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 Wednesday 5 November 2008

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The Committee met at 9.15 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: Good morning and welcome to the first public hearing of the Standing Committee on Law and Justice Inquiry into Legislation on Altruistic Surrogacy in New South Wales. Today we will be hearing evidence from the New South Wales Attorney General's Department, the Department of Community Services and the Law Society of New South Wales. We will also be hearing from two sets of parents of surrogate children, a representative from the Next Generation Fertility Clinic and Professor Jenni Millbank from the Faculty of Law of the University of technology, Sydney.

Before we commence, I make some comments about certain aspects of the hearing. The Committee has previously resolved to authorise the media to broadcast sound and video excerpts of its public proceedings. Copies of guidelines governing broadcast of proceedings are available from the table at the door. In accordance with the guidelines, only members of the Committee and witnesses may be filmed or recorded. People in the public gallery should not be the primary focus of any filming or photographs. In recording the proceedings of this Committee, the media must take responsibility for what they publish or what interpretation is placed on anything that is said before the Committee.

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 by any other person. 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. I therefore request that witnesses avoid the mention of other individuals unless it is absolutely essential to address the terms of reference. Could everyone please turn off their mobile phones for the duration of the hearing.

KATHRINA WAI LAN LO, Director, Legislation, Policy and Criminal Law Review, Attorney General's Department, affirmed and examined, and

SOPHIE NEVELL, Senior Policy Advisor, Legislation, Policy and Criminal Law Review, Attorney General's Department, affirmed and examined:

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

Ms NEVELL: Yes, I am.

Ms LO: Yes, I am.

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 that request. If you take any questions on notice, the Committee would appreciate the response to those questions forwarded to the secretariat by Monday 1 December 2008, but the secretariat would contact you with a list of questions and that date later. Would either or both of you like to start by making a short statement?

Ms LO: Yes, I would like to make a brief opening statement to provide the Committee with some background and context. As the Committee would be aware, surrogacy is a very sensitive and complex issue involving a number of government portfolios at the State level, namely Health, Attorney General's and Community Services. At the Federal level, taxation, child support and family laws are relevant. Surrogacy is not a widespread issue. The number of people in New South Wales who are affected is probably quite small, however, for these people it is an issue of fundamental importance. For the intended parents, it is about their right to be legally recognised as the parents of the child they are caring for and bringing up.

In recent years public policy issues around surrogacy have attracted suitable attention in various jurisdictions. For example, parliamentary committees in Queensland, South Australia and Tasmania have been asked to inquire into and make recommendations on the issue. The Victorian Law Reform Commission handed down its report on the issue in 2007 and its recommendations form the basis of a bill, which is currently before the Victorian Parliament.

Surrogacy is currently on the agenda of the Standing Committee of Attorneys-General [SCAG]. Surrogacy is a policy issue that has national implications. There is the potential for a harmonised approach to the regulation of surrogacy across States and Territories and for Federal laws to complement laws at the State and Territory level. Currently the laws affecting surrogacy arrangements vary across States and Territories and this creates opportunities for forum shopping. SCAG has agreed on a number of principles that should underpin any proposed national model laws on surrogacy. These are that any surrogacy arrangements should give paramount consideration to the best interests of the child, that they should minimise the scope for disputes between the parties and that they should aim for minimal intervention in people's lives.

SCAG has also agreed that any proposed national model laws should have a number of key features. These are that commercial surrogacy should continue to remain unlawful, that altruistic surrogacy will be lawful but that a surrogacy agreement will not be legally enforceable, that is, a surrogate mother cannot be forced to give up the child or cannot be forced to pay damages for refusing to do so. Other key features include that the informed consent of all parties should be necessary, that counselling should be mandatory and that court orders should be available to recognise the intended parents as the legal parents where the surrogacy arrangements meet legal requirements and it is in the best interests of the child.

A joint working group comprising SCAG officers and officers from the Health and Community Services Ministerial Council has been convened to progress this work, that the working group has prepared a discussion paper and we anticipate that this will be released shortly. I think this inquiry is very important for a number of reasons. Firstly, it will allow individuals and groups the opportunity to provide input into the work being done on surrogacy in addition to the SCAG consultation process. Secondly, the inquiry will focus on the New South Wales context whereas the SCAG work will look at things at the broader national level and, thirdly, the inquiry is very important because its findings will be taken into account by the New South Wales Government in formulating its policy position on the issue.

Given that SCAG and the Committee's work are still continuing, I think it would probably be inappropriate for the department to put forward any policy positions on issues as this would pre-empt findings by this Committee and also pre-empt the SCAG's consultation process and its final decision. However, we are very happy to assist the Committee in providing as much information as possible, both during the hearing this morning and afterwards directly to Committee officers. Given that the issues around surrogacy are quite complex and the law in this area is quite complex, there may need to be some questions that we take on notice so that we provide you with a very comprehensive and accurate response. Thank you.

CHAIR: You are participants in the SCAG process so do you perceive that this Committee's inquiry is to further inform the SCAG process?

Ms LO: That will be part of the process. Obviously each Minister that it is represented at SCAG will bring to a SCAG meeting his or her position and the position of the Government they represent. The New South Wales Government would have to formulate a policy position on, firstly, whether or not surrogacy should be regulated and, if so, what type of model that regulation should take the form of. So, yes, it will feed into the SCAG process because the New South Wales Government will have to make a decision initially.

CHAIR: So with the complexity of all the different departmental policies and laws, is there any perception that it perhaps would come under one piece of legislation or is it perceived that there would be required the multiple legislative systems that are currently in place?

Ms LO: I think it is a bit difficult to answer that without a concrete proposed model in front of us. I would anticipate, though, that a number of pieces of legislation would need to be amended if the Government goes down the path of regulating this area. For the Attorney General's Department, it would probably be the Status of Children's Act and possibly the Births, Deaths and Marriages Registration Act. For Health, it would probably be the Assisted Reproductive Technology Act and for the Department of Community Services it would be the Adoption Act possibly. Usually when the Government agrees on a policy position the Parliamentary Counsel will actually advise on what sort of consequential amendments are needed and which pieces of legislation will be affected.

CHAIR: My next question is one that you have been sent and is background information about the involvement of SCAG and altruistic surrogacy. You may feel you have dealt with it in your opening statement or you may have something further to add that will be useful.

Ms LO: A lot is covered in the opening statement but for the information of the Committee I will describe the next steps in the process so that you understand the key steps in the SCAG process. The next step for this project would be the release of the discussion paper for public consultation. Members of the public and interest groups would then have the opportunity to make submissions. The joint working group would then consider those submissions and put up recommendations to SCAG Ministers. If SCAG Ministers agree that there should be national model law governing this area, what would normally happen is the Parliamentary Counsels Committee would draft a draft national bill and States and Territories could then use those provisions to amend the Acts in their own jurisdictions. They are basically the key steps in the process.

CHAIR: We have extended the reporting time of this inquiry due to the complexity of the inquiry. Is there any indication whether the SCAG discussion paper will be out before Christmas?

Ms LO: Unfortunately we cannot give you a precise date. I expect it will be sooner rather than later and we are talking of a matter of weeks rather than months. As part of releasing the paper we have had to get approval from a number of Ministers at both the State and Federal level and we are nearly at the end of that approval process at the moment, so we are hopeful.

The Hon. DAVID CLARKE: You are aware that the Department of Premier and Cabinet has made it clear that it is opposed to what is called commercial surrogacy as compared to altruistic surrogacy and that this opposition is based broadly on ethical considerations? Would you agree with that?

Ms LO: Yes, we would agree with that and SCAG has agreed to that principle too.

The Hon. DAVID CLARKE: You would be aware also, would you not, that a substantial body of opinion out there considers commercial or altruistic surrogacy is unethical? Are you aware of that position?

Ms LO: Yes, I would be aware. Obviously, it is a complex and sensitive area, and various stakeholders would hold different views on it. Of course, that makes the Committee's deliberations all more important in having the consultation process.

The Hon. DAVID CLARKE: You would agree also that all points of view, including that substantial community point of view, would have to be taken seriously by your department in responding to this issue?

Ms LO: Yes. I think in any policy development process stakeholder opinions are important and they need to be balanced and looked at.

The Hon. DAVID CLARKE: You would agree, and I believe the Premier's Department has made clear, that the most important thing about this is what is in the interests of the child?

Ms LO: Yes, we would agree with that and SCAG also agrees with that.

The Hon. DAVID CLARKE: That has a higher value than the interests of a person wanting to become the parent of a child born to surrogacy? The interests of the child have more paramount importance than the interests of such a person?

Ms LO: Yes, we would agree that the best interests of the child is the paramount consideration. That principle applies across various areas where children's legal issues are involved.

The Hon. DAVID CLARKE: Are you aware also of the view that laws relating to surrogacy could bring us into conflict with the United Nations Convention of the Rights of the Child? Are you aware of that argument?

Ms LO: I have not heard that argument and I must say that I am not across the details of the convention. If you want a more comprehensive response, I will have to take that on notice.

The Hon. DAVID CLARKE: Would that be something that you would go back and look at to see whether there is a conflict? That would be a serious matter to be taken into account, would it not?

Ms LO: I think that where Australia has signed up to an international instrument, it is a factor that we need to take into account.

The Hon. DAVID CLARKE: If this surrogacy issue proceeds, do you believe medical practitioners and so forth should be allowed to take a conscientious objection to participating in such procedures?

Ms LO: Sure. Well, I do not think I should answer that partly because it is the health area and perhaps the health department is better placed to answer questions on medical ethics. The other issue is that I would not want to pre-empt any findings here or by SCAG.

The Hon. DAVID CLARKE: But you can see that it is a substantial matter that needs to be looked?

Ms LO: I understand that people would have views on those medical ethics issues.

The Hon. JOHN AJAKA: I have concerns with a couple of areas. You mentioned earlier that your opinion is that altruistic surrogacy agreements should remain void; you do not believe that situation should be changed?

Ms LO: I think the terminology that is used is that they should be not legally enforceable; that means that a birth mother cannot be forced to give up the child that she has borne and given birth to.

The Hon. JOHN AJAKA: Is that the view across the board regarding any circumstance of the birth mother? You would know that there different circumstances could exist with the birth mother? For example, a birth mother could donate one of the needed gametes and, therefore, has a genetic connection to a child as opposed to the extreme situation where a birth mother donates no gametes and the two intending parents—the husband and wife—donate all of the gametes necessary and have 100 per cent biological, if I can use that word, connection with the child, and the surrogacy agreement is entered into. You do not believe that in that circumstance we should maybe look at a different approach? If the surrogate mother is not compelled to give a child over, that means that the intending parents, who would be genetically connected to the child by having donated all the gametes, would miss out on what they would consider to be their child? That is the area with which I have the main difficulty.

Ms LO: Yes. Once again I do not think I can pre-empt deliberations and findings by, I guess, expressing a policy opinion on that, but I agree with you that that issue needs to be looked at. That would mean looking at the current parentage presumptions under the Status of Children Act. That is something that SCAG will be looking at as well.

The Hon. JOHN AJAKA: It might be feasible or it might be something to which we should seriously give consideration. Comparing the birth mother to the intending parents might result in different presumptions regarding the status of children as to who is to be named on the birth certificate, that is, who is deemed to be the parent at the time of birth. The more appropriate view might be to actually have different scales as opposed to one general across-the-board rule?

Ms LO: That is something the Committee is open to look at. As you would probably be aware—this would probably be the basis of your concern—the current parentage presumption is that the birth mother is the legal parent.

The Hon. JOHN AJAKA: And immediately goes onto the birth certificate as well as her partner, who may have had absolutely nothing to do with the arrangement?

Ms LO: Yes. Obviously the terms of reference that the Committee has are quite broad. So, you can look at that if you wish.

The Hon. JOHN AJAKA: Associated with that is the issue in relation to the birth certificate. I guess what I really want are your views—you are the witnesses here—as opposed to expressing my views. I really want to hear your views or the views of your department in relation to the birth certificate. Is it appropriate that the birth certificate should still have the surrogate and her partner as mum and dad, so to speak, or is it a situation where if all gametes are donated by an intending parent that that parent should automatically be on the birth certificate? Or is it the other theory that all four people should be on the birth certificate, as some submissions have suggested? What is your department's view?

Ms LO: As I said in the opening statement, it is really not appropriate for us to be putting forward a policy position given that our Minister and the Government have not decided on this. That is why they have sent it to the parliamentary committee to look at it.

The Hon. JOHN AJAKA: But you are giving evidence for us.

Ms LO: Yes, I know.

CHAIR: But not on policy.

Ms LO: But that is on a policy issue. I think the birth certificate issue needs to be looked at. Obviously, certain things happen after an adoption order is made, for example. I suppose the Department of Community Services [DOCS] representative will be able to comment on what happens under the Adoption Act and the birth certificate can be changed after an adoption order. One of the options, I guess, that needs to be looked at as part of a national model law is whether there should be an opportunity to change a birth certificate after a parentage order is made following a surrogacy arrangement.

The Hon. JOHN AJAKA: This is no criticism of DOCS or the adoption procedure, but the impression I have from reading some of the submissions is that it almost seems that the road for adoption is an horrific road to take from a legal costs, paperwork, bureaucratic nightmare perspective. Again, you are dealing with situations that could easily arise in that period. Is there scope for the birth certificate—whether by adoption or by legislation—to be predetermined prior to the child being born as opposed to happening within 40 days, 60 days, a year or five years after a child is born and creating this almost limbo situation?

Ms LO: I cannot comment on the adoption process itself but I think if you are looking at what the law could be, one of the options would be to look at whether the making of a parentage order is followed by a change to the birth certificate. It would make sense to look at what happens in relation to the birth certificate after a parentage order is made.

The Hon. JOHN AJAKA: But again the question is should that be occurring prior to the birth of a child so that the birth certificate immediately has the intending parents as the noted parents from day one?

Ms LO: In terms of the administrative process and the involvement of the Registry of Births, Deaths and Marriages, that is a level of detail that we have not looked at yet.

CHAIR: Have you any information as to why SCAG made the assumption about the birth mother and rights?

Ms LO: Could you clarify that question?

CHAIR: You made comments in your opening statement about SCAG's terms of reference and the primary rights of the birth mother?

Ms LO: Are you referring to the fact that SCAG has agreed to a principle of that?

CHAIR: Yes, the principle?

Ms LO: The birth mother cannot be forced to give up the child?

CHAIR: That is right?

Ms LO: I think I will take that on notice and go back and look at the SCAG papers to see if there is any reasoning there that would be helpful.

CHAIR: That would be useful to us, thank you.

Ms SYLVIA HALE: You may have already answered this, but what would be the ramifications if New South Wales decided not to regulate altruistic surrogacy?

Ms LO: Basically the status quo would prevail. There would be no stand-alone surrogacy Act. Commercial surrogacy would continue to be impermissible. Adoption would be available to some surrogate parents seeking to be recognised as the legal parents of the child. Family Court orders would continue to be sought in relation to parental responsibility. If other jurisdictions have comprehensive surrogacy legislation, we could also continue to have a situation where people wishing to enter into a surrogacy agreement might have to go to those other jurisdictions to get their arrangements recognised—basically forum shopping.

Ms SYLVIA HALE: You would see that as the greatest disadvantage or is it just that it would be a question of the Government turning its back on an existing problem and just not wanting to deal with it?

Ms LO: I think that depends on your perspective. I understand that you are speaking to parents who are surrogate parents. They might have the view that being forced, so to speak, to go to another jurisdiction is stressful and costly. But I suppose with any legislation or any government regulation there could be upsides or downsides. It often depends from which perspective you are coming.

Ms SYLVIA HALE: In your remarks in answer to the Hon. David Clarke you said that the underlying principle is to be governed by what is in the interests of the child. However, I noticed that in at least one submission was the proposition that that is not a particularly helpful approach because it raises as many questions as it resolves. Do you have any comment on that?

Ms LO: Possibly the DOCS representative might be able to comment on the concept of the best interests of the child. It is difficult. If laws were introduced to govern surrogacy in New South Wales, how would the court go about establishing what is in the best interests of the child? Would we give the court an unfettered discretion or would the legislation list certain factors that the court must consider in determining whether something is in the best interests of the child? So, there are different ways of doing this.

Ms SYLVIA HALE: Because the child is not considered in isolation from the context in which it lives?

Ms LO: That is right. It really depends on the circumstances of that particular case.

The Hon. GREG DONNELLY: On the second page of the department's submission under the heading "National Work" it states, "The New South Wales Government notes that the Standing Committee of Attorneys General has prepared a comprehensive discussion paper for public consultation on a national model law." That is the one you are referring to, which not yet released?

Ms LO: That is right.

The Hon. GREG DONNELLY: Has the New South Wales Government produced a public document at all dealing with surrogacy or is it verging directly into the national process?

Ms LO: It is feeding into that process. So there is no document that I am aware of now that has been released. This will be the key document as part of the SCAG process.

The Hon. GREG DONNELLY: Sorry, what will be the key document?

Ms LO: The discussion paper.

The Hon. GREG DONNELLY: So that the contributions from the various States and Territories are going to lead to this national document out of the SCAG process and that is what is then going to inform the community about the whole issue, is that right?

Ms LO: That is right. And how consultation normally works in the SCAG context is there is a discussion paper that is agreed to by SCAG but the consultations are generally conducted at a local level by each jurisdiction. So, for example, in New South Wales the Attorney General's Department would generally perhaps advertise it or send it to a list of targeted stakeholders.

The Hon. GREG DONNELLY: But, and this relates to one of the questions on notice, what appears to be happening—do you have all the questions on notice?

Ms LO: Yes, I have.

The Hon. GREG DONNELLY: Question number 4 about various States already progressing down a path to address the issue, and there obviously have got to be some variations from jurisdiction to jurisdiction, is that inevitably leading to a situation where there are going to be differences around the country?

Ms LO: I think SCAG is committed to harmonising, if possible, the fact that they have got it on their agenda as a harmonisation project and the fact that they have agreed to some key principles and key features I think is progress on that road towards harmonisation. I think ultimately whether there is, I guess, national consistency depends on political decisions that are made across the country. I would note, however, that SCAG has achieved success in harmonisation in other areas of the law where there have previously been variations at a State and Territory level, so I do not rule it out. I think the fact that it is on there as a harmonisation project, they have made some decisions on principles and features, that is progress in itself. But with all of these things the devil is in the detail.

The Hon. GREG DONNELLY: Would it be likely that in the context of what we are doing here in New South Wales that the SCAG process is playing itself out? I think what you said in an earlier answer was how this is sometimes dealt with is that there is a draft bill developed which could become a model for the various State and Territory jurisdictions to consider?

Ms LO: That is right.

The Hon. GREG DONNELLY: Is it likely that New South Wales is going to wait for that to be done or that we would move ahead of that process?

Ms LO: I do not know what the Attorney General's view is on that, but I think, given the timing of this inquiry and the timing of SCAG releasing the paper and the various other steps that need to be gone through, we would wait to see what comes out of SCAG.

The Hon. GREG DONNELLY: I just noticed on reading the material we have been provided by the secretariat that, for example, Western Australia has passed legislation over there, I believe.

Ms LO: I understand that there had been legislation—and I could be corrected on this, we might need to check—I understand that a bill was introduced before the last election but did not pass before the last election so that it lapsed and if the new Government wishes to proceed with it they would have to reintroduce it.

The Hon. GREG DONNELLY: Would you be able to take that on notice?

Ms LO: Yes. We can check that for you.

The Hon. GREG DONNELLY: The other jurisdiction is Victoria. Has not Victoria recently through an ART bill dealt with changes with respect to surrogacy?

Ms LO: They have a bill before the Parliament now. I understand it has passed one House and is due to be debated in the other House, possibly this month.

The Hon. GREG DONNELLY: So it is a work in progress. With respect to the questions on notice again, question number eight—can you describe how Federal and State laws interact to determine the parentage of a child born of a surrogacy arrangement—are you able to provide us with some information on that?

Ms LO: Yes, sure, very briefly. State legislation provides for recognition of a parent/child relationship for the purposes of the laws of the State. The State legislation also deals with the registration of births occurring in this State, it deals with adoption laws, child protection laws and out-of-home care. At a Federal level we have the Family Law Act 1975, and that provides parenting presumptions for the purposes of that Act. The Committee might also want to note that there is a bill currently before the Australian Parliament—it is a bit of a mouthful—the name of the bill is the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008, and that will provide a mechanism for the Commonwealth to recognise the parentage of children born out of a surrogacy arrangement regulated by the State or Territory.

If it would be helpful to the Committee we can provide the contacts at the Commonwealth Attorney General's Department that might be able to provide you with more information on the details of that bill. The interplay between Commonwealth and State law is quite complex. As part of the SCAG process the joint working group is looking at that and we have a Commonwealth representative on the group to try and nut through those issues.

The Hon. GREG DONNELLY: On this issue—and I appreciate it is a vexed issue—on the best interests of a child, is consideration given to the question of the child having a right to being raised by a mother and a father?

Ms LO: I guess that is an issue that would need to be looked at as part of the process. Different people have different views on that issue. I think if New South Wales regulated it would have to look at the parentage presumptions—it would have to review the parentage presumptions to see what might need to be done.

The Hon. GREG DONNELLY: Also, the issue of a child being born without, for example, a father; in other words, the provision of surrogacy arrangements for a person to have a child and that child just to have one parent. That also surely would be an issue that would have to be considered as part of this whole thing?

Ms LO: Yes, it would.

The Hon. DAVID CLARKE: Especially if there were research that it would be contrary to the interests of the child? In that case particularly so it would have to be considered, would it not?

Ms LO: I think that is one of the issues where there are a whole range of views from different stakeholders and once again those views would have to be taken into account by the Government in deciding what its final policy decision would be.

The Hon. AMANDA FAZIO: In the questions we sent to you, number nine—what processes do intending parents in New South Wales currently have to go through to establish their legal responsibility for the child—I understand that changes to the adoption laws in 2002 have made it more difficult for surrogate parents to adopt their surrogate child. In the national framework of looking at these things would there be, do you think, scope for recommendation that State governments go back and look at how surrogacy laws interact with adoption laws to try and dovetail them a little better than we seem to have at the moment?

Ms LO: I am really not in a position to comment on the adoption laws. Perhaps the DOCS representative could comment on that. I think if we went down the path of model laws it would mean that the intended parents could seek parentage orders so that they would be recognised as the legal parents of the child; they would not have to go down the adoption route.

The Hon. AMANDA FAZIO: So that would actually streamline things much better?

Ms LO: That is right. At the moment what the intended parents would have to do is either go down the adoption route and/or seek orders from the Family Court to recognise the arrangement of where the child is already living with them, and it may be argued that that is not necessarily an ideal option by people that are going through this process.

The Hon. AMANDA FAZIO: How would that impact on the issue of things like the detail on birth certificates? Would that be covered in the model laws, do you think?

Ms LO: I think if it was going to be comprehensive it would need to be something that we would have to look at. Whether it is a provision that would sit in the model laws or whether it is a provision that would sit in the Births, Deaths and Marriages Act, I guess that would be something that the Parliamentary Counsel's Committee would advise us on.

The Hon. AMANDA FAZIO: I have also heard of the case where someone who had adopted from overseas always had to show the abandonment certificate from the country where they adopted their child as part of the legal requirements, which they saw as affecting the parent/child relationship into a future date. I was just interested to see whether that sort of issue was likely to be covered in any national model laws to try and make sure that these sorts of questions do not keep popping up and breaking down the surrogate families' relationships.

Ms LO: I think it would need to be looked at if you were to have a comprehensive approach.

The Hon. AMANDA FAZIO: I think that probably also covers questions 10 and 11 that we sent you. In relation to question 12 we sent you, which was about the Family Court recording parentage to the birth parents and disregarding surrogacy arrangements, could you comment on that question?

Ms LO: I do not actually think we can comment because I am not aware of the decisions, and also the Family Court is a Federal Court operating under Federal laws. So, no, we are not in a position to comment. The bill currently before the Australian Parliament that I mentioned before might be relevant to this issue in the future though.

The Hon. GREG DONNELLY: Are you able to provide us with a copy of the bill?

Ms LO: Yes, sure. Perhaps we could send the link to the Committee officer so you will get the explanatory memorandum too.

The Hon. AMANDA FAZIO: If we go and look at the legal rights and responsibilities, could you elaborate a little bit more on the issues that we have touched on in question 14?

Ms LO: That is actually quite a difficult one for us to answer, firstly because the Assisted Reproductive Technology Act is the health Minister's Act, and I think that sort of question would probably be better directed to the health department. The other reason why I hesitate to comment or to answer that question is that I think it is essentially asking the department to provide a legal opinion or legal advice on the issues and I think that probably goes beyond the scope of what we are really allowed to do in this context. However, I would point the Committee to two cases in the Supreme Court—and we are happy to give the citations afterwards to the Committee officers—and they are the application of A and B and the application of D and E. I am happy to provide that information. That would, I think, relate to the first dot point in the question.

The Hon. AMANDA FAZIO: I suppose the other issue that we always get is in question 17 we sent you—the rights of children to access genetic information. Could you comment a little on that for us?

Ms LO: Once again, I think that this question probably should be asked of the health department. But I would just make the observation that in the area of adoption, for example—and I think the DOCS representative would be better placed to comment on this—there has been a move towards more openness and a recognition of the rights of children to know their genetic heritage, because that relates to very fundamental issues about an individual's sense of self and their identity. I think if we were to look at national model laws in this area one of the issues would be what rights the child should have to access information about their genetic parents and about the surrogacy arrangements that resulted in their birth.

The Hon. AMANDA FAZIO: Do you think that the model laws would take into account, because there are a million permutations—not a million; probably only about eight, but I tend to exaggerate; there are a whole range of permutations about that—whether the parents are donating their own reproductive material or whether the surrogate is using donated materials? Will all of that be covered, do you think, in the discussion paper and the resulting national—

Ms LO: I do not know whether the discussion paper goes to that level of detail. Obviously the issue generally will need to be considered as part of the national work being done.

CHAIR: Is it perceived that the new surrogacy laws would be included in the Federal family law Act?

Ms LO: Once again, it is difficult to comment without knowing the concrete proposal. However, if you wanted to go down this path you could have state and territory legislation and then you would have complementary commonwealth legislation because there are various areas of commonwealth law that could be relevant; for example, under family law and taxation law there are benefits and rebates available to parents for the care of children. There is also Medicare.

The Hon. AMANDA FAZIO: And passports.

Ms LO: Yes. There is a range of areas. You might be looking at quite a few consequential amendments as well.

CHAIR: And maintenance orders.

Ms LO: Yes. What happens when there is a breakdown of the relationship? A range of areas would need to be examined.

The Hon. DAVID CLARKE: As you are aware, the Government is opposed to commercial surrogacy because in effect it would be sanctioning the sale of a child.

Ms LO: I think that is the rationale.

The Hon. DAVID CLARKE: There is a view that allowing a legally binding contractual arrangement for the passing of "ownership" of a child, even without financial consideration, would in effect be in the same category.

Ms LO: As I have said before, there is a range of stakeholders and a range of views. It is a difficult task, both for the committee and the Government, because you have to weigh it all up. No matter which point you arrive at, there will be some people who are not completely satisfied.

The Hon. DAVID CLARKE: I understand that there will always be different views. However, I am putting it that to allow legally binding contracts to be entered into, even though there is not a commercial aspect to them, would in effect be the same thing. It would be a contact allowing the transfer of ownership of a child, to put it in a very basic way.

Ms LO: I cannot express an opinion. Obviously people can make that argument.

The Hon. DAVID CLARKE: You can see that as a legitimate point of view?

Ms LO: Yes, people can make that argument.

The Hon. DAVID CLARKE: Thank you. I will read this statement and I would like a response:

> Research is increasingly showing that men and women parent differently, that certain genes in young mammals are activated by parental behaviour. Those arguing that same-sex parenting is just as good for children have the burden of proof. They have not discharged this burden for the evidence is lacking.

They are assuming that there is scientific evidence to support that proposition. If that were the case, that would also be another important consideration to be taken into account in this area, would it not?

Ms LO: The only thing I would say is that in arriving at any position on this issue the Government and the committee would have to consider whether same-sex couples should be permitted to participate in surrogacy arrangements.

The Hon. DAVID CLARKE: Would you agree that one of the things to be taken into account is the scientific evidence available as to whether that being allowed to occur would have a good or harmful effect on the child? I am not talking views; I am talking about scientific evidence.

Ms LO: Good policy work is evidenced based. That is my only comment.

The Hon. DAVID CLARKE: Thank you.

The Hon. JOHN AJAKA: I would like to run an analogy by you. Let us accept that the paramount consideration is the best interests of the child. Let us also accept the fact that each case is different on its circumstances, factual basis and merits. I take you back to the example I used where the husband and wife have been married for 10 years, they both donate the gametes to a surrogate mother, who donates no gametes whatsoever, and they enter into a contract. On today's standing that contract is void or, to use your term, unenforceable, meaning the same thing.

If we wanted to keep this state based and not wait for federal intervention, what is to prevent us from passing legislation providing that that contract remains unenforceable or voidable until it has been approved by a Supreme Court judge? The legislation would provide that the contract be brought before a Supreme Court judge who would listen to all of the facts, circumstances and merits, taking into account the best interests of the child prior to the child being born, and then make a determination as to the correct parental status of the child and that upon the birth of the child the intending parents would be deemed to have the parental status, and the birth certificate would note that likewise. In that situation—the child is born, the intending parents are known as the parents and they take the child from the hospital and continue in the normal course that any other parent would and would have all the right recognitions—federal legislation would still recognise those two people as the parents of that child.

Ms LO: I am not sure what the question is.

The Hon. JOHN AJAKA: I would like your comments. Is that something we should consider examining? Perhaps we should be involving the Supreme Court in looking at these agreements in the same way that financial agreements and adoption orders are brought before the Family Court before finalisation.

Ms LO: There is nothing to stop the State Government acting ahead of national agreement on this issue. It is just what form that regulation would take. There is no impediment in that sense. However, I think the Government would like the benefit of the work of the committee as well as the work of the Standing Committee of Attorneys-General on this before acting. In terms of your question about what is there to stop us doing that—nothing formally.

The Hon. JOHN AJAKA: If you were to have a best guess, how long will it take between the time the standing committee finishes all its inquiries and possible federal legislation being tabled? You would have to be talking about at least five years, if not longer.

Ms LO: I hope it would not be that long. If a discussion paper is released this year, obviously we will give people the opportunity to comment. As we are coming into the Christmas-New Year period, we would like to have any consultation factor that in. When you are working towards a national model it depends on how quickly you get agreement to different aspects of the model.

The Hon. JOHN AJAKA: But there is nothing to prevent us as a state amending a number of existing acts to be able to move forward, if necessary, to cover some situations, whether it involves the Supreme Court approving it or we change the provisions relating to the deemed parents at birth on certain levels.

Ms LO: There is nothing to stop us doing that.

CHAIR: What is the process for parenting orders now?

Ms LO: Are you talking about parenting orders from the Family Court?

CHAIR: So the Family Court controls this process?

The Hon. JOHN AJAKA: I was not talking about parenting orders.

CHAIR: No, but I wanted to deal with that.

Ms LO: I will speak about it on a general level, but we may need to get back to you on that because that is a commonwealth Act. The parenting orders obtainable from a Family Court would regularise the relationship between the intended parents and the child. It would basically legally recognise that the child is living with the intended parents and for all intents and purposes the intended parents are looking after that child, bringing up that child and making decisions in relation to the care of that child.

CHAIR: That is like the step family situation.

Ms LO: I do not know.

Ms SYLVIA HALE: I think you have raised the issue I was interested in with regard to question No. 12, which relates to whether Family Court parenting orders would in effect override any decision by the

Supreme Court in the context of what John Ajaka has just suggested. Of course, this may be asking for a legal opinion. Do you have any comment?

Ms LO: It is difficult to comment. First, I do not have enough knowledge of how the family law works; it is a federal act. Secondly, I think the Hon. John Ajaka was putting forward a proposition rather than talking about what happens now.

The Hon. JOHN AJAKA: Correct.

Ms SYLVIA HALE: But I was asking whether, if that proposition were to proceed and the State Government were to allow that to happen, it would potentially run into conflict with the power of the Family Court to make a determination that the birth parents were going to remain the parents regardless of any surrogacy contact that the Supreme Court might have endorsed.

Ms LO: If you were going to bring in national laws you would be looking at the interaction between the state and federal laws. We are envisaging that if you did go down this path you would have a state **Act** that would allow the making of parenting orders by a court and there would be complementary commonwealth legislation that would recognise the orders made by a state court for the purposes of commonwealth law, such as Medicare and the other things we talked about. You would try to avoid that inconsistency or one overriding the ear.

CHAIR: Is that what your work comprises when new law is brought in?

Ms LO: Yes, that would be looked.

CHAIR: You have to check that.

Ms LO: Yes, the interrelationship between the two levels would need to be examined.

The Hon. JOHN AJAKA: At present with the Status of Children Act the presumption exists that the birth mother is automatically deemed to be the mother of the child and is automatically put on the birth certificate. That is the starting point. I was alluding to the proposition that if there is an altruistic surrogacy agreement approved by the court and therefore enforceable, and amendments were made to the Status of Children Act, in that circumstance the intending parents were then automatically deemed the parents of the child and the birth certificate was issued to them as the parents of the child. That would then at least reverse the starting position. What the Federal Court would then do in relation to its legislation obviously would not have a huge effect on that. However, at least the Federal Court would be looking at it and would acknowledge the state starting point, these are the parents on the birth certificate and they have taken the child home with them. At least it would allow them a far greater opportunity to do what was initially intended in the agreement.

Ms LO: As part of this process there is the option to change or modify the presumptions.

The Hon. DAVID CLARKE: Following on from the proposition that the Hon. John Ajaka has put to you, the bottom line of that proposal is that there would be a contract—contracts would be allowed—and it would be signed off by a government authority or a judge. That is more or less the substance of what I understand.

The Hon. JOHN AJAKA: I am saying that a judge would have to look at it first.

The Hon. DAVID CLARKE: A judge would sign off. It is still a contract for the passing ownership of a child with a tick by a government authority or a judge. It would be the same as someone buying a property that is a heritage protected building and the contract is allowed to proceed subject to the relevant government authorities ticking off on the heritage protection aspects of the building.

Ms LO: I understand that.

The Hon. JOHN AJAKA: They are not my words.

The Hon. DAVID CLARKE: No, they are mine.

Ms LO: I understand essentially the proposition put by the Hon. John Ajaka.

The Hon. JOHN AJAKA: As one of the things we have to look at.

The Hon. DAVID CLARKE: A contract is a contract.

Ms LO: He is putting forward one option. My only comment is that the Standing Committee of Attorneys-General has agreed that there should not be legally enforceable agreements or contracts, or whatever word you want to use.

Ms SYLVIA HALE: You are talking in terms of contracts. Would an adoption order be the equivalent of the sort of contract that Hon. John Ajaka has referred to?

Ms LO: I have just noticed that the Department of Community Services has arrived. The Department of Community Services is in a better position to comment on the Adoption Act.

The Hon. AMANDA FAZIO: Question 19 was sent to you, which was the Government's submission that refers to same-sex couples and the recent amendments to the Status of Children Act 1996. Would you please explain the implications of that for altruistic surrogacy?

Ms LO: The Act in question is the Miscellaneous Acts Amendment (Same Sex Relationships) Act and it extends parenting presumptions to lesbian couples for children born as a result of a fertilisation procedure. However, this only applies to cases where the birth mother is a member of the couple. The reforms will not cover most altruistic surrogacy arrangements because the birth mother is generally not a member of the couple. The reforms mean that further consideration will need to be given to the parentage presumptions in relation to surrogacy.

The Hon. AMANDA FAZIO: Will those parenting presumptions include single people, either male or female?

Ms LO: That has to be determined.

CHAIR: Thank you for your attendance today and your helpful evidence. If the Committee perceives it needs more information the Secretariat will forward additional questions to you. But having said that, I also acknowledge that you have said that several of the questions asked of you need to be answered by the New South Wales Department of Health and the Department of Community Services.

(The witnesses withdrew)

(Short adjournment)

RODERICK CHARLES BEST, Director Legal Services, Department of Community Services, sworn and examined:

CHAIR: Mr Best, I welcome you to the first public hearing day of the Standing Committee on Law and Justice inquiry into legislation on altruistic surrogacy in New South Wales. Before we begin I must take you through some formalities. There are broadcasting guidelines, and the instructions for them are beside the door. The Committee Secretariat will handle any messages or documents to be tabled on your behalf. Although you have parliamentary privilege this Committee hearing is not intended to provide a forum for the public to make adverse reflections about others. If you have a mobile phone it would be preferable if you would turn it off, as it may interfere with the electrical equipment. Mr Best, are you conversant with the terms of reference of the inquiry?

Mr BEST: Yes, I am.

CHAIR: If you should consider at any stage that certain evidence you wish to give, or documents you may wish to table, should be heard or seen only by the Committee please indicate that fact and the Committee will consider your request. If you do take questions on notice, the Committee would appreciate it if your response to those questions could be forwarded to the Committee Secretariat by 1 December 2008. The Committee has resolved, due to the complexity of the questions in the inquiry, that the inquiry will not be completed until well into the New Year and you could well be asked to respond to further questions beyond this part of the process. Would you like to make an opening statement?

Mr BEST: Yes. The perspective of the Department of Community Services—and I do not think it would be a surprise to know this—will always be to start with the paramount concern of the best interest of the child. That is clearly stated in the legislation that the department works under: the care legislation and the adoption legislation in particular, but also related legislation such as the Family Law Act and the Convention on the Rights of the Child. Flowing from those broad principles and, also recognising the long-standing heritage within the State that the State cares for the most disadvantaged in society, we are looking at the parens patriae jurisdiction of the Supreme Court and looking after those who cannot care for themselves, there are a couple of principles which immediately start to emerge.

The first principle when we are looking at children is their relationship with others. The important aspect of the relationship is how that develops, and building upon that relationship: having that relationship established as early as possible so there is a long-term nurturing and loving environment in which the child is raised. On that basis the department would say, particularly when you look at surrogacy arrangements, that that would override a contractual arrangement that might be entered into between adults who might be entering into that arrangement prior to the birth of the child. While all factors might need to be taken into account, the actual relationship between the child and those who care for the child should be the paramount concern.

When we are looking at that, there is considerable diversity in individual needs. Therefore one of the principles that should flow from that should be that any arrangement is flexible and allows for a diversity of arrangements that might arise. It also permits a choice for the individuals concerned to adopt arrangements that would best suit their needs and circumstances and the needs and circumstances of the child.

The other concern is that at the present time there is not a whole lot of evidence base in terms of raising children from surrogacy. We are working in an area where we cannot say that there is clear agreement as to what are the best circumstances for the child. I think that means we should be proceeding with a degree of caution and only looking at laying down laws or other directions where it is clear that we are not likely to be causing harm to a child, and working only to a child's benefit. I think they are the basic fundamental principles that the department would start to approach the issue and which we would be recommending the Committee should be looking at.

CHAIR: Do you have any ideas on what sort of research questions would be appropriate for children born of surrogacy, as compared with other children? What sort of questions would you ask?

Mr BEST: Particularly from our background, we would be looking towards an adoption situation, and that is where we deal with surrogacy. We know that there are, and the law has already established, different rules and bases for approaching adoption, whether the child is genetically connected or not genetically connected. Some of the issues you would be wanting to know are: To what extent does that make a difference in

terms of the surrogacy? To what extent does it make a difference if the child is genetically conceived by the people who are in fact caring for the child and the surrogate mother was just carrying the child during the conception term? Does that make a difference for the child? That sort of information, as far as I am aware, is not currently available.

CHAIR: In relation to surrogacy?

Mr BEST: That is right.

CHAIR: Those sorts of research questions have been asked in relation to adoption?

Mr BEST: Some of them have been asked in terms of adoption, that is correct.

The Hon. DAVID CLARKE: Mr Best, I am sorry, my attention was distracted for the first minute or so of your opening statement so you may well have touched on the issue I am about to raise. As you are aware, commercial surrogacy contracts are illegal and non-commercial contracts are unenforceable at the moment. I preface the question by saying this. Your department particularly would see the emotions involved in family situations and family break-ups. You could have a situation where a child needs to be taken from the mother because it is in the best interests of the child to do so, but the child does not want to go. That would be an extremely heart wrenching situation.

You see at the ground level the results of the break-up of families and so forth. I put this proposition to you. If we did allow contracts to go forward whereby the birth mother could enter into a contract to, in effect, allow the transfer of ownership to another party or couple, and they entered into this contract—and those contracts are accepted under the law, they are enforceable contracts—and then we find on the birth of the child that the birth mother does not want to give the child up. We have a situation where one party to the contract goes to the court to enforce the contract. That would be an intolerable situation, would it not?

Mr BEST: It would be a very difficult situation. May I comment on a couple of things in your lead-up. I certainly would not want the child to be regarded as the property of anyone, that would be bought and sold. I was trying to say that the relationship of a child should always be a relationship—

The Hon. DAVID CLARKE: They were my words, and I was not suggesting that you implied that in your comments.

Mr BEST: If we look at Brazier's report, an English work which was done in back in the late 1990s, they indicated that in England about 5 per cent of birth mothers changed their mind. I am not quite clear how they got to do it, because the report was also clear that they were not sure of the level of surrogacy occurring in England at the time. But they estimated that there was 5 per cent—and that is not an insignificant percentage, which I think supports your question. The issue is still going to be: You have to come back to what is in the best interests of the child, and therefore you have to assess those. The fact that people have entered into an arrangement at the beginning is clearly going to influence that decision, but it should not determine the decision. You should be able to look at that situation and say, yes, there was an arrangement being made between these adults.

You would hope that the situation was that that arrangement was made in a way that they had assistance prior to making that decision, as they do in adoption. You would hope that they had counselling available to them, that they were unaware of the decision that they were making, that they had time to make that decision, that they were not making the decision in times of high emotion, and that there was some sort of oversight around that process. Putting all of that to one side, your question is still going to be: Even with all of that, there are going to be some changes and therefore you need some guidance available and someone to be able to say what is going to be in the best interests of this child, with the birthmother now having decided that she wants to retain the child.

The Hon. DAVID CLARKE: But the prima facie starting point, and all other things being equal, subject to other issues, it is going to be in the best interests of the child to be with the birth mother, unless there are other circumstances that come into play—in other words, in the normal situation. Would you agree with that?

Mr BEST: I am not sure that the research would necessarily establish that. I think the research establishes that a child needs a loving, caring, nurturing and long-term arrangement, and that can be with someone other than the birth mother.

The Hon. DAVID CLARKE: But if it turned out to be the birth mother who had entered into a contract for, in effect, the transfer of ownership, and it was shown that she would be a loving mother, we would have a situation where we could have some real problems in court proceedings, could we not?

Mr BEST: That is right.

The Hon. DAVID CLARKE: That would be an intolerable situation. That is a very serious matter that has to be taken into account when we consider whether or not to recommend that such surrogacy contracts be regarded as enforceable contracts?

Mr BEST: It is a very serious matter for someone to consider, that is correct.

The Hon. DAVID CLARKE: And we would have to be satisfied beyond a reasonable doubt that it would not go against the interests of a substantial number of children?

Mr BEST: That is correct.

The Hon. JOHN AJAKA: Clearly, altruistic surrogacy arrangements are not criminal in this State. Also, contracts entered into are not illegal; merely, at this stage they are void, meaning in reality they are unenforceable. Earlier you mentioned genetic connection with the child. As I understand that, there are different levels in relation to an altruistic surrogacy agreement. At one end of the scale, we can have the arrangement whereby a husband and wife donate all the gametes and the surrogate mother simply carries the child until birth. At the other end of the scale, a surrogate mother donates the female gametes and someone completely different donates the male gametes, and the intending parents have absolutely no genetic connection. I would appreciate your view on this. My view is that perhaps we need to look at altruistic surrogacy in different ways, in relation to the different levels of the genetic connection. Would you agree with that?

Mr BEST: I certainly think that in terms of what I was saying about flexibility that would be an advantage. If I could come back to one part of your introduction, it is not always the case that all the arrangements will not be contrary to law, so that if there is a passing of money—

The Hon. JOHN AJAKA: I have said leaving commercial surrogacy aside. I am talking altruistic in its purest sense, no remuneration.

Mr BEST: Even if there is no remuneration there are still some possible offences under the Adoption Act—advertising, disclosure of names and the like—so some aspects could still lead to prosecution. Just putting that to one side, yes, there is a range of circumstances. I am not aware of any research that helps us to distinguish between those at the present time.

The Hon. JOHN AJAKA: That was my next question.

Mr BEST: I suppose my concern is that if we do not have an evidence base as to what we are doing, we need to be sufficiently flexible so that if the evidence and research comes out in the years to come as surrogates start to grow to adulthood and the like and we get some longitudinal studies, or whatever they might be, we have some flexibility in the arrangements so that we can build in different responses depending on the circumstances of the child.

The Hon. JOHN AJAKA: I think it is accepted from both a Federal and State point of view and in just about everything else we have read, that no-one has really argued that the best interests of the child are not the paramount consideration. We understand that. However, when you are dealing with situations where an agreement is being discussed and the parties are first talking about this, it almost seems to me a little strange that we are saying at a State Government level, fine, we are not stopping you from entering into the agreement, we are not criminalising you for entering into the agreement, as long as you meet all the legal criteria, but we will not assist you in any way whatever in relation to what occurs after this agreement other than the presumptions that exist with the Status of Children Act. Would it not be better in the interests of the child if more concrete arrangements were put into effect, if these agreements are going to be entered into, so that either a Government

departments such as yours or a judge of the Supreme Court is allowed to be involved so that the parties can have a venue and the agreement becomes enforceable? In other words, you can enter into one of these agreements on your own and have no involvement with DOCS or the Supreme Court, or both, or you can go through another procedure where the Supreme Court is involved and wants a report from DOCS and the Supreme Court looks at all the flexible criteria of the parties at whichever extreme of the surrogacy arrangement and a decision is made immediately about what the situation will be upon the birth of the child—the birth certificate, the parental status of children, and presumptions. Is that something that we could seriously look at?

Mr BEST: I think so. That is one of the reasons that DOCS has difficulties with the current arrangement, which is that if surrogate parents want the legal status of the child they have to go through an adoption process. DOCS does not think that the adoption process is appropriate in this case. It does not address what the intending parents are after. The intending parents usually approach DOCS—there are not a large number of them, but they do approach DOCS—and want an arrangement that will be in place almost immediately upon birth. They are saying, "This is the process, this is what is happening. If we were conceiving this child biologically then immediately the child is born the law kicks in and says this child is our child and we have that legal relationship with that child. We want a similar situation for a surrogacy; we want the two to be aligned." If we are saying no it is going through an adoption process, depending on what the arrangements might be, if the gametes are those of the father and not of his wife we are looking at a step-parent adoption. As the law currently stands that means the wife will not be adopting the child until it is about five years old. There is currently a bill before Parliament to reduce that period of time, but it will still be far in excess of what surrogate parents would be expecting at the present time.

The Hon. JOHN AJAKA: Assuming both intending parents have donated all the gametes and they proceed by way of adoption, realistically what is the average waiting period?

Mr BEST: About 12 months.

The Hon. JOHN AJAKA: In that 12-month period numerous problems could arise where the child needs urgent medical attention, or the child is to be enrolled at a school because the parents want to enrol it in advance, or they are moving interstate or overseas or obtaining passports. The reality is that unless the surrogate mother cooperates completely and assists and signs the necessary forms it can almost be a nightmarish situation for the parents and the child.

Mr BEST: The period probably is not as long as that because the adoption process allows for certain responsibilities to be transferred across immediately there is consent. If you look at the adoptions apart from surrogacy you would expect that those same circumstances could arise for any of those people, and they rarely do because of the time from when you get consent. There is really only a 30-day period prior to the surrogate mother's consent. Once that happens aspects of responsibility are immediately transferred to someone under the existing Adoption Act. The period of time is not all that long and we do not have an experience of significant problems with ordinary adoption. If you are thinking what is the difference between a surrogacy arrangement and an ordinary adoption, in those circumstances I cannot think that there would be significant differences. It certainly could arise; I am not saying that it could not arise.

The Hon. JOHN AJAKA: In some cases a month could be a long time indeed. I think one of the submissions mentions urgent medical treatment was needed and they had to go and ring the surrogate mother to come rushing in to sign. I must say I was a bit astounded by that. Leaving that aside, when a child is born and the gametes have been donated by the intending parents even the fact that a child is told he or she is adopted seems to me rather strange when biologically, genetically, that child is derived from those two intending parents. In those circumstances should there even be the need to adopt or have the terminology of adoption? Should we not be moving more into the reality that the birth certificate notes that these two are the parents from day one?

Mr BEST: I think that is the position of the department. Adoption is there and usable, but it is not the preferred option. There should be a better system in place that recognises what the arrangement is, particularly the arrangement where genetically both gametes are coming from the caring adults.

The Hon. JOHN AJAKA: If we looked at a situation where the agreement was being entered into prior to the child being conceived, if I can use that word, and was brought before a Supreme Court judge to look at the best interests of the child and all the circumstances and flexible arrangements that the parties are entering into, and both parties being independently legally advised, DOCS being brought in to prepare a report on the circumstances to ensure that this child is not going to be put in any danger or any unfortunate circumstances—

let us assume all the boxes are ticked and the judge makes an order that on the birth of the child the intending parents will be noted under the presumptions of the Status of Children Act and will be immediately on the birth certificate, do you see that as a more logical approach than the current procedure?

Mr BEST: Yes.

Ms SYLVIA HALE: It is my understanding that in Victorian times it was the height of ill manners to comment on any likeness a child might have to anyone else. In fact, we have a situation today, do we not, that there is a high degree of unacknowledged surrogacy in the population—namely the actual father may not be the legal father? Has there ever been any research as to the impact on the child of the legal father not actually being the father? I do not know how you would go about getting people to acknowledge that.

Mr BEST: As you say, clearly there are difficulties in trying to identify it. We have research about children who have been adopted and research on the stolen generation, the Aboriginal children of the State, in relation to their removal. We have equivalent research elsewhere. Certainly the moves in this State and elsewhere towards openness in arrangements and making clear what the information is are supported by the research that exists. While people may not comment on the fact that you have dark hair and both your parents are blonde, the research is still clear that the child is still benefited and has a better life as a consequence of knowing what the arrangements were around his or her parenting. I think that is reasonably clear in terms of the research that exists. Whatever the circumstances, I think the department would be saying the arrangements should be clear. It is not just a case of the child's having the information but also a case of the child linking in terms of future partners and all that sort of knowledge. It is very important for an individual for the purposes of their own identity and procreation to have that information available to them. That is where the current research is important and what the current research would guide you towards.

Ms SYLVIA HALE: Presumably in the case of all children, whether it is before the child is born or after or five years down the track or whatever, the department would have the power to intervene in a situation where a child was not being raised well or was not being well nourished and cherished. Does it have that power at the moment? Is that correct?

Mr BEST: That is correct.

Ms SYLVIA HALE: So, if for an example a gay couple had come to an arrangement with a woman to have the baby and she immediately handed it over to the gay couple to raise, how would the department respond once it became aware of that situation? Would it have a consistent monitoring role?

Mr BEST: No, the department would only become involved if it considered there was a risk of harm to that child from some circumstance.

The Hon. JOHN AJAKA: Which you may never know.

Mr BEST: We might never know. We are reliant, therefore, upon the information coming in. Having said that, I think it is reasonably common knowledge that an awful lot of information is currently coming into the department about children. I cannot remember the statistics but it is a very large percentage of children about whom information is currently coming into the department based upon someone suggesting that there is a risk of harm to that child. If the information is coming in the department has to take that information and ask whether we think there is a risk of harm. If there is a risk of harm the legislation asks whether there is something the department can do to care and protect that child better than what is already there. The department then has to satisfy the Children's Court that the child is in need of care and protection; that is, not just that the child is at risk of harm but there is something the department can do that would improve the situation for the child.

CHAIR: So the same-sex couple issue is not a criterion for harm?

Mr BEST: Same sex is not a criterion for harm.

Ms SYLVIA HALE: So criteria such as wealth, social status, employment status or sexuality of the parents is irrelevant when you look at the situation from the point of view of the child's welfare? It is how the child is actually being raised in that context.

Mr BEST: That is correct.

Ms SYLVIA HALE: So it is irrelevant also whether it is a single parent or a couple, regardless of their sexual orientation?

Mr BEST: That is correct.

Ms SYLVIA HALE: Presumably in any surrogacy arrangement, acknowledged or otherwise, you would be more or less intervening after the event when you have some evidence rather than trying to make a prior judgement as to whether this was an appropriate arrangement for the child? It would be assessing it in material or actual terms as to how the arrangement was playing out?

Mr BEST: Yes.

The Hon. AMANDA FAZIO: I wish to ask you a question following on from some of the issues raised by Mr Ajaka earlier. If a child was born through surrogacy and the father had provided his reproductive material and the wife and the couple had not, you said it took five years for a step-parent adoption to go through. What would the wife's status be if the husband were to die? Would she have any more rights?

Mr BEST: It would be similar to a normal step-parent relationship now. There are no automatic rights. The step-parent these days would normally apply to the Federal Magistrates Court for parenting orders to obtain those. The Federal Magistrates Court would look and say, "What is going to be in the best interest of this child? Long-term nurturing arrangements, not shifting existing arrangements, maintaining schooling, family connections, those sorts of things." Clearly it is going to be in the interests of most children to remain with the step-parent in the house that they have been raised in. To actually obtain the legal status the step-parent would need to go to exercise the Family Law jurisdiction.

The Hon. AMANDA FAZIO: If they got the parenting order, would that interfere at all with the adoption process, or would the adoption process just tick over when the five years came?

Mr BEST: That is right. If they wanted to proceed with adoption, that would just be an interim step because it provides a bundle of orders, which gives them certain rights for parenting up until the time the child turns 18, but which would not influence some other aspects like succession laws or the birth certificate of the child.

The Hon. AMANDA FAZIO: In the indicative questions we sent to you, question No. 5 was a submission to this inquiry, which noted that adoptions cannot be finalised within 60 days of a child's birth in order to give relinquishing parents time to make a free decision about relinquishing their child. It was argued in the submission that a similar period of time should elapse before parenting orders can be sought for a surrogate child by the intending parents. Do you have any comments on that suggestion?

Mr BEST: The 60 days is broken up into the first 30 days—and it is a minimum of 30 days—to allow the birth mother to make sure that she is clear about what her decision making is, so it is not taken at the hospital during a high time of emotion. Then there is a further period of 30 days in which the birth mother can revoke that consent and during that period of time the birth mother is receiving mandatory information and has the opportunity to seek advice. The department would want to make sure that the ability to see that the birth mother was properly making a decision still existed; the department thinks that the birth mother should be still entitled to receive access to independent advice, should still receive a level of information about what the arrangements are and what it means.

When that occurs in the surrogacy arrangement, the department does not know basically, has not decided—and I am not quite sure how you would decide where it would be appropriate but the department still feels it is necessary for those principles to be applied, whether they apply prior to the birth or after the birth and I would be interested to see what this Committee recommends on that but the principle from the department's side is that those fundamentals are still important but when should they occur, there is no concluded view.

The Hon. AMANDA FAZIO: Do you think it should apply in a blanket or a uniform way or if the parents have provided the reproductive material, do you think that the surrogate mother should have less time or less say in the process?

Mr BEST: Because we know so little about people's response and because we do know that even where all of the genetic material has come from the intending parents, birth mothers have still changed their minds, they are still a key participant in what is going on, I think the question is unclear in my mind as to what extent you then differentiate. I suppose my view would be that access to information, access to legal advice and the ability to make a decision, which is informed and free of an emotional environment are still fundamentals. How you play that out, depending upon the genetic input from the intending parents, I can see some merit in having different arrangements, depending upon what the surrogacy arrangement might be.

The Hon. AMANDA FAZIO: If, for example, John and Jane Smith decided that they were going to use a surrogate to have a child and they arranged for the surrogate to book into a hospital as Jane Smith, nobody would ever know, would they?

Mr BEST: No, but that does not necessarily mean that is the best arrangement for the child.

The Hon. AMANDA FAZIO: Yes, I know that, but I am saying that people would not know?

Mr BEST: That is right, and all the studies have indicated we cannot be sure about what the arrangements are with what is happening at the present time.

The Hon. AMANDA FAZIO: I do not think we have actually asked you, from a number of cases that come to Department of Community Services each year that involve surrogacy arrangements, can you quantify that for us?

Mr BEST: Yes, we are looking at one or two matters a year. It is very small, and so they would come to us by people wanting to have adoption or making inquiries about adoption saying "This is what we are proposing to do" or someone else might give us some information by saying, "Something strange is happening here. We think money has been passing hands", so we are looking at the prosecution side of things. But even with all that range, we are looking at very small numbers.

The Hon. AMANDA FAZIO: I have read about quite a few people, whether it is same-sex male couples or ordinary couples who go overseas where commercial surrogacy is available, does the Department of Community Services have any involvement when they bring the child back to New South Wales?

Mr BEST: Again it depends upon what those arrangements might be. To bring the child back in, if there is not appropriate birth documentation, the Department of Immigration and Citizenship [DIAC] would often approach the Department of Community Services to say, "What is the adoption arrangement for this. Can you look at the circumstance for this child", but if the documentation is clear, then the Department of Community Services would not have any involvement there at all.

The Hon. AMANDA FAZIO: Do you have many cases where you get involved like that each year?

Mr BEST: No. They fall within that same category of one or two matters a year.

The Hon. AMANDA FAZIO: Can you explain how the relevant Federal and State laws work in relation to adoption of parenting orders and how they relate to surrogacy? I am not talking about overseas adoptions because they are different.

Mr BEST: At the present time the Federal laws will be there to establish the parenting rights. Those rights give you access to becoming a parent, which is not the decision about everything to do with the child because we do have a residue of rights in relation to a child that the State has reserved, so it is not quite like owning something because there are some decisions that parents cannot make at the present time, but those rights are there and they then give those rights for decision making. Parent rights would exclude naming on a birth certificate and succession rights. They are limited until the child is 18.

If you want to change the status of the relationship with the adults, you have to go through an adoption process and the adoption process is then the State law and the adoption will change birth certificates and it lasts for the lifetime of the child. It does change succession laws. So for the continuum between dealing with a child, adoption is up one end and parenting rights are partially along those. If the child is involved in the care system, short of the parenting rights in the Federal, there are also parental responsibility rights that the child can obtain

through the Children's Court and again they are comparable to but do not give quite as many rights as the rights of the Family Court.

The Hon. JOHN AJAKA: This is why, realistically, the Federal Family Law Act for parental rights is deficient in many ways. At the end of the day, as you said, it really comes down to one parental responsibility: who does the child reside with, who has the right to spend time with the child, which I understand is the new terminology under the Family Law Act, but it really does not state that this child is the child of this parent or has this "for life" relationship and that is where only the State legislation, through the recognition of the child and parent status comes into it?

Mr BEST: Yes, that is correct.

The Hon. AMANDA FAZIO: Do the genetic parents of a child born of a surrogate, if they are applying to adopt that child, have to go through the same hoops as any other adoptive parents?

Mr BEST: Yes, they are not treated any differently at all.

The Hon. GREG DONNELLY: Question No. 3 of the questions on notice asks for a brief outline of the adoption process. For the benefit of the Committee could you give us a quick outline of adoption process in New South Wales?

Mr BEST: The process for adoption at the present time is that an individual or a couple who wishes to adopt lodges an expression of interest with one of the accredited adoption agencies of which the Department of Community Services is one. Having lodged that, they will be invited along to an information session. Having gone through that information session, they will then be asked to formally apply for adoption. They lodge their application. Upon that application having been formally lodged, they will go through various screenings—they will go through criminal record checks and those sorts of matters. They will look to be seen and if the information indicates that they are appropriate and suitable people to be adoptive, the application will be referred out to a social worker independent of any of the agencies who will provide a report on that arrangement.

Having got all that information, the decision will be made by the agency as to whether or not the adoption should proceed. If it is the local adoption, they will go back into the pool waiting for a child to become available who appears to be suitable for them—and they try to match the child with carers. Having done that, the court process will then commence in terms of getting appropriate consents for the adoption of the child and lodging the application in the court. So from the time the child is identified as being suitable for this adoption, that is the 12-month period that I referred to in one of the earlier questions. That is, in a very quick nutshell, the sort of process you would go through.

The Hon. GREG DONNELLY: What I am struggling to come to terms with is this. The overwhelming evidence seems to be that it is a very difficult situation to raise, nurture and care for a child by a single parent, be it a mother or father, than by a mother and a father. There seems to this potential conflict between the rights of the child and the claims of adults. I am struggling to work out how these two situations are reconciled, if in fact they are able to be. In surrogacy we have claims by adults to have a child through a particular set of circumstances with the child actually having no say at all, by definition, because the child is not born. How do we come to terms with the resolution of the best interests in that circumstance when the evidence is that not every relationship may necessarily be optimal in the circumstances of raising the child?

Mr BEST: You cannot ever say that you are going to be able to make a decision that this is going to end up with the optimal arrangement. All that you can say is that you think this is going to be the best arrangement for the child, on the evidence before you. I think that is to acknowledge that there is going to be a range of circumstances. While people may say that the best arrangement is going to be a mother and father raising the child, it is hard to deny that we have a long history, particularly in some cultures, of grandmothers, for example, effectively doing the raising of the child. People raised for a number of years by their grandmother may in fact even come President of the United States. So, you have to look at that and you cannot say that this is the optimal way. You always have to go back and look at the circumstances and arrangements for that particular child and that particular couple. I think that is the answer to your question. You cannot answer the question by saying, "Here is the rule that is going to apply in every case." You have to say, "This is what we know about this arrangement and these people at this time" and, therefore, how do we work that out as the best arrangement. I am sure it is not a satisfactory answer for you, but that is the best I can do.

The Hon. GREG DONNELLY: I am trying to work out how the two reconcile. On one hand we have the paramount interests of the child, which seems to be an underpinning principle running through all of this narrative, but on the other hand we have, in effect, claims by adults to have a child through a particular set of circumstances. How you discern the child's best interests in that case?

Mr BEST: If you are looking and saying, "We have a couple who wish to have a child by surrogacy," that is not looking at the best interests of the child. Prior to the child's birth that is an entirely appropriate arrangement for them to be in and it will be an entirely appropriate matter for them to consider after the birth of the child as well, but their desire to have a child is only one element of whether or not they are going to be the best carers for that child. Clearly, their desire for a child out there wanting to love a child as their own will be very important factors to determine whether or not they are going to be the best carers for this child. But it is only going to be one subset, albeit a very important subset, of determining the other question.

The Hon. GREG DONNELLY: What other considerations does the Department of Community Services look at arrive at that considered decision?

Mr BEST: You would be looking at what the relationship would be with the surrogate mother, for example. You would be looking at it to say do these people demonstrate that they have the ability to care for a child? We have parents who have demonstrated, because DOCS has been involved in their life and removed five or six other children from them, that they do not have parenting skills. No matter what their desire is to have a child by surrogacy, DOCS would say there is a proven history here that these parents do not have the capacity to parent children. Just because parents have a desire to parent a child does not mean that that they are going to be suitable parents.

The Hon. GREG DONNELLY: But is not the issue with surrogacy that we set up the legislative framework that will provide the boundaries? Will we have to confront the reality that people will go out and enter into arrangements anyway, which, in some sense, is almost the laissez-faire system that operates at the moment? Will we have to confront that?

Mr BEST: That is right.

The Hon. GREG DONNELLY: In a sense we have now pretty much an open framework where arrangements are entered into, I guess, mainly on an informal basis?

Mr BEST: Yes.

The Hon. GREG DONNELLY: Although through DOCS some people seek to formalise it through the awkward adoption process you have described?

Mr BEST: Yes.

The Hon. GREG DONNELLY: Even if you have the legislative framework, do we not face the situation that people will pursue their own arrangements anyway?

Mr BEST: I would have thought so. The question therefore is what should be the role of the State in that? I think DOCS' perspective is that if the State is to be involved, then the State needs to be making sure that the best arrangement for the children results. If the State is not involved—and the State cannot be involved through a whole range of scenarios, some of which were raised this morning—the next step is to ask whether the child is at risk of harm because of those arrangements; then the child comes back into the care and protection system. If the child is not at risk of harm and the State has not been involved—there has been no endorsement or support by the State of what has gone on—but the child is being raised properly, is healthy and well and everything else is okay, does the State need to worry that it was not involved? I do not think so.

The Hon. DAVID CLARKE: Arising from the general questioning by the Hon. Greg Donnelly and a specific question asked by the Hon. Christine Robertson, my question relates to children being transferred to the care of homosexual couples as a result of surrogacy arrangements. I would like to read to this statement made by Professor Bernadette Tobin of the Plunkett Centre for Ethics, which is associated with St Vincent's Hospital. She said:

> Since research is increasingly showing that men and women parent differently, that certain genes in young mammals are activated by parental behaviour, those arguing that same-sex parenting is just as good for children have the burden of proof. They had not discharged this burden, for the evidence is lacking.

Professor Tobin, from a scientific research institute with appropriate background, is relying on research to show that that burden has not been discharged. What would your response be to that?

Mr BEST: My response to that is that the role of the department is not—I think it links in, as you said, quite nicely to the comments of the Hon. Greg Donnelly as well—to establish what is the best parenting for a child but to establish whether or not the child is at risk of harm and then in need of care and protection. Whatever the research might be for optimal parenting, the question is, is that parenting of such a level that it then creates a risk of harmful the child? There is no evidence of that.

The Hon. DAVID CLARKE: That is a different thing, but you would not argue against that statement I have just read, would you?

Mr BEST: I could not argue against Professor Tobin, no.

Ms SYLVIA HALE: My question is on a completely different tangent and you may wish to take it on notice. Where a surrogacy arrangement is in place and, possibly as a result of how that surrogacy has come about, the child is born severely or even moderately disabled, is there any evidence or has DOCS encountered situations where this has caused either the intending parents or the birth mother if she is left with the child, to reject that child? Is that a feature of any DOCS experience?

Mr BEST: The number of children coming through that DOCS is aware of in relation to surrogacy arrangements is so small, and of that small number I am not aware that that has arisen. However, DOCS is aware of children who have been adopted, not through a surrogacy arrangement, where during the course of the adoption or shortly after the adoption it has become clear that the child is developing a disability and factors that were not previously known have appeared and have placed considerable pressure on the adoptive parents. The adoptive parents have wished to either not proceed with the adoption or when the adoption has been finalised to then put the child back up for adoption as a result of that. Again, it is not a large number but certainly there are instances of that occurring. Clearly, that is very distressing for everyone involved.

Ms SYLVIA HALE: Would that proportionally be a greater factor when you have disabled children in an adoption situation as opposed to children who are born severely disabled to a conventional family?

Mr BEST: I am sorry, I really would not know the basis for that. I know there are instances of it, but I do not know of any data that would establish proportionates or ratios.

CHAIR: Mr Best, thank you for attending today. You did mention Brazier's report?

Mr BEST: Yes.

CHAIR: Would it be possible for the Committee to have that?

Mr BEST: I can provide the citation for that.

CHAIR: Thank you. There may be some questions on notice, of which the secretariat will notify you, mostly relation to questions you were sent and we have not had time to reach.

Mr BEST: You said that you would like a reply by 1 December?

CHAIR: That is right. The secretariat will advise you of that. We have extended the reporting time for this inquiry into the new year because of its complexity. So, the Committee may contact you again.

(The witness withdrew)

DENISE ANNE NORMAN, Indoor Sports Owner/Manager, NSW, and

DAVID JOHN NORMAN, Indoor Sports Centre Manager, affirmed and examined:

CHAIR: Thank you very much for coming to this first public hearing day of our inquiry into surrogacy. There are a few procedural issues relating to mobile phones and communicating with the committee. The secretariat people will assist if you need to give us a piece of paper or anything. There are just some formal questions I need to ask for the record. Mr Norman, in what capacity are you appearing before the Committee; that is, are you appearing as an individual or as a representative of an organisation?

Mr NORMAN: An individual.

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

Mr NORMAN: Yes, basically.

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

Mrs NORMAN: An individual.

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

Mrs NORMAN: Yes.

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 you have any questions you want to send back to us later because you feel better having had time to put the answers together, we need those by 1 December. Something I did not say to you earlier: There is an issue about adverse mention. When you are sworn into these committee hearings you come under parliamentary privilege, but we would much prefer that it does not provide a forum for people to make adverse reflections about others. So if you want to do something like that we would rather you did not. Would you like to start by making a short statement?

Mr NORMAN: We would like to thank the Committee for taking the time to look at the laws related to surrogacy and to thank our local member, Lylea McMahon, for her assistance in trying to help us to see the laws reviewed. I might hand over to Denise.

Mrs NORMAN: We would like to thank the Committee for taking the time to look into the laws related to surrogacy and to thank our local member, Lylea McMahon, for her assistance in trying to help us to see the laws reviewed. We need to point out that our experience was having surrogacy performed through Canberra IVF, since our surrogacy application to Sydney IVF was rejected. So although legally Emily was born in New South Wales and most of the processes were done under New South Wales' law, some of our experiences may not apply to those who had surrogacy arrangements and the full process conducted in New South Wales.

CHAIR: Do you believe the Government regulation could play a role in improving the experience of parties wishing to enter surrogacy arrangements, and if that is so, what issues do you think should be addressed?

Mr NORMAN: Yes, we do think it can help. The three things that we would really like to see changed are standardising the legal reports that are required as part of the process. Once again, we did stuff through Canberra, not Sydney, so I am not sure that the same legal reports are required in New South Wales as were in Canberra. But basically it appears to us that everybody who wants to go through the process has to go and get independent legal advice, which basically means every time it happens they are reinventing the wheel at fairly sizeable expense because you cannot just get your local Joe Bloggs solicitor to do it, it has got to be somebody who specialises in family law, and I think a barrister or something. So you are not talking cheap.

The second thing is to streamline—I am sorry to put it in such terms—the handover of the child from a legal perspective. At the moment it is a really long, drawn-out process. The surrogate literally handed over the

baby—we caught her on the way out at the birth—but from a legal perspective we had to wait a period of time until we could get the processes done to get a parenting order initially and then later on we have to go through an adoption process. And because of the procedures within DOCS we are talking five or six years before we can legally adopt Emily. If we could streamline that down to a much shorter process it would be great. The third thing is recognition of the genetic parents on the birth certificate. They are the three main areas that I think could help.

The Hon. GREG DONNELLY: In terms of the lengthy process that you both went through, obviously the essence of your submission is the need to streamline the whole process but I am just wondering, and can I invite you to think about this not from your own personal point of view, although this is intimately personal because it is your own circumstance, but is there a case to be put that with something as significant as the bringing into the world and the raising of a child that it should be in fact quite a detailed and comprehensive process? Is there a midpoint to all of this? In other words, I do not suspect you are arguing it should be a very easy process, I am just wondering what type of process have you generally got in mind?

Mr NORMAN: We generally do not have a problem with the process leading up to the birth of Emily really—I am answering it from our perspective. But basically we went through a significant vetting process, if you like, to get to the point of even being allowed to apply for surrogacy. Once we had got through that process we had to go through then a much longer process beyond that with psychological, legal and medical checks all over the place to make sure. What I am basically saying is that I actually do not think the process leading to the birth of the child is that big a problem. I think it is really important that those checks and balances are in place. You do not want this to be—we do not want it and I do not think anyone really wants this to be an open slather situation. It really is something, in my opinion, which should be available for someone who is in a desperate situation like we were.

Mrs NORMAN: It is a last resort.

Mr NORMAN: In reality it is an altruistic thing in Australia, which I think is terrific. I would hate to see something like America where people are doing it for commercial gain. I would argue that even beyond all of the hoops that we had to jump through to get to the stage of the birth, anyone wanting to do this, the biggest hurdle they are going to have to come across is finding someone willing to do it. I cannot see too many women out there jumping up and down, waving their arms around, saying, "Gee, I want to have a baby for another person". The short answer is I think the stage up until the birth is fine; it is the stage after the birth that is the frustration point.

The Hon. GREG DONNELLY: I read your submission but perhaps in your own words can you describe what was the real challenge associated with that period after the birth that was the most problematic for you?

Mr NORMAN: It is the not knowing. Realistically, legally, when Emily was born she was the child of Barbara Martin and her partner Graham Jolliffe. In the hospital she was referred to as Baby Martin and then when we named her Emily she was Emily Martin. Basically at all stages of until we get to the six-year point where we get the DOCS, I think it is called a section 21 or 51 report or something—

CHAIR: You know more than us.

Mr NORMAN: There is a report that DOCS has to do that basically tests our suitability as parents. They come into your house and they check out that you have got a bedroom for them and they fingerprint us and they do criminal checks; they check bank records and they go through and make sure that we are going to be suitable people to bring up a child, which kind of feels a bit awkward, but we have got no problem: we have got nothing to hide. It seemed a bit odd, but that aside, up until the point when the adoption process is finalised and from that point onwards Emily is legally ours and in every other way would be described as the child of an average Joe Bloggs couple, up until that point, legally, if anything changes, if anything goes wrong, if one of us was to get hit by a car or both of us was to get hit by a car, for example, then Emily is not exactly in legal limbo but there is every chance that someone could decide to hand Emily back to the surrogate mother, who does not want her—not that she does not love her, she does, she thinks she is a terrific kid—but she did not have Emily for herself, she had Emily for us.

One of the scariest moments in my life, probably before coming in here, was sitting in the Family Law Court just down the road here and having a gentleman standing up there—a very nice gentleman, by the way—

who was sitting there with our entire lives in his hands. He could say, "I am not going to approve this parenting order", or "I am going to approve this parenting order". If he did not approve the parenting order we had no idea what we were going to do with Emily. There were some frustrating administrative type things, like we could not apply for a Medicare card or to put Emily onto our Medicare card, our health fund, Centrelink, all those sorts of things. A kind of scary one: Emily's surrogate was in Nowra and we are in Shellharbour, which is about 45 minutes apart. If Emily fell sick and had to go to hospital and needed some sort of medical treatment which needed parental approval, technically we had to ring Barb in Nowra and get her to come up and sign the papers because up until we had the parenting order we had no legal right. Those sorts of things were a bit awkward, but the worst thing is just this state of uncertainty.

The Hon. GREG DONNELLY: One of the big issues that we are wrestling with as part of the consideration of this whole area is the question of enforceability of the question of surrogacy arrangements. I am keen to hear your reflections on that. Obviously, you entered into an arrangement with a woman—was she married?

Mr NORMAN: She is a de facto—a long-term de facto.

The Hon. GREG DONNELLY: She obviously carried through with the whole arrangement, but we are contemplating in our whole consideration of other circumstances where, for example, it could be a single woman who has a child and has a change of mind, or even in the circumstance of a couple who could change their mind. As a couple who have been through this, did these things trouble you in terms of possibilities as you went through the whole period?

Mr NORMAN: Not really because this was not a stranger to us, this was a friend who came to us and actually offered. We did not decide to do surrogacy and were not looking for someone to do it—

The Hon. GREG DONNELLY: It was an offer made to you?

Mr NORMAN: Yes. A surprising offer, but it was an offer made to us. So from point dot we knew that Barb had no intention of wanting to keep the child. We kept all the way through, once again, those checks and balances you were referring to earlier. The solicitors, the counsellors, the doctors, everyone kept saying, "You do realise that if at any stage she doesn't want to give up the child she doesn't have to?" Yes, we did know that; yes, we did accept that, but given what we had gone through to get to that point we were willing to take that risk. As I said, to us it seemed like a fairly minimal risk because we were very confident that she would go through the process.

Realistically, that is what that process is there for. That is why you spend thousands of dollars seeing a solicitor or a barrister and why you go and see a counsellor specialising in this kind of—not that they specialise too much in surrogacy but in family type counselling and so on. All four adult parties—being myself, Denise, Barb and Graham, as well as Barbara has a son who was 12 at the time and he had to go through assessment by the psychologist and we spent many hours in her rooms getting completely psychologically assessed, basically to make sure that that would not happen from her perspective. I think I have lost track of where I was up to.

The Hon. GREG DONNELLY: Just one final question, and it is something you would not be familiar with because it is in the papers we have been given and have been reading through. It was mentioned in one of the submissions—I forget which one it was—a thought that in terms of surrogacy arrangements that really they should only be contemplated in circumstances where the woman has had at least one child herself; in other words, has been a mother and therefore second and subsequent experience—

Mr NORMAN: The surrogate has already had a child?

The Hon. GREG DONNELLY: Has already had a child.

Mr NORMAN: Yes.

The Hon. GREG DONNELLY: Does that idea make any sense to you? When I read it I thought that that at least put the surrogate in a position of knowing exactly what she was getting herself into with the experience of pregnancy and birth compared to a woman who went ahead having a first child.

Mr NORMAN: Not having been a surrogate and obviously not having given birth, I do not know. Canberra IVF is so professional at this that it has a booklet about the surrogacy process. I did not read much of it, but I am sure that one of the requirements is that the surrogate has to be married, or in a long-term de facto relationship and already have a child.

The Hon. JOHN AJAKA: It is.

The Hon. GREG DONNELLY: I was not aware of that.

Mr NORMAN: They would probably know.

Mrs NORMAN: In our situation, Barb did have a child and still felt the same away about having a child for us. One of the reasons she had a child with her partner was to see whether she just wanted a child or whether she wanted to give us a child. She had no doubt at all, and having that child cleared everything up for her.

Mr NORMAN: She had been thinking about this long before she had her second child, which surprised me. On the question of whether or not they should have had a child before, we did not find it difficult to find a surrogate because she found us. Part of me also wants to think it must be extremely difficult to find a surrogate if you are looking for one and if you start putting too many criteria on would who can and cannot, that makes it even more difficult. I have probably made it more difficult for you.

The Hon. GREG DONNELLY: No.

The Hon. AMANDA FAZIO: You said that it was quite unsettling having to go before a judge to get a parenting order. Did you feel any apprehension in the 60-day period after Emily's birth when her birth mother had to put her up for adoption? In New South Wales there is 30 days for the birth mother to put the child up for adoption and another 30 days for revocation.

Mr NORMAN: I do not think we went through that.

Mrs NORMAN: I do not even recall that coming up.

The Hon. AMANDA FAZIO: That might be a New South Wales requirement.

Mr NORMAN: She was born in New South Wales and came under the New South Wales law. To be perfectly honest, when we first sought legal advice on what we were supposed to do we kept getting conflicting views. What you are saying is what we were initially told. However, when we went through the process, we were told that we would not be able to have her put up for adoption because of the section 21 certificate. We contacted the Department of Community Services and I was having arguments with people and saying, "No, that is not what we have been told. We should be able to adopt her virtually straightaway."

In fact, the legal reports we got pre-surrogacy from our solicitors said that within a short period after the birth we would be able to apply for adoption. Our experience was that we were able to apply only for a parenting order. The advice from our solicitor was that we could apply for adoption if we wanted to without this section 21 certificate, but it would be less likely that the Family Court would approve the adoption if that certificate did not accompany the application. It was the Department of Community Services that told us that it wanted to wait until Emily was five or six before we could apply. I do not know that your question related to what we did, even though this happened under New South Wales law. As members know better than we do, it is confusing for most people.

The Hon. AMANDA FAZIO: One of the three issues that you identified in your opening statement and your submission relates to the birth certificate. You want the birth certificate to have the birth parents' names on it as well as the names of the genetic parents. Is that so that the child would have full access to medical histories and so forth?

Mr NORMAN: Yes, genealogy, medical histories and all those sorts of things. If in three generations when no-one remembers the significance of the fact that Emily was a surrogate baby, and someone is trying to trace a medical problem that might be genetic they would head in all sorts of wrong directions if they looked at this birth certificate because Emily's birth certificate shows that Graham Joliffe and Barbara Martin as Emily's

parents. Our names appear nowhere on it. A parenting order is attached to the birth certificate wherever it goes, but we all know that people doing genealogy look up the Internet or apply for a birth certificate or a death certificate, and it will not be attached to that. It could be really confusing.

From that perspective alone, it is crucial that our names are on the birth certificate. But the people who went through the process should not be ignored because Barb did carry Emily for nine months and gave birth to her. If there is only one set of parents mentioned on it, I think logically it should be us. The way I describe it to people who do not understand why we are having so much difficulty is that if we were to abandon Emily in the street and then jump up and down and say that she is our child and they run DNA tests to check that that is true, everyone would say that she was because she is genetically ours. However, Barb went through the pregnancy and gave birth to Emily, according to the official records, which are going to be there forever, we do not appear anywhere.

Ms SYLVIA HALE: If the birth mother had not been as accommodating as she obviously has been, and perhaps she did not want to take total responsibility and care for the child, and she wanted to intervene in the child's upbringing in some way, what would your response have been?

Mr NORMAN: Once again, that was covered in considerable detail in the counselling process beforehand. Any scenario like that was discussed and so on. In fact, the specific issue of the surrogate mother having a say in what was going on was covered in our pre-surrogacy legal report. Once again, it comes back to our confidence that our surrogate would not do that because that was not what she wanted. In many ways our surrogate is having less to do with us now than she did prior to the birth of the child. There is nothing nasty or horrible about that, but she feels she wants to ensure that she is not going to be hanging off our coat tails.

She has made a conscious decision to run her life and not to stick her nose into ours. She loves it when we visit with Emily. It was not a concern for us because we were so confident that it would not happen. At the end of the day, Barb is not genetically linked to Emily, but she will always be a special aunty. It would be the same as any aunty who might want to give us a nudge in the ribs and tell us she does not like the way we are bringing up the child. We would listen to her views and respect them as much as we would Denise's mum, who is sitting in the public gallery, or my mum and dad or another aunty or whatever.

Ms SYLVIA HALE: When Emily gets older, will you tell her about the circumstances of her birth?

Mr NORMAN: Definitely. I am sure it was part of the counselling process that we agreed to do that.

Mrs NORMAN: Part of Canberra IVF procedure is that you agree to tell the child, but we would have anyway.

Ms SYLVIA HALE: Say that you and Emily have an extraordinary falling out, as parents tend to do with their children, and she decides that she wants to live with her birth mother, whose name could well be on the birth certificate if your suggestion is implement, how would you deal with that? What do you think the rights of the child are in that regard?

Mr NORMAN: She would be no different from any other child who wanted to run away from home and live with someone else, whether it is their aunty and uncle or a friend down the road. If Emily were naturally conceived through Denise and me and was in all other ways like "normal" children, and she was 13 or 14 we would not let her go. By the time she is 13 or 14 we would have hopefully legally adopted her. We would not let her go then either in the same way that any parent would not let their child go. When she is old enough to make that decision by herself and she wants to go, if that is what she wants to do that would be it.

Ms SYLVIA HALE: Do you not think it would be satisfactory to have your names recorded on the certificate and the surrogate's name and information kept but readily accessible to the child should it subsequently be needed?

Mr NORMAN: Not on the public record?

Ms SYLVIA HALE: It seems to me that putting it on the birth certificate imbues that person with greater rights than intended.

CHAIR: And perhaps responsibilities.

Mr NORMAN: I had not thought of that. I guess the answer is that at the moment they are the only names on the birth certificate.

Ms SYLVIA HALE: True, but if the law is changed—

Mr NORMAN: To be perfectly honest, I think the essential thing is that our names are on it. Perhaps it could be optional. Some surrogates might not want their name on the public record. I do not know.

Ms SYLVIA HALE: You are in a slightly different situation because you are the genetic parents whereas in many instances that may not be the case.

Mr NORMAN: You are right. I do not know.

Ms SYLVIA HALE: It is one of the conundrums we must deal with.

Mr NORMAN: I do not have a good answer.

CHAIR: You have the Canberra IVF document. Recognising that you probably want to keep it, would you mind tabling it and we will copy it?

Mr NORMAN: This is our only copy and I would like to keep it.

CHAIR: We can copy it and return it.

Document tabled.

Mr NORMAN: I am not sure, but I think this was done through the John James Hospital in Canberra, which I think has been taken over by another organisation and it has now stopped the process.

CHAIR: We have IVF Sydney appearing this afternoon and it would be useful to have that.

The Hon. JOHN AJAKA: I have read your submission and heard what you have had to say. You have my utmost admiration. We could look at changing the law so that you would go through all the pre-agreement requirements, do all the counselling, obtain independent legal advice, obtain a report from the Department of Community Services, and an altruistic agreement was entered into. You would then go before a Supreme Court judge because it would be a state matter and the judge would consider the best interests of the child and approve it—all the boxes are ticked and everybody is happy. The agreement would then become an enforceable agreement as opposed to unenforceable and it would be recognised at law on the basis that when the child is born you are noted as the parents on the birth certificate and you would be given the full status and recognition as the parents of the child. All that would occur and nothing else would be required to be done by you after the child was born. Are you saying that is the situation you would like to see because it removes this limbo-type situation for you and the child while awaiting adoption orders or Family Court parental orders?

Mr NORMAN: Yes.

The Hon. JOHN AJAKA: I am asking you to speak from your point of view.

Mr NORMAN: No.

The Hon. JOHN AJAKA: Do you feel that that would be a fairer situation for all concerned because everyone would know exactly what was going occur as opposed to having this limbo situation?

The Hon. JOHN AJAKA: More importantly from Emily's point of view, God forbid if suddenly there was a need for urgent medical treatment in the first or second week and the birth mother was overseas, those problems were suddenly eliminated?

Mr NORMAN: Yes. In reality, from the legal perspective we went through—as I have said, we reinvented the wheel that other people had already done a number of times over—somewhere here I have got a note that the pre-surrogacy agreement cost us $3,300.

The Hon. JOHN AJAKA: I appreciated that, but I understood you did not have a problem with all you had to do prior

Mr NORMAN: No.

The Hon. JOHN AJAKA: I think your words were that you did not want to allow anybody to do it—

Mr BEST: Except for the proviso, that in answering the Government regulation bit I actually did say we would like to see that as a streamline situation.

The Hon. JOHN AJAKA: I understand that. It is more the aspect of the counselling and the understanding.

Mr NORMAN: It just seems a bit odd to us that we went through all of that process to get a legal document that was not worth the paper it was written on. That is the point I was trying to make, with all that expense and so on. We did it because we needed to do it. In a lot of ways it cleared our heads and cleared our minds and made us understand clearly what was going on. It really made sure that Barb and Graham knew exactly what was going on because it was all written on this 15 page legal document and so on. But at the end of the day, even the person who wrote the document kept saying, "You do realise if Barb decides not to give up the child, we tear up this document—it does not mean a thing?"

The Hon. JOHN AJAKA: I understand that.

Mr NORMAN: It just seems a bit pointless.

The Hon. JOHN AJAKA: Do you feel as a result of your child Emily being born with you as the genetic parents of Emily—you donated the gamete—you are prejudiced in some way, as opposed to a single woman who goes to hospital and gives birth to a baby, or someone else in another situation? Do you find that because you went into a surrogacy arrangement that somehow or other your situation is prejudiced?

Mr NORMAN: I do not want to sound like a victim.

The Hon. JOHN AJAKA: I am not asking you to but from the point of view of the law of recognition?

Mr NORMAN: To a certain degree, yes. I have a very close friend who went through menopause early and in her second marriage was unable to have a second child. On the quiet she had a friend donate an egg. The IVF egg-sperm was implanted in my friend, who is postmenopausal at this stage. She went on to have a completely normal pregnancy and gave birth to a child. Under the law that child is hers. I am even more concerned about her than I am about Emily because, once again, with that pathway thing with the genealogy and so on, no-one will ever know—she is not going to tell anyone. The only people who know are the people who did the IVF, the person who donated the egg and us I think. Compared to them, they are in a much better situation than us because they had none of these problems. Look, I do not feel we are being prejudiced. I understand the processes need to be there because you do not want open slather.

The Hon. JOHN AJAKA: But you would like the processes there before and not so much after?

Mr NORMAN: Anyone who has had a child normally knows that the first 12 months with that child are bad enough. You know, trying to organise your life, organise your nappy changes, everything, without having to go through this other stuff as well.

The Hon. JOHN AJAKA: No instruction book.

Mr NORMAN: Oh yeah.

The Hon. JOHN AJAKA: Returning to the questions asked by Ms Sylvia Hale on birth certificates. Accepting the proposition that you as the intending parents should be on the birth certificate, and that would be that were in the best interests of the child, I have a little dilemma on which I would like your comment. The thought of having all three parents—birth and intending—on the birth certificate and that child being required at

6 years, 7 years, 8 years, 9 years or 10 years of age to hand over a copy of their birth certificate when they are going to play football or netball or be enrolled in school et cetera, would it not be better that the birth certificate shows both intending parents and the other details are left in a situation where Emily or you can access them anytime you want to? It is not simply each time a birth certificate is requested, to obtain a driving licence for instance; suddenly there are all the details? How would you personally see that?

Mr NORMAN: I have a real thing about the genetic side of things—I am really worried about that. If the genetic parents are known I think they need to be recorded somewhere that anyone who is going to look will find them. I do not quite know how the record-keeping system works but, to me, it really is important from a genetics perspective that somebody knows who the genetic parents are. Even if it is a donated egg or donated sperm and it is listed as "unknown", at least they know it is unknown.

I can see where you are coming from. In a lot of ways we look at it from the alternate perspective. It is something that I think Emily should be really proud of: somebody loved Denise and I enough that they were prepared to do what they did for us so she could exist. I hope that Emily grows up to beat her fists on her chest and say, "Look at me. Somebody loved my parents this much." I do not see it as a source of embarrassment. The poor kid was on a *Current Affair* before she was six months old. So it is not like it is hidden. From our perspective I do not see that as a massive issue.

The Hon. DAVID CLARKE: First of all, thank you for coming along to give evidence before us today and for taking the trouble to prepare a written submission to help the Committee. Mr Norman, you made it very clear that you were very much opposed to commercial surrogacy agreements?

Mr NORMAN: Yes.

The Hon. DAVID CLARKE: You were quite definite about that. You spoke about having a parenting order. I took it that you did not really have a problem with that. You saw it as a necessary part of the process that there had to be a parenting order?

Mr NORMAN: That was a necessary part of the process as we experienced at. I do not necessarily think it is a necessary part of the process in the ideal scenario.

The Hon. DAVID CLARKE: Do you think that is something that should be dispensed with?

Mr NORMAN: Nirvana for me is that everything is sorted out from a legal perspective prior to the birth. Once the birth has occurred then, from a legal perspective, the child is—I guess logistically you might have to have some sort of a cooling off period or something like that, but I am talking weeks and not months. Without that certainty you go through what Denise and I are still going through: wondering whether or not in a few years time we are going to have Emily legally. To answer your question, the parenting order was something we had to go through because that was the way it was for us but I do not necessarily think that is the ideal way of doing it.

The Hon. DAVID CLARKE: But you can understand why that process is there. While you wish it were streamlined, you can understand that there may be factors that make it necessary to get a parenting order?

Mr NORMAN: Probably not really, no.

The Hon. DAVID CLARKE: You do not?

Mr NORMAN: No. Because, as I said before, Barb and Graham and myself and Denise went through two years of legal, psychological and medical preparation for this.

CHAIR: So the process of adoption is, if the birth mother puts the child up for adoption at the beginning of the 90-days, there are then the 60-days? You have 90-days while it is being considered and then 60-days that the birth mother has to change her mind, would that be more appropriate?

Mr NORMAN: Once again that is not what we experienced but maybe, yes. It would certainly be better than what we have got now.

CHAIR: No, I am telling you what we have just heard from the Department of Community Services representative. He told us when a woman has a baby and says it is for adoption at the time there is a cooling-off period, which is deliberately to stop what used to happen in the 1960s when babies were just flicked off women?

Mr NORMAN: Yes.

CHAIR: That is in the adoption laws at the moment. I was just interested to see what you thought about that.

Mr NORMAN: No-one told us about that.

The Hon. DAVID CLARKE: You accept the reason why there has to be an adoption process. There is the question of time but the adoption process itself, do you agree, that is something that needs to be part of the process?

Mr NORMAN: That goes to the crux of the argument as to whether or not the child is theirs or ours. In my opinion the child is genetically ours, even in the case of non-genetic surrogacy arrangements, the child was—it sounds so clinical—created for the purpose of handing over to Denise and I. I hate the way that sounds but that was the purpose of the whole exercise. As I said, two years of legal, psychological and medical preparation led to that particular point. My perspective on it is—and I think Denise will agree with me—that we should not have to adopt something that we perceive as being our own anyway.

The Hon. DAVID CLARKE: You also referred to the fact that at any time this document you referred to could have been torn up if the birth mother changed her mind?

Mr NORMAN: Yes.

The Hon. DAVID CLARKE: I think you would also take on board that you might have a birth mother who might also undergo some emotional concerns and that is one of the things that has to be factored into the whole situation. There could be emotions on both sides.

Mr NORMAN: There are.

The Hon. DAVID CLARKE: Certainly there could be emotions that you understandably feel and, in some situations, there could be emotions felt by the birth mother?

Mr NORMAN: Absolutely.

The Hon. DAVID CLARKE: It has been indicated that up to 5 per cent of birth mothers in a situation like this subsequently want to keep the child. You can understand that there could be situations where emotionally they are also affected—

CHAIR: Is that a worldwide figure?

Ms SYLVIA HALE: It is British figures.

The Hon. DAVID CLARKE: British figures, yes.

Mr NORMAN: I cannot tell you what the British figures say but I can tell you that at Canberra IVF—who pioneered this in Australia—Dr Stafford-Bell has never had a mother fail to give up a child. They go through this two-year process that we went through. What I am saying, and what I have said pretty much all the way through, is I have no problem with the process leading up to it, because I think that works perfectly well; it is what happens afterwards that I have a problem with. My experience, and it would appear from what Dr Stafford- Bell from Canberra IVF told us, they have never had a mother unprepared to give up a child in their history. So obviously the process works.

The Hon. DAVID CLARKE: If you assume that the British figures show 5 per cent, even if there is a smaller percentage, you would have to factor and balance into the equation the emotions by the birth mother as well?

Mr NORMAN: I disagree.

The Hon. DAVID CLARKE: You disagree with that.

Mr NORMAN: Yes.

The Hon. AMANDA FAZIO: Or do you think there should be different criteria for couples in your circumstance? The genetic parents versus those who are not the genetic parents, and perhaps the birth mother is the natural mother? Do you think there should be a two-tier system or something?

Mr NORMAN: That is actually not allowed, certainly under Canberra IVF ethics. I would be really surprised if it is allowed anywhere along the lines that the person who gave birth to the child actually has a genetic connection to the child.

CHAIR: Okay, they always use IVF—

Mr NORMAN: There cannot be any genetic connection.

The Hon. AMANDA FAZIO: If a birth mother was using donated egg and sperm not related to the parents who were going to bring up the baby, do you think they should be treated differently to the genetic parents using a surrogate?

Mr NORMAN: No, I do not. Purely because I am not trying to dilute in any way the emotions that the birth mother goes through at the birth and in the short period after—we all know about postnatal depression and those sorts of things, the emotional highs and lows that a mother goes through—we more than anyone probably know that, even though we have not experienced it, purely because that was what the counselling and stuff was all about. That was explained to us. It was explained to us why Barb might not want to give up the child. So we understood if she did exercise her right to keep the child that would be why it happened. So we understand why that happens.

The Hon. JOHN AJAKA: So prior to you signing the surrogacy agreement you went through a whole two-year process?

Mr NORMAN: The Canberra IVF process basically is as follows. You send an initial application letter followed by a formal application. Part of that formal application is that you have to have an independent gynaecological report both on the commissioning mother and the surrogate, that is, Denise and Barb. We have to have an appointment and report from the clinical psychologist, who has to interview all the parties, including any children. That is where this sort of thing is first raised.

Then we have to have an independent legal report on the surrogacy laws as they apply in your State, which for us was New South Wales, and a statutory declaration that the surrogacy agreement would be altruistic. You have to send that, together with an accompanying cheque for $3,500, to Canberra IVF, and then they assess your suitability for surrogacy. Once they have done that and they have approved the surrogacy, then you start the actual counselling process, which is very minimal until there is a pregnancy confirmed.

The Hon. JOHN AJAKA: Prior to conception of the pregnancy, how long is the period?

Mr NORMAN: I think we made an initial application in late 2005, and Emily was conceived in late 2006. So it took about 12 months. It was about two years from the first application until she was born.

The Hon. DAVID CLARKE: Getting back to the questions I was asking. I put to you that you could understand that there could be cases where the birth mother could go through emotional distress. It did not happen with the birth mother in your case but there could be cases—as I say, they have found 5 per cent of cases in Britain, and presumably there are cases in Australia and other countries. So that is something that has to be considered as an issue.

Mr NORMAN: You have to consider it as an issue.

The Hon. DAVID CLARKE: It has to be considered, and there have to be checks and balances to accommodate that emotional distress by that percentage of birth mothers who experience these changed emotions.

Mr NORMAN: It is certainly a factor that you guys have to consider. But I would hate to think that things would be made it difficult for 95 per cent of people based on what happens to 5 per cent of people—if there is 5 per cent. As I said, in Canberra the IVF experience is zero per cent.

Ms SYLVIA HALE: I know that you do not approve of commercial surrogacy. But did you meet any of the expenses of your friend—reasonable out-of-pocket expenses, or anything else?

Mr NORMAN: We actually met all medical expenses. Barb and Graham had to take time off work to attend some of the counselling sessions, to attend appointments, and that sort of stuff. Any time they had off work was done as leave without pay, and we paid the equivalent of their wages for their time off work. I think Barb ended up being off work for four months, because she had some minor complications leading up to the birth and then she had to be off work for six or eight weeks after the birth.

Ms SYLVIA HALE: What was the total?

Mr NORMAN: It was around about $7,500 that we paid out in her wages.

Ms SYLVIA HALE: Those costs were quite expensive?

Mr NORMAN: Yes. I can tell you what some of them are, if you would like.

CHAIR: If you have prepared answers for the questions we sent to you, we would be very grateful if you would table them for us. We can give you back those prepared answers, if you are comfortable for them to be part of our record.

Mr NORMAN: Yes, that is fine. I have some handwritten notes as well. You are more than welcome to take them.

CHAIR: I would like to thank both of you very much for your attendance today. We perceive it to be an honour that you came to share your experiences with us, and it will certainly help us and influence our decision making in this process.

(The witnesses withdrew)

(Luncheon adjournment)

CHAIR: Good afternoon and welcome to the first day of public hearings of the Law and Justice Select Committee's inquiry into the legislation on altruistic surrogacy in New South Wales. There are some general guidelines in relation to broadcasting. Messages and documents are to be tendered to the Committee. The Committee staff will look after those if there is anything you want to deliver to us. Committee hearings are not intended to provide a forum for people to make adverse reflections about others. Protection afforded to Committee witnesses under parliamentary privilege should not be abused during these hearings. Some mobile phones interfere with the Hansard recording of proceedings so it would be preferable if you turned them off.

JOHN RICHARD LONGWORTH, Solicitor, member Family Issues Committee, Law Society of New South Wales, sworn and examined:

ALEXANDRA LOUISE HARLAND, Solicitor, member Family Issues Committee, Law Society of New South Wales, and

PAUL AUSTIN LEWIS, Solicitor and mediator, member Family Issues Committee, Law Society of New South Wales, affirmed and examined:

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

The Witnesses: Yes.

CHAIR: I would like to thank all of you for giving up your time for this inquiry. I recognise that you have a heavy workload so it is very good for us that you have come today. If you should consider at any stage that certain evidence you wish to give or documents you may wish to tender should be heard or seen only by the Committee, please indicate that fact and the Committee will consider your request. If you take any questions on notice or they are too complicated to answer now, we would appreciate receiving your answers by Monday 1 December. Before I ask whether you would like to start by making a short statement, I would like to say that we have extended the time frame for this inquiry until the new year because of its complexity, so there is a possibility that following our deliberations, readings and listening to people we may require further information from you at a later stage. Would all of you or one of you like to start by making a short statement?

Mr LONGWORTH: From our perspective surrogacy is a reality which has been taking place for many years in various forms and will continue to do so whether the Government regulates it or not. Our perspective as lawyers is that we should look at the realities of issues such as parental responsibilities, which are not addressed, and look at the issues of the impacts on children. I note for example that in 1988, I think it was, the Law Reform Commission of New South Wales produced a paper called "Artificial Conception: Surrogate Motherhood", so the issues have been around for a while. We together, the three of us, do not represent one set of views, coherent or otherwise. We do not necessarily represent the combined view of all lawyers and we certainly do not represent the published view of the Law Society of New South Wales; perhaps not even that of the Family Issues Committee. However, we are the solicitors delegated by that committee to think about the issues and delve into them and do the reading and we have been asked to speak to you today about the legal issues as they broadly apply. We also come at the issue from the context of the law. You have many submissions before you from ethicists and from other organisations. We try not to pass judgement on the rights or wrongs. What we do try to do is foresee the consequences and the complexities.

CHAIR: Thank you. That is excellent.

The Hon. DAVID CLARKE: So your response does not represent the Law Society and does not even represent a view of your committee. It is just a number of individual responses that have been put together.

Mr LONGWORTH: The responses came about in a time frame where our committee could meet and formulate something, which was quite a short time frame for today. There was not the opportunity for a single coherent document to be put to our council for its approval so we cannot say it is the view of the Law Society as a body. The time frame, which fell between meetings of our committee, meant that it is not possible for us to say that this has been developed by the committee, but the three of us have together done the work of putting a lot of the thought into it. It has been distributed but we cannot stand here today and say that is the case. We might be able to next year if you invite us back.

The Hon. DAVID CLARKE: Thank you. Are you aware that there is a strong view that surrogacy is in conflict with article 7 of the United Nations Convention on the Rights of the Child? Is that a matter that you looked into?

Mr LONGWORTH: I read some of the material that has been submitted to you by some of the ethics groups and they certainly identified that, so I am aware there are people with those views. I cannot say I have personally researched the United Nations declaration on that.

The Hon. DAVID CLARKE: But if it happened to be the case would that be a matter of concern to you?

Mr LONGWORTH: What is a concern to me personally as opposed to the committee might be different. I would have confidence in saying that my committee and the three of us are of one voice in saying that the interests of the child are paramount. We work as family lawyers and have for decades in a regime where section 60CA of the Family Law Act identifies the paramount interest as being that of the child's welfare. I do not know if that properly responds to your question.

The Hon. DAVID CLARKE: Not exactly because I think that would have been the intent of the United Nations when it drafted the Convention on the Rights of the Child. I am saying that it is suggested that surrogacy is not in the interests of the child. I am asking if you think it is appropriate that the Law Society and your committee look at any suggested conflict between that convention and what is being proposed.

Mr LONGWORTH: I think I hear what you say. One of the other things that were said in the material that identified the United Nations declaration was that surrogacy was not a concept contemplated at the time that declaration was prepared or passed. Indeed, if I look at the raft of State and Federal legislation, whether proposed, passed or not yet commenced and in operation, we can find quite a lot of conflicts just in the difference in, for example, the definition of a parent, let alone something quite as fundamental as what the United Nations was dealing with.

The Hon. DAVID CLARKE: Except that we can still take a document that might have been prepared decades ago that deals with factors that were not in existence at that time. If there is a clear conflict between what is being proposed and that convention, even taking into account that the convention was drafted before these matters came into the public arena, it would be something of significance.

Mr LONGWORTH: It would only be significant if they had had the opportunity to take it into account. I think that might be putting it higher than I would be prepared to place it. I would certainly concede that if there are two documents that have an apparent conflict, that will be plain on the face of it. That does not necessarily mean that one or the other is undermined by that. I do not speak for my friends; they may want to say something.

Ms HARLAND: I think also that the different perspective that we come from is that the Convention on the Rights of the Child is talking about the interests of children at large. In dealing with individual clients we are often talking about the best interests of individual children. One area we have looked at in particular, again from the perspective of lawyers, is what are the consequences of these arrangements. It is certainly our view that surrogacy is a reality. It has been happening. The fact that there is not regulation has not prevented those arrangements being in existence. One concern, particularly from the perspective of family lawyers, is what impact it might have on children who are born out of a surrogacy arrangement, and dealing with the realities of what recognitions there should be of that reality. I suppose the universal declaration of rights is coming from that broader perspective. I suppose we have been taking a different focus to that.

The Hon. DAVID CLARKE: So you would not agree that while the convention deals with the rights of children collectively it also deals with their rights individually? I took it that you are arguing that it deals with those rights collectively but not necessarily individually.

Ms HARLAND: I think the inquiries that we have to make necessitate us looking at individual children's rights and I do not think the declaration or any document like it is going to take you very far when you are looking at those particular individual rights. I think that is looking at it in a broader term and I think you have to look at individual circumstances.

Mr LONGWORTH: This is about the difficulty of dealing with documents that predate where we are at. As I understand it, and I am reading from one of the submissions because I had to remind myself of the wording, it talks about article 7 in that declaration and "the right to know and be cared for by his or her parents". If I took you to all the various pieces of legislation, the word "parent" is very differently defined. In fact, the Family Law Act has never carried a definition of the word "parent". If you looked at the Assisted Reproductive Technology Act, for example, it has a definition of parent that would be different at law from what the Federal sphere would say. It talks in terms of someone who exercises parental responsibility. That is a much narrower definition than the Federal sphere uses, where many people can be allocated parental responsibility. My point is simply this: there is no criticism made of the declaration, but it is of an age that may not have contemplated the very complex issues we are talking about here today.

The Hon. DAVID CLARKE: Except that Article 9 imposes a duty on States to ensure that a child shall not be separated from his or her parents. Moving on to another issue, in respect to surrogacy, do you believe that there should be conscientious objection to participating in such procedures, for instance, doctors and nurses, if it is against their conscience to participate in those procedures? Do you believe they should have a right to opt out?

Mr LONGWORTH: Are you asking for our personal beliefs?

The Hon. DAVID CLARKE: I am asking, first of all, has your committee considered that important issue?

Mr LONGWORTH: I do not think we have. That was not one of the questions on the list. That is not a criticism.

The Hon. DAVID CLARKE: Do you have a view?

Mr LONGWORTH: I would not be confident to answer on oath, off the top of my head. I would like the opportunity personally to contemplate that in the position I sit here as. The two of you may have thought about that.

Mr LEWIS: I have a personal view on that, and I think it is something that we do, nearly all of us, in our day-to-day life. I chose to be a family lawyer rather than a tax lawyer, and medical specialists do the same, as it is. They choose different areas of speciality, or they might choose general practice.

The Hon. DAVID CLARKE: If I am a general practitioner or a specialist and someone comes to me and I have a competency in that area and I say, "This is something that is against my ethical values, I do not wish to be involved. I prefer you to go and see somebody else", do you believe that that medical practitioner should have the right to say that?

Mr LEWIS: I think we enter the ethical realm here. I am not a doctor but I am aware of the Hippocratic oath and these are value judgements that professionals have to make in the course of their work. I do not know, in the context of contemplating moving the status of surrogacy New South Wales from an unregulated approach to a regulated approach, whatever that may involve—and there is probably a range that you could contemplate—but I do not know that you would need to go there, with respect.

The Hon. DAVID CLARKE: With respect, why would we not need to go there? If we have a situation that a doctor does not wish to assist in this procedure, it is a pretty clear area. Do you believe if it is against the values of the doctor, that he should be able to opt out of that?

Mr LONGWORTH: Firstly, there would be medical ethics that will govern what a doctor does and does not do; they are not legal ethics. Secondly, if the question you are asking is: should a doctor on a particular day when a couple comes to them and says, "We would like to have a child by way of surrogacy. Will you assist us in the medical steps?" That would be different, I would have thought, to a doctor who, faced with a woman about to give birth in distress, as to whether they are able to assist or not because they do not believe in surrogacy or do believe in it, and whether a child would be placed at risk. I do not know that those are not medical questions and ethical questions for a medical practitioner or a board as opposed to a legal question.

The Hon. DAVID CLARKE: I am talking about the former set of circumstances you give rather than the latter. I am not talking about a mother's life being in danger; I am talking about a couple going to seek advice and assistance in this process of surrogacy. Do you agree that it is an important issue?

Mr LONGWORTH: I agree it is an important issue for medical practitioners and for the ethicists who devise the guidelines and policies of practice for people who work in that field, yes. Whether it is a legally ethical question, I am not in a position to comment today.

The Hon. DAVID CLARKE: One final question—there are many others but we each take our turn—you are aware that the Government has made clear that it opposes what is called commercial surrogacy as opposed to altruistic surrogacy. Did you come to a view on that issue?

Ms HARLAND: We certainly have come to a view on that. What we have focused on is looking at altruistic surrogacy. Commercial surrogacy brings in a whole range of other issues. Certainly I personally am opposed to commercial surrogacy because of a concern that then it becomes a form of buying and selling human beings or the potential for something to grow into a human being. It raises a range of difficult ethical issues which some of the other submissions have identified in relation to exploitation, which does not necessarily mean that you do not have some of those potential issues in altruistic surrogacy but there are some different issues there and we have taken the approach that looking at altruistic surrogacy is something that has been happening, the distinction between whether you agree with that or not, or as the lawyers looking at what are the consequences of the fact that this takes place.

The Hon. DAVID CLARKE: So at this stage you are opposed to it?

Ms HARLAND: I am opposed to commercial surrogacy.

The Hon. DAVID CLARKE: What about you, Mr Lewis, are you opposed to it?

Mr LEWIS: I think it is fair to say that there is consensus between the three of us, that we would not advocate commercial surrogacy.

Mr LONGWORTH: I would go one slight step further and say we have to acknowledge that surrogacy is a process whereby an individual provides a service in bearing a child; where people do obtain that service. Whether it is right or wrong is not our position. Whether it is in the context of commodity, a child is something that is part of that service is just a reality. Now, we may well be saying that is the reality but I think it is a bit hard to move away from it. I read in particular Dr Somerville's comments from McGill where she made a case for saying, "If surrogacy exists, why would you not have commercial surrogacy?" That is not saying I personally believe in it. I personally do not believe in commercial surrogacy.

That is not a Law Society view, but I think you clearly take it one step further when it is commercial and then you have differences as to fees or rewards or expenses. There are many different models of how it might work but I do not think it is possible to remove ourselves from the fact that it is saying, "I want to explore my right to have a child". Whether that is by forming a relationship with someone and having a child in a heterosexual married relationship or whether it is a heterosexual de facto relationship, I am still exploring that right; whether it is in a IVF process or whether it is in a surrogacy process. There are degrees of distinction between them.

The Hon. GREG DONNELLY: In the questions you received on notice, one question refers to the Australian Capital Territory legislation, and you commented on it in your submission. Can you elaborate further on that legislation?

Ms HARLAND: Certainly. One of the attractions of that legislation is that it deals with in one Act the issue of parentage presumptions in a variety of areas. In New South Wales we have the Assisted Reproductive Act, which has not commenced, which deals with some issues, and we have the Status of Children Act dealing with other issues. One reason that the Australian Capital Territory Act is attractive is because it deals with those issues in one spot and deals with them fairly clearly.

That Act could be used as a reference point or a template. One of the difficulties or challenges in the area of surrogacy—and we have seen it in the area of parentage presumptions of reproductive technologies—has been that there have been so many piecemeal bits of legislation that have the potential to contradict each other

and can be difficult to comprehend. That to some extent has been cured in New South Wales recently, but if we are looking at those issues in terms of surrogacy, it makes sense to look at having a coherent piece of legislation that deals with these issues.

The Hon. GREG DONNELLY: The Attorney General's representatives this morning explained that a SCAG process is going on, which to me seems to be the wrong way round. It seems that in different States and Territories legislation is already passed or is in the process of being passed yet there is an endeavour at the national level to create what was described to us today as a model bill that could be contemplated by States and Territories as legislation. Do you know any more about the SCAG process or how that is developing?

Ms HARLAND: Not very much. I attended a lecture recently by an academic of the University of Technology, Sydney, who expressed concern that the chances of having a national scheme did not seem great because of the difficulties of forming a coherent piece of legislation, so whether or not you then have the issue of all the States individually developing their own schemes and then hopefully a uniform approach develops out of that.

The Hon. GREG DONNELLY: As part of the SCAG process between the Commonwealth and the States, it was explained that an underpinning feature would be that the surrogacy arrangements would be unenforceable or void?

Ms HARLAND: Yes.

The Hon. GREG DONNELLY: Does the Law Society have a particular view on that?

Ms HARLAND: The three of us have a particular view that we have discussed. There is a difference between looking at surrogacy agreements being unenforceable and looking at the consequences of surrogacy arrangements after the fact. It is highly problematic to have a surrogacy arrangement, whether you call it a contract, arrangement or agreement—and different words have been used in legislation and elsewhere—does not really matter, but to try to say that that should be enforceable either under law of contracts or under law of torts would be hugely problematic because you have this issue of contracting about the potential life of a human being.

I do not think that sort of contract should ever be enforceable but that is a different issue as to whether or not there should be any regulation about altruistic surrogacy. It does not mean that you need to say that the contract should be enforceable. I suppose the kinds of issues we were discussing when looking at do you have regulations or not, would be do you require people to undergo mandatory counselling, for example. We see those types of issues very different to the issue about enforceability as a contractual matter.

Mr LONGWORTH: If you look at contracts, because that is what they are, they work more than one way. The one we are thinking about is: if someone entered a contract whereby there was an agreement that someone would give birth to a child and somehow hand the child over or assign rights. Is that enforceable, the child being handed over? There might be other aspects. For example, the person who gives birth to the child might say, "I contracted to be paid X amount of dollars and they haven't paid me and I have given the child over". Should that be enforceable? Our focus has been the child's interests and what is in the best interests of the child do not dictate some prescriptive contract as to what is to happen to a child after birth in the same way adoption works. A parent who wants to adopt a child out is not bound to do so at birth. There are cooling off periods and all sorts of procedures in place to ensure that happens in an appropriate and sensitive fashion because those interests of the child are paramount.

But if you said that a surrogacy agreement was void, that does not mean that it will not happen. Our focus has been: What are the consequences for the child? If a surrogacy agreement is void, does that mean that the child is a different class of child because it was born by way of a surrogacy agreement and is denied some of the parental responsibility allocations that other children might be denied? Do you merely make void those parts of a surrogacy agreement that are involving the child as opposed to the payment? I do not know, but in that context, I think there are great difficulties in even thinking about what the contract might be.

Mr LEWIS: I would like to give you my thoughts on the question you ask. We did move on to talking about the perspective of contract about surrogacy. I would like to draw the analogy of marriage. When we think about marriage we can look at it from two perspectives. We can look at it in terms of a contract and we can also look at it in terms of status. So, in a similar way, when we look at surrogacy, you can take the contractual

perspective and think about an arrangement as being a contract. If you analyse that further, a lot of that is between the adults. If you change your focus to looking at it in terms of the rights of the child, or children if there are multiple births, then you can think about the status of the child. You can get away from contract altogether, if you want to, and just think of it in terms of statutory matters that you may decide to regulate.

About the COAG process and the idea of a uniform bill, I think it is a commendable thing. I think in practice it could take quite a while to achieve. There is no magic surrounding this court objective in surrogacy because probably for 20 years in the family law literature in this country and overseas there has been the idea of having one family core in the country. There are lots of good reasons to try to achieve uniformity of laws for an efficient use of resources and all that type of thing.

The Hon. GREG DONNELLY: The nature of the surrogacy issue seems to invariably draw on consideration of moral and ethical debate and discussion. Obviously there is a range of positions on that. How can the issue be reduced to a legal discussion about whether there should be surrogacy? The point that has been made already is that the reality is that it is unregulated now to a large extent; it is going on now and has gone on for some period of time, and will go on whether or not there is legislation. How do you put boundaries around it? For example, on the last page of your second submission a number of rhetorical questions are posed for consideration. The submission says "There is a large body of research into surrogacy, much of which is available through Internet search. Questions raised may include" The first is, "Should surrogacy be available at all?" It is a very fundamental threshold question, but the reality is that it is going on. Is there a capacity to actually blend the moral and ethical discussion about surrogacy in coming up with a legal framework to deal with it?

Mr LONGWORTH: That touches on your COAG question.

The Hon. GREG DONNELLY: Yes.

Mr LONGWORTH: As you would be aware, we have the referral powers for de facto relationships on a property basis. I think that took 10 years and we still do not have every State participating. I am sure we could develop something, but could we get everyone agreeing about it? If you look at the Federal legislation in relation to de facto powers that is going through Parliament at the moment, it contains no definition of "de facto relationship". I suspect, I do not know, that that has something to do with the fact that coordinating every State's different definition on what was a de facto relationship—the New South Wales one was entered in 1990—was probably too hard. I would have absolute confidence that the COAG process will be very difficult because of trying to do precisely what you ask, which is to blend that moral and ethical thing.

In a way I have a view, and I probably indicated this, that your starting position is, what is in the best interests of the child if surrogacy is going to occur? Should it be available? Well, it happens. It is like, should childbirth be available? Well, it happens. You are right, how do you then build the framework? Do you then say what is the context in which we let it happen? I was looking at the definition in this reproduction technology document about an hour ago because someone asked a question about that. In one way it is defining a terribly standard relationship as a surrogacy arrangement—that is, a woman agrees to become pregnant with the intention that the child is treated as a child of the other person, which could be her husband. Is that a surrogacy? Is it really about childbirth? Is it about bearing children? Is it about children being born into the community? What are the ground rules about that?

Ms HARLAND: There are probably two quite separate areas that need to be considered. One is much more straightforward for us than the other. What regulations, if any, do you put in place for the potential for surrogacy to take place? So, if you are going to have law regulating surrogacy, what kind of regulations would they be? For example, does a woman have to be of a certain age to agree to become a surrogate? Does she have to have had another child before agreeing to become a surrogate? All those issues have to be considered. I think that is a much more complex area and that is where more of the moral and ethical debate comes into it.

Probably the area that is easier for us to look at, which is probably the area we focus on, is after the fact. That is really looking at the consequences, accepting that the surrogacy arrangements have taken place. What happens to the child who is born of a surrogacy arrangement? What consequences could there be for that child through the non-recognition of people who are caring for that child? So it is issues you have about parentage arrangements and not recognising, say, the person who gives birth, as being the mother of that child but the person who raises that child, and all those sorts of issues. That is very much our perspective in saying you have to look at the best interests of the child in those circumstances. What are the consequences for the

child? The adults have made the decision to enter into that sort of arrangement. Of course, the child has no say in that arrangement at all.

What are the consequences for the child if there is no recognition as to parentage and parentage rights of the people who are bringing up that child? We have seen particularly in the context of same-sex relationships the consequences of non-recognition of someone who is variably described as a psychological or social parent, but who is doing the practical day-to-day raising of that child then finding in a medical emergency, for example, that a hospital will not take any instruction from that person because that person does not have any legal status. Of course, that has an impact on that child. Those are the types of potential issues not dealing with the reality of surrogacy after the fact and the existence of those family arrangements to which we have particularly given some consideration.

Mr LONGWORTH: It could easily be in the child's best interest to stay with the birth mother. There may be a set of circumstances I could think of where I could create that situation. Of course, that would not honour what was apparently the surrogacy agreement. That is where I think the difficulty of the concept of an agreement is, because it creates the notion of a commodity.

Ms HARLAND: The reason for mentioning the case of *re Evelyn* in our submission is not so much for its legal issues but because it provides an example of the kinds of emotional complexity that can be involved in a surrogacy arrangement. If I could speak just briefly about that case.

The Hon. GREG DONNELLY: Please do.

Ms HARLAND: That case involved two couples who had been friends for many years. Mr and Mrs Q lived in Queensland. Mrs Q could not give birth to a child because of ovarian cancer. Mr and Mrs S lived in South Australia. Mrs S had three children of her own and she offered to be a surrogate for the Qs. The Qs did not accept that at first. It was something that was discussed over a period of time and later they did accept. So the biological parents were Mrs S and Mr Q. The child was born and initially went to live with the Qs. The problem started to occur in the months after that where Mrs S in particular had second thoughts about whether she could live with that arrangement of having given up the child with which she had a biological connection.

That case wound up in the Family Court. They had three cases in all. It became very bitter in a sense, and highly emotional. The end result of that case was that the child lived with the birth mother. The reason I think that case is a useful example is that that could well be a situation that you are looking at and thinking that should be a situation where surrogacy would be successful because it is not the case of impending parents asking someone else to do that for them. It was a case of somebody offering them; they were good friends. I think that is why having any sort of enforceable arrangement is also so problematic. The emotional and psychological issues involved in these types of arrangements are so complex that you have no way of predicting how someone is going to feel about it after the birth of a child. I think that is one of the challenges that any Legislature faces in dealing with these issues as well.

One of the things we had talked about before coming today was whether you would look at having a similar arrangement to that which is currently in place for adoption. You cannot make any binding arrangement in relation to adoption before a child is born. The mother may change her mind after the child is born. There is a certain cooling-off period, a certain level of counselling and review before that arrangement becomes final. Certainly in my personal view that sort of arrangement has a certain amount of attraction; it should not be a simple issue of handing over a child without really thinking through and accepting the concept.

Mr LONGWORTH: *Re Evelyn* is a very important case. There are three cases you probably should look at from the Family Court. *Re Evelyn* is one of them. That is a Full Court decision in 1998. As Alex said, that definitely explores the emotional issues that went on. There was the case of *Re Patrick*, which is a 2002 decision of Justice Guest of the Family Court. That was an arrangement whereby two same-sex women arranged for a male to provide the donation. There was a child-support consequence and ultimately the male sought time with the child, which the court ordered. You will not read it in the judgement but there was quite an extraordinary tragic consequence from that because of all the emotional outpourings. There was the case of *Re Mark*, which was a 2003 decision of Justice Brown again in a Family Court single instance. That was a case where two males in a same-sex relationship engaged a surrogate to provide a child. There was no dispute; it was just that there was no allocation of parental responsibility at all. So, the approach to the court was to allocate that parental responsibility. It is quite a detailed analysis of what was required at the time. The law has changed a bit, but it goes through what is quite difficult about the legalities at a Federal level at least.

Mr LEWIS: If I could return to your question about the blending of moral and ethical aspects, as lawyers we have a word for that and it is jurisprudence. To pick up on Alex's point about the attractiveness of having some sort of approach comparable to that taken with adoption, from that jurisprudential point of view the court would be exercising a supervisory jurisdiction about the welfare of children rather than just letting it run completely free, which could be done if you moved to recognition of altruistic surrogacy arrangements based on presumptions between consenting participants. Because it is an issue that contains a lot of difficult and challenging elements, and it is one on which people can reasonably differ with their moral viewpoints and so on, I think that formal approach of the court having a supervisory jurisdiction to ultimately sanction what is going on is probably the best starting point in the rights of the child, if you are transitioning from an unregulated approach to a regulated approach.

The Hon. GREG DONNELLY: In one of the submissions, I forget which it is, some reference was made to the legislation in Israel—and I am not familiar with it; I have not had a chance to look at it—where apparently there is that direct supervisory role by the court.

The Hon. AMANDA FAZIO: I just wanted to ask you a couple of questions about after a child is born by way of surrogacy. I think you said earlier, Mr Longworth, that one of your concerns was that a child born through surrogacy should not have different rights to any other children. One thing that came out of some evidence that we heard this morning was that a couple who were the genetic parents of a child born by way of surrogacy were being required to wait five years before their adoption was finalised. And yet if somebody else were to be adopting a child that was not genetically related to them they would not have to wait five years. Do you have any comments on that? I just found that astounding.

Mr LEWIS: I think it is a very concerning anomaly. I had a very similar matter about a year ago with commissioning parents and the gestational mother was the sister of the commissioning father and, paradoxically I believe, the father could obtain his name on the birth certificate by making the relevant declaration of paternity under the Status of Children Act, but there is no provision there for the commissioning mother to do that, and they have to wait the five years by virtue of it being an intra-family altruistic surrogacy arrangement before that full parentage status can be obtained. I believe that to be anomalous, and from the perspective of the child it is not good. We have a number of children out there who may grow up with some reasonable basis for feeling that they are not being treated the same as other children.

Ms SYLVIA HALE: In that case would that be that the law has created a situation of incest whereby the father on the birth certificate is the brother of the mother?

Mr LEWIS: It might look like it, yes.

Mr LONGWORTH: Dr Somerville comments on that in her material, and I think she calls it "technically incest" because the crime of incest requires a sexual act and therefore that is not present. It creates, however, the closer genetic pool, which I think is her primary concern. This is getting off your question but one of the things we discussed is that a lot of the social scientists that I have spoken to—and we work a lot in that area—talk about how the safer emotional environment for a child is to be within a closer family context because it is a safe landing place and environment to grow in; however, it does bring with it the closer genetic problems. The wider you spread the relationships therefore the genetic problem is safer but the sociological impact might be greater.

These are things that are beyond our ken. But the question you asked Ms Fazio, really we see that the children should be treated the same. That does not say that there might not be some sensible logic to cooling off periods—whether it should be five years or three I do not know. I understand that with the adoption regime with newborn children there is a three-month cooling off period and it is not impossible for the birth mother who does give the child up for adoption—a phrase which is hard to say anyway—to revoke that if she says at the time, "I did not understand what I was doing". There is case law about that sort of thing. But there is quite a structured process, so I agree with Paul: it should not be a different arrangement, but that is not saying there should be no arrangement.

CHAIR: Is there a reason why the surrogate mother cannot say, "This baby is for adoption to—" at the time of birth?

Mr LONGWORTH: She can say that, but as I understand the adoption process, one says it at the time of birth, there is then—

CHAIR: Ninety days and then 60 days.

Mr LONGWORTH: I thought it was certainly a three-month period and then there is a further period, but she can still say that, yes.

CHAIR: That does not stop the five years.

Mr LEWIS: No, it does not. I cannot tell you what section number it is but there is a section in the adoption Act that states that if it is a proposed adoption between close family members—so there is a definition of that—it says an application for an adoption cannot be brought until the child has attained the age of five.

The Hon. DAVID CLARKE: What is the rationale behind that?

Mr LONGWORTH: I do not know that we can say.

Mr LEWIS: I can only speculate.

Mr LONGWORTH: One assumes that at the time that was in place there would be some material that explained it. I would be loathe myself to say we should wipe that because that might be treading on the toes of someone who said there is a very good reason for that. I do not know it, I simply say that in treating children the same there are lots of indicia I can find for saying there should be no difference between who the child is and having its own rights recognised.

Ms HARLAND: I suppose it comes from that perspective of if there is a legal vacuum about parental rights for five years that is not just about the adults but it is about the child because the report that was released by the Human Rights and Equal Opportunity Commission [HREOC] in 2007 on same-sex entitlements summarised those issues quite succinctly in saying that it is contrary to children's rights for them to have a family structure where both their parents are not recognised legally, and I think one of the submissions attaches the chapter of that report, which I think was quite compelling in that respect. We are really coming out of it from the perspective that it is about the children's rights: even though it is impacting on adults' rights and responsibilities it is impacting on children as well.

The Hon. AMANDA FAZIO: I have got one last question on the issue of children's rights and that is the way in which children born in surrogacy are dealt with. I must say my natural inclination would be that it should be easier for children to be children born of surrogacy through genetic material donated by the people who have arranged for the surrogacy to become part of their family more immediately than if perhaps the surrogate mother's own egg is used or if it is donated material used. But then that does not accord with your view that says that all children should be treated equally. I just wondered if you have any comments on that, because I think a lot of people's reaction would be similar.

Mr LONGWORTH: The question you are asking, I think with respect, moves from the parents' rights not the child's rights. I think the ACT legislation defines "birth mother" as the person who gave birth to the child, or somebody else. There is the ability to actually define someone else as the birth mother. The ACT Act I think it is in section—

Ms HARLAND: Section 23. It defines a birth parent as being a woman who gave birth to the child or another person who is presumed under division 2.2 to be a parent of a child, and that relates back to parentage presumptions.

Mr LONGWORTH: And then, of course, there is the question of it might be genetically someone's child but the fact that somebody gave birth to a child and it was not their genetic material, it was done by biological material, and I do not think we have got any research that tells us, in the way it tells us about adopted children, that they do seek out biological parents, whether a child will seek out the person who gave birth to them in the same way as opposed to someone who looked after them at a day-care centre for three years.

Mr LEWIS: It is an interesting question. Potentially it is the nature and nurture argument in another guise though, and I would be pretty cautious about taking a differential approach based on the genetic material, because you might really be elevating nature above nurturing. That does not seem to sit well.

The Hon. JOHN AJAKA: Ideally, a uniform law—Federal and State—would be perfect, but I was asking earlier on, and you were starting to give an indication, I personally have not seen that happening for a long period of time, is that a fair assumption?

Ms HARLAND: I think so.

The Hon. JOHN AJAKA: Realistically, if we are going to do something we have to do something on a State level as soon as possible rather than sit back and wait for the Federal Government to do something first and we pick up the pieces?

Mr LEWIS: I would agree with that.

The Hon. JOHN AJAKA: If I can run this analogy by you. The reality is surrogacy exists—you have said that; we are all aware of it. It is not criminal; it is not illegal. Surrogacy agreements at best are simply void or unenforceable, full stop. That is the reality of what is occurring. The door is open; people know they can go and do it; we are not going to be able to prevent them from doing it. So if we look at the child's interests as absolute paramount, surely we must regulate or legislate to look after the interests of that child if we are allowing the surrogacy arrangements to continue? Is that a fair comment? Or do we leave the status quo as is?

Mr LEWIS: I would agree with your first proposition that because we are seeing anomalies at the moment of the example you gave, Ms Fazio, and the one that I have seen myself, that it does call for some legislative change which recognises these children as a category of children that can be born by other than usual means. So I think it would not necessarily be too involved or too hard, as we pointed to the ACT as an example of simple cogent legislation, to come up with some sort of minimalist model that neither gives greater encouragement nor greater discouragement to altruistic surrogacy.

The Hon. JOHN AJAKA: The concerns that were raised in the submissions in some of the evidence we have heard tend to relate to what occurs after birth where intending parents, especially when both were the entire genetic gamete makeup of the child, suddenly find themselves in a situation where it came to medical emergencies, birth certificates, enrolling them at school, moving them interstate, et cetera, we suddenly have this void vacuum where the surrogate mother could be overseas but suddenly she has to be involved again.

Mr LONGWORTH: I do not actually think, with respect, there is a vacuum. I think if a child is born there is a national scheme that for 33 years has covered the field in the issues of the child's interest. If there is nobody who can be recognised as having the legal responsibility for the child there is a procedure available—Re Mark was an example of that. Re Mark was a published decision. They do not often get that high.

The Hon. JOHN AJAKA: But it still involves going to court; it still involves getting parental orders; it still involves actually taking steps in that regard.

Mr LEWIS: Subject to this: that the parties involved can use a parenting plan, at least in the case of the example between close family members.

The Hon. JOHN AJAKA: And the presumptions of the Status of Children Act apply as well, et cetera. I understand that.

Mr LONGWORTH: But it involves an oversight in relation to a child, I agree, and I do not think our position is that that is a bad thing.

The Hon. JOHN AJAKA: Can I put a different alternative to you? Would it be more appropriate or does it work from the point of view of this, that if we look at the Status of Children Act we look at the presumption that there is some reversal and that is that if we have a situation where there is a criteria to be met before a surrogacy agreement is entered into, that criteria not only involves counselling, independent legal advice and all the other boxes are ticked—such as the ACT system—but also involves that the agreement is brought before a Supreme Court judge, for example. The Supreme Court judge then looks at it, is satisfied as to all the criteria necessary to be satisfied and makes the appropriate orders so that when the child is born we then

have a situation where the presumption is that the intending parents are the parents, the birth certificate shows the intending parents as the parents on the birth certificate, and proceed that way. So that all occurs prior to the finalisation of the surrogacy agreement, prior to conception, prior to birth. Is that something we should be looking at from a State level to at least eliminate some of the problems?

Ms HARLAND: I think there is a problem in terms of whether a court can make a decision about the best interests of a child that does not exist. I personally have difficulty with that. It then comes back to making a surrogacy arrangement binding. You are really saying—

The Hon. JOHN AJAKA: That is part two of the question.

Ms HARLAND:—we can enter into a contract arrangement beforehand. I would be absolutely opposed to that. Adoption is a useful analogy. We do not force a woman who has indicated while she is pregnant that she wants to give up her child for adoption to sign away her rights and say that the agreement is binding and enforce it against her if she changes her mind once her child is born. We need to treat surrogacy in the same way. That is not to say that we should delay dealing with the realities afterwards when dealing with parental presumptions. I think parental responsibility is a much narrower issue that is not satisfactory. We are really talking about the status of a parent. It would be dangerous to look to introduce that before a child is born.

The Hon. JOHN AJAKA: Irrespective of the level of genetic involvement? In other words, would we treat two intending parents who have donated the entire gamete in exactly the same way as we treat the two intending parents who have not donated?

Mr LONGWORTH: The answer is that you do not know.

Ms HARLAND: I think we do.

Mr LONGWORTH: Well, I do not know.

Ms HARLAND: I think we do because otherwise to what are we reducing the woman who is carrying the child? This is where it becomes a more difficult ethical issue. My concern would be that we would be simply saying that this person is an incubator who has no rights or any say in what is happening to her body.

The Hon. JOHN AJAKA: Except that she has gone through the counselling and had independent advice. From what we have heard, that can take up to one to two years before it finally occurs.

Mr LEWIS: Except that as practising lawyers we know that families do fall out. In my opinion, that is why you do not elevate nature to that level.

Mr LONGWORTH: The new federal legislation will recognise the fact that some children are born of surrogacy arrangements. That does not in my view stand in contrast to making surrogacy agreements contrary to public policy. If it is the case that when a child is born there is a consensual arrangement between whoever is involved as to where that child should be raised and cared for, there is a system that can deal with it, whether it is a parenting plan or asking the court to oversight it. That is fine. However, if there is a dispute, the first recourse should not be a contract but to what is in the child's best interests. I think that is the issue.

The Hon. DAVID CLARKE: Can the present system provide that already?

Mr LONGWORTH: The present system can provide for the child's best interests being paramount. I think the point that Alex is making—without speaking for her—is that parental responsibility is a very different beast and is treated very differently in different regimes.

The Hon. JOHN AJAKA: What is your view about birth certificates? Dilemmas were raised about the intending parents not being on the birth certificate but merely the birth mother and her partner who had nothing to do with it. Some suggest that all four should be on it, some suggest that three should be on it, some suggest that only the intending parents should be on it and some suggest that we maintain the status quo. I would like the Law Society's view on that.

Mr LEWIS: You will not get that as we have said before. You will get up to three views.

The Hon. JOHN AJAKA: As a member of the society I was hoping for a view.

Mr LEWIS: I will give mine first. It is a great question because we know there is a strong argument that it is the right of the child to know his or her genetic origin. My view in the surrogacy context is that it is also the right of the child to know how they came into the world, and that must therefore also include knowledge of the identify of the gestational mother and her partner or spouse, if she has one.

Ms HARLAND: Whether or not that means you put all four on a birth certificate is a different issue. I think the birth certificate issue should follow the parentage presumption. If you say that the intending parents should receive the status of the parents then they should be on the birth certificate much as now occurs with the recent amendments to the Status of Children Act. It is now possible for same-sex couples to do that. That is very important. Certainly for couples I have acted for it can be an important symbolic issue of recognition of their status as well as the legal consequences. I certainly think that should be linked to—

The Hon. JOHN AJAKA: The Status of Children Act.

Mr LONGWORTH: Wherever you put the parentage presumptions should be linked to it and followed. The issue of whether you have other people on the birth certificate as well and in what capacity is another issue. I know that has been debated. There have also been debates about having a national birth certificate, and there is some merit in that. If we have more than two people named on a birth certificate will there then be an issue that you are creating a different status of children? Will they ask, "Why is my birth certificate different from everyone else's? Do you deal with that in terms of an information registry instead? One of the things we probably all agree about is that as research has shown with adoption for some children it is imperative that they know where they come from genetically. You would want that information to be available for children born out of a surrogacy arrangement as well.

The Hon. DAVID CLARKE: It may be in the interests of two homosexuals to be named as the parents, but that may not be in the interests of the child. We say the interests of the child are paramount.

Ms HARLAND: If those parents are raising the child, it is in the interests of the child that both their parents are included. They are the ones they know as parents and who are the only parents that they know in that household. The reality is that they are the parents regardless of what other people or society thinks. I think it is in the child's interests that both those parents are recognised.

The Hon. DAVID CLARKE: But you referred to what was in the interests of the parents. I understand what you are saying, but I think you put it as a reason for names to be shown. You said that it would be in the interests of the people you have acted for that they be shown.

Ms HARLAND: It is of symbolic importance to them because it is a recognition of that status. It is terribly damaging to have your relationship unrecognised in a broader sense.

The Hon. DAVID CLARKE: That should be irrelevant to the supremacy of what is in the interests of the child.

Mr LONGWORTH: Unless the interest of the child is affected by—

Ms HARLAND: But it is linked to the parents.

The Hon. DAVID CLARKE: I understand that.

Mr LONGWORTH: I wonder what a birth certificate is for. It registers the birth of the child. All the rest of it is information, which appears more important to other people. For some time birth certificates have not always accurately recorded who are the biological or genetic parents of a particular child. You could have a birth certificate with the name of the child, where they were born and the date of the birth. If you like, there could be an information statement on the back giving a full history for the child to find in 50 years when they look it up.

The Hon. JOHN AJAKA: But it is used by organisations such as schools to determine that, for example, the person bringing the child to be enrolled is the parent. That is where the dilemma arises.

Mr LONGWORTH: It is, but that has grown up by practice. It does not necessarily have to be that way. In the Australian Capital Territory only two people to can be on a birth certificate. Which lucky two? I just wonder whether the birth certificate is a distraction. I agree with Alex that parents get very involved in the process. However, I recommend that the committee refer to the comments in the case of re Mark about the use of the word "parent". Yet again, the Federal Parliament is choosing not to define it.

Ms SYLVIA HALE: There was some discussion earlier about the role of the Canberra fertility centre, which I believe is no longer functioning. It was a criterion of using that facility that the surrogate mother not have a biological connection with the intending family. If New South Wales were to enact legislation specifically dealing with that issue, would you think that should be a feature of any requirement of a registered IVF clinic?

Mr LEWIS: I would say no, because there will be that category of would-be mothers commissioning parents or substitute parents who actually have a preference for using the genetic material of someone within their family rather than a stranger. They might feel more comfortable psychologically with that. At the end of the day, this is all about values and we all have our respective values about families tied up with where we have come from and our life experiences. There will be commonalities and differences between us. That will exclude a category of people if you take that approach.

Ms SYLVIA HALE: I refer to the Australian Capital Territory Parentage Act 2004. Can you outline why you think that is a good piece of legislation? It may not be good, but is it legislation we should follow?

Ms HARLAND: I think it is useful as a template or a jumping point because it deals with presumptions in one spot. That is one of the attractions of the legislation. It is also fairly easy to read, which is rare with this type of legislation. It avoids some of the circularities in the New South Wales legislation on assisted reproduction technology. That legislation is riddled with problems and circular definitions, particularly in the definition of "parent" versus "parental responsibility" and other issues. That legislation is not in force and I am not sure why, given that it was passed in 2007. It is quite problematic. Although the ACT legislation is not perfect, it does have an attraction in that it deals with similar issues in one spot—not just about surrogacy but also parentage presumptions that can appear as a result of artificial conception in a variety of contexts.

Ms SYLVIA HALE: You say that it is easy to read and it avoids circularity. Does that mean it glosses over the complexities of the problems? Presumably the law deals with arrangements that break down—the exceptional rather than the usual.

Mr LONGWORTH: It may well gloss; it is very easy to gloss in this area. We do not say it is the model legislation either, but you have to go to a variety of different pieces of legislation in New South Wales to get your head around the topics. Some of them are not consistent—and do not ask me for specific examples at the moment. We have been looking at this for some time. Some of them are just not as easy to understand and you wonder what it is all about. It is an easier document to read and it appears to encapsulate a number of areas in one place. If we went through it we would probably say there are some problems with it from our perspective. Then there is the issue of what is happening federally versus what is happening at a state or territory level. We do not say it is the best; we say it is not a bad bit of legislation as opposed to some of the legislation we have seen.

Ms SYLVIA HALE: What reservations do you have about it? You say there could well be problems.

Mr LONGWORTH: There is the definition of "parent". I do not criticise the Federal Government for avoiding that; I think it is quite deliberate. As we said, there is "birth parent", which is a birth mother, and something else. That involves a range of other considerations. That moves from the parents' rights as opposed to looking at it from the child's perspective. There was one other issue, but it has gone from me. I think it was about the declarations, but I will have to come back to that.

CHAIR: Thank you very much indeed. As you can see, committee members are very hungry for further information, and you have provided a lot of it. We did not get responses to many of the formal questions we sent for you to answer. We would be very grateful if you could take them on notice and get the responses back to the committee. The secretariat will contact you. The committee may have further questions. I think I said at the beginning of the hearing that the timeframe for the committee's report had been extended because of the complexities. We could be getting back to you in the new year. Once again, thank you very much for your work and for appearing today.

(The witnesses withdrew)

(Evidence continued in camera.)

(Conclusion of evidence in camera)

(Public hearing resumed)

CHAIR: Welcome to the first day of the public hearing of the Standing Committee of Law and Justice Inquiry into Legislation on Altruistic Surrogacy in New South Wales. There are formal guidelines about the broadcast of the hearing, delivering of messages, and staff with assist if you want to give us any information. The 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. Therefore, I request that witnesses avoid the mention of other individuals unless absolutely necessary. I ask that you turn off mobile phones.

KIM LOUISE MATTHEWS, Paediatric and Adolescent Gynaecologist, IVF Specialist, Medical Director, Next General Fertility, sworn and examined:

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

Dr MATTHEWS: From a medical and a clinical point of view, yes.

CHAIR: If you consider at any stage that certain evidence you wish to give or documents you may wish to tender should be heard or seen only by the Committee, please indicate that fact and the Committee will consider your request. If any of the questions we ask are a bit complex for you to answer today, you can take them on notice and we would like to receive them by Monday 1 December, if possible. The secretariat will contact you with extra questions. Would you like to start by making an opening statement?

Dr MATTHEWS: Yes, I would, and I would like to thank you for asking me to come and have a chat with you today. Basically, I want to talk to you about the practicalities and, from my point of view with my dealings with women who require surrogacy from a medical point of view—and my subspecialty is in reproductive endocrinology and fertility, as part of that I work as a paediatric and adolescent gynaecologist and I have been at the Children's Hospital at Westmead for the past 10 years in that role.

Therefore, I see the young women when they are diagnosed with a condition that means they are then given that lifelong verdict of the fact that fertility is going to be incredibly difficult for them and they are not going to be able to carry a pregnancy. I do not know what information you have been given and I am happy to expand on that, but basically I am talking about conditions where the uterus does not develop or it develops in a complex fashion or they have a complex medical illness that means it would be contra-indicated for them to carry a pregnancy.

The one in particular I am talking about is Mayer-Rokitansky-Küster-Hauser syndrome. I am not sure whether you have seen many people with that today. It might be easier to say mullerian agenesis, which means that the uterus and the upper third of the vagina and the fallopian tubes do not develop. So, they are born without a uterus. Usually, these young women present with no periods looking absolutely perfectly female. So they present somewhere about 16 or 17 years of age. It is always during the Higher School Certificate year and they get investigated. Then they turn up with an ultrasound where their whole identity of who they are completely changes.

I guess I have been involved with that process several times. It is a fairly rare condition: we are talking one in 4,000. I am just picking on that to give you an example of some of these conditions. It completely changes who they are, where they are and where they think they are heading. Of course, one of the main questions they ask is what is going to happen in the future. It has always been very difficult because there has been no legislation or advice to be able to give them on exactly how things are going to be. You can give them medical advice. I think it would help their whole wellbeing and impact less on their whole health if we had things in place so we could say, "Okay, this is where we are at now, but I can tell you that there are options for

the future." I think that impacts on a lot of medicine. I also deal in the same way with children who have cancer treatment. With donor gametes we can talk through their options for the future. I think these young women with complex anomalies really need that advice and certainty of what is going to happen in the future. So, yes, I am an IVF specialist and my particular area is fertility after childhood illnesses. So that is why I wanted to come and talk to you about these issues today.

CHAIR: We have had some comment about inadequacies of the Assisted Reproductive Technology Act, which has not yet been enacted but has gone through Parliament. Have you any thoughts on that?

Dr MATTHEWS: We are talking about the 2007 Act?

CHAIR: Yes.

Dr MATTHEWS: I believe there is really no legislation within that Act that covers altruistic surrogacy and, therefore, there is the need to look at these issues. I will say that I am not strong on the legalities.

CHAIR: I just wondered if you had heard or been involved in any discussions about it.

The Hon. JOHN AJAKA: You probably are the best person to ask this question and forgive me if it sounds silly. When both the commissioning parents donate 100 per cent of the gamete and the birth mother does not, if a DNA test is conducted of the child after birth, is anything of the birth mother revealed?

Dr MATTHEWS: No, the genetic material from the embryo that is placed back in for gestational carriage is the embryo created from the gametes from the commissioning parents. So, therefore, it would carry the full genetics of the commissioning parents.

The Hon. JOHN AJAKA: So nothing from the birth mother will come in to suddenly show something a little bit different genetically?

Dr MATTHEWS: No.

The Hon. JOHN AJAKA: One of the main things you argue in your submission is that protection should be based on the presumption of parentage to the commissioning parents. Some of our earlier witnesses gave us a scenario and I would like to go through that with you. It seems that the problem or conflict occurs after the child is born. Would it be better prior to the surrogacy agreement being entered into for the parties to go through counselling, medical assessment et cetera to meet all the set criteria as to who, where and why, and once the agreement is entered into and approved on independent legal advice and then by, say, the Supreme Court, that upon the child being born the commissioning parents are automatically deemed the parents of the child and appear on the birth certificate without the need to go through adoption or to the Family Court to get parental orders? What would be your views on that having seen and dealt with people in these circumstances?

Dr MATTHEWS: I would think that would be preferable and gives them the certainty and confidence in going through the process. When you see these people go through things like when the child becomes unwell and the birth mother has to give consent for any treatment for that child, those sorts of issues are difficult indeed. Therefore, I think the process you are proposing would go a way towards alleviating that.

The Hon. JOHN AJAKA: Looking at least at the situation of the commissioning parents having donated 100 per cent of the gamete and the birth mother not—

Dr MATTHEWS: As I put in my submission, that is the sort of arrangement I believe we should be what we are talking about.

The Hon. JOHN AJAKA: I find it strange that they then have to adopt what is, in effect, their child.

Dr MATTHEWS: Correct.

The Hon. JOHN AJAKA: Would your views differ if, for example, the birth mother donated a gamete or where the gamete were donated by two complete strangers as opposed to the commissioning parents?

Dr MATTHEWS: I believe that areas of conflict and difficulties have arisen where there has been a situation of the birth mother having provided the gametes. That is why I do not support that process. I have not been involved in a situation where the gametes have been donated by other people. I would need time to think that through and see what I thought because, obviously, I have been involved with donor gamete situations as well. I think parentage rights where they provide the gametes are important.

The Hon. JOHN AJAKA: What is your view about same-sex couples where one donates the gamete and the other one does not?

Dr MATTHEWS: We are talking about a very small number of cases. I have been involved with donor gamete situations with same-sex couples, but I cannot think of a situation where I have been asked for a same-sex couple in a surrogacy situation. So, I think that would be incredibly unlikely. I will say all things can and will happen in medicine that you have to consider, and you need to consider things on an individual basis as you do with most medicine. So, I probably would want a bit more time to think about that one to give you an answer.

The Hon. JOHN AJAKA: That leads to the next question: The reality is that you have to take each case on its own circumstances and merits?

Dr MATTHEWS: That is exactly right.

The Hon. JOHN AJAKA: You have to look at the different levels of altruistic surrogacy: where the commissioning parents have donated 100 per cent, one of them has donated and then none of them has donated. I guess there are different circumstances also with the birth mother?

Dr MATTHEWS: Yes, there are but, as I have said, I think full surrogacy or, as I call it, gestational carriage, is the form of surrogacy that I feel is most appropriate.

The Hon. JOHN AJAKA: You used the Israeli situation as an example, but although the presumption is that the commissioning parents become the parents of the child from day one, is that from the time the child is born?

Dr MATTHEWS: I would have to speak to the Israeli medical. They are the legal things that they comment on.

The Hon. JOHN AJAKA: But they still look at the aspect when they go to adoption, do they not?

Dr MATTHEWS: I am not sure that I am qualified to answer that question.

The Hon. JOHN AJAKA: Perhaps that is something the secretariat could follow-up.

Ms SYLVIA HALE: On page two of the submission you say, "Next Generation Fertility submits that the commissioning mother should be medically infertile" and then nominate two specific categories, one being a physiological incapacity and the other a pre-existing medical condition. You say that only on those grounds should surrogacy presumably take place. What do you do in the case of a parent who wishes to have a child but is frightened of passing on a genetic difficulty, such as haemophilia? The birth mother genuinely believes that her offspring either will manifest the condition or pass it on to subsequent offspring. Why do you think those people should be excluded from surrogacy?

Dr MATTHEWS: Because they can be treated through a donor situation rather than a surrogacy situation.

Ms SYLVIA HALE: So the woman in that instance could be—

Dr MATTHEWS: Or can be treated with pre-implantation genetic diagnosis, which is growing all the time. So that would not fit into a surrogacy arrangement per se but looking at the genetic condition that they are carrying.

Ms SYLVIA HALE: What about the case of a woman who may have had a child and wants more but suffers extraordinarily severe postnatal depression and becomes suicidal—I gather that is not totally unknown? In that case would you think that it would be necessary for that woman to make use of a surrogate?

Dr MATTHEWS: I think that would need to be considered on an individual basis and with input from her psychiatrist and things like that to look into it. That fits into my second category where if the carrying of a pregnancy would be considered to be a life-threatening condition, if the postnatal depression was considered by her treating psychiatrist to be a life-threatening condition, then maybe you would have to look at that on an individual basis. But I was talking more about things like cardiac failure, renal transplant, things like that.

Ms SYLVIA HALE: It always seems to me that once you begin to lay down hard and fast rules you are always going to come up with exceptions.

Dr MATTHEWS: Of course you are, which is why we were talking about an individual basis before, because medicine is very like that.

Ms SYLVIA HALE: In another part of your submission, at dot point five on page three in relation to clarifying the legal status of any child born of such arrangements, you say that legislative amendments are required just to clarify this and the protection should be based on the presumption of parentage to the commissioning parents. What would your view be if there was no presumption? Because presumably in most cases where this works out well the arrangement is carried through as anticipated, but where you get to legal problems is where the arrangement collapses. Would it not be better then to have no presumption as to who has the parental responsibility—and I think this was the view of the Law Society—and that would allow the matter to be looked at from the perspective of the child rather than the rights of either of the adult parties?

Dr MATTHEWS: I guess my view is—as I say, I am not legal on medical and clinical—if we limit surrogacy to gestational carriage or full surrogacy, then the genetic material of the gametes being used belong to the commissioning parents. That is what we mean by the presumptive parentage of the commissioning couple: that they have provided all the genetic material, and therefore I believe that they have parentage rights because it is their genetic material. I certainly agree that the rights of the child are very important and should be considered as part of it, but I would have thought that to make things clear for the whole way through the surrogacy arrangement that looking at parentage rights from when the arrangement is undertaken and the whole pregnancy goes ahead that that would be a better outcome for all concerned.

I have to say that as the new clinic that I am I have not done many in my new clinic but when I have been involved with them in the past the people that come to do the surrogacy arrangements usually have been planning this and thinking about this for years because they have a condition which means that they have done lots of planning and they are very committed. And the number of people that come for consultation compared to the number that actually go through the surrogacy arrangements is a disparity.

Ms SYLVIA HALE: Is it a very great disparity?

Dr MATTHEWS: Yes. Because it is such a lot of work and such a commitment to all concerned, not everyone that comes through a consultation will proceed on. It is not come for a surrogacy arrangement, come and see the doctor and then, bang, it is going to proceed; it does not happen that way. As with donor gametes, it is a whole Pandora's box for many people and by going through the process not everyone would proceed.

Ms SYLVIA HALE: There was a comment by the witnesses from the Law Society that in terms of the rights of the birth mother, gestational mother, or whatever, that one of the difficulties they found was the sheer unpredictability of the actual response to the child's birth; that it is one thing to agree to something in advance but it is another thing when you are presented with the concrete requirement that you hand over a child. How do you deal with those instances?

Dr MATTHEWS: I have to say that my experience—and it has not happened to many—but most of the people that come forward who present for surrogacy it is usually often a relative or someone with whom they have a long-term relationship and most of those intending mothers who feel that this is a gift that they are giving and they are purely carrying the pregnancy for the person. Therefore, if it is well worked before you start the process then your arrangements are less likely to fall through—if you have had all your proper counselling and things, and counselling during the pregnancy as well and also counselling after the pregnancy.

I agree what we have to look for, because not every situation is perfect and not every pregnancy is predictable, there can be issues that arise, but that has not been my experience. I have had people that have been planning these issues for a long time.

Ms SYLVIA HALE: In your experience or that of your colleagues have you come across instances where a child has been born who is developmentally disabled in some way, and how do the intending parents, or even the birth mother, gestational mother, respond to that? How is that situation dealt with?

Dr MATTHEWS: That has not been my experience so I probably cannot comment on it. I have not been involved in a surrogacy arrangement where a child has been born with a disability.

Ms SYLVIA HALE: How common would it be for a pregnancy not to end up with a perfect result, as it were? Is that one of the problems with reproductive technology?

Dr MATTHEWS: No.

Ms SYLVIA HALE: I am not prejudging the issue, I am just asking.

Dr MATTHEWS: I think what is important is that pregnancies that are actually conceived through reproductive technologies, whether we are talking general IVF, donor situations or surrogacy, are probably some of the most monitored pregnancies and outcomes in the world. There are over a million babies born from IVF worldwide and there has been lots of literature looking as to whether there is an increased risk from those procedures, obviously. The data all comes back very in favour of the fact that there is not an increased risk. You cannot guarantee anyone a normal pregnancy or a normal outcome.

The data also comes in to say that—we do not believe any of the procedures that we use are involved—there are thought to be some inherent risks in the couples that require fertility; that there might be some slightly increased risks in some very rare conditions, but those absolute risks are very small. There are babies born with disabilities and with malformations but the literature would suggest that there is not an increase in excess of those born from spontaneous conceptions. So it would be the same risk as for a normal pregnancy.

The Hon. GREG DONNELLY: We have had a range of witnesses today covering a number of aspects of the whole discussion on how to achieve surrogacy. We provided you with some questions on notice.

Dr MATTHEWS: I got those yesterday.

The Hon. GREG DONNELLY: It has been discussed with at least one of the witnesses today their views with respect to surrogacy, that there should be some requirement—to the extent that surrogacy goes ahead—that the commissioning woman should at least have had a child before. Would you like to make some comment about that?

Dr MATTHEWS: That is question 12?

The Hon. GREG DONNELLY: Yes, 12.

Dr MATTHEWS: We were talking before about the fact that not every pregnancy is predictable, and I certainly am aware of situations where prematurity and complications of pregnancy have developed in a surrogacy arrangement even in a woman who had had previous pregnancies. So it is not always predictable, and I think part of the medical and the counselling process that we go through is to say that basically the bottom line is that women can die in childbirth—it is very rare but it can happen—and that you are giving the ultimate gift of attempting a pregnancy for someone else. That is the bottom line and basically that is discussed with the commissioning parent and the intending mother is part of the process.

So I would not support it being anyone's first pregnancy because there can be increased complications in people's first pregnancies, such as pregnancy-induced hypertension, and I will say now that I have not done obstetrics for over 10 years so I do not feel qualified to talk to you about the prevalence, et cetera. Therefore I would not recommend it from that point of view. Obstetrics is a very humbling thing: you have two patients to look after and things can happen very quickly. I think all of us have been involved with situations with difficulties at birth and situations where people end up with a caesarean hysterectomy—they have the delivery and then they lose their uterus for whatever reason. So therefore I do believe that they should have perhaps

completed their families first before they offer because you just cannot predict what is going to happen from that point of view.

The Hon. GREG DONNELLY: Question number 13 in relation to age criteria.

Dr MATTHEWS: That is a harder one. Having said what I have said—and that is just my opinion that I think people should have completed their family first—in this day and age where we know that lots of women are putting off their fertility and having a pregnancy, I think that finding women who have completed their families at a young age is going to be fewer and fewer. I looked at that question and I thought I do not know that I want to put an age criteria on that because there are so many factors in that. I do believe that the person needs, obviously, to be able to give consent and therefore of an age which they are considered to be an adult.

I do think there should be some sort of upper limit because I think pregnancy complications increase as age increases as well. I know you are going to have to consider these issues but I am not sure that an age cut-off at the lower end or the upper end is going to be helpful. I think it is going to have to be individual basis but a guideline for appropriate ages—obviously 18 being an adult age. Also what we say for treatment for fertility is that it should not be beyond the age of 51 because that is the natural age of menopause. So I am giving you a huge age range, but I think that is necessary in your deliberations to see what is most appropriate.

The Hon. GREG DONNELLY: Questions six and seven refer to the NHMRC guidelines. Are those guidelines enforceable or are they essentially a broad set of principles that fertility clinics are obliged to be generally aware of?

Dr MATTHEWS: They are enforceable. The process is changing at the moment. Again, just like I was saying, most IVF pregnancies are very recorded and monitored, the IVF industry has been at great pains to be accredited and up until recently we have been under the Reproductive Technology and Accreditation Committee, and that has been a three yearly accreditation process that the Fertility Society of Australia monitors and has a full group of accrediting people that come round to the various clinics, and if you have not met the guidelines and, basically, your ability to function as a unit, you do not get accreditation.

And then there is an accreditation that has been either yearly or three yearly. That process is going to change in April 2009 to go to an outside body, which is called JASANZ, and the initial accreditation will be an initial audit and then there will be a yearly audit after that, which is a surveillance audit, to make sure that the clinics are complying. Some of them are guidelines and some of them are absolute must dos. We are talking pages of documentation; it is a bit hard to summarise that today.

The Hon. CHRISTINE ROBERTSON: Is the NHMRC an appropriate body to be writing the guidelines on a clinical setting, or was that a leftover from when it was still a research process?

Dr MATTHEWS: My understanding is that the National Health and Medical Research Council and RTAC, and the bodies that have been involved in RTAC, worked together on the current guidelines and the president of the FSA also worked very hard on them. They have been updated within the past two years. That has been put forward to this new accrediting body. It is not just research guidelines.

CHAIR: Was there a clinical component in the development?

Dr MATTHEWS: Yes.

The Hon. GREG DONNELLY: Obviously the circumstances around surrogacy arrangements in terms of the range of people involved can be complex—there can be various combinations of people involved in donation of the gametes. Are you specifically endorsing a particular set of surrogacy arrangements and not others in your submission?

Dr MATTHEWS: I am endorsing full surrogacy or gestational carriage, whichever term you would like to use. The commissioning parents provide the genetic material for the embryo that is then put back. I call it third-party reproduction, whether I am talking donor gametes or surrogacy where a third party is involved. It is a matter of whether the oocytes, the sperm or the uterus is being donated. I believe surrogacy is very different from oocyte and sperm donation because the embryo is the generic material of the commissioning couple, but it is the uterus that is being utilised as the third party.

The Hon. GREG DONNELLY: Do you have a view about whether or not the Government should be legislating to deal with other circumstances?

Dr MATTHEWS: Do you mean partial surrogacy?

The Hon. GREG DONNELLY: Yes.

Dr MATTHEWS: Having talked to my colleagues my view is that it is with partial surrogacy that a lot of the arrangements have broken down. I have concerns about those issues.

The Hon. GREG DONNELLY: Can you give us a hypothetical example?

Dr MATTHEWS: Several legal cases could be quoted. Again, I point out that I am not a lawyer, but I am aware of situations whereby friends offered to be surrogates and it was the mother who was inseminated with the partner's sperm and then carried the pregnancy and then did not want to give up the baby. That went to court and it was an incredibly difficult situation. It is was in another state, not New South Wales. That has been the experience in the United States as well. The cases that have been particularly ugly have involved the birth mother's oocytes. She has not only carried the pregnancy but it has been her genetic material as well. They are the ones where it seems to be an issue. Something has happened at birth and there has been a breakdown of the arrangement.

The Hon. AMANDA FAZIO: I was surprised by question No. 7 that we sent you.

Dr MATTHEWS: So was I.

The Hon. AMANDA FAZIO: How closely does the National Health and Medical Research Council define close relative? It is not uncommon for people, particularly those from a Mediterranean background, to marry first cousins.

Dr MATTHEWS: It is consanguinity. It does define it. Basically, any relationship that is seen as involving siblings is completely against the guidelines. I had a case involving a donor gamete situation and not surrogacy. A couple came to see me and her brother wanted to donate sperm and his sister donated the egg. That was not a genetic mix so we were not dealing with a sibling arrangement. People come to us with all sorts of combinations. However, the guidelines are very strict about not entering into something that becomes a sibling combination.

The Hon. JOHN AJAKA: Who carried the child in that situation?

Dr MATTHEWS: His sister donated the egg and her brother donated the sperm and we created the embryo, but the woman carried the pregnancy. It never ceases to surprise me what options people come to me with for all sorts of reasons. That arrangement was designed to rule out a genetic condition. They came up with a combination that they thought was appropriate to ensure we were within the guidelines. The thing that was important to them was that there were genetics from both sides. That was the combination they came up with.

The Hon. JOHN AJAKA: And it was not incestuous.

Dr MATTHEWS: No. Doing full surrogacy or gestational carriage would deal with the issue in question No. 7.

The Hon. AMANDA FAZIO: Question No. 8 seems odd. If they are coming to one of the clinics you are involved in, they would be impregnated with a fertilised egg anyway.

Dr MATTHEWS: I will go back to my donor gamete situation. We counsel all people coming through in donor situations or these sorts of situations that contraception is important. Every now and again in a donor situation you will pick up the eggs and create the embryo and the donor turns up pregnant. Obviously not every egg was collected and she has gone home and not used contraception and the original couple is not pregnant. It has not been a good look. With all the best will in the world, we advise contraception as part of both the medical and counselling processes.

I had another situation involving donor gametes. I have a set of twins where I know I put a single embryo back and we had a twin pregnancy and one is a girl and one is a boy. This couple, after many years of infertility, had a donor embryo implanted and a spontaneous conception in the same cycle. Medicine is not always clear.

The Hon. JOHN AJAKA: There is a possibility when you view the DNA that they are actually twins as such.

Dr MATTHEWS: One is a spontaneous conception and one was the embryo that we put back in that situation. That will never happen to me again.

CHAIR: In the same lady.

Dr MATTHEWS: Yes.

The Hon. JOHN AJAKA: It is amazing.

Dr MATTHEWS: It is.

Ms SYLVIA HALE: It is quite common that after a couple adopt a child the parents go on to conceive naturally.

Dr MATTHEWS: That is right. A similar thing happens with IVF treatment. Your first pregnancy might be an IVF treatment and you go on to have a child naturally. I have had situations where I have done IVF and we have put eggs and sperm together and there has been no fertilisation. You then move on to the next step and they come back spontaneously pregnant in the next cycle. Biology is biology.

My answer to that question is what I said before: I find that the couples who come to me for a surrogacy arrangement have been thinking about this for a long time and usually the intending mother or the birth mother has completed her own family and the last thing she wants is to have another pregnancy of her own. I would say that those women are incredibly likely to take contraception and to be making sure that it is only the embryo that we put back that results in a pregnancy. They are my thoughts.

The Hon. AMANDA FAZIO: I move now to question No. 9. I would have thought that you would not make available counselling records to anyone else.

Dr MATTHEWS: From a privacy point of view.

The Hon. AMANDA FAZIO: Yes.

Dr MATTHEWS: That is correct.

CHAIR: We have heard a lot about mandatory counselling in this process. In our society the word "counselling" is bandied around in many ways and there are many different values and outcomes for those who are counselled and those who deliver. How do you ensure that the mandatory counselling is carried out? Are there guidelines and regulations about what needs to be dealt with and the outcomes you expect?

Dr MATTHEWS: We do not currently do surrogacy, so we do not have a policy. I have been involved with my current counsellor in previous clinics, and she has been involved in surrogacy issues. She requires mandatory counselling. We go further with the surrogacy arrangements in that we do pre-arrangement counselling and then there are also requirements for counselling during the pregnancy and after the birth of the child. Does that answer the question?

CHAIR: Yes.

The Hon. AMANDA FAZIO: Under what circumstances would you refuse to provide services to facilitate a surrogacy and what recourse do parties have to challenge such a decision?

Dr MATTHEWS: I would refuse to be involved in anything that included a commercial arrangement. That goes without saying. I am unclear about recourse, but I would think that they would probably look at

antidiscrimination legislation. Again, I go back to what I said about doing things on an individual basis. The people might come to discuss surrogacy, but not everyone goes through with it. I have not met couples who have come forward for this who have lived their whole life without a uterus who come to this decision lightly. They are usually fairly clear and I have never had a medical indication in those circumstances where I have seen a need to refuse treatment.

The Hon. AMANDA FAZIO: Would you ever refused treatment on the basis of the competency of the surrogate or the suitability of the surrogate mother?

Dr MATTHEWS: I have never come across that situation, so I do not feel qualified to give a direct answer. Because I have a history with my patients and have known many of them for years, before they consider these process I talk about them thinking outside their square but inside their circle. I get them to write a list of people they would feel comfortable going through this very intricate process with and then to go through the list and cross off all the people they would not go through this process with. By it time they get to me with either their donor or the third party they have usually been through that process pretty thoroughly and are convinced that the people they are with are appropriate They are usually pretty well matched by that time.

CHAIR: Thank you very much indeed for appearing before the committee and providing that information. If when the committee secretariat go through the information they come up with more questions they will contact with you and hopefully you will find the time to answer them. I appreciate that you are very busy. Thank very much indeed for appearing.

Dr MATTHEWS: You are welcome.

(The witness withdrew)

JENNI MILLBANK, Professor of Law, affirmed and examined:

CHAIR: I welcome you to the first hearing day of the Standing Committee on Law and Justice inquiry into legislation on altruistic surrogacy in New South Wales. Before we begin I must take you through some formalities. There are broadcasting guidelines and the instructions for them are beside the door. The Secretariat will handle any messages or documents to be tabled on your behalf. Although you have parliamentary privilege this Committee hearing is not intended to provide a forum for the public to make adverse reflections about others. If you have a mobile phone it would be preferable if you would turn it off, as it may interfere with the electrical equipment.

In what capacity are you appearing before the Committee? That is, are you appearing as an individual or representative of an organisation?

Professor MILLBANK: As an individual giving expert opinion.

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

Professor MILLBANK: Yes, I am.

CHAIR: If you should consider at any stage that certain evidence you wish to give, or documents you may wish to table, should be heard or seen only by the Committee, please indicate that fact and the Committee will consider your request. Should the Committee ask some complex questions that need to be taken on notice, it would be appreciated if you could get them back to us by 1 December 2008. The Secretariat will contact you if questions are raised during the hearing for you to answer. Would you like to make an opening statement?

Professor MILLBANK: Thank you for having me here today. I have a joint written submission with Associate Professor Anita Stuhmcke, who is an expert in surrogacy and who has written in the area for quite some time. Please take my evidence today as my view or my response to your questions rather than as our joint response, unless I state otherwise. Anita and I have a meeting of the minds on most of these issues and we are doing joint work together but I cannot really speak for her in a lot of what I will be saying today.

I want to start by saying I think lawyers and legislators approach these issues by thinking that the solution to every problem is a legal one or a legislative one. The gist of our submission is that that may not be so in the case of surrogacy. The terms of reference of the Committee largely reflect the terms of reference that the Queensland parliamentary committee used. I think they are very different in context because the Queensland committee was looking at a situation where all forms of surrogacy have been prohibited, have been criminalised in that State for 20 years; whereas New South Wales is in the position of having had virtually no direct prescriptive legislation around surrogacy for the past 20 years.

Despite the fact that in 1988 the New South Wales Law Reform Commission said that all possible means should be used to prevent and prohibit every form of surrogacy, my point is that the sky did not fall in. We did not have legislation for 20 years but we do not have a situation in New South Wales of rampant commercial surrogacy. We have not become a honey pot for people to come from all over the world and all over Australia in order to practise surrogacy. I think we should really rethink the idea of whether or not there is actually a problem that needs a solution; whether legislation is the appropriate response if there is a problem; and, if there needs to be a form of regulation in order to prevent exploitative practices, for example, whether legislation is the right thing.

My second big philosophical question is, if we take as our starting point the role of Government or the role of regulation in this field is in order to prevent exploitation, if we want to prevent the exploitation of women who carry pregnancies, if we want to prevent potentially adverse situations for children through the commercialisation of reproduction, the equation of altruistic with good practice and money with commercial and bad practice, and the kind of dichotomous view of surrogacy and reproduction as being either wholly virtuous and emotional or sullied by commercial practices and extreme exploitation, I do not think that division is as sharp or as clear as the terminology that altruistic and commercial makes surrogacy appear. Indeed, Anita and I in recent discussions have been talking quite a bit about the role of appropriate forms of payment and recompense in this kind of situation. Sometimes it can be just as exploitative to not allow recompense for someone's reproductive labour as it would to have a free for all kind of situation.

I would like to start by saying that talking in terms of altruistic and commercial surrogacy in a sense skews the issue and detracts from the underlying issues, which are about preventing exploitation, making sure that children's interests are properly safeguarded, and making sure that women engaging in reproductive practices are not exploited for the commercial gain of others—I have a lot more to say on specific elements but that is where I would like to start—somewhat perversely I guess, given that I am a professor of law, but I am not sure that law is the solution. In Queensland law is the solution because it is about reforming bad law.

The main gist of our submission is, or my work certainly, about changing parentage provisions. I think that is a legal solution to a legal problem: parentage. I am not sure that the practice of surrogacy, in terms of what people are doing and how they are coming up with arrangements, should be any more regulated by law than they currently are in New South Wales. The questions I have been hearing about as to whether there should be an upper age and a lower age, and who should we let do what, are very tempting questions for regulators. If you start thinking of it as something you can control then you start devising ideal families and say she should be between 18 and 35, she should probably be someone who does not have a criminal record, and it would be better if she were not overweight.

This is the trap that Victoria has gone down. They have had a central government regulatory body and they have had legislation in place for 25 years. They find themselves meddling, meddling and meddling and what they have meddled about and what they have discriminated about and whom they have excluded and whom they have included has changed over time. They started off by excluding everyone who was unmarried and then they let in heterosexual de-facto couples and now they are talking about no longer excluding lesbian couples but then they have come up with new rules based on age and criminal record. I am just not sure that legislators are best placed to make those judgements about the most fundamental decision that most people make, which is about whether or not and how to have a child and who with.

Guidelines need to be in place to prevent terrible practices at the end of the spectrum but with most people it comes down to making an informed decision, having access to information and the ability to freely consent to the arrangements. Again I would have to say, as one of the least regulated States in Australia, New South Wales fertility providers have, to my knowledge, behaved extremely responsibly and ethnically in making sure that people know what they are doing, making sure that there are not uneven power relations between parties in the donor arrangements and in surrogacy arrangements. My starting statement is, although I would not like to be thought of as a laissez-faire proponent, I am not sure that more law or prescriptive law about who is allowed to do what, is the appropriate track for New South Wales to take.

The Hon. DAVID CLARKE: You say in your submission, "We affirm that there should be no direct or indirect government regulation of surrogacy so no attempt to set entry criteria should be attempted." I am trying to work out what that means as far as commercial surrogate arrangements. Are you saying that there should be no attempt to stop them? They are illegal at the moment, as I understand it. You are saying there should be no further government legislation so they should remain illegal or—

Professor MILLBANK: Just on the commercial surrogacy, my argument would be no additional regulation. So when the Assisted Reproductive Technology Act comes into effect it has a prohibition on commercial surrogacy but we also have a huge web of other pieces of legislation and ethical guidelines that prevent for-profit practices. So we have the Prohibition of Human Cloning for Reproduction Act and the Research Involving Human Embryos Act at the Federal level, which prohibit payment for eggs, sperm and embryos. We have the NHMRC guidelines, we have the RTC guidelines—it is very clear in Australia that you cannot pay people for reproductive practices.

The Hon. DAVID CLARKE: So the bottom line is that we should leave it like that. There should be no legislation to allow commercial surrogacy arrangements?

Professor MILLBANK: I think that is probably right but I would add the proviso that in my view the New South Wales legislation is pretty badly drafted and pretty uncertain—

CHAIR: Excuse me, are you referring to the ART—

Professor MILLBANK: The new legislation. I am presuming that it is going to be proclaimed sometime in the future, rather than talking about the Human Tissue Act—which is the old legislation. What we do have is some confusion over reasonable expenses. There seems to be confusion between the Federal legislation and ethics requirements and the New South Wales legislation. I would be in favour of setting out

more clearly what is meant by "commercial". I mean if you are prohibiting something I think you should be clear about what it is you are prohibiting and I do think that reasonable expenses should be included.

The Hon. DAVID CLARKE: The not-for-profit?

Professor MILLBANK: That is right. The example that I have looked at in other contexts—not in the surrogacy context but in the context of paying for sperm donation—there was an investigation a couple of years ago into a clinic advertising holidays in Australia for sperm donors, paying for them to fly over, paying for their hotels. That was held to be reasonable expenses because travel and accommodation fell under "reasonable expenses". Even though those expenses amounted to $7,000 or $8,000 per person the investigation at a Federal level, which was conducted by the Australian Federal Police in the first instance, found that that was okay. However, if an egg donor had to take time off work and you try to give her money to cover her lost wages if she did not have sick leave, for instance, you would be transgressing the Federal ethical guidelines as well as Federal legislation.

My answer is to be clear about what you can actually compensate people for. The Canadians have taken the approach of having a body whereby you submit your receipts of what your reasonable expenses are; whereas in Britain they have taken the approach of including time off work, accommodation and so on. In Britain, for example, reasonable expenses have been in the amount of £10,000 and more for surrogacy. There is a lot you could fit in there. You could either take it as a table of expenses, or kinds of expenses, or an amount. Whatever the approach is I think it should be clearer, and I do not think the current legislation is at all clear because of its use of a fee or reward—I do not think that is particularly helpful.

The Hon. DAVID CLARKE: What is your attitude to enforceable contracts for surrogacy arrangements?

Professor MILLBANK: They have never been enforceable either under common law or under the statutes of Australia.

The Hon. DAVID CLARKE: Do you think it should remain that way?

Professor MILLBANK: Absolutely, yes. I think that is beyond question. The other thing is that we should distinguish between the Australian situation and the American States. I think a lot of what happened in America in the 1980s led to a moral panic and led to a lot of the legislation that happened in Australia without thinking through the differences in our context. In the Australian context, legal parentage of a child and where a child lives, or who a child is going to spend time with, are different questions. The best interest inquiry will always govern who is going to raise a child regardless of legal parentage. Even if you have a so-called enforceable contract about who was going to be a parent, and even if you transferred parentage according to that legal contract—which I think is unthinkable on many grounds—that would not determine who the child was going to live with if there was a dispute between the parents involved. You would still have a best interest inquiry.

The Hon. DAVID CLARKE: No enforceable contracts?

Professor MILLBANK: No, absolutely not.

The Hon. DAVID CLARKE: With respect to this general issue of surrogacy, do you believe that there should be a conscientious objection to participating in such procedures—by medical personnel, nurses, and so forth?

Professor MILLBANK: I would be surprised if it were needed, frankly.

The Hon. DAVID CLARKE: But if it arose? If, for instance, a nurse were working in a hospital where once in a while the procedure arises? There is always a possibility that it can arise.

Professor MILLBANK: Have you seen the waiting lists for public hospitals for fertility treatment?

The Hon. DAVID CLARKE: Say you have such a situation. Should there be—?

Professor MILLBANK: I do not know; I would have to really reflect on that. I am not a health ethicist in the bigger picture. I would have to think about how that would interrelate with antidiscrimination provisions and so on. My answer at the moment is: I am not sure.

The Hon. DAVID CLARKE: You say antidiscrimination provisions in the sense that it could be infringing on the freedoms of the medical practitioner not to participate in such a process?

Professor MILLBANK: Equally, it could be discriminatory treatment to the person who is being refused treatment by someone who does not want to treat them.

The Hon. JOHN AJAKA: I put a scenario to a number of witnesses, and if I could put it to you as well. In a situation where we have a husband and a wife, they donate 100 percent of the gametes, they are the commissioning parents, the surrogate carries the baby, the child is born, and then we hear about what I would describe as almost a nightmarish situation that the parents go through: their names are not on the birth certificate, they have to wait up to six years to be able to adopt a child, and they go to the Family Court and get parental orders, et cetera. It seems to me that the uncertainty is there and the pressure is there. How is that in the best interests of the child?

Given the Status of Children Act et cetera, whilst we are assuming that nothing is happening federally, are we in a better situation if, at least in that example, we change the status where the commissioning parents become the deemed parents of the child, they go onto the birth certificate, from day one they are the parents, they do not need to obtain parental orders, they do not need to adopt the child—it is their child. It almost reverses the current situation. I would appreciate your views on that.

Professor MILLBANK: My view is: absolutely not, for a number of reasons. Anita and I are both very clear in our work that there should not be a distinction drawn between the rights and responsibilities of any of the participants in a surrogacy arrangement based on genetic connectedness. I do not think that the commissioning couple who are both using their gametes should be privileged over a commissioning couple where there is only one of their gametes involved.

The Hon. JOHN AJAKA: That was part two of the question—if there should be any prejudice.

Professor MILLBANK: Yes. I would say no. I think intended parents, the people who are going to be raising the child, need legal recognition of their relationship—because they are the child's care givers, not because they are genetically connected to the child, or one or both, or whatever.

The Hon. JOHN AJAKA: Using my scenario, should that also be the situation? In other words, in any circumstance should we be reversing the presumption that the intending parents should be noted as the parents of the child?

Professor MILLBANK: Again, I would say no in that instance, for a number of reasons. The model that I support for transfer of parentage is a post-birth transfer process. I support keeping the current parentage presumptions as they are, for a number of reasons. One is that it does allow the gestational mother to change her mind, and I think that is right. I think if a woman is carrying a pregnancy, whether or not it is her genetic child, we should prioritise her interest. The commissioning parents have an interest—their interest is that they really want that child; they intended that child; they have invested emotionally, they have invested financially; they may have donated one or both of the gametes involved. So they have an interest.

The interest of the gestational mother, I think, is more significant because her reproductive labour is more intense—it is her body. If you start talking about enforceable agreements, if you start talking about transfer of parentage that she cannot opt out of, you also raise scenarios such as the commissioning parents being able to require her to have an abortion. It is her body, it is her baby, and therefore it is her decision. I think we absolutely have to prioritise her interests. That is why I think models of transferred post-birth, that allow a cooling-off period, are really important.

If at the end of the day the gestational mother in this instance is a crackpot, and the commissioning parents are devoted, loving, concerned people, you can still have a situation where the Family Court would determine, regardless of legal parentage, that the child should live with the commissioning parents.

The Hon. JOHN AJAKA: The trouble with the Family Court is that at the end of the day, yes, you can get orders for sole parental responsibility, and you can get orders that the child will reside with the commissioning parents, and possibly orders that the child will spend time with whoever the court considers in the best interests of the child. But ultimately, the shortfall of the Family Court is that that child does not become the child of the commissioning parents. As soon as the child turns 16 or 17, you have all those shortcomings: intestacy, various other aspects—

Professor MILLBANK: Absolutely. But I think there are two different situations that we are muddling up here. One is surrogacy arrangements that go to plan, where there is no conflict whatsoever, and the other is surrogacy arrangements that go wrong, where there is conflict.

The Hon. JOHN AJAKA: Let us look at the first. With surrogacy arrangements that go completely to plan—everyone is happy, everyone is excited—and we hear of it taking up to six or seven years for an adoption to occur. There must be a better system to allow other commissioning parents to be on the birth certificate, to become the parents, without having to go through what appears to be a nightmarish situation through the adoption process. What would you recommend instead of that happening, if we leave everything else intact?

Professor MILLBANK: I think surrogacy requires a transfer of the parentage process that is specific to surrogacy. It is not the same as adoption; it is not the same as parental responsibility orders under the Family Court; it is its own unique thing. I support something similar to the ACT regime, where you have a time limit. I think with the ACT it is between six weeks and six months, which was originally modelled on the British legislation, so that there is a cooling-off period whereby everyone has to consent, and that includes the birth mother's partner, if she has one, whether or not they are genetically connected to the child. In most instances, they would be a legal parent of that child, if they have consented to the conception, so they have an investment and an involvement.

The Western Australian model, which has not passed, included the requirement that the child be living with the commissioning parents at the time the order was requested. So it is a streamlined process. It still goes through a court, but you have the court checking that everyone has informed consent as to what has happened. It is a very truncated child's best interest inquiry, because obviously the child is the baby so you are not going to get a very detailed report of their wellbeing, but you will have some form of assessment of the adults involved and their capabilities. Then parentage is transferred to the commissioning parents and a new birth certificate is issued.

The restrictions on a process like that are, in the case of the ACT, that they require that the commissioning parents ordinarily reside in the ACT, they require that the child be born in the ACT, and they require also, I think, that the conception process had taken place in the ACT. They are very concerned, in the way they have drafted it, that it not be somewhere that people fly into and fly out of in order to do their transfers.

In New South Wales, I am not sure whether we would need to have a requirement that the conception take place in New South Wales; I do not think that is necessary. I think a requirement that the commissioning parents be ordinarily resident in New South Wales would prevent the fly-in, fly-out abuse. I also think that the requirement that the child be born here is necessary in order to be able to change the birth register, because we do not have power over the registration of births anywhere else. That requirement, I think, is a must-have.

The Hon. JOHN AJAKA: May I summarise it in this way. In a sense, we leave the status quo of contracts not being enforceable; we create one specific piece of legislation to cover surrogacy; if all the big criteria are met, the child is born, the child will go with the commissioning parents immediately; a period of time lapses; everyone is still happy, whether it is three months, six months or a month. After that period, orders are specifically made by, for example, the Supreme Court, and once the orders are made the parental status transfers from the birth mother to the intending parents. The birth certificate is then ordered by the Registry of Births, Deaths and Marriages, and then the relationship continues as occurs with any other relationship.

Professor MILLBANK: That is a very accurate summary, except where you said we pass a specific piece of legislation "and then if all the criteria are met". I am not sure that there should be a specific piece of legislation passed to regulate surrogacy or to set criteria. I would propose a piece of legislation that passes for the transfer of parentage, full stop.

The Hon. JOHN AJAKA: Where do we get the other criteria that already exist?

Professor MILLBANK: We already have the Assisted Reproductive Technology Act prohibiting commercial surrogacy, and I would tinker with that to make that definition a bit clearer—

The Hon. JOHN AJAKA: Provided there have been no breaches of any other aspects, we now have a piece of legislation that specifically allows us to transfer parentage—which solves the birth certificate problem, eliminates any need for adoption, and eliminates the five-year waiting period?

Professor MILLBANK: Yes. Although, with that situation we are still left with a number of problems. What we have in the ACT, for example—I would need to check it, but I think their legislation says that they will only transfer parentage for non-commercial arrangements, that those orders are not available for commercial arrangements. I think again there is a temptation to say, "We have a piece of legislation. Let's start putting requirements in." I am not sure that we should be using parentage laws to try to alter people's behaviour, or to threaten or cajole them into doing things in a particular way. At the same time, having thought about a transfer regime, I would find it very difficult to contemplate transfers of status if, for example, a surrogate was an impoverished woman from a rural area of India whose consent I thought was dubious and the children were being whisked over here and transfers were going through without much judicial oversight.

CHAIR: Is that not outside the criteria?

Professor MILLBANK: It is, because the child is born elsewhere—unless you have brought the surrogate here for the birth. If we look at the practice of surrogacy as it has happened in Australia today, it seems to me that we have a significant number of people who have gone to America to have their children. The parentage of those children cannot be resolved through a scheme like this, because they are not born here. They also cannot be resolved because I think the ACT regime, and certainly the models that have been floated today, including the Victorian legislation, have expressly said that parentage cannot be transferred if there is a commercial arrangement.

The Hon. JOHN AJAKA: Realistically, if we had a provision here you would not need to go overseas.

Professor MILLBANK: I do not know. I think that if you are looking at a situation where you cannot advertise, where you need a surrogate mother or, in the case of the ACT, you also need an egg donor if the commissioning mother is infertile, that is a big ask—and it is not likely.

The Hon. JOHN AJAKA: In your view there should be no difference in relation to same-sex couples with regard to what you are proposing in the new piece of legislation?

Professor MILLBANK: Yes, for two reasons. First, because I do not think that legislation makes good judgement about classes of people and whether they will not be good parents and I do not think the sociological literature bears out any distinction between parents on the basis of sexuality. It also follows from my model and Anita's model, which is that we value the care giving of parents rather than their genetic connectedness. The thing that same-sex couples will always face in reproducing is that there will be no more than one genetic parent in the couple.

The Hon. JOHN AJAKA: Thank you, Professor. I took more than my fair share of time.

CHAIR: Because you did and because we have sent you a list of questions, Professor, we would be very grateful if you would not mind sending us some detail on the questions because people have their special interests that they want to pop in as well, as you said.

Ms SYLVIA HALE: Professor, your colleagues from the Law Society were suggesting that the Australian Capital Territory Parentage Act was a good model for New South Wales to follow, but you have indicated that you have some reservations about the criteria to be used. If that issue were resolved would you be happy with the Australian Capital Territory Act?

Professor MILLBANK: I think it is a very good model but I think it can be improved slightly. Again, my reservation is that it valorises genetic connectedness by only covering transfer if the gestational mother has no genetic connection and only one or more of the commissioning parents does have a genetic connection to the child. I do not think that is borne out. If you look at recent studies of surrogacy done by Professor Susan

Golombok in Britain—I can provide the citation for that—she actually found that the experience of surrogate mothers in relinquishing their child did not vary dramatically in the way they expressed that process in terms of their relationship to the foetus, their grief about relinquishment and so on, and did not have a strong correlation to whether they were genetically connected to the child. In terms of protecting the surrogate's interests I do not think we should be drawing a distinction. In terms of protecting the child's interests and their relationship with the commissioning parents, again I do not think there is a difference in the quality of that relationship. To improve the Australian Capital Territory model I would remove the focus on genetic connection. I think there are some neat things that other jurisdictions have done that we can learn from.

I think the requirement in Western Australia that the child be living with the commissioning parents at the time the orders are made is a very logical one in making sure the child is bonded to the home it is going into. If there has been any hesitation by the surrogate mother about handing the child over that will be investigated fully before the orders are passed. The other thing that I think was a good addition in the Western Australian model was that they included provisions for a contact regime. They basically took from modern thinking about adoption the idea that the parties could be counselled and think about the kinds of contact, if any, they want to have, and that could be part of the plan that the court oversaw. If the birth mother intended to have ongoing contact with the child that could be thought through and put in place in the same way it is done with open adoption.

Ms SYLVIA HALE: You were suggesting that legislators like to legislate but it is not always necessary, and what you might need are simply guidelines. How do you distinguish between guidelines and legislation and who enforces the guidelines?

Professor MILLBANK: I think we actually have very enforceable guidelines in Australia. My understanding is that if the National Health and Medical Research Council guidelines were breached, fertility providers would not be able to claim Medicare for services they were providing. If they are in breach of the Reproductive Technology Accreditation Committee guidelines there is a chain of effects that go back to the Prohibition of Human Cloning Act. You have to comply with all those guidelines to comply with the legislation, but I guess the legislation is the blunt instrument.

Ms SYLVIA HALE: So you say that in terms of preventing terrible outcomes the guidelines are already in existence and there is no need to add to them in any way?

Professor MILLBANK: That is right.

Ms SYLVIA HALE: The Law Society was suggesting that we needed legislation to deal with the anomalies, and they are the hard cases. They nominated three cases in particular, *re Evelyn*, *re Patrick* and *re Mark*, in 1998, 2002 and 2003 respectively. I am not sufficiently familiar with those cases. I have read the judgement in *re Evelyn* but I have not read the judgement in Patrick or Mark. Would your approach deal with the problems that those cases presented?

Professor MILLBANK: I think they would. In the case of *re Evelyn*, the gestational mother changed her mind. Depending upon the point at which she changed her mind that would have prevented the transfer of parentage going through. It still would have ended up in the Family Court to determine whom the child should live with regardless of legal parentage. In a sense some of those hard cases will end in dispute regardless of the legislation. Parentage legislation is not going to change the outcome. The case of *re Mark* was two gay guys who went to America to have a child through commercial surrogacy. The kind of legislation we are discussing here does not resolve the problem for them because the child was born outside Australia through commercial arrangement. The parentage transfer process we have been talking about here would not resolve their problem. Part of what I struggle with as someone whose work is very much focused on the idea that law should reflect solutions for people's needs is if people are doing something that you do not think is fantastic ethically, nonetheless they have had their child and come back to Australia, what do you do? Whose child is that?

If you look at the Federal Australian Citizenship Act, you have a situation where gay men are having children through surrogacy overseas and are then presenting at an Australian embassy and saying, "This is my child. I want citizenship for this child so I can bring them back into Australia". Technically under the literal wording of the Act the child is not their child because they have had the child through an assisted conception process, so their status is as a sperm donor. It has been severed. The birth mother is the legal mother of the child and yet they have gone through the process in California, or a number of other States, which severs her parental status. What you have is a child who has no parent and who is stateless.

From what I have heard the Department of Immigration has simply been ignoring the provisions of the legislation so that the genetic father can be treated as the legal father of the child so the child can be given citizenship and brought into the country. You cannot leave them at the embassy; you cannot leave them at the border. You have to form some kind of solution to the child's parentage. In that situation we are left with what they did in *re Mark*, which was that they went and sought orders of parental responsibility from the Family Court. I do not think any of the models we are contemplating actually has a solution to that situation because of the adherence to non-commercial surrogacy and because of the requirement of territoriality for granting parentage.

Ms SYLVIA HALE: And *re Patrick*?

Professor MILLBANK: *re Patrick* involved a sperm donor who donated to a lesbian couple and then wanted to have an ongoing relationship with the child and saw himself as a father of the child. Under current New South Wales law and the law of all other States and Territories he is not a parent, nor do I think he should be. The intended parents were a lesbian couple that the child was born to and who were caring for the child. Again, the Family Law Act has provision for other adults who are not legal parents to say they have an important relationship with the child and they want time with that child. I think the Family Court responded very well to that claim and honoured the child's relationship with that adult even though he was not the legal parent.

Ms SYLVIA HALE: So that would be a case where if there had been adequate counselling beforehand and discussion of access arrangements that should have been—

Professor MILLBANK: Absolutely. Indeed, one of the things I have said in writing about that case was that it was a situation where Victorian law in a sense coerced that outcome for all parties involved. The gay man wanted a child but was unable to adopt. He was not able to go through a surrogacy arrangement. There was a lesbian couple who wanted a child but were not able to access unknown donor sperm through fertility services and they found themselves in an arrangement that actually did not suit any of their needs at all but they were desperate to pretend that it did. So it fell apart very quickly as a result.

Ms SYLVIA HALE: Is there any way you resolve the needs of such a group or do you just allow things to—

Professor MILLBANK: I would say that if you have a non-discriminatory regime allowing a lesbian couple in that instance to access unknown donor sperm they would not have gone ahead with him. If he had been able to adopt a child or go through a surrogacy arrangement he would have had a child of his own, which is what he wanted. I think if you have a regime that is non-discriminatory and provides people with options you are better off. One of the things I meant to say at the very outset about the increase in surrogacy is not acknowledged often. Part of the reason for the increase in surrogacy in recent years is the decrease in the availability of children for adoption. In the early 1980s, 20,000 children were adopted every year in Australia. It is now about 300 or 400. Because people's options to have children are reduced because adoption is not viable for so many people they are turning to surrogacy instead. I think that is what people do when they want a child. If one avenue is not available to them, they pursue another. I think most people would find the idea of commercial surrogacy abhorrent until there is no other way to have a child and then if they have the money they will do it.

CHAIR: I refer to the expression "mandatory counselling" that we are reading everywhere and that is part of the processes of the Assisted Reproductive Technology Act and of the clinics that operate in this way. The word "counselling" in our society now covers an awful lot of descriptors of amazing things that do not necessarily match what is required. From what we have heard so far from people involved in this process, they believe the counselling process was very healthy and that they got lots out of it. It sounds like very vague descriptors of what it actually means. There does not seem to be a definition.

Professor MILLBANK: No, there is not a definition in the legislation. The new 2007 Act requires providers to inform a person about the availability of counselling services rather than to actually provide the counselling services themselves.

CHAIR: You can buy it from this place or that place.

Professor MILLBANK: They can outsource it in a sense.

CHAIR: That is what I mean.

Professor MILLBANK: I do not know whether you are talking to anyone from the society of fertility counsellors, but they have their own professional body and they specialise. They would be the people to give you detailed information of the kinds of things they go through. There is a very well established tradition of counselling in any instance using donor gametes or any instance of a relinquishment of a genetic connection with a child as well as the idea of having a child who is not genetically connected to one of the parents.

CHAIR: So it has just grown up as a norm in their requirement processes?

Professor MILLBANK: Yes. It is required by the NHMRC guidelines that there be counselling if there is any use of a donor gamete. We now have a version of that in the Assisted Reproductive Technology Act. My understanding of the Australian Capital Territory clinic that does IVF surrogacy is that they have a separate ethics clearance process and a separate counselling process that is specific to surrogacy that deals with the issues. Again, there is room for improvement in the sense that we have not thought through whether or not counsellors should be independent of the clinics they are working for. It is very difficult for counsellors if their wages are being paid by a clinic to say, "Actually we are not really sure that this particular practice is that great for people."

CHAIR: Put the questions on the table.

Professor MILLBANK: Yes. For instance in Britain, COTS—childlessness overcome through surrogacy—which is their major charity, is very large charitable organisation that independently provides counselling. It is one of the major providers of counselling for people going through surrogacy. Again, I am not sure that legislation is the way to proceed with this but I think it is worth thinking about how to take counselling out to clinics and make it more independent and think about counsellors being professionally accredited and so on. I am sure they mostly are.

The Hon. DAVID CLARKE: Following on from a question by the Hon. John Ajaka about same-sex couples being commissioning parents, let me read this quote to you: "Research is increasingly showing that men and women parent differently; that certain genes in young mammals are activated by parental behaviour. Those arguing that same-sex parenting is just as good for children have the burden of proof. They have not discharged this burden of proof." That is a statement by Professor Bernadette Tobin of the Plunkett for Ethics, which is connected with St Vincent's Hospital. This whole issue is not about discrimination but is about what is in the best interests of the child. If there is scientific evidence that demonstrates what Professor Tobin claims that it demonstrates, what would you say to that?

Professor MILLBANK: I have reviewed a lot of the available sociological and psychological literature on family form and child's wellbeing. I am not a psychologist but I have looked through the high-quality studies over the last 20 years and it is my view that they conclusively demonstrate that it is family function and not family structure that determines children's wellbeing. Children's wellbeing across a variety of indicators, which includes their happiness, their relationship to peers, their self-confidence—there are standard markers in those tests. There have been a number of meta-analyses of those tests so that people have looked at all the tests and pulled out the good ones and knocked out the dodgy ones.

All of those major studies have shown that it is not whether there is one parent or two; it is not whether there are women or men. It is the way that parents relate to their children. It is having a warm, communicative, conflict-free environment, preferably one that involves a certain level of material comfort that relates to children's wellbeing. I do not know the person you are referring to, but whenever I see things that say, "research says", I worry about it and whenever human beings are likened to other mammals, I worry about it.

The Hon. DAVID CLARKE: You have studied research and you have come to a conclusion. She has come to a different conclusion. Let us assume that there was this research.

Professor MILLBANK: You can look at her footnotes, then you can look at mine and make a judgement about what is the high-quality research.

The Hon. DAVID CLARKE: Let us assume that it was presented to us in a very strong way; that there was this research that proved this and that you were convinced finally by the research yourself. If you were convinced by the research yourself that what she concludes is correct, would that change your view?

Professor MILLBANK: I would still be concerned about legislation based on general research when it comes to individual decisions. When you look at things like adoption or assisted reproduction and surrogacy, you might be able to say, for instance, generally that poor people with divorced parents make bad parents, but you still might have two people who are poor and who have divorced parents and who, when you individually assess their characteristics, would be excellent parents. That is why I do not think legislation should set down that kind of criteria.

The Hon. DAVID CLARKE: But if you accept that the scientific evidence was there and it was there beyond a reasonable doubt, would that change your mind?

Professor MILLBANK: I am saying that even if I had evidence that said a general class of parents are terrible parents, you cannot legislate for general classes of people because individual people may not fit that category.

The Hon. DAVID CLARKE: Let us assume that this cup is filled with water and I am going to give it to one of my children. One scientist comes along and tells me, "This is poisonous for your children" and another scientist comes along and tells me it is quite okay. The reasonable thing is for me to play safe and not to put my son at risk at that stage.

Professor MILLBANK: Your analogy is false because one set of scientists is saying that it is an ideal glass of water and one set of scientists is saying that glass of water depends on the metabolism of the person drinking it.

The Hon. DAVID CLARKE: And I am asking you to assume that scientists are saying that surrogacy arrangements involving children being transferred into the care of same-sex households either will not be in their best interests or it will not be as good for them as in other situations?

Professor MILLBANK: Again I think your science is wrong and even if it were right, you have to make an individual assessment of the qualities of the people involved.

The Hon. JOHN AJAKA: You judge each case on its own particular circumstances?

Professor MILLBANK: Yes and that is why I would say, for instance, prohibitions that exist in adoption law in New South Wales, for instance on same-sex couples are wrong because you are not looking at the individual couple. You are classifying them according to a category. Adoption law that says everyone is eligible and then look at whether or not the people before them were going to be good parents of the child concerned would be a better way of assessing that child's best interests than putting forward these kinds of meaningless categories.

Again, coming back to adoption, part of the reason that people are pursuing surrogacy is because adoption is not available. Part of the reason that adoption is not largely available is because most of our adoption is from overseas and we have to honour the requirements of the sending country as well as our own requirements. We can make our own requirements as non-discriminatory as we like but if you go to the Department of Community Services website and look at the list of criteria for the different sending countries you can have things like must be non-smokers, must be Lutheran, must be under 35, must not have cancer, must be no more than 25 years older than the oldest child to be adopted. Their range of requirements for what they think are best for children, they exclude a huge number of parents who would provide a very good home for children who need them.

The Hon. DAVID CLARKE: So you do not think we should take precaution?

Professor MILLBANK: I do not think discriminating is cautious. I think it is discriminating.

The Hon. DAVID CLARKE: I am not talking about discrimination, I am talking about what is in the best interests of the children and that is going to be the main factor for this Government to decide?

Professor MILLBANK: It is in the best interests of the children to have a legal relationship, a relationship of care and responsibility that is protected by law within the household in which they live with the intended parents who have brought them into the world. If you said you think gay men are terrible parents yet they have gone off to America, have had a child, they have brought the child back here and you exclude them when they have the child here and you exclude them from your parenting regime, I do not see how that helps that child, to be excluded from the child support regime if their parents break up.

The Hon. DAVID CLARKE: But you indicate that is what the law actually provides in Australia, although it is actually being circumvented, according to what you understand?

Professor MILLBANK: They are two different situations. One is how far the parenting regime can cover in Australia but if you are saying that you think gay men are not as good parents as straight people and you exclude them from your parenting regime when they conceive a child here, I do not see how that helps the child.

CHAIR: Thank you very much becoming today. Your information has been invaluable.

Professor MILLBANK: I suddenly realised something since we put our submission in. We have talked about the Family Law Act. The current version of the Family Law Act, amendment De Facto Financial and Other Measures Bill 2008 was amended in Committee a couple of weeks ago. They have a new section to provide for surrogacy and parentage and that is section 60HB. That provides for State law to take precedence and that makes it even more important that New South Wales think about a parentage transfer process of whatever ilk. Federal law is stepping back now and saying we will basically reflect the provisions of the States but it is the States, which have to do it. Once the States have done it, it will be mirrored in all Federal law. It will be mirrored for child support provisions and citizenship.

The Hon. JOHN AJAKA: They threw the ball in our court.

CHAIR: That was the issue we picked up earlier in the day about the family law provisions.

Professor MILLBANK: When we talk about the disjuncture between Federal and State provisions in our submission, it has now been overtaken by events.

The Hon. JOHN AJAKA: This is why we should be; we no longer have to look at Federal law prevailing over State law?

Professor MILLBANK: Exactly, it will be picked up in the Family Law Act and reflected out to others.

CHAIR: We will contact you if there is anything else we have to ask you, and perhaps it maybe in reference to information you have already given us. Thank you for coming.

(The witness withdrew)

(The Committee adjourned at 5.11 p.m.)