



9 February 2023

Tēnā koe

On 7 December 2022, you emailed the Ministry of Social Development (the Ministry) requesting, under the Official Information Act 1982 (the Act), the following information:

- *Would we be able to have access to the Recommendations on the Surrogacy Law Reform Project (REP/22/10/945) received on the 28th of October?*

On 20 January 2023, the Ministry emailed you to advise that more time was required to respond to this request. In accordance with section 15(1) and 15A of the Act, the Ministry's decision is due to you no later than 9 February 2023. The reason for this extension is that the consultations necessary to make a decision cannot reasonably be made within the original timeframe.

Please find attached a copy of the following document:

- REP/22/10/945 – Report – *Recommendations on the Surrogacy Law Reform Project*, dated 25 October 2022.

Some information is withheld under section 9(2)(f)(iv) of the Act to maintain the constitutional conventions for the time being which protect the confidentiality of advice tendered by Ministers of the Crown and officials. The release of this information is likely to prejudice the ability of government to consider advice and the wider public interest of effective government would not be served.

You will note that further information is withheld under section 9(2)(h) of the Act in order to maintain legal professional privilege. The greater public interest is in ensuring that government agencies can continue to obtain confidential legal advice.

Some information is withheld under section 18(c)(ii) of the Act as release of the information would constitute contempt of the House of representatives.

The principles and purposes of the Official Information Act 1982 under which you made your request are:

- to create greater openness and transparency about the plans, work and activities of the Government,
- to increase the ability of the public to participate in the making and administration of our laws and policies and
- to lead to greater accountability in the conduct of public affairs.

This Ministry fully supports those principles and purposes. The Ministry therefore intends to make the information contained in this letter and any attached documents available to the wider public. The Ministry will do this by publishing this letter and attachments on the Ministry's website. Your personal details will be deleted, and the Ministry will not publish any information that would identify you as the person who requested the information.

If you wish to discuss this response with us, please feel free to contact OIA_Requests@msd.govt.nz.

If you are not satisfied with this response regarding REP/22/10/945, you have the right to seek an investigation and review by the Ombudsman. Information about how to make a complaint is available at www.ombudsman.parliament.nz or 0800 802 602.

Ngā mihi nui

A handwritten signature in blue ink, appearing to read 'B. Hogan', with a long horizontal flourish extending to the right.

Bede Hogan
Policy Manager
Welfare System and Income Support Policy

Report



MINISTRY OF SOCIAL
DEVELOPMENT
TE MANATŪ WHAKAHIATO ORA

Date: 27 October 2022 **Security Level:** IN CONFIDENCE

To: Hon Carmel Sepuloni, Minister for Social Development and Employment
Hon Chris Hipkins, Minister of Education
Hon Kiri Allan, Minister of Justice

Recommendations on the Surrogacy Law Reform Project

The following report contains legal advice and is legally privileged. It should not be released on an information request without further legal advice.

Purpose of the report

1

s9(2)(f)(iv)

Executive summary

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18(c)(ii)

- 3 The Law Commission's report made two recommendations that, if agreed to, would have both operational and legislative implications for MSD.
- 4 **Recommendation 50 (R50):** *The money value of any payments to (or for the benefit of) the surrogate for any reasonable surrogacy costs actually incurred in relation to the surrogacy arrangement should not be treated as income for the purposes of the SSA, other than payments that reimburse the surrogate for a loss of earnings.*
- 5 R50 aims to ensure surrogates are not left worse-off financially for participating in a surrogacy arrangement by ensuring that any reasonable surrogacy costs incurred in relation to the surrogacy arrangement are not

treated as income.

s9(2)(h)

s9(2)(h)

s9(2)(f)(iv)

s9(2)(f)(iv)

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s9(2)(f)(iv)

s9(2)(h)

s9(2)(h)

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s9(2)(f)(iv)

s9(2)(f)(iv)

s9(2)(h)

s9(2)(h)

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Recommendation 51 (R51): *Surrogates should be exempt from work-preparation and work-test obligations under the SSA for a specified period of time after they have given birth.*

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R51 aims to ensure surrogates have a reasonable period to recover from childbirth before being subject to work obligations and potential sanctions. Currently, work obligations are applied consistently for pregnant people, but become inconsistent after the child is born. This is because work obligations are currently connected to caring for a child, rather than giving birth.

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s9(2)(f)(iv)

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s9(2)(f)(iv)



13 If the recommendations are agreed to by the select committee, substantial amendments to the member’s bill and an extension of timeframes and scope may be required. Any changes for MSD will be implemented alongside the member’s bill. MSD officials will work closely with MOJ officials to understand the overall proposed implementation timeframes when these are known.

Recommended actions

It is recommended that you:

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s9(2)(f)(iv)



2 **note** that the Law Commission made two recommendations that have impacts on assistance provided by MSD:

2.1 R50: The money value of any payments to (or for the benefit of) the surrogate for any reasonable surrogacy costs actually incurred in relation to the surrogacy arrangement should not be treated as income for the purposes of the SSA, other than payments that reimburse the surrogate for a loss of earnings

2.2 R51: Surrogates should be exempt from work-preparation and work-test obligations under the SSA for a specified period of time after they have given birth

3

s9(2)(f)(iv)



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Minister of Education and Minister for Social Development and Employment:

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s9(2)(f)(iv)



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s9(2)(h)

Minister for Social Development and Employment only

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s9(2)(f)(iv)

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s9(2)(f)(iv)

9 **forward** this report to the Minister of Housing for their information

YES / NO

Minister of Justice only

10 **note** the decisions made in this report will be reflected in the draft Cabinet paper ^{s9(2)(f)(iv)} provided to you by Ministry of Justice officials.



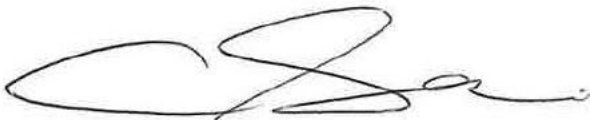
27/10/2022

Leah Asmus
Acting Policy Manager
Income Support Policy

Date

Hon Chris Hipkins
Minister of Education

Date



Hon Carmel Sepuloni
Minister for Social Development and
Employment

30/10/22

Date

Hon Kiri Allan
Minister of Justice

Date

Background

14 Surrogates are in a unique position of agreeing to conceive and carry a child that is intended for another set of parents. In April 2022, the Law Commission released their report *Te Kōpū Whāngai: He Arotake | Review of Surrogacy*,¹ which examined surrogacy law, regulation, and practice. Through this report the Law Commission:

- identified a range of barriers to surrogacy in Aotearoa;
- broadly estimated that up to 50 children may be born as a result of a surrogacy arrangements each year (about 60% of these arrangements occur in New Zealand and 40% internationally);
- outlined their view that the current model of surrogacy in Aotearoa is consistent with the treatment of other donative practices (e.g., organ donations) and the law views these practices as a gift, rather than a commercial transaction;
- provided recommendations for surrogacy reform, including two recommendations with implications for MSD.

15 A government response was planned to the Law Commission's report, led by the Ministry of Justice (MOJ). However, a member's bill titled *Improving Arrangements for Surrogacy* had its first reading earlier this year. This bill is currently at the Select Committee stage.

18(c)(ii)

s9(2)(h)

16 The first recommendation from the Law Commission with implications for MSD is R50: *The money value of any payments to (or for the benefit of) the surrogate for any reasonable surrogacy costs actually incurred in relation to the surrogacy arrangement should not be treated as income for the purposes of the SSA, other than payments that reimburse the surrogate for a loss of earnings.*

17 R50 relates to the recommendations that aim to remediate the fact that the Human Assisted Reproductive Technology Act (2004) is currently unclear on what costs, if any, can be paid to the surrogate by the intending parents. This ambiguity places unnecessary stress on the relationship between surrogates and intending parent(s) and can lead to surrogates being financially worse-off for participating in a surrogacy.

18 As part of their recommendations, guidance for what constitutes a 'reasonable surrogacy cost' was developed by the Law Commission [Appendix

¹ [NZLC-Report146-Review-of-Surrogacy.pdf \(lawcom.govt.nz\)](#)

one refers].^{s9(2)(h)}

^{s9(2)(h)}

19 R50 aims to ensure:

- intending parents can cover reasonable costs incurred by the surrogate as a result of participating in the surrogacy arrangement (excluding any payments that reimburse surrogates for lost income);
- these costs are not charged as income against welfare support provided under the SSA, so that the surrogate is not made financially worse-off by providing the voluntary service.

^{s9(2)(f)(iv)}

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^{s9(2)(f)(iv)}

21 Currently, when a person is engaged in voluntary work and they are reimbursed for costs associated with that work, MSD compares the amount received with the costs incurred. The actual costs are deducted from the amount received and any excess is charged against the person's benefit.^{s9(2)(f)(iv)}

^{s9(2)(f)(iv)}

22 Because of the unique relationship dynamic between surrogates and intending parents, any costs a surrogate incurs as part of the surrogacy arrangement are likely to be the result of (or influenced by) choices made by the intending parents, rather than the surrogate e.g., choosing to use private obstetric care, rather than publicly funded care.

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^{s9(2)(f)(iv)}

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^{s9(2)(h)}

^{s9(2)(h)}

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s9(2)(h)

s9(2)(f)(iv)

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s9(2)(f)(iv)

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s9(2)(h)

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MSD's current work obligation settings result in inconsistent treatment for surrogates after birth

35 The second recommendation the Law Commission has proposed with implications for MSD is R51: *Surrogates should be exempt from work-preparation and work-test obligations under the SSA for a specified period of time after they have given birth.*

36 For people who keep their child, work-test obligations will be deferred until their youngest child is three, but they are still subject to work-preparation obligations.⁵ In contrast, both work-preparation and work-test obligations would apply to surrogates from childbirth, because the child is not in their care.⁶

s9(2)(h)

⁵ Unless they are unable to undertake work-preparation obligations for another reason e.g., a health condition that impacts their ability or capacity to plan for work.

⁶ Providing they do not have another child under three or another reason to defer work obligations.

37 Currently, during pregnancy,⁷ MSD's application of work obligations for surrogates and other pregnant people is consistent. However, there are no specific work obligation exemptions for the period immediately following childbirth. While unlikely, it is possible that a work obligation failure and a subsequent sanction, could be applied to a person who has just given birth, but did not keep their child.

38 This recommendation aims to ensure:

- surrogates have a reasonable period to recover from childbirth before being subject to work obligations
- surrogates avoid potential sanctions (in respect of work obligations) that could be applied during this time.

s9(2)(f)(iv)

39 s9(2)(f)(iv)

40 Additionally, as part of the welfare overhaul, obligations and sanctions are being reviewed. s9(2)(f)(iv)

s9(2)(f)(iv)

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⁷ SSA, Schedule 2, specifies that the use of the term 'health condition' includes pregnancy after the 26th week.

s9(2)(f)(iv)

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s9(2)(f)(iv)

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s9(2)(f)(iv)

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s9(2)(f)(iv)

s9(2)(f)(iv)

49 If the recommendations are agreed to by the select committee, substantial amendments to the Bill (and therefore an extension of current timeframes for reporting back to the House), along with an extension of scope, may be required. MSD officials will work closely with MOJ officials to understand the overall proposed implementation timeframes when these are known.

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s9(2)(f)(iv)

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Next steps

52 MOJ are working towards the following milestones:

Action	Date
Policy advice on outstanding issues	October 2022
s9(2)(f)(iv)	November/December 2022
18(c)(ii)	

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s9(2)(f)(iv)

54 We recommend you agree to forward this report to the Minister of Housing for their information, s9(2)(f)(iv)

s9(2)(f)(iv)

Author: Alice Fitzgerald, Policy Analyst, Income Support Policy

Responsible manager: Leah Asmus, Acting Policy Manager, Income Support Policy

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Appendix one

The Law Commission Review of Surrogacy report recommendations

[NZLC-Report146-Review-of-Surrogacy.pdf \(lawcom.govt.nz\)](#)

Recommendation 47: The Human Assisted Reproductive Technology Act 2004 should be amended to provide guidance on what “reasonable surrogacy costs” can include. A new provision should be inserted that explains that, without limiting section 14(4), “reasonable surrogacy costs” includes the following:

- a. Any reasonable medical costs incurred by the surrogate, including costs associated with achieving conception, pregnancy and birth, and post-partum recovery.
- b. Any reasonable travel or accommodation costs incurred by the surrogate or her partner as a result of the surrogacy arrangement.
- c. Any reasonable costs relating to the care of the surrogate’s dependants incurred as a result of the surrogacy arrangement.
- d. The cost of obtaining any product or service recommended by the surrogate’s healthcare provider in relation to conception, pregnancy, birth or post-partum recovery.
- e. The cost of any insurance premium payable for health, disability, income protection or life insurance obtained for the surrogate in connection with the surrogacy arrangement or of any increase in an existing insurance premium payable for the surrogate as a result of the surrogacy arrangement.
- f. The cost of reimbursing the surrogate for a loss of earnings incurred as a direct result of taking leave for the following periods (less any paid parental leave payments received in the same period):
 - i. A period of not more than three months during which the birth occurred or was expected to occur.
 - ii. Any other period during the pregnancy when the surrogate was advised not to work on medical grounds.
- g. Any reasonable out-of-pocket expenses incurred as a direct result of the surrogacy arrangement, including in relation to maternity clothes, housework services, groceries, and care of pets.