THE LEGISLATIVE COUNCIL COMMITTEE ON GOVERNMENT ADMINISTRATION 'A' MET IN COMMITTEE ROOM 2, PARLIAMENT HOUSE, HOBART, ON TUESDAY 12 JULY 2011

SURROGACY INQUIRY

Professor JEFF MALPAS, UNIVERSITY OF TASMANIA, WAS CALLED, MADE THE STATUTORY DECLARATION AND WAS EXAMINED.

CHAIR (Ms Forrest) - Thanks very much for coming along today, Jeff. I know that you have appeared before committees and knows the drill pretty much. The hearing is being recorded, and if you want to tell us anything in confidence you can make that request and we can consider that as a committee, but we are just interested in your views broadly about the legislation that is before us. As you are aware we have talked to a couple of other people and there is a bit of media reporting in the two papers this morning with broad comments about some of the failings of the current legislation. We want to look at the broad issues around how the legislation is now, whether you think it needs to be adjusted and how, and issues around that generally would be good.

Prof. MALPAS - I should probably say first of all I am not strongly committed to any of the parties that have interests in this discussion. My interest primarily is as a philosopher and I am interested really in the ethical issues, and this is one of a number of ethical issues that I think we have to deal with at the moment.

When I approach ethical issues I do not do so on the basis of a standard meta-ethical position, as we say in philosophy. That is, I do not come to this as utilitarian or anything of that sort. The way I approach just about every ethical issue I look at is in terms of what are the implications for this sort of stance for our community as a whole. I think that is a really important perspective to adopt. Rather than saying, is this and does this maximise utility, as Peter Singer might put it, my approach is to say, what sort of impact does this have on the relations of a constituent of our community more generally and what sort of values does this exemplify instancia?

When you look at something like surrogacy it seems to me that there are a lot of issues that come up about the way we think of child rearing, about the interests of children, about the role of women as child bearers, about the childbearing process, about relationships between mothers as well as parents and children. That is the direction from which I come to this.

Having looked at the original bill I have a number of concerns about that bill. One of the first was in terms of ensuring that children born through surrogacy arrangements should at some point have access to the full information about their parentage. I think it is extremely important that children be able to access at an appropriate time details about the circumstances of their birth, who their birth mother or gestational mother was and one of my concerns with the original legislation was that that seemed to be something that was made quite difficult. That is one of the issues.

The other issue that concerns me is that I think it is absolutely important there be a written agreement, of course, but I also wonder whether we don't have some of the structure around surrogacy the wrong way round. Rather than trying to sort out some of these issues through a family court or through some other arrangement, as it were after the fact, after a child has already been born, it seems to me a more sensible way is to try to get it all upfront, so that when surrogacy agreements are set up they should be set up in a way that brings in counsellors and some sort of legal framework right from the beginning. It seems to me there are a number of advantages to that, partly because it impresses upon people the nature of the process, that it is a significant and complex arrangement. It also gives us an opportunity then to try to work certain problems out in advance. One of the concerns, it seems to me, that might arise with some forms of surrogacy arrangement where we bring in a legal or other structure after the birth is that there are going to be cases where children are perhaps are born with problems that may not have been anticipated, where you do not get the absolutely healthy baby that you may have expected. It seems to me there are all sorts of reasons for trying to pre-empt those problems first up rather than leaving them until later to try to sort out.

I guess those are the two main areas that concern me. I am not in favour of a complete relaxation of the restrictions on surrogacy. I can see arguments for allowing altruistic surrogacy. There are probably forms of altruistic surrogacy that have always taken place. However, the fact that something does take place, it seems to me, is not a reason in itself for legalising it. You could well argue that those forms of altruistic surrogacy that have taken place in the past are perhaps best left as they are. I do think that there are sufficient reasons to think that we probably need to allow some form of atruistic surrogacy. I think commercial surrogacy is a real problem. I would also be concerned about using arguments about surrogacy arrangements overseas as a reason for too much relaxation within Australia.

It seems to me that on the one hand I know some people, for instance, will argue that what we end up doing is simply exporting surrogacy to other countries, particularly India and parts of the US. Equally I think it would be a mistake to import arrangements from elsewhere into Australia and to, as it were, import some of the inequalities and some of the ethical problems that I think attach to those arrangements. I also think it is a real mistake to try to address one form of inequality or one form of discrimination by then introducing something else that allows a different form of inequality or a different form of discrimination. It seems to me there are good reasons for not trying to increase or multiply those sorts of inequities.

I guess that sets out some of my general concerns. As I say, I am looking at the legislation not as somebody who has a particular axe to grind necessarily one way or the other. I have formed some opinions about surrogacy, but they are very much derived from my concerns as a philosopher and somebody interested in ethics rather than somebody who has any external interest to bring to bear.

Mr HALL - Jeff, have you had a chance to look at the other jurisdictions?

Prof. MALPAS - I have looked at some of the other jurisdictions, so I have a bit of an idea of how it is working elsewhere and I realise that some of the things that I am raising are a little bit different from some of the arrangements elsewhere.

Mr HALL - How do you think we fit with the others? It was put to us yesterday that it is a real problem having seven different arrangements, aren't there, including the ACT, and Australia-wide that is not a good deal.

Prof. MALPAS - But equally I think we need to arrive at a decision about what we think is actually best on the base of the evidence that we have before us. If we arrive at a view that says this is the best arrangement and somebody says, hang on, but it is different in the ACT or it is different in Queensland, we then have to ask, are we happy with the legislative arrangements in Queensland or in the ACT or wherever else, in the UK, if somebody brings up the UK case? Unless you are happy to endorse those arrangements on their own merits, it seems to me you have no reason for simply saying consistency is going to be the overriding consideration.

One of my concerns with a lot of legislation like this, and particularly in areas like surrogacy, is that very often we end up being swayed by what in my view are purely legal considerations rather than attending to the broadly ethical considerations that I think are important here and at the risk of offending my legal colleagues -

Mr HALL - We don't mind.

Prof. MALPAS - I do not think lawyers have a very good grasp of ethics. They tend to focus on a set of legal and regulatory considerations and those are not necessarily the primary considerations. For instance, if it turned out that Tasmanian legislation was different, and there were good reasons for it being different, then the hope would be that Tasmania could actually set a bit of an example that might then lead to some legislative reforms elsewhere.

CHAIR - That could be more nationally consistent, which is the criticism isn't it.

Mr HALL - Yes.

Prof. MALPAS - You have to consider the case on its merits rather than simply being overly guided by what other people may have decided and the only reason for accepting what other people have decided is if you think, again, there are good reasons for going in that direction.

Mr WILKINSON - What people have said to us already is that it is a pity that there is not uniformity Australia-wide because you have to know all the legislation pretty well if you are advising in relation to it. If one of the parties is interstate, it might be a situation where that party is acting - even though it is lawful within Tasmania - contrary to the law outside Tasmania. It is a bit of mish mash at the moment and what we are endeavouring to do is to put the good bits of each one of them together and say here is Tasmania's law. We believe it is the best as a result of knowing what the experiences are interstate with their laws that are in place, and have been in place for some years, in relation to some States.

Prof. MALPAS - The likelihood is that you will never have a perfect consistency anyway. The likelihood is that there will always be work for lawyers and advisers here in terms of helping people negotiate the legal structures they have to go through. So, again, I would simply say the primary consideration is what are the real merits of this legislation

independently of what is being done elsewhere. Consistency can be a consideration but it cannot be a consideration that overrides what I would call the ethical considerations that have to be primary. These are ethical concerns here.

I probably have a broader conception of the ethical than most other people because I see the ethical as really that domain that concerns our relationships with ourselves, with other people and with the wider world. I take ethical considerations to be fundamental to much of what we do in government, fundamental to the way we order our communities. Ethics is about the things that really matter to us. Those are the considerations that should underpin any piece of legislation. One of the things that matters, to some extent, is making sure we are consistent with other jurisdictions but it is not the overriding consideration and we can get round that. It may mean that we create more work for lawyers sometimes, although one would hope that if every jurisdiction tried to address these matters on the base of the underlying ethical issues then you might get more consistency. Maybe you would more inconsistency partly because of the intrusion of what I would think of as extra ethical considerations into the policy process.

Mr WILKINSON - What has happened in other States as well, it seems that once it has come into parliament, once it is being debated, an idea has sprung into the mind of one of the members and they bring forward an amendment. I understand that happened in New South Wales and as a result it has caused difficulties. The process that we are going through now is a good process because, hopefully, you are able to weigh up all the options and not be left with a situation as it was in New South Wales when they passed the legislation.

Prof. MALPAS - I think this is a good way of going.

CHAIR - Jeff, the two main points about the access information regarding the genetic parentage of the child and the structure around surrogacy being the wrong way round in your view, do you want to take us through those two particular issues with some more commentary around that.

Prof. MALPAS - Firstly, I am always a bit uncomfortable about distinguishing between let us say genetic parentage and other forms of parentage. For a long time I was involved as a chair of a research ethics committee in Western Australia and we had one very interesting case involving reproductive technologies that was focused on the issue of mitochondrial DNA. There are lots of areas where we have assumed that there is no genetic interplay or no genetic involvement. We have often assumed that mitochondria in cells do not have any impact on the development of the child. They do not have any significant impact. That is not so clear. Given that a child developing in a womb is in the womb for a very long time and has a very close relationship with the mother, I think it would be a mistake for us to assume that that relationship is purely one in which the mother carries the child and there is no other relationship. Just out of prudence I think that would be a sensible approach to take. So I think we need to be careful about saying you have got the genetic parents to whom the child is genuinely related and we have a birth mother or a gestational mother who does not have a genetic relationship to the child. I think we need to be very careful about underestimating that relationship. So that is really just by way of preamble.

On the issue of making sure that children have full access to their parentage details, I think that is absolutely crucial. I think there has to be a way of ensuring that children, once they reach an appropriate age, are able to request details regarding their birth that will give them access to all the details regarding their birth. So the fact that they are the product of surrogacy should not be hidden from them. I think there are ways that you could get around that by modifying the way in which we structure birth certificates. That might give some rise to some larger problems again across jurisdictions and so on, perhaps inconsistencies between one area and another. I am not familiar enough with the way in which that is handled to know what some of the problems would be, but I would be in favour of having some sort of expanded birth certificate where the additional information is accessible to anyone named on that expanded portion of the certificate and that would mean that the children would then be able to request a copy of the birth certificate. There would be a public part of the birth certificate, but there would be another section that would tell them who their birth mother was and so on.

CHAIR - And also who the sperm and egg donor may have been?

Prof. MALPAS - I am not of the view that sperm donation should be anonymous. I think that is a real problem. It involves a larger set of issues and it indicates the way in which the surrogacy debate really implicates a whole set of other issues about the IVF industry that I think are much larger and more complex. Certainly I think it is very important that children, who are the product of whether it is a surrogacy arrangement or any other sort of arrangement, should have access to the details of their parents.

Dr GOODWIN - What would be an appropriate age, in your view, for a child to be able to access that expanded birth certificate?

Prof. MALPAS - To some extent that is always going to be a somewhat arbitrary decision. It is going to be the point at which we think a young person has sufficient autonomy and independence to make decisions of their own. Hopefully it would be an age that would be consistent with the way we make those decisions elsewhere. I guess the two obvious ages that spring to mind would be either 18 or 25. I am not sure that you would want to allow it any younger than 18.

CHAIR - When a 14-year-old can give consent for a medical procedure?

Prof. MALPAS - As I say, to some extent it is an ad hoc decision, so I do not think there is a fact of the matter as to what is the right age one should decide. This is going to be a case where probably the decision will be made on the basis of comparison with other sorts of rights we give to young people. So 18 strikes me as a reasonable point to suggest. You might argue that 14 is starting to get a bit young. Are people really going to be in a position at the age of 14 to make good use of that information? Is it information, if they gain access to it at that age, that could create problems in terms of their relationship with their existing parents, the existing familial relations? So there are various considerations why you might think 14 is a bit too young. Eighteen is an age at which somebody could reasonably be considered to be able to undertake an independent life.

CHAIR - The age of consent is 17 and so there are all these ages and I am just trying to make the point that it is difficult. If they are looking at potentially becoming sexually active

legally and potentially going to reproduce themselves then that may be information that is relevant, particularly in Tasmania, being fairly small.

Prof. MALPAS - That is true. Certainly some of the issues around surrogacy, as around IVF, have been cases where children who are the product of these arrangements, who do not know the details of their parentage, end up getting together with people who are actually related. Therefore, you might argue that 17 is the age of consent and that is an appropriate age also to have details about your parental and family background, full details rather than partial details.

Mr WILKINSON - I know the family court take into account the wishes of a child, it used to be at age 14 and it has come down to 12 now, so as Ruth was saying the ages seem to vary depending on a person's situation. If you set an age at, let us say, 18 you can then put that catch-all phrase in 'unless it can be proved on the balance of probabilities that knowledge of parentage is in the best interests of the child.' That might be a way around it do you think?

Prof. MALPAS - Actually I think it is going to be very important in this sort of legislation. Because the issues are so complex it is very difficult to have legislation that in all of its detail will capture every instance. That is true for a large range of instances of legislation anyway. I think it is very important on a range of issues that this legislation concerns, to give power to the Family Court, or whatever body is going to manage this situation, to vary the situation in special circumstances. Yes, I think there might well be cases. This is probably not the sort of case that we would have in mind but let us say a child develops some sort of a condition and there is an argument in the family as to whether or not this condition might have been inherited, maybe the parents think it could not have been, they do not want the child to know the details of the birth mother or of the anonymous sperm donor, the child is adamant that they do and you might reach a decision that actually it is in the best interests of the child for there to be full disclosure so that any issues can be properly addressed.

You can imagine circumstances in which there might be disagreement between a child and the parents that might lead to the need for some sort of disclosure at an earlier age. There isn't a metaphysical truth about what age, so it is always going to be an age that would be conditioned by a set of other social and legislative factors as to what ages we have deemed appropriate in other circumstances, what are the circumstances, and the best solution is probably going to arrive at an age that is reasonably consistent with other circumstances in which age matters, but then also give the court some sort of capacity to vary that in appropriate circumstances.

CHAIR - Jeff, yesterday we had some discussion about the practicality of this matter with the Registrar of Births, Deaths and Marriages. Effectively they have informed us that if there were a policy decision that we were going to change the way this information is recorded, they would apply that basically through the data fields within their information capture. They also suggested that the process around adoption is a similar process and it should be considered. If someone who believes they are adopted or is informed they are adopted goes to try to track their birth parents or mother, certainly they go through a separate process where there is counselling. The discussion around the surrogacy issue was that whatever age may be deemed appropriate, before they were provided with that

further detail if there was further detail to be provided, they should receive counselling. Would you have a view on that?

Prof. MALPAS - I do think that these sorts of issues and adoption issues and so on are very similar. It would be important to treat them accordingly and consistently. I am not sure how this operates in the case of adoption. Just on the face of it it strikes me that there is one interesting issue. Let us say somebody doesn't know that they are the product of a surrogacy arrangement. At some point they apply for their birth certificate and let us say an arrangement comes into place whereby just as a matter of course you can ask for just the standard birth certificate or you can ask for the expanded birth certificate. Let us say everyone has an expanded birth certificate, it is just that some expanded birth certificates do not show any additional detail because there isn't any. Somebody ticks the box that says I want the expanded birth certificate and then what happens next? Does somebody from Births, Deaths and Marriages say, 'Sorry, we cannot give you that right now, you have to go through a counselling process first'? In which case they are already then going to know. Do you say to everybody that they have to see a counsellor before they get their expanded birth certificate? That would be one way around it, but then you may need a lot of resources. It is very common amongst children to think they are adopted.

CHAIR - Particularly in certain stages of life. If you are an adolescent you say, 'I can't belong to these parents.'

Prof. MALPAS - You could imagine lots of people asking for copies of their expanded birth certificate.

Mr WILKINSON - Some people are disappointed when they are not.

Prof. MALPAS - Do you bring in the counselling just at the point at which somebody asks for it? Do you bring it in just at the point at which they have asked for it and you know there is additional detail on the birth certificate, in which case you have already basically told them something? It may be that there isn't a simple way around that. It may be that all you can do is make available counselling at the time when that information is provided in order to provide support. I think the practicalities of it mean that there are going to be some awkward aspects to this. I am not sure exactly how this is operating in the case of adoption. Presumably in lots of cases people are coming asking for details of their original parents, knowing that they are adopted.

CHAIR - When we were discussing this yesterday, the point was made that adoption is a decision that is made after the fact. The person is already pregnant and not wanting to keep the baby and so it is a decision after the fact and then a new birth certificate is issued when the adopting parents adopt the child. If a child applies for a birth certificate they get the adopting parents. If the child knows or not, or suspects that they might be adopted they go to adoption services.

Prof. MALPAS - So essentially you have a completely different pathway.

CHAIR - Yes, it is completely separate. The birth parents may not want to be identified and so then there is some work around that. What is being suggested here is that that information is available but it is putting that process around, I guess, that young people particularly who may be a bit vulnerable may be seeking answers at a time in their lives

when they are dealing with a whole lot of other pressures, and we need to make sure there is some support for them. Having never had to face it, it is impossible to know what it would be like to find out that your parents are not really your parents.

Prof. MALPAS - Whether it is an adoptive case or a surrogacy case there are going to be some complex issues to deal with. Whether or not changes you make in relation to surrogacy will also require that we look again at how we handle such issues is anther matter. Adoption is one of the questions you might come to subsequent to this.

There is also the issue of course about how you deal with issues of sperm donation. There are already some existing issues there. Obviously there are issues about mothers who give up children for adoption and do not wish to be identified and we have structures in place to enable people to get back in contact with their original mothers if necessary. Possible paths are whether you use the adoptive model as a way of trying to deal with the surrogacy situation or whether you look at the surrogacy situation again and then set that up in a particular way with the possibility that you might then look at that as a model for dealing with adoption.

The cautious approach might be to say we are going to try to do this on the model of adoption because that is a structure you already have in place so making this consistent with that would not force you then to modify any of your adoption procedures. If you do this in a different way there would be the inconsistency or the difference and you could say that is fine, or what is more likely I think is there would be some pressure to modify one or the other arrangement.

CHAIR - Those are fairly rare events in the State. Certainly adoption is very rare now. Intrastate adoption where the baby is born in Tasmania and adopted to a family in Tasmania is very rare.

Mr WILKINSON - Only six last year.

CHAIR - That was across Australia though.

Mr WILKINSON - No, no. I think in Tassie there were six.

CHAIR - Was it?

Prof. MALPAS - Whether it is six or two that is still relatively few.

CHAIR - It is still small numbers, and you would not think there would be a lot of surrogacy. We only have limited facilities.

Prof. MALPAS - If you use this idea of an expanded birth certificate, presumably you could use that as a way to capture all the sorts of information that you want to be able to capture about a person's birth. That might be a useful system to have in place anyway. Then the second question is how do we allow people to access the information on the expanded birth certificate and there are a second set of questions that you have there. You are going to have to have some sort of consistency in terms of the arrangements that you would put in place in order to allow access to that expanded birth certificate.

I do think it would be very useful for all sorts of reasons to have all of that information in one place.

CHAIR - The ART has donor sperm or donor eggs as well. I don't know if you saw the Senate report that was released from February this year. That was a very strong recommendation. They wanted a national register of donors but in the absence of that the State should be working as a matter of urgency towards that. You can understand some States do have a register. We are yet to verify as we have conflicting advice about where there is compulsory or mandatory registration.

Prof. MALPAS - Again, that is a really good example of a case where you might have inconsistency in legislation across different jurisdictions, but where it is really important that decisions made on that should not just be that they do it this way somewhere else, so we should do it in the same way. I think it is really important to make a decision on the basis of the real merits of the case, rather than just privileging consistency.

My view on anonymous sperm donation is I think it is highly problematic, but it is actually very important that we keep details of the origins of children for all sorts of reasons, not just because you can end up with children who in later life meet one another and decide to start a family when they are actually related, but also in terms of the increasing concern we have for information about genetic parentage, inherited disorders and so on. All of that is really important. The sperm donation situation is actually a really interesting example of a situation where sometimes we allow this idea that it is really important for people to be allowed to have children. That is the paramount situation and we ought to be putting everything in place so we can allow that. It actually leads us to forget that there are a whole lot of other considerations around having children that are relevant here. Most people when they think about it think about having a healthy child. They do not think about the fact that having children is not like that. You can have all sorts of problems that come up, all sorts of complications, and of course most people don't assume that they are likely to pass on an inherited disorder or that there might be some other issues. The idea that you can just go along and donate sperm is mind-bogglingly silly.

CHAIR - As a midwife, I know many times that when a father's name is put on the birth certificate there is some doubt as to the validity of that claim.

Mr WILKINSON - Talk about names, I got from the Royal Hobart Hospital on Friday the strangest names in the last 10 years. One was Bus Stop 16 - truly. I will not go into others.

CHAIR - The registrar can and sometimes does reject them. Anyway, I am talking about the father's name here, and the named father is not always factual. The registrar accepts what is provided, unless someone goes to DNA testing to actually prove or otherwise that that is their father. We certainly know who the mother is, but what if she had a donor egg that no-one knew about. You would have to do that through a fertility clinic, so I think that would be traceable, so we are pretty much sure who the mother is. In that case why do we need to be so particular about ensuring that if a sperm donor is being used that they are identified when we do not always know if the father is right when they are actually named.

Prof. MALPAS - In some cases it is difficult for us to be sure, but in this situation we have the possibility of setting things up in such a way that we can get that information. It would be foolish to say that because we do not have the information in this situation where it is difficult for us to get it, so we are going to forget about getting in these other situations.

CHAIR - Where it is not difficult.

Prof. MALPAS - It is in the interests of a child to have as much information about their parents as possible. That should be the bottom line and we should legislate in ways that support that. There will be limits on how far we can go in terms of making sure that people have that information, but we should not set up limits ourselves that actually restrict our capacity to do that.

I think the way you put that problem, though, does indicate something that is interesting here. The birth certificate basically has been operating in the way it has for a long time. The idea that you will register births goes back hundreds of years. In most circumstances that was a standard procedure. It followed on standard patterns of family and relational structures and it wasn't so complicated. In small communities, even if somebody put down a fictitious name as the father, in most cases it would probably be known anyway. So as our societies have got bigger, as there is more medical intervention, more technological intervention in reproduction, the whole issue about parentage and birth has become more complicated. You might argue that in fact the birth certificate as we have it is really a leftover from an earlier, simpler time where these issues were much more straightforward. It seems to me you could put an argument to say we need the whole idea of registration of births to catch up with where we are now.

CHAIR - That is probably a fair comment. When I look at mine and my parents' and even my grandparents' birth certificates it is the same information and the same old language is used - like 'previous issue' for the number of children you have had previously.

Prof. MALPAS - Also, sometimes you get errors, as we discovered in our child's case where it turns out someone is listed as the father, but not quite me since they misspelt my surname. So the whole process seems to be less reliable than it might have been.

CHAIR - The information is maybe put out in a different format but nothing has changed in that time since we have significant advances.

Prof. MALPAS - It is the same structure. Maybe it is time that we look at the birth certificate and start asking whether or not it is doing the job that we really need it to do, given all the changes that have occurred over the last 20 or 30 years, let alone the last 100.

Mr HALL - Jeff, given the bill before us, what would you change or amend or add or subtract?

Prof. MALPAS - I have those two main concerns. There are other details that I know you have had other submissions on - for instance, what the age should be. I think that is an important question, and whether the proposed birth mother should have had a child previously. Generally speaking I would be in favour of requiring that the surrogate

mother ought to have had a child previously. I would tend to put the age up around 25 or something similar, but I do think there are good arguments for giving the power to vary those arrangements to the Family Court, for instance. I think that is another reason why you might want to allow, for instance, the surrogacy arrangement to be something that is actually administered first of all by a Family Court before anyone becomes pregnant, before you go ahead with the process. So a whole lot of details like that are important.

Mr HALL - Outside the couple of main issues, you are reasonably happy with the rest of the bill?

Prof. MALPAS - I think so. There are adjustments that you might want to make. If you took seriously the idea, for instance, of an expanded birth certificate and making it accessible with the full information of the child at some point, that might require that you fiddle with the bill in some other ways as well. If you were going to require a written surrogacy agreement be made prior to a pregnancy - administered, say, by the Family Court - and that those parties to the agreement have to go through some sort of counselling process, that the whole arrangement has to be dealt with up-front, then it seems to me you are going to have to modify the bill in a number of ways in order to deal with consequences that will flow from that. If you decided those two things were going to go in you would need to go through the bill and work out what the consequences would be.

CHAIR - That would be a job for Parliamentary Counsel.

Prof. MALPAS - Yes. There may well be changes that I cannot think of sitting here that you would want to make that will change the structure of the legislation in various detailed ways. Those are the two most important and major changes that I would make. As I say, there are going to be other details which I understand you will have heard from other people about.

CHAIR - Because each State has its own legislation and the Family Court operates under the Commonwealth Government, we cannot actually link this to the Family Court, so the Magistrates Court or the Supreme Court would be dealing with it in Tasmania. Whether it is a Supreme Court, the Magistrates Court or the Family Court, the principle you are suggesting is the same.

Prof. MALPAS - Yes. You might also want to make sure that the framework within whatever court deals with this is clearly specified so that the areas where the court has the ability to vary requirements are clear. One of those areas might be the age of the surrogate mother. There might be other issues to do with, for instance, the compensation and the financial payment to the mother. That might be an issue you might want to give some ability for the court to consider. It does seem to me that you would want to allow some capacity for reasonable expenses to be reimbursed. You certainly would not necessarily want a situation where somebody takes on a surrogacy arrangement, incurs expenses that are additional to those that they may have expected so they go into it altruistically but they find there are complications with the pregnancy and the mother is then burdened with having to pay for that. There are all sorts of areas where it seems to me that it is quite reasonable to expect that the prospective parents will actually make sure that the mother is well provided for, short of this becoming some sort of commercial surrogacy arrangement. There is a fine line in terms of when you might cross over and it might be that you need the court to be able to judge what is reasonable in these cases.

CHAIR - Do you think there should be a level of prescription around or should it be completely at the discretion of the court?

Prof. MALPAS - I think that what the legislation might say is set out the broad terms of compensation or the broad terms of payment around costs, reasonable expenses, and so on and so forth. The exact details in terms of monetary compensation are going to have to be handled by the court. There is no way that this legislation can do it beforehand, simply because you cannot predict all the circumstances that will arise. So it is important that the court have some direction as to what sorts of expenses would be considered reasonable.

CHAIR - I think it was the Queensland legislation that had quite a prescriptive list.

Dr GOODWIN - There are a couple of States that have lists.

CHAIR - But it was not limited to those things basically named.

Prof. MALPAS - There is an issue about just how prescriptive that list should be. I think there should be some level of prescription there. In each case it is going to be a matter of going through and saying that that is reasonable, but you are also always going to have to give some leeway to the court to apply this and decide whether there is anything else that should be considered. As I say I think that applies to a number of considerations, so you might want to allow the court some latitude in terms of the age of the mother, or they might want to be able to vary it so there might be special circumstances in which a woman who has not had a pregnancy before is allowed to participate in this sort of arrangement. Maybe there is a familial relation or there are some other circumstances that make this important. You need the legislation to set up a framework, but how that framework operates will have to be up to the court. As I say, that gives the court a much bigger role in this than might have been apparent in the original legislation, but I think it is vitally important that this structure is set up with a clear framework that is there from the start, rather than it coming in after the child is born. There should be a framework to make sure people understand the arrangements they are going into so it makes sure the surrogacy arrangement is properly structured and properly thought through. That is one of the other issues that you might look at, what should be the structure of a surrogacy agreement and do you want to set out any prescriptions as to what would be the accepted form, given the power to vary it that the court might allow.

CHAIR - This is a question that Jim asked of a couple of witnesses yesterday, if we are going to have a written agreement. There seems to be a very broad agreement that there should be a written agreement, so what should that include? We had a fairly relaxed approach from one witness who said 'I agree to have a baby for you,' and hand it over at the end right through to you could almost prescribe everything. Where do you think where we need to be with that? What should be in it and when we can about the counselling and legal advice, where do they fit in with that?

Prof. MALPAS - I would not be in favour of just saying, 'I'm going to have your baby,' and that is it. I think that is setting things up for difficulty. Again that indicates the extent to which people go into these arrangements thinking that of course it is going to be trouble-free. They are just going to have the baby, give us the baby and everyone will be happy.

CHAIR - And it is going to be perfect as well.

Prof. MALPAS - Yes. But we know that that doesn't happen in every case. I don't think you can prescribe every detail of an acceptable agreement. Just as you can never in advance prescribe every detail of these sorts of situations. I think it is important to set out what broad areas should be covered by an agreement and for the parties to try to think through some of the most likely circumstances where there could be tension, or there might be disagreement, and try to make sure that at least those have been talked through, canvassed and there is some sort of broad agreement as to how things will go.

Mr WILKINSON - What do you think should be in that broad agreement?

Prof. MALPAS - I think there needs to be some agreement about the covering of costs. That is one of the really important matters. There has to be some detail about the rights of the woman in terms of termination. You might argue that that is already assumed as it were but I think some of these things need to be in there, not because they are not things that somebody could do anyway, but to make sure that all parties understand what can be done.

CHAIR - And it has been discussed.

Mr WILKINSON - And people focus on the issues.

Prof. MALPAS - That is right. So one of the things that I would say the agreement is important for is not simply setting up a legal framework to which everyone will adhere, but rather the agreement is there as an instrument to aid in the counselling process and ensuring that people are properly educated about what they are embarking upon. Costs are an obvious thing, as are issues relating to termination. Obviously you want in that agreement some sort of clear specification that the mother will give up the baby. Those sorts of issues need to be discussed if the agreement is to be legally enforceable in terms of requiring that people stick to it.

The thing that most concerns me would be making sure the financial compensation is dealt with as well as issues relating to medical complications. They will be the most important things. But as I say, you would want that agreement to include a whole lot of issues that need to be discussed and the parties need to be aware of. So as I say, I think the guiding consideration should be that the agreement is not merely a legal contract, it is rather an educational instrument that ensures that people are properly informed about the process on which they are embarking.

CHAIR - People go into a pregnancy normally assuming that everything is going to be fine. No-one turns up for their 18-week scan expecting to get bad news. They go in with their videotape, I am not sure they are on DVD now, to get the recording and not for a second do they think they are not going to want it. That is before 20 weeks. After 20 weeks plenty of things can happen, things that are not always evident, and can happen during the birth, that may have an impact on the child after it is born as well. How do you deal with those sorts of things? Is it just accepted that there has been a discussion around that - even with a married couple who get pregnant on their own without any assistance.

Prof. MALPAS - They can get into all sorts of -

CHAIR - They can but there is still that expectation that they will have the perfect baby.

Prof. MALPAS - When I talk about the issues relating to the course of the pregnancy, again you cannot pre-empt what will happen and set up a fail-safe structure that says that if this happens we are going to do that, if this happens we are going to do something else, but what you can do is put in place, maybe, a program that says you will go in for the scan, there might be a schedule of meetings, there might be a schedule that says these are things that we are going to discuss as we go along. But the important thing is to make sure that they are aware of the issues and what sort of action might be taken to resolve those issues if a problem arises. Rather than the agreement setting out what we will do if this problem arises or that problem arises, set out a process of discussion, of negotiation, that would enable those sorts of problems to be resolved. That is all you can do. That is what I mean by saying that the agreement has to partly set up a framework for the surrogacy arrangement to go ahead. It is not going to deal with or define every feature of the actual progress of the pregnancy but it can set up a structure within which people can then try to resolve issues as they arise.

CHAIR - Someone who says the bill does not need to change, it is right how it is, would suggest that happens in the counselling aspect. If the potentially four parties are counselled then that would be a part of it. Anna Grant, when she spoke to us yesterday felt that there needed to be a greater requirement around that need for counselling and legal advice, and that - I can't think how she actually described it - having some sort of -

Dr GOODWIN - Kitchen table agreement.

CHAIR - Having the written agreement, but it would be incumbent on the lawyers to be also well-practised in the field.

Mr WILKINSON - A bit like accredited in that area - and there is accreditation in family law because you get your good and bad in everything, your hardworking and your lazy and whatever. It would seem to me that some of the counsellors might be better than others and they might make people aware of the circumstances.

Prof. MALPAS - I would argue that that is another reason for allowing some sort of court administration of this right from the start because if we do that then the court can have a list of accredited counsellors. It can approve somebody who maybe isn't accredited as a counsellor. Just getting the court involved in the beginning, in the setting up of the original agreement, means you can handle all of those sorts of issues right from the word go.

CHAIR - If they haven't been done correctly you can say 'Before you enter into this agreement you need to go and be counselled by an approved counsellor and lawyers who are actually accredited in that area'.

Prof. MALPAS - I know that some people might argue that this is actually putting an additional complicated legal structure in place around this, but I think we all agree that surrogacy isn't a straightforward, simple process without problems and that is why we have the legislation. If you say okay, let us put this in place right from the start and let

us try to make sure that everybody is as safe and secure in this arrangement as they can be, you cannot make them absolutely secure, but at least we can try to provide a supportive structure within which people can go through this process. I would say that bringing in a court arrangement from the beginning isn't an attempt to make this more aggressively legalistic, it is actually to say we accept that altruistic surrogacy is okay, and we are going to put in place an arrangement that tries to support people who want to go through that process - both parents, the child that is the product and the birth mother and her partner, if necessary, which is one of the other issues that might be considered here too.

Mr WILKINSON - The crazy thing about it, Jeff, is to me the ideal body to look after and oversee what is going on is the Family Law Court because they are the most experienced and they deal with it day in, day out. Here we were told yesterday - and I am going to look into it further - that in relation to the agreements and the upfront matters which may need to occur it cannot go to the Family Court because that is Commonwealth and it has to go to the State courts. Yet if there is any issue at a later stage as to who should have custody of the child or access to that child it is going to go to the Family Court. It just seems wrong that the matter could not be before the Family Court in the first place.

Prof. MALPAS - I agree and it would be much simpler and easier if it could all be handled by the Family Court, but obviously there are legal issues and Constitutional issues surrounding that that make that complicated. I had assumed that it could be handled completely by the Family Court - not just because it means you have one court handling the whole process, but because as you say, the Family Court has more familiarity and more experience in this area, so that would be by far the best way of doing it.

CHAIR - We obviously need to look at that anyway.

Prof. MALPAS - Otherwise, too, you might get a situation where a local court, a State court approves an agreement which the Family Court then decides is in some respect lacking or deficient. You will still need to have some arrangement whereby you can get decent coordination between the two court structures. But the best arrangement would certainly be if the Family Court could manage this rather than having a State court do it. But whatever, it does seem to me that the sensible way to handle this is to have a structure in place from the time that the agreement is made through to the birth of the child and so on, and that is going to be actually quite important. The idea that you can just do this on the basis of even a written agreement that was made between two parties, where the agreement could have almost any form, where the two parties might have had different expectations and then try to sort all that out after the child is born I think is just setting it up for trouble. There will be problems that will arise as a result of that. There might be problems that will arise in the other case as well, but I think there will be fewer problems and they will be of a different nature.

Mr WILKINSON - Jeff, the other matter that I raised yesterday, and other people as well, is: this legislation seems to focus on the rights of the parent, but not the child. All the family law legislation back in 1974 when the Family Law Act came into being from the old Marriages Act, the major focus is on the paramount interests of the child. Am I right in saying your views are still that is what should be occurring, still we should be looking at the paramount interests of the child as opposed to the interests of the parent?

Prof. MALPAS - Yes, I tend to think that the interests of the child should be paramount. I do think that there are some complications. Commercial surrogacy arrangements have been undertaken in overseas jurisdictions where a different set of laws operate, so I think you have to be very careful of saying the interests of the child are best served by our simply allowing the child to be treated as if this were an altruistic surrogacy. That is a case where I think it is a little bit more complicated and I do not think you can simply say the rights of a child are there paramount, and that is one of the cases where it seems to me you do not address the inequity which arises, partly because at least in some cases you have a situation of enormous inequities. For instance, in India where the whole situation surrounding commercial surrogacy really arises out of inequities and problems within that society. I do not think you say, 'Okay, so the rights of the child are paramount and we are going to forget about everything else.' The inequalities that arise arise first of all because of the Indian situation and I think you do not resolve that by simply forgetting about the some of the arrangements you might have within Australia.

So the argument that the interests of the child are paramount I think is generally correct. Certainly within the structure of this legislation I would say that that is what is important, but if you look more broadly than this legislation then I think a narrow focus on the child's interest might actually give rise to some difficulties. I know that some people argue, for instance, that the rights of a child should be paramount in some of those overseas surrogacy cases, but I think it is a little bit more complicated there. Certainly my argument about providing access, for instance, to full birth information is really putting the concerns of the child first over, let us say, the interests of the parents in not having that information disclosed, or, where you have the case of sperm donation over the interests of the person who has donated sperm and then remaining anonymous.

CHAIR - I think Anna Grant yesterday who mentioned that the bill talked about the child's best interests when the court could make a decision when there hadn't been the legal advice or there hadn't been the counselling that forms part of the bill. She made the point, quite rightly, that there was no actual description or definition of 'the best interests of the child.' She pointed us to some other legislation like the Adoption Act and a couple of others where there is more - some of the Federal acts, obviously, Marriage and De Facto Relationship Act. Do you think there needs to be a bit more description about what is the best interests of the child?

Prof. MALPAS - Probably. My memory of the legislation as it stands said, for instance, the default position is that it is in the best interests of the child to remain with the genetic parents, for instance, and there are some details about that where there are disputes between the gestational mother and the genetic parents as to what would best serve the interests of the child even though there is no actual specification of what the best interests of the child are. I do think that there is probably room for there to be a little bit more clarity on that and I would have thought the place to go for that is to the existing adoption legislation or to other forms of legislation that address those issues in other ways, and that would also be part of the process of trying to ensure that this legislation was not simply consistent with legislation in other jurisdictions, but also consistent with other existing legislation within the same jurisdiction, as it were. I think that is certainly a concern, but again you do need to leave a certain amount of latitude to the court in terms of deciding those things. Again, it is really a matter of providing some guidance rather than complete prescription.

Dr GOODWIN - I think Anna was concerned about this clause 20, which relates to presumption as to the best interests of the child. There is a presumption that if all the parties are in agreement then that is presumed to be in the best interests of the child for whatever they have agreed to.

Prof. MALPAS - When I first read the act that was one of the things that I had a question mark against. That is at least an indication that that is an area that needs more careful attention. I have not worked out exactly how I would do that. This is one of the areas where if you make this change in terms of setting this up so that you have a court involved in this from the beginning, then that might lead to some other changes elsewhere in the act. The bill seems to me to be written in a way that assumes this going to be after the fact and that for the court, given the child is in existence, we are then going to basically sort this out now. My suggestion is you do that beforehand, in which case you are going to have to modify a lot of the sort of the structure.

There are going to be two areas of interests that it seems to me are going to be relevant. One is in terms of the immediate welfare of the child. If there is a dispute, who is best positioned to look after this child. The second issue is a longer term one which really concerns the making available of the information to the child about their parentage. Both of those need to be addressed. This sort of issue is going to come up where there is a dispute between, let us say, the birth mother and the parents who may or may not be the full genetic parents. In the case where the birth mother has also contributed an egg and the father let us say has contributed the sperm, you have some complicated situations there.

It is interesting to ask what are the reasons for saying it is generally in the best interests of the child for the child to become the child of an intended parent or intended parents who have made an application for a parentage order. What would be the reason for making that assumption? If you have a mother who says, 'No, I do not want to give up this baby', why assume that the intended parents who have set up the surrogacy arrangement are the best parents? I could imagine a devil's advocate saying maybe there are reasons why they are not the best parents, because maybe they have entered into this arrangement for the wrong reasons. That was what bothered me most about that paragraph when I read it. I wondered what the reasoning was behind it and it is not clear to me what the reasoning is. I can see pragmatic reasons for doing it because this is a semi-legal arrangement that has been put in place and generally speaking there is a presumption that if there is a contract we should enforce the contract.

Dr GOODWIN - I think it places the child's interests on a secondary level.

Prof. MALPAS - I think it probably does that too, but what is meant by that clause? Why is it in there? What is the reason for thinking that the intended parents should be, by default, the real parents, because that is what it is actually saying.

Mr WILKINSON - Is the only reason it is there because the intention of this bill is to look after and give predominance to the people who are intending to be parents? That to me seems the only reason that it could be in there.

Prof. MALPAS - Since this is a bill to enable surrogacy arrangements to be put in place, that presumably is the reason for the presumption. But notice it is an odd presumption

because ordinarily you would assume that the person who has given birth is the person who would be parent who would look after the child. So this is actually running counter to that. Okay, the bill is about surrogacy so you might expect that presumption, but if you look for a reason further behind that, it seems to me that the only reasoning it can be there is that there is a contractual arrangement in place and we will ordinarily enforce the contract and the contract says the child actually goes with the parents. One of the reasons I think this is worrisome is that it almost looks as if the child is becoming the subject of a property dispute. The child looks like they are being treated as property and that is one of the reasons I am feeling a little uncomfortable about it. I think that is larger issue about the whole of the surrogacy arrangement.

This is why you might have ethical qualms about surrogacy - because it treats the person who is giving birth as basically a manufacturer who is contracting to produce something. What they are producing is the child and the child is therefore being treated effectively as a commodity. Of course there is a whole lot of other stuff around this about the love that parents have for children and so on and so forth, but essentially that is the fundamental reason for thinking this is a problematic arrangement from the start. It is because of the way in which it treats human lives essentially. Just to go back to my comments at the beginning, when you are looking at something in terms of its ethical status one of the questions is: how does this action or proposal affect the way in which we relate to ourselves, to other people and to the rest of the world? What this does is effectively say that one of the ways in which we can relate to a child or someone giving birth is rather like the relation to a manufacturer or someone supplying a service or to a commodity, and generally speaking we think that is a bad relation to have to a human being.

Mr WILKINSON - How uncomfortable should we feel about this? It concerns me for a couple of reasons. Let us say the birth mother wishes to not hand the child over, for whatever reason it might be. Then you would go to court and then you would argue about it. The courts on this basis would say, 'Look, it is presumed to be in the best interests that the child is best with the contracting parents', if we can call it that, even though it is not in the best interests of the child in all other aspects which the Family Court look at for a child to stay with a parent who might have a brother, a sister, or they might be the best parents in the world and the child is far better suited to this person as opposed to the contracting parents, but the contracting parents start in front. They are handicapped, so to speak, they are 10 metres in front of the 100-metre race because of this.

Mr HARRISS - Is that concern heightened in the event that the birth mother has provided the egg?

CHAIR - The legislation seems to suggest that the only time the court can order the mother to give the baby up is when she doesn't have any genetic material and one of the intending parents or both do. It almost flies in the face of that in a way. It is almost a bit contradictory, isn't it?

Prof. MALPAS - I worry about that a little bit as well because I think that underestimates the relationship that the birth mother has to the child as a result of carrying that child. I think we are too quick to assume that there is a nice tidy relationship or distinction between carrying the child where it is like you are a truck.

Dr GOODWIN - I was thinking about the *60 Minutes* program where they were implanted with wrong embryo. Both the woman carrying someone else's embryo and her partner were so strongly attached to that child, even though there was no genetic connection.

CHAIR - It was a really big decision for them.

Dr GOODWIN - Yes, very traumatic.

Prof. MALPAS - We are too quick to say there is no genetic connection. We know that mother and child share blood. They are in a very close relationship and there are all sorts of ways in which we thought there was no genetic influence but there has been. We might at some point in the future come to realise that actually the relationship between a child in the womb and the mother is a relationship that does have an effect. Certainly we know it has an effect on the subsequent growth of the child because we know that what a mother does and the mode of life of a mother carrying the child will have an effect on that child's subsequent development. That raises another issue about what restrictions can be placed on a mother who is acting as surrogate. We also know it is not just how she is acting, whether she is smoking or drinking, but also the circumstances in which she is and how much stress she is under. All sorts of factors are going to affect the baby through affecting the mother. That suggests that we should not treat the birth mother as simply a truck that happens to be carrying something inside it that is not affected. The relationship is a much closer one. That is one of the reasons for thinking that it is not just inappropriate to treat the mother as a human being as a manufacturer in this way but also the relationship between the mother and the child is a very close one biologically. It is obscured when we just talk about the genetic relationship as opposed to the gestational relationship or whatever. If I were to make another criticism of the legislation it is that that distinction is relied upon too heavily in a lot of this discussion, as if the relationship between the birth mother and the child that she carries is not a close and vital relationship. It is precisely because it is a close and vital relationship that we need to be very careful about these sorts of arrangements.

Notice, however, that if you take out that presumption then it does create larger issues. I think this is perhaps the reason it is in there and it does go back to this contractual issue. If you take that out and allow that either party can make a claim on the child then you might argue that it does not give any protection to people who enter into surrogacy arrangements because at any point the mother can decide it is my baby, whether or not there is a genetic connection.

CHAIR - So isn't this, Jeff, an argument for having that agreement sanctioned upfront by the court in one way or another? We are talking about a planned event here. We are not talking about a bit of a slip up and we are pregnant now and we might talk about adoption, which is after the event. This is planned because we cannot have a baby ourselves physically, genetically or whatever. There are choices being made. So it is a planned thing. It is not something that is a mistake.

Prof. MALPAS - That is right and because it is a planned thing why wouldn't you get all the planning done beforehand rather than try and tidy it up after the fact?

CHAIR - If this planning all comes to the front end, then for this issue of assuming that the intended parents are the most appropriate, would you actually need a clause like that,

because surely that would be dealt with within the arrangement? That would be the agreement - that at the end of this process my intention is to hand the child to you.

Prof. MALPAS - I think that is a good reason for putting it all up-front. There is still going to be the issue about how you deal with cases of disagreement where for one reason or another the mother has gone through the process and has become very attached to the baby and is incapable of giving it up. That is going to be less of a problem in cases where you have the sort of genuinely altruistic surrogacy that involves a family member. The biggest problems are going to be cases where the birth mother is more removed from the family. Where it is a family member, first of all, it is more likely to be genuine surrogacy. Secondly, the mother is probably going to retain contact with the child anyway and be the child's aunt or whatever in some sense. The most complicated cases are going to be the cases where there is some greater remove between birth mother and parents. Those are the cases where you might still have some difficulty. Probably the only way you can deal with those is to let the court decide on the basis of the interests of the child, in which case perhaps that clause should not be in there, although it does still leave a little bit of uncertainty in the relationship and maybe you simply cannot get rid of that.

CHAIR - It probably needs to be there in the way the bill is formed at the moment because it is all after the event.

Prof. MALPAS - Yes, of course. The bill is formed at the moment, as Jim puts it, on the presumption that surrogacy is an arrangement that will go ahead. This bill is there in order to enable surrogacy to go ahead. The bill also assumes that the pregnancy and so on is going to be relatively unproblematic and that the only issue at the end is basically sorting out the parentage.

Dr GOODWIN - Ticking off on the agreement that was made at the beginning.

Prof. MALPAS - Yes, whereas I am saying it is a more complicated process than that. Notice that the point you are making about planning is a little bit like the issue we raised in relation to birth certificates. Where we cannot do anything, okay, we cannot do anything, but where we can do something, the fact that we cannot do something somewhere else is no reason for not doing something there. This is a planned event. The fact that in other circumstances babies happen by accident - sort of - the fact that we cannot plan in those cases does not mean that we should not try and plan as carefully as we can here. We have got the opportunity to do that. Why wouldn't we take it up?

Dr GOODWIN - Could I ask you about another option from other legislation and that is to get an independent report done for the benefit of the court. So all the parties go off to see the same counsellor and then the counsellor on the basis of those sessions provides an independent report to the court to help inform the court's decision about what is in the best interests of the child. Do you think there is any merit in that sort of approach?

Prof. MALPAS - It might be that that is not that different from the situation where the court is able to take advice from other independent people anyway. It seems to me you want to allow the court to seek whatever advice is appropriate.

Dr GOODWIN - So to talk to the counsellors.

Prof. MALPAS - It might well be the case that the court might want to talk to the counsellors. There is a question about how much latitude you give the court in terms of what sorts of avenues they can go down, but in some cases it seems to me you might want independent advice, particularly if a dispute has arisen subsequent to the agreement, subsequent to the birth of the child. If there is a dispute between birth mother and intending parents then it might be that the court would want to seek some independent advice. Whether that is from a counsellor whom both parties have seen or whether it is from some other individual, it might well be appropriate for the court to have the power to ask for that sort of advice and that might be quite important.

Whether you want to set up a process that says in these sorts of cases the court always asks for an independent opinion, you want to give the court the opportunity to get the advice that it needs and then the court is going to make up its own mind in the end anyway. I am not sure that you would want the court being required to go to an independent arbiter, who then effectively judges the case and tells the court what to decide. It is really important that the court be the one that makes that decision and is able to take whatever advice it thinks appropriate in relation to that decision. You certainly want to avoid a situation where somebody else is making the decision for the court, or where someone else is seen as making that decision, because otherwise you might get into a situation where a counsellor who is seen as being the one who is really going to give the advice to the court becomes the target for opposing parties or is viewed in a different way by the parties when they meet with them, or whatever.

Dr GOODWIN - Or seen as being biased or whatever.

Prof. MALPAS - Yes, so it is really important that the court should make that decision rather than anyone else.

CHAIR - We will take a 10-minute break now and have a cup of tea.

Mr WILKINSON - In the end the matter is going to be looked at by the courts, but the courts will have to start with a presumption that the contracting parents are the best people to look after the child.

Prof. MALPAS - What I was trying to do was partly to set out what the argument might be for having clause 20 in there. The reason it is in there is not simply because this is a piece of legislation designed to allow surrogacy. If we have said altruistic surrogacy is okay and we have a surrogacy agreement in place, then in the ordinary course of affairs you would expect that the child would go with the intended parents. There has to be a reason why that would not happen. Now I think that is what this is trying to do. Where it becomes problematic is the identification of that presumption with the presumption in the best interests of the child. So perhaps the solution to clause 20 is to separate the two out, to say that in the ordinary course of affairs one would expect a presumption in favour of the surrogacy agreement holding. In which case, in the ordinary course of affairs you would expect that the intending parents would be the parents who would take custody of the child.

Then there is another question about whether that will always be in the best interests of the child and perhaps needs to be put separately. Rather than identify the best interests of the child being to go with the intending parents, my suggestion is that these two things be separated. You allow that in the ordinary course of affairs that is the way it goes and that is where you would expect it to go. If there was a real dispute about custody, there is a certain presumption that you would expect the child to go with the intending parents, but there might still be an additional issue about whether that is in the best interests of the child. That ought to be dealt with quite independently of the issue of the surrogacy agreement. Notice that that is only going to come up where there is a dispute. So in the ordinary course of affairs the court isn't going to have to decide what is in the best interests of the child and who should have custody. Where a dispute comes up then you are going to look to the best interests of the child as a way of trying to resolve that dispute. But in the ordinary course of affairs you would expect the agreement to be one that would be upheld.

CHAIR - Which was the whole purpose of the agreement in the first place.

Prof. MALPAS - Yes. So that weakens clause 20 by separating this issue of what in the ordinary course of affairs happens from the question of what is in the interests of the child. I think it captures your discomfort with this, which is the identification of what happens in the ordinary course of affairs with the interests of the child, which is what is problematic. Even if you kept this legislation as it is, possibly what you might want to do is disentangle those two things and allow the one to be decided independently from this question of what would happen in the ordinary run of things.

CHAIR - We did talk briefly about the impact on the birth mother and Vanessa raised yesterday how do you know, if you have never had a child, whether you would be able to give a child up or not. We talked about the connection that is made between the mother and child. They do not actually share blood, but they share hormones and other things that pass through the placental barrier. The current view, and this has been fairly well researched, is that the baby actually initiates the labour. So there must be some communication between the baby through the release of hormones to actually trigger the uterus into action. So it is definitely more than someone carrying a baby in a completely unconnected way. There is no requirement to have had a baby previously in the legislation as it stands. Do you see that as an issue?

Prof. MALPAS - I am a bit careful about commenting on this because I do not have the first-person experience, but all the evidence is that that relationship is a very close one. For somebody who has gone through pregnancy before it is not just that they might be better positioned to know what is involved in giving up the child, but they might be better positioned to know what the pregnancy will involve. You could imagine somebody who has never gone through pregnancy before who has a sort of rosy picture of what it is like and who gets violent morning sickness and just wants to die and says I do not want this baby.

CHAIR - That lasts for months.

Prof. MALPAS - Now somebody who has gone through pregnancy before at least will have some foreknowledge of what the process might be like. For somebody who hasn't it is more likely that you might run into those sorts of difficulties and therefore you might run

into various sorts of problems, not just unwillingness to give up the child but perhaps wanting an early termination for the wrong sorts of reasons, or perhaps being unwilling to do the sorts of things that are required in order to ensure a health pregnancy. There are a range of reasons why it just seems sensible to say that generally speaking if you are going to do this then you will need to know what you are letting yourself in for, and really only somebody who has had a child before is going to know what they are letting themselves in for. It just seems eminently sensible.

CHAIR - So should there be the discretion of court even in that? There was a case where a 26-year-old woman was unable to have children through a genetic issue. Her 22-year-old sister was wanting to be surrogate. I still find this a bit odd because she apparently also suffered the same genetic condition.

Prof. MALPAS - That would render her infertile by the age of 24.

CHAIR - Yes. So she was going to have a child to give up to her sister and if she wanted one of her own she would have another straight after for herself. I can see why that is one fairly unique occurrence, but if there was a clause in the bill that said that that should be the case, that a woman has actually experienced carrying a live birth to term -

Prof. MALPAS - It would rule that out.

CHAIR - Yes, but then if you give some discretion to the court under specific circumstances then that could be considered. Would that be a way of dealing with that?

Prof. MALPAS - Because I think you should have the court involved from the beginning, that also gives you the power to give the court some discretion in terms of how the legislation is to be administered and managed. If you are going to go down this path then that is a sensible way of going. Why have the court in place handling all of this and not give the court some discretion to vary circumstances where they see fit, within some broad guidelines. It just seems good sense to do that. You have the court there, so why wouldn't you? You presumably trust the court to make a whole range of other decisions so why not trust them in certain circumstances to vary from what would ordinarily be the case? What you are doing in the legislation when you set down the age and the requirements of having a previous pregnancy, you are saying to people this is what we normally expect to have happened. If you want to do this in a different way then you are going to have to make a case for it. You are going to have to argue that case in front of the court. You are not precluded from doing that but the onus is then on you. So it makes very clear what the expectations are.

CHAIR - So it is the principles really and then allowing to court some discretion.

Prof,. MALPAS - That is why we should be setting up a framework that allows altruistic surrogacy to go ahead, assuming we have agreed that altruistic surrogacy is going to go ahead. We need a framework that then can be administered by the court which is going to, in the end, have to deal with the concrete cases. Because what we are dealing with are so many complex issues that relate to human relationships, it is very hard to legislate in a precise way about those sorts of things. You want somebody on the sport who can actually look at what is going on and say this is what is most appropriate here,

Prof. MALPAS - is most appropriate here, and who has good judgment in that situation. So the legislation should, having enabled altruistic surrogacy, then set up a framework within which we can enable people to make good judgments to allow this to go ahead in the right circumstances and can make sure the circumstances are configured in a way that makes sure it goes ahead in the best possible way. I would sell this package as providing a safe and secure framework, a supportive framework for altruistic surrogacy, rather than being seen as a sort of legislative barrier to altruistic surrogacy. The way to ensure it is supportive is to give some sort of discretion to court in the administration of the legislation. If you restrict the amount of discretion then you are going to reduce the degree to which the court can genuinely be supportive and is going to operate in a more disciplinary way.

CHAIR - Do you want to make any other comments, Jeff?

Prof. MALPAS - There is a question to begin with about the nature of surrogacy and there are ethical questions we can raise about that. I would not be in favour of open slather in relation to this. Clearly by the way the technology and other things have developed we need to have some sort of framework around this. Simply having a blanket ban probably is not going to work, so given that what do we do? We set up as supportive a framework as we can and that I think will also maximise the chance of the legislation actually being successful. If it was in the spirit of a disciplinary, prohibitive legislation then I think it probably would not work.

CHAIR - There was some concern about putting that court process up front and making the whole process more onerous, though you have to have the court process somewhere along the line. Generally there was an agreement that it wouldn't be impractical. But if seemed to be too onerous on the parties intending to proceed, is there a danger those people could pursue commercial surrogacy through other countries?

Prof. MALPAS - There is that danger, but the fact that other arrangements are possible overseas that people are now accessing is not a reason for importing those arrangements here - not of itself. It is also not a reason, because there are problematic arrangements elsewhere, to try to resolve them by importing them here and allowing additional inequities to arise here. So I do not think that is an argument that should carry very much weight. I do think it is really important that this legislation is seen as supportive of a certain form of altruistic surrogacy. The more it is seen as a supportive process, the less it will be seen as a process that is prohibitive.

For the most part the people who are looking to surrogacy are people who do seem to have the resources and be sufficiently committed to this process that they are willing to go through a fair number of hoops in order to get through it. There are quite a few hoops in going overseas and getting this underway anyway. If this is set up as a process that aims to ensure that everyone is as safe and secure as possible, that aims to be supportive, that aims to make sure it is going to work, then that ought to mean that people who are genuine about the process are more likely to go through it.

I have no doubt that there are plenty of people who, for the wrong reasons, will want surrogacy arrangements. I do not think we can simply say that everybody who wants surrogacy wants it for the right reasons. Human beings are complicated psychological creatures and sometimes we tell ourselves we want something for one reason, and we

want it for another. Sometimes it is to do with the dynamics of relationships and sometimes it is to do with expectations of relatives or whatever. There will be plenty of people who will go into this for the wrong reasons and we are not going to be able to stop those people if they have the resources from going overseas and doing it, but that is not a reason to say, 'It's all too hard. We'll just forget about it. You can do what you like.' Partly what our legislative framework does is tell our community what we think is valuable and what way we ought to be living. I am very much against the idea that the fact that you can do it overseas means it is okay to do it here too.

As you say, I don't think it necessarily makes it any more onerous. There is going to be a fair amount of legal stuff at work once you apply for the parenting order anyway under the existing legislation. I would argue that the existing legislation allows for more uncertainty about that process, whereas this framework gives you more certainty and security about how this is all going to work out. Someone going into this can go into it knowing what is going to happen, whereas under the existing proposal they go into it thinking they know what is going to happen but it may not turn out that way. First of all, I don't think the consideration is well founded that it is making it too onerous. Secondly, even if it did make it onerous, this is an important matter, not a matter that we should be prepared to completely relax on and say, 'Just go ahead'. This is partly for the reason that even if altruistic surrogacy does go ahead many of us might still have worries about some of the ethical implications that go with it that might lead us to feel uncomfortable about it.

CHAIR - There may be members in the Legislative Council who oppose the very principle of surrogacy but if the majority agree that it is to be proceeded with then we want to proceed with the best possible legislation. That is what the committee is seeking to achieve. Whether we vote for it at the end of the day will be a matter for individuals.

Prof. MALPAS - Many of the ethical issues that surround surrogacy as such are issues that surround a whole series of reproductive and other interventions that give rise to ethical difficulties. I don't think we have properly thought ethically about the whole IVF industry, which I think raises enormous issues.

CHAIR - When you talk about the way technology has moved, technology in that reproductive area has moved at an enormous rate without the legislative requirements keeping up. That is the reality.

Prof. MALPAS - And not just the legislative structure. As a society we are increasingly unthinking about much of what we do and that is a function of a whole set of things. As a result, we find ourselves in situations we have not thought about and suddenly we are forced to think about something and we have a whole set of problems that have arisen, and the surrogacy issue is just one of them. I think there are a whole series of issues, life-and-death issues, that are relevant here. We have really got ourselves into situations as a result of not having thought about what we were doing.

CHAIR - We need more thinking people, Jeff, like you and me.

Laughter.

Prof. MALPAS - I am a philosopher so I am going to sell the idea of thinking. That is a reason I would argue for there being a different approach sometimes to how we school people to what we do in university. I don't mean teaching ethics as it is standardly taught because I don't think that helps us very much. These are issues about reflection, thoughtfulness, trying to think about what our values fundamentally are. We don't do enough of that. We approach too many of these issues in a legalistic way or else in a purely pragmatic or prudential way and, as a result, we forget about where that situates us as human beings. That is my reason for being concerned about the surrogacy legislation.

CHAIR - Thank you very much, Jeff. We have had you in front of other committees before and have always found your approach very broad and interesting.

THE WITNESS WITHDREW.