

13 October 2021

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Improving Arrangements for Surrogacy Bill

Purpose

1. We have considered whether the Improving Arrangements for Surrogacy Bill (the Bill), a Member's Bill in the name of Tāmati Coffey, is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 14 of the Bill of Rights Act (freedom of expression). Our analysis is set out below.

The Bill

3. The purpose of the Bill is to simplify surrogacy arrangements, ensure completeness of information recorded on birth certificates, and provide a mechanism for the enforcement of surrogacy arrangements.
4. New Zealand does not currently afford any automatic rights to the intending parents of a child born via surrogacy, and a formal adoption process is required. The Bill provides a mechanism for parties to surrogacy arrangements to seek to have the terms of the arrangement embodied in a court order (subject to the approval of the ethics committee under the Human Assisted Reproductive Technology Act 2004 (the HART Act)). This order would be enforceable under the Care of Children Act 2004 (COCA) as if it were a parenting order. The amendments also enforce the legal obligations of the intending parents by making them liable for child support, and appoint a Registrar to establish and maintain a surrogacy register of births that are the result of surrogacy arrangements.
5. The Bill is split into seven Parts, seeking to amend the following five Acts and two sets of Regulations:
 - a. the HART Act;
 - b. COCA;
 - c. the Status of Children Act 1969;
 - d. the Child Support Act 1991;
 - e. the Births, Deaths, Marriages, and Relationships Registration Act 1995 (the BDM Act);
 - f. the Births, Deaths, Marriages, and Relationships Registration (Prescribed Information) Regulations 1995 (the BDM Regulations); and

- g. the Social Security (Exemptions under Section 105) Regulations 1998. We note that these Regulations were revoked on 26 November 2018.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

6. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including freedom to seek, receive, and impart information and opinions of any kind in any form. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.¹
7. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of s 5 of that Act. The s 5 inquiry may be approached as follows:²
- a. does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
 - b. if so, then:
 - i. is the limit rationally connected with the objective?
 - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - iii. is the limit in due proportion to the importance of the objective?
8. The Bill contains the following provisions which limit freedom of expression by compelling individuals to provide information to a Registrar:
- a. Clause 24 inserts a new s 9(1B) in the BDM Act, requiring intending parents to jointly notify a Registrar of the birth of a child in accordance with the BDM Act, and inform the Registrar whether or not they are New Zealand citizens or persons entitled under the Immigration Act 2009 to be in New Zealand indefinitely.
 - b. Clause 28 inserts a new reg 3A(d) in the BDM Regulations, setting out the information that must be notified where a birth is a result of a surrogacy arrangement. We note that this provision would have the effect of requiring the intending parents to provide personal information about the surrogate.
9. The objective of these provisions is to ensure that the information recorded in birth certificates and in the register of children born as a result of surrogacy arrangements is complete, accurate and up to date. This is a sufficiently important objective to justify a limitation on the freedom of expression. To the extent that these provisions limit this right, we consider that they are rationally connected with this objective, impair a person's freedom of expression no more than is reasonably necessary, and are in due proportion to the importance of the objective.

¹ See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

² *Hansen v R* [2007] NZSC 7 [123].

10. On this basis, we consider that the Bill appears to be consistent with the right to freedom of expression affirmed in s 14 of the Bill of Rights Act.

Conclusion

11. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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