UNCORRECTED

REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO LEGISLATION ON ALTRUISTIC SURROGACY IN NEW SOUTH WALES

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At Sydney on Thursday 19 March 2009

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The Committee met at 9.00 a.m.

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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

CHAIR: Welcome to the fourth public hearing of the Standing Committee on Law and Justice's inquiry into legislation on altruistic surrogacy in New South Wales. We will be hearing evidence from a number of individuals today. Before we commence I have to make some comments. We will be taking some teleconference evidence later in the day. Broadcasting guidelines are at the back of the room if you wish to read them. The media who use this place understand what they say. Witnesses, members and their staff are advised that any messages should be delivered through the attendants or the Committee clerks. I also advise that under the standing orders of the Legislative Council any documents presented to the Committee that have not yet been tabled in Parliament may not, except with the permission of the Committee, be disclosed or published by any member of such Committee or any other person.

The Committee hearing is not intended to provide a forum for people to make adverse reflections about others. The protection afforded to Committee witnesses under parliamentary privilege should not be abused during these hearings. I therefore request that witnesses avoid the mention of individuals unless it is absolutely essential to address the terms of reference. Mobile phones should be turned off because they interfere with recording mechanisms.

ANITA STUHMCKE, Associate Professor, Faculty of Law, University of Technology, affirmed and examined:

CHAIR: In what capacity are you appearing before the Committee, as an individual or representing an organisation?

Professor STUHMCKE: As an individual.

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

Professor STUHMCKE: Yes.

CHAIR: If you should consider at any stage that any evidence you wish to give or documents you may wish to tender should be heard or seen only by the Committee, please indicate that and the Committee will consider your request.

Professor STUHMCKE: Thank you.

CHAIR: If you take any questions on notice, we would appreciate them back by Friday 3 April, but the secretariat will be contacting you about that issue. Would you like to start by making a short statement?

Professor STUHMCKE: Yes. Firstly, I would like to thank the Committee for providing me with time to address what I believe is a very important area of family creation. At the outset, I would like to note that I supplied a written submission, and that submission is co-authored by me and Professor Jenni Millbank. While we have a meeting of like minds on many issues that arose from this inquiry, I emphasise the opinions I will be expressing today are my own and cannot be inferred to be Professor Millbank's. I note that Professor Millbank has already appeared before this Committee.

Before I start, I would like to note four brief matters. Firstly, my starting premise is that surrogacy is a practice that is slowly growing and is also slowly gaining acceptance in Australia. This is due to the fact that I am sure you are all aware of, the declining number of children available for adoption. There is now the availability of integrated surrogacy with other forms of assisted reproductive technology. There is the availability of information on the Internet and the availability of the practice overseas. All these contribute to growth of knowledge amongst Australians and the growth in the practice being undertaken. While the extent of the practice is not known, I believe that Professor Millbank has forwarded to you some recent research that was undertaken during a media count, and on that count there were 40 media reports of people in the past two years engaged in surrogacy. Between us, Professor Millbank and I received about 80 inquiries from members of the public who were considering engaging in surrogacy over the past 18 months, while a South Australian lawyer has reported 12 inquiries being made to them in the past year.

Secondly, it seems to me that we as lawyers—I am a lawyer—would tend to rush in to fill any gaps in legislation. Indeed, it seems, from looking at other jurisdictions, that this is an area where prescriptive legislation does not work. For example, the recent inquiry in Queensland, which has similar terms of reference to those that are used here, to reform altruistic surrogacy, is a reflection of the fact that that is the type of criminalisation of the practice that has existed in Queensland and has not worked. Indeed, it would seem that the small amount of prosecutions engaged in in Queensland as a result of those laws mirrors the fact that this is not an area where that sort prescriptive legislation has great effect. I think the current lack of legislative regulation in New South Wales with respect to the practice of surrogacy is, while in its present state not perfect, preferable to the legislative models that exist in many other jurisdictions. That said, I think we can learn from some of the recent reforms made in Western Australia and Victoria which, while they are not perfect, at least move towards a model that recognises parentage transfer, which is one of those areas where I think there is a need for legislation in New South Wales to clarify this.

The third point I would like to make is that the terms of reference of this inquiry seem to assume a very clear distinction between altruistic and commercial surrogacy. I am not so convinced that the line shines so brightly and it is one of those areas that I would like to caution the Committee about how that is dealt with. It might be something we can talk about a bit later. Fourthly, I think surrogacy is a unique form of family creation. As such, the parallels that can be drawn between it and other forms of family creation must be applied with care. For example, I think it is very tempting to equate the experience of a surrogate mother with that of a woman

who has relinquished her child for adoption. It is tempting because we see those as very similar. However, I think they are quite different. I think the empirical studies that have been done on surrogate women overseas, in the United Kingdom and the United States of America, illustrate the fact that the experience of the surrogate mother is quite different from that of a mother who relinquishes her child for adoption. Given those four general points, I would like to make myself available for any questions you have.

The Hon. DAVID CLARKE: Professor Stuhmcke, you said you want to expand on some differences or matters you want to draw out regarding altruistic surrogacy and commercial surrogacy. Would you like to tell us what you have in mind there?

Professor STUHMCKE: Yes, thank you. I think because of the label altruistic surrogacy we start from the premise that somehow altruism equates with everything that is good, that if a person is performing a service and it is labelled an altruistic service, it is done for love. That equates with the reasoning that it is positive. If we label something as commercial, we tend to equate that with motivations that might be for money, and when we look at that and try to mix money with family we have an emotional response to that which is negative. I think those two labels, to start with, are not helpful. Beyond that, if we go somewhat deeper into that division, we can find sensational examples where altruistic surrogacy arrangements have not worked.

Similarly, we can look at commercial surrogacy arrangements and find examples where they have not worked or where they have worked very well. The other difficulty I think is that there is no bright line between those two concepts. So, is altruism something that involves no payment of money? If it is, I think we have a very limited pool of people who we can allow to perform these types of arrangements, and generally we are better restricting it to family and friends. We know from looking at the practice that that is not what happens. Even when you have family and friends who embark on these sorts of arrangements there is generally some sort of payment involved—payment for loss of work, for medical expenses, whatever it might be. Then, to me, the problem becomes if we start to recognise there is some form of payment involved, where does the line start and stop? The United Kingdom has sanctioned payments for altruistic surrogacy, I have read, to £10,000 to £15,000.

CHAIR: Is that cash amount in the legislation?

Professor STUHMCKE: I do not believe so but I would have to check. So, what we tend to think when we think about commercial surrogacy is again the label of the commercial surrogacy industry, the type of thing we have seen in California and now in the newspapers and on television being seen in India. I do not believe that is where Australia will end up. I do not think, from my experience of reading where inquiries are at, that we are moving to that path. That is one extreme. However, if we look at altruism, there is a need to recognise that if we are going to pay expenses, are we then talking about expenses for things like pain and suffering? Are we going to incorporate a payment to a woman for something whereby we recognise that childbirth and what she is going through is a difficult process? In that case, are those the sorts of payments that the United Kingdom is allowing some recognition for? Once we start to label things in this way we have difficulties if we start to move down the path of then trying to dissect what those labels mean.

One of the difficulties I think in the Assisted Reproduction Technology Act, which has not yet come into force in New South Wales, is that idea of preventing something that is for fee or reward. I do not quite understand what that means, and of course it will be up to a court to determine that. But the difficulty in equating commercial with fee or reward is that we seem to think there is a shared understanding of what that means and I am not so certain that is the case. For me, the problem ends up being—unfortunately it was a committee with that term of reference—with labelling something altruistic, perhaps one steps away from that to recognise the fact that that line is not so bright and perhaps not to try to define what that means. The difficulty is if you start to exclude people on the basis that they have made some form of payment, exclude them from a regime whereby a child is born and the child will be able perhaps to access a transfer of parentage regime, if you deny that child access to that regime because there has been a payment, I do not see the logic in doing that because, to me, it is based on the premise that is not particularly well thought through in terms of that division between altruistic and commercial. For me, that is a difficulty in this area.

The Hon. DAVID CLARKE: Taking into account what you have said, in a practical way what would you be suggesting? Say you were given the power to determine the laws, what would you recommend with regard to that area?

Professor STUHMCKE: I think I would go for a model like the Victorian amendments recently introduced. I would recommend a transfer regime for parentage based upon the twin principles of consent and the best interests of the child.

The Hon. DAVID CLARKE: I am sorry, we might be talking about different things. I am talking about the question of altruistic versus commercial. You are pointing out the difficulties, and I see where you are coming from there. It is not so easy. It is in that area I am specifically looking.

Professor STUHMCKE: My temptation would be in a sense sidestepping the issue. I do not think it is helpful to set up a regulatory regime that attempts to distinguish between those two things. That is why I refer back to the Victorian Act. The idea of determining whether or not a parentage transfer should take place would seem to me to rest more easily on both concepts of consent by parties and the best interests of the child, and the best interest test might capture some of those aspects that seem to trouble the community in this area.

The Hon. DAVID CLARKE: So, would you therefore allow for the legalisation of commercial arrangements?

Professor STUHMCKE: Can I ask you a question in relation to that? What do you mean by commercial arrangements? That is the difficult part.

The Hon. DAVID CLARKE: Well, those arrangements that are presently banned.

Professor STUHMCKE: I am sorry to sound difficult, I do not mean to, but that is the sticking point. We have not yet had a legal issue in Australia that has tested what that concept of field reward means. What is that concept of payment? When is payment unacceptable?

The Hon. GREG DONNELLY: Take the example in India. The other day I was reading on a Google search about the Patel Corporation, which is the major corporation in India that operates commercial surrogacy. It focused on a town or village in India where it has its main facility, which operates as dormitories. It has about 20 young women between the ages of about 18 and 35. These women are in dormitories. Basically, they carry the child and give birth to the child. The children they are carrying have parents from the United States, United Kingdom and Western Europe. Through the Patel corporation I think the transaction to have a surrogate carry the child for the commissioning parents and for the ultimate provision of that live child back to the commissioning parents—I know it sounds very crude—is about $US22,000. The young women carrying the children receive something like, I will have to check the figure, $US2,200. So, they are paid $US2,200 to carry the child. The arrangement is that they sign on to carry the child and hand the child over. That is what I think the Hon. David Clarke is talking about when he talks about a commercial surrogacy arrangement—so, very clear and very explicit.

Professor STUHMCKE: I am not aware of that particular circumstance you are referring to. So I am just taking that as read.

The Hon. GREG DONNELLY: You can Google it yourself. It is the Patel corporation.

Professor STUHMCKE: Sure. I think this is what I was trying to say before: I do not believe that the current situation in Australia is going to be such that we will have, and this is that label I used, a commercial surrogacy industry. I say that because, for example, if you look at the NHMRC guidelines, the principles by which the clinics operate in Australia prevent, and this is a difficult thing, that concept of commercial surrogacy. They will not allow at that level the clinics to engage in it. So, by all means, while I am not denying the fact that legislation could be passed here to facilitate the creation of a commercial industry, I do not believe that that is somewhere where Australia, in terms of our social mores and norms at this point in time, will end up, and also because of the fact that there is through globalisation the ability for people to access those services outside Australia.

The Hon. DAVID CLARKE: Okay, let us take this example. A woman advertises on the Internet, "I am available to be a surrogate mother for the sum of $65,000, $100,000." Should that be banned or should it not be?

Professor STUHMCKE: In New South Wales?

The Hon. DAVID CLARKE: Yes?

Professor STUHMCKE: So, a New South Wales resident advertises that she is available for $65,000? In my opinion, if you set the regime up in such a way that you have steps by which to catch people who we might not think should engage in these arrangements—for example, counselling would be one of the concepts that I would encourage—if you then have the test at the end, which talks about the best interests of the child and consent, I personally do not have an issue with that. Now, that might sound quite surprising. Just to explain where I am coming from with this, I have been researching legal issues around surrogacy for over 20 years. For almost 18 of those 20 years I have been very uncertain myself about the practice, very unclear about the outcomes.

However, in the last three or four years my perspective I think has started to shift. I think the shift has come because I have increasingly come to know people who have engaged themselves in commercial surrogacy through other reasons, through global avenues; I have increasingly known a lot of people who are themselves infertile and who have no other options and for whom it is quite heartbreaking. I think those twin concepts are very personal choices people make. I guess from that sense it is nothing necessarily to do with me being a law professor, but from that perspective I think that if those people have been counselled, if that person is advertising a service that she sees as valuable, I do not really see why she should be stopped from doing that. The figure you have pulled out of the air, $65,000, or whatever it might be—

The Hon. DAVID CLARKE: Well, I pulled the figure out that was well above what would be regarded as general expenses.

Professor STUHMCKE: But again, and this is why I guess coming back to try to explain my position just a little more, this is the difficulty. Let us go with that figure of $65,000. If a woman is saying that for her that is going to cover her medical expenses, it is going to cover her time off work, it is going to cover the pain, it is going to cover the disfigurement she might have—

The Hon. DAVID CLARKE: Or $200,000? Would the principle be the same for you?

Professor STUHMCKE: Again.

The Hon. DAVID CLARKE: All right.

Professor STUHMCKE: It is difficult. I guess to reinforce that point: that is the difficult thing about the line that you would try to draw once you start to engage in that type of debate. I think that is very hard.

Ms SYLVIA HALE: In some ways you can draw a parallel with prostitution in that many people might consider prostitution an undesirable exercise but for women, historically it has often been a means of maintaining themselves. What I think people might consider deplorable is that if women are forced into, say, prostitution or into carrying a child perhaps unwillingly because their economic circumstances oblige them to go down that track. Do you think there is a role for the Parliament to say that women should not be put into a an unwilling position where they can be exploited?

Professor STUHMCKE: Yes, I do. The difficult thing I think in practice, and this encompasses all those questions, is regulating individuals' private reproductive capacities and autonomy. There is a limit to which an announcement by Parliament will have an impact in terms of people's private decision making. Now that said, there is, of course, an enormity role; there is a standard-setting role. The analogy I guess between prostitution and surrogacy, while I would agree in terms of the ability of women to have a choice in relation to what they do with their body, I think a lot of the research into women who are surrogates and in areas where there are commercial surrogates in particular—this is why I would have liked to have checked some of the research in relation to India—

The Hon. GREG DONNELLY: I am happy to Google it for you, if you like.

Professor STUHMCKE: It seems to show that women who engage in these types of activity, who performed a surrogate role, tend to come from middle classes. They tend to be well informed and they tend to make the decision even if money is involved not simply for that reason. There are a number of other issues. So, I guess the thing is if the Parliament was going to pass legislation aimed at protecting women, I would encourage that type of research to be considered because I am not quite sure that the women it would target are going to be

the women who will be surrogates in New South Wales. How we would know that, I do not know. I agree with that concept of setting an enormity role to try to protect people, but the extent to which protection infringes upon reproductive choice in our liberal democratic society is quite hard.

Ms SYLVIA HALE: One of the features of assisted reproductive technologies is how expensive they have been?

Professor STUHMCKE: Yes.

Ms SYLVIA HALE: Therefore they exclude so many people. Coming here this morning I was listening to the news. There are now two million people unemployed in the United Kingdom. Clearly, we are going to see a situation that for a lot of people things will get a lot worse. Perhaps that tendency to go beyond the narrow group of women who have participated in surrogacy will be broken down and we may have a situation where many more women feel compelled to participate in order to provide for themselves, their families and whatever. Should you recognise that situation and, therefore, try to provide or source possibly alternative sources of income or make sure that the experience with them is as health promoting as possible?

Professor STUHMCKE: The difficulty with surrogacy, taking a feminist perspective, for example, on this, is that there are two very clear arguments. The one is that surrogacy is exploitation of women; that assisted reproductive technologies are exploitation of women. The other is very clear:, women have the right to exercise autonomy and choice over their reproductive capacity, and that is exactly right. The presenting scenario sits right in the middle of those; how do we deal with it? My starting point would be that paternalistic approach is not appropriate. I think I sit on the side of saying that if we can safeguard individuals through a health aspect, through things like counselling, through ensuring, in so far as we can, that there is a system that supports informed decision making, that is the role that could be played. I do not think that depriving people of a choice as to how they exercise their reproductive capacity and who they do that for is a role that the States in this area has been able to play successfully. It has not worked. So, I think my preference would be promoting the health of women, promoting the choice making, giving the structures to inform their decision-making processes rather than taking that right away from them.

The Hon. GREG DONNELLY: I might reserve some of my question time because I have just rung my office to see if they could bring down the material on the Patel organisation so that we could have a more detailed discussion about it. In regard to the Victorian legislation to which you referred, has that actually become law in that State?

Professor STUHMCKE: Yes. I believe it was in December.

The Hon. GREG DONNELLY: So we are dealing with a piece of legislation that is operating in one of the States of the Commonwealth. I do not actually have a copy of it or even the bill itself, but one witness yesterday, if my memory serves me correctly, raised the issue that there are certain criteria, shall we say, in that legislation, one of which I understand includes criminal record or criminal behaviour or criminal acts, which—I could be wrong—I understood could prevent certain individuals entering into a surrogate arrangement. I was not quite sure whether that was in respect to the actual commissioning individual or the one providing surrogacy, but it is a condition within the legislation. It is setting a requirement that cannot be breached with respect to surrogacy and it relates to criminal record. Are you familiar with that provision?

Professor STUHMCKE: No, but I am familiar with similar—I mean in terms of ART generally.

The Hon. GREG DONNELLY: Yes.

Professor STUHMCKE: So your question is?

The Hon. GREG DONNELLY: I use that, if it is correct, as a very real example because one could imagine that, through a piece of surrogacy legislation, one could create other conditions that go to the issue of how it should be regulated and, if I understand it correctly, the thrust of your submission essentially is that we have got it right in New South Wales as a light touch regime, if I could use that phrase, save and except perhaps for the need to look at the issue of consent and the child's best interests as part of the parenting transfer issue. If we could get that as right as possible, I think your submission is that, while not perfect, it is probably as good as we could get. Is that essentially a summary of your position?

Professor STUHMCKE: Yes, in brief.

The Hon. GREG DONNELLY: Is it your submission that with respect to the fee and reward provision, which I think is in section 43 of the ART legislation in New South Wales, you do not understand what that means?

Professor STUHMCKE: I could make a number of arguments as to what that means. From my perspective there are a number of possible interpretations, yes.

The Hon. GREG DONNELLY: If that term were tightened up, would that assist in removing your concern about this artificiality between the notions of commercial and altruistic?

Professor STUHMCKE: Yes, and that goes back to the notion that the use of that language—fee or reward—is to me too vague. If you wished to take the route of trying to make that line bright then I think those phrases need some further clarification because as they stand I think they are too vague.

The Hon. GREG DONNELLY: If the term was made very clear, and let us assume we gave you the job of drafting the definition of the remuneration or payment or whatever term we came up with, and let us assume also that we agreed on a nominal amount of money that would go into the legislation to make it absolutely clear, you would not have a problem with the dichotomy between commercial and altruistic?

Professor STUHMCKE: That is right.

The Hon. GREG DONNELLY: That is the key thing.

Professor STUHMCKE: That is right. Could I just add one point though?

The Hon. GREG DONNELLY: I just thought there might be other issues, but that is the key thing.

Professor STUHMCKE: That is right, but could I just add one point. I think the difficulty that underlies that is that, while that would clarify that issue of having a clear distinction, I am not convinced—and I do not think your terms of reference necessarily allow you to do this—that the assumption upon which that is based, the assumption upon which we demonise one form of commercial surrogacy as opposed to allowing another, has been well thought through. However, given the fact that it seems to tie in with the community response, which is to say we should not mix cash and families—it ties in on that level—I can understand and appreciate why, as a legislature, that would be something that would be a temptation to do. I am just not convinced that the evidence bears out that it is necessarily something that is against the interests of the individuals involved or the child, and that seems to be coming from research from the United States. I can appreciate that.

The Hon. GREG DONNELLY: In the end, though, that is really a philosophical debate about personal autonomy, is it not?

Professor STUHMCKE: Well, philosophical, and I think it is based now on empirical evidence. However, surrogacy, particularly commercial surrogacy, is relatively recent. We are only talking about something that has happened in the last 30 years, so the information we are going to have is of course going to just be emerging.

The Hon. GREG DONNELLY: Surely, that being the case, it must be the position of the legislature to move cautiously?

Professor STUHMCKE: Yes, exactly.

The Hon. GREG DONNELLY: Very cautiously.

Professor STUHMCKE: Exactly, and not be too prescriptive, yes.

The Hon. GREG DONNELLY: Well, no, the two do not follow. I do not accept what you are saying. You have said that we need to move cautiously, but you say what follows from that is that we should not be prescriptive. Why do you say that?

Professor STUHMCKE: I am saying that in the framework of two waves of surrogacy regulation. To me the first wave of surrogacy regulation, which was that that happens in other States, was prescriptive, the criminalisation of an activity that was based on a cautious approach. To me the caution that was required was not necessarily matched by the prescriptive approach that the legislature took. So when I am talking about cautiousness and prescriptiveness I am talking about that type of first-wave approach to surrogacy. I think that caution does not necessarily mean that we have to be prescriptive in relation to people's regulated choices and this is where New South Wales, over the last few decades, has probably allowed surrogacy in a way that maybe was not intended, but we can see that the results have not been terrible outcomes. There have not been awful things that have happened. That is where I am coming from in terms of the use of caution.

CHAIR: The Hon. John Ajaka.

The Hon. GREG DONNELLY: I have one more question.

CHAIR: No, I am sorry, we have seven minutes left.

The Hon. JOHN AJAKA: I am looking at a situation of either leaving the status quo exactly as it is, going to the absolute other extreme and saying, "Let's create the New South Wales Surrogacy Act of 2009" or, as the Hon. Greg Donnelly says, taking what exists and maybe making a few adjustments here and there. Clearly the child's interests are paramount. You have said New South Wales has been an interesting 20 or 30-year concept and we have not had any terrible situations. I am not aware of a single dreadful case where one could say, "Look, it's a disaster". But there are issues of parenting, passports, birth certificates—there are issues that clearly are not in the best interests of the child as far as I can see. If you had the choice, would you create a brand new Act that looked at what was workable, looked at the guidelines of the various IVF clinics and looked at the ACT Act, or would you leave it as it is and make a few adjustments? You are the associate professor and the person I wanted to ask.

Professor STUHMCKE: And isn't that a terrible question to ask a lawyer because my immediate response is: Let's have a nice shiny bright new Act.

The Hon. GREG DONNELLY: The bigger the Act, the bigger the fee.

Professor STUHMCKE: That is my immediate response. However, I think the better approach for New South Wales would be to create parentage transfer, a legislative regime specific to surrogacy. Whether that is under a new Act I do not think has to be the case, but I think that that is necessary.

The Hon. JOHN AJAKA: So using an existing Act, such as the equality of children's status Act, et cetera?

Professor STUHMCKE: It can be done that way and, following on from that, the idea of a genetic register for surrogacy I think is going to be important. The idea of that is somewhere embedded in the Assisted Reproductive Technology Act. It is there. I think there is a need for that and again that does not have to be done in a shiny bright new piece of legislation; that might be something that is done in terms of looking at ART, but I think the issue for children is genetics, the idea of transfer of parentage and also the birth certificate. Again it does not have to be done in new legislation.

The Hon. JOHN AJAKA: Births, deaths and marriages.

Professor STUHMCKE: That is right, so that would be my preference.

The Hon. JOHN AJAKA: A clear fear is that we suddenly bring in these amendments and there are going to be thousands and thousands of people trying to make money out of this, but the reality seems to be that in this State the number of births via surrogacy is very small. Evidence was given that, through Sydney IVF, there have only been 15 births over the last 10 years, which came as a surprise to me. Looking at the interests of the children as paramount, simply bringing in those amendments seems to be the short-term answer to solve the immediate problem, looking at the longer term later on?

Professor STUHMCKE: Yes, I would absolutely agree.

The Hon. AMANDA FAZIO: I would like your opinion on an issue that was raised in the submission of the Law Society, which is the option of removing the birth mother's parental responsibility rather than creating a presumption of parenting in favour of the intending parents. What do you think of that proposition?

Professor STUHMCKE: I do not agree with that proposition. I think that the transfer of parentage must come after birth. We must leave the rights of the birth mother intact. This is where I would agree with the ACT, Western Australia and Victoria in terms of having the window period whereby the transfer of parentage takes place based on the consent of the partners after birth. The reason for that is I think that the wishes of the birth mother, whether or not she is genetically related to the child, are paramount.

The Hon. AMANDA FAZIO: Could you explain the effect of the recent amendment to the Commonwealth Family Law Act that inserted a new section 60HB and how this relates to any transferral of parenting scheme that we might introduce in New South Wales?

Professor STUHMCKE: Yes. If a State or Territory effects a transfer of parentage, that is mirrored in the Family Law Act and other pieces of Federal law.

The Hon. AMANDA FAZIO: In relation to parental responsibility—and other members may have broached this issue earlier—do you think there should be any distinction between cases in which the commissioning or intending parents have provided the reproductive material versus a case where the material has no connection to either the surrogate or intending parents?

Professor STUHMCKE: No. I think once we start to delve into differences in surrogacy between what is called gestation or more traditional surrogacy we will end up not serving the interests of the children who are born of those arrangements. I would emphasise the need for the State to have a role to play in the preservation and determination of genetic identity of an individual, but I do not think it has a role to play in terms of trying to tease out differences between surrogacy arrangements.

The Hon. AMANDA FAZIO: That leads to question 11, which I think we sent you as an indicative question about genetic relationships. In your submission you disagreed with the law in the ACT that restricts the transfer of legal status to non-genetically connected surrogates and genetically restricted commissioning parents. Could you elaborate a little on that?

Professor STUHMCKE: I think my approach to that is two-fold. The first is the idea that it is the carers of the children that we should be focusing on. The genetics of the child are something which, while they have a place to play in terms of the medical history and health identity of that individual, should not predetermine in whose care that child would be best looked after. The second thing is that if you start to do this, if as the ACT has done you start to distinguish between genetics and non-genetics, again you drive people out of the system. There will be people who will engage in various forms of reproduction and will not therefore take advantage of the system that the State might set up to transfer parentage. It drives people away from assistance that the State can offer and I think, from that perspective, it means it can only ever be detrimental to the child. I do not think having those types of restrictions based on genetics is necessary to be helpful.

Ms SYLVIA HALE: Following on from the Hon. John Ajaka's question, in your submission you talk about the increasing disparity between jurisdictions. If we were to take, for want of a better word, the piecemeal approach of having a genetic register, parentage transfer, and a birth certificate would that be an obstacle to or a promotion of consistency amongst the jurisdictions?

Professor STUHMCKE: It seems to me that at this point in time it would be a promotion of consistency. I say that given the background of the Australian Capital Territory, Victoria and Western Australia and also given the outcomes of the inquiries in Queensland, South Australia and Tasmania. They seem to be the areas that are now issues of commonality for reform. So I think it will promote consistency. To do nothing would probably not move New South Wales in the direction that the other States are going.

CHAIR: Thank you very much for coming this morning and for the work you have put into this. I am sure you will be getting some questions on notice. The secretariat will be in contact with you.

Professor STUHMCKE: Thank you very much.

(The witness withdrew)

GERALD PATRICK GLEESON, Associate Professor, Catholic Institute of Sydney, sworn and examined:

CHAIR: Welcome and thank you for coming to talk to us today. This is the fourth public hearing of the Standing Committee on Law and Justice inquiry into legislation on altruistic surrogacy in New South Wales. I will not go through all of the formal details. There is information about broadcasting guidelines and delivery of messages and documents. If you want to give the Committee any material the secretariat will take care of that. Committee hearings are not intended to provide a forum for people to make adverse reflections about others. The protection afforded to Committee witnesses under parliamentary privilege should not be abused during these hearings so I therefore request witnesses avoid mention of other individuals unless it is absolutely essential to address the terms of reference. If you have a mobile phone it would be preferable if you turned it off as it interferes with our recording mechanisms. Professor Gleeson, what is your occupation?

Professor GLEESON: I am a Catholic priest and also a professor of philosophy.

CHAIR: In what capacity are you appearing before the Committee—as an individual or as a representative of an organisation?

Professor GLEESON: I am appearing as an individual but I need to make one qualification to that. I am currently a member of the Australian Health Ethics Committee, which as you probably know is a principal committee of the National Health and Medical Research Council. I am here in a private capacity and not as a member of either of those bodies.

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

Professor GLEESON: Yes, I am.

CHAIR: If you consider at any stage that certain evidence you may 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 you take questions on notice from the Committee—I have to confess that we are quite good at giving extra questions—would you please forward the answers to the secretariat by Friday 3 April? Would you like to start by making a statement?

Professor GLEESON: Thank you for this opportunity to speak to this issue today. I am not a lawyer, I am not a doctor and I am not a professor of psychology as it says on the card here. My field is philosophy. I am thinking about this issue in terms of the relationship between ethics and the law. It emerged in listening to the testimony of the previous witness and looking at some of the transcripts that one of the big issues, which I think is a dilemma for this Committee and the Parliament, is what approach should Parliament take to legislation in an area where there is very serious division in the community about the ethics of this issue. My interest is in the relationship between ethics and morality and what is the role of the law in these kinds of questions. That means of course reflecting on the issue of surrogacy itself but then on the dilemma that you face, and which has been expressed, as to whether there is any legal framework that can actually help the situation or whether we would be better to say very little about it in legal terms. That is the perspective I would like to take. I am happy to speak further about that or would you prefer to question me at this point?

CHAIR: That is fine. We will start questioning.

Ms SYLVIA HALE: Professor Gleeson, I know you were listening to the evidence of the previous witness. What is your response to the suggestion that we should advocate reforms that attend to the issues of genetic register, parentage transfer and birth certificate and not go much beyond that? It seems to me that that approach might be significant with your point 3(a), which says, "At present New South Wales law says nothing about surrogacy. This sends an ambiguous message and does not regulate abuses, but at least it does not encourage surrogacy or suggest it is ethically unproblematic." What is your reaction to that previous evidence?

Professor GLEESON: I think that evidence was significant. The previous speaker also added to her perspective the thought that the law should not be paternalistic and that in a sense the law should step back from governing people's reproductive choices. I take a slightly different view, namely that the law has an educative role. I mentioned at the start that there is a difference between matters of law and matters of ethics and it would be wrong for the law to seek to regulate all aspects of people's lives. That is not the purpose of the law. The law is to particularly focus on issues of justice along with the protection of rights and so on. But the law does have

an educative role. That is to say, if there is a law saying something is permissible many people simply assume without any further inquiry that it is a good thing to do. I do a lot of work in bioethics and I often encounter doctors who say, "It's legal, therefore I can do it." If I ask the question, "But is it a good thing to be doing?" they say, "Oh, it's legal." Yes, it is legal.

So there is a tendency for many people in the community who perhaps do not think as deeply about things as others and parliamentarians do, to think that whatever the law says settles the ethical question, whereas this is clearly a very difficult ethical issue. With all of the issues of regulation that have been debated it seems to me almost impossible to find a legal solution that is actually going to solve the problem, as it were, because the issue itself is intrinsically fraught with difficulty. It is impossible in a sense for this to work out as a happy-ever-after arrangement. There is going to be suffering and grief for someone, I think, in almost any surrogacy arrangement. The law is not going to solve that problem, so one reason I think it would be better for the law not to explicitly encourage surrogacy is because it would thereby suggest that this is ethically straightforward, and I do not think that is the case.

Ms SYLVIA HALE: We had evidence yesterday that suffering and grief, to use your phrase, does not necessarily accompany surrogacy and that for many surrogate mothers, provided they were empowered to say, "No, I don't want to surrender the child"—if they come to that conclusion after the child is born, or at any stage I suppose—having that ability to control the outcome paradoxically removed from them a lot of the pressures of the situation and thereby eliminated the potential for suffering and grief.

Professor GLEESON: Yes, but I guess if that was to be the case—and that should be the woman's right, of course—what about the commissioning parents? They are not going to be too happy about that. Indeed, I have seen some of the evidence from people involved in surrogacy that they want to take away that right from the mother who gives birth precisely because it cuts across their desires and interests. This is why I suggest there cannot be a happy outcome. There cannot be an outcome in which everyone goes away happy, or at least that would be a very rare outcome. It is far more likely that this practice is going to lead to great difficulties.

Ms SYLVIA HALE: I think the response we had yesterday was that the successful outcome of the process from the perspective of all parties, leaving aside the child for the moment, was that people have access to counselling and at all stages there is informed consent, and intending parents who went into the arrangement were very conscious at the outset, and it was reinforced, that the final decision would rest with the birth mother. You do not think that would allay—there may be disappointment but I am not sure that that transfers into suffering and grief. After all, reproductive technology has a huge lack of success rate, which engenders a lot of unhappiness.

Professor GLEESON: That is right. I imagine in some instances a situation may work out smoothly, but it seems to be unlikely. We have enough current affairs shows describing the anguish on one side or the other to know that it is unlikely that everyone is going to be happy. Therefore, you are trying to set up regulations to shape the way the future is going to turn out, and we do not know how it will turn out. It seems to me the obvious thing to do is act cautiously and not run the risk of causing those terrible outcomes. Think of the issue of genetically modified [GM] food. As far as I know there is not much evidence that GM food is doing any harm to anyone. However, many people think the risk down the track is not worth taking. It seems to me this is a similar situation. Yes, it might work out well but, gee, it is a risk, and it is a risk for the child. We are constantly saying the best interests of the child come first. Are we going to expose a child to those risks?

The Hon. GREG DONNELLY: We had evidence yesterday—you probably would not have had a chance to see it because it would not be up on the website yet—from representatives from the industry, the service providers, specifically Sydney IVF. In their testimony they were helpful in completing the picture about the regulation. Obviously, in the context of New South Wales at the moment—and it is a phrase I have used before—we have pretty much a light touch regime where it is no to commercial surrogacy and that is explicit in a piece of legislation in this State, and in the same piece of legislation surrogacy arrangements are void, unenforceable. But that is not the whole picture because to get the whole picture you need to see clearly the detail of the NHMRC guidelines, the industry code of practice, which I have not seen yet.

CHAIR: We have got it.

The Hon. GREG DONNELLY: The code for the industry itself—we have not seen it.

CHAIR: Yes. I am sorry, it has been sent to us, so we will get you another copy.

The Hon. GREG DONNELLY: Then we have the individual company guidelines. In this State I understand there are two major providers, one of which is Sydney IVF. They have their own internal policy guidelines and prescriptions. It is the totality of all of that which becomes in some sense the regulation, and clearly the voidability and the non-commercial nature is in the law. The other is in guidelines. Given what you said at the outset about the sub-committee you said you served on, which I did not know, which is attached to the NHMRC, can you explain to us the nature of guidelines and as best you understand the difference between what a guideline is and its enforceability or its capacity to be required to be followed versus the nature of what is a law or regulation passed by a Parliament?

Professor GLEESON: That is the book—I am sure you have it—of the ART guidelines from RTAC. I do not speak for RTAC but I think there is a bit of a consensus around the table of RTAC that the best way to deal with a lot of these issues is through guidelines rather than legislation. In some States legislation has been brought in, with draconian penalties of jail, fines and all sorts of things, which will never be enforced. We will not be sending police around to laboratories checking what is happening and threaten jail on people. This seems to be a very inappropriate way of addressing the problem.

Guidelines, however, generally set the standards that have to be followed by the ethics committees that are assessing the proposal and the protocols. What goes with the guidelines then is a licensing arrangement. For example, companies like Sydney IVF, which are bound by these guidelines, if it was shown that they were breaching those guidelines they might lose their licence to engage in that practice. No-one is going to jail. No-one is sending the police. It is not about that; it is about a way of regulating things that I think helps people focus on the real issues here, which are ethical. Companies should have the appropriate governance structures, committees and so on to use the guidelines. Then there would be some regime of monitoring, accountability to the guidelines. So I think guidelines can be a better way of dealing with a lot of these things, rather than legislation.

The Hon. GREG DONNELLY: If we take this hierarchical pyramid of guidelines, you start with the NHMRC, which are the national guidelines, and then you have the industry code and the corporate guidelines. Clearly, the corporate guidelines or policies are developed by the entity itself, the business itself.

Professor GLEESON: Yes.

The Hon. GREG DONNELLY: Is it the case, and does it follow logically, that if they are company guidelines or company procedures, the company itself exercises control over what they are and can ultimately change them? Is that the case?

Professor GLEESON: Yes. I am sure that would be the case.

The Hon. GREG DONNELLY: If it is the company policy.

Professor GLEESON: That is right. And not only that but the companies establish their own ethics committees. There are in fact many ways in which this regime can be watered down, if you like. However, if a company establishes an ethics committee it must meet the criteria of the NHMRC for the membership, but again you can find a friendly lawyer and a friendly minister of religion if you go looking. So it is not a full-proof system but it seems to me that it is a more realistic and more appropriate way of trying to govern many of these issues, rather than bringing in the heavy hand of the law and the police.

The Hon. GREG DONNELLY: To follow that logic through, if we go to the national guidelines, the NHMRC guidelines—I am not sure who is on that NHMRC committee; presumably it is a broad cross-section of people. It operates under the auspices of some Commonwealth legislation, does it?

Professor GLEESON: Yes, it is a principal committee of the NHMRC, which is the Government's body for medical research. It is a principal committee established by an Act of Parliament. So in the case of ethical guidelines, the only guidelines that can be issued by the NHMRC are those prepared by RTAC, which is the Australian health ethics committee. The process with this booklet—for example, we had to revise these guidelines last year in view of changes to the legislation dealing with cloning and embryonic stem cell research. The legislation said that whatever guidelines RTAC developed were the ones that had to be followed. So there was an RTAC process of development which included community consultation and so on. They are then issued by the CEO of the NHMRC.

It may be relevant to your own experience on this Committee that the RTAC committee involves members with very different points of view on almost every issue. We have never had to take a vote on anything. We have always worked on a kind of consensus model, which means that nobody gets everything they want, but we find we end up with in this case guidelines that everybody was happy to live with and which I think we believe more or less reflects the Australian's community's view, given there will be differences and not everyone will agree with everything. In terms of these regulations, accepting the fact that the Government had passed laws to permit these activities, these regulations then try to oversee that activity in a way that we think is as ethical as it can be.

The Hon. GREG DONNELLY: The previous witness—I think you heard her testimony because you were sitting in the back of the room at the time—on at least four or five occasions I noted made reference to and specifically gave some priority, I thought, to this issue of reproductive autonomy. That was the phrase she used. I think I understand what that is and what it means. But there is the issue, though, of the rights of a child. In witnesses to this inquiry, that phrase has been thrown around a fair bit, the rights of a child. It has been thrown around so much that we do not even think about what it actually means, which takes me to my question. In the context of surrogacy the actual child born has had no say, if I can put it that way, in the fact that they have been born in the way they have through the nature of the relationship between the commissioning parents and the surrogate. One can see how arguments from points of view can be either supportive of that or critical of that as a proposition in terms of how the child has been born.

That takes me to the issue about how we get a handle on this issue of the rights of a child. No-one disagrees that a child should be harmed. No-one disagrees that we should ever do anything that is not in the best interests of the child. Yet we have this sort of chasm of difference between those who think surrogacy is not necessarily a good thing for a range of reasons, and those who think that in the most liberal sense very minimal regulation and let people decide what they want to do, and the child becomes essentially the product of the relationship between the commissioning parents and the surrogate.

Professor GLEESON: As you say, we all use the phrase "the best interests of the child". One way to try to answer that would be to say, "Let's wait 100 years and do a big survey and try to work out whether surrogacy turned out to be a good thing or not." I do not think we have that luxury. It is like genetically modified food. We cannot just say, "Let's use it and wait and see." We are trying to make a decision in advance. We are trying to think in principal. We are trying to think of a level of principal. In principal, what are the things we want for a child? The child to have a good life. There is a philosopher, Rawls, who—I am not necessarily supporting his philosophy—used a phrase he called the veil of ignorance. He said, "Imagine a society, imagine you were planning a society and you didn't know who you were going to be. You didn't know whether you were going to be rich or poor, male or female, black or white. What sort of social rules and policies would you desire for a society where you didn't know where you were going to fall in that society?"

Of course, people have difference responses. Some people are gamblers, and they say, "I'd like a society where you can become very rich because that could be me." Others think, and Rawls thought, that the rational thing to do was to choose a society in which the worst off were better off, because I might be the worst off. I might be the most vulnerable person in that society. So if I turned out to be the most vulnerable person in the society what social policies would I want? Perhaps with best interests we can do a similar sort of imaginative exercise. If we are imagining, I do not know who this child will be. What if I were to be this child? What are the conditions under which I would want to come into this world? I think many of us would say that the answer is obvious: it is within a family with a mother and a father, and to be raised by those parents. Of course, that may not work out. We know that life often does not work out, but we are trying, in advance, to make a decision in principal about what is the best way to care for the children of the future. The alternative is to run a hell of a risk.

The Hon. JOHN AJAKA: I take this one step further. The reality in life is this: no child has a say about being born or not being born. No child knows how they will be born, and no child knows who they will be born to. You hear it all the time, "I wish I was born" to such and such. That is the reality of life and you go through that and you persevere with that. Is that not the reality? I just cannot see the difference between a child being born through surrogacy or the way I was born. I did not choose my mother. I did not choose my father. I did not choose where I was born or how I was born or whether I would be of Lebanese descent or Anglo-Saxon. That was thrust on me, in a sense.

Professor GLEESON: That is right but I think I take that thought. That is an interesting way of helping us think about it, but I think I would take it the other way, which is to say, "Well, that's true. As a child I don't get a choice". But then what sort of parenting situation, in principal, would seem to be the best?

The Hon. JOHN AJAKA: In a perfect world.

Professor GLEESON: If you have the traditional marriage; you have man and a woman who are committed to each other, committed to having children together, committed to raising that child in the years ahead, committing to love that child whoever the child turns out to be. They did not know you were going to be you. Along you came, but the thing is they made a decision; through being married to each other and through their commitment together they made a decision that whatever child they conceive and bear will be the child that they love and raise. The difference—

The Hon. JOHN AJAKA: That is not reality. The difference is that if you look at, for example, average Australian communities where you hear certain stories about children who were born to a mother and a father who were married, and some of the horror stories that we hear. We look at situations of extreme poverty around the world, again born but poverty, starving to death, disease, et cetera. In reality, single parent families are raising their children because the fathers might have died at a very young age, or they have walked out on the family. Those children turn into incredible human beings and incredible achievers. That is the reality of life today and that is what we are faced with.

Professor GLEESON: But it is not the preferred way that we would like things to be. We do not want parents to die young and we do not want children to be raised by single parents, but if it happens we work with it.

The Hon. JOHN AJAKA: I am happy to go on the record as saying that I hate prejudice of any kind. I grew up with enough prejudice to know how it can affect a child. When someone says to me, "That is not the normal family", or, "That is not the best family", I find that offensive to all those children who were raised by single parents, by grandparents, or by a grandmother. Somehow or other we are saying that they are not normal and that is not the ideal or perfect situation. I am a Catholic and I believe in God, but I do not believe that that is what God would want us to do. We should treat everyone equally. Is a child born of surrogacy somehow or other inferior to a child born in any other way?

Professor GLEESON: No. I agree that we should not say that. It can be difficult in lots of areas to maintain the ideal while recognising that there are many ways in which we fail to live up to those ideals. When we face that tension one solution is to throw out the ideal and to say, "We give up; it is not the reality." At the moment we are grappling with the question of under-age drinking. Massive numbers of young people are drinking. Do we say, "They are all doing it so we might as well lower the drinking age"? No, we do not do that because we think that there is something important there. When we come to the use of reproductive technologies such as surrogacy the difference to me seems to be that this is a practice we are setting up in advance. We are deliberately doing something that we know could well be detrimental to the child that is born.

The Hon. JOHN AJAKA: Even if we maintain the status quo it is already occurring. I appreciated your comments about the guidelines. My dilemma with the guidelines relates to three specific areas that are causing problems and that could well cause problems to the best interests of the child—passports, birth certificates and parental responsibilities and rights. We know that surrogacy is occurring. We have not gone to the extreme of outlawing it. As legislators, do we not have a moral obligation at least to say, "Let us ensure that there are some regulations that will alleviate the problems that might exist"? Is that not our responsibility?

Professor GLEESON: I think it could be, but with two caveats. As has already been said, the numbers are very small—15 births at Sydney IVF in 10 years. If we suddenly had the Surrogacy Act 2010 up and running, one of my concerns would be that all sorts of people would begin to think that that was a good thing to do. I would be reluctant for Parliament to send out that message. If there are real issues of regulation that we need to address, I think we need to address them. Again, we might well address them without mentioning the word "surrogacy" because we would be recognising principles that apply to children in all situations of conception. For example, the right of a child to know his or her genetic parents is unarguable.

The Hon. JOHN AJAKA: Unfortunately, my time is up. I would like to discuss this issue for hours.

CHAIR: Perhaps we should all have a general philosophical discussion.

The Hon. AMANDA FAZIO: I have a couple of specific questions. Recently I saw a documentary about an English family in which there were three sisters. All the sisters were married. The two oldest sisters had had their families, but the younger sister could not have children. One sister donated an egg, which was fertilised using the sperm of the younger sister's husband, and the middle sister carried the child. That did not appear to me to be an aberration but a show of strength within the family to assist the younger sister to have a child. I could not see anything wrong with that and I do not believe there was any ethical dilemma.

The major concern of the sister who was carrying the child was that the IVF attempt to implant the egg might not work and she felt a weight of responsibility towards her younger sister. About a year later, at the end of the whole process, the sisters were interviewed and the sister who had carried the child said that from her point of view she would be quite happy to do it again because she could see the way in which her sister had benefited and it bonded them all together as a family unit. Do you believe a procedure such as that to be wrong?

Professor GLEESON: The short answer is yes, I do, but that is not to say that every aspect of this is bad. Obviously, the people in that situation were well motivated, and perhaps it will work out happily. It is hard to establish whether or not there will be some confusion in the mind of the child when he or she is growing up. The child might ask, "Who are my parents? Who is my real mother and who is my real father? " I hope that this work outs for the sake of everyone. However, it still seems to me that they are taking a big risk.

The Hon. AMANDA FAZIO: The second question that I want to ask you relates to a couple of comments in the submission that you provided to us today. In paragraph (6) you state:

> If on the contrary we expect the full meaning of the relationship between a mother and the child she gives birth to, then we begin to appreciate why many of us believe surrogacy is not a good thing to do.

Further down, in paragraph (7 (c), you state:

> It does not truly enable the commissioning mother to have a child of her own but merely to have a child to raise as if it were her own.

In some surrogacy cases the commissioning parents are able to use their own reproductive material. I raised two children, sometimes not happily, but I think that is every parent's experience. Because I have two children of my own I understand the process of giving birth. I cannot see why, if the genetic material is provided by the commissioning parents, the surrogate mother has the right to say that that is her child. If you made a bit of a crazy comparison, it is not that much different from somebody walking into a hospital nursery and snatching a baby, because that child is the child of the commissioning parents. What is your view about a case such as that?

Professor GLEESON: I think that goes to the point that I tried to make in paragraph (6). How do we see the relationship between the mother—the woman carrying the child and giving birth to the child? Do we see that as a deeply human relationship? I think most people would say that that is very significant. For nine months the woman carries this child and she gives birth to the child. Some people have argued that commercial surrogacy would be better than an altruistic surrogacy, because commercial surrogacy would take away that relationship. The mother would approach this as a business proposition, give birth and hand the baby over with no tears. I think that would appal most of us.

Let me make this point: We are appalled by that because we think that to carry a child for nine months and to give birth to it is a profoundly significant human experience. That is why the law states that these arrangements cannot be binding. As an earlier witness said, the rights of the birth mother must come first, precisely because of the significance of that relationship. You could then say, "From the point of view of the commissioning parents that is not how they see it. Perhaps genetically they are the parents" and so on. To my mind the dilemma we then face tells us that there is something wrong with this arrangement. We have created a situation that is intrinsically problematic. It cannot be a happy situation for everybody.

The Hon. AMANDA FAZIO: I do not know. In my opinion far too much emphasis is being placed on the significance of carrying somebody else's child and giving birth to that child. As somebody who has been through the experience twice of having children, I think there is an overemphasis on this and, to a certain extent, it seems to be coming from women who have not had children.

Professor GLEESON: I think that is a good point to highlight. I disagree with you, but I think it is a good question for this Committee to think about because it goes to the heart of whether or not we think

surrogacy is a good thing. Earlier I quoted the phrases "rent a womb" and "woman's incubator", which I believe to be awful kinds of expressions. In a sense that is how you have to think about it if you are going to say that the relationship between the mother and the child she carries is one that can just be abandoned. That is how you are seeing it. To me, that seems to be very demeaning to women, does it not?

The Hon. AMANDA FAZIO: No. I would say that women who are offering to act as surrogates are offering to do an act of good in altruistic terms—out of the goodness of their hearts or out of their desire to see somebody that they know experience being a parent. They are doing it out of the goodness of their hearts. The phrases to which you referred, "rent a womb" and "woman's incubator" are phrases that should relate to commercial surrogacy rather than to altruistic surrogacy. Women are becoming surrogates because it is almost an act of community service, or an act of personal sacrifice, to assist others. I think you have to bear that in mind. That is the reason why the surrogate is being a surrogate. That is why I am concerned that there is an overemphasis on this relationship between a surrogate and a child.

The Hon. DAVID CLARKE: Professor Gleeson, you advocate a light touch approach in regard to the regulation of surrogacy. For the sake of the argument let us assume that the Government makes a decision to legislate on this. Would you like to comment on the issue of surrogacy that involves commissioning same-sex couples, especially those having no genetic relationship whatsoever to the child?

Professor GLEESON: I mentioned that at one point. This comes under what is in the best interests of the child. Sometimes there are cases where same-sex couples raise children happily. Again, we are thinking about this in principle and in advance. I think a child has a right to a mother and a father. It seems to me that to run the risk of commissioning by same-sex couples could not be in the best interests of the child. On rare occasions it might work out.

The Hon. DAVID CLARKE: Do you believe, all things being equal, that it would benefit the child and be in the best interests of the child, where possible, to have a mother and a father?

Professor GLEESON: Yes, definitely.

The Hon. DAVID CLARKE: They may not always have good mothers and good fathers, but that does occur on the whole?

Professor GLEESON: Yes, in principle. We have to make a judgement in principle about what we believe is the better thing to do.

The Hon. DAVID CLARKE: I refer to a question asked earlier by the Hon. Greg Donnelly about the rights of the child. Everybody talks about the rights of the child, but what is in the best interests of a child? What is in the best interests of a child could be compared with what is beauty in the eye of the beholder. We cannot wait 100 years to see whether surrogacy will be in the best interests of the child, so we have to go on what is in the best interests of the child, based on the evidence that we have here and now. Could you give us your thoughts on that? What must we take into account in ascertaining, as objectively as we can, what is in the best interests of the child?

Professor GLEESON: I am not a psychologist or an anthropologist, so I cannot really go to the empirical studies. What do we already know about? We know about adoption regimes. We know how important it is for children who have been adopted to contact their genetic parents, or their natural birth parents. We know about our Aboriginal children who were taken away from their family. We know the anguish that caused. It seems to me we have got plenty of evidence about how important these relationships are for children as they grow up to be adults and that anything that we do which confuses or sets up tensions between different kinds of parents and different relationships and so on, all of this is fraught with difficulty. It is almost inevitable that this is going to unravel in a bad way. In advance, the only thing we can do is let us err on the side of a mother and a father, a family, a marriage, what we think of as the ideal situation for children. Legislation or regulation are sending a message to the community as to what we think is good and also they are creating a regime that is going to operate into the future. That is how I would view that point.

The Hon. DAVID CLARKE: You would say that we proceed on the basis that the evidence shows that it is in the best interests of the child to have a mother and a father?

Professor GLEESON: Yes.

The Hon. DAVID CLARKE: And the onus is on those who argue otherwise to prove it and, you would say, prove it not on the balance of probabilities but beyond a reasonable doubt, a very high doubt?

Professor GLEESON: Absolutely.

The Hon. DAVID CLARKE: In other words, we put the bar at a very high level because we are talking about the interests of children?

Professor GLEESON: That is right. At the end of the day, I suppose legislators are going to have to choose. They are going to have to ask themselves, "Who are we going to give preference to? Are we going to prefer protecting the vulnerable"—in this case, children—"or are we going to expand the freedom of those who are powerful, and perhaps rich the same time?" It seems to me the role of the law is to protect the vulnerable.

The Hon. DAVID CLARKE: So we err on the side of caution and we should be very cautious about social experimentation when children are involved?

Professor GLEESON: Exactly.

CHAIR: Thank you for coming today. Your evidence is very inspiring. If the Committee has further questions, the secretariat will send them to you and discuss with you the date for response.

(**The witness withdrew**)

(**Short adjournment**)

ROGER HOWARD COOK, Counselling and Clinical Psychologist, Psychology Clinic, Swinburne University of Technology, Victoria, before the Committee via teleconference, affirmed and examined:

CHAIR: Professor Cook, thank you for participating in this fourth public hearing of the Standing Committee on Law and Justice inquiry into legislation on altruistic surrogacy in New South Wales. Thank you also for speaking to us via teleconference. We are just getting used to this technology. Every now and then, unfortunately, we get sound feedback. If that occurs I will ask you to repeat the last sentence because we are unable to hear it. The Committee members today are Hon. John Ajaka, the Hon. David Clarke who is Deputy Chair, the Hon. Amanda Fazio and the Hon. Greg Donnelly. I am the Hon. Christine Robertson and Chair of the Committee. Also present in the room are secretariat staff and Hansard staff who will record the information. There is no-one at the moment in the public gallery. Committee hearings are not intended to provide a forum for people to make adverse reflections about others. The protection afforded to committee witnesses under parliamentary privilege should not be abused during this hearing. Therefore, I request that witnesses avoid the mention of other individuals unless it is essential to address the terms of reference. Professor Cook, what is your occupation?

Professor COOK: I am an academic psychologist at Swinburne University of Technology in Melbourne.

CHAIR: Are you appearing before the Committee as an individual or as a representative of an organisation?

Professor COOK: As an individual.

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

Professor COOK: I am.

CHAIR: If you take any questions on notice—which is possible because the Committee asks questions outside expectations—we ask that you respond by Friday 3 April 2009.

Professor COOK: Yes.

CHAIR: Would you like to start with a statement?

Professor COOK: I will make a brief statement, but I will rely on the questions to draw out the information that I have. It probably helps to know that I am a registered supervising psychologist in Victoria. I got some very nasty feedback there.

CHAIR: I am sorry. We can hear properly now.

Professor COOK: Do you want me to say that again?

CHAIR: No, we heard the sentence before the nasty feedback.

Professor COOK: I am also a member of the College of Counselling Psychologists and Clinical Psychologists with the Australian Psychological Society. I am also a member of the Fertility Society of Australia and the Australian and New Zealand Infertility Counsellors Associations. It probably also helps to know that while I have indicated to you that my primary occupation is here at the university, I conduct a private practice of a small kind which relates to the surrogacy information that I will give you today.

CHAIR: Thank you very much. The Hon. John Ajaka will now ask you questions.

The Hon. JOHN AJAKA: Professor, could you please expand on the concept that a woman giving birth via surrogacy does not seem to have the same serious, if I could use this word, problems that occur in relation to a woman who has her own child and gives the child up for adoption? Is there a distinction in your mind?

Professor COOK: Yes, there is. There is also a distinction in the minds, more importantly, of the women who do this. If I can speak first about those women who undertake gestational surrogacy, these women are the ones that my student and I have been looking at very carefully. The very clear finding is that people who undertake this, the women who are volunteering to do this treatment, are very clear in their minds that there is a distinction between giving away a child that might have been formed from their own egg and one that has been formed from the gamete of the commissioning couple. So it is as if they have a cognitive protection, in a sense, about the situation in which they find themselves. I know there has been some concern voiced by some people that it must be very difficult if you have a pregnancy with a child and relinquish it. The difference here is that these women are very clear that the embryo that has been implanted in their womb which has been formed by the commissioning couple is very much the property of the commissioning couple. So they do not have that sense of belonging to the embryo, if you like. There is a clear emotional cut-off from the connection to their embryo as it grows.

The Hon. JOHN AJAKA: If I can take it in three stages from most connected to least connected: an adoption situation, most connected; a surrogacy situation where the surrogate uses her own egg; the furthest connection is a situation where both gametes are coming from the commissioning parents and the surrogate is not providing any gamete whatsoever. Do I understand correctly that is what you are saying?

Professor COOK: I think so. I think that is a reasonable distinction made between the various situations. The situation probably most problematic for this inquiry, of course, would be what to do about those women who are offering to be surrogates but who are wanting to use their own egg. That is something which I am less clear about, but I am happy to discuss with you. The situation I am quite clear about is the gestational surrogacy situation.

The Hon. JOHN AJAKA: We have received evidence where certain guidelines or institutions recommend that the surrogates should in some way be connected to the commissioning parents, either as a family member or in a very close relationship or friendship and in that way the surrogate remains, supposedly, in the life of the child. Compare that to the situation where the surrogate is a complete stranger and will basically have the child and never see the commissioning couple or the child again. Do you have any views on that situation? Which would be more appropriate from the studies you have conducted?

Professor COOK: The people that I have studied and have seen clinically for assessment for this treatment have been people where primarily the surrogate has been a sister or a family member, in some cases even the mother of the commissioning mother. In circumstances where it was not a family member, it has been a person who has been a very close friend, typically known to the commissioning mother and father for a number of years. So we are looking at a situation, or the situations I have looked at have been where people have already established relationships with each other. The other part of that is that for the future these people also say that they intend to maintain a relationship. Of course, that is obvious with family members but in relation to friends, if you like, those people also indicate that they envisage that the future will be that they will have a relationship with the couple and the child, however, maintaining that they do not see that they have anything other than—perhaps a way of characterising this might be—a kind of a favourite aunt relationship with the child.

The Hon. JOHN AJAKA: In your experiences and case studies that you have personally been involved in and any case studies you have read about, are you aware of any serious adverse situation with a surrogacy pregnancy, in the sense of huge battles afterwards, dilemmas, problems with one party or the other or the child?

Professor COOK: Of course, the one that is well known in Australia is the baby Evelyn case. I am aware of that and I have read the detail of the judgement in relation to that. That, of course, was a most unfortunate and tragic situation. I imagine that members of the Committee are familiar with it. It was, of course, a surrogacy arrangement that was a traditional arrangement or a partial surrogacy arrangement and it was not, as I understand it, arranged through a clinic. So there are lessons to be learnt from that, I think. Perhaps I could say a bit more about that later. In relation to gestational surrogacy, in my experience I have no knowledge of any of those arrangements which have foundered, for whatever reason. It has certainly been the case where some couples have not proceeded beyond the psychological assessment that I have done with many of these couples. That is not common, I might add, but nevertheless there have been some circumstances where couples have not proceeded because of the preparation they were undertaking before beginning treatment.

The Hon. DAVID CLARKE: Professor, in your report you talk about the guidelines we might like to consider and you say:

> These protocols should include a requirement that applicants (the commissioning couples and the potential surrogates and their partners) should at least have—

and you list a number of conditions, and the first one is the one I am interested in, "a medical justification for their treatment." Do I take from this that you believe legislation should exclude commissioning same-sex couples who have no medical impairment whatsoever to conceiving and to bearing children?

Professor COOK: Firstly, I have no research on this matter, so I cannot speak other than from my experience in working with some same-sex couples in other areas and not in the surrogacy area. I believe in the surrogacy area the most important criteria are the ones I have listed there. I think it becomes a matter of political judgement or social judgement as to whether one wishes to extend the treatment to same-sex couples, for example. I am aware that the recent legislative changes in Victoria have allowed that. I am also aware it was quite controversial, however it has proceeded in Victoria. I am not able to provide you with any research on this matter.

My own feeling, in the sense of working with same-sex couples—and primarily I have to say my experience has been with lesbian couples—that lesbian couples in many ways make very sound parents. Part of the reason for that, I believe, is that they understand they are a minority group in the community and they understand they should expect to be questioned about their right to have a child, so many of them prepare very thoroughly indeed for their future parenting. From that sense, they make very loving parents.

The Hon. DAVID CLARKE: Let me pursue this a little further. Let us take the situation where there is a commissioning couple, a mixed commissioning couple, a man and a woman, and they have no medical problems, they could conceive and bear a child but they still want to engage in the surrogacy. You have given as one of the conditions that there should be a medical justification for the treatment. What is your attitude to a mixed couple who have no medical impediments? Do you believe they should be allowed to participate in such surrogacy programs?

Professor COOK: I do not think they should. That is why I put that particular criterion in there. I believe it makes sense there should be some medical justification for this and it is not simply a matter of somebody wishing to avoid pregnancy, for example. I believe the nature of the treatment and the arrangements that have to be established between the couples are on much sounder ground is if there is medical justification for it. Clearly, there are many medical reasons for this, including, for example, the absence of a uterus congenitally. There are various endocrinological problems that lead to people not being able to sustain a pregnancy, and many others. I am sure the medical people will be able to tell you those. That to me seems to be important as a first step.

The Hon. DAVID CLARKE: I understand that. Do you not think there is a contradiction in saying that mixed couples who have no medical impediment should not participate in surrogacy arrangements yet same-sex couples who have no medical impediment either should be able to? Would you see a contradiction in that?

Professor COOK: I understand the point you are making it, but I believe with same-sex couples the impediment is a biological one in a sense and one where they still desire to have their own family, and many of them would make very good parents. If they maintain their sexual preference, of course, they are not able to have a family. However, a heterosexual couple could do that. While there may be reasons, and I have mentioned some of them before, there are other problems for heterosexual couples in relation to perhaps sexual dysfunction, for example, that to me would come into the medical justification category. I think there is a reason for proceeding with those but not others, and the only people we are now talking about are those who for personal preference do not want to sustain a pregnancy or carry one out.

The Hon. DAVID CLARKE: Just taking that a bit further, professor, with homosexuals it is not a biological impediment at all, it might be a social impediment and it is a personal preference that they do not wish to do that, just as it may be a personal preference for a mixed couple not to want to have a child naturally but want to have it through surrogacy. I am a bit concerned you make this distinction that we seem to allow a broader area here in respect of same-sex couples that you do not allow to mixed couples. There is not a biological impediment, it is a preference, it is a choice they make, and why would not the same apply where there is a preference for a mixed couple wanting to have a child through surrogacy where there is no medical impediment?

Professor COOK: I understand the point you are making. I think it comes to some sort of judgement about the aetiology of homosexuality. Plenty of evidence would suggest it is not a choice, however I know some people in the community believe this to be the case and, depending on how you understand the evidence on this, I think it will lead to the sorts of comments you have just been making. I think at the end of the day this will be a matter for the Committee and the parties you represent to assess in your own way as to where you go with this.

The Hon. DAVID CLARKE: Would it be fair to say, professor, you do not have enough experience or anecdotal research information for you to come down one way or the other, and it is something you would steer away from and leave for others to comment on?

Professor COOK: As I said earlier, I have not conducted research with these people because they do not exist in great numbers in this country. The only ones who would be around would be those who made arrangements in the United States probably, and they are not people I am familiar with or have researched. So, in a sense, I do not have anything further to add to the comments made earlier.

The Hon. AMANDA FAZIO: Professor Cook, I have a couple of questions I want to ask you. Firstly, can you tell us more about your findings in relation to the male partners of women volunteering to be surrogates? We have had a lot of evidence, both in submissions and from people who have come before the Committee, referring to these male partners as birth fathers, which seems to imply some greater connection between them and the child that their wife is carrying for another couple. Can you tell us what your findings are in relation to these male partners?

Professor COOK: Yes. This was a study we did a little while ago now, 2004-05. At that time there were not so many people in Victoria who had had the treatment, but nevertheless we endeavoured to find as many of these men as we could. My student Heather Young conducted some in-depth interviews with eight of these men. The general findings were that these men found—some people thought they were on the margin of the arrangements, that the main players, if you like, were the commissioning mother and her partner and, of course, the surrogate mother, and the men were somewhat not included. However, the protocols for the clinics with which I have been associated, the Canberra Fertility Centre and the Sydney IVF Clinic, asked that partners be interviewed and be part of the assessment. The findings really point to the importance of that. Basically, if the partners are unhappy with this proceeding, it is not likely to be a successful arrangement.

I might give as an example one of the very few cases that have not proceeded. A young couple I saw some time back, it would have been perhaps four or five years back now, in my interviews with them and in my assessment of them it was clear that the potential surrogate mother was very keen to proceed. However, her partner, when I interviewed him separately and independently, which is the way I manage these matters, was quite concerned about the offer for his wife to do this. So we explored this at some depth and it was clear he was reluctant for it to proceed yet he found it difficult to communicate this directly to his wife at the time. As a result of all that there was a resolution between the couple as to what should proceed, and it did not proceed.

That points to the importance that these partners have in being either supportive or not. I have to say that the evidence is that these men are, generally speaking, very supportive of it. They acknowledge, most of them, sometimes in a humorous way, that their wives are the drivers of the situation, and the people for whom most of the treatment will happen is these women, not them. They acknowledge that their partners or wives are going to go through considerable treatment and a pregnancy, and if they have any concerns at all it is a concern for the health and wellbeing of their wives as they go through another pregnancy.

It is also true that these people have usually proceeded through a whole lot of discussion, sometimes just the two of them and in all cases where the four of them have met and discussed what this altruistic surrogacy is about. So, there is general agreement amongst the four adults in this situation that they have an arrangement that they believe they can sustain. I guess that is a long answer but I am trying to make the point that these men are not secondary to the situation at all but they are quite significant contributors to the success of the arrangement.

The Hon. AMANDA FAZIO: If the Government were to regulate altruistic surrogacy, do you have any comment to make about the criteria that might be applied before a surrogacy arrangement can be entered into? For example, things like age restrictions on the birth mother?

Professor COOK: Yes, I do. I am familiar, of course, with the Victorian legislation, which requires that a woman offering to be a surrogate should be 25 and that she should be the mother of a live child. I think

both those criteria are very important. It argues, of course, for a sense of maturity and having experienced something of a relationship and a pregnancy and birth, all of which means the woman should be well informed about the process she is about to undertake. I think as well that the whole process or treatment should occur in a registered clinic. I have difficulty with unregistered practitioners, who do not have any obligation to provide any account of their treatment, proceeding with these sorts of treatment. In Victoria we have clinics registered by our legislation, and these clinics are held accountable for their practices. I think this makes sense and it means the records that are kept by clinics are readily available to any panel or register or organisation the Government might set up to monitor what is happening in relation to assisted reproductive technology.

So I think in any sense of allowing people outside clinics to provide this treatment should be looked at with great caution. I know the Victorian legislation allows it; it is one of the aspects of it that I think was unfortunate. As well as that, I think in terms of what your Government might want to consider is whether it should register approved counsellors, people who may be trained in either social work, psychology or psychiatry, for example, who have undertaken some experience and some professional development in this area where they can be relied upon to provide good information. So, I think there should be that.

I think also there should be as well as medical assessment, which, of course, is obviously essential in this matter, a requirement of psychological assessment. Of course, I am aware I have a vested interest in saying that too but, nevertheless, it is part of the protocol for both the Canberra fertility clinic and Sydney IVF, and they are the clinics I am working with. There should be an independent assessment by a psychologist. I think that is an important component, which is not part of the Victorian legislation you may be aware.

I think the other part of this is in relation to birth certificates. I think the Government needs to arrange the legislation in such a way that commissioning parents can be appointed as the legal parents of the child that they believe of course is theirs. Of course, at the moment the legislation does not allow for that: the surrogate and her partner would become the legal parents. But this is a matter that is highly distressing to couples who proceed. In Victoria at least, it has been the source of a great deal of distress and difficulty with the whole matter. In relation to the research we have done with the commissioning couple, that whole business of the legality of their parentage is probably the most important matter that distresses them.

The Hon. AMANDA FAZIO: I have been personally concerned about what I feel is overemphasis that some people, who have appeared before the inquiry and in some of the submissions, place on the attachment between the surrogate mother and the child they are giving birth to.

Professor COOK: Yes.

The Hon. AMANDA FAZIO: There are two angles to that: first, particularly where the commissioning parents have supplied the reproductive material and, second, as a woman who has had two children I just think that there is, particularly by some proponents, this overemphasis on that point, which is being used to justify putting up impediments to the early legal recognition of the commissioning parents as the parents of the child.

Professor COOK: Yes.

The Hon. AMANDA FAZIO: Have you any comment on that?

Professor COOK: Yes I have. As you know, my research is with the gestational couple. They are very concerned about this whole business of establishing legal parentage and they would like that to happen very quickly. But in relation to the attachment issue that you mentioned, one of the other things to keep in mind is that we have psychological evidence, for example, that women who have premature children who may be admitted to an intensive care unit in a paediatric hospital do not establish the sort of attachment that you would expect with a full-term baby. Part of the reason for that, the way in which that typically has been explained, is that women will not form the strength of attachment to a child which they believe may not survive. So, in a sense there is a rational part of that.

The Hon. AMANDA FAZIO: Like a coping mechanism.

Professor COOK: Why would they become very attached to a small baby, which is very ill and which may not survive and in which case they would be experiencing enormous grief? I believe their modified reaction is because of the circumstances. I think it does not take too much to extrapolate that to the situation we have

here, which is the gestational situation. This argument that presumably there is a bond that is extraordinary difficult to break simply is not based on any evidence other than people's own feelings and perhaps their own experience with their own children. But what you have to understand is that this whole business of gestational surrogacy is not compulsory. People who enter into it are people who are volunteering after considerable thought and discussion, considerable analysis of the relationship they have with their partners and with the commissioning couple. They go through a preparation or a protocol of an assessment and counselling and at the end of it all they still want to proceed. So, my answer I think to those who make those sort of comments, I understand where it is coming from, is that it is not based on the evidence we have. It is certainly not what our evidence here shows is appropriate. The evidence is very clear from surrogate women that they did not believe they were relinquishing their own children.

CHAIR: The Hon. Greg Donnelly will now ask you some questions.

The Hon. GREG DONNELLY: Before I commence my line of questions may I just touch on the point you were discussing with the Hon. Amanda Fazio about this attachment and relationship issue?

Professor COOK: Yes.

The Hon. GREG DONNELLY: You referred to research. Did you know that it really was not much before the 1980s and 1990s that when a woman miscarried in a hospital the arrangement was to immediately take away the child?

Professor COOK: Yes.

The Hon. GREG DONNELLY: That was pretty much standard practice in maternity wards, was it not?

Professor COOK: I believe so. Yes.

The Hon. GREG DONNELLY: What do you understand the practice is today?

Professor COOK: Well, it very much depends on the time at which the miscarriage has occurred. The amount of distress and grief that is experienced by the couple where a miscarriage has occurred can vary very much, depending on whether it occurred at, say, seven or eight weeks, which is, of course, at a time when miscarriages are more likely to occur.

The Hon. GREG DONNELLY: Perhaps if we get to the point of well-formed foetus, well advanced.

Professor COOK: Yes.

The Hon. GREG DONNELLY: Forget about the couple for a moment concerning the male; I am talking about the mother.

Professor COOK: Yes.

The Hon. GREG DONNELLY: What is the standard practice now in maternity wards in public and private hospitals in those cases?

Professor COOK: I am not an expert in standard paediatric practice or obstetrics practice, so I cannot offer you my sense of what is standard practice.

The Hon. GREG DONNELLY: What do you now understand?

Professor COOK: I can tell you that in the clinic I run here at the university and in my other private work we have certainly dealt with women who have had miscarriages that you might describe as being late where, in other words, they have miscarried or even had a stillbirth. The women I see in this situation and which I know my colleagues see, and which have been discussed in our supervision arrangements, indicate that for many of these women it is important that they go through a grieving process and that part of that often involves naming the child and having a funeral and a burial or whatever the couple decide they will do. So, that is what

many people do. In fact, those who sometimes are not offered that sort of opportunity can be in fact very distressed by that.

The Hon. GREG DONNELLY: They actually give the stillborn child to the woman to hold?

Professor COOK: Yes, that is done in some cases I know, but I must say that you would need to speak to a paediatric obstetrician or a medical person to get more confirmation of that. But that certainly is the anecdotal evidence I have had from clients of mine.

The Hon. GREG DONNELLY: I just raise that as a counterpoint to the thrust of what I thought you were saying about this question of the bond between the mother, that is the mother carrying the child, and the child. If we take that example I have just given, it seems to me that good current medical practice acknowledges that strong bond between mother and child, and it is manifested in the ways we have described by giving the mother the stillborn child, naming the child and enabling the child to be buried?

Professor COOK: Yes.

The Hon. GREG DONNELLY: That just seemed to be a counterpoint to what I thought you were saying about this question mark perhaps over the bond between the mother and the child she is carrying?

Professor COOK: Yes. I understand the point you are making, but I need to remind you that these women are very clear that this is not their child. So, we are not talking about the same sort of situation. The women we are now discussing are people who clearly have conceived their own child with a partner with whom, presumably, they have an affectionate relationship; they have suffered the tragedy of an early or late miscarriage perhaps in this case, and the most tragic, of course, of all is a stillbirth. These are women who are delivering their own children and the children they have, for the most part, are planned and desired to have with their partner. These are not the same women who are entering into arrangements of traditional surrogacy or of gestational surrogacy.

The Hon. GREG DONNELLY: One of our witnesses earlier today advocated the position that, in her view, in this whole discussion of surrogacy there really was an artificial dichotomy being made between altruistic and commercial surrogacy.

Professor COOK: Oh yes.

The Hon. GREG DONNELLY: These are my words, not hers: It is essentially a continuum and for the purposes of the discussion we have this inquiry looking at the issue of altruistic surrogacy. But we then had a discussion about commercial surrogacy. The thrust of our argument as it was concluded was that she in fact thought that it was a dichotomy we should step away from; and ultimately conceded, as I understood her evidence, that really she did not disagree with the idea of commercial surrogacy in principle. Would you care to comment on that?

Professor COOK: Well, I can comment on it. I have not conducted any research, nor have I seen any couples who have undertaken a commercial arrangement because, of course, these people would have had to have done this in another country, commercial surrogacy being illegal in Australia in all the various jurisdictions. But in relation to that matter, I believe that there is something about the Australian culture that allows us or encourages us to be altruistic and to volunteer. We have in this country one of the highest rates of volunteerism in the world. I think the nature of the relationship that we are talking about is of that kind and I believe, therefore, that the altruistic nature of this arrangement is something to be preserved. I think that if we entered into a consideration of commercial surrogacy, we would go down a very slippery slope. I know that it operates in the United States and I know that perhaps they would have a different view of that there, but perhaps that suits their culture. I believe that what we are undertaking here and what I think your Committee is undertaking in relation to altruistic surrogacy suits our culture.

The Hon. GREG DONNELLY: Thank you, that is very clear. I take you back to a line of questioning the Hon. David Clarke was pursuing with you on the issue of homosexuals being able to actually access surrogacy arrangements in Australia.

Professor COOK: Yes.

The Hon. GREG DONNELLY: I recall in the context of your answer in relation to recent Victorian legislation, which goes back to last year, I think you said that a political social judgement had been exercised in that the government of the day ultimately put through that legislation in the Victorian Parliament?

Professor COOK: Yes.

The Hon. GREG DONNELLY: If we look at the procedure of adoption in New South Wales at the moment—and please do not misunderstand me, I am not trying to muddle the two—the paramount interest principle, with which I am sure you are familiar, applies in terms of consideration of who would be considered parents suitable for adoption. I will call it the paramountcy principle—it is the same principle that basically operates in Family Law.

Professor COOK: Yes.

The Hon. GREG DONNELLY: The paramountcy principle means that the adult's interests and rights, to the extent that they have rights, are completely subservient. There is no public debate about that issue in this State. A child's best interests are served by the paramountcy principle and that sits on top of any other rights. If we move from adoption—and I understand it is a different process from surrogacy—it seems to me, from much of the evidence we have heard in the hearings thus far, a lot more adult-centred, if I could use that phrase, in terms of adults asserting rights in terms of a right to have a child.

Professor COOK: Yes.

The Hon. GREG DONNELLY: At the end of the day, though, if you have a situation of adults who have a capacity to assert their rights as adults, to be perfectly frank or blunt, the child does not have a capacity to resist those rights if they are articulated and expressed firmly enough. In the end it is an unequal power arrangement. Would you like to comment on that?

Professor COOK: Yes. I think it is a very thorny problem and I believe that in the end it is something about which perhaps a political judgment will be made, because I think it gets to that in the end. I suppose one other aspect of this, if I could comment on it, is the way in which we wish to treat people in discriminatory ways or not. I am conscious that, for example, for access to assisted reproductive technology we make all sorts of rules and regulations concerning the people who can undertake this. We would not do any of this with ordinary heterosexual couples who are having their own children. There might in fact be an argument for doing it, but we have not got there yet.

What we do effectively is provide all sorts of constraints on those people who are undertaking assisted reproductive technology in all its various forms, and I think the reason probably for doing that—perhaps the only reason we do it—is because there is an expenditure of public funds in supporting these treatments. You might well make the argument I suppose that in an ordinary person or couple having their children there is an expenditure of public funds in a public hospital, for example. Do we restrict their right to have that child when very often we know that perhaps they are not the sort of people who might pass whatever other constraints we put on people approaching assisted reproductive technology? It is a very difficult issue in that sense and I suppose one for the Committee to discuss at greater length, but there needs to be some consideration about the extent to which you wish to put people who are infertile through further assessments and further screening and further regulation before they can form their families.

The Hon. GREG DONNELLY: What you say about public funding is not right. Sydney IVF representatives were here yesterday and they acknowledged to one of my questions that there is no Medicare rebate for procedures that they offer, which are paid for by the individuals.

Professor COOK: That part of it is true. I think I was probably talking about the medical check-ups from time to time, for example, the undertaking of pregnancy testing or ultrasounds that are done through a pregnancy. I would imagine that they would not be made distinct from the ultrasounds given to people having ordinary pregnancies.

CHAIR: Thank you very much for your time today; your evidence has been very informative and useful.

(The witness withdrew)

NICHOLAS TONTI-FILIPPINI, consultant ethicist and lecturer in bioethics, John Paul II Institute for Marriage and Family, before the Committee via teleconference, sworn and examined:

CHAIR: This is the fourth public hearing of the Standing Committee on Law and Justice inquiry into legislation on altruistic surrogacy in New South Wales. A committee hearing is not intended to provide a forum for people to make adverse reflections about others. The protection afforded to committee witnesses under parliamentary privilege should not be abused during these hearings. I therefore request that witnesses avoid mention of other individuals unless it is absolutely essential to address the terms of reference. In what capacity are you appearing before the Committee? Are you appearing as an individual or as a representative of an organisation?

Professor TONTI-FILIPPINI: I am appearing as an individual in my own right.

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

Professor TONTI-FILIPPINI: I am, thank you.

CHAIR: If you should consider at any stage 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 gives you some questions on notice or there is information we would be happy to receive later, we would like that by Friday 3 April, but the secretariat would be in contact with you about the specifics of those questions if it should be necessary. Would you like to begin by making a statement?

Professor TONTI-FILIPPINI: Just very briefly. My chief concern in terms of giving evidence to you is to protect the interests of children. I see those as being defined in terms of the United Nations Convention on the Rights of the Child, which Australia has ratified, in particular the right of a child to an identity and family relations under Article 8; the right to know and be cared for by his or her parents under Article 7; and the right to maintain personal relations and direct contact with both parents on a regular basis under Article 9.

I also have in mind the International Covenant on Civil and Political Rights, which does not recognise the right to a child. A child, in my view, is not property, not an object, but has rights in his or her own right that should be recognised in this area. The covenant does recognise under Article 23 the right of men and women of marriageable age to marry and to found a family, and "marriage" means a contract entered into between a man and a woman for life. I would uphold those principles in the covenant on civil and political rights.

CHAIR: I am terribly sorry to interrupt you, but could you just slow down a little because the person who is recording your voice is having difficulty keeping up.

Professor TONTI-FILIPPINI: Sorry. Article 23 of the covenant also holds that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. It is my concern in relation to surrogacy that the family, as a natural and fundamental group of society, does have that protection. The changes that are proposed in relation to giving recognition to surrogacy, and I am taking as a model what Victoria has done, I think are quite profound changes and the Parliament needs to be very careful about what it does in terms of protecting the interests of children. There are great complexities involved. I greatly appreciate the fact that you are holding an inquiry into this and I commend the attention that you are giving it and hope that I can help. Thank you.

The Hon. GREG DONNELLY: The Victorian legislation is operational, as you understand it; it has received royal assent?

Professor TONTI-FILIPPINI: Yes.

The Hon. GREG DONNELLY: I do not want you to do a disservice to your answer, but in a relatively short answer are you able to identify your key concerns with respect to the Victorian legislation?

Professor TONTI-FILIPPINI: The major concern can be found in the section of the legislation that deals with the priorities of the legislation, and that is reflected in it. The old legislation gave priority to the interests of the child. The new legislation still has the interests of the child as one of the elements, but not the dominant element, and it gives priority to anti-discrimination provisions in relation to discrimination law and

who may want to access a service in this respect. The dominant change that occurred in Victoria with this legislation was that it treated assisted reproductive technology services as a service and therefore commodified the child as a product of that service. At the end of the day in Victoria now the dominant issue is not the protection of children and their rights; they have been made, in effect, secondary to the rights of those who want a child. In other words, the law has treated a child as the object of a right rather than having rights themselves.

The Hon. GREG DONNELLY: This is the precise point that I addressed to an earlier witness about the adoption legislation in New South Wales, which currently provides for the paramountcy of the interests of the child. No-one really disputes that. It is accepted that the interests of parents who wish to adopt in New South Wales are subservient and secondary to the considerations of the child. That is clearly articulated in the objectives of the Act. In the discussions we have had with various witnesses appearing before this Committee I have gathered from their testimony that they are articulating an emphasis where the adults' rights, if I can put it that way, have at least the same standing as that of the potential child from a surrogacy procedure. In some instances I have gleaned that they are almost articulating that the adults have paramountcy in terms of their decision to have a surrogacy arrangement. Would you like to comment on that?

Professor TONTI-FILIPPINI: That is my major concern in relation to what happened here in Victoria. The child has become virtually property and the legislation confers rights to a child on various adults. It has moved away from what the law was in terms of the paramount interests of the child. If you uphold the principle of the paramount interests of the child you cannot recognise anything that gives anybody rights to a child in any form; for instance, in a surrogacy the weight you give to a genetic relationship that some people may have to the child. If that confers some sort of right of parenthood then immediately you have moved from a paramountcy of the child's interests to a model that says people can have rights in relation to the child. Parents do not have rights in relation to a child; they have obligations. We recognise the special status of the woman who gives birth to a child largely because of the huge sacrifice and contribution she has made in carrying the pregnancy and giving birth to the child. In fact, when you look at the reality of the matrix of possibilities, she is the one constant that the law can look to as the mother of first instance to the child.

The way we phrase the law currently under the status of children legislation—and I was involved in that discussion in 1983-84 when uniform legislation was introduced across the States—is that the woman who gives birth is the one constant. Reproductive technology has made it such that she may not also be the genetic mother of the child but at least this woman gave birth to the child and the doctor and others witnessed it, so we know this woman is the mother of the child. That is the one constant. Everything else is quite variable. So that is the one thing the law can hold onto. If she relinquishes or if the child welfare people find there is evidence that she is a danger to the child then of course the law steps in to give protection to the child under the obligation that it has. In the first instance she is the mother of the child and my concern is that we do not overlook that. That is the best thing going for the child and we should hold onto that until she relinquishes or until she is found by evidence to be a danger to the child.

The Hon. GREG DONNELLY: On the question of looking at the fabric of the regulation for the ART industry, and within that surrogacy, obviously there are the National Health and Medical Research Council guidelines, the industry code and, to the extent that they have them, individual company policies, guidelines or procedures. Sydney IVF gave evidence yesterday and has agreed to provide us with a copy of their policy guidelines with respect to surrogacy. In New South Wales at the moment we have two specific provisions in legislation that say that there shall be no commercial surrogacy in this State—it is not provided for in the law—and that surrogacy agreements are void. They are not enforceable.

If you look at those two matters in conjunction that is the regulation, if I can use that phrase, of surrogacy in New South Wales. I mean surrogacy in the context of it being done through a body such as Sydney IVF. I guess there will be instances of "backyard surrogacy", which we do not hear about or find out too much detail about. This Committee is looking at whether we should create a formal piece of legislation that deals with surrogacy—let us call it the New South Wales surrogacy Act—and if we make that decision, what should go into that Act. Alternatively should we look at the reality of the situation in New South Wales and make decisions about dealing with some of the issues that have arisen as a result of surrogacy being practised in this State? Would you like to make a comment about that?

Professor TONTI-FILIPPINI: Surrogacy will happen, whether it is paid or unpaid. It does happen. We have some scope to regulate what the clinics do, although any couple that have the resources can take themselves outside Australia to achieve the same purposes. It will happen, paid or unpaid, because people will make these payments without formalising them in a way that will bring them to the attention of the law. That

happens. It is also the case in my view that so-called altruistic surrogacy can be just as exploitative and involve less choice for a woman who is pressured by her family to assist a sister, for instance. I do not see a huge distinction between paid and unpaid surrogacy, but I understand that New South Wales law makes a distinction.

You need to regulate this area for the sake of children. There does have to be some content to the law, so there could be a New South Wales surrogacy Act that gave some content to it. The concern I have in this respect is that in that Act the child should never be treated as something to which anybody has a right. The child is not a good or a service. There should be no right to a child in any sense. That is certainly the human rights approach to take. The child has rights so the function of a New South Wales surrogacy Act should be to enshrine the rights of the child in these arrangements, which would include details such as what goes on a birth certificate.

Any effort to make surrogacy arrangements enforceable at law would be coercive of the woman involved and ought not happen. I think the decision of the woman who gives birth to a child to relinquish the child should always be a free choice and not something that is determined by prior agreement. If she has been foolish enough to enter into such an agreement that agreement should not be enforceable. It is a very serious mistake to do that and it could also mean the law recognising a contract to treat a child as property because at the end of the day a surrogacy contract is a contract to exchange a child. The law should not do that.

My view is that with the contracts being unenforceable the word of law should remain in the content of such an Act. If it happens and it is a question of setting some guiding principles for the courts in relation to how they make decisions, my view is the genetic relationship that some may have to the child is irrelevant in a court of law to the decision as to whether that person would make a better parent or not. The fact that there is a genetic relationship indicates some kind of connection that the court can take into account. My view is that it should not be overriding. If the woman who gives birth relinquishes the child, the court needs to make a decision in the best interests of the child and can take into account the genetic relationship, but it ought not be bound by any such genetic relationship or by any pre-existing void contract.

The Hon. GREG DONNELLY: With respect to how we came to be dealing with this matter in the first place, you are probably aware of the process through the Commonwealth and State Attorneys-General to try to come up with a framework that will best provide comity between the States and Territories in their respective surrogacy legislation. However, we are faced with the reality, as I understand it, that the Australian Capital Territory has surrogacy legislation in place; Victoria put its legislation in place as recently as last year; Queensland had made progress and might well have had legislation before the Parliament but for the fact that there is an election shortly—

Professor TONTI-FILIPPINI: Tasmania.

The Hon. GREG DONNELLY: I am not sure of the position in Tasmania. Are we not going to end up ultimately with a situation where, whether we like it or not, we will have a patchwork of surrogacy arrangements in Australia that will contain some differences between States and Territories?

Professor TONTI-FILIPPINI: The only times we have come close to uniform legislation in Australia in the bioethics area are with the human tissue Acts, in which both Tasmania and Western Australia did not comply with the uniform approach the others took; and the cloning legislation, which Western Australia departed from. We have not achieved it in any other bioethics area apart perhaps from the time from 1984 until the recent Victorian legislation when we had uniformity of the status of children legislation. Otherwise we have not managed to achieve uniformity across the States because they have done their own thing.

Where children are involved, and because people move between States, family law and law in this area ought to be uniform in Australia, but I think it is a faint hope that we are going to achieve that particularly with Victoria producing such abysmal legislation in relation to the rights of children. I think the Victorian legislation is in for a rocky road when some of those children start challenging the inconsistencies between Victorian legislation and the Commonwealth's obligations under the ratification of the United Nations Convention on the Rights of the Child or the International Covenant on Civil and Political Rights. The Victorian legislation is really problematic from a human rights point of view.

The Hon. JOHN AJAKA: Do you see a major distinction between paid surrogacy—commercial surrogacy—and unpaid surrogacy?

Professor TONTI-FILIPPINI: No, I do not. Obviously there is the distinction that one is paid for and the other is not. I see both as exploitative of the child and of the woman involved. In the case of paid surrogacy it is economic exploitation because we know from experience that in the areas where it happens the women who agree to be surrogates are nearly always economically disadvantaged. That is the problem in relation to economic surrogacy. Then there is the fact that it is a contract to exchange a child. The child in a commercial surrogacy arrangement is treated as a product or an object to be exchanged for a fee. Unpaid surrogacy, when it happens, usually happens within a family although it is not restricted to that. When it happens within a family there is a very strong possibility of the woman who carries the pregnancy being put under pressure to do so by other members of the family, not just the woman who wants the child and her partner. Other family members see the unfortunate circumstances of a woman being unable to produce grandchildren and so on. There is some evidence that an altruistic surrogacy can involve quite coercive circumstances.

The Hon. JOHN AJAKA: I put it this way. If we are to recommend certain regulations, whether by creating a new Act or by simply amending provisions of existing Acts, do you feel that we should differentiate between commercial surrogacy and non-commercial surrogacy, or we should simply ensure that the same rules apply in either case?

Professor TONTI-FILIPPINI: The area of paid surrogacy is easier to regulate. It is sort of like that patchwork where you are trying to regulate what you can, and it is relatively easy where there is money being exchanged, especially where you are talking about paying special operations. I think it would be a much worse situation in Australia if we had an entity that advertised its services to provide commercial surrogacy, and that is why—I was on the NHMRC committee that drafted the ART guidelines for the NHMRC and on surrogacy we have it that clinicians should not advertise a service to provide or facilitate surrogacy arrangements; nor should they receive a fee for services to facilitate surrogacy arrangements. In other words, we think that one way you can control this area is to prevent people advertising it and offering the service for a fee. So to that extent I think it is worth regulating it by regulating those who might offer the service.

The Hon. JOHN AJAKA: One of the propositions is that we should be looking at maybe a court—for example, the Supreme Court of New South Wales—to be given the power to look at each and every case on an individual basis, taking into account the best interests of the child, of course, and allowing that court to determine what will apply in respect of that child by way of parental orders, birth certificates, et cetera. Is that something you would advocate, or alternatively we simply legislate for what occurs in certain circumstances that upon the child being born the birth certificate is already determined, whether it is the commissioning parent or the surrogate?

Professor TONTI-FILIPPINI: I would argue in the first instance that the Parliament needs to give some degree of direction, and one direction should be to prevent deception. In other words, birth certificates should tell the truth. Birth certificates should contain all the known information so they should contain the name of the birth mother, the name of those whose gametes were used to achieve the pregnancy, and by being on the birth certificate they should then be available to the child when the child applies to receive a copy of the birth certificate, and that should be made known to the parents that that will be the case.

In other words, there never should be any secrecy about the parenting of a child because it is not in the child's interests for that secrecy to be there. So from the outset the Parliament should stipulate that birth certificates should tell the truth and should prevent them from being fabricated or prevent them from excluding information that is important to the child. They should tell the truth. That is the first thing. The second thing is that the Parliament needs to direct that any contract is unenforceable and the courts should pay absolutely no attention to any existing contract because to do so would be treating the child as property.

The Hon. JOHN AJAKA: I accept that and understood that. What I meant to say is that assuming that the contract remains voidable and never to be enforced—and leaving the contract completely aside and even assuming one does not exist—should we have a system where the court, say, the New South Wales Supreme Court, is looking at simply what is in the best interests of the child and take into account all the circumstances—for example, were the gametes donated by both commissioning parents, was the gamete donated by the surrogate, were no gametes donates—and all the other usual aspects of what would be in the best interests of a child?

Professor TONTI-FILIPPINI: I would argue that the court should only have a role in that respect if the woman who gives birth relinquishes the child. In other words, the whole question of the court dealing with

this matter should not arise until the woman has clearly relinquished the child, and only then should the court be involved.

The Hon. JOHN AJAKA: So if we have a situation, for example, where the surrogate, commissioning parents, all involved, psychologists, everyone recommends parental responsibility should automatically transfer to the commissioning parents, everyone is in agreement, the problem with the current system is that one must wait almost a minimum of two years plus before one can apply for adoption orders. What I am asking you is: Should we look at a situation where the court should be able to make a parental order a lot quicker than that?

Professor TONTI-FILIPPINI: I would agree that it is in the interests of the child for a decision to be made earlier than two years after birth. I would argue that that should only be the case if clearly the woman has relinquished.

The Hon. DAVID CLARKE: Can you give us your thoughts on the issue of surrogacy which involves commissioning same-sex couples?

Professor TONTI-FILIPPINI: By same-sex couples.

The Hon. DAVID CLARKE: Same-sex couples—I am sorry?

Professor TONTI-FILIPPINI: You mean if a same-sex couple commissioned a woman to carry a child for them.

The Hon. DAVID CLARKE: Exactly, yes.

Professor TONTI-FILIPPINI: I think all commissioning should be regarded as void. It does not matter who does it. I do not think anybody should be able to commission a child in a way that is upheld by the law.

The Hon. DAVID CLARKE: Let us take a situation where the Government has decided that it will legislate in this area. I know what your preference is, but let us assume that the Government will legislate. What would your views be then on surrogacy involving same-sex commissioning couples?

Professor TONTI-FILIPPINI: In the way I would see the law operating, it would only be that if a woman relinquished the child and then the proposition is that if a same-sex couple also have some kind of genetic relationship or something like that offer to the court to be the couple that parent the child. I would not object to that, but I would argue that the court needs to make that decision in the best interests of the child. So it needs to be satisfied that that couple are the best couple for that child in terms of parenting the child, and they would need to take into account when they make that decision, looking at the fact that one or other of the couple may have a genetic relationship to the child, whether it be the man's sperm or the woman's egg. Secondly, they need to look at the fact that a same-sex couple cannot give the child both a mother and a father. So they would need to weigh up the genetic relationship on the one hand and on the other the fact that some other couple may be able to give the child both a mother and a father. The court would need to make a decision in each individual case as to who would be the best option for parenting of the child.

The Hon. DAVID CLARKE: Do you believe, all other things being equal, that it is preferable that a child has both a mother and a father, that it is particularly important? We have had some witnesses who minimise the importance of having a mother and a father. Would you like to comment on that question?

Professor TONTI-FILIPPINI: My view is that a child needs both role models. A child needs to see the relationship between the parents, how that love relationship works. I have a particular view about the importance of a relationship between a man and a woman and the way in which their love is expressed between them. I see it as different in kind from the relationship or friendship between a same-sex couple. In my view it would normally be in the best interests of a child to have a mother and a father. However, I can see a set of circumstances—and I have been asked by a court for advice in relation to a set of circumstances in which both men were genetically related to a child. One man's sister carried the child and the other man's sperm was used. They both had a genetic relationship to the child, and there was a strong argument in that case for the court to allow the parenting to go via an adoption order to that same-sex couple. So I am not excluding the possibility of a same-sex couple having such a relationship that the court decided that they were the best thing going. But I

would say that in most circumstances the best thing going would be a circumstance where there was a mother and a father.

CHAIR: One of our questions relates to your submission, pages 3 to 4, arguing that it would be irresponsible to transfer matters related to the welfare of children to clinical ethics committees. Can you outline a bit more on that particular view?

Professor TONTI-FILIPPINI: Yes, and happy to do so. As you know, I sit on the Australian Health Ethics Committee so I am closely involved in the regulation of human research ethics committees in this country and have been involved there for six years now. My view on this is that that is a well-regulated structure. We have guidelines for the operation of human research ethics committees, governance standards. They have to report to the NHMRC. So we have a member of the NHMRC Australian health ethics committee. I have a fair idea of what is going on in the country in relation to human research ethics committees.

But there is no such standard applying to clinical ethics committees. There are no regulations, no guidelines, no governance standards, no defined composition. There is absolutely nothing that says what they do, how they do it, and there is nothing that requires them to report. So there are absolutely no standards that apply to clinical ethics committees in this country. That is a huge gap that applies, but no government agency so far as opted to do anything about it. I think it is quite inappropriate for a government or a Parliament to allocate to a body that is completely ungoverned, with no governance standards, no regulations, no guidelines and no defined composition, a responsibility such as this.

CHAIR: The Sydney IVF people who spoke to us yesterday said that their ethics committee was structured using NHMRC guidelines and was in a review process relating to their quality body that is a Federal body.

Professor TONTI-FILIPPINI: I am sorry, there are no NHMRC guidelines for clinical ethics committees. So they cannot be structuring it according to national RT guidelines. There are none. There are only guidelines for human research ethics committees.

CHAIR: Thank you for participating in this inquiry and for your submission. It has been helpful and useful for us. Do you have anything further that you want to say?

Professor TONTI-FILIPPINI: That is fine. I think I have said enough. Thank you.

(The witness withdrew)

(The Committee adjourned at 12.15 p.m.)