PRIVATE HEARING

THE LEGISLATIVE COUNCIL SELECT COMMITTEE ON SURROGACY MET IN COMMITTEE ROOM 2, PARLIAMENT HOUSE, HOBART, ON WEDNESDAY 21 MAY 2008.

INQUIRY INTO SURROGACY

PROFESSOR DON CHALMERS, DEAN, AND **PROFESSOR MARGARET OTLOWSKI**, DEPUTY HEAD OF SCHOOL, FACULTY OF LAW, UNIVERSITY OF TASMANIA, WERE CALLED, MADE THE STATUTORY DECLARATION AND WERE EXAMINED.

CHAIR (Ms Thorp) - Thank you for making yourself available to us. We have received written submissions but we are hoping you will be able to provide us with a framework and some background on the issues we should be exploring.

Prof. CHALMERS - Surrogacy is an extraordinarily complicated, emotional, legal, financial and commercial area. There has been a deal of discussion over the last 30 years in particular. Surrogacy was quite well known before IVF. There are quite a number of cases in the reports, particularly in the 1960s in the United Kingdom. This used to consist of the husband having an arrangement with a woman and the child is then transferred to the couple. You can of course even go back into biblical times and find examples of surrogacy. I think things changed quite dramatically during the period of IVF because you had other alternatives - the transfer of embryos or gametes during an IVF program - and this opened up some opportunities. I could provide an article that I wrote in the 1980s. It is, I think, of rather interesting historical significance. You really had a demonising of those involved. The commissioning parents were seen as the embodiment of middle-class selfishness, not taking on the responsibilities of motherhood. There were some interesting sociological tensions about that. It was also seen that the surrogates invariably were being exploited. I don't think those caricatures were accurate then and they are certainly not the caricatures that we have now. You also had, unfortunately, a very clear line in the United States where surrogacy arrangements were being set up for commercial purposes and I think suddenly this became demonised. This was seen now as the child as property - commercialisation, buying and selling. It became very critical.

The first effort in this country to think about those issues, following on from the comments of the Warnock committee in the mid-1980s in the United Kingdom, was by Professor Waller in Victoria. The Brits, bless them, basically came to the conclusion that surrogacy was immoral and couldn't be countenanced. The mere fact that there were reported surrogacy cases seemed to be beyond Baroness Warnock. Louis Waller, on the other hand, took a more nuance view and introduced this idea of altruistic surrogacy. I think that is what we're going to be talking about today. We can distinguish between the commercial promotion and so on and those which are done for a whole variety of complex reasons, usually sororial - the Kirkman sisters being the classic example. You have three, you have none and you come together.

I was at that time with the National Bioethics Consultative Committee, a Commonwealth committee set up to consider some of these issues and I think this was quite compelling. The interesting thing was the way in which public debates bring together - and forgive the expression - strange bedfellows. One of our very organised churches, headed by the Pope, decided that this was a battleground. Interestingly, the feminist movement, almost all of them such as FINRAGE, were actually aligned on the same side of the fence. I think what we are trying to do in the NBBC was tease out all the attendant problems of saying absolutely no to things because if you criminalise something you sometimes end up creating black markets which are actually more serious. If you completely allow it, we found that there is a moral view in the community, which I think the Parliament are supremely required to look at and which did not seem to support it. Then there was a fine line in the middle, between 'yes but' and 'no but', so you can actually tease out and say, 'Well, we're going to do it but it will be subject to conditions'.

Mr WILKINSON - Do you find that is where the majority of people are, in that 'yes but' category?

Prof. CHALMERS - Absolutely, as I said in this room earlier in another presentation about genetic modification. Justice Michael Kirby had a wonderful categorisation. The fatalists just say it is going to happen and you just accept it. There is the opposition who just say no to everything, and in between tends to be where most of us are - the agnostics. We do not want to judge others; we want to know and so on. I suspect that the Press tends to run these sorts of things quite regularly about all kinds of problems. In the early 1990s you had some very unpleasant people in the United States selling surrogacy. One quite famously said, 'If any one of my surrogates was to break her contract I would hunt her down. I would chase her. She would never work in any town'. It was just bizarre behaviour. I think now there seems to be some understanding that there are cases which compel our compassion as a community. We now realise that the luxury of everyone being able to have children is simply not true. Infertility rates are going up. Marriage rates are declining. The singles and the gay community are also becoming involved in such debates and that is something I have mentioned.

Yes, public attitudes have changed considerably, from moral censorship to much more of the moral agnostic. We have also as a community started to really see that the comparison is with adoption. This was something which was always stronger and it is something which I think we covered in the NBCC report. It is one of these rather odd things that for most of the IVF debate, as you are probably aware, large numbers of people from this State seem to have been involved from the original Senate committee. Senator Harradine, agree or disagree, had a very prominent view on these matters - I do not know if he is appearing before you. Senator Shirley Walters also had a great deal to do with it. I think one of the best comments on embryo research was produced by Senator Michael Tate. I have been involved for many years in this debate and so has Professor Otlowski. It is a rather unusual thing that Tasmania has produced some writing on it and I hope some wisdom, which is much more important. At the beginning of the twentieth century this was seen as something anathema. It was seen as baby selling, just as surrogacy was later. It was seen as breaking the genetic and biological nexus.

CHAIR - The baby-farmer syndrome.

Prof. CHALMERS - That is right. Yet it was quite well known that the British upper classes had women called 'wet nurses' who had to give up their milk for their child because one didn't want to change one's bosom shape. There were conflicts of moral attitude which were very strange. What eventually happens around the world is that people eventually said, 'Better to legalise it and make sure that it is done to the highest responsible standards than leave it outside'. I think that's what we'll be pausing and thinking about today.

With IVF, everyone around the world eventually said, 'Well, if it's going to happen it should be done well'. It now represents at least 2 per cent of births in developed countries. You want quality assurance; you don't want cowboys running it. You want seriously qualified practitioners and so on. I think this is what is happening in surrogacy now. People are saying, 'Well, if it is happening should we, as a responsible community, leave it outside to black markets, unregulated markets and exploitation?' - not of the people involved but of the whole procedure - or does public policy say that it's better if it is there. We can be morally agnostic. We can simply say that we know something is going on. We know about things in the community that we don't agree with but we still say it is better to regulate them.

You may be aware that this matter is being examined in various other places. There is an investigation currently into altruistic surrogacy in Queensland. That is the only State of those States which have produced legislation in relation to surrogate parenting that has not left the door open to altruistic surrogacy. The older I get the more I realise we are a federation and that people hold very closely to that. The trouble within a federation is that there are probably some things now internationally that we ought to be thinking of doing together. Five of the States and Territories have regulation. Queensland has it but it is different because it doesn't allow altruistic. All the rest remain silent. I think this is a terrific and reasonably-brief coverage of what I say are the issues that you need to think about if you decide to go down the regulation.

Margaret has comments from the Victorian Law Reform Commission, at the time chaired by Marsha Neave - now Justice Neave of the Court of Appeal in Victoria. I think this is a very nice coverage of the other States. It also has a very neat coverage of Canada, which has tended to be in the censorial group. They are extraordinary as a nation for independence and tolerance but there are some things for which they get black spots.

In the United States, New Hampshire and Virginia have brought in substitute surrogate parenting. That's what we will be talking about, the idea that if you're going to allow the commissioning couple to have a child, either her as a single mother or as a couple, then we can have some process where you can substitute your names as the parents. Now even that becomes a little bit more complicated because in New Hampshire and Virginia they only allow it for what is called 'partial' - in other words, one of you two donating genetic material. In Texas, and you can always be surprised that Texas could actually do anything that is tolerant but they can, they allow it but it has to be gestational - in other words the biological material is from both. There is some thought that if it is gestational then somehow there is no genetic connection and somehow it is going to be easier to relinquish. Well, there is supposed to be some research to that effect.

Then, importantly, in the UK, section 30 of the Human Fertilisation and Embryology Act permits substitute agreement but it is of the partial, traditional kind - in other words biological for one. You also might want to look at the ACT, which is basically the place you go to if you want to have a surrogacy. They have gone down gestational track, so if you are looking at which model to follow - there are about 46.

I have also presented a short article by Lindy Willmott, who may be known to some of you. She is very prominent and was tied up for some time with law reform and is now an academic. I think she very usefully in this short article published in New South Wales Law Review talks about one of the important constituents. We are not talking about the parents here. We have a duty to be talking in terms of the child. I actually find that whole thing about 'the best interests of the child' a bit waffly. I do not know where you actually define it.

Mr WILKINSON - It sounds good, though, doesn't it, the 'paramount interest of the child' as they call it.

Prof. CHALMERS - Yes, but I think it does at least say that in this debate there would be a higher claim. Two parents arguing about best interest is a nonsense because I presume they both have the best interest. We should try to focus here not on the creative process but on the child and I thought that is quite useful.

I have also brought along again a short article by Victoria Lambropoulos. This is the case of Re Mark - the decision in Victoria of the gay couple who went through a commercial surrogacy and then they have come back. Her Honour did not actually find that there was parenting under the Family Law Act that allowed the adoptive processes to go through. Those scenarios sometimes grab the public imagination and are more readable. As lawyers we find that it is very hard sometimes going through dense law so you give the case of something that everyone understands. There is quite a useful coverage in this article about Darren Howe and Mr and Mrs G in the United Kingdom. These were the Turkish couple who were involved in a surrogacy arrangement with an organisation which is brilliantly called COTS - Childlessness Overcome Through Surrogacy. This is a private, not-for-profit, brokering company, which we will talk about because there is a fine line between 'commercial' and 'brokering'. This was a partial surrogacy and what happened under the act.

I have also brought along a very dense article from Canada which I think is extremely useful coverage of the philosophy underlying the biological connections and whether we can still really as a community keep holding so closely to this biological notion. She does very quickly mention that a lot of that is to do with western society. We all had to think in terms of who is inheriting the money. In many Aboriginal communities there are ideas of extended responsibility. The much-maligned Islamic faith has very strict rules. If you are my brother and you die, then I take on your wife and children with all the attendant responsibilities. That biological thing has been massively under challenge now with things such as IVF. It also covers the ideas of contract, what it is to enter into contracts to do certain things in your private life. Finally, it is this idea of what we call the best interests.

I will quickly summarise the issues. The National Health and Medical Research Council has some guidelines which apply in those States and Territories without regulation.

They are also intending to set down some broad guidelines. You can see that rather than yes or no, we grumblingly know some people might be doing this, but if you do it then these are the kinds of things you should do.

This is an extraordinarily complicated and difficult area. I tend to very much be of the view that we passed our surrogacy legislation with the full knowledge that we were leaving altruistic outside. We did it deliberately. We knew perfectly well because what we were saying was that we tried in this State to say no to commercialisation, no to brokering and also that the contract, if you've entered into it for money, shouldn't be going before the courts. In other words it was hands-off.

Mr WILKINSON - Do you think that the reason for that was this aspect of best interest of the child? That is the way it seemed to me at the time. We've had paramount interest of the child since 1974, as you know. Because that flavour came through since 1974 especially, with the paramount interest of the child always taking its place, people thought that if you did it for money you were not doing it for the right reasons. That is probably why it occurred as it did.

Prof. CHALMERS - Yes, I am sure we were thinking of the best interest. I think internationally at that time we had a very strict view about good and bad. I suspect everyone sitting in this room grew up at a time when public was good. I happen to be one of the beneficiaries of a free education. We are now in a very different world. I think we will probably look back at the last 50 years of the twentieth century and find it quite quaint that the state did all these things for us. We are currently watching a collapse of the state and much more is fee-for-service. I find that sad but the realities are that that is what is happening in our public life. At that time we saw commercialisation, plus what was happening in America, as anathema. I think we have to face it now. One of the great difficulties I think for parliaments nowadays is to look to the best interests of the child and accept that some things are going to be done more and more through commercial, private hands. Again, may I declare my interest; I don't agree with it because I think there's a whole host of things that we are going to find out, as they are doing in Europe. You have to then start bringing things back into the State; the State does some things better. It might not be as efficient, but that's not the question. You like some things to be done without conflicts of interest. If we do that, I don't think we should worry so much about commercialisation. We have to regulate it. There are lots of things now being done through private health, whether we like it or not. We have to look to the quality of the service and the practitioner who is carrying it out and the effect.

CHAIR - The other thing about that 1993 act is access to IVF, isn't it?

Prof. CHALMERS - Yes.

CHAIR - Because it bans that.

Prof. CHALMERS - Correct. If people want to go for surrogacy, you can do it privately. During my time as commissioner, Tasmania was the second reporting State. It had just as many submissions because most of the Victorians and many of those from organised churches were terrified that there was going to be anyone finding legitimacy in these processes. We had a very accomplished team at that time so it was quite sensible that we looked at that. As the debate went forward we found out something about surrogacy,

that couples, having agreed to transfer the child, waited until about the seventh month, then took a three-month trip around Australia and registered the child in some other State. So there were ways in which surrogacy was being carried out. That facts are that we have now seen more people demanding that kind of service. Either we say no or, as we said in the introduction, we regulate.

I think it would be useful if you refer later to the summary of issues which is in the Queensland paper. I think if you're going to start saying, 'We feel that we ought to regulate', I hate to tell you that as a committee you will have extraordinary challenges. First of all you have to decide if you are going to restrict it to infertile and what you mean by 'infertile'. There are clinical standards for infertility but do you, for example, include gays, who are not infertile but simply are unable to have children? The second is: do you want to introduce a pre-conception agreement. If this is going to be put forward, rather than trying to solve the problems afterwards, do we say this is something which has lots of pitfalls and problems, so what we would like you to do is to try to have a pre-conception agreement and try to think through the various -

CHAIR - Like issues of disability or the birth parent changing her mind.

Prof. CHALMERS - Yes, everything. When we have difficulties as a community we have tended to prefer legislation that says we can't avoid every risk, but of the most risky thing we say can you start thinking about it now. We expect you to think about it. Secondly, I think we would want to know about the genetic contribution. As I said in my introduction, there is a different between this and a pure IVF. You have ACT, UK, Texas, New Hampshire - lots of different ways of doing it. There may be no answer and it might be both.

Fourthly, I think you have to start thinking of age categories. For example, some have said that surrogates ought to be 25.

CHAIR - Not 16.

Prof. CHALMERS - Not 16, not 18.

Mr WILKINSON - That's difficult because then you are looking at discrimination.

Prof. OTLOWSKI - I suppose we have some analogy in the adoption legislation with age boundaries.

Prof. CHALMERS - Discrimination is a big thumping hammer which doesn't prevent parliaments saying, with justification, 'except in *x* case'. One of our colleagues in our centre, Professor Loane Skene of Melbourne University, was the first academic who said, 'We're running around passing all this IVF legislation, talking about people being 40 or this or that, living in a stable relationship'. What the hell is that? I can understand somebody living in a stable, which has been converted for housing, but I would suspect that if we all had to go up with a partner, married or otherwise, and be asked, 'Are you in a stable relationship?', then hand on the heart I would not be swearing. This is very strange. She was the first to identify that discrimination legislation would come along. I think this is a case where you do positively discriminate. I would find it strange that we would say that surrogates can be underage or whatever.

Fifthly, we have to really look at the idea of informed consent, something which Marg and I have written about most of our lives. The idea that we should be ensuring that people are not being coerced, they have all the information, they are entering into it voluntarily and you may then decide, like the NH&NMRC, including counselling. People get very discriminatory, 'I'm a big grown-up'. That is the nanny's fate. I am sorry, the nanny's fate is something I grew up with and I think the State has a right sometimes to say that there are some things that we want to protect. Harms can come through and this is a proper responsibility of governments and parliaments so I think that question of counselling comes in and the kinds of materials.

Sixth, should this surrogate already have had a previous pregnancy. There seems to be some small amounts of research and some of it is referred to in the Canadian paper. These are tiny studies, though. They should really be called 'a little bit of opinion' rather than grounded research. At least it gives you some indication that the surrogate mother having already given a birth, as in the Kirkman with her three children, seems to be less problematic or likely to lead to litigation with all the attendant harms.

Seventh, how do you do this transfer of parenting and if you are going to do it, what kind of criteria are included? Mr Wilkinson, as Chair, has already mentioned the next category which is the discrimination and non-discrimination. Not only is there age discrimination but I think you have to work out access to this service for single parents. I think you have to also think of gay couples and if we go down that track -

CHAIR - Gay single people.

Prof. CHALMERS - Yes, and you have to really work that public principle through because if we really do want to regulate and we know those couples, and there is a great deal of sociological public evidence now irrespective of the critics which suggests that it is the quality of parenting, not the gender of the biological connection because there are a hell of a lot of very unhappy biological parents and so on, so if we are looking at best interest and the quality of parenting, what exclusions would you put in from surrogacy. For example, if there have been some charges of child abuse would there be some cases where we are actually entering into a discriminatory process of actually saying 'sorry'?

We confuse sometimes our rights to things. Most times we do not actually have rights, we are just making claims - that is, that no-one has a right to a child. That has been a complete furphy in the public debate about this and in some cases when we start putting in service with a State, I think it is a duty on the State to put in the best, not a system of regulation which seems to fulfil claims that people have rights to certain things. I think we try to put in the best.

Tenth, what about residency because, for example, the ACT says that one of them has to be resident there. The UK have certain things like citizenship. Brokering: let us be quite clear that whilst the Re Evelyn case consisted of couples who knew each other, that is not going to happen in every single case. If you want to have an organisation like COTS in the UK that tries to facilitate this, it may in fact be from some small contributions from people or whatever it comes through so it is not really commercial. If you were brokering should you be finding some way of checking on these organisations, licensing them, making sure again - the quality assurance things? We do not let just anyone get

into this game, we actually say this is a market and we are now finding out that sometimes complete rabid commercialisation and letting the market solve itself does not happen. The State has to come in, as it does quite frequently through things like trade practices or accrediting lawyers or whatever. That is the brokering. I have a few others but that was a bit of a summary.

Prof. OTLOWSKI - I am very fortunate that I have had the chance to hear what Don has presented to you. It certainly helps to have that excellent framework of legal and ethical issues, and hopefully the comments I can make can slot into that. I would strongly endorse the view of the complexity of this issue. I think it is very timely that this committee is looking at the matter. Obviously there are growing apprehensions about the adequacy of the current laws, not just in this State but for Australia as a whole in terms of lack of uniformity. This was highlighted with the recent events nationally with a notable Victoria senator going to another jurisdiction and coming back with a baby and highlighting disparities.

I think, more fundamentally, there is questioning now whether a policy of prohibition, which perhaps technically we don't fully have in Tasmania, although the actual title on the legislation is 'An Act to prohibit surrogacy contracts' - even for the altruistic category, you could say that the tenor of the legislation, if not expressly in all respects to outlaw them, is to largely do so or ignore them.

CHAIR - And the reality of the access to biotechnology.

Prof. OTLOWSKI - Yes. In terms of availability, absolutely. I will come to that a bit further on.

I think it is important in laying out scope for this that we maintain the distinction between commercial and altruistic. I think in people's minds the idea of people doing it for money purposes, or particularly third parties making money out of it, is still seen as anathema largely. I'm not talking about brokerage and those kinds of monitored arrangements that Don is putting forward in contra-distinction to full commercialisation. I think there has over the last decade or two been greater sympathy and tolerance to altruistic surrogacy. I think we have seen this through some notable examples in the media. Don has mentioned already the Kirkman sisters with baby Alice. There have been other publicised cases in the ACT and the Re Evelyn case which came to litigation. There is a good article - and I only have it in the original but I am very happy to provide a copy - where the writer speaks of growing legislative approval of altruistic surrogacy through a process of incremental acceptance. She documents the position in the UK and various Australian jurisdictions and talks of slow, steady acceptance of surrogacy and how it is almost as if it is by stealth in that it is not done, for example, in Australia with a national overview. We had attempted that with the National Bioethics Consultative Committee but its voice was ignored and instead a more prohibitive scheme was introduced. Yet, increasingly, there are modifications and the direction is now much more towards support of altruistic surrogacy.

In light of the terms of reference and the core issues of what the problems are with it, I think the law is unsatisfactory for a number of reasons. In part it is because of the lack of uniformity nationally. Tasmania sits somewhere in the middle, probably on the more restrictive end of things, in that we do have those prohibitions on professional and

technical services. Obviously it outlaws commercialisation, as do all the acts. It also holds any arrangement to be unenforceable and in effect void and that reflects also the public policy view that we wouldn't want to have anyone being able to compel an arrangement and force a handover. As soon as you have these kinds of differences between State and Territory legislation it really opens the door for comparison and forum shopping. We intended, I think, originally to have a national scheme but not all States even legislated. At the other extreme we have Queensland, and there is a review now. Their restrictions are such that it attaches even to parties to an altruistic arrangement, so that that is in fact criminalised. I guess the stark contrast between what the law says and what happens in practice is highlighted by the fact that I don't think there has been a single prosecution under that, notwithstanding the fact that there have been opportunities for there to be so because the Re Evelyn case involved a Queensland couple. It is a law in name but not seen as one that ought to be enforced because there has been no attempt to apply it.

I think we have touched on already why even for altruistic surrogacy the law in this State is a problem. If it does occur and I am sure it does - I know I was asked to prepare a legal opinion some years ago of a couple that was considering an arrangement and what the implications would be - the consequence is that it occurs in a vacuum here. There is no protection and because there is no regulation there is no support, no opportunity for proper advice through counselling and other methods and all they are hearing is that it is void and unenforceable and really they are left to their own devices in sorting through the placement issues. The plan would be to relinquish but then particularly the parentage issues, and this is something Don has touched on but perhaps it would be helpful if I could elaborate a little on that because I think in practical terms this is probably the greatest sticking point.

CHAIR - The idea of the parenting orders.

Prof. OTLOWSKI - The parentage - the issue of existing presumptions of parentage which have been developed to deal with the issue of artificial reproduction generally and of course there the assumption is that if you get donor gametes or eggs that they are to be donated. The donors do not want to be the parents and the birth mother and her partner, husband or other partner, provided they have consented to the procedure, they are the ones -

CHAIR - Is deemed to be the parent.

Prof. OTLOWSKI - The trouble is I have actually just extracts from our State legislation and also the Federal legislation in the Family Law Act where there are these irrebuttable presumptions about parentage so the birth mother is irrebuttably presumed to be the mother. The female who donated the egg, even if it is the commissioning mother, is irrebuttably presumed not to be the mother and similarly for the birth father, provided there was consent to the procedure. These presumptions cover the normal situation.

This is the article I referred to previously from the Australian Journal of Family Law 2004 which is a good coverage of the legislative progress in favour of altruistic surrogacy and I just have extracts. Perhaps you have these already but it just covers the presumptions in the Family Law Act, which of course is Federal legislation. It only

applies in circumstances where there is an application under that act to do with contested child issues.

CHAIR - We have another inconsistency there, though, don't we, because under our significant relationships legislation the original legislation had deemed parenting in there for same-sex couples and we removed it, so the situation you are talking about -

Prof. OTLOWSKI - Quite possibly.

CHAIR - You are talking more about the birth mother but if -

Prof. OTLOWSKI - Yes, I am talking about the assumptions -

CHAIR - the egg came from someone else and the woman carries the child, under our legislation they are deemed to be the parent but the partner is also deemed to be the other parent except for the circumstances of the same sex.

Prof. OTLOWSKI - Yes.

Prof. CHALMERS - Yes, then that is in quite a few of the States. It is very interesting that you have mentioned that. We have got ourselves into some confusion with our parentage. The principle of presumption that mater semper certa est - it is always clear who the mother was because of the most fundamental principle of birthing that could be now upset with IVF. We actually, I hope, because I advised in the drafting of it, introduced something into the Status of Children Act which if you look at that section says, 'who are treated as parents'. Every other State worked through these presumptions. We tried to use the expression which I think I notice in one State in America when I did my research. I think what we are actually trying to do is assume that some people are going to end up as adopted partners and so on. There are so many different ways in which you end up with the responsibilities but what you want to do is have the law saying 'we are treating you as a parent' because, if you remember, there was the most extraordinary thing I think in legislative history when the Victorians actually put in a statement that the father who actually created would be deemed not to have caused the pregnancy. It really was one of the most remarkable things. We may have to start thinking of saying, 'You're a father, you're a mother'. What it might be is using this concept of attributing the duties and obligations and treating it as such.

Mr WILKINSON - About two weeks ago in the Blue Mosque, talking about the Islamic religion and how there are a lot of similarities between the two as to how everything started, I said, 'In Islamic religion how did Mary become pregnant?' This person said, 'Immaculate conception'. They just take it for granted.

Prof. CHALMERS - The Abrahamic faith of Judea is exactly that of Christ, and it is exactly that of the Koran. If you have the occasion, as I have, to read the Koran you will find that there are references. It is only that time at which we decided that God was in three parts in Christianity, not accepted by every section of Christianity, that we have had difficulties. There is actually a continuity, going back to the Persian, Zoroastrian idea of a single God - end of conversation. We are exactly the same faith; we are of the book.

Mr WILKINSON - Yes, that surprised me. Talking about the father, that was the same thing. Immaculate conception was completely accepted.

Prof. OTLOWSKI - Just picking up on Don's comments about the framing of the Status of Children Act provisions, they do indeed use the terminology 'to be treated as if', recognising it is a legal fiction but saying that for legal purposes that is the way it will be. I can tender these parts of the Family Law Act and the sections of the Status of Children Act. The important thing to note, though, is that whilst they cater for a very specific need, namely dealing with IVF where couples can't produce their own gametes and want the children to be their own children, they operate in a contrary fashion - completely contrary in fact to the parties' expectations in a surrogacy arrangement where the gametes are to be used from the commissioning parents. It makes this assumption that they are not the parents, even though that is the dear wish that they are recognised as the parents. In reality they are the parents.

CHAIR - Does this bring in the need for clarity then with things such as parenting orders?

Prof. OTLOWSKI - If there is going to be a space in which surrogacy is recognised and regulated in some way, then the parentage issue must be properly addressed. It can be addressed in a variety of ways. One option is adoption, but there are plenty of examples to say that that is not the optimal model. Adoption is about children who cannot be looked after by the birth mother and her family and who need a home. It is created for a very particular situation. To create this new fiction, that the genetic parents have to adopt their own child and create a relationship through this legal mechanism, which is an artificial one of creating a family, when in fact it is their own child is quite unsuitable for this model. Even though some suggest that that is a mechanism, I strongly disagree with that. Placement of children and their actual care can almost be done informally, just by the child living with that family and it is understood. The problem then is you have birth certificates, issues of naming and other complexities that may then play a role when the child wants to marry and the documentation goes forth, or for passports and legal and formal purposes. The Family Court obviously has jurisdiction and they can make orders if couples aren't agreeing about where the child should be placed. If we are assuming a smooth transition in terms of the arrangement itself - and one can't always assume that, but that is probably the majority position - then what you need is a mechanism that allows for the transfer of legal parentage in a way that is consistent with the parties' expectations and wishes, and also best interests of the child.

CHAIR - That is what my reading of it is suggesting, that there probably needs to be a point, some weeks after the birth perhaps, where the forms are filled in and lodged and then the parenting is clarified in the document.

Prof. CHALMERS - It is called 'substitute parentage'. There is one where there are laws that are actually involved in creating children. There are others who are participating in a more communitarian way of bringing the child in. We hope that this is deliberate and intentional for the best interest. Everyone and the papers which I have presented to you give this expression, which the ACT is using, of substitute parentage. That is actually what was happening with IVF but I do not know that we really actually understood that so we invented all of these little fictions of pretending that you are not really the father but you are. I think that is exactly what you are doing with substituting. What is absolutely clear is that once you have done that you are 'treating', the only act in the

country that uses that word, them as the parents with all those duties and obligations at law. So if I suddenly decide afterwards to say no, they say, 'Sorry, you are the parent'.

CHAIR - That could also clarify that the birth mother is happy about relinquishing the child.

Prof. OTLOWSKI - It would have to. You would have to have a mechanism that caters for that.

Prof. CHALMERS - That is just part of the things that you would have in the preconception agreement. There would be a whole series of things that would be included. For example, after the cooling-off period, 'I fully understand, having been counselled, that I will relinquish all biological - and so on'. It is not an adoption because adopting means that you do not know why this child is floating around. If that child really wants to find out afterwards then we have one of the things we have not touched on - information and rights of children. I do not think everyone has a right to know everything about what happened to its parents, but I think once the State starts intervening then I think we should be keeping effective records to allow that child information later for a whole variety of things which we will talk about.

Mr WILKINSON - Yes, it is a concern. A lot of people have trouble, as you know, later on because they do not know about their beginnings when they really want to know, and as a result they suffer. There has to be some type of information bank for those children to go back to properly explore what occurred.

Prof. CHALMERS - I believe that Victoria, in IVF, has now a small notation and letter which is on the birth certificate indicating that you can follow up with the Child Welfare department to find out that this was actually donated gametes so that you can actually have them chase it up. You do not have a right to the information -

CHAIR - But you can apply for it?

Prof. CHALMERS - I actually think that when you have the information we may very well want to ensure that that preconception agreement includes an undertaking of all parties that the birth certificate have some small notation enabling that person to follow up. If you actually find out later that people have sensibly sat down and thought about the best interest then I do not think that is going to be a problem for a child - that you have been brought up under those circumstances.

The other reason I am very keen on this is that we are actually trying now to set up databases of genetic information about the community. I actually think we have always had a view that public records must have integrity. IVF surrogacy corrupted that system. There are actually some birth certificates that may not faithfully record truthful statements. They also become biological so I think we should have some system of information being recorded on birth certificates and also information to be followed up.

Mr WILKINSON - Where do we keep that information? Secondly, where do we keep the agreement, because at some stage there may be a necessity to go back to the original agreement that was signed if somebody is endeavouring to escape from that agreement? Do we keep it in the family courts or in births, deaths and marriages?

Prof. OTLOWSKI - You would need some regulatory body that has oversight.

Prof. CHALMERS - The best thing would be to say child welfare. As you know, the child welfare departments traditionally keep the adoption information. They are usually the bodies that may or may not be looking after the counselling. You do need to keep those agreements somewhere. Obviously the parties will keep them but I think this is a public document so you would be registering it. I do not necessarily think it should be the Register of Births, Deaths and Marriages. It is not going to be a large number of documents. I tend to think that they only keep the actual certificate and you would then have to cross-reference.

In the NBCC report I think we did go down into that detail, to the very important principle about consequences - consequential change implementation - which you are required to think about as parliamentarians. I would have thought it would be child welfare and perhaps you could inquire whether that is difficult.

Prof. OTLOWSKI - On the issue of access to information, the new legislation in the ACT, the Parentage Act 2004, does have a section 29, 'Effect of parentage order and access to information'. Similarly, in the Victorian report that Don has already tabled one of their recommendations also related to free access for the child born as a result of surrogacy. That is recommendation 129, which refers to a central register being maintained or expanded under the Infertility Treatment Act to allow a information about a surrogate mother and commissioning parents to be registered and released to a child in the same way as information about donors is registered and released.

Prof. CHALMERS - You would be aware that Victoria has an infertility treatment authority so of course they have a very natural choice of place to keep those records secure but we don't have that.

Prof. OTLOWSKI - Before talking about what different options there might be for transfer of parentage, and perhaps to underscore the difficulty of the present law and its absolute inflexibility - we talked about irrebuttable presumptions; these are conclusive - and the frustration this creates for all parties involved. I will refer to an ACT case by the name of Re an application, Births, Deaths and Marriages Registration Act 1997, which was heard in 2000. This involved two couples where the males were brothers and a surrogacy arrangement was organised with full intentions. In fact the child was handed over, so it was purely altruistic to enable one of the couples who weren't able to have children to have a family. They had brought an application seeking a declaration as to parentage before the Supreme Court in the ACT. The judge, despite the consent of all parties - they were represented by a single solicitor - and being satisfied that it would have been in the child's interest to make such a declaration - the child was actually now living with the commissioning parents - commented that regrettably he was unable to do so because there is no scope within these presumptions for best interest to be taken into account. The fact that the parties consented was irrelevant. They do operate in that very automatic fashion that allows none of this to be considered. So that is why some model needs to be adopted.

There are some precedents. In the National Bar Ethics Consultative Committee report a number of options were canvassed and all of the options were seeking to protect the surrogate to some extent - whether you do that by a cooling-off period and so on. It is

the mechanism of the process that you put in place and how much time. They also wanted in their options to be considering ways that one can more accurately reflect the expectations and wishes of the parties involved, which the current presumptions don't because they are not designed for that purpose. They are for another purpose of artificial conception in general where the people want to keep the baby. So we need some model which recognises that commissioning parents, particularly when there is a genetic link, can gain legal parentage and in law be the parents and have birth certificates amended in that fashion.

One option is the one that has been favoured in the UK. Don has already mentioned that under this ACT there is to be a legal application process that has to be determined by a court. It's not the inevitable option.

CHAIR - It doesn't have to be really onerous.

Prof. OTLOWSKI - No, it doesn't. One could even say you could have something similar that is more automatic and that doesn't involve a court application, subject to certain pre-conditions. I am not suggesting this is the only way to go but it certainly would be an opportunity to check off on a number of things, including best interests and the consents and so forth. It could be done in a more automatic fashion whereby there is a cooling-off period of at least a month or six weeks and if there is no objection - and we're assuming that it's in the context of some registered agreement between the parties -

CHAIR - A pre-conception agreement.

Prof. OTLOWSKI - Yes - so the birth mother hasn't decided to exercise her right to retain the child, because one must give some space for that to occur. In the absence of an objection, which is consenting to the process going forward, it could happen more administratively, having vetted the parties earlier and knowing there has been counselling in the context of other safeguards. Perhaps people are more comfortable with a court option with legislative criteria for the court to consider. That is certainly what has been done in the ACT legislation.

Mr WILKINSON - What happens with a court option, though? Is it where you have the counselling first, whatever that involves, therefore there is the agreement after the counselling has been entered into, there is then this cooling-off period - is there then just an application or a document put before the court, such as property agreements which are signed by both parties and not really looked into?

Prof. OTLOWSKI - I think the critical thing will be the issue of the consents. It will depend on the criteria that the legislation sets out. For example, in the ACT where they talk about a 'substitute parent agreement' there are certain pre-conditions. If it is a commercial agreement you are already excluded. As Don mentioned, there are genetic requirements; neither birth parent is to be a genetic parent of the child. It has to be donated material, either from the commissioning parents and/or from another third source donor. There is also a requirement that at least one of the substitute parents is a genetic parent. It is very much favouring that genetic link, like in the case where there was a genetic link, that kind of surrogacy where there is a real compelling logic for the commissioning parents to be recognised as the parents because one of them in fact, if not both, is the genetic parent.

CHAIR - One thing that has been bothering me a bit is that I can accept that there seems to be a general acceptance that the birth mother shouldn't have to part with the child should she change her mind, but if you had a situation where it was a donor egg and donor sperm then they could say, 'It is biologically our baby' and this person has chosen to hold onto it -

Prof. OTLOWSKI - Are we being too precious in terms of protecting -

Prof. CHALMERS - But there has never been a dispute in any of those types of cases. That is why I think the hypothetical comes out that people prefer this gestational ACT because the feeling is there is going to be less risk -

CHAIR - So the birth mother is not the egg donor.

Prof. OTLOWSKI - In this example where they were very happy to hand over they were. The sister-in-law did provide the egg. In terms of possible considerations, these are premised I think also in the UK on the child currently living with the commissioning parents and life going forward as a child in that family. Obviously the issue of consents and then making it such that the order must be made if the court is satisfied that it is in the child's best interests. It is not a discretionary thing, 'Do we approve of surrogacy?', but that it does go forward.

Prof. CHALMERS - I think if you don't want to distinguish between the gestational - that is the ACT where there's no biological connection - where you hope therefore that there is no biological link and they are going to relinquish. If you want to cover both, I think you are probably then talking about a pre-conception agreement which would cover both. If you are doing that, both will still end up with the application to the court. I think that is absolutely fair, that this is something which is really quite serious and you should really go through and tick all these things from the court, as Marg is saying. 'You are the birthing mother, are you relinquishing? Good, now we can sign all the orders', but in both cases you would have a preconception agreement. That is a reasonable function of the State, the proper protectionary obligations of agencies such as child welfare. I am not sure whether it is the same but I certainly many years ago interviewed some officers there who had familiarity with adoption. They did not seem to me to be putting one view or another. They were correctly independent. They saw this as a series that, in the highest possible regard for the public service, this is what I have to do and these are the things that we are to check through. I presume that is the same and if that is the case it seems to me that is exactly what they should be doing - somebody to check through and can actually ask. You might want to set up some extra ethics committees or whatever but that is going to be looked at and then the final process I think is there. Do you agree with that?

Prof. OTLOWSKI - Yes I do. Interestingly in the Victorian model, because they have such prominence with the Infertility Treatment Authority, they are also involving in the recommendations, or at least suggesting, that a clinical ethics committee be involved at the front end in terms of decision making and approvals.

CHAIR - They tick off on the preconception agreement?

Prof. OTLOWSKI - Yes, and suitability as well.

Prof. CHALMERS - I did not actually mention that one because I think you have a slight difficulty because I think they are assuming that most of this is going to flow through their six registered clinics with an ITA that goes around and double-checks. It actually has the act. I am not sure that we could put that in, and the substitute for ITA I do not think can be done privately. It is a State function; it is a cost to the State and you may have to then think there are some minor expenses. If couples are doing this there may have to be some kind of user-pays amount because it will be I would think -

CHAIR - Like an application fee or something.

Prof. CHALMERS - If you did not want an ethics committee -

Prof. OTLOWSKI - The hospital now has one.

Mr WILKINSON - It can be made too hard, can't it? When you endeavour to regulate for a lot of different things it makes it so cumbersome that in the end we get to a situation where people say, 'There's too many hurdles'.

CHAIR - All of that stuff does not necessarily have to be in the legislation, though.

Mr WILKINSON - I do not think so.

CHAIR - It can be a regulation.

Mrs SMITH - Yes, but sometimes it is not the legislation that is complicated; it is what drops off the end of it in the regulations et cetera. Think of what we see in the House compared to what we see in subordinate legislation committee. That is where the mechanics happen.

Prof. OTLOWSKI - It is true. You do not want the hurdles to be so impossible that people to ignore them anyway.

Mr WILKINSON - Am I right in saying that what we need is this informed consent, the proper consent, that takes place prior to this agreement. It may be counselling or whatever it might be. Let the experts decide upon that. The preconception agreement is entered into, the child is born, you go through perhaps a six-week cooling off period and then there is a process at the end of that six-week cooling-off period where it is all signed, sealed and delivered - for want of another word.

CHAIR - A parenting order, for want of a better word.

Mr WILKINSON - Yes. Whether that happens in the Family Court, I do not know - it seems to me to be the best place for it - but there has to be something that occurs also at the end of that six-week period for that informed consent to continue. In other words, people know what they are doing six weeks after the mother has had the child.

Prof. OTLOWSKI - So there is a formal point where parentage does transfer and people know where they stand and documents are adjusted accordingly.

Mr WILKINSON - Is that too simplistic to say that?

Prof. CHALMERS - I think you are breaking into logic there. I think in the best of all possible worlds there is a court, which is the Family Court, and if you were actually looking at the preconception agreement you would not have to worry about child welfare because they are equipped with counselling services, registration services and so on. It is the most likely place for some of those disputes to possibly end up. We have chosen family law to be basically a Commonwealth responsibility. That is quite unusual because most other federations actually have it at State level for obvious reasons. I think they are absolutely equipped to do those things. They would look after the children and the parentage. The courts are the ones that can declare parentage under relevant sections of the Family Law Act. I am just not sure whether you could get agreement about that.

Prof. OTLOWSKI - Another matter that would need to be considered - the Parentage Act in the ACT, for example, and also in the UK create this window of opportunity - is where an application for transfer can be made. It has to be sometime between six weeks after the birth of the child - that is to allow the cooling-off period - but before the expiration of six months after the birth. It is as if to say that this is the period in which this ought to be considered and addressed and that is the only opportunity. That may work fine for the prospective arrangements but I have seen some examples of people appealing for current surrogacy, unofficial ones, to also have the benefit of some recognition. It doesn't pick up on those where arrangements have somehow crept through the cracks and people want retrospectively to be able to apply for transfer of parentage. You would need to consider the scope. Interestingly, as I read it, the Victorian recommendations - and it remains to be seen what is done with these - contemplated scope whereby it wasn't limited to people using the new legislative mechanisms, if they are introduced, but that it would also be possible for existing surrogacy arrangements to have the benefit of -

Mrs SMITH - So you'd have retrospectivity in any legislation that you brought in?

Prof. OTLOWSKI - You may need slightly different conditions because you couldn't have the requirement of a preconception agreement and so forth. Some thought might need to be given to what should be done with existing arrangements. Often those issues haven't properly been addressed just because of the nature of the laws.

Mr WILKINSON - It is very difficult to take a child from the birthing mother after six months.

Prof. OTLOWSKI - Maybe that is why they believe that if the transfer hasn't already occurred in that time then it is unlikely that this is going to be happen.

Mrs SMITH - In the past, what has been the process? I make a presumption that the main issues should be dealt with before conception and the cooling-off period and everything should be at that process. The psychological work et cetera should be in that time line. I would have made a presumption, in the things you've read, that the surrogate mother and the parents, as they calls themselves, were all there for the birth. I made a presumption that when the parents walked out of the hospital they walked out with the child, and the surrogate mum went home with the expectation that she has fulfilled the great dream for her friends or whatever. I didn't see that she takes a child home for three or six months.

Prof. OTLOWSKI - No, absolutely. I agree with that.

CHAIR - No. Say the scenario you have just described happens, that the commissioning parents take the child home, the birth mother might then start to stew and worry. When six weeks pass she says, 'I don't want to sign this parenting order. I no longer consent'. That's how I read it.

Prof. OTLOWSKI - It was suggested one month might be enough - and six weeks might be safe. I think that would capture any second thoughts and real problems arising from the act of relinquishing, which would normally just happen at the time of birth, and that that would have surfaced. That is why that cooling-off period is seen as adequate.

Prof. CHALMERS - Perhaps 'cooling-off' is not the best expression, but I think we have tended to use that in law for a period of reflection. I think it would be very strange if you were to decide that this is worthwhile and then you could have the parents rushing off to the court with the baby or bringing the judge around -

Mrs SMITH - Surely you would utilise a registrar and if every condition has been met then it is then ticked off. There must be a legal process before you can leave the hospital with the child, technically under law. You can't just go into the hospital and leave with someone else's child under the current laws we have.

Prof. OTLOWSKI - Perhaps the hand-over occurs outside of the hospital, in recognition that it can't be done more openly.

Prof. CHALMERS - If it was an IVF attached to a hospital, everyone would know exactly what was happening and you are just discharging yourself within a day or two. With IVF the normal discharge is after two or three days and then you are leaving.

Mrs SMITH - IVF is very different to this though, isn't it, Don?

Prof CHALMERS - Yes, exactly.

Mrs SMITH - With IVF, I have carried my child and am leaving with my child - that is a mental status - whereas with surrogacy someone else has carried my child, I will leave with that child and they leave -

Mr WILKINSON - Empty-handed.

Mrs SMITH - Yes. That is where the psychological issues may arise.

Prof. OTLOWSKI - Certainly. The only litigated case in Australia that I am aware of is the Re Evelyn case. That was exactly the situation, with friends though rather than relations. The woman in the commissioning-couple relationship had had a hysterectomy - she was unable to have children, she had previously had cancer - and the friends who had already had children suggested that the wife could act as a surrogate, which she did. The child was initially handed over. One couple lived in Perth - the surrogate mother and her husband - and the commissioning couple were in Queensland. They travelled to Queensland and said, 'Look, I'm sorry, but we need that baby'.

CHAIR - Took it back.

Prof. OTLOWSKI - What was perhaps unusual in that case - because that is when Family Law litigation commenced - was that at an interim stage an order was made that the child should be returned to the commissioning couple. The child ended up in their care for one year, which of course established some status quo. The commissioning couple - and that is perhaps not the best terminology because it disguises the fact that the father in that relationship was the genetic father but of course he was assumed not to be the father under the presumptions. The birth mother and her father in law, and all the paperwork in terms of legal entitlement, insofar as parentage gives such entitlement, were the parents.

When the matter went to trial - and this decision was subsequently endorsed on appeal - the view was taken that the child should be returned to the surrogate mother and that for her long-term development - even though this was now a change and, as an infant, she had been with the other family and had some connection with an adopted Aboriginal child in that family - and in drawing on expertise also from the adoption arena, in reconciling herself to her origins she would be better placed with the surrogate mother and her family. Also, that woman had a more open relationship to maintain contact if the child was within that family rather than if she was placed with the commissioning parents, recognising that there has to be some ongoing relationship because we have genetic material -

CHAIR - Like access?

Prof. OTLOWSKI - Exactly, and so on a best-interest basis the child was returned to the surrogate.

CHAIR - If for whatever reason the commissioning parents change their mind and the birthing mother doesn't want the baby either, that would leave the child the limbo. My assumption would be that normal adoption would apply and that would be it. There wouldn't be any legal sanction against this, such as, 'Well, you ordered this baby and now you don't want it'.

Prof. OTLOWSKI - No, because the agreement, itself, is unenforceable.

Prof. CHALMERS - It could be. That is one of the things that you might want to think about - preconception contracts. Contracts are wonderful things. They are actually called strategic planning. You can put all sorts of things into it. That is what it was all about until somebody realised there was another way to describe it. The usual thing is it might up for adoption but it does not preclude that, if you have this substituted parenting and that if, in fact, it has happened afterwards, then there will be a substituting parenting order. This means that, yes, you can put the child up and relinquish but you are still going to have some ongoing financial responsibilities and duties and so on and so forth. The child will still be able to follow-up and so on. So you are actually tying up the future. It is not flippant. In some ways you might actually say it is preferable to the kind of thing that happens just because people were casually wondering around and then suddenly relinquishing. It is a very good example of why, if we were going to legislate in this area, you would actually be trying to do risk minimisation. That is the whole idea because I hope what we are really talking about is the child; we are not talking about the

parents. If they end up doing something silly then they will pay the price - if it could be put so crudely - but you're hoping that will not happen.

CHAIR - Thank you both very much.

Prof. OTLOWSKI - Good luck with this difficult exercise.

CHAIR - It is better for us to do it now than wait and have something imposed from somewhere else.

Prof. OTLOWSKI - National uniformity is obviously the ideal goal but as a single State it is not possible to dictate that, but we should be working towards it.

Mr WILKINSON - And that might solve the problem, too; it might be able to be quite happily in the Family Court if there is a national legislation

CHAIR - That could well end up being one of our recommendations.

THE WITNESSES WITHDREW.

PROFESSOR KEN KIRKBY, CHIEF PSYCHIATRIST, MENTAL HEALTH SERVICES, DHHS, TASMANIA, WAS CALLED, MADE THE STATUTORY DECLARATION AND WAS EXAMINED.

CHAIR (Ms Thorp) - Thank you for giving up your time for us. This is the very beginning of our inquiry and what we are trying to do is set the legal, medical and psychological context in which we are working. If you could provide us with your opinion about where all this debate should be going and your understanding of the issues we should be addressing then that would be really useful to us.

Prof. KIRKBY - It is a wonderfully complicated area. I am here in terms of my general expertise in psychiatry. I am Professor of Psychiatry and Chief Psychiatrist in Mental Health Services. I do not have specific expertise in surrogacy per se although I have looked after, over the years, many people who have been adopted and lots of people with separated families and so forth, so I am very aware of the identity issues and emotional issues that can intervene. Also I have considerable experience dealing with the human condition, people's foibles, and the tendency to get at odds with each other and so forth and reject and abandon each other. I think those issues necessarily come into any discussion of surrogacy, so it was rather interesting when I was approached to give some comments to the committee. I thought I would give you my general comments and hopefully that will be of some assistance.

Mr WILKINSON - What has concerned me with some of these debates that we have already had in relation to similar matters is that a child who is unable at some stage to find out who his real father or mother is often struggles and often comes to people like you to get some assistance because they do struggle and struggle quite badly, don't they?

Prof. KIRKBY - Yes. They have often an idealised a picture of that parent in their head, which is often quite at variance with the reality. I can point to a number of people who have located their parents after 40 or 50 years and the emotional situation can be both fraught and also very exotic and exciting in some ways. It takes people into new territory where they are often confronted with a very different version of the parent they thought they had. Sometimes that can be very rejecting and abandoning and sometimes it can be very welcome. Either way they can be very surprised, depending on their previous life experience.

Surrogacy necessarily sets up an adoption context essentially, a more complicated one than usual because both sets of parents - the donor parents who are donating the egg and sperm and the people who are caring for the pregnancy itself - have an obvious claim to parenthood. That is an unusual situation so there is a natural set-up for a tug-of-war there, depending upon which way their inclinations run. In terms of these long-term emotional sequelae, I think much would depend on having clear parameters at the outset in terms of the child's rights and the child's ability to access knowledge about its parents. Whether that is a necessary part of the procedure or whether it can be left to the discretion of the parties involved is particularly important.

Mr WILKINSON - It is important for the best interest of the child, isn't it?

Prof. KIRKBY - The best interests of the child have to be the primary focus, but there are also potentially competing interests of the parents during the pregnancy. The health of the pregnancy is obviously of keen interest to the expectant adoptive couple.

CHAIR - Do you think that some of the potential difficulties that can arise because of the very issues you are talking about - people's confusion about where they come from and all that kind of thing - are sufficient to warn us off going anywhere near surrogacy, or are they issues that we need to be mindful of when talking about setting up a system under which surrogacy is allowed?

Prof. KIRKBY - The comparator has to be what happens in the real world in terms of people getting pregnant, having babies and so forth. Without prejudice I say it is fairly chaotic. People can give birth in the most exceptionally good circumstances and the most exceptionally appalling circumstances. I think in surrogacy that range would be narrowed somewhat because there would necessarily be some form of screening process in terms of legal and legislative requirements - common-law requirements, implicit contracts and so forth - and medical supervision would likely be higher than it would in normal circumstances. It probably would involve a fertility clinic in some regard to the technical aspects. They would have their own ethical and professional guidelines in terms of screening, counselling et cetera. So it is likely to be much more vetted than the normal pregnancy. The normal range of pregnancy, as you would appreciate, goes right through to people who, for example, use intravenous drugs, abandon medical care or smoke and drink throughout pregnancy. Some have HIV throughout pregnancy. Most of those really difficult problems that would impact severely on the child potentially would be largely averted through the screening process.

I don't think the surrogacy stands out as 'Oh my god, that would be going into new territory'. It is circumscribed territory. Because it is a contrivance, in the sense that it has been set up within a legislative framework, that brings in a new level of complexity in terms of emotional processing. It is no longer down to the individuals to do whatever course they take with nature. There are certain checks and balances involved and it is getting those right. That will set the emotional tone of the relationship. It is important to acknowledge that there are two sets of parents, assuming that the surrogate couple have to be a couple and not just an individual with a womb, as is required in many jurisdictions. You have four people immediately involved with that child who would in a natural way have some affection for that child or would be likely to develop some affection and would be able to claim some affection for that child.

Mr WILKINSON - Even though it is a totally different pregnancy to the normal pregnancy, it is still far less chaotic that the types of pregnancy you are talking about when people are drug dependent and have a night with somebody and so on.

Prof. KIRKBY - Yes; there are lots of ways in which pregnancy can be very prejudiced as far as the outcomes for the child are concerned.

Mr WILKINSON - With the fairly ordered and planned procedure that takes place, does that mean that the parents involved are more able to properly cope psychologically with what they are doing?

Prof. KIRKBY - One would expect so, yes, but it depends upon the integrity of what happens next. In the natural course of events people separate and so on; it is coping with the contingencies that arise sometimes. Somebody who decides to have an abortion is one obvious one that has been reported in the literature. The person who is carrying the child says, 'No, I don't want to carry this child any more. Forever whatever reason, I'm going to have a termination'. It is their child in law in many jurisdictions. That is a very fraught situation in terms of, 'You are aborting our child. We have never had a child'. The gun is loaded essentially.

Another one is where either couple had a separation during the pregnancy, with untoward effects on the pregnancy or untoward effects on their willingness to relinquish that child, or wishing to keep that child themselves to make up for the loss of the other partner and so on. These are just normal plays in every day life that would have a particular nuance and poignancy in the case of a surrogate couple.

Mr WILKINSON - What does your knowledge tell you in relation to the mother who has put her hand up and is willing to be the carrying mother, but then after three or four months she said, 'Look, I can't go through with this. I want the child to be aborted'.

Prof. KIRKBY - As it stands, as I understand it, that is their right. Essentially, the child is in their womb and they are the biological parent. They may not be the biological father and mother but they are the biological parent so people tend to give them the rights they would have with any other child. In fact it happens to be two other people's child instead of one other person's child. It is always one other person's child in the equation, whether that person is known to them or not.

CHAIR - And the pregnant woman has the right to continue with the pregnancy.

Prof. KIRKBY - It would be hard to legislate not to have such a right. It would be most unusual and probably unfair on the judiciary

Mr WILKINSON - And you would be setting yourself up for a fall because things could occur where the person can say, 'I didn't abort it; it was just unfortunate that this occurred'.

Prof. KIRKBY - Yes. So there are two issues there. One is that it might have long-term mental health sequelae for the individuals involved but they will be in the normal rough and tumble of life, essentially. Pregnancies can miscarriage in any case, for example, so people are up for those sorts of perils. They would want to be briefed beforehand from a legal safeguard point of view and probably have some counselling available.

CHAIR - So that they realise that that is a possibility.

Prof. KIRKBY - So that they have countenanced these possibilities. Someone else doing it may not countenance the usual possibilities that would occur to them if they were doing it themselves.

Mr WILKINSON - What type of counselling should they obtain and how long should it be for?

Prof. KIRKBY - I do not think it is an area of high science. Counselling would probably be delivered in a fertility clinic setting but they would need to have a safety net available should anything go wrong. It would be the advice you might apply to anybody getting pregnant, for example about post-natal depression or pre-natal depression. They may not get it but they are given advice beforehand. A GP might have a chat to them about that and what they do if anything happens and so forth.

Mr WILKINSON - Leaflets often worry me, though, because they are given leaflets and a lot of people do not read them. That is why I think there should be this conversation that is taking place where you are offering opinions and I am asking you questions. That is the only way you can get proper informed advice. Just handing over a document is a bit of a furphy.

Prof. KIRKBY - It depends a lot on how intact people's family networks are. If somebody is having a baby, whether it is theirs or not in terms of their intentions of keeping it or handing it over to the biological parents, the rest of the family are still involved - the aunties and the grandmas asking whether it is kicking and all the usual things. I do not think people would distinguish it and say, 'No, that's somebody else's pregnancy; it's not yours'. It would be that the person is pregnant, with all of the baggage that comes with that - the fears and trepidation, the compliments, the people getting out of your way in the shopping line and so forth - the whole kit and caboodle. There might be lots of people involved. In many families the family would very seriously take onboard the question of health during the pregnancy and psychological wellbeing through life, and they would be the support mechanisms. If somebody had a miscarriage or an abortion, for example, they would presumably have some grief related to that and many families would deal with that themselves. They would have the wherewithal and experience to provide that sort of counselling, and the emotional relatedness to provide that sort of counselling. It is usually a back-up where you are relying on somebody sort of synthetically to provide that counselling. People would need to have both options available to them.

CHAIR - Formal and informal.

Prof. KIRKBY - Some information for families so it is not seen as some odd person who is doing something unusual; it is just one of the things that people do these days. There might be a leaflet for the family that explains some of the issues relating to surrogacy and so forth to help them be available for that person so they are not in a prejudicial situation of being rejected perhaps by the family - 'We don't approve of that' or 'We're Catholics' or whatever the churches views are in these matters. There may be some religions that are more or less disposed.

Mr WILKINSON - Should it be a prerequisite of any surrogacy event that counselling be entered into?

Prof. KIRKBY - Whether it would make a difference in terms of the outcome I think would be a moot point. Counselling is very difficult because there are so many other factors going on in people's lives. It is very hard to pin down that it would necessarily have a better outcome. It's a commonsense position that people have an opportunity to ask questions and get information they wouldn't have otherwise thought of, and process it with their partner, and not just themselves as a couple but also through their extended family or other peer supports and so on. People these days will go straight to the Internet

and look up surrogacy. If they hear that their cousin is having a surrogate child they will look it up. A national approach, if there was a national approach, should provide sensible supportive materials to help interested persons. It might be work mates or somebody who read something in the paper and knows they live down the street.

Mr WILKINSON - Even though one might say at the outset, 'You're thinking about the parents and parties involved but you're not really focussing on the child when you're talking about the counselling' - but you are really focussing on the best interests of the child. If the parents, when they have the child, are more able to understand what has gone on and accept it, and can accept and understand what might be the pitfalls at some later stage, then that child is going to be better off.

Prof. KIRKBY - To me the most complicated thing is the Brady Bunch in reverse. We have two lots of parents and one child, instead of two lots of families and one lot of parents. It is an unusual recombination. How those parents on both sides relate to each other, or decide to relate to each other, in the long term is probably the key issue. That is when you get into separated families and disputes, family law court issues, custody battles and access battles. To me it would be better if there is a fairly commonsensical approach to what the parameters are and within which people can then decide amongst themselves. It is the sort of thing about which the Family Law Court would say, 'You have to have access'. It would be unusual these days to insist that somebody gives up a child that they have raised in the womb themselves and not have access rights to the child.

Mr WILKINSON - But it's not unusual when you look at adoptions, is it? There are adoptions where, say, I hand the child over and I don't see the child again. It is only when the child finally tracks me down that they come back into my life.

Prof. KIRKBY - Yes. The range is going to occur. Some people might decide that that is fine and they give the baby up after six weeks or whatever. It's a bit like taking your dog out of the home - however many weeks after the birth you are allowed to hand the baby over without fracturing the maternal attachment relationship and so forth. It is a complicated one. Once you have done that, six months later they might say, for whatever reason, 'I want to have an ongoing relationship with that child'. They are still the biological parent.

Mr WILKINSON - Should they be allowed to, in your view? I suppose it depends on the circumstances.

Prof. KIRKBY - If you don't do that you're back with the stolen generations and all that sort of stuff. When I was a young lad in medicine, if a young girl had a baby you put a pillow at the end of the bed so they couldn't see the baby and it was then whisked away. Some people are still missing that child. Whether it was well-intentioned in the John Howard way, it wasn't very well considered psychologically.

CHAIR - One issue we have been discussing is the importance of accurate records being held so that the child at any point during their life can track down their biological parents.

Prof. KIRKBY - It is becoming increasingly important with genetic diseases and so forth.

CHAIR - So you would approve of access to information being given?

Prof. KIRKBY - We are talking about rights to access.

CHAIR - Yes.

Prof. KIRKBY - I think the rights framework is somewhat more of a moral and ethical framework, isn't it, rather than a purely legislative framework? It will probably incorporated or referred to in the legislative framework.

Mrs SMITH - With altruistic surrogacies, in most instances in the past, certainly in the stories we have seen, it has been a family member or a very good friend who had their children and wanted to assist their friends to have a child of their own et cetera. If surrogacy became a legal process do you see more difficulties or less difficulties in that process of that close connection? If it is family, there is going to be close connection forever in that family process.

Prof. KIRKBY - With a lot of the families I see, that is not quite the case. Family dynamics can change dramatically. It makes more sense that there are genuine lines of affection, both to the parents and to the child, and that the person would be, effectively, growing up in an extended family situation that is likely to be very beneficial to them. They would have an auntie and a mum, except the roles are reversed. So they have two mums and two aunties. However, you could get other people putting their hand up who may have more unusual motives. It's a bit like people who visit people in jail. Some of them are very driven by their appeal and other ones are a just a bit unusual. So some people put their hand up when they have strange motives. Some of them are simply caught in the screening process when asking people why they are doing it and what is it for. People might be doing it for Andy Warhol's 15 minutes of fame for everybody - 'You are going to get in *Women's Weekly* if you do this', or 'You're going to be in the *Mercury*'. It is very newsworthy material - at least in the initial stages - so some people might be more guided by the celebrity mags aspect of surrogacy, whether they get in the paper themselves or not. The fact that somebody else has done it means they are a star for that day. That is a very powerful influence in people's lives. It is a bit like reality TV.

Mrs SMITH - There has been some suggestion that there be preconceptual agreements so that all the issues that may arise are actually on the table before there has been any conception process. That would also require mandated psychological assessments and discussions and understandings et cetera to try and cover off anything that might happen, hopefully to allow someone, before anything has happened, to change their mind. 'No, I have discussed this, I have talked it through and I am not the sort of person that can go through this process and hand the child over.' Do you have a comment on that process?

Prof. KIRKBY - I think the reason that society does not legislate for every other pregnancy is that it is too hard. Once you start to say, 'This particular area is special and you have a duty of care and it is artificial, so we can legislate here' but it is still too hard. You cannot stop people changing their mind and so forth.

As I understand it, for example, in the British jurisdiction, a surrogate mother can do what she likes during the pregnancy and then she has to decide to adopt the child out to the genetic parents after a certain length of time. So the baby is hers and she can do what

she likes with it. Then she has to decide to adopt it out. The genetic parents have no right to get that child off her if she changes her mind.

When you start to think of it in those ways, it is really quite fraught. The State cannot go and remove, through the law, a child either from someone's womb or immediately afterwards unless they have some sort of court order. It would be a most extraordinary thing to do. So the agreement wouldn't be classed in those terms, but you couldn't back it up, essentially. It would be very complicated. So what you need, I think, is a clear definition of whose child it is at what stage. You cannot have the child in an amorphous place where it does not belong.

Mrs SMITH - I understand that but I am trying to take as much out of the issue through something at the beginning of the process that educates them enough to totally understand as much as they can about the process so they may make a mature judgment at that stage. 'No, I shouldn't have even considered this', and then to walk away rather than having nothing in that vein at the front end. So you have an education process.

Prof. KIRKBY - From an education point of view and from a 'This is what we plan to do' point of view, I think you are absolutely right. What is enforceable is an entirely different matter. The law provides a guiding framework for people and in that sense it would be very helpful. The law as remediation or punishment or enforcement I think would be a very queer pitch, unless there was the usual thing like child abuse and the child had to be taken away. You would just go into the normal processes there. As I see it, the agreement would effectively have to be life-long. The chances of somebody predicting accurately and in court being able to say, 'Yes, I was fully briefed and I knew everything but I didn't know that when I was 50 I wanted to see that child' - there is no way of backing that up. There is no way that people can predict what they really want to do in 10 years or 20 years' time and what their social mores will be at the time. It would give us a false sense of order when really you are dealing with a average, messy sort of situation.

CHAIR - So you would be doing the best you could to make sure that all the issues had been canvassed prior to preconception, but with the knowledge that anything can change.

Prof. KIRKBY - Yes, any of the obvious things could happen. The neat and tidy idea is like the child in swaddling clothes dumped in a basket. You have the baby and then you put it in the river and somebody picks it up. That is not the way it is going to work. The parents on both sides are going to be potentially hovering around each other for the rest of their lives.

Mrs SMITH - But it does not work even in the society we have today, though, with the natural parents. You cannot predict in five years' time whether that child might be greatly distraught because dad has moved to America with somebody else and mum is left here with the kids or vice versa.

Prof. KIRKBY - Yes. Basically pre-nups are not worth the paper that they are written on. My guide to it would be: if you introduced the same processes as are being contemplated for every pregnancy, would it work? - and then commonsense will prevail. If it were not done for every pregnancy, why would it be done especially for that pregnancy, other

than, as you say, helping people to understand what they are doing? This is essentially complex; there are potential problems that need to be considered beforehand.

Mrs SMITH - But surely you see a difference between a normal pregnancy versus a conscious decision of somebody who will have a child, genetically not theirs, with the express purpose nine months later of handing it over to somebody that they have built a connection with over that period of time. Surely there are two different mental states in that process. Somebody is pregnant and says, 'Whacko, I'm having my child', but the other says, 'I'm pregnant because I've come to an arrangement with my friends who cannot have children, to pass it over'. There must be two different mental states at that stage.

Prof. KIRKBY - There is another mental state which is, 'This is my baby. I want this baby. This is growing in my womb, I am the mother'. These people are not the mother. They are not different to donors. Lots of people have donor children of one sort or another, derived naturally or unnaturally, and in this case you just have two donors. That is another concept. I understand it, in legal terms unless you say the baby is not the person's baby, which should be quite complicated to hold up because it looks like it is -

Mrs SMITH - Psychologically, is there a difference in the issue of not knowing your donor - IVF can be that; you have information but you do not know the donor - as against the surrogate who knows the donor. Psychologically, is there a difference in people's mental states there or is it, 'I'm carrying this baby regardless of any of that'.

Prof. KIRKBY - It depends on what sort of surrogacy you are talking about. There is surrogacy where you do not know the donors and you just bear the child and hand it over and get the money and so forth. Obviously we are not talking about that in this case, but people might do that internationally anyway, whether you legislate for it or not, and they might come back to Tasmania with the baby and so forth. There are going to be issues in surrogacy that go beyond the well-intended and the well-constructed Tasmanian legislation. It is going to be much more complicated than that. It is just like getting a kidney from India. It is quite easy to arrange for somebody from some other country to surrogate their child.

CHAIR - Do you see any need for us to make any distinction between heterosexual and same-sex couples when we are dealing with this issue?

Prof. KIRKBY - I wouldn't go there, personally. Then you are dealing with donor issues more explicitly because you need to have heterosexual genetic parents, biological parents. You could have a gay couple raising a surrogate child in the womb and handing it over to a heterosexual couple, or one of them could be a donor. There is every which combination available to you there.

CHAIR - If I understand you correctly, we would be better off not even referring to someone's sexuality in our dealings?

Prof. KIRKBY - With surrogacy as generally defined you have to have two biological parents, two genetic parents.

CHAIR - The commissioning parents could be the genetic parents.

Prof. KIRKBY - The commissioning parents by definition can't be a same-sex couple. You can't commission a child with two eggs or two sperm.

CHAIR - You could have partial surrogacy, where it is only one.

Prof. KIRKBY - Yes, so then you basically have somebody with a donor and a surrogate parent.

CHAIR - But that can happen with heterosexual couples too.

Prof. KIRKBY - Sure. There's nothing specific about that, except that is getting beyond the usual bounds of surrogacy. If you smear surrogacy across all those categories it is very hard to catch a hold of it. It would depend whether you require people to be married, for example. Some legislation requires people to be -

CHAIR - In a stable relationship.

Prof. KIRKBY - You'd have to decide on all those parameters.

Mr WILKINSON - As you would know, Ken, it is happening now where, say, two gay females are getting together and want to raise a child.

Prof. KIRKBY - Sure; there's lots of gay females raising children very happily. There's no shortage of gay males who have partnered with somebody else after they have had their baby. It happens anyway; it is just a question of whether it is legitimised in some way or not.

Mr WILKINSON - So you just leave that alone?

Prof. KIRKBY - I certainly wouldn't recommend making specific reference to it. I think you need to decide whether you're talking about surrogacy as such where both genetic parents are the ones who are aiming to take on the child.

CHAIR - Would you be aware of the Senator Conroy situation? They were in the situation where Mrs Conroy was unable to conceive because she'd had cancer and had no eggs. Mr Conroy donated his gametes and then they had another woman who donated an egg and they fertilised it and implanted it in a third woman. So the woman carrying the child had no genetic connection to the child but when it was born the child was of the father but of the other woman because the mum who wanted the baby couldn't produce eggs. That is a partial genetic situation and that exact same situation could arise with same-sex male couples.

Prof. KIRKBY - That would simply come down to the definition of 'surrogacy', whether the biological mother raising the child in the woman is not genetically related to that child, or not immediately related. If that is your definition of 'surrogacy' then all of those other things are encompassed within that. The definition of 'surrogacy' used in some places is a more narrow one where both of the genetic parents are the commissioning couple.

CHAIR - So that the woman who is carrying the child is not genetically related to the baby.

Prof. KIRKBY - That is the surrogate part and then the commissioning couple can be any couple, providing they meet the standards, depending upon how relativistic you want to be in your moral dimension. There will be some public debate about this. None of this was as God intended 2 000 years ago because the technology wasn't there.

CHAIR - If the mother is capable of producing a healthy egg and the problem is with the father, then that is not surrogacy anyway; that is just using IVF, isn't it?

Prof. KIRKBY - Not necessarily IVF. Lots of people get someone else to help them out with knowledge of the couple and so on. That has been happening for thousands of years - and there is donor sperm.

CHAIR - Yes, but there is no handing over or relinquishing of a child involved, is there?

Prof. KIRKBY - Donor sperm through a syringe or you can have IVF and put it back in the womb that way. So I think a lot of those things could be dealt with simply by the careful attention to the definitions to make sure that they are not exclusive but as inclusive as you wish to be. It is an interesting area because it plays upon so much of the essential aspects of people's lives.

Mrs SMITH - The final essence becomes the emotional attachment of the woman who is carrying the child. The base issue at the end is whether or not she is prepared to hand that child over, as per some arrangement that has been made in the past.

Prof. KIRKBY - Yes, and whether she should be forced to do so.

Mrs SMITH - And what psychological effect it has on the commissioning parents who may have a genetic attachment if she decides not to. That is another issue. It is not just the mother carrying the child; it is the issue of the people who thought, genetically, they would have a child and are left as well.

Prof. KIRKBY - The lawyers know much more about this than I do, but to me that is the nub of it - whose child is it? At the moment children have somebody who is responsible for them in common law, so you need to specify who that was because it is an uncommon situation.

CHAIR - Do you think there is any need for there to be ongoing external, if you like, psychological care of the child produced in this way, which is a bit Big Brotherish, or would you say that the child has been born, it has been handed over to the commissioning parents and there is no need for there to be any ongoing observation of the mental health of that child unless an issue arises?

Prof. KIRKBY - It is a child who has been adopted out so there is some increased risk of mental health issues in the long term - and people should be aware of that - the maternal attachment has been broken. One of the issues that we haven't discussed is obviously breastfeeding. That is where you start to really get into the nitty-gritty of mother/child attachment. The surrogate parent is able to breastfeed and presumably would breastfeed initially; I doubt we would whip the baby away at birth. There might be some places that require the baby to be looked after by the mother. They are biologically ready for that,

fully primed for the milk and ready to go, and the extra immunity you get from that and so forth. That sets up a very interesting issue of mother/parent relationship, whereas the adopting/commissioning parent has no children, presumably - though they might have had previous children and want some more - so other issues that need to be countenanced as well. They have no children so they may or may not have as well-developed mothering capabilities. The child may be stepping down immediately going from one couple to another, or they might be stepping up, but they are not going to be breastfed.

Mrs SMITH - But that is making a presumption that every natural mother breastfeeds her children and that if they don't then they don't have a relationship with their children.

Prof. KIRKBY - I think about two-thirds do. My mum bottle-fed me and I am still surviving. A whole generation was bottle-fed.

Mr WILKINSON - Are you saying, a child, if possible, is better off and forms a better relationship with the mother if they are breastfed.

Prof. KIRKBY - What we apply to dogs and cats is that they stay with their mum for a little longer and then they are taken out of the litter. You don't put them out on day one. I think we need to be sensitive to the importance of the mother/child bonding. That mother has had the child in the womb; they are part of their body, their immune system, their antibody system, they are part of their life. It is a fairly profound thing to legally whip the child away and give it back to the genetic parents.

Mrs SMITH - Is it different with each individual? Would you see it as reasonable for a transfer to take place up to so many weeks or -

Prof. KIRKBY - I would not be able to comment on how many weeks but part of the issue is that breastfeeding, where available, is better for the health of the child. So it is a question partly of duty of care for the child because you get antibodies and that protects you against diseases. So children thrive better and they have better immunity if they are breastfed, notwithstanding that most children survive if they are not. There is a whole literature on that and I am not an expert on infant psychiatry.

Mrs SMITH - The longer that happens the more danger there is of this great affinity being built up? It is already there and then it becomes more difficult to transfer the child, say, three months on.

Prof. KIRKBY - That is where it depends on your perspective. I do not see that as a danger. I see that as a perfectly natural and desirable thing to happen. The danger is in being a bit too clinical about it - okay, time to go now. These are your parents. Usually we do that with babies in extremis. They are not going to be able to be cared for by that parent and so they are adopted out because they have the prospect of a better life. Things are so bad that they could not get worse because the mother is destitute or an intravenous drug user or something like that.

Mrs SMITH - But that is a current view. I remember the first select committee that I was on here was about adoption. It is only 40 years ago that, if society had thought differently, single mothers would have kept their children. It was not because of the non-capacity of families or women to look after their children; it was societal attitudes. Your life will be

better if somebody who cannot have children takes this child. You come home and forget all about it and move on with your life. I have seen the potential danger at the other end of women in their 40s and the effect later in life that had on them as young women of 16.

Prof. KIRKBY - Yes. What we have here is something quite similar in a sense. There is a preconception agreement so, whip, off you go. Somebody signed the form, they said that they understood all the conditions, it is so many weeks after birth or days or hours after birth, so off you go. Then it depends on where the baby is situated after that. Do they still have a right of access to their genetic details? Do they have still a right of access to that parent? Does that parent still have a right of access to them or is that just open to the usual interpretations or are they expressly denied access? I guess that is a decision for the legislation.

Mrs SMITH - If it was a case of surrogacy being legalised under strict regimes that then allow the potential for childless couples to make arrangements - or leave it alone? Do you have a professional opinion on that?

Prof. KIRKBY - I think it is an unstoppable tide. It is best to work with technology rather than go into battle against it. People have a genuine wish to have children and have used all sorts of very arduous techniques. IVF is a very arduous process for many people, with very low success rates. This has a much higher success rate, as I understand it, because the people are chosen for their fertility and not for infertility. It is so straightforward that it is not going to stop and you have to go with it.

Mrs SMITH - There is surely a different psychological aspect to it. 'I have had scientific intervention and it has not worked' - that is a tragedy for a couple and they have to work their way through that process - as against 'I have gone into an arrangement with surrogacy and have watched this expectation for nine months' and been part of this presumably. Then on a change of mind it is death by a thousand cuts again to the couple.

Prof. KIRKBY - Yes. That is a question of whether the law would seek to impose its own value judgment as to who has the primacy. Whether it is the person who has given birth to that child, which is the natural state of affairs, albeit with a twist early on in the pregnancy, or whether it is the opposite - the commissioning couple having the legal right, essentially the genetic advantage point from which to press their claim.

Mrs SMITH - You believe a law can and perhaps should give consideration as to where that legality is, whether it is at conception or at birth?

Prof. KIRKBY - I think it has to. Unless the system is sorted out by the courts or the Family Law Court and I am not sure how the Family Law Court would deal with these pre-natally. It could be accumulated through common law. I would profess almost total ignorance of how you would do that procedurally.

Mrs SMITH - Do you think society would accept that?

Prof. KIRKBY - We have to recognise that there is an ambiguity if somebody is carrying a child that is their own by virtue of carrying it, but not their own by virtue of where they got it from. An ambiguity arises there which is fairly profound and the law is going to

have difficulty controlling that area. It may be assisted by some definition as to who is responsible and at which stage. You might wrap it up in normal provisions, like adoption, so once a child has been adopted out it has all the rights and non-rights of adoptees, adoptive parents and biological parents. That is commonplace so it might just fold in with that, as opposed to having a separate category, 'No, you're a surrogate, you're not adopted'.

Mr WILKINSON - If you are looking at the best interest of the child or the paramount interest of the child, as the family law always said, it would be the lady with the child in the womb who would be, at that stage, the parent. I say that because, looking at the best interests of the child, that lady is carrying the child and therefore it is her and her behaviour that is going to influence the development of that child. Therefore, if her behaviour is what is going to influence that child then she is the parent, I think, at that stage because it would be in the interests of the child for her behaviour to not include drink, smoking, intravenous drugs et cetera. She would be the one who is pulling the strings as far as that is concerned. She is doing all the running so she should be the parent at that stage.

Prof. KIRKBY - Except that the commissioning couple may be providing financial support in terms of making up expenses and so forth.

Mr WILKINSON - But for the best interests of the child it would seem to me that the carrying mother at that stage would be the one -

Prof. KIRKBY - That is a big decision. Does that person then adopt out that child back to the commissioning couple or how is the agreement enforceable. What if somebody says, 'I don't care whether I did sign it or not. You can't have it. It's mine. I'm breastfeeding'.

CHAIR - I don't think there is anyone who really thinks you would ever make a woman give up a child that she carried. I don't think you could do it.

Prof. KIRKBY - It would be very complicated.

Mr WILKINSON - It would be complicated. There was some talk previously that it should be in the hands of the Family Court because they have been the ones who have gone through all the law since 1974-75 when the Family Law Act came in. They have been the ones who have looked into this matter, but because it is not a Commonwealth matter it is the State that has to look at it. To me, that is wrong. It should be the party that is most expert or the area, which is the Family Law Court.

Prof. KIRKBY - I would think in the case of dispute the Family Law Court would be the way to go. They resolve these issues to do with human frailty. Then it can creep along with common law precedents, judgments and so forth and be able to move with the mores of the times. I don't think you can have a set legislative framework that sets up what is going to happen necessarily in five years, 10 years, 20 years time because it would just be overturned. I think we should be aware that, that it will be subject to whatever.

Mrs SMITH - A judge made a judgment where they felt they had no room to move on, and yet acknowledged the issues out the side. I think they left us some paperwork on it. The

judge could only work within the parameters he was given, whilst logically and realistically it should have been a different result. He was tied by those strictures of law. You are quite right, the law somehow should be able to incrementally change as society's expectations change. It takes years to get a piece of legislation out of this place.

Mr WILKINSON - That is why you shouldn't be too prescriptive within the actual legislation.

Prof. KIRKBY - It is a false sense of security. The law of unintended consequences will always apply otherwise you end up doing something you didn't realise wasn't the intention in the first place. Once the barristers get a hold of it will get twisted around and be argued in court and so forth. They will pick it to pieces.

I admire you for taking it on. I think it is an important area and one that is going to grow. I think it is very important to look at the legal and psychological aspects. I think you are well-equipped to do that and good luck. I am sorry to be inconclusive but I think it is an inconclusive area. On the one hand I see all the worst things that could go wrong and in my clinical work, but in my daily life I see quite a lot of good things happening in the world, so it has to be able to somehow accommodate those extremes.

CHAIR - Thank you very much for giving up your time.

THE WITNESS WITHDREW.