STANDING COMMITTEE ON LEGISLATION

SURROGACY BILL 2007

TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
WEDNESDAY, 20 FEBRUARY 2008

SESSION THREE

Members

Hon Graham Giffard (Chair)
Hon Giz Watson (Deputy Chair)
Hon Ken Baston
Hon Peter Collier
Hon Sally Talbot

Hon Kate Doust (Participating Member)

Hearing commenced at 11.54 am

MCGIVERN, DR BRENDA
Senior Lecturer, Law School UWA,
affirmed and examined:

CHAIR: On behalf of the committee, I would like to welcome you to the meeting. Before we begin, I will ask you to take either an oath or an affirmation.

[Witness made the affirmation.]

CHAIR: Can you please state your full name and the capacity in which you appear before the committee?

Dr McGivern: My name is Brenda McGivern. I appear as a representative member of the Reproductive Technology Council.

CHAIR: You will have signed a document entitled "Information for Witnesses". Have you read and understood that document?

Dr McGivern: Yes, I have.

CHAIR: The proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of the hearing, for the record. Please be aware of the microphones and try to talk into them. Ensure you do not cover them with papers or make noises near them. I remind you that your transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today's proceedings, you should request that evidence be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Please note that until such time as the transcript of your public evidence is finalised, it should not be made public. I advise you that premature publication or disclosure of public evidence may constitute a contempt of Parliament, and may mean that the material published or disclosed is not subject to parliamentary privilege.

We have a number of questions that we will take you to, but to begin with, I will invite you, if you would like, to make an opening statement to the committee.

Dr McGivern: Yes, thank you. First of all, thank you for inviting the council to address this committee. Perhaps the beginning point should be to note the role of the Reproductive Technology Council, and in particular its proposed functions under this proposed suite of surrogacy regulation.

As you will be aware, essentially under the Human Reproductive Technology Act, the Reproductive Technology Council is the body responsible for advising the minister and the CEO, as it is defined under that act—essentially, the executive of government—on the implementation of the HRT Act, including issues arising from its implementation. In practical terms, much of the administration, then, of the Human Reproductive Technology Act falls to the council.

I want to turn, then, to, I suppose, the mechanism by which surrogacy is proposed to be regulated under this bill, and, I suppose, importantly, not under this bill. The bill proposes to regulate surrogacy essentially in two principal ways: one by creating certain offences in relation to surrogacy arrangements. Those appear to be, principally, in relation to surrogacy arrangements for reward, although of course section 7 falls into that sort of area of the bill, saying that arrangements are not going to be enforceable. The second principal operation that it seems to have is conferring jurisdiction on the Family Court to make parentage orders and recognising parentage orders and matters flowing from that.

Notably, from the Reproductive Technology Council's perspective, the bill remains silent on surrogacy arrangements generally; that is, what surrogacy arrangements may be entered into, who are the parties that may enter into surrogacy arrangements etc. In particular, it remains silent on matters proposed to be dealt with by the directions.

It is clear from the explanatory memorandum that the latter of these issues—this idea of access and eligibility, for example—is to be dealt with not in the Surrogacy Bill but by way of directions. Essentially, then, those are going to be matters drafted by the CEO, under the Human Reproductive Technology Act.

[12.00 noon]

Dr McGivern: In essence, then, that aspect of regulation is delegated to the executive arm of government. From the Reproductive Technology Council's perspective, we are then going to be in a position of needing to implement and oversee issues of licensing and processes associated with that important part of the regulation. Perhaps by way of introduction, I should say that that shaped quite fundamentally what we did and did not comment on in our written submissions to the committee. That is, we have not commented on the detail of the directions largely because we were asked to respond to the bill. That is not to say that there is no concern about the directions and, I suppose importantly, the fact that the directions are not subject to the same level of parliamentary drafting and parliamentary and public scrutiny, being directions rather than legislation. Any lack of clarity, for example, is going to impact directly on the ability to implement and oversee matters falling under the directions. Perhaps importantly, included in that are areas which may or may not be described as areas of policy. I suppose here I would flag the issues of access and eligibility. Whereas directions, it seems, have previously taken the role of dealing with matters of process and detail under a policy framework given by legislation, the question that arises is whether eligibility and access are in fact issues of process or policy. I am really raising that as an issue only by way of then saying that the council has to deal with any lack of clarity by way of looking for policy to guide that, and if that is in fact a matter of policy, it does not appear to be reflected in legislation. We do not have Parliament's views or direction on that.

Flowing from that, I suppose the council would be concerned that the directions are closely scrutinised at the very least. Putting aside any issues about the validity of directions on which Parliament may or may not have taken advice to the extent that they go to issues of policy, certainly the drafting of those directions will become an important issue for the council. Without going into all of the directions, there are certain matters that I think can be flagged as perhaps lacking a certain clarity. I raise that by way of introduction. If there are any particular matters the committee would like me to address, I am happy to do so as best I can. Of course, there are other matters I should highlight arising out of the written submissions we have made, and those go essentially to issues of reiterating or perhaps emphasising guiding principles that will exist under the act, particularly those dealing with the welfare of any resultant children, and harm minimisation to parties participating in surrogacy arrangements. Then, of course, there are the other ones that we have noted. Section 7 raises issues about whether reasonable expenses will be part of surrogacy arrangements and hence whether they are not enforceable under section 7, and so on. However, I can probably deal with those by way of questions.

CHAIR: I think a lot of our questions will take up your idea about the issues that arise in the directions. You say in the opening statement of your submission that the council has not addressed any matters specific to the draft directions. These directions were tabled in order to provide a general indication of how surrogacy arrangements may be regulated under the directions. You say that the council notes that the directions will require further consideration and amendment in the event that the Surrogacy Bill is enacted. Firstly, can you tell the committee whether the draft directions, as you understand them, are complete, in terms of the current bill? That is, if the bill remains unchanged, are the draft directions adequate in your view?

Dr McGivern: I suppose whether they are adequate and whether they are complete are two separate issues. Do they deal with the issues not dealt with by the act? Probably. Are they adequate? I think there is a lot of uncertainty in the current drafting. For example—this is only by way of example, because it would probably take some time to go through all of the issues that might arise—I take the committee to part 4 of the draft directions, which deals with eligibility, and 4.1 in particular, which deals with requirements for the arranged parents. Incidentally, are these complete insofar as they go? When I say that they are complete, I mean that they are complete in the sense that they go to matters that will arise under the Human Reproductive Technology Act; I do not think they go to any of the issues that arise in respect of surrogacy arrangements that do not fall under the ambit of the Reproductive Technology Act. So, for example, if a child is conceived naturally but is intended to be part of a surrogacy arrangement, the directions cannot, necessarily, deal with those situations because of the ambit of the act under which they are made. Yes, I think they are reasonably complete in terms of dealing with issues as they fall under the appropriate legislation. The issue is that they are falling under different legislation to the surrogacy legislation. Returning to the adequacy issue, we have drafting such as that which appears at 4.1(d). It states —

> No payment other than the costs associated with an artificial fertilisation procedure . . . is to be made by or on behalf of the arranged parent(s).

That seems to be incredibly broad. That is, no payment to whom, and in respect of what? How is it that one is supposed to consider what payments have been made by these parents? It seems reasonably clear that what is being said is that there is no payment in respect of or in connection with a surrogacy arrangement, but that is not what the directions say. That is an incredibly broad drafting issue. I think there is a lack of clarity built into that. Where a payment is not made, say, directly to the birth mother for example, is it going to be a payment that is caught up in that or is it not? I think there needs to be some clarification about to "whom", "at the direction of whom", "in connection with"; something that makes that a little less all-encompassing than any payments made. That is just by way of example, but there are any number of examples as one goes through the directions, and I suppose this comes back to the point—admitting and clearly acknowledging that these are only draft directions, and I understand that—that it is clear that they have not been subject to the sort of scrutiny, I suppose, that legislative drafting is subject to. I think they would need to be, before one could consider the regulation to be adequate in terms of certainty for the purposes of implementation, which with the Reproductive Technology Council is going to be concerned.

[12.10 pm]

CHAIR: The committee has identified a number of aspects of the directions that it had anticipated asking you why you think they appear in the directions but not in the bill, and how you would see provisions and details of the directions being supported by provisions in the bill.

These directions need to hang off something and we are having trouble in a number of respects identifying aspects of the bill that enable these directions. There are quite a few that we intended to identify with you. From listening to what you were saying, I am worried about whether we will end up at the conclusion of this with a complete and exhaustive account of the directions. What you are suggesting to me is there might not be because the directions themselves do not answer that.

Dr McGivern: One of the difficulties in responding to that line of questioning is that this is in draft form and, as I understand it, not nearly complete draft form.

CHAIR: Perhaps before we go to specifics we will probably try to walk you through the first few more general questions. That might help members of the committee to understand what particular insights you can give to us about the adequacy or otherwise of the directions.

The first question in this more general respect is that you say in your submission that you have had significant involvement in developing the draft directions. Perhaps you can expand a little on that

and explain to us what the council's role has been in the development of the directions on surrogacy.

Dr McGivern: Council was largely called upon to consider the process issues involved in preparing participants for the surrogacy process. We were called upon to comment on things like, "What should come first, legal advice and/or counselling and should that occur before or after certain stages of the surrogacy procedure?" When I say procedure, I do not mean the physical procedure, I mean the entire arrangement. Largely, we were involved in that, so council members were suggesting that, from a process point of view, the matters you see reflected in the directions occur in that order. That is probably the principal role that the council has. Bear in mind also that the directions came to council on the basis that the directions would be made. Council has not been involved in the broader question of where this regulation should be. Council has been involved in, "This is the proposed scheme, what do you think is going to be an appropriate mechanism for implementing that scheme?" We have discussed the directions in that context.

CHAIR: Your submission also recommends the inclusion of a preamble to reinforce what is described as the intent of the legislation. Can you expand a little more the reasons for that preamble?

Dr McGivern: A preamble and/or a statement of guiding principles or objectives within the body of the act. Ultimately, what council did feel quite strongly about was that there ought to be some fundamental, overarching, guiding principles or policies that are of use in implementing legislation, as we see reflected in other kinds of legislation where those guiding principles exist. If there is an issue of uncertainty, that can give some guidance to the implementation process. You can say, "Well, at least we know what needs to be paramount, for example." On discussion, the strong feeling of the council was that there ought to be some reflection of the fact that the welfare of the resultant child or children should be the paramount consideration, but that also an important consideration was that there be harm minimisation to all participants in the process.

Hon GIZ WATSON: Does the Human Reproductive Technology Act have a set of guiding objectives or principles?

Dr McGivern: The Human Reproductive Technology Act has a preamble and certain objects set out under the act. Do you want me to speak to those further?

Hon GIZ WATSON: No; that is fine.

Dr McGivern: I note that, although it has a preamble, it is a slightly older act. My understanding is that there is a move towards providing a statement of principles rather than necessarily having those reflected in a preamble, which may be of dubious interpretive effect. I suppose I am noting that the HRT act has a preamble but there may be other ways of dealing with having that statement of principle incorporated in this legislation if that is not considered to be an appropriate way of doing it.

CHAIR: In terms of the procedure that the council has gone through, who have you been liaising with in relation to that procedure? Has it been a direct relationship with parliamentary counsel in the development of this document, or has it been the council and the department? Who have been the players in the evolution of this document.

Dr McGivern: I have to give you my understanding of this, although I suspect that our executive officer may be able to speak to that more clearly and it may be appropriate that I suggest that that question be directed elsewhere. My understanding in being a participant, but at the meeting of council end rather than the lead up to that meeting, is that there has been liaison between the health department and the executive arm, which has been drafting the directions, in terms of at least giving us where things are at and then we are asked to comment on that. However, as I say, that question would probably be better directed to our executive officer.

CHAIR: As you can see, we are keen to get that understanding. Parliamentary counsel generally see all the bills and draft the bills and the regulations that potentially come before us. They have an understanding of the requirements of these instruments. We would like to be reassured that those same types of skills have been brought to this document on the basis of that sort of training and skill.

Your submission recommends that "genetic parent" is defined in the bill. Section 3 of the HRT act reads —

> **"biological parent"** means a person who —
>
> (a) is the source of a human egg or human sperm used in an artificial fertilisation procedure; and
>
> (b) is the genetic parent of a human embryo developed, or of a child born, as a consequence of that procedure;

Should that definition be the same as the one for "biological parent" in the HRT act?

[12.20 pm]

Dr McGivern: Yes, probably. A query whether, in fact, the drafting might be made consistent if the same thing is meant by them.

CHAIR: I take you to, then, clauses 7.5 and 6 of the directions document. In relation to psychological assessments, can you advise the committee what is the purpose of the psychological assessments, and what research, if any, that you are able to point to that establishes the effectiveness of these assessments?

Dr McGivern: Certainly, I can speak to the purpose. In terms of the research, I understand that the committee has heard or will hear from the counselling subcommittee of the Reproductive Technology Council. I would suggest that it is that subcommittee that should speak to the latter aspect of your question. I do not think that as a general member I would be well-equipped to deal with that question. As to the first part, that goes clearly to the stated objectives, which go to welfare and harm minimisation. So, the purpose of psychological counselling is considered to be one of the mechanisms of recognising that welfare—or indeed the term "best interests", as we sometimes see used—covers more than physical welfare or interests, but also psychological issues, and that participants need to have preparation and counselling in respect of those interests as well as in respect of things like the legal ramifications of entering into a surrogacy arrangement. So, it is considered to be an important preparatory step, as is consistent indeed with the Human Reproductive Technology Act. Counselling is an important part of the process of preparation of parties to avoid harm.

Hon PETER COLLIER: Can you just expand a little bit more on what you mean by harm minimisation with the participants?

Dr McGivern: Well, necessarily, when you look at engaging in assisted reproductive technology and, perhaps even more so when you look then at surrogacy, you are shifting, perhaps, concepts or processes that have historically been a little less complex. For example, in a natural conception what you would have are two parents who are clearly the parents of a child. That child is born and is the child of those parents, and that is a fairly coherent situation, and one that society recognises and responds to in certain ways. When you are looking, for example, at a surrogacy arrangement you may have a set of biological parents, a set of arranged parents and a set of surrogate parents—certainly, the surrogate mother and any partner that she might have—so you potentially have a far more complex system, which is not necessarily an arrangement that society and all the participants themselves are particularly well-equipped to deal with, given our current frameworks. So, for example, where a child may have an issue as to who their parents are, it is important that all of the participants in that process are able to prepare themselves to answer those questions and to do it in a

way that will not cause psychological harm, principally to the child, but also to the other participants in that process.

Hon PETER COLLIER: So, are you talking about counselling?

Dr McGivern: Well, counselling helps prepare people to do that very thing, yes. There is an assessment aspect, I suppose, in terms of saying are these people able to respond well to that situation and also then assisting and facilitating them to respond to that situation.

Hon PETER COLLIER: I assumed that that was the situation of the harm minimisation you were referring to, but I got the impression from your previous comments that they were separate or divorced from or in addition to the preparation for the process. It is one in the same—that is what you are referring to, is it not?

Dr McGivern: I think harm minimisation and welfare issues should extend throughout the regulations; so, yes, absolutely, it is a necessary and important part of the preparation process, but it really needs to be a guiding principle throughout the process. So, for example, it is very clear that welfare considerations will be paramount, as well as harm issues, in respect of making a parentage order. It seems appropriate that those same guiding principles govern the implementation of the whole suite of regulation from its inception to its close, to the extent that you can call it a close with the granting of the parentage order. Does that answer your question?

Hon PETER COLLIER: I think so.

Dr McGivern: Okay.

Hon PETER COLLIER: I will be all right.

CHAIR: Just on the psychological assessments, I think in the first part of your answer you talked about them being encouraged in IVF procedures that occur now. These are required under IVF procedures—you said to be encouraged. Are they required or encouraged?

Dr McGivern: Required, from recollection, under IVF itself, yes.

CHAIR: Yes. As I indicated to you a few minutes ago, there are a number of aspects of the draft directions. Listening to your comments, I invite you to advise the committee on whether you feel that you are the appropriate person to respond. There are 13 issues that we have identified in the directions, and really what we were intending to seek from you was a response on why these things occur in the directions rather than the bill. As I said, how is it that these things can be in the directions, if the bill appears to be silent or there is nothing on which they can hang off in the bill? I am not sure, particularly based on the process that you have gone through just as an advisory one, whether you would be best placed to do it. However, I invite your views on that because, for example, 4.1 was one of the ones that we wanted to ask you about. How is it that a provision like this, when you look at what is and what is not in the bill—how is it that a directions statement can have any force?

Dr McGivern: It seems to me that that is a matter largely of legal advice, which Parliament may or may not seek to get. I am not necessarily certain that the Reproductive Technology Council is the body to advise on that. Perhaps I can say this by way of general comment: as to why the matters contained in the directions are contained in the directions, it is perfectly clear from the explanatory memorandum that that is what Parliament has intended and directed. So, as to why they are there, it is because that is what is intended by Parliament. It is by no means something that has been directed from the executive or, indeed, from the council; they are there because that is the mechanism of regulation that has been intended by Parliament. So, as to whether they —

CHAIR: No, just there is a view that Parliament needs to express that in a more particular way, rather than just saying whatever is in the directions statement, we say okay to; that is kind of the proposition.

Dr McGivern: The second question that you posed is perhaps the more tricky one and perhaps one that you may need to take advice on; that is, what is the force or the validity of the directions? As I say, I am here in my capacity less as a lawyer than as a representative member of council. However, I would say this: that, certainly, aspects of those directions would take their validity or their force from the conferral of power under the Human Reproductive Technology Act. So, it is perfectly clear, for example, under section 5, and then section 21 of the Human Reproductive Technology Act—and there are a number of other sections, section 31 and so on—that the executive arm of government can make directions and those directions shall have force, except as contrary to the code etc, so I will refer you to the legislation in that regard.

But it would rely on the Human Reproductive Technology Act for its force. Those would be directions made under that act as opposed to under this act —

[12.30 pm]

CHAIR: Yes.

Dr McGivern: —the Surrogacy Bill. So, the scope then of the force given to those directions is dependent on that act. The question, I think, that has to be raised is: what is the extent of support that can be given to those directions? It is perfectly clear that the directions do deal with surrogacy arrangements as they rely on access to assisted reproductive technology. It is clearly going to come generally within that act, but perhaps more problematically is the question: are there issues of policy that are purported to be delegated to the executive arm of government and query then whether that is a valid delegation. I am afraid, I think, that is where I have to step back and say I cannot advise you on that.

CHAIR: Yes, you are dead right. That question arises. Absolutely, that question arises in the mix that resulted in that dilemma.

Dr McGivern: Yes; in my capacity as a reproductive technology representative I cannot answer that.

CHAIR: That is fair enough.

I might ask you a couple of questions that you may be able to answer. Quite specifically, I take you to 3.1 and 3.2. Are you able to advise the committee in relation to who pays the panel members referred to in 3.1 and 3.2?

Dr McGivern: I am not sure that I can answer that question.

CHAIR: Okay.

Dr McGivern: However, obviously, even from a Reproductive Technology Council perspective there are going to be clear of funding implications in terms of the overseeing of this. I mean, there would have to be a separate subcommittee in respect of surrogacy, and there are clear funding implications for that.

CHAIR: Okay; that is fine. Are you able to tell us whether or not clinics are able to provide specified members; for example, a legal practitioner with experience in family law or a person with experience in child welfare?

Dr McGivern: I think clinics would certainly be able to approach those people and find out whether they would be willing to sit on that sort of body and then put forward their names, in the ordinary nomination method, to council for approval. Are they able to provide them directly? Are they going to be members of staff? Probably not. Do they have to be? Probably not. That, in and of itself, I do not think is hugely problematic.

CHAIR: Are you aware of any clinics that operate with any sort of similar membership panels or committees for any other functions that they perform?

Dr McGivern: I am not aware of that; no.

CHAIR: Do members have any other questions?

Hon KATE DOUST: I did have a question. I suppose the first basic question was when the council was looking at these issues, why they—you may have answered; I might have missed it—went down the path of directions rather than proposing regulations?

Dr McGivern: We did not go down that path. We operated within a path that was given to us.

CHAIR: Yes. So, you were asked for the feedback and you gave it.

Dr McGivern: That is right.

Hon KATE DOUST: I have no more questions.

CHAIR: That concludes the questions that we have for you.

Dr McGivern: Thank you.

CHAIR: Thank you very much for your submission and for your answers today.

Dr McGivern: Thank you.

Hearing concluded at 12.33 pm