



**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**STANDING COMMITTEE ON JUSTICE
AND COMMUNITY SAFETY**

(Reference: [Inquiry into Parentage \(Surrogacy\) Amendment Bill 2024](#))

Members:

**MR P CAIN (Chair)
DR M PATERSON (Deputy Chair)
MR A BRADDOCK**

TRANSCRIPT OF EVIDENCE

CANBERRA

WEDNESDAY, 21 FEBRUARY 2024

**Secretary to the committee:
Ms S Milne (Ph: 620 50435)**

By authority of the Legislative Assembly for the Australian Capital Territory

Submissions, answers to questions on notice and other documents, including requests for clarification of the transcript of evidence, relevant to this inquiry that have been authorised for publication by the committee may be obtained from the Legislative Assembly website.

WITNESSES

CHEYNE, MS TARA, Minister for the Arts, Culture and the Creative Economy, Minister for City Services, Minister for Government Services and Regulatory Reform, Minister for Human Rights 1

McKINNON, MS GABRIELLE, Senior Manager, Human Rights and Social Policy, Justice and Community Safety Directorate 1

NG, MR DANIEL, Executive Branch Manager, Legislation, Policy and Programs, Justice and Community Safety Directorate 1

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Amended 20 May 2013

The committee met at 11.00 am.

CHEYNE, MS TARA, Minister for the Arts, Culture and the Creative Economy, Minister for City Services, Minister for Government Services and Regulatory Reform, Minister for Human Rights

NG, MR DANIEL, Executive Branch Manager, Legislation, Policy and Programs, Justice and Community Safety Directorate

McKINNON, MS GABRIELLE, Senior Manager, Human Rights and Social Policy, Justice and Community Safety Directorate

THE CHAIR: Good morning, and welcome to this public hearing of the Standing Committee on Justice and Community Safety for its inquiry into the Parentage (Surrogacy) Amendment Bill 2023. The committee will today hear from the Minister for Human Rights.

The committee wishes to acknowledge the traditional custodians of the land we are meeting on, the Ngunnawal people. The committee wishes to acknowledge and respect their continuing culture and the contribution they make to the life of this city and this region. We would also like to acknowledge and welcome other Aboriginal or Torres Strait Islander people who may be attending today's event.

These proceedings are being recorded and transcribed by Hansard and will be published. The proceedings are also being broadcast and webstreamed live. When taking a question on notice, it would be useful if witnesses used these words: "I will take that question on notice." This will help the committee and witnesses to confirm questions taken on notice.

We welcome Ms Tara Cheyne, MLA, Minister for Human Rights, and her officials. I remind witnesses of the protections and obligations afforded by parliamentary privilege and draw your attention to the privilege statement. Witnesses must tell the truth. Giving false or misleading evidence will be treated as a serious matter and may be considered a contempt of the Assembly. Could you each please confirm that you understand the implications of the statement and that you agree to comply with it.

Ms Cheyne: Yes.

Ms McKinnon: Yes.

Mr Ng: Yes.

THE CHAIR: Thank you very much. We are not going to take an opening statement, so we will just get straight into questions.

Minister, I make reference to the Surrogacy Australia submission. They make the point that the offence of compensated surrogacy remains one of extraterritorial operation. Under the Parentage Act, part 4, it is an offence for an ACT resident to engage with a commercial surrogacy arrangement overseas. Given the strength of the Surrogacy Australia submission, have there been any prosecutions under that part of the Parentage Act? What has been the impact of that prohibition and that offence?

Mr Ng: Mr Cain, I am not sure that we have that information to hand at the moment. Can I take that on notice for the committee? If I can come back with an answer before the end of the hearing today, I would be happy to do so.

THE CHAIR: Okay. Thank you. Surrogacy Australia go so far as to say it is a “failed experiment”. I look forward to the information that you are going to provide later.

Ms Cheyne: Mr Cain, would you mind clarifying: what is the failed experiment?

THE CHAIR: The offence. Under the Parentage Act, it is an offence for an ACT resident to engage with a commercial arrangement, even if that is outside of the ACT.

Ms Cheyne: Yes.

THE CHAIR: That may be overseas, for example. That is the reference that I was making.

Ms Cheyne: And they are saying the offence is a failure?

THE CHAIR: They are saying that the ACT’s prohibition is a “failed experiment”. This is from the Surrogacy Australia submission.

Ms Cheyne: Thank you.

THE CHAIR: They say that the ACT’s prohibition on extraterritorial compensated surrogacy has been a “failed experiment”, given that it seems that it still occurs but it then deters those parents from engaging in a legal relationship with that child, who has basically become theirs under a commercial engagement. I am interested to know whether there have been any prosecutions under that. I am interested to know whether, in your consideration of this amendment bill, that offence was part of the review or whether you have not turned your mind to that.

Ms Cheyne: Entering in the ACT into a commercial surrogacy agreement interjurisdictionally or overseas is not condoned by the ACT government, nor is it condoned by any jurisdiction in Australia. It is a criminal offence.

What we have done in our review of the act and how it is operating is to balance the criminal nature of the offence with the rights of the child—I would not go as far as to say “balance”. What we have done in considering the reality of what can occur, while being very clear that this remains an offence, is to say that parentage orders can be granted in limited circumstances where a child has been born through commercial surrogacy arrangements.

This is where we are seeking to balance that strong policy objective, discouraging commercial surrogacy, with protecting the rights of the child, given that a child should not be punished for the actions of their parents or indeed the circumstances of their birth. The limited circumstances are where the court is satisfied that the child is facing a pressing disadvantage that would be alleviated by making a parentage order that it is in the best interests of the child and it is reasonable in the circumstances. Nothing changes in terms of the offence, but, in terms of supporting the child who may have

come about through these actions, this is the approach we have tried to strike here, recognising the rights of the child. It is a concept that is established in ACT legislation and also under our international obligations.

Mr Ng: Minister, I might just add to that. In terms of that proposition, Mr Cain, about the efficacy of the offence, we will try and find the data on the number of the prosecutions. But I would say that the number of prosecutions does not necessarily holistically indicate the efficacy of an offence. One of the objectives of criminal offences is to disincentivise certain behaviours and so the fact that—

Ms Cheyne: Deterrence.

Mr Ng: Yes, indeed. So the fact that a prosecution has not occurred does not count the number of times that individuals in the community might have been disincentivised and thus chosen not to partake in that activity, because the ACT participates in this natural approach of criminalising commercial surrogacy arrangements.

THE CHAIR: But you will get back to me with some data on that?

Mr Ng: Yes, if I can find the data, Mr Cain.

Ms Cheyne: Yes. We are just not in the business of prosecution. This is a policy matter for us.

THE CHAIR: Yes.

Ms Cheyne: That is why we do not have it.

THE CHAIR: But you are aware that there are limited circumstances where a parentage order can be issued.

Ms Cheyne: No, not at the moment, Mr Cain. So that is what we have inserted into our bill.

THE CHAIR: It might seem that that would affect the prosecution. Anyway, the historic information is something I am interested in.

Mr Ng: Yes.

MR BRADDOCK: I appreciate that you are trying for that balance. I worry that “pressing disadvantage” is a high test. I think we all agree that it is probably in the best interests of the child, where the court is able to have that discretion, to put in a parentage order. Is there still too much of a barrier for the court to act in favour of the child and intervene through that pressing disadvantage test?

Ms Cheyne: I think that is a difficult question for us to answer at this stage, Mr Braddock, because it has not been tested within the courts yet in the intent that we have drafted. Certainly, the intent is not to undermine our policy concerns about commercial surrogacy but to identify the circumstances where not having a parentage

order is creating a real difficulty for the child and something that is quite substantial. It is not just about being recognised in a parentage order. For example, if a parentage order is not granted then there may be difficulties in getting a passport. That is the intent that we are looking at here. We will be watching closely to see how the Supreme Court will be interpreting this. But our intent, both in drafting and in the explanatory statement, is clear.

MR BRADDOCK: Okay. I have a follow-up on where other jurisdictions are going with this particular question. I understand that the Northern Territory, South Australia, Tasmania, Victoria and Western Australia have decriminalised extraterritorial commercial surrogacy. I can see that different parts of Australia are moving in different directions. I am not sure where the national movement is lining up behind this.

Ms McKinnon: Perhaps we could come back to you with a bit more information about that. My understanding is that it is not that they have decriminalised but that they never had the extraterritorial prohibitions.

MR BRADDOCK: Sorry; that is correct.

Ms McKinnon: So it may be just a historic difference in the way that different jurisdictions have approached this matter, rather than it being a national change in that direction. But we can come back to you on that.

MR BRADDOCK: Thank you.

THE CHAIR: Is there some nationally agreed framework for surrogacy that we are talking under the umbrella of, or is that not the case? It seems like not—

Ms Cheyne: Mr Cain, it is a good question. I am sighing not at the question but at the circumstances. Surrogacy laws across Australia do differ. While this was not necessarily on our agenda at the time of putting together the PAGA, for example, it did become apparent very early on, for me, that the ACT surrogacy laws had not been updated in some time. While other jurisdictions had moved forward in recognising some of the realities of surrogacy and were considering them in a rather incremental way, the ACT had not done that yet.

That was balanced with the fact that there had been a working group on surrogacy that was established by the Standing Council of Attorneys-General in November 2019. That work continued for some time. It was established to advise that committee on opportunities for attaining greater national consistency. It was through that process, largely, that we identified some of the opportunities for us and where we were distinctly out of step with other jurisdictions.

In terms of achieving national consistency, as you know, being in a federated system can be difficult from time to time. What we have sought to do with this amendment bill is to try to harmonise, where we can, with where other jurisdictions are. Also, if there have been elements that have come through in our consultation and the representations made to us, we have tried to address those in our amendment bill.

That is a very long way of saying that we were driven by being quite inconsistent with the generalities of where we were nationally. We think that that has brought us up to being largely in line with other jurisdictions. But where there have been other issues that we have identified then we have sought to address them as well.

THE CHAIR: Would you say we will be closer to a particular jurisdiction once this passes or are we just picking bits and pieces from different stages?

Ms McKinnon: I would say it is drawing aspects from different states and territories, rather than necessarily mirroring one state or territory particularly, although in many aspects we will probably be closer to New South Wales. I also want to add that the national working group on surrogacy was really focused on removing barriers to altruistic surrogacy across jurisdictions—looking at consistency and making sure that we were making surrogacy more readily available on an altruistic basis—while not necessarily touching prohibitions and commercial surrogacy.

THE CHAIR: Okay. Important work in progress.

MR BRADDOCK: Donor Conceived Australia, in their submission to this inquiry, on the particular issue of giving the court that discretion, raised a concern that parents unable to secure their preferred type of surrogacy arrangement elsewhere in Australia might come to the ACT to take advantage of that. Have you give any consideration to or seen any evidence that such surrogacy-based tourism might happen?

Ms Cheyne: It is difficult for us to answer, because the ACT has been so strict; we do not really have those examples to draw from in terms of evidence. I certainly understand that it is a concern.

We have sought a balance here. The ACT has a very small population. As the act works currently, the surrogacy arrangement must occur within the ACT. That is incredibly limiting, obviously, for everyone. For a jurisdiction as small as the ACT, it really becomes quite a stark issue. In seeking to balance that altruistic surrogacy can occur interstate, we are also making sure that there are requirements within our legislation that offer some further protections. This relates, in particular, to seeking counselling beforehand, making sure you understand the process and your obligations, and putting an agreement in writing. Currently, in the ACT you do not have to do that. We think that is an important measure as well. We have increased the age limit from 18 to 25, noting that there are some circumstances where discretion can be granted. We think those are relevant protections that make a surrogacy arrangement workable, still promote human rights, but also achieve altruistic surrogacy without trying to create a world of surrogacy tourism.

I would say, Mr Braddock, that I certainly understand Donor Conceived Australia's concerns. We have engaged with them in our consultation as well. It is something that we keep an eye on. But I would say that, with surrogacy, even in a no-barrier world, it is very difficult to find someone who is willing in the first place, so I cannot envisage that tourism is a likely outcome. But of course we keep an eye on it.

MR BRADDOCK: Yes. Thank you.

THE CHAIR: I note the requirement for a counsellor to engage with what I will call a birth parent under 25. I could not find a definition either in the bill or in the Legislation Act of “counsellor”. Is that intended to be just the common meaning of counsellor, which does create some uncertainty, or are you going to make that more specific?

Ms Cheyne: This is an issue that also arose in the voluntary assisted dying considerations. We have recognised that there have been several submissions that have said a definition would be helpful, particularly in ensuring that someone has the appropriate qualifications. That is something that we will look at before the bill is debated. And, of course, we will take any recommendations from the committee seriously.

THE CHAIR: Okay. So you are not quite sure how you will address that just at this stage, but you will look at that?

Ms Cheyne: We are certainly aware that there have been submissions raised. I am guessing here, but I would say that if we looked across the statute book “counsellor” would not be an uncommon term. Maybe it is, but it is something that we can look at. I certainly take your point, Mr Cain, that there is not a dictionary definition of it, at least as we understand it, within the legislation.

THE CHAIR: Yes; within the legislation.

Ms Cheyne: That is something that we take seriously. We will have a further look at it. We will also be guided by the recommendations of this committee.

THE CHAIR: Okay. Thank you.

DR PATERSON: An overall comment would be appreciated on this. There is lots of talk through the submissions about aligning with other states. My question is: where is this bill at in comparison to other states? Is it where we need to be? I think there is an advantage in not being the first to legislate or to change legislation, in that we can learn from other jurisdictions.

Ms Cheyne: I will hand to Ms McKinnon in a second for some of the detail there. I would say that our intent from this—and going to Mr Cain’s question before about the working group that was established across jurisdictions for SCAG—was that we were seeking to be more harmonised with other jurisdictions, particularly noting that in the ACT we were quite behind. In a perfect world, the working group would have come to a conclusion and we all would have had recommendations on what we needed to change for national harmony. We are not at that stage.

On that basis, I felt it was quite important, given just how inharmonious our legislation was, to make some changes that brought us more into alignment with other jurisdictions, understanding where there was best practice, understanding our own circumstances in the ACT as a small jurisdiction within a bigger one, and also taking into account what we have heard through our consultation. That is the position that we have got to.

I would say the one area where we are quite different at this stage is something that we were just discussing before, which is that parentage orders can be granted in some limited circumstances where a commercial surrogacy arrangement has resulted in the birth of a child. We are seeking, as a human rights jurisdiction, to balance the rights of the child. They have no control over the circumstances of their birth and may be in a situation where there is pressing disadvantage from them not having a parentage order granted. So that is where we have gone perhaps a touch further. I think that is recognising reality—that a child should not be punished for the circumstances of their birth—while also maintaining the policy intent that commercial surrogacy is not something that we condone.

MR BRADDOCK: Going to the use of terminology, both here in the ACT and nationally, “surrogate mother” is used in about three territories and states and “birth mother” is used in about four other jurisdictions. We introduced in the bill—

DR PATERSON: Birth parent—

MR BRADDOCK: Sorry?

DR PATERSON: Birth parent or birth mother?

MR BRADDOCK: “Birth mother” is used in New South Wales, Queensland, Tasmania and Western Australia, whereas we are using the term “birth parent”. My concern is, firstly, how is this term going to work in practice with other jurisdictions and other systems—for example, ensuring that these children can be appropriately listed on Medicare and ensuring that it is going to work when “birth parent” as a term does not line up with the federal understanding of this term?

Ms Cheyne: Thank you, Mr Braddock. Before we were aware, you and I, that we were going to have hearings, your office did contact mine and we provided a response to you.

MR BRADDOCK: Yes.

Ms Cheyne: But if it is of benefit to the committee, I can read that response.

MR BRADDOCK: Happy for you to read that and then we will go further and answer my question.

Ms Cheyne: Okay; sure.

The term “birth parent” was chosen to reflect a gender-neutral approach to the description of a parent who gives birth, noting that the person who gives birth may not necessarily identify as female. The meaning of the term is defined in the bill so that it applies only to the parent who gives birth.

However, we acknowledge your concern that this potentially could cause some confusion for people not familiar with the defined term who assume it has its ordinary meaning—that is, that it would also capture the birth parent’s spouse or partner, who would be presumed to be the parent of the child. We think that confusion around this could be addressed through some clear explanatory information about the changes and what they mean.

We also note that people who are entering into surrogacy arrangements will be required to have legal advice.

I think, Mr Braddock, on that I misspoke before when I said the requirement for counselling is only for under 25s.

Ms McKinnon: Counselling for—

Ms Cheyne: It is for everyone?

Ms McKinnon: Yes.

Ms Cheyne: Counselling and legal advice for everyone—

MR BRADDOCK: Yes.

Ms Cheyne: which should also help to avoid misunderstanding the intent in the legislation. On the suggestion that the term “surrogate” be used instead of “birth parent”, there is a concern that this terminology assumes that the birth parent will decide to proceed with the surrogacy arrangement, which remains their choice until they consent to an order being made to transfer parentage. For this reason, we would consider birth parent to be the preferable term, as it makes clear that until the order is made the person is the legal parent of the child.

MR BRADDOCK: Yes. Coming back to one part of my question, which was about Medicare and other federal systems, will there be any disadvantage to the child because of this use of the terminology “birth parent”?

Ms McKinnon: I can take that one. The use of the term “birth parent” here is really about who can be a party to a surrogacy arrangement, and it is used in that context. The child would be registered when the child is born, and the birth parent would be a parent on the child’s birth certificate. That would then be changed once a parentage order is made, usually. The use of this terminology in the Parentage Act will not affect Medicare or the ability to—

Ms Cheyne: Mr Braddock, regarding the parentage order for the intended parents, there is a defined time within which that needs to be made. It is quite early in the child’s life. In terms of establishing all of their connections to different systems within federal and ACT governments that support their life, the parentage order being issued quite early effectively removes that issue that you are raising.

MR BRADDOCK: Okay. Does the term “birth parent” flow through into the parentage order?

Ms McKinnon: Once the parentage order is made, it makes it clear that the intended parents are the parents of the child for all legal purposes, and they become the parents who would be registered, if the child is born in the ACT, in our register of births, deaths and marriages.

MR BRADDOCK: Okay. If people are applying for Medicare or any of those other

steps they have when they have a newborn child, and that happens before the parentage order is put into place, how are they going to be able to navigate through that phase?

Ms McKinnon: As we have said, Mr Braddock, this defined term really only relates to the specific matters in the Parentage Act, which are around who can apply for surrogacy and who can enter into a surrogacy agreement. It does not have broader effects in terms of applications for Medicare or other matters. It is just identifying who are the parties who need to consent, and the particular requirements for the surrogacy arrangement and for the application for a parentage order.

MR BRADDOCK: Thank you.

THE CHAIR: For many, the term “conception” has an obvious meaning. Surrogacy Australia, as you are aware, have raised some questions about the lack of a definition of that term, even suggesting that we just drop it all together. Have you given any thought to having a very clear definition of the term “conception” within the bill? Basically, it has been left as an open term. Are you satisfied with leaving it that way? Again, it is not defined in the Legislation Act. How would you address Surrogacy Australia’s concerns on that?

Ms Cheyne: Because conception is not defined in the bill, the plain and ordinary meaning of the word applies. Dictionary definitions of “conception” and “conceive” involve pregnancy, so we are confident that elements that are required to occur prior to conception will not be enlivened prior to the creation of an embryo but instead prior pregnancy, as intended by the government when we created this bill.

THE CHAIR: Are you happy to leave it at that level of definition at this stage?

Ms Cheyne: Yes.

DR PATERSON: Surrogacy Australia’s submission says:

The current draft bill does not require intended parents to demonstrate a medical or social need for surrogacy.

They see that as problematic. I was just wondering if you can speak to what the bill intends to do in that space and why it has not identified a medical or social need for surrogacy?

Mr Ng: Dr Paterson, I think at the macro level the bill seeks to address these two different policy streams of not only introducing a more robust framework for requirements of arrangements prior to birth and the like but also removing difficult barriers for people to enter into arrangements. On that last stream, we would probably consider that the introduction of this extra requirement was done in the context that the safeguards and obligations that were being imposed at the front end were of a lower level of public policy utility. But I acknowledge the basis for the submission about the lower level of surrogacy arrangements out there. I guess those are the policy considerations that underpinned the policy position that we came to in the bill.

DR PATERSON: Thank you.

Ms Cheyne: I think there is a question about someone's marital status and whether that has an impact under the definitions and the concerns that Surrogacy Australia has raised. You may know that, as our act currently stands, if you are a single person you cannot access altruistic surrogacy—

DR PATERSON: Yes.

Ms Cheyne: I think it is open to interpretation whether being single is a social circumstance. It is certainly not a health circumstance that may limit somebody. There are plenty of single parents in our society who do an exceptional job, obviously. Removing this as a barrier has certainly been a priority for me. I think that is why we would want to be cautious about how we were defining “need”.

DR PATERSON: Thank you.

THE CHAIR: I am interested in the scenario—and it was raised in one of the submissions—where there is a risk identified that the child may have, for example, a disability of some sort in utero. Where does that leave the surrogate if the surrogate is of the view that they want to continue with the pregnancy on their own terms and the intended parents say, “Well, no. We want to discontinue the pregnancy”? Where is that under the current act? I do not know that the bill addresses any of this. I am open to your views on that.

Ms Cheyne: In the first circumstance, Mr Cain, I draw your attention to the fact that part of the intent with this bill was to create a framework for surrogacy. That means not only are there requirements for legal advice and counselling but also that the agreement itself is made in writing before conception occurs. On that basis, I would be expecting that the agreement in writing before conception occurs would be what would be pointed to in those circumstances where there was a disagreement with continuing the pregnancy.

Ms McKinnon: Just to flesh that out a bit further, while there is an arrangement that the surrogacy agreement would take place before conception, we do not currently have the requirement that that happen in writing at the moment. Under the bill, that would be required. Before an order is made to transfer parentage from the birth parent it does require the agreement of all parties. So if there is a circumstance where the intended parents decide not to proceed with the arrangement, the court cannot enforce that arrangement and force the transfer of the parentage.

There would be policy considerations about a court doing that if the intended parents did not want the child. Ultimately, it is not going to be in the best interests of the child to make that transfer. One of the benefits of a surrogacy arrangement occurring in Australia is that in those circumstances, if the child is not able to stay with the surrogate, our care and protection system would then take responsibility for the care of that child.

Sometimes these things can happen overseas and then Australia really has no ability to look after the welfare of that child, who might be abandoned in really difficult

circumstances—which is another of the human rights considerations against commercial surrogacy overseas. Obviously, it would be a very difficult scenario in that situation. But the bill does not change that scenario here because of the policy impacts of forcing an agreement to its conclusion if the intended parents are not in favour of that.

THE CHAIR: So the legal advice that the law will require is really just between the parties and their legal representatives? Apart from some things that are going to be introduced by the bill as to what this legal advice should address, it is otherwise left to the parties to have their own advice and then come up with their own agreement?

Ms McKinnon: That is right. There are some requirements around what needs to be in a surrogacy agreement. It is a very big decision to become a surrogate. The legal advice is intended to take the parties through all those kind of risks so that the person who is undertaking that really understands fully both the emotional but also the legal consequences if the agreement is not completed. It is so that they have full understanding.

THE CHAIR: With incorporated bodies, a kind of a standard document can be used if they so wish, and there is a contract of sale that the Law Society provides. Is there any intention to try and create pro forma advice or guidance, or are you just going to leave that out there for the parties to work out themselves?

Ms Cheyne: I would say that the model rules, Mr Cain, are quite divorced from—

THE CHAIR: I am talking about in principle, I guess.

Ms Cheyne: Of course. I understand the intent of the question. I think exactly what advice they should be receiving really does depend on the circumstances of the two parties here. Of course, the legal advice is to be drawn from the legislation and its intent.

DR PATERSON: Is there any evidence across Australia of surrogacy arrangements falling through before the birth of the child? Does this happen?

Ms McKinnon: I suspect it would be something that would be difficult to find very conclusive data on.

DR PATERSON: Yes; okay.

Ms McKinnon: I think the level of altruistic surrogacy arrangements in Australia is quite low generally and often occurs with family members or friends—those kind of relationships. We can have a look.

Ms Cheyne: On a privacy level, Dr Paterson, I suspect if an arrangement falls through that probably happens in a way that is difficult to express or to report either publicly or to anyone. There is certainly no reporting requirement that I understand.

Ms McKinnon: That is right. Because they would want—

Ms Cheyne: They would not want that.

Ms McKinnon: Yes. They would not necessarily seek a parentage order, so there would not then be that record of it coming to the court. It would be difficult to ascertain.

DR PATERSON: Equality Australia's submission talked about the requirement to prove pressing disadvantage facing a child as being too strict. They thought it was unnecessary burdensome and should be removed from the act. I am wondering what your views on that are and why the government has decided that that is important to the bill.

Ms Cheyne: I think it is about what we are trying to achieve here, Dr Paterson. As I understand it, this is the first time in Australia that a government has contemplated this. We have gone further than just contemplating; we are really seeking to avoid an impression that those sorts of arrangements are something that we condone. This is about altruistic surrogacy. That is where almost all of the bill sits.

We have heard some devastating stories and experiences of families currently in the ACT who have gone through enormous difficulty in seeking to get a parentage order or simply being refused or whatever it may be, and what the flow-on effects then are for that child. I think pressing disadvantage is a reasonable test for us, certainly as a starting point, in terms of how we are trying to balance the rights of the child. As we were saying, they should not be punished for the circumstances of their birth.

Also, it is not simply about recognition. It is about something more than just that. It is further enhanced by the fact that this provision is retrospective. Some of those harrowing stories that have been shared with us may, if the pressing disadvantage approach is taken, be addressed through this. I think we have tried to take a holistic approach here, in preparing something that we think is fit for purpose, without undermining our view that commercial surrogacy is not condoned.

DR PATERSON: Thank you.

MR BRADDOCK: I am interested in what consultation has happened with people who have been born out of surrogacy arrangements. I am particularly interested in their views, given that we are trying to adopt a child-centric viewpoint in this piece of legislation.

Ms Cheyne: I can speak to that briefly, Mr Braddock. We did undertake a targeted consultation with stakeholders who represent specific groups within the community that have an interest in surrogacy and would be most impacted by the bill. That included community organisations, as well as fertility and sexual health organisations, legal organisations and donor conceived organisations. We can share with you the full list of who we engaged with, if that is useful. I believe we had some specific representations from people who had been born through a surrogacy arrangement.

Ms McKinnon: Certainly from parents, and intended parents.

Ms Cheyne: From parents, yes.

MR BRADDOCK: I am more interested in the children. It takes time, and they need to grow up, but I am interested in what their perspectives are because, being babies, they were unable to speak for themselves. This is a very important bill. Regardless of whether the arrangement was commercial or altruistic, we still have a baby at the end of it and we need to be legislating in their best interests. I am interested in the views of those who have the lived experience of going through this process.

Ms McKinnon: Probably the closest organisation that was able to give that perspective was Donor Conceived Australia. We did have detailed consultation with them. While they are primarily about supporting and advocating for children who have been conceived through official reproductive technology, a lot the issues are likely to be very similar for children conceived through surrogacy. Because of the very low numbers of children born through surrogacy in Australia, certainly through altruistic surrogacy, it is difficult to consult directly with those children and to identify them in the ACT.

Ms Cheyne: I understand that Sarah Jefford is familiar to some of you. Through her engagement right across Australia and the advice that she has given and received in understanding some of those arrangements, and the complexities and what needs to be considered, she played a role in feeding that back through to us.

MR BRADDOCK: Yes. A group in the community that might have a very similar experience are those who were adopted as infants. I would be very interested in any learnings from that group about their experience of going through the process and what impacts and challenges they had.

Ms Cheyne: I would say adoption is more variable, Mr Braddock. In the ACT and across Australia we have seen adoption become less of a common practice. I think identifying people who have been through adoption is tricky. Certainly, we can reflect on that, but I do not know whether we will be able to identify a cohort with which to consult. Noting that adoption can occur at difference stages of someone's life, whereas the transfer of parentage in a surrogacy arrangement is really quite quick once the child is born, it might be not quite comparing apples even with oranges. It might be comparing apples with a steak or something like that.

MR BRADDOCK: I am very interested in how we are listening to those children who have been in this situation, to ensure that their views are fed into the design of the bill.

Ms Cheyne: Yes. I certainly take your point, Mr Braddock. We have been very considerate of our international obligations. The rights of a child is a very established concept. As a human rights jurisdiction, that has been the lens through which we have taken this, as a whole. While that might not necessarily be about someone's individual experience, it is certainly where we are at in terms of human rights legislation. Consideration has been informed by the experiences of children.

MR BRADDOCK: Thank you.

DR PATERSON: We recently introduced the assisted reproductive technology

legislation. I want to hear your views on alignment between the two pieces of legislation to ensure that they say the same thing and speak the same language.

Ms Cheyne: That has always been front of mind for us. I think that is why it was so important to identify Donor Conceived Australia as a stakeholder and to speak with them about how the two bills were talking to each other.

Ms McKinnon: Certainly, from a policy perspective, we have been working closely with the Health Directorate, as they have developed the ART bill, to ensure that there is consistency in the way things are approached. Those provisions around assisted reproductive technology will have some application in relation to the use of ART in conceiving in a surrogacy arrangement. To the extent that there are requirements on providers around providing information on donor-conceived children, that will apply where a child has been conceived through an IVF procedure, using donor eggs or sperm. I think there will be an overlap. We certainly have been working closely to make sure that that is consistent.

DR PATERSON: Thank you.

THE CHAIR: That brings us to a close. Minister, is there anything you would like to add in closing?

Ms Cheyne: Yes.

Mr Ng: Chair, could I come back to you, in some respects, on the question I took on notice earlier today? Unfortunately, we have been unable to get crystallised statistics about the number of prosecutions. We will seek to engage with the Director of Public Prosecutions and come back to you on that.

I did want to provide a bit of additional information, just to support the committee's considerations of the criminal offence landscape for commercial surrogacy arrangements. The consistent policy position across the jurisdictions is that no parentage order can be made as a result of commercial surrogacy. That is a position that goes across all states and territories. The ACT, Queensland and New South Wales have extraterritorial offences for commercial surrogacy arrangements, but all jurisdictions have local offences for entering into commercial surrogacy arrangements. I just thought I would provide that context about the different tiers of offences across the different statutes.

THE CHAIR: I appreciate the follow-up. On behalf of the committee, thank you for your attendance today, Minister and officials. We also thank broadcasting and Hansard for their support. If you have taken any questions on notice, please provide your answers to the committee secretary within five business days of receiving the uncorrected proof *Hansard*. If a member wishes to ask questions on notice, please upload them to the parliament portal as soon as practicable and no later than five business days after the hearing. This meeting is now adjourned.

The committee adjourned at 11.50 am.