

## SURROGACY BILL 2007

### *Second Reading*

Resumed from 18 September.

**HON ROBYN McSWEENEY (South West)** [3.47 pm]: I first heard about surrogacy some 20-odd years ago. I am extremely surprised that there has never been a legislative framework around those babies involved in surrogacy. In 1976 a lawyer named Noel Keane arranged the first formal agreement between a surrogate mother and a couple in the United States. The marketing of surrogacy developed as a solution to female infertility. Brokers entered the scene and so did the hiring of women to become pregnant by artificial insemination with the sperm of a husband of an infertile woman. In 1986 surrogacy was brought to the fore with the attention caused by the case of baby M in which Mary Beth Whitehead, a woman hired as a surrogate, refused to relinquish the baby. That was probably when most of us realised that surrogacy was taking place. After a protracted court battle in which the Whiteheads' parental rights were stripped and replaced, the hiring couple won custody of the baby, but Whitehead remained the legal mother with visitation rights. Since the 1980s, advances in technology have increased the use of gestational surrogacy and it has become more common. There has been an increase in the number of Latin American, Asian American and African American surrogates. The Center for Surrogate Parenting in the United States estimates the cost of traditional surrogacy, in which artificial insemination is used, to be \$56 000. It estimates that if another woman's egg is used, the cost increases to \$69 325. Approximately \$15 000 is paid to the surrogate mother for the time and sacrifice of her pregnancy. When surrogacy agreements first came about in the mid-1970s, there was no payment for surrogate motherhood. The arrangements then tended to involve middle class and blue-collar couples, and friends and sisters helped each other. When payment became the norm, the demographic changed considerably. The majority of couples are now largely upper middle class, whereas the majority of surrogates are working class women. It has become one law for the rich and another for the poor. The poor usually give birth for rich women.

In 2002 most American states had no specific laws for surrogate motherhood. I find it strange that in America, after all the trouble in 1976, there was no legislative framework. Here we are in Western Australia in 2007, finally setting out a legislative framework. It is rather bizarre. Although many American states do not uphold surrogacy contracts, all states recognise birth certificates and adoption certificates from other states, which means that surrogate services are available to anyone with the money to hire them. Surrogacy has become a business, but that does not mean that contracting couples do not value the surrogate mother, or that the surrogate mother does not care about the child or the couple. I guess that in America it is a business, whereas here it is more altruistic. Over there it is a red-hot business; I will return to that point later.

Approximately 95 per cent of potential surrogate mothers are rejected, which ensures that situations similar to that of Mary Beth Whitehead do not happen. Surrogates are often chosen for their commitment; however, we know that in America it is sometimes money that brings poorer women into these situations. Helena Ragone has undertaken an ethnographic study of surrogacy which has revealed that couples adopted one of two strategies in dealing with their surrogate. "Egalitarian" couples wanted to maintain a relationship with the surrogate mother and did not see her as merely a means to an end. In all of Ragone's cases the children were still quite young, so it is difficult to know how that situation will play out. "Pragmatist" couples simply dropped the relationship with the surrogate and took the child as their own, regarding the payment to the surrogate mother to be sufficient acknowledgement of her role. An American Law Encyclopedia article retrieved from the Internet and entitled "Surrogate Motherhood - Does Surrogacy Involve Making Families or Selling Babies?" states in part -

The *Baby M.* decision inspired state legislatures around the United States to pass laws regarding surrogate motherhood. Most of those laws prohibit or strictly limit surrogacy arrangements. Michigan responded first, making it a felony to arrange surrogate mother contracts for money and imposing a \$50 000 fine and five years' imprisonment as punishment for the offense. Florida, Louisiana, Nebraska and Kentucky enacted similar legislation, and Arkansas and Nevada passed laws permitting surrogacy contracts under judicial regulation.

In 1989 the **AMERICAN BAR ASSOCIATION** (ABA) drafted two alternative model laws involving surrogate motherhood. These laws are not binding but are intended to guide states as they formulate their own laws. One legalizes the practice of surrogate motherhood and makes surrogacy contracts enforceable in court; the other bars the enforcement of contracts in which a surrogate mother is paid to have a child and then give up any claim to the child.

Under either ABA model, states legalizing surrogate contracts limit them to agreements between a surrogate mother and a married couple. A genetic link must be established between the couple and the child, by the husband's supplying sperm or the wife's contributing an egg, or both. To be valid, the contract must be approved by a judge before conception takes place, and it must be accompanied by

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proof that the wife is unable to bear a child. The surrogate mother has the right to repudiate the contract up to 180 days after conception, in which case she may keep the child. If she does not repudiate the contract during that time, the couple becomes the child's legal parents 180 days after conception.

In 1993 the California Supreme Court issued a landmark ruling declaring surrogacy contracts legal in California. The case, *Johnson v. Calvert*, involved a surrogacy contract between a married couple, Mark Calvert and Crispina Calvert, and Anna L. Johnson. Crispina Calvert was unable to bear children. In 1990 the Calverts and Johnson signed a surrogacy contract in which the Calverts agreed to pay Johnson \$10 000 to carry an embryo created from the Calverts' ovum and sperm. Disagreements ensued, and later that year, Johnson became the first surrogate mother to seek custody of a child to whom she was not genetically related.

I would be absolutely appalled if that happened in Western Australia. I will read that out again. The article states -

Johnson became the first surrogate mother to seek custody of a child to whom she was not genetically related.

**Hon Barbara Scott:** It was not her egg.

**Hon ROBYN McSWEENEY:** No, it had nothing to do with her. The couple's genetic material was placed into the surrogate mother, and the child had no genetic relationship with the surrogate mother, but once she had the baby, she wanted to keep it.

**Hon Barbara Scott:** So legally it was hers?

**Hon ROBYN McSWEENEY:** Yes, that is what I am getting to. The article continues -

After the child's birth, the Calverts were awarded custody. Johnson appealed the decision. The state supreme court finally upheld the legality of surrogacy contracts under both the state and federal constitutions. The court held such contracts valid whether or not the surrogate mother provides the egg. The U.S. Supreme Court declined to hear Johnson's appeal.

This meant that the parents, who had the genetic link with the child, still kept the baby. It is a case in which commonsense prevailed, but they would have had to go through a lot of expense to keep their child. The article continues -

In many states, surrogacy contracts are considered unenforceable because of existing adoption laws designed to discourage "baby selling." These laws may, for example, forbid any consent to adoption given prior to the birth of the child. They may also make it illegal for a birth mother to receive payment for consenting to give up a child or for an intermediary or **BROKER** to receive a fee for arranging an adoption. In states with these laws, a surrogate mother who wishes to keep the child rather than give it up for adoption may successfully challenge an already established surrogacy contract.

Laws concerning artificial insemination can also conflict with surrogacy agreements. Some states have laws maintaining that semen donors are not legally the fathers of children created with their sperm. These laws were originally designed to facilitate the development of sperm banks. In a surrogacy arrangement, they conflict with an attempt to adopt the surrogate child. Increasingly, states are drafting laws that clarify the legal status of surrogacy arrangements, including who is the rightful parent of a child born through surrogate mothering.

By 1995, 19 states had adopted laws for surrogate motherhood. Most of those were designed to prevent or discourage surrogacy. Arizona, the District of Columbia, Kentucky and Utah all have complete bans on surrogacy; 13 states bar the enforcement of paid surrogacy contracts; and 10 jurisdictions prohibit a third party, such as a lawyer or physician, from collecting compensation for arranging surrogacy agreements. State laws differ in the way they handle disputes over custody. The article continues -

...

Surrogacy laws in Michigan and Washington make custody determinations on a case-by-case basis, attempting to reach the decision that best serves the interests of the child. In New Hampshire and Virginia, such laws presume that the contracting couple are the legal parents but give the surrogate a period of time to change her mind. In North Dakota and Arizona, the surrogate and her husband are the legal parents of the child.

Arkansas, Florida and Nevada are the only states that allow surrogacy contracts. These states permit the intended parents named in the contract to be the legal parents. In Florida and Nevada, the surrogacy laws apply only to gestational surrogacy, in cases in which the egg used is not from the surrogate mother.

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*Sitting suspended from 6.00 to 7.30 pm*

**Hon ROBYN McSWEENEY:** Before the dinner break I was giving a rundown of how surrogacy laws work in the United States. It seems as though there are very loose legal frameworks around ordering a surrogate mother to hand over the child she has carried for nine months even though she has been contracted to do so and the baby may not be from any genetic material of the surrogate mother.

The issue of surrogacy continues to raise great moral, ethical and legal debates in Australia. It has done so for more than 20 years. It is a fact that, in Australia, demand for infertility treatment continues to increase while the number of children available for adoption steadily decreases. I think last year about eight babies in Western Australia were adopted. That would probably be mirrored in most of the other states. Surrogacy therefore becomes an alternative option for couples who cannot have children. It is estimated that 10 to 15 per cent of Australian couples wishing to start a family experience infertility. Many of the couples turn to IVF or other assisted conception techniques, which have a limited success rate of between 10 and 35 per cent. Due to this low success rate surrogacy can be seen as an alternative form of assisted reproduction.

I will talk about IVF and donor sperm. In New South Wales I came across a woman who had been in care for the first part of her life. When she left care she married and found that she could not have children. She went to a Macquarie Street specialist when she was about 21 years old and was given donor sperm. She subsequently had three children. When she started digging around years later she found that the specialist did not keep records and that there were 200 children created from the same sperm. Those 200 children were her children's brothers and sisters but they would never know each other because the documents were not handed over. In fact, they were destroyed. It was a case in New South Wales not so long ago. I know I am going off track about surrogacy but it is the same issue really because sometimes there can be a lot of people involved in surrogacy and children are not told who their parents are. Records are destroyed as well.

The argument for surrogacy is that people should be free to make arrangements for a surrogate mother provided that those arrangements do not bring harm to others. It is said that a surrogate mother and her child can be adequately protected if strict regulations and controls are established and enforced. That does not really seem to be the case. Supporters of surrogacy argue that if the commissioning couple are willing to go to such extreme lengths as surrogacy in order to have a child, it therefore follows that the child will very much be wanted and loved. In some cases that does happen. I can see that, for people who cannot have children and who desperately want a child, surrogacy is the only way that they can have a child. Why should they be denied that chance? They would love the child; they want the child. It is the legal framework that surrounds handing over a child that causes me grave concern. If the United States still does not have legislation that makes the woman who carries the baby hand it over to the parents, what chance do we have here?

Surrogacy is promoted as a viable alternative for infertile couples who are unable to participate in other assisted reproduction techniques, such as IVF, based on medical, financial or other ethical grounds. It is the belief of supporters of surrogacy that a surrogate mother's willingness to enter into a surrogate pregnancy is motivated largely by compassion and concern for women who are unable to have children based on their own infertility. That is fine if it stops at that. I will show later that in the United States it is very much a business. A woman in a poor situation can be a surrogate and earn quite a lot of money. Sometimes women are forced into that situation. I would hate to see that happen here. With the legislation that is proposed that would not happen - one would hope. The case against surrogacy is based on two distinct issues: the rights and feelings of the surrogate mother and the best interests of the child. It can be argued that surrogacy arrangements are really contracts for the purchase of a child, which is largely considered morally, ethically and legally unacceptable. It is possible that surrogacy arrangements could lead to custody disputes. I have already alluded to "Baby M" in America, as well as the other case I brought up. A child born of such an arrangement could possibly belong to more than one family group. That is cause for concern. It brings to mind a minefield of "what ifs", such as what if the surrogate mother changes her mind or if the couple decide that they no longer want the child? Most people believe that a surrogate mother may change her mind. In fact, there have been court cases to that effect. There have not been many court cases in which the couple decide that they no longer want the child. There was the case not so long ago of the twins born through IVF to a lesbian couple who wanted only one child. That could possibly happen. If the child born has a disability, what then? Will the parents still want that child? What if there is more than one child or the child is stillborn? What is the effect upon the child when he or she finds out that he or she was born as a result of a surrogacy arrangement?

The issue of payment also needs to be debated regarding moral, legal and ethical concerns. Once a child is born to a surrogate mother, a number of ongoing issues must be addressed once the child has been handed over to the commissioning parents, such as guardianship, access, custody, maintenance, financial support and paternity and maternity rights. Those matters are covered in the bill to some extent. Is legal regulation of surrogacy

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appropriate? The nature of any surrogacy arrangement could vary widely from case to case, dependent upon whether the surrogate procedure produces a child who has a genetic relationship to the surrogate or not, which is likely when IVF is used. Surrogacy arrangements could also be sought by unmarried couples, male or female couples or even a single person, which comes back to the moral and ethical, not so much the legal, debates that surround this issue.

I turn now to payments to the surrogate mother. Would the introduction of legal surrogacy in this state basically allow surrogacy to become an occupation for some women? Surrogacy should not be a for-profit service, and any legislation being considered needs to ascertain what determines a reasonable expense for a surrogate mother, both in terms of the definition and financial limitation of that expense. Taking this one step further, if the surrogate mother was to become disabled as a result of her surrogate pregnancy, what are the legal ramifications that would be placed upon the commissioning parents? In legally regulating surrogacy, these and other concerns need to be addressed. That potential surrogate mother disability issue is not raised often, but sometimes medical procedures can go wrong during pregnancy. For example, medical issues surround a Caesarean birth. Under the proposed legislation, the arrangement to act as a surrogate will not be enforceable through law. I keep coming back to that point as it concerns me greatly. Even though a legal framework is to be established, it is not enforceable by law. How can there be legislation and a legal framework that is not enforceable by law? I looked at legislation in the American states, and surrogacy is still not enforceable by law there. That is the one issue, the one sticking point, that I have with all this legislation. I have a few concerns I could probably get over, but I cannot get over the fact that surrogacy is not enforceable by law.

There will be no right of veto by the surrogate mother if she is not the biological mother of the child. What does this mean if the surrogate decides that she wishes to retain the baby and not hand it over to the biological commissioning parents? What rights would the biological parents have to that child, and, more to the point, what rights would that child have in respect of both its biological parents and the woman who carried the baby for nine months? A court would need to decide what was best for that baby. These types of court cases can take years, and what happens to that child in the meantime? Does the surrogate mother keep the child until such time as the court makes a decision, and then risks the possibility of having to hand that child over after who knows how long? In one piece of American legislation that I read out, the period was 180 days. I am not sure whether there is any time frame for when the baby is handed over in our legislation, which is a rather big issue for me. If the legislation is not legally enforceable, does a clause state it is legally enforceable after so many days? It may even be 180 days, which is rather a long time.

This bill needs to create certainty as to who the parents are or will be by law. If the baby is handed over and all goes well, that is fine. However, if there is some hitch, like disability or a woman who wants to keep the baby, there will be a long and protracted court battle that will cost a lot of money. In the meantime, a baby will be in the middle of all of that.

I said that surrogacy has become a business in America. I pulled this information about surrogacy law off the website of the National Fertility Law Center. It states -

If you are planning to become a parent with the help of a surrogate, National Fertility Law Center can help you. Our practice is limited to legal services for assisted parenthood and to family formation (parental rights law). Our expert team of attorneys can provide you with highly skilled, confidential legal services that will protect all of your rights and privacy while giving you legal rights to your baby, and will be there to support and advise you through the entire legal process. Our decades of experience and proven track record of success in all aspects of surrogacy law will provide you with the legal protections essential to bringing a new child into your family.

We also provide the legal services and advice needed when an egg or embryo donor is needed in addition to a surrogate; for more information . . .

It continues -

The National Fertility Law Centre can help you by:

- (1) Drafting or providing legal review of surrogate agreements
- (2) Drafting release letters required by physicians/agencies assisting in surrogacy
- (3) Keeping surrogacy agencies informed -

Obviously there are plenty of surrogacy agents in the USA -

of the legal proceedings regarding your baby's birth

- (4) Managing the funds and timed release of surrogate compensation

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- (5) Bringing court proceedings where state law permits to have your names placed on the original birth certificate as the parents when your child is born. In states where this cannot be done, we can help you by bringing post-birth court proceedings to establish your rights to your baby
- (6) Providing proper legal notice to the hospital and surrogate, ensuring that the birth certificate is completed according to court order
- (7) Acting as a liaison between state and county vital records offices to streamline the birth registry process.
- (8) If you are from a country other than the U.S., assisting you in coordinating the legal aspects of the birth registry and law with an attorney in your country of origin
- (9) Court proceedings where parental rights are disputed
- (10) Providing all other related legal services and legal representation that may be needed to help you establish your complete legal rights to your baby

Therefore, surrogacy is by no means a perfect system, and these law firms and surrogacy agencies are everywhere.

On 11 November 2006, *The Daily Telegraph* had a headline "Mum's US Surrogacy Mission". The article states -

**This Sydney baby girl was born with a \$200,000 price tag and three mothers - two of them on the other side of the world.**

Infertility and strict Australian surrogacy laws forced the Eastern Suburbs mother to visit a Californian baby factory, where she hand-picked her egg donor and the woman who would give birth to her baby.

The business transaction made her dream of a second child come true.

"She is a miracle - what price do you put on a miracle. Her creation was approached in a very business like manner, but she is my baby," . . .

A handful of Los Angeles-based mothers formed egg donation and surrogacy agency Miracles Inc in response to the increasing number of couples, including three Australians, who turn to surrogacy for their chance at a family.

They charge nearly \$20,000 for an egg and more than \$50,000 to carry a child to full term.

The Australian parents cover all other costs - which can take the total cost to \$200,000.

While Australia is unlikely to commercialise surrogacy - where donors and the surrogate can charge for their services - the nation's attorneys-general met yesterday to discuss uniform laws across the states.

The call came after Victorian Labor Senator . . . had a baby daughter . . . who was born to a surrogate mother . . .

The couple had come to NSW for the procedures as surrogacy is illegal in Victoria. They face up to five years of paperwork to adopt their daughter. It continues -

For . . . -

The mother -

who is in her early 40s, searching overseas for a surrogate mother was a costly but ultimately simple process that took 18 months.

It does not sound simple to me -

The mother-of-two turned to surrogacy after giving birth to a son five years ago, then finding she was unable to carry more children.

She joined the growing ranks of women advertising for egg donors but soon realised she would be relying on the goodwill of strangers because the "archaic" Australian laws make it illegal to profit from surrogacy.

I do not think they are too archaic but, as I keep saying, I would like the legal framework to be tighter. She said -

"I gave it two months and then I decided I'd never get anywhere.

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She read about surrogacy clinics in America. The woman and her husband, whose sperm was used in the process, sifted through 200 profiles before choosing an egg donor and then a separate surrogate. The article continues -

In California, where the process is legal, the egg cost \$19,500 and the price for pregnancy was \$52,000.

. . .

Legal bills, insurance, travel costs, drugs, IVF bills which were not covered by Medicare and astronomical American hospital bills added up to a \$200,000 figure that the couple were not expecting.

. . .

Still in close contact with the surrogate mother, . . . helped deliver her daughter and stayed in the same US hospital room as the surrogate for the days after the birth.

She sounds quite clinical -

Now back in Sydney where her child will grow up, there are times when she forgets her daughter's first nine months were spent in another women's womb.

"She does something which is very characteristically me and I forget that I didn't actually give birth to her . . .

Five years to legally adopt someone is a lot of rigmarole. As I said, I wish that the laws surrounding surrogacy could be tighter. When a woman who has carried someone else's genetic material in a surrogacy arrangement gives birth to that child, why can she not be forced to hand over that child? It has nothing to do with her; the parents have the genetic -

**Hon Giz Watson:** That's what Hon Helen Morton said. If you bear the child, you have a connection to the child.

**Hon ROBYN McSWEENEY:** I have a problem because it is a genetic link. In America, nobody can force a woman to hand over a child. If a woman enters into a contract to carry somebody else's genetic material and she carries that genetic material inside her for nine months, somehow the legal framework should be clear enough so that that baby -

**Hon Giz Watson:** It's a baby, not genetic material.

**Hon ROBYN McSWEENEY:** I know that. However, I classify a surrogate mother carrying someone else's egg and someone else's sperm as being a little different. If I could not have a baby, and my eggs that were fertilised with my husband's sperm were placed into a surrogate and nine months later, that surrogate wanted to keep that baby, who was mine and my husband's genetic material, I would find that absolutely appalling. Maybe I am wrong but that is how I see it. If a surrogate mother carries her eggs that have been fertilised by the husband of another partner, she will then feel such bonding. She will not give up that baby because she knows it is her genetic material. Does Hon Giz Watson see what I mean? Maybe I am wrong, but I see a difference. It must be really hard. If a woman has been the oven for nine months for somebody else's genetic material, she really has no right to say that she wants to keep that baby. However, if it is her genetic material, and another man's sperm, she would be thinking that this was her baby, not somebody else's baby that she has to give away. I think there is a difference.

The legal frameworks in this Surrogacy Bill are definitely not strong enough. That is why I would also like this bill to go to a committee, not because I am against surrogacy totally but because there are so many moral, ethical and legal issues surrounding surrogacy. The role of the upper house is to look at legislation and do its job in committees and do it properly. We owe it to those children who will be born to surrogate parents to do that and to do it properly. This bill is lacking in a few things. It needs to be tightened before I will support it totally.

**HON DONNA FARAGHER (East Metropolitan) [7.55 pm]:** I wish to make a few brief comments on the Surrogacy Bill 2007. This bill is a very difficult one. I am much like Hon Barbara Scott, in that in grappling with this bill, the best interests of the child has dominated my thinking and the final decision that I will make. In looking at this issue, it is important to distinguish between the different forms of surrogacy, itself a complicating factor. As has already been mentioned by other speakers, traditional surrogacy is where the surrogate for the intended pregnancy provides the eggs and is impregnated by assisted insemination by the male partner of the arranged parents. In this instance, the surrogate or birth mother is also the biological mother. Gestational surrogacy involves a surrogate being implanted with the arranged parents' fertilised eggs using IVF. There is another form where neither the ovum nor the sperm has a genetic link to either the surrogate or the arranged parents; rather, that comes from donors. Having regard to all these types of surrogacy arrangements, who then are the real parents of the child who is born? Is it the birth mother, who may also be the biological mother, and

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her husband or de facto partner? Is it the biological parents who provided the ovum and the sperm, not necessarily the birth mother or the arranged parents? Is it the arranged parents who may or may not have a genetic link to the child? Is it a mixture of the above? This is where it starts to get very confusing, and if it is confusing for legislators, what will it be for the child who is born?

In looking at this complex issue, I am very conscious that there are couples who desperately want a child and who for some reason, perhaps medical, or perhaps as a result of an accident, are not able to have children. While I certainly accept and understand that most couples in such a situation would raise a child in a very happy and loving environment, as legislators we must look at the unintended consequences of a bill such as this.

It is true that the legislation before us does concern me. This legislation is very broad. For that reason, I have to look at it from the what-if point of view. While some may say the what-ifs are remote, they do happen, and when a child is involved, they must all be carefully considered. I turn to the first what-if. What if the birth mother does not wish to hand over the baby when he or she is born? Hon Robyn McSweeney talked about this. Clause 13(2) states -

For the purposes of this Act it is presumed to be in the best interests of the child for the arranged parents to be the parents of the child, unless there is evidence to the contrary.

However, clause 7 clearly states -

A surrogacy arrangement is not enforceable.

Therefore, there is no enforceable legal contract for the birth mother to hand over the child to the arranged parents.

There is clear evidence that a pregnant woman bonds with the foetus during her pregnancy, and in circumstances in which the birth mother is also the biological mother, there can be significant risks. In a paper by Associate Lecturer Donna Cooper from the Queensland University of Technology, which I found on the Internet the other day, she outlines the case law in Australia and in the United States on traditional surrogacy. She writes -

In both the United States and Australia the position in relation to traditional surrogacy arrangements is clear. Apart from in a handful of states in the United States that strictly regulate them by statute, traditional surrogacy agreements are not legally secure.

Courts in both countries have acknowledged a strong emotional link between a surrogate who is the genetic and birth mother and her child. The landmark decision in the United States was the *Baby M* case -

Members may recall that Hon Robyn McSweeney has already mentioned this case -

decided by the New Jersey Supreme Court in 1988. Almost ten years later the Brisbane Family Court handed down Australia's first and to date, only decision involving a dispute over residence of a surrogate child, *Re Evelyn*.

The landmark decision in each country resulted from a situation where the surrogate mother suffered intense grief after relinquishing her baby and reneged on the surrogacy agreement. In both, the surrogacy agreement was declared void and it was held that the genetic parents, being the surrogate mother and the commissioning father, were the legal parents of the child. Both courts then looked at which parent it was in the best interests of the child to reside with.

In *Baby M* the surrogate mother unfortunately was not in an equal position with the commissioning parents to provide a stable home for the child. The Supreme Court of New Jersey granted the commissioning father and his wife custody, and the surrogate visitation rights. However, the Court voided the purported termination in the surrogacy contract of the surrogate's parental rights. It also set aside the commissioning mother's adoption of the child granted by the trial court.

In contrast, in the Australian case . . . the trial judge made it clear that both sets of parents could equally provide a satisfactory environment for the child. He then proceeded to make a decision in favour of the surrogate mother on the basis of her special relationship with the child as her genetic and birth mother.

This is where it gets very messy. She goes on to state -

This decision was made despite the fact the child had been residing with the commissioning parents for most of her life and they therefore had the "status quo" as is significant in Australian family law. It was also made despite the judge's acceptance of expert testimony that the child's primary attachment at that time was to the commissioning mother and that in children under three it is ordinarily in the best interests of the child to support this attachment.

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The trial judge decided that the long-term implications were more important than the short-term distress to the child caused by separation from her primary caregiver. His Honour stated:

*I also accept that an order placing Evelyn in the residence of her biological mother provides her with the optimum situation in which to work through issues relating to her surrogacy.*

On appeal the Full Court said:

*Notwithstanding that the present case concerns a surrogacy situation, it remains clear, as a matter of principle, that there is no presumption in favour of the biological parent nor any presumption in favour of the biological mother where the child is female.*

Despite this statement it seems clear that the trial judge gave preference to Evelyn's biological and surrogate mother. He held that if the child was not returned it was likely that she would experience a sense of rejection by her biological mother. He also took into account that this may result in the mother suffering from extreme grief that could lead to major depression. Further, he felt that the biological mother could best answer questions about her origins as she approached adolescence.

This is a heartbreaking and tragic situation, not only for the child, but also, obviously, for the commissioning parents and the birth mother. What effect do contractual disputes and court cases such as these have on those involved, both now and in the future?

I turn to the second what-if. In circumstances in which in-vitro fertilisation is utilised, what if twins or triplets are born? Multiple births are not uncommon. What if the arranged parents want only one child? What happens to the other children, or "living birth siblings", as they are referred to in the bill? We have already seen a situation occur here in Australia - this has been referred to by other members - in which a lesbian couple are seeking to claim more than \$400 000 in the Supreme Court of the Australian Capital Territory to cover the cost of raising one of their twin girls after an obstetrician allegedly implanted two embryos instead of the requested one. Although this obviously does not involve a surrogacy arrangement, it illustrates the point that nowadays, if something does not go according to plan, there can be consequences. Then, of course, there might be a situation in which a disability is diagnosed before the birth. What happens in that instance if the arranged parents seek to renege on the agreement? I understand from the departmental briefing that should any of these situations eventuate and the birth mother does not want to raise the child or children, the normal adoption procedures would apply. In my view, if this were to occur as a result of any of these circumstances, it would be both devastating and cruel to those children who effectively become unwanted.

I now turn to the third what-if. This relates to clause 16 of the bill, which deals with the application for a parentage order. Subclause (2) states -

The application can be lodged with the court only after a period of 28 days has elapsed since the day on which the child is born.

Subclause (3) states -

The application cannot be lodged with the court more than 6 months after the day on which the child is born except with the leave of the court, which may be given in exceptional circumstances.

This is what has been referred to as the "try-before-you-buy" aspect of this legislation. I turn to an article on page 5 of *The West Australian* of 8 September. It states -

Parents who receive a baby born under a surrogacy agreement would be allowed to return the child to its birth parents at any time within six months under proposed "try before you buy" laws.

Under legislation being debated in State Parliament, so-called arranged parents, classified as a couple who intend to raise a child born under a surrogacy arrangement, can take a baby home from hospital but would be given six months to apply for a parentage order, which would put their name on the birth certificate in place of the birth mother or parents.

Independent MP Liz Constable successfully argued to reduce the original 12-month time frame to six months this week when she raised her concerns with Health Minister Jim McGinty during debate on the laws.

"What if the arranged parents use that 12-month period to try out that arrangement and determine whether they can handle the sleepless nights?" she asked Mr McGinty.

Outside Parliament, Dr Constable said she did not press Mr McGinty to reduce the time frame to three months because he had already made a big concession.

**Extract from Hansard**

[COUNCIL - Wednesday, 14 November 2007]

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Hon Donna Faragher; Hon Kate Doust; Deputy President; Mr Vincent Catania; Hon Ed Dermer; Hon Ken Baston; Hon Ray Halligan; Hon Bruce Donaldson

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“I would have thought one to three months (would be best) but I was happy to agree to six months because we are breaking new ground and we are feeling our way a bit,” . . .

Although this might seem an unlikely scenario, I reflect on the comments in the same article by Father Joe Parkinson from the L J Goody Bioethics Centre, who said -

. . . it would be extremely harmful for a child to spend up to six months with the arranged parents, only to be transferred from their care.

“This issue of ‘try before you buy’ is a problem,” he said. “If after a week or a month of sleepless nights, they decide ‘No, we’re not up for this, let’s give the child back to the birth mother’ and the birth mother doesn’t want it, then you have got this problem.”

“This is just an expression of the basic problem I have with the whole issue of surrogacy and that is that the child is being treated as a commodity. The child is becoming the issue of a contract and I find that very disturbing.”

There are many other what-ifs to this legislation. What if, for example, a birth parent who is not a party to the approved plan seeks to vary that plan? This will be allowed under the legislation. In my view, this has the potential to cause stress and heartache for all involved. Further, it has been put to me that this legislation may well be challenged in the future on the basis of discrimination, as outlined by Hon Helen Morton in her contribution last night, or that it will be extended to capture what a former member of this place, Hon Louise Pratt, referred to in an article in the *Sunday Times* of 17 June 2007 as “social infertility”. The article reads -

Ms Pratt would like the legislation to cover what she called social infertility, to give homosexual couples and single fathers access to surrogacy.

The problem with these sorts of controversial bills is that their contents are often not enough to satisfy everyone. There will always be someone, or some organisation, wanting to take the extra step, or seeking to change those fundamentals that are the very fabric of our society. I have sought to highlight just some of the what-ifs that may arise from the passage of this legislation. There are, however, many others.

I reiterate that I cannot imagine what it would be like to know that my husband and I could not have children. As we are yet to have children, we cannot rule out that possibility, and it would be truly heartbreaking. However, I said at the beginning of my contribution that, in coming to terms with this bill, my thoughts would be and have been dominated by the test of the best interests of the child. I have concerns about this legislation’s looseness, its broad applicability, and particularly its potential effects on children - the very ones who do not have a voice in this debate, but who do have the right to know their genetic and birth parentage; in other words, the right, in my view, to know both who is their mother and who is their father. A discussion paper on reproduction technology, surrogacy and adoption from the New South Wales Law Reform Commission states -

Given that the major purpose of reproductive technology is to create a child who would not otherwise have been conceived, it seems clear that the community has a particular responsibility to promote and protect the interests, needs and welfare of that child.

Some may say that the what-if situations are remote, and perhaps they are, but my concern relates to those situations in which things can and do go wrong. When things go wrong, the child will tragically suffer the most. As a legislator, I have to think of those consequences. Because of this, and because of the breadth of this legislation, I find that I cannot support the bill in its current form.

**HON KATE DOUST (South Metropolitan - Parliamentary Secretary)** [8.14 pm]: I have listened to what some members have had to say, and find myself agreeing with them on a number of counts. This bill is very difficult legally, socially and ethically, and promotes a whole range of dilemmas that we need to deal with. I went through this bill when it was first introduced. I have a great empathy for people who, for one reason or another, are not able to conceive children through natural means. I take on board some of the comments that Hon Donna Faragher made, that there may be chemical, medical, age or other issues involved in infertility, and that as a society we seem to have ever-increasing rates of infertility. The member is right; it can be a soul-destroying situation to find out that one may not be able to conceive children. We are finding in today’s society that very often couples are reaching the point, perhaps later in life, at which they start to think about having children, and perhaps at that point they discover they cannot do so. By this time, they may have missed other opportunities to become parents. They may have discovered their infertility at the point at which they have exceeded the age at which they could adopt. There may be other barriers to their having a child and forming a family.

I have great empathy for that situation, but I also have great concern about a number of the issues framed in this bill. This caused me to do something a bit radical, and I sought a conscience vote from my party, because we did

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not actually have one on this type of legislation. This kind of legislation is really quite new, even though we talk about these things as if they have been around for a while. We have not had access to this kind of technology for very long. Previous inquiries of this Parliament in the late 1980s and early 1990s considered reproductive technology issues, although not this particular issue. Science has advanced since then, as has the community's awareness and understanding of these issues, although not always in a positive direction. The message is that we should proceed with caution on these issues because people understand that there are legal, social and ethical implications of surrogacy.

One of my great concerns is that surrogacy is different from adoption, in which a child has already been created and is born. In those cases, the mother or the parents make a decision at that point that, for whatever reason, they cannot keep the child, and they then place the child for adoption. In the surrogacy situation, a child is being deliberately created to be given away. I have real concerns about the creation of children who have a real potential to be traded. I know the second reading speech stated that this bill did not encourage commercial surrogacy, but once these kinds of situations have been set up, the potential is there. We see examples of this happening in the United States, where people work through lawyers and agencies and money is exchanged. I read of a particular case in which one woman had had nine separate pregnancies in which she had entered into surrogacy arrangements and money had been exchanged. Presumably the money was to cover costs, but each case involved possibly \$20 000 to \$30 000.

**Hon Barbara Scott:** Were all nine pregnancies surrogacies?

**Hon KATE DOUST:** They were all surrogacy pregnancies, after which the child was handed over to other parents.

In fact, in one case, a woman had entered into an arrangement with a young couple and the pregnancy did not succeed but by chance she fell pregnant to her long-time partner, and so she delivered on the surrogacy arrangement by presenting to the arranged parents her natural child as the surrogate baby. I have real concerns about where we go with those sorts of issues, particularly as we keep saying that the best interests of the child must be paramount. Down the track, this legislation will open up a minefield of complications, not only in a legal sense, but also in accessing medical information and family history. The one thing that all individuals want to know is where they come from. They want to know their family story and medical history. That information helps individuals to grow and move forward. Some members have referred to situations in which multiple players are involved in one surrogacy arrangement. There will be difficulty accessing that information, and that could cause problems for the child down the track.

Fortunately, the national executive of the Labor Party took on board the comments I made to it. I will not go through the detail of those comments, but the guts of it was my concern about children being treated as commodities. At that point, I could not support the bill on that basis. I felt it was important that members be given a conscience vote so that they could consider the issue in depth and perhaps offer it to the community for consideration. I do not believe that we have allowed the Western Australian community to engage appropriately in debate on the issue of surrogacy. I say that because this afternoon I became aware of the Victorian Law Reform Commission report that was tabled this year. It took five years to complete that report. The terms of reference were given to the Victorian Law Reform Commission in 2002 and the report was tabled this year. It received something like 700 submissions and it held public forums, one of which was attended by 150 people. It went out into the community and raised the issue and sought feedback. It got the community thinking about the issue and all the ramifications of allowing a surrogacy arrangement to occur. I have empathy for couples who are infertile. I understand that the need to have a child can be very intense for and very important to individuals and to couples in how they move forward in their relationship. We need to be very careful about how we deal with these issues. I do not believe we have given members of the community enough opportunity to really consider the issue and the detail of the proposals in the legislation and to tell us what they think about it. When I went through some of the proposals, I asked myself, "When is a contract not a contract?" The answer is that a contract is not a contract when it is in this bill. Things can just fall apart for the arranged parents, the surrogate mothers and all the other parties in these arrangements. I think Hon Donna Faragher and other members have talked about what would happen if certain circumstances arose. One of my concerns is what would happen if a couple entered into an arrangement and the surrogate mother became pregnant, but at some point early on in the pregnancy she decided that she did not want to continue with the pregnancy and decided to terminate it. That would be devastating for the arranged parents, who put all their hopes into the arrangement to meet their long-held desire for a child.

**Hon Barbara Scott:** Whose baby is it?

**Hon KATE DOUST:** That is right; that is the question. If one person donates an egg, another person's womb is used and somebody else donates sperm, whose child would it be?

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**Hon Simon O'Brien:** The arranged parents would no doubt see that as an attempt to murder their child.

**Hon KATE DOUST:** They may do. People have different views on this matter. However, all I am saying is that they would not have any comeback; it would be the surrogate mother's decision. The same thing would apply in reverse. What would happen if the arranged parents changed their minds at some point for whatever reason and said to the surrogate mother that they had had a rethink and did not want to have a child and asked her to terminate it? What would happen if the surrogate mother said that she did not want to do that? Where would she stand legally?

I also have some concerns about the length of time after the birth before the child is handed over to the arranged parents. It is very important that the arranged parents get the child as quickly as possible so that they can bond. A study has been conducted into how mothers and fathers bond with children. If there is a gap between the birth and handover, it would be harder for that bonding to occur. Sometimes there might be complications with newborns; bonding is not always a straight-up, lay-down *misère*. Sometimes parents need a bit of help with it. I see Hon Helen Morton nodding in agreement with me. There can be lots of complications.

I also have some concerns about the exchange of money, and this relates to the United Kingdom example that I referred to earlier and also to some of the examples in the United States that I have read about. The bill refers to reasonable expenses. My question has always been: how far will that extend? There was quite a bit of discussion in the other place about this issue. I think one question that was asked was: should a person who earns \$100 000 and takes time off only to fall pregnant be compensated for her loss of income, and should her partner be compensated if he has to take time off work to help her while she is pregnant? Will people start to track down women on low incomes or women with no income so that they can reduce their reasonable expenses? What should be included as reasonable expenses? Should it just include medical and legal costs? Should it cover housing and transport expenses? Should it include expenses for going to the hairdresser and buying clothes? How broad should it be? I would like to see a detailed definition of "reasonable expenses" because that is an area of real concern. People will take the opportunity to exploit that provision. I would not understand it if someone wanted to have children all the time simply to make money out of it. I think that would be quite -

**Hon Barbara Scott** interjected.

**Hon KATE DOUST:** People could if they were busy. There are opportunities for people who are devious or smart enough to exploit that provision. I would hate to see that happen and I want to make sure that we contain that as much as possible.

Another question that was asked about reasonable expenses was: what would happen if the surrogate mother decided to keep her child upon birth and she had been paid for her expenses? Would the arranged parents have any legal recourse to get that money back? Where would they stand? Once we go down this path, we will be opening up a range of other doors. There are a number of what-ifs. I have a concern with the meaning of "reasonable expenses". I would like to see that aspect dealt with, although I do not think that we will be able to deal with it in this place.

I know there has been some discussion about referring this bill to a committee for an inquiry, and I think that would be very healthy. This could be based upon what was done in Victoria, where there was extensive consultation with the community and a very good report was put together to address all the issues that line up with this issue of surrogacy.

**Hon Barbara Scott:** Are they similar issues to those we've raised?

**Hon KATE DOUST:** I have had only a very cursory look through the report's summary, but, yes, they are.

Another area of concern that I have - Hon Giz Watson referred to it - is the counselling, for which I would have thought that the bill would contain more detail. I thought Hon Giz Watson made an excellent point about the qualifications and experience that counsellors in the surrogacy area will need, because it is a relatively new area for which people will need to hone their skills.

The cooling off period, if members like, is another area of concern. The decision to engage a woman to carry one's child or to have another woman donate an egg or a man to donate sperm so that a child can be created is not like buying a new pair of shoes or a washing machine; it is something that people really have to make a decision to commit to, and it is a decision that should take quite a length of time. I believe a longer cooling off period is needed between the various decision-making processes so that people are very clear about what will happen.

I think it is important to have proper legal advice and, again, Hon Giz Watson made an excellent point about making sure that low-income people had access to either free legal advice or - I hate to use the term - "cheap legal advice" because I think lawyers could get very upset about that -

**Hon Giz Watson:** Affordable.

**Hon KATE DOUST:** I thank the member - affordable legal advice. Otherwise, it puts low-income people seeking to access these facilities at a disadvantage. More meat is needed in the bill about some of those issues. We referred last night to the directions that were put together on the advice of the Western Australian Reproductive Technology Council for the chief executive officer of the Department of Health. These directions provide a lot of the detail that I would have expected to have seen either in the bill or attached to it in some way in the form of regulations. The directions are fairly clear, and put a lot of emphasis back onto the various IVF clinics. I understand that about five IVF clinics in Perth deal with surrogacy arrangements.

Another point that needs to be made is that people are not queuing up at the door to enter into a surrogacy arrangement. There are not thousands or hundreds of people; it is a very small group of people. Although that group of people is very important, I do not know whether this bill will provide the means, mechanisms or the solutions that they seek. I think we might have provided support in other ways for that small group of people who are probably in very genuine altruistic surrogacy situations in which they may have a sister or a good friend willing to carry their child for them or to donate the necessary materials. Rather than creating a separate surrogacy act, it might have been more appropriate to amend the Adoption Act to deal with issues such as changing the birth certificate details or seeking to adopt the child because one of the parents may not be the biological parent.

**Hon Barbara Scott:** But this really is not about adoption.

**Hon KATE DOUST:** I think it is about adoption, but it is just done in a different way, whereby the life is created deliberately. That raises another concern for me: if we open up the opportunities, some people might start to seek out surrogate mothers who might provide certain genetic qualities.

**Hon Peter Collier:** Designer babies.

**Hon KATE DOUST:** That is right - designer babies.

**Hon Ljiljana Ravlich:** There won't be another one like you, Pete!

**Hon KATE DOUST:** Under current IVF laws, one is not supposed to do that, but I do not know -  
Several members interjected.

**The DEPUTY PRESIDENT (Hon Graham Giffard):** Order, members! Enough, thank you. Hon Kate Doust has the call.

**Hon KATE DOUST:** I do not know whether people would be able to do that under this bill or whether they would find ways around it. This bill covers all methods of surrogacy; it is not about only access to IVF. It also covers what is probably a very old-fashioned way of having a surrogate child; that is, those people who are in the situation in which the husband is fertile and the wife is not and they engage a woman to fall pregnant; the husband has intercourse with that woman, the baby is born and the couple has a child. There is still capacity for people to enter into a surrogacy arrangement without the need for this legislation. I am sure that there are lots of other ways for women to fall pregnant without the need to go to an IVF clinic and without the need for this legislation.

**Hon Robyn McSweeney:** They could advertise.

**Hon KATE DOUST:** I will not even talk about those various means!

Anyway, I think that if this bill was referred to a committee before the second reading was agreed to, it would be very useful for that committee to have a good look at these directions and see how they could be incorporated into the bill or how the bill could be amended to pick up on the range of matters that are dealt with by these directions. This would tighten up the bill, if we like, and improve it. Therefore, I hope that if that happens, people would pick up on that matter. Although it is a good document and it goes into great detail, my concern is that it has nothing to do with Parliament. It is a set of guidelines developed by an organisation totally external to Parliament. The directions will never come to Parliament for approval or discussion, and they can be altered at any time. I have real concern about that. Although this legislation may be passed, all the mechanical issues that enable surrogacy to happen through an IVF clinic mean that the ground rules can be changed without any of us in Parliament knowing about it. Therefore, that is one reason I am very keen to see if there is a mechanism to have these directions incorporated into the bill or rewritten as regulations, so that at least the Parliament could review them and, if possible, disallow them. At least there would be a connection that would be open and accountable, and Parliament would be aware of any potential changes as this process goes on.

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I want to raise more specific issues, which may have already been dealt with by other members. I do not know whether people have picked up on this aspect, but, again, it comes back to the fact that pregnancy does not always go to plan. Complications can arise, not only for the mother, but also for the child, and sometimes unexpected health issues can develop. What happens to that child if it is born with a genetic defect or a health issue? What happens if the arranging parents say that this is not what they entered into the agreement for? This is not the perfect child that the arranging parents wanted; they do not want this child anymore, and the birth mother says she has delivered on her part of the deal and she does not want to keep this child. What happens to the child in that situation? What in this bill provides some sort of protection or a future for that child? That issue needs to be considered.

Another issue is a bit unusual. Members should imagine that if there is a woman who has had nine children to various arranging parents over a long period of time, and if there are difficulties for those children to actually access details about their family history or the family connections -

**Hon Barbara Scott:** Health connections.

**Hon KATE DOUST:** Yes, health connections. What happens if at some point siblings meet up and, without the knowledge that they are siblings, decide to marry? I know that we hear about these things happening; for example, adoption information not being provided. It is important that people are not denied access to all the information about themselves.

I have already talked about gender selection. We want to make sure that if genetic diagnosis is used, gender selection cannot apply in surrogacy situations. I imagine that some parents, be it a result of their family or cultural backgrounds, want either a boy or girl. They might say it will be their only child; therefore, they want a particular gender. I want to ensure that they cannot go down the path of selecting the child's gender. The Western Australian Reproductive Technology Council has a very important role to play in this area and I hope it is given a greater level of oversight of this legislation, particularly with respect to the people who apply to be either arranging parents or surrogates.

Another area of concern is how to go about getting a surrogate. I know that this bill says that a person cannot advertise, but it allows for an IVF clinic to introduce a potential surrogate mother to an arranging couple. Whilst the IVF clinic cannot charge -

**Hon Helen Morton:** Can it advertise?

**Hon KATE DOUST:** That is the point: how to find a surrogate mother if one cannot advertise. There must be a way to find a surrogate mother if it is not being done for altruistic reasons whereby the surrogate is a family member or friend. If they do not fall into those categories, how do they find a surrogate mother? If the IVF clinic cannot charge for that introduction, I dare say that the arranging parents would probably pay a higher premium for their IVF processes if it is for surrogacy than if it is a straightforward IVF process. I imagine that, like any other business, the IVF clinic would want to recoup its costs. I think that the arranging parents would have to pay a higher cost. It is a real concern. It comes back to the question of how to find a surrogate mother. Will they be able to advertise or do they go through lawyers? How will it work? Will it happen by word of mouth? There must be a way it will happen and it is an issue that needs to be clarified. I do not imagine that a lot of women would be lining up to take up being a surrogate mother as an occupation. I suspect it is something people would do only once, but one never knows.

I have some concerns with this legislation. However, I have the greatest empathy for those couples who, for whatever reason, are unable to conceive or deliver a child naturally. I understand that there are occasions when people resort to desperate means to have a child. It is very important for people, if they can, to raise a family. It is something we probably all aspire to. It is an enjoyable thing to do.

I am very cautious about the mechanics of this bill. I still think that the way in which this bill is structured might make it more complicated for those couples to have the child they want in this particular type of circumstance. I hope there is an opportunity for broader community consultation to deal with some of the issues I have raised.

I would like to know how this legislation relates to the Adoption Act. If one is too old to adopt in a normal situation, what happens under this legislation if a child has been born and the legal processes are being gone through to adopt that child and the courts turn around and say that the adoptive parent has exceeded the age threshold to adopt that child? Quite often we hear about people who are denied access to adoption, not because of age but because of health issues. It might be that they are denied that adoption because they have had cancer or there is a potential health problem down the track. Does that also apply to the arranging parents in a surrogacy? I note in the directions that the arranging parents are required to go through a medical examination. If the medical does not come back -

**Hon Robyn McSweeney:** You have to have different adoption laws from the surrogacy laws.

**Hon KATE DOUST:** That is what I want to know. Is the set of criteria for the arranging parents of a child deliberately created for them different from the set of criteria for the prospective parents of a child who has been born and put up for adoption? Do we go down the path of people having to meet different criteria for adoption and surrogacy? We might find that people enter into an arrangement, be it under this legislation in which IVF is used or other arrangements we have already referred to, and then find, when they want to get the adoption finalised, that they cannot adopt the child because they breach the age level or their health issues may prevent them from being a parent.

To be quite honest, I am not too sure whether I will support this bill. I would like further consideration of and broader community consultation on this bill. It is important that we do that at this point so that we can get the full story. This is an ever-evolving world and surrogacy is one area. There will be other areas such as this. People are trying to find all sorts of ways of dealing with infertility issues and getting access to children. Sometimes I wonder why we make things so complicated for ourselves, both ethically and legally, when we are trying to accommodate the needs of individuals. Hon Chrissy Sharp made an excellent point a couple of years ago during the stem cell debate when she asked why we go through this excessive quagmire of legal difficulties and ethical issues to create a life when there are so many children overseas needing a family and a home. Perhaps we need to look at those issues to accommodate infertile couples without facing the difficulties that we do when dealing with these sorts of bills. It is an ever-changing world and these issues will arise.

I hope that during the committee stage the minister is able to clarify some of the issues that have been raised. I also hope that at some point there is an opportunity for this bill to be referred for broader community consultation. Perhaps that will result in the opportunity to make amendments to allay some of the concerns I have outlined and provide better protection for not only the arranging parents, but also other individuals involved in this arrangement. It is not simple. It is complex because we are dealing with people's emotions and, in some cases, livelihoods. We need to ensure that all the checks and balances are in place to prevent problems arising down the track.

**HON VINCENT CATANIA (Mining and Pastoral) [8.50 pm]:** I support the remarks made by Hon Kate Doust tonight. Having become a father for the first time - it has only been three weeks and six hours - I am lacking a lot of sleep, as is my wife, Johanna. I have a sense of understanding and great pride and the feelings that one has when one first discovers that one's partner is pregnant. I know the thoughts that go through a person's head. Having a child, I understand the amount of love and devotion that one suddenly has towards a little human being. That has given me a totally different outlook. I have many friends at the moment who are trying to fall pregnant. They are going through the IVF process. I also have a cousin who is finding it difficult to have a child; she is only 25 years of age. I can understand the want and desire to become a mother or father because it is one of those wonders of the world that until a person has had a child, he or she does not know how wonderful that experience is. As I have said, it has totally changed my outlook on many of these social issues that have come before Parliament and are coming before Parliament.

I will relay some of my concerns about the bill. Hon Kate Doust has touched on quite a few of them. Who knows what will happen down the track? There are a lot of possible legal issues. There are issues with the medical side of things. It is important for people to know their medical history. A child may not have the ability to find out. It concerns me that arrangements can break down. We see that breakdown happening all over the place when constituents come to see us as members of Parliament with their problems. Contracts break down and relationships break down and it is not always plain sailing. I have many concerns in that regard, especially having learnt how important it is for a mother and child to be together. That is particularly so when the child is premature. Having been through that with my son coming seven weeks early, one of the things that doctors and midwives have drummed into me is that it is very important for babies to have one-on-one contact with their mothers and fathers, particularly their mothers. They need skin contact to help them develop and grow. It is important that babies have a close bond and feel safe so that they can grow strong quickly. It is one of the things we have done in the past three weeks. We have made sure that Johanna and my son have had as much contact as possible. I believe that is what has helped him get out of hospital some two weeks earlier than anticipated.

What amazed me, having spent every day for two weeks at King Edward Memorial Hospital - it is an amazing hospital, particularly for premature babies - is the number of babies being born so early. I cannot remember the statistics on how many premature babies people are having these days. I do not know whether it is because the environment is changing or because people are having children later in life. There is a raft of reasons for the many premature babies. Nevertheless, given that fact, it is very important to have a connection between a mother and child in the early days of a baby's life. A mother may have an arrangement with another couple, but suddenly there is a premature birth. There is a need for a bonding period. For a couple of weeks my wife and I had to go home to sleep. We had to leave our child in a humidicrib. That was the hardest thing to do. My concern is that the bonding and the relationship that a mother and child will have may cause a lot of emotional

problems down the track not only for the mother, of course, but also for the child. It is a very important period. Given the fact that there are a lot of premature children these days, my concern is that bonding between mother and child -

**Hon Barbara Scott** interjected.

**Hon VINCENT CATANIA:** Yes. It concerns me how a person can give up a child. I do not know. I suppose that I am still quite emotional about being a father for the first time. I find it difficult that anyone can give up her child. I understand totally the reasons people want to have children. I feel for people who find it difficult to have children or who cannot have children. I agree with Hon Kate Doust that a cooling-off period is needed. Sometimes we need to take emotion out and do the research. One of the things my partner, Johanna, has made sure she does is to constantly throw books at me and send me addresses of websites. She has put my name to many subscriptions on the Internet so that I get an email every week telling me what is going on and what I should expect. It is important that one fully understands pregnancy and motherhood and fatherhood, and also that things can go wrong. It is not plain sailing all the time when someone goes through pregnancy, which is something I have discovered. A cooling-off period and a very strong education program are needed so that people understand the process from the start and all the hurdles that may be thrown in front of them along the way.

**Hon Barbara Scott** interjected.

**Hon VINCENT CATANIA:** There should be plenty of bonding with fathers, of course. It is very hard to be here tonight and not be at home because it is only his second day at home. It is difficult. As I said, it is very important to have that bonding between parents.

Other members have canvassed issues that concern them. I agree with Hon Kate Doust that the best solution to this bill is to make sure that we tighten it up and that there is broader consultation with the community. The world is changing and, as I said, there is an increase in the number of premature births these days, and it is important to have that connection with a child. I believe that the bill should be referred to a committee so that there can be broader consultation. We can then properly examine the bill and make sure that all these issues are canvassed and addressed. I understand totally that people who want to become parents have the desire to become a mother and father. It is important that we assist those people. As I said, it is happening to a lot of my close friends and family at the moment.

Further and broader consultation is required for me to support this bill. I hope the minister can clarify a lot of these issues. As Hon Kate Doust said, referring the bill to a committee will provide a good check and balance. It is a very, very important bill. Having become a father for the first time, I appreciate how important it is to ensure that we get it right. Kids are not toys; we cannot hand them back. A lot of people in this chamber are parents, and I know they understand. There are a few who are not. It is a miracle of life and we have to make sure that we get it right and all the t's are crossed and the i's are dotted. I would like to support this bill but I think we should refer it to a committee and get it right from the start.

**HON ED DERMER (North Metropolitan)** [9.01 pm]: I have listened carefully to the contributions to this debate on the Surrogacy Bill 2007. The general impression that comes over most immediately is complexity and what a difficult task we take on when we endeavour to anticipate the wide range of possible developments that could arise in the process of any pregnancy, particularly the further complexity involved in a surrogate pregnancy. Trying to anticipate this range of events and to find a just and appropriate answer for each of the matters that may arise is not easy. The more I have listened to the various complexities raised in the debate so far, the more I have come to share the inclination of Hon Helen Morton when she said last night that the natural course appears so much more attractive compared with the range of complexities that have been discussed. I am grateful to have been born naturally to a mother and father who provided a stable home. I have had the pleasure of being a father and hopefully have provided a similar stable environment for my children. Having enjoyed the advantage of natural fertility leads me to have a concern for people who do not enjoy that advantage. Obviously, the attraction of surrogacy is that it may provide people with the opportunity to be parents who otherwise may not have that opportunity. Certainly our hearts go out to people who are in that situation.

In any of these considerations it is important to remember that as much as one may feel compassion for people who would like to be parents and for reasons of biology do not have that opportunity, it is far more important to promote the primary consideration of any child who may come to life via the surrogacy proposals entailed in the bill. It was with this view that I went along to briefings on the bill that were provided to members of Parliament in the early stage of the bill. Even through those briefings the great complexity involved in surrogacy and parenthood became apparent. It got to the point where we started counting the number of people who could reasonably be described as a parent in the surrogacy arrangement. Initially, a woman who bore a child would be the first parent; the husband or partner of the woman who bore the child would be the second; the woman who

commissioned the surrogacy would be the third; the partner of that woman would be the fourth; if the donation of an egg was involved, the donor of that egg would be the fifth; the partner of that woman would be the sixth; if donation of sperm was involved, there was a seventh parent; and the partner of that gentleman would be the eighth. There is this notion of a child being born with eight people who could reasonably be described as parents. Life is complicated enough without a child having to sort through all that while developing a sense of his or her own being and identity.

During the second reading debate, I came to realise something else that disturbed me far more. I look to the Minister for Child Protection to interject and answer my question or perhaps answer it in her response.

**Hon Sue Ellery:** I won't answer it by interjection.

**Hon ED DERMER:** Okay.

I understand from what was said in the debate last night that the bill allows for one person to commission a surrogacy pregnancy. I find that very concerning. Many single parents do a most marvellous job bringing up children. As members of Parliament, it is our responsibility to design good public policy. Notwithstanding that there are very many single parents who do an excellent job bringing up children, I do not believe there is any question that a child is better off having two parents rather than one. It would be wrong for us to pass a bill that, as a matter of deliberate public policy, enabled one parent to have custody of a child. That would be more concerning than the overabundance of parents who could notionally be described in the way that I did earlier in my contribution.

Other issues that came up during the briefings were very disturbing. I am the first to admit that the briefings tended to lead people to think of a range of possible scenarios that would never arise in many surrogacy pregnancies. We have a responsibility to consider those scenarios. Hon Kate Doust referred to this matter in her contribution. What would happen if a child who is the subject of a surrogacy arrangement was found to have a disability? Sadly, from my point of view, many children who are found to have disabilities are aborted. I have no doubt that they are children as much as other children are. That is a serious human tragedy. I am trying to imagine how that issue would be resolved if a child in utero was found to have a disability and the mother bearing the child took one view and the parents commissioning the pregnancy took a different view. Resolving that situation would be impossible. Perhaps the minister could confirm this, but I understand this legislation provides that the ultimate say over that decision would reside with the woman bearing the child.

Let me take this scenario further again. What would happen if a child was born with a quite serious disability? Would we then reach the situation where none of the prospective parents would own the child? We can have all the committee deliberations in the world and take all the evidence that we might like to hear and consider, but if this bill contemplates the prospect of a child beginning life not only with a serious disability but also with no parent willing to own and take responsibility for that child, I could not bring myself to vote for such a bill. It is horrifying to imagine a child starting life under those circumstances literally all on his or her own because no parent was willing to take responsibility.

**Hon Helen Morton:** Who would be the parent?

**Hon ED DERMER:** I am not sure. We may hear further advice in reply to the second reading debate from the minister who has carriage of the bill

It must be extremely difficult for people who have concluded that surrogacy is their only option for achieving the natural and, I imagine, anguish-filled desire to be a parent. As much as we might be concerned for people in that situation, when we weigh the interests of such adults against the interests of a child who is ultimately defenceless and dependent on the love and care of others, if those scenarios remain in which the child could be neglected or otherwise traumatised, I do not believe it is possible for responsible members of the Legislative Council to support such a bill as a matter of public policy.

**HON KEN BASTON (Mining and Pastoral)** [9.10 pm]: I was not going to have a great say on this bill, but after listening to the comments that have been made in the house, I felt that I would like to contribute to the debate. The general dictionary definition refers to "surrogate" as a substitute, someone or something else. When it is used today, it generally refers to a woman who has a baby for another woman who is unable to become pregnant and have a baby herself. Now, with in-vitro fertilisation, surrogacy potentially takes on additional dimensions. In the second reading speech, the Minister for Child Protection said -

Surrogacy is a practice whereby a woman agrees to become pregnant and bear a child for another person or persons - the arranged parents - to whom she intends to transfer the child's care at, or shortly after, birth.

This bill will give couples the chance to be a family and to love and care for a child they so desperately want. It is an example of using technology and the law to fulfil their dream to be a family.

**Extract from Hansard**

[COUNCIL - Wednesday, 14 November 2007]

p7058g-7078a

Hon Donna Faragher; Hon Kate Doust; Deputy President; Mr Vincent Catania; Hon Ed Dermer; Hon Ken Baston; Hon Ray Halligan; Hon Bruce Donaldson

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Those two paragraphs sound very good, and one could look at them and say, “Well, that’s fantastic. Let’s get on with it and get behind this bill.” However, after listening to members in this chamber, I believe that we are very much raising a moral and ethical debate. I think Hon Kate Doust said that this is a legal, social and ethical debate. I listened to Hon Vince Catania, and I congratulate him on his new family. The experience of bonding and the relationship of a mother, father and child are really what life is all about.

As I mentioned, with IVF, surrogacy potentially takes on additional dimensions. The impact of IVF treatments means that a surrogate mother can now carry the biological child of another couple, or, it would appear, a child conceived by donated eggs or donated sperm, or both. The minister’s definition calls into question just to whom surrogacy is available. This is where things start to fall down. It is available to couples in marriage; to couples in marriage or relationships when they have a child, either themselves or from a previous relationship, and who find that the female partner is unable to have another child; to couples in de facto relationships; to same-sex couples; and to single females. I presume it would be available to single males also. A number of parenting possibilities can arise from surrogacy. The arranged parents can both be biological parents when the embryo is implanted. An anonymous sperm donor may fertilise the female egg. A male partner may impregnate a female surrogate. Although the intention of surrogacy is to assist childless couples, the possibilities of parentage for the unborn child become mind-boggling. As Hon Ed Dermer said, up to eight people could be involved in the production of a child. Goodness knows how a child could trace where he or she came from. At the centre of all this, of course, is an unborn child, and the question arises about the rights of that child, which I believe should be absolutely paramount.

I will deal with the thrust of the bill. I have expressed reservations about surrogacy. If a male and a female wish to be parents, I can support a surrogacy arrangement if it is not a commercial transaction, if both biological parents are involved and if there is a single surrogate mother. I can understand that. However, once it gets past that - members can call me what they like - I believe that we are treading on new ground, and so many issues arise from that that it is dangerous. There are arguments for surrogacy, and that is what I just mentioned. They include infertility and the inability to have a child. Today, adoption is becoming more difficult, because not a large number of children in this country are available for adoption. However, in many nations, there are children who are parentless and wandering. Some friends of mine have adopted children from overseas and, putting it simply, it has worked very well. I must say that I have been quite amazed that children who have come to Australia from totally different socioeconomic backgrounds have achieved very well. They were adopted at about two years of age, and they are now in their mid to late teens. They have very good relationships with their adoptive parents.

Of course, there are arguments against surrogacy. Hon Ed Dermer asked what would happen if a child was deformed. Would the surrogate mother have the right to have an abortion? Would the parents who utilised the surrogate mother have the right to seek an abortion? What would happen if there were multiple births? Who would decide how many children there should be? I guess the minister could answer this. I have not read the bill in detail. I have read only the second reading speech, and I have browsed through the bill. However, if there were multiple births, what would be the outcome? From memory, the surrogate mother has a month to make up her mind whether she wishes to keep the child. I imagine that the bonding between her and the child would be very strong. Many situations could arise of the surrogate mother not giving back the child. Also, there are risks to the surrogate mother during and after the birth. She may suffer emotionally as a consequence of relinquishing the child. A friend of mine put up a child for adoption. For years afterwards, she could not forgive herself for adopting out that child. She certainly suffered many traumas as a result of doing that. Therefore, I believe that bonding is very important. Consequently, what seems like a simple process may not necessarily be so simple. I think we are going down a very dangerous road.

One aspect of the bill with which I do agree is that there will not be any commercial transactions. Under the American model, there are commercial transactions. I refer to the Surrogate Mothers Inc website, which quotes some of the expenses involved, such as \$12 500 for legal expenses. Of course there will be legal expenses. That raises another issue. If a surrogate mother does not carry a baby to full term and the pregnancy is aborted, what expenses will that entail? Do the expenses go just to the point at which the pregnancy is aborted? How far do they go? In America, all this is laid out. In relation to the legal expenses, the website states -

This includes all contract preparation; surrogate selection and monitoring; escrow account supervision; final preparation of the adoption decree, and any other legal work necessary to ensure that the adoption and/or termination of parental rights . . . is successful. If legal work is necessary outside of Indiana, we may need an attorney in that state also represent you, in which case there might be additional legal fees.

Medical Expenses ..... \$1000 - \$15,000

**Extract from Hansard**

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This includes physical exams and sperm count of the father; physical exam, HSG test (if necessary), insemination/embryo transfer, prenatal, delivery, postpartum care for the surrogate. Medical costs will vary greatly . . .

Advertising/Accounting Expenses ..... \$3,500

. . .

Psychological Fees..... \$1800

These are the costs for the psychological evaluation and testing that the surrogate will undergo once she is selected. Also included is consultation during and after the pregnancy, if necessary.

Miscellaneous Surrogate Benefits..... \$750 - \$2,000

This includes a \$500 maternity clothing allowance; a \$100,000 term life insurance policy which must be taken out . . .

This is where we are eventually headed, I believe, with this bill. The United Kingdom model is quite interesting, because it is a little more controlled. The situation in the United Kingdom when applying for a parenting order is that the child must be genetically related to one or both parents, and the intended parents must be married to one another and be over the age of 18 years. There is an interesting case in the United Kingdom that some members may have picked up. An article in *The Age* reads -

Surrogacy mother duped parents on births

Clare Dyer, London November 1, 2007

A BRITISH judge has issued a stern warning to surrogacy agencies to make more stringent background checks after it emerged that a surrogate mother deliberately duped two couples into believing she had miscarried their babies.

The woman, named only as Mrs P, entered into the surrogacy deals and conceived using sperm from two fathers with the intention of keeping the two children for herself, the judge ruled. One of the children was nearly four when her father learned of her existence.

Mrs P already had three children of her own by different fathers but was motivated by “a compulsive desire to bear further children”, Justice Coleridge said. It was only when her own eldest daughter, 19, blew the whistle to the surrogacy agency that the two couples learned the miscarriages had never happened.

The judge said surrogacy arrangements were now a feature of contemporary life. “When all goes according to plan, they are a way of remedying the agony of childlessness. However, when the arrangements do not go according to plan, the result in human and legal terms is, putting it simply, a mess,” he said.

The elder of the two children born by surrogacy, a girl, was about to turn four when Mrs P’s daughter revealed the deception to the agency that had set up the deal.

Her true father, who had paid £850 (\$A1900), and his wife decided not to apply to have her live with them but sought a court order for contact with her.

He later reached an agreement with Mrs P that the girl would be told at the appropriate time who her real father was and be allowed to see him.

The father of the second child, a boy, discovered just before his birth in December 2005 that there had been no miscarriage. He and his wife took the case to court, fighting Mrs P and her husband for the right to bring up the boy.

Justice Coleridge ordered that the boy, by then 18 months old, should be handed over to his real father and his wife.

That is the kind of thing that will happen if we continue down this path. It does not matter what kind of legislation is passed. It is a dangerous direction in which to be headed. I will finish on the note that surrogacy is biological technology taken too far.

**HON RAY HALLIGAN (North Metropolitan)** [9.24 pm]: This is a difficult piece of legislation, for a number of reasons. We need to ask ourselves why it is before the house. What is being attempted by bringing this bill before the Parliament? The long title of the bill reads, in part -

**A Bill for**

**An Act about arrangements for surrogate births and children born under those arrangements and for related purposes . . .**

Apparently, it has been determined by the government that there is an issue or a problem in the community of people who want children but are unable to conceive them, and are unable or have no wish to adopt them, and wish to take this particular path. As we know, surrogacy is a situation in which somebody else takes on the role of, in this case, the birth mother. We have two possible situations: a woman can use her own egg and be fertilised by the sperm of a biological father, or can be implanted with an egg fertilised in vitro. In each case, the birth mother becomes the surrogate. In one instance, the surrogate, for want of a better term, owns half of the child; in the other instance, where a fertilised egg is implanted, I would suggest that it could be said that the birth mother owns none of the child. As others have mentioned during their speeches - or perhaps I read it somewhere - the birth mother becomes the "oven" when the would-be parents of this child have been unable to conceive. We have reached a situation in which the government is attempting to convince us that there is a problem that needs to be resolved, and that this bill before the house will resolve that situation.

However, it seems to me at this point that this bill does nothing but create further problems. It is, as others have said, a moral, ethical and legal situation. The amount of weight assigned to each of these factors depends on the individual who is discussing the issue. I am trying to view this pragmatically. There has been much talk about the emotive circumstances of the would-be parents who are unable to conceive. It would appear to me that the bill before the house sets out a situation in which certain things are allowed and many other things disallowed. One of those disallowed things is that surrogacy cannot be arranged when money is to change hands. I accept that. I would not like to see legislation that would allow that type of thing to happen, although I am aware that it may very well be happening at present, with or without legislation.

What interests me greatly is clause 7, "Surrogacy arrangement not binding". I am unsure exactly what the government is trying to put before us. It is a scenario in which certain things are allowed, but they are not binding. Clause 7 states -

A surrogacy arrangement is not enforceable.

This means that the terms of the arrangement cannot be enforced in a court of law by any of the parties. That is unusual in a situation in which an arrangement is being allowed by this bill, admittedly with many conditions attached thereto, but an arrangement nonetheless, but the bill states that the arrangement will not be enforceable. I am not completely sure exactly what the government is trying to create by way of this bill. What is the government trying to achieve? Is it a particularly narrow end that will satisfy one or two couples a year? I do not know, but I would dearly love for the government to explain a little more what it has in mind.

Whether this bill is passed or not, certain things are happening in the community at present on a day-to-day basis that the house is not necessarily aware of. I digress ever so slightly: I recall that when the Acts Amendment (Abortion) Bill went through this place, many members wanted to bury their heads in the sand and say that it does not happen, and eventually they had to accept that there are at least 8 000 abortions a year -

**Hon Helen Morton:** And the rest!

**Hon RAY HALLIGAN:** I do not know the exact number.

**Hon Helen Morton:** It would be many, many more than that.

**Hon RAY HALLIGAN:** That matters not; it is the principle of the thing. The principle was, and is, that members did not want to know. Whilst they did not know and did not wish to know, it did not exist in their minds. I am saying that certain things could well be happening in the community at present, and I do not believe that this bill is likely to overcome the negative sides of what is currently happening in the community.

I digress again. I know I should not mention certain things that are happening in the other place, but shortly a bill on prostitution will be in this place. The same principle will apply to that bill and members will bury their heads in the sand. It is not a matter of bringing legislation to this place that will overcome the problems to make it easier for, in this case, a man and a woman - a family - who want children, who cannot conceive and who have decided this is the best path for them. The legislation before the house does not necessarily provide an easy path for those people. Part of the reason for that situation is clause 7; that is, the bill is not enforceable. The house has heard from other speakers that moral and ethical issues will certainly come to the fore, and no doubt they will. There may be a situation in which, as has been said, the birth mother may very well at some stage say, "I have no wish to part with this child", even though both the egg and the sperm were implanted. I do not know how the birth mother could possibly say that the child is hers, apart from pointing to the fact that she was the incubator and gave birth to that child. From a genetics point of view, I would expect - I am no scientist - there would be little of that child that belonged to her, that was part of her, yet that arrangement cannot be enforceable.

**Extract from Hansard**

[COUNCIL - Wednesday, 14 November 2007]

p7058g-7078a

Hon Donna Faragher; Hon Kate Doust; Deputy President; Mr Vincent Catania; Hon Ed Dermer; Hon Ken Baston; Hon Ray Halligan; Hon Bruce Donaldson

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I come back to the emotion associated with the Surrogacy Bill, and associated with the aspect of the birth and the conception of a child, the bonding of a child with “a” mother, not necessarily “the” mother. I will not bore members with stories about how the wrong child, at birth, has been given to the wrong mother in a hospital; this has happened in the past. In fact, my wife, with our first daughter, who is our second child, was given the wrong baby. Fortunately, and it may have been totally biological, she recognised that there was something wrong and it was the wrong child, so the child was changed -

**Hon Kate Doust:** Did you pick it early or was it only a few years ago?

**Hon RAY HALLIGAN:** We believe that was the case. That can happen, and it happens in the animal kingdom that mammals can bond with one another and different species bond with one another. I would suggest that bonding is not necessarily impossible with human beings.

I agree that bonding is all important; it is particularly important. However, in such a bill, how can that type of bonding be included? I do not think it can and I do not think the government is trying to include it. I bring to the attention of members clause 7. Why is the bill not enforceable? If it is an arrangement, an arrangement is a contract. We are talking about emotion and bonding and children, but it is still a contract, and that is exactly what it is whether money passes hands or not. If people are going to enter into a contract - that is exactly what people do when they find a woman who is prepared to be the surrogate - why can it not be enforceable? I would like the minister to explain that matter when she responds. I have extreme difficulties in understanding why it is not enforceable, because all we have heard to date from various speakers are the problems associated with the fact that it is not enforceable. For example, if the birth mother says, “I want to keep it”, if it was enforceable, that child would be taken from the birth mother. Whether that is the right or wrong thing to do is another question and may very well be the question that suggests whether this bill should be before this place or not. If that question cannot be answered, it might be better to withdraw the bill, because the government has not achieved what it necessarily tried to achieve. Again, that is the question that I put to the government. As I said before, all the government has referred to is an act about arrangements for surrogate births. Please explain. What is the government trying to achieve, and what checks and balances has it put in place to allow that to be achieved? It should not just list all the reasons that it cannot be achieved, and there are plenty of those.

The difficulty with this bill is that whether or not we have legislation, someone is likely to be disappointed. If the birth mother does not want to give up the child but the child is taken from her, she will be disappointed. If for some reason the birth mother is able to keep the child, the would-be parents will be disappointed. Someone will be disappointed. That needs to be recognised, and the government needs to allow for that if it believes it will be an issue.

Mention has been made of multiple births, deformities and the like. Of course, we are all aware of a certain case that has been referred to in the newspapers in the past couple of weeks. I think it involved a lesbian couple who ended up with twins instead of one child. That was an arrangement but not, admittedly, a surrogacy arrangement. I understand that it involved in-vitro fertilisation, but it was an arrangement. As with any conception, people can end up with a multiple birth. Do people suddenly ask the doctor why that happened, why he or she did not do something about it and why he or she did not ensure that the woman had only a single child? Of course, that is absolutely ludicrous. As far as I am concerned, these other instances are just as ludicrous. I believe that if there is an arrangement, a contract, which I believe should be enforceable, the parties to it should see it through; and, if there is a multiple birth, that is part of the contract. That is part of life. That is what happens. We have to accept what happens, just as we have to accept a great deal of what happens in daily life. If there is a deformity, it is unfortunate, but, again, it is part of life. I do not believe anybody has the right to suddenly - how should I term this? - renege on that arrangement. An arrangement is an arrangement is a contract, and there is no renegeing. That is why I believe the contract should be enforceable. People who enter into these arrangements will know what the likely outcomes could be, not necessarily would be or will be, and they have to accept the good with the bad. That is the way life is. People cannot have it their way all the time. If that is the government’s intent with the possible outcomes of this bill, I suggest that it needs to be amended dramatically. Again, I can only reiterate that I am totally unsure exactly what the government hopes to achieve with this bill and what the outcome is likely to be.

I have mentioned the checks and balances. Clause 13 is particularly important and I agree with it entirely, but this may give members some insight and of course the government can tell me whether I am wrong. Clause 13 is headed “Child’s best interests paramount”. Of course that is true. The explanatory memorandum states -

In making any decision about a parentage order, the court must -

It is obligatory -

regard the best interests of the child as paramount.

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Hon Donna Faragher; Hon Kate Doust; Deputy President; Mr Vincent Catania; Hon Ed Dermer; Hon Ken Baston; Hon Ray Halligan; Hon Bruce Donaldson

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I think we all agree with that. The clause says that it is presumed that the best interests of the child are to have the arranged parents - not the birth mother - recognised legally as the parents of the child, unless there is evidence to the contrary. I do not know what that evidence might be and, again, I would appreciate it if the Minister for Child Protection could provide some insight into what the government intends the courts to take into consideration. The majority of members, if not all of them, would agree with clause 13; that is, that the child's best interests are most definitely paramount. I wonder why we are raising all these other issues, particularly about the birth mother wanting to retain the child, if under clause 13 the court is highly likely to hand the child over to the arranged parents, unless there is evidence to the contrary. I am not sure exactly what the government intends, but it is important that it provide us with that information.

In the explanatory memorandum, under clause 12, "What this Part is about", it states -

Part 3 deals with the transfer of parentage of a child born under a surrogacy arrangement in certain circumstances.

Clause 12 of the bill states -

This Part is to enable the court to transfer, from the birth parents to the arranged parents, the parentage of a child born under a surrogacy arrangement in certain circumstances.

I do not think there is a definition of "certain circumstances" in the bill. I admit that I have not thoroughly read the bill, but I ask whether the minister could explain what she believes those certain circumstances may be.

The bill causes me some little concern. I am not sure that the government has fully explained exactly what it is trying to achieve, and it certainly needs to do so. One can only guess that the bill before us is unlikely to achieve a great deal at all.

**HON BRUCE DONALDSON (Agricultural)** [9.48 pm]: I rise to make a very small input to debate on the Surrogacy Bill 2007. It is always fascinating when members have a free vote in the house on legislation such as this. I have noted from the different contributions that there is a lot of uncertainty and some concern about the way that the bill has been framed. This house already has some runs on the board because of its committee work. I am a great supporter of the committee process. It is the role of members in this place to ensure that the legislation that is referred to a committee for consideration comes out of that committee better than when it was presented to it. Successive governments have presented sloppy legislation in this place and it is a matter for concern. Given that that is the case, it is very important that this bill be referred to a committee at this stage because the concerns that members have raised should be addressed.

*Discharge of Order and Referral to Standing Committee on Legislation*

**Hon BRUCE DONALDSON:** I move, without notice -

That the Surrogacy Bill 2007 be discharged and referred to the Standing Committee on Legislation for consideration and report not later than Thursday, 10 April 2008.

Question put and a division taken with the following result -

Ayes (18)

Hon Ken Baston  
Hon George Cash  
Hon Vincent Catania  
Hon Peter Collier  
Hon Murray Criddle

Hon Ed Dermer  
Hon Kate Doust  
Hon Brian Ellis  
Hon Donna Faragher  
Hon Anthony Fels

Hon Nigel Hallett  
Hon Ray Halligan  
Hon Barry House  
Hon Robyn McSweeney  
Hon Helen Morton

Hon Simon O'Brien  
Hon Barbara Scott  
Hon Bruce Donaldson (*Teller*)

Noes (10)

Hon Kim Chance  
Hon Sue Ellery  
Hon Adele Farina

Hon Graham Giffard  
Hon Paul Llewellyn  
Hon Sheila Mills

Hon Ljiljana Ravlich  
Hon Sally Talbot  
Hon Giz Watson

Hon Ken Travers (*Teller*)

Question thus passed.