



LEGISLATIVE COUNCIL LEGISLATION COMMITTEE

REPORT ON THE CONSIDERATION IN DETAIL OF THE ASSISTED REPRODUCTIVE TREATMENT BILL 2008

DECEMBER 2008

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**EXTRACT FROM THE MINUTES OF THE PROCEEDINGS
OF THE LEGISLATIVE COUNCIL**

Thursday, 13 November 2008

15 ASSISTED REPRODUCTIVE TREATMENT BILL 2008 — The concurrent second reading debate having concluded —

Question — That the Bill be now read a second time — put.

The Council divided — The President in the Chair.

AYES, 20

NOES, 18

Mr Atkinson	Mrs Coote
Mr Barber	Mr Dalla-Riva
Ms Broad	Mr D.M. Davis
Ms Darveniza	Mr P.R. Davis
Mr Eideh	Mr Drum
Ms Hartland	Mr Elasmar
Mr Jennings	Mr Finn
Mr Leane	Mr Guy
Mr Lenders	Mr Hall
Mr Madden	Mr Kavanagh
Ms Mikakos (<i>Teller</i>)	Mr Koch
Mr Pakula	Mrs Kronberg
Ms Pennicuik	Ms Lovell
Ms Pulford	Mrs Petrovich
Mr Scheffer	Mrs Peulich
Mr Smith	Mr Rich-Phillips (<i>Teller</i>)
Mr Tee	Mr Somyurek (<i>Teller</i>)
Mr Thornley (<i>Teller</i>)	Mr Vogels
Ms Tierney	
Mr Viney	

Question agreed to.

Bill read a second time.

Mr Tee moved, That the Assisted Reproductive Treatment Bill 2008 be referred to the Legislation Committee to report by 2 December 2008.

Debate ensued.

Question — put.

The Council divided — The President in the Chair.

AYES, 23

NOES, 14

Mr Atkinson	Mrs Coote
Mr Barber	Mr Dalla-Riva
Ms Broad	Mr D.M. Davis
Ms Darveniza	Mr Drum
Mr P.R. Davis	Mr Finn
Mr Eideh	Mr Guy
Mr Elasmar	Mr Hall
Ms Hartland	Mr Kavanagh (<i>Teller</i>)
Mr Jennings	Mr Koch
Mr Leane (<i>Teller</i>)	Mrs Kronberg (<i>Teller</i>)
Mr Lenders	Ms Lovell

Legislative Council Legislation Committee
Consideration of the Assisted Reproductive Treatment Bill 2008

Mr Madden Ms Mikakos Mr Pakula Ms Pennicuik Ms Pulford Mr Scheffer (<i>Teller</i>) Mr Smith Mr Somyurek Mr Tee Mr Thornley Ms Tierney Mr Viney	Mrs Petrovich Mrs Peulich Mr Vogels
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Question agreed to.

LEGISLATION COMMITTEE

Committee Members

Mr Bruce Atkinson – Chair

Member for Eastern Metropolitan Region

Ms Candy Broad – Deputy Chair

Member for Northern Victoria Region

Mrs Andrea Coote

Member for Southern Metropolitan Region

Mr Damian Drum

Member for Northern Victoria Region

Ms Jenny Mikakos

Member for Northern Metropolitan Region

Ms Sue Pennicuik

Member for Southern Metropolitan Region

Ms Jaala Pulford

Member for Western Victoria Region

Substituted Members during consideration of Bill

Mr Richard Dalla-Riva (substitute for Mrs Andrea Coote)

Mr Brian Tee (substitute for Ms Jenny Mikakos)

Mr Martin Pakula (substitute for Ms Jaala Pulford) – for 19/11/08 only

Mr Peter Hall (substitute for Mr Damien Drum) – for 25/11/08 only

Mr Johan Scheffer (substitute for Ms Candy Broad) – for 25/11/08 only

Committee Staff

Mr Richard Willis, Secretary, Council Committees

Dr Stephen Redenbach, Assistant Clerk – Committees

Mr Anthony Walsh, Research Assistant, Council Committees

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REPORT

The Legislation Committee of the Legislative Council, appointed pursuant to the Resolution of the Council on 17 April 2007, reports as follows:

1. The Legislation Committee is established by Standing Order 16.01 of the Legislative Council. The function of the Committee, prescribed by Standing Order 16.02, is to consider in detail a Bill or series of related Bills referred to the Committee by the Council and to report to the Council on the Committee's consideration of the Bill, which may include any recommendations for amendments to the Bill(s).
2. On Thursday, 13 November 2008, on the motion of Mr Tee, the House resolved to refer the Assisted Reproductive Treatment Amendment Bill 2008, to the Legislation Committee with a reporting date of 2 December 2008. The Bill is the fourth to be referred to the Legislation Committee in the 56th Parliament.
3. The Committee met on 19 and 25 November 2008 and received evidence from the Minister responsible for the Bill in the Legislative Council, Mr Gavin Jennings, MLC, Minister for Environment and Climate Change. Ms Anne Brown, Department of Human Services and Ms Sarah Nieuwenhuysen, Department of Justice were also in attendance.
4. A number of the clauses were examined in detail by the Committee. No amendments to the Bill were proposed and the Committee agreed to the Bill without amendment.
5. The Committee's consideration of the Bill is found in the Minutes of the Proceedings included in this Report. The Hansard transcript of proceedings, including the Minister's evidence, is also included in this Report. Following this consideration, the Committee recommends that this Report be adopted.

Committee Room,
1 December 2008

MINUTES OF THE PROCEEDINGS

The Minutes of the public proceedings of the Legislation Committee in relation to consideration in detail of the Assisted Reproductive Treatment Bill 2008 were as follows:

WEDNESDAY, 19 NOVEMBER 2008

The Committee met in the Legislative Council Committee Room to consider the Assisted Reproductive Treatment Bill 2008.

Members Present: Mr Bruce Atkinson, MLC (Chair)
Ms Candy Broad, MLC (Deputy Chair)
Mr Richard Dalla-Riva, MLC (substitute for Mrs Coote, MLC)
Mr Damien Drum, MLC
Mr Martin Pakula, MLC (substitute for Ms Pulford, MLC)
Ms Sue Pennicuik, MLC
Mr Brian Tee, MLC (substitute for Ms Mikakos, MLC)

Witnesses: Mr Gavin Jennings, MLC, Minister for Environment and Climate Change
Ms Anne Brown, Department of Human Services
Ms Sarah Nieuwenhuysen, Department of Justice

Also in attendance: Mr Bernie Finn, MLC
Mr R. Willis, Secretary, Council Committees
Dr S. Redenbach, Assistant - Clerk Committees
Mr A. Walsh, Research Assistant, Council Committees

1. Meeting Opened

The Chair declared the meeting open at 3.36 p.m.

2. Consideration in detail

Clauses 1 to 4 — consideration of clauses 1 to 4 ensued.

On the motion of Mr Pakula, the Committee resolved to postpone further consideration of Clauses 1 to 4 until later this day.

Clauses 5 and 6 — consideration of clauses 5 and 6 ensued.

On the motion of Mr Tee, the Committee resolved to postpone further consideration of Clauses 5 and 6 until later this day.

Clauses 7 to 10 — consideration of clauses 7 to 10 ensued.

On the motion of Mr Tee, the Committee resolved to postpone further consideration of Clauses 7 to 10 until later this day.

Clauses 11 and 12 — consideration of clauses 11 and 12 ensued.

On the motion of Ms Pennicuik, the Committee resolved to postpone further consideration of Clauses 11 and 12 until later this day.

Clause 13 — consideration of clause 13 ensued.

On the motion of Mr Tee, the Committee resolved to postpone further consideration of Clause 13 until later this day.

Postponed Clauses 1 to 13 – By leave, postponed Clauses 1 to 13 agreed to.

Clause 14 — agreed to.

Adjournment

The Committee adjourned its deliberations at 5.22 p.m.

TUESDAY, 25 NOVEMBER 2008

The Committee met in the Legislative Council Chamber to further consider the Assisted Reproductive Treatment Bill 2008.

Members Present: Mr Bruce Atkinson, MLC (Chair)
Mr Richard Dalla-Riva, MLC (substitute for Mrs Coote, MLC)
Mr Peter Hall, MLC (substitute for Mr Drum, MLC)
Ms Sue Pennicuik, MLC
Ms Jaala Pulford, MLC
Mr Johan Scheffer, MLC (substitute for Ms Broad, MLC)
Mr Brian Tee, MLC (substitute for Ms Mikakos, MLC)

Witnesses: Mr Gavin Jennings, MLC, Minister for Environment and Climate Change
Ms Anne Brown, Department of Human Services
Ms Sarah Nieuwenhuysen, Department of Justice

Also in attendance: Mr R. Willis, Secretary, Council Committees
Dr S. Redenbach, Assistant Clerk Committees
Mr A. Walsh, Research Assistant, Council Committees

1. Meeting Opened

The Chair declared the meeting open at 12.07 p.m.

2. Consideration in detail

Clauses 15 and 16 – agreed to.

Clause 17 – consideration of clause 17 ensued.

Agreed to.

Clauses 18 and 19 – consideration of clauses 18 and 19 ensued.

Agreed to.

Clauses 20 to 28 – agreed to.

Clause 29 - consideration of clause 29 ensued.

Agreed to.

Clauses 30 to 38 – agreed to.

Clauses 39 to 42 – consideration of clauses 39 to 42 ensued.

Agreed to.

Clause 43 – consideration of clause 43 ensued.

Agreed to.

Clauses 44 and 45 – consideration of clauses 44 and 45 ensued.

Agreed to.

Clauses 46 to 48 – consideration of clauses 46 to 48 ensued.

Agreed to.

Clauses 49 to 56 – consideration of clauses 49 to 56 ensued.

Agreed to.

Clauses 57 to 81 – consideration of clauses 57 to 81 ensued.

Agreed to.

Clauses 82 and 83 – consideration of clauses 82 and 83 ensued.

Agreed to.

Clauses 84 to 89 – agreed to.

Clause 90 – consideration of clause 90 ensued.

Agreed to.

Clauses 91 to 98 – agreed to.

Clause 99 – consideration of clause 99 ensued.

Agreed to.

Clauses 100 to 146 – agreed to.

Clause 147 – consideration of clause 147 ensued.

Agreed to.

Clauses 148 to 152 – agreed to.

Clause 153 – consideration of clause 153 ensued.

Agreed to.

Clauses 154 to 159 – agreed to.

Bill agreed to without amendment.

Adjournment

The Committee adjourned its deliberations at 3.08 p.m.

Hansard Transcripts of Proceedings

19 & 25 November 2008

PARLIAMENT OF VICTORIA

**LEGISLATIVE COUNCIL
LEGISLATION COMMITTEE**

Assisted Reproductive Treatment Bill

Wednesday, 19 November 2008

Chair

Mr B. Atkinson

Deputy Chair

Ms C. Broad

Members

Mr B. Atkinson	Ms J. Mikakos
Ms C. Broad	Ms S. Pennicuik
Mrs A. Coote	Ms J. Pulford
Mr D. Drum	

Substituted members

Mr R. Dalla-Riva (for Mrs A. Coote) Mr M. Pakula (for Ms J. Pulford) Mr B. Tee (for Ms J. Mikakos)
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Staff

Mr R. Willis, secretary

Also present

Mr G. Jennings, Minister for Environment and Climate Change Ms A. Brown, Department of Human Services Ms S. Nieuwenhuysen, Department of Justice Mr B. Finn, Legislative Council

ASSISTED REPRODUCTIVE TREATMENT BILL*Legislation Committee***Referred from Legislative Council.**

The CHAIR — Can I just call the hearing to order and extend a welcome to all of those in attendance, particularly Minister Gavin Jennings, Ms Anne Brown and Ms Sarah Nieuwenhuysen, who will be assisting the committee with its brief in considering the Assisted Reproductive Treatment Bill. I indicate that I am Bruce Atkinson, the Chair of the committee. The Deputy Chair is Candy Broad. Damian Drum and Sue Pennicuik are members. I have substitute members: Mr Tee for Jenny Mikakos, Mr Pakula for Jaala Pulford and Mr Dalla-Riva for Andrea Coote. Mr Finn is at the table.

Mr WILLIS — Mr Finn is not a committee member, but he is permitted to take part in consideration of the bill.

The CHAIR — All right. Welcome, Mr Finn. The committee is considering the Assisted Reproductive Treatment Bill 2008, a bill for an act to regulate assisted reproductive treatment and artificial insemination, to make provision with respect to surrogacy arrangements, to repeal the Infertility Treatment Act 1995, to amend the Status of Children Act 1974 and the Births, Deaths and Marriages Registration Act 1996 and other acts and for other purposes. Minister, I would invite you to perhaps make some brief introductory remarks in respect of the committee's deliberations.

Mr JENNINGS — Thank you for the opportunity to say something briefly, and I will even be briefer than I was when I appeared before you 2 hours ago, which is to say that this piece of legislation has been a long time in coming both through the considerations of the Victorian Law Reform Commission and then subsequently by government. I know there has been broad-ranging consultation with the community about the provisions of this bill and very lengthy and protracted debate and consideration in the other place, so obviously the Legislation Committee is part of the scrutiny that the bill will be subjected to in the Legislative Council. I am very happy to deal with issues of explanation and concern that the committee may raise with me. I am mindful that at the end of this process we are likely to go back into the committee of the whole and deal with some elements again, so I would implore some members of this committee to understand that and to try to simplify that process from your vantage point — I would greatly appreciate that — and to try to deal with this efficiently both in today's consideration and then subsequently. I would appreciate that and I will try to respond appropriately to matters that are raised with me whenever they are raised appropriately, so I give you that undertaking and hopefully it comes back. Thanks very much.

Clause 1

The CHAIR — Minister, perhaps I can just start at the outset with one question. We are dealing with clause 1, the purposes clause, in the first instance. Can I ask: did the government give any consideration to breaking up the bill into separate propositions in respect of particularly surrogacy and assisted reproductive technology IVF? In other words, what was it that brought the government to a position of having a composite bill rather than perhaps dealing with the two issues separately?

Mr JENNINGS — I do not have any difficulty with the question. As you would understand, the government tries to consider in the preparation of all pieces of legislation what the appropriate scope might be in order to form a cogent debate and basket of issues. In fact sometimes we are criticised in Parliament for having too narrow cast a piece of legislation, just as we are sometimes accused of having omnibus bills that bring together a whole range of disparate issues that do not have any relationship with each other.

In this case the bill that was brought before Parliament addresses a narrower range of issues than the reference that was given to the Victorian Law Reform Commission. Some of the elements of the referral that was given to the commission dealt with adoption, and those issues were subsequently referred off for the consideration of ministers around the country who deal with adoption law reform. So there was a conscious decision to narrow the range of issues to the range that is currently addressed by the bill. When the bill was presented to Parliament members of the Legislation

Committee and other members of the Parliament might have had a view about the relevance of having a cognate debate about this bill and others in terms of the regulation in relation to human embryos that was previously in the Infertility Treatment Act. Part of the basket of issues that was discussed at that point in time was the government's commitment to take out those provisions and have a stand-alone, discrete piece of legislation that dealt with those matters. In the path that has led us to this point in time we have extricated some issues already. We have referred the adoption issue for the consideration of Australian jurisdictions that govern adoption law. We have taken out of the package of bills that came before Parliament the issues relating to the regulation of research and development using stem cells from human embryos. We have also extricated for a separate bill the issue of the prohibition of human cloning. We were left with this basket of issues which we felt formed a cogent set of matters to be dealt with in the one bill. However, we can understand the logic that has been applied — that is, we have weeded out some issues; we could have gone further and weeded other issues out — but we think the basket of issues in regard to in-vitro fertilisation technology and parenting form the core of this bill, so they do have a connection that makes sense within the scope of a bill.

The CHAIR — I will ask another question for the sake of context, with the forbearance of the committee. A lot of people have been contacted by people who opposed this bill and would rather it did not pass, but there are also a number of people who are supportive of the bill in principle but are concerned about a number of aspects of the bill that will no doubt be taken up in the committee's deliberations. I ask why, on matters such as these, the government did not proceed to a draft bill position that would have allowed greater consultation and an opportunity for some other organisations that have significant expertise and interest in these areas to make further comment? Was there a time frame that the government was for some reason bound by?

Mr JENNINGS — On some issues we are particularly mindful of a range or diversity of views in terms of the philosophical centre of a piece of legislation such as this that relates both to technology and the use of technology and to human rights issues. A separate range of issues that fall into different categories are discovered through an ethical framework. The government has formed the view on a number of occasions that the appropriate deliberation or distillation of those views and consideration of community values should be undertaken by the Victorian Law Reform Commission. That consideration is in fact one of its key reasons for existence — its core rationale for contemplating these perplexing and challenging issues — to skirt the horizons for the appropriate legislative model but also to be mindful of the range of community views, to distil those and provide advice to the government. That was the path that was initially embarked upon, as distinct from the government either predetermining the outcome or producing a draft bill to allow the community engagement. Your suggestion is not an unreasonable one in terms of a model, but it is not the model the government has determined on. That model does not exclude the encountering of a broad range of views and the obtaining of considered advice on those issues.

The CHAIR — I guess the point I make is that whilst the Victorian Law Reform Commission did conduct a fairly lengthy and extensive process, it arrived at a position with a number of recommendations. In framing the legislation the government was selective about the elements it picked up and those it left out. A draft bill would have given people the opportunity to argue that selection by the government in terms of the bill before the house. I do not expect you to comment further on that; it is just the observation I make in response to your reasoned answer. I invite other questions with regard to the purposes clause, clause 1. Ms Pennicuik?

Ms PENNICUIK — Before I do that, Chair, can I just clarify that at the moment we are not going to be moving the clauses, or are we, because I have several amendments and I am not keen to move them here? I would rather move them in the committee of the whole.

The CHAIR — We still need to tick off on the clauses as a Legislation Committee, irrespective. Whether or not we choose to incorporate amendments in that process is a decision of the committee, but we would still need to tick off the clauses.

Mr PAKULA — Chair, it is fair to say that if clauses are ticked off in the committee, it does not preclude anybody from moving amendments in the committee of the whole.

The CHAIR — Exactly. Clause 1 is the purposes clause, which I think does cover a number of elements that people might well have some questions on — I might be misreading the circumstance, but at any rate I have opened up a gambit myself — so I would propose to put clause 1 and then call for clauses that members were interested in.

Mr DRUM — I have a question for the purposes.

The CHAIR — Yes, okay.

Ms PENNICUIK — If we went through that process the amendments would take a long time. I did have one question on clause 1. Minister, clause 1(c) says that one of the purposes is:

to promote research into the incidence, causes and prevention of infertility ...

I am just wondering where that is in the bill.

Mr JENNINGS — I am advised by the people who know this bill intimately, even beyond my knowledge of it, that it is in part 10 of the bill.

Ms BROWN — Clause 100(1)(f).

Mr JENNINGS — Clause 100(1)(f).

Ms PENNICUIK — Thank you.

Mr DRUM — In relation to the bill opening up ART (assisted reproductive technology) to a whole new cohort of those who are not infertile, are you as minister aware of the quantum of IVF (in-vitro fertilisation) recipients on a per annum basis?

Mr JENNINGS — In terms of the number of people who receive the service during the course of the year, as distinct from the babies who are born — —

Ms BROWN — About 4500.

Mr JENNINGS — Four and a half thousand.

Ms BROWN — Approximately.

Mr DRUM — That is live births?

Ms BROWN — Births? No.

Mr DRUM — That is couples?

Mr JENNINGS — Yes.

Mr DRUM — If this bill is to pass in its current form, will there be a financial provision to assist the couples who will then be trying to access IVF? Due to there being an increase in the number of people who would then be eligible to receive ART, will there be an increase in the funding provided to it from the state?

Mr JENNINGS — No, this is not a money bill. It does not have a money provision in it.

Mr DRUM — So in that instance it will make it harder and more expensive for the existing group that is eligible to receive ART to receive ART into the future?

Mr JENNINGS — No, there is no inbuilt assumption of that being the case at all. Part of the assumption is that there will be a — —

Mr DRUM — Increase?

Mr JENNINGS — Underpinning your assumption is a dramatic increase.

Mr DRUM — No, not a dramatic increase at all, just an increase.

Mr JENNINGS — Yes, but for you to allege a change in terms of cost and availability and that variation implies — —

Mr DRUM — It is already a very expensive procedure, Minister. All I am asking is will this — —

Mr PAKULA — Why would it be more expensive?

Mr DRUM — I beg your pardon?

Mr PAKULA — Why would it be more expensive?

Mr DRUM — It is already a very expensive procedure.

Mr PAKULA — Why would this make it more expensive?

Mr DRUM — Minister, if you were to increase the number of people who were eligible to receive IVF, would that not make it harder to access?

Mr JENNINGS — It would if in fact there were a quantum change in the numbers that actually sought what you have already described as a fairly intense, expensive procedure, for which the people who embark upon it already — in terms of what they go through, in terms of receiving the service, in terms of the human cost and the financial cost — pay a very significant price. People do not enter into it lightly to start off with. In fact in relative terms a relatively small number of people in Victoria seek this service. The inbuilt assumption that there is going to be a major change in the number of people who are seeking this service is at best a guess, and in relation to the impact upon price and availability of service the government has not in the preparation of the legislation and approach to the area shared your assumption.

The CHAIR — What also needs to be understood I think is that there are two different procedures. IVF is clearly a higher order procedure than the procedure that most of the people in this expanded cohort, as you describe them, Mr Drum, would avail themselves of — for all sorts of reasons, including not just the cost and so forth, but the fairly intrusive nature of IVF treatment.

Mr FINN — Chair, I would just like to follow up the question that you raised right at the beginning, and put to the minister, given that we have had in the period leading up to the introduction of this legislation into the house some fairly time-consuming and some very controversial pieces of legislation to consider, it seems to me that we as legislators have not had time to take in the full implications, the full breadth, of this legislation. How can you have expected the community to have done that when we as legislators are under such pressure to do it? That being the case, why has the government rejected a full, open public inquiry, and would the government at some stage in the not-too-distant future reconsider that decision?

The CHAIR — Just for the sake of the record, there were members at SARC who actually sought a public submission process in regard to this legislation, but SARC did not pass that recommendation.

Mr JENNINGS — There are two elements to Mr Finn's question, and I appreciate that the reason we are here, sitting today, having this discussion, is that the government — —

Mr DRUM — Because you had a gun held to your head.

Mr JENNINGS — Pardon?

Mr DRUM — Because you had a gun held to your head.

The CHAIR — Mr Drum, that is a most unhelpful remark, frankly.

Mr DRUM — It is true.

The CHAIR — Mr Drum, most unhelpful.

Mr JENNINGS — Thank you, Chair, for trying to assist me. The thing is, Mr Finn, as much as anybody, knows that I am prepared to go the hard yards in relation to the committee stages of the bill, which in part includes this. I am prepared to do that on behalf of representing the government and being accountable.

We are part way through this story and through this conversation and consideration of the bill. But the building blocks of this is that the Victorian Law Reform Commission answer that I gave Mr Atkinson in terms of their consideration — their report was tabled in the Parliament in June 2007, so there has been now the best part of 18 months since the basket of issues arrived in the Parliament. This bill arrived in the Parliament in this form in September 2008 and notwithstanding the fact that we have had a few things on our plate between then and now — —

Mr FINN — This bill arrived the day that debate of the abortion bill begun; would that be a fair thing to say? My recollection is that that was the case.

Mr JENNINGS — The answer may be approximately. I cannot absolutely tell you, but I have been told that September was the date and we are now two-thirds of the way through November, so it has been around for a couple of months for people to consider. I understand that people are dealing with and grappling with ethical situations and the concern of their conscience. They may want to exercise their right to have those concerns teased out and that is part of what we are doing here today.

Mr FINN — Do you accept that there are more than ethics involved here? This is a very advanced technical bill as well and it does take us a fair way to get our minds around it?

Mr JENNINGS — I do not know really. As legislators we all have to deal with the technical applications of our work and we all, on the way through, become bush lawyers.

Mr FINN — Some are easier than others, you would have to say.

Mr JENNINGS — Yes, but ultimately that is the challenge we have all been volunteers for. I take it as part of what I have volunteered for, to be able to account for whatever questions are going to come my way; and you have to exercise your mind about what the appropriateness of those questions might be, and how we try to find the maximum common ground, from my perspective, anyway.

Mr TEE — Following up on the issue of timing, Minister, can you confirm that the process that the Victorian Law Reform Commission engaged in took four or so years, involved at least 20 public meetings, involved the receipt of 1000 submissions and involved four or five discussion papers that canvassed the issues that were the subject of the final report.

The CHAIR — It is a fraction past question time. Dorothy Dixers are perhaps not as necessary in this committee.

Mr JENNINGS — Let me just — —

Mr TEE — It is relevant to the issue about the timing.

The CHAIR — That is fair enough.

Mr JENNINGS — Yes.

Ms PENNICUIK — Following on from Mr Tee, I did not intend to say anything on this point, or labour it, but it is all very well to say what the Victorian Law Reform Commission did, but I think the Chair made the point that the bill is different from the recommendations of the Victorian Law Reform Commission in several key aspects, and the bill has not had a public hearing. I am on the record to say I think it should have had and we may not have been in this position if that had been the case.

Another question I have is in regard to a submission that most people have received regarding the setting up of the moving of the keeping of records from the Infertility Treatment Authority to births, deaths and marriages. Does the minister have any comments about challenges to that? I am sure the

minister would have received the submission we have received on whether the existing place for those records is the best place and moving them to another place is not the best thing to do?

The CHAIR — To clarify that question further so that I do not ask a separate one. The issue for me, and I would endorse Ms Pennicuik's question, is why did the government decide to establish a new authority and not recognise the existing expertise that was available in the current authority?

Ms PENNICUIK — Just the rationale, Minister.

Mr JENNINGS — Yes. In fact the people who are advising me on either side have actually offered up the same piece of information, one in a bigger typeface than the other. I will read from the bigger one.

The fundamental proposition relates to the confidence level we have, the availability of information and the appropriate capacity to deliver a better access and reliability of information, which is in fact a concern that I know you are going to express at a later point in time. It is perhaps ironic that our entry point to this conversation is that the government asserts that we get better outcomes in relation to some of the principal issues that you are concerned about:

The decision to relocate the donor registers and associated counselling services from the ITA to BDM is based on the principle that donor information is for the basis of children born as a result of donor treatment procedures.

As noted by the VLRC, a child's access to birth and genetic information should be treated separately from the infertility or treatment needs of his or her parents. The parent(s) infertility should not prevail upon the child throughout his or her life.

Centralising all information about a child's birth would also help to normalise donor conception, and will see donor conceived persons who have a desire for information about their genetic parentage accessing this information in the same way as other children in a similar position.

BDM is the key agency in Victoria for the collection and management of identity-related data and accordingly has protocols to internally validate data that is received and protect its privacy.

Existing working arrangements between the registry and adoption and family records services will provide each donor register applicant access to prescribed counselling before identifying information is released.

Adoption and family records services has built an impressive reputation over a long period for its sensitive and confidential service to adoption applicants and, more recently, wards of the state.

So I will stop what I have obviously been reading there, and just in case Mr Finn wants to pull me up and ask what is BDM, it is births, deaths and marriages.

Mr DALLA-RIVA — I just want to get back to the issue of clause 1, the purposes. I guess from my perspective, when you read the clause it seems to make sense. Yet following on from Mr Tee and Ms Pennicuik and Mr Finn, it appears that we can only now refer this matter for further scrutiny to the Legislation Committee. The very fact that Mr Tee had moved it to the Legislation Committee prevents the Council now from referring it to a parliamentary committee — the Family and Community Development Committee, for example. I am somewhat concerned that given the significance of this bill, and I am still receiving an enormous amount of literature as you probably are and we all are, that in the purposes clause it fails to recognise a range of issues, in particular the rights of the child. There has been much discussion about the rights of the child in this process, but that does not seem to be covered in clause 1. It seems to be about the rights of those wishing to have children but not considering the child in the process. From my perspective I have just sought counsel from advisers here and I am prohibited from referring this or making a recommendation to the Family and Community Development or indeed any other external committee, so we are really restricted in what can occur now. We are restricted in terms of further evidence from the public and I think it just makes a mockery of the process that we have had a Labor member move this to a Legislation Committee, probably with the full knowledge that by referring it to a joint parliamentary committee it would have been open to a very public hearing. This has limited it by shutting it down to the Legislation Committee.

So in respect of clause 1 it is disappointing that we are not able to examine continuing reams of paper that we are all getting on this issue because there are some real issues. Everyone was very clear about the abortion bill, for example. There was much discussion and debate. But with this one I feel as though it has been put on to us, as legislators, and some of us are uncomfortable with parts of it.

Mr PAKULA — Chair, I understand your comment before about this not being the place for Dorothy Dixers. Is it a place for setpiece speeches about people's concerns about the bill? Is that a question for the minister?

Mr DALLA-RIVA — It was about clause 1.

Mr PAKULA — What was the question?

Mr DALLA-RIVA — It was about the overarching issue of clause 1 — the principles underlying it, Chair. Mr Tee made a statement. I have made a statement and I am prepared to move on to clause by clause.

The CHAIR — On the basis that it is moving on — —

Mr JENNINGS — Sorry, there was an implied question early on, and the question was about where do the rights of the child fit.

Mr DRUM — Thank you, that is my question.

Mr JENNINGS — I think that is an important issue. So the rights of the child do actually fit within the guiding principles within the legislation. In two aspects of the guiding principles, which is clause 5, they are clearly outlined although the phrase 'the rights of the child' is not used. In fact the first principle is:

The welfare and interests of persons born or to be born as a result of treatment procedures are paramount.

That is in the rights of the child issue, and the third point is:

Children born as a result of the use of donated gametes have a right to information about their genetic origins.

That is another specific provision.

Mr DRUM — I would just like to expand on the third point. Are there any scenarios where a child born through an assisted reproductive treatment process will not be able to access the information about their natural or genetic father?

Mr JENNINGS — I have just facilitated this jumping, haven't I?

The CHAIR — Pardon?

Mr JENNINGS — I have just assisted our jumping clauses.

Mr DRUM — We have, yes. So we will leave it go and get back to it later, when we get to clause 5?

The CHAIR — Yes, when you get to that clause.

Mr DRUM — Sure.

The CHAIR — Are there any further matters in regard to clause 1? No further matters.

Clause 2

The CHAIR — Clause 2, the commencement. I take it there are no issues on commencement?

Clause 3

The CHAIR — Clause 3, which is the definitions. Can I just ask the minister why there is no definition for parent? It has been raised by a number of organisations that there are issues in this bill and a great deal of import applied to the parent of children going forward and yet there is no actual definition in this clause.

Mr JENNINGS — My adviser is echoing that in fact the answer to this is the parent, under normal circumstances including this bill, has a common-law meaning, a common understanding and that is what would be relied on. I know there are specific provisions in relation to categories of parent, as you would be aware, because in fact 'commissioning parent', for instance, is a definition that is here and to which we specify a subset of parent or a specific circumstances by which parenting comes about. So that has been the element where the definitions and

delineation have occurred. Within the context of parents and parenting we would expect that to be within common usage.

The CHAIR — Can I suggest to you, though, that this legislation actually seeks to establish a person who has not previously perhaps been defined as a parent, and in fact one of the key issues of this bill that has been raised by many of the people seeking these legislative changes is that the opportunity to be a parent to a child is recognised where those people do not believe at this point they are recognised as a parent. In other words, the mother of a child will be recognised, but the same-sex partner of that mother is not recognised as a parent at this time. A lot of what this bill is about is in fact extending that recognition, and yet there is no definition. I hear your answer, but I would put it to you that in fact this bill takes the concept of parent beyond what is conventionally understood to be a parent today.

Mr JENNINGS — As a starting point, I continue to state the logic that is implied in the government's thinking in the preparation of the bill. It is one which is in fact the common-use understanding of parenting. In relation to new categories that may become relevant within the provisions of the bill, such as the example that I gave that is covered within the definitions of 'commissioning parent' that is specified by the definition, there are other specific provisions that relate to rights and opportunities that are ascribed to parents in terms of the accountability and the registering of parents in accordance within the bill that are covered by specific provisions.

In fact there has not been a first-order issue to delineate or define 'parents' at the beginning of the act. If there is any relevant issue that is actually describing the rights or opportunities or obligations of any subset of parent within the provision of the bill, they are covered by either the definitions or a specific provision.

Mr TEE — Without wanting to further cloud the issue, I just notice that at page 123 of the copy of the bill that I have got, it is described as clause 150 'Definitions', there is a definition of 'parent'. There is a further reference there to the Status of Children Act 1974. I am wondering whether or not there is a definition. That definition under this is referred to in the Births, Deaths and Marriages Registration Act and is then subsequently set out in the Status of Children Act. I just noted that. I am not sure where that leads us, but it might be that it is defined elsewhere.

The CHAIR — I am not going to labour the point particularly from the chair, but I think it is an area that ought to be included in the definitions.

Mr DRUM — I was just wondering if there is a limit to the number of parents that any child can have?

Mr JENNINGS — It is a matter of what the specific nature of the question is. If the question is: 'How many parents could be on the child's birth certificate?'; the answer is two.

Mr DRUM — That is the maximum.

Mr JENNINGS — Yes. If it is a different question you are asking in terms of communal living or a whole range of other things —

Mr DRUM — Is that in the bill, that we are restricted to a maximum of two?

Mr JENNINGS — Yes.

Ms PENNICUIK — Maybe to be helpful, there is a definition of 'doctor'. We all know what a doctor means, but it does refer to the Health Professions Registration Act, so maybe in terms of 'parent', that could be included as well as referring to the Status of Children Act, or whatever it is, so that 'parent' is otherwise defined.

Mr JENNINGS — I think the reason that 'doctor' is in there is it pins it specifically to actions that would be undertaken within the doctors registration, as under a specific act — that is why it is there. 'Parent' and 'parenting' is not under a specific act. I know that that might be the point of Mr Atkinson's question, but in fact that is the reason there is a definition of 'doctor'.

Ms PENNICUIK — My question is, Minister, regarding the definition of criminal record check. Can the minister tell me why, given that the Victorian Law Reform Commission recommended — whether people accept this or not — a presumption against treatment for people convicted of certain offences. But this criminal records

check includes any convictions, any findings of guilt, any charges or any other matters. Why is it so broad ranging when elsewhere in the bill it only refers to certain offences?

Mr JENNINGS — It is a difference between what is the nature of a police record check, which is in fact more encompassing than the specific provision that relates to what crimes or considerations should be that apply to the presumption about whether treatments should be supplied. That specific provision is a narrower cast issue, so in fact all the circumstances that may be applied in making that determination are a narrower range than what would be a police check that we would expect to be undertaken within the state of Victoria. This framework, this definition, is consistent with what the scope of a complete police check would actually contain.

Ms PENNICUIK — Would the minister consider that getting that information is actually not necessary, under the bill as it stands at the moment, for a presumption against treatment would be an invasion of privacy?

Mr JENNINGS — The only information that is relevant to the decision, under the specific provision of the bill, is the narrower range. That is correct. Whether in fact this constitutes, by having a broader definition within the scope of the bill, an impinging on people's rights to privacy, the government would not be of that view.

Mr FINN — I am sure the minister would agree with me that language is very important in drawing up any legislation but perhaps more so than most in this particular instance. I refer to the term that is used by the government of 'commissioning parent'. I ask if that reflects the government's view of a child. My view is that 'commissioning' is an offensive word. One commissions a painting or an object; one does not commission a child. I just wonder what was the underlying thought process behind the use of that term in this legislation by the government.

Mr JENNINGS — I am not quite sure whether my advisers on either side are rushing to provide me with some assistance in this matter. My appreciation and common-sense understanding of it would be that I am certain the concept was not generated on the basis of its being either offensive or, indeed, to downplay the significance of the rights of a child.

Mr FINN — You accept that that is what it could do though?

Mr PAKULA — If that is what you tell people it should mean, Mr Finn.

Mr JENNINGS — No, I think the notion of commissioning has been used as a word to describe someone who is seeking assistance from somebody else to be the surrogate for ultimately their child and to seek assistance through the IVF providers to enable that to occur. It is only in the context of commissioning that process as distinct from commissioning a child that I would find it acceptable, and I would believe that that would be the intention that underpins why it has been selected in that term.

Mr FINN — So this legislation does not refer to the commissioning of a child?

Mr JENNINGS — The only definition is commissioning the process by which a child would be born, because I would share your philosophical concern about that.

The CHAIR — There is nothing further on the definitions or questions in regard to interpretation of references to procedures and treatment in clause 4. There are some comments to be made about clause 5 'Guiding principles', so on that basis a motion to postpone consideration of clauses 1 to 4 has been moved by Mr Pakula, seconded by Ms Pennicuik and agreed to.

Clauses 1 to 3 postponed; clause 4 postponed.

Clause 5

Ms PENNICUIK — Under clause 5, 'Guiding principles', paragraph (a) states:

the welfare and interests of persons born or to be born as a result of treatment procedures are paramount —

which I do not think anyone can object to, and its relationship to clause 5(c) that:
children born as the result of the use of donated gametes have a right to information about their genetic parents.

Minister, given that certain classes of people who have been born as a result of donated gametes do not have full access to that information, is this principle not fully carried out by the bill — that is, because later in the bill, which we will not jump to now, there are classes of persons who are excluded from that information? Is that not a contradiction in the bill?

Mr JENNINGS — Before we do get to that stage, I will just give you the umbrella concept. The government understands that the right to knowledge is important, and for children who are born subsequent to the provisions of this bill, their rights would be enhanced and protected and clarified in a way that has not previously been the case, and that is our intention going forward, very clearly. We have outlined the process and the mechanisms why that would take place.

In terms of the principle that goes to your question, which is how is this legislation to apply retrospectively in terms of the children who have been born prior to the implementation of this legislation, the substantive issue is not to argue the principle with you, but to argue the appropriate approach and the mechanisms by which that could be guaranteed and which would not retrospectively either intrude upon undertakings or expectations that were entered into by various people within this process previously, whether the retrospective application of this principle and the rules in place would lead to unintended or adverse consequences and would be delivered in an appropriately sympathetic fashion that deals with all the interests of people who have been involved in this process prior to the implementation of the bill. We will be arguing about the limits of applying this retrospectively.

Ms PENNICUIK — There are other parts of the bill that will apply retrospectively?

Mr JENNINGS — Yes.

Ms PENNICUIK — So that sort of weakens your argument a bit, that this cannot apply retrospectively.

Mr JENNINGS — I have chosen not to exercise all of my answer, because we are not at the place in the bill to do it.

Ms PENNICUIK — All right, I will leave it that way until I get to the place in the bill.

The CHAIR — Minister, just in regard to the guiding principles I note that one of those is that the welfare and interests of persons born or to be born as a result of treatment procedures being paramount. It has been put to me by one constituent, and supported perhaps by some others, that there has not been a great deal of data comparing the stability of homosexual habitation. That is what has been put in a report. I think this report this report relies on a study done in England, which was the Breakthrough Britain 2007 report. To the extent that it relies on that, this constituent says that the data of the stability of same-sex partnerships has not been as extensively available on public record or in experience, if you like, as with heterosexual couples. I wonder to what extent the government might have formed an opinion as to how those relationships will in fact ensure that guiding principle (a) is met in those relationships?

Mr JENNINGS — I think the issue that is at the heart of your question is in relation to the confidence level that the government has about trying to make sure that children are born into and come into and are parented by people who are capable of providing them with love and comfort and support, and the support of their developmental needs and their emotional needs is paramount. We do not take this aspect of the bill lightly. In fact we rely very heavily on the extensive evaluation of these issues by the Victorian Law Reform Commission. In terms of the preparation of their work, they do rely, I am reminded, on about 40 different pieces of research that have been undertaken over the years about parenting capacity across the range of family structures and indeed across the gender and sexuality divide. In fact the overwhelming position that those 40 pieces of research that have been undertaken over a 20-year period provided the law reform commission with the confidence to make recommendations to the government that were accepted. This was an overwhelming case to actually say that we should not construct a preconceived view about family structures on the basis of sexuality or gender as the dividing line about who should have the ability to be a parent in the state of Victoria. That was the research that we have relied on and the evaluation that the government has accepted.

The CHAIR — Minister, it has also been put to me that this legislation might be inconsistent, firstly, with the Charter of Human Rights and Responsibilities. I note the report that is attached to the second reading in that respect anyway, but it has been put to me that it is inconsistent with that and also inconsistent with the Declaration of the Rights of a Child, which is at international law. I have not got the reference on that. Can I understand your thinking in terms of those two mechanisms and the guiding principles that the government is confident that the rights of a child are upheld against those two mechanisms and met under principle (a)?

Mr JENNINGS — I took advice, Chair, because I literally took your comment, which was the phrase within the question about a report that was attached to the statement of compatibility about the charter as actually something that was an addendum to the statement, but I understand on advice that you are referring to SARC's consideration of that; is that correct?

The CHAIR — Yes.

Mr JENNINGS — That is the only reason I took advice, because otherwise the government is of the view that we need to consider both state obligations under the charter and our international obligations.

Mr DALLA-RIVA — In terms of the guiding principles, I note that it talks about the treatment procedures in each of (a), (b), (c), (d) and (e) of the provisions there. I was trying to reconcile that with the concept of the bill. Does the bill actually give an individual man or an individual woman the right to commission a child by surrogacy?

Mr JENNINGS — The answer to your question is a single person can commission that process. In fact the ability to be able to satisfy all of the procedures and approvals and the way in which that process could be commissioned by a single person would be understood to be a very onerous and protracted one. We have to acknowledge that there is potential for an individual to commission that process. I would think that this would occur in practice in very, very rare isolated circumstances.

Mr DALLA-RIVA — In the context of the guiding principles I am trying to get the understanding that if that is the case, if a male or a female wishes to commission a child by surrogacy, where does that fit within the guiding principles. From my reading of it, it talks about treatment procedures, and you would assume that that would be for those who cannot conceive, but I am trying to reconcile that with the guiding principles of the bill.

How do you conceptualise that as a guiding principle when it seems to be outside the guiding principles I am reading?

Mr JENNINGS — I think the guiding principles indicate the priority in terms of the rights and opportunities of the child, which is a prior concern that you have expressed. It is also to try to make sure that in terms of the process itself that in fact we prohibit the commercialisation of surrogacy, so we make sure this does not enter into a commercial relationship. We want to make sure that the quality of care is provided in a way that tries to maintain the health and wellbeing of all persons who are considered, and that in fact the child who is born has rights to know of their genetic inheritance and the circumstances by which they were born. You may read this in a slightly different way to me, but in fact the reason why there is a rights-based approach to an individual seeking this is consistent with the last issue, which relates to a principle about a rights-based approach to people not being prevented from participating in this process on the basis of their sexual orientation, marital status, race or religion. While that specific principle applies to those who undergo treatment, the logic of that guiding principle applies to those who may commission the process.

The CHAIR — Minister, accepting the guiding principles — and to some extent this is landmark legislation in this jurisdiction at least — does the government have a review process in place to ensure that the guiding principles are met? Is there a proposal by the government to have some sort of formal review of this? Is the authority commissioned to consider these guiding principles and the effectiveness of the act in meeting those principles?

Mr JENNINGS — In fact the broad power to enable the authority — the Victorian Assisted Reproductive Treatment Authority — to undertake the monitoring and evaluation of the question you put to me is available under clause 100 of part 10 of the bill. In terms of the head of power, the expectation that monitoring and accountability frameworks be put in place is given to the authority and outlined in that bill. While we have not specified over what time frame, I think it is reasonable for the community to expect that the authority will evaluate these matters and the wellbeing of the act and the procedures under the act on a regular basis. There is nothing beyond what I have

described, but in fact I would agree with your supposition that it is appropriate for the authority to make sure that that work is accountable.

The CHAIR — Without wanting to press you on a specific, would you hazard a guess at what sort of period might be appropriate in a time line? Would we be talking about five years?

Mr JENNINGS — Yes, in fact my good friends either side of me would probably confirm what my instincts say, which is that I would not want to specify it. I think it was a reasonable proposition that you put to me. Can I just leave it at that without specifying anything else?

The CHAIR — Thank you, minister.

Mr FINN — I just want to go back to follow up a point that Mr Dalla-Riva made when he asked the question of the minister that this bill in fact gives an individual man or woman the right to commission a child. I refer to guiding principle (a), and I ask the question: what evidence does the government have to justify deliberately bringing children into the world to be raised without a mother or a father, and how can that be said to be in a child's best interests?

Mr JENNINGS — There are two elements. I do not want to be confronting about this, but within the question I would hope that Mr Finn and I might be able to agree that people commission the process rather than commission a child. I hope we would be able to agree on that and not give anyone the impression of anything else.

Mr FINN — I might reserve my judgement on that, Minister.

Mr JENNINGS — I ask you to join me in that regard. That is the first element. The other element in effect is the issue in terms of what the government would rely on. It is in fact the evidence that I outlined previously in answer to Mr Atkinson's question. The evidence the law reform commission evaluated in making assessments about household structures, family structures, parenting arrangements and reviewing those at length in terms of the availability of material, would suggest that on the basis of demonstrable outcomes from the evaluation of that research and from a rights-based perspective and framework that in fact the provisions of this bill would hold weight in accordance with both of those.

Mr FINN — It is the government's view that a child brought up by a single parent is in no way different, or in effect in no way different, to a child brought up by two parents?

Mr JENNINGS — Mr Finn, you and I, again, should look for some common ground in relation to what messages we give the community.

Mr FINN — I am just interested in getting an answer to this particular question. I think it is a very important question.

Mr JENNINGS — It is a very important question, because I am sure there are a lot of single parents in your electorate just as there are in mine and all through the community.

Mr FINN — Who would prefer not to be in this situation.

The CHAIR — Mr Finn, it is not a debate. It is an opportunity to ask the minister questions and for him to respond to those questions.

Mr JENNINGS — I rely on the evidence and I rely on the principle, and I also say that in terms of our relationship with the community I think we should not make judgements on the parenting ability of single parents as a precondition of our support for the bill or not.

The CHAIR — As there nothing further on guiding principles or on clause 6, a motion to postpone clauses 5 and 6 has been moved by Mr Tee, seconded by Mr Dalla-Riva and agreed to.

Clause 5 postponed; clause 6 postponed.

The CHAIR — The next stage is part 2, treatment procedures, covering clauses 7, 8, 9 and 10. As there are no comments in regard to clauses 7, 8, 9 or 10, a motion to postpone clauses 7 to 10 has been moved by Mr Tee, seconded by Ms Broad and agreed to.

Clauses 7 to 10 postponed.

Clause 11

The CHAIR — This is the first clause that mentions criminal records, but we will come back to the substantive one, unless Ms Pennicuik wishes to pursue that here.

Ms PENNICUIK — I would like to pursue one part of it here. Minister, clause 11(1)(c) requires that you provide a counsellor to the woman or her partner, and that counsellor should have sighted a criminal records check. I refer you to clause 12, which is with regard to child protection orders, and does not require the counsellor to be involved in that process — it is the ART provider. I am wondering why the government has chosen to involve a counsellor in the whole procedure regarding police checks. I know that Monash IVF has raised that concern with everybody. I think all members would have received that information. Therefore I wonder why the government has chosen that path.

Mr JENNINGS — I sought advice on that matter as I wanted to make sure that I did not just outline the processes as distinct from really what is at the heart of the question.

Ms PENNICUIK — I would like you to get to the heart of the question.

Mr JENNINGS — I think I have got to the heart of the question. I think I have an answer. The two elements, both aspects that you talk about — the different forms of evidence and what is available for the counsellor's consideration — both pieces of evidence are provided to the counsellor and the counselling relationship, but they are provided in different ways.

In the first instance the police check is actually provided by the person who is seeking the service and actually presents to the counsellor and would furnish this information after the police check has been undertaken. The checking with the child protection orders requires a different process because the counsellor would make contact, just as the ART provider would make contact, so both of those aspects of the decision making would make reference to the Department of Human Services about the child protection check, after seeking permission to do so to accord with the Information Privacy Act 2000 to ensure that there is a consent provided by the person seeking the service.

That is the reason they are delineated in a different way, but that is how it would work in practice.

Ms PENNICUIK — Minister, as I mentioned, Monash IVF said clearly in its submission, which I am sure most members have received, that its counsellors may be put in difficult or dangerous positions if they are required to make statements about not having viewed these documents. Certainly some people who have been involved in counselling actually came to see me and raised the issue of this being contrary to the role of counsellors, and to make the point that if — and that is a big if — you accept the need for police checks, that is one thing, but involving the counsellors in sighting those police checks is another. Why did the government go down this road, considering that it does not occur in any other jurisdiction?

Mr JENNINGS — I do not make any assumptions about the integrity of anybody who actually has a criminal conviction, because there might be a whole range of circumstances that in fact may explain it and justify it in some ways. I do not actually start from a position of having any preconceived views about anybody who has a criminal record necessarily. I assume that this is the mindset that a counsellor should have in relation to this matter. They would be required under the act to verify what that criminal record is, to make the other inquiries in relation to child protection orders, and in the nature of a counselling relationship form an honest, well-informed view within the scope of what is available to them — if in fact there has not been anything there that precludes the applicant going forward — about the appropriateness for this person to proceed through the process.

Coming from that framework and that mindset, I think that people who are embarking upon this process would have an expectation that in fact disclosure and appraisal of their circumstances, who

they are and their history on any matter that may reflect on their ability to be a good parent, is relevant to the conversation and the relationships that they briefly form with the counsellor in relation to these decisions. On that basis, anybody who is going through this process should not form the view that in fact they should withhold information from the counsellor that may be relevant to going through the process.

I would tend to think — and again I would assume, despite the fact that people are making the assumption that this will be totally a negative and combative experience — that the maturity that is required to be a good parent would warrant that you would enter into that discussion in a wholehearted, open way that would account for what has happened in your life, and on that basis demonstrate some goodwill towards the counsellor rather than actually having a preconceived view that this would be as a necessity a confronting experience.

Ms PENNICUIK — Minister, I might agree with some of the things you have said. I think partly your answer was a rationale for having police checks and being open and honest about your past. My question really in this particular instance on this particular clause goes to the involvement of the counsellor, which I think you went to slightly. Given that those who have been long involved in the counselling are not supportive of this aspect of the bill, why does the government feel that their expertise and opinion should be ignored? Do you have other evidence to say that a counsellor should be undertaking this role, when they say a counsellor should not be undertaking this role?

Mr JENNINGS — It is interesting what you do to actually satisfy your obligations and responsibilities. There might be ministers of the Crown who find appearing before the Legislation Committee an onerous responsibility. They may find it confronting and they might get upset about it, but it is a requirement of the job. In fact if it is a reasonable requirement of the job, you should do it.

Ms PENNICUIK — It is not a requirement of the job anywhere else in Australia.

Mr JENNINGS — I am just saying to you that some people think so. In terms of the motivation here, there might be some elements that may be, through experience, something that may actually cause some degree of anxiety or unfortunate circumstances that people may have to deal with. I would like people's work and experience never to fall into that category, but what I am actually saying to you is that I believe the assumption that it will inevitably lead to this and inevitably lead to conflict situations or make the life of counsellors harder would be in the vast majority of cases not the right assumption to make.

The CHAIR — Can I just bring to the committee's attention that we actually advertised that today's hearing was to end at 5.00 p.m. In large part that was determined by the minister's availability. I do not know what the minister's position is in terms of us going on, and I am also not sure what Hansard's capacity to continue is, or indeed the availability of members of the committee. Minister, can I first understand your position?

Mr JENNINGS — The first thing is that I am right until 5.25 p.m.

The CHAIR — Thank you. Members of the committee, is everybody still with us?

Mr PAKULA — I would like to go. I will just appoint Bernie as my proxy.

The CHAIR — That might be a very dangerous thing!

Mr FINN — In that case, I will stay.

The CHAIR — Are there any further items in regard to clause 11? I will not put clause 11 yet because there is a relationship between clause 11 and clause 12, which is why I want to keep that one open.

Clause 12

The CHAIR — In clause 12, minister, just as an overview position, because Ms Pennicuik may well in particular pursue the matters of police checks, can I suggest to you that some people put to me, and no doubt to Ms Pennicuik and others, that police checks was an onerous proposition and a proposition which created two classes of parents, quite an anomaly in terms of the way we treat different people, and that perhaps maybe a less

intrusive or, on the other hand, maybe a compromise position might well have been to run with something that I understand is used interstate, which was the statutory declarations. In terms of that overview position, did the government consider statutory declarations and what brought the government to this position of initiating police checks, given that it created a significant difference to people presenting for this treatment to other citizens?

Mr JENNINGS — I have not in any shape or form tried to play members of the committee off against one another, and I will not do that, but I would anticipate that there would be diametrically opposed views around this table to start off with about the relative utility of police checks in this frame. They would all have a centre of rationale and reasonableness to them, all of them. I think on balance the government does understand that ultimately in relation to a whole range of laws, including this one, you do ultimately rely on goodwill being demonstrated by people in the community and you give as much as you can people the benefit of the doubt. In relation to issues of this gravity and of this import, the government has formed the view that that be more onerous and prescriptive than allow for people to voluntarily provide the relevant information, and that is on balance where the government has fallen. On both aspects of clauses 11 and 12, that is the reason why it would fall on that side of the equation.

The CHAIR — Thank you. Is there any further discussion in regard to this one?

Mr DALLA-RIVA — We are talking about clause 12, I gather?

The CHAIR — Yes.

Mr DALLA-RIVA — It is a child protection order check, it is not a police check; is that right?

Mr JENNINGS — That is right. This is a separate thing, but in fact Mr Atkinson's question invited me to straddle both.

Mr DALLA-RIVA — To clause 14?

Ms BROWN — Yes, clause 14.

Mr DALLA-RIVA — Clause 14 talks about the police check, the criminal record check.

Mr JENNINGS — I was invited to comment on 11, 12 and 14 in effect.

Mr DALLA-RIVA — Can you give a differentiation between a child protection order check and a police check?

Mr JENNINGS — What is the difference?

Mr DALLA-RIVA — Yes.

Mr JENNINGS — In the first instance, the police check covers, as in the definition, a range of issues that cover charges or convictions in relation to someone's personal history. A child protection order or a check of child protection order relates to orders which may not fall within the criminal jurisdiction but may relate to the person's experience about effective parenting, or the circumstances where children in their care may become wards of the state or under direction orders to protect for their wellbeing, but it does not involve criminal activity or even allegations of criminal activity that may reflect on inadequate parenting skills or family circumstances beyond the control of the parents that they were not able to provide for the safety and security of children.

Mr DALLA-RIVA — So a child protection order against a child who then becomes an adult?

Mr JENNINGS — No.

Mr DALLA-RIVA — Who may have been subject to that order, that does not apply to that child, now adult?

Mr JENNINGS — It is the parent.

Mr DALLA-RIVA — It is the parent of the child who now becomes an adult?

Mr JENNINGS — Yes.

The CHAIR — The child protection order would usually be something that was in the community services jurisdiction, perhaps with a court order, but community services jurisdiction, whereas the criminal check is usually a police jurisdiction.

Mr JENNINGS — Yes.

The CHAIR — I apologise to the minister for causing him to straddle those two clauses, but it was a matter of context. As there is nothing further in regard to clause 12, which is the child protection orders, a motion to postpone consideration of clauses 11 and 12 has been moved Ms Pennicuk, seconded Mr Pakula and agreed to.

Clauses 11 and 12 postponed.

Clause 13

The CHAIR — Clause 13 is a standalone clause and it does not relate to the other clauses. Mr Tee and Ms Broad have moved that that be postponed until later, and the motion has been agreed to..

Clause 13 postponed.

Clause 14

Ms PENNICUIK — Just regarding police checks, I have looked into this issue quite a lot and there have been, as you would be aware, many representations about it. I know the Victorian Law Reform Commission came to the conclusion and the recommendation that there not be police checks in this bill, and recommended instead the statutory declaration regime that applies in the South Australian legislation, but also bearing in mind that South Australians are having second thoughts about that as well, as in saying that it too is pretty well unworkable and not reliable. But in jurisdictions that do have similar legislation, there are no police checks, so there are no police checks required in New South Wales or Western Australia, or anywhere else.

My question to you is: notwithstanding the recommendation of the Victorian Law Reform Commission, on which the government relied a lot for this bill, is it the case that the government made a contrary policy decision?

Mr JENNINGS — Yes, it is the case. A few minutes ago I outlined why in an answer to Mr Atkinson's question. What we were trying to do was use the majority of analysis and rights-based recommendations that came through the Victorian Law Reform Commission's report. That forms the centrepiece of this bill; there is no doubt about that. What we are talking about is an element where we may have varied from that. We varied from that on the basis of providing the community with confidence that, despite elements of the bill involving what we can simply understand to be liberalisation of the legislation in certain directions in relation to access and human rights issues, we have a balanced approach. We introduced these balancing arrangements to provide the Victorian community with assurance and certainty that we are adopting a rigorous process based upon the ability of someone to parent a child appropriately, which is reflected in their criminal record and in their track record of being a parent, which is shown by whether they have been subject to a child protection order being placed upon their children. We did it to formalise that they are the basket of issues that reflect on parenting — not anything that relates to race, religion, gender or sexuality. We are clearly demarking the basis upon which decisions should appropriately be made, and we are tightening the regime that relates to the documentary evidence and the consideration of those matters. That is the law.

Ms PENNICUIK — Minister, I am not necessarily arguing with you about what sort of information might need to be collected — it is the process by which that is done. Did the government give consideration to the South Australian example or any other way of obtaining information that would be relevant to the parenting skills of prospective parents?

Mr JENNINGS — I will possibly not be able to provide you with any documentary evidence of that consideration, but the government considered this bill for a long period of time after the Victorian Law Reform

Commission's report, and on balance we arrived at the mechanisms within the bill. I can assure you that within the process within government a lot of consideration was given to the matter to arrive at the balance that we did.

The CHAIR — Clause 15, application to review, allows for an appeal against the presumption under section 14. It enshrines appeal rights for somebody who perhaps had a criminal record established in circumstances of mental illness, drug addiction or suchlike that is very much part of their past, and rehabilitation and their behaviour is such that there is no ongoing risk. I understand that section 15(1) actually provides that appeal right and would cover the sorts of circumstances I have outlined.

Ms BROWN — Yes.

Mr JENNINGS — Yes.

Mr DRUM — I think you have gone to the point, Chair. I was concerned about how under section 14(2) a child protection order could generate a presumption against providing treatment. That effectively puts a framework together, and then all of a sudden in the next clause there is an independent panel that can overturn that.

Mr JENNINGS — It goes to the onus of proof and the consideration that is given. The onus of proof and consideration are outlined through the series of clauses 11, 12 and 13. They list the things of which the relevant agencies — the decision-makers within the process — need to be mindful. What we are telling them is the default position. The default position is to err on the side of caution in relation to trying to protect the interests of the child. They are the default settings. If someone believes they are not afforded natural justice within that default setting, they can exercise the provisions outlined in clause 15. That is the logic of it. It is a natural justice provision.

The CHAIR — With the indulgence of the committee, because my question goes more to clause 15, who would promulgate the guidelines that the patient review panel might work off in considering appeals? There are some guidelines included in the legislation in clause 15(3), but clearly they are not exhaustive. One would expect the panel to work off a more elaborate set of guidelines. Who would put those guidelines together?

Mr JENNINGS — Starting from the bill, it will be the panel that is charged with that responsibility. In the first instance it will be guided by the principles within this clause, and subsequently by part 9 of the bill, which elaborates the protocols and procedures by which it should conduct these matters, which would give it some guidance as to structure. This relates to the way the panel should demonstrate through its process and procedures, some of which are outlined in the bill, that it satisfies a natural justice test. It ensures that it properly accounts for that responsibility.

The CHAIR — Are there any further questions on clause 13 or 14?

Ms PENNICUIK — Minister, one person did raise with us the issue that, given there have been people moving interstate to avail themselves of certain ART treatments that are available in one state and not in another, perhaps people, if they are required to provide a police check here, might go interstate where they are not required to?

Mr JENNINGS — My friend to my left would like to make a contribution but then ultimately does not want to turn the microphone on; it is a sad thing, because her instincts are sound. The proposition that it is pretty much a free country and that people should be able to move across state borders is actually pretty fundamental. Beyond that, in terms of service provision in other jurisdictions which is consistent with their law, that is actually something which we would not prevent from occurring.

Mr PAKULA — Nor can we.

Mr JENNINGS — Yes. Ultimately we hope that we provide a regime that is fair, provides increased access — which we believe it will do — and is as open as we can make it, but in fact there will be a threshold level of how we can actually account for it.

Ms PENNICUIK — I will ask a question later, as we get to further parts of the bill. What I am talking about really is the need for some national consistency on these issues. The passing of this bill will make not only this aspect but other aspects of assisted reproductive technology around the country not very uniform. That was the reason for the question.

Mr JENNINGS — Yes, well, you would like national frameworks, you would like national consistency.

Ms PENNICUIK — It would be good.

Mr JENNINGS — We would like it all to go to the highest level, but very rarely — with the exception of the water bill that we dealt with earlier today — do we actually get there.

The CHAIR — Anything further in regards to this one? Anything in regards to clause 15? Okay. Can I have an indication from members of the committee whether anyone intends to move any amendments in this legislation committee process to any of the clauses from 2 to 15 — well, 1 to 15, effectively?

Ms PENNICUIK — Sorry, could you repeat the question?

The CHAIR — Here.

Ms PENNICUIK — No, not here.

The CHAIR — Are there any members of the committee who believe they would wish to return to any of the clauses we have dealt with to date? There being none, I invite a motion to the effect that the committee adopts clauses 1 to 15 without amendment.

Mr DRUM — It does not preclude anyone from moving amendments in the committee of the whole?

The CHAIR — It does not preclude anything from happening in the house; it simply means that when we next meet we will not go back to those clauses. We have dealt with them today.

Ms PENNICUIK — Just for clarification, Chair, I want to amend some of those clauses. You are proposing to pass them as a block, but I do not want to amend all of them.

The CHAIR — You have indicated to me that you do not want to progress amendments here. Your rights to put amendments in the house to any of those clauses is, you know, sacrosanct. It is just that we will not go back to these clauses when we next meet as a legislation committee.

Ms PENNICUIK — Thank you, Chair.

Ms BROAD — Unaffected.

The CHAIR — What is unaffected? Me?

Ms BROAD — Sorry, it is just language.

The CHAIR — I thought you meant me.

Ms BROAD — ‘Sacrosanct’ has a particular connotation.

Clauses 1 to 13 agreed to; clause 14 agreed to.

The CHAIR — We have just about exhausted the minister’s time. We have actually talked to the minister’s office about when we can reconvene. They have given us a time frame that I think is unfortunately a little narrow.

Mr JENNINGS — Oh! That is how my life is.

The CHAIR — They have suggested Tuesday, 25 November, from 12.30 p.m. to 1.45 p.m. I really do not think that an hour and a quarter is sufficient, so what I would propose is that we take a motion to adjourn the committee to a time to be advised, according to the availability of the minister to continue with the discussions.

Mr TEE — Should we try to grab that time and seek additional time elsewhere?

Mr JENNINGS — Did they find a whole hour and a quarter in my diary?

The CHAIR — They did suggest breakfast — they did not really.

Mr DRUM — Is there an urgency, Chair, to have this done and completed by the next sitting week?

The CHAIR — The motion was to report by 2 December. We may well grab that time, but I would prefer a longer period of time if possible. We will negotiate with the minister to see if we can fiddle with his diary, and it will be a time to be advised.

Ms BROAD — What about members' diaries?

The CHAIR — Members' diaries too, but we will do whatever we can to accommodate.

Mr PAKULA — Members can substitute.

The CHAIR — That is right, members can substitute, but we will do whatever we can.

Mr DRUM — Maybe we could get Mr Holding to come and give evidence.

Mr JENNINGS — My office, I am sure, has tried to be obliging, rather than being difficult. Can we just have a ballpark of what you would be hoping to achieve? Would 2 hours do us?

The CHAIR — For safety's sake I would have thought 3 hours. We can move it along. It is not our intention to filibuster either, but I would have thought that 2 to 3 hours would do it. I thought three, other members think somewhere between two and three.

Mr JENNINGS — We know that we are all reserving our right to go back into the committee of the whole.

The CHAIR — I think that is why we should try to keep it as short as possible.

Mr TEE — Was that an offer for 2 hours?

Mr JENNINGS — I will try to do my best to get the maximum window that I can.

The CHAIR — Thank you, Minister, Ms Brown and Ms Nieuwenhuysen; thank you, Hansard, particularly for your forbearance in continuing a little later than advised; thank you, members.

Committee adjourned.

PARLIAMENT OF VICTORIA

**LEGISLATIVE COUNCIL
LEGISLATION COMMITTEE**

Assisted Reproductive Treatment Bill

Tuesday, 25 November 2008

Chair

Mr B. Atkinson

Deputy Chair

Ms C. Broad

Members

Mr B. Atkinson	Ms J. Mikakos
Ms C. Broad	Ms S. Pennicuik
Mrs A. Coote	Ms J. Pulford
Mr D. Drum	

Staff

Mr R. Willis, secretary

Substituted members

Mr R. Dalla-Riva (for Mrs A. Coote)
 Mr P. Hall (for Mr D. Drum)
 Mr J. Scheffer (for Ms C. Broad)
 Mr B. Tee (for Ms J. Mikakos)

Also present

Mr G. Jennings, Minister for Environment and Climate Change
 Ms A. Brown, Department of Human Services
 Ms S. Nieuwenhuysen, Department of Justice

ASSISTED REPRODUCTIVE TREATMENT BILL*Legislation Committee***Resumed from 19 November.**

The CHAIR — I extend a welcome to all members of the committee. Transcripts of the last proceedings have been circulated. Did any of the committee members have any matters to raise out of the transcripts? Minister, did you have any concerns out of the transcripts from the last occasion?

Mr JENNINGS — Not at this stage, no.

The CHAIR — Thank you. We have dealt with clauses 1 to 14, and we are up to clause 15.

Clause 15

The CHAIR — Clause 15 deals with the application for review, and we briefly touched on this at the last meeting because it ran on from clause 14. Are there any further aspects that members wish to raise in respect of clause 15, the application for review? There being none, I will put that clause to the test.

Clause agreed to.

Ms PENNICUIK — Are we not just deferring all the clauses?

The CHAIR — We did pass clauses 1 to 14. Did you have amendments that you wished to move?

Ms PENNICUIK — I was just clarifying that.

Clause 16

The CHAIR — Clause 16 is the donation of gametes or an embryo. Are there any comments in regard to clause 16?

Clause agreed to.**Clause 17**

The CHAIR — Is there any consideration in terms of clause 17?

Mr HALL — Through you, Chair, could I ask a question about clause 17 — that is, the requirement as to consent? The requirement for a donor to have a consent form is described in the legislation, and I think it is clauses 49 and 50, which then outline who holds those consent forms. I think I read in another nearby clause that the transfer of that information is to another registered provider in the case of the existing person who holds that consent form if they cease to be a provider. I just want to check to see if my understanding of that is correct, and in the event that one who holds such a form goes out of business and they are not able to pass that to another registered provider, who would then hold the register of those consent forms?

Mr JENNINGS — I am advised that the Royal Women's Hospital would be the final holder of those certificates.

Mr HALL — Can I just check: it is my understanding also that when that donation is no longer able to be used, those consent forms would become irrelevant after 10 years anyway?

Ms BROWN — After the 10 years a person can apply to the patient review panel for an extension of the time of storage of the gametes, so the consent form is still valid after 10 years.

Mr HALL — Thank you.

The CHAIR — Are there any further matters in relation to that clause? If not, I would put clause 17 to the test.

Clause agreed to.**Clauses 18 and 19**

The CHAIR — Clause 18 relates to counselling. Minister, it has been raised with me that there are some concerns about the extent of counselling and the independence of counselling, and the fact that counselling to a large part is to be provided by the organisations that are also carrying out the treatment as distinct from being necessarily a separate process. I wonder if you could just comment on the government's reasoning behind that counselling regime?

Mr JENNINGS — The reason why I took some additional advice is because the government has the view that the employment circumstances of the council is not the critical issue here, or its location, but obviously where there is a coincidence of where the service is ultimately going to be provided, the availability of quality counselling could and should most often happen in the same location.

But the most critical factor is the professional standing and the accreditation that is applied to that counselling. We are very mindful of national standards and the appropriate scrutiny of those standards through RTAC (Reproductive Technology Accreditation Committee) and ANZICA (Australian and New Zealand Infertility Counsellors Association). The infertility association is a professional body that has been formed to make sure there is a recognised discipline and standards brought to bear in that form of counselling.

We see that requirement and expectation as the most relevant expectation in the confidence that the government would assert and the community could have about the appropriateness and rigour of the counselling that is provided. We believe that that is far more important than what might be perceived as a potential conflict of interest, but ultimately if we understand that just as in many areas of professional activity that are regulated by statute, guidelines and procedures, that the government would assert through this legislation and the process by which we would regulate this field that the counselling will be rigorous and of the highest calibre to make sure that the people who are going through these various forms of service are mindful and appreciative of the complexities of the philosophical, biological and developmental issues they will be confronting and to try to make sure that the people who receive the service are well able to deal with what are quite often a challenging set of issues that they may be confronted with.

The CHAIR — Minister, whilst that might be the case and the professionalism of the people might be judged to be of a high professional standard, the reality is that someone working for an employer and an organisation that has a particular focus will inevitably bring an element to that counselling that is supportive of the overall enterprise, whereas somebody from an independent counselling situation would perhaps be in a position to canvass more options and provide a wider range or depth of information to the person. Did the government at any time consider limiting the counselling option to an external party?

Mr JENNINGS — I can understand the centre of gravity of the thought process and the concern that you are reflecting, Mr Atkinson, because it is in fact fair and reasonable to have the expectation that appropriate rigour, scrutiny and support is provided for people when they are contemplating receiving this form of support, whether it is right for them and whether they are able to address the basket of emotional and other responses that they need to be mindful of, but the inbuilt assumption that there is a commercial imperative for all the advice to go one way is something that we would contest.

We do not believe that would be the case. In fact the standing of the service and the standing of the treatment would only continue to have community support if it is of a high calibre and if all the relevant issues are dealt with. In terms of the options that may be available, again without making any assumptions about the journey by which either a couple or an individual arrives at the point of seeking service, usually that process has been a lengthy one that has involved a whole range of support, thought and consideration of a range of options; it is not necessarily the first port of call for many people seeking this form of support.

The assumption that people may not have thought about the diversity of their options and the considerations probably does not do justice to either the gravity or the rarity with which people would come to this service lightly. I think whilst there may be some consideration, and we should always be mindful in terms of monitoring of the effectiveness of the impact of this piece of legislation, whether we should be mindful of this issue in future if it seems to be a feature of the field — I think the government would be alive to it — we are not coming off the basis of any evidence of cumulative concerns apart from the theoretical concern, which I acknowledge is real or has the potential to be real, but in the circumstances we have found ourselves in up until now it has not warranted a stand-alone separate entity to deal with these matters.

Mr DALLA-RIVA — On clause 18, are the costs associated with somebody attending counselling borne by the individual, or will it be dealt with by the registered ART provider or by the government? If it is borne by the individual, how much would it be expected to cost per session?

Mr JENNINGS — I am advised that it is part of the fee for the service. Whilst we do not have a delineation of the fee structure, I am advised that a treatment cycle costs something of the order of \$10 000.

Again, it is a reflection of the fact that people who embark upon this service are extremely committed, dedicated and actually have to try and find the financial wherewithal for the service. Counselling is part of that fee structure.

The CHAIR — Clause 19 is actually related. It has been suggested to me that perhaps up to clause 28 there may not be people who are seeking to raise issues on those clauses. Can I just have an indication of any matters that might be raised in regard to clauses 19 to 28?

Ms PENNICUIK — Chair, I was just wanting to ask a question about clause 19(b)(iii), but I could wait until — —

The CHAIR — Okay, fine. We will do that now. We will do that and I will hold clause 18 and move them together.

Ms PENNICUIK — Clause 19(b)(iii) relates to the donor's rights to obtain information under divisions 2 and 3 of part 6 of the bill. I have just a general question, Minister. The Victorian Law Reform Commission recommended that the donor's rights to information not be part of the bill — that is; that donors should not have a right to automatic information about the use of their sperm or eggs or the offspring of that treatment. So the question is: why did the government choose to keep it in the bill?

Mr JENNINGS — The reason why it is retained in this provision and organised within the principles of the other provisions of the existing arrangements of the act is because of the fact that it is current practice. The government decided, on balance, to maintain that existing practice and cover it by the application of the law.

Clauses agreed to; clauses 20 to 28 agreed to.

Clause 29

Ms PENNICUIK — Clause 29 allows for the production of no more than 10 families from the use of donor gametes, and in other jurisdictions that is five families, which is quite a considerable difference. Can you explain why the government has chosen to go with 10 rather than five?

Mr JENNINGS — In the question Ms Pennicuik has already identified that a different regime applies in different jurisdictions to this matter — for example, the 10 families, which is the practice under the current licensing regime and has developed as current practice within the sector in Victoria, is the same as what it is in South Australia and some other jurisdictions. She is quite right to indicate that New South Wales has a different regime in place. Again, this was a matter of the government trying to balance what would be the appropriate restriction, obviously in the name of biological risk. You would have to actually acknowledge it is pretty low, whether it is five or 10. That is pretty low in terms of a population of our size; it is very low indeed. However, there is some risk in terms of genetic inheritance and confidence and the government does believe it is appropriate to have a limit. But in terms of the current clinical practice and what is actually happening in terms of the availability

of donations to service providers, the government believed on balance it would be overly restrictive to reduce that number to five and settled on 10 as it most accurately reflects the current licensing arrangement.

Ms PENNICUIK — Minister, on what basis was the figure of 10 arrived at originally? You are saying it is current practice, but why was 10 rather than five arrived at originally?

Mr JENNINGS — To be perfectly honest, I think any limit is based upon a sense of what is reasonable on the basis of reducing the risk profile of those in our community who are produced by donations. There is not pure science that actually underpins this. I think we have to acknowledge that there is not pure science and the statistical evidence would indicate, in a population of our size, that the difference between five and 10, whilst it may seem to double, is actually very minute. The concern that I have, and that you might actually have, is in fact where you have smaller and smaller subsets of the population that might through a process of selection increase the risk profile. That is where the risk lies. The government was alive to and considered this, but on balance as I indicate to you, there was a recognition of a need for a capping mechanism or limit to be placed on where those donations may be used. That is one of the balancing elements.

The other was to actually reflect the availability of supply within the Victorian clinical application and trying to ensure that there was not any adverse reduction in the availability of supply to meet demand going forward immediately. That is the reason why, on balance, we arrived at 10.

Ms PENNICUIK — You would not use the whole population of the Victoria, for example, you would be using the population of people undertaking assisted reproductive treatment as the pool because it would not necessarily apply to the other parts of the population that are not using ART in terms of mixing of those particular gametes?

Mr JENNINGS — Yes, but they live in the community. They are part of the population.

Ms PENNICUIK — They are part of the population but they are not the population using those gametes.

Mr JENNINGS — On this side of the table, we are a bit confused about what is being put to us.

Ms PENNICUIK — You said that the risk in the population the size of the population in Victoria — was what you were implying — is low but the whole of the population of Victoria is not using those gametes. It is only people using assisted reproduction technology that are using those gametes and that is a much smaller pool of the population, is what I am saying, so the risk is probably higher than what I think you are implying it is.

Mr JENNINGS — No, because that is an extraordinary leap of mathematical logic in relation to the fact that what we have, dating clubs for children who have been born through donor or assisted reproductive technology, that is not the natural way in which people organise themselves in this community. They live in a community, they live in a population and they are broadly dispersed, so mathematically they are part of the community, so they are part of the total population.

Mr DALLA-RIVA — To clarify: the NHMRC (National Health and Medical Research Council) guidelines used by ART clinics throughout Australia is five families and I understand that DHS originally proposed a limit of five. What was it in the final decision that you went against DHS's recommendations and the guidelines that are applied more nationally?

Mr JENNINGS — Mr Dalla-Riva, in my last answer I indicated that it is not an absolute harmonised regulatory environment. In fact there are different restrictions placed in different jurisdictions. The defining factor at the end of the day was that the government was mindful of the risk, it was mindful of the recommendations that came to us from the department but it was also mindful of what the clinics themselves were saying of the availability of supply, and the restriction that that may place on the availability of supply, and to meet the demand that the community is demonstrating — that there is demand for the service; and that ended up being the final determination of 10 being the appropriate number.

Mr DALLA-RIVA — It was based more on supply than it was on any other consideration?

Mr JENNINGS — No, all of those factors were considered together, so I appreciate the opportunity for me to come back and clarify that. It is the basket of the issues that I have outlined in relation to the availability of supply.

The ethical considerations, the risk in terms of genetic inheritance that were considered, and the last element of the equation which determined that 10 was the appropriate consideration within all of that was the availability of supply.

Mr HALL — Given the government's often espoused view about the usefulness of having consistently applied guidelines in a whole range of matters across Australia, does the Victorian government now intend to seek change so that the 10 figure becomes the national standard?

Mr JENNINGS — Mr Hall, you have created an opportunity for us to start thinking about that process. The good news is that there is not anything in place, either in New South Wales necessarily because it has not introduced its legislation; in terms of the NHMRC guidelines, it is currently open; South Australia has a limit of 10 and we are locking in with that.

We might establish a centre of gravity for that to become the common benchmark. I am sure the Minister for Health would be very happy to consider what role he may play in relation to trying to get some consistency across the field. You may be on to something.

The CHAIR — Is there anything further in regard to this clause? If there are any further matters that people wish to consider up to clause 34 initially which relates to the storage aspects — 'destructive research, storing and storing for later transfer' et cetera; does anybody have any issues with those clauses?

Clause agreed to; clauses 30 to 38 agreed to.

Clauses 39 to 42

Ms PENNICUIK — Looking at the Victorian Law Reform Commission report, two things are clear from the report. One is that the remit of the commission to look at the issue of surrogacy was rather narrow, and it was precluded from looking at surrogacy in a wider aspect or its broader applications.

It was just in regard to the provisions in the original bill regarding the fertility of the surrogate et cetera — and those clauses. So it did not have the remit to look at surrogacy more widely. My first question is just a general question as to the basis of the provisions in clauses 40, 41 and 42: what are they based on?

Mr JENNINGS — In the first instance the lack of, perhaps, depth in the law reform commission's work reflects the fact that this was not a specific term of reference that they were required to provide us with a depth of advice on. However, they did recognise that there was a need to have a form of regulation in this space and recommended a cautious approach to regulating the space, within what was available to them under their terms of reference — so it was comparatively light in its recommendations; we understand that.

The Victorian government believes that if it is going to have some regulation, it needs to adopt a cautious approach — which we believe the provisions of this bill represent — and to make a clear statement that the commercialisation of surrogacy should be rejected within Victoria and should not be available under Victorian law. We provide the regulatory framework within this bill for those reasons, and we do it in a way that we believe is consistent with the consideration of the law reform commission, although obviously, as it was not a specific term of reference, it is beyond the scope of their report.

Ms PENNICUIK — Chair, the issue is a difficult one. It basically arises because whilst under other ART treatments you are really just dealing with commissioning parents and the use of gametes and then a donor-conceived person. In this case you have got the commissioning parents, the donor-conceived person and a surrogate mother whose interests also need to be looked after. I am sure the minister and all other members have received a lot of correspondence regarding this issue.

A lot of correspondence has come our way regarding the problems that surrogate mothers may have relinquishing children, and I ask the minister what thought process the government has gone through in relation to this issue, in particular with regard to what is known as 'partial surrogacy', where the surrogate mother uses her own ovum?

Mr JENNINGS — The logic and concern that underpin this set of provisions come from a philosophical place not too different from the one that is in the question, and obviously is a concern to a number of people in the community who are concerned about this matter. Assuming that we are going to allow and regulate a form of altruistic surrogacy within Victoria — and in fact that is what is provided for within this bill — beyond that, what are the appropriate frameworks that are in place to try to protect the interests of all parties, including the woman who will ultimately relinquish the child?

Within that framework at the beginning of the process there are restrictions which prevent the commercialisation of this activity and make sure that a person who is willing to be a surrogate receives rigorous counselling and support through the process to make sure that she is aware as much as she possibly can be, in a pre-emptive way, of the range of emotional, biological and other relevant factors associated with this process before entering into it as well as during it.

The logic of these provisions here is that there is a failsafe mechanism whereby if the woman at the end of this surrogate pregnancy determines that she cannot relinquish the child, the provision allows that in fact she can assert a right to maintain the relationship with the child. That is what is provided for. So in my view — and according to the prevailing logic of this bill and the view of the government — if you are going to allow surrogacy to occur, regardless of the genetic material that underpins the development of the child through the pregnancy, the relinquishing mother has the reserve right to maintain the connection with the child and ultimately is the most failsafe provision within the bill, regardless of any other matter.

Ms PENNICUIK — Minister, I noticed that Monash IVF, who have a lot of experience in ART, have written to everybody, and presumably to you. My question is: have you had discussions with them, because they have recommended against partial surrogacy in their representations to us?

Mr JENNINGS — To specifically answer your question, I have not had conversations with them, but I am sure other relevant parts of government and people who are in the network of people who are here with me at the table certainly have. I might just ask them to supplement my personal engagement on these issues.

You are quite right. With respect to your question there have been ongoing conversations and considerations between relevant parts of government — DHS and the relevant agencies — and service providers in IVF and ART technology. There have been ongoing discussions. Ultimately the government has a different approach than that provider to the availability and appropriateness of surrogacy occurring within Victoria. There is a different philosophical basis to our consideration compared to theirs. The government's action, whilst not totally covered by the law reform commission, is consistent to the extent that the commission covered this matter within its report, and the government is acting consistently with that.

Ms PENNICUIK — I said in my contribution to the debate on the second-reading speech that I do not believe I have the wisdom of Solomon, but I am raising these issues because a lot of people have put them strongly to me many times, and I am sure, to other members. They are difficult issues.

On another issue, I noticed in clause 40(1)(b) that a surrogate mother must be at least 25 years of age. The patient review panel must consider the whole proposed arrangement very carefully before it gives the go-ahead and that there would be no surrogacy arrangement without the agreement or approval of the patient review panel. Given that there are groups that are concerned about the effect on surrogate mothers of relinquishing children and the parallels or similarities between adoptive mothers and the pain and suffering they have gone through, even if they have relinquished a child thinking that was the best thing but later on they may regret that, I have two questions. What provisions are in the bill for ongoing counselling and support should a surrogate mother require it? Also, how can the patient review panel assure itself that a woman who has never had a child understands the emotional, biological et cetera ramifications of giving up a child if she has never had one?

The CHAIR — I would like to take the opportunity to add to that. It is my understanding that the practice of IVF practitioners is that they specifically tell young women who have never had a child that they ought not

participate in the procedure in terms of even giving their eggs to someone else. They do that because of concerns about certain dangers, that things might go wrong with the procedure, and because they have not had children and have not had that experience themselves. So there is already a best-practice situation that involves counselling women who had not previously had a child against participating in IVF donation. In that context, this is a particularly important question.

Mr JENNINGS — It is an extremely important question. No-one should enter into this consideration on the inbuilt assumption that they know how any individual will respond to any circumstance and absolutely assert that that is what is going to happen. It would be inappropriate for us as people who are determining the way in which legislation is written, for those who sit on the review panel, for those who provide counselling, for those who provide the clinical service to make inbuilt assumptions on how any individual will respond.

You can start trying to work through on an individual basis the relative awareness, the resilience, the adaptability, the emotional stability of an individual that may vary over their life and over their circumstances and the issues you have raised, either by age or whether in fact they have previously given birth, they are all relevant factors and should be considered at great depth in each individual circumstance. In terms of trying to create the legislative framework, at the end of the day in an area where there is no black-and-white philosophical position, no black-and-white clinical answer, no black-and-white emotional response, the best we can do and the best we can rely on is that people base their considerations on and operate in accordance with a reasonable construction of the law, which is what we have before us, and its reasonable application in practice and try to do our best to ensure that it is applied with the highest degree of professional engagement and respect.

We all might have our views about how old you need to be to be able to determine that, and that is an element that is set out within this law. We could argue about whether 25 is the appropriate degree of maturation or not. We could argue about whether it is preferable for a woman to have given birth previously before she could have the confidence that relinquishing a child would be easy to bear. I start from the assumption that it would be a very difficult thing to do under any circumstances at any stage of life, and if I was involved in counselling or providing service I would have a very high threshold that I would find as being the appropriate regime to assist a woman in making such a decision and going through a process.

I am very sympathetic to the arguments that you put, but in fact in balancing these issues the government believes that it has actually struck an appropriate balance and would have an appropriate expectation that these issues would be addressed appropriately and sensitively without making any more assumptions than what are written here in the proposal.

The CHAIR — Minister, just under clause 40(e) I wonder if you could describe to me what the government envisages are the consequences that might be addressed as part of that clause?

Mr JENNINGS — I have been provided with instant advice which I have taken, but I just wanted to read the provision a couple of times. The failsafe provision that is outlined in 40(e), the provision that I actually answered previously, is the reverse side of the question about how do we protect the rights of the woman who provides the surrogacy. This is actually that all the parties entering into this arrangement understand that the consequence of the woman who gives birth to the child is her reserve right to keep the child. And everyone understands that. That is what this provision allows for.

The CHAIR — Under this proposed section then or where else is there provision in the event that, for instance, the child was found to be suffering some disability and was in fact rejected by the commissioning parents or indeed if the commissioning parents were to die before having taken delivery, if you like, of the child? What is the legal position in those circumstances?

Mr JENNINGS — Under the scenario you have described — and I thank the people at my side for providing me with the answer, but I do not think it is the answer you are after — the answer to that question is that in both of those examples the child would stay in the care of the woman who gave birth to the child, in both of those circumstances, and this is in provision with the act, until there is effectively an agreement to relinquish the child that then is ratified and there is a formal designation of the care of the child transferring to the commissioning

parents, then in fact the child would stay with and be in the care of the surrogate mother. I know that is not the answer you are after.

The CHAIR — No. If the commissioning parents say, ‘We are out of here because this child is not the perfect baby. We do not want it’ or if in fact, as I said, they were to die in a car accident or something before they had received the child that was subject to this arrangement, what happens to the child? What is the child’s legal status? The surrogate mother presumably has reached a position and does not necessarily want to continue with raising the child?

Mr JENNINGS — The provision we have actually come up with talking about is just making sure that people are aware of this basket of issues that you have just outlined, so in fact this current clause we are talking about is in fact making sure that these types of scenarios well and truly are listed out with all the relevant parties. We are living a case study of how that may work. The answer to that question is ultimately in practice the same one that I gave you. In fact the default settings if the commissioning parents either are unable to care for, or unwilling to care for, the child, then the child stays in the care and will continue to stay in the care or be returned to the care of the surrogate mother, the mother who gave birth to the child, up until there is either a subsequent decision that that woman is not prepared or willing to maintain for the care of the child and either puts the child up for adoption or some other process.

The CHAIR — It puts the lie to the ‘interests of the child’ a little bit. It has been put to me that in fact this whole regime that is established under clause 40 is actually less stringent than the regime that applies in adoption under the act passed, I think it was, in 1984. Can I just have the minister’s observation of whether or not that would be a fair criticism?

Mr JENNINGS — I can understand why I am asked the question, because in fact we are dealing with a whole variety of scenarios, of which this would be the most tragic circumstance. If a child is born using surrogacy arrangements and ultimately no-one is either willing or able to care for that child, that would be an extremely distressing circumstance, and theoretically it is possible. Under those circumstances, when any child is born and its parents are unable or unwilling to look after it, then that is a tragedy for the whole community.

This provision, though, is trying to ensure that those various scenarios, those considerations and the wherewithal of both the commissioning parents and the potential surrogate mother are rigorously tested, and people’s wherewithal and capacities are tested through the counselling process. If, Mr Atkinson, you have very, very high expectations that they should be rigorously tested, I share that. I think they should be very, very seriously tested before such an arrangement would ever be entered into.

When we go back before the whole line of questioning that we have had today about quality of counselling, certainty of counselling, the professionalism that should be applied here and the discipline that should underpin this from the professional side of the equation, I actually think that any person, whether they be the commissioning or the surrogate mother, should dig pretty deep in relation to understanding the consequences of their actions and the arrangement that they are entering into.

The CHAIR — That does not entirely address the two regimes of adoption which have been put to me, as I said, by several parties, that in fact adoption is a lot more stringent and probably has more focus, it has been suggested to me, on the rights of the child. I understand that in the default position in this legislation the rights of the child are part of the overall principles of the entire legislation but certainly when it comes to matters to be considered by the patient review panel, there is not in this list of things to be considered specifically a requirement that the rights of the child be looked at. As I said, it has been put to me that under adoption proceedings that would be a much higher priority in the consideration.

Mr JENNINGS — As you would appreciate, Mr Atkinson, at the time of the original Adoption act — if it is from 1984, and I think you are probably right in relation to that — there were far more adoptions than there are today. I think it was a far more usual practice for the state to regulate and have expectations of those entering into adoption arrangements because it was a far more prevalent feature of community life.

That is not to say that those standards should diminish over time. I would think that they should be maintained to a very high degree and in fact there are elements that were originally perhaps envisaged within the scope of this bill and considerations of the law reform commission's report that warrant further examination, consideration and are undergoing a different process than being included in this bill in recognition of the significance of those.

I think the inbuilt understanding in this piece of legislation is that there will be relatively few instances where these provisions of the bill, in relative terms, will be applied. In the instances where it is applied, whether it is ill advised from your assumption or well advised from my assumption about the commissioning parents and their abilities and capacity to care for a child, it would be something that they are absolutely wedded to and committed to, otherwise they would not get to this stage or embark upon this process.

In terms of their absolute, I would think, unswerving desire to actually have a child is one basket of issues. The other basket of issues relate to the guiding principles that we actually have within the provisions of this entire act that were outlined at the beginning of the bill. We talked last time we gathered about the principles by which everything in this act should be seen through provisions that consider the wellbeing of the child.

In fact I am pleased to say that both of my colleagues, on either side, remind me of clause 5, and I am pleased I was mindful of that myself. Within the arrangements to enter into commissioning beyond the various checks and mechanisms that are put in place, there is rigorous testing of people's capability beyond what a criminal check or a child protection check may actually provide. Ultimately in the last recourse, the Victorian government and the courts have opportunities to intervene to protect the interests of the child. So it is the interlocking nature of those frameworks and the mechanisms within this bill and the broader law that we would actually hope provides the rigour that you quite rightly say should be there.

Ms PENNICUIK — Yes, Minister, if I could just go back to my question which I do not think you have entirely answered. You went to the issue of a person having already given birth maybe finding it easier to give up a child — anyway, I do not want to debate that issue — but my question was about how could the patient review panel in its deliberations actually assure itself that somebody who had not given birth to a child would be able to understand exactly what was being required of them? That was my question.

If you have not previously had a child, it seems to me you could not possibly know what you are actually getting into in terms of if you have never experienced it. So that is one thing. How can the patient review panel assure itself of that? My second question was about ongoing support for the surrogate mother after relinquishing the child. Is there anything in the bill about that because that seems to be a gap?

Mr JENNINGS — I acknowledge I have not answered the second part but I reckon I have answered the first, probably as well as I am going to. Having said that, I actually think even within your question, if you are going to rigorously put me to the test, you would actually say, 'How can the review panel determine that any woman who has not relinquished a child would understand the consequences?' — not just give birth to one but relinquish it. So I reckon you have fallen short of the logic in terms of the pain and potential anguish that someone could experience.

Ms PENNICUIK — There are a few steps there, are there not?

Mr JENNINGS — None of us can make inbuilt assumptions about how far along that emotional chain you can go or you need to go before you can absolutely, confidently and 100 per cent assert that. I doubt that anyone can 100 per cent assert that — not anyone.

Ms PENNICUIK — I agree with you in that respect.

Mr JENNINGS — Yes. So what the review panel has to do is it actually has to make, on the basis of its professional focus and its understanding, in accordance with the law and on balance with the wherewithal of the woman who comes into its company to discuss this matter, the best decision that it can make. I would assert that it is a very, very hard decision to make in any circumstances. I have not got a lot of dividing lines or clearly defining

lines along that continuum of concerns that actually say, 'Now we have reached the threshold', but ultimately on the cumulative weight of consideration they need to arrive at the decision that in fact it may be appropriate. That is the answer to that part of question, and that is about as good as I am going to do.

In relation to ongoing counselling, certainly as part of the original counselling process within the clinic provider there would be discussion about the nature of the issues that need to be considered and the likely consequences, and the need for ongoing support would be discussed as part of the initial counselling arrangements. I am advised that part of that would be to allow for ongoing counselling within the service of the clinic itself. In terms of the longevity of that, when it in fact —

—
Ms PENNICUIK — The cost of that.

Mr JENNINGS — When it may be most relevant or most required would involve some degree of speculation, and I think that warrants some degree of depth of consideration in the very first instance of the counselling arrangement. Beyond what would be seen as a reasonable time — and I cannot actually define what a reasonable time of after-care counselling consideration would be within the clinic, and I think it is appropriate for us to have an expectation that that would be provided within the clinic — there may be ongoing counselling required, and people certainly should be made aware of that and of what the cost consequences in all forms of that are over a longer period of time.

The CHAIR — In terms of the counselling process, does the department have a minimum expectation of what the counselling might involve? Could somebody turn up and have a 30-minute session and say, 'Okay, I understand it all', or are there likely to be guidelines published and is there likely to be some expectation of what counselling might involve as a minimum requirement and as a broader counselling requirement?

Mr JENNINGS — I am advised that the best and appropriate way for us to consider this would be in regulations which are ultimately attached to the act, where there would be prescribed matters that need to be dealt with for individuals concerned and for the group that is concerned within the surrogacy arrangement. So there will be some matters that need to be dealt with, as I say, as a group, and the gravity of some issues will mean that they need to be understood and worked through on an individual basis, and the regulations will prescribe those. I do not think it is likely that they will be prescribing the time that is involved to make sure that those issues are adequately considered, but I think because of the nature of those matters and the gravity of them that the expectation would be that to comply with the regulations it would warrant time, effort and reflection to be able to appropriately work through that.

The CHAIR — I appreciate particularly that last sentence, and in the context of that last sentence would it not be desirable in fact to have an objective or an external counselling process?

Mr JENNINGS — There are two aspects that may address that question. They do not necessarily give you the absolute guarantee of a crystal clear answer to your question, Chair, but the patient review panel must be mindful of these matters and must have an appreciation of the ability of either the commissioning or the surrogate parent to work through these issues, and it must have the ability to impose conditions on their consent.

That is provided for within clause 91(3) of this bill, and beyond that may determine, as part of those conditions, to refer the people concerned to a relevant support agency which may involve counselling, so that is one of the options that is available to the patient review panel before it makes a recommendation to proceed.

The CHAIR — Can I just alert you to page 38 where there is a provision, subclause (2) of clause 47. Clauses 46 and 47 deal with the posthumous use of gametes, but it is indicated in subclause (2):

Without limiting subsection (1), the Patient Review Panel must have particular regard to any research on outcomes for children conceived after the death of one of the child's parents.

So there is a specific requirement in regard to that aspect of the bill that the panel have regard to research and in fact look to see if it can inform itself on, if you like, what the longitudinal effects are of some of these decisions.

I am surprised that a similar provision has not been introduced in some other parts of the bill, particularly in the surrogacy area where there is no similar requirement for the patient review panel to take into account research on some of the outcomes of the decisions and circumstances that might occur, particularly in regard to women entering into surrogacy arrangements where, for instance, they have not had the experience of having had a child or such like previously, so there are some issues that the community would envisage and that we are hopeful on, but there is not a specific provision for the review panel to take those into account or to seek out information to do that longitudinal work. Did you wish to add to that?

Ms PENNICUIK — Yes, Chair. I think it was a recommendation of the Victorian Law Reform Commission that that be included.

The CHAIR — It is not in the bill, though.

Ms PENNICUIK — No.

Mr JENNINGS — I do not balk at a reasonable question that the Chair asks. This is one aspect of a provision where the government has been very specific in relation to matters that the patient review panel should be mindful of, but there are general provisions, and clause 91(2) of the bill provides for both the expectation or the requirement of the panel to act in accordance with the guiding principles and any other relevant information or criteria it may see fit to be mindful of in its appropriate delivery of its requirements under the act. That is a general provision on which I think you are quite right to give the committee and give the government guidance and subsequently the panel guidance about what might be the range of research and the contemporary nature of research that it may apply to its appropriate application of a number of its considerations across a number of the provisions of the bill.

The CHAIR — Are there any further matters in regard to clause 40?

Ms PENNICUIK — It is just a question that the bill appears to be silent on contracts. That issue is mentioned in other legislation, and I am wondering why, as in other legislation it says, ‘Any contract entered into between surrogates and commissioning parents is null and void’, or words to that effect.

Mr JENNINGS — Was the inbuilt assumption that there is no such provision in the bill? It did not appear where you — —

Ms PENNICUIK — I cannot see one.

Mr JENNINGS — Okay, clause 44(3).

Ms PENNICUIK — Yes, under reimbursement. Thank you.

Mr DALLA-RIVA — Just a summing-up question on part 4 of this bill: is this the first time we are introducing surrogacy into Victoria? No. I have sat here for half an hour listening to the debate on the various clauses. There appear to be more holes than Swiss cheese, in my view, listening. If this is not the first time you have introduced it, why is it so all over the place? It seems to me that we have problems that may confront individuals, people who are undertaking the surrogacy, issues of counselling, issues of the rights of the child, issues of contracts — what else have we discussed? — issues of situations that might fall outside of the requirements of the clauses. Would it not be better to take it back and redo it and perhaps apply it to what the Victorian Law Reform Commission had indicated it would like to apply, or am I being overly critical?

Ms PULFORD — Perhaps in responding to that — —

Mr DALLA-RIVA — We have got the new minister coming in.

Ms PULFORD — I have just got a question that is perhaps a little related. Could you outline what happens now, what the current situation is, because as I understand surrogacy arrangements are being entered into without any consideration having to be given to counselling suitability, age and that sort of thing?

Ms PENNICUIK — This is the first time we are legislating for it.

Mr DALLA-RIVA — That is what I am trying to get at — this is the first time.

The CHAIR — Most of them at the moment are overseas. People go overseas for it.

Mr TEE — We have had no regulation.

Mr DALLA-RIVA — We are Victoria. You cannot legislate interstate. I will let you into a secret. This is just hopeless legislation. That is what I was getting at. If you are going to do it, do it right or remove it and bring it back in.

Ms PULFORD — I think the hop-on-a-plane option is not a sophisticated response to this.

Mr DALLA-RIVA — But do not implement poor legislation.

Mr JENNINGS — In the spirit of Mr Dalla-Riva's question, some people do like Swiss cheese.

Mr DALLA-RIVA — It is all over the place, though, really.

Mr JENNINGS — No. As a starting point, going back, the logic of this provision comes out of regulating something that has already occurred in Victoria and occurs in other jurisdictions in a variety of different ways, so the government was of the view that there needs to be regulation of this field. We did so in the way we assumed that it will be something that occurs comparatively rarely, requires a cautious approach, relies on a rejection of this being entered into a commercial basis and has the default setting that the child that is born to a surrogate mother will stay with the surrogate mother unless she agrees to relinquish it. That is what this bill does. The reason why we have chosen to regulate this field is that surrogate practices have already occurred in Victoria — relatively few — but the law was either blind to it or overly restrictive. My colleague will outline the current circumstances by which it has occurred in Victoria.

Ms BROWN — Under the Infertility Treatment Act 1995 altruistic surrogacy — —

The CHAIR — For the purposes of Hansard, could you identify yourself?

Ms BROWN — I am Anne Brown from the Department of Human Services. Under the 1995 act altruistic surrogacy has been allowed. However, the surrogate mother needs to be infertile and the interpretation is that her partner, if any — husband or de facto partner — also needs to be infertile. It is therefore a very restricted practice in Victoria, and that is why people like Senator Conroy, et cetera, have had to go interstate. Under the current legislation there are a few surrogacy arrangements and they are mainly within families, say, a mother who has past the menopause and is therefore infertile carrying the egg and sperm of her daughter and the daughter's husband, for example. That is the current practice in Victoria. There are very few arrangements, and they are generally within the family.

Ms PENNICUIK — The spirit of my questioning is predicated on the concern that many people have that this difficult area is approached with caution, as the minister has said and as the law reform commission recommended strongly. I thank Ms Brown for what she just outlined because they were the limitations in what the terms of reference allowed the law reform commission to report on. However, it did go into quite a lot of descriptions of surrogacy and did recommend that great caution be applied. I have two questions for the minister. Is the government satisfied that there is enough caution in these provisions, and is there a process by which this will be monitored to see how it is working and if that needs to be reviewed or altered?

The CHAIR — I will piggyback on that question, which I think again is a very good question and is consistent with something that I was going to ask. What I was going to ask, and what I would like to piggyback, is: we have the law reform commission's viewpoint on this reflected now in the legislation, but what has been the advice of the Department of Human Services and the Department of Justice with regard to the conclusions that the law reform commission came to and the legislation which reflects it? In other words, what other advice has the government received that might have informed its position?

Mr JENNINGS — I was just making sure that we have reconciled advice between the representatives for the DHS and DJ on either side of me, and it was reconciled. They were part of an interdepartmental committee that

provided a consideration across jurisdictions in relation to the appropriate legislative and regulatory regime for this practice. They provided consolidated advice based upon that evidence, based upon the scope of the law reform commission's work and how it could be enacted within Victorian legislation and brought to the Parliament. Basically, in terms of the pedigree of departmental evidentiary advice that has been brought to bear, it has actually been worked through the various arms of government jointly and it underpins this bill. When it was brought to cabinet this bill, as I recall, had the sponsorship of the Attorney-General and the Minister for Health, and that is a reflection on that reconciled advice. That is its pedigree. In relation to the nature of ongoing consideration and effectiveness of the legislation and the practices under it, the patient review panel will be charged with that responsibility, and the evidence it brings to bear to be mindful of its effectiveness would be in accordance with those provisions that I outlined a few minutes ago — from memory, clauses 91 and 92.

Ms PENNICUIK — Minister, I do not know if you have fully answered my questions because in this discussion we have been talking about a very difficult issue that involves, as I said, a surrogate parent but also a partner of a surrogate parent and children of a surrogate parent, who would be siblings or half-siblings of the donor-conceived person. You admitted yourself that if things go wrong, they could go very wrong. While there are happy stories, there are also unhappy stories that have been brought to my attention and, I am sure, to everybody else's I am sure. My question is: is the government assured or satisfied that this approach has enough caution in it, and is there a process whereby it will be monitored in terms of looking to see whether it needs amendment or adjustment further down the track?

Mr JENNINGS — Unfortunately we have got into a bit of a dynamic at the minute that the way I have described those issues is not to your satisfaction. In fact I did answer the substance of the elements of your question, but I may not have done it in a set of words that made you happy. Ultimately the government is of the view that it has adopted the appropriate cautious regime. It does understand the gravity of it. It enters into this legislation with its eyes open. That is not to say that it is oblivious or has blind spots to the potential risks involved for all the people who are involved in this process, but the government believes it has a balanced approach to those matters and expects that the patient review panel would be mindful of the consequences for any family structure or an individual who goes through surrogacy arrangements, and mindful of the welfare of those individuals and those family groups, but also reflects on appropriate clinical practice counselling support mechanisms of the bill so that we could use it for both purposes.

Ms PENNICUIK — Thank you, Minister. I just wanted to finish with a comment in that I think what the problem is here is that we have a bill that sets out these provisions and says in clause 40(1)(c), (e) and (f) that people are prepared for the consequences and are able to make informed decisions. I think members of the community, when this is put in front of them, need to be assured that that is the case. There is not a lot of information there for members of the community; that is why I want to get it out now, so that members of the community can be more assured of what might be happening because there is not a lot here to tell them what is happening, and I think it is important.

The CHAIR — Is there anything further on that clause? Is anybody likely to discuss clauses 41 or 42? Clause 42 is police checks.

Ms PENNICUIK — No, I have covered all that. My previous questions apply to clause 42.

Clauses agreed to.

Clause 43

The CHAIR — I have had a number of representations in regard to clause 43. I do not know if other members have as well. Could I just open it up perhaps with some indication from the minister. This is obviously in regard to partial surrogacy, and it has been put to me that in other jurisdictions partial surrogacy has been found to cause a number of difficulties because of the close bond that a mother understandably forms with her child, and that some leading ART clinics actually do not provide partial surrogacy services. Can I have some indication then as to why the government has elected to provide for partial surrogacy in this legislation?

Mr JENNINGS — As a starting point, some time ago in this committee we actually discussed the logical construction of the government's thinking in terms of how it allows for surrogacies to take place, the counselling

that should be undertaken to make sure that people work through the range of issues and considerations that may be appropriate to them, and having a fail-safe provision that the child will only end up in the care of the commissioning parent if the surrogate mother agrees to relinquish the child. Within that construction is the assumption by the government that this is an extremely serious matter and there should not be any prejudices or predetermined conditions about any woman's capability about being able to undertake such an arrangement, to do it happily with confidence for all her life, whether or not she uses her own biological material in relation to its being used to give birth to the child. We do not necessarily make any assumptions about there being an automatic division. We actually think this is a very significant and very serious matter regardless.

We are also mindful that is actually something that perhaps has not been discussed a lot within the debate or within the community's concern about partial surrogacy, about whether there be any medical or biological reason why there may be an advantage of using the egg of the surrogate mother to be able to undertake this procedure in terms of the benefits such as a reduced medical risk or a reduction in the degree of medical intervention required to assist her in the carrying of the child, which may in fact be an advantage under these circumstances.

That is something the government has thought about and allowed for. That is ultimately the reason why these circumstances have been allowed for within the scope of the bill, notwithstanding the fact that some people might either have a philosophical concern or postulate that in fact there will be an increasing emotional burden if the surrogate mother donates the egg to enable this child to develop.

Ms PENNICUIK — I do not want to go over that ground again; I think we have talked about that. But one of the other issues that has been raised with me and occurs to me, in particular where a surrogate mother may have other children and then goes through a pregnancy and relinquishes that child, is the effect on the other children who, if it is a partial surrogacy arrangement, are obviously related to the child being relinquished, and the child being relinquished is a related half-sibling to those children. What thoughts does the government have in terms of that — of the rights for them to maintain a sibling relationship, particularly existing children, already knowing that that donor-conceived or that partial surrogacy-conceived child is their sibling?

Mr JENNINGS — I would suggest that in terms of the basket of those issues — I can envisage a whole range of scenarios where that is relevant, and there may be a whole range of other relevant considerations that may be brought in to bear; we might be here for a very long period of time discussing relevant scenarios and circumstances and people who may be affected by such a decision — ultimately it is the decision of the woman who gives birth to the child, ultimately, on balance, about whether the child is relinquished or not.

Ms PENNICUIK — I suppose I am talking in terms of the bill being about the welfare of children, and this section seems not to talk about the children very much. It talks about the parents, the surrogate parents and the commissioning parents but not about the children or any existing children. If there are issues arising there, how will they get sorted?

Mr JENNINGS — The answer will be: on balance, in the response of the surrogate mother who will be the arbiter of whether they are compelling reasons and whether they actually contribute to the decision not to relinquish the child, ultimately.

Ms PENNICUIK — In the event that the child is relinquished, then there is an effect on other children.

Mr JENNINGS — I am encouraged to expand on how this may work in practice, but ultimately I will stick by my answer. In practice, there will be a connectivity. There is a very high potential — given the nature of the surrogacy arrangement, the way in which it has been established through goodwill and is maintained hopefully through goodwill — that there would be a high degree of expectation that that goodwill would be maintained and a connection would be maintained, which would in part account for, hopefully in the optimum circumstances, the interests of those other children or other relevant people within the constellation of those who are brought into the wellbeing of the surrogate mother and the child, that they would have opportunities to relate to each other. But ultimately, in terms of who makes the decision, where does it lie and about whose interests are protected and maintained? It lies with the surrogate mother.

Ms PENNICUIK — Minister, I think it is important that we follow these issues up, and this will be my last question. Given that there may not be goodwill, and there may be separation, under the terms of information that is

available in the voluntary register, for example, would the existing siblings be able to follow up and perhaps make contact with a sibling born in those circumstances with whom they had lost contact, but they know that that sibling is around — an older sibling?

Mr JENNINGS — Just as you test me, I test others — that is basically the dynamic that we go through.

Ultimately, in terms of the availability through the registry of births, deaths and marriages, which will ultimately be the repository of this documentary trail of a person's genetic inheritance or the means of their birth, those administrative practices will develop over time. I know this is an issue that will probably be the subject of bitter contest for us a little later. I know there will be some expectations about trying to guarantee access to evidence and open up access to information. I can understand the reasons — including the reasons that you have outlined, and I am sure a whole range of other cases which you will perhaps outline later on — as to why that should be appropriate. The government is alive to the need for the appropriate disclosures so that all the relevant parties have access to reasonable forms of information, but we are also particularly mindful of privacy provisions and of the respect that needs to be shown for all people within the regime that we are regulating here. Our concern has been to try to make sure that the appropriate balance was struck. In the specific example that you have asked me about, I think the inbuilt assumption is that the starting point is the surrogate mother. The surrogate mother will be acutely aware of the relevant information, and if her other children seek access to that information, I would have thought that a relevant place to start would be through her, because she would have access to it.

Ms PENNICUIK — She may not be around for one reason or another.

The CHAIR — Minister, it has also been put to me in regard to 43 generally, and in some other provisions closely related to 43, that in fact the determination of commissioning parents' suitability to parent relies essentially on police checks — that is hardly a full assessment of their parenting ability — and that parentage orders, which you might rely on in this answer, in fact are granted retrospectively in various circumstances. In terms of the counselling, legal information and so forth that is available, to what extent is the government satisfied that there is a suitable assessment of the parenting skills of commissioning parents beyond a police check?

Mr JENNINGS — There is cumulative documentary evidence that you have actually already referred to. It is a combination of the police check history of child protection orders or other forms of intervention. There is a capacity for the counsellors to test out those issues and any other relevant issues in relation to a person's ability to parent and care for a child. There will be matters that we have previously discussed which need to be prescribed in terms of the considerations that the patient review panel will need to be mindful of in giving the approval subsequent to the consideration of the counselling and those check mechanisms. And within the patient review panel there is a requirement that there be a person who has expertise with child protection matters as a member of the panel.

The CHAIR — Are there any further comments on 43? If not, I propose to put that one to the test.

Clause agreed to.

Clause 44

Mr HALL — I want to ask the minister about the surrogacy costs. The clause quite clearly says that the surrogate mother must not receive any material benefit or advantage, but there is provision for a claim for reimbursement of prescribed costs. The power to prescribe costs I believe is given by clause 124, which provides certain powers to make regulations. I have got a couple of questions about that. The first thing I want to ask is: is there any draft regulation in respect of what sorts of costs may be prescribed?

Mr JENNINGS — The specific answer to your question is that we have not got draft regulations. However, we will be using a couple of things as the benchmark or template for them. Existing provisions for people's medical and travelling expenses being covered are outlined in the Human Tissue Act, section 40. Beyond that we will also be mindful of the issues that were outlined in the law reform commission's report that cover this matter. But they will be basically the same types of matters that could be covered by those regulations.

Mr HALL — Loss of income?

Mr JENNINGS — At the moment they are covered by reimbursement rather than loss of income.

Mr HALL — With respect to clause 124, which I believe effects the regulation-making power of this section, why has the government chosen to not make regulations under this particular act disallowable by either house of Parliament?

I think I am correct in saying that there is no provision within clause 124 or any other clause of the bill that I can find which would make any regulations made under this legislation disallowable by Parliament.

Mr JENNINGS — I am advised that there is nothing in the bill to that effect. I am also advised that my friends on either side of me do not think there is anything necessarily unusual about that, although I might take some subsequent advice about it.

Mr HALL — I would appreciate it if you would and perhaps respond to the house as a whole because these are important new matters we are considering, and they are quite serious matters. In the absence of even any draft regulations regarding this and a range of matters, the Parliament is really taking the government on trust in respect of these matters.

Finally, I have a third question about the whole of this issue. How is compliance with clause 44 going to be affected?

Mr JENNINGS — That is a good question; I like this question.

The CHAIR — I had this question too.

Mr JENNINGS — It is even better if it comes from you, Chair.

The CHAIR — I am sure Ms Pennicuik had it too.

Mr JENNINGS — It is a damn good question. In the first instance the expectation is that this will be monitored, and the first port of call would be the patient review panel, which will have an eye for this matter. But ultimately your question is: how does this get remedied; who provides the sanction? The courts do. The courts provide the sanction, and the remedy for those costs would be by civil action that the surrogate mother would take.

Mr HALL — So there is no requirement for the submission of a statutory declaration or anything like that to assist with compliance at least?

Mr JENNINGS — The reason I thought it was a very good question, and probably still is a very good question, is because I took it to the ultimate form of recourse that is available. If this stays in the area of oral and whose evidence you would accept in the first instance in invoking this provision, I think the patient review panel would determine the body of evidence it would require to work out on the balance of probability who it would believe in these circumstances. But ultimately if this is pursued through the courts, there would be other forms of evidence to the satisfaction of the court.

Mr HALL — My concern is who is going to complain and get it there. A person receiving a substantial reward is certainly not going to complain, nor are parents who are desperate to have children; I do not see that they are the ones who are going to complain either. I do not see any way in which these sorts of matters will be detected and complied with, and that is why I ask the question.

Mr JENNINGS — Coming from the other perspective about who are the interested parties that may consider whether this has been entered into and what level of confidence they have, firstly, the patient review panel in terms of providing the authority to proceed with the treatment would need to assure itself that such commercial arrangement had not been entered into. That is the first port of call. Members of the panel may choose to use evidence such as a statutory declaration to satisfy themselves of that, but that is a matter for them to work through in terms of the procedures that they establish.

The second element would be the County Court in terms of its degree of satisfaction before the substitute parenting order is determined; that is after the child is born. After the surrogate mother agrees to relinquish the child then the County Court will need to satisfy itself that a commercial arrangement has been entered into. It will require some sort of supportive evidence before it will make its substitute parenting order.

The CHAIR — Can we clarify again? You indicated that it was not really envisaged that lost wages would be considered a reimbursement. Can we have that as an absolute? We understand that travel costs and medical costs, those sorts of direct costs, would obviously be subject to reimbursement, but can we have a definitive position that forgone wages for the period of perhaps the pregnancy and the recovery period thereafter are not subject to this reimbursement provision?

Mr JENNINGS — In terms of the absolute, I do not know that I am going to give you an absolute commitment, although we are all perhaps pleased to know that the house may have an opportunity to get me further down the clarity line. The reason I asserted that lost wages are not part of the consideration is because in the existing provision — section 40 of the Human Tissue Act — they are not accounted for. That is consistent with my answer, although I have subsequently been shown that some provisions of the law reform commission's report suggest that lost earnings up to maximum period of two months may be considered to be a prescribed payment that may be appropriate. There is some consideration that we will need to give to that matter, because the existing provisions and the recommendations of the law reform commission are the field in which we are trying to prescribe those under section 24.

The CHAIR — I think the circumstance for us is that the law reform commission's report will gather dust; the legislation is what people will rely on.

Mr JENNINGS — Yes, of course.

The CHAIR — Not that that will not also gather dust. In the case of a situation where the commissioning parents actually walk away from the arrangement, are the costs associated with the surrogacy or incurred by the surrogate mother enforceable against the commissioning parents? Is it anticipated that they would pursue some civil action for the recovery of such costs?

Mr JENNINGS — Yes. The three of us are nodding.

The CHAIR — I guess there are other matters that one might contemplate in a lawsuit in such a circumstance, but we will not go into that.

Clause agreed to; clause 45 agreed to.

Clause 46

The CHAIR — Clause 46 is interesting because it requires somebody to anticipate their death and to enter into some agreement, much as you would enter into a power of attorney and all sorts of other documents, to say, 'Yes, if I fall over I want my gametes to be used and my wife or partner to have a child'. In terms of the government's consideration of this — and I notice there is a case on this in Western Australia running at the moment, and we referred to one previously in the last year in New South Wales — to what extent have the rights of the child been considered in regard to this particular provision? Some concerns have been put to me in particular that decisions could be made subsequent to the death of the partner, based on grief, loss and a need to hold onto the person who had been lost. The decision might not be a decision that had the best interests of the child at its centre point.

Mr JENNINGS — It is a good question because it warrants or deserves an answer. There is the potential for this to be distressing for the parent and for the child, and it gets into a whole range of consideration of the whole range of existential matters that may be fairly confronting. You are quite right to say that potentially it could be a very perplexing matter. From my own personal feelings on this subject, it would be very challenging to make any assumptions about how a child born through this process may spend the majority of their life contemplating this matter, so I do not take it lightly.

However, having said that, there is nothing within this bill and nothing within the way in which our community and societies around the world organise themselves in relation to assumptions about single parents and single parenting. The evidence that is attached to the success of children who are born in a whole variety of circumstances and live in single-parent families is an example. Children can grow up and as long as they are cared for, are provided with love and care and have the good fortune to have a healthy upbringing and their development needs cared for, they can live rich and fulfilling lives. That in-built knowledge and assumption mean that this opportunity is provided for within the bill, because it does not make any hard-and-fast ruling about a predetermined likelihood of a child living a happy and fulfilled life through different circumstances if this bill allows for it. In terms of trying to field that basket of philosophical, emotional and developmental issues, the patient review panel, I am sure, will exercise its mind and its wisdom greatly about exercising and providing the appropriate authority for such a procedure and such an arrangement to take place, because in the rare circumstances where they will be confronted with it they will have to take their responsibilities very seriously.

Ms PENNICUIK — I think the Chair has really asked the question I was going to ask. It occurs to me that I am not sure how many times this has ever faced ART providers, but whether in practice there is some period by which ART providers might wish a person to sit on a matter before proceeding with it, given the different perspective that the immediacy of a death brings. Do you see what I am saying? Somebody who lost their partner a week ago will be in a certain emotional place that they may not be in two years hence, for example. I am asking whether there is any clinical practice regarding that?

Mr JENNINGS — Part of the difficulty with any of the scenarios that we contemplate is that in abstract it is hard to predetermine the competency, the motivation or the wherewithal of any of the individuals within this process, and in fact what is ultimately the driver of the decision making or the support which they seek to obtain. Ultimately you would hope and expect through the law, the regulations, the protocols, the disciplines and the knowledge that the patient review panel brings to this exercise that it can work its way through these issues in an appropriate fashion. It calls upon relevant expertise, life experience and value systems that are consistent with the law to assist it. Beyond that it may seek guidance that may pre-exist. It is something that will be worked through in practice.

The CHAIR — Anything else on clause 47? I assume clause 48 is okay. I propose to complete part 5 by putting to the test clauses 47 and 48.

Clause agreed to; clauses 47 and 48 agreed to.

Clauses 49 to 54

The CHAIR — Are there any questions in regard to part 6?

Ms PENNICUIK — Clauses 55 and 56.

The CHAIR — Are there any questions on earlier clauses? I have one. Let me ask a question in regard to the clutch of clauses at the start of this part of the bill. It has been put to me that there are concerns about the capability or the competence, if you like, of some of the service providers to maintain adequate records, particularly in a case where they might be subject to commercial developments such as takeovers or mergers where they might go out of business, or where a service provider might simply keep his records in a shoebox rather than on a computer system. Whilst it is understood that the registration process requires the records to be given to a central register — I think it is on 1 July each year — concern has been expressed to me that in the interim period records could in fact be lost or ‘damaged’; in other words, not accurate. I wonder if the minister has a response to that comment?

Mr JENNINGS — We have spent a bit of time contemplating what might be at the heart of this concern, Chair, because the relevant agencies and practitioners — the clinical practice that currently exists, let alone what we will be moving to — will be covered by the relevant provisions of the Health Records Act, and expectations of recordkeeping. We expect the accountability within that act to be maintained. We start from the assumption that whilst obviously we want to make a smooth transition to the new arrangements administratively, we do not believe

that records are kept in a variety of circumstances which are included within your question even though the community might have concerns about appropriate recordkeeping. We believe a higher standard applies in the field now and is accountable to the relevant act, and we would have that expectation in the future.

The CHAIR — I guess the concerns have been expressed to me in the context of the fact that we are broadening the number of practitioners; we are going outside established ART providers that perhaps have a higher regime, if you like, of recordkeeping, and concerns have been expressed. I accept what you say in terms of the fact that there are other regimes with which all medical practitioners need to conform. But the concern expressed to me has been along the lines of, ‘There is an element of commercial undertaking to these processes’. That was probably a pejorative by the people who put it, but there may well be cases where in fact it is convenient to actually lose information or not record information accurately. That is not a position I put, but that has certainly been put to me.

Clause 55

Ms PENNICUIK — If I could just ask a question on clauses 55 and 56 together, clause 55 allows for the donor to apply for and receive information about the woman or partner for which their gametes have been used and clause 56 allows for the donor to apply for and receive information about a child that is conceived using their gametes. The Victorian Law Reform Commission was quite strong on that point in recommending that those provisions be removed and that the only circumstance under which a donor should be able to apply for that information would be if they had knowledge of a genetic condition which they wished the donor-conceived person and/or the parents to know about. I want to know the rationale of the government for including it.

Mr JENNINGS — Earlier this afternoon I was asked a similar question, and my answer at the time was that because it is the existing provision, and that ultimately is the reason the government has continued with that opportunity for the donor to have access to that information, that is the reason the government maintains it. The interesting thing is that rights to information and opportunity is something we might be dividing on in terms of an a priori sort of issue about who should take precedence and whose rights and opportunities should be described in what detail within the bill. It is something we contest — or maybe I should not read anything into the line of questioning about whether in fact that is going to be an inconsistent philosophical position you put or otherwise or whether you just want to draw my answer on this question, hopefully to use it against me later.

Ms PENNICUIK — I think the point when we get to clause 59 — which you know, Minister, I have been waiting to get to — is that there is somehow a right for donors to access this information, but elsewhere in the bill there is a right to information denied to donor-conceived persons. It is just inconsistent, and it is not consistent with the Victorian Law Reform Commission’s strong recommendation against it. The government is relying on that commission report in many ways to defend its bill. So the rationale was because it is current legal practice. That was the rationale, even though that was criticised as being probably not the best way to proceed.

Mr JENNINGS — We will have arguments about what is the best way to proceed when we move through latter clauses.

The CHAIR — Certainly, Minister, what has been put to me and no doubt to other members is the importance of, from a lot of people’s viewpoint, what they would refer to as ‘true birth certificates’ — birth certificates that obviously provide full information — and accurate information in terms of registers and access to information. That has been a fairly central point of what has been put by many of the organisations that have had contact certainly with me and I think with other members.

Ms Pennicuik, did you wish go on with clause 56?

Ms PENNICUIK — I sort of threw clause 56 together with clause 55.

The CHAIR — In terms of clause 56, in particular, one of the specifics — and it is sort of a follow-up to what Ms Pennicuik put as well — that has been put to me is that there is no provision in this section for genetic siblings to obtain information about each other and no recognition of biological sibling relationships, which are considered a very important issue for adult donor-conceived people. It has also been put to me by organisations like TangledWebs, for instance, that this ability to actually identify siblings and parents under these circumstances is very important. Did you have any comment in regard to the access of genetic siblings to information under clause 56? In other words, there is no provision for them to actually obtain the information.

Mr JENNINGS — There are two avenues by which connection could be made between siblings. One is through access to the voluntary register, or advice that has been received from the donor exercising their rights, which is another form of voluntary engagement. So both of those forms of information can be used in that way.

The CHAIR — There is, as I understand it, an inconsistency with the approach on these matters to the adoption regime that exists and the level of information available under adoption. Is that a fair observation?

Mr JENNINGS — I think that was the case previously. In fact there have been changes to the way in which adoption has been considered in terms of the registry of births, deaths and marriages so that in fact the current practice is more closely aligned to this than it had been previously. For instance, on a birth certificate there was an item for children who had been adopted that was an indicator of the adoption of a child but that identifier has not been removed, so that is now more consistent with the approach we are adopting here.

The CHAIR — Are there any further questions in regard to clauses up to clause 56? Anything further on those? If not, I put clauses 49 to 56 to the test.

Clauses agreed to; clause 56 agreed to.

Clauses 57 to 81

The CHAIR — On clause 57 a point has been made to me, Minister, but I do not want to labour it because it really comes up in other parts more effectively, but there has been quite a bit of concern expressed by a number of organisations about the loss of expertise from the existing ITA and the reorganisation of VARTA. I guess I will come to that more in terms of the constitution issues of the authority. But there is a concern in regard to the handling of these information matters which were central to that role that the ITA had provided.

Mr JENNINGS — I do not actually want to draw attention to perhaps a dispute between the Parliament and the executive. I know that you wanted me for a certain period of time. I thought I was coming for a certain period of time, which has been exceeded. What was the intention to actually keep me here?

The CHAIR — If you have exhausted your time, Minister, I do appreciate that. I think it was 2.15 p.m. Was it? I cannot remember whether it was 2.15 or 2.30.

Mr JENNINGS — I thought it was 2 o'clock, to be honest.

Ms PENNICUIK — No, it was later than that. It was 2.30, I think.

Mr HALL — It is 2 o'clock on the agenda.

The CHAIR — We have appreciated your goodwill, Minister.

Mr JENNINGS — I have demonstrated it, but I am now getting to the stage of exhaustion.

The CHAIR — Are there other matters that — —

Ms PENNICUIK — Yes.

The CHAIR — There are other matters, but we realise that you have other commitments today. Minister, we would thank you for today. I take it you are not able to extend, obviously?

Mr JENNINGS — I have now got myself into trouble. We need to have an idea of how we can acquit this, don't we?

The CHAIR — Yes. I think it is probably to resume on another occasion. That is what we are going to have to do. As I understand it, one of the clerks is checking with your office about availability of another timeslot some time during this week. I think we have probably covered most of the really contentious stuff and the things that are likely to take the most time. There are perhaps some structural matters in regard to the authority, as I just indicated.

Ms PENNICUIK — I only have questions on two more clauses.

The CHAIR — Two more clauses, yes. I probably have a number, but they are not massive questions in terms of taking a great amount of time. They are points of clarification that I think we can get through fairly quickly. Do other members have any questions at all that they are likely to pursue?

Mr TEE — I am just wondering if now is an opportunity to move through the clauses because if Ms Pennicuik has only two clauses we might be able to — —

The CHAIR — What are your two clauses?

Ms PENNICUIK — Clauses 59 and 83 — fairly short questions.

Mr DALLA-RIVA — I have questions relating to clauses 83, 85, 90, 96, 97, 99, 147, 153 and 154.

The CHAIR — On clauses 58 and 59, somebody has raised with me the age of a child under clause 58; are we talking about a child under 18 years, as in the Adoption Act? Yes, that was the only clarification I needed on that.

Mr HALL — It is also in the definitions.

The CHAIR — Can we jump to clause 59? What was your question on clause 59?

Ms PENNICUIK — I had a question — —

The CHAIR — Minister, do you think you need to get away instantly?

Mr JENNINGS — The thing about it is until Mr Dalla-Riva's intervention I thought it was promising that I could have just taken a hit now and just deal with it. If we reschedule, if it is this week, it is going to be very early in the morning or very late at night.

The CHAIR — I am in the hands of the committee as far as the resumption is concerned.

Mr TEE — I expect in terms of our reporting date it will need to be early in the morning or late at night.

The CHAIR — We can do that. From our point of view we can do that.

Mr DALLA-RIVA — Is that 4.30 a.m.?

The CHAIR — I am better at night. Do you think your question on clause 59 is fairly quick?

Ms PENNICUIK — Yes.

The CHAIR — Nobody else has raised clause 59, so we will just deal with that one quickly.

Mr TEE — I do not think the next one is until clause 83, so we might be able to deal with the others.

The CHAIR — Your office says we can squeeze 30 minutes out of you now.

Mr JENNINGS — They have obviously already taken a hit on my behalf for what was supposed to happen at 2 o'clock.

The CHAIR — Tomorrow is certainly no good because you are away. Do you want to see how much we can get done in the half hour?

Mr JENNINGS — Yes, all right.

Mr DALLA-RIVA — My questions will be brief, and as long as people do not talk for an hour on one clause like we did before, then I think we can get through it.

Mr JENNINGS — All right.

Ms PENNICUIK — Minister, you may have been anticipating this. I am sure you have received representations, as I have, from donor-conceived persons who were conceived using gametes donated before 1988 about their inability to obtain information about their genetic identity. My question is: given the rights of the child under the United Nations convention, given the evidence to the House of Commons regarding people's rights to their genetic identity and given the representations made to us in person by people born at that time and who are telling us of the effect that the denial of access to that information has had on their lives, why has the government chosen to keep that provision, given that the Adoption Act 1984 allows for adoptees to find out information about their birth parents notwithstanding that that information was not available beforehand and that that was made retrospective. It would appear to me that the rights of donor-conceived persons to this information would override any rights of donors prior to 1988 or any understanding that they would have anonymity. Why has the government chosen to keep that denial in place in the law?

Mr JENNINGS — There are two baskets of issues that relate to the reasons why the government does not automatically fall on the assumption that the information should be compulsorily available. The first basket of issues relates to our ability to be able to identify and account for donations that were made prior to 1988 both in terms of the basis on which those donations were given in the first instance, which was on the basis of anonymity, and on the basis of the records procedures that were in place then, which indicate that our certainty and confidence about being able to gather that information and provide that information are in question. The issues of whether it would in fact deny the person who donated material prior to 1988 the appropriate privacy protections that were the basis upon which they voluntarily provided donor material at that time and whether it would be a denial of their civil rights are concerns.

Between 1988 and 1997 a different regime was in place, and that material which has been kept in a better form could be made available and would be made available with the consent of the donor. That is a different set of circumstances to those prior to 1988. We hope to encourage a regime where that consent may be provided and the information may be able to be made available in an accessible form so that people can exercise their rights and opportunities to know their genetic inheritance. Certainly the government is mindful of that, but our concern about the overriding of some of those privacy issues and our concerns about the practical implementation of being able to provide the information are the reasons why we have currently not allowed for it within the bill. However, it should be understood that we are interested in increasing access to information, and the government would assert that our electronic consolidation of information through the registry of births, deaths and marriages has provided a better repository of information and may lead to improvements in both the collation and dissemination of information in the future.

Ms PENNICUIK — I hear what you are saying about there being difficulties in obtaining that information — it may not be kept, or it may be difficult to retrieve — and that is one thing. But it is another thing to continue in the law the lack of the actual right to have that information, particularly given the following two guiding principles contained in clause 5:

- (a) the welfare and interests of persons born or to be born as a result of treatment procedures are paramount ...

and

- (c) children born as the result of the use of donated gametes have a right to information about their genetic parents ...

If they are the guiding principles, I cannot really understand your answer that the privacy of a donor prior to 1988 can override those two guiding principles of the legislation, given that it is not as if that information, if it were released to the donor-conceived person, would necessarily be released to the general community. If the legislation is about the rights of the child, I cannot see how this provision is consistent with that provision, so there is an inconsistency in the bill with the guiding principles.

Mr JENNINGS — No, because this act is in 2008. We are talking about circumstances that describe, and it has to harmonise both in terms of rights, opportunities and obligations to an act that predated 1988, and the conditions that apply in 1988. There is a whole range of statutes that sit between you and I that account for the change in circumstances over time and do not retrospectively intrude on rights and obligations that were described in the laws prior to their introduction. So it is very usual that new bills before this Parliament would have different provisions

acting over different periods of time in terms of their application because there would not want to be intruding retrospectively on different either administrative or in this case rights based on provisions.

Ms PENNICUIK — I presume we could argue all day about that, Minister.

The CHAIR — Anything further in regard to those clauses?

Clauses agreed to.

Clauses 82 and 83

Mr DALLA-RIVA — Just in respect of the members appointed under clause 83(3), one member must have expertise in child protection. Why is that and does it indicate that there are some concerns about issues of child protection?

Mr JENNINGS — In fact under our discussion at the committee today, in light of I think it was Mr Atkinson's question, he asked me to outline what confidence level the government has that people who seek to become parents under these provisions demonstrate that they have sufficient skills, capability, compassion to be a good parent.

In answering that question, I ran through the various ways in which we try to achieve that consistently through the act, the way in which the counselling would occur, and then ultimately the consideration of the patient review panel who make the decisions to enable people to go through this process and, as part of that discussion, it was in terms of someone who has an appreciation for parenting skills and has witnessed occasions where parenting skills have been inadequate and lead to child protection intervention or support mechanisms for children. We would think a practitioner who is well trained in these matters would be appropriate to make sure, as much as we can in terms of the procedures of the panel, that that focus is drawn in their considerations of whether the parents are appropriate to have a child in their care.

Mr DALLA-RIVA — Thank you.

The CHAIR — It has been put to me by some organisations that there is no mandated representation for infertile people — and I have argued that one with the organisation as to the appropriateness of that or whether or not that is necessary — but to what extent is the panel likely to involve people who have some direct experience of the process, who perhaps have, to use a colloquialism, been through the mill and perhaps understand these circumstances and the sensitivities and the needs of people?

Mr JENNINGS — I think it is a fair question for us to go back to first principles. The first principles about this act are to facilitate support to people who are incapable of giving birth, and infertility is a prime reason why people — couples, women with or without a partner — have had an inability to be able to give birth. Infertility is perhaps at the heart of the starting point as a first principle about why this bill was originally envisaged, its practices were developed and the technology was developed, and continues to be a prime focus of why this bill exists.

I know that in terms of the consideration of civil rights issues, equal opportunity issues beyond that original starting point of the bill in terms of people's access to services and support is perhaps not emphasised — the original genesis of this bill — but ultimately if you consider it from a first-principle basis, I do not think any of us really has lost sight that infertility and concerns about the inability for a woman to give birth to a child, for whatever reason, with or without a partner, is a fundamental driver of what this bill is about.

The CHAIR — So does that mean that the panel is likely to have people who have that experience —

Mr JENNINGS — Sorry, I would have thought that anybody who is associated with the patient review panel would be particularly mindful of those basket of issues. Probably I finished one sentence short.

Whether in fact there is any particular — —

The CHAIR — I guess the question that has been put to me by organisations is whether or not a — —

Mr JENNINGS — Consumer.

The CHAIR — That is probably the word. The question is whether the panel will be simply made up of clinicians, medical practitioners and associated people, or whether clients, or consumers, if you like — which is clumsy terminology — are represented.

Mr JENNINGS — In fact that is right. The overriding issue is an appreciation of the role which the panel will undertake and the ability of members of the panel to undertake their responsibilities. You would hope panel members would have compassion, consideration and an ability to acquit themselves in terms of their responsibility. We would hope there is a high degree of recognition and understanding of the process that people who embark on ART would have to undergo, and the emotional consequences of that. If in fact that comes through somebody having gone through the process, it would be appropriate for them to be considered to be part of the panel. We see this as a relatively open process under which people will be encouraged to apply to be members of the panel.

The CHAIR — Minister, just to enable me to again put together a batch of clauses to pass, can we jump to clause 85. I think Mr Dalla-Riva's question is probably the same as mine, and Ms Pennicuik might also have some comment on this one. Essentially there has been concern about the change of roles. The Infertility Treatment Authority, having built up an expertise, having been a trusted agency in terms of some of these matters, is to be replaced. There are concerns about that replacement. Clause 85 lists the functions of the panel. We have touched on some other things that might have been functions in the course of this committee. Can we have on record the reasons why it was decided to establish a new body rather than to continue with the Infertility Treatment Authority and simply give it these expanded functions?

Mr JENNINGS — As a starting point, under the specific clause you have referred to, which was clause 85, I am advised that existing — —

The CHAIR — Infertility Treatment Authority?

Mr JENNINGS — Yes. The ITA has not actually undertaken functions under clause 85(a), (b), (d) or (e). As a starting point, clearly there are a new range of responsibilities that the patient review panel would be considering. That is not necessarily in its own right a reason to move in such a way. We were guided by considerations that the law reform commission was concerned about, particularly the perhaps confusing decision making or accountability framework that may overlap between the clinical practice that the ITA monitored and was responsible for, which needed to be dealt with in its own right, and the appropriate scrutiny of access to the service, the quality of the service and the accountability of the service through the patient review panel, which should be distinct from it. The model that has been adopted by the government within the bill allows for those issues to be delineated and for the decision making of the patient review panel to be accountable to the Victorian Civil and Administrative Tribunal (VCAT) in a way that ITA was not.

The CHAIR — Thank you, Minister. If there are no further questions, I will put clauses 82 to 89.

Clauses agreed to; clauses 84 to 89 agreed to.

Clause 90

Mr DALLA-RIVA — In respect of conduct of hearings, a guiding principle under clause 5(a) is:
the welfare and interests of persons born or to be born ...

Why is it not within clause 90 that there is at those hearings a representative who would have interests of the child to be born?

Mr TEE — They are on the panel, aren't they?

Mr DALLA-RIVA — Mr Tee said they would be on the panel. They are not.

Mr TEE — I said there would be someone with those interests on that panel.

Mr DALLA-RIVA — There is nobody with the interests of the child on the panel.

Mr TEE — But is that not where the child protection person comes in?

Ms PENNICUIK — That is a different thing.

Mr JENNINGS — The first answer to your question is that the patient review panel would rely on the direction that has been given to it in respect of its decision making, which is in the following clause 91(2), for it to be mindful of the guiding principles that cover the welfare of the child, the interests of the child and any other relevant criteria. The second element relates to your previous question about the expertise. We stipulate that child protection is one of the most specified areas in terms of the expertise that the patient review panel would actually have in the make-up of its members.

The CHAIR — Very quickly again so that I can dispatch a whole lot, is it correct that under clauses 96 and 97 no party has the right to appeal to VCAT against a decision to approve a surrogacy arrangement? In other words, applicants can appeal if approval is refused, but no-one can appeal to VCAT if it is approved; is that right?

Mr JENNINGS — It took me such a long time to find the answer, I have forgotten the question!

The CHAIR — In the event that the surrogacy is approved, is it correct that there is no right of appeal to VCAT? In other words, nobody has the opportunity to take to VCAT an appeal against the approval of a surrogacy.

Mr JENNINGS — Yes.

The CHAIR — They do if there is a refusal but not if there is an approval.

Clause agreed to; clauses 91 to 98 agreed to.

Clause 99

Mr DALLA-RIVA — Minister, last week in the Legislation Committee you spoke about the reasons for transferring recordkeeping from the ITA to the register of births, deaths and marriages but only briefly mentioned the closing down of the counselling service for contacts between donors and donor-conceived children. Is it correct that the government under part 10 intends to dismantle the counselling service for those contacts run by the Infertility Treatment Authority and replace it with counselling by an ART provider or by the DHS adoption service? What is going to happen to those staff? What are you expecting? Are they going to be sacked? Are they going to be transferred? What is the intention?

Mr JENNINGS — I understand there might be one person who is affected by that change, and I will try to encourage people to be mindful of their wellbeing in making the transition. But I will look out for that issue.

The CHAIR — How many people does the counselling service currently see?

Ms BROWN — According to the ITA's 2008 annual report, 21 people.

Clause agreed to; clauses 100 to 146 agreed to.

Clause 147

Mr DALLA-RIVA — Just in respect of the proposed new section 22, which is on page 102 of the bill, when a substitute parentage order is made, the court is required to consider whether it is in the best interests of the child to make that order. However, is it correct that the only alternative the court has to making the substitute parentage order is to require the child to remain with the surrogate mother who neither wants nor expects the child to remain with her? What sort of choice is the court provided with under those circumstances?

Mr JENNINGS — Mr Dalla-Riva, I am not quite sure whether you are wanting clarification that that is how the provision works. If the court decides not to make a substitute parenting order, then the consequence of that is that the child stays with the surrogate mother. That is the effect. Beyond that, is your question, 'Is there any other alternative option for the court'?

Mr DALLA-RIVA — Yes, under this proposed new section 22.

Mr JENNINGS — In this instance, the answer to that question is no. There is no other consideration at that time. If in that unfortunate circumstance the surrogate mother still wishes to relinquish the child, then other procedures would be applied.

The CHAIR — With regard to the revocation of a parentage order, what happens to the child in that situation? You are saying that in every instance the child would remain with the surrogate mother. That would be the continuing position.

Mr JENNINGS — Yes, that is the position. The child would return to the care of the surrogate mother until the surrogate mother made a decision that she was unwilling or unable to care for the child, and then she would seek other forms of support.

Clause agreed to; clauses 148 to 152 agreed to.

Clause 153

Mr DALLA-RIVA — In relation to the donor-conceived children and the right to know their genetic heritage, where a child is conceived using donor sperm or eggs in future under the legislation, is there any way they will find out that they are donor conceived if their social parents do not tell them or if the donor does not seek to have contact with them?

Mr JENNINGS — It is going to be difficult under the circumstances posed in your question, because in fact without direct knowledge they may seek out that information and may subsequently have access to it, going through the registry of births, deaths and marriages. You may ask me about a variety of circumstances by which they might arrive at that position, but they do have opportunities to seek that information through births, deaths and marriages and obtain it, even though it may not be voluntarily given to them by their parent.

Mr DALLA-RIVA — The bill effectively denies children the right to knowledge of their genetic heritage, because they can only apply for access to that knowledge if they know that they are donor conceived in the first place. I can see nothing in the bill to give them the right even to know that they are donor conceived. They have got to know they are donor conceived before they can actually apply for that.

Mr JENNINGS — They do not absolutely have to know. The reason I know this is because I ask people at great length — and I hope you do not ask me at the same length that I ask the people who are around me about this matter — about either suspicions or concerns or some form of information that may come to the child who may want to seek out that information. The absolute lack of certainty about those circumstances does not preclude an inquiry, and then that inquiry being responded to by the counselling regime at the registry of births deaths and marriages, which then may ultimately lead to access to that information being given to the child.

Mr DALLA-RIVA — There is one problem there, though: the child is not at that counselling service.

Mr JENNINGS — Pardon?

Mr DALLA-RIVA — The child is not at the initial counselling, is it?

Mr JENNINGS — No, this is subsequently, when the child is maybe an adult and wants to exercise that right or that form of inquiry, then they pursue it themselves. You would say to me, ‘What makes the child reach that conclusion, or want to pursue it?’. It may well be that they have actually had a blood test or something that means that they have a source of inquiry that may seem relevant to them and that they may embark upon this themselves. Is this the most desirable way for them to find out this information and get access to it? No, it is definitely not. In my view they should be absolutely told at the earliest opportunity by the commissioning parents or their parents about the way in which they were conceived and developed. That is my clear, absolute and unswerving preference, and that is the preference of the government. But by whatever means they seek out this evidence, they will have the opportunity to obtain it even if they do not have absolutely unswerving certainty and that it is being provided by their parents.

Mr DALLA-RIVA — I look forward to your amendments in the committee stage reporting that.

The CHAIR — Minister, this is one of the key issues. It is a really important issue with many organisations that have actually approached me and no doubt other members, about the right to true and accurate information about a person. There is a lot of discussion about things like the stolen generation, and so forth, and identity is essential to all of us. The issue that has been raised by quite a number of organisations, and particularly some young people from TangledWebs, for instance, who have been through some of these processes in one way or another, have all indicated that the accuracy of that birth certificate in recording all those people who are associated with that birth, not just the social upbringing of the child but indeed the conception of the child, is absolutely paramount. I am not sure that your and the government's apparent consideration of the importance of people having that knowledge at an early stage is actually represented by the legislation. The proposition put by Mr Dalla-Riva is right, that unless you happen to stumble upon it you might never know. In this day and age there are medical conditions and so forth that might well be resolved by having that information, quite apart from the identity issues that seem so central to so many of the people who have actually raised these issues with us.

Clause agreed to; clauses 154 to 159 agreed to.

The CHAIR — Minister, we thank you for your forbearance, and we thank the staff who have attended with you as well, for being here and for going over time. I also thank Hansard for again going past what was expected to be the allotted time of the committee. Minister, can I come back and just say we have appreciated your support of the committee's inquiry and the manner in which you have approached your answers and tried to assist the committee in providing information that helps us to understand the legislation better and to be in a position to report back to the house. We both obviously know that in the house we will go into the full committee and therefore test some amendments, but I would hope that the process you have endured thus far will truncate some of the questioning in the house as a result of your having been so candid with some of those answers. I appreciate that; thank you.

Mr JENNINGS — I share that hope. Thanks.

Committee adjourned.