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Should Surrogate Pregnancy Arrangements be Enforceable in Aotearoa New Zealand?

Abstract

Aotearoa New Zealand has no unified regulatory system governing the ethical and legal issues that arise with surrogate pregnancy arrangements. Accordingly, legal scholars and moral philosophers have recently called for revision to parentage and payment around surrogacy. Several academics have additionally suggested making surrogate pregnancy arrangements enforceable under New Zealand law. This discussion combines empirical research with key informants and experts working in the field of assisted reproduction with interview data

from surrogate mothers and ovarian egg donors about their experiences of donating reproductive materials and services. The aim of the article is to expand the conceptual toolkit of assisted human reproduction to better understand the donative acts of women who share their reproductive materials and services, and to critically examine calls to introduce a regulatory model that makes surrogacy enforceable in light of concerns about the relational complexities of these arrangements.

Keywords surrogacy, relational gifting, adoption, reproductive legislation

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Non-commercial surrogate pregnancy is at one and the same time prohibited in numerous jurisdictions around the world (Allan, 2017) and regarded as a legitimate pathway to family formation for people experiencing medical or social infertility (Berend, 2016; Imrie and Jadva, 2014; Teman, 2009). As a pathway, surrogacy may be the last option for heterosexual couples when other forms of fertility treatment have failed or a first step to creating a family for gay couples and single men.

Surrogate pregnancy encompasses two types of arrangement. In traditional surrogate pregnancy, a woman carries a foetus, as well as providing genetic material, for intended parents. These arrangements can occur without fertility clinic intervention and ethical review. In cases of gestational surrogacy, the birth mother provides the gestational services, but the gametes are provided by others (usually, but not always, the intended parents) through in-vitro fertilisation techniques. In Aotearoa New Zealand, gestational or clinic-assisted surrogacy is a regulated procedure under the Human Assisted Reproductive Technology Act 2004 (HART Act) and must be approved via a process of ethical review by the Ethics Committee on Assisted Reproductive Technology (ECART).

The body of legal and bioethical research on surrogacy in New Zealand is substantial and growing (Alawi, 2015; Anderson, Snelling and Tomlins-Jahnke, 2012; Ceballos, 2019; Powell, 2017; Walker and Van Zyl, 2017; Wilson, 2018, 2019; Van Zyl and Walker, 2015), but with very few social science studies of the lived experience of surrogate pregnancy. This article presents empirical data from two qualitative studies discussing the motivations of surrogate mothers and ovarian egg donors. The aim of the article is to expand the conceptual toolkit of assisted human reproduction (AHR) to better understand the donative acts of women who share their reproductive materials and services. A corollary aim of the discussion is to examine the call to enforce surrogate pregnancy arrangements under New Zealand law.

New Zealand legislation

New Zealand legal scholars and ethicists have recently called for amendment to

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the HART Act and supporting legislation, in relation to the enforceability of surrogate pregnancy arrangements. A key concern for these commentators is that the HART Act provisions say very little about surrogate pregnancy arrangements and leave several issues unresolved. This criticism is not new. In 1999, Anne Else referred to the legislation around AHR at the time as 'confused' and 'piecemeal', saying, 'a comprehensive new approach is urgently needed' (Coney and Else, 1999, p.56). More recently, Powell and Masselot have commented that 'New Zealand law, as it currently stands, fails to adequately address the complex issues around commercial surrogacy, and surrogacy generally' (Powell and Masselot, 2019, p.vii). The point these commentators make is that the legislation, which is a blend of the HART Act, Adoption Act 1955 and Status of Children Act 1969, creates unnecessary stress for those involved, is not purpose-built, and requires overhaul.

A key recommendation for change pertains to section 14(1) of the HART Act, which states: 'A surrogacy arrangement is not of itself illegal, but is not enforceable by or against any person.' Commentators who advocate reform want to enforce surrogacy arrangements to protect surrogates should the intended parents decide, for whatever reason, that they do

not want the baby. Conversely, enforceability of the arrangement would protect the intended parents if the surrogate decided they did not want to relinquish the baby upon birth.

A second recommendation concerns legal parentage and calls to amend the Status of Children Act so that intended parents are automatically parents upon the baby's birth. Under current law, the woman who becomes pregnant is the legal mother of the baby to whom she gives birth. Her partner, if she has one and they have consented to the donative procedure, is the other legal parent of the child. The intended parents, who may or may not have genetic links to the baby via gametes, have no legal relationship to the child until it is transferred to them through New Zealand adoption legislation.

Under section 10 of the Adoption Act, which is used to transfer parentage from the surrogate (and her partner) to the intended parents, the latter must apply for and obtain an adoption order from the Family Court. The surrogate must sign a consent statement in the form of an affidavit to relinquish the baby, and a social worker is required to provide a report for the court regarding the suitability of the intended parents in respect of the application (Casey, 2014).

AHR vocabulary

These issues have attracted a range of recommendations for reform from legal scholars, such as pre- or post-birth parenting orders, the creation of a new Surrogacy Act, and amendment to the Status of Children Act. My concern with enforcing surrogacy arrangements is that it is out of step with the local and institutional moralities that underpin the promotion of donative acts and practices in New Zealand. A central problem is the term altruism, which is used in recruitment and promotional literature around AHR.

Altruistic procurement of reproductive materials and services is legally mandated under the HART Act. Although the term altruism is not used in the act, it has been used in the Advisory Committee on Assisted Reproductive Technology (ACART) guidelines and Oranga Tamariki website information (Oranga Tamariki, 2019). The word altruism is also used by

the fertility clinic Repromed on their website. Fertility Associates, which has 18 clinics across New Zealand, does not use the term on its website, but does refer to egg donors giving ‘the ultimate gift’. The link to ‘Becoming a donor’ says: ‘Being a donor is about giving the most amazing gift to a family in need. A chance to have a baby’ (Fertility Associates, 2019). Unsurprisingly, the same phrase is not used in the link to ‘Sperm donors needed – more info’. This may be due to the gendered labour required of sperm donors, which does not conjure an image of selflessness or sacrifice in the same way as egg donation.

I have argued elsewhere that the conflation of altruism with gift is misleading when used in relation to contemporary moral economies that promote the donation of bodily cells, tissue and organs, since the term gift is deployed by stakeholders, donors and recipients alike in a variety of different ways (Shaw, 2015). Rather than relying solely on altruism, I suggest expanding the conceptual toolkit of AHR to help explain why surrogate pregnancy arrangements should not be enforceable.

To do so, I draw on two studies. The first study was designed to investigate the motives of women who donate reproductive materials and services, the kinds of relationship (if any) that resulted from their actions, and the relationship between the moral experience of donors and the vocabulary available to describe and articulate their experiences (see Shaw, 2008). This research involved fieldwork and in-depth interviews with 14 women about their experiences of egg donation and surrogate pregnancy. Of the 14 women in the study who donated ovarian eggs, three had also been involved in traditional surrogate pregnancy arrangements, and one had been a gestational surrogate.

The second study draws on qualitative research undertaken from 2017 to 2020 with key informants and experts about their views on AHR.¹ This project includes in-depth interviews with 45 New Zealand and Australian legal scholars, lawyers, ethicists, social scientists, fertility clinic specialists, counsellors, ethics committee members and representatives of stakeholder groups. The participants in this study were

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recruited by convenience sampling and snowballing. The data was analysed thematically (Braun and Clarke, 2013) and documented participants’ views on policy and legislation around AHR, compensation and payment for surrogate mothers and gamete donors, information disclosure around donor conception, donor–recipient relationships, and access to fertility treatment.

Framing donative motivations

To frame the experiences and social-psychological motivations of surrogate mothers and egg donors, I draw on four concepts that I have used in previous research (Shaw, 2015) to talk about bodily donation: unconditional gift; relational gifting; gift exchange; and body project.

The image of an unconditional gift is the concept that often comes to mind when people think of surrogate pregnancy and egg donation as an altruistic, other-oriented, selfless act. This kind of altruism refers to a gift that is given freely (voluntarily), without remuneration or external reward. It is regarded as unidirectional (one-way) and disinterested (offered without regard to the quality of the recipient). One of the requirements of the unconditional gift is that the donor surrenders or ‘relinquishes’ any idea of property rights or control over their bodily donation.

All the surrogate mothers and egg donors in study 1 regarded their acts as altruistic in some way, envisaging their donations as symbolic of human connection and empathy with people experiencing infertility. Additionally, as a New Zealand fertility counsellor in study 2 commented, attitudes about the importance of refusing payment for surrogacy persist among the group of surrogate mothers and donors she sees. As she put it:

It is perfectly reasonable if somebody is giving up their time and energy to carry a pregnancy for someone else that they be given reasonable compensation, but I also think that it in some way diminishes the altruistic nature of doing something incredibly generous and meaningful for other people. ... People who are being surrogates often say ‘oh no, I wouldn’t [take money], you know that would tarnish what I’m doing’ ... and egg donors. So, not everybody receives the expenses payment, they refuse it, they do.

Several other experts in study 2 corroborated the existence of this attitude. A New Zealand lawyer remarked that the positions people take on surrogacy and payment are variable, saying: ‘There are people who want [a compensation] model and there’s people who say they’d be insulted to be paid, as it would have discouraged them from being a surrogate.’

Relational gifting refers to dyadic relationships – of which the parent–child relationship is paradigmatic – between intimates or people who are familiar to or become known to one another. Importantly, the term ‘relational’ emphasises how people’s sense of self is constructed in their relationships with others and in terms of their social roles. In relational gifting, the donor presents their donation as a personalised gift which symbolically connects them to their recipients (Gilman, 2018).

This notion of the gift relation tends to underpin the gendered practice of donating ovarian eggs and surrogacy and is institutionally sanctioned in relation to AHR. For example, in New Zealand, fertility clinic egg donors and recipients meet for

joint counselling sessions in line with ACART guidelines and the current Fertility Services Standard; in surrogacy arrangements in which the relevant parties are strangers, ECART expects them to form a relationship over six months before making an application; and in online surrogacy support groups, the social etiquette guiding prospective surrogates and intended parents' interactions requires that they get to know one another before broaching a surrogacy arrangement. The same approach to counselling and the establishment of a relationship between a surrogate mother and intended parent(s) is taken by the Patient Review Panel and fertility clinics in Victoria, Australia.

Gift exchange is an anthropological concept that emphasises the social significance of giving, receiving, *and* reciprocating. The notion of gift exchange draws on Mauss's (1990) view that the giver's identity, essence or spirit is inserted or invested in the gift or donative act, and consequently requires reciprocation. Again, like the gift relation, this is a relational ontology. However, gift exchange goes further: sharing biological matter such as body parts and substances not only creates relationship responsibilities between donors and recipients; for some cultural groups, such as Māori, gift exchange implicates entire kin networks (Mead, 2003; Salmond, 2012). Where gift exchange relationships exist, donors do not construe bodily gifts as alienable, and may not see themselves as ever relinquishing control over the gift.

The idea that kinship is fixed by biological relatedness is a powerful motivation for people to assist one another's reproductive journeys. One of the surrogate mothers interviewed in study 1 said that she agreed to be a traditional surrogate for her sister because they valued keeping genetics and reproductive matters within the family, as did several egg donors. Likewise, Glover and Rousseau's (2007) qualitative research shows that for Māori who subscribe to traditional views, what is given in the process of third-party reproduction is not simply the generous gift of shared body tissue, but a different kind of futurity for the individual concerned and the groups to which they belong. It is not just bodily matter that gets

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transferred between donors, recipients and the larger group, but also rights and responsibilities, and, with that, the importance of information sharing about donor conception.

Another key motivation for giving reproductive gifts or services is to establish people's moral identities as pro-social. In these cases, surrogate pregnancy objectifies a person's sense of self as good, kind or civic-minded and can be conceptualised as a process of identity-construction that involves a body project. Sociologists have talked about people engaging in body projects by altering their bodies as part of make-over culture and consumption practices (Shilling, 1993), but body projects are undertaken not simply by the self, for the self; some people also deliberately transform their bodies for the benefit of others, to objectify themselves as a particular kind of subject (Shaw, 2008). For instance, in addition to displaying maternal affect and care, some of the women in study 1 wanted

to donate ova and become surrogate mothers as an assertion of individual agency and a way to exercise autonomy and independence. Aside from symbolising moral connection with the donor, they donated reproductive services and materials as projects of the self, or as events that marked new beginnings in their lives. One woman in study 1 had been left at the altar by her fiancé; one had experienced a string of deaths in rapid succession and, recognising the inherent vulnerability of human beings, felt compelled to reaffirm life; another woman had a pregnancy termination. While these women did not give the impression that they acted directly to resolve feelings of grief or assuage guilt at having lost a loved one or a child, such life events were not discounted as irrelevant to their decision making.

Additionally, some studies indicate that women elect to be surrogate mothers because they like being pregnant (Imrie and Jadva, 2014). This was not a stated motivation for the women I interviewed. However, although it is uncommon, there are anecdotal accounts of childless/child-free women in New Zealand becoming traditional surrogates because they want to experience pregnancy. Additionally, several fertility clinics reported seeing surrogates who have not been pregnant before being approved by ECART. Some of these women donate their services to family members; others may find themselves 'childless by circumstance' rather than design (Cannold, 2005), and consider a surrogacy arrangement as an opportunity to 'try' pregnancy.

Ragoné suggests that women who become surrogate mothers may also want to 'transcend the limitations of their domestic and motherhood roles' (Ragoné, 1994, p.65). As an extreme example, some surrogates enjoy the public attention their acts elicit. In study 1, two surrogate mothers were equally generous about disclosing their identities and stories as surrogate mothers to the media, and later came to occupy roles as mentors in the New Zealand surrogacy community. A more subtle example of this class of motivation is about doing something 'special', which may be related to surrogate mothers' view of themselves as exceptional because not everyone can be a surrogate (Berend, 2016).

An Australian psychologist from study 2, who has counselled over 200 surrogates, said that she found surrogate mothers tended to score slightly lower on the median grandiosity scale in psychology tests than non-surrogates. She thought this stemmed from, 'a sense of having achieved and stuff; it's that sense of "I want to be more than just a mum", you know, "I want to do something ... for my children to be proud of me."' Likewise, several New Zealand counsellors talked about egg donors and surrogate mothers wanting to be 'special'. One commented:

Sometimes I think with surrogates it is an attention thing – they like to be put on a pedestal and thanked and made to feel special. I wonder sometimes whether money is changing hands in some cases. ... Maybe you get a trip somewhere or you get a holiday, or you get a voucher.

One participant from study 1 described her decision to become a surrogate mother explicitly as a project. She was first an egg donor, and when that was unsuccessful she decided to offer her services as a gestational surrogate. This participant explained that she liked the idea of surrogacy as a project because it was 'different', enabling her to be 'part of the technology of my day'. Unlike egg donation, which has ongoing social implications for genetic continuity, gestational surrogacy represented a project with a finite end. Another AHR project was reported to me by a key informant in study 2 who said that one of their participants had set a goal of doing the most surrogate pregnancies in New Zealand (undertaking three thus far).

It is clear from the discussion of participants' motivations that there are multiple reasons why women might be interested in becoming surrogate mothers and/or egg donors. Most of the women I spoke with were not hard altruists, in that they did not view their donative acts as unconditional, one-way and with no strings attached. They typically wanted their generosity to be recognised (and not necessarily in terms of payment). Most – except for the gestational surrogate in study 1 – were interested in ongoing relationships with the intended parents.

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The question of enforcing surrogacy

The emphasis by ACART and fertility clinics on surrogate pregnancy arrangements as relational, and the fact that parties are already encouraged by fertility counsellors and lawyers to think through and formalise agreements (Wilson, 2019), raises questions about the rationale for enforcing surrogacy arrangements. Although advocates frame their argument as protecting both parties should either renege on the agreement, enforcement creates an imagined contractual environment of competition and fear and could be construed as a lack of trust rather than cooperation.

Wilson's online survey of 185 child and family lawyers asked participants whether surrogacy contracts should be enforceable. Of those who responded to this question, 54 favoured the status quo as determined by the HART Act, and 75 thought surrogacy arrangements should be enforceable (Wilson, 2018, p.72). Ethicists Walker and Van Zyl likewise want to enforce surrogacy and advocate radical reform of the current system. It is worth outlining their approach, as it has been influential in academia and the New Zealand media.

Walker and Van Zyl support a centrally controlled regulatory model to monitor surrogacy. They present what they call their 'professional model' as an alternative to both commercial and altruistic surrogacy (Walker and Van Zyl, 2017, p.12). The model is predicated on the idea of a professional, multi-disciplinary body tasked with facilitating surrogacy arrangements. This body would offer a range of services, one of which would be registering and licensing prospective surrogates. The concept of licensing prospective surrogates is novel and would involve a regulatory body to oversee the screening and 'selection' of surrogate mothers, who are paid a fee for service. This would mean that surrogates could not put themselves forward without being vetted for approval (Walker and Van Zyl, 2017).

Licensing would also involve training surrogates in the care of their bodies and pregnancies. There would be additional training in the assessment of values and ethical standards, which Van Zyl and Walker claim is not sufficiently provided by current models in New Zealand. In their model, the authors understandably emphasise the reproductive vulnerability of the intended parents, who go to great lengths to get a baby and must rely on the surrogate's trustworthiness and generosity. They comment that concern about the surrogate relinquishing the baby causes uncertainty for the intended parents.

Van Zyl and Walker discuss their position regarding the enforceability of surrogacy in several texts, stating that in their model intended parents would be unconditionally recognised as 'the legal parents from birth' (Van Zyl and Walker, 2015, p.384). Their view is that 'if a

surrogate cannot make a promise in advance to relinquish the baby, she cannot enter a surrogacy contract' (Walker and Van Zyl, 2017, p.9). For them, 'the intended parents are automatically the baby's legal parents and no transfer is necessary. The surrogate does not make a promise to relinquish the baby because it is not hers to relinquish' (ibid., p.18). They go on to say that this is 'the most significant benefit of the professional model' in 'that it removes the prolonged uncertainty that intended parents have to endure' (ibid., p.21). Additionally, they do not advocate that the surrogate has a 'parent-like voice' in the new family formation, but do permit some presence of the surrogate in the story of the family, and some level of contact if the surrogate so wishes (ibid., p.22). In short, Walker and Van Zyl argue for the intended parents to possess the rights and obligations of legal parentage from the birth of the baby, despite empirical evidence that 'a large majority of surrogates relinquish the babies without difficulty and have no regrets later on, regardless of whether they were gestational or genetic surrogates' (ibid., p.2).

In my empirical research, participants discussed whether they experienced bonding and emotional attachment with the baby, and if they found it difficult to relinquish the baby after the birth. The gestational surrogate I spoke with expressed no connection to the baby when it was born, saying that 'it helped that it looked so unlike [her]'. A traditional surrogate mother remarked:

I felt like I was babysitting a friend's child. I didn't look at her and think, 'Wow, that's, that's my daughter'. I've never ever looked at [baby X] and thought, 'Wow, she's my daughter', and I've never looked at [baby Y] and thought, 'Wow, he's my son'. Because the whole intent of the surrogate is to have a baby, have a child, for somebody else, so that child is never yours. And I think that's why it's quite hard for a lot of people to understand.

These comments convey that surrogate mothers are often clear in their own minds about what they are doing. At the same time, these women enter relationships with

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intended parents, which evolve and change over time. A stakeholder from study 2, who was also a traditional surrogate mother, was mindful to represent both sides of the surrogate-intended parent story in a recent interview with me. At the end of her account she commented:

The main problem is, they're all very close while the surrogate is pregnant, helping her out. Oh yes, they're getting on with their children, you know, being close with their family, and we're going to be close after, and then afterwards she signs the adoption paper and they run for the hills, you never hear from them. And it's extremely tough on a surrogate.

Confirming the significance of the surrogate-intended parent relationship, an Australian stakeholder from study 2 stated: 'the key motivation for surrogates ... in the absence of payment is a relationship. Not

a relationship with the child, but a relationship with the parents.'

Critiquing the professional model

Elsewhere I have argued that framing bodily donation in terms of a hard altruism/commodity distinction stymies conversation around the social meaning of money and reciprocity for donors' body work and affective labour (Shaw, 2015). This perspective broadly concurs with Walker and Van Zyl's position on compensation. That said, I do have reservations about other aspects of their model.

The first concern is that, as part of the licensing of surrogates which Walker and Van Zyl suggest, surrogates would be screened and trained so that their values are aligned with those of the intended parents (2017, p.17). I take this to mean that surrogates' motives must be compatible with the values that underpin the professional model Van Zyl and Walker propose. While the authors are concerned to ensure that surrogates act according to the right motivation to relinquish the baby, the idea of schooling surrogate mothers in line with the values of the professional model derogates their autonomy and would remove surrogates' right to rebut the presumption of parentage in favour of the intended parents should the arrangement be enforced (see Ceballos, 2019). In a pluralistic context such as New Zealand, where people have a range of (cross-cutting and sometimes contradictory) motivations for donating reproductive materials and services, Walker and Van Zyl's proposal seems out of step with the way ordinary, albeit generous, people make real-life moral decisions.

Walker and Van Zyl stress the pregnant surrogate's right to self-determination and bodily integrity (2017, p.147), yet they gloss over the corporeal investment involved in 'hosting' a child for the intended parent(s), discussing this dimension of generosity in seven lines of their book (ibid., pp.72-3). They claim that they do not support the commercial system in Israel, in which the intended mother, not the surrogate, is positioned as the primary obstetrics patient (ibid., p.148). However, the unintended effects of the professional model may result in similar circumstances

to those they denounce in Israel. That is, one of the reasons the Israeli system appears to work is because the surrogate mother induces dissociation (called 'distancing' by fertility psychologists) from her body in order to collaboratively project the pregnancy onto the intended mother, thereby facilitating easy relinquishment of the baby (Temam, 2009). If New Zealand is to adopt a similar system, a much greater emphasis on counselling support and therapy will be a necessary component of the model.

A third criticism relates to the language of enforceability, which is contrary to the notion of relational gifting that governs institutional ideas and conduct about altruistic surrogacy that influence the surrogate mother's desire to elevate her relationship with intended parents beyond the contractual (Berend, 2016). Enforceability is based on a model of social relations that pivots around the concept of 'relinquishment'. This involves 'giving up' and signing away a relationship with the baby in the interests of the intended parents. The idea of relinquishing the baby, as an individuated entity, does not account for the surrogate mother's guardianship of the baby at birth, her relationship with the intended parents, or different cultural views of bodily donation in relation to social identity (Glover and Rousseau, 2007).

Furthermore, the introduction of an enforceability clause does not align with the HART Act section 4, principles e, f, and g. These principles state that: (e) donor offspring should be made aware of their genetic origins and be able to access information about those origins; (f) the needs, values, and beliefs of Māori should

be considered and treated with respect; and (g) the different ethical, spiritual, and cultural perspectives in society should be considered and treated with respect.

While Māori views are not homogeneous, a child born from a surrogate pregnancy arrangement could still have ties to the whānau. They would retain their whakapapa and social identity and would be included in the iwi. Not only is this spiritually significant; it may have social and economic implications under the Waitangi Tribunal settlement process, as one fertility counsellor in study 2 commented:

For some Māori who are, you know into their culture, or immersed in their culture, it's a difficult thing because it's like well, okay, so if you go down blunt lines, this baby then whakapapa's to these people, but if you're talking socially well, then they whakapapa to these people, and then you know, the strange things that you end up talking about, like well, what if they want a scholarship? ... You've got to have at least, I guess, two generations, you've got to know your parents, and you've got to know your grandparents to be able to do it, and then it's like, oh well, what about ... you know, what about land claims?

In line with the concept of gift exchange, relinquishment of the baby could not only symbolically sever the child's relation to its birth mother, it could potentially break the child's relationship to the kinship network. While policy around donor registration is enormously helpful in enabling offspring to contact their donor 'progenitors', this only works if a person knows they are

donor-conceived. That may or may not happen, as the HART Act does not impose a statutory duty on parents to disclose this information to donor-conceived children. Suggestions by legal scholars that birth certificates be annotated to include the child's genetic and birth history (donors' and surrogates' identities) could be of benefit here, but Van Zyl and Walker are not advocating this as part of the professional model.

Conclusion

This article offers a conceptual toolkit based on sociological analysis of research findings to frame the motivations of surrogate mothers and the perspectives of various professionals who interact with them. If New Zealand legislation and policy around assisted human reproduction in relation to surrogacy is updated, this should be more than a legal (and philosophical) matter, as one of Wilson's lawyer participants points out (Wilson, 2018, p.73). More empirical research, documenting qualitative information from participants and service users occupying different perspectives in this domain, needs to be undertaken. Alongside surrogates and intended parents, the voices of donor-conceived persons, counsellors, psychologists and social scientists need to be heard in these debates. And any envisaged changes to legislation need to be flexible enough to accommodate multiple pathways to family formation without jeopardising cultural and situational diversity.

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