

Privacy Commissioner's submission to the Health Committee on the Improving Arrangements for Surrogacy Bill (72-1)

1. I am pleased to provide a submission on the Improving Arrangements for Surrogacy Bill (the Bill), a Member's Bill introduced by Tāmati Coffey.
2. The Privacy Act 2020 is New Zealand's main privacy statute. One of the Privacy Commissioner's functions under the Privacy Act is to examine proposed legislation that may affect the privacy of individuals.
3. I support the Bill's intent to provide a more robust and simplified legal framework for surrogacy arrangements. However, I believe the best option would be for this Bill to be subsumed into the Government's response to the recommendations of the Law Commission's review of surrogacy law. Alternatively, I recommend that the Committee itself consider whether any recommendations of the Law Commission report should be reflected in the Bill.
4. If the Bill proceeds in its current form, I have specific recommendations in relation to the provisions dealing with birth registration and the creation of a surrogacy register.

The Bill and the Law Commission surrogacy review

5. The Law Commission spent 18 months reviewing surrogacy law for its project Te Kōpū Whāngai: He Arotake | Review of Surrogacy. The Law Commission published its final report on this review on 27 May 2022, after the Bill had been referred to the Health Committee. The Government has not yet responded to the Law Commission report.
6. The Law Commission report makes comprehensive recommendations for a new legal framework for surrogacy arrangements. The report is informed by extensive consultation with and submissions from individuals with experience with surrogacy, experts, organisations and government agencies. The previous Privacy Commissioner made a submission to the review.
7. Because the Law Commission report is so comprehensive and is based on extensive public feedback, I believe its recommendations should be given serious consideration before new legislation for surrogacy is passed. Ideally, the Bill would either be withdrawn and replaced by a Government Bill, or adopted as a Government Bill, so that a comprehensive framework for surrogacy can be enacted, drawing on the Law Commission's recommendations.
8. If the Bill is not subsumed into a Government Bill, I recommend that the Committee examine the Law Commission report and consider whether any of its recommendations should be reflected in the Bill.
9. My remaining comments relate to the Bill in its current form.

Surrogacy and birth registration

10. Parts 5 and 6 of the Bill relate to the notification and registration of information about a birth resulting from a surrogacy arrangement.

11. Clause 25 would insert new section 15AA of the Births, Deaths, Marriages, and Relationships Registration Act 1995. New section 15AA would require, in the case of a child whose birth results from a surrogacy arrangement using a donated embryo or donated cells, that information about the identity of the surrogate and of any person who donated the embryo or cells be registered as part of the child's birth information.
12. Clause 28 would amend regulation 3A of the Births, Deaths, Marriages, and Relationships Registration (Prescribed Information) Regulations 1995. The amendment to regulation 3A would provide that, if a birth is a result of a surrogacy arrangement, a notification of birth for registration must include certain information in relation to the surrogate and any donors of embryos or cells. This information includes details of address, Māori descent, ethnicity, citizenship or residency status, date and place of birth, and the type of cells donated.
13. I support the right of surrogate-born people to have access to information about their genetic and gestational origins. However, I do not support any changes that would result in information indicating that an individual was born as a result of a surrogacy arrangement being recorded on the individual's birth certificate. This is because birth certificates are commonly used to establish identity, and surrogate-born people may not wish to disclose the circumstances of their birth when providing evidence of identity.
14. There are options for reform that could allow more information about surrogacy to be recorded on the birth register and certificates while protecting privacy. For example, a system of short-form and long-form birth certificates could be introduced. However, such potential reforms raise wider questions about the extent to which the birth registration system meets the needs of people in contemporary Aotearoa New Zealand. The Law Commission has therefore recommended in its surrogacy report that the birth registration system be reviewed.
15. In the absence of a review of birth registration, the Law Commission recommended the creation of a national register of surrogate-born people (the surrogacy birth register) under the Human Assisted Reproductive Technology Act 2004 (the HART Act). The Law Commission report also makes recommendations about the information that should be recorded on the surrogacy birth register and about access to the register by surrogate-born people. I recommend that the Committee consider adopting the Law Commission's recommendations for a surrogacy birth register in place of the provisions in Parts 5 and 6 of the Bill (apart from any provisions in those Parts that would be consistent with the Law Commission's recommendations).

Surrogacy register

16. Clause 9 of the Bill would insert new sections 66A to 66E of the HART Act. These sections would create a Surrogacy Registrar who would be responsible for establishing and maintaining a surrogacy register. In contrast to the proposed register of surrogate-born people discussed above, the surrogacy register would be a register of women who are willing to become surrogates, and of intending parents. The purpose of the register would be to enable potential surrogates and intending parents to be matched so they can determine whether they wish to enter into a surrogacy arrangement.

17. The question of whether a surrogacy register should be established involves policy questions that go beyond my focus on privacy. However, given that such a register would have privacy implications, the Committee should consider whether there is a strong policy case for establishing a surrogacy register. The Law Commission surrogacy report does not recommend establishing a surrogacy register. I encourage the Committee to consider carefully the Law Commission's reasons for reaching this conclusion.
18. If the Committee recommends that the Bill be passed with the provisions establishing a Surrogacy Registrar, there are several points I would like the Committee to consider:
 - The Bill does not create a surrogacy register, only a Surrogacy Registrar with a function of creating a surrogacy register. The Bill itself should establish any surrogacy register and provide for appropriate controls on access to, use and disclosure of personal information from the register. I note that the register would contain potentially sensitive information, including the reasons why people wish to enter into a surrogacy arrangements.
 - The Bill provides (new section 66A) that the Minister may appoint any person, organisation or department as the Surrogacy Registrar. The Bill should be clear about the type of entity that may be appointed as the Surrogacy Registrar, as this decision will have implications for whether and how legislation such as the Privacy Act and the Official Information Act applies to the Registrar.
 - New section 66B(2) provides for the Surrogacy Registrar to remove the details of any person from the register if the individual concerned notifies the Registrar that they no longer wish to be registered on the register, or if the Registrar considers there is a good reason to remove those details from the register. It would be appropriate to clearly provide for some but not all of an individual's details to be removed from the register, if that is what the individual requests or what the Registrar concludes there is good reason to do.

Conclusion

19. I **recommend** that the Bill be adopted as a Government Bill, or withdrawn and replaced by a Government Bill, so that the recommendations of the Law Commission's report on its review of surrogacy can be comprehensively considered and implemented or modified as appropriate.
20. If the Bill is not withdrawn or adopted by the Government, I **recommend** that the Committee consider whether any recommendations of the Law Commission's report should be implemented as part of the Bill.
21. With regard to specific provisions of the Bill, I make the following **recommendations**:
 - Delete provisions in Parts 5 and 6 of the Bill that would have the effect of recording a person's surrogate-born status on that person's birth certificate.
 - In place of the provisions in Parts 5 and 6 of the Bill, consider adopting the Law Commission's recommendations for the creation of a national register of surrogate-born people.

- Give careful consideration to the Law Commission's view that a surrogacy register (a register of potential surrogates and intending parents) should not be established.
- If clause 9 (inserting new sections 66A to 66E of the HART Act) is retained in the Bill, amend the clause to:
 - establish the surrogacy register (not just the Surrogacy Registrar) and provide for appropriate controls on access to, use and disclosure of personal information from the register
 - provide clearly for the type of entity that may be appointed as the Registrar
 - amend new section 66B(2) so that the Surrogacy Registrar has a clear power to remove some but not all of an individual's details from the register in appropriate circumstances.

22. I trust my comments are of use to the Committee. I do not seek to be heard on my submission but am happy to appear before the Committee if that would be of assistance.



Michael Webster
Privacy Commissioner

19 July 2022