REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO LEGISLATION ON ALTRUISTIC SURROGACY IN NEW SOUTH WALES

At Sydney on Thursday 6 November 2008

The Committee met at 9.00 a.m.

PRESENT

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

CHAIR: Welcome to the second 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 a number of religious and ethics organisations, VANISH and the Gay and Lesbian Rights Lobby. Before we commence, I would like to make some comments about 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 the proceedings are available from the table at the door. In accordance with the guidelines, members of the Committee and witnesses may be filmed or recorded; however, 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? Some phones interfere with our recording.

MEGAN BEST, Social Issues Executive Member, Anglican Church, Sydney Diocese, and

ANDREW LEIGH FORD, Minister of the Anglican Church and Social Issues Executive Member, Anglican Church, Sydney Diocese, sworn and examined:

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

Dr FORD: Yes, I am.

Dr 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 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 if we ask complicated questions that you would prefer to answer later, you may indicate that during questioning—could the responses to those questions be returned to us by Monday 1 December 2008? Would either or both of you like to make a short statement?

Dr FORD: I will make a short statement. Firstly, thank you for the opportunity to talk with you about these complex but very important issues, and I thank you for the work you are doing in trying to grapple with these issues on behalf of us as your constituency. Children are a good gift from God given in the context of a relationship between a mother and a father. From the human perspective, this biological reality comes with an emotional reality as well, a good desire to have children of our own and to be open to receiving this gift of children as part of our created humanity. When that desire is unable to be met there is an associated grief, a pain of loss. This is a terrible burden that someone will suffer and it should be recognised as such. But we must not only respond in compassion to people in that situation; we must respond as a society with a view to the good of all in society, not just those people.

In a sense, this is not only a private matter to be dealt with in isolation. The State has an appropriate role as the State has an appropriate interest to ensure that the conditions are created and exist in our midst for welcoming children in such a way that they can be born and reared in the best possible way. Surrogacy is not a newcomer; however, with the advent of assisted reproductive technology [ART], the biological reality of the father and the mother, which we all result from, is increasingly potentially separated from the relationship of the parents of children. The State remains interested in these matters, and may be even more so. What we do as a society with these increasingly complex and complicated situations must, of course, operate in the best interests of the child and continue to set those good conditions that I spoke of, and, as others become involved in bringing children into the world, must also seek to minimise the potential harm to any parties involved.

Surrogacy is inherently an adult-focused and not child-focused situation. Unlike adoption where you start with a real child before you who is in need of care that is not being met, surrogacy starts with a different need. It starts with the need of parents or individuals who desire a child. That need can be met by something—a child. We need to put into focus the child's need at that point because the child becomes a solution to fix a problem, in a sense—not a bad problem, not a problem that we want to dismiss in any way, but that we need to react to in compassion. I think recognising that dynamic is important as you consider surrogacy law reform.

Humanity's long-standing practice and experience is a practice and experience that is spoken to in the long-standing position of the Christian church with regard to receiving children into this world and the relationship of a mother and a father. Surrogacy, even in its simplest form, draws others into that relationship and also brings complexity and complications into the relationship. There are biological complexities, emotional complexities and ethical complexities. This is especially true for children arising from surrogacy arrangements, and you have submissions alerting you to the possible complications in the long term for children coming into the world through surrogacy arrangements.

It is also true for the surrogate mother, who finds herself in a potentially exploitative and vulnerable position, although in its best situation it is not that. She will be called upon or freely choose to break a very real connection, a bond, with the child she has nurtured and who has been born, and there is an increasing body of evidence outlining that this can potentially be a real harm for her. It is our position that surrogacy should not be legalised. We recognise that surrogacy arrangements do occur and will continue to occur and exist, but we want to offer some practical ways forward for your consideration, recognising that we have limited expertise in law and a few other areas that I am hoping you will think carefully about.

The priority should always be the best interests of the child. I think legislation will actually increase disputes and allow for litigation that does not happen now. The State does have an appropriate but minimal role in these situations. Surrogacy should be contained to the biological and historical reality of children received as a gift into a family of a mother and a father. It is their responsibility for care, nurture and unconditional love of this child. This restriction in light of the suggestions fits with the long-standing and reasoned public opposition that we have for use of donor gametes within ART for the sake of the resulting children.

We believe that surrogacy arrangements should remain void under the law, but that they should not be unlawful or attract penalties for any parties and the parents involved. However, ART providers or other agencies that may be involved should be restricted from promoting, advertising or receiving additional fees in light of surrogacy arrangements for their services. Assisted reproductive technology [ART] providers should not have the role of the formation of surrogacy arrangements or the formation of relationships that would lead to surrogacy arrangements. The only role that ART providers would provide would be a medical one, an interaction with the actual procedures of ART. Any surrogacy arrangements should only be entered into after independent counselling that ensures full consent—not just about the reality of the medical side of things, but legal consent, implications, a clear picture of what that might look like for the parties involved, and especially for the surrogate mother.

At the birth of a child we suggest that the child should be subject to the arrangements as they stand now where the surrogate mother is the uncontested legal parent until she freely, after some cooling-off period we suggest, relinquishes parental responsibility. It is in the best interests of the child and the surrogate because it fits within those three principles that the child at no time is without a clear legal parent. There is no controversy or question about who is the legal parent. The surrogate can choose to keep the child and remain in control without any dispute under these arrangements and the State need not be unduly involved in parental or custodial arrangements if we clarify the next thing, which is what happens after such birth. I believe you heard evidence yesterday from people in this situation. We believe that there is a need for some changes with regard to parental and custodial arrangements in a more timely manner than at the moment, particularly for those involved in surrogacy where the child is of their genetic material, and I think that is the case that you had.

On that note, we recognise that there are issues surrounding the birth certificate as well. Birth certificates, as you will be aware, perform a number of functions. They record the reality of the birth and, therefore, maybe the birth mother does need to be on the birth certificate. They also record the biological or genetic heritage of that child. We would suggest that maybe there can be some inconspicuous but plain notes on birth certificates that alert the child at the appropriate time to the fact that there is more going on than may meet the eye. This gives parents the opportunity to interact with their child as they see fit for informing them about the conditions and circumstances of their birth, but also allows the child an appropriate time to access that

information, which we think is important. It also does not put an undue burden on the State to follow up children when they reach majority to make sure they have the information that they should have before them.

Finally, let me reiterate our starting point, which is the opposition to opening of surrogacy to all arrangements. We do believe that surrogacy, because of its problematic and complex nature, should be limited in our society. One point where it could legitimately be used is where you have a child-focused picture. Imagine a couple involved in ART have a number of embryos but the woman, for whatever reason, through disease or some other condition, finds herself unable to carry those embryos to full term. Maybe in that situation—because you do have a child there in an embryo—surrogacy would be appropriate.

CHAIR: Thank you very much. I will ask one quick question that does not need a great deal of elaboration. I am interested to know about your organisation and the sort of issues you deal with.

Dr BEST: We come to you today representing the Social Issues Executive of the Anglican Church Diocese of Sydney. The role of the Social Issues Executive is to comment on and give advice to the Sydney diocese on social issues as they impact on our congregation and the wider society. In view of the short time frame for this inquiry, we have been unable to gather wide opinion from the diocese and the opinions we will give today reflect the opinions of the committee only.

The Hon. DAVID CLARKE: Dr Ford, you indicated that you do not come here with any expertise in law but both of you present as people who have some considerable knowledge of ethics.

Dr FORD: Yes.

The Hon. DAVID CLARKE: Did you study ethics?

Dr FORD: I lecture in ethics at Moore Theological College.

The Hon. DAVID CLARKE: As the Government has indicated, this whole issue involves ethical questions. There is a view that surrogacy is in conflict with the United Nations Convention on the Rights of the Child, especially in the case where the mother has a genetic connection to the child and the commissioning parent or parents have no genetic connection to the child because it is a separation of the child from its natural biological parents. Do have a view on that?

Dr FORD: I think this fits with what I was saying about anything that moves outside that normal biological pattern that has been our historical reality of bringing children into the world by a mother and a father will bring inevitable complications with it and complexity, which brings ethical considerations. That is why in our submission we said we want to limit surrogacy. Does that situation make it exceptionally bad in comparison to others or a special case? I think it is one of a raft of complex situations that we would want to see avoided in limiting surrogacy to situations such as I have spoken of.

Dr BEST: May I add to that? I do not think there is any doubt when you speak to donor offspring who have been conceived through the ART process to date that it is extremely important for children to know their genetic origin. It is part of their identity that just needs to be pursued by the majority of children. The problem with having a child separated from a genetic parent at birth compounds this in several ways. Firstly, we have the problem that it is possible that the child will grow up not knowing that their social mother is not their genetic mother. I can give you references that show that the majority of parents going into a surrogacy situation do not intend to tell their child about their origins if it can be avoided. At the moment there is no indication on a birth certificate that the genetic component of the birth is different from the legal parent, unless that is put into the legislation. So we have a problem that a child grows up apart from their genetic parent and is perhaps not told of their genetic origin. Unless something is put in place to allow the child to trace their genetic mother, they may never be able to find their genetic mother.

Another point we are very concerned about is that we see pregnancy as a relationship and it is impossible for a birth mother not to bond in some way to her child during the process of pregnancy. It is very troubling to us that a woman will be entering into a relationship with commissioning parents really unable to predict how she will feel on the birth of her child. And for her to be obliged to give up that child after the nine-months relationship against her will is very troubling to the natural relationship between a birth mother and her child.

The Hon. DAVID CLARKE: Arising out of that, I will ask one quick question in a general sense because of time restraints. What is your view about enforceable contracts? For example, the birth mother enters into a contract with the commissioning parent or parents, decides at the birth of the child that she wants to keep the child, but there is then an enforceable contract. Would you be opposed to such a situation?

Dr BEST: Definitely. I think that informed consent in that situation is almost impossible.

The Hon. JOHN AJAKA: Unfortunately, we are limited for time. I will give you two hypotheticals, which might solve some dilemmas for me. I will take one aspect of the spectrum. A husband and wife who have been married for 10 years have been trying desperately to have a child and are unable to. It is discovered that the woman cannot carry a child, for whatever reason, but they are able to use both their gametes and are able to have a surrogacy arrangement with a woman who is a friend. All of the appropriate checks and balances are ticked; all the counselling is undertaken; it seems to be a wonderful arrangement. They then have almost two years of getting it through at enormous expense and so on. The child is born and is healthy and everything is wonderful. Then for a period of five or six years they are waiting for an adoption order, having gone to the Family Court. Clearly, that is not a satisfactory situation.

Dr FORD: No, not at all.

The Hon. JOHN AJAKA: In that situation you would want to assume that they are the parents of the child. Would you agree that the birth certificate should immediately note them as the parents of the child from day one without the need for adoption? Do you still feel there should be a cooling-off period for the surrogate mother? Can you take me through what you believe should happen in that scenario?

Dr FORD: This is not a hypothetical, I do not think. I think it alerts the problem or one of the issues before you because there are going to be individual situations and every situation has an individuality about it. You are going to have to make legislative changes that will be able to be enacted across the raft of situations. What I have suggested is on entering a surrogacy arrangement you need to protect the rights of the surrogate mother to retain the child after birth, if she wishes—even in that situation, which is at the extreme end.

The Hon. JOHN AJAKA: The optimum extreme.

Dr FORD: Almost the best that you could hope for, maybe. I think you still need to have in place the rights of the surrogate mother to say, "No, I do not want to give this baby up." In light of that, as I understand what happens at the moment, she has parental custody, she has responsibility and, therefore, will appear on the birth certificate. As I said, the birth certificate does two things. It notes the reality of the birth and the situation that is there in the hospital or wherever they are at that moment. She is the mother; she is legally the mother. Although that situation does raise issues for the surrogate and parents and an ongoing conversation with the child over time, I still think that given the other situations that could be affected by that you would want to leave the surrogate mother on the birth certificate with a clear indication that that is not the whole story.

The Hon. JOHN AJAKA: What time period should we put in for transfer? Let us assume the surrogate mother has given birth and in some situations she just wants to get on with her life and move away. Do we want to call her every five minutes if there is a medical emergency?

Dr FORD: No. That is why the present arrangements need to be dealt with. The orders that can be received by the court and the waiting for adoption process to happen are not timely and, therefore, are not good for the child or the surrogate or the commissioning parents.

The Hon. JOHN AJAKA: I have a concern even with the issue of adoption. I am talking about biological parents of the child. Why should we even say this child is adopted? Why can we not impose a mechanism that, in reality, as was suggested yesterday, the parentage is transferred from the surrogate to the biological parents in a very timely fashion to eliminate all that stress?

Dr FORD: With fully informed consent and making sure there is not any new coercion, all of those kinds of things—

The Hon. JOHN AJAKA: All the boxes are ticked.

Dr FORD: —I think that would be appropriate, as long as it does not then become the norm for those who are not the genetic parents.

The Hon. JOHN AJAKA: That was the other hypothetical.

Dr FORD: Whatever you do in light of that situation needs not to become the norm for all situations.

Dr BEST: We have to remember that during the pregnancy the surrogate mother is the parent. We cannot get away from that. Any decisions regarding the baby will need to be run by her and she will need to give her consent. The current situation where the birth mother is the legal mother is an easy way just to deal with the fact that she is the parent through the pregnancy. We are concerned that the birth mother retains the right to keep the child if she wants to, but we agreed that there needs to be some change in the transferral of the parentage. It is certainly the parents who are living with the child, we would hope, would be the legal parents. So at whatever point the birth mother decides to relinquish the child and when all the checks and balances have taken place is the time at which the legal parentage changes. We think the maximum time the mother will have to decide that is six months. Certainly we would want a cooling-off period of four to six weeks.

The Hon. JOHN AJAKA: Do you feel the same about same-sex couples? That is the other extreme of the hypothetical.

Dr BEST: We can give you a written answer to that, if you prefer.

Ms SYLVIA HALE: I am interested in that issue.

CHAIR: They have been given permission to give written answers to complicated questions.

Ms SYLVIA HALE: I am trying to clarify the situation. Provided there is some sort of indication of the child's genetic origin and that can be obtained by the child, do you stipulate that the commissioning family must be a conventional, nuclear family of mother, father and child? Do you have any other stipulations, or would you not be prepared to countenance, say, same-sex couples adopting or having a surrogate child?

Dr FORD: As my opening remarks indicated, I think the historical and biological reality, which fits with the longstanding position of the Christian church, has been that the appropriate place for bringing children into the world, whether you believe in God or not, that there is a historical and biological reality to father and mother. We could extend that answer but that is the framework in which we are operating that surrogacy fits, if it fits at all within our society, in the context of the inability of a woman in a relationship to bring to birth a child.

Dr BEST: We have been looking at the research. We are interested in the best interests of the child. To date the social science research really does show that children do benefit and tend to do better with both a male and a female parent compared to single parents, divorced parents. I am sure a lot of people will tell you that the sex of the parents has an impact on the children in their upbringing, but it seems to us that really there is a paucity of information about how children do with single sex parents. The children of these relationships are really only now just coming through adolescence, which is the time where identity is very important. The first raft of children of single-sex parents tend to have been the result of a previous relationship of one of the parents. So, there is a parent of the other sex in the picture. At the moment we are conducting a review of the research. We have not completed that, but we would be very happy to forward our results once that is done. I am sorry, we do not fully have that information.

Ms SYLVIA HALE: Evidence to the Committee yesterday suggested that it was not so much the structure of the family that contributes to a child's welfare but, rather, how that family functioned. It was relevant whether it was same sex.

Dr BEST: Definitely that is a factor.

Ms SYLVIA HALE: In fact it was that nurturing environment.

Dr BEST: I would question that that is the only thing. That certainly is important, but males and females parent in different ways. It is the combination of the different ways of parenting that has been shown in current research. But, as I said, there is a paucity of information.

Ms SYLVIA HALE: As you have just said, it is early days; there is not the evidence and studies have not been conducted. Do you think it is inappropriate to suggest that donation to non-conventional families should be prohibited in the absence of evidence that it has an adverse impact on the child?

Dr BEST: I would think that it is the people who want to change the status quo who have the burden of proof to show that it will not be detrimental.

The Hon. DAVID CLARKE: You are saying that evidence is coming through showing that there is a detrimental effect?

Dr BEST: I am saying that at the moment we do not have research of sufficient detail to tell us either way, and we are happy to forward you the results of our research.

The Hon. JOHN AJAKA: Do you know roughly when that will be?

Dr BEST: We will certainly give it to you by the beginning of December.

CHAIR: We have extended this inquiry into the new year, due to its complexity.

Dr BEST: It is a very complex study.

The Hon. GREG DONNELLY: You touched on the point about the different nature of mothering and fathering with respect to the development of a child. Are you able to elaborate on that in more detail now or provide it in writing?

Dr BEST: We could definitely provide it to you. Mothers tend to be more nurturing. Fathers throw you up in the air and catch you; it is a much more physical form of parenting. But we can give you those details in writing.

The Hon. DAVID CLARKE: So there is evidence of that already?

Dr BEST: Oh yes.

The Hon. DAVID CLARKE: That is what I was referring to when I asked about the research?

Dr BEST: Yes. It is quite well documented. In fact, in gay couples you often find that one will take a more female-type role in parenting and one will take a more male-type role. It is definitely different styles of parenting.

The Hon. GREG DONNELLY: On the issue of creating legislative framework, New South Wales has very limited legislative framework with respect to surrogacy. This Committee is examining whether there should be a legislative framework. In New South Wales at the moment the only thing that clearly is prohibited is commercial surrogacy. One view put to the Committee yesterday was, "Well, it's out there as an arrangement, with very little legal requirements; it's operating and functioning, therefore, there is no real need to regulate or seek to regulate something that appears to be operating reasonably okay at the moment." Do you have a view about leaving the status quo as opposed to trying to regulate it?

Dr FORD: I do not think you should come away from this inquiry saying there is nothing to do because we have already noted a number of points where the system is not working for the best interests of the child, the surrogate mother and the commissioning parents. So, I am not saying there is nothing to do. Trying to think through the arrangements and their legal weight, I have come to the conclusion that having them as void, legally speaking—I think that is the right terminology; they are not enforceable—protects the interests of the surrogate mother in particular, but still allows people to enter into those arrangements. Part of the issue with any changes that you might make is that it will potentially open up surrogacy to a whole new range of people with a whole new range of complicated issues and situations, and then they might not work. So if you make any changes, you will have to think through what that might look like in extending from a limited number of people who are engaging in surrogacy arrangements to a wider group of people, and what complications that will bring. Apart from that, I am not sure what else to say on that point.

The Hon. GREG DONNELLY: Question number six in the questions provided to you on notice asks about the contest of the rights of the child versus that of the adult. Yesterday a number of witnesses, at least in the way they put their arguments, indicated—this is my impression—that, even before the child in fact was conceived and carried by the surrogate, the decision of the adults almost by definition was in the best interests of the child. But the reality, of course, is that that judgement is being made by those adults in discussion between themselves about the whole idea of actually having a child through surrogacy. This got the Committee looking at the whole notion of the best interests of the child. Would you care to comment about what in particular should be examined when we are trying to give consideration to what are those best interests?

Dr FORD: The first thing to say is that it is hard to actually bring to bear the best interests of the child because of the starting point with surrogacy as I said, which is a parent-adult focused starting point where the child at first instance becomes a way of meeting an unmet need. So, the best interests of the child at that point could very well go against the exact thing that is the parents' desire. The best interests of the child may be to not be born at all; to not even exist. So, it is hard to weigh that up at that point because you do not have a child before you to look at. If there is evidence to show that there is a best way of children entering into the world, growing up in our society and becoming members of our society as we desire, then that should be taken into account. The problem with evidence-based legislation at this point is that you will have people who will tell you one thing and people who will tell you exactly the opposite. You are going to have to do the job, which is a very difficult job with the type of evidence that we present to you. It is not like one plus one equals two: it is different sorts of evidence. You are going to have to do the job of weighing that up. As you decide that though I would encourage you also to keep in mind the weight of historical evidence that relates to the biological reality of children throughout generations. The reality is man, woman, child. There is a certain level of historical evidence on that point.

The Hon. JOHN AJAKA: But is that the reality of today's society? That is the problem I have.

Dr FORD: Exactly, and that is what you are going to have to struggle with. We cannot actually do a historical view of that, so you are going to have to struggle with that. But what I am suggesting to you is that things have changed. Assisted reproductive technology [ART] has opened up possibilities that never existed, make legislating in this area needful, maybe. I would encourage you not to dismiss that historical evidence as you weigh up these two piles of evidence that will be presented to you.

The Hon. DAVID CLARKE: Which you say is there because it works?

Dr FORD: Well, no. What I am saying—

Ms SYLVIA HALE: Because there has been no alternative, possibly.

Dr FORD: There has been no alternative and I am not saying it does not work always. It has worked. We are all sitting in a functional society. We are all sitting here having been brought up by our parents. I cannot speak for what your parenting relationships were like and whether you came from particular types, but that is what I am saying. In general this has been a proven track record for humanity.

The Hon. JOHN AJAKA: Even without ART today, I started to list different groups of parenting, so to speak, from grandparents to single mothers et cetera. I got to about 38 and stopped.

Dr FORD: Absolutely.

The Hon. JOHN AJAKA: The reality is that percentage wise the traditional mother, father, husband and wife original core almost seems to be disappearing?

Dr BEST: We have extreme compassion for those who find themselves infertile. The pain of infertility for those who do not experience is just imaginable. As someone with two children, I just cannot imagine what would have happened if I could not fulfil my desire for a child. We are not discarding that at all, but we have been asked how do we see this from the perspective of the child. Our whole approach to this issue is from that of the child. There is no provision of surrogacy that is going to satisfy all parties or all stakeholders. There is not sufficient common ground because the needs of the parents and the needs of the children conflict. So, someone is going to have to be disappointed. Whoever is disappointed, that will be terrible for them, but the reality is that you are not going to be able to keep everybody happy.

From the perspective of the child I think the most eloquent expression of the needs of the child come from those who have been through this experience or have been as close to this experience as we can see—the offspring of ART, particularly donor offspring. They have this issue with identity. With surrogacy you bring in an extra mother at the very least. We are talking about families where there may be three mothers. These children tell us that they have issues of identity. I would say that if we want to consider what is best for the child, minimising the number of parents they have is certainly an issue. When we have looked at other forms of ART, such as things like cytoplasmic transfer where you have two genetic mothers, people are concerned because we are all expecting to have one father and one mother. That is what children see as the norm. Children who have anything different from that express issues of confusion of identity in the majority of cases. So, if you are concerned for the best interests of the child, certainly you have to look very carefully at the issues of identity every time you increase the number of parents they have.

CHAIR: We thank you for attending today. You can safely expect that the Committee will forward further questions to you.

Dr FORD: That will be fine.

CHAIR: The secretariat will advise me of the questions on which you said you would provide information. We will be working well into March next year.

(The witnesses withdrew)

ELIZABETH MICKLETHWAITE, Senior Research Officer, Australian Christian Lobby, and

BENJAMIN PETER WILLIAMS, Research Officer, Australian Christian Lobby, sworn and examined:

CHAIR: Welcome to the second public hearing of the Standing Committee on Law and Justice Inquiry into Legislation on Altruistic Surrogacy in New South Wales. I will not read the guidelines as they have already been read today. We have broadcasting guidelines to follow. If you have any messages or papers that you would like to give to the Committee, the secretariat will look after that. Committee hearings are not intended to provide a forum for people to make adverse reflections about others, even though you are under parliamentary privilege. I ask that you turn off your mobile phones as they interfere with recording equipment. We very much welcome you.

CHAIR: Mr Williams, in what capacity are you appearing before the Committee? Are you appearing as an individual or a representative of an organisation?

Mr WILLIAMS: I am appearing as a representative of the Australian Christian Lobby.

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

Mr WILLIAMS: Yes, I am.

CHAIR: Ms Micklethwaite, in what capacity are you appearing before the Committee? Are you appearing as an individual or a representative of an organisation?

Ms MICKLETHWAITE: I am appearing as a representative of the Australian Christian Lobby.

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

Ms MICKLETHWAITE: Yes.

CHAIR: 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 we ask you complicated questions, because of the short time it is perfectly acceptable to the Committee for you to go away and send answers back. We prefer you to do that by Monday 1 December. Would either of you or both of you like to start by making a short statement?

Ms MICKLETHWAITE: Firstly, we would like to thank you for the opportunity to appear here today. This is an issue that we have been following for a number of years now since it first began to gather momentum probably two or three years ago. We have made similar submissions to many inquiries in other States and have been following closely the development through SCAG and so on. We are an organisation that represents a broad constituency of Christians. Before the last Federal election we were able to mobilise about 80,000 to 100,000 to listen to the then Prime Minister and the then Opposition leader.

You may well be aware that the Christian constituency has had a very strong interest in family matters for a long time. Churches provide a lot of marriage preparation and family support and they do a lot of work with young people—fostering and that kind of thing. So this is really a key area of interest within the constituency around family health as being quite foundational to a functioning society. We undertook a consultation on surrogacy in order to arrive at our position a few years ago, consulting with Christians who were lawyers or ethicists or doctors or experts in family law and so on. So our view is informed by that background.

We have also discussed with a range of theologians from different Christian denominations, and although none was speaking on behalf of their denomination we kept hearing a real resonance of the same messages coming through, which was a fairly overwhelming concern about surrogacy. The issues there were really centring on the best interests of the child and a concern that fracturing parenthood into the genetic, the gestational and the social would have many issues for children around their identity later on, even assuming everything went very, very well, which of course, in many cases, it does not. We can all cite cases of custody disputes that have dragged on for a very long time to the detriment of all involved, particularly the child.

We also heard from Christians with a focus on women's rights, very concerned about the potential exploitation of the surrogates involved, fearing that this was not really an issue where women can actually know what they are taking on prior to taking it on and who have talked with former surrogate mothers and heard what it was actually like for them. That is how we have approached this issue. We are conscious though that the direction of many of the statements coming out of SCAG and the terms of reference of many of the State inquiries does have a momentum behind it towards making some changes to surrogacy legislation. If that is the case, if that is going to happen, then we would be arguing for the most limited form of surrogacy arrangements that involves the least fragmentation of parenthood.

So we would echo the previous comments around maintaining the genetic link with the commissioning parents so that the child at least has its social parents and its genetic parents the same people. It is impossible with surrogacy to avoid the introduction of a third party into that arrangement, but that will be one of the key things that we believe would protect those involved.

The Hon. GREG DONNELLY: In your submission on page two—and this is one of the questions on notice that we provided to you—you reflect on the unregulated nature of surrogacy in New South Wales at the moment. To the extent that the Government ultimately did decide to proceed with some regulation of it, have you got any specific ideas about what that regulation should be?

Ms MICKLETHWAITE: I will just say from the outset, we are not legal experts. In the legal advice that was given to us we would share some of the concerns that have already been discussed around the transfer of parentage being a very extended matter. We would want to maintain the current situation where any surrogacy agreement is void, that a woman cannot be compelled to give up a child that she had given birth to. That is quite an important provision, I think. Essentially, I think you would have to frame legislation there with a concept of who are the most vulnerable people in this situation and what would their best interests be.

I think the question on notice also talked about whether that whole issue could just be met through guidelines to ART clinics rather than government regulation. We probably feel that that is insufficient because the ART clinic is only part of the surrogacy process; it deals really with the procedure of actually creating a pregnancy. Many of the other issues that crop up regarding surrogacy occur later in the process or need to occur earlier in the process in the parties deciding whether or not they should actually proceed down this route. So probably we would be favouring some sort of government regulation over and above just guidelines to ART clinics. But we would certainly never want to see a situation where a woman was compelled to give up a child that she had given birth to.

The Hon. GREG DONNELLY: On the issue of the best interests of a child, which is a phrase that has been used throughout our inquiry in terms of submissions that have come in and discussion that we have had, we seem to be getting a range of different perspectives on what that means. Can you frame from your organisation's point of view how you see that as being defined and what the principal focus of it should be?

Ms MICKLETHWAITE: I think the UN Convention on the Rights of the Child was mentioned earlier, and the best interests of the child phrase is certainly in there and that states that parties are compelled to act in the best interests of the child at all times. That is an obligation that Australia has taken on. That Convention also states that as far as possible the child shall have the opportunity to know and be cared for by its own father and its own mother. That is the sort of framework that the UN Convention puts on the best interests of the child. Also, the way that we would be approaching it is we would particularly think that the child's best interests are first of all probably not served by surrogacy.

If surrogacy is going to happen then I think we would want to be mimicking as far as possible what we do know about situations where children do well, and that seems to be with parents who are committed to each other over the long-term, and there seems to be a body of evidence that would show that marriage is a much, much more stable relationship than a cohabiting one. We have started research in our submission showing that by a child's fifth birthday I think it was over 40 per cent of cohabiting couples have split up, whereas only about 12 per cent of married couples have split by that point. So we would argue that marriage is one of the foundational things that will provide security to a child. Marriage also provides the father/mother role modelling, and you have heard testimony just now about the different ways that men and women parent and the importance that that has to a child's life.

We have talked previously about the biological connection with parents. So we would really be looking for a married couple using their own gametes who are going to then raise a child that is genetically theirs as well as socially theirs.

The Hon. GREG DONNELLY: We seem to be moving down the track with this potential division between the biological parents and the biological parents raising children with these possibilities now of social parenting, as the phrase has been used by some of the submitters yesterday. This dichotomy that has been created between biological parents and biological parents raising their own children versus the notion of adults of various combinations caring for and raising children, do you see emerging issues and problems associated with this dichotomy?

Ms MICKLETHWAITE: Generally, yes. I think we have seen that in many different guises throughout history. We have adoption where, again, the child is not raised by its own natural parents. But I would agree that that is a child-focused thing where the child already exists and needs care. It is wonderful that you can then match up that child with people who want to be parents, but it begins with what does a child need?

Similarly, in many of these other situations where, for example, I think you mentioned before grandparents raising children. That has often been a response to a situation that has broken down and so grandparents have stepped in to help. It is very rare that grandparents would begin thinking, "I'm going to raise this child". So usually those sorts of situations are a response to something that has gone wrong somehow, and it is wonderful that those individuals step in and provide that sacrificial loving care. What we are talking about in surrogacy though is creating that situation in the first place, and that is very, very different, and the ethical considerations around that are really quite different because you are responsible then for the situation that you create.

And if going into that there is reason to be concerned about the impact of a fractured parentage on a child, if we are hearing from children conceived through donor conception that that has been very hard for them—we know from adoption over a longer period that most adopted children do want to find their genetic parents, and we recognise that many women who give up a baby for adoption struggle with that and have grief for a long time. I do not see why we should expect different from a woman who enters a surrogacy arrangement through that. So I think the issue is really one of responding to a number of situations where the ideal has not been met and people are stepping in to look after a child who needs care versus creating that situation in the first place.

Ms SYLVIA HALE: When you talk about grandparents stepping into a breach are you not taking a very sort of non-historic view of this in that whilst the nuclear family has become the norm, say in this and the last century, for the majority of human history people have lived in fact in very extended family and groupings and that it has been the norm while the parents worked for the grandparents, in effect, to raise children. Rather than just saying this is what is happening now, you do not think it is appropriate to take that broader approach?

Ms MICKLETHWAITE: I think that is certainly there and I think there are many things within that extended family model that are very, very good for family life that provide intergenerational connections for children. Many of the issues that people face now are probably because we now live a great distance from extended family and cannot draw on that network. But still it is the parents who are the parents; the grandparents are providing an additional role and obviously love being involved in the child's life. I agree that extended family model has been there throughout history, but the parents are still primarily responsible for the children.

Ms SYLVIA HALE: I notice in your submission you say it would be a requirement that the surrogate be a relative or a long-term close friend, and then you say that it is important, if the surrogates so desires, that she should be able to keep the child. After a child is born do you not think there is likely to be a lot of pressure on the surrogate from that immediate family or those ongoing close connections for the surrogate to surrender the child, even if she does not wish to, and is that not one of the problems of restricting the surrogacy to those very close connections?

Ms MICKLETHWAITE: I would agree with that. I think we noted in our submission that whilst there were the positive side of an existing relationship between the surrogate and the commissioning parents in that there is already a strong relationship when issues come up you have a foundation on which to discuss them, we did note the corresponding risk is increased obligation, not being free in a way that people feel under pressure to help and risking a relationship if they choose to keep the child.

With all of these things there is no clear-cut solution. There is always one recommendation that has these risks and another recommendation that has the other risks. For example, if we were to take the opposite scenario and say that it would be an unknown woman, you have to ask the question: how does the commissioning couple find this unknown woman and that is taking us much closer to a situation to commercial surrogacy where you have agencies that introduce potential surrogates to potential commissioning parents where parents may still be offering their services on an altruistic basis but there are increasingly agencies involved to put people in touch with each other and it becomes closer to the market.

There also seem to be stories of women who have been surrogates that they want to have an ongoing role in the child's life and that is perhaps more easily attained when there is already an existing relationship with the surrogate parents. There are surrogates who have talked about feeling very hurt when the family eventually took the baby and moved away and that has made it harder for them to handle it.

Ms SYLVIA HALE: But it has also been suggested to us that evidence about how children are affected by surrogacy is very sparse at the moment. I have concerns about trying to establish hard and fast rules, laws, criteria or requirements in the absence of that evidence when we might find that what we are doing eventually is not in the best interests of the child and rather than racing in to restrict, we would be better to stand back to see what the results are?

Ms MICKLETHWAITE: I think that is one of the issues at the heart of this inquiry, that you are needing to make recommendations that will have an incredibly lasting effect on many people's lives almost in a vacuum. I do feel for you greatly in actually trying to work through what is involved in this sort of issue because I think even the Victorian Law Reform Commission noted recently that there just is not the evidence there. Their recommendation as a result of that was to proceed with extreme caution and I would hope that this Committee takes that on board.

I take the point that I think you can argue it both ways. You can argue in the best interest of the surrogate: She has the opportunity to stay close to the child; you can argue in her best interest she may feel under pressure. The corresponding risk, as I said before, is sliding into commercial surrogacy where people's motivations are much less clear. I think one of the cases we alluded to was the Kirkman case, which was a case where a sister carried a baby for the family. Their story is one of extremely strong existing relationship, very self-aware people who were able to talk through everything first. Obviously it was never really put to the test because in that case the surrogate was able to hand over the baby and has had an ongoing role in the child's life, but I do accept where that falls down, you would be risking a lot more than you would in other circumstances.

The Hon. DAVID CLARKE: Because of time, could this sum up the position of the Australian Christian Lobby and the constituency that you represent: that whilst you are opposed to surrogacy generally for a variety of reasons, if we are going to have it, that it should be based, first of all, on one pillar, that the commissioning parents should be a heterosexual couple; secondly, that the donor gametes should be derived from the commissioning mother and father and this is because you believe that according to research, some of which you have listed, this is going to be in the best interests of the child and that you are vehemently opposed to enforceable surrogacy contracts because that could involve the pulling away of a child from its birth mother? Would that be a general summary of your position?

Ms MICKLETHWAITE: It would. The only thing I would add to that would be that the child deserves to know what has happened. As some parents would find age appropriate ways to talk to their children about it and others will not, I think there does need to be some backup that means that the child is informed; whether that is a birth certificate or some other mechanism, I think we need to ensure that the child knows, because if we are essentially saying that as a society this is okay, the corresponding thing is there should be no reason for secrecy to the child. The fact that children are actually lied to a lot in this process illustrates there is actually quite a lot of unease about it still, even in the people who are doing it.

The Hon. DAVID CLARKE: You have cited research. Would you be able to get that research to us?

Ms MICKLETHWAITE: Which particular research?

The Hon. DAVID CLARKE: Any research that you use to base your conclusions upon?

Ms MICKLETHWAITE: We can certainly do that, yes.

The Hon. DAVID CLARKE: That would be helpful to this Committee.

Ms MICKLETHWAITE: Certainly.

The Hon. JOHN AJAKA: Do you believe that we as a Legislature should be denying any other couple or person surrogacy simply because of the heterosexual married aspect? In other words, we simply forbid anyone else from doing it?

Ms MICKLETHWAITE: Perhaps I should turn that around before I answer it and ask would you believe that anybody actually has a right to a child and simply because somebody wants to have a child, the State should give every possible assistance to them to have a child irrespective of their circumstances?

The Hon. JOHN AJAKA: That is the decision we have to make.

Ms MICKLETHWAITE: It is.

The Hon. JOHN AJAKA: That is why I need your assistance to answer the question I ask?

Ms MICKLETHWAITE: I would argue that people do not have a right to a child; that a child is vulnerable and therefore we begin with what does a child most need.

The Hon. JOHN AJAKA: But once you open the door and allow one group, are you not prejudicing other groups? How is that Christian philosophy to simply say one group is entitled to it but the other group is not entitled to it? That is the difficulty I have, that once the door is open to one particular group—forget whether the door should or should not be opened—how do you prejudice any other group?

Ms MICKLETHWAITE: Because you go back to what is the best interests of the child and if that is a male and female parent, if that is a male and female parent who are actually committed to each other explicitly for life and therefore better able to provide a stable environment than one who has not made that commitment, that is the direction that our logic would travel down. We are also coming from a theological position where marriage is part of the created order, where children are a gift within that relationship.

In previous centuries this has not cropped up because people who are single or were in a homosexual relationship could not naturally conceive. Those kinds of circumstances closed off the option of parenthood. We now have the technology to circumvent that but we will be doing so in a way that meant you had to use donor material because you simply do not have male-female parties to the arrangement—and we have talked about the problems there—and we would be doing so in an environment that says we think it is fine for a child to have two mothers or two fathers; that we do not see any benefit of a male-female role model. I would argue that it is actually discriminating in favour of what it is best that the child rather than discriminating against people in other relationships.

CHAIR: I thank you very much for coming here today. Your evidence is very important to our inquiry. We have not touched on the questions on notice that we sent you. We ask that you send back the answers to those through the secretariat. There could well be further questions as we have extended the time of the inquiry.

(The witnesses withdrew)

CHAIR: Welcome and thank you for attending this important inquiry. We have broadcasting guidelines and if you have any messages you wish to give the Committee, the secretariat will attend to that. Committee hearings are not intended to provide a forum for people to make adverse reflections about others, even though you are under parliamentary privilege. Please turn off your mobile phones.

CHRISTOPHER LAURENCE MENEY, Director, Life, Marriage and Family Centre, Catholic Archdiocese of Sydney, sworn and examined:

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

Mr MENEY: 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 your request. If you do take any questions on notice or if our questions are too complicated for today's short period of time, we would appreciate answers to those questions on Monday 1 December. Would you like to start by making a statement?

Mr MENEY: Yes. Thank you for the opportunity to appear. I acknowledge that this is a very difficult issue and there are people of goodwill on both sides, both in the wider community and in the Committee. All of the church's activities in the area to do with the care of the community are motivated by strong beliefs about the dignity of the human person, including vulnerable women and of the intrinsic value of marriage and family, both for the individual and society. These same beliefs give us cause to oppose any move to legislate for the regulation of altruistic surrogacy arrangements in New South Wales.

Surrogacy is a complex practice, which is unethical at several levels. Of greatest concern to us is that surrogacy is never in the best interests of children. It is grounded in a false philosophical understanding of the meaning and value of children. The desire to be a parent to a child is both natural and strong, and infertility can be a cause of great suffering to a married couple, but we are mistaken if we think that adults have a right to a child. Children are the subjects not the objects of rights. They are human subjects, bearers of human dignity and full members of the human family.

Children are not objects, commodities or an expression of adult preferences. They ought never to be created in a way that is not respectful of them as a person in order to satisfy adult yearnings and desires. An important implication of this is that whilst spouses have a right to try and have a child, this should only be by means which are respectful of the dignity of that child. Couples should intend only to bring a new person into the world by conceiving, carrying and nurturing a child within marriage as this is the setting, which fully acknowledges the dignity of the child and establishes a relationship of equality between the child and his parents. There are, of course, instances such as adoption where this ideal is unable to be met, however adoption is very different to surrogacy in that the child is not intentionally conceived with a will to relinquish the child after birth. Adoption does not involve commissioning parents. Adoptive parents do not contract to create a child. Instead, they rescue an existing child into their family, in situations in which a child's biological parents are unable, or feel they are unable, to care for a child.

Surrogacy further instrumentalises children when the process of their conception, birth and upbringing is placed under a contract. We acknowledge that moves to enshrine surrogacy in contracts of law are often motivated by the desire to protect children from harmful custody battles. However, while this is well intended, it overlooks the personal and cultural consequences of further commodifying children by making them the object of formal contracts. Surrogacy also deliberately impedes the child's right to enjoy and benefit from an immediate and enduring link with his or her natural parents. In cases where the surrogates mother is the genetic mother of the child, that is, in cases where she is also the ovum donor or when gametes which do not belong to either the commissioning couple or the surrogate mother are used, surrogacy may also deprive children of their right to know and have contact with their biological parents and wider biological family. Margaret Somerville recently proposed that the most fundamental human right of all is a child's right to be born from natural biological origins, and explained it as follows:

> Knowing who our close biological relatives are and relating to them is central to how we form our human identity, relate to others and the world, and find meaning in life. Children – and their descendants – who don't know their genetic origins cannot sense themselves as embedded in a web of people, past, present and future, through whom they can trace the thread of life's passage down the generations to them.

This is supported by an increasing body of biographical accounts from adult donor conceived individuals of how discontinuity between a child to their genetic parentage, gestation parentage, or social parentage, can result in an experience of genealogical bewilderment. Ultimately, in view of these philosophical considerations and the absence of conclusive empirical evidence about the long-term effects of surrogacy upon the child, legislating to regulate surrogacy would be nothing less than an experiment in child welfare. Surrogacy is also an invalid form of family formation which undermines the role and the ability of the natural family to contribute to the flourishing of persons, communities and societies. It weakens the integrity and functionality of the family by confusing relationships between children and parents, as well as relationships between spouses and partners.

As a result of surrogacy a child may come to have a matrix of parents—a genetic mother, a gestation mother, a social mother, a genetic father, a social father, and the men, if any, who partner the gestational and genetic mother. Surrogacy also involves the dissociation of husband and wife by an intrusion of a person other than the couple by means of the donation of a surrogate uterus and possibly a donor ovum into what should be an exclusive relationship. This can have detrimental effects upon the relationship of the commissioning couple as well as the surrogate mother and any husband or partner. Through all of these effects, altruistic surrogacy contributes to the development and legal and cultural deconstruction of parenting. It promotes the delinking of the notion of parenthood from traditional understandings and ties.

There are also the ethical issues relating to the surrogate mother. It is doubtful whether a legally authorised body could ensure with sufficient confidence that a surrogacy arrangement is genuinely free and informed an. Emotional coercion, however subtle, is a serious possibility when the potential surrogacy mother is a relative or close friend of the commissioning couple. It is also highly questionable whether a surrogate mother can be fully aware of her potential physical, emotional and psychological state at the end of nine months of pregnancy prior to entering into a surrogacy arrangement. Therefore, in view of these ethical problems, it would not be prudent or responsible of the government to legislate for the regulation of altruistic surrogacy.

An important function of the law is to protect people from injustice, especially vulnerable members of the community, like children. The law also functions to educate people about appropriate behaviour for living well together in a community. Therefore, moves by the Government to regulate surrogacy could be seen by the community as condoning surrogacy and facilitating a form of family formation which is against the best interests of the child and the common good. Where private surrogacy arrangements are made, the birth mother should continue to be lawfully deemed to be the legal parent. If the birth mother wishes to relinquish the child, then the principle of the child's best interests should be used to ensure that a decision about social parenthood is determined, not by a surrogacy contract, but according to a judicial decision in the child's favour. This circumvents the idea that a child's interests can be subject to a contractual arrangement and ensures that the best interests of the vulnerable child are deemed by an independent objective body.

In conclusion, we recommend that the Government should not move to legislate for the regulation of altruistic surrogacy arrangements in New South Wales, ensure that surrogacy contracts remain unenforceable, and do what it reasonably can to discourage all forms of surrogacy.

The Hon. DAVID CLARKE: Mr Meney, take this situation: we could have a surrogacy situation where a person has three mothers, the gestation, birth and social mothers, and could have two fathers, a gestation father and the social father. There could be five parents involved. You say in your report:

> There is an increasing body of biographical accounts of how discontinuity between a child's genetic parentage, gestational parentage or social parentage can result in an experience of 'genealogical bewilderment'. Here, the experiences of adult donor-conceived individuals are particularly relevant …

You then go on to refer to one or two of those. Would you be able to expand on information or on the research that has come forward to you on this issue? Time probably does not allow a full exposition, so anything that you cannot provide for us today, could you get that to us?

Mr MENEY: Certainly, Mr Clarke. I would just say that the term comes from a psychologist in 1964, Dr Sants, who was talking to children who have uncertain, little or no knowledge of one or both of their natural parents. He talked about the additional stress that results from children in adoption situations. To date, most of the literature in the area has focused on how an adoptee's lack of knowledge of their origins can result in difficulties in the development of self-identity and self-esteem.

They have also looked at how a lack of biological mutuality among adoptive family members, such as shared biologically based characteristics regarding appearance, intellectual skills, personality traits and so forth, can impede an adoptee's ability to identify with adoptive parents. Many other studies in this area have driven the agenda towards the whole notion of open adoption with respect to the information for children in adoption. Surrogacy intentionally deprives children of clear parental relations. A secure and recognised relationship to his own parents is important in helping that child to discover his or her own identity.

It is in that sense that the experience of those in adoption have a sense of what is called genealogical bewilderment. It would be dramatically accentuated, were you to provide a wider matrix of parental-type figures where a child beyond that returns being the norm experience, even when they did not have a strong biological connection with the parent. Where you extend that matrix into a greater complexity, it will increase the level of bewilderment.

The Hon. DAVID CLARKE: You refer to blogs being maintained by some of these people who have had problems. You refer to one web site of people called Tangled Webs. Would you be able to give us some research and information, whatever information you can, that can provide details so that we can look at that and view the question from that particular angle?

Mr MENEY: I am certainly happy to do so. That particular site is a site where people essentially are looking for their biological origins and are trying to find where they come from. It is a pretty natural inclination that we all have.

The Hon. DAVID CLARKE: I have another question, but because of the shortness of time, I must be brief. I will read a quote from Professor Bernadette Tobin of the Plunkett Centre for Ethics, which is associated with St Vincents Hospital:

> … 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-six parenting is just as good for children have the burden of proof. They have not discharged this burden, for the evidence is lacking.

What do you say about that statement?

Mr MENEY: I think there are intrinsic differences about what men and women offer children as fathers and mothers. When we say same-sex couples are placed on an equivalent level in terms of a desirable outcome for children as a heterosexual couple, we are essentially saying to children and the wider community that either fathers do not matter or mothers do not matter because you do not need both. When you have two women who are looking after a child, we are essentially saying to that child, when we are mandating it and enshrining it as an equality situation, that a particular family which does not have a male figure is in no situation of detriment; it is not compromised at all. We say the same thing when we place a child in the care of two men; that it does not matter that the child does not have a mother. I think it says that, not just for that particular family and that particular child, but to the wider community when it becomes sanctioned under law.

We know that there are intrinsic differences between what men and women can offer children, and at various stages we can talk about the mentoring behaviours that men offer with respect to sons and how to manage risk and with respect to daughters. Issues such as early pregnancy dramatically are put off when there is a father figure in the home. We know that these are important in terms of the sociological outcomes of children, and so I think it is really important for us to be cognisant of that. Rather than embark on any dramatic social experiment in various forms of social welfare, we should adopt a very prudential approach to the care of children and say that we know this works, so why would we experiment in any way, shape or form? Why would we give such a situation its head and see what eventuates? I understand that different groups of the community have the desire to have children, and it is a very natural thing for someone to want to have a child. But nobody has a right to a child. The child is a gift. It is not an entitlement.

The Hon. JOHN AJAKA: If I put it in its simplest form, what you are advocating is that the status quo should remain in that there really is no need or requirement, nor should there be, for any legislative changes on our part in relation to the area of surrogacy. We should just simply leave it as it is.

Mr MENEY: I would agree that there is a danger, if we start to legislate, of saying that something is legal therefore it is desirable, therefore it is moral and therefore it is acceptable, and therefore there are things about it that are quite okay within the community. I think governments at all levels make decisions about things that they proscribe and prohibit, about things that they tolerate, about things that they are neutral about, and

about things that they encourage, and about things that they provide all sorts of inducements for. There is a whole spectrum of things that governments have to deal with.

The Hon. JOHN AJAKA: Do we not face a dilemma if we do absolutely nothing? First of all, it is not as if surrogacy is criminal or illegal. If we do absolutely nothing, do we not face the dilemma of ending up in a situation in which children are born to surrogacy arrangements and we have failed to take action that is in the best interests of the child or that protects the best interests of the child by simply doing nothing?

Mr MENEY: I think we have a system at the moment where the mother gives birth to a child and, if she feels that she does not have the ability to care for it or does not want to care for it, the courts make a decision in the child's best interests.

The Hon. JOHN AJAKA: We are hearing that the dilemma with that is that, in situations of surrogacy, where the arrangement is working, the child is handed over, if I can use that expression, the surrogate mother is happy with the arrangement, the commissioning parents have the child, yet all of a sudden there is a legal minefield if, for example, the child suddenly needs urgent medical attention, the surrogate mother is not available, and the child's birth certificate, passport and enrolment at school are all needed. How are the child's best interests catered for by us simply saying that we should leave the status quo as is?

Mr MENEY: Because the court can make a decision in a child's favour as to where the best interests would be served and which home, or which family, or which couple that child should be placed with, and that couple would then have rights to do all those things that would be necessary for the care of that child.

The Hon. JOHN AJAKA: In the perfect world, having been a lawyer for 30 years, that court action would occur in one hour or one day. It does not happen that way. The reality is that there are huge time delays and when we look at the issue of adopting a child we are talking about five, six or seven years. That seems to be where the dilemma is.

Mr MENEY: I think there are some problems in the process of adoptions, but we do not just say, "Let's not worry about it, we'll just let whoever wants to look after the child look after them. We won't regulate it, we won't monitor it—as long as everybody is happy, we won't worry about it." We do not say that with respect to adoption and I don't think we should say that with respect to children through surrogacy either.

Ms SYLVIA HALE: I think your concerns about adoptees or children born of surrogate arrangements having a right to knowledge of their genetic inheritance is a view that is more or less universally accepted. Would you not agree that it would be appropriate to legislate to ensure that the details of the donor of sperm or eggs are stored and kept on record so that the child could access them if need be?

Mr MENEY: If you are asking me what our position would be if a law was passed which enabled surrogacy to occur and genetic details could then be made available to children we would say, if that was the situation, if children were in that situation, having access to that information would be very important and indeed would be their right.

Ms SYLVIA HALE: Do you think that in failing to pass such a law in some way we are ignoring the rights of the child to that information, that we are turning a blind eye to what is in fact occurring?

Mr MENEY: No, because I think we are doing the best we can to provide a society which has social disincentives to people going down the surrogacy path, and that is in the best interests of children.

Ms SYLVIA HALE: It seems to be acknowledged by everyone who has given evidence that surrogacy is taking place whether we like it or not, so it is not a question of saying it should not happen when the reality is that it is happening. In that context there are women who are acting as surrogate mothers and in your submission, particularly on page 2, you are very damning of those women. You say that surrogate motherhood is an intentional abdication of maternal obligations. You say that they exhibit an objective failure to meet the obligations of maternal love and responsibility and that what they are doing is an offence against the dignity and the right of a child to be conceived. Quite damning. Do you think there is some contradiction in your position that women who are so morally deficient should be allowed to retain the child, given their abdication of their maternal responsibilities by the very act of bearing that child?

Mr MENEY: Should they be allowed to retain the child?

Ms SYLVIA HALE: Yes. How do you allow morally deficient people to retain control of the child when there may be an alternative—a couple whose biological material contributed to the creation of the child and who may offer a stable environment? I am not saying that the woman should not; I am just asking what your position is?

Mr MENEY: I think the best interests of the child always have to be the pre-eminent determinant. There may be many reasons why women go down the path of having children, and some of them may be less than ideal reasons, but I think there is a strong reason for saying that a woman who gives birth to a child should have the best call on looking after that child and taking care of it in the initial instance. She may feel that she is not able to do that, but I think it is inappropriate for an objective outside body to make that decision. I do not think it is something that should be subject to contracts. I do not think that children should be in any way subject to contracts. I think it is one of the great battles we face sociologically—the whole notion of the commodification of children.

Ms SYLVIA HALE: There seems to be a lot of evidence, and certainly the evidence that the Committee received yesterday—and today there is a report in the *Sydney Morning Herald*—that what is important for a child's wellbeing is the care and nourishing environment in which they are raised. What is significant is not the actual structure of the unit in which they are raised, namely, a mother and father who are conventionally wedded, but the preparedness of the parents, whether they are the biological or social parents, to interact and genuinely participate in the child's upbringing. Do you accept that position at all?

Mr MENEY: Of all the studies that have been done, none of them have conclusively shown in any way, shape or form that a same-sex parenting arrangement is equivalent in terms of what it is able to provide for a child to a heterosexual couple. All of the studies that are often cited are methodologically flawed. There has been very significant meta-analysis done by many people who are specialists in this area and I am happy to provide the Committee with that information.

Ms SYLVIA HALE: If you would, please.

Mr MENEY: The basic conclusion is that the information is not there to say it is just a matter of a nurturing environment. Those sorts of comments that are often thrown up are not reflected by the studies. I could cite a number of them for you, but I will give you one comment from the *American Sociological Review*. These people would be quite supportive of same-sex couples adopting, but they did make the comment that, "We recognise the political danger of pointing out that recent studies indicate that a high proportion of children of allegedly gay parents are themselves apt to engage in homosexual activity. The adolescent and young adult girls raised by lesbian mothers appear to have been more sexually adventurous and less chaste." That is just one comment from one study. They would not be authors—if you looked at people like J. Stacey and T. Biblarz—who would be in any way pursuing an agenda that said only heterosexual couples should be allowed to have children.

I do think there is a lot of information that needs to be carefully sifted through and we do need to have a good look at the studies because they are often flawed methodologically, so they are not really painting a true picture. I think that is very important and if we do not have the information, if we cannot say that this is in the best interests of the child or this is an equivalent situation, we should adopt a very prudential approach that shows that we care about putting children in a situation where we know that is going to be in their best interests. In the absence of any information or studies to the contrary to prove that other situations are in any way equivalent to that, we should place them with a heterosexual couple in a committed lifelong relationship.

The Hon. GREG DONNELLY: In terms of some of the questions on notice that we provided to you, question 4 relates to the comment on page 5 of your submission that surrogacy undermines the role and ability of a natural family to contribute to the flourishing of persons, communities and society. Can you explain to the Committee how you see that surrogacy does that?

Mr MENEY: In a case where the children are not engaged with both of their biological parents we are intimating to them and to wider society that biological intergenerational connectedness is not critical, it does not really matter that much. In the case of biological siblings or half-siblings situations, we are saying that those sibling relationships are also not that important because we are quite happy for a child to be placed in a situation where it might not know its other siblings or half-siblings. I think it is also saying that what we hear about mother-child bonding and inter-utero attachment, which seem to be quite important for children, does not really

matter because we are quite happy to have a child removed at birth and placed with somebody else intentionally. We are quite happy to create a child deliberately and then to place it in that situation. It says those sorts of things about how we view those different aspects of our society, and it is not just for that couple or that child, it is for the society generally.

The Hon. GREG DONNELLY: On the issue of the unique contribution that men and women make to the rearing, development and maturation process of a child, is there research material that goes to explaining in some detail those very distinct contributions made by mothers and fathers?

Mr MENEY: There is, and I am happy to provide that to the Committee. One recent study on the effect of father absence on girls found that girls who grew up with an absent biological father were much more likely to experience early puberty and teen pregnancy than girls who spent their entire childhood in an intact family. We know that those sorts of changes do make a difference, so where we are actually removing children and creating a more complex situation it is fair to say that that would further exacerbate some of those difficulties that the children have already experienced. We cannot, as a society, talk about fatherhood and motherhood if we seriously at the same time try to balance it with something that says that mothers can father just as well as men or fathers can mother just as well as women. It does not really resonate in terms of any congruence. I think if we are serious about the importance of fathers and mothers we need to be very careful about any social messages we might be sending through legislation with respect to placing children in care where having an opportunity for them to have both a mother and a father is in some way just pushed to the side.

The Hon. GREG DONNELLY: My final question relates to some evidence we received yesterday, which was essentially—and I am paraphrasing it—that the best way forward for New South Wales is to approach this in a very light-touch way whereby there is no acceptance that contracts are binding, but that there be a determination at some point after the birth of what is in the best interests of the child in terms of the caring of the child, which is the product of a surrogacy relationship. As I was reflecting on that last night it dawned on me that one could easily move beyond one or two to three or more adults making a claim for the care of a child. How do you draw a line, or can you draw a line once you have passed over a particular point where you are making a value judgment on who is caring for the child as opposed to the child's biological parents being the ones who will obviously look after and rear the child? Do you see there is a danger in crossing the line? I think you commented that you might have up to three, four or five adults involved in the process of creating a child by surrogacy.

Mr MENEY: I think that is an enormous problem for us if we were to say it did not matter how many parents you have. We have not even thought through properly exactly what it means to have a mother and a father in terms of the public debate that has been going as to whether a same-sex couple should have a child or not, but I do think it is important for us always to remember that children have rights, which is due to the fact that they have dignity as persons and we should do whatever we can to prudentially act in their interests. We should not have any burgeoning industry and we should not have any possibility of people advertising for surrogates. We should have sanctions against people who engage in those sorts of practices, but it would be perhaps a different thing to say we should have sanctions against a person engaged in that because they have a real interest in pursuing it. As I said, society has things that it prohibits and things that it tolerates, and there are things in between that it tries to discourage. I think that surrogacy is definitely at the end of that spectrum.

The Hon. GREG DONNELLY: One submission at least has touched on the issue of the conscientious objection of people working in medical facilities—hospitals, clinics—in terms of their conscientious objection to participating in medical procedures that are against their conscience. Do you have a view about the issue of the conscientious objection of people who are involved in medical procedures that they do not agree with?

Mr MENEY: I think it is absolutely critical. I think both within State jurisdictions and federally we have to get serious about looking at these international covenants that we sign up to, like the International Covenant on Civil and Political Rights that enables people to have a conscientious objection to be engaged in certain activities and to withdraw their labour from those things that they have a conscientious objection to. We have seen a line crossed in Victoria recently with respect to that. I think that is yet to be resolved nationally. It is a great challenge for us because there are many bodies that contribute to the welfare of the community. We would be seriously compromising their ability to continue to do so were we to remove their right, either as an organisation or individually as members within that organisation, to be engaged in activities to which they had a conscientious objection.

CHAIR: Thank you, Mr Meney, for coming today and giving us your important information. I recognise that you were sent questions on notice that we only touched on today. We would be very grateful if you communicated with the Secretariat about providing us with those answers. We have extended this inquiry to well into the new year. We would be grateful if you have any further information to provide it to us.

Mr MENEY: Yes, thank you.

(**Witness withdrew**)

THOMAS ROBERT FRAME, Director, St Mark's National Theological Centre, sworn and examined:

CHAIR: Welcome to the second day's hearing of this inquiry. I will not state some formal matters that relate to the media reporting of proceedings. If the press arrive, I will deal with them. As some mobile phones interfere with the Hansard equipment, we would appreciate it if all mobile phones were turned off. Professor Frame, what is your occupation?

Professor FRAME: Academic.

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

Professor FRAME: As an individual.

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

Professor FRAME: Yes, I am.

CHAIR: If you should consider at any stage certain evidence you wish to give or documents you 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, the Committee would appreciate it if the response to those questions could be forwarded to the Secretariat by Monday 1 December 2008. Some of the questions we are asking in this inquiry are complex and you may prefer to have time to give your answers. Do you want to start by making a statement?

Professor FRAME: Yes. The first thing to say is that the previous speaker and I have not seen each other for 15 years. We were in the Navy together and I was surprised when I walked in the door and there he was.

CHAIR: We do other things on the side—bring old friends together.

The Hon. JOHN AJAKA: It was God's will.

Professor FRAME: I will take that on trust. I am grateful to the standing committee for its invitation to give evidence to this inquiry. My interest in surrogacy is personal and professional. I was adopted at birth and was raised by an infertile couple. There are some similarities in the experience of adoptees and those born by surrogacy—in those cases I am referring to when donor eggs and sperm are involved—while I have also seen personally up close how heavy a burden childlessness can be. I have also served on a hospital ethics committee with oversight of a fertility clinic that offered surrogacy services in a jurisdiction, which in the Australian context, is very progressive in its attitude to providing access to a range of reproductive technologies. As an Anglican bishop and now principal of a theological college, I am frequently asked for advice on matters relating to alternative family formation strategies, such as surrogacy. This might explain why I published a book *Children On Demand* earlier this year.

While I generally support the use of technology to overcome infertility, I cannot support procedures that have the potential to harm children and the capacity to damage adults. Given that Australia is a signatory to the United Nations Convention on the Rights of the Child, I do not believe we ought to countenance any procedure that might create long-term disadvantages or possibly debilitating difficulties that either conflict with or are plainly contrary to a child's best interests. I am, therefore, concerned about surrogacy when it involves the use of donated gametes and the intentional alienation of a child from its biological mother or father, especially in a more complicated parenting arrangement and adoption, for instance, which surrogacy can be. In my view, based on the experience of many adoptees, the State should not encourage any parenting arrangement in which a child is not to be raised by its natural parents.

My second concern with surrogacy is the emotional and spiritual harm that could potentially be done to the surrogate. I have heard first hand from a small number of women and they have spoken with great anguish about relinquishing the child they carried for nine months and the anxiety they feel every time they see that child as it grows. They are not and should never be referred to as incubators. They are mothers in the proper sense of the term. I am not convinced that we really grasp how harrowing it is for women to be surrogates. I have been

told by several women that they would not volunteer a second time. Once was enough and all they could ever manage. I have even heard surrogates express their doubt that any woman could in fact give informed consent being a surrogate, given the totally unexpected nature of women's reactions to relinquishing a child. When I met my own birth mother in 1994, she spoke in similar terms about how hard it was to relinquish me. As most surrogates are close family or friends, the pain of separation can and sometimes is revived by family gatherings and outings with friends. I am not one to say today that surrogacy is always wrong because it invariably harms children, women and the men who are involved. I am, therefore, not advocating its prohibition but a more sombre and realistic depiction of its complexities and complications. My submission is simply that surrogacy has not been practised in Australia for very long. We do not know anecdotally or analytically, and I do not believe we can yet say, what long-term effect it does have on those who are involved.

I think that we ought, given the desire to ensure the interests of children remain paramount, proceed with caution and provide what might be deemed, if it is deemed to be necessary, a restrictive regulatory environment until we know more about the consequences of the whole practice. I also believe strongly that uniform national legislation is highly desirable, as I have already seen many stressed couples around the country relocate to Canberra where I live to access services not available elsewhere. This has placed upon them another considerable burden. If they are committed to pursuing this option, I think we ought to say that they should have access to surrogacy services as near as possible to their usual place of residence and vital family support. I was furnished with a series of questions late on Tuesday afternoon and have prepared some answers, should they be put to me formally. I appreciate the chance to be heard and I thank you for the invitation to appear today.

The Hon. GREG DONNELLY: With respect to the questions we provided to you on notice, I refer to question 4, which to some degree you have already commented on. That relates to the effect on surrogate mothers from the handing over, if I could put it that way, of a child to a commissioning parent. Do you have direct insights through your experience or research to validate the position you are putting there?

Professor FRAME: All I can say is that the material that was provided to me over the three or so years that I was on the committee, when I left, as I thought was right, I destroyed it all because it was confidential to those who were involved. I have been racking my brain since you put this question to me about the number. I think it was only two surrogates whose responses and experiences were recorded and then conveyed to the committee, which was then authorising surrogacy agreements in the Australian Capital Territory. So it is not a very large example at all. One particular woman of the two—again I have to say honestly I think it is only two that I can recall—spoke very loudly and later on I had separate contact initiated by the person involved to say that it was one of the hardest things she had ever done in her life and she did not know it would be so hard.

I had already had a glimpse of that, I suppose, with my own mother when I met her. She was 17 when I was born. That has led me to say that it is very difficult for, I think, any woman—and I have to take it on trust—to know what they are actually signing up to. I certainly think that the anguish of this one particular woman was palpable on the pages and in between the lines that it was such a difficult thing to do. As I have tried to say, it was, if you like, made worse or prolonged by the fact that it was in a family situation and she continues to see the child. If I could go maybe in a slightly different direction, if you said to me when I was 12—and I had a violent alcoholic father and I have written about this in a book published by Hale and Iremonger—"Over there is your biological mother", I would have said without almost any thought at all, "I will go and live with her because it has to be better than this." I would lay awake at night thinking, "She's out there somewhere. It has to be better than this." Then I met her and it was not better. You might think that hard to imagine.

I am concerned about instances. We have heard about the child having five parents and they are all gathering for the big family Christmas. Here is the child with its social parents and if it is having a bad time with those social parents I am concerned that the child might say, "You're not my real mother. You are my mother, you understand me, you're like me, I want to come and live with you." If I have a real concern about surrogacy it is that. We know there are children who are not adopted who wished they were because, "These people can't be my parents. I don't want them to be my parents. Give me another option." That is one answer to a short question. I just do not think at this stage we know what we are doing in Australia. In the United States it has been happening for a longer period of time. Whether Australians and Americans are the same in this regard, I think that is a matter for the Committee to decide. I actually think that the only similarity is that we speak the same language and even then differently. I would not think that we could necessarily take the American experience of surrogacy and say that what we learn from that is what we can apply to its practice in Australia.

The Hon. GREG DONNELLY: Do you have any comment on the American experience that you think is useful for us to know and understand?

Professor FRAME: I have got the questions, but I have a house on the coast where my files are. I am happy to look at what led me to the generalisation, and it was a generalisation. You could say in one sense it is true of any child who does not grow up with their biological kith and kin that there seems to be, and I would support what Mr Meney was saying before, that it is difficult first of all to get a benchmark but it seems to be the case that two parents living together raising the child is the best model. If you want to contrast surrogacy with adoption, in adoption the child exists and the mother could not care. So you had to provide alternatively and permanently for the child. There is a big difference between that and then saying that we are going to bring a child into being to provide a child for this particular couple. That is where the responsibility and the role of the State is different, and that is when I think if it is going to happen then let us regulate it.

I also want to say that I do not know necessarily why I should have to pay for it. That is an issue I am not sure whether the Committee wants to deal with or it is confined within its terms of reference. All of this kind of activity is actually very expensive and some of it to me is problematic. I have to pay for things in our society all the time that I think are problematic and I do that through my taxes. But there may be some things we say collectively that we are so unsure about this, we are so worried about the consequences of doing this that we do not think so strongly that we will prohibit it but we are not going to provide public money to encourage it.

Ms SYLVIA HALE: You referred to a restrictive legislative regime. Would you care to outline those restrictions you believe should be in place?

Professor FRAME: The ones that we were using in Canberra on paper I thought served the need quite well. They dealt with most of the issues that I think you would want in a legislative framework for surrogacy. The only difficulty was that there was an element of guideline in them. There are also guidelines that guided the committee. I have to say that there was bracket creep on this in the three years that I was on the committee. One of the guidelines is that the surrogate ought to have a live child in the current partnership, which I think was the phrase. But we had people coming to the committee saying, "Oh well, look, it's her younger sister. Look, she's a good kid" and everything else. I would just roll my eyes saying, "Well, are the guidelines going to be applied or not?" Is it important that the surrogate be in a long-term stable relationship and have a live child already? You might say there are guidelines; we would want to see them actually in legislation rather than just guidelines to guide a committee that is exercising oversight.

Again the question arises, and this is my particular concern, that surrogacy is complicated enough than having donated reproductive material adding further to it. I would say to the Committee that surrogacy is sufficiently complicated that you should not introduce these potentially five parents because of the possibility later in life that the child has whatever sense of confusion because it does not like the place in which it currently finds itself. So, I have not come to the view that the Australian Capital Territory legislation was unhelpful in the way in which we did it, except that fertility clinics are in the business of providing services. Across the three years I did hear, "Well, can we test this?" Every single guideline and limit that we had, "Oh, can we just try you out on that?" The top end of the IVF success rate I think is over 41, but negligible; "Oh, maybe we could try 44. She's very keen." Or we would get a particular kind of social story that would tug at the heartstrings. That is where I suppose I would like to see things perhaps a little more tightly regulated than we have in the Australian Capital Territory.

Ms SYLVIA HALE: From where did the pressure come to push these boundaries?

Professor FRAME: I thought it was from the service provider. Obviously, behind that are people who want to access the service. So, the service provider would say, "Look, I think this one's a bit different." I would say, "They're all different." "But this is different in this particular way." We had another case where we asked, "Where did this proposed surrogate come from?" "Oh, they found each other on the Internet." We said, "What do you mean they found them on the Internet?" "Oh, well, there was a chat room about surrogacy and this person said she liked being pregnant and in one sense was offering to be a surrogate." We were troubled by this because we knew that we could not police the non-commercial elements of the arrangement. You cannot stop someone saying, "I need a new car to make my medical appointments and I want a top-of-the-range Land Cruiser" because you could then say, "Oh, that was necessary to assist the surrogate in bringing the child to term" or, you know, "I need relaxation room in the back of my house," which suddenly appears. I think we all took the view, despite the fact that we got people to sign statutory declarations, that it was almost impossible to regulate or prevent from commercialism of the arrangement in some way, particularly when the surrogate is not close family or a friend. Like, "We met on the Internet because I like being pregnant." What are you going to do about that?

Ms SYLVIA HALE: You draw attention to the problems of the surrogate being a close family friend or relative?

Professor FRAME: Yes. It is a conundrum. So, if you get someone who is close, then you can see that it is something that you do genuinely altruistically if it is someone else in the family. If they are not that close, then there it is. We had one well-known case recently of a Federal parliamentarian whose child has four parents and deliberately separated the surrogate from the egg provider in order to try to get over some of the concerns that I have been expressing, which is to stop, if you like, the surrogate bonding to the child because it is not her egg. So, they are trying, if you like, to diversify things. So, in one sense to make sure the child bonds to the one they want to bond to, which is the social mother, and prevent the others feeling that way. But they are friends and they are going to get together. I do not want to universalise the particulars of my situation, but if teenagers are given some choice, mum and dad is this, and someone else's mum and dad looks better, what then will the courts do? How will we decide if the child says, "But look, I really want to go with that parent there"? We know again because of some of the bizarre cases in the United States that courts are not the best places to sort out some of these things. Therefore, my view is, do not create the circumstances you cannot sort out legally.

The Hon. JOHN AJAKA: You were present during the evidence of the previous witness, whom you have not seen for a while. I got the impression that his view was to just leave it alone, do not get involved, do not regulate it and leave it for some time. I get almost the exact opposite picture from you—if I am wrong, please tell me—that it should be regulated properly and in a tight way, and we should ensure that if these arrangements are occurring, that they at least occur within a proper framework with all the boxes ticked et cetera. Am I right in that perception?

Professor FRAME: Yes. He and I probably in some broad principles actually do not disagree, but I am going on my experience from a place where it does happen. We knew that people did come to Canberra in order to access the services, if they did not in fact go overseas. That is why we know that Federal authorities will have to be involved in regulating the exportation of reproductive material to do things in the United States that you cannot do here. In other words, you cannot get a surrogate here. If you can actually get the embryos to the United States, you can find some poor woman who will just do anything for the money and be exploited.

The Hon. JOHN AJAKA: That is the second part of my question. The reality today, as opposed to 50 or 100 years ago, is that it is a shrinking world. It seems almost illogical, to me, that if we bring in prohibiting or restricting laws, all someone has to do is go overseas for nine months, come back with a child and say, "This is my child born of me" when it could well have been a surrogacy arrangement and we are not aware of it. Or they come back with the surrogacy-arrangement child and says, "What are you going to do about it?"

Professor FRAME: Yes. On the one hand I am saying I do not like it, but if you have to do it, let us do it in this particular way. But I do share Mr Meney's view when you put things in legislation. I have two teenage daughters—one is no longer a teenager—and I would say, "Don't do that." They say, "Why, it's not illegal." In other words, legality defines morality. There will be some people who say that just by virtue of decriminalising it or putting it within a legislative framework you are saying more about it than you would actually want to say. He and I might differ from the point of view that I do not want the State to do what my religious community ought to do for itself. There are some things about which I would say okay. Even in my family we have talked about this is a great deal. In our family we have certain values and virtues that inform and give shape and substance to our family. So, my daughters would not go down the surrogacy route because there are certain things about being part of our family that would prevent them from doing that. There is always that tension.

We hold the particular view here, but how much would become the prevailing view and then be supported by legislation? I am still to be persuaded that surrogacy and separating children from their parents causes harm. If you asked me was I harmed by what happened to me when I was born in Newtown and kind of handed over to the people who got to the top of the queue, and that someone never checked that my father partly was a violent alcoholic because he was childless, I would say no. Was I perhaps disadvantaged by it? Probably. Still at 46 years of age, if I could meet my father, I would walk over cut glass to do it. I cannot tell you why and I cannot tell you what has been done to me by the New South Wales Department of Child Welfare, as it then was. If I could say, "There is harm, don't do it" then I would say prohibit it. I think there is an element of disadvantage and maybe even disability in it, but I do not think I can properly and rightly say to you today that I think it is to this degree or of this kind. So, I think it is the case that if you separate children from their parents, they go throughout life wondering who they are. I could walk out into the street today and think, "Could this

person be my father?" Apparently my father is 25 years older than me and he looks like me. That would help because I find it difficult understanding me and I have to live in this body.

The Hon. JOHN AJAKA: But if we are going to regulate, should we not regulate across the board? Or should we be simply looking at one situation: married couple, gametes donated, close friend surrogate? Or do we simply say regulate where we do not restrict, prohibit or prejudice against any particular group?

Professor FRAME: I am just glad that I am not a legislator. It is complicated enough without introducing donated gametes and, to lay that over the top, to my mind could make the problems worse. So, if you proposed in the legislation that it is just the commissioning couple and the surrogate—I do not know that you could really say that there has to be a family relationship but it is the best way of ensuring altruism—then I think that would be a good thing to do. Again, I might not like it and I might not want to see it happen, but I think for the good governance of New South Wales that is what I would rather see.

The Hon. DAVID CLARKE: If there were regulation, what would your attitude be to enforceable contracts for surrogacy? For instance, the situation could arise where a genetic birth mother could be forced to hand over her child to a commissioning parent with no genetic relationship to the child. What would your attitude be to enforceable contracts?

Professor FRAME: I would not support enforceable contracts. I think they are blunt instruments. They do not care for the people who are involved. There are all sorts of factors. We know about the case of what happens when the commissioning couple do not want the child: "The child is disabled; this is not what we thought we were getting" and therefore declined to take the child. In my book I mention one particular case of a little girl in America who nobody wanted until she was three. The State almost had to say to the commissioning couple, "Well, she's yours, you take the responsibility for the child." If we agree that we cannot predict how women will feel about relinquishing children in surrogacy arrangements, then you cannot say it was informed consent. We do that in lots of things, but this is so grave and significant that I do not think either would want them at all. I think they are a terrible idea, quite frankly.

The Hon. DAVID CLARKE: You have been associated with a hospital that provides surrogacy services. Do you believe that medical practitioners should have a right to conscientious objection? Many people would assume that they should have, but in view of recent Victorian legislation we know that in the world in which we live, this new order, there is not an automatic right of conscientious objection for medical practitioners?

Professor FRAME: I said to people when I was bishop to the defence force, "If you do not like force, then do not join the defence force." All of these services are highly specialised medical procedures. If you have qualms about one, then it seems to me that you are better off not in that kind of area at all. You cannot cherry pick what bit of technology or procedure you like. In a country such as ours, yes, people should have the right to conscientiously object. Should they put themselves in a position where they need to? No.

The Hon. DAVID CLARKE: Except there could be a situation where, for instance, an uninformed nurse ends up in a hospital where these services have just been introduced and she could find herself having to make a choice?

Professor FRAME: Yes.

The Hon. DAVID CLARKE: I know you can say, "Look, don't go in there" but there could be situations where that is not the case?

Professor FRAME: Yes, I see the point you are making. Years ago a woman came to see me who was working in Goulburn and did not want to be involved in a needle exchange program for moral and ethical reasons. I went with her and we explained it to the supervisor. She was reallocated in her duties. I want there to be that right to conscientious objection, but I would like to think that we are in a society where we have professional people who do not put people in that position where they need to exercise that right. But the scenario you are setting does have a point.

The Hon. DAVID CLARKE: For instance a couple could come to a medical practitioner and ask for advice on how to go about entering into a surrogacy arrangement. That is a situation where—

Professor FRAME: I would throw them the phone book.

The Hon. DAVID CLARKE: Fine, except that under Victorian legislation that has just been passed in regard to abortion, they could not do that. They have to refer the person to a doctor who is prepared to carry out an abortion. We could have a situation where a medical practitioner could be forced under the law to provide medical advice on surrogacy services even though it is against his or her beliefs?

Professor FRAME: That would be a terrible thing—and would you get good advice from them anyway? That is the other side of it. As a principle I believe that people conscientiously should be able to say, "I can't participate in this".

The Hon. DAVID CLARKE: A final question because of time: Do you have any comments to make on commissioning parents being same-sex couples?

Professor FRAME: It would not matter whether it was surrogacy or any other arrangement; my father was my father despite all the things that he wasn't and some of the things that he was. I got some things from my father that I could not have got from anyone else but my father. I miss my father and I would have to say that I share almost Mr Meney's view entirely that people bring different things to parenting—men and women bring different things. The question he was asked about: is the operative factor love and care and compassion? Of course that is all there, but that is not the full sweep of our concern for children.

My father was brutal, he was cruel and he was unkind. Was he a good father? Probably not, but he was my dad and I looked to him for certain things and I got certain things from him, and a lot of what you are hearing today is Robert Frame speaking from the grave, because he has put a mark on me and he, in some sense—maybe in a bad way—helped me understand what it meant to be a man. But I do believe that children need the complementary care of mothers and fathers. So if we are going to have surrogacy do not then make it even more complicated by putting in another layer of potential complication on top of the ones I have already mentioned.

CHAIR: Thank you very much for coming today. I am not rushing you but, as you can see, we are very inquisitive about these issues and continue to go on and on. We sent you some questions on notice, which I acknowledge you have not had a lot of time to work on, but the Committee would appreciate it if you do get time to work on those questions for us, and the secretariat can communicate with you on that issue.

(The witness withdrew)

(Short adjournment)

BERNADETTE TOBIN, Director, Plunkett Centre for Ethics, sworn and examined:

CHAIR: Welcome to today's hearing and thank you for coming to talk to us today. We have issues in relation to broadcasting guidelines and communication with the Committee. 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. Dr Tobin, what is your occupation?

Dr TOBIN: I am Director of the Plunkett Centre for Ethics, which is a joint research centre of St Vincents Hospital and Australian Catholic University.

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

Dr TOBIN: I am appearing as Director of the Plunkett Centre for Ethics, so I am representing the centre.

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

Dr TOBIN: I am.

CHAIR: 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 do take questions on notice—and some of our questions have been very complex and not able to be fitted into the period of time so I am reinforcing this—we would ask that responses to the questions be forwarded to the secretariat by Monday 1 December. Would you like to start by making a short statement?

Dr TOBIN: I would like to say three things. I think that because surrogacy is ethically and socially controversial, any law will have an educative function. Any laws you pass will affect how people think about surrogacy, so I want to begin by congratulating the Parliament on taking its responsibilities seriously and having this inquiry. That is the first thing. The second thing is I think the fundamental issue is the best interests of the child. For a couple of decades now it is the primacy of that issue which has been enshrined in family law, adoption law and the law relating to the donation of gametes. My third point is that because that is the fundamental issue in my view, I respectfully suggest that the inquiry should be into all surrogacy—surrogacy in itself—rather than merely just commercial surrogacy or surrogacy motivated by altruism.

The Hon. DAVID CLARKE: I went through your submission and you refer to the United Nations Convention on the Rights of the Child and suggest that this could be in conflict with surrogacy. We had one person appearing before our Committee say that the UN Convention is not really relevant because it was written before surrogacy came on the scene. What would your response be to that?

Dr TOBIN: That is quite right, it was written before not just surrogacy but before a whole lot of these assisted reproductive technology arrangements came into play, and it was written before some of them were even anticipated. Nonetheless, I think it should be read in a way where the natural meanings of the words are taken seriously. Articles 7, 8 and 9 talk about rights of the child, which I think surrogacy of any kind threatens. That is my simple view: I think it is directly relevant. If I can just add to that—and it is something I perhaps should have said in my introductory remarks—I come from a centre that works out of the Catholic tradition but you probably know that that tradition is made up of both faith-based and reason-based considerations. Reason-based just means open to the rational assessment of anyone. So my submission today comes out of the reason-based side of that tradition.

I do not expect you to agree with everything that I say but I hope that it will not be, as it were, dismissed as faith-based. So the connection between your question is that what I say really builds on what I think is very clearly there in the UN Convention on the Rights of the Child.

The Hon. DAVID CLARKE: So you have put the faith-based part aside and you have come to the views that you have on surrogacy as a result of your scientific investigation and research?

Dr TOBIN: My PhD is in philosophy. So what I am saying is that the considerations I put to you, which you may or may not agree with, are not faith-based. I am not going to be relying on what God does or does not think or says or did not write down. I am not going to be relying on any of that. I am just putting a few ideas that we can differ on but can be assessed just as a matter of our reason.

The Hon. DAVID CLARKE: What is your attitude to enforceable contracts where, for instance, you could have a birth mother, the generic birth mother being forced to give up her child to a commissioning person who has no genetic relationship whatsoever to the child?

Dr TOBIN: My view about those contracts is that they should not be enforceable, and this flows from my view, which is that the rights of a child are paramount and therefore there are a lot of consequences with respect to legislation about surrogacy that flow from that principle, and one is that any contract is meant to be unenforceable.

The Hon. DAVID CLARKE: In your submission there is a statement by you, which I have been putting to others, where you say, "Research has increasingly shown 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." You say that that is based on research. One or two people have suggested that the research does not exactly show that and there is some confusion. You are quite certain in your mind from your research that there is a growing body of research that shows this to be the case?

Dr TOBIN: You will note in my submission that I reference that to the work of another contributor in this debate. She has done the research and she has in her article the references. I do not know that research first-hand and I do not pretend to know it. It is a matter of empirical inquiry and I think we are early days at the moment in that kind of empirical research. I do not know that, but I do take seriously the point that Margot Somerville makes, which is that as our knowledge of genes and their function with the environment develops it looks as though some are activated by some kinds of parenting and some are activated by other kinds of parenting. But I just take her word on that and she has taken the word of scientists who have done the first-hand work.

So that is all empirical and I am no expert on that at all. My submission really is not relying on empirical research; that is not my contribution to your thinking and your deliberation. Mine comes from the kind of normative side of philosophy.

The Hon. JOHN AJAKA: In today's society, as opposed to 50 years ago or 100 years ago, the reality is that children today, notwithstanding their age, are raised by a married couple who are the father and mother of the child; a de facto couple who are the mother and father of the child; the father of the child with another female partner; a mother of the child with a male partner; the mother only; the father only; a parent and a grandparent; a grandparent only; a sibling; an aunt; an uncle; a family friend; either a gay or lesbian person or a gay or lesbian couple; then we get into either a religious organisation, which are many and varied; a community organisation, which are many and varied; or one of the government institutions.

Is it not the fact that to simply say that on average the research shows that it is a better environment for a child to be raised by a married heterosexual couple who are the mother and a father, is that really still a correct statement to make in today's society?

Dr TOBIN: I do not make that statement. Lots of those social facts that you draw our attention to are evidence of the fact that all kinds of people can parent wonderfully well; all kinds of people can be devoted, willing, committed, wise and humane in parenting. That is very clear and it is clear of same-sex couples, and it is clear of single parents. My point is a different one. It is that the best interests of the child are to be brought into being and gestated, born and raised by its biological father and its biological mother.

There are occasions when something goes so wrong; there is an emergency or a tragedy where it is in that child's best interests to be raised by someone else or by another couple but that ought to be, in my view, the institutional arrangement, parents to children, that the society protects, enhances, and endorses and does not kind of facilitate or legitimate. I do understand that there are a lot of people with interests and wishes here in this matter and I do understand that there are people who will wish to have surrogacy arrangements and who desperately want to have children. My point is that I think that the rights of the child and the best interests of the child to be born into and raised by its biological parents should be the centre point.

The Hon. JOHN AJAKA: I understand that. The dilemma I face is that since we are not outlawing surrogacy; since we are not turning it into a criminal act or even an illegal act and it is occurring—the world is getting closer and people can go interstate or overseas—surely it is in the best interests of the child that we ensure that proper regulation is in place and that the best interest of the child is paramount in the circumstances and looked after rather than simply leaving it as it is, as a laissez-faire situation and let us hope that the best. That is my concern.

Dr TOBIN: I understand that point of view. I think that what you have to place against that is the reality that the law has an educational function. I teach medical students, nursing students and other students and they tell me what they think about what is right and wrong, often by reference to the law. I think you have to take into consideration what a law that legimates these arrangements and not those arrangements, what effect that is likely to have on the interests of the child to be brought up by its biological parents, the effect on the women involved and the effect on things like our concepts of mother and father and parenting. I do not dismiss what you say but I think there are other things that play in this discussion.

The Hon. JOHN AJAKA: I have one last question because time is limited, sadly. If we do regulate for what has been mooted as the married couple, husband and wife heterosexual couple; they donate all of the gamut, then you have the surrogate, who is a close friend. By not regulating for any other circumstance, which is clearly occurring with same-sex couples, et cetera, do we not then prejudice those children in some way by suddenly saying that they are an inferior class or that they are not as acceptable? Do we not tend to label them, if I can use that horrible term? Is that also not acting in the best interests of the child by excluding those classes?

Dr TOBIN: I reckon that any time we legislate as a community or draw up any policy it will have some good effects and some bad effects and so you think about not legislating or legislating differently and that will have some good effects and some bad effects. In the end we have to take a view about which set of good effect and bad effects we prefer. I accept what you say, I see the force of it, but I think it is a partial view of what you have got to take into consideration.

The Hon. GREG DONNELLY: We provided you with some questions on notice that you may have had an opportunity to reflect on. Question No. 4 relates to the dichotomy between private and public morality and the State's consideration in that. In your submission you argue that surrogacy is not purely a matter of private morality but should be seen as part of the responsibility of the State to have a view and perhaps ultimately legislate on. Can you elaborate on that point?

Dr TOBIN: What I had in mind there is the primacy of the best interests of the child, which, I think, is a matter of public morality and then an issue such as the significance of surrogacy for the surrogate mother. As you would know—and no doubt people have put to you—there is great debate about whether it is inherently exploitative, whether she accepts it or not. We ought to recognise that the rights of a child is a matter of public morality and it is the responsibility of the State to protect the interests of children but that other matter of whether these are intrinsic exploiters of a demeaning relationship for the surrogate mother, that is much more debatable as to whether the law and the Parliament should get involved in that matter. Say it had no bearing on the to-be-born child and we were only thinking about whether these are exploitative of the surrogate mother, I think it would be much more debatable as to whether the Parliament should get involved in that question or not. That is the kind of contrast that I had in mind.

The Hon. GREG DONNELLY: We have heard throughout the hearing the term that it is of paramount importance that it is in "the best interest of the child". Clearly there are a variety of views about what should be the underpinning principles about what is in the best interests of the child. Can you give your reflections on the notion of what is in the best interests of the child?

Dr TOBIN: I understand what you mean and I have spent a lot of years of my life working on National Health and Medical Research Council guidelines so we spent a lot of time thinking about that. One of the things that you notice is that people tend to use that phrase to label whatever arrangement they prefer. I have a simple view of it, that is, if you look at Articles 7, 8 and 9 of the United Nations Convention on the Rights of a Child, you get a pretty substantial sense of what it means in this context: the child's right and need to know and be cared for by its parents; its right to identity, including family relations; and the right not to be separated from its parents unless in the exceptional cases it is in the child's best interests. That is the kind of thing that I had in mind.

The Hon. GREG DONNELLY: Question No. 9 relates to the possible conflict of interest between the fertility industry, as one interested party in this issue. Could you elaborate on that point?

Dr TOBIN: Yes, there are three points to note there. As the market penetrates the practice of medicine, the medical colleges are really trying to address the matter of conflict of interest. The hardest thing they are finding is to get doctors to accept that there is a problem here, that is, to realise that their prescribing habits are influenced by their relationships with industry; they just do not see it. That is the first point. The second point is that I worked with a lot of people in the fertility industry in drawing up guidelines such as those and I have got great respect for them. Some of the best parts of these guidelines come from people working in the fertility industry. It would be irresponsible not to note that as an industry they do stand to gain by permissive laws, which facilitate surrogacy.

The third thing to say is that people working in the fertility industry, I am sure they come into contact with the individual really hard case of someone who desperately wants to have a baby and cannot do so. It must be hard for them not to be influenced by those really hard cases and be opposed to us putting obstacles in their way, but I do will urge you, in your inquiry, to have a think about surrogacy in a wider context. There is a book called *Women As Worms*—I will get the name of the author for you—and she shows what the international scene is with respect to surrogacy and the picture is very clear: Commissioning couples come from the rich countries and the surrogate mothers come from the poor countries. When you look wider than that, you really get a very different view, I think, of what we are considering here. They are the three things in relation to that conflict of interest.

Ms SYLVIA HALE: Dr Tobin, just coming back to the question of the United Nations convention, you quote that the child should have the right to know and be cared for by his or her parents. Clearly when the convention was framed, the biological parents were the only ones that the framers were aware of. You seem to make the jump therefore that were those framers living or working today, they would make that similar assumption—that the biological parents rather than the social parents are the group whose needs are being catered for by this convention. Is this not a way of interpreting the law, as it were, that is very static rather than interpreting it in a way that takes into account the changing circumstances?

Dr TOBIN: I do not know what the framers would now think and I am not really making that assumption. My thought was that this is the natural meaning of the terms and they ought to be read in their most obvious, everyday, common or garden sense. That was my thought. I remember 25 years ago there were debates about who should get access to in vitro fertilisation, and it was said that that was only infertile people. Really as a direct result of that excluding of access to some people, a term was invented—social infertility. But in philosophy, that is winning the argument by stipulation. It is just inventing a term in order to make your case by that term.

Ms SYLVIA HALE: Yes.

Dr TOBIN: You can see that going on in this debate too. There are attempts to say that we ought to distinguish between biological and social, et cetera. My view is not that we should just stick with what was brought in during the 1970s when that convention was framed, but that we should read it in a natural way, using the words in their ordinary, everyday sense.

Ms SYLVIA HALE: But the difficulty in reading it in what you say is the natural way—

Dr TOBIN: A natural way.

Ms SYLVIA HALE: —is to really straitjacket people's ability to think about these issues as they apply to current circumstances.

Dr TOBIN: Yes.

Ms SYLVIA HALE: But I certainly agree with your argument by stipulation. Over the last few days we have had in this discussion the use of phrases like "genetic bewilderment", and I find the particularly unhelpful because they seem to assume a given position rather than to argue for that position or rationally maintain it.

Dr TOBIN: Yes. We are in furious agreement on how argument by stipulation does not really help and you want to get behind it. I think there is something very odd about the notion that a child might have two fathers and one mother. I think it does damage not just to social institutions but to the actual concepts. I think it is a way of trying to bring about a change, which is an arguable one and in which people obviously believe, but by doing it just by a kind of verbal trick. It is clear to you, obviously, that the centre point of my position is that the law should not do anything to undermine primary biological relationships.

Ms SYLVIA HALE: Perhaps what I am conscious of is that it was a self-evident truth in the 1920s, 1930s and up to the 1960s that children of single mothers who were born out of wedlock were far better served by their removal from that mother.

Dr TOBIN: Yes.

Ms SYLVIA HALE: That was the conventional wisdom at the time.

Dr TOBIN: Yes.

Ms SYLVIA HALE: I just worry that some of us is equally trapped in the conventional wisdom of our own time.

Dr TOBIN: I think it is a very good cautionary point to make—that what we think ought to be the case is just what is conventionally thought. Yes, I think that is quite right. But we have learned, have we not, about the significance of these biological bonds from our experience with adoption and our experience with the stolen children, although I know it is very different in many ways. The New South Wales Parliament did a terrific thing a couple of years ago by insisting on bringing to an end the anonymous donation of gametes. It was a terrifically sensible thing for it to have done. You may be right about my view that it is merely a rather old conventional view. It does not seem that way to me. But I think it is a good question to ask me.

CHAIR: Thank you. Extending on what Ms Sylvia Hale was saying, we are having lots of persons informing us from any side—this is not a side issue—about history and reality in relation to family law. It is not all that long ago approximately in the 1960s, and you have touched on this, when young women who became pregnant in their teenage years were forced to go to institutions and do housework and deliver the children up at the very end. That was perceived as a norm because there was shame and the family norm was that you got out of the lives of the family for a period of time. While we are talking about the history of family norms, and a lot of people have come to us to tell us what is a family norm one way or the other, I have difficulty with interpretations of history. It is a bit like what you were speaking about. I am not supposed to make comments. That was supposed to be a question.

Ms SYLVIA HALE: It is an observation.

Dr TOBIN: I think it is truly a difficult thing to discern whether one's view is well founded or is merely a conventional one or a convention of the day. I think that people are often congratulated for the courage of their views, and when you step back and see, they are really expressing what is in the air. I take the point that you are making, but it does seem to me that there is a kind of undeniable need for children not just to know of, but to know, their biological parents. I mentioned a couple of scenarios where I thought we saw that. I think that is the natural meaning of the United Nations convention, which is calling on us to protect that. I know these surrogate arrangements are in place, but my view is that it would be a great pity if New South Wales did anything which encouraged, and by facilitating encouraged, an increase in these arrangements because of what I am calling an injustice to the child.

CHAIR: I would like to thank you very much for coming today. Do you have anything further to say?

Dr TOBIN: I would like to see two things. As you can see, I am not very much in favour of the law doing anything to encourage surrogacy, but the thing that I would say, if you were to ask me what you should keep in mind if you are going to do it, is that the law should not do anything that in any way is less than forthright about the origins of that child, or that in any way obstructs or confuses the child's capacity to find out at every point. In that other paper which you thought came from me but did not, there was a discussion about what birth certificates should state. If you are going to legislate in this area, I certainly hope that you will insist that what is on a birth certificate really tells the whole story. I understand the adults involved. I truly understand

that they might not want the whole story told, but if you make the child's welfare primary, I very much hope that you will not be party to anything that confuses that.

The Hon. JOHN AJAKA: So it should indicate genetic parent, birth mother—

Dr TOBIN: Everything, everybody.

Ms SYLVIA HALE: It is one thing to put it on the birth certificate, but a birth certificate needs to be produced in a whole variety of circumstances which may cause a person who looks at the birth certificate to view the owner of it as being odd, different, or separate.

Dr TOBIN: Yes.

Ms SYLVIA HALE: Rather than being publicly available, should there be an indication on the birth certificate that additional information about the child's origins can be obtained by approaching X body? I think that would preserve the child's privacy to a greater extent.

CHAIR: When they go to school, the birth certificates are taken everywhere now—not like us, when everyone trusted that we were just the products of something or other. These days they are required even to open a bank account.

The Hon. JOHN AJAKA: There is a short form extract birth certificate and you can have the full form extract that only the child can get.

Dr TOBIN: We have got that. I can see the problem that you are raising, but again I think my view is that you have to take the pros and cons of doing it that way as against the pros and cons of doing it the other way, with the full story showing. My experience with people who have something that they do not want to make central is that they promise it will be there at the very bottom, but each time round it gets lost; or if it is not the next time, it is the next time after that. It just drops off. If there are people who care enough about it out there, they will say, "Hang on a minute, we did agree that it should be there", and that is all right. But if they are not, they are not. I can see that you have to balance privacy against truthfulness for the child, but I would go for the whole story, although I can see the privacy problems with what I am saying.

CHAIR: It is a protect-the-child issue. But you have another point?

Dr TOBIN: I will just say two things about conscientious objection. One, the National Health and Medical Research Council [NHMRC] guidelines for 1996, 2004 and 2007 all have a very robust conscientious objection clause—very robust—and a no-disadvantage clause. I hope very much that you would build that back in. But the other thing I was going to say is something that I think is really very important. My favourite example of conscientious objection is what happened to me when I went to a doctor and told him that one pierced ear is always fine, but that the other one always gets infected. I asked if he could help me to sort it out.

He just said no, he would not, and he could not. He said, "These are sites of infection. They are potentially very dangerous. You should take the ear-rings out and let the hole close up." I was very struck by his professional ethic. It was done in a perfectly friendly kind of way. I think that, as a society, there is an enormous public interest in having doctors with their judgement about how best things should take place in the therapeutic realm and in them using their judgement about what is therapeutic and what is not. There is a very great public interest in protecting that.

I think that the two reasons are, one, because it is there and it is robust and, two, because society has an interest in having doctors use their judgement in their relationships with their patients. I also hope that, if you are going to legislate, you build that in, in robust league.

Ms SYLVIA HALE: But there is an equal interest in having the patient refuse to accept that advice, and continue to wear the ear-ring.

Dr TOBIN: As you can see!

CHAIR: Thank you very much indeed for coming. It has been very useful to us, so thank you. You were sent some questions on notice. If you do have time, we would appreciate some answers back to those that

we did not touch on. Any further information you may think would be of use to us, we would be happy to receive that too. We have extended the time frame for this inquiry. We will be having public hearings again in March. Thank you very much indeed.

Dr TOBIN: Thank you very much.

(The witness withdrew)

DAMIEN FRANCIS TUDEHOPE, Legal Representative, Family Voice Australia, sworn and examined:

CHAIR: Good afternoon and welcome. We are continually running late with the inquiry because of the interest of the Committee in what the participants have for us. I will not go through the formal processes. There are broadcasting guidelines and we have a system for delivery of messages. If you want to give something to the Committee, the secretariat will look after that. Our Committee hearings are not intended to provide a forum for people to make adverse reflections upon others, even though there is parliamentary privilege. If you have a mobile phone, some of them interfere with our Hansard recordings, so if you would not mind, could you please turn off mobile phones. Not all of them do it, but some do. Are you familiar with the terms of reference of this inquiry?

Mr TUDEHOPE: I am.

CHAIR: 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—and some of our questions have been quite detailed and complex, so we are happy if you say you will take those on notice or get back to us—could the responses to those questions be returned to us by Monday 1 December 2008? The secretariat will communicate with you about specific questions before then.

Mr TUDEHOPE: Thank you.

CHAIR: Would you like to make a short statement?

Mr TUDEHOPE: Yes, I would. Thank you for the opportunity of addressing you and making a submission. I must say at the outset that I am the spokesperson for the organisation. The primary person responsible for the drafting of the submission is resident in Western Australia, a fellow called Richard Egan, and Richard Egan and I have worked very closely together over many years in relation to this material, so although I speak to this material, I am not the author of it.

Primarily you have heard from people who are, in my view, much more qualified to give evidence on this issue. In fact I just had the opportunity of listening to Bernadette Tobin, who is very articulate and reasons well the philosophical underpinning relating to a lot of the arguments regarding surrogacy. I suppose organisations like mine generally deal with lobbying type issues and probably act at a level above the philosophical material, which does lobby parliaments and groups like yours for the purposes of trying to get the best legislative outcome.

Our primary position is that there should be no change to the law. I think that emerges from our material. We would say that the provision as it currently exists at section 45 of the Assisted Reproductive Technology Act is an appropriate provision and is one which probably best reflects what we would say is the current community attitude. I am sure people will disagree with that, but we would say that on balance, at the end of this inquiry, you would come to the view that community attitude is that the community is best served by maintaining the current prohibition.

You have to ask yourself at the end of the day: Why are we having this inquiry? Ten years ago a lot of this material was debated, whether it be the so-called notion of altruistic surrogacy—and I note the discussion in relation to giving things labels—or commercial surrogacy, which were both concepts which were generally thought of by the community as being inappropriate. What has changed? Has anything changed in the community at large to say that it is now appropriate? We would say that the thinking which applied at the time in terms of what is in the best interests of children and whether this was something being driven by adults who were seeking to use women as a commodity and to epitomise the position of women as merely gestational vehicles for children—nothing has changed in relation to those positions and, if you were to balance the best interests of children against the needs of infertile couples, the best interests of children would win and the dignity of human beings would be maintained.

I am sure that you have heard lots of really heart-tugging stories in relation to people who are infertile who have been able to use surrogacy or artificial insemination or some other artificial reproductive technique and become very loving and wonderful parents to their children. Any comments that I make would be premised on the fact that I would not criticise those parents for one moment, I am sure that they are parents who love their children very much. But we would think that overwhelmingly, if you look at the interests of the children—and

you will probably ask what is my interpretation of the best interests of children, so if you look at what I perceive as the best interests of children—I would say that, if there is an obligation to look after their interests, you would reject any suggestion that surrogacy ought be something that we introduce or remove prohibition from and introduce a whole regime of laws which would be tested by courts for the purposes of, I suppose, finding the nuances of the law, whether in fact we can discriminate against particular people in relation to who is able to avail themselves as surrogate parents and the like. Our primary position, which I will not move away from, is that this Committee and this Parliament should take the view that the legislation as it currently stands, and the prohibition which exists within the Assisted Reproductive Technology Act, ought remain.

The Hon. GREG DONNELLY: Earlier we provided to you some questions on notice, which you may have had a chance to look at and give some consideration to. Could I take you to question 9, which makes reference to your submission, specifically at page 6, where you note that the Family Court of Australia in interpreting the Family Law Act 1975 would override State laws relating to parenting orders in surrogacy arrangements because it gives paramount consideration to the best interests of the child. Could you explain why this would be the case in practice, as you understand the law?

Mr TUDEHOPE: I would probably move away from that because, I think as late as last month and just after this document had been prepared, there have now been amendments to the Family Law Act in relation to parenting orders which would in fact override some of that material. Certainly the Family Law Act does encompass concepts of best interests of children in making its decisions within its ambit but, as a result of the amendments which have been introduced in relation to the Family Law Act, it would take into account the prevailing State law in relation to parenting.

The Hon. GREG DONNELLY: With regard to question 5, referring to page 2 of your submission, surrogacy contracts may include a commitment by the gestational mother to abort the pregnancy in the event of a prenatal diagnosis of disability, imperfection or non-preferred sex. I gather you are raising that as a potential cause of difficulty and conflict in the whole surrogacy arrangement. Are they issues that you are aware have occurred?

Mr TUDEHOPE: I was interested if that question were to arise because there was a specific case in 2001 where there was a surrogacy arrangement relating to a couple in the United States who commissioned a surrogate mother in the United Kingdom and she in fact became pregnant with twins. The couple in the United States said that it was a term of the contractual agreement which existed between them that if she in fact became pregnant with twins or in fact there was any disability relating to the child who was about to be born she would abort the child. There was a denial of that by the woman in England—I can give you a report of the case if you need it—and there was a court case and effectively the couple in the United States walked away from the agreement, but it was said to be a term of the agreement that if there was a disability or some other issue which arose relating to the term of the contract then the surrogate mother would abort.

The Hon. GREG DONNELLY: Could you comment on the issue of the best interest of the child, which is something we have had various witnesses make comment on. Could you express your view?

Mr TUDEHOPE: I would certainly adopt exactly what I heard Bernadette Tobin say earlier, that I think the starting point is that you look at primarily what the United Nations says and the need for children to have a continuing relationship with their biological parents and to know those parents. We say that in surrogacy arrangements the bond is contractually broken where the mother of the child who gives birth to the child goes into a contractual arrangement before the child is conceived to deny the child that relationship with her. We would say that that is fundamentally not in the best interests of the children. If you ask how do I get to that position I would say there is a lot of material, and we looked at things like belongingness and how that is played out in relation to adoption. There are people better versed in this than me. You have a submission from an organisation called VANISH Inc, which deals with their experience of the breakdown of the bond in relation to children of adopting parents. Generally those submissions are made with the best interests of children in mind after the birth of the child and in many respects is unavoidable, but where you deliberately decide that you are going to deprive a child of a relationship with the person who has given nurture to that child for the first nine months of its life appears to me to be doing enormous damage and in fact almost, in my submission, would be an abuse of that child.

The material you would see from TangledWebs I again would submit to you is very powerful material. I think a lot of the material they have dealt with relates to artificial insemination donors, but some of the material points to the fact that there exists a bond, and then the dramas in adult life that those children go

through when they find out the circumstances of their birth and the fact that they do not have a relationship with the person who nurtured them in that period of time. I would say those people are much better qualified than me to talk about this, but in our view it would be overriding at the end of the day that the interests of the children are best served by making sure that they primarily have a relationship with the person who has nurtured them during the first nine months of their life.

Ms SYLVIA HALE: You asked what had changed in 10 years. Could I suggest that assisted reproductive technologies have become safer and more accessible; there is a greater preparedness of people to travel, whether it is to the Australian Capital Territory or overseas, in order to engage in some form of surrogacy; there is greater acceptance of it within the community; and there is greater understanding and acceptance by the community that children need to know their genetic inheritance. We have seen that in Victoria and Queensland there are moves to change the law and there has been the express desire for uniformity. Taking all those factors into account, do you think that means that there needs to be clarification in this State of laws in relation to surrogacy?

Mr TUDEHOPE: All the things that you have just listed, I do not think they necessarily have changed in the last 10 years. I think they were existent at the time 10 years ago. I think there has been a greater level of, I suppose, agitation for people to have greater access to infertility techniques. I think we have moved away from, for example, the situation where you had access to infertility treatments for couples who are married or have been living together for two years, certainly in Victoria, to a situation where it is available to single sex people. In my view, what has changed is that there has been increased pressure from the homosexual groups. I think that is the big thing that has changed, and I will not resile from that. I think that is where the pressure has come from for this sort of legislation because the scientific material was available, but where the push has come from is the push for access.

Ms SYLVIA HALE: Even if, as you say, that is the source of pressure, that does not mean that that pressure is any less legitimate and that it does not create the need for the legislature to respond in some way rather than just bury its head in the sand.

Mr TUDEHOPE: I am not suggesting you should bury your head in the sand. I am suggesting that you should continue the current regime.

Ms SYLVIA HALE: So you think the status quo as it exists in this State is preferable to any more formal intervention in the process?

Mr TUDEHOPE: What I am suggesting to you is that the current regime for access to assisted infertility techniques is readily available to those people who should have access to it.

Ms SYLVIA HALE: I find one of the most interesting aspects of this inquiry is that people who are on different sides of the ideological divide seem to be united in the desire not to make any change. Some see the existing processes as giving flexibility and others see them as holding the fort, as it were, against change.

Mr TUDEHOPE: I have read a fair few of the submissions and some of the people who have made submissions do surprise me in some of the things that they have said. I would have thought that some would have been my ideological opponents.

The Hon. JOHN AJAKA: I want to start with a couple of propositions: Surrogacy exists. Commercial surrogacy is prohibited but altruistic surrogacy exists. Agreements exist; they are simply void, not enforceable. We have a system that exists, so we are not able to say it is prohibited. We start at that point, and we then have the new Family Law Act amendments coming in. I do not think they have been gazetted yet. Once they are gazetted, the law in its simplest form basically puts it all back onto the States and says the States must regulate and legislate for that, it is now their responsibility. We hear of situations where a husband and wife have entered into a surrogacy agreement, they have given evidence and they have the child. Then they tell us about what they consider to be an emotionally horrific situation for five to six years of having to go through, firstly, the Family Court for parental orders and, secondly, the adoption process where, in fact, they adopt what they consider to be their own child. You say we should not do anything; we should keep the status quo. I find that difficult when I hear these stories from people.

Mr TUDEHOPE: How do you solve the problem? I say solve the problem by fixing up the adoption process. Do not change this material; fix up the adoption process.

The Hon. JOHN AJAKA: One of the suggestions to solve it was to bring in a piece of legislation that specifically applies to the surrogacy situation where there is no need for the parents to adopt the child. Of course, there have to be checks and balances and there have to be criteria. If we are going to wait for the Federal Government we will probably wait another 20 or 30 years. Maybe by bringing in such legislation we alleviate some of the immediate commercial concerns. But to say fix the adoption system, that is not happening.

Mr TUDEHOPE: You have to ask yourself why it is not happening. In many respects the adoption procedure you have got really does concentrate on making sure that the interests of the child are protected. In many respects that is what this is all about. If you enter into a contract at the beginning of the day that you are going to hand over your child after you give birth to it, in many respects you have ignored straight off from the beginning any outside involvement in relation to what is in the best—I understand what you are going to ask me: Can we not write it into the legislation?

The Hon. JOHN AJAKA: No, I was not going to argue that.

Mr TUDEHOPE: Lawyers should never do that. In any event, adoption really focuses on making sure that the interests of the children are properly looked after. I have some very direct experience in relation to that. I know specifically in relation to my own sister who had to adopt two children the long and tedious process that she went through to adopt children. She now has a wonderful relationship with the birth parents of that child and the children have a good relationship. In many respects it was born of the fact that they went through a very difficult process to adopt and that they set in place those situations very early in the piece.

The Hon. JOHN AJAKA: I understand that. To me, adoption is a completely separate issue to surrogacy. They are two completely separate things, as far as I am concerned.

Mr TUDEHOPE: I agree with you.

The Hon. JOHN AJAKA: Accepting that, is it not best that there should be a specific piece of legislation for surrogacy as opposed to adoption, which has its own specific piece of legislation? With surrogacy, there could be a situation where within a time period, a cooling-off period prior or subsequent to birth, the matter immediately can be brought before a Supreme Court judge who can look at the best interests of the child and make the orders, where there is no longer a waiting period for adoption or it is in conflict with the adoption process. The argument will be: Why should people adopting have to wait for what is occurring on the surrogacy level? Surely they are two separate things.

Mr TUDEHOPE: I have a fundamental difficulty with the surrogacy arrangement. I think it demeans women. I think the mere concept of surrogacy is not in itself in the best interests of children because it effectively before the child is conceived requires the child to be removed from the gestational parent.

The Hon. JOHN AJAKA: Our problem is that surrogacy exists and we now have to legislate for it.

The Hon. DAVID CLARKE: Mr Tudehope, it has been suggested, including by the last witness Professor Tobin, that surrogacy contravenes the United Nations Convention on the Rights of the Child. As a lawyer who is recognised in the legal community as one who has particular expertise in legislative interpretation, what is your view on that?

Mr TUDEHOPE: I appeared in the McBain case, which was the case involving the Sundberg decision in Victoria where access was given to infertility treatment by Dr McBain. In many respects, in my view, the decision of His Honour Mr Justice Sundberg was wrong because it contravened this particular provision relating to the rights of the child. But that was never, ever litigated before the High Court because there were jurisdictional issues that had the effect of getting rid of the case. Coming back to your question, fundamentally, in my view, the United Nations has a convention that has been ratified by Australia. If Australia no longer wants to be a party to that convention, then there are ways that it should do it. It should move on to say that the law in Australia no longer recognises that the convention applies and that Australia should not be bound by it. But we are bound by a convention that we have entered into.

The Hon. DAVID CLARKE: You agree with Professor Tobin that the wording in that convention, even though it was written years before surrogacy became known, in its normal understanding applies to this situation?

Mr TUDEHOPE: I absolutely agree with Professor Tobin.

The Hon. DAVID CLARKE: I want to ask a couple of other quick questions. What is your view on conscientious objection—for example, medical practitioners or nurses who may find themselves confronted by this situation? I would have thought that would have been a given, but in view of the recent legislation in Victoria I am not so sure. Do you have a view on that issue?

Mr TUDEHOPE: I would have thought that conscientious objection is something that is absolutely fundamental for the proper running of a medical practice. Just in relation to the freedom of medical practitioners, any medical practitioner who was not given an opportunity of saying, "In conscience I cannot be involved in that sort of practice" ought to be given the ability to be able to refuse to apply that treatment. In my view, though, I thought that in one sense conscientious objection should be also available to donors. Say there is a situation where a donor or someone said, for example, "I do not want my child placed with a homosexual couple or with a single person." Does that person have a right in conscientious objection to say "That is not the family situation that I want my child to be involved in"? I think there is a role to play for conscientious objection in those circumstances as well, without a person necessarily being vilified for taking that decision. It is a decision that they may well take in conscience, which they should be respected for.

The Hon. DAVID CLARKE: Do you have a view on enforceable contracts in surrogacy arrangements? I am thinking of a situation where a birth mother is being forced to give up her child. She has reconsidered the issue and is being forced to give up the child to a commissioning person who has no genetic relationship to the child. If that were to occur, that would appear to me to be an infamous situation.

Mr TUDEHOPE: It has occurred in the United States. In fact, it arose from one of the questions that was put to me. There was a couple that took action in relation to a surrogate. If I could, I will elaborate on a particular case where that arose. It involved a United States couple. If you do not mind my reading this material, there was a lady called Judy Stiver, a Michigan housewife, who agreed to bear a child for Alexander Malahoff—the names are unimportant—and there was a fee of $10,000 payable. In the United States there is no prohibition in relation to commercial surrogacy. All went well until the child was born and it was discovered that the child had suffered from microcephaly, a condition whereby a child has an abnormally small head and often turns out to be mentally retarded. Mr Malahoff no longer wanted the child and he told the hospital to withhold treatment. Mrs Stiver also rejected the child, saying that there had been no maternal bonding. The hospital went to court and won permission to care for the child and the Michigan Department of Social Services fostered the child out.

This was not the end of the matter, as Malahoff asserted that he could not be the father. Mr Malahoff and Mrs Stiver then undertook blood tests to establish paternity before appearing on the Phil Donahue television talk show to discuss the situation where it was dramatically revealed that Mr Stiver was in fact the father. The husband of the surrogate mother was in fact the father of the child. It emerged that while Mrs Stiver was contractually obliged to abstain from intercourse for some time after insemination, she had not received any instruction about intercourse prior to insemination. The Stivers accepted that the child was their own. Mr Malahoff reacted by suing Stiver for not producing the child that he had contracted her services for. Mrs Stiver countered by suing their doctor, the lawyer and the psychiatrist for not advising properly about the proper time to be having sex. They also sued Malahoff for invading the privacy by making the matter public and alleged that the child's illness was caused by a virus transmitted by Malahoff's sperm. In many respects what you say, Mr Clark, is right. The litigation minefield that can arise out of this material, and this is clearly a pretty tough case, shows the extent to which these sort of cases can blow out.

The Hon. DAVID CLARKE: What is your view on a commissioning couple being a same-sex couple?

Mr TUDEHOPE: My view would be that is governed by what is in the best interests of children. I think that there is material available that suggests children are entitled to have a relationship with both a father and mother. There is plenty of literature available that we are emerging into a community that has lots of fatherless children and the difficulties with those. There is plenty of literature that perhaps goes the other way; I admit that that exists. In my submission, that would be discredited literature. At the end of the day I would say that it is in the interests of children, the best interests of children, to have a relationship with a father and a mother.

The Hon. JOHN AJAKA: Mark's case is on this point, is it not?

Mr TUDEHOPE: Yes.

CHAIR: Thank you for attending today. Your submission and information are very important to this inquiry. I appreciate that you were sent questions on notice. The Committee would appreciate it if you get them back to us? The secretariat will work with you on that specific issue.

Mr TUDEHOPE: Yes.

(The witness withdrew)

(Luncheon adjournment)

TIMOTHY CANNON, Research Officer, Australian Family Association, sworn and examined:

CHAIR: Thank you for attending the public hearing of the Standing Committee on Law and Justice Inquiry into Legislation on Altruistic Surrogacy in New South Wales. We have some guidelines in relation to broadcasting, of which the media is aware, and there is a document posted on the door if you wish to read it. If you have any messages or documents for the Committee, the secretariat will assist in that. Committee hearings are not intended to provide a forum for people to make adverse reflections about others. The protection afforded to committee witnesses under parliamentary privilege should not be abused during these hearings. I therefore request that witnesses avoid mentioning other individuals unless it is absolutely essential to address the terms of reference. I ask that you please turn off any mobile phone you may have as some mobile telephones interfere with the recording equipment. In what capacity are you appearing before the Committee? Are you appearing as an individual or as a representative of an organisation?

Mr CANNON: As a representative.

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

Mr CANNON: I am.

CHAIR: If you consider at any stage that certain evidence you wish to give the Committee or documents you may wish to tender should be heard or seen only by the Committee, please indicate that at the time and the Committee will consider your request. Also, if you take any questions on notice, the Committee would appreciate if the responses to those questions were sent back to the secretariat by Monday 1 December. The reason we stress that is that we have only a short period of time in which to conduct this very complex inquiry and some of our questions are very complicated. If you wish to take questions on notice, please say so. At the conclusion of your evidence the secretariat will advise you of the questions you have taken on notice.

Mr CANNON: Sure.

CHAIR: Would you care to make a short opening statement?

Mr CANNON: I will just make a brief one. The Australian Family Association opposes the idea of surrogacy in principle based on the way in which surrogacy arrangements infringe upon the rights and interests of children. We understand that the desire to have children is widely held and the inability to have children is a very difficult circumstance to have to deal with. However, we believe that the solution of surrogacy unfortunately substitutes one evil, which is the inability to conceive or bear children, with another evil, which is to sever at a fundamental level some very important connections between the child and the parents, particularly the child and the mother. Also, I suppose in a more secondary way because of the way that it impacts on the relationship between children and parents, it has a general detrimental effect on the integrity and stability of the family, which we hold to be the fundamental unit of society. Therefore, we think it should be protected. We understand that surrogacy involves very close personal issues and relates to personal relationships, and that is an area in which the State I suppose is rightly reluctant to intervene. We respect people's individual liberty, however, we think the State has responsibility in this area because surrogacy affects the rights of children and we see that where the rights and interests of children are compromised then the State has a special responsibility to protect those rights and interests.

CHAIR: Could you tell us a bit about your organisation, the Australian Family Association, and the work it does in relation to the issue of surrogacy?

Mr CANNON: We do not do a great deal of work in particular in relation to surrogacy other than to look at the way in which it impacts on the family in Australia on a policy level. We are an interest group in looking at that on a policy level. So, in some respects we are a lobby group. So, we take an interest in expressing the views of the people we represent, our membership. We believe we are representative of more than just our membership; there is a large base in Australian society who agree with us with the traditional family of a mother, a father and children naturally conceived.

The Hon. JOHN AJAKA: Can you give us an idea of your membership, how many and where they come from?

Mr CANNON: I am sorry, I cannot at the moment, but I could let you know.

Ms SYLVIA HALE: Would you take that on notice?

Mr CANNON: Sure.

The Hon. JOHN AJAKA: You said that you also represent groups for which you lobby. Could you also give us an indication of those groups and how many there are? Will you take that on notice as well?

Mr CANNON: Yes.

CHAIR: Can you let us know what other issues your organisation works on in this way?

Mr CANNON: Basically anything that is likely to have an impact on the family at a social level with a particular interest in public policy that impacts on the family.

The Hon. DAVID CLARKE: The Committee has heard some evidence during this inquiry that suggests that surrogacy is in breach of the United Nations Convention on the Rights of the Child, although we heard from a witness who said that that Convention no longer is relevant because surrogacy was not around in the days when it was drafted. Does your organisation have a view on that issue?

Mr CANNON: We do have a view, that is, that it does breach the United Nations Convention on the Rights of the Child. Just elaborating a little on what our submission said, article 7.1 of the Convention talks about the child's right to know and be cared for by his or her parents. Surrogacy first of all complicates the question of who is a child's parent. The prospect of regulating surrogacy would mean that the State assumes a responsibility to nominate who actually are a child's parents. I would agree that at the time the Convention was drafted that question of who are a child's parents was clearly obvious because children were not conceived in any other way than by natural conception. Unfortunately, surrogacy complicates and confuses the question of who are a child's parents, and particularly who is a child's mother. There are varying degrees in the way it does that. You could have a surrogate mother who bears the child and who is also the child's biological mother, but who has agreed to surrender the child to the parents who have commissioned the surrogacy. In that instance, the State has to decide who will be the child's mother. That is a question of law that the State is free to decide. I suppose it does so in issues of adoption, but we would suggest that by assuming the ability of questioning who is a child's mother at law raises serious questions for the child about who its mother really is. I believe that the presumption at the moment is that a child is deemed to be the child of the woman who bears the child.

The Hon. DAVID CLARKE: Arising out of that we have the question of enforceable contracts; that is, should a surrogate mother be entitled to enter into a contract before the birth of the child with a commissioning couple or individual for the transfer of that child? Let me give you this example: You could have a genetic birth mother give birth to a child and there be a contract that the child pass to a commissioning individual who has no genetic connection whatsoever to the child and then the birth mother changes her mind—and very often this happens in adoptions and so forth. What would your attitude be to enforceable contracts? In that particular situation the commissioning individual could go to law and require the birth mother to give up her child.

Mr CANNON: I think the obvious implication is that the child is dealt with as property. It is not the child's best interests or the child's right to know its own parents which are the primary consideration, it is the State basically objects to the child's best interests and the child's status as a person subjects that to a contract.

The Hon. DAVID CLARKE: Do you believe that medical practitioners, doctors and nurses and so forth, should be entitled to conscientious objection to participate in such surrogacy procedures? Do you believe that they should have a right to—

Mr CANNON: I believe so. I believe conscientious objections on legitimate grounds should certainly be respected.

The Hon. DAVID CLARKE: Of course that has not happened recently in Victoria with the new abortion legislation where it is now a criminal offence for a doctor who does not wish to participate in giving advice on abortion not to refer that person to a doctor who is prepared to perform an abortion procedure. That is why it is something of particular concern.

Mr CANNON: Could I just say in that regard, I tend to be a hopeful person, and I did mention this in my submission, that in spite of trends in the law in other States or in other jurisdictions I think the fact that New South Wales does not have legislation concerning surrogacy means there is an opportunity to really see what are the detrimental effects and an opportunity really to avoid those.

The Hon. DAVID CLARKE: My final question because of time: I would like to read a quote from Dr Tobin from the Plunkett Centre for Ethics, which is associated with St Vincents Hospital—and Dr Tobin was here earlier as a witness. She says, "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". What is your reaction to that statement?

Mr CANNON: I would agree. I would say the same applies not just to the effects of same-sex parenting but also to the effects of any artificial reproductive technologies in terms of their impacts on children. There are certainly well documented cases of children who have not responded well to the circumstances of their conception, whether it be through artificial donor insemination or surrogacy arrangements. There is certainly evidence. But the fact that there are already cases of clear infringements on children's rights and wellbeing says that to in some way permit or regulate something like surrogacy is to expose the children in those arrangements to a social experiment and we do not know the consequences.

The Hon. JOHN AJAKA: At point seven your submission says, "The New South Wales Government should adopt and implement a policy which protects and affirms the rights and welfare of children by prohibiting all forms of surrogacy". You are aware that altruistic surrogacy in New South Wales is not prohibited and you are aware that it is not prohibited in other States and that altruistic surrogacy has existed and has occurred and is in the process of occurring?

Mr CANNON: Yes.

The Hon. JOHN AJAKA: Are you saying that we should now look at bringing in legislation that completely prohibits any form of surrogacy?

Mr CANNON: Yes.

The Hon. JOHN AJAKA: Notwithstanding what has occurred in the past and notwithstanding the fact that other States are allowing it to happen?

Mr CANNON: That's right.

The Hon. JOHN AJAKA: You do not see a situation that if we were to do that that all we are doing is encouraging everybody to just simply go to another State to perform what they will perform here anyway?

Mr CANNON: That may be the outcome but the New South Wales Government has an opportunity to protect the interests of the children in New South Wales.

The Hon. JOHN AJAKA: But how do we protect the best interests of the child as a paramount consideration if we simply wash our hands of it, allowing them to go to another State and come back and yet those children in one sense are no longer protected by any legislation here?

Mr CANNON: I believe that laws would prohibit it, so obviously it would at least reduce the number of them taking place in New South Wales.

The Hon. JOHN AJAKA: You are an optimist.

Ms SYLVIA HALE: I would like to pursue this question of total prohibition. Presumably if you prohibit an activity you then have sanctions such as imprisonment or heavy financial penalties. Can I put to you a scenario that we have a family where there is a child that has been produced by surrogacy; the surrogate mother has a falling out with the family; she denounces them, even though she herself is at risk because she has violated the law; the whole family itself, as well as the assisted reproductive technology people, are at risk because they, presumably, were involved in it; but, more importantly, the family that looks after the child is also

at risk. That family could therefore face the threat of imprisonment of both parents or heavy financial sanctions, neither of which would be conducive, I suggest, to the welfare of the child, and, in fact, the child might even be removed from them because of their violation of the law. Do you think that is a desirable outcome?

Mr CANNON: Of course not. But with all due respect, I think the idea that the law would need to imprison or impose heavy financial penalties on people who undertake surrogacy agreements—the law simply would not need to do that. The law can discourage in other ways; there is not even any need to criminalise the behaviour.

Ms SYLVIA HALE: Say you do not do that, but presumably if the law is going to have some effect—because there is certainly no point in producing laws that people can just thumb their noses at and say, "It's there but I don't care; it's never enforced"—even if all that law does is to name that family and charge them with some offence, even if the offence carries a significant penalty, does that not stigmatise that family and would that be in the long-term interests of the child?

Mr CANNON: I suppose it would stigmatise the family to an extent, but at the same time—

Ms SYLVIA HALE: Who would benefit from that? Who would the beneficiaries be?

Mr CANNON: To the extent that the law would deter people from—

Ms SYLVIA HALE: This is an act that has already taken place. You would be punishing people not for the crime they have committed—if you say it has got a deterrence angle—it would not be for the crime they have committed, it would be for the crime someone else might potentially commit.

Mr CANNON: The very fact that you raised the possibility of a falling out to me sets off alarm bells. Surrogacy agreements are fraught with danger and they do jeopardise the best interests of the child. There are documented cases in America—

Ms SYLVIA HALE: I quite concede that surrogacy arrangements can come to grief, and that is one of the problems that the Committee is struggling with, but if that is the case how do we respond? I do not doubt for one minute that these arrangements could come undone. That is not desirable, nor do I think a blanket prohibition is desirable, but we may choose to disagree.

Mr CANNON: Sure.

The Hon. GREG DONNELLY: In your submission at point number two about the children's rights and the responsibilities to them, I am interested in your comments associated with the first paragraph and the reference to Margaret Somerville about the right to one's own natural biological origins and the right to be raised by one's biological parents. Could you just elaborate on that as you understand her argument and in the context of the Australian Family Association?

Mr CANNON: The question of a child's right to its natural biological origins, Professor Somerville does make the point that this is a question that society has not had to consider because it is only a recent phenomenon that it is possible to tamper with a child's origins. The question of whether a child is entitled to natural biological origins goes a lot to the question of a child's right to preserve its own identity, which is also protected in the Convention on the Rights of the Child. Looking at the experiences of children born through artificial or assisted reproductive treatments, a common experience is for these children to be disconnected from their natural biological parents and for that reason to suffer severe crises of identity: they do not know who they are; they do not know where they fit in the world.

This is a serious problem that has been experienced and acknowledged in other areas, such as in adoption. Children of adoption suffer the same questions of identity, and in the case of adoption it is unavoidable. But we acknowledge that there is a problem, that these children have suffered a wrong and it should be somehow compensated for. In the case of surrogacy, this is a wrong that is inflicted upon children not through circumstance but by choice, and the children are deprived of their sense of identity and their ability to know where they come from because of the choices made and because of rights claimed by other people.

The Hon. GREG DONNELLY: The issue of the impact of surrogacy arrangements on the surrogate woman—in other words, the woman who carries and bears the child—do you have any comments or thoughts about that?

Mr CANNON: I can certainly comment in a general manner. The basic concerns that the Australian Family Association would have with the impact of surrogacy on women is first of all the separation of the personhood of the woman from a biological function that the woman performs, and to that extent the objectification of women that surrogacy necessarily gives rise to.

There is the question of financial inducement. Certainly commercial surrogacy is discouraged in jurisdictions in Australia and indeed throughout most of the world, but the question of policing financial or other inducements to women raises the question of whether women may feel compelled, because of financial or economic circumstances, that this might be a way that they can make money, and the degree to which that exposes women to exploitation, you are creating a market in gestation and we would say is not in women's best interests.

The Hon. GREG DONNELLY: I think you made some comment about the impact of surrogacy on the child's welfare in terms of identity of the child, but do any other matters to do with the child's welfare arise from surrogacy arrangements?

Mr CANNON: There has been some research—again this is not well documented—demonstrating the importance of the bond between the mother and the child during the period of gestation and the impact that can have on the subsequent relationship between the mother and the child. A report was produced last year, I think—I do not have it with me because I could not find it yesterday when I was preparing—which suggests that children raised by the non-biological mother are more likely to suffer domestic abuse. It is an unfortunate statistic but the study linked that to hormonal connection between the mother and child, which is generated in the womb. Naturally at the genetic level there may be connections, which the child is deprived of.

The study spoke about the mothering instincts, which may be triggered by hormones, which obviously the child being raised by a non-genetic mother will not have the benefit of. Again, where people are deprived of the benefit of these kinds of things out of unavoidable circumstances, whether through the death of a parent or separation of the parents, we concede we have to make the best of the situation. But to allow adults by their choices to impose these kinds of things on children, we think is to neglect the best interests of the child, to subject the best interests of the child to other people's claims to the right to have a child.

CHAIR: We really appreciate you coming to speak to us today. Your work and that of your organisation are very important for our deliberations. We have given you a set of questions on notice. We would appreciate, if you have the time—and the secretariat will confer with you—if you would get your answers to those questions back to us so that they can be considered when we are deliberating on all the evidence. Because of the complexity of the inquiry and the number of issues that have come forward, we have extended the inquiry and will be having another public hearing in March. If you have further information, the Committee will have no hesitation in receiving that.

Mr CANNON: Can I just add something?

CHAIR: You can make another statement.

Mr CANNON: There were two things that I wanted to encourage the Committee to inquire into. The first is the impact of artificial reproductive treatments and surrogacy on children as evidenced by the experience of people who have gone through the experience. I am not sure if you are familiar with the organisation Tangled Webs, but I hope that you consult with them. We have had some dealings with them. I have a paper here entitled "From a bundle of joy to a person with sorrow: Disenfranchised grief for the donor conceived adult by a donor conceived woman". It was a presentation made at Murdoch University. It speaks in very clear terms about the impact of artificial reproductive treatments on children who are now becoming adults.

The Hon. DAVID CLARKE: Could you make that paper available to us?

Mr CANNON: Sure. There was one other issue I want to raise. Looking at the experience of other groups in society, other children, including the children of adoption, particularly the children of the stolen generations, we are quite happy as a society to accept that removing children from their parents causes a great

deal of harm and that the wrong is to the child. What we are suggesting is that surrogacy removes children from their parents and there is a social cost, which will be brought to bear on society if we allow these kinds of things to go on unchecked.

We need to protect the children and in protecting children we are essentially protecting the wellbeing of society, and that includes an economic cost. It was drawn to my attention by one of the people from Tangled Webs that if this keeps going there are going to be a lot of angry kids who are going to be calling the State to account in the future, and I think it is good to keep that in mind when we are considering drafting legislation that is going to have such a significant impact on children.

CHAIR: I thank you very much for your statement and for your evidence.

(The witness withdrew)

CHAIR: Welcome and thank you very much for attending today. We have broadcasting guidelines and if you have any messages you wish to give the Committee, the secretariat will attend to that. Committee hearings are not intended to provide a forum for people to make adverse reflections about others, even though you are under parliamentary privilege. Please turn off your mobile phones. We have read about the work you do, so it is good to have you here.

HANNAH SPANSWICK, Secretary, VANISH Inc., affirmed and examined:

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

Ms SPANSWICK: 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 your request. If you take any questions on notice the Committee would appreciate if the response to those questions could be forwarded to the secretariat by Monday 1 December. The reason we are doing so is that some of the questions are so complex and require detail. The secretariat will let you know what to do.

Ms SPANSWICK: Okay.

CHAIR: Would you like to start by making a statement?

Ms SPANSWICK: Just very briefly. First of all, I would like to thank the Committee for inviting VANISH to expand on its submission. As our submission indicates, we have been in existence for almost two decades now and in that time we have had approximately 144,000 contacts, that is, either telephone contacts, people dropping into the offices, written inquiries or people attending our support groups, so it is a fairly significant number. The majority of those people are looking for support because they have discovered late in life that they may have been adopted or they are having issues with their particular separation from their families of origin or they are actually looking for assistance in searching for their biological families.

CHAIR: Before we move on to the rest of the Committee, what proportion of persons do you perceive—and I realise this might be difficult because it is statistical information—are coming from the 40s, 50s and 60s when there were full adoption processes in play before that got sorted out?

Ms SPANSWICK: The predominant number of our inquiries would probably come from that age group, however we do have a number of younger women who have been involved in an open adoption and they are experiencing a particular set of issues that have not been experienced by those in the 50s, 60s and 70s. Their particular issues, to some extent, may well have similarities to those with surrogate experiences in that because it is an open adoption there is an arrangement whereby the birth mother can have ongoing contact with her child and the common theme for those women is that, whereas women who relinquished their children previously and, in many instances, never saw their child at all—

CHAIR: Or found out where they went?

Ms SPANSWICK: That is right or did not know where they went, these young women are suffering that relinquishment and that loss over and over again because, on the one hand, it is beneficial for the mother and her child to have that contact, but the child and the mother are suffering the separation repeatedly.

The Hon. JOHN AJAKA: Is that in adoptions or surrogacy, did you say?

Ms SPANSWICK: No, in adoptions. Surrogacy in Victoria, as you are probably aware, is still not legitimised so, apart from the Kirkman sisters, we do not have any surrogate members and we are not aware of any other surrogacy arrangements. I think it is interesting and it is very pertinent that these young women are experiencing these particular issues, as are their children, because of that repeated and ongoing separation, which may happen as often as once a month or once every two months.

The Hon. GREG DONNELLY: Thank you for coming along today to provide further evidence to your submission. We provided you in advance with some questions on notice?

Ms SPANSWICK: Yes.

The Hon. GREG DONNELLY: I take you particularly to question No. 4, which refers to page 3 in your submission to the mothers: the egg donor surrogate and the social mother, and the issues that can cause. Can you elaborate on the whole set of issues that in your experience may have arisen?

Ms SPANSWICK: For people who have had an adoption experience, many of them have difficulty dealing with the fact that they have two mothers; that is, their biological mother and their social mother or their adoptive mother, and often feel torn between the loyalties that they think may be expected of them, in terms of not being seen to favour one against the other. That often causes a great deal of stress for people, for adults who are adopted.

Some of our members who have been born as a result of IVF treatment—in one instance one member's biological father's sperm was used to impregnate nine women, so having found her biological father she has also found eight half siblings that have resulted from that one donation, as well as a number of other siblings that her father had with his partner, whom he subsequently married. That person has ended up with 14 half siblings. Of course, those half siblings have their own social parents and there is a lot of distress caused to some of the donor offspring people because of the gamete of relationships that they have to try and negotiate.

Ms SYLVIA HALE: Could there not also be a great expression of joy that suddenly you have this very large circle of family members?

Ms SPANSWICK: That may be the case, but certainly in our experience I suppose we would see people who are actually having problems, we do not necessarily see the ones who are overjoyed with having found a large family. Having said that, I would imagine that in the circumstances of a surrogate—I have to say at this point that we probably take some issue with the term "surrogate" because the woman is in fact a natural or a birthmother, not some machine or incubator that has been used for the purpose of producing a child, she is in fact, and will remain, that child's biological mother irrespective of whether the gametes used are donated by somebody else or are her own. But in the event that a child was conceived as a result of an egg donor and a birthmother and then a social mother potentially that child is likely to have six sets of grandparents, not to mention other siblings or half siblings that the surrogate or the donor mother may have, their partners, and so it goes on. There is a lot of potential for what they describe as genealogical bewilderment to take place, because the child has so many different parents and variations of parents to put into perspective and to know where they belong and who they belong to in that sense.

The Hon. GREG DONNELLY: I take you to question number seven, about the issues of the negative experiences of people who utilise the services of Vanish, specifically in the context of not knowing their biological origins. Once people know the biological origins, does that change things for them? If it does, what are the changes?

Ms SPANSWICK: It depends on the definition of "biological origins". It is one thing to be given a piece of paper that has your biological parents names on it; it is another thing to have a connection to those people to whom the names belong. Quite often people will obtain identifying information of their biological parents, certainly their mother, and their father if that information has been recorded, and in many instances that information will sit in a drawer somewhere for quite some time before they have managed to integrate it into their psyche and are prepared to make a connection or try and find their parents. I think there are two components to that biological information. One is the data, if you like, the names of the people who they are biologically related to. The second component is the actual connection and finding them and meeting them and either establishing a relationship that is ongoing or not. I do not know that you can separate the two.

Certainly in some instances where people have obtained identifying information about their birth families, they have that information but when they have gone to search for them they have found that one or other of the parties has died. That can be absolutely devastating to people because although they have had that biological information, in terms of the name, they are devastated by the fact that they have not had the opportunity, or they have lost the opportunity to meet and to establish some sort of relationship.

The Hon. GREG DONNELLY: I take you to question number eight, about what conditions could be placed on surrogate arrangements to minimise the impact on a child of not being raised by its genetic parents.

Ms SPANSWICK: I do not wish to sound flippant, but I wonder how you can legislate to ensure that people maintain civilised and ongoing relationships. I think if you sat any day in the Family Law Court you would probably hear people arguing over the Tupperware, much less than over what is in the best interests of their child. I am not sure that it is something that you can adequately legislate for. Certainly in Victoria the Kirkman surrogacy arrangement appears to have been a success but if you look at the literature overseas, particularly in the United States, there are a number of surrogate mothers who have subsequently taken court action to try and take back their children.

CHAIR: Do you think this has got anything to do with the difference between commercial and altruistic surrogacy, because America has commercial surrogacy?

Ms SPANSWICK: Yes it does, indeed. That may be the case but irrespective of whether an arrangement is entered into, and whether or not money changes hands or not, as we have said in our submission, you cannot exterminate or extinguish the physiological, and psychological and the emotional attachments that a woman has with her child. The best-crafted piece of legislation cannot undermine that, not in our experience. Those bonds are so strong that they are almost inviolable. Our response to that would be one of the reasons that we oppose surrogacy arrangements is because we do not believe that there can be adequate protection, particularly for the child.

Ms SYLVIA HALE: I am looking at the second page of your submission where it says:

> Unlike a child who has been born as a result of an unplanned pregnancy and adopted and placed in permanent care under a guardianship order, surrogacy sets out to deliberately and intentionally create a pregnancy to satisfy the psychological, emotional and social needs of adults in their quest for parenthood.

Except in the case of totally unplanned pregnancies, would it not be the case that most pregnancies occur as a result of the desire of the parents to meet their needs and the children are the offshoots—that applies to a whole range of families?

Ms SPANSWICK: I guess in an ideal world we would like to think that all children are conceived and born in a loving and caring environment. The reality is that we know that does not happen. I think the distinction between children being conceived and raised through normal or usual methods, as opposed to surrogacy, is that the State is sanctioning and being a party, if you like, to that arrangement and it is requiring a medical procedure or intervention of some sort in order to create this child or embryo in a Petri dish. I think there is a distinction because, for example, in Canada, we are aware that recently some action has been taken by a group of people born as a result of IVF who are suing the State for what they claim are flaws in the legislation which withheld information about their biological parents.

Ms SYLVIA HALE: If that information were made available to them, would that be satisfactory from your point of view? Because I gather a lot of the dissatisfaction with an adoptee is that ignorance?

Ms SPANSWICK: Yes. I do not believe so because the view of Vanish is that these arrangements contravene the United Nations Convention on the Rights of a Child. Surrogacy arrangements seem to be geared towards the rights to a child, rather than the rights of a child. The state does not owe anybody the right to a child, and we do not believe that individuals necessarily have the right to demand that of the state. Just because the technology is available, that does not necessarily compel any State to legislate in favour of it. For example, there have been technologies and procedures available to enact euthanasia for many decades, but it is not enacted because it is fraught with problems or potential problems.

Ms SYLVIA HALE: It is available in some instances.

Ms SPANSWICK: Yes, but not in others. It is not necessarily a state-sanctioned free-for-all that people can access. I am not suggesting that this legislation would create that, either. However, the issue that you have raised is fraught with problems. It creates a situation in our view where the child and the mother become commodities, and those commodities are there to satisfy the needs of adults.

Ms SYLVIA HALE: I think the use of the term "commodity" puts it all into a contractual legal context, which may distort the realities of the situation. Can I suggest to you that I can well understand a child that has been adopted at birth saying, "Look here, my mother saw me. She could see me. She was a living human being with whom I bonded, and she gave me away." Therefore the child is subsequently blaming the parents for that act. But when what has been given is basically a microscopic sperm or ovum, do the children

who result from that have the same feeling that somehow they have been individually deserted by their biological parents?

Ms SPANSWICK: I do not know that they necessarily feel that they have been deserted, but I know of one particular donor offspring. In fact, there is a group of them who have stated quite openly that from their perspective they would have preferred not to have been born at all rather than be placed and have to experience the emotional turmoil that they currently experience as a result of this bewilderment from not knowing precisely who they belong to, and all of the issues that are raised as a result of being created in that sense.

Ms SYLVIA HALE: That could well be the response of some people, but equally there must be children who are conceived naturally and who also, because of the circumstances in which they are raised, wish that they had never been born.

Ms SPANSWICK: Sure. That is obviously a fact. I guess the distinction, as I said before, is the fact that the state does not—at the moment, to the best of my knowledge—interfere or encourage or discourage natural conception and people have that choice. However, the issue with surrogacy is that, because it requires additional parties, if you like, including somebody to act as a birth mother and to be the birth mother, and it also requires a medical procedure and some other intervention, there is a distinction between the natural conception and the downside that that may result, in some circumstances, as opposed to the state intervening and being a party, if you like, to that arrangement. In our view, that would be the distinction.

The Hon. JOHN AJAKA: I would like to continue the same line of questioning raised by Ms Sylvia Hale. My dilemma with this inquiry is that I really cannot see adoption in the same way as I see surrogacy. People give examples of have they have felt about the issue of abandonment—you know, what was wrong with me? Why was I not wanted? I just cannot see that as being in the same area of surrogacy. I feel that the two should really be looked at separately, but I am not really getting that from you.

Ms SPANSWICK: In other circumstances, we have birth mothers who have relinquished a child to adoption and have gone on to have other children.

The Hon. JOHN AJAKA: Is this surrogacy, or is it pure adoption?

Ms SPANSWICK: No, it is pure adoption. When one of their subsequent children died, the message from those women was that losing a child, either to a terminal illness or to an accident, ultimately is easier to come to terms with than is losing a child to adoption. The reason for that is that when a death occurs, there is some sense of finality. Society mourns with you. Your friends and your family join with you in your grief. There is a graveside that you can go to and lay flowers on, so you can still have some connection one way or another with that child.

The Hon. JOHN AJAKA: I understand that from an adoption point of view where a woman gives up her child, but how do I connect that to surrogacy? In the surrogacy arrangement a woman understands the circumstances from day one, participates from day one, and is counselled from day one, assuming all the balances and checks are met. I do not see how I can connect that to a surrogacy arrangement.

Ms SPANSWICK: The research also tells us that young women, predominantly, who relinquish their child to adoption believe at the time that they are making the right decision, for all kinds of reasons including a certain amount of familial pressure or whatever was in the background, but we are now finding that 20, 30, 40 or 50 years later, those women are still suffering from that loss.

The Hon. JOHN AJAKA: There is a fundamental difference, though, is there not? I must say that I was really looking forward to hearing you today because you are the main person I could ask these questions of. I am sorry if I am throwing so many at you.

Ms SPANSWICK: No, that is all right.

The Hon. JOHN AJAKA: There is still a fundamental difference that in an adoption situation, especially with a young person, a girl who did not intend to fall pregnant falls pregnant and circumstances are not allowing her to retain the child. Whether she is pressured, forced or feels it is the appropriate thing for the child, she gives the child away by way of adoption. Again that is a very different situation from surrogacy in the Australian Capital Territory scenario, for example, where women already have children, they are in a specific

age group, they have had countless sessions of counselling for a period and have received independent legal advice, and they make the decision to still proceed. I am still finding it very difficult to link the two together.

Ms SPANSWICK: Ultimately, as I said earlier, with the best will in the world and with all the appropriate counselling, that woman has still carried that child and given birth to it, and has undergone the hormonal, physiological, psychological, emotional reactions and responses to a normal pregnancy. Their head may well say, "Yes, I could do this and I am fine", but her heart will ultimately say, "I have made the wrong decision."

It is a very emotive issue. There is nothing more emotive than a childless couple who desperately want to have a family of their own. But I think we need to err on the side of caution. The point that you raise is very valid. However, certainly in our experience, women change as time goes on. There is certainly some evidence in the United States, even when those arrangements may well have been altruistic, that the birth mothers have gone on to try and reclaim their children, despite having had the counselling and advice and the lawyers, et cetera. With the sisters, there are three cases in the United States where those court cases are currently underway. Three is a fairly small number compare to the number that may well be taking place, but nonetheless there will be, and there is likely to be, a percentage of women who believe they are making the right decision for all the right reasons, but subsequently change their minds for the reasons that I have outlined.

The Hon. JOHN AJAKA: Looking at the other aspect—which is, of course, the child.

Ms SPANSWICK: Yes.

The Hon. JOHN AJAKA: And accepting the fact that the paramount consideration is the best interests of the child as opposed to the mother or the commissioning parents, et cetera, again I see a huge difference between the situation of adoption and surrogacy. With adoption, the child—leaving aside the parents—seems to be saying, "Look, I was abandoned. I was not wanted", whereas in a surrogacy situation, the exact opposite seems to be said. In the Kirkman situation, the exact opposite seems to be said, and at seven years of age or 14 years of age, the child is saying, "This is wonderful. I'm special. My parents really wanted me, and this is how I was created." I find it difficult to reconcile experiences of children involved in adoption with the very few examples we have in relation to surrogacy.

Ms SPANSWICK: I think in the Kirkman case—the girl's name was Alice, if I recall correctly—that case is unique insofar as the sisters obviously have a very close and loving and caring relationship, and the child has grown up. In her formative years, I think they lived in close proximity to one another so the child could see both mothers on any given day. Unless you can ensure that that is going to happen in any future surrogacy arrangements where the child will have unfettered access to both mothers, that is where we have major concerns. How do you legislate to ensure that that will take place and that the adults will not have some falling out over whatever, whether it is over the way the child is being reared or what school it is attending, or whatever the issue may be, but particularly when the child is not old enough to make a decision for himself or herself?

The Hon. JOHN AJAKA: Let us make the assumption that you have a similar scenario. We have heard evidence from people yesterday and today who described that scenario, and it seems to be a perfect scenario. Because we have done nothing as the state and if we leave it at the status quo, these children are put in a bit of a limbo situation where the commissioning parents have to go to the Family Court to get orders, they may have to wait approximately seven years to adopt a child, there are issues of the birth certificate, there are issues of emergency medical procedures, and issues in relation to passports. Surely it is better for us to say on a completely separate level, in legislation completely separate from the adoption Act, that it specifically allows for surrogacy rules, regulations and procedures to regulate what occurs. That has to be better than simply doing nothing at all, and it will protect the best interests of the child.

Ms SPANSWICK: I have two comments: First of all, if people know what the current law is and they choose to ignore it and act outside it, I guess the question is whether they should have the right to come and demand that legislation be changed to accommodate their actions. If you are going to take a particular scenario, do we legalise all sorts of what are currently illegal activities now?

The Hon. JOHN AJAKA: Past history shows that we have.

Ms SPANSWICK: But is it appropriate to do that? Just as in the same way when in vitro fertilisation legislation was first enacted it was geared towards married couples and initially the sperm and the egg were

supposedly to come from that particular couple rather than using donor sperm and egg, demands have been made by a whole range of groups who argue that that particular piece of legislation is discriminatory. If legislation is enacted to legitimise surrogacy, there will be demands placed on that piece of legislation down the track, in 10 or 15 years, that may well result in what you perceive to be a contained and appropriate piece of legislation in today's circumstances being challenged in the courts that it is discriminatory. Our view is that people are well advised that this is the law, that if you work outside it then you deal with the consequences, as we all have to do, rather than taking the position: if you break the law, because a child is involved we will take action to remedy the situation.

The Hon. JOHN AJAKA: But, unfortunately, that does not protect the best interests of the child, who is not making the decision.

Ms SPANSWICK: I understand that. But I think if you go down the path of legitimising that situation, you will find that more and more situations will arise that will need even more drastic action to accommodate them.

The Hon. DAVID CLARKE: I guess your organisation is unique, because you are dealing first-hand with those who are the subject of adoption and the problems that many of them experience. We talk about genealogical bewilderment and so forth. I want you to imagine: How much greater are the problems going to be as you have more and more people coming to you as a result of adoptions through surrogacy? You talk about your members being in their forties, fifties and sixties. You will have a situation where, as a result of this process, a person could have a genetic mother, a birth mother and a social mother, and a genetic father and a social father. Do you foresee that the fall-out of problems will be even greater as more and more of these people who have been affected as a result of surrogacy come out of the woodwork, as it were?

Ms SPANSWICK: I think that is an accurate prediction. I would imagine that if legislation were enacted to enable surrogacy arrangements, be they altruistic or otherwise, to occur, then the very scenario you have painted would become a reality. Even in today's circumstances, where we have people with an adoption experience and, in most cases, two sets of parents, the balancing act that they have to try to manage in terms of dealing with the emotions that are associated with, firstly, the relinquishment and their abandonment issues, and their attachment and bonding issues with their adoptive parents—not to mention the siblings that they find along the way—it is a very complex and heart-wrenching experience for many people, and it is lifelong.

The Hon. DAVID CLARKE: We are seeing a process going on at the moment whereby many people in this generation are being reared to be separated from their birth mother. They are being reared specifically to be taken from their birth mother. Is this not, in a way, a new stolen generation?

Ms SPANSWICK: It certainly could be construed as that. The concern we have is that, based on experience, regardless of whether or not the woman is counselled, regardless of whether or not the woman received independent legal advice, and regardless of the parameters and boundaries that are put in place to try to protect all the parties involved, it does not alter the fact that that woman—the birth mother, the natural mother, or surrogate mother, whatever title you use to describe her—remains inextricably connected to the child, and the child to its mother. The fall-out of past policies and social engineering are the very things that we are dealing with on a daily basis.

The Hon. DAVID CLARKE: Let us have a look at the birth mother and some of the consequences. Firstly lets us look at the question of enforceable contracts, whereby the birth mother enters into a contract before the birth of the child, the child is born, and the birth mother says, "No, I want to keep the child." As very often happens in adoption situations, the mother wants to keep the child after all, and she keeps the child. If we had enforceable contracts, you could have a situation where a child was being forcibly taken from its mother. That would be an intolerable situation, would it not, if we allowed enforceable contracts with regard to surrogacy?

Ms SPANSWICK: I think enforceable contracts are a recipe for disaster, for that very reason: The child ends up being the football, if you like, being kicked between one set of parents and another, and the courts ultimately make a legal decision as to whether or not that contract is enforceable. Whereas, it is not necessarily a legal issue that will be the nub of the problem; it is whether or not that mother, having gone through a 39-week gestation period, has the right to keep her own child.

The Hon. DAVID CLARKE: I refer to the United Nations Convention on the Rights of the Child, which you touched on in your submission. It has been suggested by a number of witnesses, both today and yesterday, that surrogacy is an infringement of that convention. One witness has said that it is not, because that convention was drafted at a time when surrogacy really did not exist, or not to the extent that it does today. What is your view on the matter?

Ms SPANSWICK: I think that is a misguided view. The convention is quite clear, and irrespective of whether the child has been born as a result of surrogacy, the convention states that the child, wherever possible, will be reared by its parents, retained in its own country where possible, and its own culture. I am paraphrasing, but that is essentially the principle that underpins it.

I wonder if you are familiar with this publication entitled *Surrogacy—In Whose Interest?* It is the proceedings of the national conference held in Melbourne in 1991.

Ms SYLVIA HALE: Of which organisation?

Ms SPANSWICK: It was sponsored by the Mission of St James and St John, Caring for Children and Families, in association with the Australian Institute of Family Studies, the Australian Council of Social Service, the Victorian Council of Social Service, and the Social Work Department of the Phillip Institute of Technology. The then Minister for Health and Community Services, the Hon Brian Howe, opened the conference. He stated:

> I am personally uncomfortable with suggestions that because agreements to create a child in this manner made prior to conception, that the interests of the child eventually born are somehow of less significance than the rights of the commissioning parents to form a family.
>
> Secondly, and related to the above, I believe it would be unwise to ignore the adoption experience of this and other countries. While there are significant differences between the two circumstances—the intentional as compared to the unintentional creation of a life being the most obvious—I believe relinquishing mothers can make a significant contribution to the surrogacy debate and must be listened to. This applies equally to adopted children and adoptive parents.
>
> In the last decade we have, as a society, been confronted with a great deal of evidence about the dislocation that can result from adoption, when the adopting family are deemed to "own" the child, severing the social and psychological links with the child's family of origin.
>
> It is highly improbable that the types of problems that have arisen with adoption practice will somehow be avoided in surrogacy arrangements merely by denying the similarities between the two methods of family formation.

So, back in 1991 when this debate was clearly emerging, the issues that are being considered today in many respects are similar to what was being considered then. Certainly from our experience and our perception, our view was that surrogacy was something that should not be entered into back then, and the experience and exposure we have had to a whole range of people and service users in the interim has not changed our minds: we certainly still support the concerns that the Minister expressed at that point in time.

CHAIR: Do you have anything else you wish to tell us? I might add, we have extended this inquiry until early next year. We have another hearing scheduled in March. Any further information you would like to send we would be very grateful to receive. Some of the questions on notice we certainly have not touched. We recognise that you have probably put a lot of work into those questions, and so the Secretariat will deal with that and we would be grateful to have it. If you have anything further to say, we would be happy to hear it.

Ms SPANSWICK: I think I have probably covered most of it. We would certainly be very happy to expand on a written submission and answer the specific questions you have raised.

The Hon. JOHN AJAKA: Accepting the fact that surrogacy exists and children have been born through surrogacy, what is your view in relation to birth certificates? Much has been made about birth certificates. At present, if we do not regulate, the birth mother's name is on the birth certificate as the mother, and the name of her husband or partner is on the birth certificate as the father, even if he had no involvement whatsoever. Whereas, the intending parents, who may have donated 100 per cent of the genetic makeup, are not on the birth certificate at all until they go through that procedure. Is it in the best interests of the child—that being paramount—that that situation be allowed to continue, or should some regulations be introduced in relation to birth certificates, to at least acknowledge who the genetic parents are, et cetera?

Ms SPANSWICK: I think in those circumstances, arguably the child has the right certainly to know all parties who were involved in its creation. If such a situation exists, perhaps that can be accommodated in some

form of legislation. The reservation I have is that it is a bit like opening the floodgates: if you create an environment where that becomes permissible and it is sanctioned by the State, what are the repercussions down the track in terms of people making decisions about whether it is self-insemination, or whatever processes are used in order to create a child.

The Hon. JOHN AJAKA: The Kirkham case is a perfect example. It seems almost ironic that if the birth certificate showed her aunt as the mother, and yet she is living with her mother and father and the aunt's partner as the father, it does not seem to be a satisfactory outcome in the best interests of the child.

Ms SPANSWICK: Yes.

(The witness withdrew)

(Short adjournment)

CHAIR: Thank you for coming this afternoon. This is our second day of hearings. We have some formal guidelines, which I will not go through because they have been put on the record for the day. There are some rules in relation to broadcasting that the media know about, but instructions are available if you are interested. If you have any messages or information you want to specifically give us during the hearing, the secretariat will look after that. Committee hearings are not intended to provide a forum for people to make adverse reflections about others. The protection afforded to Committee witnesses under parliamentary privilege should not be abused during these hearings. I therefore request that witnesses avoid the mention of other individuals unless it is absolutely essential to address the terms of reference. Some telephones interfere with the Hansard recording equipment, so we would request that you turn off your telephone.

GHASSAN KASSISIEH, Policy and Development Coordinator, Gay and Lesbian Rights Lobby, affirmed and examined:

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

Mr KASSISIEH: Yes.

CHAIR: 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, the Committee would appreciate it if the responses to those questions could be forwarded to the secretariat by Monday 1 December 2008. Some of our questions are fairly complex, so you may like to say you will get back to us and the secretariat will record those and get to you that information. Would you like to start by making a statement?

Mr KASSISIEH: Yes. Firstly, thank you for the opportunity to make an oral presentation in relation to the New South Wales altruistic surrogacy inquiry. The Gay and Lesbian Rights Lobby is the peak human rights organisation representing lesbians, gay men and their families in New South Wales. We have substantially contributed to law reform in this State on these issues. Our particular expertise in relationship recognition and parenting reform has been influential in law reforms in New South Wales and elsewhere with many of our recommendations garnering the support of several law reform and parliamentary inquiries.

The central premises of our submission on surrogacy are three-fold. Firstly, surrogacy is already adequately regulated in New South Wales via the incoming Assisted Reproductive Technology Act and the National Health and Medical Research Council guidelines. We believe the only area of uncertainty that may need more pronounced regulation is what medical and other expenses relating to surrogacy may be reimbursed to the birth mother. Secondly, we oppose any regulation that would discriminate against gay men, lesbians or their children. Twenty per cent of lesbians and up to 10 per cent of gay men are parents. Many are also teachers, social workers, carers and foster parents. Discrimination against lesbians and gay men in parenting-related areas hurts children foremost by denying equal legal and social recognition to these children and their families. But also lesbian and gay citizens as a whole are stigmatised on the basis of debunked stereotypes and myths about their risks to children. All the credible research over the last 30 years confirms that children are not disadvantaged in welfare outcomes because of the sexuality or gender of their parents. Finally, we would like to see children born through surrogacy have equal protection through the legal recognition of their parents. We support a surrogacy transferral of parentage scheme whereby a consenting birth mother can relinquish her parental rights in favour of the intended parent or parents after the birth of a child.

The Hon. GREG DONNELLY: As you might appreciate, we have had a number of witnesses provide testimony over the last two days and some detailed submissions, many of which are on the site and you have probably had a chance to read them. A number of witnesses have asserted that with respect to fathering and mothering of a child—fathering by a male and mothering by a woman—they are fundamentally different human acts. If I can put it this way, mothers cannot father and fathers cannot mother; these are quite unique things to the humanity of the man and the woman. That position obviously is in contrast to the position of your organisation and really the two cannot meet. They are different positions that respective parties hold and they cannot be reconciled, can they?

Mr KASSISIEH: I would say we would refute the statements that are made in some of the other submissions around the research of welfare outcomes for children. I point you particularly to the attachment of our submission to the Ruth McNair summary—

The Hon. GREG DONNELLY: I was not talking particularly about welfare outcomes, or even matters to do with related issues, but something far more profound and innate, that is, a woman can bring certain things to the mothering of a child and a male can bring certain things to the fathering of a child and in a situation where you have a child being raised by two males or two females you cannot get the same result by the very nature of the fundamental differences between manhood and womanhood. What I am posing to you is that those positions are irreconcilable; there is no way to bring them together to get agreement on that point, is there?

Mr KASSISIEH: The problem with that position, though, is that it assumes that all men and all women are the same as a group and we know that within women and within men there is a variation of different parenting styles and it is around the parenting style that either gender provides to a child, and the structure of that parenting—things like setting limits for a child, being able to confidently set boundaries for that child, to discipline the child in a caring and loving way—that actually contributes to the caring rather than the gender of the parent. So I would first challenge the idea that only a mother can provide a certain type of care and only a father can provide a certain type of care.

The Hon. GREG DONNELLY: Are you essentially asserting that there are not innate differences between a mother and a father? For the purposes of rearing a child, you are saying this is beyond a question of gender, but the way in which the adults, whoever they may be, behave towards the child. Is that the essential position you are putting forward?

Mr KASSISIEH: Absolutely. It is about the caring role and caring technique and methods that a parent of whatever gender approaches caring and parenting of a child. The other thing I would say is that in relation to same-sex families, even though there may be two mothers or two fathers, a child does not grow up in a vacuum. There are a variety of role models in that child's life through teachers, grandparents, uncles, aunts, cousins, and a whole range of people around the child that support and nurture the child's development, so they do get more than just male or female role models, but varieties of male role modelling and varieties of female role models, so I would challenge that as well.

The Hon. GREG DONNELLY: I appreciate you are challenging it, but at least since the 1960s there has been a fair bit of social science done looking at the differences between what men and women bring to the raising of children and the innate nature of motherhood and fatherhood to the raising of children. That has been built up over at least the last four or five decades. Are you aware of that social science?

Mr KASSISIEH: I have looked at it. One of the problems I think with making comparisons with research that does not even look at gay and lesbian families, or takes a starting point where gay and lesbian families are not included, is that it makes analogies that gay and lesbian families are exactly the same, in the same form, and parent in the same way. What we know is that children brought up in gay and lesbian families often have lots of different involved role models and people who are contributing to the contact and care of that child beyond just the primary mothers or primary fathers. We know of co-parenting arrangements where a donor is often involved in the care of a child, or the known donor may be a gay man and his partner may also be involved in contributing to the care and development of the child, and certainly family is a culturally different practice across the world and across cultures. It should come down to the outcome of the caring for that child and, if there is no difference in the welfare outcomes for the child, then the method of getting to that point should not matter if it is slightly different from one family to another, as long as the child's best interests are protected and the child's outcome is not adversely affected, and certainly the research would not suggest that gay and lesbian parented children are adversely affected by the fact that their parents are of the same sex.

The Hon. GREG DONNELLY: We have had a lot of discussion about this. I am not approaching this in an antagonistic way. I am trying to flesh out some of these issues that we have been discussing over the last couple of days. The issue of the best interests of the child is repeatedly used by both sides of the argument, if I can put it that way. Once again, it does not seem to me that that can be reconciled because one group essentially asserts that the best interests are served, if at all possible, by the child being raised by the input of a mother and father in a permanent relationship. Then there is the alternate view, which I suppose is one that advocates diversity in the sense that there can be a whole range of possibilities and all are equally valid to that of a child being raised with a mother and father in a permanent relationship. That is where we have this fundamental difference, is it not? There are fundamentally different points of view on this.

Mr KASSISIEH: I would suggest that is right. I suppose one of the things to remember is that we have a situation where 20 per cent of lesbians are already caring for children and by demonising families that are parented by two people of the same sex we create a situation where there is social prejudice and stigma towards

those children. When we create a situation in which that happens those children are harmed by the prejudice that is directed, through no fault of their own, at their family situation. I suppose as social policy regulators and law makers our role surely should be to enforce that whatever family a child lives in, that family is respected and recognised so that the child can benefit from the same protections and entitlements provided to any other child in areas such as inheritance, consent and child support and all those important areas in which parent-child relationships are legally recognised.

The Hon. GREG DONNELLY: I do not think anyone for a moment accepts at all the idea of any child being demonised by virtue of the domestic circumstances he or she lives in. I am not alluding to that. One area in your submission that caught my attention was the reference to the research that had been done about children in same-sex relationships and the outcomes. It commences on page 15 of your submission and goes on to the following pages. Would you like to elaborate on that part of your submission?

Mr KASSISIEH: Absolutely. We did a report in 2002 called "Meet the Parents" in which we reviewed 25 years, at that time, of research into this area to show that there were not negative impacts on children in a variety of issues that I bullet-pointed at 1.1.1.1 in our submission. It included things like the level of happiness, satisfaction with life, anxiety or depression, cognitive development, gender or sex role identification or sexual orientation in adult life. The research did suggest that children could experience more homophobic harassment at schools and childcare centres as a result of the sexuality of their parents, but it also showed they were actually armed by their parents and resilient to that homophobic discrimination. In some ways they were more able to accept other family diversity and other diversity in society. That suggested that even though there were homophobic environments in which they may experience bullying they were well prepared by their parents to weather those challenges. Even in those areas where they did have more negative social outcomes they were able to challenge the homophobia and bullying that they may have experienced at school for having parents of the same sex.

Our research is not the only research in this area. The Victorian Law Reform Commission's inquiry into altruistic assisted reproductive technology in surrogacy did a position paper specifically on this issue, not just for gay and lesbian families but across-the-board for children born through ART. It also found that children have no worse outcomes in terms of child welfare development and cognitive development as a result of having parents of the same sex. It also interrogated some of the research that it is often cited by people on the other side and looked at the argument made by that research that the research that shows that children are doing okay was methodologically flawed. The McNair study in particular went through each of those arguments on the methodology of that research and found that many of those arguments could not stand. In particular, the research has developed in sophistication since it began 30 or 40 years ago to include not just the opinions of gay and lesbian parents or their children but also people who interact with those families to get more of an objective view on what the children's outcomes were. The research still confirmed that children in same-sex families were doing just as well. The only area in which they were experiencing more negative outcomes was the result of social prejudice and discrimination against their families. That again consolidates the importance of challenging those prejudices rather than confirming them in the law making we do on parenting and recognition of families.

The Hon. GREG DONNELLY: Just one final question, which is a general one in the nature of this discussion on surrogacy. A number of witnesses have put to the inquiry that surrogacy by its very nature as a medical procedure is putting the rights of the adults ahead of those of the child, namely the adults themselves wishing to fulfil a desire for a child without perhaps taking into consideration all aspects of what might be in the best interests of the child. Would you like to comment on that?

Mr KASSISIEH: Surrogacy is a complicated social issue because there are multiple parties involved in creating a child. At the same time it is a type of family formation just like any other in the sense that a child is going to be created and the best thing we can do is ensure that that procedure, that process to having a child born, is supported and affirmed and the right counselling and information is available to those parents at the outset before they begin to have a child. The parents who go through assisted reproductive technology do not take the decision lightly. They are parents who are committed to caring and loving the child no matter what the child grows up to be. In some ways they are more ably prepared, as some of the United Kingdom research on surrogacy would suggest, and more ready for the care giving responsibilities that come with caring for a child.

The other aspect is that the surrogacy research is still quite new and so it is an evolving area. That is why our position at this point is that there is no empirical basis to cause alarm about this procedure. It is a bit more complicated than the average suburban family formation but it is not causing a crisis in child welfare outcomes. We are seeing that families in surrogacy situations are quite open with their children from a younger

age than even, say, adoption, so there is a comparison with adoption. They are open with their children about the circumstances surrounding their conception. We are also seeing that parents are quite open to having a relationship with the surrogate mother even after the child is born, and they actually foster that contact relationship, which is yet another marker of positive development outcomes for children—the openness around their conception and parenting.

In some ways we are also seeing in the surrogacy research, even though it is emerging, those positive outcomes are as a result of the fact that people have given time to thinking about what this arrangement means for them. For example, in relation to relinquishment the Queensland inquiry heard from Professor Roger Cook who said that even though the intended parents were concerned that the surrogate mother might be concerned about relinquishment, surrogate mothers were able to make a cognitive difference between having a child for themselves and having a child for someone else. So whilst there are more complexities in a surrogacy arrangement certainly the research at this stage is not showing the forecast crisis situations we have been hearing about particularly in cases like Evelyn, which was a very difficult case. That does not seem to be the across-the-board experience. In fact, if more children could tell us about their experience of care giving, their family situation, the positive aspect of being able to have a relationship with the surrogate mother and an open non-stigmatised dialogue around the conception procedure that led to their birth we might help people to access the right information so that they make the right decision before a child is conceived. In some ways they are going to be more prepared for having a child than the average Mary and Joe who decide to have a child without that help.

The Hon. DAVID CLARKE: Just a comment before I get on to the questions arising out of something that the Hon. Greg Donnelly said. You called into doubt the methodology of some of the research relied upon by what you call the other side. You said it was deficient. You are aware of course that the same criticism has been made against some of the research you would rely upon. It is not a one-way criticism. There are people on both sides who call into question the methodology of the research relied upon by, as you say, respective sides on that issue. Are you aware of that?

Mr KASSISIEH: Yes. I would point you again to the McNair position paper as part of the Victorian Law Reform Commission inquiry into this issue, which interrogated some of the claims made by, I think, an American paper about what they called the fatal flaw in each of the studies. It found things like the arguments made about the fatal flaws related to quantitative research whilst this research was qualitative. It is a completely different way of finding information. The arguments that were made were in some way directed at the wrong type of research.

The Hon. DAVID CLARKE: I think there were reports from the other side, some of which are going to be sent to us by other groups who have a different perspective on some of these things. There are reports calling into question the methodology used on both sides by reputable people on both sides. Just prior to you we had a representative of an organisation called Vanish. You may have been here when I asked questions. That is a body that deals with the psychological fallout for those who were put up for adoption and now, 30, 40 or 50 years later they are starting to face problems about their parents and so forth. That is an organisation that deals with the fallout from that. Do you agree about how much greater the fallout is going to be when people now are being adopted as a result of surrogacy and they have four parents as it were? They could have a genetic mother, a birth mother, a social mother, a genetic father and a social father. Would you agree with that witness that if they are getting such a fallout from those who were put up for adoption the fallout will be much greater from those who are put up for adoption as a result of surrogacy?

Mr KASSISIEH: I would not want to discount the experiences of people who have been put up for adoption and have had a negative experience. That would not be my intention. But I think that adoption is slightly different from surrogacy. Firstly, you have a situation where a child is born that is, to use the colloquial, unwanted by the parents that had the child and is given up through a process to new parents that do love them or want to care for them. In surrogacy, it is different. You have a situation where all the parties want to have a child but are under agreement that the child is for the couple who, in other words, commissioned the surrogacy arrangement. Let us not forget that adoption has changed. Only in 1990 did we really go towards an open adoption model. We had a closed adoption model and children were taken from parents without the necessary and informed consent and the counselling that is required. I think it is a bit dangerous to just compare those situations with a situation where you have a couple that has gone through surrogacy with the right information and the right support. The research is suggesting that they are very open with their children about the methods of conception and the children are doing okay.

The Hon. DAVID CLARKE: The problem arises from the fact that these children are being reared to be separated from their birth mother. That is a specific fallout that is going to create psychological problems, and that is starting to appear now. Many people have serious concerns that children are reared by their birth mother to be separated from their birth mother. That comes as a shock to a lot of people and they cannot handle that. Would you agree that, in a way, we are raising a new stolen generation in people being born out of these surrogate arrangements? They are being separated without any choice from their birth mother.

Mr KASSISIEH: I would think that that would be a rather strong term to describe these loving family situations which, on all the research we have, there is no crisis of this separation. In fact, the relationship between the surrogate mother and the child is fostered by the parents that commission, if I may use that term, the surrogacy arrangement. If you have a look at some of the United Kingdom research, children are given to the intended parents very soon after the child is born. Certainly, in our submission, we recommend that for the stability of a child any scheme must be contained by a temporal limit from the birth of the child.

The Hon. DAVID CLARKE: With the Stolen Generation, many of those young children went into loving homes. That was not the issue. The issue was that they were separated from their birth mother. We are now getting people being born as a result of surrogacy and from day one, from the moment of conception, they are being reared or raised to be separated from their birth mother. In many ways it could be worse than the so-called Stolen Generation in the sense that there may have been tragic reasons during the Stolen Generation period why a child was taken from their mother. Can you not see the problems that will arise? This is calling into question surrogacy in general.

Mr KASSISIEH: Sure. I have to separate my personal views from the views of the organisation. I think it is a big jump to say that surrogacy is like the next stolen generation because there is a specific cultural history around the whole argument that I would say is likely to offend both sides—both the people who are part of the Stolen Generation and the families who are having children who, I would suggest, would probably resist the idea that their children were a stolen generation. That said, again if we look at the research that is being done in this area, I concede that it is emerging. It is an area of knowledge that continues to develop, as all research does, but we are not seeing the crisis outcomes that people keep predicting. If we regulate on the basis of real lives not predicted crisis outcomes that have not eventuated empirically, then I think we are heading in the right direction because we are reflecting the reality of the situation. In New South Wales there was no regulation of surrogacy until 2007 when commercial surrogacy was outlawed. Even then the guidelines had essentially outlawed commercial surrogacy. We did not see a crisis in outcomes. People were coming to New South Wales from Tasmania and South Australia because of the fact that New South Wales was an enabling jurisdiction that provided them with the counselling required. People were travelling from South Australia to just access a doctor.

The Hon. DAVID CLARKE: Except that we are seeing fallout. We have received information that blogs are being set up by people who are a result of the surrogacy arrangements and a lot of problems are arising. We had expert evidence here today of that, so we are getting fallout. I would be at issue with you on that. I turn briefly to the question of enforceable contracts in surrogacy arrangements. I refer to a situation where a child is being born as a result of a surrogacy arrangement and the birth mother says, "No, I do not want to part with the child." As you know, enforceable contracts are illegal but there is a question whether they should be made legal as part of any new arrangements. Do you have a view on that? I specifically put this to you. Let us take a woman who is the genetic mother and the birth mother and the recipient of the child will be a person or couple who have no genetic relationship to the child. If there were an enforceable contract and the mother on the birth of the child says, "No, I do not want to part with my child", but the court orders that she has to part with her child, would that not be an intolerable situation?

Mr KASSISIEH: Absolutely. We do not support enforceable contracts. I think we have made it pretty clear in our submission that we support the status quo that the birth mother is the legal parent until with informed consent she relinquishes her rights. Then there should be an inquiry into the best interests of the child in that situation as well. That is why we think the transfer system, like in the Australian Capital Territory, is a good robust model to make sure that where there is conflict—and certainly I would say again that the empirical research does not suggest there is always conflict and it would be overstating that concern—but where there is conflict, the best interest of the child is the paramount consideration.

The Hon. DAVID CLARKE: We have a process to allow that—that is, the adoption process—although there is concern it is a very drawn out, long process. From your point of view, would a shorter waiting period for adoption solve that problem?

Mr KASSISIEH: Firstly, for same-sex couples adoption as a couple is not available. So it would not be an adequate solution for same-sex couples. At the moment in New South Wales we have the unusual situation where single lesbian or gay people can adopt but not as a couple. Yet they can also foster children and, in fact, many do and have been actively recruited to foster children. So adoption would not be a suitable situation for them unless adoption laws changed. The other thing is that the surrogacy situation is slightly different to adoption because it has, first of all, limits. Once a child is born there is only a six-month period or a one-year period, or whatever the period is set as a limitation period, after which you cannot make an order in that situation. So you might need adoption if the child is older. The other thing is at the moment adoption is only available to relatives, so a surrogate who is a relative. We do not allow private adoption. Essentially you have to go through the Department of Community Services [DOCS] process for an adoption and there is a whole series of things. So private adoption as such, a relative or step-parent adoption is allowed, but no other type of adoption is allowed. If the surrogate mother is not a relative of the intended parent, adoption still would not be an option for the parent. This was an issue we were not quite sure about but there seems to be a discretion in the Director General of DOCS at the moment and that is being used to help families navigate this legal limbo once a child is born. I am not clear on that. Certainly adoption for two reasons for us would not be adequate. One, same-sex couples are currently not allowed to adopt and, two, adoption at the moment is only available privately for limited people, relatives of the child. If the surrogate mother is not a relative of the intended parents, then adoption would not be an option either.

The Hon. JOHN AJAKA: I will take you to three areas. You indicate in your submission that the status quo should remain and that the paramount consideration is the best interest and welfare of the child. I understand that. Are you saying that the status quo should remain as far as the legislation and regulations are concerned or you saying we need to amend the legislation or bring in new legislation?

Mr KASSISIEH: There are two: One is the pre-baby law, the actual getting to have a child and the criteria and eligibility. We think that is adequate under the ART Act and the guidelines. It is the post-baby issues and the Status of Children Act issues around who is the legal parent. That area we do see a need to regulate.

The Hon. JOHN AJAKA: Let us take the proposition that there should be no discrimination whatsoever in relation to whether the commissioning intending parents are same-sex or opposite sex. Is it your submission there has to be some legislative reform in relation to the parental status and parental responsibility of the child from birth?

Mr KASSISIEH: That is right. We support the status quo, which is that the surrogate mother is the legal parent and her partner, if any, who consented at the time—at the moment it can be a female or male partner who consented at the time, is the legal parent—and that she, with the right support and giving informed consent, can relinquish her rights to the intended parents. The reasons for that are twofold. One, that process allows for an inquiry into the best interests of the child, so there is an independent oversight of that by a court. Second, it ensures against undue pressure, for example, on the surrogate mother. Therefore, it tries to protect the fact that there are arguments from lots of different sides of the view that surrogacy might be using a woman as an incubator or using a woman's body or reproductive capacity in a way that is commercialising pregnancy. So we also would resist anything that would deprive a surrogate mother of the right to make an informed decision about that.

The Hon. JOHN AJAKA: Let us proceed on the basis of the best interest of the child and that any surrogacy agreement is not enforceable, so no-one can take the child away from the birth mother. Let us then look at a scenario that we have heard in the last few days that the surrogate birth mother is happy, the commissioning parents are happy, the child is born. They suddenly come into the limbo situation where they have to get to the Family Court at some reasonable time, with delays, obtain the parental orders for the child's living and contact arrangements, then all of a sudden they wait up to five, six, seven years before an adoption process can take place and face a legal minefield. In your opinion should we be looking at a situation of a separate piece of legislation or surrogacy? Leaving aside adoption and the status of children, should there be a separate piece of legislation to cover surrogacy arrangements, which will in effect amend the Status of Children Act and any other relevant Act? Is that the way we should proceed?

Mr KASSISIEH: I think a good model would be the Western Australia surrogacy bill, which essentially looks at once the child is born ensuring that the intended parents have a mechanism to confer parental rights with the consent of the birth mother. We have outlined the essential aspects of that model we would support, which is the limitation period, the fact that you have to have made an agreement before and now

the child is born you conduct a best interest inquiry. It first of all confirms the status quo in terms of the status of children presumptions. The only difference from the current models that we would suggest is that there should not need to be a biological link between the child and the intended parents in order for that order to be made, because, as Mr Clarke said, for whatever reasons—be they medical or genetic—an egg and a sperm of a donor could be used and not the egg and sperm of the intended parents. In that situation, again the child would be in a complete legal limbo.

The Hon. JOHN AJAKA: Then you have the situation where, if necessary, you can go before a Supreme Court judge, et cetera. Are you aware that the Family Law Act is being amended so that, once it is gazetted, in effect the Federal Government will have put the whole issue of surrogacy back into the hands of the States?

Mr KASSISIEH: That is right. The beauty of the amendments being made at the Federal level is that they confirm consistency once a State has actually instituted a surrogacy transfer scheme. So New South Wales could introduce a scheme. It would then be listed under regulations and under the Family Law Act and it would operate through new section 60HB. Under that, if the current Family Law Act amendment bill at the Federal level goes through—which is likely at the moment—a parent under State law would be a parent under the Family Law Act. That would mean that children would have equal rights in terms of issues like equal time, where they live, or parental responsibility under the Family Law Act, but also if the parents split up the non-resident parent would have child support obligations of helping to keep that child.

The Hon. JOHN AJAKA: That eliminates the argument that whatever we do on a State level will not work because the Federal law prevails. So, once that is gazetted, that solves that problem.

Mr KASSISIEH: Absolutely. In fact, it makes consistent that the child is the child of those people, rather than the current situation, where the surrogate mother would be the legal parent under Federal law; and if you have, for instance in the ACT, an order, they would be the legal parents at State or Territory law. So you have potentially two different sets of legal parents.

The Hon. JOHN AJAKA: I move to the second area, that of birth certificates, because I know we are running out of time. One of the main arguments we have heard in relation to the requirement for some legislative amendment is the situation where the child is born, they go to the Family Court, but all the Family Court does is determine parental responsibility, and who the child will reside with. The birth certificate remains as noting the birth mother as the mother, and possibly her partner as the father. Until the adoption takes place in five, six or seven years time, you have that situation where the birth certificate is not reflecting the intending parents, that is, who the child lives with. In your view, should there be some change in relation to birth certificates?

Mr KASSISIEH: The difference, of course, between parentage and parental responsibility is an important one. The Family Court can only make an order regarding parental responsibility. In essence, you are a foster carer to the child; you foster your child. However parentage, which a transfer scheme at the State level would achieve, is the severance of one set of rights, like an adoption process, and the transfer of that set of rights to another couple, and with that would come birth certificate changes. The child could still have an original birth certificate that listed, like in the adoption scheme, the birth mother, and her partner if any, who consented to the procedure, as the law continues. But there would also be a birth certificate for day-to-day use to reflect the family—for medical purposes, for child-care enrolments et cetera. So that is an important evidentiary issue.

The Hon. JOHN AJAKA: I come to the last matter. I asked this question of a previous witness. Some 30, 50 or 100 years ago the "normal family" was the married husband and wife who bring a child into the world. The reality today is that a married couple could be the father and mother; a de facto couple who are the father and mother; a father with another female partner; a mother with another male partner; a mother only; a father only; a parent with a parent or grandparent; a grandparent or grandparents on their own raising the child; a sibling or siblings raising a child; or an aunt, an uncle or a family friend; a gay or lesbian person; a gay or lesbian couple; foster carer; numerous religious organisations; numerous community organisations; and various government institutions. This matter comes back to what you said earlier, and that is why I raise it. To simply label children in any way—I think you used the expression demonise children—by saying that they are not being raised by a heterosexual couple, or a surrogacy mother, really does in some sense adversely label the children who are in all these other relationships that I have mentioned.

Mr KASSISIEH: Absolutely, and adversely impacts on their wellbeing. You stigmatise their family, you stigmatise their parents, you stigmatise the whole community that they come from, and they experience that every day in the schoolyard, at the child-care centre, and when their parents take the child to a hospital and they hear, "You're the parent? Who the hell are you?" The law should be reflecting people's lives. There is a reality here. Great numbers of children are living in same-sex families, and we do them a disservice if we do not recognise the reality of their lives—and I mean for the entirety of their lives, well into the 80, 90, or 100 if they are lucky, years of their existence. We deny them all the rights and benefits that come from the recognition of a child-parent relationship under the law.

Ms SYLVIA HALE: Mr Kassisieh, the Committee has heard evidence today from a number of people and organisations who believe that no changes should be made to the status quo in New South Wales, particularly in relation to surrogacy, as opposed to the treatment of the child post birth, but they argue their position for reasons that may be very different from those that you made. Two arguments in particular have been advanced. One is that the United Nations Convention on the Rights of the Child, particularly articles 7, 8 and 9, refer to the right of the child to know and be cared for by his or her parents; and, similarly, the right to preserve his or her identity, including nationality, name and family relations; and a duty to ensure that a child should not be separated from his or her parents. The construction that has been placed on that is that, when it was written, that clearly referred to the biological parents, and that is the construction that should be placed on it today. Do you have any comments on that?

Mr KASSISIEH: I start from the position that I am not an expert in international law.

Ms SYLVIA HALE: None of us are.

Mr KASSISIEH: If you have a look at the Human Rights and Equal Opportunity Commission's 2007 national inquiry into same sex discrimination entitled "Same Sex, Same Entitlements", you will see that that inquiry actually looked at the Convention on the Rights of the Child. They said that, by discriminating against a child on the basis of sexual orientation, or the gender of the parent, you are actually in breach of the convention, which also provides, I think in article 2, for the right to non-discrimination on a whole range of areas. I do not know enough about international law to know what the construction of "parent" is at international United Nations level, but I do know that "family" has not been defined by the United Nations to take into account the fact that families are diverse across cultures and countries, and even within countries. So I think it would be wrong to construe a piece of international law so narrowly as not to reflect the fact that families change, and family situations and understanding of parenthood change as well.

The Hon. DAVID CLARKE: Part of the "families" would be biological families. So there might be other families included in that definition in the United Nations covenant, but it would certainly include biological families. I think the question relates to taking the child away from the biological family.

Ms SYLVIA HALE: I was going to get to that later on. For the moment, I was directing my mind to the definition of a parent.

Mr KASSISIEH: Would you like me to take that question on notice?

Ms SYLVIA HALE: I would be delighted if you would. A second argument has been raised about the need for a child to remain with his or her biological parents, the biological family. Indeed, there is an article by Margaret Somerville called "Children's human rights and unlinking child parent biological bonds with adoption, same sex marriage and new reproductive technologies," which appeared in the *Journal of Family Studies* in 2007. There is one section of that which I am sure members of the Committee would be able to recite without any prompting. It was in a submission by Dr Bernadette Tobin from the Plunkett Centre for Ethics. Her words have footnote references to the Margaret Somerville article. She says:

> 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 have not discharged this burden, for the evidence is lacking.

Are you in a position to comment on either the research that Ms Somerville has undertaken, or on the view that certain genes in your mammals are activated by parental behaviour?

Mr KASSISIEH: I do not have any scientific basis. I can take that on notice as well. In terms of the biological arguments, and that biology means a certain type of caring, I do know that we mentioned a United

Kingdom study specifically on surrogacy. I think it is wrong to look at different types of families and compare all the research, as if they were looking at the same types of situations. I mean, in one case you could look at a family of a single parent and say the family has an adverse outcome, but you are not taking into account poverty factors or all sorts of different factors that might not make it easy to compare different situations. However, there was in the United Kingdom study a finding that the non-biological mother, the intended mother, did not have any problems in bonding, or creating a bonding relationship, as a result of not having a biological relationship with the child. That would be the extent to which I could answer your question off the cuff, but I am happy to take it on notice and look at that research in particular.

The Hon. GREG DONNELLY: Does your response link back to comments you made in response to an earlier question I asked you about the approach you are taking in regard to parenting, and that is that it is beyond the innate nature of a man and a woman; that, really, if we do not consider that, the primary consideration is the care given by adults to the child? In some sense history, which has got us to the point, in large measure, we are acknowledging fundamental differences in mothering and fathering, you are essentially asserting that we put that to one side and adopt a new paradigm of just looking at the care as being the fundamental consideration in terms of decisions about what is in the best interests of the child.

Mr KASSISIEH: I was reflecting on the research that I am familiar with, and trying to highlight what that has found. I think that is a different matter, because I was asked about research that I have not read, and it is too difficult for me to comment on research that I have not read. To accord fairness to Margaret Somerville, I would rather read what she has had to say before I critique it, or respond to it, or agree with it.

The Hon. GREG DONNELLY: What I have described to you is the fundamental position that you are asserting, about the issue not of the innate nature of the man and woman as parents raising a child, but with respect to what is important, the contribution that adults, be they same sex, or that even an individual adult might make in the context of being able to raise a child. That is your essential position.

Mr KASSISIEH: That was certainly the conclusion of our 2002 report "Meet the Parents," which said that it was the family processes, not the family structure, which contributed to the welfare outcomes of a child. If you would like, I could elaborate on the research that was covered in that report, but I cannot do that at this moment.

The Hon. GREG DONNELLY: I do not mean to put you on the spot. I just wanted to get the position clear in my mind.

Mr KASSISIEH: Sure.

CHAIR: I have a couple of questions about specific issues for the Gay and Lesbian Rights Lobby. The first is in regard to the conditions on surrogacy relating to defining gestation inability for female same-sex couples, excluding assisted reproductive technology [ART]. If two lesbian women wish to participate in surrogacy and one of that partnership is capable of gestation—there is no clinical reason for that person not to have a child—my personal perception is that they then should have the same conditions imposed on them as anybody else participating in ART. Am I clear?

Mr KASSISIEH: So that the partner could act as a surrogate?

CHAIR: No. The question is about the inclusion of criteria in surrogacy programs. The current inclusion processes are about women not being able to actually bear a child. Does the Gay and Lesbian Rights Lobby perceive that the social inclusion process for ART also includes gestation?

Mr KASSISIEH: I am not completely clear on that.

CHAIR: Could a lesbian couple say, "We have found somebody and we want the surrogacy process for us?" Do you think this should happen when one of the women could actually carry a child? I know it is a hard question; perhaps you could take it on notice and chat with the people?

Mr KASSISIEH: Sure. From our consultation with people I am aware of only one case where a partner has actually carried the child using the egg of her partner because her partner was not able to carry the child. Really, although it is theoretical that two women might consider having surrogacy and a third woman to

carry the child, it is really going to be mainly gay men who are pursuing surrogacy. But I will take that on notice.

CHAIR: My next question relates to the huge social shift that the Committee has discovered over the past two days concerning the obsession about a child knowing how it is conceived. I do not know about other Committee members, but I grew up without ever knowing that my parents did the act until I reached the age of finding out how it was done. This huge social shift that has occurred through adoption laws and the actual surrogacy process is that it is very important for a child to understand the way it was conceived. This is just an interest comment of mine. In my mind this is a huge social shift and must be taking a lot of people time to catch up on.

Mr KASSISIEH: Certainly the premise of the Assisted Reproductive Technology Act was that a donor register should be established so that a child could access their information. Anecdotally and from some research we find that actually a lot of lesbian women in particular know the donor who is involved in the conception of the child. In some cases they may have a limited contact relationship and in other cases they may have a more substantial parenting role. That would be the extent of the knowledge I have on that area.

CHAIR: It was not really a question for the Gay and Lesbian Rights Lobby; it is more a question of society.

Mr KASSISIEH: I think it is a broader question that has been brought out about by the openness of parents around the conception of the child, particularly when there are concerns, I think, around genetic heritage being important for medical outcomes et cetera and concerns around ensuring blood types et cetera for organ donation and other issues that may arise.

CHAIR: Thank you very much for working so hard to give us the information we required. We have extended the inquiry to next year and will be holding a further hearing in March. There could be further questions the Committee may send to you, if you would be happy to answer them. The secretariat will contact you about them. The questions you were sent on notice that we have hardly touched on today are a fairly important component of the inquiry and the secretariat will work through what information we still require from you in relation to those questions. Thank you very much.

(The witness withdrew)
The Committee adjourned at 3.50 p.m.