REPORT OF PROCEEDINGS BEFORE

LAW AND SAFETY COMMITTEE

INQUIRY INTO THE INCLUSION OF DONOR DETAILS IN REGISTER OF BIRTHS

At Sydney on Monday 5 March 2012

The Committee met at 9.15 a.m.

PRESENT

Mr G. D. Barilaro (Chair)

Mr N. Lalich
Mr J. O'Dea
Mr J. T. Rowell
Mr G. Zangari

CHAIR: Welcome to the public hearing of the Law and Safety Committee on the inclusion of donor details on the register of births. The inquiry is examining whether the details of sperm, egg and embryo donors should be included on the register of births which is maintained by the New South Wales Registry of Births, Deaths and Marriages. Today the Committee is hearing from Dr Allan and Professor Jenni Millbank by telephone and from the Law Society of New South Wales and the Inner City Legal Centre. I now declare the hearing open.

SONIA MARIE ALLAN, Senior Lecturer in Law, Deakin University School of Law, before the Committee via teleconference, affirmed and examined:

CHAIR: Welcome, Dr Allan. You are speaking to us via telephone. Thank you for appearing before the Law and Safety Committee today. The hearing is being transcribed. If the Hansard reporter has any difficulty hearing certain things we may have to ask you to repeat what you have said so that the transcript is accurate. Before we proceed do you have any questions concerning the procedural information sent to you in relation to witnesses and the hearing process?

Dr ALLAN: No, I do not.

CHAIR: Please state in what capacity you are appearing before the Committee today.

Dr ALLAN: I am appearing, I suppose, in my personal capacity or as a researcher who has worked on these issues for many years now.

CHAIR: Would you like to make an opening statement before the commencement of questions?

Dr ALLAN: I think I will keep my statement very short. You have my submission and I am happy to answer any questions or, if I am not able to answer them, to provide further information after the hearing. I am happy to just proceed with the questioning if that is okay.

CHAIR: That is fine. I will start off with the indicative questions that we have previously sent you. In your submission you express support for the retention of a separate assisted reproductive technologies [ART] central register in New South Wales. What do you consider to be the benefits of retaining the current system for recording donor details?

Dr ALLAN: I would say I suppose to me it is not so much an issue of where the information is held but primarily it is dependent upon how the register operates. So I believe at the moment the central register, because it is only new, is simply a repository for information, so I imagine that if the same were to be so of the **B**irths, Deaths and Marriages Register then there is not really much difference. But I think what needs to be looked at is whether or not in the future the role of the Central Register, or wherever the information is held, goes beyond simply being a repository for information and functions in a way that is able to deal with some of the complexities surrounding donor conception.

So, to me, wherever the information is held, it needs to be either at a place that does not only hold information but can assist with information exchange, guiding applicants to information, the process of receiving information and how to handle the information that they have received. The information in relation to donor conception I would view as not the same as somebody simply going and applying for a birth certificate and getting information about their legal parents or their birth parents. There are things that go beyond that like providing assistance to people—if that is required or wished for—if there are issues about the fact that donor conceived people could be genetically related to siblings in a number of families. So it is much more complex than simply having information held on the register.

I think one of the other reasons that I would suggest, before simply making the shift, is that there has been quite a lot of discussion—including in a recent Senate committee report on donor conception—that in the future there might be hope for some kind of national register. The register would be useful in relation to the complexity surrounding donor conception and things like donors donating in numerous States or women having travelled interstate in the past in order to access assisted reproductive treatments. If a national register were not possible, at least registers could be set up to communicate with one another. So I am again not sure what the position of the central register is but I think there are a lot of things that need to be considered before these changes are made. And I think that there were mistakes made in Victoria.

CHAIR: In relation to that you mention a central register. Is that being looked at through a Senate inquiry?

Dr ALLAN: The Senate Committee Inquiry into Donor Conception which reported in February 2011 made about 32 recommendations on the whole and I think 17 were directly related to donor conception information. One suggestion was that there should be a national register set up and if that did not occur that the States pass uniform legislation and have central registers in each State and Territory that could communicate with one another.

Mr JAI ROWELL: The Victorian Registry of Births, Deaths and Marriages recently assumed responsibility for managing the donor registers in that State. In your submission you refer to criticism of the transfer of records in Victoria. Will you elaborate on what you see as the advantages and disadvantages of the Victorian system in the managing of records and releasing of information to donor conceived individuals?

Dr ALLAN: I worked at the Victorian Law Reform Commission from 2003 to 2005 when the recommendations were made to shift the information from the then Infertility Treatment Authority [ITA] to Births, Deaths and Marriages and, from recollection, the impetus at that time was that we had received a number of submissions—including from the ITA itself—that queried whether or not it would be more appropriate for donor registers to be managed by Births, Deaths and Marriages. I think then the sense was that centralising the information would normalise donor conception and that a donor conceived person seeking information should be treated just like any person seeking information about their parents. However, the lesson to be learnt from that is that it is not the same situation and that it is much more complex.

What has happened—and again perhaps this is something that if the information were shifted it could be addressed or improved upon—is that the Victorian Registry of Births, Deaths and Marriages is not set up or equipped, as the former Infertility Treatment Authority was, to deal with being able to link donors with donor conceived children or to even communicate with people in the same way that the ITA had the power to do. So from what I have been told by donor conceived people or people who are going through the process, applications to the Victorian Registry of Births, Deaths and Marriages result in less information exchange than the system Victoria had previously.

Again I think, based on those criticisms and the difficulties, if the objective was to facilitate information exchange we might want to stop and look at how on births, deaths and marriages is set up to meet the functions, keeping in mind that it is not just a matter of record-keeping. I suppose then, because of the New South Wales situation, the same question applies in relation to the central register. There are lessons to be learnt by what is happening in Victoria, and there are now some suggestions in the Victorian inquiry that they look at moving back to having their Victorian Assisted Reproductive Technology Authority manage the linking part of things again because it does not seem to be working effectively in Victoria the way it is. I think we really need to do some research and establish what the best model is, rather than just a shift to something because intuitively or ideally we think that that is where the records should be kept.

Mr GUY ZANGARI: Some submissions to the inquiry have argued that including a donor's details on the births register or birth certificate of a donor conceived child may create confusion in terms of legal parentage, given that donors are not legal parents and have no parental rights and responsibilities. You refer to the need to separate the issues of legal parentage and information release on donor conception. Can you elaborate on this point?

Dr ALLAN: Sure. I have a number of things to say on this one. I am a very strong advocate, having worked or discussed with donor conceived individuals their needs for a long time now, for them having information. But one thing we have come across over the years is some confusion about a donor conceived individual's desire to have information about their genetic parentage and their desire to have a relationship with their donor. Some people think it is because they are not happy with their own parents, and that is not necessarily the case.

Some donor conceived individuals want information but they are not looking for another parent. They do not see the donor as a parent. They have their parents that have brought them up and, you know, that situation is their family. It then becomes everybody having their own opinion of what should be placed on the birth records, but I do think that it can cause confusion. I think the issues of legal parentage and release of information need to be kept quite separate for some of those reasons.

In relation to some of the information being placed on a birth certificate, I think that in itself can lead to a lot of confusion, but it can pose a lot of other problems. While I understand the view that some might like that information there, I do not think it would ultimately be helpful to the child. If we are child-focused, I think that is the starting point. During childhood, the recognition of people caring for a child as their legal parent or parents is really important for a child's protection. They may need to use a birth certificate for a number of reasons: They might need to produce it to get a passport, enrol the child at school, or engage in other parental activities that are necessary for the care of the child. I imagine if you have three or five people listed on the birth certificate that this might not be better in these circumstances.

I think that the suggestion that donors be recorded on the birth certificate, if accepted, could create a situation where the birth document no longer reflects the legal relationship but, rather, reflects something else by adding additional information that is not reflecting the legal relationship between the child and the parents who are caring for it. That is really what a birth certificate is being used for in a child's early years.

Then we have an issue of the birth certificate creating conflict with what is clearly laid out in statute concerning the donor, and that relates to the donor having no rights or responsibilities. As that currently stands, they are not listed on the birth certificate for many reasons but listing them might also lead to fears that in some way they are seen as a father, if we are talking about sperm donors or otherwise if we are talking about egg or embryo donors. I think that this can be confusing because it can lead to questions about legal obligations. Again I think that the birth certificate or the idea of legal parenting should be kept quite separately to the idea of giving children and donor conceived individuals information about who their donor is.

I think probably as a last point on the actual birth certificate that there is also a problem in terms of the potential number of people who might end up being listed on that document. Again I think that this could be problematic for the donor conceived individual. Some donor conceived individuals want information, others do not, and that is quite clear.

We need to produce our birth certificate in many different situations. Unfortunately, as much as we embrace new family forms and celebrate them, I do not necessarily think that having all of that information on a document that you have to produce publicly would always be favourable to the person having to produce it. They could suffer discrimination, they could have to explain things to people that they do not want to explain, and so in that sense I think the issue really needs to be kept separate.

Mr NICK LALICH: Dr Allan, I will jump question No. 4 because you spoke a bit about children's genetic heritage and I will go to question five. You stated that, at a minimum, an annotation on birth certificates should exist to indicate that there is further information available to donor conceived individuals, as is the case in Victoria. How do you see this operating? For example, at what age should donor conceived individuals be able to request the annotated certificate? Do you have any comments on Victoria's system of annotating birth certificates?

Dr ALLAN: Yes, that follows on directly from what I was saying. If we do not have all of this information on the birth certificate, how does a donor conceived individual get it, if it is held somewhere else; or how do they know that there is information sitting somewhere about them on a central register or elsewhere? Victoria has done it within the Assisted Reproductive Treatment Act. They provide for the birth certificate of the donor conceived child to be annotated with the text "donor conceived" where a birth registration statement specifies that the child was conceived by a donor treatment procedure.

Ultimately the role of births, deaths and marriages is to alert the person to the fact that there is more information about them on the register, but then it is up to the donor conceived individual to choose whether or not they want it. They can then go to the register and ask what further information is available, but it also leads to options that donor conceived individuals who do not want to pursue that to just leave it at that.

I think the importance of annotating or the decision to annotate the certificates in Victoria—and maybe New Zealand does the same—is a way of ensuring that donor conceived individuals actually know that there is more information out there for them. It was also a way to encourage parents to disclose to their children. The age in Victoria that donor conceived individuals get this information, when they apply for their birth certificate at age 18, they will be told that there is an annotation and that there may be further information to obtain. I think in terms of what age this should happen is a really difficult one. I think I write about it in my submission a little bit. The evidence and the research shows that the earlier a child knows, then the better the outcomes.

The people that we hear have the most angst or are upset about not having information are the children, or now adults, who have found out later in life. The issue of when a person should be able to actually access information is really important. I would say that 16 is actually quite acceptable for a person to be able to handle the information with counselling or guidance, but I would suggest also that access to information from a younger age should be possible if there is the support of an adult, and that adult does not necessarily have to be the people parenting that child. It might include a counsellor or a youth worker, it could be a parent or it could be another responsible adult that the child is working with in relation to that information.

Again, I think these systems do not exist yet in New South Wales, but it is really important to recognise again that there are a lot of complexities that surround the receiving of information. So it needs to be within a support system. It could be at a younger age provided that the person is provided with adequate support.

I just remembered something. There are problems with the Victorian system. The problem with the Act, and this is really important, is the idea that this is disclosure. I do not know if you would call it a loophole but if a parent applies for the certificate prior to the child's eighteenth birthday and then the child has no reason after their eighteenth birthday to apply, the child or now adult will never know about the annotation because it is not marked on the birth certificate. The get-out of the individual knowing there is information there is to apply for the birth certificate before that person turns 18. I am not sure how you address that other than by encouraging parents to let their children know. I suppose too that at some point later down the track the donor-conceived individual might themselves make an application. That is an important thing: the annotation does not necessarily mean that the donor-conceived individual will know later on.

CHAIR: In relation to the appropriate or acceptable age for a child to find out further information, a witness told us that in her case she told her children when they were as young as two years of age. She accepted that at that age they do not understand what is being said but she was trying to have early and continued conversation so that the kids are aware that it is part of their normal upbringing. Do you have any comment?

Dr ALLAN: Yes. I agree. I am not the expert on the psychological or sociological aspects of all of this, but I have attended the Victorian Assisted Reproductive Technology Authority. It runs a Time to Tell program. I am familiar with quite a bit of that. Donor-conceived individuals for the most part are doing very well. We have some who are now adults who were not told early in life who want information and are saying how important it is for donor-conceived individuals to have that information. It seems like there has been a real shift over the last few years to a lot of people telling their children earlier and the outcomes are really looking very positive. Telling a child from when they are two in the terms that they can understand, having another conversation when they are six and when they are eight and that also being supported, there are some good education programs happening in some places that support parents in knowing how to do that. It is early in terms of its research but the indications are that the children are much better positioned not only in knowing the truth and their parents having an open and honest relationship with them, which, obviously, is very important, but also being able to deal later on and make decisions about what information they want and how they want to then proceed.

Mr JONATHAN O'DEA: Some submissions have proposed the retention of existing ART registers with the Ministry of Health, obviously at a State level, with additional voluntary recording of donor details on the birth register. What is your view on that suggestion? Given you express support for a central register, could you comment also on what body you think might be best to perform that central registry function, the Federal health department or another body?

Dr ALLAN: To the first part of your question in relation to voluntary recording of donor details, my opinion is that this is not acceptable. I have read the submissions that have now come around to saying that they agree that donor-conceived individuals have a right to the information about their donor or donors and then move on to say "but this information should be voluntarily recorded on a register". The voluntary aspect then negates the recognition of the rights of the child because it takes the decision about whether that donor-conceived individual knows that there is extra information and whether they then get to make the choice about whether they want it away from them and keeps it in the hands of the recipient parents, donors and of the clinics that are facilitating these arrangements or the outside private arrangements. This has been really what has been identified as being the primary problem in all of this. As I said before, we really celebrate all these different types of family formations and it is really important, but it is really important also to recognise that in the middle of all of this is a child who is not having any say or a child to be born that ultimately will not have any say if the recording of the information is voluntary.

In Victoria it is interesting because there are three times as many donors placing their information on the register as donor-conceived people in terms of the voluntary registers, but ultimately the information should be recorded. It should not be voluntary and then the decision to be made about whether or not to access that information should lie with the donor-conceived individual. In terms of a central register and where it should be held, I think federally there are issues of powers—Commonwealth as opposed to State. If a Federal register were to be set up or operate, I think the States would have to refer their powers. We looked kind of at the constitutional powers possibly being stretched to enable the Federal Government to be able to legislate in this area or act across Australia. It is problematic. Ultimately I think it would require agreement amongst the States and Territories with the Federal Government to allow that to happen. That is such a big process that I think possibly the more realistic approach is that these registers are going to be established or tweaked within the States and Territories and then potentially in the future linked in some kind of way.

In the Senate committee's recommendations for a national register, they were quite clear if this could not happen then it was going to fall to the States. I think it is important to then say for the moment it is operating at a State based level and we need to determine—I suppose that is what you are doing with your inquiry—who is best to hold this information. As I have said before it is not just about holding the information; it is about moving beyond that and having in place some kind of body, authority or system that provides adequate education for greater openness, how to share information, and what to do with the information once it has been imparted.

Mr NICK LALICH: Dr Allan, I wish to ask you a side question. What problems do you perceive if a donor conceived individual never knows that he or she was conceived by any means other than the rest of us were conceived? Is there any problem with a child never knowing?

Dr ALLAN: That is probably the situation with most donor conceived people in Australia who were conceived pre-2005 when across Australia there were only a few States that required a donor to place his or her information on a register. It has predominantly been left up to parents of the children because again in the past it has been particularly a treatment for couples in relation to infertility and the majority have not told their children. In an article I read quite recently on the idea of "no harm no foul" and not telling somebody something that is quite pertinent to them, it was not just okay because they will never know. Maybe they will never know but potentially further down the track the secret may come out. Family secrets can be detrimental and it can create problems within the family between the parents. If they have had a donor conceived child because the father was infertile and they have keep it secret for 20 years, it is almost like saying that there is something wrong with having used a donor. That can affect a family in all sorts of ways.

One of the recipient parents kept the secret from her eldest daughter for 24 years. She has a younger daughter who is 21. She said that she was constantly worried that there would be a car accident or somebody would end up in hospital and the children would find out that way. It may come to the point where somebody needs medical assistance and all of a sudden the child or adult realises that they are not genetically related to one of the parents and cannot be a medical donor.

What is wrong with the person never being told? I think ultimately the short answer is because secrets have a way of coming out or causing harm. The donor conceived person who has never been told will not know what is causing the problem. There is the underlying secret that perhaps, in the future, could cause some harm.

Mr GUY ZANGARI: This is a follow-on question to what you have been talking about. Some of the submissions discuss the current lack of support and counselling facilities to assist parties affected by donor conception. You have noted that adequate counselling should be provided to assist recipient parents, donors and donor conceived individuals in the shift to greater openness and sharing of information. Do you have any further comments on this issue; for example, which agencies could facilitate counselling and public education?

Dr ALLAN: We have a model, and it is a good model, for an education campaign run by the Victorian Assisted Reproductive Technology Authority. They have the "Time to Tell" campaign. The last one was attended by parents who had already had children by donor conception and there were parents who were looking at potentially entering assisted reproductive technology treatment to have children and they ran a public education campaign about the importance of telling people, the need for greater openness and the need for sharing of information. They had donor conceived individuals talking in the forum, recipient parents and donors who were saying that they regret having donated at a time when it was anonymous and they too wanted more openness. Those sorts of education campaigns provide a good model. There are opportunities through that for donor linking and counselling. One of the important things to realise is that getting information may lead to having a relationship with the donor and so there needs to be counselling around that as well.

I looked at New South Wales and I know you can draw an analogy with adoption in relation to seeking information but not in relation to past adoption practices. You have the Adoption Information Unit in New South Wales which facilitates education and counselling for adoptees looking for information about past adoption practices and information on themselves. I think there are other services for adoptees that are now opening up that are looking also at including, if they have not already, some education and counselling for donor conceived individuals. Vanish is one and I am aware also of International Social Service Australia which is a child focused non-government organisation that has done quite a bit of work on adoption and they are starting to look at how they might have a role in relation to donor conception as well. There are a number of options and good models. I do think it is important to have that available and in place. The last question was about secrecy. I think it is important to be able to educate and encourage sharing information and being open and honest rather than impeding access to information.

Mr JAI ROWELL: Dr Allan, private donor conception arrangements which occur outside assisted reproductive technology [ART] clinics cannot be currently registered. The New South Wales Government submission suggests expanding the voluntary register currently managed by the Ministry of Health to include private arrangements. What is your view on recording donor details for private arrangements?

Dr ALLAN: My view is that I would definitely advocate the recording of details of private donations. I suppose that we have to face the reality that because they are private arrangements we have to rely on people coming forward to place details on the register and that this would therefore necessitate some kind of voluntary register continuing because a person in a private arrangement is not reported through the clinic system. I think that it really would be great if they had the opportunity to place their information on a register as in other donor conception situations.

In an ideal world, for the donor conceived, it would be nice that they have requirements that they have to do something. But it would be very hard, or you may not be able to police these private arrangements, so there would have to be some capacity to place that information on the private arrangements. It does not take much searching to see that there are a lot of private arrangements going on, but there are some private donors who seem to be donating to a lot of families. I would like to see a limit on the number of families to which a private donor could donate, focussing on the children that result from such donations and their ability to access information if they so choose. The centre of the issue should be the wellbeing of the person who is ultimately being conceived. So, if we advocate anything for these people, we should be advocating that information regarding private arrangements should be made available to them.

Mr JONATHAN O'DEA: Dr Allan, further to that: acknowledging that it would be difficult to police, your suggestion that private arrangements should be made possible in New South Wales might be extended to actually making it a mandatory or legal requirement that private arrangements actually record the donor relationship. I tend to agree with you that, if you are going to take the perspective of the donor conceived person as predominant, and take their interests as overriding those of others in a general sense, then you might entertain making it a mandatory requirement, which might be difficult to enforce but nonetheless might result in a better situation, as you suggest.

Dr ALLAN: I agree. Ultimately, you could have a mandatory requirement that they do so, but without penalty or without the capacity to police it, it still requires that people act in good faith. That would be an impetus to their placing this information somewhere. Again, if you have a mandatory requirement you need to make it quite clear, because a lot of people act out of fear, to those in this kind of arrangement that we are doing this because the child might want information in the future, not because you are going to have any rights or responsibilities in relation to that child in a legal sense, or that the parents will be threatened in some way. The parenting issue needs to be made quite clear. But, yes, I agree that it should be a mandatory requirement to place that information wherever it is required to be placed.

CHAIR: Dr Allan, you have expressed support for granting retrospective access to donor details—as have other submissions, but others also oppose that. Do you have anything further to add on that issue?

Dr ALLAN: I think I have provided the Committee with an article I wrote on retrospective release. I have come to that conclusion over a number of years, and over the past eight years receiving information and being contacted by a number of adult donor conceived individuals. I think it is important to recognise that there is a need for information, or at least the donor conceived individual should have a choice about accessing information about genetic heritage if they wish, and we should apply that uniformly. Some of the loudest voices calling for information are those of donor conceived people of the seventies and eighties—so they are now 20 or 30 years old. Retrospectivity makes people feel nervous, but what we are saying is that we want open records. If we do not do that for them, then these people are sidelined or marginalised.

If we recognise that information is really important for a donor conceived individual, then how can we possibly ignore the people who are asking for that information now? That requires retrospective legislation to say: we know there are competing interests between donors, recipient parents and the donor conceived individual, but where does the balance lie? Again, I would say we need to be quite clear that giving information does not necessarily mean anything other than where there is a future relationship or contact needs to be negotiated between the parties. Does the donor conceived person who is now 20 or 30 need to know something about their identity? Should they have access to that information? I have come to the conclusion over the years that they should have. We have seen that happen progressively over time in relation to adoptees, all of whom now have access to their birth history and their genetic heritage. I think the opportunity should be the same for donor conceived individuals who want that information.

CHAIR: Would that apply for non-identifying information and identifying information, or for one or the other?

Dr ALLAN: I think most or all donor conceived individuals whom I have consulted with want both. So they would like a name and they would like as much other information as possible. My suggestion is that, if there is going to be a name released, perhaps there could be some form of contact veto. You could pass legislation saying that records would be open so that the donor conceived individual can have as much information as they require. But because it is retrospective you have to balance the issues of privacy against access to information, and one way to deal with that—and New South Wales has this for adoptees—is to enable the donor to place a contact veto, so that the donor conceived individual could have the information but cannot show up on that person's doorstep, or interfere with that person's life—because some of these donors donated when they were 20, and they have gone on to have their families.

It might not be a situation where they would want a relationship with the donor conceived individual. But that does not mean that we should limit the amount of information that donor conceived individuals can have. If, ultimately, the government was not happy with complete, open records, then at the very least the record should be open to give them as much non-identifying information as possible. At the moment, many individuals are just told they cannot have anything. I am quite familiar with a number of people who know that there is information sitting there, and they are constantly told they cannot have it.

Mr NICK LALICH: Dr Allan, how do you feel about statements by some people that the Committee has had before it that the donor conceived individual register should reside with Births, Deaths and Marriages and not with the Department of Health?

Dr ALLAN: I go back to what I was saying about how, in the future, these registers should function, and that we really need to think about who is best placed to then facilitate the functioning of these registers. If it is an information repository, then I do not know whether it is either here nor there whether it is Births, Deaths and Marriages or whether it is the Department of Health. But if it becomes more of a way to facilitate information exchange and dealing with the information and dealing with the way that a person is conceived and the possible number of family relations that that entails—because a donor can donate to up to six or 10 families, depending on where you are, which means that there is the potential for a lot of half-siblings and so forth, so that it becomes very complicated—then looking at who is best placed to manage that sort of information is really important. At this stage I would reiterate that moving the information from the Department of Health to Births, Deaths and Marriages without thinking about how this information is going to be dealt with it is probably too early to make that call.

Mr JONATHAN O'DEA: If we take more your model, which I think is suggesting that there is a need for more information facilitation and more counselling rather than just information provision, which is more akin to Births, Deaths and Marriages, who do you suggest should be paying for all this?

Dr ALLAN: How do we do it in relation to adoption?

Mr JONATHAN O'DEA: It is always a difficult question—the money one.

Dr ALLAN: I am sure it is. I do not know that I am best placed to make that call; I do not know the extent of funding required. Western Australia—I believe it is through their Department of Health—has maintained a register to facilitate contact and provide counselling, and all of that has been in place for some time. That would be funded by the Government. I suppose the money issue is a hard one too because the use of assisted reproduction and donor conception is growing, it is not limited, and we are making provision for information. Now it is mandatory in New South Wales, since 2010, that for anybody who is donor conceived this information will be recorded. What happens with them in the future? Who will pay?

I suppose you have to cost it but I do not think that I am best placed to say how we pay for it. Through the public tax system? There are other models. You can charge clinics: have them pay into a pool or perhaps have them provide counselling beyond the counselling of recipients prior to them engaging in assisted reproductive technology, so there is a possibility further counselling can be provided through clinics. I think the independence of VARTA—I am not sure of the top off my head how Victoria funds that. That is probably as far as I can comment on that question.

CHAIR: Thank you for making yourself available today to the Committee by telephone. The Committee may wish to send you some additional questions in writing, the replies to which will form part of your evidence and be made public. Would you be happy to provide a written reply to further questions?

Dr ALLAN: Most definitely.

(The witness withdrew)

PAMELA GAIBRIELLE SUTTOR, Councillor and Chair, Elder Law and Succession Committee, Law Society of New South Wales, sworn and examined:

CHAIR: Thank you for appearing today in front of the Committee. Before we proceed do you have any questions concerning the procedural information sent to you in relation to witnesses and the hearing process?

Ms SUTTOR: No, but I am grateful for this opportunity to be here and thank you for the challenging set of questions that you have asked of me that have really focused my thinking.

CHAIR: Would you like to make an opening submission before we commence with questions?

Ms SUTTOR: No, I think you have got the submission, and I think what we are really talking about here is pre-eminently the rights of the child.

CHAIR: The New South Wales Government's submission states that a sole repository of donor conception information will provide a streamlined service that would be more economical and user-friendly for individuals than two separate repositories of information. The Victorian donor registers were recently transferred to Victoria's Registry of Births. In your view what would be the advantages and disadvantages of transferring donor records to the registry?

Ms SUTTOR: I think the advantage is a sole repository. I think the Registry of Births, Deaths and Marriages is the appropriate body. I do, unfortunately, think that it has a lot of faults in it but, subject to all that, I think it is the appropriate organisation. As it already has most of this information it should be able to provide an accessible, reasonable-cost information service. The Law Society does adopt the view of the National Elder Law and Succession Committee, and I do not think it has gone on to the Attorney General's papers yet, of the concept of a national births, deaths and marriages registry so that we can find out about Australian children rather than those who were born this side of the border or that side of the border.

Privacy and access to the information of course has to be properly looked at. I do not think there are a lot of disadvantages except that I think at the moment we do have a lot of problems with getting access to information from the New South Wales Births, Deaths and Marriages registry. I think it is worse in other States.

Mr JAI ROWELL: You submitted that the register of births should include all the parents a child could have, such as a donor, but that this information does not need to appear on an official birth certificate. You note that in certain circumstances it may be possible for a child to have several parents; for instance, egg and sperm donors, surrogate mothers and legal parents. Can you elaborate on this proposal?

Ms SUTTOR: It is awfully difficult now for a child to know who its parents are, and if you are a litigator like I am you will see with family provision litigation all sorts of children who have had an association with that parent, whether it is by being part of the household as a step-child or being a child of bare paternity, as I recently had, where there was an old child maintenance order. All sorts of children can have rights against parents. I think it is an awfully difficult exercise because the registry is, above all, dependent on the information that the birth parent—usually the mother—provides to the registry.

That is where without full disclosure and without any compulsion to disclosure there are lots of distortions in the registry. In the days of stigma against children born out of marriage you got some very funny registrations, such as grandparents saying that they were the mother. I do not quite know how that worked, especially if the birth was in a hospital. So it is a problem but the more information the better for the child and of course if we had more interagency cooperation the better for the child when trying to prove its parentage.

Recently I dealt with a bare paternity. It was in Victoria but their legislation is quite the same. There was a registration by virtue of their Status of Children Act by virtue of a child maintenance order. That magistrate's court had been abolished. I had a client who was very anxious to prove his paternity and he managed to get the orders through archives, but there should be more interagency cooperation so there is more information here on this central repository to prove who children are.

Mr GUY ZANGARI: Some submissions to the inquiry have argued that including donor details on the birth register or the birth certificate of a donor-conceived child may create confusion in terms of legal parentage given that the donors are not the legal parents and have no parental rights and responsibilities. What comments do you have on the issue of legal parentage?

Ms SUTTOR: I suppose we would not be recommending it be on the actual certificate. Whether there is a notation on that certificate so that children knew to find additional information behind the certificate is something like we used to be able to recognise an adopted child because of the form of the certificate. You know, if you were experienced in dealing with births, deaths and marriages you would be able to pick up that that is an adoption and go further. But not all donors are not legal parents. I mean what about if I form a relationship with a man, it is only short term and there is a pregnancy resulting. That is what I wanted. You think you are the father; I say no, you were just the sperm donor. There are all of these very real and perhaps insoluble problems because we are dealing with human beings.

Mr NICK LALICH: Some submissions we have received have supported the recording of donors' information on birth certificates on a voluntary basis only with the consent of the donor and the child's legal parents and without legal presumption arising. What is your view?

Ms SUTTOR: I think that we should only have the conventional parents, subject to all of this statutory amendment as to who are parents, on the actual certificate with the information available from the registry on request and on sufficient cause.

Mr JAI ROWELL: You refer to the evidentiary requirements in relation to parentage for claims on a parent's estate and how they apply to children born of assisted reproductive technologies [ART] procedures. Can you clarify these provisions for us?

Ms SUTTOR: If it is an ART procedure and we have the Act and it is a donor not a child for that purpose, that child of a donor may not be the legal child for intestacy, for instance, but it could still be a child if there had been a relationship with the donor. Hard cases make hard law. That matter the other day where the male donor went off the birth certificate in favour of the two same sex mothers, that child, because of the financial dependence on the donor and perhaps membership of a household with the donor, could still have rights against the estate of a deceased donor parent in family provision legislation. So we are creating this sort of wide pool of people who are children for some purposes, are not children for other purposes.

Mr JAI ROWELL: Are you aware of any cases where that has actually occurred?

Ms SUTTOR: No, but I do not know how many donor births there are. And I did see an article in the *Good Weekend* at the weekend on three women who had had donor births and I got the impression from that that we just have a very few, but it will increase so we have got to look at these questions.

Mr NICK LALICH: The New South Wales assisted reproductive technology [ART] central register began operating in early 2010 and records all donor conceived births from that date. However, information about donor births before that date is obtained on a voluntary basis. The issue of whether donor registers should operate retrospectively was raised in several submissions to the inquiry. What is your view on the issue arising by retrospectivity of donor records?

Ms SUTTOR: I think it is pretty impractical. When you look at the problems arising from misinformation now on the register, why would anyone put their hand up and say, "Oh yes, this was a donor birth", retrospectively? Why would they traipse along to births, deaths and marriages [BDM] to retrospectively register that that child was born by a donor? And what does the donor have to say about it? I just do not think it is an awfully practical suggestion.

CHAIR: We heard earlier from a previous witness that one of the major concerns of donor conceived individuals is information, and a lot of it relates back to the 1970s and 1980s. So retrospectivity is important going forward. If we put the donor conceived person as the underlying factor of why we are trying to change or trying to get that information—and we know it is impractical and it is hard to police—there is a suggestion that it may allow people to come forward on a voluntary basis. Could that not be a good thing in regards to further information for those who are seeking information?

Ms SUTTOR: But have you not got a lot more people who do not know their parent when you have the mother not in a formal relationship and where on the birth certificate there is no record of the father, whether it has been a conventional birth or not? You know, the donor is in a bit of a different situation, but the donor at least is free from the prospect of child support claims. But I do not know why that donor would be any more willing than some of these missing fathers on birth certificates.

Mr NICK LALICH: It has been suggested that there should be a national register, and not a register kept by each State and that there should be a federal department to look after all these donor conceived children and names on birth certificates. What is your opinion?

Ms SUTTOR: I am all for national laws in this whole area of succession. We have not got it. The States sort of squibbed on uniform succession laws. We now call it harmonisation. I would like to see national births, deaths and marriages, but would not like to see the registry of donors kept independently from where the birth certificates are.

Mr NICK LALICH: That may answer Jonathan O'Dea's question of, "Where is the money coming from?" We can get the Feds to pay for it.

Mr GUY ZANGARI: Private donor conception arrangements that occur outside of assisted reproductive technology clinics cannot currently be registered. The New South Wales Government's submission suggests expanding the voluntary register that is currently managed by the Ministry of Health to include private arrangements. What is your view on recording donor details for private conception arrangements?

Ms SUTTOR: I have no real problem with it. I just wonder whether people are going to register. And how do you define a donor arrangement? I mean, if it was the test tube and whatnot, you have an identity, but there are all sorts of ways on the spectrum to conceive a child.

Mr JONATHAN O'DEA: Ms Suttor, I have a couple of questions. One picks up from that last question. Under a normal conception arrangement, if there is such a thing, is it mandatory to record a father at birth?

Ms SUTTOR: There is a presumption that, subject to so many weeks and whatnot, if the child is born within a marriage relationship, then it is a child of that marriage. Whether there is any verification of the marriage is a different question. In a lot of your old certificates, in the days before equality of status and all that sort of thing, the marriage dates are false because people wanted a marriage. So if you have a marriage relationship, yes.

Mr JONATHAN O'DEA: And if there is not a marriage relationship but the father is known, whether there is an intended pregnancy or not, is there any compulsion on the mother at birth is to record the father's name or details, or indeed is it just a practice that that has happened if the father is known? Is there, or should there be in your view, a compulsion to record that father's name? I am going somewhere later with this question.

Ms SUTTOR: Well, the father has got to consent to put his hand up because putting himself on the birth certificate is going to render him liable to not only all the joys of parenthood but also all the burdens.

Mr JONATHAN O'DEA: One would argue that he put his hand up when he put something else up.

Ms SUTTOR: This conversation does look that way, does it not?

CHAIR: What can I say?

Mr JONATHAN O'DEA: From a Law Society perspective or from your perspective, is there some rationale for making it mandatory, if indeed somebody fathers a child, that they should take some responsibility? I am not drawing that direct parallel at this stage with the donor relationship because it is quite different, but when someone fathers a child, obviously at law there are certain obligations and responsibilities that come from that. I just want to understand, before I ask my next question, whether therefore there is, or whether there should be in your view, some compulsion to record paternity in a normal sort of intercourse situation of that father of a child?

Ms SUTTOR: A DNA specialist once said to me, "Pam, there's a lot of slippage." When you do not have a formal marriage relationship, how do you prove that paternity, short of DNA testing?

Mr JONATHAN O'DEA: I understand that, but I will ask my next question, which may help you understand why I am asking the current questions. Do you think that there should be a mandatory requirement to record donor details in a private arrangement? You have already been asked whether or not that should be done possibly in a voluntary sense. I am actually going a stage further and asking should that be done in a mandatory sense. In answer to a previous question, you said that there is no real incentive. If in fact it is a mandatory requirement, then there would be more than an incentive; there would actually be an instruction, even though you may not police it and you may not fine anyone for not meeting that requirement. But the reason I was asking the earlier question is that it is difficult to argue that there should be a mandatory requirement in private arrangements for donors if that requirement is not there for fathers.

Ms SUTTOR: I do not think a mandatory requirement for private donors is practical. I mean, you have got to have people, first of all, defining what is a donor relationship. When it is done with an agency, there is no doubt as to the nature of that relationship. With the private donor relationship—who knows? And how do you prove it? I think that it is not a practical solution.

Mr JONATHAN O'DEA: And I would accept that it certainly could not be policed in all circumstances, but do you not think it would be persuasive in certain circumstances, where somebody who is responsible—and many donors are very responsible upstanding members of the community.

Ms SUTTOR: Yes.

Mr JONATHAN O'DEA: If they know that that is the legal position, a lot of people would adhere to that. Would that not be a good thing?

Ms SUTTOR: I think it is always good for a child to know about its genetic make-up. I think by nominating that father, at least that child—and I will talk about my Victorian one the other day. He had had a serious accident and some brain injury, and part of his winning a case against his deceased father was to establish that, yes, he is part of that family, and what is their genetic make-up? But whether we can do it is something else.

CHAIR: As there are no other questions, Ms Suttor, thank you for appearing before the Committee today. We thank you for your time. The Committee may wish to send you some further questions in writing, which will form part of your evidence and be made available to the public. Are you comfortable with that?

Ms SUTTOR: Yes.

CHAIR: Thank you very much.

Ms SUTTOR: Thank you.

(The witness withdrew)

DANIEL STUBBS, Director, Inner City Legal Centre, and

AMY McGOWAN, Solicitor, Inner City Legal Centre, affirmed and examined:

CHAIR: Thank you for appearing before the Law and Safety Committee today to give evidence. Before we proceed, do you have any questions concerning the procedural information sent to you as witnesses and the hearing process?

Ms McGOWAN: No.

Mr STUBBS: No, no questions.

CHAIR: In what capacity are you appearing before the Committee?

Mr STUBBS: I appear in my capacity as Director of the Inner City Legal Centre.

Ms McGOWAN: I appear in my capacity as a solicitor at the Inner City Legal Centre.

CHAIR: Would you like to make an opening statement prior to the commencement of questions?

Mr STUBBS: Yes, we would like to summarise some of the key issues we see. Briefly, by way of background, the Inner City Legal Centre is a community legal centre based in Kings Cross. We provide legal services to people in the city and northern beaches areas. We also have a specialist service for anyone who is lesbian, gay, bisexual, transgender or intersex in New South Wales. We do that specialist area of law and a generalist area of law for people in the city area. As part of that we see a lot of people on family law related issues in both same sex matters and opposite sex matters. Our position generally is that we support the status quo of where birth certificate law stands at the moment, just to be clear about that. We feel that the current birth certificate arrangements put an appropriate value on the position of parentage. The issues that are being inquired into, the idea of adding donors on to the birth certificate, actually inflates and conflates the donor's role in any birth certificate. We feel there is a lot of the debate around this issue and certainly a number of the submissions have confused definitional issues and legal definitions of particular aspects of the law in this area.

We are going to just cover off on what are currently the definitions of some of the key areas of law, the definition of birth certificate, parents and donor. We will talk briefly about the ART central register. We will just talk briefly about some of the legal risks that we see if donors are put on birth certificates. We will look at a couple of brief case studies that have come up in our experience in our legal practice. We will have a couple of comments on some other submissions and respond to your questions that we received on Friday. The birth certificate is an administrative law document with particulars of an individual's parentage and about when they were born and that kind of thing. It is a record of parentage. It is not a medical document. So quite frequently people are noted on the birth certificate who are parents but not necessarily have a sort of donor role in that process.

Anything else is medical and we want to be clear about that. At the point of making a donation of genetic material, that is a medical issue. It is a document of identification, which we will come back to a bit later. It is a high-value proof of identification. It is not anything that reflects someone's cultural background. It almost always does not have someone's whole family—for example, if you have younger siblings, they are not on your birth certificate, but if you have older siblings who were born before you, they are usually named on your birth certificate. It is not your whole family; it is more of a snapshot of what the situation is at time of birth, usually. I will get Amy to talk about the definition of parents.

Ms McGOWAN: As you probably are aware, the Family Law Act provides at sections 60H, HA and HB an exhaustive definition as to who is deemed a parent. It is really important that parents are easily identifiable as legal parentage gives rise to a set of responsibilities that are child focussed. Parents require this legal status to raise children and to act in their interests through the exercise of parental responsibility. If a child's parents were not recognised, the child would have reduced rights and protections compared to other children in the community.

Legal parentage is important in lots of areas including: deciding on medical treatment, appointing guardians, bringing about legal proceedings on behalf of the child, making decisions about school, employment, being a party to child protection hearings, being present if a child is questioned by police and it has significant repercussions for succession. Furthermore, we note that it is established law to issue a new birth certificate in situations like adoption or surrogacy. We note this because it is further evidence that parents listed on a birth certificate do not always have a genetic connection to the child. We are going to talk briefly about donors.

Mr STUBBS: We have heard a lot about donors and people talk about "donor dads" and "biological" parents, but these terms have no basis in law. There are parents and we do not talk about biological parents. We have just mentioned what parents are. Someone can be a dad, and that is fine, and someone can be a donor and that is fine too: They are distinctly different roles. There is a myth of the biological parent and the donor dad, I think. If a donor wants to have a role in the child's life there are quite well-established processes that work very well for a donor to have a role in that child's life. Section 65 of the Family Law Act allows for a person with a significant interest in the child's welfare to have access to that child. This is done with the best interests of the child in mind.

Most of our submission comes down to thinking about the best interests of the child. The experience of the Family Court is that when a donor makes an application to have a role in the child's life it is always successful. It is not like there is a great barrier; there is a myth that donors have been shut out of everything. It is not true. Effectively, parents have responsibilities to a child and donors do not. If the donor chooses to have responsibilities then there is a process in place for that to occur. A donor who has been put on the birth certificate would create fear in parents that sometime in the future—in the next 16 or 18 years—a donor could come forward and make a claim on that child's life. In 10 years time a donor might say, "I never had kids. I want to have a role in a child's life." That is potentially going to be in the back of the mind of a parent on the birth certificate. Donors give genetic material. Once the genetic material has been used to fertilise an egg medically a child is conceived, but otherwise that genetic material is useless stuff. It is genetic material. Let us not build this into something that is way more important than it is. It is genetic material that gets wasted every day.

Ms McGOWAN: Just briefly, the central register. As you would be aware, donor details have been included on the artificial reproductive technology [ART] central register, administered by NSW Health, under the New South Wales Assisted Reproduction Technology Act and the associated regulations since January 2010. We support this system as it assists to cement the demarcation between a birth certificate—a document used publicly to describe legal parentage—and medical information relating to genetics. We further acknowledge that protocols have been developed by NSW Health to assist parents of donor-conceived persons to contact the donor if the circumstances warrant it and to exchange information between the donor and donor conceived persons.

Mr STUBBS: Privacy is one of the legal issues we come up against here. The child will be using this document in all sorts of circumstances from a young age, for example, when they start school, and their privacy about how they were conceived is important. To have how they were conceived, as in by a donor, on their birth certificate is a breach of their privacy. The birth certificate is a public document. You have to show it to a lot of people because it has high value, it is 70 points in the process of opening bank accounts and other processes in interacting in normal life.

CHAIR: If there was an annotation on the front page of the birth certificate that referred you on to further information or an addendum or second page, would that be a problem?

Mr STUBBS: It depends on whether it was still seen as part of the birth certificate. I guess it may get over some of the aspects of privacy, but the other aspect of privacy is that there are privacy aspects for the donor as well. I know you are talking about with the consent of the donor the donor's details go onto the birth certificate, but we need to be concerned about the privacy of the donor. Currently that information is held by the ART, which is a rigorous and robust database. There are other privacy issues as well. There is also the privacy of the parents to consider.

Ms McGOWAN: I briefly wanted to talk about the presumption of parentage in the Family Law Act. Someone who is named on the birth certificate has a presumption of parentage and it is quite a tricky process to undo that. The presumption has broad legal ramifications including liability for child support and Centrelink entitlements. One of the big issues that is a little hard to talk about specifically is the implication of changing the system to include donor details on the birth certificate which will have an impact on the established law but more problematically it will confuse the policies and procedures of many government departments.

We have recently given advice on this. I thought I would give you a case study about one of the clients that has come into the inner city legal centre. May is a single lesbian woman who has conceived using artificial conception procedures with a known donor. She did not use a clinic and she conceived her child via self-administered artificial conception procedures. May attended a Centrelink office when she was 25 weeks pregnant to inform them that she will need assistance when her child is born. She was informed by Centrelink staff that she will need to take a maintenance action against the donor. May tried to explain on numerous occasions to Centrelink staff that she is a single woman but her donor is not a parent. She came to ask for advice. We looked into it and first of all the law clearly states that she is not required to take reasonable maintenance action as her child was conceived via artificial conception. However, when we look into the Government's policy document, the Family Assistance Guide, the guide distinguishes between medically and self-administered artificial conception procedures. The guide states:

> If an individual claims that a child was conceived via a self-administered artificial conception procedure it is unlikely that an individual has third-party verification of the procedure. If the mother did not have a partner at the time when the child was conceived it is unclear whether there is another parent of the child and if there is who a parent is.

It highlights the repercussions of adding to the birth certificate and the difficulties it could create.

CHAIR: We did supply you with a number of questions. I will have some of the members of the Committee ask those questions. Your opening statement has answered many of those questions. We will hone in on which parts of your statement refer to particular questions. You submitted that it is important to maintain the current distinction between parents and donors to uphold legal clarity in a confusing area of law. You note that naming a person on a birth certificate could have legal ramifications, and you have touched on that already, including liability for child support and Centrelink entitlements. Do you have any other comments on the potential legal issues that may be raised by a change in the current system to record donor details on the birth certificate?

Mr STUBBS: The other main issue is privacy of all the parties involved—naming donors risks their privacy. The child is the first concern but also the parents and the donor.

Ms McGOWAN: Also, the effects on policies and procedures of many government departments are a little hard to assess. There will certainly be a flow-on effect.

Mr GUY ZANGARI: Some submissions that we have received have supported the recording of donor information on birth certificates on a voluntary basis, only with the consent of the donor and the child's legal parents, and without any legal presumptions arising. This would allow for the symbolic recognition of biological parentage, without affecting legal parentage. What is your view of this proposal?

Mr STUBBS: I think it is confusing. It confuses the parents as to the role of the birth certificate. We have this very clear process where there is a good database, the assisted reproductive technology central register, which has a robust process. One of your questions goes to the issue of the birth certificate holding this information instead of the assisted reproductive technology central register. These processes are already well set up. Health has a really rigorous process of checking this, and with Health the register is clearly well maintained. Putting this information on a birth certificate, and collecting this information at the time of birth—which is when birth certificate information is collected—has problems.

I do not know whether any of you have read your birth certificates recently, but it is unusual to be in a room of say eight to 10 people and not find someone who has a mistake on his or her birth certificate. So it is not always the most rigorous way of collecting data; after the child has been born, dad goes off and fills in the form at Births, Deaths and Marriages. I know people whose names have been spelt completely wrongly, whether the first name, middle name or last name, or even the wrong gender is noted on the birth certificate. I think there are a number of problems with putting this sort of information on a birth certificate.

CHAIR: Maybe we are looking at using the birth certificate as a way of flagging to a donor conceived individual that there is further information. Without that being flagged on the birth certificate, how can that further information be flagged at another registry, be it at the Ministry of Health? We are looking at a process that tries to flag that. We have heard from those who specialise in the field, psychologists and doctors, that that is important for the children. You commented earlier that at the heart of all of this are the best interests of the child. There must be a way forward in flagging that information for the child. At this stage, we are looking at the birth certificate and the registry of births. Do you have any further comment on that?

Ms McGOWAN: Firstly, on the question of voluntarily putting details on birth certificates, it is important to realise that we are creating a new legal entity; we are creating, in law, the notion of the biological parent, as opposed to a parent, a person concerned with the welfare and development of the child, or a donor. That is a really significant step, and I wanted to note that. When it comes to children looking for information about their genetic parentage, I acknowledge that that is important, and that in the past there have not been polices that ensure that people have access to that information. Our submission, in short, is that a birth certificate is perhaps not the best place to look for that medical information, simply because that is a public document, and it should remain so. There needs to be a process, I agree, but I would think that process should be the central register.

Mr JONATHAN O'DEA: I am trying to understand how that would work. How does the child know to look in the central register if there is not at least an asterisk to put them on notice to look somewhere else?

Ms McGOWAN: We can take that on notice and talk about a process that might be fair. But I would not want my document of identity to contain an asterisk about my medical information. I would think there needs to be a process based around the central register and how children can have access to this information, if it is seen that that needs to happen. I do not think a birth certificate, a document about identity, is the place to look for information about medical particulars.

CHAIR: What about in a second folio or on a second page, so that it is not front and centre on the birth certificate as such but still contained in that package of information?

Ms McGOWAN: I see the point. Again, I wonder whether that is the right way to go, simply because it changes what a birth certificate is. What else would we attach to it? It is quite a convenient way to do it by melding those processes, but we are melding health information and identification information in one document, whereas perhaps a better process would be to keep them separate.

Mr JONATHAN O'DEA: I may not have been clear enough. The suggestion in the Chair's question is not to put any medical or health information on the birth certificate, but rather to notate on the birth certificate, in a very simple way, something that alerts the donor conceived individual that a central register, or some other register, might have further information that might be relevant. It is not actually putting any of that information on the birth certificate, but, in the best interests of the donor conceived individual, making them aware that there is some further information to be gained. The reality is that, without that information, or without a compulsion of the register to contact that person at a certain age—which is what you suggest might be an alternative—the vast majority of people would not proactively go to that central register to look for that information. I would like your comment more specifically on the concept of not having any medical or health information on the birth certificate, but, rather, a suggestion that the donor conceived individual might want to look somewhere else.

Ms McGOWAN: If I could clarify our language. We keep referring to "medical information" because we see genetic origins as a health issue. The reason that people would want to find out about their donor would be that they want to find out about their genetics, their body, their medical information. I understand what you are saying when you say it is not going to be front and centre on the birth certificate, that it might just be a little bit of information in a footnote, but it is still using the birth certificate in a completely different way. I wonder whether it would be better to keep these processes separate.

CHAIR: Could there not be an argument that the birth certificate originally was an administrative law document which over time has become a document of primary identification? If we look at the document's original stated purpose, you could add more information on the birth certificate if it was used not as a primary document. I think what has happened over time is that has become a primary document, but that was not the purpose of a birth certificate.

Mr STUBBS: Its use for identification has been a logical extension of the birth certificate as a tool of administrative law; it helps one interact with a whole lot of legal systems, whether that be getting a drivers licence, opening a bank account, or obtaining Centrelink access. So it is a logical progression of the use of that document. To then put medical information onto it, almost because of the development of the document as a public document, does risk its use. If there was nothing mentioned on the birth certificate, but for some people a second page saying, "For further information about your medical information, you should go here," I guess that is possible. We would need to take that on notice and maybe come back to you.

CHAIR: You continue to refer to "medical information"; I refer to it as cultural and heritage information. I think that is where we differ at this stage. I do not see it solely as a health issue. I see it as an important part of someone framing who they are as an adult.

Mr NICK LALICH: I think you have partly answered this question. The Law Society of New South Wales submitted that the register of births should include all the parents a child could have, such as donors, but that this information not appear on an official birth certificate. The Law Society notes that in certain circumstances it may be possible for a child to have several parents—for instance, egg and sperm donors, surrogate mother, legal parents. What is your view on the argument that donor details should appear on the birth register but not on the birth certificate? Would there be any legal issues or barriers to this proposal?

Mr STUBBS: I do not think any legal barriers per se. As I said, the departments of health are expert in keeping good, accurate, confidential records and they have good processes about how you get access to that, and it is quite important to have those processes to make sure that people's confidentiality is not breached, whereas Births, Deaths and Marriages have a fairly high level of discretion as to how they give out information and who they give it to, which is fine because of the level of information they hold. We would see quite significant administrative changes within those departments to provide for that and given that that data is already held how it is, and today it is working okay; 15 years ago it was not.

Things have developed a long way in the last 10 years in terms of the central register and there can be improvements to those processes to enable people to know these things better. I guess that is what we are quibbling over: how people are notified as to that. So I can see what the Law Society is saying; I can see there is some merit, but I am not quite sure what the benefit is, given that all this information is already held in a high quality database with the Department of Health and managed accordingly.

Mr JAI ROWELL: The New South Wales ART central register began operating in early 2010 and records all donor-conceived births from that date. However, information about donor births before that date is obtained on a voluntary basis. The issue of whether donor registers should operate retrospectively was raised in several submissions to the inquiry and we have heard a lot of views about that during this inquiry, what is your view on the issues raised by retrospectivity of donor records?

Mr STUBBS: I think that has got merit. I think it might answer a lot of the concerns that people have. People are raising issues that are not necessarily birth certificate issues and that could be resolved by these sorts of additions to that area of law. So yes, I think that has got merit.

Ms McGOWAN: I can understand that there would be concerns, especially—I guess it is almost contract law—whether the donor had consented or whether they would have given their donation had they known that they would be on a central register. However, all of our views are informed by the best interests of the child, and having access to that information is very important and likely trumps those other concerns.

Mr NICK LALICH: Private donor conception arrangements which occur outside of an ART clinic cannot currently be registered. The New South Wales Government's submission suggests expanding the voluntary register currently managed by the Ministry of Health to include private arrangements. What is your view on recording donor details for private conception arrangements?

Mr STUBBS: We think it is a good idea. I think it would solve many of the issues that have been raised in submissions.

Mr NICK LALICH: I know you are arguing about keeping the health register and Births, Deaths and Marriages separate but do you feel it would be of any benefit to have the Federal Government keeping a central register as a national register or do you think the individual States is the way to go?

Mr STUBBS: I think there is benefit in at least consistency across the States. We would need to think about the different kinds of methods and protections available. I could not give you a view at this stage. I know Births, Deaths and Marriages is working with other States and there are processes in place—COAG type processes—to gradually move to consistency across borders, and I think that is important, and maybe even agreements whereby requests can be made across borders. I think that is sort of a key issue. It would require quite a big change because of the nature of the Federal system. This area of law is covered at a State level, so as a minimum we would need to try and get consistency across the States.

Mr JONATHAN O'DEA: I have got two questions, and the first relates to an earlier question from Mr Lalich. Mr Stubbs, you said that you would support expanding the register currently managed by the Ministry of Health to include private arrangements, at least on a voluntary basis. What would your view be if there was more than a voluntary and more of a compulsion—albeit one that could not be policed effectively—but an obligation or a requirement even in private arrangements that people provide their, if nothing else, non-identifiable information to that central register?

Mr STUBBS: It is an interesting proposition when we think about the rights of the child in all this. I am not sure if I can give an answer to that right now. I can see both sides of an argument here. I think there is an argument to not compel people but I can see for the benefit of the child in future to have access to that information could or would be important. I think I would prefer to take that on notice.

Mr JONATHAN O'DEA: If you could take it on notice that would be great. Like other people who have given evidence before this Committee you have emphasised the best interests of the child as being the predominant factor, and I am aware that the Parliament as a whole and various members of the Parliament are consistent with that thinking that that should be a very important factor. Are you aware of any legislative basis for giving the best interests of the child some dominant position over the interests of other parties?

Mr STUBBS: The two that come to mind are the UN Convention on the Rights of the Child, which Australia is a signatory to, and the other one that comes to mind is the Family Law Act, which is a Federal piece of legislation. I cannot think of anything off the top of my head at a State level, but they are two pretty good pieces of primary legislation.

CHAIR: Have you got anything else you would like to add that we have not covered in the questions today?

Mr STUBBS: It is interesting that everyone comes here saying we are concerned about the kids and then gives a completely different perspective. So I appreciate it is not easy for the Committee. I was concerned to note the Archdiocese of Sydney with that in mind then talk about the things that are a very small part of this discussion but an emotive part where you have got lesbian mums—and obviously there is going to be a donor involved—and them wanting to comment on the fact that this is like a lesbian wanting to be a father and all this kind of thing, really undermining the ability for same-sex parents to be parents—that is already in law; we have already accepted that same-sex couples can be parents. I am concerned about that undermining, and also the lack of recognition of the diversities of family structures that exist in Australia these days, that we do have a wide range of situations that are no longer just a man and a woman who biologically conceive a child and they are the parents of that child.

CHAIR: They are not questions that this Committee is looking at, nor are they within the Committee's terms of reference. We are looking at the way we record donor details. I understand that part of the concerns from Inner City Legal Centre is in regard to the parentage and the broad legal ramifications of that. It was worthy to note that you did mention that there are no such things as donor dads or donor parents—they are parents. We have got that message this morning quite clearly, and your submission goes on to a number of case studies. Unless there is anything further, I thank you for appearing in front of the Committee today. The Committee may wish to send you some further questions in writing, the replies to which will form part of your evidence and be made available to the public. Are you comfortable with that?

Ms McGOWAN: Yes.

Mr STUBBS: No problem; that would be our pleasure.

(The witnesses withdrew)

(Short adjournment)

JENNI MILLBANK, Professor, Faculty of Law, University of Technology, Sydney, before the Committee by teleconference, affirmed and examined:

CHAIR: Good afternoon, Professor Millbank. I welcome you and thank you for making yourself available to assist the Law and Safety Committee. The hearing is being transcribed, so if the Hansard reporter has any difficulty in hearing certain things, we may need to ask you to repeat what you have said so that the transcript is accurate.

Professor MILLBANK: That is fine.

CHAIR: Before we proceed, do you have any questions concerning the procedural information we sent you in relation to witnesses and the hearing process?

Professor MILLBANK: No, that is all very clear, thank you.

CHAIR: In what capacity do you appear before the Committee?

Professor MILLBANK: I am expressing a view related to my professional research.

CHAIR: Would you like to make an opening statement, or would you like us to just go to questions?

Professor MILLBANK: I will make a very brief opening statement. You have my written submission and that details my views quite clearly. I would like to say at the outset that I think that issues of donor disclosure registers and how they operate, what information they record, and how they release that information and to whom are really complex issues that we are only just grappling with. It is an issue that I have been researching in more detail in recent years. I have to say that I think the Australian regime, such as we have—in Western Australia, Victoria and more recently in New South Wales—does have very serious issues of inconsistency between those States in terms of what they record and how they release it.

I think it is clear from a small body of developing research on the needs of donor families that not all of their needs are being met by the current registers. I do think there is a need for further research in this field and for more responsive and more reflective legal regulation in crafting donor disclosure regimes and central registers. I am not convinced that departments such as Births, Deaths and Marriages are the right places to do that and I am concerned about reform processes that are, I guess, ad hoc or on the run responding to particular cases or pressure from one or two individuals or groups without having a sense of the broader landscape. I think that there are certainly productive reforms that can be made, but I am not sure that I think this is the right forum to do that in.

CHAIR: That leads us into the first question. You have spoken about the different States having different processes. The Victorian donor registers were recently transferred to Victoria's Registry of Births. In your view, what would be the advantages and disadvantages of transferring donor records to the New South Wales Registry of Births?

Professor MILLBANK: I have to say I think it is a bad move for Victoria. One of the reasons that it is a bad move is that they have lost the kind of facilitative function that the Infertility Treatment Authority [ITA] previously performed. They helped to match people who were not on the register. They did DNA testing for people. They assisted people through the provision of counselling and through the provision of information about the process. There were lots of reasons why the Infertility Treatment Authority needed reform. They were both the regulator and performed a facilitative function at the same time, which was kind of an awkward thing for them, but I think it was a negative move to take their central register and hand it over to the Registry of Births.

I do not think that by and large this is information that should be recorded on people's birth certificates. Certainly the proposal to do just that in Britain, when they reformed their Human Fertilisation and Embryology Authority (HFEA) Act in 2008, was rejected not just because it was seen to be the wrong place to have that information, but because the idea that you would record on the birth certificates, as Victoria is now doing—putting a special marker on the birth certificates of everyone who is donor conceived—is treating them inequitably. It has been used to kind of hang over the heads of parents to compel them to tell their children that they are donor conceived, maybe before they are ready, and it was a breach of privacy of both the parents and the child to have that information there, if that is not what they would have chosen.

There are a number of issues there in terms of both the control and management of that information, the kind of information that they are used to collecting, how they go about releasing it in terms of their counselling and support functions, and the privacy issues as well. For a multitude of reasons, I would say that is not something that we should consider. I would add to that this was a move that Victoria took after having their register in place for a number of years. I would think it would make even less sense for New South Wales, having very recently put our register in place, to not give it time to see how that register is working and undertake a proper review of that register—to just jump horses only two years in. I do not think it makes sense.

Mr JAI ROWELL: You state that the current assisted reproductive technology [ART] register, as held by the Ministry of Health, is appropriate as it maintains a clear distinction between genetic and legal parentage. You also note that the Births, Deaths and Marriages Register operates in order to record legal parentage, and there is no reason for this to change. Do you have any further comments on the issue of legal parentage?

Professor MILLBANK: Yes, I do. Again, the case that triggered this inquiry is clearly an emotive one, but I do think that our system of legal parentage is a good one. I think it is the right one, and I think that it is working. I think that it makes sense in legal and policy terms to centre legal parentage with women who give birth to children and, in the case of assisted conception, their consenting partner whether or not they are the provider of the other gamete that creates the child. That system works well to support and protect the family that is going to live with that child and raise them and be the primary caregivers of that child. It does not work for families in surrogacy. We have recently put in place a transfer process to cope with the very different needs of surrogacy families.

For most people, whether they use known donors or unknown donors, if you take a gamete outside your body, if you go to an IVF clinic and have an egg removed, if you have an embryo in storage that you hand over, or if you take sperm out of your body and hand it to someone in a cup, jar or syringe, you have to think that that is going to make a difference to your legal position. As a bright-line presumption it is both a logical one and an intuitive one; people will understand that this is going to have some impact on whether or not you are a legal parent.

If you want to be the legal parent of a child and you do not want to have sexual intercourse with the child's other parent, for example, lesbians having children with known donors who are gay men, and sexual conception is not an option, there are other ways in which you can have that relationship recognised. If more than anything you want to be a legal parent you have the option of marrying the other parent, so you can undergo assisted conception and legally marry the other parent and be a parent to the child even though sex was not the method of conception. Or you can go to the Family Court and seek parental responsibility orders which, while they are not full legal parentage, give you the right to make important decisions about a child and have parental responsibility. There are a range of other options.

When I am talking to people outside the field of family law they tend to think of legal parentage as a be-all and end-all—that you are a parent or you are nothing. That is not the way the Australian system operates. We have legal parentage as a bright-line starting point for who has responsibility over a child but then we have a range of other mechanisms to allow the voices of other people to be heard and to recognise a range of other significant relationships in a child's life if that is the case. I think the system we have in place is a logical one and it works well and I would be very reluctant to see it modified.

Mr GUY ZANGARI: You support the voluntary recording of donor information on the births register with the consent of both the donor and the legal parents and without any legal presumptions arising. You state that this would enable symbolic recognition of genetic parents without affecting legal parentage. Can you elaborate on this suggestion? For example, how do you envisage it would operate in relation to the existing births register?

Professor MILLBANK: You mean if people wanted to amend the register?

Mr GUY ZANGARI: Yes.

Professor MILLBANK: That is quite an interesting question. I suppose you would have to have the consent of all parties concerned to do that and, if not, you could also put in place some kind of dispute resolution system to deal with that. Given that my proposal would be that it is consent-based, I am not sure there should be the imposition of that as an outcome. You could still put in place a mediation step or genuine-effort step to make sure that people who were not in agreement at least gave it some thought and talked to each other about it. In that case you could potentially have two records, an old record and a new record, and there would have to be some way of reconciling those records.

Mr NICK LALICH: Some submissions have discussed the current lack of counselling facilities to assist parties who are seeking donor information. Do you have any comments on that issue?

Professor MILLBANK: I do. That is something we should be thinking about in terms of reforming the system we have. The central register held by Health does not provide this kind of counselling and assistance function. Clinics themselves usually provide those functions but some people have gone through clinics that have closed down or that have changed hands and have different personnel, so people are not always able to go back and access those services. It is very clear that people's experience of relatedness in assisted conception is very diverse and varied. For some people that information is not particularly significant; for others it has a huge level of significance. Our system is set up so that young adults can access information about their donors and limited information about genetic half-siblings. We do not have a system that takes into account the wide range of people's curiosity about non-identifying information or the ability or interest that some people have in making contact when they are still children. Indeed, developing research suggests that for a lot of families their interest in the other donor offspring is much greater and more pressing to them than an interest in the donor himself.

We really have not thought about how to deal with those kinds of lateral relationships. Some clinics are facilitating that contact on a voluntary basis. Community groups are setting up their own websites and making those links on a completely unregulated and kind of rogue basis. It is clear we need to have some way of responding to those needs and interests to accommodate that broader range of interests and to do so in a way that involves oversight and the provision of counselling services so that people can consider their decisions. People are logging onto a website and saying, "Oh, how amazing, there are all these other families who have the same donor as my kids. Let's all get together." They might not have thought through the consequences of that decision both for themselves and for their children. I think the provision of counselling services across the range of those decisions is really important so that people have some sense of the ramifications.

Mr JAI ROWELL: Private donor conception arrangements that occur outside ART clinics cannot currently be registered. The New South Wales Government submission suggests expanding the voluntary register that is currently managed by the Ministry of Health to include private arrangements. What is your view on recording donor details for private arrangements?

Professor MILLBANK: I strongly support it as long as it is a genuinely voluntary system. I think that if people want to do that, that is great, particularly if that then gives access to an expanded regime that has counselling and support services attached. That would be a really welcome development. I would hate to see any kind of legal duty on people to register that information if that is not what they intended to do. At present those obligations apply to licensed ART practitioners rather than to the participants themselves and I do not think there should be an extension of that obligation to participants themselves. It should be something that is there for people to access if they think it is a useful thing to do.

The other thing I would say about the voluntary register, and that has become clear with the number of voluntary registers in Victoria and elsewhere, is that at present we have what is called a passive register. If the donors and the offspring sign on, the match is made and there can be exchange of identifying information and potentially contact between the parties. The registers do not contact someone to say, "The other party has volunteered to be part of the register; would you like to do the same?" Indeed, there has been litigation in Victoria where a woman who was donor-conceived asked the register to send her donor a letter asking if he wanted to sign on and the register would not do that. In fact, they were not able to do that because of the terms of the legislation. It is worth thinking about and it has come up in our consultations with people that they would like to see voluntary registers have some proactive dimension.

I am sure your next question will be about retrospective disclosure. I absolutely do not support retrospective disclosure. This is not retrospective disclosure; this is the register or a third party saying to someone, as an invitation, "Would you like to be part of the register? There is someone who wants to make contact with you." A lot of people are not going to turn their minds to this; they are not going to join a voluntary register or a retrospective register because that was something that happened a long time ago in their lives. If they know there is someone on the register waiting to make contact, that is a very different position. I think that we have such incoherent, not even diverse, practices across the various States and clinics in the efforts they will make to initiate that kind of voluntary contact. It is something that we absolutely have to think about in the future.

CHAIR: You have answered the question on retrospectivity, but you said also in the Victorian example that the registrar could have just written to those donors asking if they wanted to go on the register voluntarily. If we were to have some retrospective process, would that not also help getting that voluntary information?

Professor MILLBANK: My concern with the retrospective process is that it would not be a consensual one. Even in the construct of the voluntary register, that involves the Minister for Health asking for identifying information on donors to be transferred from clinics to the register and not releasing that without their consent. But the simple process of collecting that information on a central register when that is not what the donors had consented to 18, 20 or 30 years ago is a very big concern with privacy for those individuals. It is very different for a donor these days who turns up and they get counselling and get told, "This is what you're signing on for and this is what it means and you have to fast forward in your mind 20 years and think about how this is going to impact on you." It is very different for those who were university students donating in an atmosphere of anonymity where everybody thought anonymity was a great idea.

It is very different to turn around to them now and say, "Oh, actually we have just forwarded your blood type, your height and your address to a central register." That is a really different proposition and it is a vastly intrusive proposition to then say, "And furthermore, we're going to release that information to your offspring so they can make contact with you." We are in an environment where we are much, much more concerned about children's needs and the needs of donor offspring, and I think that is right. The era of anonymity has been shown to be a very destructive one for many of the donor offspring who have grown up without that information and without any way of finding that out. But in current and future regimes we still have to balance the interests of children against or with the interests of the parents, who want to have them and without whom they are not going to exist, and the interests of donors. If donors have no assurance that anything they sign, any consent they enter into, has any meaning in the future, I do not see how we will ever manage to recruit donors.

CHAIR: Would you think the same for non-identifying information?

Professor MILLBANK: Less so. Non-identifying information, by its very nature, should not be something that is as intrusive. However, with our consultations we came across the situation where a particularly resourceful recipient had pieced together various pieces of so-called non-identifying information and had in fact identified a donor through it. I would be very careful about that.

CHAIR: Does that not also highlight that those donor-conceived individuals are seeking further information and should they not have some rights to that information?

Professor MILLBANK: In fact, the example I mentioned was of a parent rather than a donor-conceived individual. Yes, for some of the young adults now, and even older adults who have no way of accessing that information, that is very painful and I do not want to gloss over that. That is a very real experience and it reflects the decisions of the time that were just wrong. But I do not think that an appropriate cure to that harm is to retrospectively identify people who donated in good faith under a different regime. We can do everything possible now to make sure that we do not have donor anonymity and to support families to make sure that they do disclose the circumstances of conception to their children. We also need to do more to think about how to track donors in an age where someone's last-known postal address is not particularly useful. There are all kinds of things we can do to make sure that that information is readily available to people prospectively. It would be quite a damaging thing to do retrospectively, not least of all because people who you identify may well be angry and feel invaded by having that information disclosed. That is not necessarily going to be a positive encounter for the parties concerned either.

Mr JONATHAN O'DEA: I understand your comments about retrospective application of laws, particularly where that might be used to identify somebody. However, if in a prospective situation a donor is told—I am going beyond a mere voluntary register—that there is a legal duty in the interests of the donor-conceived individual that health information be kept and that that legal duty should extend to private arrangements, and being mindful that it would be difficult to police or enforce—many people who donate are responsible citizens and would understand the health and medical benefits from disclosure, particularly of non-identifiable information—why are you of the view that there should not be a compulsion or legal duty on such people to be included in that register?

Professor MILLBANK: I guess because there are a range of reasons why people might choose to conceive outside of the clinic system. I would be reluctant to see that system treating people as if they were part of it actually. If you have made a private arrangement with someone, you have negotiated the extent of information that you choose to share in the same way as if you have sex with them. You have chosen that person and taken them as they come. I do not think that the formal regime should include people who are acting in their private lives, I guess, rather than within a regulated system of assisted conception. There are very different issues that generally arise in those settings. People who have unknown donors are largely within the clinical system and people who have known donors are largely outside of it. That is true of sperm anyway.

People who have egg donors usually have to go through the clinic system to use IVF. People with egg donors are much more likely to know who their donor is rather than use an unknown donor. With sperm you have a much more clear division between unknown donors within the clinic system and known individuals outside of the clinic system. I do not see the need for official records of that when people actually know each other to start with. I would be concerned about extending a reach of State regulation to behaviours that should otherwise be regarded as private. Just because you have taken sperm outside of your body and inseminated in an informal home setting does not necessarily mean that the State should have a greater degree of scrutiny and control over your relationship than if you just have sex.

Mr JONATHAN O'DEA: I understand and certainly my observation is that you are taking more of an advocacy role, understandably, for the donor or the parent rather than the donor-conceived individual, which other witnesses have focussed more on children's rights and responsibilities.

Professor MILLBANK: Let me continue then to say this. Let us suppose you have parents who had sex with each other but did not know each other particularly well. As the offspring of that sexual union, you might not have access to all kinds of health information from your father. He is your legal father but that does not change the fact that there are all kinds of health information to which you do not have access. I do not think we should treat people in informal donor conception arrangements differently because they have taken sperm outside of their body and undergone an informal assisted conception procedure.

I guess my concern is about the equitable treatment of children as well as their parents, and that any kind of State intrusion in reproductive endeavours has to be well justified. My concern would be, for instance, if we say we are going to have a central register and we are going to include everybody in that who has had an informal home conception process that is not sex. What do we do where we record Billy and Bob who have undergone lots and lots of home conception processes with lots of women because they have gone on a website and they have been very popular and they have had 10 or 15 children? They are entitled to do that because they are not within the clinic system so they are not covered by the five-woman limit in New South Wales law but since that is on the register you have to say that people will start saying, "Well, maybe we should limit it. Maybe it should be five." Yet if Billy and Bob were popular fellows down at the pub they are completely entitled to have 10 or 15 children with 10 or 15 different women. No-one is stopping them.

My concern is that if you apply the register to people in formal circumstances you are treating similarly situated families very differently. The issue with access to information, with consanguinity and all those things is that they will not arise as long as you know who your genetic parents are and you have that information from an early age. That does not necessarily have to be in a formal register if your parents have that information themselves and they make that information available to you as an offspring.

Mr JONATHAN O'DEA: In relation to counselling facilities, which you identified as perhaps inadequate at the moment—certainly in the Victorian setting it is not as good as it used to be—based on experience in other jurisdictions or just your view in New South Wales how do you suggest that they should be funded? How was the Infertility Treatment Authority funded before it was disbanded?

Professor MILLBANK: I do not know about what quantity of funding it had. That is a very interesting question and one to which I do not have the answer. It would be very interesting to compare the funding models for the Reproductive Technology Council in Western Australia with what was the Infertility Treatment Authority, Victoria, and which is now the Victorian Assisted Reproductive Treatment Authority [VARTA]. VARTA has vastly reduced functions and a much smaller personnel. Comparing its role to the role that is now being performed by the Ministry of Health in New South Wales I suspect that it did not receive any additional funding or staff to do this and it has simply been plonked in amongst its other functions.

I think it is very worthwhile considering making a separate quasi or semi-independent entity to deal with these functions and to fund it accordingly. Take into account that around about 3 per cent of live births in Australia in 2009 were IVF or assisted conception births through the clinic system and then probably more outside the clinic system. That is quite a lot of kids and families and I think it is right to be thinking about putting in place support systems and services for them. It is all too easy to say, "We should ban this and ban that." It is much harder to think about what those families need and to provide facilitative regulation to help.

Mr NICK LALICH: Earlier you indicated that you thought the holding register was held solely by the Registry of Births, Deaths and Marriages which you do not believe is the appropriate place to hold the register. Other witnesses have suggested that the medical side of the birth should be kept at the Department of Health and the legal side should be kept by the Registry of Births, Deaths and Marriages. Do you think it should be one register rather than two separate registers? I believe you think that the Department of Health should keep a record.

Professor MILLBANK: Health or another entity, I would have to say. I am not sure whether Health is necessarily the best place for it. I think there could be real administrative and privacy difficulties if that information was split across two departments, but I am not sure whether that would be a great move either. I do not know whether the central register is working well. I do not think we will know that for some time. We have to give it some time and conduct a thorough evaluation of how it has operated before shifting it to another setting.

Mr NICK LALICH: What do you think of the suggestion of a national register to harmonise the States?

Professor MILLBANK: I can see some reasons why that would be attractive. We have a mobile population; people move around and I know that donor offspring groups and some other groups are concerned about the idea that one or two rogue donors could be donating in different States and so different donor registers and different donor limits in different States do not add up. They do not communicate with each other and share information. I understand there are those concerns. There are other difficulties with a national register, not least of all the lack of Commonwealth power in mandating for the inclusion of that information. My view is that it is worth considering. I do not have a concluded sense of whether it is the right move at the moment. I think it is something that we have to think about far more carefully.

One of the things that we have been thinking about with our current research on embryo donation is the need for an external body that assists with the process of donation that is not connected to clinics. In Britain, for example, there is the National Gamete Donation Trust and that is a charitable organisation that is set up as a trust that undertakes research of donors' needs and that recruits donors and it is independent of the clinic system. If you want to donate your embryos, within Australia for example, you have to talk your clinic into letting you do that. You do not have physical control over your own embryos in an IVF process, and we do not have any kind of facilitative assistance from the State in the same way that we do for things like organ donation where you can register nationally that you want to donate your organs if you are in a car accident or whatever. You can put it on your Medicare form and on your driver licence and the rest of it.

I think there is a role in thinking about a separate body to provide assistance with donor conception. What I am concerned about is if that process turns into an intrusive process of national regulation based on the lowest common denominators. I think the history of assisted reproductive technology regulation in Australia has shown that different States at different times have taken narrower or more discriminatory views of eligibility criteria; they have allowed certain things and not others, excluded certain people and as a result Australians have travelled to other States for surrogacy, for assisted conception, for pre-implantation genetic diagnoses. It is a wonderful thing in our federation that people can get treatment somewhere and that over time different jurisdictions have looked to each other and listened to each other in developing their reforms. My hesitation with any kind of nationalisation with these things is a lowest common denominator approach that actually restricts people's options and choices rather than giving them assistance.

CHAIR: The Committee may wish to send some additional questions in writing, the replies to which will form part of your evidence and be made public. Would you be happy to provide a written reply of any further questions?

Professor MILLBANK: Yes, of course, I am happy to do that. Thank you very much for including me in your process.

(The witness withdrew)

(The Committee adjourned at 1.39 p.m.)