethnicity (by obtaining information on his/her nationality and/or ethnicity). Gametes may be sourced from a country other than that where the fertility clinic is located, and the quality of information-keeping will be variable. Errors can occur in managing and keeping records of gametes (this has occurred already). Knowing the country of origin may not always mean that the ethnic background of the donor is known or recorded.

- c) The right of children born to ISAs to know their (genetic and birth) origins:
The rights of the child to know his or her identity are severely compromised in ISA. It is possible (and in some cases likely) that the donor offspring may never be informed of his or her origins, and assumes he or she is the genetic or birth child of the commissioning parents. This is potentially harmful to that person's wellbeing, particularly if the information is disclosed to him or her at a later date.

While adoption and surrogacy are different, there are some similarities and the lessons from the closed adoption era should be heeded. Many adopted people have advised that no matter how emotionally satisfactory their parent/child bond has been, they feel incomplete without the personal connection with their genetic kin. Some children created through international surrogacy will want to be able to track down their genetic parent(s) in the future. However, very limited information will be available to children created through ISA and donors may choose whether or not they consent to being contacted by their donor offspring in the future. These are very complex issues and if they are not carefully addressed can adversely affect a person's wellbeing, including their mental health, and their sense of identity and belonging.

In addition, the donor offspring may not be aware of the medical history of his or her genetic parents. They may wish to find out if there is a family history of particular genetic disorders, cancers or heart disease.

- d) The surrogate mother's free and informed consent to the surrogacy arrangement:
It is not clear whether women are making informed decisions about becoming surrogate mothers and give free and informed consent. We have been particularly concerned about: 1) whether women are fully informed of the risks involved with surrogacy; 2) whether surrogate mothers give free and informed consent; and 3) how informed decision making and informed consent of illiterate woman is maintained. We were particularly concerned in one case where we received a copy of a surrogate mother's consent, where the surrogate mother had signed consent by simply making a thumb print. This raised for us serious concerns about whether all information is translated into a surrogate mother's language and whether the surrogate mother understands the implications of what she is 'signing'. Some contracts have required the surrogate mother to keep the surrogacy "secret" and prohibit the surrogate mother from keeping any records or documentation relating to the surrogacy arrangement. There are risks that the rights of women acting as surrogates may be infringed. Lack of records could put the surrogate mother at risk if she suffers from any medical problems related to the surrogacy in the future.
- e) The psychological impact of an ISA on the surrogate mother:

The research in this area is limited and we believe further quality research into this area is needed.

- f) The medical or other care provided to the surrogate mother:
It is not clear whether surrogate mothers receive adequate medical care and that there are no unnecessary risks to their health.
- g) The financial aspects of ISAs:
There are several issues here. One issue is the commodification of children, which international surrogacy may be perceived as perpetuating. Second, there are concerns that surrogate mothers are exploited for financial gain.
- h) The competency and / or conduct of the intermediaries involved (lawyers, agencies, etc.):
We are concerned about the extent to which the best interests of the child are (or are not) the primary consideration of intermediaries and agencies. In many cases, the services provided in this industry are driven by profit, rather than the best interests of the child.
- In Question 66 (h) we referred to a case where the wrong gametes were used. We found that the intermediary did not resolve the issues, including identifying the child's genetic parents or finding out what happened to the intending parents missing gametes. We are also concerned about intermediaries as identified in 66 (f) and whether clinics or individuals involved in sourcing gametes and/or surrogate mothers uphold the human rights of women and children. There is a risk that intending parents may engage intermediaries or agencies who are not focused on the best interest of the child, or who may be involved (intentionally or unintentionally) in other associated illegal activities such as the trafficking of women or children.
- i) The (mis)-information provided to intending parents or surrogate mothers:
We try to provide as much information as we can to intending parents. We do not know what information is given to surrogate mothers, but we suspect that in some cases full information may not be given.
- j) The eligibility and / or suitability of the intending parents to care for the child (e.g., in terms of age, criminal records, psycho-social suitability, etc.):
So far, all intending parents from New Zealand were found to be fit and proper for the purposes of adoption. However, we are concerned that at some point a surrogacy arrangement will be made and a child born and the authorities find the intending parents to be unfit for parenting the child. Currently, the assessment of intending parents only occurs after a viable pregnancy is confirmed:
- Intending parents contact Child Youth and Family about their case at varying stages of the process (some wait until the child is about to be born - which is not ideal as it means there is very limited time to do an assessment).
 - Child Youth and Family does not assess applicants when they are still in the process of considering surrogacy, but once there is a pregnancy.
- k) Contractual matters: e.g., issues surrounding the enforceability of the surrogacy agreement or the capacity of any of the parties to enter into the agreement:
We have not experienced this.
- l) Other:
It will be important to obtain the views of indigenous communities when considering ISA issues.

Consideration also needs to be given to any potential implications of ISA on future generations, such as the children of people created through ISA. These people may have trouble accessing information about their genetic background.

Please state (using the letters above) which of the concerns you have identified above are the most troubling:
c), d), and h)

Legal developments

69. Does your State have any legislation, rules or guidance which has been specifically enacted or drawn up for intending parents resident in your State engaging in ISAs?

Yes: please explain

An information sheet for intending parents:

'International Surrogacy Information Sheet' -
<http://www.cyf.govt.nz/documents/adoption/is-information-sheet-june2011.pdf>

No legislation or rules have been drawn up.

No

If your State is contemplating any such legislation, rules or guidance in future, please provide further information:

70. Please provide any other information you consider relevant concerning your State's experience of Incoming cases of ISA:
We have developed non-binding guidelines for Ministers to use as a guide when considering ISA cases.

B. Outgoing cases³²

This Section is inapplicable – there have been no “Outgoing cases” of ISA in this State. Go to Part IV.

Basic empirical data

71. Do you have any information concerning:

a) The number of **Outgoing cases** of ISA which have required the assistance of your State authorities in recent years?

Yes – please provide any figures available:

Pre-2009 One case

2009 One case

2010

2011

2012

2013 One case, child yet to be born in 2013 (so far)

No information is available

b) How many children have been born to surrogate mothers in your State as a result of ISAs involving intending parents resident in another State?

³² *I.e.*, those cases where your State is the State in which the surrogate mother gives birth and from which the child has to leave to travel to the place of residence of his / her intending parents.

- Yes – please provide any figures available:
 Pre-2009 One case
 2009 One case
 2010
 2011
 2012
 2013 One case, child yet to be born in 2013 (so far)
- No information is available

If you have provided any figures above, please comment upon whether you consider that these figures reflect the true number of Outgoing cases of ISA involving your State³³ and, further, please provide a general comment concerning the prevalence of Outgoing cases of ISAs and whether such cases have increased in the past five years: These limited numbers of known outgoing surrogacies have not increased over time. Due to particular immigration arrangements between the Australian and New Zealand governments, movement between the two countries and access to services for children, there may be more surrogate arrangements that are privately arranged and therefore not known to authorities.

If you have not provided figures above, are you able to provide any comment concerning the prevalence of Outgoing Cases of ISAs involving your State and / or whether this has increased in the past five years?

72. Please list any States in which intending parents, engaging a surrogate mother in your State by way of ISA, have been resident:

Australia and Switzerland.

The procedure for Outgoing cases of ISA

73. In general, which of your State authorities are involved in assisting those who undertake an ISA with a surrogate mother in your State?

Please tick all which apply and provide information concerning their particular role:

- a) The immigration authorities: please specify
 b) The judicial authorities (*i.e.*, the courts): please specify which
 The New Zealand Family Court
 c) The Ministry of Justice (or equivalent)
 d) The Ministry of Foreign Affairs (or equivalent)
 e) The Ministry of Health (or equivalent)
 f) The Ministry of Social Affairs (or equivalent)
 g) Other: please explain

74. Do foreign-resident intending parents require a visa or any other immigration document(s), or do they have to meet any other conditions, to *enter* your State to be able to undertake the necessary meetings and medical procedures to enter into an ISA in your State?

Please tick all which apply:

- Yes, they have to meet the following conditions – please specify:
 Visitors who can show they have been accepted for and are able to pay for medical treatment or consultation in New Zealand may be granted a visitor visa authorising a maximum stay of six months.

³³ Since it is recognised that there may be many cases which do not come to the attention of the State authorities.

- Yes, they have to obtain a visa or other immigration document(s) – please specify what type of document is required, the conditions for obtaining it and the procedure:

Visitors coming to New Zealand for medical treatment or consultation must apply for a visitor visa before travelling to New Zealand, whether or not they are from a visa-waiver country.

Immigration officers must be satisfied that an applicant coming to New Zealand for medical treatment or consultation has provided:

- a. a completed Details of Intended Medical Treatment (INZ 1009) form; and
- b. written evidence of acceptance for treatment (such as a letter from the appropriate medical authorities to the health authority in the applicant's home country); and
- c. details of the expected costs of medical treatment; and
- d. evidence that the applicant will be able to pay for all medical costs, unless the treatment is to be funded under special arrangements described at V3.40(c) above.
- e. evidence, where necessary, that the applicant requires an escort because of the nature of the condition (see V3.40.15 (b) (iii)).

If foreign-resident intending parents are required to enter New Zealand for reasons related to entering into an ISA other than for medical treatment / consultation they may be entitled to enter New Zealand visa free (without making a prior application for a visa) if they are travelling on a passport issued by a country which holds visa free status with New Zealand, those countries being:

Andorra
 Argentina
 Austria
 Bahrain
 Belgium
 Brazil
 Brunei
 Bulgaria
 Canada
 Chile
 Cyprus
 Czech Republic
 Denmark
 Estonia****
 Finland
 France
 Germany
 Greece *****
 Hong Kong ***
 Hungary
 Iceland
 Ireland
 Israel
 Italy
 Japan
 Korea (South)
 Kuwait
 Latvia****
 Liechtenstein
 Lithuania*****
 Luxembourg
 Malaysia

Malta
 Mexico
 Monaco
 Netherlands
 Norway
 Oman
 Poland
 Portugal*
 Romania
 Qatar
 San Marino
 Saudi Arabia
 Singapore
 Slovak Republic
 Slovenia
 South Africa
 Spain
 Sweden
 Switzerland
 Taiwan*****
 United Arab Emirates
 United States of America**
 Uruguay
 Vatican City

* Portuguese passport holders must also have the right to live permanently in Portugal.

** Including nationals of the USA.

*** Residents of Hong Kong travelling on Hong Kong Special Administrative Region or British National (Overseas) passports.

**** Visa waiver does not apply to people travelling on alien's (non-citizen's) passports issued by these countries.

***** Greek passport holders whose passports were issued on and after 1 January 2006. (Greek passports issued before 1 January 2006 are not acceptable for travel after 1 January 2007, see A2.10.50.)

***** Permanent residents of Taiwan travelling on Taiwan passports. A personal identity number printed within the visible section of the biographical page of the Taiwan passport demonstrates that the holder is a permanent resident of Taiwan (see A2.10.40).

If these foreign-resident intending parents are travelling on passports issued by a country other than those listed above they would need to make an application for, and be granted, a visitor visa prior to travelling to New Zealand.

- No
 It depends upon the State of residence or nationality of the intending parents: please specify

75. Is the law of the State of the habitual residence of the intending parents taken into account in any way when considering whether intending parents are permitted to undertake an ISA in your State (e.g., where this law forbids surrogacy arrangements).³⁴

³⁴ E.g., see clause 34(19) of the *Indian Assisted Reproductive Technologies (Regulation) Bill 2010* still pending, explained in Prel. Doc. No 10 of March 2012 (note 1) at para. 45. In addition, the recent Indian visa requirements now impose on foreign nationals visiting India to undertake a surrogacy arrangement, a condition to similar effect: i.e., that the intending parents must have a letter from the embassy of their State of residence indicating that the State recognises surrogacy and that the child born will be permitted to enter this State. See also the Ukrainian Draft Law No 0989 (former No 8282) on the restrictions pertaining to the use of assisted reproductive technology (rejected by the Parliament of Ukraine on 21 March 2013). This bill also

- Yes – please explain how this law is taken into account:
ECART has not yet received an application for a surrogacy arrangement where the intending parents are nationals of another country (not New Zealand) and wish to carry out the arrangement in New Zealand (e.g. using a New Zealand surrogate through a New Zealand clinic).

Should ECART receive such an application, the committee would be required by the guidelines to take into account whether the parties' residency safeguards the wellbeing of all parties and especially any resulting child.

ECART does not have expertise on ART laws in other countries and decisions are more likely to be based on ethical grounds rather than the laws in the intending parents' country of habitual residence.

- No
 It depends upon the State of residence or nationality of the intending parents: please explain

76. How do foreign-resident intending parents, who are party to an ISA, obtain legal parentage for a child born to a surrogacy arrangement in your State?

*Your response to this question will likely depend upon your answer to **Questions 26 to 27** above.*

Please tick all which apply:

- a) They will be the legal parents by operation of law and therefore their names will be placed immediately on the child's birth certificate: please explain
- b) They can obtain an amended birth certificate: please explain
- c) They can obtain a *pre*-birth court order confirming their legal parentage: please explain any conditions for obtaining such an order
- d) They can obtain a *post*-birth court order (*i.e.*, a transfer of parentage): please explain any conditions for obtaining such an order
This requires an adoption order.
- e) They can adopt the child: please explain, including whether use of the 1993 Convention has been attempted in this regard³⁵
When applicants habitually live offshore, Child Youth and Family will endeavour to obtain an assessment of their suitability from the authorities in their country of residence in order to fully inform the New Zealand court (when considering an application for an adoption order). The court wants to understand about the fit and properness of the applicants before it makes an order. The principles of the convention in respect of exchange of information in order to be able to support an adoption proceeding are followed. The convention is not followed by seeking involvement of the overseas central authority or its view on an adoption being undertaken in New Zealand. We do not create certificates under articles 15,17 and 23 of the convention.
- f) Other: please specify

Please explain the procedure for any of the options ticked above and any specific requirements which apply to *foreign*-resident intending parents:

It is difficult for Child Youth and Family to assess applicants who habitually live offshore in order to fully inform the New Zealand court (when considering an application for an adoption order).

envisaged, in particular, restrictions on the use of surrogacy arrangements for nationals of those States where surrogacy is prohibited by law.

³⁵ See note 31 above concerning the 2010 Special Commission meeting on the practical operation of the 1993 Convention which concluded that use of the 1993 Convention in cases of international surrogacy arrangements was "inappropriate".

Please further specify whether the surrogate mother's consent, and her husband or partner's consent where applicable, is required for any of these procedures and the consequences if this consent is not forthcoming at the relevant time:

The surrogate mother's consent (and that of her husband) are required for adoption. An adoption order will not be granted if consent is not provided.

77. Please explain the procedure, including any immigration and legal processes, which foreign-resident intending parents need to undertake in order to *leave* your State with a child born to a surrogacy arrangement:

If the child is adopted by the intending parent, then procedures are no different to a natural parent and their child leaving the state.

If an adoption had not occurred in New Zealand to form a legal relationship with the child then the consent of the legal parents, the surrogate mother and her husband if she has one, would be required for the child to leave New Zealand. It is not known how the child might enter other countries but it could travel freely from New Zealand to Australia.

Please state the time it may take to complete this process:

If the answer to this question varies depending upon the factors set out below, please provide a brief explanation, including the impact the particular factor has on the procedure which must be undertaken and any timeframes.

Please tick all which apply:

- a) The country in which the intending parents live: please explain
As stated there is free movement between New Zealand and Australia for citizens of these countries.
- b) The particular document(s) produced by the intending parents to establish legal parentage (*e.g.*, a birth certificate, voluntary acknowledgement, court decision, etc.): please explain
An adoption order certifying paternal rights and a new birth certificate. If the surrogate mother is a New Zealand citizen the child will also have New Zealand citizenship. If the surrogate mother holds permanent residence immigration status the child will be entitled to that same immigration status. Obtaining an adoption order can take up to a year in New Zealand if a final order is not granted in the first instance.
- c) Whether the child(ren) is / are genetically related to one or both of the intending parents: please explain
Child Youth and Family (a government department) and its social workers must provide a report to the New Zealand Family Court in all adoption cases. For children leaving the state, Child Youth and Family include results of DNA testing in their report to the New Zealand Family Court. DNA evidence takes three to four weeks to be available.
- d) The nationality of the intending parents: please explain
- e) Any other factor: please explain

78. Have your State authorities engaged in cross-border administrative or judicial co-operation with authorities in any other State in order to resolve an ISA case?

- Yes – please specify:
- a) Which authorities in each State were involved:
Australian statutory care and protection adoption services.
- b) The nature of the co-operation:
Assessment of commissioning parents.

- c) Whether the co-operation resulted from legislation, guidelines or practice: Practice. In order to fully inform the Court information about the suitability of the commissioning parents to become adoptive parents.
- d) The result:
Exchange of information to provide to the Court information about the suitability of the commissioning parents to become adoptive parents.

No

79. In general, what is the outcome of these cases in your State for the child?

Please tick all which apply:

- a) The child is able to leave your State, travel to the State of residence of the intending parents, reside there with the intending parents *and* the intending parents are recognised as the legal parent(s) of the child.
Please explain how this is achieved:
Following an adoption in New Zealand the intending parents become the legal parents and are free to leave New Zealand with the child.
- b) The child is able to leave your State, travel to the State of residence of the intending parents, reside there with the intending parents *but* one or both of the intending parents are not able to be recognised as the child's legal parents: please explain
The New Zealand Marriage (Definition of Marriage) Amendment Act 2013 permits same-sex married couples to jointly apply to adopt. An overseas country in which same-sex marriage is not recognised may not recognise both of the couple as the legal parents of the child, born of a New Zealand surrogate mother.
- c) The child is able to leave your State but is not able to travel to the State of residence of the intending parents and has to remain in your State: please explain what has happened to the children in such cases
We have had no experience of this.
- d) The child is not able to leave your State: please explain why and what has happened to the children in such cases
- e) Other: please explain

If possible, please state which of the five outcomes above occurs most frequently in your State:

In the two cases involving Australia and New Zealand an adoption order was recognised as creating a parent child legal relationship.

The challenges encountered

80. Please explain any legal problems your State has encountered in relation to Outgoing cases of ISA.

Please tick all boxes which apply and provide explanations, including the other country(ies) involved. Where reported cases are referred to please provide the full text of the judgment, including a translation into English or French where possible.

Problems relating to:

- a) The child being able to leave your State:
- b) The child being able to enter the State in which his / her intending parents are resident:
- c) The child being able to reside in the State in which his / her intending parents are resident:
- d) The child's nationality:

- e) The child's legal parentage:
Requires an adoption in New Zealand for the intending parents to become legal parents.
- f) The behaviour of any party(ies) which is criminal according to international legal standards or according to the domestic rules of the countries involved (e.g., trafficking, sale of children, exploitation of women, etc.):
The two known cases were believed to be altruistic and not commercial in nature.
- g) The treatment of the surrogate mother in any State (e.g., whether her consent was free and informed, concerning the financial payments made to her, the medical care provided, etc.): please specify
If the surrogate mother is a New Zealand citizen her ante-natal care is free.
- h) The breakdown of the ISA: e.g., due to either of the parties renegeing on the agreement, for example, due to the child's disability or ill health, the wish of the surrogate mother to keep the child, the relationship breakdown of the intending parents or the clinic using the wrong gametes or another reason, etc.: please explain
- i) Other: please explain

Please provide any further information you consider relevant concerning these legal problems:

81. Using the categories set out below, please provide any information you have concerning the costs intending parents resident abroad have paid for an ISA in your State. If, in your experience, costs have varied significantly depending upon the country in which the intending parents resided, please specify per country.

Please tick all which apply and provide any known figures and a description of to whom the money was paid and for what service:

- a) Medical costs:
- b) Legal costs:
Usual legal fees for lodging adoption application.
- c) Fees or other costs paid to an intermediary: e.g., a surrogacy agency:
- d) Expenses and / or other costs paid to the surrogate mother:
- e) Other: please explain

Areas of concern

82. Do any of the following areas give your State authorities cause for concern in these cases?

In each case, where possible, please specify your concerns in the field provided:

- a) The uncertainty of the legal status of children born to ISAs, in particular in terms of their legal parentage:
Children are born into a vulnerable position (parents are not their legal parents) and the child's legal status is uncertain.
- b) The nationality of children born to ISAs:
- c) The right of children born to ISAs to know their (genetic and birth) origins:
- d) The surrogate mother's free and informed consent to the surrogacy arrangement:
- e) The psychological impact of an ISA on the surrogate mother:
- f) The medical or other care provided to the surrogate mother:
- g) The financial aspects of ISAs:

- h) The competency and / or conduct of the intermediaries involved (lawyers, agencies, etc.):
- i) The (mis)-information provided to intending parents or surrogate mothers:
- j) The eligibility and / or suitability of the intending parents to care for the child (e.g., in terms of age, criminal records, psycho-social suitability, etc.):
So far, all intending parents from New Zealand were found to be fit and proper for the purposes of adoption. However, we are concerned that at some point a surrogacy arrangement will be made and a child born and the authorities find the intending parents to be unfit for parenting the child. Currently the assessment of intending parents only occurs once viable pregnancy is confirmed.
- k) Contractual matters: e.g., issues surrounding the enforceability of the surrogacy agreement or the capacity of any of the parties to enter into the agreement:
Contracts are not enforceable under New Zealand law. The only way to transfer legal parental status is via adoption once the baby is born.
- l) Other:

Please state (using the letters above) which of the concerns you have identified above are the most troubling:

(a).

We are more confident that surrogate mothers in New Zealand involved in ISA are able to access the appropriate medical care and are in a position to give free and informed consent.

Where adoption and/or AHR takes place in New Zealand the child will be able to access information about their genetic heritage:

Adult Adoption Information Act 1985:

http://www.legislation.govt.nz/act/public/1985/0127/latest/DLM80513.html?search=ts_act%40bill%40regulation%40deemedreg_adult+adoption+information+_resel_25_a&p=1

Sections 49 and 50 of the Human Assisted Reproductive Technology Act 2004:

http://www.legislation.govt.nz/act/public/2004/0092/latest/DLM319241.html?search=ts_act%40bill%40regulation%40deemedreg_human+assisted+_resel_25_a&p=1

We also have concerns as per (b) and (c) in regards to outgoing cases where New Zealand surrogate mothers travel overseas for AHR and return to New Zealand to give birth (while the commissioning parents live overseas). While genetic/donor information is recorded for AHR procedures that take place in New Zealand, this may not happen if the AHR procedure takes place in another jurisdiction.

Legal developments

83. Does your State have any legislation, rules or guidance which has been specifically enacted or drawn up for intending parents or surrogate mothers engaging in ISAs in your State?

- Yes: please explain
- No

If your State is contemplating any such legislation, rules or guidance in future, please provide further information:

84. Please provide any other information you consider relevant concerning your State's experience of Outgoing cases of ISA:

Part IV: Current bilateral or multilateral instruments in the field

85. Please list any bilateral, regional or multilateral instruments which currently, or may in future, bind your State concerning:

- a) Any matters related to the establishment, recognition or contestation of the legal parentage of children;
- b) Any matters specifically related to surrogacy arrangements;

Please provide any detail you consider necessary:

Part V: Thoughts on possible future work

86. What, if any, are the **needs** you consider ought to be addressed by any possible future global work in this area?

Please specify:

The issues identified in response to question 68 need to be addressed. In particular:

- the rights of the child to know his/her identity
- child's ability to contact their genetic parents
- protecting the rights of surrogate mothers and egg donors
- establishing legal parentage.

87. Please provide your thoughts concerning the **approach** that should be taken in relation to any possible future regulation of any of the matters mentioned in this Questionnaire.

In this response, you may wish to consider and comment upon the thoughts set out in Section VIII of Preliminary Document No 11 of March 2011 and Section IV of Preliminary Document No 10 of March 2012.

*You may also wish to comment upon the **nature** of any possible future regulation: e.g., whether a binding instrument should be considered or whether approaches such as a model law, non-binding principles or guidance, etc. would meet the needs you identified in **Question 86** above.*

As the preliminary documents of March 2011 and March 2012 have noted, the possible future regulation of legal parentage and / or international surrogacy arrangements can be approached in a variety of ways. The feasibility of the various approaches will depend on member states agreeing on both the need for an international instrument and the form that such an instrument should take.

New Zealand is open to considering the various approaches suggested. We are conscious that both legal parentage and international surrogacy raise ethical and moral issues for many member states. While a binding instrument would be a good outcome, we think that options such as a model law or non-binding principles or guidance should be considered if it appears that member states are unlikely to reach consensus on a binding instrument.

88. If the Hague Conference were to develop a global instrument on the private international law issues surrounding the status of children (in particular, the cross-border recognition of legal parentage), which of the following general features *may* be desirable to include in such an instrument?

Please tick all which apply (and please note that these features are not mutually exclusive and necessarily overlap):

The child's legal status

- a) Harmonisation of the private international law rules relating to the establishment, recognition and contestation of legal parentage: please comment
- b) Recognition *by operation of law* of child(ren)'s legal parentage established in one State Party, in compliance with the instrument's rules, in all other States Parties: please comment
(a) and (b) - We are comfortable exploring both these options. There may be some advantages to addressing the broader issue of legal parentage.

Safeguards

- c) The establishment of safeguards (minimum standards) to ensure that any procedures for the establishment, recognition and contestation of legal parentage take place with respect for the fundamental rights and welfare of all parties involved, in particular the child(ren) concerned: please comment
We note that, in the context of legal parentage more generally (rather than in the specific context of international surrogacy), it is not yet clear that there are problems regarding safeguards that need addressing.

Co-operation

- d) The establishment of a system for co-ordination, communication and co-operation between States in relation to the establishment, recognition and contestation of legal parentage. Such a system may include a clear division of responsibilities between States, as well as the establishment of defined channels for communication between the relevant authorities.

Please comment, including in relation to whether you see a need for the establishment of "central authorities" within such a system:

It is not yet clear why central authorities would need to play a role in an instrument that deals with the more general issue of legal parentage. We are open to considering this if there is evidence of a clear need for central authorities.

Other

- e) Other: please specify

89. If the Hague Conference were to develop a global instrument specifically on international surrogacy arrangements,³⁶ which of the following general features *may* be desirable to include in such an instrument?

Please tick all which apply (and please note that these features are not mutually exclusive and necessarily overlap):

³⁶ See **Part III** of the Questionnaire above.

The child's legal status

- a) Harmonisation of the private international law rules relating to the establishment, recognition and contestation of legal parentage, limited to legal parentage arising following a surrogacy arrangement: please comment
- b) Recognition *by operation of law* of child(ren)'s legal parentage established in one State Party following a surrogacy arrangement, in compliance with the instrument's rules, in all other States Parties: please comment
- c) Provisions concerning the child(ren)'s nationality: please comment
(a), (b) & (c) - We are willing to explore any of these approaches with a view to identifying which is the most feasible.

Safeguards

- d) The establishment of safeguards (minimum standards) to ensure that such arrangements take place with respect for the fundamental rights and welfare of all parties involved, *i.e.*, the child(ren) to be born, the surrogate mother and intending parents: please comment, including in relation to which elements you consider there ought to be such minimum standards (*e.g.*, the surrogate mother's free and informed consent, the child's right to know his / her origins, etc.)
There must be minimum standards in relation to the surrogate mother's consent and the child's right to know his or her origins.
- e) Safeguards (minimum standards) specifically in relation to the intermediaries involved in such arrangements (*e.g.*, surrogacy agencies, lawyers, etc.). These standards may be combined with a system of licensing and supervision to ensure compliance: please comment
We are open to exploring whether there should be safeguards in relation to the intermediaries involved. We note that in many jurisdictions lawyers would already be subject to professional licensing regimes, which may need to be taken into account when considering this issue.
- f) Safeguards (minimum standards) specifically in relation to medical institutions undertaking the procedures connected with international surrogacy arrangements: please comment
We are open to exploring whether there should be safeguards in relation to the medical institutions involved. As noted above we have experienced difficulties dealing with medical institutions in another country. We note that in many jurisdictions medical institutions and professions will already be subject to professional licensing regimes and this may need to be taken into account when considering this issue.

Co-operation

- g) The establishment of a system for co-ordination, communication and co-operation between States in relation to such arrangements. This may include a clear division of responsibilities between States, for example, such that: (a) the competent authorities of the State of the habitual residence of the intending parents would be responsible for determining that the intending parents are eligible to enter into the arrangement, and that any child born as a result will be permitted to enter and reside in their State;³⁷ and (b) the competent authorities of the State in which the surrogate mother habitually resides would be responsible for determining that the surrogate mother is eligible and suitable to enter into the arrangement and that the child will be entitled to leave this State following his / her birth. The co-operation system

³⁷ Following the trend in some States in which international surrogacy arrangements are regularly entered into to take into account the legal position in the State of the habitual residence of the intending parent(s) before permitting the surrogacy arrangement to proceed: see note 34 above.

could also include the creation of defined procedures which must be complied with by the parties to such arrangements.

Please comment, including in relation to whether you see a need for the establishment of "central authorities" within such a system:

If such a system were established then it seems desirable for central authorities to provide a point of contact and decision-making in each country.

Other

- h) Provisions concerning the financial aspects of international surrogacy arrangements: please comment
i) Other: please specify

90. What priority would you give working towards a future instrument on the private international law issues concerning the status of children (in particular, the cross-border recognition of legal parentage) generally?

- a) High priority / urgent
b) Medium priority – desirable but not urgent
c) Low priority – possibly desirable but other projects should take priority
d) No priority – no further work should be done in this field
e) Other: please specify

91. What priority would you give working towards a future instrument specifically on the challenges occurring as a result of international surrogacy arrangements?

- a) High priority / urgent
b) Medium priority – desirable but not urgent
c) Low priority – possibly desirable but other projects should take priority
d) No priority – no further work should be done in this field
f) Other: please specify

92. Please provide any other comment(s) you may have concerning the possible future global regulation of matters contained within this Questionnaire:

Thank you for your time: this information will greatly assist the work of the Permanent Bureau.