

IN CAMERA PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

**INQUIRY INTO LEGISLATION ON ALTRUISTIC SURROGACY IN
NEW SOUTH WALES**

At Sydney on Wednesday 5 November 2008

The Committee met at 2.30 p.m.

PRESENT

The Hon. C. M. Robertson (Chair)
The Hon. J. G. Ajaka
The Hon. D. J. Clarke
The Hon. G. J. Donnelly
The Hon. A. R. Fazio
Ms S. P. Hale

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[REDACTED]

[REDACTED]

CHAIR: Welcome to the first public hearing day of the Standing Committee on Law and Justice inquiry into legislation on altruistic surrogacy in New South Wales. We do have some rules and regulations in relation to broadcasting but they do not apply because we will not be broadcasting this session of the inquiry. You do have parliamentary privilege by being sworn in, and your evidence is confidential, but committee hearings are not intended to provide a forum for people to make adverse reflections about others. If you have mobile phones would you please turn them off as they interfere with the recording equipment?

Mr A, in what capacity are you appearing before the Committee? That is, are you appearing as an individual or a representative of an organisation?

Mr A: An individual.

CHAIR: Are you conversant with the terms of reference of the inquiry?

Mr A: Yes, I am.

CHAIR: Mrs A, in what capacity are you appearing before the Committee? That is, are you appearing as an individual or a representative of an organisation?

Mrs A: An individual.

CHAIR: Are you conversant with the terms of reference of the inquiry?

Mrs A: Yes.

CHAIR: If either of you should consider at any stage that certain evidence you wish to give or documents you may wish to tender should be heard or seen only by the Committee, please indicate that fact and the Committee will consider your request. If the Committee asks complicated questions and you would rather send the answers back would you please do so by 1 December 2008? Would either of you like to start by making an opening statement?

Mr A: I would like to make an opening statement. Firstly, I would like to say thank you for the Committee agreeing to hear our evidence in camera. [REDACTED]

[REDACTED] We feel it is in the best interests of our children's normal upbringing that we avoid any coverage of the potential special nature of their coming about. We want them to be as normal as possible. We think that is in their best interests.

I have read quite a number of the submissions on the website in regard to the Committee's hearing. To be honest and frank with you, we find a number of the comments to be quite personally insulting and offensive, in the sense that there is an attempt by a number of groups to portray people like us as being baby farmers or treating children as commodities. If I may just quote from three or four of those statements which appear to have no basis in fact, logic or evidence, such as: "There is a negative impact that surrogacy has on children"—a statement made with no evidence provided. The word "commodified" used by another organisation making a submission. "Evidence that surrogacy is detrimental to the developmental welfare of children"—again no evidence provided to that effect. The statement, "Surrogacy affects the mother and the child biologically and psychologically"—again with no evidence provided. For more than 10 years we have had that kind of statement made in the public arena about our children and us. As I say, we find it hurtful, unfounded and illogical. We wanted to bring that perspective to the attention of the Committee as well.

In regard to the religious-based commentators and the ethicists, they seem to believe that surrogacy should not be permitted on the basis that it is not nature's way. Nature has given couples like us a particular life to live, if you like, and we should not interfere with that process; we should just accept it and get on with it. They do not seem to have any problem with medical interventions such as heart transplants, lung transplants or

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liver transplants, where many of the same kinds of issues may be at play. I feel that there is a great lack of logic in the position that says it is okay in some circumstances but when it comes to children it is not okay.

Finally, I would like to say that one of our children turns ten next month and the other turns six, both—as you know from our submission—from a surrogacy agreement [REDACTED]. To everybody who knows them and has no knowledge of the way they came about they are perfectly normal children, and everybody treats them as perfectly normal children. Everybody who finds out about the process we have been through sees nothing but commonsense in what we have done, given our circumstances.

Ms SYLVIA HALE: You probably heard the discussion about birth certificates and whether the birth mother should appear on the birth certificate as well as the intending family. In your own circumstances would you consider that is an appropriate way to proceed?

Mrs A: Both our children know exactly how they came into this world. They know exactly where all their bits came from and who gave birth to them. They have photographs. My daughter was four when her baby brother was born, so she went through the whole lot. Part of me wants to recognise to them the reality of their conception, their birth and why they are here. So for me personally, being the mother in every sense of the word except for still legally in the case of my son, I have no problem with an acknowledgement: a birth certificate. I feel it is something that I can pass to my children to say this is how you came into being. We do treasure the birth certificate that we have for our daughter. It is the only way that I am recognised for my daughter legally and I do not have that for my son but I look forward to it.

Ms SYLVIA HALE: That was as a result of the adoption process?

Mrs A: Correct. I was only ever legally recognised as her mother once she was adopted. In every other sense she was my daughter except for that legal one. We celebrated that because our christening was when we got that adoption, when the birth certificate arrived is when we did that social process.

Ms SYLVIA HALE: The last witnesses from the Law Society spoke about the unpredictability of the response to a child's birth, both on the part of the intending family and on the part of the surrogacy mother. Given that, and given the difficulties you have experienced going through the adoption process, at what stage do you believe that you should be legally recognised is the child's parents? Do you think it is appropriate to wait 12 months, two years?

Mrs A: Our son turns six in December and he is still not legally ours. We have gone through the adoption process—the first-time we could not apply until [REDACTED] was two—and that takes time. We could only start the process when she turned two. This time round we could only start the process when [REDACTED] turned five, which was 10 months ago, and that process just takes time.

Ms SYLVIA HALE: Presumably in your case, [REDACTED], you were all absolutely delighted with the outcome?

Mrs A: Absolutely.

Ms SYLVIA HALE: But in circumstances where one of the parties may have grave misgivings—it may be the intending family, for example, if the child turns out to be developmentally delayed or disabled?

Mrs A: Exactly, it can go both ways.

Ms SYLVIA HALE: How soon after the child's birth, or even before, do you feel the parental responsibility should be ascertained?

Mrs A: That is a very good question. Obviously in our situation there was no contest—everybody was happy with the outcome. From our point of view, we assumed being the parents of the child from the time our children were born in both cases. So to wait two plus years, and now five plus years, has been a long drawn out affair. Certainly with our first child that two plus years was very agonising because we did not have any way of knowing how it would end up. At least second time round the anxiety level is much less, certainly on my behalf, and I am not so anxious about the result. I am hoping it will happen when it is allowed to happen but it is frustrating. First time round it was extremely agonising. Having that long drawn out affair, I suppose we had in

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the back of our minds what would happen if somebody intervened and said, "We do not like this. We are going to take the child away." That was—

CHAIR: Like Department of Community Services or something?

Mr A: There was a very real risk in the initial case that the court would say, "We won't give an adoption order" and in that case there was at that time, as we understood it from our legal advisers, an option for Department of Community Services to intervene and say, "We see this as a dysfunctional arrangement and we will take the child." There was the capacity in law for them to do that. That was a greatly anxious time for us.

Ms SYLVIA HALE: Are you aware of any instances of that happening?

Mr A: No.

Ms SYLVIA HALE: I can see why it is a fear.

Mr A: Yes. No, we are not.

Mrs A: It was a small fear in a little seed, and we did not dwell on it. Our legal advice was, "You are entering some uncharted waters. We really do not know what will happen, and this is one possible outcome."

Mr A: We also knew that the Law Reform Commission at that time was looking into those matters and that there was a very significant body of lawyers who were violently opposed to the current arrangements we are talking about, and that included, as we were led to believe, members of the judiciary. So there was a risk that if we received an appointment of a judge who was ideologically opposed, he would not give an order and then potentially we would be left in limbo land, or seeking another path which might have involved the Family Court and the Federal Court, rather than a State jurisdiction.

Mrs A: We were lucky that things worked out and our daughter is now adopted. So this time around we are not as anxious with those, but certainly there was a huge element. I can still remember where I was when I received the news from our lawyer that it "has all gone through". And I never realised how emotionally distressed I was by the process. It is a very distressing process.

Mr A: The other thing in [REDACTED] case was that DOCS actually opposed our request for orders. So that gave us extra anxiety.

Ms SYLVIA HALE: Did they say why?

Mr A: Again, an ideological position—that they were opposed to surrogacy ideologically.

Mrs A: And also, the Adoption Act is not designed to do what we were asking it to do.

Mr A: Yes. They were saying that we were using the wrong legal instrument to try to achieve our goal. But they did not offer any alternative—other than to suggest that maybe the Federal system was a better system for them. We saw that as just being a case of: We do not want to have the responsibility.

The Hon. DAVID CLARKE: They said to you that they were ideologically opposed, did they?

Mr A: They did not use those exact words. I would have to go back and look at exactly what they said. But it was very clear that their principles were that surrogacy was not the right way to go.

Ms SYLVIA HALE: How difficult was it for you to obtain competent legal advice—that is, from people who were familiar with the intricacies of your situation and the legal ramifications?

Mr A: It was difficult. We are talking about more than 10 years ago when we first started down the path. We did change advisers in that first instance. I cannot really recall why it was the case that we chose to do that, but I think we would say that we were not comfortable with the advice we were getting from a barrister in the first case, and then we saw a family friend, a solicitor who has a practice in the city, who was prepared to do the hard yards of looking into it.

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Mrs A: And certainly his advice to [REDACTED] was that any child [REDACTED] gave birth to was still legally another child to them, so it had impacts on the inheritance for their children and things like that. That is a very big issue that we wanted clarified, because always our intent was that any child born out of this arrangement was our child, and therefore he or she would be given the same rights as my brother and I are given to my parents' estate.

Mr A: And likewise for us. If either of us, or both of us, died in the five years before [REDACTED] adoption takes place, God willing, then we would have to ask [REDACTED] to have their wills to reflect that fact, and our wills to reflect it as well. We have given our estate to [REDACTED], who is legally our child, and to, as it was described at the time, any child of [REDACTED] born between these dates, to try to tie it all together and make sure there were not any cracks to fall into.

Ms SYLVIA HALE: Did the arrangement that you entered into cause any discord amongst your wider family?

Mrs A: Before we attempted to make IVF gametes, we obviously spoke with [REDACTED] because this is an offer that has been going long before I met my husband; it is something I have known about since my teens; it was always going to be an issue. Then, when I met my husband, he knew about it very early on, before we were engaged or married. [REDACTED]

We actually spoke to every single one and made sure that they understood what we were about to attempt to do, about the relationships involved, and how we intended the child or children to be brought up. And we asked what their response was. We, as intending parents, made it very clear that if somebody within those very close family relationships was going to be vehemently opposed, we would question what we were trying to do. We did not want to bring a child or children into a family where there was going to be big conflict; that was not our intention, and we would have done something else or accepted it. That was a choice that we made.

The Hon. JOHN AJAKA: I do not know how much you heard when we were talking to the lawyers. I put the proposition to them—and I would like your personal opinion on this—that surely it would be better to have a system whereby, prior to the agreement being entered into, the parties receive all the appropriate checks and balances, all the counselling, all the medical tests, all the independent legal advice—all the arrangements you have had to go through over and over. Once the agreement is entered into and the child is born, the intending parents would automatically be the parents of the child, and the birth certificate would automatically reflect that. There would be no need to go through the adoption process because the child is yours from day one. Could I have your views on how you would feel if that were the situation, as opposed to what you have had to go through?

Mrs A: It would be a breath of fresh air. I suppose it would reflect exactly what we did in reality. It would just be the law actually met where we were in reality, because that is what we did and there was no contest by us or by [REDACTED]. It would make it very clear for both sets of people involved where the legal responsibility is, where the financial responsibility is, and all those other responsibilities that come with parents from the time a child is born. Then we, as the parents, would have the rights to make those decisions for our child or children.

The Hon. JOHN AJAKA: If you had to go before a Supreme Court judge to confirm or ratify the arrangement, this would have been of no concern to you, because it must be simpler than having to do it for the adoption process?

Mrs A: Yes, it is much more simple. It has been a long, drawn-out affair, with lots of social worker involvement. It all takes time.

The Hon. JOHN AJAKA: The person from DOCS indicated—if I am wrong, please correct me, Madam Chair—that when the gametes are being donated by both the intending parents it would only take about 12 months for the adoption process. From what you are indicating to me, it is five or six years.

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Mr A: The Adoption Act 2000 makes it very clear that no child can be adopted unless they have lived with the intending parents for five years. That is in black and white. I do not know where they are getting that information from. Maybe they are suggesting a change.

CHAIR: There were two scenarios. One related to a woman saying "I wish to adopt this child when it is born", but she is not genetically connected and there is no surrogacy arrangement.

The Hon. JOHN AJAKA: It is clearly a five or six year process?

Mr A: Yes, it is five years before you can even apply to DOCS. DOCS will not even talk to you until five years has elapsed.

Mrs A: And certainly our lawyer sought DOCS advice prior to [REDACTED] turning five, and they said, "No, we cannot take anything until he turns five."

The Hon. JOHN AJAKA: I mentioned to them that this almost puts the child in a vacuum or in limbo. I know that one of the lawyers did not agree with that. From a personal point of view, is that how you feel—that you are in a bit of a vacuum?

Mr A: You do feel that way. I understand exactly what John was saying. There is no lack of clarity about the legal position whatsoever, and we understand that. We probably understand it better than most, because we come up against all those issues, like wills and registering for child care. It just goes on and on.

Mrs A: Every time I have had to register our child for something—for example, at the preschool, school, family day care, going to hospitals, going to GPs—we have to say, "This is the story. But you need to understand that the birth certificate says [REDACTED] name. It just has [REDACTED] name on it." We then have to explain that this is how they have come into being. My son does not know that.

Mr A: The effect of that is that people look at our children differently. They must look at them differently to begin with, until they know them as people and say, "That's a normal kid." But at the time, they may think, "That is a special child." I do not want our children to be thought of as being special—they are just normal kids.

The Hon. JOHN AJAKA: From a birth certificate point of view, your ideal situation would be that the two of you are noted as mum and dad?

Mrs A: Yes.

The Hon. JOHN AJAKA: What are your views about mum and dad and also the birth mother being noted? Or do you feel it should be just the two of you?

Mrs A: I am proud of the way our children have been brought into the world. And I want them to know that, and I want them to be able to find that information easily and succinctly.

The Hon. JOHN AJAKA: On the birth certificate as well? Or would you rather see a system where the birth certificate has the two of you and the other information is accessible when someone enquires?

Mrs A: I would say yes, because then you are giving them a certificate that is different from their peers in their school and it marks them as something different. I think every child wants to think they are just the same as their brother and sister.

Mr A: But the reality is that kids do not swap birth certificates at school. It is not something that children even think about it; it really only comes into play when they become adults, by which stage they have processed the knowledge for many years.

Mrs A: But again, it may be presented to somewhere else and somebody else may take offence to that.

The Hon. JOHN AJAKA: So the priority would be at least the two of you on the birth certificate. Whether the birth mother is also on it or there is a separate section for inquiries, as long as there is a registered carer, the priority is that the two of you have to be on the birth certificate from day one?

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Mrs A: Yes. I absolutely agree that the child should know their origins, both genetic and biological. I think a format needs to be made that that information is accessible to them when they wish to receive it.

The Hon. JOHN AJAKA: I know you are a doctor. Would your views be similar if the intending parents were not both donors of the gametes, if there were same-sex relationships? Do you feel there would be any difference in relation to that?

Mrs A: I have never given birth to a child, so I have no understanding of what it is like to be the mother of a child I gave birth to. But my children are my children—I would be devastated without them. I do not think there is any difference in any of those different constructs. We are just lucky that biologically they are ours. That is nice and affirming, but that is just because we were lucky we could do that part of it.

The Hon. JOHN AJAKA: Do you feel that in some way you or your children have been prejudiced by the current legal system compared to someone who gives birth in a situation where the birth mother is the gamete donor and the husband is the other gamete donor?

Mr A: I would not say prejudiced necessarily; I think that might be a little too strong. But there have certainly been things that we as a family have missed out on because of it. Please do not think that we mercenary at all. But, for example, the baby bonus came in at the time that [REDACTED] was conceived and born, and we were not able to apply for that. And we do not have any recognition for the cost of raising him. We do not want it, but I am just giving you the full landscape, if you like. So we do not necessarily feel prejudiced or hard done by, because we have our children and that is what we wanted to have, our family, and that is by far the most overriding success of the whole issue. But there a number of peripheral issues that we miss out on. They do not make us feel any less of ourselves or—

The Hon. JOHN AJAKA: Do you and/or your children find yourselves excluded in some categories, whether it be from a taxation point of view, a Medicare point of view, or being able to authorise immediate surgery if you cannot get hold of [REDACTED]?

Mrs A: Yes, it adds a level of complexity that we need to be aware of, and sometimes you are not aware of it until you are in that situation. We still do not have a passport for our son. We might have liked to travel overseas, but we cannot do that. I had a job offer to go overseas, and for a variety of reasons we chose not to do it. One of those reasons was: What do we do about the legal status of our son?

The Hon. JOHN AJAKA: What would happen in a medical emergency situation if [REDACTED] is not available to sign?

Mrs A: In a life or death situation a doctor proceeds anyway, so if it was life or death for our child there is an assumption made that you treat life and death. Then it would be the next of kin [REDACTED]
[REDACTED]

Mr A: [REDACTED]

Mrs A: [REDACTED]. If it was an elective thing, if my son needed an elective operation in the future I would have to bring [REDACTED] to the consultation and while she would say, "Yes, whatever you want", you are bringing someone in who may say, "I don't know that I like this surgery for your son. I don't know that I will sign it." That would not happen in our case because we made sure it would not, but in different situations someone may say, "I don't want your son circumcised" or "I want your son circumcised, let's go off and do it." Those sorts of things are important.

The Hon. AMANDA FAZIO: Did you ever get to the stage where you wished [REDACTED] had booked into hospital under your name?

Mr A: It is funny you should say that because when we first went through the counselling we were told of examples where people actually swapped Medicare cards as they went into hospital, so it was all done in the name of the commissioning mother and as far as Medicare and the hospital system and everybody was concerned it was all square and above board, and it made it very easy for them.

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Mrs A: Several people suggested, "Why don't you just do that? It gets you around everything." It would have made life so much easier but from the IVF point of view [REDACTED] They said they would not take us on if we were going to do that. We respected that. We did not want to be underhanded or under the table. We are proud of the way our children have been born and we feel very blessed.

The Hon. DAVID CLARKE: Thank you very much for making a submission and coming along to discuss this very important issue with us and offer your views. In your submission you said it is important that there be a legally recognised agreement in the form of a contract. By that I take it you mean a legally enforceable contract?

Mr A: They were my words.

Mrs A: We are not lawyers. I understand there are legal parts to that.

The Hon. DAVID CLARKE: To demonstrate what I am getting at let me give you the following situation: Say we have an altruistic surrogacy arrangement where the child has no genetic relationship to the proposed adopting parent or parents, they are not gamete donors. On the birth of the child the birth mother changes her mind and wishes to keep the child, as happens in a normal adoption situation. Does that mean that the mother should be forced to give up the child because there is an enforceable agreement? What would you do in that situation?

Mr A: Where would I be in that hypothetical scenario? Which one would I be?

The Hon. DAVID CLARKE: You would be making the law. You would be the legislature. There is no gamete relationship between the proposed parents and there is a contract, because you say there should be a legally recognised agreement. Should that be made an enforceable agreement so that if the birth mother changed her mind on seeing the child she would be required to give up the child because there is an enforceable agreement?

Mr A: I think the core of the issue is the enforceability of an agreement.

The Hon. DAVID CLARKE: With that consequence.

Mr A: It may well be that I have been a bit immoderate in the words I have used in our submission because the intention of what I was trying to say—[REDACTED] let me write that section of our submission—was that I believe there should be a clear statement before and during the process that allows all parties to understand where they are coming from. Having listened to the people from the Law Society who gave evidence prior to us, there seemed to be a suggestion that perhaps there could be an application to the Supreme Court to adjudicate on that level of agreement. It would probably be my preference that there is a third party involved, because of the nature of the judiciary, who would look at all the circumstances and then make a decision about what is in the best interests of the child in terms of where a child should be parented.

The Hon. DAVID CLARKE: Let me get this clear. We are talking about a situation where the agreement has been made with a couple or a single person who has no genetic relationship with the child that is going to come into the world. Are you saying that even in that situation where the birth mother, as sometimes happens when the child is born, says, "I want to keep the child", because they have that right in a normal adoptive situation—"I have changed my mind, I have seen the child"—it should be different in the example I have given from the normal adoptive situation?

Mr A: Yes I am because of the nature of the pre-process agreement, which is a very specific agreement for both parties to undertake a process effectively together. They have shared the process to the point where the child has been born and I believe there should be some way of that being adjudicated in a legal sense.

The Hon. DAVID CLARKE: Except that the only thing that the proposed adoptive person or persons have shared with the birth mother, because there is no genetic relationship, is the desire to have the child that is born. That is the same as a woman having a child and saying she is going to give it up for adoption and somebody is hoping to be the beneficiary of receiving that child. There is no emotional or genetic relationship between the couple—or it could be an individual—who have this contract. Are you saying that even in that

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situation you think it could be the case that it should be enforced against the birth mother if she changes her mind?

Mr A: I am saying that subject to the Supreme Court, if that is the appropriate adjudicating authority, if the court so directs I think that would be not unreasonable.

The Hon. DAVID CLARKE: Do you not think that would be very unreasonable to the birth mother? A mother who is going to put her child up for adoption is entitled to change her mind and say, "This is my child, I have seen the child." Are you saying that even then she should not be able to keep the child when the person who is going to receive the child under the contract has no genetic relationship to the child being born? Even in those situations you would consider it reasonable that the birth mother be required under the law to give up that child?

Mr A: I am saying that I think there is a subtle but important difference between the two scenarios. In the adoption scenario with a woman saying she is having a child and she is going to give it to her friend or to a person who has agreed they want a child and she wants to give it to them, it is not necessarily the case that she got pregnant specifically for the purpose of giving the child to the other party. I am very clear about the pre-process situation of investigation, counselling and legal advice—let us call it working up that needs to take place before a surrogacy agreement can start delivering the goods, if you like. That shows such a difference of intent to get to a result together as opposed to a woman saying, "I want to give up the child I am having to a third party." I see it as being quite different.

The Hon. DAVID CLARKE: Really? One final question: as you know, altruistic surrogacy is not illegal but commercial surrogacy is. Do you believe it should remain illegal?

Mr A: Absolutely.

Mrs A: Absolutely. There may need to be in certain circumstances an ability for people to be not left out of pocket. For example, in our situation [REDACTED] paid for all her antenatal obstetric care and that is because we did not want to run foul of any problems in the legal part of it. We were just lucky that financially it was not a significant issue, but I can imagine that if other people were not flush with funds it is quite an expensive thing to be pregnant and have the loss of income and the cost of antenatal care. I think it would be not inappropriate to have some facility for the surrogate mother to be not left out of pocket.

The Hon. JOHN AJAKA: Reimbursement of out-of-pocket expenses, to use that term.

Mrs A: Exactly. We were just lucky in our situation that we did not have to worry about that.

The Hon. GREG DONNELLY: I refer to one of the questions we provided on notice, No.7, and in your submission on page 2 you mention several options were presented to you by your legal advisers in relation to achieving legal recognition of [REDACTED] as your child. I think you have touched on part of that but would you mind going through what was presented to you as the options available to you?

Mrs A: We were given two options: one was to use parenting orders from the Family Court to say that we could make those legal decisions for our child [REDACTED] and obviously then [REDACTED]. I suppose we chose to do adoption for a variety of reasons. I think it gave us absolute clarity that we were now the parents as opposed to just orders to say that we could act like a parent making those legal decisions. [REDACTED] and [REDACTED] are our children and we want them to be recognised legally as our children and we would also like the privilege of being recognised legally as being their parents. For a variety of reasons, largely emotional, at least from my point of view, the thought of having more than just an auditor say yes you can act like a parent with regard to these two children—we have the absolute recognition that our children are the same as all other children. They have a mum and dad and we are legally recognised as those people.

Mr A: I think there may have been a subset of other opportunities under the Federal family law legislation but the primary one was the parenting orders. One of the other reasons we sought not to go down that path was that at the time we were told there was a feeling that the Family Court was not inclined to give parenting orders to just anybody who applied for them, especially in our circumstances. Again, we were balancing the risks of not getting some kind of recognition and felt that the balance of risks steered us towards the adoption as well as the clarity and emotional security aspects.

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The Hon. AMANDA FAZIO: I have been thinking about your earlier comment when you said that you thought that DOCS had a bit of a problem with surrogacy and that they had tried to point you in the direction of getting parental orders from the Family Court rather than proceeding through the adoption process. It got me thinking about whether we actually need to take a different approach. I think you were here when one of the people from the Law Society used the term "gestational mother" rather than the term "birth mother". Do you think we should be taking a completely different tack and rather than trying to fit children born of surrogacy into the adoption process we should have some other form of parental assignment than adoption? Do you think that is something this Committee should look at and recommend so that we recognise the fact that surrogacy exists and that with a whole lot of improvements in artificial reproductive technology there are probably more opportunities for people to want to use surrogacy, and to come up with some system away from either the Family Court and parental orders or DOCS and the adoption system and have a way in which the parental rights of children born through surrogacy can be legally assigned and dealt with?

Mrs A: I think surrogacy is quite unique to adoption. I think my husband quite nicely articulated it in saying that we start the process before the child is conceived, before you even get close to a conception, whether through IVF or other means. The process I went through with [REDACTED] being the gestational mother, for want of a better term, started long before we even came round to seeking approval and we worked through that together. We did a lot of those things even though we could not put it in writing, such as counselling and a legal framework, and we clearly articulated it. We were required to clearly articulate verbally that this was our intention. So it was very clear from the outset that this was the intention of what was going to happen if a child was to be born and it is very different to an adoption process.

Mr A: Can I say that I heard what the Law Society folk said about the Australian Capital Territory legislation? They think that it is a good starting point for framing some legislation and I would agree, certainly with the intention of the Australian Capital Territory legislation, which, as [REDACTED] says, moves away from adoption as being the kind of vehicle, and that is not a bad thing.

The difficulty, as you are obviously aware, is that there are so many different scenarios for surrogacy. We really are the lucky ones. In a sense, we were lucky when the Adoption Act was changed in 2000 because it more clearly made the path that we chose simple because of the relationship between the adoptive parents and the parent giving up the child. That relationship was in legislation and said, Yes, they can make an arrangement to do that, but with all the complexities that there are for surrogates and commissioning parents and surrogate parents and the like, you just have to really be careful.

It is easy for us. We are the kind of classic example. It is easy for you to say, "This is the way it should be and everyone who is like this, just go through the gate", but there are so many others that you just need to try to bring it all together for everybody.

The Hon. AMANDA FAZIO: Because I was also thinking of your comment, Mrs A, that the surrogacy process versus adoption is so different because you have all the upfront counselling, legal advice and all the rest of it, and also in adoption, the relinquishing or birth mother does not have a baby just to give it up to a specific couple. If you put your child up for adoption—

Mr A: That is why we are different in our case, [REDACTED]

[REDACTED] The director general does not have the legislative power to intervene and say, "I am going to take ownership of the child and I will decide who the child goes to."

Mrs A: If it were my best friend that was my gestational mother, it would be much harder from an adoption point of view.

Mr A: The director general could say, "I am not going to accept that private arrangement."

Mrs A: I am going to intervene and say, "I am not happy."

The Hon. AMANDA FAZIO: Could say, "Yes, I've got a couple who have been waiting 10 years on the list."

Mr A: And that is whom the child is going to, yes, whereas in our case the director general does not have that right.

IN CAMERA

The Hon. AMANDA FAZIO: So then perhaps it would be better if we were looking at a system other than adoption to deal with surrogacy?

Mr A: I think so, for everyone's sake, yes. As I say, we are an easy case and a classic.

Mrs A: Certainly, although [REDACTED] is not here and she cannot attest to this, she would like to not have the legal responsibility of another child and she has said that to me on numerous occasions. [REDACTED]. That's all I want to be. That was my only intention from the time that child was born. That was all I wanted out of that relationship." So that gestational parent or mother may or may not want the legal responsibility of either.

The Hon. AMANDA FAZIO: [REDACTED]?

Mr A: We should have brought her along.

CHAIR: I would like to thank you to for coming here. A lot of what you have said here and in your submission is very good and very important evidence. Recognising the need for confidentiality—and this is totally up to you—the secretariat could pick some phrases from your opening statement that you also put in your submission and send them back to you. This is because we cannot use and refer to your confidential information in our report, although it influences what we have heard. However, with your approval, the Committee will again reconsider a certain components that the secretariat have picked and sent to you. Saying that we could de-identify your evidence and submission sounds nice but would be impossible because you have quite rightfully outlined your personal circumstances throughout the document. We will do what I have outlined with the agreement of the Committee.

The Hon. JOHN AJAKA: Yes, and we will still try to de-identify you as X or Y.

CHAIR: Yes, we will remove all the identifying information.

Mrs A: Our friends will know but fortunately the wider, general public might not.

CHAIR: It will be healthier if it stayed that way.

Mr A: Yes, I agree.

The Hon. JOHN AJAKA: You will have the final say, which will make us feel more comfortable.

Mr A: That sounds fine.

CHAIR: Thank you very much for coming.

(The witnesses withdrew)

(Conclusion of evidence in camera)

(Public hearing resumed)