

**THE LEGISLATIVE COUNCIL GOVERNMENT ADMINISTRATION 'A'
COMMITTEE MET IN COMMITTEE ROOM 2, PARLIAMENT HOUSE, HOBART,
ON 19 SEPTEMBER 2011.**

SURROGACY BILL 2011

Mr TIM VAATSTRA, MANAGER OF ADOPTIONS AND PERMANENCY SERVICES, AND **ASSOCIATE PROFESSOR DES GRAHAM**, DEPUTY SECRETARY FOR CHILDREN, DEPARTMENT OF HEALTH AND HUMAN SERVICES, WERE CALLED, MADE THE STATUTORY DECLARATION AND WERE EXAMINED.

CHAIR (Ms Forrest) - Thank you for coming back and thank you for the information provided to the committee. The committee were keen to get you back to talk about how surrogacy arrangements could be managed within an existing structure rather than setting up a separate structure. The discussions we had previously were looking at how we can ensure that when people arrange a surrogacy they do get legal advice, they do get the counselling and there are processes in place that ensure that the best interests of the child are met and that sort of thing. You talked about how the adoption agency worked except that adoption and surrogacy are different. We also talked to Victorians and the Victorians talked about their patient review panel which assesses all surrogacy applications that go through ART processes, not the other methods that can be used to achieve a surrogacy pregnancy.

I am interested in your view on that level of scrutiny and the process that that would establish and whether Tasmania could perhaps link into that or whether, as you have alluded to in some of the information you have given us or spoke to us about last time, that could work if the legislation was to reflect an upfront process where that could be managed within adoption agency services and the demands on resourcing and the logistics of it.

Mr VAATSTRA - I was looking at it this morning, about the Victorian stuff. Do they do that through their ART legislation, though? Is that in their ART legislation or is that in their actual surrogacy legislation?

CHAIR - I am not sure, Tim, but I think it is through their surrogacy arrangements. Because they are all ART pregnancies that are referred there, I think it was still under their surrogacy arrangements.

Mr VAATSTRA - I wasn't sure, I couldn't see it there.

Dr GOODWIN - I think it might be one and the same, actually, in Victoria. The ART and the surrogacy are all in together.

CHAIR - Maybe it is.

Mr VAATSTRA - The issue that I had and that has probably come across in the stuff we prepared was trying to get a handle on exactly what you were potentially wanting in

terms of this broader service. After last time I certainly came away with the impression that the idea of a register was of interest but did not really have a clear view, or an understanding, of your view on a broader service so I did not address anything more than that in that response, or we did not.

CHAIR - The committee do not really want to form a view because what we are trying to do is to find out what could work and what might be a better arrangement so we are asking you how you think it could work.

Mr GRAHAM - I think one of the challenges for us, though, is that we obviously do not have a surrogacy program at this time so, if we knew what that continuum of care was we could then map what existing services we have that might marry up and we would be asking ourselves two fundamental questions, and one would be: what is the appropriateness of the Department of Health and Human Services facilitating that role - is it appropriate for us to set established criteria, do some vetting, et cetera, and then right through to maintaining a register? That would be the first question we would ask ourselves. The second question I think we would have to ask ourselves is: what is the fiscal impact of that? And again, if we knew what that continuum might look like then we could probably cost some of the impact on us both in terms of the existing resources we have versus any new resources that might be required.

CHAIR - If there was a pathway similar to Victoria in that couples seeking a surrogacy arrangement - I don't know that you should just exclude it to ART and exclude the others, but a group of people; it can be one, it can be singles, couples or whatever - come to a counselling service, a bit like what people seeking adoption would come to, and they receive the counselling from qualified counsellors, and the legal advice is also a part of that process. With the patient review panel there, as I understand it, they were looking at not necessarily saying you can or you cannot, it was more about, 'Have you thought about this, have you thought about that, have you considered the implications of the person who is handing over the child?' - or whatever it is. Do you see there is a role that could be consumed into adoption services in that upfront process?

Mr VAATSTRA - There is an expertise there in our service to have a role like that because that is what we do already. I do not necessarily have a firm view on whether that should be part of the legislation or not, but there is the expertise and then obviously it comes down to resourcing as to whether or not that is something that we can pick up. But the expertise is there. The counselling is similar to what we do with relinquishing parents; we counsel them about the impacts of relinquishing their child and we do all that. The legal advice would be something that you would want lawyers to do probably but, as I say, the expertise is there; it is really not a question of that, it is around what it is going to look like and how much it is going to cost.

Mr WILKINSON - Would it be fair to say that the best fit for it would be in the same service as the adoption services because it is pretty well the same types of questions that have to be asked? So long as you have the correct counselling and you have those organisations ready to link where they are needed, and they will obviously be needed, but it seems to me to be the most appropriate fit rather than starting up a new little bureaucracy in relation to surrogacy.

Mr GRAHAM - I think that is a fair assessment. The question is, I think, once you have made your point of entry - so a point of entry might be into adoptions and it might be an information-based service but it might also be like a brokerage program where in fact you can come in, we will give you the process, we will explain the process to you and give you all the information, et cetera, and here is a list of people that you might want to go and talk to that specialise in legal contracts. Here are the organisations who do particular counselling that we have accredited, if you like, et cetera. So again, it depends on the continuum of care, the appropriateness for us to do it, because there is a level of independence that is required obviously through this so people can be assured that there is an independent decision being made or advice being given and then, of course, the resource spend. It depends on what sort of model you are looking at.

CHAIR - You have made it fairly clear, Des and Tim, that there is a process in place that could start the process to give people information basically about where they need to go and the next thing is whether or not - and this is a view that I am asking you to express - you think there should be some sort of registration of that agreement so that the various parties that come together agree that the sperm and egg are going to be used from these people and the baby borne by this mother and this couple or person will then take care of the child. Should there be some sort of process of registering that arrangement within adoption services in record keeping and then when the birth certificates are altered and things like that they all sit in that same framework that adoption certificates do?

Mr GRAHAM - That is a difficult question for us to answer because that really is a fundamental policy issue which we do not have but -

CHAIR - The question is that if that was government policy that that was the case, do you see that could work within your existing structure?

Mr GRAHAM - A better question. Yes. We think that we would be able to maintain that register.

Mr WILKINSON - And that would be better done by regulation, would it not, as opposed to being in the act itself?

Mr VAATSTRA - Yes, probably because then you can include fees for those services as well.

Mr WILKINSON - Yes, that is right, because you would have a bit of a problem with the child wanting to know who their real parent is at some stage in their life. They always seem to - people that don't struggle - and there has to be some type of bank in there for these people to access if need be.

Mr GRAHAM - I think that is now an agreed principle that access to that information should be made available if you want to source that information so I think, based on the principle of accessibility and transparency, that should be done.

CHAIR - But clearly some changes will need to be made. Look at that recent decision in, was it, New South Wales where the sperm donor was taken off the certificate and then no record exists of him anymore. Clearly, we need to change this and we talked last time about having the expanded birth certificate, for example, where once the change is made,

whether it is adoption or whether it is surrogacy or whatever it is, the information still sits behind that expanded version and it is only available to certain people named particularly on their birth certificate because that father for all intents and purposes no longer exists.

Dr GOODWIN - He had been paying maintenance, too, which made it even worse.

CHAIR - It is one of those things that highlights the broader issue of artificial reproductive technologies. I guess you have to ask the question if you end up with an expanded version of the birth certificate, and that is where anyone with additional information had that information stored behind, is the place to store that with adoption services or is that with the Registrar of Births, Deaths and Marriages?

Mr GRAHAM - I don't know the answer to that question, to be honest. I think, again, based on the model of care or the model of agreement, if the question is: do we have capacity and would it sit neatly with us? Yes, we could do that, it would be fair but if the decision was no, this is something that should sit elsewhere then we could certainly map to that process as well. I am not trying to avoid answering the question, I just don't know that we are in a position to give you a definitive answer.

Mr WILKINSON - What happens with adoptions?

Mr VAATSTRA - I was going to say, with adoptions prior to 1968 Births, Deaths and Marriages holds the records of the birth certificates, the original ones, and after that time the department does; we hold records with those certificates included from 1968 onwards. We hold them for adoption now; when new adoptions go through we have a record store that we keep those in, sealed up until a child wants to access them or a birth parent wants to access them. As Des is saying, we can do these things. We do them already for adoption and that is not so much the issue.

Mr WILKINSON - How many adoptions a year are there? Is it only three, four or five?

Mr VAATSTRA - Local adoptions?

Mr WILKINSON - Yes.

Mr VAATSTRA - I think over the last five to 10 years there was probably only a maximum of three per year local adoptions, so very few.

Mr WILKINSON - With these surrogacies you would be looking at about the same?

Mr VAATSTRA - Yes, that is the indication that came through from last time of three to five and, as we noted in that response, in terms of picking up that sort of workload at least in the interim it is not going to be a problem at all. It would not be a problem but I guess that is not really referencing what may happen down the track when people come back and request that information and therefore, do you have counselling attached with the provision of that information and those sorts of things.

CHAIR - You deal with adoption at the moment?

Mr VAATSTRA - Yes.

CHAIR - When we are looking at the amount of work and resources that requires, children have been adopted or the birth parents come back, what are we talking about? Is it a fairly large impost?

Mr VAATSTRA - In terms of staffing we have an adoption information coordinator, a level 3 position, attached to that work who does some other things as well but with a real focus on that particular work and then a bit of admin time as well. At the moment we have a reasonable resource there.

CHAIR - Is there capacity within that existing resource to add a bit?

Mr VAATSTRA - There is -

CHAIR - It would be a few years down the track, mind you.

Mr VAATSTRA - Yes. Today, say, if three to five cases came through we would not be providing information for a number of years to come so it is just an admin role obviously at first.

Mr GRAHAM - But I think the point needs to be made at this point that we are working on a project to strengthen our reunification of our out-of-home care children so we would hope that there is probably more work to be done through adoptions in that space, which we are hoping will not take a couple of years.

CHAIR - Are you looking at increasing your level of -

Mr GRAHAM - Activity - yes, absolutely. If we started a surrogacy program today it could not be absorbed within the resources that we have.

CHAIR - That end of it or the front end of it - information providing and that sort of thing?

Mr VAATSTRA - I think what we said was, if the information came from the court after a parentage order was made and all the relevant documents came to us in a little neat package, we could register that. We could do those three to five a year without necessarily more resources. It is if the service is broader than that we could not do it in the existing resource base, that is what we are saying.

CHAIR - What do you deem as the additional requirements? Getting the parenting orders from the court and registering them? What other bits do you think would be difficult for you to manage?

Mr VAASTRA - It depends on what is the outcome of the model care. If, say, you wanted or the legislation demanded some counselling for people coming back for that information, then that would be an addition. If you wanted a more robust service at the front end - adoptions, administering the cases right the way through and providing information perhaps at the start, overseeing the agreements or doing counselling at that stage - then, again, additional resources would be needed there.

Mr GRAHAM - Because there is a whole range of things that happen. There is an information service at the front end and that information service can be like a brokerage: this is what you need to do, here are some lawyers, et cetera, that you need to go and see. One of the models of care points might be that we establish a panel and we get an accreditation of lawyers on that versus others not worrying about accreditation and just going to the marketplace. It might be again for counselling and we could do the same thing, we could have an accredited panel of expert counsellors on there or you do not have to have that, you can go to the free marketplace or do we want to deliver that service ourselves? Again, just very quickly, there are three different tiers of processes.

Mr WILKINSON - What happens with your adoption services?

Mr VAATSTRA - We do that in-house.

Mr WILKINSON - You do all that type of work that you have just been speaking about in-house?

Mr VAATSTRA - We do most of it in-house but we do have some contract workers that we get to do, say, counselling services.

CHAIR - The legal stuff?

Mr VAATSTRA - Not the legal stuff. We generally don't do legal counselling, we just do explaining of our legislation and who is entitled to what down the track and those sorts of things and the impacts of relinquishing your child for adoption. We don't drill down as a lawyer would into those things so much.

Mr WILKINSON - Would you have the capacity to do exactly the same with surrogacy at the moment?

Mr VAASTRA - No. We have the expertise but not necessarily the capacity.

Mr WILKINSON - But if the Government wanted that, they would have to give you the resource, wouldn't they?

Mr VAATSTRA - Yes.

CHAIR - It would be cheaper than setting up a completely separate process, though, because you already have some of the structures and administrative overheads would be covered?

Mr VAATSTRA - Yes.

Dr GOODWIN - With adoption, in terms of the front end, do you do police checks and things like that on prospective parents?

Mr VAATSTRA - Yes. There is a whole vetting process. It is not just police checks, it is assessments, interviews, medical checks and all those sorts of things so it is really robust.

Dr GOODWIN - So potentially that is another front-end sort of service that could apply to surrogacy as well.

Mr GRAHAM - Again, depending on the model of care you can do that in-house or out-house.

Dr GOODWIN - So you do all that?

Mr VAATSTRA - We do a combination of both, in-house and out-house.

Mr GRAHAM - I think it is really about once you understand the modelling, and you could map two or three of these models and then we could map against what resources we do have versus what resources might be required. Again, you could have a brokerage model, you could have an in-house model or you could have a hybrid of both and we could map against that.

Mr WILKINSON - I suppose what we are after is the best system that you believe would be the safest and most foolproof system and then it is up to the Government really, whether they can afford the resources to do it and whether they are willing to give you the resources to do it. If we can come back and say what we believe is the best system, forgetting about resources, then it is up to the Government to decide whether they want that to happen or some lesser model.

CHAIR - Do you think there is a better way or an optimal way of assessing these? What would be the best model of care to ensure that the best interests of the child are paramount? This is what the bill claims to be all about and I think what most of us would agree it should all be about. What model would be the one that, in your mind, would achieve that?

Mr VAATSTRA - I have certainly expressed the view around the provision of information being essential to the legislation. In terms of the vetting process or not, the front end process, I do not necessarily have a firm view on how that should look.

Mr GRAHAM - I think the principle of transparency is really important and I think accountability for that, but I also think the principle of independence is important. Whatever the model of care is, I think those principles should be adhered to. Generally it is now internationally accepted that you should be able to track your parents and then it is a decision between the individuals whether they meet or not; it is up to them. But you should be able to track your parents. I think that transparency and the recording of that is fundamental.

The question of independence is also an important one and given the relationships will be tense and complicated at times, we would advocate very strongly that the people who are providing the counselling or guidance need to do that independently so that the decision makers are those people who are engaged in the act of surrogacy but they have the best information available to allow them to make informed decisions.

CHAIR - You talk about that independent aspect there. Some concerns have been raised that counsellors are being used from fertility clinics and that sort of thing, so you would suggest they are not necessarily independent?

Mr GRAHAM - No, I would not classify them. I would have an accreditation type of panel approaching this and there would be criteria that would be matched and that people would apply to that panel and we would accredit them or someone would accredit them against that.

Mr WILKINSON - Are you saying that the only way these people would be able to go through the process is if they went to these people who are accredited? To me, that would be the best way of dealing with it to ensure that they have professional advice as opposed to advice from somebody who may not really know the ropes.

Mr GRAHAM - I think so. We are introducing within Children and Youth Services, since I have been in the deputy secretary position, a panel for foster carers. So, again, foster carers now apply to a panel and they now must meet criteria.

CHAIR - Could a similar panel be used for this sort of thing? The expertise would be similar?

Mr GRAHAM - Certainly that would be the expertise that we would be looking for, whether it is a panel for counselling or a panel for lawyers and so on that demonstrate their expertise in surrogacy. We should apply that independence. You meet a panel, you meet the criteria, you go on a register and then when you come in for information through adoptions or whatever, here is a list of people who have been accredited by experts.

Dr GOODWIN - If we wanted a service that ticked off on a surrogacy agreement or arrangement, if you like, is that something that the adoption service could do? You probably do that with adoptions anyway.

Mr VAATSTRA - An approval type of arrangement?

Dr GOODWIN - Yes, to make sure that counselling has been done and all the parties are agreed about contact and all those things?

Mr VAATSTRA - It is something we certainly could do, there is no doubt in my mind about that. It is similar to adoption in some ways. If you are looking at the approval process then it may be something that also fits with a foster care panel and which I think down the track will include adoptions as well, so there may be a panel approving people to care for children right across the board, which it could fit into. If you are looking at approval it certainly could.

CHAIR - Just along those lines, one of the criticisms that has been made by some who would like to have surrogate legislation as fairly loose and not too prescriptive, if we are talking about someone going through a process as perhaps we are describing here, where they go and get information, they have counselling and they have legal advice, they then maybe present before a panel or whatever process model is decided, this is all happening before conception. Conception may never occur and so all this time, energy and effort, and possibly some money, is involved at the front end when there may never be a baby, whereas with adoption we have a baby. It might be growing and it might not be born yet, but we have a baby and that is why we are having the discussion. People who come wanting adoption will not necessarily have a baby yet, but they are hoping to.

When you are bringing in the parties together in this, you actually have a baby somewhere in the picture. So do you see that as an issue? If we are putting the interests of the child at the forefront here, is that an issue? Should people be required to go through that level of upfront assessment when there is no baby at this stage?

Mr VAATSTRA - I think it is subject to whether there is an agreement that people should go through an approval process at all and, personally, I have thought about it a lot. I do not know what is the right answer there in this case. For adoption, we are necessarily trying to pick out the best parents for a child. The State is involved in actually taking on guardianship of that child for a time where we are much more heavily involved and so, yes, we go through that process. Run of the mill parents who have biological children do not go through a vetting process and surrogacy is somewhere in the middle there. I think it is just a very difficult point to decide and I am not sure that I can say either way.

If, as you say, people feel like it is a huge demand prior to there even being a child then perhaps it comes a bit further down the track once a child is conceived. They register their agreement and then it is subject to approval down the track, somewhere between conception and birth perhaps, I do not know.

Mr GRAHAM - I agree with Tim. I don't think we have an opinion on this at all, but I think on the basis of principle, your principle is right: the best outcome for the child. The other thing that springs to mind listening to Tim is litigation. You do not want to fill the courts with litigation cases as well, so there has to be absolute clarity whatever the model of care is, it has to be absolutely clear that these are the steps that need to be undertaken.

Mr WILKINSON - That is why it is different to me, anyway, than your normal child. Sure they are not vetted - a lot of them should be vetted -

CHAIR - We won't go there.

Mr WILKINSON - but it is a situation where what we are doing here is creating an ability for surrogacy really to be recognised because it is happening as we know, but there have to be certain hurdles, I think, for the State's interests for them to be properly recognised. Therefore you have to have this agreement at the front end, that is my personal belief, because the State has to have the duty of care. When the State has the duty of care, which they have here, they have to do all in their power to ensure they are not negligent.

CHAIR - Putting the legislation in place?

Mr WILKINSON - Yes, and getting the upfront agreement between the parties involved as well. You can't say anything because it is a policy thing, but that is my view on it.

CHAIR - Another difference between adoption and surrogacy is, with adoption the agency tends to match up the prospective parents with the birth parent or parents, whereas in surrogacy they tend to pick each other, which probably requires an additional level of scrutiny in some cases, potentially - if you want to ensure that the child's interests are protected and that they are placed with appropriate parents.

Mr WILKINSON - The bill itself really, if you cut it back, is not about the paramount interests of the child, as the old Family Law Act came in in 1974 as being that because we are looking at the parents, and it is the parents' agreement beforehand, isn't it? And it is after the initial conception really that we have to look at the paramount interests of the child because that is when the paramount interests of the child start to arise. Up to that stage it is all about the individuals that want the child -

Mr VAATSTRA - The desires of the parents.

Mr WILKINSON - and that is the difference.

CHAIR - That's right. I guess the committee will have to look at how we determine as a committee what we think the best model is. I guess then it will be up to government perhaps how they deal with that. If the committee determined on a model and just asked government to cost it, is that something you would do for the committee?

Mr GRAHAM - Yes, absolutely.

CHAIR - As far as the financial implications and human resourcing issues are concerned.

Mr GRAHAM - Yes. If you are able to provide that to us, we could also maybe suggest some alternatives or additional steps.

CHAIR - I am just trying to determine a framework that is easy to understand, that is watertight legally, I guess, or that makes it very clear that people know what the process is, but also protects the interests of all involved, particularly the child.

Mr GRAHAM - I agree.

CHAIR - Thanks very much for your time.

Mr GRAHAM - Thank you for having us. It is much appreciated.

THE WITNESSES WITHDREW.

MS AILEEN ASHFORD, COMMISSIONER FOR CHILDREN, AND **MS ANNIE McLEAN**, SENIOR POLICY CONSULTANT, OFFICER OF COMMISSIONER FOR CHILDREN, WERE CALLED, MADE THE STATUTORY DECLARATION AND WERE EXAMINED.

CHAIR (Ms Forrest) - The committee has been receiving evidence about this bill. Have you presented to a committee before, Aileen and Annie?

Ms ASHFORD - Yes.

CHAIR - You understand that we record it and the transcript may form part of the record and a report. If there is anything you wanted to discuss in camera, you can make that request and the committee can consider that. What you say here is covered by parliamentary privilege but if you repeat things outside they may not be, so I would just ask you to keep that in mind.

The inquiry has been going on for a little while now. We are preparing a report to suggest any potential changes that the committee believe are needed to the surrogacy act. We are seeking input from you, as the Commissioner for Children, because the bill does purport to be in the best interests of the child and that has been an issue raised by some people, that perhaps there could be improvements to enhance that so we are interested in your view in that framework.

Ms ASHFORD - You have a copy of the submission that we put through to the legislation review. Regarding clause 20 in the draft bill, my belief is that the best interests of the child should be paramount and that is not clear in the bill. We think it is too vague. If you look at the other bills that I think we referred to, which was the Queensland Surrogacy Act and the New South Wales Surrogacy Act, the guiding principles are the best interests of the child are paramount and that is not clear, that is not what the draft of the current bill says.

Mr WILKINSON - That has always been the wording in the Family Law Act since it changed over in 1974 - 'the paramount interest of the child' - hasn't it, so there is nothing new in relation to it but when, as you say, you look at clause 20 it does not seem to -

Ms ASHFORD - It does not scream out to you.

Mr WILKINSON - That is right.

Ms ASHFORD - It is presumed.

Mr WILKINSON - At first, it is not about the best interests of the child, this bill, is it? Do you agree with that?

Ms ASHFORD - Well, it should be about the best interests of the child because what you are doing is bringing a bill in to bring a child into the world -

Mr WILKINSON - I know, that is what I am saying; it is framed around the parents that want the child.

Ms ASHFORD - Yes, and we are saying it should be framed around what is paramount is the best interests of the child.

CHAIR - Having said that, what is the best model then, in your mind, that would put the child at the forefront?

Ms ASHFORD - I think that either the Queensland Surrogacy Act or the New South Wales one we put into that submission that we put forward.

CHAIR - That is talking about setting up a framework I guess, or a statement that says the child's best interests are paramount. What about the model then that sits behind that to ensure that? That is what I am interested in hearing what your views are.

Ms ASHFORD - Not the legislation you are talking about?

CHAIR - Yes, how would a surrogacy arrangement be arranged? What sort of processes - the way it is in the bill it is pretty basic. You go off and -

Ms ASHFORD - You agree.

CHAIR - Agree.

Ms ASHFORD - You agree and you put that formally into an agreement about your intent and then you go forward and then you get your parenting -

CHAIR - All after the child has been born, effectively.

Mr WILKINSON - What we are looking at is ways of ensuring that the paramount interest of the child is going to be the major focus. Is there any way in that bill that you can see that being reinforced as opposed to the way the bill is now?

Ms ASHFORD - If we work through some of the issues, that might give you more of a sense of it. That was the first point we made. In terms of their right to know their genetic parentage, it only talks in the bill about once you reach the age of 18 you can have access to that information.

Ms McLEAN - Not in this bill.

CHAIR - No, there is nothing in this bill.

Ms ASHFORD - I thought I did read that somewhere.

Ms McLEAN - That was in something else.

Ms ASHFORD - It might have been something else I read.

Dr GOODWIN - You can get the information before the court, the court records.

Ms ASHFORD - That is what I thought it said.

CHAIR - It depends what the court records include too.

Dr GOODWIN - Access to court - page 43 - the child can apply to a court for approval to access the record of proceedings.

Ms ASHFORD - Where is it?

Ms McLEAN - Page 47.

Ms ASHFORD - A lot of children who are adopted want to know who their birth parents are and that can happen at various developmental stages so it is not really when you are 18. Often it is approaching adolescence that many children want to know. I would want to see something in the bill that talks about being able to access records and find out who the birthing mother was prior to being 18, that you could do that with parental consent or when you reach the age of 18. I think every child has a right to know where they come from.

CHAIR - Did that include providing the genetic material, which may not be the birth mother?

Ms ASHFORD - That is right.

CHAIR - How do you ensure that information is recorded and stored in an accessible form?

Mr WILKINSON - Before we get to that, you were saying that it has to be by parental consent. The parents might not want that to happen and therefore has the child the ability to apply to court under the age of 18? My view would be yes, it should.

A typical example - a couple of years ago in relation to some legislation that came before this House two females came and spoke with us with their young son and I asked the same question to the son who was then 16, I think. I asked him if he wished to know who his father was. The mother piped up and said he didn't at the moment, so the son was not allowed to speak, but then the mother said she had told a friend. Well, to me that is not good enough. If that child wants to know who the parent is there should be a way for him to find out, even outside parental consent because the parents at that stage might not want it for various reasons.

CHAIR - That could be in the case of a same-sex couple where there is clearly another party.

Mr WILKINSON - Yes, that is right.

Ms ASHFORD - I do not know, though, whether legally a child can do that.

Ms McLEAN - Can do what?

Ms ASHFORD - Can then go and put forward that they want to access that information in their own right, get their own legal representative to do that. Can they engage that?

Ms McLEAN - I think that that is part of the problem. You can get a guardian ad libum but basically that is part of the problem, based on the discussion we had this morning, that

the bill is not clear about the circumstances in which you can access that information, the circumstances in which there might be restrictions on it and how you can do it.

Mr WILKINSON - Do you know what other States do in relation to it? If you do, which State's system seems to work the best?

Mc McLEAN - We have not that detail.

Ms ASHFORD - We have not in that detail. Every State, apart from the Northern Territory and Tasmania, have a bill so I suppose that is the work of the committee to do that.

Mr WILKINSON - As the child's representative, though, what do you believe would be the most appropriate for that child?

Ms ASHFORD - I think that a child should be able to access that information but if they are under the age then they need either the consent of their parents to do that, and if that is not the case, then they need another avenue to be able to pursue that.

Both of us, when we read it, really did not understand what this section meant. It is on pages 21-22, around the parentage orders. Subclause (5) says:

'Despite subsection (2), the court may make a parentage order even though -

- (a) one or more of the birth parents have at the time of the hearing not consented to the making of the order; or
- (b) the child is not living with an intended parent who applied for a parentage order in relation to the child.'

CHAIR - 'If the court is satisfied that ...'

Ms ASHFORD - none of the parents is a person from whose egg or sperm the child was conceived and at least one intended parent'.

Dr GOODWIN - That is the WA provision.

CHAIR - Yes, it is WA. What happened was that they felt that the birth mother could be, in this case, ordered to give up the child if she had no genetic input into that child, for instance if it was not her egg that had been used and her partner's sperm if she had a partner, and at least one of the intended parents - the parents-to-be - had provided the egg or the sperm for it. That is assuming that there is no connection between the birth mother and the baby.

Mr WILKINSON - But in Western Australia they said that there were a couple of things in that act that they were not happy about, but they did not let us know exactly what they were - I do not know if that was one of them.

CHAIR - That was debated at length in Western Australia and that amendment only just got up, as I understand it.

Dr GOODWIN - I think that during the consultation process it was something that they specifically wanted feedback on from stakeholders, but I am sure that they got a lot, and so they decided to pop it in.

Mr WILKINSON - Could I ask in relation to clause 14, then - the one you have just mentioned - do you say that that is not an appropriate clause, or alternatively, do you say that it needs to be made clearer?

Ms ASHFORD - I think it needs to be made clearer, especially now that you have said what it means. But the two of us sat there for about half an hour.

CHAIR - But does that make it right that if I am the birth mother and it is not my egg or my partner's sperm, should I be able to be forced by the court to give up that child, because that denies any connection that I might have with the child in utero?

Mr WILKINSON - Or is that a policy thing which you -

Ms ASHFORD - I probably need a bit more time to think about that, to be fair.

Mr WILKINSON - Because the evidence that we've had states that -

Ms ASHFORD - Because I'm thinking of the child - I'm coming from the child's perspective not from the adult perspective.

Mr WILKINSON - Yes, because there is some evidence that we have had - I forget who it was now - that was saying 'by the carrier', if I can call it that -

CHAIR - Gestational mother.

Mr WILKINSON - Yes, the gestational mother - sharing the blood, sharing the food, there is an -

Ms ASHFORD - You have an attachment.

Mr WILKINSON - An attachment is made.

CHAIR - There are hormonal issues.

Mr WILKINSON - Yes, so that was the reasoning that we received in relation to the attachment that forms from the gestational mother.

CHAIR - But not only from the mother, from the baby as well, because the baby initiates the labour, generally - they release hormones and that starts the labour off - so there is very much a connection between mother and baby, regardless of the genetic material that the baby was created with.

Ms McLEAN - It is a very vexed area.

Ms ASHFORD - It is. The other thing in this is that before anything happens, there is no one there talking about what this means for the child. This is all an adult space that everyone is in at the moment; no one's there giving independent advice about what this might mean for the child, at the very beginning of the process.

CHAIR - Yes, one of the reasons that it has been put on the table, as far as that goes, is that at this point there is no child.

Ms ASHFORD - Mm.

CHAIR - With adoption it is different because you have got a child and there is a child that needs to have parents to care for it. In this case at that point there is no child.

Ms ASHFORD - But from my perspective, if we are looking at what is in the best interests of the child, then I think that that should be in that space. I understand what you are saying but from my perspective if surrogacy is going to happen, what does it mean for the child that will be brought into the world?

Mr WILKINSON - Are you saying that there should be someone there like a child representative in the Family Court where that person just acts for the child and even though the child is not there -

Ms ASHFORD - Even though there is no child.

Mr WILKINSON - Yes, but you are saying that there should still be a child 'representative' present to put matters forward which they believe appropriate for these people intending to have the child.

Ms ASHFORD - I do.

Dr GOODWIN - So that is at the front end before the child is even conceived?

Ms ASHFORD - Yes.

CHAIR - Do you want to raise anything else?

Mr ASHFORD - The other one was the criminal records and the other checks.

CHAIR - This will probably pick up on that then. We have heard some evidence from Victoria and we have also talked to the adoption agency and that sort of thing about different models that could be put in place to ensure that when people are looking at going into a surrogacy arrangement, they have the appropriate legal advice and counselling and that the child's best interests are maintained throughout that process.

With adoption, obviously there is a child we are talking about at that point but even people seeking adoption go through a process at the front end before there is a child potentially. So we were considering perhaps a model where parties to a surrogacy arrangement could go through a similar sort of process which could involve some of the police criminal records and checks and things like that as people seeking adoption do, and children being placed in reunification programs with their families and that sort of thing.

That was subsumed into adoption services, or something that already exists. We are not talking about huge numbers here, or so our evidence would suggest. Do you think that would be an appropriate model and that is something that should be looked at so you have got an upfront process where there is a registering of the arrangement or agreement and then further down the path when the baby is born, if a baby is born, if they do actually proceed to having a child, that the court then has all that information on which to base their parentage order.

Ms ASHFORD - Yes, I would agree.

CHAIR - How would you see that working predominantly?

Ms ASHFORD - I think you have got an adoption, like you were saying there is already an adoption agency place that has a process or procedure that is based on legislation. If you are looking at what is in the best interests of the child you would want to make sure that all the steps have been taken to ensure that when this child is born there have been the proper processes put in place to ensure that the child is wanted, is going to be nurtured, is going to be loved and going to be brought up and that there is going to be open transparency for this child about where they have come from. I do not think you can have that unless you have gone through a very thorough sort of pre-process.

CHAIR - As far as registering the birth details, I mean with an adoption I think since 1968, was it?

Mr WILKINSON - 1968.

CHAIR - There was provision that these original birth certificates be kept with Births, Deaths and Marriages. Now the original certificate and the amended birth certificate sits in Adoption Services and the child or birth parent can go back and access those through the Adoption Services. There can be a number of parties here - you have potentially up to five different people who could be involved, and ultimately there could be six but still it depends on how far you want to take it. So this issue of knowing who your genetic parents are -

Ms ASHFORD - As opposed to -

CHAIR - as well as your gestational birth mother, as well as your intended parents, that also flows to a degree through to ART with IVF babies and children conceived through all those other techniques we have now. Is that something we need to expand through Births, Deaths and Marriages or should that be expanded through Adoption Services and using the current way they deal with it.

Ms ASHFORD - I think it is tricky, isn't it? It is not an adoption, is it. A rhetorical question.

CHAIR - It is handing over the parentage from one family to another or one person to another.

Mr WILKINSON - Or alternatively it is supplying, one could argue, a child to a person so it is -

CHAIR - Generally it was childless couples we heard from in other jurisdictions.

Mr WILKINSON - That is right.

CHAIR - It is generally a heterosexual couple who cannot have children, mostly.

Mr WILKINSON - Yes.

Ms McLEAN - Can I clarify that question? Are you talking about the actual use of the register, about that sort of a process? Is that your question?

CHAIR - Well, yes.

Ms McLEAN - Not under adoption but a similar process.

CHAIR - Yes. In Births, Deaths and Marriages now you have just got your birth certificate. If it is amended that is it, it is changed. That was the case in, I think it was, New South Wales where that father was taken off recently where he no longer exists really, according to that child, which is pretty unfortunate. But, if there are circumstances where you change a birth record, such as putting different names of the parents on it then if you have something like an expanded birth certificate that people could access under certain circumstances that contained all that relevant information whether they were adopted, whether it was a surrogacy arrangement and who the birth mother was, who the egg donor was, the sperm donor. Do you think that should sit within Births, Deaths and Marriages?

Ms ASHFORD - Either.

CHAIR - It could be either?

Ms ASHFORD - I think it could be either. You do not want to set up a separate entity because you are not talking about a very large number of births. I think it could sit under either but it will also have to come back to that pre-stuff, wouldn't it, and about all those people wanting to be named.

CHAIR - And that would have to be determined during the upfront counselling process.

Ms ASHFORD - Which is the other, which is all part of that pre- -.

Mr WILKINSON - We have heard from Adoptions that they do it, as Ruth was saying, since 1968 they have got the records. It would seem to me that because they have already got the system set up to do it, it may well be that the best way to deal with it is to allow this to occur through the adoption registry as well as opposed to Births, Deaths and Marriages.

Ms ASHFORD - Yes, and I am thinking of situations where children have been adopted and they do go and access that information about their adoptive parents and it is a very delicate process, so if you could just go and get your certificate through Births, Deaths

and Marriages it is not going to give you the resources perhaps that you might get through going through the adoption agency to get those records.

CHAIR - Tricky if you did not know.

Ms ASHFORD - Yes, that is right. So that would be my thing about just thinking about what that would mean for the young person if they are 18 or if they are under 18, you would really need them to understand what it means to get that information and what it means for the other people and what might likely happen. They might not want to engage with you, all those things, so it is not your normal type of process where you would go to Births, Deaths and Marriages and get your certificate. It is quite different.

Mr WILKINSON - Because we would have to change the way that Births, Deaths and Marriages register their births, deaths and marriages whereas if you did it through the Adoption avenue there would seem to me to be no difference.

CHAIR - There is already the framework there.

Mr WILKINSON - There is already the framework to do it.

Ms ASHFORD - That is right.

Mr WILKINSON - So it would be through them. Plus, as you say, if they go through that agency to endeavour to find out who their parents are then what they can do is, they have already got some systems in place to ensure that everything is in order for them to be able to do that.

Ms ASHFORD - Yes, because it is not always smooth sailing.

Mr WILKINSON - Yes, I imagine.

Ms ASHFORD - When you find out that information.

Dr GOODWIN - Can I pick up on the point you made earlier about having a children's representative or someone to articulate what it means for the child in this whole process? I am just trying to work out at what point that might occur. Would it be at the point perhaps when the parties sit down to nut out the surrogacy agreement or the arrangement? Is that when you see it as being important to have someone there to speak for the child or is it earlier than that? What do you think?

Ms ASHFORD - Well, that is the first point it is going to become serious, isn't it? Where it is going to become a formal arrangement that you are starting to work on and I think that is the place for it to be there. If you had it before that I do not know how you would do that.

Dr GOODWIN - Yes.

Ms ASHFORD - How would you do that? That is the question. I do not see how you could but once you are into a formal arrangement then there should be some independent child advocate or representative there, talking about the rights of the child.

Dr GOODWIN - What sort of person would that be, do you think?

Ms ASHFORD - I think it should probably be someone with a legal background, similar to the child representatives that you have in the Family Court - someone who is completely objective and neutral.

Ms McLEAN - There was one related issue and that was the whole issue of the child representative in the context of an application from parentage orders because, ultimately, as is the case in the Family Court and, under the Children, Young Persons and Their Families Act, in child protection proceedings where the court is to determine what is in the best interests of the child, the presence of a contradictor who is impartial and promoting what is in the best interests of the child is seen as really important to those proceedings. Particularly in this system, it seems that the only people who are parties to any application are the intended parents and the surrogate parent or parents. If they are going to consent, then there is no basis upon which information that might be contrary to the application is put before the court.

CHAIR - A child's voice is not heard.

Ms McLEAN - No. It is not an instruction model. It is clearly not a model in terms of what the child wishes because the child is so young, but that does not matter. It is a 'best interests' model of representation which is the child representative operating as they do in the Family Court where they do not necessarily have to speak to the child. They can take into account their views and wishes, if they have the capacity to express them. But what they are doing is putting before the court factors which would impact on the best interests of that child. I think that is particularly relevant when you look at the tests for 'best interests'; it is even more loaded in terms of a particular outcome. It is not just a consent to an application; it is loaded and it is probably the best for the child, for the order to be made in favour of the intending parents. That may be the best outcome for the child. But my point is, how do you know if you have that agreement? I just cannot see, apart from a dispute between the surrogate parent and the intending parents, how contrary information that is in the interests of the child, can be put.

Mr WILKINSON - What about where they are talking about having counselling before it is entered into? Do you think an independent counsellor who is looking at the overarching issues involved is a capable person to deal with these child representative type of arrangements?

Ms McLEAN - In the court, itself?

Mr WILKINSON - At the very beginning.

Ms ASHFORD - I do not know. I think that then creates putting someone into dual roles by doing the counselling as well as talking about what that means for a child. I think they are two separate roles.

Mr WILKINSON - I am just thinking aloud but one could argue that the child is not there and the child representative is more often than not involved with custodial matters or guardianship - care and control type of matters and access matters - and therefore they

have one competing family against another or one competing party against another competing party. They look at what one party can offer and what the other can offer; then they conclude that a child would be best to do one thing or another, or have an amalgam of both, and so on. Whereas here - I am not really believing what I am saying but I am just putting the argument - what could say is, because that is not open at the moment there are no competing parties and you can have access to the child here for X amount of time and you can have custody and this person is the best person to have custody. There are not those issues arising. Do you need to have that child representative rather than just saying, 'Yes, you have to give the child love, support' et cetera?

Ms McLEAN - Certainly in the absence of any preconditions in terms of if there were not a process such as there is with adoption where people do go through what you could call a vetting process as well as counselling, so issues that are said to be pertinent to whether or not a person is a proper adopted parent are addressed in that vetting process.

Mr WILKINSON - Sure.

McMcLEAN - There is no such process here in this context and so that is one thing. I know that is being discussed but I think the second thing is an overarching issue which is what is the point then of saying in a piece of legislation that the whole framework is based on what is in the best interests of the child. So I think it really boils down to whether the test in the bill which is weighted towards intending parents is the appropriate way and if so then that presumption has been made. But you still need someone to say, 'Well, look, we have found out that there are factors that have not been disclosed in any way, shape or form that go to what is in the interests of the child'. Maybe there is nothing at all at issue.

Mr WILKINSON - Am I right in saying that the child representative, for want of another word, would look into the people who were going to have the child and have care and control of the child and be more focused upon whether those people are capable parents or not as opposed to whether one party is more capable than another?

Ms ASHFORD - I think there are two separate things here. One is about your pre-work and that is about making sure that they are fully informed about the formal arrangement you are going to enter into and what that means when the child is born and what that means for a child and understanding how a child works and what they might ask and all those sorts of things.

Mr WILKINSON - A counsellor does that.

Mr ASHFORD - Yes, I think that is one bit. Then you are talking now about it really going into the parenting or - I find it very hard word - 'parentage'. I think there is two separate things.

Dr GOODWIN - I think that is right because the reality is that circumstances could change between the point of the surrogacy arrangement and when it comes to the court because it could take some time before there is a child conceived.

CHAIR - It could be twins or it could have major malformations.

Dr GOODWIN - Yes.

CHAIR - Or health issues or a whole range of things.

Ms McLEAN - I suppose the other issue too is that a child representative - I am using that term because it is a term that is Family Court-oriented but really that role could be worked out. I think you would have to define that a little bit in some sort of way, shape or form. The other thing is that the child representative's obligation is to court and that is the client in a sense, so I mean it does not have to be a huge battle with the application. It is really about ensuring that there is some sort of a safeguard.

Mr WILKINSON - I suppose it is really emphasising the fact that it is the paramount interest of the child that has always got to be the number one, as opposed to the interests of parents.

McLEAN - No-one wants it to be an argument or a fight or a dispute between the parties at all. It is just saying that like in some situations there is that sort of fail-safe provision. How that would operate in this particular jurisdiction is something perhaps that requires further consideration.

CHAIR - We have not got warring parties here generally, have we?

Ms ASHFORD - No.

CHAIR - People are quite cooperative, generally.

Ms ASHFORD - It is not about warring, yes.

Mr WILKINSON - But there may be warring before giving birth to the child.

CHAIR - Or something could happen along the way.

Mr WILKINSON - That is right.

Ms McLEAN - It may be that that is the whole point - that they are consenting and agreeing but you do not know what has happened behind the scenes.

CHAIR - It is like that clause you pointed out in 14 where the birth mother has no genetic material in the child and then the court is saying you have to give the child up and she just does not want to. The other thing that has been raised by other witnesses is that when you have not had a baby before and whether you believe you should have had a baby previously before you can be a surrogate because childbirth is a fairly unique experience and people would suggest that you really do not know what it is like until you have done it.

Mr WILKINSON - Particularly a heap of pregnant fathers.

CHAIR - Yes, particularly the pregnant fathers; they are the hardest work of all. Do you think these are issues that need to be included as well?

Ms ASHFORD - I think you could uncover a whole range of issues and you could go on and on and on and I suppose our focus is on the child, not on the parent.

CHAIR - But if there is going to be a fight over this child from the mother who has birthed it, but whose egg was not used and who has not perhaps had a baby before, and who perhaps is 21 -

Ms ASHFORD - And now feels completely attached and does not want to let go.

CHAIR - Yes, because she had no idea it was going to be like this.

Ms McLEAN - I suppose that is a classic example then where a child representative would come in handy and also in relation to the circumstances where an order can be made notwithstanding that consent has not been given - other circumstances.

CHAIR - The difficulty there is working out what is in the best interests of the child, particularly if the genetic material of both intending parents was used - which would be unusual because why wouldn't they just do it themselves? She could have health issues.

Mr WILKINSON - Then it gets down to a custodial battle, doesn't it? It is the same thing.

CHAIR - It does then, doesn't it?

Mr WILKINSON - Do you have all this in legislation or do you have it in regulation - what we are talking about now?

Ms ASHFORD - Maybe this is a curly one to throw in, but in terms of what would occur if you give birth to the child and the child is born with a severe disability that you are not aware of, and then the parents who are going to get a parenting order on the child say, 'Well, we do not want that child.'

CHAIR - It could be cerebral palsy, birth asphyxia, or that sort of thing.

Ms ASHFORD - So it is not only about the attachment; it is also then about those other components as well. That is when you would want someone independent as a child representative because you talk about what is in the best interests of the child.

Dr GOODWIN - It is not really clear what happens if all the parties decide they do not want the child. Does it end up in the care of the State? Presumably that is what happens.

Ms ASHFORD - That is what would happen, one would think.

CHAIR - It would be better for the birth mother to give that child up for adoption at that point, would it?

Ms ASHFORD - Has it happened in any other jurisdictions?

Ms McLEAN - Not that I'm aware of.

CHAIR - It is only new, you see, and we are talking to the ACT that has had -

Ms ASHFORD - It has probably happened in America.

CHAIR - I'm sure it has.

Mr WILKINSON - Which state?

Ms ASHFORD - The possibility of adoption is a consideration.

CHAIR - Going back to the independent advice, particularly at the front end, not so much further down when the child is there, but there have been some criticisms about the lack of having an independent counselling requirement because a lot of these surrogacy arrangements are provided for through the ART clinics and fertility clinics, and they have counsellors working there because they have to counsel any couples that are using ART, even if it is a married couple. Is that important do you think that the counsellors are independent of any other framework?

Ms ASHFORD - Or agency or whatever?

CHAIR - Yes, agency that is involved in the provision of the service.

Ms ASHFORD - I think if I were making a decision I would want that decision to be informed by someone who had no allegiance to anyone or anything. So you would want them to be independent.

CHAIR - Does that say that the counsellors who work in the clinics cannot give independent advice?

Ms ASHFORD - That's right.

CHAIR - You would hope they could because they are counselling people for a range of reasons.

Ms ASHFORD - You would hope so.

Dr GOODWIN - But then, if they are working for a fertility clinic and there are commercial considerations, at the end of the day they want the business for the clinic.

CHAIR - It depends on whether they are on a bonus; I am not sure how they work.

Dr GOODWIN - Neither do I.

Ms ASHFORD - It also depends on what the qualifications of the counsellors are, because if they are psychologists, then they are bound by the APS, whereas if they are social workers, they are not bound by anything.

CHAIR - So it is important to have someone suitably qualified to do the counselling.

Ms ASHFORD - You have a code of ethics if you belong to the ASW, but if you are a psychologist, it is a completely different kettle of fish. So it may be a question of the qualifications of the counsellor.

Mr WILKINSON - Or alternatively, accreditation; the counsellor should be accredited. And then, are you saying they should belong to some professional organisation?

Ms ASHFORD - I think that gives you a clear assurance about them acting independently and in the role that they should be acting in, and not being there with an allegiance, et cetera, because the APS would strike you out, and you cannot be registered as a psychologist to work, but there is no striking out of a social worker anywhere.

Mr WILKINSON - Are you saying there should be?

Ms ASHFORD - I think there should be.

CHAIR - There needs to be some sort of accountability.

Ms ASHFORD - Being a social worker myself, I think there should be, but there is not. There is no board.

CHAIR - They are not registered as such, are they, social workers?

Ms ASHFORD - They are not registered, but you can be a counsellor.

Mr WILKINSON - So there is no professional body surrounding social workers?

Ms ASHFORD - There is a professional membership, so you are a member of the Australian Association of Social Workers, but it does not make you a registered social worker.

CHAIR - Nurses are registered with AHPRA now, and psychologists and -

Ms ASHFORD - So you have nurses, the AMA, psychologists, but not social workers, and I think you would find that lots of counsellors have a social work background, so that might be a consideration - their tertiary qualifications and membership.

CHAIR - What about registration?

Ms ASHFORD - Registration, I mean.

CHAIR - With registration you are accountable.

Ms ASHFORD - That's right, and you can be struck off and can't practise.

CHAIR - Yes, if you haven't got registration you can't be struck off anything.

Mr WILKINSON - Are there any other areas of the bill that you think need smartening up, tightening up, should be inserted, should be taken out?

Ms ASHFORD - I think we have covered most of them. They were the key ones that concerned us.

Ms McLEAN - Did you want to make the point that the marital status of the intended parents is not relevant?

Ms ASHFORD - Oh, yes. The marital status, whether you are married or not, we don't believe that is relevant - being of the same sex or single.

CHAIR - The single male as well as the single female? Do you have an issue with it?

Ms ASHFORD - I do not see it as being relevant.

CHAIR - Thank you very much for your time today.

Ms ASHFORD - It is an interesting bill.

CHAIR - It is not until you delve down into it that you see the complexities of it, though, is it?

Ms ASHFORD - Yes, and we all have different views.

Mr WILKINSON - They have been pretty well uniform, haven't they? They have been pretty consistent, which is interesting.

Ms ASHFORD - Thank you.

THE WITNESSES WITHDREW.

Ms JULIE FIELD, EXECUTIVE DIRECTOR, LEGISLATION AND POLICY, AND **Ms GEORGIA HARVEY**, SENIOR LEGAL POLICY OFFICER, DEPARTMENT OF JUSTICE, AUSTRALIAN CAPITAL TERRITORY GOVERNMENT, WERE CALLED AND EXAMINED VIA TELEPHONE LINK

CHAIR (Ms Forrest) - Hello Julie and Georgia. Thanks for joining us. We just want to have a chat about your legislation. I should also tell you that we are recording for *Hansard* for the purpose of the report. We will prepare a report and it may include some of your evidence if it is helpful to the committee's report.

Ms FIELD - Okay.

CHAIR - We are looking at surrogacy legislation in our Chamber at the moment and the committee has been looking at it more thoroughly for the last couple of months now. We are interested in knowing how the surrogacy legislation in the ACT has been operating. It is a similar-sized jurisdiction to Tasmania, so we just want to hear what your views are on what your legislation looks like. I do not know if you have taken the opportunity to have a look our bill.

Ms FIELD - We had a quick look.

CHAIR - Do you feel able to make comments about any of the aspects of our bill that you think may not work well, in looking at how it has worked in the ACT?

Ms FIELD - Okay. I guess the first thing to state - and I think Danielle has already said this - is that it is not a highly used piece of legislation in the ACT. We do not get a large number of applications through in relation to this.

CHAIR - How long has your legislation been in place there now?

Ms FIELD - Since 2004, and that actually replaced an earlier version which started earlier, so I think that had been around for a while before that. So the 2004 rewrite extended the people who could apply so that it was not just heterosexual couples.

Mr WILKINSON - Julie, there is some talk that there would be between three and five applications a year. Did you find that to be the case in the ACT, or has it been less than that?

Ms FIELD - I would rely on Danielle for that, and I thought she actually said that -

Ms HARVEY - There had been three all up.

Ms FIELD - Yes, I thought she said there were three altogether.

Mr WILKINSON - Since when, since 2004 or before that?

Ms FIELD - Since 2004.

CHAIR - You might not be able to answer this, but do you know if they were heterosexual couples or same-sex couples?

Ms FIELD - I am sorry, I don't know.

CHAIR - It is not very many, anyway.

Ms FIELD - No.

CHAIR - Do you think the low numbers are a sign that the legislation is too complex, or just that there is not the demand, or why is there not a great need?

Ms FIELD - Our legislation is not that complex really. All it is is a mechanism by which, if people are entering into surrogacy arrangements, our act allows the Register of Births, Deaths and Marriages to be adjusted to take into account their own sort of personal arrangements. So we do not have a whole lot of limits around that. It really is just about recognising what they have already done. All we do is prohibit commercial arrangements. My expectation would be that the reason this is not used is that surrogacy is quite a complicated process itself, and possibly it is around people not necessarily being interested in going into surrogacy arrangements, particularly when commercial arrangements are prohibited. That would be my guess, but I do not have a whole lot of evidence around it.

CHAIR - So in the few cases that you have had, have they worked fairly smoothly? Have there been problems with them or things that you think could be done better?

Ms FIELD - As I said, all our legislation does is recognise the results at the end, so we really do not get involved in the process at all.

Mr WILKINSON - Do you have any counselling at all before the process starts?

Ms FIELD - Counselling is one thing that is, I think, a requirement under ours. It is either a requirement or it is one of the things that the court takes into consideration. We are just double-checking for you. We do not have a requirement for legal advice beforehand, so I think we do require - we will just check that.

Mr WILKINSON - While you are doing that, our clause 20 talks about interests of the child and it is presumed the paramount interest is that of the children. It does not really say it as though it should be, and to my mind it should be in accordance with the Family Law Act dating back from 1974, as you know. But with that do you think that there should be a child representative appointed at any stage, especially with the parentage orders in order to ensure the paramount interests of the child is uppermost as opposed to the interests of the parents?

Ms FIELD - Our Supreme Court certainly looks at the best interests of the child. I really could not comment on whether there should be an advocate involved. Your process has probably a lot more rules around it; ours really is just recognising at the end because we would expect the child to be living with the intended family, and it happens between six weeks and six months, so the child is very young. Effectively the handover had already happened and the relationship is already there. I think the lack of people rushing in to

take part in the scheme indicates that people are not just rushing into it. I really could not comment further than that, I'm sorry.

CHAIR - How do you deal with the registration of the birth and the recording of the details of the child?

Ms FIELD - The intended parents come in and make an application.

CHAIR - The child's birth certificate would state the birth mother and possibly father?

Ms FIELD - Yes. There needs to have been a pre-existing surrogacy agreement, a substitute parent agreement. Parentage orders are made under Division 2.5 of our act and it applies if: the child was conceived as a result of a procedure carried out in the ACT; neither birth parent is the genetic parent of the child - so it has to be completely separate; there is a substitute parent agreement in force and at least one of the substitute parents is a genetic parent and the substitute parents live in the ACT. That is when they can make the order. They apply to the court. There are provisions so it can only be made when the child is between six weeks and six months and that is around bedding it down early, but not immediately post birth, so that the people are more settled.

The court must make a parentage order if satisfied that the making of the order is in the best interests of the child and those parents freely and with an understanding of what is involved, agree to the making of the order. So there are a couple of provisions that deal with something happening to one of the intended parents, but really that is the extent of it.

CHAIR - The restrictions seem pretty tight. As a surrogate mother you cannot have genetic material in the child, and one of the intended parents at least has to have either donated the egg or the sperm for the pregnancy?

Ms FIELD - That is right.

CHAIR - Do you believe then there is probably a range of other arrangements going on out in the community in the ACT, surrogate women who use a turkey baster, or who go through an artificial reproductive technology clinic and use perhaps the donor sperm, but use their own egg? As I understand it, a lot of those surrogacy arrangements actually do use the gestational mother's egg. They could not comply under your act because they are automatically excluded. As soon as the mother's egg is used they are not part of it. Do you reckon there are others out there? You have only had three since 2004 and so the only way to know would maybe be if they went for an adoption order or something like that in the ACT.

Ms FIELD - Yes, they can go for an adoption order.

CHAIR - That would be the only way that you would actually pick up these children, I guess.

Ms FIELD - With the example that you gave where the birth mother is actually related to the child? Yes. That is right. We treat that as an adoption.

CHAIR - Right. The window is fairly narrow, then, in that case?

Ms FIELD - It is, yes.

Dr GOODWIN - Can I just clarify - all your surrogacy cases have been through ART?

Ms FIELD - I am sorry, I do not have that information.

CHAIR - They would have to.

Dr GOODWIN - They would have to, wouldn't they?

Ms FIELD - I think they have to be, yes, sorry.

CHAIR - Because the mother cannot get pregnant otherwise.

Dr GOODWIN - No.

Ms FIELD - Yes.

Dr GOODWIN - Is there a process around that? Is that covered in your bill or is that separate?

Ms FIELD - The act covers artificial reproductive technology. It comes within the auspices of Health so I am not really across that.

Dr GOODWIN - But it is in your act, the ART stuff?

Ms FIELD - I believe so, yes. There are presumptions around births arising from procedures. If a woman undergoes a procedure and she becomes pregnant, section 11 of our act sets up the presumptions and the presumptions really are around the birth mother being the mother and the birth mother's partner at the time being the other parent of the child. That is the extent to which it is dealt with. That section with all the presumptions is modified when you get to parentage orders.

CHAIR - The way the Tasmanian bill is constructed, there are no barriers as to how the pregnancy occurs.

Ms FIELD - Right.

CHAIR - Potentially there could be more people accessing it. It says, 'The manner by which a child is conceived is not to be taken into account in determining whether a parentage order should be made in relation to the child'.

Ms FIELD - That probably has the same effect as our provisions because if the method of conception is not relevant you would expect the birth mother to be the mother so it probably has the same effect as ours.

CHAIR - You said your birth mother cannot be the genetic mother.

Ms FIELD - Sorry, under a parentage order they cannot but if you go back to your ordinary presumptions around where ART is used you would expect the birth mother to be the mother for the act. Sorry, am I confusing?

CHAIR - Yes, because a lot of women access ART because they are infertile. They do not have eggs, they have had ovaries removed, whatever, and so they would be the birth mother if they have a successful IVF pregnancy but they would not be the genetic mother. Do you see what I am saying?

Ms FIELD - Yes. Under our act if you give birth you are the mother.

CHAIR - Regardless of whether you are genetically linked to the child or not?

Ms FIELD - Yes. Unless someone goes for a parentage order, but the presumption is if you give birth you are the mother.

CHAIR - I see what you are saying.

Dr GOODWIN - I think that is the same under our other legislation.

CHAIR - Yes.

Ms FIELD - Yes.

CHAIR - That is right, yes. With a case of surrogacy then you apply for a parentage order to change that.

Dr GOODWIN - Yes.

Ms FIELD - Yes.

CHAIR - In using the legislation have you identified any problems with it? Would you do things differently if you were starting again or revisiting the legislation for the second time?

Ms FIELD - I do not know that we would. It is such a complicated area. As long as commercial arrangements are excluded it really is quite a personal matter and I think what we are saying is that people have a right if they enter into these agreements to be recognised on birth certificates as parents but it is probably not necessary to go any further than that. I think we are quite comfortable with where it is at the moment. I cannot speak for the Government any more than that.

CHAIR - What about overseas surrogacy arrangements? Do you recognise those?

Ms FIELD - No. We can only be doing anything in relation to recognising or changing birth certificates, and there needs to be this serious connection with the ACT, so I would not think so, no.

CHAIR - The ACT are very protective about that. They do the same with their drivers' licences. You have to live in the ACT - just because you are so close to New South

Wales, I suppose, or surrounded by it. Are there any other comments you would like to make about the bill? Ours is obviously a bit different from yours.

Ms FIELD - Yes, I guess ours is really supposed to be only minimalist, recognising private arrangements that impact on . people's lives. I guess you seem quite brave in going for something more complicated, but we look forward with interest to see how you go.

CHAIR - As far as the children born by surrogacy are concerned, how do they access the records of their genetic parents and their birth mother, or can they?

Ms FIELD - They can only access those records for the purposes of medical information; so they can get medical information but as far as the birth certificate is concerned, they cannot get access to those records, because there can only be two parents, and as soon as the parentage order comes through, then the surrogate parents become the two parents and there is no record of the birth parents.

CHAIR - So it gets destroyed?

Ms FIELD - Danielle would be better to help you with this. It can't actually be destroyed because you can go in and get medical information if you need it; so it must be kept somewhere.

Dr GOODWIN - So how does that work in terms of getting medical information? What does that mean?

Ms FIELD - It is in our act under 29 which talks about an effective parentage order and access to information, and 30 talks about medical information. Basically, a parentage order works the same way as an adoption order, which kind of closes off access to those records.

CHAIR - Can't an adopted child get access to their birth parents' records?

Dr GOODWIN - Eventually.

Ms FIELD - They can get access to their parents' medical information.

CHAIR - What about the parents' identities?

Ms FIELD - No, I don't think so. Can I get back to you on that one?

CHAIR - Yes, it might be helpful.

Ms FIELD - I am not 100 per cent sure I have given you accurate information there, so I will just double-check that one and get back to you.

CHAIR - We are interested in when a birth record is altered to reflect the new arrangements with new parents, that the child should be able to access the information on the original certificate, and possibly including other information such as a sperm donor or egg donor's identity as well, if it was not one of the intended parents.

Ms FIELD - I don't think they can under our act, but I will double-check that.

CHAIR - It would just be interesting to have that confirmed, to see how it actually works. It is a fairly important issue. It has been raised by the committee a number of times - the right of children to access that information about their parentage.

Ms FIELD - Yes. I guess not having a genetic link to the birth parents impacts on that.

CHAIR - Yes, because there is no medical information related to the mother as such, then.

Ms FIELD - So that would make sense, which seems to suggest that the medical information is not relevant in that case.

CHAIR - How is the medical information qualified? If I am going to have a child myself and I want to know about the family history of cystic fibrosis, for example, can I just check on my genetic parents - because it has to come from both sides?

Dr GOODWIN - That is assuming you know that you are not the child of your parents.

CHAIR - That is right.

Ms FIELD - Let me check on that and get back to you.

CHAIR - Thanks. Any other questions, members? Any other comments you would like to make?

Ms FIELD - No, thank you.

CHAIR - Thanks for that. Our two pieces of legislation are a little different but it is helpful to talk to another smallish jurisdiction.

Ms FIELD - Yes, we always use Tasmania as an example because you guys are small too, so it does help because things do impact differently on larger jurisdictions.

CHAIR - That is right, particularly resourcing and things like that.

Ms FIELD - Absolutely.

CHAIR - Thanks for your time today.

THE WITNESSES WITHDREW.