

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

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**SURROGACY BILL 2011**

DISCUSSION (BY TELECONFERENCE) WITH **Hon. SUSAN MORGAN**,  
DEPARTMENT OF HEALTH, VICTORIA.

**CHAIR** (Ms Forrest) - Thank you for agreeing to have a chat with us this morning. I am sure you are aware that we have a surrogacy bill before the House which has been referred to this committee. We are interested to look at a number of aspects about how it works in Victoria and some of the issues around the registration of the birth details, how that is managed and also any issues that have arisen during the application of the legislation in your jurisdiction. When did your legislation first commence?

**Ms MORGAN** - On 1 January 2010.

**CHAIR** - Would you like to give us a bit of an overview of how it works in your jurisdiction?

**Ms MORGAN** - Yes, I certainly can. I preface it by saying that the provisions in relation to substitute parenting orders have not been used yet. The surrogacy applications only began to come through this year. Some 15 applications have come to the Patient Review Panel and all have been approved, but of course they have only come in over this year and there have not been any babies yet. The court mechanism has not been used yet so I cannot say anything helpful about that.

**CHAIR** - With the Patient Review Panel, how do couples or intending parties, both sides, approach the arrangement?

**Ms MORGAN** - That is the significant difference between your proposed bill and our legislation. In looking at your bill it operates only once a child is in existence, whereas ours commences operation at the time the parties are proposing to enter into a surrogacy arrangement. We have the first step that the PRP approve the surrogacy arrangement. As I say, we have had 15 this year and we have approved all of them. One of the reasons for the success rate is that our act sets out comprehensive guidelines for counselling and other conditions such as legal advice in relation to proposed surrogacy arrangements, so we find that when they come to the Patient Review Panel all the boxes have been ticked. The counsellors are doing a fabulous job with counselling in accordance with the guidelines. As I say, we have sent a couple back for some more information, for example if there is a donor involved. We have had a couple of cases with donor eggs involved and we have sent them back to get some information about the donor's attitude to the arrangement. Otherwise, the procedure is that the parties go through all their counselling et cetera and get their legal advice and then come to the Patient Review Panel.

**CHAIR** - So the people who provide the counselling and the legal practitioners who provide the legal advice, are they specifically accredited people?

**Ms MORGAN** - Yes. The counsellors who provide the counselling are accredited under the regulations and there are experienced counsellors at the various RBF clinics. The quality of the reports has been excellent and the clinics use their most senior counsellors for those purposes.

**CHAIR** - Could that be seen as perhaps not independent?

**Ms MORGAN** - I understand that issue and a constant issue with the legislation in Victoria is the independence of the clinics. I absolutely accept that point. We've not seen it to be a problem thus far. The counselling is done by the clinics but the decision is made by the Patient Review Panel. Insofar as the legal advice is concerned, I have noticed that inevitably with the new area a number of solicitors have leapt into the field. We tend to get advice from the same solicitors but each party is now getting independent advice. In the beginning they were going to the same solicitor, but I suggested it was better that they get independent advice and that is now happening.

**CHAIR** - Do these legal practitioners have any specific qualifications? Are they also accredited?

**Ms MORGAN** - No, they don't have to be specially accredited. I know the practitioners who have become involved and they're experienced family lawyers. The patients also get an independent psychologist's report, in addition to the report of the IVF counsellor.

**CHAIR** - So the independent psychologist's report is done for both parties?

**Ms MORGAN** - Yes, and the donor usually.

**CHAIR** - And the donor of either sperm or egg, or both?

**Ms MORGAN** - We've never had donor sperm, but we've had donor eggs a couple of times.

**CHAIR** - With registering of the donors, I'm interested in how that information is recorded in their birth records.

**Ms MORGAN** - There's no provision for the registration of the donors in the birth records. In the surrogacy cases, in our experience the donors have been sisters, sisters-in-law and friends, so there is no issue about anonymity. The donor's identity is known and the intention in all the applicants we have seen has been that the children will know the identity of the donor.

**CHAIR** - In Victoria, if artificial reproductive technology is used and a donor sperm or egg is used, is it mandatory that that identity is made known?

**Ms MORGAN** - Do you mean in surrogacy arrangements where the donor is known?

**CHAIR** - In surrogacy or even in IVF.

**Ms MORGAN** - The law has changed, as you know, in stages over the years. The present situation is that the children conceived with donor sperm have the right to get their biological details at the age of 18, but as I understand it there is no compulsion on the donor to make contact with the child. That's not an area that I am especially familiar with.

**CHAIR** - It's a topic that has been discussed quite a lot during this process.

**Ms MORGAN** - There is an issue with surrogacy arrangements which I expect will be raised sooner or later, and that is in circumstances where the donor is perhaps a relative of the 'commissioning' parent, as we call them - the commissioning mother - and the commissioning mother and the donor don't want the identity disclosed to the proposed surrogate mother. I think that's an issue we're going to have to deal with. We haven't yet but I imagine that we are going to have to deal with that.

**CHAIR** - How do you see that being dealt with or managed?

**Ms MORGAN** - I'm not sure at the moment. I'm waiting for an application and then we are going to have to think about it because the specifics of counselling require that the parties have considered how they are going to discuss the circumstances of their conception with a child. My belief is that would include the identity of the donor. Whether the surrogate has the right to know the identity of donor, or whose biological material they are carrying, is a question we have not had to decide yet but I think we will eventually.

**CHAIR** - That was something not considered in the debate of the legislation because it is hard to think of every possibility.

**Ms MORGAN** - It is hard to think of every possibility. With our act it was never envisaged that the work of the Patient Review Panel would be so heavy. When I was asked to take on the job I was told it would be maybe one or two applications a month, but I am working now two to three full days a week. We have dealt with something in the order of 165 hearings we have held in the space of 18 months. But as far as surrogacy is concerned, we have heard 15 this year.

**CHAIR** - It seems like an awful lot.

**Ms MORGAN** - It is.

**CHAIR** - What are the predominant reasons people seek surrogacy?

**Ms MORGAN** - One thing we have been terribly impressed with is that all members of the panel really enjoy the surrogacy applications. We have only had one exception to where you can really say that the motives have been entirely altruistic. It is very interesting. You expect that the donors will come from sisters or, in a couple of cases, sisters-in-law, but we have had friends. We have had donor eggs from people who have heard that somebody might need help. So it has been absolutely fascinating in that respect.

**Dr GOODWIN** - What was the one that was not altruistic?

**Ms MORGAN** - They all have a component of altruism and there has never been one that has been entirely non-altruistic. There has only been one that has really given us any trouble and that was an issue about revealing the identity of the donor.

**CHAIR** - Who sits on the Patient Review Panel?

**Ms MORGAN** - That is a good question. The minister appoints a list of approved names, as it is called. Then from that list of approved names, the chair selects four, including in this case herself. The Patient Review Panel consists of five people and there is a requirement that at least one of them has expertise in child protection but that is not defined in the act and necessarily we have had to take a fairly liberal approach to who has an expertise in child protection. Having five members, as you would understand, is logistically quite difficult and the requirement is that the chair and the deputy chair must both sit at every hearing. If the chair or the deputy chair was sick, there is no provision for delegation and the hearings just have to be cancelled.

**CHAIR** - A fairly onerous responsibility. They cannot even have a holiday.

**Ms MORGAN** - Yes, that is absolutely right.

**CHAIR** - What is the expertise of the other members?

**Ms MORGAN** - Some of the members' terms were only for two years and they were appointed from 30 August 2009, so they are about to expire. The present panel is: myself - and I am the chair and a retired Family Court judge. The deputy chair is a professor who is an agricultural scientist but is a world expert in infertility. Then we have psychiatrists, some psychologists, some counsellors and we have people in the street, so to speak. We have some consumers, people who have undergone IVF themselves and we have some lawyers.

**CHAIR** - To clarify that, you have the list of people, but can you form the panel from different people as long as the chair and the deputy chair remain the same?

**Ms MORGAN** - Yes.

**CHAIR** - So the expertise you may call in depends on who you need at the table?

**Ms MORGAN** - Yes, ideally it would be like that but in fact it often boils down to who is available.

**CHAIR** - I reckon it does. Just to go through the actual process, the applicants or the people seeking a surrogacy arrangement go to the counsellors, get legal advice and there are quite some well-defined or comprehensive guidelines.

**Ms MORGAN** - Yes.

**CHAIR** - Once they have ticked all the boxes, they then come to the Patient Review Panel and the Patient Review Panel ticks off that arrangement. What happens with that agreement then? Is that a registered agreement? What is the process from there?

**Ms MORGAN** - We do not require a written agreement. The Patient Review Panel then have to give reasons in writing within 14 days and certainly our record in that respect has been, if I may say so, very good. We usually get the decisions in about a week. In the surrogacy cases we place a premium on getting the decision to these people as soon as we possibly can and they are issued with reasons for the decision and a certificate. It is a sealed certificate which states that the surrogacy arrangement is approved, so they go to the clinic armed with that.

**CHAIR** - If a group of people were not going to use an IVF clinic - they were going to use a turkey baster or the more conventional form of getting pregnant - what happens at that point?

**Ms MORGAN** - I do not understand how you could have a surrogacy arrangement without using an IVF clinic.

**CHAIR** - If you have a same-sex male couple, who obviously cannot do it themselves, they engage the support of a female friend. One of them provides the sperm and either did it conventionally or with a turkey baster where you self-inseminate. Then you do not need an IVF clinic in that circumstance.

**Ms MORGAN** - Self-inseminations - turkey baster as you call them and we do too - are not covered by our act, but the example that you gave would not, under our act, be a surrogacy arrangement. I am very familiar with those arrangements, but the scenario you have set up is where one or other of a male couple with a turkey baster inseminates a friend, so obviously the friend would be providing her own egg, so under our definition that wouldn't be a surrogacy arrangement because in a surrogacy arrangement none of the genetic material is the surrogate mother's.

**CHAIR** - Yes, okay. That is a difference with ours then too, because that is not necessarily a requirement. Yours is limited, then. So any children born in Victoria through that situation we just mentioned would not be able to have their birth certificates -

**Ms MORGAN** - Yes, but they don't come to the Patient Review Panel. You are quite right, they would not because when it comes to the court, the court has to be satisfied that the Patient Review Panel approved the surrogacy arrangement.

**CHAIR** - I am not sure what the Victorian adoption laws are, but the gay couple then need to seek to adopt that child.

**Ms MORGAN** - Yes, adopt or get orders under the Family Law Act for, to use the usual terminology, custody.

**CHAIR** - Right, so that would fall outside -

**Dr GOODWIN** - Our current process.

**CHAIR** - Yes, effectively; it is what happens now.

**Ms MORGAN** - Yes.

**CHAIR** - You give the reasons within 14 days and there is an initial certificate. Then they expect they will conceive and at some point a baby is born, so what happens at that point?

**Ms MORGAN** - We have not had a baby born yet as far as I know and we would know because it has to come back to the Patient Review Panel when a substitute parentage application is made. Nine months would have expired since our first application but we so far have not heard of any successful pregnancies. But it is up to the parties to go and make their application for a substitute parentage order.

**CHAIR** - Through the court?

**Ms MORGAN** - Yes, either the county court or the Supreme Court.

**CHAIR** - Then the court notifies you?

**Ms MORGAN** - Yes. We have to be notified. I have the provisions in front of me. As I say, these provisions have not been used yet. Yes, we would be notified and we would have to indicate that we approved the substitute parentage order.

**CHAIR** - So the court would notify you and seek your confirmation that you had approved it?

**Ms MORGAN** - That is a good question. The court has to be satisfied that the Patient Review Panel approved the arrangements. There is no specific reference for notification to the Patient Review Panel but I had always assumed that we would be notified.

**CHAIR** - I guess if the people involved provide a copy of the certificate that is issued by the Patient Review Panel to the court then that would be evidence enough?

**Ms MORGAN** - Yes. I think the court would probably want to be satisfied as to the genuineness of the certificate. There are provisions in the act that that is established by the signature of the chair.

**CHAIR** - Do you know how the birth certificate is altered?

**Ms MORGAN** - I do not. The Births, Deaths and Marriages people are extremely conscientious and helpful but I have to say I do not know what the mechanics of that are.

**Dr GOODWIN** - Susan, I just wanted to ask a little bit about the process when the parties come before the Patient Review Panel. I think you mentioned that there are hearings; can you talk about what happens?

**Ms MORGAN** - Yes. The surrogacy hearings, as I said, are very enjoyable from the panel's point of view; they are very satisfying. We have five people sitting there and these people are confronting five people they do not know and have never seen before. We make an enormous effort to keep the hearings as informal as possible and we have found that is quite easy with the surrogacy applications. The people are surprisingly relaxed; in all cases they are a couple that have a strong relationship. The procedure is that I introduce the panel. I ask if they are happy to be called by their first names and they

always are. I explain that I am going to ask them a few questions. In most cases I am able to say that the reports we have from the counsellors, psychologists and lawyers are so comprehensive that we probably won't have many questions. A lot of the surrogacy applications we could probably determine from the papers. But my view is that people deserve to come and be heard and meet the people who are going to make such an important decision with them. So the surrogacy cases normally don't take terribly long and are very informal and are consistent with natural justice et cetera.

**Dr GOODWIN** - We were wondering whether you've had any same-sex couples at this stage.

**Ms MORGAN** - We haven't yet had any same-sex couples with surrogacy applications.

**Dr GOODWIN** - So just heterosexual couples so far?

**Ms MORGAN** - Yes.

**CHAIR** - Any single women or single men?

**Ms MORGAN** - No. No commissioning parents have been single. We've had some surrogates who are single but have children, of course.

**Dr GOODWIN** - Also in terms of the Patient Review Panel, do you just deal with surrogacy arrangements or all ART cases?

**Ms MORGAN** - The ones that we deal with first up are surrogacy and posthumous use of gametes and embryos; we've had five of those. As you would understand, they took a while to come through while people made their decisions. But the bulk of the work is under the presumptions against treatment where people have adverse police record checks or adverse child protection checks. On top of that we have all the storage applications, of which we've had nearly 400, relating to an extension of time for storage of embryos and gametes.

**CHAIR** - So are there any police checks or child protection checks done on intending couples in surrogacy?

**Ms MORGAN** - Yes, they all go through the police checks procedure, the same as all IVF patients.

**CHAIR** - So that is done through the counselling part of it?

**Ms MORGAN** - That's done at the clinic stage, yes.

**CHAIR** - The clinic stage is when they go for their pre-counselling and assessment?

**Ms MORGAN** - Yes, and then they're informed that they have to get a police record check and a child protection check.

**CHAIR** - That's before they come to the Patient Review Panel?

**Ms MORGAN** - Yes.

**Mr HALL** - Susan, can you see at this stage any problems with the legislation and any amendments you would like to see? Do any issues arise and stick out in your mind at this stage?

**Ms MORGAN** - In relation to surrogacy?

**Mr HALL** - Yes.

**Ms MORGAN** - No, I can't. I think the surrogacy provisions in the act are very good, particularly the guidelines, the counselling and the legal advice. When we first started, I sent out a guideline to the clinics which basically set out what was in the act and the regulations. That made it easier for them to follow on a step-by-step basis. I can't say there have been any problems with the surrogacy arrangements so far.

**Mr HALL** - Having had a look at our legislation, do you see deficiencies there at this stage?

**Ms MORGAN** - The thing that really struck me was that the point at which the question of counselling is considered is after you already have the baby - I think it's clause 14 of your bill. I know that the court, I think, can dispense with that requirement but that's the thing that most struck me about it.

**CHAIR** - With regard to the guidelines, you as the chair of the Patient Review Panel effectively prepare guidelines for counselling and legal advice?

**Ms MORGAN** - I did. It's a difficult situation because I can't give legal advice to clinics or applicants but I can issue procedural guidelines, and I have in a few situations. With this one about surrogacy, I sent them out quite early in the piece.

**CHAIR** - You said that they basically reflected what was described under the act and the regulations. One of the concerns or criticisms that is sometimes made is that if you try to prescribe everything in the act and the regulations you'll inevitably miss something. Obviously there are certain things that should or need to be done, or could be done, but the guidelines are just that, a set of guidelines that are prepared by the panel, or by you as chair of the panel, but don't have any legal standing as such.

**Ms MORGAN** - No.

**CHAIR** - You probably wouldn't approve an application, should it come, if they didn't tick off on the guidelines?

**Ms MORGAN** - There have been some that have not ticked all the guidelines but in general terms if we are satisfied that the best interests of the child are being served we have approved them without strict adherence to ticking boxes.

I suppose the major difficulty, certainly from the point of view of the clinics, is in relation to the donors and their involvement in the process. The Patient Review Panel has thus far taken the view that we need to see the donor. A couple of times we have

sent it back to the clinics where they haven't seen the donor and asked them if they would and they always have.

**CHAIR** - You said there have been no cases to date where you've had an anonymous donor, or was there one?

**Ms MORGAN** - We've never had an anonymous donor thus far. However there could be a case where the commissioning parent and the donor wish to keep the donor's identity secret.

**CHAIR** - And you're still not sure how to deal with that?

**Ms MORGAN** - No. We're still thinking about that.

**CHAIR** - If there's a requirement that the donors' identities are made available through other ART procedures, why wouldn't it flow that you shouldn't be able to deny that child's access to its genetic background?

**Ms MORGAN** - I don't think the issue in the case I'm expecting to come would involve the donor's identity being kept secret from the child but rather from the surrogate mother.

**Dr GOODWIN** - Why would that be? I'm struggling to work out why someone would want to do that.

**Ms MORGAN** - I agree. It seems improbable but I am expecting that that issue will arise. I can't say anything more at this stage.

**CHAIR** - Yes, it'll be interesting to see how that goes.

**Dr GOODWIN** - Susan, you've mentioned the guidelines a couple of times and I am wondering whether we might be able to have a look at those.

**Ms MORGAN** - Absolutely; I'll send them to you.

**CHAIR** - Thank you, that would be helpful. I accept it is fairly new but we are trying to put in place a piece of legislation. The committee has had considerable discussion about having an agreement up the front end, and that is something you've identified as perhaps lacking with this particular legislation. We were looking at, and have talked with the courts about a court involvement early on in the piece - some sort of agreement that the Patient Review Panel is constituted by people with expertise in the field as opposed to a judge who, with all due respect, may not have expertise of the breadth required here. That may be a more appropriate model.

**Ms MORGAN** - I think it has worked very well. Some of the applicants do enter into written agreements. As your bill recognises, they are not legally enforceable, but a lot of them do. It is further evidence, from our point of view, of the seriousness with which they are approaching the arrangement and the extent to which they have nussed out how they are going to deal with issues that might arise.

**CHAIR** - Whilst you say Victoria does not require written agreement, it does require a certificate and a statement of reasons, so that effectively is a written record if not an agreement of the details of the arrangement.

**Ms MORGAN** - Yes.

**CHAIR** - The way our bill is being considered is that a verbal agreement means that we could have a bit of a chat over the phone and say, 'I'll agree to be a surrogate for you and we'll just get someone to provide some sperm and we'll be away', and that is the end of it. Would you agree, though, that there needs to be something in writing, be it a certificate and statement of reasons or an agreement that is signed by off by both parties?

**Ms MORGAN** - Yes, I would agree with that.

**CHAIR** - So that there is something in writing.

**Ms MORGAN** - There was another thing, actually - you have reminded me - I noticed that in your bill there is a provision that the birth mother has the right to manage the pregnancy.

**CHAIR** - Yes.

**Ms MORGAN** - In all of our applications the parties have reached an agreement and sometimes quite a detailed one as to how the pregnancy is going to be managed, and we've found that the surrogate mothers are perfectly happy to enter into those agreements, such as who is going to decide if there will be a termination in the event that there is an issue with the child, how often they are going to have ultrasounds, for example, who the gynaecologist is going to be, and who can be present at the birth. In most cases they have quite detailed discussions and agreements about those issues with them.

**CHAIR** - Does that include things like drug and alcohol use and smoking?

**Ms MORGAN** - Yes, that's very common. Lifestyle factors are very common.

**CHAIR** - Did you say that's not in the legislation but is just something the couples do?

**Ms MORGAN** - It's something the couples do. It's not technically in the legislation but it is one of the things that the counsellors do go into and we consider to be important.

**CHAIR** - When you look at clause 9 of our bill it talks about the right of the birth mother to manage the pregnancy. Do you think that poses some problems there then?

**Ms MORGAN** - I think so, because it overrides anything in a written agreement and the birth mother has the same right to make decisions or take actions. To me, the most serious one there would be considering a termination in the event of some abnormality.

**CHAIR** - Or even in the case of severe hyperemesis. Sometimes women do make that choice when they really are sick.

**Ms MORGAN** - Yes. We've found that parties have been quite specific about reaching agreement about those sorts of events and that the health of the surrogate mother is predominant, so if there is a risk to her health they will talk about a termination.

**CHAIR** - It is an issue that has come up - what if there is a disagreement between the parties in relation to some of those issues, like even a multiple pregnancy?

**Ms MORGAN** - Yes, and one of the things we want from the psychologist is the parties' ability between themselves to resolve those issues and we have never had an opinion that suggests that these particular parties are not up to resolving those issues. The other issue is what happens if the child becomes sick during the period before the parenting order is made and what arrangements they are going to make in relation to that.

**CHAIR** - How is that dealt with in Victoria?

**Ms MORGAN** - We deal with it by asking them. Again, it is not something specifically provided for in the act or the regulations but at the very beginning one in particular of the panel members thought it was important and we now always address it.

**CHAIR** - Is it generally that the intending parents take responsibility for those decisions or -

**Ms MORGAN** - Yes. They would normally work out an agreement as to what is going to happen in the event of some emergency situations.

**CHAIR** - In that case when the baby is born the birth is registered at the time of the birth or soon after. Mind you, if the baby needs surgery before they are registered obviously, it is generally then considered that the birth mother, as long as she is in a fit state to do it - and on occasion she is not - provides consent. It creates a complication, particularly if there is no birth father, so to speak.

**Ms MORGAN** - Yes.

**CHAIR** - So that does need to be considered. If the birth mother had an emergency caesarean under a GA and the baby needed urgent treatment when it was born, then who makes those decisions? Is that something then that a court would decide or is it something that the intended parents would be required to take on?

**Ms MORGAN** - That is a good question. Certainly we look at it at the stage where we want to know that they have turned their minds to that, and always they have. But I do not know how would it be dealt with in that interim period from a legal point of view.

**CHAIR** - The same situation would arise with a single mother, but then the next of kin would be the person who would take responsibility.

**Ms MORGAN** - Yes.

**CHAIR** - That is more about her decisions, if she needed urgent surgery and was unable to make a decision. It gets complicated in even normal settings.

**Ms MORGAN** - It does. Everywhere you turn there is another issue.

**CHAIR** - Are there any other matters within our legislation that you think need a bit more consideration?

**Ms MORGAN** - There was nothing that springs to mind other than the obvious one that I have already mentioned - the stage in which counselling is considered is after you have already got a baby. I think that is the major difference.

**CHAIR** - One of the issues that has been raised is the age of the surrogate mother.

**Ms MORGAN** - I noticed that; yours is 21. Ours is 25.

**CHAIR** - From your experience, do you think it is an issue and is 21 appropriate? The other factor is having had a previous pregnancy and carried a baby to term.

**Ms MORGAN** - Yes, they have to have had a live child.

**CHAIR** - In ours it is not a requirement either. Do you have views on that having met some of these people?

**Ms MORGAN** - I think it is very important that the surrogate already has a child.

**Ms MORGAN** - You could imagine if it was the surrogate's first child and the reluctance to surrender. It might be greater than if she already has children. We found that the surrogates, all of them, who have children old enough, and usually they do, have already discussed it with their children and they are well aware of the process. I just think it is very important that the surrogate already has children.

**CHAIR** - What about the age?

**Ms MORGAN** - From my memory of the second reading speech, the age was raised because there has to be a statement of compatibility with the human rights charter. That was addressed as being a little bit of additional maturity and it is more likely that after 25 the surrogate would already have a child.

**CHAIR** - As a midwife formerly, I have looked after some who have had four children by the time they are 21.

**Ms MORGAN** - I know; as a Family Court judge I can vouch for that.

*Laughter.*

**CHAIR** - Often different genetic material for all of them.

**Ms MORGAN** - Exactly. I am familiar with that scenario.

**Mr HALL** - In regard to your legislation being fairly new, was it predicated on any other jurisdiction at all, or did you just pick and choose? Do you know how that was drafted?

**Ms MORGAN** - No, I did not come into it until just before it came into operation. I had no role in that. It was a conscience vote and it passed by one vote.

**Mr HALL** - It has been put to us that in some cases it would be handy if we had commonality of legislation across jurisdictions.

**Ms MORGAN** - Yes, I agree.

**Mr HALL** - But it is not likely to happen just at the moment.

**Ms MORGAN** - It does not look like it, no.

**CHAIR** - Thanks very much for your time this morning; it has been very helpful.

**DISCUSSION CONCLUDED.**

DISCUSSION (VIA TELECONFERENCE). WITH Ms SANDRA SALCEDO, MANAGER, AND Ms DANIELLE KRAJINA, SENIOR DIRECTOR, CLIENT SERVICES, BIRTHS, DEATHS AND MARRIAGES, ACT

**CHAIR** - Hello, welcome. We are recording the proceedings because as part of our taking of evidence we like to be able to use some of the information potentially in our report and it does become part of the public record that will inform the report and then the debate on the bill when it gets to the House. So you are aware of that?

**Ms SALCEDO** - Yes.

**CHAIR** - Thank you for joining us. I know you have received some information from the committee about the inquiry that we are undertaking and I assume you have seen a copy of the bill?

**Ms SALCEDO** - Yes.

**CHAIR** - We know that your area is around the registration of any birth in the ACT, but we are particularly interested in how that is managed with a surrogacy arrangement and what problems or issues you think have either arisen or could be better addressed. We are looking at how we achieve the best outcomes for the child, particularly in recording details of their birth, when they are born through a surrogacy arrangement.

**Ms SALCEDO** - We have no surrogacy arrangements in the ACT. We have an act called the Parentage Act 2004 and we register orders from the Supreme Court. So they go on a parentage register and the court tells us who the parents are and then the birth is registered that way.

**CHAIR** - When they are registered in the circumstances where there has been surrogacy arrangement, the child will already have a birth certificate issued from the birth mother and potentially -

**Ms SALCEDO** - That is right. We treat it like an adoption. There will be their original birth certificate with their birth parent and then there will be the parentage order from the court and then the birth will be reregistered with the parents who are on the order.

**CHAIR** - What happens to the original birth certificate at that point?

**Ms SALCEDO** - In the background, it always stays there but it is like an adoption, it is superseded by the new birth registration.

**CHAIR** - What access does anyone have to the original birth certificate?

**Ms SALCEDO** - The only way anyone can obtain their original birth certificate is by going through the Department of Community Services and they have to obtain a consent order from them and then they bring it to us, stating that they can have access to their original birth certificate.

**CHAIR** - For that to happen, that person would need to know there was other information to be found? Is that a fair comment?

**Ms SALCEDO** - Yes, that is right.

**CHAIR** - Do you know how that happens, how that person knows?

**Ms SALCEDO** - I do not know how a person finds out.

**CHAIR** - Are there any requirements for that person to have counselling or anything like that?

**Ms SALCEDO** - That would all be with the Department of Community Services. That would be all their processes. I do not know any of their processes.

**CHAIR** - Are you saying that the person would go to the Department of Community Services to make an application?

**Ms SALCEDO** - I am not sure of their processes. All I know is that for them to obtain their original birth certificate, they have to provide us with a letter of consent and for adoptions that is checking the veto register. Community Services does that and ensures that there are no contact vetos on their register and if it is free, then they allow the person to obtain their original birth certificate by giving them an order, a consent letter, and they bring it to us. As long as they have consent, they are entitled to obtain their original birth certificate.

**CHAIR** - Do you know who could be issued with a consent order? Is it just the person who is the subject of the birth certificate or is it other people named on it?

**Ms SALCEDO** - I do not know. I assume it would only be the person there originally. You can obtain your own birth certificate, so I assume that would be the case, but that would be for Community Services. We have only ever had three parentage orders registered.

**CHAIR** - How long has the Parentage Act been in place in the ACT?

**Ms SALCEDO** - The Parentage Act has been in place since 2004.

**CHAIR** - And there have been only three?

**Ms SALCEDO** - Yes.

**CHAIR** - Presumably there is an age at which someone can access that information?

**Ms SALCEDO** - As far as I am aware there is no restriction on age - that would all be with Community Services, because they administer the actual Adoption Act so most of our requests for original birth certificates are through the Adoption Act.

**CHAIR** - Which makes sense if the act has only been in place since 2004. Those children would hardly be old enough to be seeking a copy of their own birth certificate at this stage.

**Ms SALCEDO** - Yes, that's right.

**CHAIR** - , Have you had many of the new parentage orders coming in from the court ?

**Ms SALCEDO** - We have only had three.

**CHAIR** - Those are the three that have come through?

**Ms SALCEDO** - Yes.

**Dr GOODWIN** - That is not many, is it, since 2004?

**Ms SALCEDO** - No.

**CHAIR** - I have a question, Sandra, regarding Danielle's role. Danielle, can you provide some information about your role? We are just wondering whether we can make the discussion a bit broader than the basic registration and access to records here.

**Ms KRAJINA** - I am the Senior Director of Registration, Client Services, and Births, Deaths and Marriages is just one of the areas that I am responsible for, but we are purely a registration and licensing arm within government. As Sandra has already mentioned, if there was an interest to go more broadly I had suggested we include: (1) our legal policy area, which is part of the Justice and Community Safety Directorate, because obviously they have written the legislation in the first instance; and (2) the Community Service Directorate, which is responsible, as Sandra mentioned, for the adoption process and how the parentage orders are treated in relation to that adoption process. It is probably better to have a chat with those parts of government. From our perspective it is purely registration and licensing.

**CHAIR** - We were seeking to speak with someone with that area of expertise because we are at the stage of actually scrutinising the legislation as opposed to applying it. Are you able to provide any light on our bill in that regard at all, or not?

**Ms KRAJINA** - To be honest, I only became aware of this process late last week and I had suggested that we were probably not the best area to speak to. I had suggested that contact be made with the legal policy area and Community Services, but this morning I discovered that we had not achieved that, so that is why Sandra and I are here together.

**CHAIR** - Going back to the earlier question, can you talk more broadly about policy yourself or only in relation to the registration issues?

**Ms KRAJINA** - It is not my role to talk about the policy development and that is why I suggested it would have been preferable to have someone from the legal policy area, so you could actually scrutinise the way and the intent of the legislation in the ACT.

**CHAIR** - Do you have the name of someone who would be the most appropriate person in that area?

**Ms KRAJINA** - It is probably a gentleman called David Snell, but as I said we have not had that opportunity to talk to that area to see who they would recommend.

**CHAIR** - The registration of the birth is a fairly narrow area of the whole bill, obviously. It is an important part, but we are interested in the broader issues and the policy around the establishing of a surrogacy agreement and how that is all managed prior to getting to the point of registering the birth. The registering the birth is the last step almost.

**Ms KRAJINA** - Exactly and that was my expectation. Whilst we do have experience here, I still think it is better to talk to the policy area who understand the original intent and what has gone through so far. Then again, as we have said, we have got very limited experience. We have only had three orders since the legislation came into force.

**CHAIR** - In saying that, are you suggesting there have only been three birth certificates amended as a result? It would not then be surrogacy, or would it?

**Ms KRAJINA** - Yes.

**CHAIR** - It is only surrogacy ones?

**Ms KRAJINA** - Yes.

**CHAIR** - We are also trying to get a bit of an idea of the number for a State the size of Tasmania, which is probably similar in some respects to the ACT, but it is over a period of six years or seven years.

You only consider artificial reproductive technologies, so those babies would have been born, you would imagine, through some sort of fertility clinic but if there had been more casual arrangements where you had not used a clinic would those children be registered through a different process, either adopted or through a custody order, which would not change their birth certificate?

**Ms KRAJINA** - They could have been but we would not have been privy to the arrangements made prior to what came to us. If it was an adoption we will just respond to the adoption order. If there was some sort of custody arrangement we would not know about that either.

**CHAIR** - So if it was an adoption you would just treat it as any other adoption and you would not flag the fact that it could have been a surrogacy arrangement and then the child was adopted?

**Ms KRAJINA** - We wouldn't know. What we receive is the final order and we register on the basis of what that order tells us to do.

**CHAIR** - How many adoption orders would you have had in the last six years?

**Ms KRAJINA** - I don't know off the top of my head but we could certainly find out for you. We have a reasonable number every year; there would probably be at least a dozen. Adoptions are getting fewer and fewer each year.

**CHAIR** - Does that include your overseas adoptions?

**Ms SALCEDO** - Yes, it does. They are all classed as an adoption and we don't distinguish.

**CHAIR** - Are you able to provide the number of local adoptions? That might be helpful. We are just trying to get an idea of the number we are talking about here. We are talking about resourcing these areas and it obviously has resource implications if there is a huge number, but if it is only very small you have to consider how best to manage that.

**Ms KRAJINA** - From my recollection of when we first implemented this there was a little bit of education in developing all of the administrative arrangements from a registry point of view, but certainly we don't even receive contact from the legal practitioners who are preparing these arrangements. I think the legislation is fairly clear that you go through the Supreme Court process and an order is made. We did our part but I can't say I even recall any education or any other information being circulated amongst the community, because it does affect such a small number of people - at least in our experience.

**CHAIR** - Thank you for your time.

**DISCUSSION CONCLUDED.**

DISCUSSION (VIA TELECONFERENCE) WITH Mr COLIN WOOD, DEPUTY REGISTRAR, BIRTHS, DEATHS AND MARRIAGES QLD.

**CHAIR** - Colin, thank you for joining us. We understand that your area of expertise in surrogacy arrangements is limited to their registration of birth, so it might not take us that long to deal with all of this. We were hoping, as Stuart discussed with you, to have some policy people there too but that hasn't happened at this stage.

What you say is recorded and we may use some of the evidence in our report and then we wait until the Parliament starts in due course. It will guide the debate for the bill that we're considering.

**Mr WOOD** - Certainly.

**CHAIR** - Perhaps you could let us know if we are straying outside your area of expertise, but we're interested in how surrogacy births are dealt with and registered in Queensland. Can you tell us, firstly, how long surrogacy law has been in place in Queensland and the numbers you've had?

**Mr WOOD** - It's been in place since 1 June 2010. Currently we've received three applications which we have processed and it's been fairly straightforward. The birth is registered by the birth parents and once we receive the parentage order and the application from the intended parents we close off the original entry and reregister the birth as per the parentage order and the application completed by the intended parents.

**CHAIR** - So what happens to the original birth certificate at that point?

**Mr WOOD** - The actual registration or the certificate itself?

**CHAIR** - The registration and the certificate - both.

**Mr WOOD** - What happens is the original birth entry is closed off pursuant to the legislation covering surrogacy. What happens internally in Births, Deaths and Marriages is that we have an internal link that links the original birth entry to the new registration but that's sort of in the background - it's not evident to any of the parties. So the original birth entry is closed off, we are unable to issue any more birth certificates from that entry, we reregister the birth pursuant to the surrogacy legislation, the intending parents request the birth be registered pursuant to the parentage order, and that then allows them to make application for a fresh birth certificate with the new birth particulars.

**CHAIR** - So if the birth mother applied for a copy of the birth certificate for her child before the parentage order and the re-registration occurred, that would no doubt be issued?

**Mr WOOD** - Certainly, yes. The birth mother has every right to make application prior to that and certainly we believe that the birth parents should have that because it is a historical record. What we do internally though is once we close off that entry we security code it, so that at a later date if someone was trying to use that, say, for passport purposes or a driver's licence, those organisations would endeavour to validate that certificate and it wouldn't validate because of the security code on it and when they

contact us we would advise them that it's not a valid birth entry. So even though the natural parents have the birth certificate it can't be used for official purposes.

**CHAIR** - So as far as access to that original birth record later on by the child is concerned, how does that occur?

**Mr WOOD** - There is provision in the act that allows the child to make application for either information or the certificate itself. If they're after the official certificate we can issue it but there will be a stamp put on it saying 'not to be used for official purposes'. But more than likely the child would be after the information rather than the physical document itself. It's the same with adoptions; people are more interested in the information about their natural details.

**CHAIR** - Are there restrictions placed around at what stage that child/person can apply?

**Mr WOOD** - No, not at this point in time. When the child gets to age 18 the registry is required to advise them of what process has taken place but we would hope that the intended parents would have advised the child prior to that. There maybe instances we're not aware of at this point in time because of the very small volume of surrogacy applications, but there is provision for the registrar when the child turns 18 and applies for a certificate that the registrar is required to advise the child of the original details.

**CHAIR** - Just to clarify that, Colin, if a person turns 18 and they apply for their birth certificate they are going to get the one with the new parents listed on it?

**Mr WOOD** - Yes.

**CHAIR** - But you are required at that point to let them know there is also other information?

**Mr WOOD** - That's right, but because this is all new legislation we have yet to address that -

**CHAIR** - The babies aren't old enough yet.

**Mr WOOD** - Exactly; we have a few years yet to worry about it. The legislation refers to an addendum but our concern is that if the child is unaware of those details whether there ought to be some official counselling prior to that. We don't want to shock someone if they're not aware of those details, much like a person who is adopted and they don't realise it.

**CHAIR** - So in Queensland, if a child who is adopted applies, the same would occur?

**Mr WOOD** - That's right, yes.

**CHAIR** - So there is no requirement for counselling?

**Mr WOOD** - Not through us, but morally I think we have some obligation to handle it appropriately, so if we had that sort of request we would have to give a lot of consideration to how we were going to handle it because I think it could come as a great shock to a person if they weren't aware of those details.

**CHAIR** - This is one of the issues that has been raised with our Tasmanian legislation. With a heterosexual couple being the intended parents, it could be hidden from the child potentially. For a same-sex couple it will be different, obviously, because they're going to ask some questions, but there is that risk that they could apply for a passport or whatever and then be told that there is more information.

**Mr WOOD** - That's true, but from what we've seen with our clients who process the applications through BDM, all parties were quite upfront and said the child would be made well aware of the circumstances. Just dealing with those clients, I take them at their word that they would be fairly upfront because, as they said, they have nothing to hide, it's quite open and transparent as far as they're concerned. But it's like all things, you rely on people carrying through with the intention of the legislation.

**CHAIR** - With the Queensland legislation I understand that the surrogacy arrangements can be either through a fertility clinic with artificial reproductive technology or it could be through more traditional means. I don't suppose you'd have any idea how that happens because you've only had three since June. We just want to get a handle on how many of these sorts of births are occurring.

**Mr WOOD** - That is a good point. We don't know, other than the applications that have been sent to us. We're aware there's another one or two before the Children's Court at the moment, and I think because of the legislation it is altruistic surrogacy, so that is what the legislation is based on. I don't know whether because it's non-commercial that that has any impact or not.

**CHAIR** - So it could be that these babies could have been through artificial reproductive technology or through more conventional means?

**Mr WOOD** - That is correct, yes.

**CHAIR** - So it would encompass both sorts?

**Mr WOOD** - Yes.

**CHAIR** - The numbers so far are quite low.

**Mr WOOD** - They are. For what we've set up our processes, we were thinking we would probably get a few more applications. It is a fairly rigorous process that families have to go through with counselling and legal representation and things such as that. Whether that has anything to do with it I'm not sure.

**CHAIR** - Have the new parenting orders in the three you've had been same-sex or heterosexual couples?

**Mr WOOD** - One was same-sex and the other two were heterosexual couples.

**CHAIR** - It seems to be more common that it is heterosexual couples who are seeking it, from what we're hearing. Is there anything else you wanted to add, Colin?

**Mr WOOD** - For our purposes at Births, Deaths and Marriages, it is a very straightforward process. You close off the original entry, reregister the birth with the new details as presented by the application in the parentage order and the clients walk out the door with the birth certificate. That's all we're involved in. We're not involved in the legal side or the counselling, so it's a bit difficult for us to comment on that.

**CHAIR** - One other thing that came to mind is that there has been some discussion about children who are born through artificial reproductive technologies with the use of donor sperm or egg. Has there been any move in Queensland to provide the detail of who the donors are, even if it's an addendum?

**Mr WOOD** - Not at this point in time, but I'd imagine that when our legislation is eventually reviewed that would be one of the matters discussed and they would seek consultation from the appropriate people. At this point in time there's no movement on that front.

**CHAIR** - You may not be aware, but is there a mandatory requirement to have non-anonymous donors in Queensland?

**Mr WOOD** - I couldn't comment, sorry.

**CHAIR** - Looking at other broader policy issues regarding the Queensland legislation, are you able to recommend someone within the policy area who would be able to help us in those areas?

**Mr WOOD** - There would be someone from our strategic policy area. The officer who did the main work with surrogacy has now moved on to another area in the department so I would have to find someone who would be able to discuss that with you.

**CHAIR** - It would be very helpful if you could do that. We appreciate the information you have given us but it would be good to look at the broader policy area.

**Mr WOOD** - Certainly, that's understandable.

**CHAIR** - Thank you very much for your time today.

**DISCUSSION CONCLUDED.**