THE LEGISLATIVE COUNCIL COMMITTEE ON GOVERNMENT ADMINISTRATION 'A' MET IN COMMITTEE ROOM 2, PARLIAMENT HOUSE, HOBART, ON MONDAY 11 JULY 2011.

SURROGACY INQUIRY

Mr CHRIS BATT, REGISTRAR, AND **Ms ANN OWEN**, BIRTHS DEATHS AND MARRIAGES WERE CALLED, MADE THE STATUTORY DECLARATION AND WERE EXAMINED.

CHAIR (Ms Forrest) - Thank you for coming along. I know you have been sent some information about the committee and the intention of the committee. It's not to revisit the issue of surrogacy as such but to look at the bill that is before the House, and within your area of expertise. This is being recorded and any evidence you give is covered by parliamentary privilege but if you talk outside the committee hearing that may not be the case. The committee will prepare a report at the completion of the hearings. If you think any of your evidence needs to be given in a confidential nature, you can make that request and the committee can consider it. That information will not become part of the public record, but it can inform our decisions.

This bill is to put some regulation around altruistic surrogacy and part of the process associated with that is to reissue a birth certificate after a baby is born through a surrogacy arrangement to reflect the intending parents as the parents, with the rights and responsibilities that parents have. Some members of the committee have a view that there are other ways that this process could be managed. We are here to ask you how you see the current process in the bill as it sits and then perhaps look at other alternatives. I don't know if you've read the debate of the motion -

Mr BATT - I've only read the bill.

CHAIR - We talked about an option of perhaps having something like an expanded birth certificate where every baby born from, say, the end of the year when the bill is enacted, would have a birth certificate that included an expanded version. In the expanded version would be anything relevant to that baby's birth, genetic background or whatever that doesn't need to appear on the front of the birth certificate - such as when you go to be enrolled in school or to get a passport. They don't need to know that you're a child born of a surrogacy arrangement, an adopted child or a child born through artificial reproductive technology, when you have a donor sperm or egg. They're the sorts of things we want to explore with you but, firstly, we would like to have your view on how the bill currently sits and whether you think there are any problems with it or whether it could be improved and, if so, how.

Mr BATT - I will give a fairly broad response. In essence, the process as detailed in the bill is very similar to the adoption process. It establishes two identities: the original birth records and the re-registration record. Whilst there is a link required by the act in the records, which is useful for internal purposes, the birth certificate that is produced on request is no different from any birth certificate that would be produced under normal

circumstances, which works in terms of delivering the policy of the bill. In a broad sense, I don't see any difficulty from a practical point of view in managing the birth registration and certificate production processes in accordance with the policy intent of this bill.

Mr WILKINSON - Chris, what is the situation in relation to births where, say, a child wants to know who its genetic parents are and with the birth certificate they would be unable to do that?

Mr BATT - The role of the Births, Deaths and Marriages Register is simply to establish an impartial record of the facts that are known at the time. Often those facts are informed by the persons who register the birth event and those facts are usually the identity of the mother and the identity of the father, if that is known - and it is not uncommon for the identity of the father not to be disclosed - and the name of the child. Being an impartial register, the process doesn't really allow people to explore or entertain those more broadly philosophical questions such as the one you've raised.

Mr WILKINSON - Is there a way that you could have a register which would not only encompass what it does now but then underneath you could have, for people who wish to look further, another document and the only people who are allowed access to this document is the person - a certificate which would tell the truth behind a birth. I say that for reasons where people now are wanting to know their real identity. There are issues if they do not know their real identity that have been seen psychologically or psychiatrically. You could be finishing up going out with your half sister or your half brother, issues like that. Is there a way that you could have another document which fits in behind your birth certificate?

Mr BATT - In essence, that is what the proposal already does, in my view because it records the birth event and it records the name given by the original parents and it records the identity of the parents.

CHAIR - The intending parents?

Mr BATT - No, the actual birth parents. That is there on the record. There is then the surrogacy register or record which, again, records other facts. So all of the facts in that particular event are there; similarly with adoption. The details surrounding the birth parents and the details surrounding the adopting parents are all there. The question, I guess, that we are concerned with and our responsibility with respect to the registration is, to whom do we give access to that information. It is not a question in most cases of whether the information exists or does not exist. Although, as I said before, it is quite common for children to be registered with 'father unknown', but it is a question of who is given access. With adoption and presumably with surrogacy, the policy view would be - and I am not quite sure of the terminology. Is it surrogatee?

CHAIR - A baby born as result of a surrogacy arrangement.

Mr BATT - I think that is probably the right terminology. That person would not, automatically, have access to the identity of their birth parents. It is not a deficiency in the register that prevents that from happening but a policy decision around who gets access to what information.

Dr GOODWIN - That is the same with adoption in terms of being able to find out who your birth parents are?

Mr BATT - Yes, because a person who applies for a birth certificate can only get the birth certificate that is created as the new record.

Dr GOODWIN - Yes, the official record.

Mr BATT - Yes, so their parents and their adopted parents. Unless they are aware of the facts about their original identity, in essence the policy is that we do not tell anybody what they do not fundamentally already know. We give information and it is only information they are already aware of.

Mr BOOTH - If they become aware that they are adopted, then they can come back to you and ask the details of their biological parents?

Mr BATT - No, they cannot. They would be very difficult because they have to produce an identification to get a certificate anyway and they would not be able to identify themselves as their original identity. But there is a process under the adoption service for people to be put in touch with their adopted parents and that is a discreet and completely different thing. That has counselling as an up-front requirement and then there is a process whereby people could be put in touch. But that is also at the option of the adopting parents. The adopting parents, as I understand, can choose not to develop a relationship or establish contact with the adoptee.

Dr GOODWIN - What about when ART and there is donor sperm or a donor egg? Is it recorded at the moment who the donor is?

Mr BATT - No. The registration has a place to record the father's name and that is recorded as a fact. If the registration does not include those details, then it is not. With ART, then that would not be recorded.

CHAIR - Going back to that point that Vanessa raised a moment ago about the adopted children being unable access their birth parents' certificate, except through a convoluted process, potentially, through another policy framework, there is nothing in the surrogacy bill that provides for that. If it was a same-sex couple it is clear that someone has helped out somewhere here, but when you have a heterosexual couple, there would not necessarily be any evidence to suggest that they should, but then you hear these stories about children feeling that something is not quite right and they do not really fit and that sort of thing. So with the bill as it sits, and the way I read it, is that if a child wanted to search, unless their intended parents told them, particularly in the case of a heterosexual couple or a single woman, for example, that there was anything other than what the birth certificate was that they might apply for and get, there is no evidence. It was suggested that if every baby born after a certain date had an expanded version that any child named on that birth certificate could access, after they pay the appropriate fee and the usual stuff, to see if there is any additional information, then the additional information would include adopting parents - the parents who gave them up for adoption - surrogate parents, the genetic and/or birth mother and father, ART donor, sperm or egg donors and that sort of thing to give that more comprehensive genetic background for the child. I know that

the Senate tabled a report in February this year for the Legal and Constitutional Affairs References Committee into donor conception practices in Australia recommending that a register is kept of donors so that could actually happen.

What if there was a decision that we would go down that path of providing that information? Again, it is not always available, the father is not always known. Working as a midwife I know how fickle it can be sometimes to identify the father. Where that information is known or where there has been a donor gamete used or where there has been some special arrangement, like a surrogacy or adoption, that information is there and it can be accessed. Whether it involves counselling or not, that can be factored into a bill, but could that work?

Mr BATT - I think conceptually I would have a difficulty with it being modelled in precisely the way you outline or for the register to actually perform that task. Again to use adoption as an analogy, the register simply records the events. This is about establishing an accurate historical record, if you like, as the primary purpose of that register for uses in multiple ways. With adoption there is another process, which is completely separate from the Births, Deaths and Marriages Register, that facilitates the connection between adoptees and adopting parents. If you are going to have a similar process for surrogatees and birth parents it would probably be preferable to establish a discrete process rather than trying to bolt something or a hybrid thing onto the Births, Deaths and Marriages Register, simply because it is outside the scope of what those registers perform. I am speaking in terms of the patterns or the laws surrounding those registers right across Australia and probably right across the world.

I am not making a comment about whether or not we should have those mechanisms, but if a policy decision were made to have a connection mechanism, if you like, it should sit outside of the register. It is not just about information because, if you look again at the adoption process, if an adoptee establishes a connection with their parents, then it is on the basis of that relationship that they can get the information and get their birth certificate anyway. The birth certificate is almost an ancillary or a subsequent stage to that. It is not critical to the process of connecting people together.

Mr WILKINSON - Chris, I was concerned a few years ago when I was talking to two females who were bringing up a son. I said to the female, 'Look, have you told the son who his father is?' And she said, 'No, I'm not telling him.' I said, 'Do you think that is fair? Do you think it is selfish? Do you think you should be able to allow him if required to be able to find out who his father is?'. And she said, 'Look, I've told a friend.' I said, 'Well, I don't think that is good enough,' because again I have seen what happens with children who want to find out who their real parent is, but for whatever reason are unable to. That child in a lot of cases suffers quite markedly. To me there has to be a way where that child is able to find out who their genetic parents are.

You are saying, as I understand it, rather than in the Births, Deaths and Marriages Register it can be done by another process, a bit like the adoption process. If that is the case, can you describe to me how that's done? I know you're saying it is a policy thing but legislation becomes policy once it is put into legislation.

Mr BATT - I suppose in terms of me not commenting on policy, I don't want to represent a view as to whether what you're proposing is a good or bad idea. I have my own personal

views. In terms of the registration process, as I understand it, a person contacts the adoption service and they are provided with counselling. The adoption service then contacts the natural parents and says that the adoptee wishes to make contact with the parents and the parents can then choose to meet or not. I think in most cases meetings do occur as most parents also have a desire to meet the children they've adopted out. That is conducted by an agency whose job it is to make those connections and to manage the sensitivities surrounding those processes and events.

Mr WILKINSON - So they have to register themselves, do they?

Ms OWEN - When there's an adoption order it is forwarded to the registry to register it and we would have the original birth record and we would lock that down so the information is held in our database. If somebody had approached adoption services in the belief they had been adopted, they would then make them undergo counselling and make them aware that there's a possibility that their birth parent or parents had nominated not to be contacted. They have a register of people who do not wish to be contacted. If the applicant has had the counselling session they can then apply to us for a records-only birth record, which would show the name and identify of the birth mother and potentially birth father. That would be released to them as a records-only documents, not a legal document, one that is stamped with that endorsement. It doesn't give them names or addresses but they have undergone that counselling and my understanding is that they work with adoption services to progress contacting one of the individuals if possible.

Mr WILKINSON - In all these matters and in all family law matters and ever since 1974 when the Family Law Act came into being after the old act went into hibernation, they talked about the paramount interest of the child. It would seem to me in relation to both adoption and surrogacy that the paramount interest of the child is put second to the paramount interest of the genetic parent. I can't see how that fits because if you're looking at the paramount interest of the child and the child wants to know who its genetic parent is, then I think the interest of the child is far better suited by finding out who the parent is, as opposed to the other way around. It does not fit with the Family Law Act and principles behind it.

Mr BATT - That is a reasonable view to hold and our view is that depending on the policy objectives of the legislation we construct a database or administrative process to suit that. At the moment, as you suggest, the parents have a capacity to not have contact, for example, and that is where the matter sits. If the law were different, we would modify out processes and our processes would be different. So it is not the processes that are driving the policy; it is the law driving the policy, an important point to make.

CHAIR - Adoption and surrogacy are fundamentally different in that in general terms adoption happens after a baby is conceived and possibly born and a decision is make to give that child up for adoption, whereas for surrogacy, particularly if this legislation is brought into being, there will be an arrangement up front and counselling and legal advice and those sorts of things will go on.

Dr GOODWIN - And a written agreement.

CHAIR - Yes, a written agreement as well. So you're looking at a situation where there has been a decision, supported by the surrogate mother/gestational birth mother and the

intending parents, and potentially the birth mother's partner if there is one in that case, and who agree to this process. You would think that part of that counselling and agreement process would be that the child should have the right to know who their genetic parent or birth mother is. Because adoption tends to be after the event - they are pregnant and they did not want the baby and they are going to give it up for adoption - as opposed to helping someone to have a baby as a surrogate, it is quite a different process. We have this separate process for adoption, which is after the event, and I can understand sometimes why a birth mother and father may not want to be identified, even though I think that is putting their interests above the child, as Jim has suggested, whereas with a surrogacy arrangement you are going into that, hopefully, with your eyes open, so do we need to have a separate process there? What if every child had a birth certificate that had an expanded version that only certain people could access? If my husband and I had a baby after this change was made and we knew for sure that I am the mother and he is the father and there is no donor sperm or eggs involved, the expanded birth certificate of that baby would have nothing on it, there would be no further information. Do you think that is not a reasonable option?

Mr BATT - Again, you are asking me about a policy question. I understand that because I can appreciate what is driving the question and that is all good, but again whatever policy position we take the register can be fashioned in order to respond and deal with that. If, for example, the policy is that we believe that surrogatees should have access to their natural parents and that should be an automatic right, but without any of the vetting processes that are inherent within the current adoption process, if that is what the policy was then we would tailor a process according to that. If, as I read the bill, the policy is that there is no automatic right of the surrogatee to contact their natural parents, as is the case with adoption, then the mechanisms around the register and the confidentiality and the lack of access to aspects of the record will be designed as it is designed in this bill because that is intended to deliver a policy outcome. I know I keep going around in circles.

CHAIR - No, I am asking you in practical terms and I think we are getting to the point here. If the policy said that every child from 1 July 2014 will have a birth certificate that includes an expanded version and the expanded version will contain any information that is relevant to their birth that does not appear on the official document - like surrogacy, donor, adoption and all that sort of information - whether or not there is a similar process around it before anyone can apply to view this expanded version - counselling or whatever it is - as registrar you would be able to facilitate that?

Mr BATT - So there will be a normal birth certificate which would be used for official purposes like getting a passport or whatever and which would have the same details, but if a person suspected - and I am feeding back on what you have to say - that they were a surrogate and they wanted to test it then they could apply for an expanded birth certificate which would not be for official purposes but it would be to provide them with information which would automatically include information about natural parents or whatever information was decided?

CHAIR - Yes.

Mr BATT - Then the real question is about process, the process of how a person who believes that they are a surrogate finds out about their own personal history. There are

probably infinite ways in which we can actually construct a system to deliver that. What you have suggested is one way but the adoption process is another way and that is a contemporary way similar to the process in this bill. The real question appears to be a policy question: do we have a process whereby the natural parents can deny meeting the surrogate or do we have a process whereby the surrogate's election automatically means that the parents do not have a right to protect that. I think that is the policy question that is really being asked.

CHAIR - It is.

Mr BATT - I actually think that the way in which the register manages that is quite relevant to this policy question.

CHAIR - Could it be done; could every child could have an expanded version?

Mr BATT - If the policy decision is for that right to be given automatically then there are a number of ways in which the registry could be constructed or managed in order to deliver that.

CHAIR - How else do you think it could be done aside from the way I mentioned?

Mr BATT - We would simply take out the counselling step or the middle step and simply say you apply to an organisation who then gives you the information. Then they can get that information from us.

Mr WILKINSON - If I believe there are parents out there that I do not know, I make application - step one. Step two, after making application and being advised that there is a parent out there that I do not know, would the best situation be for me to then get counselling - if you are looking at the paramount interest of the child - and then allow that child to see what was on the register as to who the genetic parent was? It would seem that might be the best process to take place because the child, to me, may need some assistance, therefore you have this counselling.

Mr BATT - If a policy decision was made that that connection was automatic, I agree it would be preferable that counselling occur prior to that information being given.

Dr GOODWIN - Which is the adoption.

Mr BATT - What I am hearing is a little bit more than that. If the surrogatee asks then they are given access to their birth parents' information, but the pre-condition to giving that information is that they undertake counselling.

Dr GOODWIN - So you are talking about an automatic entitlement to know?

Mr WILKINSON - Yes, it is up to the child.

Mr BATT - Which is not the same as adoption.

CHAIR - They could be counselled with the view that they could be the child of a surrogacy arrangement, but they could end up not being. Nothing is lost. Are you saying that should not happen?

Mr WILKINSON - My view is, let's cut to the chase. Normally if you are going to give some counselling there would have to be a parent that you do not know about and that child would have to know about that, and hopefully that counselling would then equip the child as to whether they get in touch with the parent or not.

Mr BATT - You might be able to design a system whereby you confirmed whether the person is a surrogate or not.

CHAIR - Before you went to the counselling step.

Mr BATT - And not provide the information till after counselling.

Ms OWEN - That would all be information that would be set up in the database behind the scenes, if you like, because we have that core legal record which for the majority of purposes would just confirm legal information for identity purposes. If there was a need, then you could put the parameters of counselling or whatever you wanted to the records, or any information behind that which is looked at in database is additional.

Mr BATT - I think the critical thing we are saying is that we do not need to change the database on the way it is proposed to be structured here; it is whether you bolt something on the side or not.

CHAIR - So it is a process around that.

Dr GOODWIN - Put some extra fields into the database to record potential players, which could be many in the end.

CHAIR - If a child presents a birth certificate to enter school or whatever it is and there is an indication on that birth certificate that they are different and that there is information that is stored in the locked down part of the database, then in my mind that would not be appropriate.

Mr BATT - That is why, when you were describing it to me, I asked that question. Are we talking about a birth certificate for official purposes - like entering school or getting a passport or driver's licence - then another certificate which is for personal information purposes only?

CHAIR - Yes, it sits behind but is not evident at first glance at the official document, such as what occurs with adoption. The thing is there is no provision in this bill as it stands for the right of the child to access that information. That is an issue that has been raised.

Dr GOODWIN - No right and also no process in place with the donor egg or sperm situation with ART. At the moment that information is not kept.

CHAIR - That is another area. The Senate inquiry report suggested that there should be a register of donors. I am not sure where that register would sit, whether it would be something for Births Deaths and Marriages.

Mr BATT - You alluded to the differences or similarities with surrogacy and adoption. I suppose one of the observations with surrogacy is that the permutations are much larger, and that is a challenge. With artificial insemination, my understanding is that there are private registers kept by the medical practitioners who provide these services. There is probably no question about the integrity of those databases and there are some laws which apply to those. It if were a policy decision that those were pulled together in some way then there is probably no reasons why could not.

Ms OWEN - They have a voluntary register in Victoria, I believe.

CHAIR - There are no mandatory registers anywhere. There are some voluntary but they were looking at making them mandatory. A doctor moving to the UK and was saying that when they brought in a mandatory register there, numbers of donors did drop significantly. I do not necessarily think that is a bad thing, because children should have that right. That is a personal opinion.

Mr BATT - From a purely bureaucratic point of view, we are happy to have whatever registers the Government decides but note that they are quite expensive to run.

Mr WILKINSON - Are there any examples that we could get hold of in relation to the type of register that we are speaking about?

Mr BATT - In relation to surrogacy?

Mr WILKINSON - Yes.

Mr BATT - It is difficult because most people conceive of a register as being a large, leather-bound book where you make entries. That is traditional. We have some of those that you are welcome to look at in Births, Death and Marriages, with slightly tatty corners and they are still in use. But modern registers are, in fact, an electronic register. If we are talking about a surrogacy register, it would simply be fields in a database and it is not a tangible thing. So the answer is no, it would be difficult to look at it. We can produce reports and we can do searches and print certificates from it but it does not exist in time and space.

Mr WILKINSON - Do you know of any other jurisdiction that has this in place?

CHAIR - Are you talking about a register of donors?

Mr WILKINSON - No, a register of surrogacy arrangements.

Ms OWEN - Yes, Victoria and ACT in different ways. Victoria also have the additional voluntary donor register and I believe people can apply for information from that register. It has not been in place that long, so I do not know too much about it. The ACT, I believe, have had the arrangement for surrogacy a bit longer, but as far as I am

aware they do not release any other information other than updating the original birth record with a parentage order, which is just the intended parents.

Mr WILKINSON - But they have a record of who all the parties are?

Ms OWEN - Yes, they have the record but they do not have any additional information. It does not extend to donor information.

Mr WILKINSON - So Victoria is the only one that extends to data information?

Ms OWEN - I believe so.

Dr GOODWIN - On a voluntary basis.

Ms OWEN - Yes.

Mr WILKINSON - So there is a document which notes the interest, if I can call it that, of all parties. Then if that child is a surrogatee, that child is able to go to a body, I do not know which body as yet, and say, 'I think there is some more information in relation to this; I would like to explore that'. If that child had other parents, that child then would be told, 'Yes, you have every right and it is maybe a situation where you can look further, but before you look further, by law we have to have you involved in counselling'. Then after that counselling session it is up to the child to decide whether they want to be introduced to their, for want of another word, 'real' parents. Should there also be a body in place, like the adoption process, who can assist that child to meet the parent? If the parent is going to say no then the parent can do a lot of things not to do it, obviously. Does that sound attainable, forgetting about the policy, for that type of process to occur?

Mr BATT - From the registry perspective, that process could occur with the registry as it is designed at the moment. We would not need to make any changes to what is being proposed in this bill in order to accommodate -

Dr GOODWIN - Would it involve a significant impact on resources?

Mr BATT - Not for us because we will simply have the information in place and then if there was another body there then at the request of that body we would provide the information to that body. I do not think that it entails any additional work.

CHAIR - You did mention cost. It is adding a few more data fields.

Mr BATT - I know that; I am saying that in terms of having a donor register.

CHAIR - Oh, right.

Mr BATT - I am just saying that when you are looking at a big register then that might be -

CHAIR - I do not think that we are going to have a big register of donors in Tasmania to be quite honest.

Mr BATT - True.

CHAIR - With only 500 000 of us all up - and a fair few of those are not producing anything.

Mr BATT - We are only a small office.

Laughter.

CHAIR - And only a few of those who are producing will donate.

Mr BATT - I am just nervous about committing to anything that involves cost.

CHAIR - We are not asking you to commit to anything. I do not think that it would be a huge register, to be honest.

Mr BATT - We were not anticipating that a surrogacy register would be enormous either. I would not have thought so.

Ms OWEN - It is the set-up costs to establish the fields in the database and develop any forms that you need to do which you need to do whether you have one donor or 100 000. So there is a certain amount of cost involved whatever.

CHAIR - Most of that would be managed with the court process because when the child is born the parents fill out the notification of birth, the midwife fills out her form to make sure that gets sent in, because a lot were slipping through the net, as we know - not anymore.

Mr BATT - Not so many.

CHAIR - And then that is the end of that part of responsibility then it becomes a matter for the court.

Mr BATT - Yes. Once we get the order then we just simply process that. There is not a lot of decision-making from our end. With something like a donor register you would need to verify the facts; there is a little bit of work around it, looking at the documentation and verifying it. I agree, it is not going to be an enormous register.

Mr HARRISS - If we were to go down a path like Jim has been talking about, with the surrogate child exercising some sort of right to access information as to who the birth parents are, you mentioned counselling. What sort of counselling? What sort of matters are raised in counselling for the adoption process? If a kid wants to find out who their biological parents are, what kind of matters are raised, so the kid can then make some assessment as to whether they can exercise that - let us call it - a right?

Mr BATT - We do not provide that counselling so I do not think that it is appropriate for us to answer. It is not part of the service we provide and I would not like to presume to describe what would be a quite valuable service.

Mr HARRISS - Are we getting form evidence from anybody in that area?

CHAIR - Not at this stage, but we certainly can.

Mr BATT - I think that would be more appropriate than my perspective.

CHAIR - Part of the process at the moment is identifying who else we need to speak to about, firstly, fleshing out what could work and what might work better in the interests of the child which is where our predominant focus is. Not ignoring the needs and rights of other people and individuals involved but once we establish that then we may need to talk to other people involved in that process. Is it through Centacare that most of the counselling is provided through the adoption process, do you know?

Ms OWEN - Adoption Services in Health and Human Services have a dedicated unit.

CHAIR - Right.

Mr WILKINSON - Are you able to give us any information at all as to how many voluntary names have gone onto the registry in Victoria over the past 12 months?

Ms OWEN - I do not know, I could possibly find out, but I do not know.

CHAIR - We could follow that up.

Mr WILKINSON -Because in relation to adoptions within Tasmania it is not a lot each year is it? Last year was it six?

Ms OWEN - It is not very many at all.

Mr BATT - It is not a lot across Australia anymore, is it?

Mr WILKINSON - Is that is adoptions within Australia, or outside Australia as well, international adoptions?

Ms OWEN - There are only two or three within Australia and then there are a few more international.

Mr WILKINSON - That is Tasmania-wise.

CHAIR - It is a very rare event these days to have a baby come up for adoption in a maternity ward. It is quite special when it happens.

Mr BATT - I think most would be overseas adoptions.

CHAIR - It is becoming somewhat less because of the challenges with overseas adoptions - a fair comment or not?

Mr BATT - My understanding is that most overseas countries are not all that supportive about overseas adoptions for fairly obvious reasons such as cultural dislocation. It makes it all a little bit harder

Mr WILKINSON - Is there anything else you think we should be looking at that we haven't raised with you - not a policy thing, just a factual thing that you believe with the job at hand would assist us one way or another?

Mr BATT - I think the counselling service would be one to talk to. Clearly it would also be valuable to talk to other jurisdictions already providing the services.

Ms OWEN - The Victorian Registry has a register and have been recording voluntary information.

Mr BATT - They are the obvious one and I can't think of anyone else.

CHAIR - Would either of you like to add anything more?

Mr BATT - I think I have said all I need to say. It has been a fairly thorough discussion.

CHAIR - After talking to others there may be questions that we want to come back to you on. Thank you for your time today. It does help to talk about the practicalities with people who do the practical things. As much as we can have a chat and think it is an appropriate way to go and to work in the best interests of the child, if you tell us that that would never work and why that obviously changes things. It has been a useful discussion.

Mr BATT - I'm glad we are able to assist.

THE WITNESSES WITHDREW.

Professor JENNI MILLBANK, UNIVERSITY OF TECHNOLOGY, SYDNEY, WAS EXAMINED BY TELEPHONE.

CHAIR - Hello, Professor Millbank, it is Ruth Forrest speaking, I am the Chair of the committee. Just to introduce you to the members of the committee, I have Jim Wilkinson, Vanessa Goodwin, Paul Harriss and Greg Hall and the media are here listening as well. We do not actually require you to swear the oath because when you are in an interstate jurisdiction we just take the evidence from you, so it is not sworn evidence, but we may use some of your evidence in a report that we will prepare at the end of the process and we just need to make you aware of that.

Prof. MILLBANK - Of course.

CHAIR - We received the article you sent us. It is one of your publications and I am sure you have written many more. We sent you an e-mail outlining the areas we wanted to cover with you, so would you like to make an opening statement broadly initially?

Prof. MILLBANK - Sure. I will say a couple of words. Thank you for inviting me to give evidence to your inquiry. My areas of expertise are family and relationship law and reproductive technology law broadly. I have had a lot of experience working on legal recognition models for non-traditional families, particularly families where there are non-genetic parents, so same-sex families and step-parent families, and more recently have been working on issues with surrogacy families, including international surrogacy. As you said, I have sent you a recent publication looking at the new Australian regimes and I have also had some input into the development of the Australian regimes through evidence and submissions that I have made to the Federal inquiry into the Family Law Reforms in 2008. I also gave a submission to the Queensland inquiry and the New South Wales inquiry. However, this is my first contribution to the Tasmanian debate, so I am sorry I am making my contribution belatedly, but I suppose it is a case of better late than never.

The gist of what I would argue today is that although the harmonisation moves in Australia are perhaps quite optimistically called 'harmonisation' in the sense that there is obviously quite a degree of divergence in the detail across the various States, that the basic premise that Australian jurisdictions have followed is modelled on the UK surrogacy law. That is a post-birth consent-based process for the transfer of legal parentage from the birth mother and her partner, if any, to the intended parents. I have argued that that is basically the right model and that is a sound model. That model ensures the informed and continuing consent of the birth mother by making sure that she has to consent to the process after the child has actually been born. That also has the advantage of giving her or enhancing her autonomy and control of the pregnancy and birth process, and allowing for an assessment of the child's best interests after the child has come into existence. I think the basic model is sound and I think that the Tasmanian bill largely reflects that model.

Where I think the Australian approach has failed has been in not including sufficient discretion and flexibility to the court to deal with circumstances of mistaken non-compliance or inability to comply with the various legislative requirements. I have to say I think that the various States have become carried away in wanting to include more

and more detailed substantive and procedural requirements in the legislation in the hopes of perfecting a surrogacy regime that looks in the abstract as if it will guarantee good results. My basic argument to you today is that you cannot set those things in stone in advance and really the aim of this kind of legislation is setting down a basic framework and some goals for outcomes and some goals for process, but leaving some discretion to the court to still grant legal parentage orders in cases where not every requirement has been fulfilled, but that the orders are still clearly in the best interests of the child and/or there are exceptional circumstances that justify that.

I have a short list of notes here and we can talk in more detail about them as we go, but -

Mr WILKINSON - Jenni, do you mind if I just break in for a minute there? Sometimes, as you are aware, courts are saying the legislation is empty in relation to where we go from here and therefore at times they are saying you have to give us some indication of the areas in which we should go. When you are saying that there should be a discretion and that discretion, I take it from what you are saying, should be fairly wide, what areas are you talking about, just the paramount interests of the children or what?

Prof. MILLBANK - If you look at the case law from England - and England is really where I think we should be looking, given that they have had this kind of provision in place for nearly 20 years now - what you have is a series of cases there where the courts have said that their hands are tied in getting orders when children are older. Tasmania does not have that problem because you have included a discretion to give orders when a child is over the age of six months and I think that is right. I am actually arguing that that kind of discretion should be in the act more broadly so you can say you should have counselling, you should have legal advice and I would add introducing a requirement of writing is also a good thing to have.

Mr WILKINSON - A written agreement do you mean?

Prof. MILLBANK - Yes, that is one of the few areas where I do think that the bill could be amended and that would be useful because it helps people to spell out what it is they think they are agreeing to. It is not that you are binding anyone to it, it is about clarifying expectation but again if that has not been done I still think you have to leave a discretion with the court to make the orders anyway. The English courts have that discretion in cases where, for example, a payment has been made so they prohibit payment quite clearly but if a payment has been made they can still give the parentage order where it is clearly in the child's best interest to do so and there have been a number of cases where they have weighed up parliament's intention and policy considerations against what is going to be good for that child in those circumstances and held that they are still justified in making the order.

Mr WILKINSON - What should be in the written agreement?

Prof. MILLBANK - I think it is not helpful to be prescriptive; I think that simply requiring that the arrangement be evidenced in writing is a useful thing. I do not think you should have a checklist of things to be included.

Mr WILKINSON - Should there be a basic agreement, though, and then people could, if necessary, add to that basic agreement? I suppose my question is that if there should be a basic agreement what should be in that agreement?

Prof. MILLBANK - It is really just reflecting what people have agreed to which is that they are going to attempt to conceive a baby and the intention is that that baby will be handed over to the intended or commissioning parents after birth and that is really the gist of it. The other thing that I would stress is that when people are undertaking surrogacy arrangements in Australia overwhelmingly they are doing so through fertility centres and those centres have their own counselling requirements and ethical requirements which are pretty arduous actually. They make sure that people have really thought through what they are doing and what the consequences of that are so simply asking people at the conclusion of that kind of process to set down what it is they have agreed I do not think is too much to ask. Where I would say it becomes too onerous is where you require it to be evidenced by lawyers and be in a particular form. I think really the requirement of writing is just about helping people be clear about what it is they have agreed.

CHAIR - Jenni, just taking up on that point, you made a comment about you need a sound model that is informed and continuing so that all parties involved have some agreement before the process begins and then continuing through until after the baby is born. The written agreement upfront clarifies those points. Do you have a view that that should be a type of registered agreement so that it can be registered with the courts so that then the court can be satisfied that the best interests of the child are being considered at the outset? Obviously if things change during the pregnancy with this process you could facilitate further amendment to that agreement?

Prof. MILLBANK - I do not support a process of going to a court beforehand because I think that necessitates in fact two court applications and two court processes and I think that is overkill. I also think that you should bear in mind that many surrogacy arrangements do not produce a child so there is no child's best interests to worry about. A lot of people go through this process and it does not work, the woman does not get pregnant or they will realise at some point that it is not working for them or there is miscarriage or other mishaps along the way. I think every procedural step you put in place is going to add to the cost and every additional procedural barrier and every additional cost is a perverse incentive for people to go offshore.

CHAIR - People entering into a surrogacy arrangement enter into it with the intention of having a child, so one would assume that is going to be the outcome. Whether or not that happens, a married couple could try for years and still not achieve a pregnancy, and that could happen with a surrogate. If a child's interest is paramount here, wouldn't a registered agreement upfront be as appropriate as leaving it until afterwards?

Prof. MILLBANK - No, I do not think so, because it is an intrusion into people's reproductive autonomy. I think it is legitimate for a court to oversee a process whereby parentage is transferred of a child who exists. I do not think that approving people before they have even tried to get pregnant or approving to attempt fertility treatment is a justified intrusion.

CHAIR - Except here we are interfering in what people would possibly consider to be a normal process of having a child, creating a child through a process that is not the usual

way, because you are using other people to effect that. When we step outside that boy-meets-girl and they decide to have a family and go through the usual process, you don't think we need to have some protection around that, because we are introducing a number of complexities here?

Prof. MILLBANK - No, I don't because there are many other ways to achieve that end so people can undertake traditional or genetic surrogacy through sex or through home insemination and people can pursue gestational surrogacy through travelling interstate or travelling overseas. So what you, the Parliament of Tasmania, can control is the process of transferring parentage through a court order. You cannot control the circumstances in which people conceive, and I would suggest that you ought not try.

Mr WILKINSON - In relation to your comment where you said different States got carried away, I take it you thought they were being too prescriptive in what they did. Can you give us some examples of that, please?

Prof. MILLBANK - For instance, I would say it is very helpful that people have counselling. I think it is very helpful if people are mature and considered about the process, but as soon as you say they have to be over 25 or they have to have a lawyer's certificate that they have had legal advice and understood it, or that the counsellor has to approve them as suitable candidates for surrogacy, then I think you have crossed a line. Age limits and lawyers certificates are examples of what I would call crude legislative proxies for informed consent. I think pretty much everyone would agree that informed consent is a critical component and something that you would always want to see in a surrogacy arrangement, but I would suggest that you can't legislate for that by using broad categories. You have to have facilitative processes through information-giving and counselling, and a case-by-case assessment of whether that maturity and that capability for consent and giving of consent is actually present. So an age limit of 25 or a banning of genetic surrogacy or a requirement of a lawyer's certificate I would say are all examples where you are trying to guarantee something through a broad category that is much better assessed on an individual basis.

Mr WILKINSON - Depending on who the counsellor might be and that probably is an area I question. I hear what you say. If there is informed consent, informed consent may be something different depending on who the counsellor might be. What do you say to that?

Prof. MILLBANK - Again I would say that we have well-established practice in Australia. We have professional associations and infertility counsellors who are very thoughtful and very experienced on these issues, and clinics will turn people away if they are worried that they do not know what they are doing. Again, your alternative is people going overseas to clinics where there is no counselling whatsoever and a far less rigorous concern for the informed consent of all parties. It is all relative and I think it is about doing the best that we can. Having a requirement for counselling is a good thing. Having professional accreditation of those counsellors is a good thing, but at the end of the day having a post-birth consent-based mechanism in court ensures that if the birth mother changes her mind, and she has made a mistake, then the child should almost certainly I would say remain with her.

Mr WILKINSON - In relation to the informed consent, though, as you would well know, you can come before different judges in a Supreme Court or an Appeal Court and each one of them might have a differing view in relation to a certain matter. Depending on which judge you come before, or magistrate, it would depend on how that person would make their finding. Do you think there should be some type of definition in relation to what informed consent is? If that is the case, is there any jurisdiction that has that definition.

Prof. MILLBANK - No. The court has to assess that everyone concerned has consented. That is certainly not a concern that I have with any of the legislation around Australia. They would take affidavit evidence from the parties concerned. They would take evidence from the counsellor, if there was any doubt. If there is doubt about the birth mother's consent, she can change her mind. Likewise she could apply to have the orders re-opened if there was any suggestion that she had been pressured or coerced into an arrangement.

You have to bear in mind too what the alternatives are. If you don't have a State-based regime that is sufficiently accessible to people in order to transfer parentage, then what you will have instead, and what you do have in cases of international surrogacy, is people going to the Family Court of Australia for parental responsibility orders, and their processes are even less tailored to the issues that you want to explore. It is about finding a balance between the things that concern you and making a regime that is going to be flexible and accessible to work.

Dr GOODWIN - In relation to the age aspect, you were suggesting you were not in favour of having an age limit but leaving that up to the discretion of the court in a particular case. Is that the way you feel about that?

Prof. MILLBANK - Yes, it is. I know that some jurisdictions have said 18 and some have said 21, and some have said 21 and then amended it to 25. At the risk of being facile, you can have an extraordinarily immature 27-year old and a very mature 24-year old. I do not think that kind of limit is meaningful.

Just to backtrack for a second on the question of consent, one of the changes that I very strongly suggest to the Tasmanian bill is on the provision that you have replicated from Western Australia, which is the ability to override the consent of a birth mother when she is engaged in the gestational surrogacy and at least one of the intended parents is a genetic parent. That provision is absolutely unjustified and is anomalous in a scheme that is meant to be a consent-based scheme. To say, 'Oh well, it is not her baby so we can override her consent' is a real negation of the significance of gestation and birth and that puts her in a very vulnerable position in terms of the management of that arrangement.

CHAIR - So you think that bit should be taken out - clause 14(5)?

Prof. MILLBANK - Yes, and 19(5) for previous arrangements. I absolutely think that should be removed. Western Australia went off on a frolic of its own. If you read the legislative debates from Western Australia you basically have a small cohort of MPs there who believed that gestational surrogacy should be an enforceable arrangement and that birth mothers should be compelled to relinquish children. I think that is anathema in terms of the approach that we are building on here.

CHAIR - I know it was debated at length. I agree there are circumstances where the birth mother may have a very difficult pregnancy and birth, and even require a hysterectomy. I know it does not happen very often these days, but it does occasionally, such that she could never have another baby herself, but the court could order that child to be given up, so it is an issue.

Dr GOODWIN - It is a difficult one because in that circumstance she does not actually have a genetic link to the baby, but the intended parents do.

Prof. MILLBANK - There are two different issues. One is legal parentage and the other is who the child lives with and spends time with. All you would be doing is saying you cannot strip her of legal parentage. You are not determining where the child lives or what happens next. That is up to the Family Court and that is irrespective of legal parentage.

CHAIR - When you say 'legal parentage' we are talking about the rights and responsibilities that go with being a parent of a child such that you provide for them. If they need a medical procedure you provide consent until they are 14 years of age and on it goes; that is what you are talking about. Are you suggesting that I as the birth mother, and Vanessa as the intending mother, she might be caring for the child but I have not relinquished the child because I could not give it up, but I can still make decisions about that child's surgery whereas Vanessa can't, because I am the legal parent? Is that what you are saying?

Prof. MILLBANK - I think you are coming up with an unusual example where you have relinquished the child but you have not consented to the orders; is that what you are suggesting?

CHAIR - That is what I thought you were suggesting.

Prof. MILLBANK - No. I am saying that if there is a dispute at birth and the birth mother refuses to consent to the orders, then that is almost certainly going to be because she intends to keep the child and wants the child to reside with her. The question of how to determine that shouldn't be played out in the context of State orders. It should be determined in the Family Court but based on the status quo at birth, which was that the birth mother is the legal parent until there is any decision to adjust parental responsibility.

CHAIR - Regardless of the genetic material that made the child?

Prof. MILLBANK - That is right. That is really, from my perspective, a value judgment that the contribution of genetic material is not as significant as a gestational relationship in the circumstances of having to relinquish a baby against your will.

CHAIR - I am not saying whether I agree or disagree with that point, but on what do you base that statement?

Prof. MILLBANK - Because I think that pregnancy and birth are extremely significant events and that in supporting and facilitating surrogacy my position is that it should only

be when the birth mother genuinely consents to that, and that genuine consent has to include an escape hatch, I guess, such that if she finds relinquishment is not possible then that cannot be compelled.

Mr WILKINSON - It is an interesting point you raise about the gestational relationship as opposed to the genetic material relationship, as we could call it. Are there any writings or literature in relation to what you are saying?

Prof. MILLBANK - The British research done by Olga van den Akker, Susan Golombok and a couple of others suggests that there are not significant differences in the experience of gestational and genetic surrogacy. That is at least in part because women who cannot relinquish a genetic child do not undertake genetic surrogacy. They know that about themselves in advance. So the women who can relinquish a genetic child will undertake genetic surrogacy and the ones who cannot will only undertake gestational surrogacy. In a sense the value and the meaning of genetic connection varies for people and as long as people understand their own limits and their own values then they have been able to undertake a wide variety of surrogacy relationships successfully. So there is not a significant difference, for instance, in the number of disputes or failed relinquishments that arise between gestational and genetic surrogacy.

Mr WILKINSON - But you are saying gestational takes precedent.

Prof. MILLBANK - No, I am saying that the birth mother's experience of pregnancy and birth should take precedence regardless of whether it is a genetic or a gestational surrogacy.

Mr WILKINSON - Yes, that is as I understood it.

Dr GOODWIN - You talked a bit earlier about the whole idea of informed consent but as I understand it you are not in favour of putting any maturity requirement or previous birth requirement for the surrogate mother. I wonder about someone who has not carried a baby, not experienced what it is like to actually be pregnant and to have that connection with a baby. I am in that position myself because I do not have children. I am struggling to see how someone could know what that is going to be like.

Prof. MILLBANK - I certainly take your point but equally it is not a guarantee. We have had one disputed surrogacy arrangement in Australia and that involved a birth mother who had had three kids already. The surrogacy arrangement was her idea and she repeatedly raised it with the intended parents over a three-year period, yet when she had the child she was painfully depressed, could not bear the relinquishment, missed the child, thought she had made a terrible mistake and litigated for two years to get the child returned to her. This was a case in the 1990s case Re Evelyn. You can hope that if someone has had children before then they know what they are doing, but maybe they won't. Equally, there might be someone who has never had children who does understand themself sufficiently to know this is something that they can do and can do well. As it happens a lot of the clinics do require or prefer that a woman already has her own children, has completed her own family, for reasons that include not just psychological readiness but also, as you said, the possibility that pregnancy can go wrong and can impair your future fertility, for example. I can see that it is a desirable element

but I would encourage you not to mandate it on the basis that you just lose that ability to make a case-by-case assessment.

Dr GOODWIN - I suppose one option is to mandate it but have the get-out exceptional circumstances clause, which has happened I think in a couple of other places, but your preference is to not mandate it at all.

Prof. MILLBANK - If it is a pre-conception kind of requirement I do not see how you can mandate it unless you set up an approval process prior to conception. In jurisdictions that already had State control over their fertility practices - Western Australia and Victoria - they have included surrogacy in that kind of machinery so that they can have pre-approval before people can access fertility services. If you do not already have that machinery in place I do not know how you would do it.

CHAIR - Jenni, your view was that the post-birth court process is the best. I put it to you that an upfront registered agreement process would perhaps deal with some of things we have just chatted about. How then do we deal with issues, if there is no registered agreement and process at the front end, such malformations of the baby? There may be a major malformation, like a severe spina bifida, or there may what some people would consider minor, a cleft lip, which can be repaired but obviously is a major thing when a baby is born. They are not the most attractive looking babies and they do require extensive surgery and they have a lot of feeding problems. It is considered minor in some respects but to a new parent it is quite major. Or it could just be a birth mark, for example, or multiple pregnancy. How do you deal with these things if you do not have some sort of agreement at the front end?

Prof. MILLBANK - As I said I do think that if you mandate counselling, and any responsible clinic would also mandate counselling, then that would be the kind of issue that people would have talked through and thought about. One of the really positive aspects of the Tasmanian bill is that it makes clear that the birth mother has control over the pregnancy. So if there was a multiple pregnancy or if there was a disability that is her decision whether to selectively reduce or whether to terminate or whether to proceed.

CHAIR - I was a midwife previously and I dealt with these things all the time. Everyone has this dream in their head of an ideal baby. No-one ever expects to go for their first scan and find a malformed baby and it is a complete shock when that happens. So everyone goes into it with a view they are going to have a perfect baby, so when you are having this up-front counselling you say that these things will be talked about, but the reality is that sometimes there will be problems.

Prof. MILLBANK - If you look at the kinds of counselling in clinics like Sydney IVF and the Canberra Fertility Centre that have done this work for more than 10 years, that is absolutely a standard thing that they would counsel about. It is on the checklist and they would spend a lot of time talking people through: what are your expectations? Who do you think is going to make this decision? What do you imagine is going to happen?

CHAIR - Both the surrogate parent and the intending parent will go into it assuming that the perfect baby is going to be the outcome and they might say, 'I definitely wouldn't want you to terminate a baby even if it had a malformation,' because that is not going to happen. That is the mindset. When they get to the 18-week scan and there is a major

malformation, then the pregnant mother says, 'I am going to terminate this pregnancy; I cannot bear to carry this baby,' whereas the intending parent would say, 'I am happy to look after that baby.'

Prof. MILLBANK - Either way, whether they have registered an agreement or not, that is going to be the birth mother's decision. I would say in that instance that a registered agreement could actually be more trouble in the sense that it could mislead people about what their legal rights and entitlements are. You cannot sign an agreement that says that other people have a right to enforce or prevent a woman having a termination. You just can't.

CHAIR - If an upfront registered agreement confirmed that, then at least everyone would know.

Prof. MILLBANK - But it would not be enforceable. There is Family Court authority that says that you cannot force a woman to have a termination and you cannot prevent her from having one either. It is her body.

Dr GOODWIN - I suppose our bill confirms that because it does -

CHAIR - It makes it clear that management of the pregnancy is with the pregnant woman.

Prof. MILLBANK - So in that situation the best you can do is have everyone talk about it and say what they want, and make sure they understand what the underlying legal position is in terms of her autonomy. I think your bill spells that out nice and clear.

Mr WILKINSON - You were talking about a written agreement at the outset; you believed that that would be appropriate. What should be in that written agreement?

Prof. MILLBANK - I would not suggest that you be prescriptive about it. You have your definition of what a surrogacy arrangement is in the legislation; I would simply add that that be written.

Mr WILKINSON - So it would be parties signing up pretty well to what is in our definition section?

Prof. MILLBANK - Yes.

Mr WILKINSON - That is all. Nothing else?

Mr WILKINSON - I do not think it is helpful to set out a prescription.

CHAIR - In 4(5) it says:

> 'To remove any doubt, it is declared that a surrogacy arrangement -
>
> (a) does not include an arrangement made after the birth mother becomes pregnant; but

(b) may include a variation, made after the birth mother becomes pregnant, of an obligation under the arrangement to pay or reimburse the birth mother's surrogacy costs.'

As I read that, the only variation that can be made to this agreement, which as the bill stands is a verbal agreement, but that could be changed to a written, is about how much the mother is going to get paid in meeting her costs. There is no room there to look at challenges that may arise during the pregnancy.

Prof. MILLBANK - But that is because it is a minimalist definition of what the agreement is. It is basically, 'You will have a baby and you will give it to me when you are done'. That is the agreement.

Mr WILKINSON - One could argue, maybe, it is already in the legislation so why is there a need for a written agreement?

Prof. MILLBANK - Yes, I take that point. Reducing it to writing is not to make it more enforceable and it is not to include any detail. It is simply to try to help people be clear about what it is they are agreeing to. For many years I have given legal advice to the gay and lesbian community about known-donor arrangements where men have given sperm to lesbian couples and they have had widely varying understandings of what those men's roles are going to be in those families. I have spent 15 years saying, 'Write those agreements down', not because they are legally enforceable, not because I believe they should be legally enforceable, but because they help people to spell out what they mean. People say things like, 'I want someone who will be involved', and one person means involved by getting together twice a year and the other person means every weekend. Getting people to write down what they mean helps spell those things out. Likewise, having a counselling process where some hard questions are asked about what those things mean helps spell them out. I am not suggesting that this is in any way a kind of enforceable contract. The requirement for writing is really just about directing people's minds to being specific about what they are getting themselves into.

Mr WILKINSON - Talking about same-sex couples having a child, what are your views in relation to the child. It seems strange that within Tasmania and I think it is in other States as well in relation to adoption that it is up to the genetic parent whether they want their child to know that they are actually the parents. That goes against the 1974 Family Law Act of course with the paramount interest of the child, because my argument would be that the paramount interest of the child is, if that child wishes, they should be able to know who their genetic parent is. What are your comments in relation to that?

Prof. MILLBANK - Is your question about surrogacy involving donor conception.

Mr WILKINSON - Yes.

Prof. MILLBANK - I think there is clear and growing consensus that donor-conceived people need the opportunity to access information about their genetic origins. Whether or not they ultimately do so, it is clear that being deprived of that opportunity has been experienced as very harmful. But, Tasmania does not currently have a register for gamete and embryo donations. When you do you would certainly include surrogacy conceptions within it if they included a donor gamete, but I do not see how you can

require that or introduce that just for surrogacy and not for every other form of IVF or assisted conception with donor gametes.

Mr WILKINSON - The only thing would be that we are looking at the surrogacy legislation now. My view is that paramount interests of the child should be what we are looking at and should be the underlying factor in all of this, therefore let's fix it up with surrogacy and then the others can come on board at some later stage when the legislators apply for it.

Prof. MILLBANK - Under the NH&MRC and ART guidelines and accreditation process now any donor conception through any clinic requires that the donor be prepared to have their identity released when the child is 18. In States like New South Wales we keep that information now on a State-held register. In States like Tasmania that information is held by the individual clinics.

CHAIR - Of which there is only one now.

Prof. MILLBANK - Really, what you could do is just ensure that that information can be transferred across to a register when it is created.

CHAIR - Are you saying that New South Wales has a donor register?

Prof. MILLBANK - Yes.

CHAIR - Victoria?

Prof. MILLBANK - Yes.

CHAIR - Are they the only two?

Prof. MILLBANK - Western Australia now has one, but that is quite recent, and South Australia has introduced a voluntary register only.

CHAIR - Are the others mandatory?

Prof. MILLBANK - Yes.

CHAIR - Even Victoria?

Prof. MILLBANK - Victoria was the first - since 1998. So where you already have the register, surrogacy just becomes a part of it. It is just another form of donor conception. Again, those record-keeping practices are already in place in Australia. Whether the records are kept by the individual clinics or whether they are kept by the State, those records are preserved and are seen as significantly important pieces of information. If people are travelling offshore to other countries, those countries are practicing anonymous donor conception and the opportunity to retrieve that information at a later time is a lot lower.

Mr WILKINSON - Jenni, what do you think about a register place being Births, Deaths and Marriages where you have your initial certificate, your birth certificate, and then there be

another certificate, that other certificate taking into account what has actually taken place and you give the ability to look what is behind the original certificate only to certain people?

Prof. MILLBANK - That is exactly what will happen under your act with surrogacy because you have your original birth certificate with the birth mother and their partner and then the court order would create a second birth certificate, so that is already there. I am more cautious about having Birth, Deaths and Marriages control information about donor conception. I think that information is probably better held by a fertility treatment authority or an agency that has provision of counselling services and is about facilitating that flow of information, rather than just be a record-keeping agency. I do not actually support the idea of second birth certificates for donor-conceived people, but I do support the measure that you already have in place, which is second birth certificate that reflects the surrogacy transfer process.

Mr WILKINSON - In relation to whether a child can get access to that, do you believe that before that is attained the child should first have counselling?

Prof. MILLBANK - I think they should have the opportunity. Again, it is not about compelling people to do things. The model I would most strongly promote is a facilitative role for government in providing information and assistance, rather than setting down rules and prohibiting things.

Mr WILKINSON - It should be encouraged, though, shouldn't it?

Prof. MILLBANK - Yes, I would say so. Until the Infertility Treatment Authority was recently abolished in Victoria and replaced with another agency, they did have on-site counsellors who job it was to assist young people when they were trying to find their half siblings or their donor.

CHAIR - Any other questions from any other members?

Mr HALL - All jurisdictions have different legislation. Which one in your view is perhaps the 'best'?

Prof. MILLBANK - I think they all have plusses and minuses. I would group Tasmania with Queensland and New South Wales broadly as more facilitative models and less intrusive models, with some exceptions. The model you largely have in place is the better of the Australian models, but I would still say that the British model with the inclusion of more flexibility and more discretion would be the one that I would urge.

Mr WILKINSON - In relation to that Jenni, in order to make ours a better bill are there any sections that glaringly need amendment?

Prof. MILLBANK - As I said I would remove clauses 14(5) and 19(5), which override a gestational surrogate's consent. I would take the model that you already have in 13(2), which gives you the ability to make orders despite certain conditions not being satisfied. That provision only relates to children being over the age of six months. I would take that wording and apply it to part 4 more broadly. Set all the pre-conditions you have but leave the court with that ability if there are exceptional circumstances and it is in the

child's best interests. You have that catch or provision that you are not just limiting it to how old the child is. You have that ability if other conditions have not been met as well.

CHAIR - Thanks, Jenni. Did you want to make any closing remarks?

Prof. MILLBANK - No thanks. I think this has been a thoroughgoing discussion and I appreciate your including me in it.

CHAIR - Thanks for taking the time.

DISCUSSION CONCLUDED.

Mr STEPHEN PAGE, HARRINGTON LAWYERS, WAS EXAMINED VIA TELEPHONE LINK

CHAIR - Stephen, we will be recording the evidence you provide to us and we may use some of that in our report once we get to that stage.

Mr PAGE - I expected it would be all on the record.

CHAIR - The submission you provided, which is very helpful and quite extensive, are you happy for us to make that a public document?

Mr PAGE - Absolutely.

CHAIR - Thank you for making yourself available. I know that Sam Everingham from Surrogacy Australia suggested you as a good contact because of your experience in dealing with this sort of legislation in a number of jurisdictions. It might be helpful if you could give us an overview of your views.

Mr PAGE - The starting point for me is that it is a crying shame there is no national legislation. We will hopefully soon have seven sets of legislation for each State and Territory, except for the Northern Territory, dealing with surrogacy and unfortunately when people are interstate they then have to deal with different rules in different States. I have clients and one party might be in a different State from the other side, and I then have to consider the laws in each State to ensure that they are not committing offences. There seem to be different tests in each State about who is eligible and who is not, and it seems that all it is really achieving is driving up the costs of surrogacy.

CHAIR - As far as getting that legal advice?

Mr PAGE - Yes, absolutely, and adding grief. Red tape unfortunately does that.

CHAIR - Be that as it may I suppose we have six different versions now anyway.

Mr PAGE - That is right.

CHAIR - And the decision has been taken by the Tasmanian Government at the moment that we need to have legislative framework around this. Our job in this committee is to look at the most effective model for Tasmania, in spite of the fact that it will be different from every other State in some way or another.

Mr PAGE - When I looked at the Tasmanian bill as an exposure draft many months ago, what struck me was that in most ways the bill was fine. The real concern that I might have had about the bill was what Western Australia and Victoria have done, which is to have a State regulator. Although it is fine and dandy having a State regulator, what it does is immediately increase the cost for those who are going through surrogacy because once you have bureaucrats performing a job, they then find a reason to perform that job, and the reports I have had from people undertaking surrogacy in Victoria in particular is that it is a slow and costly process. It certainly seems to be considerably more costly than that in the ACT, Queensland or New South Wales. I certainly would not want to be burdening the taxpayer of Tasmania with a regulatory authority of that kind.

Dr GOODWIN - On that point of being significantly more expensive, can you give us a bit of an idea of what sort of difference you are talking about?

Mr PAGE - Unfortunately I have not been given specifics by the people who have gone through it, but certainly what has been put to me by a number of people working in clinics and a number of clients and those who have gone through surrogacy, is that the process in Victoria in particular - and I am more familiar with the Victorian one than WA - is considerably more expensive than doing it interstate and it is considerably slower. There appear to be a series of roadblocks. The first requirement in Victoria and WA is that you must have your counselling and legal advice and your surrogacy arrangement in place. Then you have to run it past the regulator and you have to have approval from the regulator. In Victoria it is the Patient Review Panel and only when you had approval from the Patient Review Panel can you then proceed with the next stage, which is to then commence treatment. So you cannot have treatment at that point. Victoria also requires a criminal check and a child safety check. Both of those have to be undertaken first. Once you have got past that and you can undertake treatment, then you go to the final stage in which hopefully the child is conceived, carried, born and then you have a parentage order made. What I have heard about the last stage in Victoria it that is straightforward. It seems to be the same as the other States but it's that process of getting it past the post from the review panel.

CHAIR - Can you talk a bit more about the Patient Review Panel because there has been a bit of a discussion within this committee that maybe some sort of agreement needs to be ticked off, like a registered agreement through the court process, at the front end so that everyone is clear that the child's best interests are served. Basically at the other end it is a formality if nothing changes.

Mr PAGE - I must say I am comfortable with the process that exists. There are variations of the process in New South Wales, Queensland and the ACT. ACT surprisingly does not have a requirement for a written surrogacy arrangement. You immediately think that is a bit of a worry but the difference between what might happen in the ACT and what is likely to happen in Tasmania is that in the ACT we have a smaller population, we have one city, one IVF supplier and one company - the Canberra Fertility Clinic - which is the sole provider of surrogacy services there. The ACT legislation requires that for someone to undertake surrogacy, to obtain a parentage order in the ACT, not only must the person be resident in the ACT, because each of the States have this residency requirement, but the procedure must be undertaken in the ACT. So if you live in Belconnen, for instance, you cannot go to Sydney for your surrogacy or you will not get a parentage order.

The Canberra Fertility Clinic requires the most extensive counselling and legal advice to be undertaken before any surrogacy arrangement can proceed past its ethics committee. It is a very rigorous process. I have had clients who have done it and gone through that clinic. Unlike the procedure in New South Wales and Queensland where the advice that lawyers give clients before the surrogacy arrangement is signed, and that advice remains privileged as it does for everyone else going to see a lawyer, in Canberra they actually require the written advice that you give the client to be supplied to the clinic. You have to cover certain points. You have 10 points to cover or thereabouts. They have all to be covered in the advice or it will not get past the ethics committee.

The idea of there being a written surrogacy arrangement I think is by far and away the most important part of any change that is required for your bill. The reason for that is very simple. If it is written people then can focus on it. They can look at it; there is certainty as to what people are agreeing to. There is then certainty. It is one thing to discuss matters in counselling with the counsellor, but it is another to go to a lawyer and say what does this actually mean. If it is an oral arrangement, what can the lawyer advise about that? The lawyer can say the usual things about surrogacy, what can go wrong medically, what can go wrong with the surrogate changing her mind or the intended parents changing their minds. They can certainly cover those concepts but cannot be specific about what you have agreed upon. This idea of having it in writing is so important. In Tasmania I would anticipate there is more than one IVF supplier and likely to be more than one surrogacy supplier.

CHAIR - I think there is only one, Stephen. There were two but it is just in Hobart now.

Mr PAGE - Okay. That might make it simpler.

Mr WILKINSON - I agree with you. I know when I first looked at the bill, 'oral' seemed to be a bit open and it should be written. That being the case, what should be in that written agreement?

Mr PAGE - It is whatever the people agree to. There is a provision in the Queensland act which, when I first read it, was one of those so-what moments. It says in the Queensland act that a surrogate has the right to manage her pregnancy as she sees fit. I looked at that and I thought that does not tell me anything as a lawyer; I already know that. When one looks at the other acts around Australia, from recollection they do not actually say that. When I act for surrogates I say, 'Look, there are all these provisions in this arrangement which say you should manage your pregnancy in this particular way. You should make sure you don't smoke, you don't drink, you follow doctor's orders, you authorise your medical information for the doctors, all those things', but what I think should be in there is a provision that says 'you manage the pregnancy as you see fit'. Suddenly the surrogate is empowered because it is in this section of the act and it is something that should be emphasised. Surrogates are typically family members or friends. Sometimes it is not; it might be someone who had a desperate yearning to be a surrogate and somehow they have managed to contact each other. For these women it is particularly empowering to see that there in the document.

Mr WILKINSON - When you draw up your documents, what type of thing, though, do you put in? I know it is what is agreed between the parties.

Mr PAGE - There are things about the providing of information. I like to set it up as a deed or similar to a deed. I normally have recitals at the beginning - a statement of agreed facts. They are things like, for example, Jim and Jemima knew that Fred and Myrtle desperately wanted to have a baby and were unable to have a baby, so Jim and Jemima, out of an act of love, offered to Fred and Myrtle to have a baby for them via surrogacy. That is the kind of thing, just setting that factual background at the beginning of it.

When one looks at the substance of the document, the framework in Queensland and New South Wales is that the only legally binding part is the payment of those expenses or the reimbursement of those expenses if the baby is not handed over, or the consent

order isn't made. When one thinks about going to have a baby, how do we try to build trust between these parties and encourage them to get along. My younger son recently turned 18 and it made me reflect. My first memory of him was to touch his mother's stomach and feel him kick. So far as intended parents are concerned, they would like to have that feeling. They would like to go to the scan when the scan happens. They would like to be with the surrogate when all the medical action occurs, all the checkups and then some discussion about the birth.

I have certainly had one surrogacy arrangement where the surrogate was insistent that the intended parents not be present at any occasion on which she was nude or partly nude, which when you start to think about it was every occasion when she went to the doctor. Something like that I think is negative, more an education for lawyers who are preparing these documents to say, what are we actually talking about here? We are talking about a natural process of pregnancy and childbirth, usually mixed in with high-tech medicines via IVF. Doctors require certain tests to be carried out, so we might make mention of certain tests and then at the end there are things like whether the intended parents are going to be there at the birth. Normally I would say they should be because this is going to be their child and there ought to be this bond of some kind between the surrogate and the surrogate's partner, assuming she has one, and the intended parents because they are all in this together. There is all this building of trust, communication and commitment during the course of the surrogacy. One would hope after the child is born that there is some ongoing relationship by the surrogate and her partner with the child and the child knows where he or she came from, so there will be a statement in the document about how they ought to foster that. Then there will be something like, is the child going to be breastfed? I have one at the moment where the surrogate intends to breastfeed and another where the surrogate may be or will be expressing. Ordinarily you would not have the surrogate doing that because the great fear of intended parents is that the surrogate, once breastfeeding, will form the bond with the child and therefore there will not be any desire to hand over the child, but that is what people are agreeing to.

CHAIR - It is in the best interests of the child to be breastfed.

Mr PAGE - That is right, but if the child is breastfed by the surrogate then the fear is that the surrogate is going to keep the kid. Another one is to discuss the hospital. I have found it challenging as a lawyer to have to deal with concepts of conception and also choice of hospital. These are the practical realities that people have to talk about and it is not necessarily what is in the arrangement. The written surrogacy arrangement in many ways is merely reflective of the broad agreement. It is only a portion of the broad agreement that the parties have entered into. There is the idea that all parties go to the one counsellor. They do not necessarily have to because it may be impractical for some reason, but it is actually a good idea that they go to the one counsellor because, even if they are not all together in the same session at all times, they have this opportunity to air these matters, discuss them thoroughly, and make sure that they are all of the one mind. That is, I think, the most important aspect.

The other is that they have independent legal advice before they enter into the deal, whatever the deal is, whether it is written or oral, and preferably written. I think that is also important; it is an extra check and balance. There have been a number of cases that I have had where the counsellors have discussed some or often many aspects of surrogacy, but some haven't been discussed so the lawyer going through it is certainly

being very thorough about it. Other times the counsellors raise the matter with the parties and there has been one of those Chinese whisper moments where the counsellor said A and the clients understood B. It is the lawyers getting the clients back on track saying, 'Well, no, this was obviously what was discussed and here is my advice about it.'

I am sorry that I have given such a long-winded answer to it but every matter is different. People have different expectations in each surrogacy arrangement about exactly what they want. There are certainties about things like medical intervention. There has to be this recognition that the surrogate has control over her body. I have seen provisions, if there is a medical need for it, about whether there needs to be a termination, but again it has to be subject to medical advice and again subject to what the surrogate decides. It is her body.

CHAIR - Did you want to go through the Queensland and New South Wales legislation? You said they were the less costly processes.

Mr PAGE - That is because there is no State regulator, but you have that process. The counselling and legal advice is the real key to making sure that this actually works.
About a month or two ago I bumped into Linda Lavarch, who was this State's former Attorney. Later she chaired the committee of inquiry about altruistic surrogacy in Queensland. I knew her at university and she was a friend of mine way back then. We just happened to bump into each other and I said to her it is interesting how these laws are written this particular way. She said the intention was after a couple of years to review it to see how the laws were going because the intent was, at least at the beginning, to have a very strict framework so far as the clinics were concerned to see whether the clinics were able to manage it, that surrogates and intended parents were all protected in the process, that it was all a very clear process. Then if it is working and there needs to be some relaxation of certain aspects because they are too tight, to consider them at that point.

Mr WILKINSON - In the Tasmania act, Stephen, forgetting about that written agreement up front, is there any deficiency or any flaw there which you say shouldn't be there?

Mr PAGE - No. You have my written comments. The one concern I had was about that brokerage clause that unintentionally means that if people are intending to go and look for commercial surrogacy overseas - which I do not encourage people to do - then as I read that bill they have every means of unintentionally being caught up in that section. Because they are compiling a list on their computer of overseas commercial surrogacy clinics with the intention of making payment, then suddenly the next you know they have committed an offence. I think it is clause 39(2)(c). It is just a provision that says for the intention of making payment or receiving payment you compile a list. There is no extra-territorial aspect in the bill as it stands but that provision really does provide for an extra-territorial element to it. It may be that is what the Parliament wants but it is not apparent on the face. It certainly was not stated in the second reading speech. There is no reference to it.

CHAIR - Do you think that could be unintentional.

Mr PAGE - I think it is unintentional.

Mr HALL - I go back to the regulator again, the regulator here being the Department of Justice. If we strike that out, you are saying we do not need it, can you explain what we need in lieu of that - or nothing?

Mr PAGE - The Department of Justice administers the act, assuming it is enacted. I do not have any problem with that. It is having to set up a bureaucracy and fund the bureaucracy of an agency to basically administer the clinics, which is what exists in WA and in Victoria.

Mr HALL - But as we have said we have probably have only one clinic here now.

Mr PAGE - It would seem a bit of overkill to me.

CHAIR - I would have to check that but that was my understanding.

Stephen, with a registered agreement up front, once you have done the legal and the counselling stuff that you say is very important, should that then be registered in some way and ticked off by the court as opposed to the regulator? You do not think that is an appropriate process?

Mr PAGE - I do not think that is necessary. I will give you an example of what can happen. I have one where it was the daughter and her partner and her parents. Her mother was to be her surrogate, so the four of them had counselling. They then had two sets of lawyers, so lawyers for the daughter and her partner and lawyers for the mother and her husband, so mum and dad, and they were then to proceed. A copy of the surrogacy arrangement was provided to the clinic. The clinic would then say, 'Right, okay, we can satisfy ourselves within the National Health and Medical Research Council and Fertility Society of Australia ethical guidelines that each of the parties have entered into this arrangement of their own free will. They are fully informed, they have had counselling and we know that because they signed a surrogacy arrangement and they could not have signed it without having gone through that process first.' Some clinics such as Queensland Fertility Group, which is the largest in Queensland, require an extra step; they require statutory declarations to be executed, but others don't. So that happens and before treatment started the partner of the daughter said, 'Look, I am not proceeding with it. I have had a real change of mind and I am not going to go ahead with it.' So subsequently a second surrogacy arrangement has been signed between the daughter and mum and dad so that they can proceed with it because the daughter is keen to have a child and mum's body clock is ticking and she is keen to try to have a child now rather than wait some time down the track.

Now, of course, donor sperm is required, so lo and behold they need more counselling because the National Health and Medical Research Council guidelines require counselling where there is any donor sperm or donor egg. It is funny that they need more counselling even though they have gone through the process all over again.

CHAIR - Is the daughter's partner still around?

Mr PAGE - No. He has gone - not interested.

CHAIR - So she is a single woman seeking that?

Mr PAGE - Yes.

CHAIR - Don't you think it is reasonable that she should have counselling for raising a child on your own, even though her mum and dad are probably available?

Mr PAGE - I think they should have the counselling. I do not have any problem with the counselling at all. It is just that they required more counselling. They weren't necessarily happy that they had to have more counselling because they had plenty of it already, but the advice was no, you have to have it.

CHAIR - I hear what you are saying about the importance of the counselling and the legal discussions, but why then wouldn't it be appropriate to have it ticked off through the court process and having the court agree that it is in the child's best interests?

Mr PAGE - Of course there would not be a child at that point.

CHAIR - The potential child, then, because if you are going down this path generally people would be fairly serious about proceeding. Obviously that woman you talked about was serious because even when the partner went she still decided she was going to do it.

Mr PAGE - That is right.

CHAIR - They are serious and genuine. I do not think anyone would enter into this sort of process unless they really wanted to have a child.

Mr PAGE - I have never come across someone who has gone into one of these flippantly. I have certainly had clients who consulted me who are gay or lesbian, and certainly one single woman, but the bulk of the people seeking surrogacy are husbands and wives or de facto heterosexual couples. Some of these people have been trying to have children forever. I think the couple who took the prize had been doing 15 years of IVF. Say they had started at 23, by the time they got to 38 they were still doing IVF, which I think is financially and emotionally crushing.

CHAIR - Physically too with the impact on the woman's body.

Mr PAGE - Absolutely. Typically what one will see at that point when they have been doing it five, seven, 10 or 15 years is that the woman is the driver to have a child and her partner or husband is acquiescent, certainly of the same mind, but so exhausted by the emotional process and the cost. The a lawyer tells them that going through this legal process as it stands is going to cost you somewhere between another $7 000 and $15 000, plus the counselling, plus the surrogacy. The kind of cost that parties are looking at to undertake altruistic surrogacy is somewhere between $40 000 to $60 000. My only concern about asking it to go before a court at the beginning is that it will add to the cost burden of parties. As a concept I do not have a problem with it because presumably an application of this kind could be dealt with fair quickly in court. It would not be a great delay in getting it on. One would presume you could get it on within a week or two, maybe a couple of weeks. I don't know what the list is like in Tasmania.

Dr GOODWIN - A bit of a backlog in the Magistrates Court.

Mr PAGE - This is straightforward application. We have signed the surrogacy arrangement, the court can look at it and say yes that looks okay. But then it comes down to a question of resources. I cannot speak for Tasmanian magistrates and judges, but I know that magistrates up here hate being given extra jurisdiction because they have only got so many resources. It always make them more stressed. That is a matter for budget.

CHAIR - Couldn't it make the process at the other end, when the child is born and there is transfer of parentage, a much more a straightforward process? Whilst it may add a little bit at the front end, it probably streamlines it at the other end.

Mr PAGE - It might do. I don't know, because at the beginning of course there is no child. At the end there is a child. The child may or may not have disabilities. Presumably in most cases the child will be healthy and one would hope that there will be a report by a social worker who has assessed the parties.

With an application at the beginning, what will the magistrate be presented with. The magistrate or Supreme Court judge - the bill says magistrate - whichever court it goes before, the judicial officer gets an application and then probably an affidavit by all concerned saying we think it is a wonderful idea. They might get the affidavits from the counsellors and the lawyers saying, yes it is fantastic; they have had their counselling and their legal advice and here is a copy of the arrangement. It just moves that part of the transaction to the beginning. I do not see that makes terribly much difference one way or the other, except the cost burden increases slightly because there is an extra court appearance. That is about it.

Mr WILKINSON - Stephen, do you believe it should be dealt with in the Family Court or the Magistrates Court. Family Court deals with it day in, day out. Magistrates Courts do not deal with this type of thing much at all in Tasmania.

Mr PAGE - The Law Council position is definitely go to the Family Court. The problem is that you are a State legislature and the effect of the High Court decision in Re Wakim is you cannot impose jurisdiction on the Family Court no matter how much you might want to.

Mr WILKINSON - Right, so therefore it has to go to the Magistrates Court.

Mr PAGE - Or Supreme Court or whichever court you deem appropriate.

Mr WILKINSON - That comes back to having this uniform legislation all over Australia as opposed to State-by-State legislation because the people that deal with this type of issue day in, day out, are the Family Court and not the Magistrates Court.

Mr PAGE - It is funny you say that. They certainly deal with children. Recently I bumped into a federal magistrate and he asked how life was and I said I was doing all this surrogacy work. He looked at me along the lines of what is that because, of course, they do not do any. I think there have been about three reported cases in the Family Court or the Federal Magistrates Court concerning surrogacy. Because the legislation is so new and also because it is State-based, nothing has ended up there yet.

Mr WILKINSON - In Tasmania it is mainly to do with child protection. The magistrates, and there are a couple of dedicated ones down here in Hobart, deal with that and whether a child should be taken from a family or not, but that is as far as it goes.

Mr PAGE - As a family lawyer, and I am sure the judges have a similar approach, for me a challenge is that I am not dealing with warring families. I am not dealing with these bitter fights which I see every day in my family law practice. I am dealing with a process of love where all four people - there might only be two but let us assume it is four people - want to have this baby and they want two of those people to have it at the end. It is all by agreement and it is a process of building trust and commitment. Often, as I said, they are family members already. I have one where it is going to be the aunt for the niece and her husband, so the aunt and uncle offered to the niece and her husband to have the baby for them because they are the only ones who have not had children and knew how much the niece particularly wanted to have a baby. That is the reality, that you have in these ongoing family relationships well and truly after the baby is born.

One of the things that I am particularly concerned about is managing the relationship between the surrogate and her partner and the baby after the baby is born - that the surrogate is not cut out of the process. There are certainly some surrogates who said to me that they are going to give birth but they are not terribly interested, but most are certainly saying to me that they are giving help, that it is not genetically their child and the husband and the partner have had enough kids already and they do not want to have any more. They are happy to help out, and that is all they are doing. They have done something special for them but it would be good if the child knew where it came from.

Mr WILKINSON - That is the other point I was going to come to in relation to the child knowing actually where they do come from. Do you believe that there should be, say, a birth certificate and then something behind that certificate saying the facts behind it all? Do you believe the courts should hold that register? What are your views?

Mr PAGE - I do not have any views on that at the moment. It is one of those matters where I think time will tell. We all know personally people who have been adopted and after 30 years discover their father and they have these tearful reunions, and then we know other people who know throughout their lives that they were adopted and are much more relaxed about it and do not necessarily want to find their natural mother or father. I do not know how it is going to pan out. One of the great difficulties for all of us as a society is a number of ethical conundrums in dealing with surrogacy. It is not a straightforward process, but the reality is that if there is not a process of regulation of some kind it is still going to be happening. It is still going to go on and just be driven underground. As far as birth certificates are concerned, I just do not know the answer there.

Mr WILKINSON - Under the legislation at the moment it is for the genetic parent to decide whether they will allow the child to discover them. To me, that is the wrong way around, especially when you are looking at the Family Law Act and the paramount interest of the child. To me, it should be up to the child to decide whether they should or should not know their genetic parent.

Mr PAGE - We say that are in fact four types of surrogacy but they overlap. You have altruistic and commercial - which talks about money or not - and then you have the other part of it which of course is whether it is traditional or gestational. Traditional is, of

course, being the form in which a turkey baster or a syringe is used for impregnation, and of course gestational is where an IVF-type process is used and a clinic is involved. One would think it would be much more common. With gestational surrogacy, of course, the surrogate and their partner have no genetic relationship with the child whatsoever. I know there is criticism about your bill by some of your members about that issue, but traditional surrogacy, I believe, will continue. It has happening now and it will continue and it is better, in my view, that it is regulated than not.

Mr WILKINSON - I agree with that but I am wondering whether it is your view that the child should be the one who decides and is able therefore to make connection with the genetic parent if required?

Mr PAGE - I think that is there already and the reason it is there is that one of two things is going to happen when this child is born - ordinarily. The surrogate and her partner hand over the child or they don't. If they do hand over the child then presumably a parentage order will then be made of some kind. If they do not hand over, then we have a Re Evelyn-type case where ultimately it ends up in the Family Court with an enormous amount of bitter and costly litigation. If it is the former, one would think that they would know who their genetic parents are because they will probably have some link by way of some contact order. If it is the latter then the child is going to genetically know who the parents are in any case.

In any case, under the National Health and Medical Research Council ethical guidelines there is a requirement that the donor of any sperm or egg is ultimately known by the child. I think one of the most telling examples I can give you is that last year I was the independent children's lawyer for this young boy in the Federal Magistrate's Court in Brisbane. It was a fight between two lesbians. One was the mother and one was her former partner. During the course of the court case there had been a change to Queensland law so that the partner was now recognised as the parent and the partner could be added to the birth certificate, so one would be shown as mother and one would be shown as parent. When we got to the trial the co-mother, for want of a better description, said 'No, I am not terribly interested about whether or not I am named as the parent; I just want to make sure I have that quality relationship with the child.' So far as the natural mother was concerned she said, 'I do not want the co-mother named on the birth certificate. I want to leave it blank.' So for reasons of discrimination, amongst other things, with the child having two birth certificates when applying for a job that might impact on his employment and might cause some embarrassment at school, but the main reason she said was that when he turns 18 he can then discover who his father is, because that is the current guideline provided by the National Health and Medical Research Council that your clinic in Tasmania will have to comply with.

CHAIR - Thanks very much for that and we appreciate your time today.

THE DISCUSSION CONCLUDED.

Ms ANNA GRANT, BUTLER McINTYRE & BUTLER, WAS CALLED, MADE THE STATUTORY DECLARATION AND WAS EXAMINED.

CHAIR - Have you given evidence to a committee before?

Ms GRANT - No.

CHAIR - Just to explain how it works then. It is recorded and there are members of the media are here as well. What you say is protected by parliamentary privilege but outside it is different, so just bear that in mind. If there is something you wanted to give the committee in confidence you can make that request and the committee would consider and if that was agreed to the evidence at that time would not become part of the public record but it may inform our report. It would not be quoted or attributed to you at all.

It would be good if you could give us a bit of an overview of who you are and your background for the purposes of the record and then if you would like to make some opening statements please feel free to do so.

Ms GRANT - I have got some comments that I could make if that helps.

CHAIR - That is fine.

Ms GRANT - I am a partner at Butler McIntyre & Butler, have been for the last six years, but for the last 12 I have practised predominantly in family law, both in the family law jurisdiction, also in regard to the Relationships Act which is a Supreme Court jurisdiction, and in child protection matters which is a Magistrates, Children's Division, jurisdiction. I have had some experience in surrogacy in that I have dealt with clients who have wanted to enter into an altruistic surrogacy arrangement through the Canberra Fertility Centre. It is a very limited experience but at that time, which was quite a few years ago, involved review of the then surrogacy contracts act and the various related legislation here in Tasmania, as well as looking at the ACT legislation. It is a query that is commonly asked by clients interested in -

CHAIR - Clients wanting to be intending parents.

Ms GRANT - It is usually people who have had a discussion with, say, the four parties who then want to know what is legally involved and then you never hear anything again. It just dies a natural death for whatever reason. I do not necessarily think it is the legal advice that they receive but it is just the whole gamut, it is too hard, it is too complicated. I would like to think hopefully they have resolved it in another way and got pregnant in whatever way, but you don't know.

Mr WILKINSON - Anna, would it be right in saying that it is probably because there are no laws at present within Tasmania and therefore there has not been a great deal of work within Tasmania as a result of that?

Ms GRANT - Absolutely.

Mr WILKINSON - Recently I am aware that you were involved quite extensively with trying to work out an agreement. Is that right?

Ms GRANT - Not so much an agreement but if parties go through a surrogacy arrangement through the Canberra Fertility Centre they have to obtain a report from a family lawyer setting out a whole list of things - the implications within their jurisdiction, legal advice as to how to obtain a parenting order, legal advice in regard to costs, things like that. That has been my most recent involvement. We just provide the report and that is it. We do not have any further involvement and I have not had any further involvement. I think in the actual case it did not come to anything.

Mr WILKINSON - In relation to that agreement, what was contained in it that you had to look at.

Ms GRANT - Again, it was not an agreement it was more a report so it was not signed by the parties. It was just advice in regard to the legislation - the Adoption Act, the Status of Children Act - and highlighting to them the implications under the Child Support Act and how they would go about adopting that child if it went that way. It was broad advice basically because that is all that we were required - and asked - to do for them to then make an application or to go through the Canberra Fertility Centre process.

Mr WILKINSON - In relation to the bill itself, I do not know whether you have had time to have a look at it, are you able to say whether you believe it seems okay on the face of it but this needs sorting out, and that needs sorting out.

Ms GRANT - I have got quite a few concerns with it as it is currently drafted. A particular concern is that it gives the option for these arrangements to be oral, which I think leaves us open to kitchen table-type arrangements where parties do not necessarily talk about the cost implications, emotional implications and that sort of thing. If it becomes known in the public arena that you can have an oral arrangement, there is a great risk that people won't even pick up the act to see what they need to obtain to then get a parenting order, nine months, 12 months or two or three years later when there is a birth. It seems to me that if there is an oral arrangement then there is no necessary evidence upon which the parties can rely to enforce the arrangement if there is a problem. I think the fact that that option is there is a big danger going forward.

I suppose my biggest concern is that the provision for legal advice is hidden in the then application for a parenting order. I think it is section 14(2). The magistrate has to be satisfied that there has been legal advice at the time of entering into the arrangement. Then later on in subsection (3) the court can be satisfied if it is in the best interests of the child to make the parenting order even though there has not been legal advice. I think that is a concern. It is the same with the counselling. I think legal advice and counselling is a necessary evil. I think it was Stephen who spoke beforehand, I agree with him that in most cases you have parties who have well and truly considered what they are entering into. I know that there will be some opponents saying the want for legal advice is simply a want to increase the cost of this. But I think having legal advice and that being compulsory means that there has been a consideration of all implications, both during and after the pregnancy.

CHAIR - I hear what you are saying that that is an important aspect, both the counselling and the legal advice. I think it was Stephen, but it may have been Jenni Millbank before that, was talking about the importance of having the capacity for an order to be made in the

best interests of the child when things haven't been done and you need some sort of flexibility around that. Would you suggest that if the legal advice and counselling has not been attended to that perhaps they should be looking at an adoption approach as opposed to a surrogacy arrangement?

Ms GRANT - That is a possibility, I suppose, but from my knowledge of the Adoption Act that process would be much, much harder than what it currently is under the proposed legislation here.

CHAIR - It seems that there is a catch-all there, like this is what you should, but if you do not do it don't worry we will still sort it out anyway.

Ms GRANT - Then my concern is that the best interests of the children provision is just, 'If everyone consents we would consider it to be in the best interests of the child,' which again seems fairly weak. The section that deals with legal advice is broad as to what you have to advise on. I think the provision is a bit akin to the legal advice that we have to provide under the Relationships Act. If we give advice in regard to a financial agreement, it is either entered into during or after a relationship because those agreements are not registered anywhere, so the legal advice is to give those agreements some integrity to make sure that parties have thought about them and their implications because they are not sealed by a court or anything like that. In those situations we have to provide a certificate of independent legal advice that is then attached to the agreement. We do not set out what our actual advice is, but we basically tick that we have advised them on the implications and their rights under the act and I think that is something that could easily be introduced here and it would not be a huge cost to the parties.

CHAIR - You probably heard us talking to Stephen about having the legal and the counselling happen, and then having that written agreement registered with the court so the court can then say, 'Yes, we can see that the counselling has happened, the legal advice has been provided and we agree that it appears to be in the best interests of the child' - and nobody can ever say 100 per cent because human nature is an odd thing. To get that agreement in place up front that is registered and recognised and hopefully at the other end it would be a formality if everything was as it was.

Ms GRANT - I do not necessarily think if you have got a written agreement with certificates from a legal practitioner and a certificate from a counsellor that you need to worry about having it registered or considered by the court at that stage because under our Relationships Act we do not have to with our property agreements and under the Family Law Act we do not have to in regard to financial agreements either.

CHAIR - We are talking about children here.

Ms GRANT - I know. I understand that but I think there is a cost implication if you go running off to the court and from the discussion I heard with Stephen if you are pushing it through the Family Court you are going to have endless delays.

CHAIR - Well is cannot go through the Family Court currently anyway.

Ms GRANT - In the Magistrates Court I think, yes, there is a huge backlog but I have heard anecdotally that adoption matters are given priority and they are treated quite swiftly. So

again a similar process could be set up there. I am not necessarily of the view that you would need to have the agreements registered at that stage. They could simply be sighted at the time of the parenting order.

CHAIR - Obviously there are two parties getting legal advice and the lawyers need to advise both parties differently.

Ms GRANT - They would each have their own lawyer.

CHAIR - That is right because the needs of the surrogate are different from those of the intending parent, obviously. What you are providing, in some sort of certification that that has occurred, is that, yes, intending parents and the surrogate parent have had their advice, so would it not be appropriate that we wait till the child is born and then we get the court to tick it off? Is there anything wrong with doing at the front end?

Ms GRANT - No, nothing at all.

CHAIR - Except for the costs.

Ms GRANT - The costs and time. In an ideal world that would probably be the best method but I also do not think there is any disadvantage to having the agreement with the certificates attached - your counselling certificate attached - and then when you go to do your application for a parenting order you attach it all together and it goes to the court. I do not see what effect the court's considering it or sealing it before the child is born is going to have.

CHAIR - Except that it has been sighted by them and if there was something glaring -

Dr GOODWIN - I suppose that is the benefit though of this certificate approach that you are talking about.

Ms GRANT - The onus is on the solicitor. Every other solicitor in town is going no, don't give us the responsibility.

Dr GOODWIN - Presumably there is a check list that the certificate equates to - you are certifying that you have actually discussed the following matters.

Ms GRANT - If it helps I did copy out - and I have copies for everyone - the relevant provisions that I am talking about in the Family Law Act and in our Relationships Act. It states what we have to give the legal advice about and then what form our statements take, but under this legislation I think what you would need to advise in regard to are Parts 3 and 4, which would be the most important ones and which cover the cost issue and the pregnancy management issue. I think they are the fairly obvious sections and that you would have to advise on.

CHAIR - So you are suggesting a slightly different approach to what is in the bill now - putting more prescription around the legal advice.

Ms GRANT - And the counselling. Yes. I think one of the deficiencies in the legislations is that there is no real onus on the parties to go off to get counselling or legal advice

because, as you said earlier, if they do not have it the magistrate can still tick it off. I assume if the parties get to that parenting order stage and they do not have it but they are there consenting well there is obviously no issue. It is for those that fall through the cracks that it is an issue.

Mr WILKINSON - It is one of those things, Anna, I suppose say you can come before me to get that advice, I would not have a clue but I could tick off that I have given you the advice. Therefore what worries me a bit is who is to know what advice has been given. As you know, you should be going only to experts to get that advice. Should you be going to only prescribed -

Ms GRANT - But then the magistrate is not seeing that advice either.

Mr WILKINSON - That is what I am worried about, so therefore people could well be entering into this agreement with just a tick from somebody who - we will not mention any names - but rarely, rarely if at all acts in that jurisdiction. How are we going to safeguard that, especially when the magistrates haven't the ability to see what is there?

Ms GRANT - The magistrates are only going to flick through the agreement and say, yes, it satisfies all the legislative provisions. I do not know - do you put a greater onus on the solicitors, on the counsellors or on the magistrates? Do you make the parties make their parenting order even before the child comes into existence?

CHAIR - That is what we are asking here. It is like an interim order. That way then they could at least look at what has been discussed, wouldn't they, in that process?

Mr WILKINSON - If there is no child what is the point of a parenting order? I can understand there not being a parenting order beforehand because of that.

Dr GOODWIN - Can I just mention something and Stephen did address it in his submission when he talks about the independent counsellor's report, which would go to the court. So in addition to parties getting their own legal advice and going to a counsellor, they also have to go before the court order, I think, in some places, an independent counsellor who -

Ms GRANT - Is that under Queensland legislation?

Dr GOODWIN - Yes, I think that is where it is. So they go to this independent counsellor who can then obviously make an assessment as to what extent the consent is informed and report that back to the court.

CHAIR - The Patient Review Panel in Victoria?

Dr GOODWIN - No, it is an independent counselling report. I think it might be Queensland.

Mr WILKINSON - That is the Queensland one, yes.

Dr GOODWIN - I do not know whether that is another potential safeguard.

Ms GRANT - I do not think you can rely on the magistrates.

Mr WILKINSON - No, I accept that.

Ms GRANT - I think you can rely on the magistrates even less than you can rely on the solicitors. Under the Relationships Act jurisdiction the solicitor who gives the certificate must be a solicitor admitted to the Federal Court practice, which would assume that that solicitor has family court experience, particularly here. So there is an effort in the legislation to make sure that you are seeing a practitioner who is experienced.

Mr WILKINSON - Accredited.

CHAIR - So you have copies of those from the other -

Ms GRANT - If it helps.

CHAIR - That might be helpful.

Ms GRANT - It just indicates what the wording is of the legislation and then gives you an idea of what is in our certificates.

CHAIR - One of each in each one is there?

Ms GRANT - Yes.

CHAIR - So you think incorporating something similar would assist strengthening that part of it?

Ms GRANT - Yes, I do. I think it would require the parties to have a written agreement. It would necessitate the need for parties to get legal advice and then you have a mechanism there that shows they have had the legal advice, and I suppose the implied thing is that the solicitors would have a file where they have given the advice. Any solicitor entering into signing those certificates takes it very seriously in regards to property matters because obviously there are consequences if the wrong advice is given. I do not necessarily think that would carry over, even though I think it should, but I just thought it was worth considering that sort of approach.

CHAIR - If that was there or incorporated into the act, what do you think then about this catch-all phrase? If we have a bit of a chat and then we get pregnant, and then we have the baby and, 'Oh, yes, I was going to give it to you anyway,' but no legal advice, no counselling, do we need the catch-all phrase or what do you do with that?

Ms GRANT - I think you do because you are going to have situations where families have entered into these arrangements. I think, yes, if all parties do consent and there is no issue then it probably is as best we can tell at that time in the best interests of the child for a parenting order to be made. I have concerns about how loose that provision currently is because I do not think there is anything in the legislation that really makes it compulsory or even slightly compulsory to obtain legal advice or counselling.

CHAIR - What about the criminal and child safety check - to try to avoid it? How do you avoid paedophiles getting involved in this, for example?

Ms GRANT - There is an interesting provision in the Adoption Act. I think it is adoption by relatives. That provision provides for the magistrate to consider similar factors as you would consider under a child protection order. In section 21 the court has to be satisfied that the order would make adequate provision for the welfare and interests of the child and it refers to whether or not it would be more appropriate for an order to be made under the Children, Young Persons and Their Families Act. You can undertake a similar risk analysis to what the child protection authorities do, but then - going back to something Stephen said - most of these parties are there for good reason after a long battle. But then, particularly with the broadness of the proposed legislation, you probably do need to have something like that for those cases that are a bit sinister.

CHAIR - It is a fine line. Someone may not have a record but have been committing offences that have not been caught yet.

Dr GOODWIN - Then you would probably want to include intelligence, not just what is on the official record but what police might have in terms of intelligence. Then it goes on and on.

CHAIR - It is a difficult area. Fortunately a lot of people who may not behave very well can conceive naturally anyway.

Laughter.

Ms GRANT - Very true and they are not subject to any checks.

CHAIR - That is right, unless you are going to issue all parents with a licence before they start, or people with a parenting licence, which some people argue would be a good idea. Did you have other concerns? I know you said you had a few.

Ms GRANT - The only other concern revolves around that issue of what is in a child's best interests because the Adoption Act takes a much deeper look at it. I did also include in those papers section 60CC of the Family Law Act, which is what the Family Court considers in determining best interest. This is a unique area because you generally have couples who agree that this is what they are going to do, and section 60CC is there for couples that are well and truly at war with each other. Particularly when you compare it to the Adoption Act, where you have parties that are in agreement, that are all on the same page, I think it is perhaps a bit unfair that it is so light in the Surrogacy Act. I think surrogacy, if it continues along in accordance with this proposed legislation, is going to be a much easier option than adoption, with less checks and crosses and all that sort of thing.

CHAIR - There is nothing really that does define the best interests of the child in that act at all.

Ms GRANT - No. It is only mentioned if there is no legal advice, no counselling and everyone consents; then they will consider the process to be in the best interests of the child.

CHAIR - You think there really needs to be some sort of definition or clarification?

Ms GRANT - Yes. All the child-focused legislation - the Family Law Act, Children Young Persons and Their Families Act in this jurisdiction, and the Adoption Act - all spend a great deal of time setting out what is in the best interests. They are based on the principle that the best interests of the child is paramount.

Mr HALL - So some of this ought be lifted out and put in the -

Ms GRANT - No, I think that is probably going a bit too far.

CHAIR - The Adoption Act?

Ms GRANT - For the magistrate in determining whether or not to make a parenting order there needs to be consideration as to whether or not this is in the best interests of the child, not simply because every party consents.

CHAIR - What actually constitutes the best interests needs to be described in the act?

Ms GRANT - Yes, possibly. I note that the Queensland legislation requires both the birth mother and the intending mother to file an affidavit and I would assume that the affidavit would set out their living arrangements, financial provisions and things like that. So it could be addressed in that way, that they file an affidavit about their living circumstances.

CHAIR - For the court to make a determination.

Ms GRANT - Yes, that it is in the best interests of the child. I do not know whether you necessarily need to define what the court considers to be in the best interests of the child, or whether you need to obtain information for the court to consider when making the parenting order to ensure that there is a home for this child to go to. I think it is missing, particularly when with the Adoption Act, even when you are looking at adopting within a family situation, the court has to be satisfied in that situation that it is not more appropriate to make an order under the Children Young Persons and Their Families Act, such as a care and protection order. That just seems an imbalance.

CHAIR - We are looking at issues where there are warring parties and dearly loving parties, but it is important not to lose sight that the child is the innocent party in all of this. Despite the great relationship the two parties may have, the child still being born into that -

Ms GRANT - If you look at the sinister situation you gave before - the paedophiles - well, there is nothing. The court, based on this, could say, 'Okay, we've got all the information we need.'

CHAIR - Ticked the box.

Ms GRANT - Ticked the box, done, and there is no examination of the actual living arrangements proposed for this child under the current legislation, whereas if you are adopting within a family there is.

CHAIR - Stephen, in his written submission, did provide some feedback in some of the other areas such as the age of the surrogate and whether or not she has carried a live baby to term and that sort of thing. Do you think that is important?

Ms GRANT - I know in Queensland the age is 25, and here it is proposed as 21. If the parties undergo the counselling and the counsellor has said they have made an informed decision and are aware of all the possible implications, it doesn't matter what age they are. You can have a more mature 21-year-old than a 25-year-old.

CHAIR - Should you have any age?

Ms GRANT - I think you do need to have an age. I think 21 is probably as young as you can go.

CHAIR - Stephen was suggesting 25 is a better age.

Ms GRANT - I would agree with that, but I am only picking a number because I think most people at 25 have had a bit of life experience, whereas at 21 not necessarily. At 21 I think you are more likely to perhaps be pressured, particularly in a family situation.

CHAIR - Again, do you need that sort of catch-all if someone ends up on their twenty-third birthday or whatever it is and they are involved in an arrangement?

Ms GRANT - I think if you are going to look at age, you need to look at the upper age too. Is there an age where you should say, 'No, they shouldn't do this anymore.'

CHAIR - For the surrogate?

Ms GRANT - For both.

CHAIR - For the intending parents as well?

Ms GRANT - Yes. If you are going one way then you need to look at the other way too. I think the cut-off age for donating eggs is 38, or it could even be 35.

CHAIR - The risk of getting 'good' eggs after that becomes less likely, and chances for a successful pregnancy become less. The surrogate, if she had enough treatment, could effectively carry a baby but the risks to her health increase with her age as well.

Ms GRANT - The only other issue that I had was in regard to the lack of definition around costs. I note in the Queensland legislation it is quite prescribed and I think there is a danger with the current proposed legislation that you can easily have a commercial arrangement, thinking that you had an altruistic arrangement, depending on who is looking at the arrangement.

CHAIR - We could prescribe in regulations what should be considered as costs. I don't know; I am suggesting that it could be. Would you have a view that it should be in the principal legislation?

Ms GRANT - I think it should be in the principal legislation.

CHAIR - Talking about what you are actually covering.

Ms GRANT - I think the Queensland legislation sets out a whole page. It doesn't limit it to that, but it is covered. Even though it is prescriptive it is still fairly broad and I think it gives parties a good indication of what the limits would be.

CHAIR - Does that include the cost of the loss of income from employment?

Ms GRANT - Yes, the value of the birth mother's actual lost earnings because of leave taken for a period of not more than two months during which a birth happened or was expected to happen, or for any other period during the pregnancy when the birth mother was unable to work on medical grounds.

CHAIR - So if she had a placenta preview or something that would cover all that period where she may be in bed rest.

Ms GRANT - Yes, if it is medically certified. It covers legal costs, counselling costs, reasonable medical costs, and premiums payable for health, disability or life insurance which would not be needed other than for the surrogacy arrangement to be entered into. It is fairly broad.

CHAIR - So if she wanted to use a private hospital, for example, you have to take out private health cover 12 months before.

Ms GRANT - I think at the moment the lack of definition leaves it very open. One couple could say, okay, we do not want the birth mother to work. We will cover her pay and we will pay her $100 000 to stay at home. Other people might look at that and say that is a commercial arrangement.

CHAIR - Because she is only on a $40 000 income.

Ms GRANT - Exactly.

CHAIR - That would be a fine line. But if she was getting a $100 000 a year -

Ms GRANT - That is covered by the Queensland legislation because it is what she is earning. The risk you run by defining it in the legislation is unpaid work.

CHAIR - It does not get any value.

Ms GRANT - No, so there may be criticism.

CHAIR - You noted the requirements for lawyers who do participate in this to have certain qualifications. Do you think that is important as well.

Ms GRANT - It is something that could certainly be considered. For example, to give a certificate under the Relationships Act you have to be solicitor admitted in the Federal Court, which assumes you have Family Court experience. The other thing worth comparing it to is that for those of us who practise in the family law jurisdiction for more than five years we are eligible to become child representatives or independent children's lawyers within the family jurisdiction and the child protection jurisdiction. Because of that experience, and we have to do a short course, we are put on the panel, so you could consider something like that. You can only get that advice from a panel of solicitors. That might become a bit too draconian but that is one possibility.

CHAIR - To ensure we are getting good advice.

Ms GRANT - Yes. If you have a panel then the magistrates know that the quality of advice is of a hopefully high standard, a consistent standard as well. That is one possible option.

Dr GOODWIN - Any idea how many would fall into that category?

CHAIR - In Tasmania.

Ms GRANT - Who are child reps?

Dr GOODWIN - Yes.

Ms GRANT - Byron Cross, the assignments officer for the Legal Aid Commission, would be the person to ask. The panel is managed by the Legal Aid Commission so they appoint to the panel and then they allocate the work. For example, in the Magistrates Court if an order is made for the appointment of a child representative then the court sends that order to Byron Cross, who then looks at his panel and allocates the work.

Dr GOODWIN - So there would be reasonable State coverage.

Ms GRANT - Absolutely. There would probably be 10-15 solicitors on the panel for child reps in the child protection jurisdiction, and probably about the same, not necessarily the same people, on the ICL panel for the Family Court.

Patrick Fitzgerald might be another person. He is the senior in-house counsel for the Legal Aid Commission and he runs all our training courses for child representatives and independent children's lawyers. It is not a mandatory thing. Because those of us who are on the panel treat it very seriously, we educate ourselves on an ongoing basis.

CHAIR - So is it worth talking to him about this issue more broadly.

Ms GRANT - If that was how that panel process could be run and how the solicitors could be educated, he would be the person to talk to.

CHAIR - Thank you very much for your time today.

THE WITNESS WITHDREW.