THE LEGISLATIVE COUNCIL COMMITTEE, GOVERNMENT ADMINISTRATION 'A', MET IN COMMITTEE ROOM 2, PARLIAMENT HOUSE, HOBART, ON MONDAY, 1 AUGUST 2011

SURROGACY BILL 2011

Mr ANDREW WEIDMANN, REGISTRAR, FAMILY COURT OF AUSTRALIA, WAS CALLED, MADE THE STATUTORY DECLARATION AND WAS EXAMINED.

CHAIR (Ms Forrest) - This hearing is being recorded. Everything you say is protected by parliamentary privilege, but if you repeat anything outside it may not be. If you do want to give us any evidence in camera, then you can make that request and the committee will consider that. Evidence you provide may be used in our report that we will be producing in due course.

We have had a couple of days of hearing, looking at the legislation from a couple of different points of view. One of the areas that has become fairly evident is that the act, as it is set up, means that any court contribution is through the Magistrates Court because we have been informed that the Family Court does not have jurisdiction over a State law such as this. We have made the observation that if a child is born through a surrogacy arrangement, the Magistrates Court makes the determination about the parentage order and if there is some conflict later on then the Family Court becomes involved at that point. We were wondering what the impediments are to having the Family Court involved in that process and could it work that way?

Mr WEIDMANN - I was fearful that this was going to happen because the principal registrar has limited my authority to speak on behalf of the court today to the parameters set out in her letter - the current court processes and the Commonwealth jurisdictions. I am happy to comment in that ambit but in terms of the interrelationship between Commonwealth and State jurisdiction, I do not think I am authorised by the principal registrar to comment. How it would conflict with the proposal arrangements in the State system, I do not have sufficient expertise to comment on that. I can tell you how it currently works.

CHAIR - Yes, if you could start there.

Mr WEIDMANN - Then perhaps give examples of problems that might flow from that. What would happen in the current arrangement with proposed parents of a child born under a surrogacy arrangement?

CHAIR - Yes.

Mr WEIDMANN - The actual mechanics of how that would work?

CHAIR - Yes. You have looked at the bill, I assume?

Mr WEIDMANN - No, because I was only asked to comment on the current Commonwealth processes in both the Family Court and the Federal Magistrates Court in situations where people were seeking consent orders from either court under the Family Law Act.

CHAIR - Do any other jurisdictions operate under the Family Law Act?

Mr WEIDMANN - Interstate, a number of local courts, the equivalent to our Magistrates Court, work under Commonwealth jurisdiction. Technically the Magistrates Court in Tasmania has Commonwealth jurisdiction although they do not in a practical sense exercise it. It is exercised by the Family Court and the Federal Magistrates Court but in geographically remote areas of New South Wales and Victoria and Queensland often the local court steps in as a first point of call, as it were, in terms of the starting of proceedings in those remote or regional locations, and then it is referred to the Commonwealth court. But they are exercising Commonwealth jurisdiction under part 7 of the Family Law Act. In Tasmania it is invariably not exercised by the State Magistrates Court even though they do have jurisdiction under the act.

CHAIR - So the Tasmanian Magistrates Court could act -

Mr WEIDMANN - Under the Family Law Act but in my experience since the 1980s, apart from maintenance work prior to the child support legislation, they have not because of the ready availability of a Commonwealth judicial officer in this State, unlike, as I say, the remoter, regional areas of the bigger States on the mainland. I do not want to speak double-dutch or confuse things as to how that works. Basically anything in this State, not an application to the Magistrates Court under child protection legislation, but anything to do with children outside that State welfare jurisdiction comes to either the Federal Magistrates Court or the Family Court exercising the same jurisdiction in effect under part 7 of the Family Law Act - irrespective of how the child is born. Whether it be surrogacy, artificial conception arrangements or whatever, it comes before us.

Dr GOODWIN - So could you take us through what happens at the moment when there is an informal agreement between the intended parents and a surrogate mother and the surrogate mother agrees to have the baby for them and hand over the baby. Then something goes wrong and it all falls apart so the surrogate mother says I am not giving you the baby. What happens?

Mr WEIDMANN - Okay. The problem is that Ms Filippello restricted me to talk about consent arrangements.

Dr GOODWIN - Okay.

Mr WEIDMANN - But in effect it is not much different. There are three processes depending on which court - remember there are two courts exercising the same jurisdiction. In the Family Court there is a process called an application for consent orders. The application for consent orders comes before a registrar of the Family Court, in other words, me in Tasmania, and that is predicated on all parties who are concerned with the welfare of a child being a party to it. In other words, to go under that process you would, in my view, need to have the biological mother, the biological father, the parties who propose to actually care for the child, all be parties to that arrangement. It is

a one-stop shop, as it were - one document. Obviously in 999 out of a thousand cases it is usually mum and dad or husband and wife in property matters, but for the purposes of the surrogacy it could still be the operative arrangement or process.

Indeed, his Honour Justice Benjamin actually has one of these before him for judgment next week on this very topic - not commercial surrogacy but altruistic surrogacy involving a young relative of the putative caring mother and father of the child. His Honour invited me to suggest that his associate e-mail you a copy of his judgment when it is handed down in the next week or so.

CHAIR - That would be very helpful.

Mr WEIDMANN - It summarises the situation from the Family Law Act perspective. So it is not commercial surrogacy; it is altruistic surrogacy, but technically there is no difference under the legislation. But for any of these arrangements, however the child is born, part 7 covers that child in Australia apart from the child protection jurisdiction. As I say, surrogacy is an issue to consider but it does not change the law so far as the judge has to consider.

The application for consent orders would come to me, like the altruistic example that I gave, and that is where the ordinary mum-and-dad-type consent order process ends because I would automatically refer that to His Honour for consideration. If it is mum and dad working out what the parenting arrangements are for their child then I would, assuming it was appropriate, simply sign off as a registrar under my delegation. If it was a grandma - there are many cases you might be familiar with of grandparents who take over care of a child for mental health or whatever reasons - in the surrogacy, certainly after lengthy discussion with His Honour on the issue, there is no doubt that it would be appropriate to refer it to a judge of the Family Court, and at that point in this example His Honour ordered a family report. A family report to all intents and purposes is the same process as if a mother and father go to trial with a disputed case in the Family Court. They ask a family consultant to prepare an in-depth or thorough analysis in investigation of the arrangements for the child or children. It involves interviews with the children, the parents, the children with the parents and it carries out a thorough assessment of the family relationships and dynamics. In this case the judge took the view that that was appropriate.

CHAIR - How old is the child we are talking about here?

Mr WEIDMANN - The specific case?

CHAIR - Yes.

Mr WEIDMANN - A very young child.

CHAIR - A baby then?

Mr WEIDMANN - Yes. I think the point is that it is the usual course of action in the unusual situation of a surrogacy to seek such a family report and the family consulting can be up to two months - it can be longer depending on the work schedule of the available family consultant - to prepare that report. The family report is released to the

parties, and their solicitors if they are represented, and the judge considers the report and hands down reasons for approving, or may not approve the proposed consent orders. That family report process is to all intents and purposes the same process that disputing parents would go through in a matter that actually proceeded to a trial, what in very old-fashioned terms has been called a custody trial. But even in this consent arrangement certainly Justice Benjamin would be of the view that a family report would be appropriate.

Dr GOODWIN - What sort of qualifications would the family consultant have?

Mr WEIDMANN - A social scientist. We have three family consultants in Hobart and one in Launceston. Two are clinical psychologists and two have social work degrees. I think from memory they would set aside about two days of their time to prepare a family report - on average.

CHAIR - The bill we are looking at basically requires, in an ideal world, that the surrogate mother and/or her partner and the intending parent or parents have counselling and legal advice before entering in an agreement and then the court makes a decision after the child is born. We have had some evidence from a variety of people suggesting that a process like that, and even a court involvement, could happen at the front end before the pregnancy occurs. Obviously, you still need those fall-back situations, as exist already in the bill, where no counselling has been received and no legal advice was sought but the child is still being born. What you are talking about here is getting this family report organised and done and the use of family consultants to do that and then the court makes a determination. Could that happen at the front end?

Mr WEIDMANN - No, not under the Family Law Act because a child has to be a child. The court only has jurisdiction when there is a child. I cannot comment on the State jurisdiction but under the Family Law Act a child has to be a child.

CHAIR - They are not a child until they are born.

Mr WEIDMANN - Yes. There is no contractual element in the Family Law Act. There is plenty in the property divisions of the Family Law Act about prenuptial agreements and all that sort of thing, so in a sense it is analogous, but so far as children are concerned the court can only determine what is in the best interests of the child and go through all the steps when there is a child to determine what should happen to the child.

CHAIR - Therein lies a potential problem, I guess. If you wanted to try to get a court-sanctioned agreement before the child was born, whether the woman was pregnant or not -

Mr WEIDMANN - Certainly it would be nothing to do with Commonwealth legislation.

CHAIR - Right.

Mr WEIDMANN - I cannot speak for that and the inconsistency issue with Commonwealth law. That is well outside my remit today.

Dr GOODWIN - In a situation where you have a surrogate mother and she has a partner who doesn't have a biological connection to the child, would that partner still have to be party to this arrangement, to the consental process?

Mr WEIDMANN - So you have the surrogate mother and the sperm donor or the man who is going to be in effect the father?

Dr GOODWIN - No, just her partner. The surrogate mother is having a baby for a couple and she has a partner who doesn't have any biological or genetic connection at all.

Mr WEIDMANN - He has nothing to do with my consental process.

Dr GOODWIN - Okay.

Mr WEIDMANN - I do not see this as being a likely scenario in commercial surrogacy processes because you are not likely to have everybody involved in a commercial surrogacy as a party - you could of course. You probably need the person who carried the child, the person who donated the egg, the person who donated the sperm - if it was someone different - there could be a whole raft of people involved, unlike the altruistic surrogacy arrangement.

CHAIR - Commercial surrogacy is not part of this, it is only altruistic.

Mr WEIDMANN - I see.

CHAIR - But you can still have many parties involved.

Mr WEIDMANN - That's true. In altruistic you are probably going to have everybody cooperating in what I call our consent order process because if they are going to be that altruistic to help in the first place, they will want it all properly done at the end of it, assuming the arrangement doesn't break down of course.

Dr GOODWIN - I want to explain why I was asking that question. There is some debate with the Surrogacy Bill about the agreement between all the parties upfront, which is the surrogacy arrangement where one female agrees to have a baby and hand it over to the intended parents. There is some debate over whether her partner should also be a party to the surrogacy agreement because of course you could get the situation where they go through the pregnancy and then he is not happy about her handing over the baby, even though he has no genetic or biological connection.

Mr WEIDMANN - If after the birth a couple care for a child for a period of time before the surrogacy agreement is activated then I would have thought it is entirely probable, or may be probable, that he is a person with an interest in the care of the child who should be a party to proceedings under Commonwealth legislation. Of course if the child is handed over, like an old-fashioned adoption, straightaway at birth, and he has had nothing to do with the child, simply because he is married or in a de facto relationship doesn't give him status, I would have thought, if he has had no interest in the care of the child, as distinct from the sperm donor, as the biological father, or a carer of the child after the child is born. In every case the judicial officer is entitled to require certain people to be parties if they think they have a proper interest in the welfare of the child.

I suppose the paperwork that would become before me in a consental arrangement wouldn't have to include that person but the judge might take a different view on reading a report, for example, that this person has a clear interest and he/she should be a party to the proceedings.

CHAIR - You could argue that he has cared for the woman during her pregnancy to ensure that her medical, physical and nutritional needs are being met. It is a long bow, I guess.

Dr GOODWIN - And possibly developed an attachment, even though the baby isn't born yet.

Mr WEIDMANN - One of the Family Law rules that governs who should be a party says that if there is an application for a parenting order, the following must be parties - it doesn't mean that somebody else may be asked to join but these must be parties - the parents, any other person in whose favour a parenting order is currently in force and any other person with whom the child lives and who is responsible for the care, welfare and development of the child and of course the child welfare authority, if they give some order. If that man became a dad for a few months after the birth, then clearly he would need to be a party.

In the other one it would highly discretionary and it depends on the facts of the case.

Dr GOODWIN - Yes, okay.

CHAIR - Are you also saying that the parenting report can take up to two months as a general rule?

Mr WEIDMANN - That is only because there are lots of other parenting reports going on and they need to structure their diary. It can be quicker and it can be a bit slow, but not significantly slow, I would have thought.

CHAIR - Either way, though, even if it is only month or whatever, there is a chance that the baby could be with the birth mother and her partner, if there is one, while that parenting report was done?

Mr WEIDMANN - Anything is possible. You have to remember that we are talking about a consent arrangement here where the court, unlike in a child protection case, is not there to instantaneously protect a child from some harm that is going on. It is there to consider whether the proposed arrangement is in the best interests of the child. Presumably there is an arrangement and the child may already be in the care of a surrogate parent.

CHAIR - Yes, could be.

Mr WEIDMANN - Could well be and all that the court is being asked to do is to sanction that by way of a consent order to regularise the situation. It depends on each individual case.

Dr GOODWIN - How important is it for an arrangement like that to be formalised by the court, whereby the baby born to a surrogate is recognised as the child of the intended parents? What does that mean?

Mr WEIDMANN - Presumably they would obtain an order from the court that they have sole parental responsibility, what used to be called guardianship in previous versions of the Family Law Act. In other words, they have sole responsibility in that scenario for long-term issues about the child, about their health, about their upbringing, education and so forth. They would have an order that the child live with them, which is obviously important from any Centrelink perspective or any legal perspective. It works in exactly the same way if, for example, a father or mother is successful in some court case, as against the other parent of the child.

Of course, that leads to the next issue and that is that the court, under this arrangement, only makes a parenting order in favour of the new surrogate parents. It is not an adoption order. In other words, it does not negate the rights of the birth parents to bring subsequent legal action insofar as the child is concerned.

Dr GOODWIN - Do you mean that five years down the track the birth mother could say, 'I want the child back'?

Mr WEIDMANN - Yes. They may be unsuccessful. We are talking about legal rights here, as distinct from what they might be successful in doing. It is in the same way that if a mother or father is successful in proceedings that the child live in their care and three or four years down the track the father is unhappy with the arrangements, no-one disputes that he can bring a subsequent application to revisit the parenting arrangements for the child. In the same way, if grandma looks after a child from a drug-affected mother, her daughter, but the daughter gets a lot better, which is a frequent occurrence, and she seeks to have the child returned but a strong bond has developed between the child and grandma, mum will make an application for the child to be returned to her care. As long as there is a significant and substantial change in the circumstances of the parties, you can bring an application under Part 7.

CHAIR - But you cannot do that with adoption?

Mr WEIDMANN - Adoption is State legislation and you cannot. But Commonwealth overrides State and section 60G of the Family Law Act provides that the Family Court may grant leave for proceedings to be commenced for the adoption of a child. In other words, a lawyer may well consider, as well as ordinary parenting orders, having such an order in a consent arrangement, giving a child to the intended parents and that would enable the parents to not only get their parenting order but then they could apply to the Supreme Court for an adoption order.

CHAIR - You might not know this, but I wonder whether that is happening in other jurisdictions. The reason I am thinking that might be the case is that effectively the surrogate mother could come back in a few years' time and say that she has changed her mind. She may or may not be successful in that, as you said, but if the intended parents had got the parenting order in the first instance and then gone down the path of adoption, why would they need that? If they have already got a parenting order -

Mr WEIDMANN - Because an adoption order is substantially different from a parenting order. If you think in terms of a mum and a dad, a parenting order places a child with mum or dad - or hopefully there is a better share-care arrangement. It does not exclude the other parent as a loving dad or a loving mum, but that is a parenting order because that is what 999 out of 1 000 demand with grandparents included perhaps. However, an adoption order excludes the birth parents forever from being parents; it makes the others the actual parents, it excludes the parents, whereas a parenting order does not exclude dad and in fact because that is why it has actually gone even more the other way in terms of the 2006 amendments to keep even a greater role for the non-living-with parent. This is more of a judgment call on my part, but the Family Law Act is not aimed at excluding people, it is aimed at what is in the best interests of a child, whereas adoption in a sense is aimed at saying these are the new mum and dad of this child.

CHAIR - Again and this probably is something that you may not be able to answer but in other jurisdictions and -

Mr WEIDMANN - Which other?

CHAIR - Other States in Australia.

Mr WEIDMANN - I wouldn't know.

CHAIR - I am just wondering whether they have had issues where a surrogate has come back later on but I do not know how long their legislation has been in. We are talking to some of those people so we will ask them.

Mr WEIDMANN - Firstly, I don't know and, secondly, no comment. I honestly do not know the answer to that question. What I am talking about is Australia-wide, of course, in terms of Commonwealth jurisdiction.

CHAIR - Yes.

Mr WEIDMANN - Then you would have an order from a judge and that can only be a judge, not a federal magistrate, entitling the person to go to the Supreme Court for an adoption order. It is quite a protracted process we are talking about here but that is a matter for the legal adviser, of course, of the prospective parents of the surrogate child.

CHAIR - The parenting orders issued under this bill are issued by the Magistrates Court and then the parents would need to apply to the Family Court for an adoption. Am I lost again here?

Mr WEIDMANN - I have to say that I don't know the answer to that question because I have not studied the legislation to know what -

CHAIR - It doesn't mention adoption at all in here, I am just running it through my head from you have said.

Dr GOODWIN - I think this bill is needed to prevent the need for adoption because they are recognised as the parents.

Mr WEIDMANN - Yes.

CHAIR - It doesn't remove the potential right for the birth mother to actually make a claim at a later time.

Dr GOODWIN - Possibly not, I'm not sure.

Mr WEIDMANN - My understanding of section 62 of the Family Law Act is that by virtue of that order it removes the power of the Commonwealth court to make orders with respect to the adopted child - with respect to the birth parents. Obviously the adopted parents can then have dispute with each other under the Family Law Act about their care arrangements but I can't comment on what the equivalent section 60G inconsistency provision is as regards this new legislation, so I just don't know.

CHAIR - With the family law then, the Commonwealth legislation, is there mention of surrogacy? It obviously talks about adoption in section 60G.

Mr WEIDMANN - To the best of my knowledge there is no mention of surrogacy in Part 7 of the Family Law Act. If you remember, Part 7 just deals with children. Section 60H(b) says that if a court has made an order under a prescribed law of the State to the effect that the child - it does not call it surrogacy, but the heading is surrogacy - is the child of one or more persons or each or one or more persons, then they are deemed to be a parent. In other words, there is a provision that recognises surrogacy legislation. Can I read to you the actual provision in full?

CHAIR - Yes.

Mr WEIDMANN - It says:

'If a court has made an order under a prescribed law of a State or Territory to the effect that -

(a) a child is the child of one or more persons or,
(b) each of one or more persons is a parent of the child

then for the purpose of this act the child is the child of each of those persons.'

It is not for me to say what my understanding is at all, but I think presumably the effect of that, without having researched the point, is that if there were some State legislation that would be recognised for the purposes of surrogacy. But I can honestly say that it has never come before me because there is no Tasmanian issue for me to consider under Commonwealth legislation.

CHAIR - But that would stand for adoption as well or a child born through ART or-

Mr WEIDMANN - No there is a separate one for artificial conception procedure declaring:

> '... where a child is born to a woman as a result of carrying out of an artificial conception procedure while the woman is married to a de facto partner of another person' -

and it goes on to say:

> 'and either the woman or the other intended parent consented to the carrying out and the person who provided the genetic material did so by consent then they are both deemed to the parents of the child'.

Then there is some complex piece of legislation.

CHAIR - That is saying that if the man has not provided the sperm, it is still his child, it is recognised as his child - that is what they are saying?

Mr WEIDMANN - I think so, yes. Again, I have not researched that point and really, as I say, I am only authorised to speak on process issues for the court, not substantive law issues.

CHAIR - I appreciate that. One of the other matters that was raised was looking at having a more formalised registered agreement that the court sanctioned somewhere along the line before the conception of the baby was that a process that happened at the front end would allow some of the issues like a multiple pregnancy, a baby with minor or major malformations that might or might not be compatible with life and thus an abortion may be a consideration for one of the parties. These sort of processes will be dealt with in an upfront process to a degree so there was some understanding that if this happened then that would be the expectation. But if you are saying that because there has to be a baby for any involvement in the Family Court that there is no way that anything could happen at the front end.

Mr WEIDMANN - No.

CHAIR - How do you deal with that.

Dr GOODWIN - The only way to do it would be to change the Family Law Act and you would have to get the Commonwealth Parliament to do that, presumably.

Mr WEIDMANN - I think one of the things that is probably worth looking at is the issue of section 60H and how it relates on inconsistency with your proposed legislation but I have not got the expertise or the authority to comment on that. It may well be that it is already planned by the Commonwealth Government through the Parliament to cover the surrogacy arrangement.

CHAIR - Surrogacy arrangements have been in place in other jurisdictions for ages.

Mr WEIDMANN - That is what I was going to say, it is not new in that sense.

But no, there definitely has to be a child. Then the court does not have litigation between prospective parents. That is assuming everyone consents with that process that I was outlining to you. There are of course cases where there is not consent of everybody. And when the court has to make ex parte orders or orders made in the absence of one of the parties, it is hard to imagine in a surrogacy arrangements you are talking about from the altruistic approach that there would not be consent. But there could be a breakdown

of the relationship post birth of the child - a breakdown in the arrangement between the parties as to the child. Certainly then you would have to bring forward what is called an application for final ruling, which is how a contested court case starts in either the Family Court or the Federal Magistrates Court, seeking the same orders but not in terms of an already-done arrangement, as it were, between the parties. So you would actually commence a court case, in other words. As in any court case you bring an application against another party.

CHAIR - There was a case in Queensland where it was noted that there was an altruistic arrangement between a woman and, I think she might have had a partner, and a gay couple who were the intended parents. There being no formal arrangement and, as I understand, no counselling or anything much either -

Dr GOODWIN - Or had there been a surrogacy arrangement but she changed her mind?

CHAIR - The baby was handed over and then the woman who birthed the baby had significant regrets and became quite depressed and suffered adversely as a result of that. One of the comments that was made was that you need to have that assurance of counselling, legal advice and an agreement. Currently, as our bill stands, all you need is a verbal agreement. The Government has committed to changing that at least, so that it needs to be in writing. In those circumstances it was an altruistic arrangement, all parties seemed quite happy, allegedly, up until some time after the child was handed over.

Mr WEIDMANN - At that point, that case - forgetting about your legislation and just saying what would happen currently - would become a standard court case about the child. The only difference is that there would be more parties, rather than just mother or father. You would probably need to join a number of people as parties to that case - the prospective caring mother, the prospective carers of the child, the birth mother -

CHAIR - The intending parents - I think it was a gay male couple?

Dr GOODWIN - Yes.

Mr WEIDMANN - I think whoever will be, has been, or is involved with the child would be a party, so there would be a significant number of parties to it. But at the end of the day the process would be exactly the same, except more complicated, and the mother or father disputing where the child should live. The family report would be exactly the same, the trial would be exactly the same, except longer. So in terms of process it would be exactly the same. Obviously the issues the judge would need to consider, or the magistrate, would be significantly different but it would go through that process which can take some time, depending on the availability of the judicial resource.

CHAIR - Mrs Armitage is in Launceston. Do you have questions, Rosemary?

Mrs ARMITAGE - No, I think they have all been answered. There are certainly a few issues to look at.

Mr WEIDMANN - His Honour is happy to send a copy of that judgment in the next couple of weeks to you. Shall I get it e-mailed to Ilise's e-mail address?

CHAIR - Yes. Are there any other matters you would like to raise?

Mr WEIDMANN - No. As I said, I am not expert on surrogacy - far from it - but I was happy to answer the questions about the court processes. As to the deeper questions you have, I really do not have the expertise nor, as an aside, the authority today to comment on them. Hopefully that judgment will make things clearer but the inconsistencies I will leave to wiser heads than mine on that issue of how exactly it would work. There is certainly nothing else from my perspective.

CHAIR - The issue has been raised as to why doesn't the bill before us engage the Family Court process, because we are talking about a child and parenting orders, which are normally dealt with through the Family Court. Because we are talking about an unborn child that seems to be one of the major impediments to it.

Dr GOODWIN - Yes - no jurisdiction.

CHAIR - Yes, that's right. Also, at what point will the Family Court become involved, and obviously it would be in the case of a dispute, afterwards, but after the parenting order has been made in the first instance by the Magistrates Court.

Mr WEIDMANN - Sorry, in terms of the current arrangement?

CHAIR - Yes.

Mr WEIDMANN - The court can be involved the day the child is born, of course. You can have your application ready to file, if you wish, apart from the fact that you are mandated to go to mediation first before you can file an application.

CHAIR - To clarify that point then, Andrew, you are saying the day a baby is born of a surrogate arrangement, application could be made to the Family Court as opposed to the State Magistrates Court?

Mr WEIDMANN - Under the current situation, yes. The one thing that I can't comment on is if your legislation becomes an act, how that affects the Family Law Act at birth.

Dr GOODWIN - I think we probably need to get some advice. There is a clause in here which talks about effective parentage orders on legal relationships and it talks about on the making of a parentage order in relation to a child, the child becomes the child of the intended parent or parents named in the order, the child ceases to be a child of the birth parent and each birth parent of the child ceases to be a parent of the child, so it suggests that it solves that issue of the Family Law Act then being able to be applied and the surrogate mother coming back and seeking custody. I think that deals with it but we probably need to get that confirmed.

Mr WEIDMANN - I can't comment about that because that is well outside my remit today. That is certainly the current situation but it is certainly the only one that I have struck for many years. It is not a common arrangement. Can I say for the sake of completeness because I am also here on behalf of the principal registrar of the Federal Magistrates Court, reminding you again that there are two courts in Australia dealing with Part 7 of the Family Law Act, that Their Honours in the Federal Magistrates Court would take, to

all intents and purposes, a similar approach as well. It is the same legislation, of course, Part 7, and indeed the same family reports and, for all intents and purposes, there are very similar time schedules and requirements for everyone to be a party and to properly consider the matters. The structure is the same but for the sake of completeness I thought I should just add that.

CHAIR - When would the Federal Magistrates Court deal with one of these issues as opposed to the Family Court?

Mr WEIDMANN - If you are a lawyer who is applying for a section 60G order, that is an order for leave to have an adoption as well, and you know your law then you would apply in the Family Court because of the drafting of the legislation and your Family Court judge can make a section 60G leave to adopt order, whereas Federal magistrates can't. If you had someone who wanted to go all the way - in other words, not only the parenting orders but also the adoption order - then you would apply in the Family Court. If you didn't want such an order and if it was a consent order then it comes to me because only the Family Court has a swift application for a consent order process but if you were in between those two zones and you had neither a consent order, a quick consent order where everything is an amicable scenario, or you were not applying for the adoption order under section 60G then you would probably be better applying before an order before the Federal magistrate who may well be able to hear your case at an earlier date and deal with it in a more timely fashion. There are more Federal magistrates and so you may, and that is a better way of putting it, have a quicker hearing than in the Family Court. It would probably be dealt with by a Federal magistrate in that event.

One extreme is the consent order situation would be me under Family Court processes or in the other extreme if you want the adoption provision then you would have to go to the judge but in between, if someone was asking for my advice I would probably say, 'File it in the Federal Magistrates Court, it is not a complicated matter and you would probably get a quicker hearing date before a Federal magistrate'. That is purely a process but the same law.

Dr GOODWIN - Generally speaking, do you know how long it would take for consent orders to be dealt with?

Mr WEIDMANN - Consent orders involving mum and dad would be 24 to 48 hours; consent orders involving surrogacy of a similar nature to what His Honour is currently dealing with would be perhaps three to four months; a trial, I don't know, a year but it could be longer. I know it may be longer in Melbourne and Sydney but in Hobart it may well be under a year, including the full gamut of the process.

Dr GOODWIN - Then, if they decided to go down the adoption route as well, that would be -

Mr WEIDMANN - That is very much outside of my area. That is a separate process through the Supreme Court under State jurisdiction.

Dr GOODWIN - But it would be on top of the Family Court?

Mr WEIDMANN - Very much on top because all the Family Court can order is the parenting order. It cannot exclude the rights of all those under that provision who have an interest in the welfare of the child.

Dr GOODWIN - That might add even more time to it?

Mr WEIDMANN - Yes, it could complicate things - and costs, of course, which is always an important issue, what the people affected by all this have to pay in legal costs and the time involved, so yes, certainly.

CHAIR - But that section of our bill basically removes the opportunity for a surrogate mother or the birth mother to come back in a few years and say I have changed my mind.

Dr GOODWIN - I think that is the whole point of it, to try to streamline the process and get it sorted fairly quickly for all the parties.

Mr WEIDMANN - It may be analogous but it is not for me to comment on the whole adoption situation. It is completely different up there because surrogacy is just another way of having a child, so you still have to look at the best interests of the child because, at the end of the day, that is the test.

CHAIR - I think he major point was the fact that you cannot do anything until there is a child. That was one of the things we were looking at. Is there a way you could get some sort of register agreement in place, and there still may be, before the child is conceived, so that all parties are aware of what they are agreeing to in a variety of circumstances, like a multiple pregnancy or a baby with malformations?

Mr WEIDMANN - The Family Law Act provides that you can only make an order about a child that is in the child's, not the future child's, best interests. I suppose it could be said how would you know what is in the child's best interests until there is a child because who knows what might happen in the next nine months.

CHAIR - That is why something needs to be thought about during that time because lots can happen. Lots can happen in a naturally conceived pregnancy as well. No-one goes for their 18-week scan expecting to be told that your baby is not going to survive or it has a major malformation and you need to make a decision here. But when that happens it is up to the parents at the time to make some decisions. But when you have these complications of other people, like the woman carrying the baby and these other people -

Mr WEIDMANN - Obviously it is fundamentally different from an average mum and dad.

CHAIR - One party might have very different views about abortion, for example, even for a baby who has a condition not compatible with life.

Dr GOODWIN - The family consultants that you mentioned, are they registered with the court?

Mr WEIDMANN - They are employed by the court. There are what are called regulation 7 family consultants who are paid on a contract basis to do reports and who are not employees, but the report has exactly the same character and is ordered under exactly the

same section of the legislation. It is just that sometimes there are not enough family consultants to go around. It is not common in Tasmania, but they then hire certain pre-selected, already-arranged and contracted, private social workers or psychologists to undertake these reports, but that is quite uncommon.

Dr GOODWIN - The family consultants that you mentioned, how do they get chosen?

Mr WEIDMANN - In the same way as public service. There is an ad and you apply for the job as a family consultant with qualifications in either the field of psychology or social work and with a high level of expertise in that area. It is a public service appointment - as a court employee. The contracted ones would be people who have a high reputation known to the family consultant managers and who sign up for contract work with the court, or indeed both courts because family consultants are consultants for both the Family Court and the Federal Magistrates Court in the same sense that I am a registrar for both courts.

CHAIR - Andrew, thank you very much for your time.

THE WITNESS WITHDREW.

Mr MARK BYRNE, Mr TIM VAATSTRA AND **Mr JEREMY HARBOTTLE**, DEPARTMENT OF HEALTH AND HUMAN SERVICES, WERE CALLED, MADE THE STATUTORY DECLARATION AND WERE EXAMINED.

CHAIR - Welcome. We have taken evidence form a number of witnesses looking at various aspects of the bill and because there are some similarities between adoption and changing a parentage arrangement and surrogacy we thought it was important to get a good understanding of how the adoption issues work and why or why not some of those things may be applicable for surrogacy. The committee has had some discussion about the most appropriate framework for putting this arrangement in place and at what point we have an agreement and how that is established, and also how we manage the birth certificate issues.

Mr VAATSTRA - Adoption has been around for a long time in Tasmania. I think that we were the second State to enact legislation in relation to adoption and that was in 1920. Between 1920 and the next piece of legislation in 1968 there were around 7 000 adoptions. To begin with the legislation was pretty loose; there was not a great deal of content there, although it was the skeleton of what came after it. In 1968 a similar process to this occurred where the States and Territories got together and decided that they wanted uniformity around adoption legislation and each State enacted legislation. We did so in 1968.

There was a lot of positive stuff about that legislation but one of the deficits, which we realised later, was really around access to information. It was enshrined in that legislation about secrecy around adoptions so that everything should be kept confidential and even the new birth certificate was designed to hide the fact that the child was adopted, and that reflected attitudes at the time in society about these matters.

Twenty years or so after that another big review was done - I think in 1985 - of adoption legislation and at that time they decided that there were a lot of concerned people - adoptees and birth parents - who really thought it was important to have access to information about their biological history. So the biggest change that happened in our current legislation was that access to information was allowed. Our act is quite specific now about what we can release to people and when, and particularly to adoptees and birth parents there is quite free access to information about their genetic history and adoption records.

There has been a heap of other things in there as well - I highlight that particularly because I think that is relevant to surrogacy. From my understanding of it, limited though it may be, it is a little lacking in terms of the current proposal. There are other things that are relevant that have come up along the way - consents and dispensations, consent from birth parents, provision of information - and counselling is something that is similar to some of the provisions in the new surrogacy legislation - and the best interests of the child.

I guess the biggest difference for me in understanding where surrogacy is coming from is that in adoption we have the convenience that the child actually exists and so the paramountcy principle really is the focus of what we are doing. Everything we do under the Adoption Act is about the best interests of the child and I guess the focus is a little

different, at least at the beginning point in the surrogacy legislation, in that the child doesn't exist yet and we are looking to facilitate the wishes of commissioning parents and through that parents trying to ensure that the best interests of the child are met. There is a different focus there which makes it easier for us to have our focus on the paramountcy principle.

CHAIR - You made a comment - and you might want to come back to this - that there were some issues lacking in the current proposal with surrogacy. Can you first take us through how a child now accesses that information - this is one of the things we were having some discussion about. I don't know whether you read the transcript of Chris Batt of the Births, Deaths and Marriages Registrar when he gave evidence to the committee?

Mr VAATSTRA - No, I haven't read any of that, sorry.

CHAIR - As the Registrar they register the birth, they basically follow instructions, I guess, they don't make judgments about anything. It was a discussion we had about how would a child born into a surrogacy arrangement actually access information. We are interested in how it happens with adoption and how that might apply or not apply in a surrogacy arrangement.

Mr VAATSTRA - I think the first point to make is what is recorded in adoption is important. We record birth parents' details, details surrounding the adoption and the reasons for the adoption. So there is a whole bunch of information that is recorded at the time of the adoption which we maintain, and that is maintained in the Department of Health and Human Services. We have an adoption information system register and a system that is prescribed under our act. From there we receive applications for access to information - it might be from adoptees, birth parents, birth relatives and it could also be from adoptive parents - and then there are different provisions for different people as to what they are allowed to receive under the act. Progressively, over time, more and more openness has been allowed. For adoptees, they are allowed full access to information, including identifying details around birth parents.

Dr GOODWIN - At what age?

Mr VAATSTRA - Over 18 they are allowed access but under 18 they are allowed access with permission from both their adoptive parents.

CHAIR - The ones who adopted them?

Mr VAATSTRA - Yes, adoptive parents and they are able to apply with permission from adoptive parents but then in receiving information we seek approval from the birth parents for under 18 to provide that information but if they are over 18 they are allowed to have it without approvals or without written consent from anyone.

CHAIR - The adoptees - and you might say it is a silly question - if they all know they are adopted that is okay, but do we have fishing expeditions at all? You know when a child thinks he or she can't be a child of these parents, surely!

Mr VAATSTRA - That used to be the case. There used to be scenarios where children grow up and don't know they are adopted until later on and then it is the horrible realisation

that they have had the wool pulled over their eyes for the last *x* amount of years but nowadays we would not approve adoptive applicants if they said they would hide that from a child. That is a practice issue - it is generally considered appropriate in society that families should be open about all these sorts of differences in terms of family dynamics - and it might be step-family relationships or in our case adoption. I think transparency is much more the usual status quo for families.

CHAIR - Is that a requirement, Tim? Are you saying that you would not agree to an adoption arrangement if that commitment was not given because this is the thing with the surrogacy arrangement. How would a child know, particularly if they end up living with a heterosexual couple - with a gay couple obviously some questions will be asked, but with a heterosexual couple it could effectively be hidden?

Mr VAATSTRA - That is what I think a bit lacking in that the fact that we have an information register and we have the provisions around access to information it means that even if applicants through an assessment of their capacity pulled the wool over our eyes they still have the fact that down the track the adoptive person will be able to access information should they find out by other means. I think it just promotes transparency in adoption and when we are assessing people we would be talking about it in terms of our assessment of their capacity -

CHAIR - Is this in the adoptive parents?

Mr VAATSTRA - Yes. When they come to us and they are interested in adopting and we assess them under the act we would discuss those issues as well, how would you talk to your child about the fact that they are adopted, what sort of things would you do to make them feel okay about that? These are the sorts of conversations we would have and that is very much built into the adoption process now. It was not, as I say, under the previous act, it was actually discouraged and secrecy was encouraged, but now we realise that it is really important for people to understand those things so things have changed.

Mr BYRNE - That is also true for intercountry adoption where those issues of demographics may play out, a black child with predominantly white parents and they are encouraged to be open about where they have come from, where the child is from, that cultural links are maintained and all those things.

Mr VAATSTRA - That has been a shift in society's attitudes I think very much and -

CHAIR - That is not legislated, though; from what I am hearing that is just a practice. Is that right?

Mr VAATRSTRA - It is not legislated. Our regulations talk about how we are to assess - they are quite prescriptive actually in terms of how we fully assess - but they do not actually say that you must discuss with the child their adoption, but it does talk about things like how will they facilitate an understanding of their cultural heritage. So it talks broadly but it does not prescribe it in detail but it is definitely in there and it is definitely a practice for us to discuss those issues through an assessment.

Dr GOODWIN - In terms of the birth certificate where there is an adoption who is recorded on there as the parents?

Mr VAATSTRA - The new birth certificate or the original?

Dr GOODWIN - I suppose there is the original which has the birth parents and then what is on the new one?

Mr VAATSTRA - It is just a new certificate as if the adoptive parents gave birth to the child and their names are recorded.

Dr GOODWIN - That does not give the adopted child any clue that they are adopted?

Mr VAATSTRA - No, it is basically a whole new birth certificate with new parents names in there.

CHAIR - But the original birth certificates stands and is stored in an adoption information system, is that right?

Mr VAATSTRA - Yes, it is still there. It is basically confidential so only under the act can anyone access that birth certificate. I think it is section 80 of our act which allows an adoptee to access their original birth certificate.

Dr GOODWIN - So when they are 18 they get whatever records you have, including their original birth certificate -

Mr VAATSTRA - On application they do, yes.

CHAIR - Is there any requirements for them to have counselling at that time?

Mr VAATSTRA - Yes. Our act requires us to counsel people who make application for information. It is not counselling in the sense of psychological counselling; it is more talking about what it means to access the information and some of the things that adopted people experience when they get this information - feelings and those sorts of things. Also we talk about what our act provides, what you can and cannot access.

Dr GOODWIN - Who provides that counselling?

Mr VAATSTRA - That is the Adoption Information Service. Basically it is about providing advice about the act, receiving applications for accessed information under the act and then giving that information out to applicants. The other thing about our act is that it allows for contact veto, so that if a birth parent does not want any contact they can register with the adoption register to say I do not want any contact should my adoptive child come and seek me out. It does not preclude our giving information to that adopted person but it means that they have to sign an undertaking saying I will not try and make contact with that person.

CHAIR - The birth mother is identified, so they know who they are but they cannot make contact.

Mr VAATSTRA - Yes. It does not stop us from giving the information but they have to sign an undertaking before they receive it to say no, I will not make contact. That is a legally

binding undertaking. People can come to the register prior to any information being exchanged and say what they wish. That was one of the things, particularly when they changed the legislation in 1988 and removed all the secrecy provisions, that a lot of people were really worried about because it was retrospectively done as well. So people who understood that in 1968 everything would be kept secret, suddenly in 1988 realised it would not. Therefore they could go and register a contact veto so that they did not have to have that intrusion if they did not want it.

CHAIR - Currently of the people who do give up their babies for adoption - and there are not that many in the State -

Mr VAATSTRA - No.

CHAIR - do most request that veto now or are most of them open and free?

Mr VAATSTRA - It varies. Most of them are interested in information about their child and therefore necessarily are aware that their child might be interested in information about them down the track. We talk about that at the time of relinquishment. We say that the child has the right to access information down the track so they will be able to find out who you are. Attitudes are changing around that. People do not have as adverse a reaction to that as they used to so I don't see it being something where people are always wanting contact vetoes.

CHAIR - Sometimes they put a veto on and come and lift it later.

Mr VAATSTRA - Yes, they can do that.

Dr GOODWIN - Does it only apply to the birth mother? What if they have siblings and grandparents?

Mr VAATSTRA - There are a whole bunch of people prescribed under the act. Siblings are included, and birth relatives and birth parents. I think it talks about lineal descendants as well so there are a variety. I do not remember all the people but there is a range of people, not just birth parents.

Dr GOODWIN - Does the contact veto automatically apply to them or do they have to request it?

Mr VAATSTRA - It has to be specific. The register records their specific wishes around veto - I do not want contact with this person. Usually it is not birth relatives. Usually it is an adoptive person or a relinquishing parent who would register a contact veto. Their life has gone in a certain direction and they do not want that disturbed and they need to register a contact veto.

Dr GOODWIN - In terms of the counselling, you mentioned that it is not psychological counselling. In terms of the people who deliver the counselling, they would be people working in the Adoption Information Service?

Mr VAATSTRA - Yes.

Dr GOODWIN - What background would they have?

Mr VAATSTRA - The position is a level 3 allied health professional and I guess it is with a relevant tertiary qualification. I would not say it is a social work qualification every time although that would probably be preferable. The level is recognising the sensitivities, particularly providing information and discussing those issues with people. We have quite a competent worker in that position who has, for many years, been an adoption officer and then came into the role a couple of years ago - Jane Monaghan, who does a really good job. It is a senior person in the adoption team who does that particular work.

CHAIR - They would refer that person to psychological counselling if they felt they needed it?

Mr VAATSTRA - Yes, if required. We have talked about that. I think, in the past, different workers in that position have taken a different tack. I have felt like we need to be fairly clear about the definitions of that role and not overstep too much, given that there is a lot of work attached to it in terms of receiving applications and meeting with all the different clients. We do referrals to psychologists if we feel that is necessary and do not necessarily take that task on ourselves.

CHAIR - You said a few things were lacking in the proposed legislation. How do you see that could be improved?

Mr VAATSTRA - I have thought a lot about a surrogacy register. I might be a little bit off in my understanding of the current proposed legislation, but the records are kept by the Registrar of Births, Deaths and Marriages. It is a bit like the deficit with assisted reproductive technology around donors. Children are denied the opportunity to understand where their biological roots are and I think it is the same with this legislation. They will not necessarily be able find out who was the sperm donor. Given the possible complexity of the arrangements - up to six people, I understand, could be involved - it seems to me even more important to make sure that, when talking about the best interests of the children, this would give a really strong message to people that when you are thinking about a surrogacy arrangement, remember that the child will be able to get information about who you were or who you are and may seek contact. I think that is a strong message that this is really about us trying to protect the interests of the children, not just through the process now but also in the future if we are facilitating the process. I feel quite strongly about that because of the way adoptions have gone and the learning we have had around access to information and how it benefits people.

CHAIR - Are you aware of the Senate inquiry that reported in February 2011 looking at donor registers and those things? One of their recommendations was, as a matter of urgency, that a national donor register be implemented, but in the absence of that, in the short-term at least, a State-based register should be in place. It has been suggested to the committee, and some of us are of the view that this information should be recorded on perhaps an expanded birth certificate or some other documentation, whether it is a surrogacy register or whatever it is, so that a child who is born through a surrogacy arrangement could come and access who their sperm donor was, the egg donor, the birth mother, her partner if there was one and was around at the time and the intended parents, the potential six people that you talk about. The bill does not seem to provide for this

sort of set-up. The issue of backdating was also interesting. With the adoption it was retrospective.

Mr VAATSTRA - But with adoption it was fortunate because there were usually records there. In this case you might not even have records. Since 1968 the department has held records on adoption, whereas that might not necessarily be the case.

CHAIR - Maybe we draw a line in the sand starting from here with surrogacy but still having that information available. We are talking to Bill Watkins later in the day. I think that he is the only one who does fertility treatment in the State now since the Sydney people withdrew.

Mr VAATSTRA - I do not know.

Mr BYRNE - There are others.

CHAIR - He will inform us of those. But do you think that is an important step before proceeding with this legislation - is that what you are suggesting?

Mr VAATSTRA - As I say, I definitely would suggest that because down the track you leave out a whole section of children who will be born through these arrangements who will not have access if you do not start that now. That is my feeling on it given that the records are not necessarily kept in the same way that adoptions are. I would definitely say that in the interests of those children it starts at day one.

It was interesting drawing the parallels, particularly given that it was so distinctly similar in terms of a national discussion about uniformity around adoption in 1968. They came out with this legislation and then it took 20 years to realise that we should have thought about this back then. We are almost at that point now with surrogacy. We have had the national debate and we are all going out and doing it but the provision for a register of information is not really part of that. I know that New South Wales, for instance, has tacked it on because they have artificial reproductive technology legislation and they have a register - is that right?

CHAIR - We are going to check with some of these because it is a bit unclear who has mandatory provisions and who has not. We will be clarifying that.

Mr VAATSTRA - I am pretty sure that from my reading New South Wales did and then they have just tucked it in with the register for artificial reproductive technology donations and things like that. That is my understanding. But because we do not have that kind of legislation here, it leaves us out in the cold in terms of having to redevelop something or develop something totally new.

CHAIR - It could be suggested that the government position could be to move with this, we have it there, it is ready to go. It might need amendment but you hear that all the time. Are you aware of any urgency around it? Should we push more with getting a donor register and then a surrogacy register as part of that at the outset before you progress so that you have everything that moves forward together?

Mr VAATSTRA - As I say, the decision is still to be made but if you push ahead and then say we will tack that on down the track then you do leave out a quota of children potentially who will miss out on that if records are not kept appropriately.

Dr GOODWIN - The question that I am thinking of and you probably do not want to be asked this in a time of budget cuts, but is it something that potentially your service could do given that you already have the structures and the processes in place? Are you thinking a model similar to the one that you have in the Adoption Act around what is kept, access to information, the counselling provided? Is that the sort of model that you think would work best?

Mr VAATSTRA - That is the model I know and, as you say, it is certainly something that could tie quite easily into what we are doing because we are already performing that type of role.

CHAIR - So it would not be a huge impost on the adoption services to add another component. Is that what you are asking, Vanessa?

Dr GOODWIN - Yes, I suppose.

Mr VAATSTRA - Potentially not. That is not my decision to make.

Mr BYRNE - The difficult part of this is the complexity of these arrangements. If you imagine a child entering adolescence and finding out, 'I am part of six people's arrangements', you are going to need some quite specialised service and you would not just set up a service; you would look at a way to dovetail off other services to provide that, and you have the expertise within that.

CHAIR - Mark, you are saying that it could be done?

Mr BYRNE - It could be. I am not making that commitment but realistically, looking at it from my background as a social worker, I can see the complexities. Some of these kids when they hit adolescence, for example, have the whole identity issue and it is going to have to be incredibly carefully handled and they are going to need access to specialist services.

CHAIR - But that is the point that you make, Mark, that your service could access, whether it is in the private sector or in the public sector, the appropriate support. We are looking at the best interests of the child here.

Mr BYRNE - Yes, that is where we come from.

Mr VAATSTRA - The only other thing that would I think work in favour of that would be to firm up the original agreement that is made in terms of a written agreement because then that could form part of that register, whereas if it is just a verbal agreement, which I think is part of the current proposal, that would make it difficult for understanding the context of when the agreement was made and those sorts of things. You have a court order perhaps but you will not necessarily have that context of when mum and dad first went to talk about surrogacy with a potential surrogate and what was agreed to. I think that

would be quite good information to have in black and white on a register that was created.

CHAIR - The Government have agreed to at least have a written agreement and that is one amendment that they have agreed to but you are saying that that should then form part of the surrogacy register information?

Mr VAATSTRA - I am always in favour of as much information as possible. If that could be there -

CHAIR - Bearing in mind that at that point there is no baby or no child.

Mr VAATSTRA - No, but I guess it gives the child later on the story of how they came to be basically. Say, if either of the other parties died and they never found out those details, if we could have it preserved there then that would be quite in their interests.

Dr GOODWIN - There is a provision in the bill, clause 43, around access to court records and the court records would include the surrogacy arrangement which might have some of those details in there or we could make sure that it has some of those details but I suppose the issue with going through the court to get access to those records is that they would not have the benefit of counselling so while they still might be able to get all of that information, perhaps that process is not as good as it could be.

Mr VAATSTRA - We provide counselling around what is a good way to approach a surrogate mum, saying hi for the first time in making contact. Those are the things that we have experience in dealing with and I think that is quite appropriate, whereas if you are just getting a bit of paper with information on it -

CHAIR - From a court?

Mr VAATSTRA - Yes, from a court - it is not the same.

CHAIR - Is there anything you want to add, Tim? Are there any other deficiencies that you see?

Mr VAATSTRA - That was really the one that stood out to me in talking with the team in my office.

The other thing is the rights of the surrogate mum in the whole scenario. With the rights of birth parents of adopted children, they have been left out in the cold in the past and so progressively we have increased their ability to access information. Originally when provisions were made they could not access as much as they can now and over time we realised that this was a really difficult thing that they had done in the past and they need to be able to come to terms with that, too. I guess we have to focus on the child in this situation but also I think the surrogate in terms of relinquishing that child, despite it being an agreement. I think we need to recognise that there will be a cost associated with that and that will have an ongoing effect on the surrogate. With issues like contact, can they be worked into an agreement? I am not sure that these things have been considered but we have certainly got provisions now that allow for contact between birth parents and adoptive families after the fact.

CHAIR - When you say 'after the fact', do you mean after the original adoption agreement has been made?

Mr VAATSTRA - Yes, after the adoption has been made there could be an agreement between the parties that they send letters every six months or they even have face-to-face visits once a year or they have a birthday party together. The issue we have is that it is not legally binding. It is just an agreement made at the time of the adoption. If, later on, the adoptive parents say, no, we do not want a bar of that anymore, then that is their right because it is legally their child. But over time those provisions have been worked in, so when you are consenting to an adoption, a birth parent expresses wishes about contact or having information about that child. Then we would talk to the adoptive applicant who was selected for that child and say, 'The birth parents wish this. Do you think this is something that you could accommodate?'. We always try to accommodate the wishes of the birth parent. If they were saying, 'I want to have contact every couple of weeks', we would be saying that perhaps they should consider caring for the child themselves, rather than putting the child up for adoption. If it is a reasonable request then we try to facilitate that.

These are the things that, over time, have been worked into adoption legislation to cater for the rights and needs of the birth parent as well. Maybe those issues will come up over time for a surrogate.

Mr BYRNE - Open adoptions have been about the fact that, as young people get older, there are identity issues, so they do not have false views of their birth parents, so that they do not walk around with the idealised view that mum was this type of person and these people took me away and so you have all those confusing issues. Some of the theory behind the open adoption is that you maintain that reality for the child as they grow up. They still know who was the birth mother and they know who mum and dad are - the people looking after them.

Dr GOODWIN - What happens if, say, it starts out that the birth parents do not think they want contact with the child that is adopted, but five or 10 years down the track they do want to make contact? Can they apply for that to happen and then do you broker that?

Mr VAATSTRA - There is not specific provision for that but we have had occasions where people have come back over time, particularly a birth mother who relinquished and was quite adamant at the time that, no, I just want to get this out of the way and I do not want anything to do with it after this. Later on they realise that, hang on, I made that decision at a bad time and I regret it to some degree, so yes I would like contact. We have had occasions where that has come back to us and we have then gone out to the adoptive parents and talked to them about what they feel comfortable with. It can be negotiated after the fact, but it is not legally binding. It is just whether, if all parties agree, that can occur.

CHAIR - Were you engaged at all when this bill was being drafted? Did they talk to you?

Mr VAATSTRA - I was. I have been in this job for a about a year. I was pretty green at that stage and did not really have time or inclination to comment, but then, over time,

many ideas have solidified. Yes, we were approached in the early days and I did briefly give a comment along the lines that access to information should be included but I did not give anything substantial.

CHAIR - How many adoptions, annually, do you deal with now?

Mr VAATSTRA - Local adoptions?

CHAIR - Yes.

Mr VAATSTRA - I think for the last 10 years the maximum we have had is three a year, certainly low numbers for local. I think last year we had 11 intercountry adoptions. Adoption numbers are low.

Mr BYRNE - Although it is fair to say that we are looking at a cohort of kids in long-term care who could be potentially adopted, but that is going to take some time to work through because we do have a number of carers through the intercountry process who are there waiting and have been approved but there are no intercountry babies coming through. Is there a way we could make a cohort of kids in long-term care, with no prospect of ever going home, into that space because the carers are very clear that they do not want to be de facto foster parents. They want to be adoptive parents.

CHAIR - Are the majority of local ones from women who make a decision early in their pregnancy or do you get some of that right at the end or when the baby is born?

Mr VAATSTRA - It can be all sorts. Quite early on in a pregnancy they come and talk to us about the potential of adopting their child. It can be after the birth and anywhere in between. We have strict provisions around when we can and cannot take consent and those sort of things but it happens at all different times. Once the child is that bit older and the child has gone home it is not usually a case of where we have some come back at six months.

CHAIR - When can't you take consent?

Mr VAATSTRA - We cannot take consent within seven days of the birth and we cannot take consent without providing counselling and written information. It is a bit like the legal advice that is written into the surrogacy bill - information about the consequences of consenting to adoption. And then we have a period of 30 days where consent can be revoked.

CHAIR - In which case the child is usually cared for by foster parents.

Mr VAATSTRA - Yes.

CHAIR - That sort of thing will not happen with the surrogacy arrangement either. The agreement is made ideally upfront, though there will be cases where it might not be. It could be after the event, potentially, but it seems there are a variety of ways when the child is born that it could stay with the birth mother for a period. It could go straight to the intending parents and then an application to court is made. That is quite different

from adoption. As a midwife previously, I know the process. The amount of time the baby spends in hospital is extended, and being kept by the midwives.

Mr VAATSTRA - Yes. I am not sure. I briefly read the provisions under the proposed legislation for surrogacy. What exactly happens after the birth? Usually within six months the child is to go to the -

Dr GOODWIN - Yes. They cannot make the parenting orders until six months.

CHAIR - But the child can live with either by the sound of it.

Mr VAATSTRA - Yes, there is a certain amount of time after the birth that they cannot be placed with the permission parents. Is that right?

Dr GOODWIN - I am not sure about that. They cannot make the parenting order.

CHAIR - 'May not be made less than 30 days and not more than six months after the day on which the child is born.'

Mr VAATSTRA - That is for making the parenting order, sorry. The child can be whisked away into the care of the permission parents.

Dr GOODWIN - If that is what they agreed, I suppose.

Mr VAATSTRA - I think in adoption the provision of a certain amount of days post-birth or before consent can be given is different because you do not have an agreement beforehand. So presumably the agreement takes the place of that to some degree, because they have made that in the time when they are rational and reasonable.

CHAIR - Even things like breastfeeding, getting the baby the colostrum, are really important.

Mr BYRNE - We had that discussion this morning.

CHAIR - Did you?

Mr BYRNE - We did not reach a conclusion but when does that actual timing of the transfer happen?

CHAIR - I know they could always express the colostrum and the intended parent could give the colostrum to the baby that way. These are important matters.

Mr VAATSTRA - Yes, for the bonding. But then do you facilitate the bonding process with the surrogate mum as well, only to sever that.

CHAIR - Her milk is going to come in regardless. And it is not very nice when you cannot feed a baby. Like when a baby dies, it adds insult to injury.

Mr VAATSTRA - Ideally you would want there to be agreement that all these things are possible.

CHAIR - Yes, and ideally it needs to be upfront and that is why the upfront discussions are so important. Even with adoption, some babies go up for adoption and the birth mother still breastfeeds them for a few days, doesn't she?

Mr VAATSTRA - Yes, it can be. The child can stay in the hospital and stay with the birth mother for a while she is still deciding. We take a fairly flexible approach to those sorts of things. We do not put our foot down and say we need signed consent now that nine days are past. We could leave that for quite a while, allowing the birth mother to digest the decision that they have made, particularly if they have not talked about it with us prior to the birth, then we would give more time and say, 'You need to consider options around the care of a child before jumping into this.' We certainly do not rush that process.

CHAIR - As far as resourcing for adoption services is concerned, are cuts being made?

Mr VAATSTRA - It is not a good time to talk about that.

CHAIR - Feel free to tell us how it is.

Mr BYRNE - I suppose it is fair to say we are trying to reorient the adoption service to look much more to local rather than to intercountry adoptions because the supply of intercountry babies is not so great. I think we should be celebrating that there are fewer kids being placed from overseas because that means that Australian aid has done its job - to prevent kids being placed with all the identity issues we encounter with that. But I think with the reorientation of the adoption service locally we would be able to perhaps pick up this type of role as well, but obviously it would be a question of the department finding the necessary funds to do it. They are ideally situated to actually pick up that because they are well versed in the issues and the importance of identity. The other thing that I would say, though, is do not underestimate how many people these sorts of decisions can affect - you guys have seen 4 000 people in this space since 1988. Now that does not sound a lot but that is 4 000 life stories that people are working through so it is quite a huge issue for such a small cohort of people. You probably have not done many more adoptions since 1988 - in fact we have done less than that - but the effect of these decisions can be quite compelling across a lot of people. So with any resourcing you have to think about the fact that if you open it up to that kind of approach, as Tim is suggesting, there will be a cost implication.

CHAIR - But if we are looking at the best interests of the child.

Mr BYRNE - That is where we come from.

CHAIR - Yes.

Dr GOODWIN - Would you be able to do some modelling on the cost implication?

Mr VAATSTRA - A Rolls-Royce.

Laughter.

Mr BYRNE - The whole part with all this, though, is the number. It is hard to know what the quantum of the number is. For example, if we are going to look more locally at adoption we can do that model. We can say that if we are going to adopt 10 kids then we can do that but we have no idea. I don't have a sense of how many people this is actually going to affect so it is hard to -

CHAIR - Maybe a fertility expert might have some more idea.

Mr BYRNE - That is right.

CHAIR - If we actually got a ballpark figure would you be able to do some modelling around that?

Mr BYRNE - We are very versed at doing financial modelling at the moment.

Laughter.

CHAIR - We will get back to you on that because we are talking to him later in the day and he may have some idea of the likely demand. I suppose that is a bit of an unknown quantity, but with increasing of fertility rates -

Mr BYRNE - The other thing is that - and I don't know whether you are aware of this - in intercountry adoptions the actual carers themselves pay a fee. Perhaps you may want to think about a process whereby for the people coming forward wanting these arrangements there would be a fee for service for this and we could then do a full cost-recovery type of approach with that.

Mr VAATSTRA - There are fees in relation to access for information as well.

CHAIR - How much are they at the moment?

Mr VAATSTRA - I don't know, to be honest. I think it is no more than $200 or $300.

CHAIR - Can someone on hard times apply?

Mr VAATSTRA - Yes, I could provide that to you.

CHAIR - If a young person came and had no money?

Mr VAATSTRA - Fee waivers and fee reductions - those sorts of things are possible and we do do them from time to time. At the moment we are working out a simpler system around that and it is a little bit complex. If people are under hardship then we can just waive fees if need be so that is quite straightforward.

CHAIR - Are there fees associated with you arranging a local adoption for the birth mother or the intended parents?

Mr VAATSTRA - Not for the birth mother but for the adoptive applicants there are fees around applying, undergoing assessment, preparation of their file if they are going

overseas and then post-placement supervision. That constitutes the majority of fees in adoptions and then there are also the fees for accessed information.

CHAIR - You will provide all those to us?

Mr VAATSTRA - Yes.

CHAIR - That will be good, thanks.

Mr HARRISS - On that matter, Tim, you have just raised about the investigation and assessment of adoptive parents' suitability, et cetera - and that seems to be the fundamental part of the equation if you are looking at the best interests of the child because neither of the adoptive parents are going to have any biological connection to the child - we could have a surrogacy arrangement exactly the same with no biological connection whatsoever and yet there is no proposal in our bill to conduct any such investigation or assessment of the suitability of the people. What is your view about that in terms of taking the best interests of the child into paramount consideration?

Mr VAATSTRA - We have the fortunate position of having a child that we need to place and therefore if possible, and it is not always possible in this country although there is matching done, we assess people for a particular type of child. We would approve a person for a child, zero to *x* number of years, possibly with special needs and these sort of things. We are approving people for children who exist, whereas I know the focus of this bill has been very much what seems to me to be a fairly hands-off approach to the whole thing. I think if you are introducing something like that, this changes the whole nature of the bill. Whether I have a hard and fast view on it either way, I do not know. You do not vet parents who have their own kids. I think that is a really tough ethical issue.

Then you can throw the issue of single parents in. In our legislation, single parents cannot adopt unless there are exceptional circumstances that relate to the needs of the particular child. Same-sex couples can adopt known children, so a step-parent adoption is okay, and de facto couples are the same. They are all issues that are unresolved in our legislation as well. I do not think I can have a clear view on that, unfortunately.

CHAIR - Going on from Paul's question, when you were screening, for want of a better word, the potential parents, you would do police checks and all those things and see if they had a history of child abuse?

Mr VAATSTRA - Yes, we do all that.

CHAIR - But there is no provision in this bill to do any of that.

Mr VAATSTRA - No.

Mr HARBOTTLE - The fundamental difference is that the relinquishing parent relinquishes the child to the secretary of the department who then places the child with the assessed adoptive parents. Under this legislation it is an arrangement between two parties, so the department is not placing the child.

CHAIR - Whose right is it? If I were a surrogate mother then I should perhaps do the police check on you and whoever?

Mr HARBOTTLE - Yes.

Mr VAATSTRA - I am trying to think of a scenario where it all went horribly wrong and the surrogate came back and said -

CHAIR - In Queensland recently, is that the one you are talking about?

Mr VAATSTRA - No, I was speaking hypothetically.

CHAIR - There was a case in Queensland where the surrogate gave up a child to a gay male couple.

Mr VAATSTRA - Yes, I can imagine that down the track we would have a situation like we did in adoption, where lots of adoptees come back and say, 'The State facilitated this for me and did an ordinary job of it or allowed me to be placed with people who were dodgy or worked me like a slave'. These are real situations that have come up. I think, as Jeremy said, it became much more important when the department was involved in placing children but it was still relevant prior to that time when you had arrangements facilitated by doctors or -

CHAIR - Churches?

Mr VAATSTRA - Yes, or private arrangements. Basically we moved on from there to the State saying, 'We need to take a more proactive role'. You could say perhaps down the track we would be looking at that for surrogacy. But I think it is a hard one. I do not know what the answer is.

CHAIR - Whether it is ART or whether it is adoption or surrogacy or whatever, you are creating an unnatural, for want of a better word, entry of a child into the world and you could argue that in those circumstances we should put plenty of protections around that, but how far do you go?

Mr VAATSTRA - Yes. I do not know the answer to that, sorry.

CHAIR - As a midwife, I would be happy to see some checks done on some people.

Mr VAATSTRA - I feel the same. There is certainly the horror situation like someone who has bad intentions for a child commissioned to a surrogacy.

CHAIR - That might not show up on a police check or other check anyway might it?

Mr VAATSTRA - That is right. Even through our process we do not uncover everything; people can tell you what you want to hear. I have done a lot of foster parent assessments also and it is the same. It is not foolproof.

Dr GOODWIN - It adds another layer of protection.

Mr BYRNE - But equally just a police check is not really a good test for parenting really.

CHAIR - No.

Mr BYRNE - There are good parents out there who have a police record.

Mr VAATSTRA - I know in the adoption system we used to talk about the adoptive parent must be of good repute and that just involved them having a conversation with the local copper - 'What are these people like?' 'Not too bad', and it was a big tick.

CHAIR - Not down at the pub every Friday and Saturday night.

Laughter.

Mr VAATSTRA - I think that is a tough question.

CHAIR - It comes back to what is a good parent.

Mr VAATSTRA - Yes, but the more the State gets involved, the more liability there is as well around, 'You facilitated this arrangement' or 'You enacted legislation which allowed this to occur'.

CHAIR - That is a good question then in that if we enact legislation that sets up this process where there is an agreement made, there is a change to the birth certificate and the State is not involved in the receiving of the child and the handing over of the child as with adoption but we have passed the legislation, if it does all go terribly wrong, what then?

Mr VAATSTRA - To me the justification of the legislation is in providing some sort of avenue for people who are doing this sort of thing anyway. This sort of thing happens informally, or can do, or people go overseas and they make all sorts of dodgy arrangements around surrogacy. What the State I see is doing is providing a legal avenue for them to do it here appropriately. It is not going to stop all the dodgy things that potentially could happen but I think that it is providing something where people are doing things anyway.

CHAIR - Putting a framework around to do that but protect the child.

Mr VAATSTRA - Yes, that is what justifies it to me, even though you can look at it in all sorts of different ways and be a bit stressed about it. It is about damage control to some degree.

CHAIR - Harm minimisation.

Mr VAATSTRA - Yes, that is right. At first you think this legislation is not really in the interests of children, it is in the interests of commissioning parents, but better that they have a structure to do it within if they are going to do it anyway than not have anything at all.

CHAIR - At least then the child has some protection of the parents who are looking after it; they actually have some responsibility for the child.

Mr VAATSTRA - Yes, legal responsibility.

CHAIR - And they are required to educate them and care for them and give consent if they need medical treatment.

CHAIR - We might send you some figures and ask for a few figures back and see what we come up with. It has been very helpful to compare the two processes and to consider what other possibilities there may be for getting the best outcomes for any children in these areas.

THE WITNESS WITHDREW.

Mr NORMAN REABURN, DIRECTOR, LEGAL AID COMMISSION TASMANIA, WAS CALLED, MADE THE STATUTORY DECLARATION AND WAS EXAMINED.

CHAIR (Ms Forrest) - You are aware that everything you say is covered by parliamentary privilege here?

Mr REABURN - Yes.

CHAIR - We have invited you along predominantly because we are talking about the way the bill is structured. Ideally it would be a commissioning a couple or a person, or engage a woman and perhaps a partner, to have a baby and hand the baby over. Ideally there will be counselling and legal advice at the front end but the court process does not happen until after the baby is born and then there is application for parenting orders and changes to the birth certificate. There was some discussion about whether we should try to have a court process on a registered agreement.

Mr REABURN - I read the transcript of the evidence that was given by Ms Grant and particularly the bit where she thought that some of the things that the Legal Aid Commission did might be of assistance to your inquiry. That is what I understand I am here to talk about.

CHAIR - Would you like to address those points.

Mr REABURN - In family law matters, both in the Commonwealth jurisdiction and in the State jurisdiction - so that is in the Family Court and the Federal Magistrates Court dealing with Family Law Act matters, and in the State Magistrates Courts dealing with care and protection matters - it is open to the court to appoint an independent children's lawyer. They do this in circumstances where the court feels that, given the nature of the case and the nature of the issues that are going to be before the court, it would be of assistance to the court if there were a lawyer whose sole task it was to assist the court in determining the best interests of the child.

In both these jurisdictions the independent children's lawyer, as it were, operates without a client. In other words, while he is there to represent the best interests of the child he is not there to represent the child and the child cannot give that lawyer instructions. It is a very unusual creature. The common analogy, although I don't think it is totally on all fours, is counsel assisting a commission of inquiry and that, in other words, has a kind of an independent function. When these entities were created and started to be appointed everybody scratched their head and said, 'Oh, but who's going to pay for them?', and with a flash they said, 'Legal Aid can pay'. Legal Aid, as a consequence of paying, appoints the lawyer but there is a national agreement between all the Legal Aid commissions and the family law section of the Law Council of Australia as to the basic qualities and attributes that an independent children's lawyer will have. So we all, when we appoint people to be independent children's lawyers, look for them to fulfil these basic qualities. They are essentially qualities that relate to their areas of practice and the length and type of their experience, so that only people who have a reasonable familiarity with practice in these areas are going to be independent children's lawyers. Then the court makes an order that there be an independent children's lawyer in a particular case and requests the

Legal Aid Commission to provide one. The Legal Aid Commission, certainly in Tasmania, invariably does provide one and chooses from a relatively limited group.

I think the matter that you were discussing with Ms Grant and the point that she had made was that the Legal Aid Commission provides further training and education to these people. We certainly do not train them for that kind of appointment. There is training for the appointment but it is, again, in conjunction with the national agreement about equalities. There is a training course which is run by the Family Law section in consultation with National Legal Aid and anybody who wants to be an independent children's lawyer has to have done that course. But it is a relatively straightforward course and it introduces people to the nature of the task and some of the Family Court decisions about the nature of an independent children's lawyer and things of that kind. There are guidelines on how a lawyer should fulfil the task. Those guidelines are National Legal Aid guidelines and they are endorsed by the Family Court.

In effect what you have is a group of relatively experienced family law practitioners who agree to undertake this work at the request of the Legal Aid Commission and who do it for Legal Aid rates. Legal Aid rates are pretty poor and so these are people who are making a significant contribution to the proper functioning of the system and to the search for the best results for children. The Legal Aid Commission takes the view that the very least we can do, every year when the Family Law Practitioner's Association of Tasmania holds its annual conference, is that the Legal Aid Commission the day before holds an independent children's lawyers seminar day and we invite all the independent children's lawyers on our books to come to the seminar. We provide speakers, morning tea and lunch and things like that. We pay for the location and we pay whatever the speakers cost and so on and we invite them. The cost to them, if they are coming to the family law conference, is an extra night in the hotel and they pay for that. We turn on the seminar as a thank you and acknowledgement of their professional skills and as an assistance to them to learn what is happening, to be across research and thinking and things like that. The speakers we get are a mixture of lawyers and other professionals. We often have psychologists and psychiatrists, social workers, court counsellors, people like that, who participate in these exercises.

CHAIR - Is it fair to say that lawyers you get to fulfil these roles probably do it for a bit of an altruistic action themselves, because they are not paid that well?

Mr REABURN - There is an element of altruism involved in everybody performing this kind of task. Also, being asked to perform the task is an acknowledgement of their skill and their professionalism. There is an element of stature within the profession that accompanies the performance of the task - but, yes, of course, a high degree of altruism.

Dr GOODWIN - How do they get on your list?

Mr REABURN - They ask.

Dr GOODWIN - They apply?

Mr REABURN - Yes.

Dr GOODWIN - How many of them are there at the moment?

Mr REABURN - There are 15, 20 or something like that on the Family Court list and then a slightly wider number on the Parent Protection List.

CHAIR - So this legislation does not provide a process that they will be involved in - or will they in the Magistrates Court?

Mr REABURN - I am not aware that there is anything in that legislation about that.

CHAIR - They do not act for the child they act in the interests of the child?

Mr REABURN - Yes, in the interests of the child.

CHAIR - So would that not be an important aspect of this process if we are focusing on the best interests of the child here? The way the bill is structured at the moment is that ideally there is counselling and there is legal advice given but legal advice is legal advice both parties have advice and they instruct their own lawyers. If all goes to plan the baby is born and then there is a process that the court then issues orders to change the birth certificate of the baby and transfer the responsibilities of parenting to another one or two people. But there is no process that would automatically trigger the involvement of a children's lawyer in this regard who acts in the interests of the children or child?

Mr REABURN - And my understanding is that there is not a similar process in the adoption procedure -

CHAIR - There is not?

Mr REABURN - There is not. And you should understand also that in circumstances where a Family Court is being asked to endorse an agreement between parents, it would be extremely unusual for there to be an independent children's lawyer in those circumstances.

CHAIR - So, the use, for want of a word, is fairly limited. It is not quite the right word. But their engagement on a particular case is when?

Mr REABURN - Well, if the material involved in the case is of a kind that is likely to raise issues about the best interests of the child and the kinds of things that lead courts to order that there be ICLs - a high level of dispute between the parties, allegations of violence, allegations of sexual misconduct, the circumstances where the parents wish to live widely apart and situations like this - those are the kinds of circumstances where the court will order an ICL. It does not happen in every case.

CHAIR - In your view would it be important in such an arrangement, that they were engaged in this process at all?

Mr REABURN - I do not have a view about that. I am happy to give you as much information as I possibly can about what we do with ICLs. I do not have a view about that one. In any area where there were to be an independent children's lawyer, then you have to look to somebody to provide it and somebody to make an appointment and to pay for it.

Dr GOODWIN - So there would be resource implications for Legal Aid?

Mr REABURN - Certainly. Legal Aid is the obvious place to come to in terms of fulfilling the kind of appointment and therefore naturally the payment. If the payment responsibility is given to Legal Aid then that does put the independent children's lawyer in a situation where there is no link, particularly no financial link, with any of the other parties involved and we regard that as very important in the family law area and in the care and protection area. Then obviously there would be a financial implication and it will be a financial implication on the State side of the budget.

CHAIR - Again, this may be something you do not want to comment on and it is fine if you do not, we did have some discussion - and I am not sure if you read it in the *Hansard* - on counselling, legal advice and an agreement being made before a pregnancy occurs. There are also provisions if that does not happen that the court can still make an order afterwards because not everyone does what they should. But if you were able to bring a court process to the front end of that where there had been counselling and hopefully all those challenging things like what if it is a multiple pregnancy, what if there is a baby with a disability or malformation of some sort, what if an abortion is sought by one of the parties in view of that fact or whatever and then you have your legal advice being given to both parties as to the legal aspects of the surrogacy arrangement, if there was a registered court agreement at that point, and being as there would be no child at that point, would it be possible at all for an independent children's lawyer to be appointed or involved at that point?

Mr REABURN - I dare say nothing is impossible in the law when Parliament waves its hand.

Laughter.

Mr REABURN - No, I would have thought it was difficult at that particular stage.

CHAIR - You said the independent children's lawyers act in the interests of the child and not for the child, there is no child.

Mr REABURN - That is right, they act in the interests of the child but, of course, in all of the instances where they exist they are acting in the interests of a child who exists in a context. For example, independent children's lawyers will go and get information about a child's schooling - on how that child is doing at school - about the child's physical circumstances, about the child's friends, about the child's activities, that kind of thing, so they build a picture of a child in a context and that is the basis on which they work.

CHAIR - We are talking about a newborn baby here.

Mr REABURN - Yes. It is not common but it is not unknown for there to be independent children's lawyers in family law matters where the child is below the age of one but it is not common.

CHAIR - I suppose there is less to assess.

Mr REABURN - There is less to assess.

Dr GOODWIN - In terms of the care and protection order cases and the court's ability to appoint an independent children's lawyer, is there a legislative base to that?

Mr REABURN - Yes. In fact it is quite interesting because there is also a legislative basis for the court to not only order that there be an independent children's lawyer but also require that the child is represented so you can actually have a situation in the current protection jurisdiction where a child is represented by a lawyer who is taking instructions from the client and there is also an independent children's lawyer -

CHAIR - Who is not.

Mr REABURN - who is not making assumptions.

CHAIR - But acting in the interests of the child.

Mr REABURN - Again, it is relatively rare, thank goodness, because the more lawyers there are in the room the bigger our bill tends to get.

Dr GOODWIN - Yes, because you would have to pick up the child's -

Mr REABURN - We do. My understanding of the discussion you had in the previous *Hansard* was that you were concerned about whether there were mechanisms that you could operate or include in order to somehow exercise some degree of quality control in the advice that was given to parties and the only place where the Legal Aid Commission makes any attempt to put threshold attributes or threshold qualifications is in fact in relation to the independent children's lawyer and a certain amount of time practising in the field, a certain degree of certain kinds of experience during that time of practising, completion of the course and then an assessment of whether the person has the right kind of approach or right kind of character. But other than that, we do not hold ourselves out as responsible for the quality of day-to-day work. That is a matter for either the court, by whom they had been appointed, or the legal profession as a whole.

In relation to the other areas where Legal Aid provides legal assistance to people, we do not have any threshold requirements, apart from the fact that you are a practising member of the legal profession, and if somebody comes to us and says, 'My Legal Aid lawyer is doing a rotten job', our answer to that is, 'Go and tell the Legal Profession Board'. In other words, the legal profession as whole has mechanisms for ensuring the quality of work done by its practitioners and we do not see any reason that people dealing with us should somehow have additional measures of protection, and that has been the position of the Legal Aid Commission for a long time.

CHAIR - Did you want to add anything else?

Mr REABURN - No. If I have satisfied your desire to know about the things that we do, that is all I wanted to do today.

CHAIR - It puts together the whole picture of how it could, should, may work to try to determine what is the best framework to establish an arrangement where you bring a

child into the world through not what we consider a natural means. They are born naturally but it is not the usual way we do it, the tried and true way.

Dr GOODWIN - They could be conceived naturally.

CHAIR - Yes, but they are still handed over at the end and you do not normally give your children away.

I think it has been helpful to understand a bit more about how that all works. Thank you for your time.

Mr REABURN - Thanks very much.

THE WITNESS WITHDREW.

Dr BILL WATKINS, TASIVF, WAS CALLED, MADE THE STATUTORY DECLARATION AND WAS EXAMINED.

CHAIR - Thank you. We invited you along to talk about the surrogacy legislation because of your expertise in artificial reproductive technology particularly. What you say here is protected by parliamentary privilege. It is recorded and the transcript will be made public and inform our report that we hope to produce in the not-too-distant future. If there is anything you wanted to talk about that you thought was confidential in nature and you wanted to have it in camera you can make that request and the committee can consider it, otherwise it will all become part of the public record. Do you have any questions before we start?

Dr WATKINS - No.

CHAIR - You haven't presented to a committee like this before, or have you?

Dr WATKINS - I don't know exactly what sort of committee it was, but a number of years ago I gave evidence - I think it was on donor sperm.

CHAIR - It could have been in the surrogacy inquiry maybe.

Dr WATKINS - It was so long ago now.

Mr HARRISS - It might have been Lin Thorp's committee.

CHAIR - It might have been. We are keen to hear from you from a number of perspectives about the use of donor eggs and sperm, the issues of having a donor register, also how many surrogacy agreements or arrangements there are likely to be - and I know you cannot give us a total number on that.

Dr WATKINS - Yes, it is not going to be as many as people think.

CHAIR - No. Firstly, I know that you have run a fertility clinic for a number of years here. Are there other ones in the State and how many are we talking about?

Dr WATKINS - One month ago there was, now there is only one.

CHAIR - That is what I thought, the Sydney crowd pulled out.

Dr WATKINS - Yes.

CHAIR - So it is just you?

Dr WATKINS - Just me.

CHAIR - Looking after the whole of our State, yes, and the women of the north west love you! They say that when they get pregnant after years of trying. It is helpful because you will have pretty much the whole State. I accept and acknowledge that not all surrogacies will occur through artificial reproductive technologies, some are natural

conceptions and using the turkey baster, but if you want to give us a bit of an idea of the issues as far as you see them and the likelihood of -

Dr WATKINS - From my point of view, just doing the selfish point of view, what is going to mean to us, it will mean an awful lot of inquiries, probably a lot of consultations for, I would expect, maybe one or two a year at the most. On the actual need for surrogacy, most patients who ask about surrogacy are not suitable for it. The classic case would be someone who is 43 has tried some IVF, has not succeeded and think that a surrogate is the answer. Take their eggs put them into a younger woman and that will work and of course it is no benefit whatsoever to that woman. What she needs is the eggs from the 23-year-old woman put into her uterus.

CHAIR - That is right. It is the good eggs you need.

Dr WATKINS - It's the good eggs you need. The other group I think we will get are people who have tried IVF quite a bit and who are generally unhealthy for other reasons and obesity is the classic one. It reduces their pregnancy rates quite significantly and they will come wanting a surrogate to help them get pregnant, which is the more difficult one because you know they can improve their chance of success by addressing the medical issues. From my point of view how much risk do you put a surrogate through and thinking about the child primarily - that is how we do it with our donor stuff as well, the child is the most important person here - so do you draw the line and say, it is just not worth that increased chance of a pregnancy, particularly where you can do things yourself to improve your own chances of success? There are very few clinics that really do surrogacy in Australia at the moment.

CHAIR - Oh right.

Dr WATKINS - Cases we have had we have sent to Canberra and they are very well set up for it.

CHAIR - Do you get one or two requests a year with the referrals?

Dr WATKINS - I will probably refer one or two a year to Canberra. There is a bit of international tourism for surrogacy, particularly with India, which is always a concern. That is why I think we need to be able to provide surrogacy here because there are some very genuine cases. I have one lady with a quite significant cardiac condition that she can probably go through an egg collection and survive it but she could not survive a pregnancy. But she has a reasonable life in front of her, so she is an ideal case for surrogacy, taking the eggs from her. If she goes off to India to have it done and she gets some complications over there, I know where I would rather be for my complicated -

CHAIR - With that major heart problem?

Dr WATKINS - Yes, back here in Australia. The other issue I see is the cost of it. Medicare do not fund it, so it is very expensive to do. You have to fund everything yourself as a patient and that is not going to be cheap.

CHAIR - What is your average cost?

Dr WATKINS - When people go to Canberra, realistically we are looking for their first cycle at probably between $10 000 and $20 000 out of pocket. With subsequent cycles, because all the legal work has been done with things before and if they try again, they are probably looking at about $10 000.

CHAIR - There is no guarantees of pregnancy then anyway?

Dr WATKINS - No. That will scare a lot of people off I think. They will not know that is not funded like that. Those numbers are probably a couple of years old, so I am not sure what Canberra charge now. The unknowns for us would be, we can say, in IVF Medicare does not contribute anything to it at all, will probably cost the patient, if they include drugs and things, between $8 000 and $10 000. Normally they would be out of pocket with insurance about $1 200, without insurance about $2 500 to $3 000 but Medicare will not put anything into surrogacy at the moment.

CHAIR - In that case, unless you have some fairly wealthy people who are willing to go to those lengths, I guess, we are more likely to see same sex couples wanting a baby and engaging a surrogate for that, just going to a friend who is a young woman who is fertile and using her own eggs or whatever, but using the sperm of one of the male partners because they are both male?

Dr WATKINS - Yes, I think that will be - and it is a bad term - a market. There is a group of people out there who would be just waiting for that because there has be no option prior to now and so they will be saying, if that comes along we will do that. I think there will be a little rush at the beginning, but I do not see a lot of people wanting it.

CHAIR - Do you care for women right throughout their pregnancy or do you hand them on?

Dr WATKINS - No, I hand them over once they are pregnant.

CHAIR - You would not really know then how many of the other natural conceptions -

Dr WATKINS - Not really. We know there are a lot out there. Quite a percentage of the same sex couples who come to see me, have tried on their own and certainly there are Internet sites popping up all over the place where people offer their sperm.

CHAIR - But clearly it is only going to be two women who come to you?

Dr WATKINS - No.

CHAIR - Two men?

Dr WATKINS - Two women will come along and one will be inseminated. But we will get two men coming along, saying, 'We need a surrogate'.

Dr WATKINS - Do you think they will come to you looking for that?

Dr WATKINS - I think they will. They will probably come with their surrogate, I suspect. I know this has happened on the mainland. In fact, I know that one couple there went to America, I think and -

CHAIR - Why wouldn't they just do it with a turkey-baster or something or have they tried that and that has not worked?

Dr WATKINS - They might have tried and not succeeded. From a medical point of view, I in the luxury situation that I am so busy, I do not need to try to attract any work whatsoever. But I have great problems with women out there using these Internet services. The risks are significant and the risk to the child is significant as well. Here we have had this process where we have moved towards getting really good documentation, having a semi-anonymous system where all the guys agree to be identified and most of them are happy to be identified as donors before the child reaches 18. Now our Federal colleagues are bringing in a much increased tightening of regulations, like how many families there can be from one donor. What that is doing is making this other little industry grow dramatically of people arranging their own donors. The whole aim was to get it so the children have some lineage there, so they can go to somebody and say, 'Who is my father; what were the medical conditions?' and so on. This is a dying end of the market and it has been forced into this other market.

CHAIR - Isn't that a reason that any donor sperm or egg should be registered?

Dr WATKINS - That won't happen in this. If you are on the Internet and you say, 'We are a couple or a single lady and I need some sperm', Joe Bloggs from Sydney will give me some if I front up to a hotel room. They front up and they do it. This is out there happening and it is increasing significantly.

Dr GOODWIN - Are they undercutting whatever you charge or -

Dr WATKINS - It is not a matter of that. It is just easier and there is availability.

CHAIR - You don't get paid to donate anyway as a sperm donor.

Dr WATKINS - No.

CHAIR - But the issue is not having a register. This is the whole point of this genetic heritage for these children, being able to have access to who their sperm donor was.

Dr WATKINS - And the safety for the women as well - disease-wise.

CHAIR - HIV and other diseases.

Dr WATKINS - Yes, plenty of other things. Just fronting up to a hotel room to meet some guy you have met on the Internet, the whole thing is crazy. The more you force it into there, you don't know how many people these guys are fathering. They could have 20 or 30 out there. There is no regulation on that at all. Fortunately there has just been a recent Senate inquiry into it. This idea of having maybe one family per donor or three families per donor from a practical point of view is going to have exactly the opposite effect to what they want.

CHAIR - Do you think there still should be mandatory registration if a donor sperm is used?

Dr WATKINS - Absolutely.

CHAIR - But you are talking about the limitations on it?

Dr WATKINS - Yes. The issues are that we are now being confined to smaller and smaller numbers of families per donor. Donors are really hard to get hold of.

CHAIR - Because they are no longer anonymous?

Dr WATKINS - I don't think that is actually true, not in my experience. When I came back to Hobart in 1996 we started introducing voluntary identification and then around 2000 we said, 'No, you can't donate unless you agree to be identified'. Then in about 2005 it became a regulation for us to work under, so we were way ahead of the game there. It scared off the 18-year-old uni students, which was a good thing because they are not appropriate donors. They were used in the old days. It is easy to criticise the way things were done back then but I think probably the average age of our donors now would be well in the thirties and it is a much more mature donor. Some clinics have complained that the anonymity bit scares them off - the loss of it - but in my experience no.

Dr GOODWIN - Is the three to four families restriction so that people do not end up hooking up with their sister or brother and not knowing? Does that become more of a risk in Tasmania because we are smaller -

CHAIR - It is already a risk in Tasmania.

Laughter.

Dr WATKINS - That is probably true. There are lots of people out there who don't know who their real father is. Forcing it underground is going to increase that because these guys can be out there with many, many more families, seeing how many they can end up with.

CHAIR - It is a challenge.

Dr WATKINS - Yes, it is a challenge. Every 15 to 20 years when we look back and review these things. We change all the regulations and things because it was clearly stupid what we did back then. I could almost bet you that 15 or 20 years from now we will be looking back and saying that this was a really dumb move. We did not do the numbers; it was not a risk. We should be looking more at the following. Okay, we have clinics collecting sperm, so let us allow a certain number of pregnancies in that clinic and then ship the sperm to another clinic somewhere else in Australia. That would be a much wiser way to do it.

CHAIR - But you don't have an issue with the registering of donors so that information is available - and eggs as well?

Dr WATKINS - No. I suppose the only issue from our point of view has traditionally been who stores that information. We have never had a leak. I don't know of any clinic in Australia that has ever had a leak when it has been held privately. It does worry most of us because we are so into the confidentiality side that it would be just terrible if

information got out there before it was meant to get out there. In a public sort of system you just worry a little bit.

CHAIR - We have talked about how a child born through a surrogacy would have their birth registered initially when the baby is born.

Dr WATKINS - Surrogacy is no problem, I do not think, because it is obvious already. It is a woman delivering a baby and giving it to somebody else.

CHAIR - But if the woman used a donor sperm or a donor egg, a donor gamete of some sort, that information would then be recorded on the baby's birth certificate so that the child would then be able to go to that information later on - under certain circumstances, potentially - and access who their genetic mother and/or father was, as well as the birth mother - who may be different - and then obviously have their intended parents who are on their current birth certificate.

Dr WATKINS - I have no trouble with somebody else storing the data. If somebody else could store the data for us it would be fantastic. It would be a weight off our minds.

CHAIR - Wait until the children are born, is that what you are suggesting?

Dr WATKINS - Yes.

CHAIR - The Adoption Information Service contains information about the birth parents, so perhaps a surrogacy register could potentially store the information about the intended parents, the birth mother and any other donors involved.

Dr WATKINS - Yes. It is going to be a rare case. I do not see a big issue with it. It is going to be extremely rare that you are using a surrogate and donor material. That would be very, very rare. What situation is that going to be? Generally you would be using a surrogate because the mother's health is such that she cannot have a child, meaning she does not have a uterus, but presumably still has ovaries so we can take eggs from her and fertilise with her partner's semen and put it in a surrogate. If you were talking about a same-sex female couple, they just need donor sperm. They do not need a surrogate and so it is not an issue for them. It is going to be the very rare case where, say, a woman who has a hysterectomy and lost both her ovaries in the process has met a man and wants to have a baby with him and use his sperm, somebody else's eggs and somebody else's uterus. That is the only situation where that is really going to rise.

CHAIR - You deal with a lot of couples where the male partner is infertile and you use the donor sperm.

Dr WATKINS - Very few. It is extremely rare now because we are so good at finding sperm in these guys. It is just a few times a year maybe that we use donor sperm.

CHAIR - In those rare cases do you think that should be recorded somewhere on their birth certificate, the sperm donor, so the child knows who the genetic father is?

Dr WATKINS - Ten years ago it was a real problem because a lot of parents were not intending to tell a child. I cannot remember seeing a case in any recent history where the

parents don't intend to tell the child. I mean that is not forcing them to and they might change their minds, but it has just all moved on. It is much more open and the parents are quite comfortable with it all. Yes, recording it on the birth certificate is forcing them into it and leaving that information available to other people as well.

CHAIR - The intention would be that only people named on the birth certificate have access to that information - like the child.

Dr WATKINS - Yes, but stored somewhere.

CHAIR - Yes, stored in a secure place, like the adoption records. They are only accessible to certain people who have the right to know.

Dr WATKINS - There are no great dramas with that. We would have to inform all our donors, of course, that it is going to be stored somewhere else as well.

CHAIR - Do think that would be a problem for them if they haven't got it stored with you?

Dr WATKINS - I do not think so. I would be surprised if it was.

CHAIR - Is there a shortage of donors of eggs and sperm?

Dr WATKINS - Yes. Always has been and always will be, though 15 or 20 years ago there were plenty. As I said I do not think it is necessarily the anonymity side that has reduced it. We just lost all the uni students, which was a natural progression into how we were selecting donors anyway and counselling them, and that would scare most of them off. You say, 'We think you should be identified. We think you should do this and you should do that,' and what reasons are you doing this for and we are not going to give you any money for it.

Laughter.

Dr WATKINS - It used to be $40 a donation. We still effectively give them $240 for all their efforts, all their travelling in and back, which has been the same over 20 years. We naturally reduce this payment down and most of them do not even ask for it. I always have to give them a cheque and say, 'Go and have a nice dinner or something. You have made all this effort and you are a nice bloke', so it is not done for financial reasons anymore.

CHAIR - When you say that uni students are not appropriate just because they do not really -

Dr WATKINS - I just think that they are too young.

CHAIR - But their sperm would still be good, wouldn't it?

Dr WATKINS - Yes, it would be great; sperm-wise, fantastic.

Dr GOODWIN - Depending on their lifestyle.

Dr WATKINS - It is more are they making the right decisions for themselves because they are making decisions -

CHAIR - You are not donating a baby, you are donating sperm, but potentially it can become a baby. But not on its own.

Dr WATKINS - and they might go ahead and 15 years later have fertility problems and not be able to have children and then they tell their partner that they have six children out there somewhere. We ideally like our egg donors to have completed their families or at least have a child or two because that gives them that maturity in both age - they are older age-wise usually - and life experience. They have a family, they know what it is; they know what they are doing. We do not always wait for the guys for that because a lot of guys are not having kids at all or having them really quite late.

CHAIR - Do you think that if you are going to be a surrogate you should be required to have had a child first?

Dr WATKINS - Yes. I would be very reluctant to put somebody through a surrogacy pregnancy if they have not had a pregnancy of their own or have not - ideally - completed their family because things do go wrong in pregnancies. One in 10 000 women die in pregnancy. Occasionally they will have a hysterectomy at the time of a caesar and then you can run into lots of strife. They are giving up this one baby that is the only baby they are ever going to have. I would be very reluctant to have a surrogate who had not had their family - or at least well on their way; had two kids, thinking about a third but 'We will do this'.

CHAIR - What about the age of the surrogate mother?

Dr WATKINS - Obviously I have thought through this argument, if this goes ahead what are we going to do? Because I do not look after people in pregnancy anymore, it is inappropriate that I assess how they are going to go in a pregnancy so I would shoot them off to one of the obstetricians and say, 'Okay, what do you think about this lady having a pregnancy?' I think you are probably looking at 50 as a cut-off. Once we get over 50 there are some papers showing that the risks increase for a mother therefore for the babies.

CHAIR - There was a natural conception of twins recently, wasn't there?

Dr WATKINS - Yes.

Dr GOODWIN - There was one on *60 Minutes* last night. How old was she, 50-odd?

Dr WATKINS - She was 50, I think.

CHAIR - What about the younger end?

Dr WATKINS - Again, I think that if you have had your family that sorts those ones out. I would be crazy to take on a surrogate who is 25 and under who has not had kids. I think that would be asking for real trouble.

CHAIR - We did get some evidence about a situation - and I have not got it in front of me at the moment - with a young woman who had some health or genetic issue that meant that she could not have a baby after the age of 25, I think it was. Her younger sister at 22 was going to develop the same condition, so she was going to be the surrogate for her older sister. But she had not had any children herself.

Dr WATKINS - You cannot make legislation to cover every single type of situation because as soon as you make it and think that it is all covered, we will come up with a case and say, 'Well, what do you do here?'

Dr GOODWIN - Then you have the exceptional circumstances clause to get you out of that.

Dr WATKINS - I suppose that brings up other issues. What do you do if we say no, we do not think that it is appropriate? Is there an appeals mechanism? There are always other clinics they can try.

CHAIR - The bill talked about covering reasonable costs for the surrogate mother and you are saying it could be in excess of $20 000 or $30 000.

Dr WATKINS - We have no idea at the moment if there are any lawyers in town who are really interested in this and want to set it up and just run with it because obviously once they have done it once, it will be much easier and quicker the second time and third time around because that will reduce those costs. Unless Medicare says, 'Okay, we will step up to the plate and we will cover these costs', I think that you will be looking at $10 000 starting just on the medical side. Then the counselling is going to be a fairly hefty component as well.

CHAIR - There could be loss of income for the woman while she is pregnant.

Dr WATKINS - Yes. Then you have to ask what is a reasonable thing to compensate a surrogate. When we have egg donors we really do not compensate them at all. We offer them the $240 we give to the guys as well.

CHAIR - It is a bigger thing to donate an egg than a bit of sperm.

Dr WATKINS - Physically it is. There are bigger risks; the woman has to go through an operation. But none of the ladies do it for the money. I think we'll probably find the same sort of thing on the surrogacy side of it. If a woman's prime motive is to make sure all the dollars add up, she is the wrong person for a start. The person who really wants to be a surrogate would be somebody who sees a desperate need and really wants to help somebody. I don't think the money side of it is going to be a big issue. If a lady does lose time from work, you could probably work out exactly how much that has cost her. Trying to make a cost for all the other bits and pieces and the inconvenience et cetera is just not possible, but it hasn't been an issue for us with egg donation. This is obviously bigger and goes on for longer; it goes for nine months rather than two weeks. There are probably going to be a couple of cases here once it all settles down.

CHAIR - There may be one or two who don't require the services that you would provide; the same-sex couples with -

Dr WATKINS - Yes, there will be lots of people inquiring who just haven't thought it through, and it's not what they need. Every week we would have somebody talking about surrogacy and it is completely inappropriate for them. Once or twice a year I see somebody who genuinely needs surrogacy.

CHAIR - So some people see it as an easy option in avoiding going through the pregnancy themselves?

Dr WATKINS - Yes, I think it's all got a bit hard doing the IVF themselves. It is not, 'Your client can't be bothered having a baby because they're too busy'. That would be rare. There are cases out there but that is rare.

CHAIR - Thank you very much. It's been helpful to get some perspective around it and your viewpoint on some of those issues, as only you would know.

THE WITNESS WITHDREW.